

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY AND )  
ETHICS IN WASHINGTON, )  
 )  
Plaintiff, )

v. )

Civil No. 07-01707 (HHK/JMF)

EXECUTIVE OFFICE OF THE )  
PRESIDENT, et al., )  
 )  
Defendants. )

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NATIONAL SECURITY ARCHIVE, )  
 )  
Plaintiff, )

v. )

Civil No. 07-01577 (HHK)(JMF)

EXECUTIVE OFFICE OF THE )  
PRESIDENT, et al., )  
 )  
Defendants. )

**PLAINTIFF CREW’S<sup>1</sup> EMERGENCY MOTION FOR AN IMMEDIATE  
STATUS CONFERENCE AND SUPPORTING MEMORANDUM**

This lawsuit stems from the failure of the White House to preserve and restore millions of missing emails from White House servers and to have in place an effective electronic record keeping system. The unlawful actions of the White House defendants have placed at risk a considerable body of historically important documents that belong to the American public. To minimize this risk of loss, the Court issued a preservation order over one year ago based on its

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<sup>1</sup> CREW is the acronym for Citizens for Responsibility and Ethics in Washington.

conclusion that absent such relief, CREW and the public would face irreparable harm.

Now, once again, there is a risk that documents at the heart of this litigation will not be accessible absent judicial interference. In less than two weeks President Bush will leave office and, under the provisions of the Presidential Records Act (“PRA”), the archivist will “assume responsibility for the custody, control and preservation of, and access to” those presidential records his administration has preserved. 44 U.S.C. § 2203(f)(1). As a result, the White House intends to transfer all of the records of the Office of Administration (“OA”), a named defendant here, to the National Archives and Records Administration (“NARA”) by no later than noon on January 20, 2009, even though OA’s status as an agency is the subject of ongoing litigation and OA possesses both federal and presidential records in commingled form. At the same time the White House will complete the transfer of the entirety of the Bush administration’s presidential records.

This transfer of such a massive volume of records to an agency woefully unprepared to receive them will directly affect plaintiffs’ ability to access documents critical to the resolution of this lawsuit, and will change the status quo of those documents subject to the Court’s preservation order. Under these circumstances, CREW seeks an immediate status conference to obtain clarification on the status of these documents and the defendants’ obligations during and following the transition between the current and incoming presidential administrations. Specifically, CREW seeks clarification about three groups of records.

First, the Court’s preservation order (Document 18) clearly sought to preserve the status quo by requiring defendants to preserve specified media and prohibiting defendants from transferring that media “out of their custody or control without leave of this court.” Order, Nov.

12, 2007, p. 2. CREW recognizes that because both NARA and the archivist are parties to this litigation a transfer of this media to NARA would not result in technically removing the media from defendants' custody or control. Such a transfer, however would change the status quo by changing the location of the media subject to the Court's order and raises questions about the future accessibility of these materials. Accordingly, the Court should not permit the transfer without first receiving adequate assurances from the defendants about the continued maintenance of these materials, including where they will be kept, the conditions under which the media will be preserved, and measures defendants will take to ensure their continued accessibility.

Precedent based on the handling of similar presidential records at the end of the Clinton administration supports this approach. In Alexander v. FBI, Civil Nos. 96-2123/97-1288 (D.D.C.), Judge Royce C. Lamberth faced the planned transfer from the White House to NARA of a body of backup tapes the White House was in the process of using to restore missing White House emails. There was no dispute between the parties about the status of the backup tapes as presidential records under the PRA subject to transfer to NARA. Nevertheless, Judge Lamberth did not authorize the transfer until he had received a memorandum of understanding between the White House and NARA spelling out OA's continuing responsibilities and NARA's newly assumed responsibilities for the transferred records (attached as Exhibit 1). In addition, Judge Lamberth relied on declarations from Charles Easley, then OA Associate Director for Security (attached as Exhibit 2), attesting to the steps he would take to ensure the security and integrity of the materials at issue prior to and after their transfer. Those measures included "a tape-by-tape inventory of the backup tapes with the NARA representative," after the transfer occurred. Id. at ¶ 5. Moreover, in authorizing the transfer Judge Lamberth made clear who at NARA was to

receive custody of the records and directed that individual to provide the court with an affidavit “describing in detail the steps he has taken and is taking to ensure the integrity of these materials.” Alexander v. FBI, Order of January 19, 2001 (attached as Exhibit 3). And Judge Lamberth expressed his intention to “personally inspect and oversee this process.” Id.

There is a particularly acute need for similar measures here given the importance of the backup tapes to any restoration measures that will be undertaken and the fact that to date the White House has made no recovery efforts. As a result, the backup media may be the only source for many, if not most of the millions of missing emails. Thus, this Court should require defendants here to provide through sworn declarations appropriate assurances about their continued preservation and handling of the media subject to the Court’s preservation order once that material is transferred to NARA.

