IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY ARCHIVE,	
Plaintiff,	
v.	**Civil Action No. 07-1577 (HKK/JMF)**
EXECUTIVE OFFICE OF THE PRESIDENT, *et al.*,	**(Consolidated with Civil Action No. 07-1707 (HKK/JMF))**
Defendants.	**ORAL ARGUMENT REQUESTED**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY MOTION TO EXTEND TRO/PRESERVATION ORDER AND FOR DEPOSITIONS

On February 26, 2008, the United States House of Representatives Committee on Oversight and Government Reform ("Oversight Committee") heard sworn testimony from Theresa Payton, Chief Information Officer for the Office of Administration ("OA") in the Executive Office of the President ("EOP"), who had previously submitted a sworn Declaration in this case.[1] In her appearance before Congress, Ms. Payton contradicted her Declaration, which was submitted in response to Magistrate Facciola's questions regarding the missing emails that are the subject of this lawsuit, raising serious doubts about the Declaration's accuracy and completeness. Importantly, Ms. Payton's congressional testimony, as well as the congressional testimony of other government officials who are also Defendants in this case or employed at Defendant agencies, confirmed Plaintiffs' fears that the missing emails at issue in this case are in fact not being adequately preserved under the Court's existing Preservation Order.

[1] The congressional hearing was convened to focus on compliance issues arising under the Presidential Records Act ("PRA"), *see* Opening Statement of Rep. Henry A. Waxman; Letter from Rep. Henry A. Waxman to Fred Fielding (Jan. 17, 2008); Letter from Rep. Henry A. Waxman to Allen Weinstein (Jan. 17, 2008), while the Complaint in this case is brought under the Federal Records Act ("FRA"). Complaint ¶ 1 [07-1577 Docket #1] (Sept. 5, 2007). The entire congressional record of this hearing, consisting of a preliminary transcript and prepared testimony and exhibits, is attached to the accompanying Declaration of Sheila L. Shadmand.

After the institution by Judge Kennedy of a Preservation Order designed to preserve the missing emails, Magistrate Facciola ordered the Defendants to answer four questions aimed at determining whether the Preservation Order is adequate to protect all potential sources of the missing emails. Ms. Payton was selected by the Defendants to answer the Court's questions. In her Declaration, Ms. Payton stated that the OA "does not know if any emails were not properly preserved in the archiving process" and that, in any event, the "back-up tapes should contain substantially all the emails sent or received in the 2003-2005 time period." Payton Decl. ¶ 12.d; *see also* ¶ 12.c.

Unfortunately, facts revealed during the recent congressional hearing indicate that Ms. Payton's Declaration is not accurate and is misleading. The OA was in fact aware, prior to the submission of the Payton Declaration, of specific EOP emails that *were not* properly preserved in the archive process and *were not* found on the back-up tapes. Specifically, the OA discovered that certain emails of the Office of the Vice President were missing from the EOP system's archive and, during a restoration effort, could not be found on the back-up tapes. Furthermore, despite having this knowledge, the OA continued (and continues to this day) its practice of destroying other potential repositories of the missing emails that are the subject of this suit.

The congressional testimony of Ms. Payton and the other government officials, along with the documentary evidence provided by the White House and the National Archives and Records Administration ("NARA") to the Oversight Committee, directly contradict the Payton Declaration, belie its accuracy and completeness, and support the extension of the current Preservation Order to protect the missing emails. Plaintiff National Security Archive ("the Archive") therefore moves for emergency, court-supervised depositions of Theresa Payton (Defendants' chosen declarant), and a representative from the NARA (a Defendant that still has

not answered the Magistrate's questions), to determine the accuracy of the Payton Declaration and the true state of the missing emails and their potential repositories. The Archive also moves that the Court extend the Temporary Restraining Order, to protect all potential sources of the missing emails in the interim.

I. BACKGROUND

In October 2007, fearing that the missing EOP federal record emails may become irretrievable by the time this Court reaches the merits of this case, Plaintiffs sought to commence discovery. When Defendants refused to engage in a Rule 26(f) conference or otherwise participate in discovery, Plaintiffs moved for expedited discovery. Motion [07-1577 Docket #5] (Oct. 26, 2007). The limited discovery Plaintiffs seek at this stage is aimed at determining what media within the EOP exist and should be preserved so that if Plaintiffs prevail on the merits, the Court will be able to provide relief.

With the motion for expedited discovery pending, on November 12, 2007 this Court adopted the Report and Recommendation of Magistrate Judge Facciola, granted Plaintiff CREW's motion for a temporary restraining order, and entered the following protective order:

> ORDERED that defendants shall preserve media, no matter how described, presently in their possess[ion] or under their custody or control, that were created with the intention of preserving data in the event of its inadvertent destruction. Defendants shall preserve the media under conditions that will permit their eventual use, if necessary, and shall not transfer said media out of their custody or control without leave of this court.

Order [07-1707 Docket #18] (Nov. 12, 2007) at 2 (the "Preservation Order").

