ORAL ARGUMENT NOT YET SCHEDULED
Nos. 16-5015, 16-5060, 16-5061, & 16-5077

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDICIAL WATCH, INC. AND CAUSE OF ACTION INSTITUTE
Plaintiffs-Appellants,

v.

DAVID S. FERRIERO AND JOHN F. KERRY
IN THEIR OFFICIAL CAPACITIES
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
Case Nos. 15-cv-785 & 15-cv-1068 (Hon. James E. Boasberg)

JOINT OPENING BRIEF OF APPELLANTS JUDICIAL WATCH, INC. AND CAUSE OF ACTION INSTITUTE

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June 20, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs-Appellants Judicial Watch, Inc. and Cause of Action Institute submit this certificate as to parties, rulings, and related cases.

I. PARTIES AND *AMICI*

The parties are Plaintiffs-Appellants Judicial Watch, Inc. and Cause of Action Institute, and Defendants-Appellees David S. Ferriero and John F. Kerry.

Judicial Watch, Inc. is a not-for-profit, educational organization incorporated under the laws of the District of Columbia and headquartered at 425 Third Street SW, Suite 800, Washington, DC 20024. It seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. As part of its mission, it regularly requests records from federal agencies, including the United States Department of State, pursuant to the Freedom of Information Act, analyzes the responses, and disseminates its findings and the requested records to the American public.

Cause of Action Institute is a not-for-profit corporation committed to ensuring that government decision-making is open, honest, and fair. In carrying out its mission, Cause of Action Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. It regularly requests access under the Freedom of Information Act

to the public records of federal agencies, entities, and offices, including the United States Department of State, and disseminates its findings, analysis, and commentary to the general public.

David S. Ferriero is the Archivist of the United States, John F. Kerry is the United States Secretary of State, and both are parties in their official capacities.

There were no *amici curiae* or intervenors before the district court. There are no intervenors associated with this appeal at this time, and Plaintiffs are not aware of any *amici curiae*.

II. RULINGS UNDER REVIEW

The rulings under review are the Order and Memorandum Opinion by The Honorable James E. Boasberg in the United States District Court for the District of Columbia entered on January 11, 2016, which denied a motion for jurisdictional discovery by Plaintiffs and granted a motion to dismiss by Defendants. District Court Docket Nos. 20 & 21; Joint Appendix ("JA") 176, 178.

III. RELATED CASES

This case has not previously been before this Court. Other than the dockets with which this case has been joined (Nos. 16-5015, 16-5060, 16-5061, & 16-5077), Plaintiffs are unaware of any related case currently before this Court involving substantially the same parties and issues.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Judicial Watch, Inc. is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Cause of Action Institute is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request that the Court grant oral argument in the present appeal. The proper construction of the Federal Records Act is a matter of sufficient importance that oral argument should be granted, and the issues are sufficiently complex that this Court would benefit from oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

*Authorities upon which Appellants chiefly rely are marked with asterisks.

Statutes

Regulations

Rules

Other Authorities

GLOSSARY OF ABBREVIATIONS

CoA Institute	Cause of Action Institute
DOS-OIG	Department of State Office of Inspector General
DOS-OIG Report	Department of State, Office of Inspector General, *Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements* (May 2016)
FAM	United States Department of State Foreign Affairs Manual
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
FRA	Federal Records Act
JA	Joint Appendix
Judicial Watch	Judicial Watch, Inc.
NARA	National Archives and Records Administration

INTRODUCTION

This case arises from the refusal of Defendants to perform their non-discretionary statutory obligations under the Federal Records Act ("FRA")[1] in response to the unlawful removal, by former Secretary of State Hillary Clinton, of federal records from the custody of the United States Department of State ("State Department"). Contrary to the statutory language of the FRA and court precedent, the lower court dismissed the case as moot by finding that Defendants were not required to initiate action through the Attorney General to recover all of the unlawfully removed records at issue in this case.

Plaintiffs Judicial Watch, Inc. ("Judicial Watch") and Cause of Action Institute ("CoA Institute") brought this action before the lower court because the failure of Defendants to discharge their statutory obligations have left them injured and unable to access records to which they have a statutory right. The district court allowed Defendants to avoid their statutory obligations, mischaracterized the nature of the injury in an FRA case, and abused its discretion in refusing Plaintiffs targeted discovery that would have helped resolve factual disputes relevant to the jurisdictional questions at issue.

[1] The Federal Records Act refers to the collection of statutes that govern the creation, management, and disposal of the records of federal agencies. *See* 44 U.S.C. chs. 21, 29, 31, 33.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Judicial Watch asserted jurisdiction before the district court pursuant to 28 U.S.C. § 1331. JA-9. CoA Institute asserted jurisdiction pursuant to 28 U.S.C. § 1331, as well as 5 U.S.C. §§ 701, 702, and 706; 28 U.S.C. § 1361; and 28 U.S.C. §§ 2201-2202. JA-20. The district court denied that it had jurisdiction, found the case moot, and granted the motion to dismiss by Defendants in an order and memorandum opinion dated January 11, 2016. JA-176, 178. Plaintiffs filed timely notices of appeal on January 12, 2016 (Judicial Watch) and March 11, 2016 (CoA Institute). JA-4; JA-5.

STATEMENT OF ISSUES

1. Does the FRA require Defendants to take action through the Attorney General to recover unlawfully removed federal records when they are unable through their own efforts to recover all of such records, and in failing to do so, do Defendants violate the FRA?

2. Does injury-in-fact in an FRA case seeking to compel agency officials to recover unlawfully removed records arise from the inability of a plaintiff to access agency records and information to which it has a statutory right?

3. Did the district court abuse its discretion by refusing Plaintiffs jurisdictional discovery that would have aided in resolving outstanding factual issues relevant to the jurisdictional objection of Defendants?

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), the relevant statutes and regulations are set out in an Addendum to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On March 10, 2015, former Secretary of State Hillary Clinton admitted that throughout her tenure as Secretary of State she used a non-state.gov email account for government business, which was housed on a computer server in her home. JA-17-18. That computer server and email account were not connected to or integrated with any record-keeping system maintained by the State Department. Secretary Clinton's work-related emails were not saved or archived contemporaneously within State Department systems. JA-24. Neither the United States Archivist nor any other proper authority authorized Secretary Clinton to use a private email system for official agency business. The failure of Secretary Clinton to preserve her work-related emails within State Department systems prevented the agency from properly responding to records requests under the Freedom of Information Action ("FOIA") and from Congress. JA-25.

On December 5, 2014, twenty-two months after leaving office, representatives of Secretary Clinton delivered paper copies of 30,490 work-related emails, totaling approximately 55,000 pages of print-outs, to the State Department. JA-18, 132. In making the December 5, 2014 production, Secretary Clinton held back an additional 31,830 emails, which she declared to be personal records. JA-134. None of those additional "personal" emails were reviewed by anyone at the State Department or the National Archives and Records Administration ("NARA"). JA-105, 135-36. In a letter to the House Select Committee on Benghazi, dated March 27, 2015, a lawyer for Secretary Clinton, David Kendall, represented that, following delivery of the email print-outs to the State Department, Secretary Clinton directed her representatives to remove all emails from her tenure as Secretary of State, both personal and work-related, from the personal server. JA-18-19, 162.

After learning of Secretary Clinton's unlawful email practices as reported in the press, CoA Institute, joined by a number of other government-oversight groups, wrote to both Defendants on March 17, 2015 to explain that the use of the private server made it impossible for the State Department to search Secretary Clinton's email records for FOIA requests and that it was therefore "of the utmost importance that all of former Secretary Clinton's emails are properly preserved and transferred back to the State Department[.]" JA-19, 30-33. The letter reminded

Defendants of their duty under the FRA to recover unlawfully removed, altered, or destroyed records, that the records should be transferred to the State Department in their original electronic form, and that any record emails deleted from Secretary Clinton's server also should be recovered to the extent technically possible. JA-30-33.

On April 30, 2015, Judicial Watch wrote to Defendant Kerry notifying him of the unlawful removal of the Clinton email records and requesting that he initiate an enforcement action pursuant to the FRA. JA-13.

The set of work-related emails that representatives of Secretary Clinton delivered to the State Department on December 5, 2014 does not constitute all of the federal records that she unlawfully removed from State Department custody. As explained below and presented to the lower court, neither the State Department nor NARA has recovered—and neither are making further efforts to recover—all of the federal records at issue. To date, Defendants have refused to initiate action through the Attorney General to recover a complete and accurate set of all federal records that Secretary Clinton unlawfully removed from State Department custody.

