IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC. Plaintiff, v. REX W. TILLERSON, in his official capacity as Secretary of State of the United States Defendant.	)	Case No. 1:15-cv-00785-JEB
CAUSE OF ACTION INSTITUTE Plaintiff, v. REX W. TILLERSON, in his official capacity as Secretary of State of the United States and DAVID S. FERRIERO, in his official capacity as Archivist of the United States Defendants.	)	Case No. 1:15-cv-01068-JEB ORAL ARGUMENT REQUESTED

PLAINTIFF CAUSE OF ACTION INSTITUTE'S OPPOSITION TO DEFENDANTS' DISPOSITIVE MOTION AND CROSS-MOTION FOR DISCOVERY OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

*Cases upon with CoA Institute chiefly relies are marked with an asterisk.

Statutes

Rules

Other Authorities

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case returns to this Court because Defendants refuse to perform their statutory obligations despite the admonition to do so from the U.S. Court of Appeals for the District of Columbia Circuit.

The Federal Records Act ("FRA") and attendant jurisprudence require that if an agency head or the Archivist fail through their own efforts to recover unlawfully removed federal records, they must initiate action through the Attorney General to recover those records. If they do not initiate such action, a private litigant may bring suit to compel them to do so. It is undisputed that the email records Secretary Clinton sent and received on her BlackBerry accounts during the first three months of her tenure are federal records and that Defendants have not recovered them. It is undisputed that Defendants have not initiated an enforcement action through the Attorney General to recover those records. Defendants' attempt to dismiss this action or, in the alternative, obtain summary judgment is accordingly unwarranted.

In their hybrid dispositive motion, Defendants add only two new pieces of relevant information to the record that was before the Court of Appeals when it held that this case is not moot. First, Defendants assert that the Federal Bureau of Investigation ("FBI") obtained grand jury subpoenas related to Secretary Clinton's BlackBerry email accounts. But Defendants do not identify the targets of the purported subpoenas, their exact nature and scope, or even the specificity of their focus on the BlackBerry emails. Most importantly, Defendants do not introduce any evidence to show that the results of those subpoenas establish that the BlackBerry emails are unrecoverable through forensic means.

Second, Defendants assert that the Department of Justice ("DOJ") asked Secretary Clinton's *personal attorney* to ensure the iMac computer in her Chappaqua home did not contain recoverable federal records. But, in an attempt to establish that fact, Defendants rely on

inadmissible hearsay contained in a report that the FBI itself admits is not intended to establish the validity of the information it contains. Moreover, Defendants employ passive voice throughout their briefing and declaration while discussing this issue to claim that a review "was conducted," even as they admit that the FBI itself never conducted a search or forensic analysis of the iMac computer, even though its whereabouts are known. As a result, Defendants' new arguments raise more factual questions than they attempt to answer.

Other than these two scant pieces of information—neither of which establishes that the federal records at issue do not exist or cannot be recovered—Defendants' motion simply repeats the same arguments the Court of Appeals already rejected. Instead of complying with the FRA's statutory mandate that they initiate action through the Attorney General to recover the unlawfully removed records, Defendants once again seek to dismiss the case or, in the alternative, obtain summary judgment. But, as they have failed to establish "that the requested enforcement action could not shake loose a few more emails, the case is not moot" and should not be dismissed. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955 (D.C. Cir. 2016) [hereinafter *Judicial Watch II*].

In addition to opposing Defendants' motion to dismiss, and out of an abundance of caution, Cause of Action Institute ("CoA Institute") cross-moves for jurisdictional discovery or discovery under Federal Rule of Civil Procedure 56(d), depending on how the Court construes Defendants' motion. CoA Institute cross-moves for discovery so that it may obtain the facts necessary to properly and fully respond to the new factual allegations in Defendants' motion. In the alternative, if the Court finds that the factual record is sufficiently clear to the resolve the case, CoA Institute cross-moves for summary judgment in its favor. Finally, pursuant to Local Rule 7(f), and to assist the Court in resolving the issues in this case, CoA Institute requests an oral hearing.

ARGUMENT

I. The Court should deny Defendants' motion to dismiss because they have not established the "fatal loss" of Secretary Clinton's email records

Defendants move to dismiss this action under Federal Rule of Civil Procedure 12(b)(1) by arguing that "the case is moot because the relief plaintiffs request – a referral to the Attorney General to initiate legal action to recover Secretary Clinton's emails – is no longer likely to redress their claimed injury, specifically by increasing the number of records recovered by the agency." Mem. in Supp. of Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J. at 18, ECF No. 33-1 [hereinafter Defs.' Mot.]. It is Defendants' burden to prove the facts necessary to sustain the motion: "The burden of establishing mootness rests on the party that raises the issue. It is a heavy burden." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (citations omitted). "The Court must accept as true all of the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)." *Wilson v. Gov't of D.C.*, 269 F.R.D. 8, 11 (D.D.C. 2010). The court also may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

The core dispute at this stage of the litigation concerns the "BlackBerry emails" from the first three months of Secretary Clinton's tenure, the original existence of which Defendants do not dispute. *See* Defs.' Mot. at 11. To sustain their motion, therefore, Defendants must affirmatively establish the "fatal loss" of these federal records. *Judicial Watch II*, 844 F.3d at 954. They have not met that burden. Further, they rely on inadmissible hearsay evidence to support their allegation that there are no recoverable federal records on the iMac computer in

Secretary Clinton's Chappaqua home.[1] As Defendants have not established that the required referral to the Attorney General "could not shake loose a few more emails," *id.* at 955, this Court must deny their motion to dismiss.