The motion for expedited discovery was then referred to Magistrate Judge Facciola, who summarized the Archive's motion as follows: "As to the question of 'what back-ups of EOP emails still exist,' the Archive seeks to determine whether the back-ups now being preserved pursuant to Judge Kennedy's order contain the several million email messages it alleges have

been improperly deleted from White House computer servers." Mem. Order [Docket #46] (Jan. 8, 2008). By Magistrate Judge Facciola's reasoning, "[t]o the extent that the missing emails are contained on the back-ups preserved pursuant to Judge Kennedy's order, there is simply no convincing reason to expedite discovery," ***but if "the missing emails are not on those back-ups, however, the relief likely to be requested by the Archive . . .will also be time-sensitive: emails that might now be retrievable from email account folders or 'slack space' on individual workstations are increasingly likely to be deleted or overwritten with the passage of time."*** *Id.* at 3 (footnote omitted)(emphasis added).[2]

Thus, to determine whether Judge Kennedy's Preservation Order covering back-up tapes was sufficient to preserve the missing emails such that expedited discovery would not be necessary, on January 8, 2008, Magistrate Judge Facciola put four questions to Defendants and ordered that "answers are to be provided by counsel in a sworn declaration within the next five business days." Mem. Order [07-1707 Docket #46] (Jan. 8, 2008) at 4 n.4. The four questions were simple and direct, calling for a "yes" or "no" answer, and aimed directly at whether or not the the missing emails were recoverable from the back-up tapes alone.

Defendants' response – the Declaration of Theresa Payton – was deficient on its face and failed to directly answer the questions. Notice of Filing [07-1707 Docket #48] (Jan. 15, 2008); *see also* National Security Archive's Response to Declaration of Theresa Payton [07-1707 Docket #50] (Jan. 17, 2008). Ms. Payton, the Chief Information Officer ("CIO") for the Defendant OA, averred that "[t]he statements contained in this Declaration are based on my personal knowledge and on information provided to me by members of my staff in the

[2] Indeed, as the Archive has argued in its opposition to Defendants' motion to dismiss, the harm is not limited to the possibility that the records will disappear at the end of this Administration. There already is ongoing harm to the Archive because of the fact that federal records responsive to its pending FOIA requests to EOP components are currently missing. *See* National Security Archive's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss at 24-28 [07-1707 Docket #42] (Dec. 13, 2007).

performance of my official duties." Payton Decl. ¶ 2. However, in addition to revealing that the White House recycled its back-up tapes until the fall of 2003, Ms. Payton stated in her Declaration that OA "*does not know*" whether any emails were missing at all, but speculated that based on OA's general practices "*substantially all*" of the EOP's emails "*should*" be on its back-up tapes. Payton Decl. ¶ 12.d (emphasis added); *see also* ¶ 12.c. Ms. Payton further declared that OA "has undertaken an independent effort to determine whether there may be anomalies in Exchange email counts for any particular days resulting from the potential failure to properly archive emails." Payton Decl. ¶ 11. Ms. Payton attempted to diminish the importance of the previous OA analysis that "purports to identify certain dates and EOP components for which the chart's creator appears to have concluded that certain EOP components were missing emails." *Id.* ¶¶ 10-11. In her Declaration, Ms. Payton stated that the OA's previous missing email analysis was the work of one "former employee" who created a single "chart," that had an "apparent lack of supporting documentation." *Id.* ¶¶ 10-11

Almost immediately upon the filing of the Declaration, the Chairman of the Oversight Committee, Representative Henry A. Waxman, called for a hearing before the entire Committee. Representative Waxman explained that the hearing was called partly in response to the statements made in the Payton Declaration, and the ensuing statements to the press by a White House spokesman concerning the Payton Declaration, both of which directly contradicted prior briefings that the White House had given to Rep. Waxman's Committee. *See* Letter from Rep. Henry Waxman to Fred Fielding (Jan. 17, 2008); Letter from Rep. Henry Waxman to Allen Weinstein (Jan. 17, 2008). In short, the Payton Declaration indicated that the White House did not believe that emails were missing, while in meetings with the Oversight Committee, representatives from OA confirmed that hundreds of days' worth of emails were missing.

On February 26, 2008, the Committee heard the sworn testimony of Ms. Payton as well as: Dr. Allen Weinstein, Archivist of the United States; Alan Swendiman, the agency head for OA; and Gary Stern, General Counsel to NARA. While the purpose of the hearing was focused on Presidential Records Act compliance, it necessarily implicated records maintained under the Federal Records Act because, as the witnesses explained, the OA maintains emails for the entire unclassified EOP network, which contains documents subject to the PRA as well as documents subject to the FRA. *See, e.g.*, Tr. at 31:672-73 (Allen Weinstein) ("the EOP mail system contains records governed under both the [PRA] and the [FRA]"); *id.* at 40:842-855 (Theresa Payton) (OA administers entire EOP network on one platform).

The testimony and documents revealed during the congressional hearing established that the Payton Declaration is deficient on its face and the current Preservation Order is insufficient to preserve the subject matter of this litigation. Not only do back-up tapes not exist for the entire period in question, Payton Decl. ¶ 12.c, but evidence was revealed during the congressional hearing that OA officials have already been unsuccessful in attempts to restore some of the missing emails from the EOP back-up tapes. *See* Sources of Supplemental Information at 44-46 (internal OA November 28, 2005 memorandum describing restoration of email related to Scooter Libby investigation and the absence of email in the journal mailbox on back-ups; describes the need to extract email from 70 Office of the Vice President mailboxes); Hearing Transcript at 89:2075-91:2118 (colloquy between Rep. Tierney and Theresa Payton) (hereinafter "Tr. at ___"). OA's inability to restore missing emails from the back-up tapes they were believed to be copied on is a fact that is not only contrary to the supposition of the Payton Declaration, even though it was known to OA before the Declaration was submitted to this Court. The credibility of the Declaration is questionable at best and its factual assertions should be probed during a court-

supervised examination, while the Preservation Order should be extended to protect the *res* of this case in the interim.