II. STATUTORY FRAMEWORK

The FRA establishes the framework for records management throughout the federal government and requires the heads of all federal agencies, including the State Department, to establish a system to capture, preserve, and safeguard records,

including those in electronic form, created while conducting official government business. *See* 44 U.S.C. chs. 21, 29, 31, 33; 36 C.F.R. pts. 1220-1239.

NARA is the primary agency for records management oversight and is headed by the Archivist of the United States. 44 U.S.C. §§ 2102, 2904.

The FRA defines a "record" as any material, "regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." 44 U.S.C. § 3301; *see also* 36 C.F.R. § 1220.18 (defining additional terms).

NARA requires "agencies [to] distinguish between records and nonrecord materials" when making preservation determinations. 36 C.F.R. § 1222.12(a) (citations omitted). For email record management, NARA directs that because most "employees manage their own email accounts[,] . . . all employees are required to review each message, identify its value, and either delete it or move it to a recordkeeping system." NARA Bulletin 2014-06 ¶ 4 (Sept. 15, 2014), *see also* 36 C.F.R. § 1236.22(b) (providing that "[a]gencies that allow employees to send and receive official electronic mail messages using a system not operated by the

agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system").

Under applicable State Department rules, "every Department of State employee must create and preserve records that properly and adequately document the organization, functions, policies, decisions, procedures, and essential transactions of the Department." 5 FAM 422.3; *see also* 5 FAM 443.1(a) ("All Government employees and contractors are required by law to make and preserve [federal] records . . . . In addition, Federal regulations govern the life cycle of these records: they must be properly stored and preserved, available for retrieval, and subject to appropriate approved disposition schedules."). As it relates to emails, State Department "employees [shall] determine which of their E-mail messages must be preserved as Federal records and which may be deleted . . . because they are not Federal record materials." 5 FAM 443.1(c). There is no provision in either NARA or State Department regulations or policies that allows anyone except a government employee or contractor to make the determination of what does or does not constitute a federal record.

Agency heads are obligated to "establish safeguards against the removal or loss of records the head of such agency determines to be necessary and required by regulations of the Archivist." 44 U.S.C. § 3105; *see also* 36 C.F.R. § 1230.10(a) (Agency heads must "[p]revent the unlawful or accidental removal, defacing,

alteration, or destruction of records. Section 1222.24(a)(6) of this subchapter prohibits removing records from the legal custody of the agency."); *id.* § 1230.10(c) (agency heads must "[i]mplement and disseminate policies and procedures to ensure that records are protected against unlawful or accidental removal, defacing, alteration and destruction"); *id.* § 1222.24(a)(6) (record-keeping requirements must "[i]nclude procedures to ensure that departing officials and employees do not remove Federal records from agency custody").

Unlawful removal of records is defined in terms of whether an individual is authorized to alienate records from the custody of the agency to which the records belong: "Removal means selling, donating, loaning, transferring, stealing, or otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States." *Id*. § 1230.3(b).

In the event of unlawfully removed records, the FRA establishes a mandatory, non-discretionary enforcement mechanism designed to ensure the maximal recovery of those records. Section 2905(a) of Title 44 of the U.S. Code is directed at the Archivist. In pertinent part, it describes the obligation of the Archivist to recover records unlawfully removed by initiating action through the Attorney General of the United States, and to notify Congress when such action is taken:

> The Archivist shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or

> destruction of records in the custody of the agency that shall come to the Archivist's attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made

44 U.S.C. § 2905(a).

The obligations of the Archivist are reiterated in 44 U.S.C. § 3106, which also establishes similar obligations for agency heads:

> (a) FEDERAL AGENCY NOTIFICATION.–The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency.
>
> (b) ARCHIVIST NOTIFICATION.–In any case in which the head of a Federal agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action described in subsection (a), or is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

Id. § 3106.

III. PROCEDURAL HISTORY

Judicial Watch filed its Complaint against Defendant Kerry on May 28, 2015. JA-2. CoA Institute filed its Complaint against Defendants Ferriero and Kerry on July 8, 2015. JA-7. Following a July 24, 2015 motion by Defendants, the lower court consolidated the cases on August 4, 2015. JA-3. On September 17, 2015, Defendants filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the district court lacked jurisdiction and that Plaintiffs had failed to state a claim. JA-3, 43. To resolve factual disputes concerning jurisdiction, on October 8, 2015, CoA Institute moved the court for jurisdictional discovery, which Judicial Watch later joined. JA-4. On January 11, 2016, the lower court granted the motion to dismiss under Rule 12(b)(1) and denied the motion for jurisdictional discovery. JA-4, 176, 178.

On January 12, 2016 and March 11, 2016, respectively, Judicial Watch and CoA Institute filed timely notices of appeal to this Court. JA-4-5; JA-5. On March 11, 2016, Defendants filed cross-appeals in both district court cases to preserve the issue of whether the lower court correctly dismissed the cases without prejudice. JA-5. On April 14, 2016, this Court, *sua sponte*, consolidated the four appeals. Order, Apr. 14, 2016, No. 16-5015.

SUMMARY OF ARGUMENT

The FRA requires federal agencies to create, safeguard, and preserve federal records. If those records are unlawfully removed from an agency, the FRA establishes a mandatory, non-discretionary process that the agency head and the Archivist must follow to recover those records. If the agency head and the Archivist fail to follow that mandated process, aggrieved parties have a private right of action to compel them to recover records by taking action through the Attorney General.

In this case, the lower court misapprehended the nature of the obligations of Defendants under the FRA to initiate action through the Attorney General to recover the unlawfully removed records at issue. This matter does not involve an "intra-agency corrective action" designed to prevent or immediately remedy the destruction or removal of federal records by an agency official or employee. It concerns the recovery of State Department records already removed from the agency in violation of the FRA. The case is not and cannot be moot, as the lower court held, because the Defendants have not recovered all unlawfully removed records and have not initiated action through the Attorney General for the complete recovery of those records. The judgment of the lower court must be reversed.

ARGUMENT

This Court reviews "*de novo* the district court's grant of a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1)." *Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011) (citation omitted). It accepts "well-pleaded factual allegations as true and draw[s] all reasonable inference from those allegations in the plaintiff's favor." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). It need not, however, give weight to allegations "supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

I. THE DISTRICT COURT HAS SUBJECT-MATTER JURISDICTION

The lower court dismissed this case under Federal Rule of Civil Procedure 12(b)(1) by holding that efforts taken by Defendants to recover the unlawfully removed records at issue were sufficient to moot the case by curing any injury Plaintiffs may have suffered. *See* JA-190 ("Taken together, all of the recovery efforts initiated by both agencies up to the present day cannot in any way be described as a dereliction of duty. In light of this, Plaintiffs cannot establish an ongoing injury actionable under the FRA; as such, their cases are moot.").

The lower court made two principal errors in reaching that conclusion. First, it incorrectly found that the FRA did not require Defendants to initiate action through the Attorney General to recover all unlawfully removed federal records at

issue. Second, it mischaracterized the nature of the injury to Plaintiffs under the FRA.

A. The Lower Court Erred in Finding that the Federal Records Act Does Not Require Defendants To Take Action through the Attorney General To Recover the Unlawfully Removed Records at Issue

1. Defendants Have a Mandatory, Non-discretionary Obligation under the Federal Records Act to Initiate Action through the Attorney General for the Recovery of Unlawfully Removed Records

The lower court mischaracterized the position of Plaintiffs by stating that they claimed an agency is required to initiate action immediately through the Attorney General upon discovering federal records had been unlawfully removed. *See* JA-186 (characterizing Plaintiffs' position as requiring "the State Department and the Archivist [to] initiate legal action through the Attorney General *as soon as* they receive notice that federal records have been unlawfully removed") (emphasis added); *see also* JA-186 (court stating the FRA "does not require [agencies] *immediately* to ask the Attorney General to file a lawsuit") (emphasis added); JA-187 (court stating the fact of unlawfully removed records "does not automatically entitle a private litigant to a court order requiring the agency to involve the Attorney General in legal action to recover the documents").