A. A federal defendant seeking to dismiss an FRA action for want of redressability must affirmatively establish that the unlawfully removed records cannot be recovered

The FRA creates a statutory obligation requiring agency heads and the Archivist to recover unlawfully removed federal records. 44 U.S.C §§ 2905(a), 3106.[2] If these officials are unsuccessful through their own efforts, they *must* initiate action through the Attorney General to further pursue that recovery. *Armstrong v. Bush*, 924 F.2d 282, 295 (D.C. Cir. 1991); *Judicial Watch II*, 844 F.3d at 954–56. Indeed, the Court of Appeals has now repeatedly stated that the agency head and the Archivist have "*no* discretion to determine which cases to pursue[.]" *Judicial Watch II*, 844 F.3d at 954 (citing *Armstrong*, 924 F.2d at 295) (emphasis in *Armstrong*). The ruling by the Court of Appeals in the instant case made clear that "[w]hile nothing in § 3106 prevents the agency from first attempting its own remedial measures (rather than immediately rushing to the Attorney General) the statute '*requires* the agency head and Archivist to take enforcement action' through the Attorney General if those efforts are unsuccessful[.]" *Id*. (citing *Armstrong*, 924 F.2d at 295, 296 n.12) (emphasis in *Armstrong*); *see also id.* at 956 ("Plainly we understood the statute to rest on a belief that marshalling the law enforcement authority of the United States was a key weapon in assuring record preservation and recovery."). If these

[1] As discussed further below, Defendants' reliance on the FBI investigation also is undercut by the FBI's failure to independently verify factual statements and conclusions upon which Defendants now rely.

[2] The Court of Appeals provides a description of the FRA statutory scheme in *Judicial Watch II*. *See* 844 F.3d at 953–54; *see also* Pl. CoA's [First] Mem. in Opp'n to Defs.' Mot. to Dismiss at 5–13, ECF No. 11 (describing statutory framework and attendant jurisprudence).

officials refuse to perform their statutory obligation, a private litigant may bring suit to compel them to do so. *Armstrong*, 924 F.2d at 295. To find otherwise "would flip *Armstrong* on its head and carve out enormous agency discretion from a supposedly mandatory rule." *Judicial Watch II*, 844 F.3d at 956. The one exception the Court of Appeals has recognized is that an agency head and the Archivist would not need to initiate action through the Attorney General to recover records if they could "establish their fatal loss." *Id.*; *see also id.* ("[T]he case might well also be moot if a referral were pointless (e.g., because no *imaginable* enforcement action by the Attorney General could lead to recovery of the missing emails)[.]") (emphasis added).

Defendants therefore bear the burden of proof to establish by a preponderance of the evidence that this suit cannot redress CoA Institute's ongoing injury because there has been a "fatal loss" of all Clinton email records that have not yet been recovered. *See Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987) (holding a movant must establish preliminary factual determinations by a preponderance of the evidence); *Nichols*, 142 F.3d at 459 ("The burden of establishing mootness rests on the party that raises the issue. It is a heavy burden.").

B. Defendants have not established that they cannot recover the BlackBerry emails by initiating action through the Attorney General or that there are no recoverable records on the iMac computer

Despite a long recitation of their actions to recover some of the email records Secretary Clinton unlawfully removed from the Department of State, Defendants offer only two new pieces of information to argue that they cannot recover the remaining email records, as the Court of Appeals held that they must. *See* Defs.' Mot. at 19–20. Both of these pieces of information are presented in a declaration from FBI Special Agent E.W. Priestap and an accompanying summary of the FBI's investigation into Secretary Clinton's mishandling of classified information. *See* Decl. of E.W. Priestap, Fed. Bureau of Investigation, ECF No. 33-2 [hereinafter Priestap Decl.],

and Ex. A thereto [hereinafter FBI Clinton Email Report]. Notably, many of the statements in the Priestap declaration cannot be based on personal knowledge.

The relevant factual allegations are as follows. First, the FBI revealed that it "obtained Grand Jury subpoenas related to the Blackberry e-mail accounts, which produced no responsive materials, as the requested data was outside the retention time utilized by those providers." Priestap Decl. ¶ 4. Second, the FBI states that "[a]t the request of the FBI, DOJ requested that Williams & Connolly, LLP, Clinton's private counsel, coordinate a review of all data on the iMac to determine whether e-mail repositories from the Apple Server were still present." *Id*. ¶ 7. "Williams & Connolly confirmed to DOJ that a review of the iMac was conducted pursuant to the request and no e-mails were found belonging to Clinton from the period of her tenure as Secretary of State." *Id*. The FBI itself, however, never independently verified the results of that search or obtained the iMac computer to conduct a forensic review for any recoverable email records. *Id*.

Both of these statements raise more questions than they answer. What Secretary Clinton's attorneys, whose highest duty was to defend their client in an FBI criminal investigation, did or did not do cannot substitute for a true government investigation and review of the relevant computer equipment and files. *See Judicial Watch II*, 844 F.3d at 956 (Under the FRA, "marshalling the law enforcement authority of the United States [is] a key weapon in assuring record preservation and recovery[.]"). The same is true with respect to the servers and back-up systems of third party commercial email providers. As such, neither of the two new pieces of information proffered by Defendants establishes the fatal loss of the unrecovered email records.

1. Defendants' bare reference to subpoenas does not establish the "fatal loss" of the BlackBerry emails

As the Court of Appeals recognized, the primary trove of unrecovered federal records at issue in this case is the BlackBerry emails from the first three months of Secretary Clinton's tenure. *Judicial Watch II*, 844 F.3d at 955–56. The FBI report upon which Defendants rely confirms that emails to and from Secretary Clinton during this period were on an AT&T BlackBerry account. *See* FBI Clinton Email Report at 3 (Secretary "Clinton used her att.blackberry.net e-mail account as her primary e-mail address until approximately mid-to-late January 2009 when she transitioned to her newly created hdr22@clintonemail.com account. The FBI did not recover any information indicating that Clinton sent an e-mail from her hrl5@att.blackberry.net e-mail after March 18, 2009."). The report also confirms that these records have not been recovered:

> According to Clinton's campaign website, Clinton only provided State her work-related e-mails dated after March 18, 2009. Emails from January 21, 2009 to March 18, 2009 were not produced to State or the FBI by Williams & Connolly. According to [Heather] Samuelson and [Cheryl] Mills, they were unable to locate Clinton's e-mails from this period. The e-mails from this time period were not provided to them by [Platte River Networks], and they believed the e-mails were not backed up on any server. Investigation determined some of Clinton's e-mails from January 23, 2009 to March 17, 2009 were captured through a Datto backup on June 29, 2013. However, the e-mails obtained are likely only a subset of the e-mails sent or received by Clinton during this time period.