II. THERE IS GOOD CAUSE FOR THE TAKING OF EMERGENCY DEPOSITIONS IN ORDER TO COMPLY WITH THE COURT'S ORDER AND TO DETERMINE HOW TO PRESERVE POTENTIAL REPOSITORIES FOR THE MISSING EMAILS AT ISSUE IN THIS CASE

A. There is Good Cause for the Taking of Depositions

1. Depositions Are Necessary to Clarify the Contradictions Between the Payton Declaration and Other Sworn Testimony

Evidence presented during the congressional hearing revealed numerous instances of contradictions with the Payton Declaration. These contradictions go to the heart of whether the missing emails can be recovered from the back-up tapes or, if they cannot, what the Court can otherwise do to protect the corpus around which this suit centers. The contradictions are numerous and significant, and a deposition will serve to effectively reconcile these apparent contradictions, or, if they cannot be reconciled, determine whether the Declaration is untruthful.

Contradictions Regarding Whether Any Emails Are Missing and Whether They Can Be Restored From Back-up Tapes

Judge Facciola's questions, to which the Payton Declaration purports to respond, posed one fundamental query: Whether the back-up tapes that are governed by the Preservation Order contain the emails that were reportedly missing. In her Declaration, Ms. Payton stated that "[a]t this stage, this office *does not know* if any emails were not properly preserved in the archiving process." Payton Decl. ¶ 12.c (emphasis added). Ms. Payton further stated that "in view of this office's practice in the 2003-2005 time period of regularly creating back-up tapes for the EOP Network, which includes servers containing emails, and in view of this office's practice of preserving all such back-up tapes from October 2003 to the present, the back-up tapes *should* contain *substantially all* the emails sent or received in the 2003-2005 time period." Payton Decl.

¶ 12.d (emphasis added). Ms. Payton's congressional testimony, however, indicates that her response is inaccurate in both respects.

First, Ms. Payton contradicted her Declaration when she agreed during her congressional testimony that emails had not been properly archived:

> Mr. Tierney: For the Vice President's office, there were days during the week of October 1, 2003, with no e-mail, and that was apparently of interest to Special Counsel Patrick Fitzgerald, who requested those documents during the period. My understanding is that when the inventory was done in 2005, nobody at the White House could locate those e-mails in the PST files that were stored in the servers.
>
> And now, as far as I know in 2008, the White House still hasn't located those e-mails in the PST files in the White House servers. So after not finding the e-mails there, the White House went to backup tapes and ultimately recovered the e-mails for those days. These were provided to the Special Counsel.
>
> Is that pretty accurate so far?
>
> Ms. Payton: Yes.

Tr. at 88:2031-2045.

Based on this exchange, it is clear that Ms. Payton and her office *do* know that at least some emails were not properly preserved in the archiving process.[3] Ms. Payton and the OA know because the OA looked for the files in the archive, could not find them, and had to look to the back-up tapes to attempt to find them. Ms. Payton should be called to reconcile her testimony to this Court with her contradictory testimony to Congress. If she cannot do so, then she should recant the testimony she gave this Court.[4]

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[3] It is also clear that they knew that emails had gone missing for some time *before* Payton submitted her Declaration. *See* Sources of Supplemental Information: Email from Gary Stern to Emmet Flood and Christopher Oprison at the White House (June 20, 2007) ("You have stated that emails appear to be missing from the White House System from the time period of late 2003 through late 2005, although you had not been able to provide any estimate of how many emails are actually missing.")

[4] Ms. Payton also conceded that other emails were so improperly archived that it has taken the OA over two years to sift through and re-classify such a significant volume of emails that the OA predicts the process will still not

Second, Ms. Payton contradicted her Declaration when she could not refute evidence made available to the Committee that emails were missing from the disaster recovery tapes as well:

> Mr. Tierney: Now, we got a document showing that when the White House restored the backup tapes for the Vice President's office, there were no journal fields, there were no PST files containing e-mails for the days that Mr. Bashara was interested in. So not only were they missing from the servers, they were missing from the backup tapes as well.
>
> Can you explain that to us?
>
> Ms. Payton: Because this predates me, I do not know all the details of that particular restorer. I do know that they –
>
> Mr. Tierney: Well, does it mean that there were no journal files of the time the backup tape was made?
>
> Ms. Payton: I am not sure . . . .

Tr. 89:2075-90:2089.

This suggests that, quite contrary to Ms. Payton's sworn statement to this Court, the OA has confirmed that at least some emails are in fact missing from *both* the EOP network *and* the back-up tapes. At the very least, this exchange, as well as the entirety of Ms. Payton's testimony, makes clear that Defendants' answer to the Magistrate's fundamental question —"Do the back-ups contain the emails said to be missing that are the subject of this lawsuit?" — is not and cannot be answered by Defendants as even a qualified "Yes."

Furthermore, the congressional hearing also demonstrated that the "archiving process" that OA uses for EOP emails is not, as Ms. Payton stated in her Declaration, in accord with OA's recordkeeping responsibilities. Payton Decl. ¶ 5; *see also* Prepared Testimony of Theresa Payton

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be finished for months yet to come. *See* Tr. at 90:2101-91:2103 (Theresa Payton) ("we still have PST files that we have not been able to associate with a component."); Tr. at 44:952-45:962 ("we have identified more e-mails for that exact time period that was looked at in 2005 than was previously identified" and explaining that OA hopes to identify other emails that were preserved on the system in an improper format).

at 3 (Feb. 26, 2008) (OA believes it has a "thorough and reliable" archiving process in place). Testimony given at the Committee hearing — as well as documentary evidence that the Committee apparently obtained from NARA — made clear that the EOP does not have a formal or reliable system in place for archiving emails. Rather, the congressional testimony revealed that the "archiving process" alluded to in the Payton Declaration is really a manual, *ad hoc*, stop-gap method of archiving emails that was never intended nor suited to be a permanent system. It was also revealed that the OA's manual journaling process does not accord with any formal, standardized procedure, nor is it subject to review or verification that it is actually being performed.[5]