The FRA, through its repeated use of the word "shall," mandates that agency heads and the Archivist initiate action through the Attorney General to recover

unlawfully removed records. 44 U.S.C. §§ 2905(a), 3106. In *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), this Court—consistent with the Supreme Court in *Kissinger*[2]—explained that initiating action through the Attorney General for record recovery is a non-discretionary obligation:

> Because the FRA enforcement provisions leave *no* discretion to determine which cases to pursue, the agency head's and Archivist's enforcement decisions are not committed to agency discretion by law. In contrast to a statute that merely *authorizes* an agency to take enforcement action as it deems necessary, the FRA *requires* the agency head and Archivist to take enforcement action.

924 F.2d at 295 (emphasis in original); *see also id.* at 295-96 (including the taking of action through the Attorney General as part of the FRA enforcement mechanism).

This Court in *Armstrong* also explained that Congress imposed on the Archivist an independent and mandatory obligation to recover records to account for the situation where the agency head (such as former Secretary Clinton in this case) perpetrates the unlawful removal of federal records:

> In *Kissinger*, the Supreme Court held that the FRA does not contain an implied cause of action allowing private parties to bring suit to recover records that have been unlawfully removed from an agency. Recognizing that this created 'the anomalous situation . . . whereby an agency head has a duty to initiate action to recover records which he himself has removed,' Congress amended the FRA *to require* the Archivist to ask the Attorney General to sue and to notify Congress if

[2] The Supreme Court characterized agency enforcement obligations under 44 U.S.C. § 3106 in terms of being "required" and "obligated." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980).

> the agency head failed to make a similar request of the Attorney General.

Id. at 292 (emphasis added).

When the agency head herself is the one responsible for the unlawful removal of records, the independent obligation of the Archivist to involve the Attorney General in the recovery efforts is crucial because without such involvement the agency head likely will act with impunity. The FRA places the burden on the agency head to implement that agency's federal recordkeeping requirements. *See* 44 U.S.C. § 3101 ("The head of each Federal agency shall make and preserve [federal] records[.]"); *id.* § 3102 ("The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency [including by providing] effective controls over the creation and over the maintenance and use of records in the conduct of current business."). Thus, if the agency head, such as Secretary Clinton in this case, is the one who violates the law by failing to preserve and maintain records as required by the FRA and by unlawfully removing records from the custody of the agency, the Archivist—an independent government official—*must* step in to hold her accountable by engaging the nation's chief law enforcement officer. Bringing the Attorney General into the recovery efforts also

is necessary because an agency official such as Secretary Clinton faces potential criminal liability for the unlawful removal of records under 18 U.S.C. § 2071.[3]

Independent action by the Archivist through the Attorney General also is an essential component of the FRA enforcement mechanism because it helps avoid the very issues that are bedeviling the State Department in this case. As discussed in detail below, neither Secretary Kerry nor his agency has used the force of law to compel Secretary Clinton or other parties in possession of unlawfully removed records to return those records to their proper home. Without making any effort to determine for itself the universe of removed records, the State Department simply requested Secretary Clinton to provide it with copies of any records that she believed had not been preserved in State Department recordkeeping systems and relied on her word to do so. As a result, the copies of the records returned to date are neither complete nor accurate (*see* below Section I.A.2).

The purpose of the above-described enforcement mechanism is to ensure the recovery of removed records, either by the agency itself or at the instigation of a private litigant, as well as the ability of Congress to oversee the proper administration of the FRA:

[3] *See* 18 U.S.C. § 2071(b) ("Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.").

> [I]t would not be inconsistent with *Kissinger* or the FRA to permit judicial review of the agency head's or Archivist's refusal to seek the initiation of an enforcement action by the Attorney General. Nothing in the legislative history suggests that Congress intended to preclude judicial review of either the agency head's or the Archivist's failure to take enforcement action. Indeed, judicial review of the agency head's and Archivist's failure to take enforcement action reinforces the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions will operate as Congress intended. Unless the Archivist notifies the agency head (and, if necessary, Congress) and requests the Attorney General to initiate legal action, the administrative enforcement and congressional oversight provisions will not be triggered, and there will be no effective way to prevent the destruction or removal of records.

Armstrong, 924 F.2d at 295; *see also id.* at 296 (finding, after quoting the language of 44 U.S.C. § 2905 and § 3106 on the initiation of action through the Attorney General, that "[o]n the basis of such clear statutory language mandating that the agency head and Archivist seek redress for the unlawful removal or destruction of records, we hold that the agency head's and Archivist's enforcement actions are subject to judicial review"); *Citizens for Responsibility & Ethics in Wash. v. Dep't of Homeland Sec.*, 592 F. Supp. 2d 111, 122 (D.D.C. 2009) ("*CREW v. DHS*") (relying on *Armstrong* to find that "suing the Archivist (or the agency head) under the [Administrative Procedure Act] to compel him or her to ask the Attorney General to initiate legal action is *the* proper course for a private party to go about enforcing the FRA") (emphasis in original).

Both this Court in *Armstrong* and Plaintiffs in their pleadings before the lower court recognized that *immediate* action through the Attorney General is not

always warranted. As this Court explained in a footnote in the *Armstrong* decision:

> We do not mean to imply, however, that the Archivist and agency head must *initially attempt* to prevent the unlawful action by seeking the initiation of legal actions. Instead, the Federal Records Act contemplates that the agency head and Archivist may proceed first by invoking the agency's 'safeguards against the removal or loss of records,' and taking such actions as disciplining the staff involved in the unlawful action, increasing oversight by higher agency officials, or threatening legal action.

924 F.2d at 296 n.12 (emphasis added, citation omitted).

This footnote directly applies to the *prevention* of unlawful destruction or removal rather than to the recovery of records already destroyed or removed (the fact at issue in this case). Where intra-agency, preventative action may stop removal of records before it happens, an immediate action through the Attorney General would be both unnecessary and the least efficient means of securing the federal records at issue.

To the extent the *Armstrong* footnote also applies where an agency is seeking to recover records already unlawfully removed, the language of the footnote establishes that any discretion to act without Attorney General involvement can apply only at the outset. If the initial efforts to prevent the unlawful destruction or removal were unsuccessful or any initial efforts to recover records already removed failed, no discretion would be left to the agency head or Archivist. At that point they would be required to initiate action through the

Attorney General and, if they do not, a private right of action would arise to enforce that mandatory duty. No other interpretation is consistent with the mandatory enforcement obligation recognized by the *Armstrong* court. *See id.* at 295 (the private right of action arises because "of the agency head's or Archivist's *refusal to seek the initiation of an enforcement action by the Attorney General*") (emphasis added).

The lower court therefore contradicted the rationale underlying *Armstrong* when it held that "[a] plaintiff's right to compel a referral to the Attorney General, accordingly, is limited to those circumstances in which an agency head and Archivist have taken minimal or no action to remedy the removal or destruction of federal records." JA-187. What matters under the FRA enforcement mechanism is not that an agency and the Archivist make an effort at recovery but that the unlawfully removed records are actually recovered. Put differently, simple effort to recover unlawfully removed records is not sufficient. Those efforts, to the extent possible, must succeed. If, for whatever reason, the agency or Archivist proves unable to achieve full recovery of the removed records through their own efforts, or demonstrates by their actions an unwillingness to do so, action must be taken through the Attorney General. Where records remained unrecovered and neither the agency nor the Archivist have taken action through the Attorney General, a private right of action arises to compel such action. *See Armstrong*, 924

F.2d at 295. That is the situation in this case. The lower court judgment must be reversed.

2. The Lower Court Ignored the Failure of Defendants To Recover All Records Unlawfully Removed in this Case

In finding that Defendants sufficiently discharged their FRA enforcement obligations, the lower court focused on what it called "a number of significant corrective steps [taken] to recover Clinton's emails." JA-188. The corrective steps identified by the lower court, however, consisted of only (1) the December 5, 2014 production of email print-outs—without a finding that Secretary Clinton had turned over all federal records in her possession, custody, or control or that the print-outs constituted a complete and accurate set of all unlawfully removed records at issue; (2) State Department letters written to Clinton lawyer, David Kendall, and the FBI in an *unsuccessful* attempt to secure the electronic versions of the emails in question and any other records recovered from the personal server used by Secretary Clinton; and (3) letters exchanged between NARA and the State Department that merely reported on State Department recovery efforts. JA-188-90.