FBI Clinton Email Report at 20 n.bbb.

Under the FRA, the proper course of action in this situation is for Defendants to perform their statutory obligation and initiate an enforcement action through the Attorney General to require BlackBerry Limited (previously known as Research In Motion Limited) and AT&T[3] to

[3] The *Wall Street Journal* has reported that BlackBerry may have managed the email servers that housed Secretary Clinton's emails. *See* Pl. CoA Inst. Mem. in Opp'n to Defs.' Mot. to Dismiss at 22 n.15, ECF No. 11 (citing Byron Tau & Peter Nicholas, *Hillary Clinton Emails Had a Two-Month Gap*, Wall St. J., Sept. 30, 2015, http://goo.gl/U1mlcL ("Jim Greer, a spokesman for

recover the records. If the companies are able to recover the emails, they should be returned to the Department of State for historical preservation and searched for records responsive to outstanding Freedom of Information Act requests, including those of Plaintiffs. If the companies cannot recover the records, they should be required to describe, under penalty of perjury, their recovery attempts and the reasons why such efforts were unsuccessful. Further investigation by the Attorney General would then be necessary to determine if forensic recovery would be possible (as the FBI achieved on the primary Clinton server) or whether the records are irretrievably lost.

If Defendants had performed these actions, they would be able to offer evidence of their efforts to Court and their motion would have more force. But Defendants refused to take these most basic steps and thus have no such evidence to offer. Instead, they rely on the bald statement that the FBI "obtained Grand Jury subpoenas related to the Blackberry e-mail accounts, which produced no responsive materials, as the requested data was outside the retention time utilized by those providers." Priestap Decl. ¶ 4. This statement raises a legion of unanswered questions. Who or what were the targets of the subpoenas? What did the subpoenas demand? How many subpoenas were there? What exactly does it mean that the subpoenas "related to the Blackberry e-mail accounts?" Were the subpoenas general requests for all emails or was there a specific effort to locate the BlackBerry emails? Who or what responded to the subpoenas? What were those responses? Were the responses written or oral? What is the referenced "retention time" and for which "providers?" Did the responses indicate whether an effort was made to forensically recover the emails? And, crucially, did the responses

AT&T, said that BlackBerry managed email servers for its own devices in 2009, even if the user was an AT&T customer.")).

conclusively demonstrate that records would be unrecoverable by forensic means if the FBI or other government investigators had access to the relevant servers or back-up systems?

Defendants provide no evidence to answer any of these questions. But without those answers, Defendants' general reference to subpoenas does nothing to establish the "fatal loss" of Secretary Clinton's BlackBerry emails. Defendants thus fail to establish that Plaintiffs' claims are moot for want of redressability and their motion to dismiss must be denied.[4]

2. Defendants cannot rely on inadmissible hearsay-within-hearsay to claim that the iMac does not contain recoverable federal records

In addition to the BlackBerry and AT&T servers, another repository that may contain unlawfully removed federal records is an iMac computer at Secretary Clinton's Chappaqua residence. According to the FBI report, "[i]n March 2009, following the e-mail migration from the Apple Server to the Pagliano Server, the Apple Server was repurposed to serve as a personal computer for household staff. [Redacted] at Clinton's Chappaqua residence, subsequently used the Apple Server equipment as a workstation." FBI Clinton Email Report at 5. Later, "[i]n 2014, the data on the Apple computer was transferred to an Apple iMac computer, and the hard drive of the old Apple computer . . . was discarded." *Id*. at 5–6.

Defendants claim they have no need to search or conduct a forensic review of the iMac computer for recoverable records because they assert that Secretary Clinton's personal attorneys at "Williams & Connolly . . . confirmed to the Department of Justice . . . that a review of the iMac *was conducted*, pursuant to a request by DOJ, and no emails *were found* belonging to Clinton from the period of her tenure as Secretary of State." *Id*. at 6 (emphasis added). In this

[4] At the least, CoA Institute is entitled to jurisdictional discovery to provide sufficient factual development for this Court to determine whether there has been a fatal loss of the relevant email records. *See infra* at 18–21.

federal court proceeding, however, Defendants may not rely on this statement to prove the truth of the matter asserted because it is inadmissible hearsay. In addition, the statement is untrustworthy because it purportedly was made by a person representing the interests of Secretary Clinton, the target of the FBI criminal investigation, and was not the product of any forcible process available to the Attorney General or other government agents.

a. The Federal Rules of Evidence apply to Defendants' motion

The parties agree that when a court considers a motion to dismiss under Rule 12(b)(1), it "may consider materials outside the pleadings." *See supra* at 2 (citing *Coal. for Underground Expansion*, 333 F.3d at 198); Defs.' Mem. at 15 (citing *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)). When considering materials outside the pleadings, courts are bound by the Federal Rules of Evidence to determine whether those materials are admissible. *See Simpson v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 168, 177 (D.C. Cir. 2005) (discussing the admissibility of expert evidence under Federal Rule of Evidence 703 in the context of a 12(b)(1) motion to dismiss); *Owens v. Rep. of Sudan*, 174 F. Supp. 3d 242, 279–80 (D.D.C. 2016) (same); Fed. R. Evid. 1101 ("These rules apply to . . . United States district courts [in] . . . civil cases and proceedings[.]"). The Federal Rules of Evidence prohibit the introduction of hearsay into evidence, absent a recognized exception. Fed. R. Evid. 802. Hearsay is an out-of-court statement by a declarant offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c).