For example, Ms. Payton and her staff met with NARA representatives in February of 2007 to "explain[] that [an automated system named] ECRMS is not being implemented, and therefore emails are no longer being preserved in a formal electronic recordkeeping system." Sources of Supplemental Information: *Chronology of White House Meetings*, Prepared by NARA (document marked 001637-001641, at 001641). Later, in November of that year, a NARA official, writing to Ms. Payton about OA's archiving process, said that "I refer to it as a 'message collection system' even though we all understand that it hardly qualifies as a 'system' by the usual IT definition." Sources of Supplemental Information: November 6, 2007 Email from Sam Watkins to Theresa Payton (document marked 001634).[6]

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[5] *See* Sources of Supplemental Information: NARA Record of Meeting on Oct. 11, 2007 With Theresa Payton and EOP Staff (document marked 001628-001630) (describing journaling process and explaining that EOP staff "have not found documentation of how this process was executed, recorded, or verified, or how often the copy took place, or was supposed to take place."). This is evidenced by the fact that in 2005, *all* EOP email for the months of August and September were retained as OA email, rather than being filed by component in accordance with the journaling archiving method, and this problem was not discovered for over a month. Responses to Interrogatories by Steven McDevitt, Response to Interrogatory No. 16 (Feb. 21, 2008).

[6] *See also* Sources of Supplemental Information: PowerPoint Slide marked as HOGR6OA-010554 (Internal OA report describing existing archiving process and noting that "standard operating procedures for email management do not exist," and "lost or misplaced email archives may result in an inability to meet statutory requirements"); Tr. at 73:1657-1659 (Rep. Danny Davis) ("The problem was that instead of putting in place a new

Not only do the contradictions between the Payton Declaration and the testimony adduced at the congressional hearing go to the overall credibility of the Payton Declaration to this Court, but a deposition on these contradictions is vital: the degree of formality and function of the archiving process is inversely proportional to the risk that emails will be improperly archived and eventually deleted. Thus, knowledge of what the current archiving practice is and how it is being implemented (or not) affects how broad the Preservation Order must be to ensure protection of the *res*. The Archive therefore requests that the Court immediately schedule a deposition of Ms. Payton to determine what she *can* affirmatively represent about the status of the missing emails, how they were supposed to be archived, what is known to be (and known not to be) on the back-up tapes, and what additional repositories of the missing emails should be preserved until this case can be decided on the merits.

Contradictions Regarding the OA's Analysis of Missing Emails

The Committee hearing exposed other contradictions in the Payton Declaration. For instance, in her Declaration, Ms. Payton sought to invalidate the results of a 2005 analysis conducted by a team of OA employees, which concluded that hundreds of days' worth of emails were missing from multiple EOP components. She declared merely that she was "aware of a chart created by a former employee within OCIO," testified to what that chart "appears to have

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archiving system, the White House began an ad hoc process called journaling."); *id.* at 73:1663-67 (former White House Chief Information Officer Carlos Solari informed the Committee that journaling process is "a temporary and short-term solution that was not considered a good long-term solution); *Id.* at 74:1701-75:1710 (Archivist Allen Weinstein) ("[I]t had been our understanding that the journaling function was meant to be temporary stop-gap until they put in a new formal records management application which we had spent some time working with them during the first term of the President, and which we still had hoped and expected they would put in a new formal system. So I think, as the quote you indicated, or you quoted from, indicates that it is our view that the journaling function is not the ideal solution."); *id.* at 77:1771-72 (Theresa Payton) ("Would it be what my staff and I would have picked if we could have had the ideal world, probably not."); *id.* at 10:2344-2349 (Gary Stern, NARA General Counsel) ("We certainly, as we have said before, hoped and expected they would have a formal records management system in place. We thought that ECRMS was going to be it. So we were disappointed that they didn't use ECRMS and would hope that they still try to get one in place even now, if they can.").

concluded," and remarked that this single chart, with its "apparent lack of supporting documentation," must be the "detailed analysis" to which the Archive has referred in its lawsuit. Payton Decl. ¶¶ 9-11.

After reading the Declaration — which was propounded by the OA witness that Defendants *chose* to present their responses to this Court — one would suspect that the analysis that lies at the heart of this litigation was a single, fly-by-night chart prepared by one rogue staffer. Yet a significant amount of uncontroverted evidence revealed at the hearing confirmed that in 2005, OA commissioned a fifteen-person team to study the missing email problem, that this team "documented its actions in very painstaking detail and reported frequently to the director of administration and White House counsel," and that this team produced many versions of the chart using different variables, as well as a report of almost 250 pages supporting its findings. Tr. at 112:2634-2638, 114 (Del. Norton); *see also* Memo from Oversight Committee Majority Staff, "Re: Supplemental Information for Full Committee Hearing on White House E-mails," at 19-20 (Feb. 26, 2008); Responses to Interrogatories No. 18-23 by Steven McDevitt (Feb. 21, 2008). When presented with this contradictory evidence, Ms. Payton could only reply that "because this is prior to my arrival, I put the information together based on what my team has told me . . .."[7] *Id.* at 112:2642-44. Delegate Norton went on at length to describe the detailed documentary evidence of this prolonged, organized verification of the OA's previous analysis. Tr. at 112-114. Ms. Payton claimed ignorance of the entire process and, when asked whether she had seen the 250-page analysis prepared by OA's team, astoundingly replied:

[7] Furthermore, Defendants can hardly argue that Ms. Payton is the only person who could testify about the 2005 review, when the documents to which Del. Norton referred made clear that the team "reported frequently" to the head of OA, who is a named defendant in this case and who sat immediately next to Ms. Payton during the congressional hearing. That Mr. Swendiman, the current head of the OA, was not in this position at the time of the frequent reporting is of no consequence. The Magistrate Judge ordered the Defendants to "provide answers," Mem. Order at 4 [07:1707 Docket #46] (Jan. 8, 2008), and it is clear that they did not seek answers from the current or former head of OA prior to the submission of the Payton Declaration.