As presented to the lower court—but left unexamined in the Memorandum Opinion—these three "corrective steps" are insufficient to discharge the FRA enforcement obligations of Defendants because they did not lead to the recovery of

all records unlawfully removed. Evidence of the failure by Defendants in this respect includes the following:

- The December 5, 2014 production was incomplete. The State Department, for example, admitted it could not locate within the production "all or part" of at least fifteen Clinton emails that had been provided to the House Select Committee on Benghazi by Sidney Blumenthal. JA-105-06. There also are acknowledged and unexplained gaps from certain time periods during Secretary Clinton's tenure at the State Department, JA-107, 129, a fact recently confirmed by the Department of State Office of Inspector General ("DOS-OIG") in its May 2016 report entitled *Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements* ("DOS-OIG Report").[4]
- Secretary Clinton removed or altered portions of certain email she provided to the State Department, evidence that the December 5, 2014 production did

[4] *See* DOS-OIG Report at 23 (JA-221) (finding that "Secretary Clinton's production was incomplete. For example, the Department and OIG both determined that the production included no email covering the first few months of Secretary Clinton's tenure—from January 21, 2009, to March 17, 2009, for received messages, and from January 21, 2009, to April 12, 2009, for sent messages. OIG discovered multiple instances in which Secretary Clinton's personal email account sent and received official business email during this period."). The DOS-OIG Report was published after the lower court's decision and is included herewith as JA-Exhibit 1.

not represent an accurate set of the unlawfully removed records at issue. JA-106.

- Clinton lawyer, David Kendall, had possession and control of thumb drives containing the electronic versions in their native format of the email previously delivered as paper copies to the State Department, but the State Department failed to recover those electronic versions.[5] JA-106-07, 110.
- The FBI took possession of the Clinton server and recovered both personal and work-related email she had attempted to delete. As with the electronic versions of the email in David Kendall's custody, however, the State Department failed to recover those records from the FBI. JA-110-11.
- On September 25, 2015, the *Associated Press*—as later confirmed in the DOS-OIG Report[6]—reported that the Defense Department had unearthed a chain of email between Secretary Clinton and then-Commander of U.S. Central Command, General David Petraeus, that Secretary Clinton never

[5] As CoA Institute argued below, the electronic versions of the emails in question constitute federal records that must be recovered independently of and notwithstanding any paper copies currently in State Department possession. *See* JA-112-16.

[6] *See* DOS-OIG Report at 23-24 (JA-221-22) ("[T]he Department of Defense provided to OIG in September 2015 copies of 19 emails between Secretary Clinton and General David Petraeus on his official Department of Defense email account; these 19 emails were not in the Secretary's 55,000-page production. OIG also learned that the 55,000-page production did not contain some emails that an external contact not employed by the Department sent to Secretary Clinton regarding Department business.").

provided to the State Department, which is further proof that the December 5, 2014 production did not represent a complete and accurate set of the unlawfully removed records at issue. JA-107-08 (citing Bradley Klapper, *Officials: More work emails from Clinton's private account*, Associated Press, Sept. 25, 2015).

- The same *Associated Press* story described newly uncovered email showing that Secretary Clinton switched to her personal email system as early as January 28, 2009, a week after she took office. JA-108. That story undermines Secretary Clinton's official statement, which explained that the email she turned over to the State Department started on March 18, 2009 because that was when she started using her private email system. JA-108, 132. The story is further evidence that the State Department has not recovered all unlawfully removed records at issue (*e.g.*, emails that predate March 18, 2009).
- Before March 18, 2009, Secretary Clinton also used an email account housed on a server controlled by Blackberry. JA-108 (citing an official Clinton statement that "[e]arly in her term, Clinton continued using an att.blackberry.net account that she had used during her Senate service"). To

date, the State Department has not made a direct attempt to recover email records from that server.[7] *See* JA-173.

- A commercial information technology firm called Datto, Inc. possessed a backup of the content contained on the Clinton server, but there is no evidence that either Defendant has made any effort to contact that vendor in an attempt to recover a complete and accurate set of the unlawfully removed records at issue. JA-109, 140-46.[8]

In reaching its decision, the lower court refused to address any of the above evidence and ignored it except to conclude—without explanation or analysis—that "to the extent that Plaintiffs have identified emails not currently in State's possession that they believe fit this description, they have not demonstrated that the

[7] *See also* DOS-OIG Report at 24 (JA-222) (explaining that, after NARA asked the State Department to determine if email records could be retrieved from the servers of Secretary Clinton's internet service or email providers, the State Department did nothing more than convey the request to a representative of Secretary Clinton).

[8] In addition to the record below, new evidence discovered since the district court decision, including additional email and an FBI declaration in a related case, provide further support for the above factual points. Plaintiffs are able to provide this evidence to this Court, if it desires. To the extent this case is remanded to the district court, presentation of this new evidence would be appropriate in that venue as well.

agency and the Archivist have not taken any steps to recover them." JA-190. As the above demonstrates, that conclusion is incorrect.[9]

The evidence presented to the lower court also demonstrates that the failure of Defendants to recover all of the unlawfully removed records at issue stems from their inability to compel non-State Department personnel—including Secretary Clinton, her lawyers, other federal agencies, and third-party commercial vendors—to produce the records in their possession. Action through the Attorney General, whether by suit, subpoena, or other legal means to compel action, is therefore necessary in this case to ensure a complete recovery of the records at issue. The lower court erred in dismissing the case and its judgment must be reversed.

3. The Lower Court Erred in Characterizing the Recovery Efforts of Defendants as Intra-Agency Corrective Action

The lower court apparently took the view that no action through the Attorney General was necessary because, at least in part, the recovery efforts of Defendants amounted to "internal remedial steps" or "intra-agency corrective action." JA-187 (quoting *Citizens for Responsibility & Ethics in Wash. v. Secs. & Exchange Comm'n*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013)).

That characterization is incorrect. Secretary Clinton resigned as Secretary of State on February 1, 2013 and thus no longer was a State Department officer or

[9] To the extent the lower court was unconvinced by the evidence presented, rather that dismissing the case, the proper course of action would have been to grant jurisdictional discovery, as argued below.

employee at the time of the December 5, 2014 production. In the only statement on this matter that Secretary Clinton has made under oath, she stated that she "directed that all [her] email[] on clintonemail.com in [her] custody that were or potentially were federal records be provided to the Department of State, and on information and belief, this has been done." JA-55. Secretary Clinton later publicly admitted that she did not participate in the process of designating federal records: "All I can tell you is that when my attorneys conducted this exhaustive process, I didn't participate. I didn't look at them." JA-105.

The State Department recovery efforts, therefore, were not "intra-agency" because none of the individuals from whom the State Department secured records, including Secretary Clinton, were officials or employees of the agency when those recovery efforts took place. Instead of reviewing the email residing on the Clinton server itself to determine the universe of federal records at issue, the State Department allowed personal lawyers of Secretary Clinton—unnamed, non-government employees—to review the entire set of email and determine which email were federal records appropriate for preservation. That process violated both NARA and State Department policies, which allow only employees to make such determinations.[10] That process cannot be considered a reliable method for ensuring

[10] Defendants adopt this position as well, stating that "under policies issued by NARA, individual officers and employees are permitted and expected to exercise judgment to determine what constitutes a federal record." JA-63.

a complete and accurate recovery of the unlawfully removed records; the reviewing private lawyers were not acting under State Department authority or pursuant to a subpoena or similar legal instrument issued on behalf of the State Department (or any other government authority).

Neither Secretary Clinton nor her personal attorneys were authorized to determine which email constituted federal records and which did not. It is undisputed that neither NARA nor the State Department ever reviewed the more than 30,000 additional email documents excluded from the production to the State Department. This was not an "intra-agency corrective action;" Defendants cannot properly rely on the judgment of private citizens about which records should be preserved. The lower court thus erred in finding that Defendants had complied with their FRA enforcement obligations in this case.

B. Plaintiffs Have Been Injured in Fact, and Meet all other Standing Requirements, Because the Failure by Defendants To Recover all Unlawfully Removed Records thwart their Rights under FOIA

In describing the mootness doctrine, the lower court contrasted it with that of standing, finding that both address injury, causation, and redressability and that the difference between them is one of timing:

> [A] standing inquiry is concerned with the presence of injury, causation, and redressability at the time a complaint is filed, while a mootness inquiry scrutinizes the presence of these elements after filing – *i.e.*, at the time of a court's decision.