Defendants argue in the alternative for the Court to consider their motion as one for summary judgment. But even if the Court were to do so, the Federal Rules of Evidence would still require all evidence offered to support summary judgment to be admissible as well. *See Gleklen v. Democratic Congressional Campaign Comm.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000) (finding evidence to support summary judgment "must be capable of being converted into

admissible evidence"); *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 53 F. Supp. 3d 191, 201 (D.D.C. 2014) (without an "exception, hearsay is not capable of being converted into admissible evidence") (citing *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007)). Inadmissible hearsay "counts for nothing" in summary judgment proceedings. *Gleklen*, 199 F.3d at 1369.

b. The statements upon which Defendants rely are hearsay and do not qualify for any exception, including the public-records exception

The statement by an unknown declarant that the iMac computer does not contain any of Secretary Clinton's email records is hearsay. It was made out of court (*i.e.*, purportedly between the unnamed declarant and someone at Williams & Connolly) and is being offered here to prove the truth of the matter asserted (*i.e.*, that the iMac computer does not contain federal records). The statement is also hearsay-within-hearsay because a second unnamed declarant (*i.e.*, someone at Williams & Connolly) conveyed the original statement (*i.e.*, that the first unnamed declarant searched the iMac computer, determined there were no records, and conveyed the information to Williams & Connolly) to someone at the DOJ, which Defendants now offer for the truth of the matter asserted.[5]

Defendants cannot establish a hearsay exception for either of these statements. *See* Fed. R. Evid. 805 (hearsay-within-hearsay only admissible if an exception applies to each part of the alleged statement). The only potentially applicable hearsay exception is the public-records exception. *See generally* Fed. R. Evid. 803 ("Exceptions to the Rule Against Hearsay"). That exception permits the introduction of a "record or statement of a public office if: (A) it sets out:

[5] Technically, both of these statements are contained in a third and fourth layer of hearsay (*i.e.*, someone at the DOJ reported the alleged statements to someone at the FBI, which statements were then included in the FBI report), but CoA Institute does not contest those levels. It accepts that the FBI report meets the public-records exception and asserts only that certain statements within it are inadmissible.

(i) the office's activities; (ii) a matter observed while under a legal duty to report . . . ; or (iii) in a civil case . . . factual findings from a legally authorized investigation." Fed. R. Evid. 803(8)(A). Even if a statement falls within one of these categories, it is admissible only if "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8)(B). This exception "'is based on the notion that public records are reliable because there is a lack of . . . motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter.'" *Gilmore*, 53 F. Supp. 3d at 204 (citation omitted). The exception is applied "in a commonsense manner, subject to the district court's sound exercise of discretion[.]" *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1481 (D.C. Cir. 1991) (citation omitted).

Although the public-records exception applies in this case to allow admission of the FBI report itself, it does not allow the admission of hearsay by non-government actors contained within the report. The accepted rule is that third-party statements contained in public records do not qualify for the public-records exception and may be admitted only if they meet an independent exception. *See United States v. Morales*, 720 F.3d 1194, 1202 (9th Cir. 2013) ("[S]tatements by third parties who are not government employees . . . may not be admitted pursuant to the public records exception but must satisfy some other exception in order to be admitted."); *United States v. Mackey*, 117 F.3d 24, 28 (1st Cir. 1997) ("In line with the advisory committee note to Rule 803(8), decisions in this and other circuits squarely hold that hearsay statements by third persons . . . are not admissible under this exception merely because they appear within public records.") (cited approvingly by *Bush v. Dist. of Columbia*, 595 F.3d 384, 388 (D.C. Cir. 2010) (Randolph, J., concurring)); *United States v. Sallins*, 993 F.2d 344, 347 (3d Cir. 1993) (In *De Peri*, "[w]e agreed with the district court that the third parties' out-of-court

statements were not admissible under the public records exception. We held that while Rule 803(8)(B) would permit the defendant to introduce the reports themselves . . . a separate exception was required for the third parties' out-of-court statements.") (citing *United States v. De Peri*, 778 F.2d 963 (3d Cir.1985)); *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2d Cir. 1991) (Even if "the police report itself would be admissible as a public record pursuant to Fed. R. Evid. 803(8)," a hearsay statement "is plainly not admissible merely because [it is] contained in a police report[.]"); 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:88 (3d ed. 2012) (The public-records exception "does not pave the way for official records to prove conclusions resting on statements by outsiders or to prove what such outsider statements themselves assert[.]"); *see also United States v. Ortiz*, 125 F.3d 630, 632 (8th Cir. 1997); *Miller v. Field*, 35 F.3d 1088, 1091 (6th Cir. 1994); *United States v. Snyder*, 787 F.2d 1429, 1434 (10th Cir. 1986); *United States v. Smith*, 521 F.2d 957, 964 (D.C. Cir. 1975).

The FBI report indicates that the first unknown declarant is one of Secretary Clinton's household staff and the second is an employee of Williams & Connolly. Neither declarant, therefore, is an employee of the federal government or any "public office." Nor have Defendants shown that either declarant was acting "under a legal duty to report" factual findings about the presence of Secretary Clinton's emails on the iMac computer, or that they made their statements under a legal duty of any kind, such as under oath. Neither declarant has been deposed. The public records exception therefore does not apply.