"[t]hat document had not been made aware to me. I know that we produced a lot of documents in response to this. So that document must not have been on the radar of my team to inform me."[8] *Id.* at 114:2690-93. Given the contradictions and deficiencies in Ms. Payton's knowledge, the credibility of the entire Payton Declaration is called into question, and its accuracy can only be determined through a court-supervised examination.

Contradictions Regarding the Timing of OA's Email Analysis

In her Declaration, Ms. Payton assured the Court that her office was conducting an independent effort to determine whether emails are missing and how to restore them, and that she "expect[s] the independent assessment to be completed in the near term." Payton Decl. ¶ 11; *see also* Prepared Testimony of Theresa Payton (Feb. 26, 2008) at 3 ("This re-inventory effort is nearly complete."). Yet her testimony before Congress made clear that OA is nowhere near completion of its audit of White House emails — which serves to replicate the assessment that a fifteen-person OA team already performed — and that any restoration will occur only after that re-review has been completed.

During the congressional hearing, Ms. Payton admitted that the White House will finish re-reviewing the EOP email archive sometime this summer — "[i]n the June, July time frame" — and only then will it devise a plan for recovery of lost data from back-up tapes. Tr. at 136:3226-3233 (Theresa Payton). Of course, this schedule may still be pushed back further, as OA has previously assured NARA that the process would be complete by June of 2007, revising

[8] Ms. Payton did claim to know some things about the chart, and insisted, as she stated in her Declaration, that it had not gone through a process of independent verification and validation. Tr. at 113:2672-2676 (Theresa Payton); *see also* Payton Decl. ¶ 11 (claiming that OA has "serious reservations about the reliability of the chart"). Yet one of the participants in the fifteen-person team commissioned to investigate the email problem stated in interrogatory responses to the Committee that the study did undergo an independent verification and validation review by a team of outside contractors, confirming its results. *See* Responses to Interrogatories Submitted by Steven McDevitt (Feb. 21, 2007); *see also* Memo from Oversight Committee Majority Staff, "Re: Supplemental Information for Full Committee Hearing on White House E-mails" (Feb. 26, 2008); Tr. at 113-14. As revealed at the congressional hearing, Ms. Payton claims she was also not made aware of this independent testing at the time she swore out her Declaration in this case. Tr. at 113-14.

that prediction to the end of the summer of 2007, and revising it again to October of 2007, then further to six weeks past October of that year. Tr. at 133:3163-135:3194 (colloquy between Rep. Elijah Cummings and NARA General Counsel Gary Stern recounting ways in which the White House has delayed and postponed recovery). *See also* Sources of Supplemental Information: NARA Record of Meeting on Oct. 11, 2007 With Theresa Payton and EOP Staff (document marked 001628-001630) ("[Payton and her staff] expect the development and report process to take 6-9 weeks after the contractor is on board. We should note that this process was supposed [to] be completed by the end of June; the end of the summer, and the end of October in our previous meetings."); Tr. at 88:2049-89:2054 (OA still must review 17 million emails before the *first* phase of its review is completed); *id.* at 91:2103-2105 (same). It is already over four months past the OA's last estimated time of completion for its review. Given the work that still remains to be done, Ms. Payton's declaration that the process will be completed in the "near term" cannot be said to be reliable or well founded in fact.

Furthermore, there are significant practical implications related to the timeframe in which OA will complete its assessment. As more time transpires before the assessment is complete and restoration is begun, there is more and more risk that emails will continue to be deleted or improperly archived, and that emails that are not on back-up tapes will be deleted from other repositories where they might be found.[9] During a court-supervised deposition, Ms. Payton can identify the specific work that has not yet been accomplished and the true timeframe in which OA will complete its analysis and pursue recovery. Such information is critical to ensure that the Court can craft the proper injunctive relief to preserve the subject emails pending adjudication.

[9] The risk is compounded by OA's practice of wiping the memory from computers of departing employees. Tr. at 98:2286-2294 (Theresa Payton).

2. Depositions Are Necessary to Determine Whether Defendants' Declarant Has the Personal Knowledge to Answer the Court's Questions or To Identify a Witness Who Can

On a more fundamental basis, it appears that Ms. Payton lacks the personal knowledge to adequately answer the Court's questions and that she has not accessed the Defendants' institutional knowledge to a degree sufficient to permit her to answer the questions. In her prepared statement before Congress, Ms. Payton said she had "numerous conversations with my staff and have reviewed OCIO documents pre-dating my arrival in May 2006," and that her "written testimony relating to matters occurring before my arrival derive principally from those sources." Prepared Testimony of Theresa Payton at 2 (Feb. 26, 2008). Yet the testimony and exhibits adduced at the congressional hearing made clear that Ms. Payton did little to educate herself, in preparation for her Declaration, about events that took place prior to her mid-2006 arrival at OA.