JA-184.

Under *Lujan v. Defenders of Wildlife*, the Supreme Court explained that standing is "an essential and unchanging" element of the case-or-controversy requirement that requires (1) the plaintiff to have suffered an injury-in-fact (an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent); (2) a fairly traceable causal connection between the injury and defendant's conduct; and (3) it to be likely (not speculative) that the injury will be redressed by a favorable court decision. 504 U.S. 555, 560-61 (1992). The Supreme Court recently remanded a case where the lower court used the wrong standard for injury. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-50 (2016).

Although Defendants' argument before the lower court was framed in terms of redressability, *see* JA-61-67, the district reshaped their argument "as better characterized as addressing the question of whether any injury still exists." JA-185.[11] The lower court, however, mischaracterized and ignored relevant case law to wrongly conclude Plaintiffs are not suffering ongoing injury.

[11] The district court also assumed without deciding that, "because Defendants do not argue to the contrary . . . Plaintiffs fall within the 'zone of interests of the records disposal provisions of the FRA,' such that they may attempt to allege injury." JA-185. Plaintiffs meet the zone-of-interest test because they both make regular use of government documents and the unimpeded access to those documents under FOIA is central to their core purposes and missions. *See* JA-116-20, 153-60 (setting forth complete standing argument); *Armstrong*, 924 F.2d at 287-88 (finding that private litigants are within the zone of interest of the FRA if they "make extensive use of government documents"); *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 57 (D.C. Cir. 1983) (Congress wanted "parties whose

The lower court described the injury-in-fact in an FRA case involving unlawfully removed records as the failure of a defendant agency to perform its enforcement obligation to recover records (which, as discussed, it believed Defendants in this case had sufficiently executed). *See* JA-188 (the lower court "now considers whether the Secretary of State and the Archivist have been 'unable or unwilling' to recover emails that might be federal records, for only then would Plaintiffs be able to allege an ongoing injury under the FRA"). The lower court also made a passing reference to *Citizens for Responsibility & Ethics in Washington v. Securities and Exchange Commission*, 858 F. Supp. 2d 51, 59-60 (D.D.C. 2012) ("*CREW v. SEC*") with a parenthetical explanation that the case found an injury under the FRA "where plaintiff alleged impaired access to FOIA documents"). JA-185. In fact, an impaired access to documents to which a plaintiff has a statutory right is the only injury that federal courts have previously found to form the basis of a private right of action under the FRA.

In *CREW v. SEC*, cited by the lower court, the plaintiff established injury-in-fact because its pleadings demonstrated that it had "at least one pending FOIA request" and "[b]ecause Defendants' search for records in response to [Plaintiff's] request is very likely compromised by the admitted [FRA violation]." 858 F. Supp. 2d at 59. Several district courts in this Circuit have reached a similar result.

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rights may have been affected by government actions to have access to the documentary history of the federal government").

See Citizens for Responsibility & Ethics in Wash. v. Cheney, 593 F. Supp. 2d 194, 228 (D.D.C. 2009) (finding injury where plaintiff filed "FOIA requests . . . [and] demonstrated . . . a real risk that records will not be available to them") (citation omitted); *CREW v. DHS*, 592 F. Supp. 2d at 123 ("Plaintiff's pending unfulfilled FOIA request provides the ongoing injury needed for standing."); *Citizens for Responsibility & Ethics in Wash. v. Exec. Office of President*, 587 F. Supp. 2d 48, 61 (D.D.C. 2008) (finding injury to sustain FRA claim where plaintiff alleged "that unless the deleted [records] are restored under FRA enforcement scheme, they will not be able to obtain these federal records through their pending and future [FOIA] requests").

Injury in a case such as the one at issue here, therefore, results from a plaintiff's inability to access federal records to which it has a statutory right (*e.g.*, under FOIA). The causation element is met where the inability to access the federal records is traceable or causally connected to an FRA violation (such as, in this case, the unlawful removal of records and the failure to recover those records). *See Citizens for Responsibility & Ethics in Wash. v. Dep't of Educ.*, 538 F. Supp. 2d 24, 28-30 (D.D.C. 2008) (plaintiff unable to establish standing because the alleged noncompliance with the FRA was not traceable to any inability to secure records under FOIA: "The injury cannot be traced to Education's e-mail policy."); *CREW v. SEC*, 858 F. Supp. 2d at 60 (standing established "[b]ecause Plaintiff's

injury includes outstanding FOIA requests that involve documents that likely will be unavailable due to the challenged policy"); *CREW v. DHS*, 592 F. Supp. 2d at 123 (the defendant agency and Archivist "alleged Federal Records Act violations contributed to plaintiff's inability to obtain the requested records"). Where injury and causation are met in a case involving unlawfully removed records, redressability also is met because the court has the power to review agency conduct and order it to execute the statutory obligation to take action through the Attorney General to recover the records. *See CREW v. DHS*, 592 F. Supp. 2d at 124 (redressability prong satisfied because *Armstrong* held "that it was appropriate for a plaintiff whose only injury is denial of records to seek the exact relief sought here").

Although this Court's decision in *Armstrong* did not speak in terms of constitutional standing (focusing instead only on zone-of-interest), one of the plaintiffs in that case was a FOIA requester and all plaintiffs were seeking to vindicate a statutory right of access to records. *See* 924 F.2d at 286-87. As the above citations demonstrate, district courts in this Circuit also have recognized that a plaintiff suffers an injury-in-fact when it submits a FOIA request that seeks access to records that cannot be accessed because of an agency failure to preserve and safeguard records as required by the FRA. In a case of unlawful removal, injury and causation are both met because records that should be available to the

requester under FOIA are not within the possession, custody, or control of the agency and thus cannot be produced.

Another facet of the injury that occurs when records are unlawfully removed is that the agency is not in a position to analyze whether it has records responsive to the FOIA request; it is not able to provide an accurate final determination that the agency has "no responsive records."[12] As nonprofit government watchdog groups, Plaintiffs regularly submit FOIA requests to learn whether certain records exist within an agency. In such a situation, an accurate "no responsive records" determination is often as illuminating as the production of any existing records. In one of the FOIA requests underlying this case, for example, CoA Institute seeks, *inter alia*, records of Secretary Clinton's FRA training, including which trainings she "attended or completed, or for which her attendance or completion was required;" records of installation or removal of a State Department recordkeeping "system on an electronic device . . . used by, controlled by or in the exclusive possession of Secretary Clinton;" and "documents relating to any waiver granted to Secretary Clinton regarding compliance with the FRA." JA-39-40. A "no

[12] A plaintiff is injured by an inability to gain access, not just to records, but to information more generally. *See, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21-26 (1998) (finding widespread use of information does not reduce the concreteness and specificity of injury in denying access to it); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990) (finding informational injury "where that information is essential to" organizational activities).

responsive records" response to this request would be just as revealing, perhaps more so, than the receipt of extant, responsive records; it would provide the public with valuable information concerning the accountability of and compliance by government officials. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (reminding that "the basic purpose of [FOIA] [is] to open agency action to the light of public scrutiny") (citation and quotation marks omitted). The inability of the State Department to provide an accurate final determination about whether those records exist or that a "no responsive records" determination is appropriate, which it cannot do without access to the email records from the beginning of Secretary Clinton's tenure (*i.e.*, from records Defendants have not yet recovered), is a concrete and particularized injury left unaddressed by Defendants' recovery efforts to date.

Plaintiffs' pleadings are sufficient to meet all elements of the standing analysis.[13] *See* JA-15 (Judicial Watch has "numerous pending FOIA requests [with] the State Department [and] is being prevented from accessing responsive Clinton emails"); JA-26-27 (CoA Institute "has a pending Freedom of Information Act request for records that may have been unlawfully removed or destroyed by

[13] In addition to constitutional standing, a plaintiff must otherwise state a valid cause of action. Plaintiffs met that requirement by establishing that the Administrative Procedure Act provides a cause of action to enforce the FRA in the manner pled. *See* JA-98-99, 120-21 (discussing elements of a well-pleaded claim in this case and demonstrating compliance therewith).

Clinton" and the failure of Defendants "to discharge their statutory duties has delayed or frustrated [CoA Institute's] legal right to obtain such records"); JA-104-20 (demonstrating to the lower court potentially responsive records that remain outside of State Department control because of their unlawful removal).