Second, plaintiffs have requested that the Court expand the current preservation order to include additional sources for the deleted emails, such as workstations and other media that may contain the missing emails, a request endorsed in large part by Magistrate Judge Facciola in two separate reports and recommendations. Defendants have opposed these motions, arguing the burden they would impose is not justified or necessary. Thus, materials that fall within this category have yet to be identified. As a result, if the Court agrees to expand its preservation order NARA will face a herculean task in locating, segregating, and preserving these additional sources for the missing emails, a task that may prove impossible to accomplish and will certainly not be completed for a considerable length of time given the total volume of materials NARA

will be receiving.<sup>2</sup>

Adding to any inherent delay are the fundamental flaws in the procedures for transferring, receiving, cataloging and retrieving the presidential records of the Bush administration once sent to NARA. Both a published report of the Government Accountability Office (“GAO”)<sup>3</sup> and recent media reports confirm the significant risk that NARA does not have the capability to process the Bush administration’s records. *The New York Times* has reported on emerging questions concerning the “archives’ capacity” and “growing doubts about whether [NARA’s] new \$144 million computer system can cope with the vast quantities of digital data it will receive when President Bush leaves office on Jan. 20.” Robert Pear & Scott Shane, Bush Data Threatens to Overload Archives, *The New York Times*, Dec. 27, 2008, at A10 (attached as Exhibit 4). Moreover, because NARA will be dealing with “a monstrous volume of material,” -- about 50 times the volume of electronic records left by the Clinton Administration -- “[a]rchivists said it could be weeks or months before these files could be indexed and searched.”

Id.

Similarly, the GAO report noted “ongoing uncertainty about the format and volume of records to be transferred,” GAO Report at 5, and the resulting “decreas[e] [in] assurance that it [NARA] will be adequately prepared to meet the requirements of Congress, the incoming

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<sup>2</sup> Of course, this assumes these media have been preserved. Just last night White House Press Secretary Dana Perino stated on *The Daily Show* that the Obama administration would be getting “brand new equipment,” raising a question as to what the Bush administration is doing with the old equipment, including hard drives.

<sup>3</sup> U.S. Government Accountability Office Report to Congressional Committees, INFORMATION MANAGEMENT: The National Archives and Records Administration’s Fiscal Year 2008 Expenditure Plan, GAO -08-1105 (September 2008) (“GAO Report”), available at <http://www.gao.gov/new.items/d081105.pdf>.

President, *and the courts for information contained in the previous administration's records.* Id. at 15 (emphasis added). With this situation, a transfer to NARA of documents relevant to this litigation will seriously threaten CREW's timely access.

Third, CREW has requested leave to conduct immediate discovery based on its well-founded concern that after January 20, 2009, CREW's ability to access key government officials and relevant documents will be severely diminished. Defendants, in response, have argued they should first be given an opportunity to file the administrative record, but have made clear in more recent discussions with plaintiffs' counsel that they intend to file an administrative record on only four of the eight counts and not until early February, weeks after the presidential transition. As a result, the vast majority of records relevant to and necessary for resolving this litigation are still unaccounted for and will be transferred out of the White House's custody and control by January 20. In this regard CREW notes that relevant documents for these purposes are not limited to OA; the Executive Office of the President ("EOP") is a separately sued defendant and other EOP components, such as the White House Counsel, had a critical role in the missing email discovery. The transfer to NARA of each of these categories of materials threatens plaintiffs with delayed or denied access and a serious harm to plaintiffs' ability to effectively litigate this lawsuit. Accordingly, in advance of the transfer the Court should require defendants to provide adequate assurances that all records potentially relevant to this litigation will be appropriately preserved and readily accessible to the plaintiffs for use in this litigation.<sup>4</sup> Given how little time remains before the transition, the most expeditious way to resolve these

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<sup>4</sup> For these purposes defendants' narrow view of what constitutes the administrative record -- which defendants have yet to produce -- should not control and the governing principle should be Fed. R. Civ. P. 26(b)(b) (defining relevance for discovery purposes).

issues is through a conference where defendants are directed to come prepared to address each category of materials at issue.

**CONCLUSION**

For the foregoing reasons, plaintiff CREW respectfully requests that the Court grant this emergency motion and schedule a conference at the earliest possible date.

Pursuant to LCvR 7(m), the undersigned counsel contacted Helen Hong, counsel for defendants, on January 7, 2009, to discuss CREW's anticipated emergency request. On January 8, 2009, Ms. Hong proposed that the parties enter into a court-ordered stipulation that would not encompass all of the records at issue, did not provide critical details on how the documents would be maintained and made easily accessible to the plaintiffs during the pendency of this litigation, failed to address the federal records that are at issue, and was premised on the assumptions OA is a non-agency component with only presidential records and OA is the only component with documents relevant to these matters. Given the numerous deficiencies with defendants' proposal the parties were not able to reach agreement. Ms. Hong stated that defendants oppose CREW's emergency motion for a status hearing.

Respectfully submitted,

/s/

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