In addition to her telling colloquy with Delegate Norton, *see infra and* Tr. at 112-15, Ms. Payton's congressional testimony is rife with pleas of ignorance of any events that fall within her office's bailiwick but pre-dated her arrival. *See, e.g.,* Tr. at 107:2514-15, 2525-26 ("The challenge about his statement is it does predate me"; "But to be able to comment specifically on things that predated me, I am unable."); *id.* at 109:2564 ("I wasn't there, sir, so I don't know."). Ms. Payton's inability to answer questions about facts that are directly implicated in her Declaration goes to the heart of the Declaration's reliability. This lawsuit is almost entirely about events that preceded Ms. Payton's tenure at OA. If she cannot speak to such events because they pre-date her, OA must produce someone who can.[10]

[10] To be clear, Magistrate Judge Facciola ordered Defendants "to provide answers," not simply affiants. Mem. Order at 4 [07-1707 Docket #46] (Jan. 8, 2008).

A deposition is necessary to determine whether Ms. Payton has adequate personal knowledge to answer the Court's questions, or, if she does not, to identify a current or former employee that OA can produce as a competent witness. *See McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 79 (D.D.C. 1999) (Flannery, J.) (under Federal Rule of Civil Procedure 30(b)(6), government entity receiving discovery request must produce witness with sufficient knowledge). If Defendants cannot or will not find a witness who can testify to prior events, then they must treat those questions as conceded. *See* Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii) (recognizing court's authority to sanction party for failure to respond to discovery-related order, including by striking pleadings in whole or part, drawing inferences adverse to the non-compliant party, etc.); *Clark Const. Group, Inc. v. City of Memphis*, 229 F.R.D. 131 (W.D. Tenn. 2005) (drawing adverse inference as sanction for failure to produce responsive information; collecting authorities); *see also Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962) (recognizing court's inherent power, "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," which permits sanctioning parties for non-compliance with court order).

B. There is Good Cause to Depose a NARA Witness

The House hearing reiterated the important role that the National Archives and Records Administration ("NARA") plays in the FRA framework. The hearing also highlighted the disconnect between the OA's statements to NARA, the OA's statements to Congress, and the OA's statements to this Court. A deposition of a NARA witness could not only clarify these contradictions, but can also fill in gaps where OA purports to lack institutional memory.

Moreover, it is NARA that promulgates the guidelines governing the retention of federal records, *see* Prepared Testimony of Allen Weinstein at 5 (Feb. 26, 2008), and it is thus NARA's testimony regarding the adequacy of OA's efforts to preserve federal records that is most relevant to the goal of preserving the emails that are the subject of this lawsuit. NARA has predicted that some type of email restoration will inevitably be necessary[11] and that in all likelihood any restoration will not take place until after the current administration leaves office, when the records will become NARA's property. *See* Tr. at 120:2838-2846 (Gary Stern). It is therefore important to determine at this stage, while ameliorative steps can still be taken, whether the existing back-up tapes are being preserved in a format that allows for restoration in NARA's hands; what other media, in NARA's experience, need to be preserved and in what formats[12]; and what additional steps need to be taken to ensure the effective preservation of the emails at

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[11] *See, e.g.,* Sources of Supplemental Information: NARA Record of Meeting on Oct. 11, 2007 With Theresa Payton and EOP Staff (document marked 001628-001630) ("We expressed great concern that the process was moving so slowly, and that we were very skeptical that the report results from the new tool could completely eliminate the possibility of messages missing from the collection system. We pointed out that some type of restoration project would inevitably be necessary if significant doubt remained that messages had not been collected, and that they should begin planning for such a project by requesting funding for the current FY."); Sources of Supplemental Information: E-Mail from Gary Stern, NARA General Counsel, to White House Counsel's Office (June 20, 2007) (document marked 001624) ("We have advised you on both occasions [April 25 and May 21, 2007] that it is essential that you begin an email restoration project from the back-up tapes as soon as possible, so that it can be completed before the end of the Administration."); Sources of Supplemental Information: NARA Record of Meeting on May 21, 2007 Theresa Payton and EOP Staff (document marked 001621-001622) ("We stressed that if they determine they need to do tape restorations projects (TRP) to recover missing emails, it needs to begin as soon as possible, so that they could complete it before the end of the Administration."); Sources of Supplemental Information: Memo from Gary Stern to Allen Weinstein (Oct. 15, 2007) (documents marked 001631-001633) ("NARA strongly recommends that the [White House] begin planning for a back-up tape email restoration project now, including seeking appropriations from Congress, even before it has the final answer.").

[12] *See, e.g.*, Sources of Supplemental Information: Letter from Allen Weinstein to Fred Fielding (May 1, 2007) (stating that "NARA has gone through three Presidential transitions involving the transfer of electronic records and, in each of these transitions, we experienced some problems with this issue. Based on this previous experience and similar problems experienced by prior Administrations, a 'restoration' project can easily take more than one year to complete."); Sources of Supplemental Information: NARA Record of Meeting on Oct. 11, 2007 With Theresa Payton and EOP Staff (document marked 001628-001630) (discussing preferred formats when receiving records from Clinton administration); Sources of Supplemental Information: NARA Record of Meeting on May 21, 2007 Theresa Payton and EOP Staff (document marked 001621-001622) (specifying that NARA needs to receive emails "in a format that we could accept"); Sources of Supplemental Information: E-Mail from Gary M. Stern, NARA General Counsel to Archivist Allen Weinstein, *et al.* (June 29, 2007) (stating that he stressed to OA lawyers that NARA must received electronic records and back-up tapes in specific formats).

issue in this case pending adjudication. Therefore, in addition to a court-supervised deposition of Ms. Payton, the Archive also requests that the Court order a supervised deposition of a NARA witness knowledgeable on the matters raised by Judge Facciola's questions.[13]

C. Exigent Circumstances Warrant the Immediate Taking of The Depositions on an Emergency Basis

Ms. Payton's testimony laid bare the exigency of the situation. She testified that when White House employees depart, her office takes their computers and "take[s] the files and store[s] them on a shared drive. Then if we want to re-use their equipment, we would need to wipe their drive," a practice that OA is currently using. Tr. at 98:2286-2294 (Payton). Time is of the essence, because if missing emails are not on the EOP system or the back-up tapes, recourse must be had to other potential sources, including individual work stations that OA is currently recycling.[14] Of course, departures have already begun and will increase exponentially as we approach the presidential transition. If the Court is to craft an order that will effectuate its purpose of preserving the missing emails at issue in this case, it must have more information at this time so that an effective order can be implemented now, before the rush to the exits, and the resulting wiping of hard drives, begins in earnest.