To summarize: (1) Plaintiffs are suffering an ongoing injury-in-fact by being unable to access records to which they have a right under FOIA; (2) the inability to access those records is caused by the unlawful removal of records from State Department custody and the failure of Defendants to recover all such unlawfully removed records; and (3) federal courts are empowered under the FRA to provide the relief Plaintiffs require to redress their injury by requiring Defendants to initiate action through the Attorney General for the complete recovery of the unlawfully removed records. The lower court erred in finding that it did not have subject-matter jurisdiction and its judgment must be reversed.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING JURISDICTIONAL DISCOVERY

This Court reviews a district court denial of jurisdictional discovery for abuse of discretion, *FC Inv. Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1091 (D.C. Cir. 2008), which is present if the decision is "clearly unreasonable, arbitrary, or fanciful." *Clayton v. Landsing Corp.*, No. 99-7069, 2000 WL 1584583, at *1 (D.C. Cir. Sept. 21, 2000) (citing *Carey Can., Inc. v. Colum. Cas. Co.*, 940 F.2d 1548, 1559 (D.C. Cir. 1991)).

Jurisdictional discovery is appropriate where a plaintiff has "at least a good faith belief" that discovery will establish the court's jurisdiction, *FC Inv. Grp. LC*, 529 F.3d at 1093-94, and where the discovery "could produce facts that would affect [the court's] jurisdictional analysis." *Estate of Klieman v. Palestinian Auth.*, 82 F. Supp. 3d 237, 249 (D.D.C. 2015) (quoting *Al Maqaleh v. Hagel*, 738 F.3d 312, 325-26 (D.C. Cir. 2013)); *see also Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) (a plaintiff should "be given an opportunity for discovery of facts necessary to establish jurisdiction prior to decision of a 12(b)(1) motion"); *GTE New Media Servs. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000) (if plaintiff "can supplement its jurisdictional allegations through discovery, then jurisdictional discovery is justified"); *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998) ("[O]ur precedent allow[s] jurisdictional discovery and factfinding if allegations indicate its likely utility."); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) (remanding because even if the "present jurisdictional allegations are insufficient, [plaintiff] has sufficiently demonstrated that it is possible that he could supplement them through discovery"), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010).

As discussed, the primary basis of the lower court decision on the motion to dismiss was a factual conclusion that Defendants had made efforts to recover the unlawfully removed records at issue. The extent and effectiveness of those record-

recovery efforts, however, remain in dispute. The lower court (as did Defendants) relied on the December 5, 2014 production as the basis for concluding that the unlawfully removed records at issue in this case had in fact been recovered. The lower court, however, never made a finding that the production was complete and accurate or that it represented the universe of records needing to be recovered in this case. To the contrary, Plaintiffs alleged and brought to the attention of the lower court (as re-presented above to this Court) factual evidence that (1) the paper copies of the email delivered to the State Department do not constitute a complete set of all the federal records that should have been and could have been turned over; (2) not all the paper copies turned over are an accurate copy of the underlying electronic versions of the emails; (3) additional records likely reside on, but have not yet been recovered from, servers and backups systems controlled by third parties; and (4) Defendants have not recovered the electronic versions of the emails in question, which are themselves federal records that must be recovered independently of any paper copies.

In short, the factual evidence presented by Plaintiffs demonstrates that records still exist, or likely exist, which Defendants have not recovered. That evidence contradicts the lower court conclusion that "Plaintiffs offer no good-faith belief that additional emails do exist on back-up servers, and, if they do, that the State Department knows about them." JA-193 (emphasis in original). The proper

course of action at a motion-to-dismiss stage of the proceedings would have been to allow targeted discovery, as Plaintiffs requested, to further develop the existing evidence in support of jurisdiction, rather than to make findings of fact in favor of Defendants. *See Prakash v. Am. Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984) (courts must "afford the nonmoving party an ample opportunity to secure and present evidence relevant to the existence of jurisdiction" (citation and internal quotation marks omitted)); *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992) ("[S]hould the trial court look beyond the pleadings, it must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties. Indeed, this Court has previously indicated that ruling on a Rule 12(b)(1) motion may be improper before the plaintiff has had a chance to discover the facts necessary to establish jurisdiction.").

In the motion for jurisdictional discovery, Plaintiffs sought discovery to determine whether the paper copies delivered to the State Department on December 5, 2014 represent a complete and accurate copy of the underlying electronic versions of the emails; the facts surrounding the failed attempts by Defendants and their agencies to recover the electronic versions and associated metadata of the emails in question; the efforts made by Defendants and their agencies to recover records now in the possession of the FBI and the commercial

information technology vendor, Datto, Inc.; and the efforts made by Defendants and their agencies to recover records from the early months of Secretary Clinton's tenure residing on a server controlled by Blackberry. *See* Pl. Cause of Action's Mot. for Jurisdictional Disc., No. 15-785, Oct. 8, 2015, ECF No. 14.

Plaintiffs had, and have, a good faith belief that discovery on these matters will provide factual evidence sufficient to show Defendants have not recovered all available records at issue, and that therefore their incomplete recovery efforts do not oust the lower court of its subject matter jurisdiction in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court.

June 20, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(e)(2(C), we hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(e)(2)(B) because it contains 9,076 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

We hereby certify that this brief also complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

Date: June 20, 2016

/s/ James F. Peterson
James F. Peterson

/s/ John J. Vecchione
John J. Vecchione

CERTIFICATE OF SERVICE

We hereby certify that, on June 20, 2016, we caused to be electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

Date: June 20, 2016

/s/ James F. Peterson
James F. Peterson

/s/ John J. Vecchione
John J. Vecchione

ADDENDUM OF STATUTES AND REGULATIONS

ADDENDUM TABLE OF CONTENTS

18 U.S.C. § 2071. Concealment, removal, or mutilation generally

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined under this title or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States. As used in this subsection, the term ‘‘office’’ does not include the office held by any person as a retired off

44 U.S.C. § 2904. General responsibilities for records management

(a) The Archivist shall provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition.

(b) The Archivist shall provide guidance and assistance to Federal agencies to ensure economical and effective records management by such agencies.

(c) In carrying out the responsibilities under subsections (a) and (b), the Archivist shall have the responsibility—

(1) to promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies;

(2) to conduct research with respect to the improvement of records management practices and programs;

(3) to collect and disseminate information on training programs, technological developments, and other activities relating to records management;

(4) to establish such interagency committees and boards as may be necessary to provide an exchange of information among Federal agencies with respect to records management;

(5) to direct the continuing attention of Federal agencies and the Congress on the need for adequate policies governing records management;

(6) to conduct records management studies and, in the Archivist's discretion, designate the heads of executive agencies to conduct records management studies with respect to establishing systems and techniques designed to save time and effort in records management;

(7) to conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies;

(8) to report to the appropriate oversight and appropriations committees of the Congress and to the Director of the Office of Management and Budget in January of each year and at such other times as the Archivist deems desirable--

(A) on the results of activities conducted pursuant to paragraphs (1) through (7) of this section,

(B) on evaluations of responses by Federal agencies to any recommendations resulting from inspections or studies conducted under paragraphs (6) and (7) of this section, and

(C) to the extent practicable, estimates of costs to the Federal Government resulting from the failure of agencies to implement such recommendations.

(d) The Archivist shall promulgate regulations requiring all Federal agencies to transfer all digital or electronic records to the National Archives of the United States in digital or electronic form to the greatest extent possible.

44 U.S.C. § 2905. Establishment of standards for selective retention of records; security measures

(a) The Archivist shall establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody. The Archivist shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to the Archivist's attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

(b) The Archivist shall assist the Administrator for the Office of Information and Regulatory Affairs in conducting studies and developing standards relating to

record retention requirements imposed on the public and on State and local governments by Federal agencies.

44 U.S.C. § 3101. Records management by agency heads; general duties

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. § 3102. Establishment of program of management

The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for

(1) effective controls over the creation and over the maintenance and use of records in the conduct of current business;

(2) cooperation with the Archivist in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and

(3) compliance with sections 2101–2117, 2501–2507, 2901–2909, and 3101–3107, of this title and the regulations issued under them.

44 U.S.C. § 3105. Safeguards

The head of each Federal agency shall establish safeguards against the removal or loss of records the head of such agency determines to be necessary and required by regulations of the Archivist. Safeguards shall include making it known to officials and employees of the agency—

(1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with sections 3301-3314 of this title, and

(2) the penalties provided by law for the unlawful removal or destruction of records.