In addition, both unknown declarants worked for or represented Secretary Clinton, whom the FBI was investigating, and thus neither were disinterested parties. Their testimony is

inherently untrustworthy.[6] Statements in a public record lack trustworthiness if there is "no information explaining who made the findings or how they were made," *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 969 (D.C. Cir. 2016); *see also Meder v. Everest & Jennings, Inc*., 637 F.2d 1182, 1187–88 (8th Cir. 1981) (finding the statement untrustworthy because officer "could not recall the source of the statement on the report"), or if a government report relies on statements from private citizens without the "authors of the Report independently investigat[ing] these [statements] in an effort to verify their accuracy." *Qutb v. Ramsey*, 285 F. Supp. 2d 33, 46 n.18 (D.D.C. 2003).

Here, the first page of the FBI report calls the trustworthiness of the statements contained within it into question. The FBI prefaced its report with a disclaimer: "This report recounts the information collected in this investigation. It is not intended to address potential inconsistencies in, *or the validity of, the information* related herein." FBI Clinton Email Report at 1 (emphasis added). Thus, this Court may not rely on the hearsay statements made in the report because (in addition to the fact that no exception applies) the FBI itself disclaims their trustworthiness and because the "authors of the Report [did not] independently investigate[] these [statements] in an effort to verify their accuracy." *Qutb*, 285 F. Supp. 2d at 46 n.18.

Not only does the report itself lack trustworthiness, but the first unknown declarant's statement does too because Defendants do not provide any evidence to identify who searched the iMac computer, how that search was made, or how the determination was made that there were

[6] The Priestap Declaration states that the "FBI found no information that Williams and Connolly's review was not comprehensive and accurate." Priestap Decl. ¶ 7. That statement lacks support, however, and the double-negative does not prove the positive, that is, that Williams & Connolly's review was in fact comprehensive and accurate. Indeed, absent an independent verification, which the FBI did not conduct, the FBI has no way of knowing how cooperative, accurate, and comprehensive Williams & Connolly really was.

no email records present. *See* Defs.' Mot. at 20–21 ("the iMac *was reviewed* for emails" and "a review of the iMac *was conducted*") (emphasis added). The only detail Defendants provide is that the search was made using "keywords suggested by the FBI." *Id*. at 20. Defendants do not provide a list of those keywords, explain how the search was conducted, or detail how the person who conducted the search was qualified to do so. There is no evidence that anyone made any attempt to recover the emails forensically, and Defendants admit that the FBI itself never conducted any forensic review. Further, keyword searches already have been shown to be an unreliable method of identifying Secretary Clinton's unlawfully removed email records. *Compare* FBI Clinton Email Report at 16 (describing keyword search Secretary Clinton's attorneys used to identify the first 55,000 pages of material returned to the Department of State), *with id*. at 19 (describing the FBI's discovery of more than 17,000 additional emails not identified by keyword search or by Williams & Connolly).

The second unknown declarant's statement also lacks trustworthiness because the unknown Williams & Connolly employee who spoke to the DOJ apparently accepted the first declarant's statement without any independent verification. Moreover, events surrounding this litigation have established that Williams & Connolly cannot be relied upon to search for and turn over all of Secretary Clinton's email records.

Defendants themselves detail this poor track record. In December 2014, Williams & Connolly orchestrated the return of the 55,000 pages of unlawfully removed records, which Secretary Clinton's agents represented was the entirety of what she was obligated to return. *See* Defs.' Mot. at 8; FBI Clinton Email Report at 15 (Williams & Connolly attorney David Kendall oversaw "the process of providing Clinton's work-related emails to [the Department of] State."); CoA Institute Compl. Ex. 4 (ECF 1-1 at 43, Case No. 15-1068) (cover letter to the Department of

State transmitting email records). After Secretary Clinton's attorneys made this initial production, the FBI seized a number of electronic devices they believed had housed Secretary Clinton's emails at some point. *See* Defs.' Mot. at 11. The FBI reports that when they "acqui[red] the Pagliano Server, Williams & Connolly did not advise the US Government (USG) of the existence of the additional equipment associated with the Pagliano Server, or that Clinton's clintonemail.com e-mails had been migrated to the successor PRN Server remaining at Equinix." FBI Clinton Email Report at 7. The FBI had to conduct its own "investigation [to] identif[y] this additional equipment and revealed the e-mail migration." *Id.* Through these efforts, the FBI recovered thousands of additional records "from Clinton's tenure that were not provided as part of Clinton's earlier production[.]" *Id.* at 12; Priestap Decl. ¶ 14. This included twelve email chains the Department of State classified as "Secret" or "Confidential." FBI Clinton Email Report at 20–21.

The FBI also identified thirteen mobile devices that were used to send emails using Clinton's non-government email account, which the DOJ subsequently requested (but apparently did not subpoena) from Williams & Connolly. Secretary Clinton's personal attorneys replied "that they were unable to locate any of these devices. As a result, the FBI was unable to acquire or directly forensically examine any of these 13 mobile devices during the course of the investigation." Priestap Decl. ¶ 11; FBI Clinton Email Report at 9. Why the users of these devices were not issued subpoenas or otherwise questioned remains unclear.[7]

[7] The FBI also identified five iPad devices used in association with Secretary Clinton personal email system. Priestap Decl. ¶ 13. It recovered three of those devices, one of which contained work-related emails from Secretary Clinton's tenure. *Id.* The FBI did not recover the remaining two iPads, but dismissed them as unimportant because "investigative activities indicated there was no likelihood that tenure emails would be present." *Id.* That FBI statement is untrustworthy because, without obtaining the iPads in question, investigators could not possibly know what was

This pattern of incomplete cooperation from Williams & Connolly casts doubt on the credibility of the hearsay provided by an unknown Williams & Connolly employee, who reported hearsay from another unknown declarant. The trustworthiness of both statements is further called into question because both parties have a conflict of interest. Their primary interest was to protect and provide services to Secretary Clinton and not to secure unlawfully removed records for the government. *Cf. Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118, 129 (D.C. Cir. 2011) ("To accept the conclusion [of the record] . . . 'would require piling inference (about the reliability and knowledgeability of the statement's author) upon inference (about when the statement was written) upon inference (about the statement's evidentiary basis) akin more to speculation than to reasonable fact-finding.").