Courts have broad discretion in supervising discovery, *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), and may expedite the process on good cause shown. *See* Fed. R. Civ. P. 26(d); 8 Wright & Miller, Federal Practice & Procedure § 2046.1; *Ellsworth Assocs., Inc. v. United States*, 917 F.Supp. 841, 844 (D.D.C. 1996). The Archive has demonstrated good cause for deposing Ms. Payton, Defendants' chosen declarant. The Court has asked for answers

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[13] While Magistrate Judge Facciola's Order was aimed at *all* Defendants, only Ms. Payton, purporting to testify on behalf of Defendant OA, submitted answers to his questions.

[14] A deposition is also necessary to determine what is being done to catalog, back-up, archive, and secure the shared file to which departing employees' files are exported, and to determine whether *all* employee files are salvaged through that process.

to questions which were posed in order to assure that the Preservation Order was sufficiently broad, such that expedited discovery would not be necessary. In the interim, it has been established that the Order is indeed too narrow, as we now know the back-up tapes do not contain all of the e-mails at issue.

Magistrate Judge Facciola recognized the exigencies involved when he ordered Defendants to respond to his questions within five days. With the passage of time since then, the exigency is even greater. The Archive requests that the Court proceed on an emergency basis to order that Theresa Payton and a NARA witness immediately be deposed. Given the circumstances, the Archive requests that the deposition be conducted under the supervision of the Court or the Magistrate so that any objections, assertions of privilege, or other issues can be dealt with during the depositions.[15]

II. THE COURT SHOULD ISSUE A SUPPLEMENTAL RESTRAINING ORDER EXPANDING ITS PRIOR PRESERVATION ORDER TO EFFECTUATE ITS PURPOSE

While these emergency depositions should provide information that will assist the parties and the Court in devising a Preservation Order comprehensive enough to preserve the emails at issue over the long term, an extension of the injunctive relief already in place is necessary to ensure that emails that are located only on media other than the back-up tapes are not destroyed

[15] In the alternative, the Court could strike the Declaration as insufficient or non-responsive, and order Defendants to produce adequate responses to Judge Facciola's questions. Federal Rule of Civil Procedure 12(f) recognizes a court's authority to strike all or part of a pleading for insufficiency, redundancy, immateriality, impertinence, or scandalousness, and affidavits or other materials submitted in support of technical pleadings are "pleadings" for the purpose of Rule 12(f). *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 474 F.Supp. 2d 75, 79 n.4 (D.D.C. 2007) (citing *Larouche v. Department of the Treasury*, 2000 WL 805214 at *12-13, 2000 U.S. Dist. LEXIS 5078 at *39-40 (D.D.C. Mar. 31, 2000); *Humane Soc'y of the United States v. Babbitt*, 46 F.3d 93, 97 n.5 (D.C. Cir. 1995)). Because the Declaration is also "not relevant to the resolution of the issue at hand," in that it fails to respond to the Magistrate's questions, it could also be stricken as immaterial or impertinent. *United States ex rel. K&R Ltd. Partnership v. Massachusetts Hous. Fin. Agency*, 456 F.Supp. 2d 46, 51 (D.D.C. 2006) (citing *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 224 F.R.D. 261, 263 (D.D.C. 2004)). The impertinence is evident in the Defendants' choice to proffer a witness lacking in knowledge, in the witness' failure to make reasonable inquiries about the subjects covered by the Court's order, and by the inconsistencies, contradictions, and credibility gaps contained in the Declaration.

in the interim. It can no longer be disputed that the current Preservation Order, which Defendants have interpreted as applying only to back-up tapes, is too narrow. It is now even more clear that a restoration will ultimately be necessary and that when it is ultimately undertaken, at least some of the missing emails will not be available on the EOP system *or* on the EOP back-up tapes. Defendants have recently provided sworn testimony before Congress indicating that it is likely the back-up tapes do not contain the missing emails. Unfortunately, we now know that to ensure the protection of the missing emails, the Preservation Order must go beyond the back-up tapes and encompass all media likely to contain the emails. The Archive has submitted a proposed supplemental TRO extending the current Preservation Order to safeguard these materials.

A. Temporary Injunctive Relief is Warranted

In his Report and Recommendation, adopted by this Court, Magistrate Judge Facciola identified the requirements for awarding a temporary restraining order, and held that Plaintiffs had satisfied them. Report and Recommendation at 3 [Docket #11] (Oct. 26, 2007) (citing *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). The same facts still prevail and continue to justify relief, and the information that has emerged in the interim makes clear that further relief is appropriate.