44 U.S.C. § 3106. Unlawful removal, destruction of records

(a) FEDERAL AGENCY NOTIFICATION.—The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency.

(b) ARCHIVIST NOTIFICATION.—In any case in which the head of a Federal agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action described in subsection (a), or is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

44 U.S.C. § 3301. Definition of records

(a) RECORDS DEFINED.—

(1) IN GENERAL.—As used in this chapter, the term "records"—

(A) includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them; and

(B) does not include—

(i) library and museum material made or acquired and preserved solely for reference or exhibition purposes; or

(ii) duplicate copies of records preserved only for convenience.

(2) RECORDED INFORMATION DEFINED.—For purposes of paragraph (1), the term "recorded information" includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.

(b) DETERMINATION OF DEFINITION.—The Archivist's determination whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record as defined in subsection (a) shall be binding on all Federal agencies.

36 C.F.R. § 1220.18. What definitions apply to regulations in Subchapter B?

As used in subchapter B—

Adequate and proper documentation means a record of the conduct of Government business that is complete and accurate to the extent required to document the organization, functions, policies, decisions, procedures, and essential transactions of the agency and that is designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

Agency (*see Executive agency and Federal agency*).

Appraisal is the process by which the NARA determines the value and the final disposition of Federal records, designating them either temporary or permanent.

Commercial records storage facility is a private sector commercial facility that offers records storage, retrieval, and disposition services.

Comprehensive schedule is an agency manual or directive containing descriptions of and disposition instructions for documentary materials in all physical forms, record and nonrecord, created by a Federal agency or major component of an Executive department. Unless taken from General Records Schedules (GRS) issued by NARA, the disposition instructions for records must be approved by NARA on one or more Standard Form(s) 115, Request for Records Disposition Authority, prior to issuance by the agency. The disposition instructions for nonrecord materials are established by the agency and do not require NARA approval. See also records schedule.

Contingent records are records whose final disposition is dependent on an action or event, such as sale of property or destruction of a facility, which will take place at some unspecified time in the future.

Disposition means those actions taken regarding records no longer needed for the conduct of the regular current business of the agency.

Disposition authority means the legal authorization for the retention and disposal of records. For Federal records it is found on SF 115s, Request for Records Disposition Authority, which have been approved by the Archivist of the

United States. For nonrecord materials, the disposition is established by the creating or custodial agency. See also records schedule.

Documentary materials is a collective term that refers to recorded information, regardless of the medium or the method or circumstances of recording.

Electronic record means any information that is recorded in a form that only a computer can process and that satisfies the definition of a Federal record under the Federal Records Act. The term includes both record content and associated metadata that the agency determines is required to meet agency business needs.

Evaluation means the selective or comprehensive inspection, audit, or review of one or more Federal agency records management programs for effectiveness and for compliance with applicable laws and regulations. It includes recommendations for correcting or improving records management policies and procedures, and follow-up activities, including reporting on and implementing the recommendations.

Executive agency means any executive department or independent establishment in the Executive branch of the U.S. Government, including any wholly owned Government corporation.

Federal agency means any executive agency or any establishment in the Legislative or Judicial branches of the Government (except the Supreme Court, Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction). (44 U.S.C. 2901(14)).

Federal records (*see records*).

File means an arrangement of records. The term denotes papers, photographs, maps, electronic information, or other recorded information regardless of physical form or characteristics, accumulated or maintained in filing equipment, boxes, on electronic media, or on shelves, and occupying office or storage space.

Information system means the organized collection, processing, transmission, and dissemination of information in accordance with defined procedures, whether automated or manual.

Metadata consists of preserved contextual information describing the history, tracking, and/or management of an electronic document.

National Archives of the United States is the collection of all records selected by the Archivist of the United States because they have sufficient historical or other value to warrant their continued preservation by the Federal Government and that have been transferred to the legal custody of the Archivist of the United States,

currently through execution of a Standard Form (SF) 258 (Agreement to Transfer Records to the National Archives of the United States). See also permanent record.

Nonrecord materials are those Federally owned informational materials that do not meet the statutory definition of records (44 U.S.C. 3301) or that have been excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit.

Permanent record means any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States, even while it remains in agency custody. Permanent records are those for which the disposition is permanent on SF 115, Request for Records Disposition Authority, approved by NARA on or after May 14, 1973. The term also includes all records accessioned by NARA into the National Archives of the United States.

Personal files (also called *personal papers*) are documentary materials belonging to an individual that are not used to conduct agency business. Personal files are excluded from the definition of Federal records and are not owned by the Government.

Recordkeeping requirements means all statements in statutes, regulations, and agency directives or other authoritative issuances, that provide general or specific requirements for Federal agency personnel on particular records to be created and maintained by the agency.

Recordkeeping system is a manual or electronic system that captures, organizes, and categorizes records to facilitate their preservation, retrieval, use, and disposition.

Records or Federal records is defined in 44 U.S.C. 3301 as including "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of the data in them (44 U.S.C. 3301)." (See also §1222.10 of this part for an explanation of this definition).

Records center is defined in 44 U.S.C. 2901(6) as an establishment maintained and operated by the Archivist (NARA Federal Records Center) or by another Federal agency primarily for the storage, servicing, security, and processing of records which need to be preserved for varying periods of time and need not be retained in office equipment or space. See also records storage facility.

Records management, as used in subchapter B, means the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

Records schedule or schedule means any of the following:

(1) A Standard Form 115, Request for Records Disposition Authority that has been approved by NARA to authorize the disposition of Federal records;

(2) A General Records Schedule (GRS) issued by NARA; or

(3) A published agency manual or directive containing the records descriptions and disposition instructions approved by NARA on one or more SF 115s or issued by NARA in the GRS. See also comprehensive schedule.

Records storage facility is a records center or a commercial records storage facility, as defined in this section, i.e., a facility used by a Federal agency to store Federal records, whether that facility is operated and maintained by the agency, by NARA, by another Federal agency, or by a private commercial entity.

Retention period is the length of time that records must be kept.

Series means file units or documents arranged according to a filing or classification system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind of transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access and use. Also called a records series.

Temporary record means any Federal record that has been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by the National Archives and Records Administration. This determination may take the form of:

(1) Records designated as disposable in an agency records disposition schedule approved by NARA (SF 115, Request for Records Disposition Authority); or

(2) Records designated as disposable in a General Records Schedule.

Unscheduled records are Federal records whose final disposition has not been approved by NARA on a SF 115, Request for Records Disposition Authority. Such records must be treated as permanent until a final disposition is approved.

36 C.F.R. § 1222.12. What types of documentary materials are Federal records?

(a) *General*. To ensure that complete and accurate records are made and retained in the Federal Government, agencies must distinguish between records and nonrecord materials by applying the definition of records (see 44 U.S.C. 3301 and 36 CFR 1220.18 and 1222.10 of this subchapter) to agency documentary materials in all formats and media.

(b) *Record status*. Documentary materials are records when they meet the conditions specified in § 1222.10(b).

(c) *Working files and similar materials*. Working files, such as preliminary drafts and rough notes, and other similar materials, are records that must be maintained to ensure adequate and proper documentation if:

(1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and

(2) They contain unique information, such as substantive annotations or comments that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

(d) *Record status of copies*. The determination as to whether a particular document is a record does not depend upon whether it contains unique information. Multiple copies of the same document and documents containing duplicative information may each have record status depending on how they are used in conducting agency business.

36 C.F.R. § 1222.24. How do agencies establish recordkeeping requirements?

(a) Agencies must ensure that procedures, directives and other issuances; systems planning and development documentation; and other relevant records include recordkeeping requirements for records in all media, including those records created or received on electronic mail systems. Recordkeeping requirements must:

(1) Identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties;

(2) Specify the use of materials and recording techniques that ensure the preservation of records as long as they are needed by the Government;

(3) Specify the manner in which these materials must be maintained wherever held;

(4) Propose how long records must be maintained for agency business through the scheduling process in part 1225 of this subchapter;

(5) Distinguish records from nonrecord materials and comply with the provisions in Subchapter B concerning records scheduling and disposition;

(6) Include procedures to ensure that departing officials and employees do not remove Federal records from agency custody and remove nonrecord materials only in accordance with § 1222.18;

(7) Define the special recordkeeping responsibilities of program managers, information technology staff, systems administrators, and the general recordkeeping responsibilities of all agency employees.