As Defendants cannot establish an exception to each part of the hearsay-within-hearsay contained in the FBI report, this Court may not admit or rely on the statements as proof of the truth of the matter asserted (*i.e.*, that no federal records exist on or are recoverable from the iMac computer). Defendants thus have failed to meet their burden to show that referral to the Attorney General "could not shake loose a few more emails[.]" *Judicial Watch II*, 844 F.3d at 955. The Court must deny their motion to dismiss.

II. CoA Institute lacks the facts necessary to fully oppose Defendants' motion for summary judgment

In the alternative to their motion to dismiss, Defendants seek summary judgment under Federal Rule of Civil Procedure 56, claiming they are entitled to a resolution as a matter of law. Such a motion is only proper when "there is no genuine dispute as to any material fact[.]" Fed. R. Civ. P. 56(a). A material fact is one "that might affect the outcome of the suit under the

---

or was not on them. If one of the iPads contained Clinton email records, the two unrecovered iPads also could have contained Clinton email records.

governing law[.]" *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). And a dispute "is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Chenari v. George Washington Univ*., 847 F.3d 740, 744 (D.C. Cir. 2017) (citation omitted). The party seeking summary judgment has the burden to establish the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When "considering a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party . . . and draws all reasonable inferences in [its] favor." *Johnson v. Perez*, 823 F.3d 701, 705 (D.C. Cir. 2016).

Defendants claim that CoA Institute "cannot dispute the facts and results of the FBI investigation as laid out in the FBI's detailed report and further elaborated on in the Priestap Declaration[.]" Defs.' Mot. at 21–22. Defendants also attempt to a rely on a conclusory statement—"there are no longer any extant unrecovered records outside of government control"—that is not supported by the record in this case. *Id*. at 22.

But CoA Institute *does* raise legitimate challenges to the statements and conclusions proffered by Defendants and the Priestap Declaration, as set forth above in opposition to Defendants' motion to dismiss. Summary judgment for Defendants is inappropriate at this stage because Defendants rely on inadmissible hearsay, statements from unidentified non-government sources, and unsubstantiated conclusions without producing any evidence demonstrating that the remaining email records are in fact unrecoverable even if forensic means of recovery were employed. Defendants' motion for summary judgment accordingly must be denied.

As detailed above, CoA Institute also does not know the full extent of the facts surrounding the grand jury subpoenas and the search of the iMac computer, and whether those facts are sufficient to prove the fatal loss of the email records in question. It thus lacks the

information necessary to respond fully to Defendants' summary judgment motion. As such, CoA Institute cross-moves for discovery and asks the Court to deny Defendants' motion until CoA Institute has conducted discovery related to Defendants' new factual claims.

III. The Court should grant discovery because of Defendants' attempt to rely on incomplete and inadmissible facts to support their motion

Defendants attempt, for the second time, to end this litigation before CoA Institute has been permitted discovery. If the Court considers Defendants' motion under Rule 12(b)(1), then CoA Institute should be permitted jurisdictional discovery to resolve the ambiguities upon which Defendants base their factual challenge to the Court's jurisdiction. If, in the alternative, the Court considers Defendants' motion under Rule 56, then CoA Institute should be permitted discovery under Rule 56(d) because the facts upon which Defendants rely are insufficiently developed to allow CoA Institute to properly oppose summary judgment.

A. The Court should grant jurisdictional discovery because Defendants raise a factual challenge to the Court's jurisdiction, which CoA Institute could rebut through discovery by establishing the true extent of the facts upon which Defendants rely

When a defendant challenges the factual basis of a court's jurisdiction, a court may "go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Phx. Consulting, Inc. v. Republic of Angl.*, 216 F.3d 36, 40 (D.C. Cir. 2000) (citations omitted). In doing so, the court must allow the plaintiff "an ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Prakash v. Am. Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984). The court "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 Circuit 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." *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d

192, 197 (D.C. Cir. 1992) (citing *Collins v. N.Y. Cent. Sys.*, 327 F.2d 880 (D.C. Cir. 1963)). Accordingly, the Court of Appeals has held that "plaintiffs be given an opportunity for discovery of facts necessary to establish jurisdiction prior to decision of a 12(b)(1) motion," *Ignatiev v. United States*, 238 F.3d 464, 467 (D.C. Cir. 2001) (citation omitted), and that, if the plaintiff "can supplement its jurisdictional allegations through discovery, then jurisdictional discovery is justified." *GTE New Media Servs. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000) (citation omitted). "This Circuit's standard for permitting jurisdictional discovery is quite liberal[.]" *Diamond Chem. Co. v. Atofina Chems., Inc.*, 268 F. Supp. 2d 1, 15 (D.D.C. 2003). It is so liberal that jurisdictional discovery may be justified even where the court "cannot tell whether jurisdictional discovery will assist" the plaintiff. *GTE New Media Servs.*, 199 F.3d at 1352. But if the plaintiff does not show how jurisdictional discovery will help its case or fails to provide a detailed summary of what discovery it would like to conduct, then discovery may be denied. *Baptist Mem. Hosp. v. Johnson*, 603 F. Supp. 2d 40, 44 (D.D.C. 2009).

Here, Defendants make a factual attack on the Court's jurisdiction. They claim that a referral to the Attorney General cannot further redress CoA Institute's injury because, in essence, all available email records unlawfully removed by Secretary Clinton have been recovered. More specifically, they claim that none of the BlackBerry email records are recoverable and that no email records reside on the iMac computer. These are factual claims. Defendants attempt to establish these facts by reference to subpoenas the FBI obtained and a purported conversation concerning a search of the iMac computer.