The Archive has demonstrated the presence of the prerequisites for injunctive relief: (1) there is a substantial likelihood of success on the merits; (2) the Archive will be irreparably injured if relief does not issue; (3) the injunction will not cause substantial injury to defendants; and (4) the public interest weighs in favor of relief. *Ellipso*, 480 F.3d at 1157. As Judge Facciola held at that time, the legal issues in this case "are substantial and warrant careful consideration," and the probability of success on the merits was sufficient to warrant injunctive

relief. Report and Recommendation at 4. As to the second and third prongs, the Magistrate held that "obliteration" of the emails at issue "is a text book example of irreparable harm," and "issuing the injunction will not harm the government or burden it in any way." *Id.* at 3. Finally, he recognized that the public interest weighs in favor of preserving media on which the emails may be stored, "since the emails at issue may have historical and public importance." *Id.*

The Payton Declaration and the questions raised at the congressional hearing provide added assurance that the Archive has a reasonable probability of success on the merits. Moreover, they have clarified that the risk of irreparable harm to the Archive is even greater than that contemplated by the Magistrate when he recommended injunctive relief to this Court in October.

B. A Comprehensive Preservation Order is Necessary to Effectuate The Court's Prior Order To Preserve The Emails That Are The Subject Matter of This Lawsuit

The existing Preservation Order, which Defendants have interpreted as preventing only the destruction of disaster recovery tapes, is not broad enough to prevent the destruction of the emails at issue in this case. The Payton Declaration, coupled with evidence made public at the congressional hearing, confirmed that protection of the disaster recovery tapes alone is inadequate: the back-up tapes do not cover the entire period at issue and there have already been instances where emails could not be found on either the EOP system or the back-up tapes. The risk that the Preservation Order is not protecting the missing emails at issue is exacerbated by OA's continuing practice of deleting files from computers when employees leave OA's employ.

First, it is now well-established that the White House recycled its back-up tapes prior to the fall of 2003. Payton Decl. ¶ 12.c. Second, the search for presidential records from the Office of the Vice President in conjunction with the Scooter Libby trial revealed that emails were indeed deleted from both the archive and disaster recovery tapes. If emails that were deleted

from the archive or not properly archived prior to the fall of 2003 are to be retrieved at all, we *must* preserve these emails from sources other than back-ups. Third, even as to emails generated after the cessation of recycling, Ms. Payton's testimony has demonstrated that preserving only the disaster recovery tapes is unlikely to be sufficient to retain all of the subject emails. Ms. Payton has confirmed that disaster recovery tapes are "not the system designed to preserve and archive email communications," though they might contain email information existing at the time a back-up is created. Prepared Testimony of Theresa Payton at 5; *see also* Tr. at 59-60. Rather than serving as an effective archive tool, a disaster recovery back-up tape is merely "a picture of how things look in the data center at that day" at the time the tape is created. Tr. at 89:2069-74 (Payton); *see also id.* at 59:1310-11 (Payton). If an email is deleted between the time the "pictures" are taken, the "picture" will not contain that email or any evidence of it.[16]

Moreover, Ms. Payton has not stated how often these disaster recovery tapes are created, other than to say it is done "regularly" and according to "industry standards."[17] Prepared Testimony of Theresa Payton at 5. The regularity with which tapes are created obviously impacts the degree of risk that emails deleted from the archive will not be contained on the disaster recovery tapes. In addition, Ms. Payton has acknowledged that she cannot know at this time whether all of the data from all of the tapes can be recovered, because "[t]he caveat I give is you don't know what you don't know until you get into the technology. So sometimes you don't

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[16] It also emerged at the congressional hearing that until 2005, the EOP email archive was accessible to anyone on the EOP network, and that there was no audit trail mechanism that could verify whether the integrity of files had been compromised. Tr. at 82-84. This is an incredible security vulnerability, which created an extreme risk that files could be intentionally or accidentally deleted from the archive before disaster recovery tapes could be created. This revelation – that *all* EOP emails were at such high risk for such a prolonged period of time – increases the likelihood that a significant number of email files may be contained *only* on individual work stations or on peripheral devices or other media besides back-up tapes, and increases the need for the Court to enter a broad Preservation Order until further information can be obtained.

[17] Ms. Payton has never stated what these "standards" are or what "industry" they are drawn from. The standards for FRA recordkeeping are spelled out in that statute, not pursuant to any industry standard.

know if there might be a flaw in a tape and some of those other things. But based on what we know right now, it should be recoverable." Tr. at 61:1364-68 (Payton).

Each of these points demonstrates the perils of relying solely on disaster recovery tapes to preserve the corpus of this lawsuit. Ms. Payton's disclosure that OA "wipes" the computers of departing employees highlights the need for a broader order, a need that will only increase as each day brings us closer to a new administration and the mass exodus of hundreds of EOP employees and with them, perhaps, their computers, peripheral devices, and other media which may contain the only copies of FRA-regulated emails at the heart of this case. For these reasons, preservation of the emails at issue in this case requires that EOP cease the deletion or destruction of *all* media that do contain or may contain emails or email data.

CONCLUSION

For the foregoing reasons, this Court should grant the Archive's Motion and enter the attached proposed Order expanding the existing Preservation Order to cover all media in EOP that may contain FRA-regulated email files, and to compel the emergency depositions of Theresa Payton and a qualified NARA witness. Undersigned counsel hereby certifies that, in compliance with Local Civil Rule 7(m), counsel has conferred with opposing counsel regarding this motion, and counsel does not consent to the requested relief. **ORAL ARGUMENT IS RESPECTFULLY REQUESTED UNDER LOCAL RULE 7(f).**

Respectfully Submitted,

DATED: March 11, 2008

/s/ Sheila L. Shadmand

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of March, 2008, I caused a copy of the foregoing Memorandum of Points and Authorities in Support of Emergency Motion to Extend TRO/Preservation Order and For Depositions to be served electronically by the United States District Court for the District of Columbia's Electronic Case Filing ("ECF") and that this document is available on the ECF system.

/s/ Sheila L. Shadmand
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