(b) Agencies must provide the training described in § 1220.34(f) of this subchapter and inform all employees that they are responsible and accountable for keeping accurate and complete records of their activities.

36 C.F.R. § 1230.3. What definitions apply to this part?

(a) See § 1220.18 of this subchapter for definitions of terms used throughout Subchapter B, including part 1230.

(b) As used in part 1230—

Alteration means the unauthorized annotation, addition, or deletion to a record.

Deface means to obliterate, mar, or spoil the appearance or surface of a record that impairs the usefulness or value of the record.

Removal means selling, donating, loaning, transferring, stealing, or otherwise allowing a record to leave the custody of a Federal agency without the permission of the Archivist of the United States.

Unlawful or accidental destruction (*also called unauthorized destruction*) means disposal of an unscheduled or permanent record; disposal prior to the end of the NARA-approved retention period of a temporary record (other than court-ordered disposal under § 1226.14(d) of this subchapter); and disposal of a record

subject to a FOIA request, litigation hold, or any other hold requirement to retain the records.

36 C.F.R. § 1230.10. Who is responsible for preventing the unlawful or accidental removal, defacing, alteration, or destruction of records?

The heads of Federal agencies must:

(a) Prevent the unlawful or accidental removal, defacing, alteration, or destruction of records. Section 1222.24(a)(6) of this subchapter prohibits removing records from the legal custody of the agency. Records must not be destroyed except under the provisions of NARA–approved agency records schedules or the General Records Schedules issued by NARA;

(b) Take adequate measures to inform all employees and contractors of the provisions of the law relating to unauthorized destruction, removal, alteration or defacement of records;

(c) Implement and disseminate policies and procedures to ensure that records are protected against unlawful or accidental removal, defacing, alteration and destruction; and

(d) Direct that any unauthorized removal, defacing, alteration or destruction be reported to NARA.

36 C.F.R. § 1236.22. What are the additional requirements for managing electronic mail records?

(a) Agencies must issue instructions to staff on the following retention and management requirements for electronic mail records:

(1) The names of sender and all addressee(s) and date the message was sent must be preserved for each electronic mail record in order for the context of the message to be understood. The agency may determine that other metadata is needed to meet agency business needs, e.g., receipt information.

(2) Attachments to electronic mail messages that are an integral part of the record must be preserved as part of the electronic mail record or linked to the electronic mail record with other related records.

(3) If the electronic mail system identifies users by codes or nicknames or identifies addressees only by the name of a distribution list, retain the intelligent or full names on directories or distributions lists to ensure identification of the sender and addressee(s) of messages that are records.

(4) Some e-mail systems provide calendars and task lists for users. These may meet the definition of Federal record. Calendars that meet the definition of Federal records are to be managed in accordance with the provisions of GRS 23, Item 5.

(5) Draft documents that are circulated on electronic mail systems may be records if they meet the criteria specified in 36 CFR 1222.10(b) of this subchapter.

(b) Agencies that allow employees to send and receive official electronic mail messages using a system not operated by the agency must ensure that Federal records sent or received on such systems are preserved in the appropriate agency recordkeeping system.

(c) Agencies may elect to manage electronic mail records with very short-term NARA-approved retention periods (transitory records with a very short-term retention period of 180 days or less as provided by GRS 23, Item 7, or by a NARA-approved agency records schedule) on the electronic mail system itself, without the need to copy the record to a paper or electronic recordkeeping system, provided that:

(1) Users do not delete the messages before the expiration of the NARA-approved retention period, and

(2) The system's automatic deletion rules ensure preservation of the records until the expiration of the NARA-approved retention period.

(d) Except for those electronic mail records within the scope of paragraph (c) of this section:

(1) Agencies must not use an electronic mail system to store the recordkeeping copy of electronic mail messages identified as Federal records unless that system has all of the features specified in §1236.20(b) of this part.

(2) If the electronic mail system is not designed to be a recordkeeping system, agencies must instruct staff on how to copy Federal records from the electronic mail system to a recordkeeping system.

(e) Agencies that retain permanent electronic mail records scheduled for transfer to the National Archives must either store them in a format and on a medium that conforms to the requirements concerning transfer at 36 CFR part 1235 or maintain the ability to convert the records to the required format and medium at the time transfer is scheduled.

(f) Agencies that maintain paper recordkeeping systems must print and file their electronic mail records with the related transmission and receipt data specified by the agency's electronic mail instructions.

5 FAM 422.3 – Employee Responsibilities

Within his or her area of responsibility, every Department of State employee must create and preserve records that properly and adequately document the organization, functions, policies, decisions, procedures, and essential transactions of the Department.

5 FAM 443.1 – Principles Governing E-Mail Communications

a. All Government employees and contractors are required by law to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency (Federal Records Act, or FRA, 44 U.S.C. 3101 et seq). In addition, Federal regulations govern the life cycle of these records: they must be properly stored and preserved, available for retrieval, and subject to appropriate approved disposition schedules.

b. As the Departments information modernization program goes forward, new forms of electronic communications have become increasingly available within the Department and between the Department and overseas posts. One example of the improvements that modernization has brought is the automatic electronic preservation of departmental telegrams. Employees are reminded that under current policy departmental telegrams should be used to convey policy decisions or instructions to or from posts, to commit or request the commitment of resources to or from posts, or for official reporting by posts.

c. Another important modern improvement is the ease of communication now afforded to the Department world-wide through the use of E-mail. Employees are encouraged to use E-mail because it is a cost-efficient communications tool. All employees must be aware that some of the variety of the messages being exchanged on E-mail are important to the Department and must be preserved; such messages are considered Federal records under the law. The following guidance is designed to help employees determine which of their E-mail messages must be preserved as Federal records and which may be deleted without further authorization because they are not Federal record materials.

NARA Bulletin 2014-06 – Guidance on Managing Email

September 15, 2014

TO: Heads of Federal Agencies

SUBJECT: Guidance on Managing Email

EXPIRATION DATE: Expires when revoked or superseded

1. What is the purpose of this Bulletin?

This Bulletin reminds Federal agencies about their records management responsibilities regarding email. This is especially important in light of the requirement in the Managing Government Records Directive (OMB M-12-18) for all email to be managed electronically by December 31, 2016. In addition, recent disclosures by agencies have put this issue into more prominent focus. NARA will continue to issue guidance that assists agencies in meeting the goals of the Directive and Federal records management requirements under the Federal Records Act and associated regulations.

2. Are emails Federal records?

NARA has issued many bulletins, FAQs, regulations, and agency records management training sessions that provide guidance on Federal email management (see list in Question 9). Each has stated emails that are Federal records must be managed for their entire records life cycle. The statutory definition of Federal records is found at 44 U.S.C. 3301 and is further explained in the Code of Federal Regulations at 36 CFR 1222.10.

All agency-administered email accounts are likely to contain Federal records. This includes email accounts with multiple users (such as public correspondence email addresses) or email accounts for an individual on multiple systems (such as classified and unclassified email accounts). In addition, agency officials may create Federal records if they conduct agency business on their personal email accounts. Email sent on personal email accounts pertaining to agency business and meeting the definition of Federal records must be filed in an agency recordkeeping system.

3. What are agency responsibilities for email management?

Agencies must have policies in place to identify emails that are Federal records. These policies must ensure that emails identified as Federal records are filed in agency recordkeeping systems. Failure to identify and manage email as Federal records can result in their loss. In addition, agencies' policies and practices for email management must comply with other statutes and obligations, such as the Freedom of Information Act and discovery in litigation. Furthermore, the

Managing Government Records Directive requires that Federal agencies manage all their email electronically by December 31, 2016.

4. What is the role of Federal employees in email management?

Currently, in many agencies, employees manage their own email accounts and apply their own understanding of Federal records management. This means that all employees are required to review each message, identify its value, and either delete it or move it to a recordkeeping system. Some email, such as spam or all-staff announcements, may be deleted immediately. On the other hand, substantive policy discussions conducted in email may be appropriate for preservation for several years or ultimate transfer to NARA.

NARA recognizes that placing the responsibility on employees to make decisions on an email-by-email basis can create a tremendous burden. As a result, NARA recommends that agencies immediately begin to adopt automated or rules-based records management policies for email management, such as the Capstone approach.

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