As explained above, however, the simple reference to these subpoenas and purported search without detailed information about the targets, exact methods of search and attempted recovery, and the results does not establish the "fatal loss" of the email records in question.

Most specifically, the available evidence does not establish whether forensic attempts at recovery would be unavailing. On that ground alone, Defendants' motion to dismiss should be denied. If, however, the Court finds that the reference to the subpoenas and the iMac search is sufficient to raise a factual question regarding jurisdiction, then CoA Institute must be permitted an opportunity for discovery to impeach the validity of that evidence. CoA Institute would seek to determine the true extent of Defendants' and the FBI's efforts to pursue the BlackBerry emails and to test the results of the iMac search, and what factual conclusions are warranted based on those efforts. The results of that discovery would enable the Court to determine whether Defendants' claims are true, and thus whether it has jurisdiction.

B. In the alternative, the Court should grant Rule 56(d) discovery because CoA Institute is unable to properly oppose Defendants' summary judgment motion without discovering the true extent of the facts upon which Defendants rely

"[S]ummary judgment may not be granted until all parties have had a full opportunity to conduct discovery[.]" *U.S. ex rel. Folliard v. Gov't Acquisitions, Inc*., 764 F.3d 19, 25 (D.C. Cir. 2014) (citing *Convertino v. Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012), and *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 257 (1986)) (quotation marks omitted). And "pre-discovery grants of summary judgment are generally disfavored[.]" *Little v. Commercial Audio Assocs., Inc*., 81 F. Supp. 3d 58, 63 (D.D.C. 2015).

Federal Rule of Civil Procedure 56(d) provides the mechanism for a nonmovant to obtain discovery in lieu of opposing a motion for summary judgment if the nonmovant "cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P. 56(d). To secure "this relief, the nonmoving party need only submit an affidavit [or declaration] . . . [detailing] why discovery is necessary." *Orlowske v. Burwell*, 318 F.R.D. 544, 547 (D.D.C. 2016) (citation omitted). The declaration must state (1) the particular facts sought and why they are necessary to the litigation,

(2) why those facts cannot be presented absent discovery, and (3) that the information is in fact discoverable. *Convertino v. Dep't of Justice*, 684 F.3d 93, 99–100 (D.C. Cir. 2012).

This rule is "intended to prevent [the] railroading [of] a non-moving party" via a summary judgement motion before discovery. *Keys v. Donovan*, 37 F. Supp. 3d 368, 371 (D.D.C. 2014) (citation omitted). District courts should grant the motion "almost as a matter of course" when the as-of-yet undiscovered facts "are in the sole possession of the . . . party" seeking summary judgment. *Folliard*, 764 F.3d at 27 (tracing this Circuit's adoption of the Third Circuit's "almost as a matter of course" standard); *see Little*, 81 F. Supp. 3d at 63 (citing *Folliard*). "Consistent with the salutary purposes underlying Rule 56([d]), district courts should construe motions that invoke the rule generously, holding parties to the rule's spirit rather than its letter." *Convertino*, 684 F.3d at 99 (citing *Resolution Trust Corp. v. N. Bridge Assocs.*, 22 F.3d 1198, 1203 (1st Cir. 1994)). Although the nonmovant's diligence is a factor, "it is not a sufficient basis, standing alone, to grant a Rule 56(d) request." *Folliard*, 764 F.3d at 26.

The accompanying Declaration of John J. Vecchione meets these standards.

1. CoA Institute seeks limited discovery to determine the complete and admissible facts concerning Defendants' new factual allegations

The "party seeking relief under Rule 56(d) must identify the additional discovery [it] would seek to oppose a motion for summary judgment 'concretely' and with 'sufficient particularity.'" *Harrison v. Office of the Architect of the Capitol*, 281 F.R.D. 49, 51 (D.D.C. 2012) (citing *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 861 (D.C. Cir. 1989), and *Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006)). The facts sought must be "essential to justify its opposition" and "if obtained, 'would alter the court's determination.'" *Harrison*, 281 F.R.D. at 51–52 (citing *Cheyenne Arapaho Tribes of Okla. v. United States*, 558 F.3d 592, 596 (D.C. Cir. 2009)).

CoA Institute seeks discovery to determine the extent of the federal government's purported efforts to recover the BlackBerry emails and adequately search the iMac computer. CoA Institute needs this information because Defendants place their hope for a dismissal or summary judgment on two vaguely worded and uncertain statements: that the FBI "obtained Grand Jury subpoenas related to the Blackberry e-mail accounts," Priestap Decl. ¶ 4, and that "a review of the iMac was conducted[.]" *Id*. ¶ 7. As CoA Institute outlined above, these half-obscured papier-mâché ramparts provide little cover, raising more questions than they answer. On their face, these statements do not establish the "fatal loss" of Secretary Clinton's BlackBerry emails or any emails that might have been deleted from the iMac computer. As the FBI demonstrated with its recovery efforts on Secretary Clinton's primary server, it has the forensic means and ability to recover computer files, including emails, that others have tried to eradicate. But without discovery to establish the full extent of the FBI efforts to recover the BlackBerry and iMac emails, CoA Institute is unable to describe in further detail why the FBI efforts are inadequate. As of today, the full extent of that information lies only in Defendants' hands.

In fact, Defendants' dispositive motion was the first time the federal government publicly revealed that grand jury subpoenas relating to the Clinton email investigation existed.[8] Information about these subpoenas—including identifying the targets, the subpoenas' scope, and

[8] *See* Josh Gerstein, *FBI confirms grand jury subpoenas used in Clinton email probe*, Politico, Apr. 27, 2017, http://politi.co/2pUFh5Y ("Contrary to widespread reports, federal prosecutors issued grand jury subpoenas in connection with an investigation into Hillary Clinton's email server, an FBI official indicated in a court filing this week."). In a public hearing held by the Senate Judiciary Committee on May 3, 2017, Chairman Charles Grassley, in questioning former FBI Director James Comey, reacted to the news that the FBI disclosed the existence of grand jury proceedings in this litigation but refused to disclose the existence of such proceedings to his committee by exclaiming, "Ye gods . . . ." *See* CoA Inst., *Senator Grassley Questions FBI Director Comey About Clinton Grand Jury Revelation made in CoA Institute Federal Records Act Litigation*, May 3, 2017, http://coainst.org/2r3o9HN.

the substance of the targets' response—is essential to CoA Institute's opposition to Defendants' motion. The same is true in respect of the iMac computer. Defendants rely on inadmissible hearsay in attempt to establish that the iMac contains no recoverable federal records. Although CoA Institute opposes the introduction of that evidence on hearsay grounds, it has been permitted no opportunity to use discovery to ascertain the complete facts about the Defendants' purported efforts to determine that the iMac computer contains no recoverable records.

2. CoA Institute cannot present the evidence sought absent discovery because the evidence is in the government's possession

A party "satisfy[ies] the second prong . . . [when it has no] independent access to [the facts in question] and no discovery has yet taken place." *Morales v. Humphrey*, 309 F.R.D. 44, 48–49 (D.D.C. 2015); *see Smith v. Henderson*, 982 F. Supp. 2d 32 (D.D.C. 2013) (finding Rule 56(d) discovery appropriate where the information sought "resides in the [movant's] records and may (or may not) further Plaintiff's claim").

CoA Institute meets this prong because Defendants are the only party with access to the information regarding the alleged subpoenas relating to the BlackBerry emails and discussions regarding the iMac computer.

3. The information CoA Institute seeks is discoverable because Defendants have already revealed aspects of the information; CoA Institute merely seeks to present it in its entirety

To justify discovery, the moving party "must do more than offer conclusory allegations" about what discovery will yield, and instead provide "a reasonable basis to suggest" the facts sought will be uncovered. *Morales*, 309 F.R.D. at 48 (citations omitted). And they "must articulate a plan for obtaining the discovery" sought. *Harrison v. Office of the Architect of the Capitol*, 281 F.R.D. 49, 51 (D.D.C. 2012). A party can meet this standard by showing "what

records [it] would actually seek in discovery or why [it] believes they exist." *Morales*, 309 F.R.D. at 48.

CoA Institute meets this standard. Defendants have introduced evidence revealing only part of the complete story surrounding the grand jury subpoenas and the search of the iMac computer. There is no doubt that more information about that evidence actually exists. And that information is discoverable under Federal Rule of Criminal Procedure 6(e)(3)(E).

In the accompanying declaration, CoA Institute sets forth in detail the discovery it seeks, complete with targets for depositions and interrogatories. The subject matter of the discovery sought is limited to (1) the efforts of Defendants and the FBI to secure, recover, forensically restore, or establish the fatal loss of the federal records that former Secretary Clinton sent, received, created, or maintained on her BlackBerry email accounts, or any non-government email account, between January 21, 2009 and March 18, 2009; and (2) the efforts of Defendants and the FBI to secure, recover, forensically restore, or establish the fatal loss of the federal records on the Apple Server or hard drive that was repurposed to serve as a personal computer for household staff in Secretary Clinton's Chappaqua residence, and their efforts to recover any other missing electronic devices. The scope of the discovery includes whether and to what extent these attempts at recovery were made directly by government agents or indirectly through Secretary Clinton's attorneys at Williams & Connolly, any of her other agents, or her household staff. The targets of the discovery include interrogatories and document requests to be served on Defendants; Rule 30(b)(6) depositions from the Department of State and the FBI; and depositions, once identified, of the two representatives of Secretary Clinton implicated in the search of the iMac computer at Secretary Clinton's Chappaqua residence.

IV. In the alternative, the Court should grant CoA Institute summary judgment

If this Court finds that it has jurisdiction and finds that discovery is not necessary to resolve factual issues at the summary judgment stage, then CoA Institute cross-moves for summary judgment in its favor.

This case is predicated on three propositions: (1) Secretary Clinton unlawfully removed federal records; (2) Defendants have a statutory obligation to initiate action through the Attorney General to recover those records if their own efforts at recovery are unsuccessful; and (3) Defendants have neither recovered the BlackBerry emails nor established their fatal loss, nor they have not established that the iMac computer does not contain recoverable federal records.

As the record currently before the Court is sufficient to prove all three of those propositions to be true, summary judgment for CoA Institute is proper as a matter of law. CoA Institute urges the Court to enter an order directing Defendants to perform their non-discretionary statutory obligation and initiate an enforcement action through the Attorney General for the full recovery of all Clinton email records, including the BlackBerry email records and any that may reside on or were deleted from the iMac computer.

CONCLUSION

For the reasons stated above, this Court should deny Defendants' dispositive motion and either grant CoA Institute's cross-motion for discovery or its cross-motion for summary judgment. CoA Institute also requests an oral hearing under Local Rule 7(f) to assist the court in resolving all remaining issue in dispute.

Date: May 12, 2017

Respectfully submitted,

/s/ John J. Vecchione
John J. Vecchione (D.C. Bar. No. 431764)
Lee A. Steven (D.C. Bar No. 468543)
R. James Valvo, III (D.C. Bar. No. 1017390)

CAUSE OF ACTION INSTITUTE
1875 Eye St., NW, Suite 800
Washington, DC 20006
Telephone: (202) 499-4232
Facsimile: (202) 330-5842
john.vecchione@causeofaction.org
lee.steven@causeofaction.org
james.valvo@causeofaction.org

Counsels for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that, on May 12, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court for the District of Columbia by using the ECF system, thereby serving all persons required to be served.

Date: May 12, 2017

/s/ John J. Vecchione
John J. Vecchione