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 **Oral Hearing Requested**
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

PLAINTIFF CAUSE OF ACTION INSTITUTE'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR DISCOVERY OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

In response to Defendants' hybrid dispositive motion, Cause of Action Institute ("CoA Institute") moved for discovery or, if the Court found such discovery was unnecessary to resolve the pending motions, summary judgment in CoA Institute's favor. *See* Pl. CoA Inst.'s Opp'n to Defs.' Dispositive Mot. & Cross-Mot. for Disc. or, in the Alternative, Summ. J., ECF No. 35

[hereinafter CoA Inst.'s Cross-Mot.]. In response, Defendants argue that even if they have not recovered all of the records that former Secretary of State Hillary Clinton unlawfully removed from the State Department, they have made sufficient efforts to meet their obligations under the Federal Records Act ("FRA") and any referral to the Attorney General would be pointless. They further argue that discovery is unwarranted in this case. *See* Mem. in Opp'n to Pls.' Cross-Mots. for Summ. J. and/or Disc., & in Further Supp. of Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., ECF No. 41 [hereinafter Defs.' Opp'n to Cross-Mots.].

Defendants misstate the applicable FRA standard and redress available to Plaintiffs in this case, attempt to reverse the burden of proof, and fail to undermine any of the three elements of CoA Institute's cross-motion for summary judgment.

ARGUMENT

I. Defendants have not established the fatal loss of the BlackBerry emails

A. Defendants misinterpret the applicable Federal Records Act standard

Defendants misinterpret the statutory standard that governs this case, arguing that the case should be dismissed because they do not know or have reason to believe that additional unrecovered federal records still exist and that, even if such records do exist, further recovery efforts are not worth the effort. *See, e.g.*, Defs.' Opp'n to Cross-Mots. at 2 ("State and NARA do not know or have reason to believe that additional unrecovered email records exist."); *id.* at 7 ("[E]ven if a few scraps of email *could* potentially be recovered (and there is no evidence that is so), the minimal results obtained would not justify the burden and expense."). Defendants' position does not reflect the applicable law.

The FRA requires agency heads to "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." 44 U.S.C. § 3106(a) (emphasis added). The FRA also

requires the Archivist to request that the Attorney General initiate such action if the agency head fails to do so. *Id*. §§ 2905(a), 3106(b). The applicable standard triggering the obligation to act (*i.e.*, to initiate action through the Attorney General) is thus *unlawful removal* of records, not the subjective belief that no records could be *recovered* or that further recovery efforts would not be worthwhile.[1]

In ruling that this case was not moot, the D.C. Circuit allowed that "sometimes an agency might reasonably attempt to recover its records before running to the Attorney General," but it "never implied that where those initial efforts failed to recover all the missing records (or establish their fatal loss), the agency could simply ignore its referral duty." *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 956 (D.C. Cir. 2016) [hereinafter *Judicial Watch II*]. To do so, the Court continued, "would flip *Armstrong* on its head and carve out enormous agency discretion from a supposedly mandatory rule." *Id*. (citing *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991)).

In arguing that they be excused from their FRA obligation to initiate action through the Attorney General because they believe further recovery efforts "would not justify the burden and expense," Defendants are asking this Court to reject the mandatory nature of their FRA obligations and replace it with deference to their discretion. Both *Armstrong* and *Judicial Watch II* prevent that attempted rewriting of the applicable statutory standard.

[1] Defendants also argue that "many of [the unrecovered BlackBerry Emails] are not likely to be permanent Federal records[.]" Defs.' Opp'n to Cross-Mots. at 8. That is incorrect, as the State Department's record-disposition schedule, which was approved by NARA, requires that nearly all records of the Secretary of State—including correspondence and schedules that are likely to be present among the BlackBerry Emails—be permanently preserved. *See* State Dep't, Records Disposition Schedules, Ch. A-01: Secretary of State, *available at* http://bit.ly/2f5uqz3.

B. Defendants have not undermined any element of CoA Institute's cross-motion for summary judgment

CoA Institute's cross-motion for summary judgment is based 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 have they established that the iMac computer does not contain recoverable federal records. *See* CoA Inst.'s Cross-Mot. at 26.

The FRA requires Defendants to initiate action through the Attorney General for records they know or have reason to believe have been unlawfully removed. 44 U.S.C. §§ 2905(a), 3106. There is no dispute that Secretary Clinton unlawfully removed records and that Defendants are aware of it. The D.C. Circuit has interpreted the FRA such that Defendants may first attempt to recover those records through their own efforts. Defendants have attempted to do so, and those efforts "yield[ed] a very substantial harvest." *Judicial Watch II*, 844 F.3d at 956.

The D.C. Circuit also explained that, if through their own efforts Defendants did not recover "all the missing records" or "establish their fatal loss," they must refer the matter to the Attorney General—action that is mandatory and over which they have no discretion. *Judicial Watch II*, 844 F.3d at 956; *Armstrong*, 924 F.2d at 295. There is no dispute that Defendants have not recovered all of the emails from Secretary Clinton's BlackBerry from the first eight weeks of her tenure; thus, the only open question on whether CoA Institute is entitled to judgment as a matter of law is whether Defendants have established the fatal loss of those emails.

Defendants muster a number of argument to claim that they have. First, they argue that they have made "sufficient efforts" to recover the BlackBerry emails and should be afforded discretion not to pursue this matter any further. Defs.' Opp'n to Cross-Mots. at 5–10. The D.C.

Circuit, however, has foreclosed that avenue by twice affirmatively stating—once in *Armstrong* and again in this case—that it "never implied that where [an agency's] initial efforts fail[] to recover all the missing records . . . , the agency could simply ignore its referral duty." *Judicial Watch II*, 844 F.3d at 956 (citing *Armstrong*, 924 F.2d at 295). Instead, the D.C. Circuit has insisted that the FRA's "mandatory enforcement provisions 'leave no discretion [for the agency] to determine which cases to pursue.'" *Id*. (citing *Armstrong*, 924 F.2d at 295). Defendants' "sufficient effort" argument is unavailing.

In this same vein, Defendants argue that they should be afforded deference to determine when pursuing unlawfully removed records is no longer worthwhile, stating "[a]t some point, as here, the results achieved by ongoing efforts diminish to zero, and soon thereafter, as here, NARA and the agencies can reasonably conclude that, if any records remain, those records are unrecoverable and hence 'fatally lost' in all practical senses." Defs.' Opp'n to Cross-Mots. at 7–8. CoA Institute does not deny that at some point efforts to recover records will "diminish to zero," but Defendants can establish that only if they establish fatal loss. Defendants go too far by concluding that no further efforts are necessary even "if any records remain." As the D.C. Circuit held, if "records remain" they are not fatally lost and referral to the Attorney General is required. The question of whether further recovery efforts would be worthwhile would then be in the hands of the Attorney General, not the agency—which may lack the proper motivation to pursue the unlawfully removed records. *See Armstrong*, 924 F.2d at 292 ("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 the agency head failed to make a similar request of the Attorney General.").

Defendants repeat the same argument in different form: "[E]ven if a few scraps of email could potentially be recovered (and there is no evidence that is so), the minimal results obtained would not justify the burden and expense." Defs.' Opp'n to Cross-Mots. at 7. That is an argument for deference to prosecutorial discretion, which may apply to the Attorney General. It does not apply to the Archivist or the relevant agency head, however, because of the mandatory nature of the FRA obligation. In any event, the D.C. Circuit has expressly rejected Defendants' argument. If a "few scraps of email" exist, they are not fatally lost and Defendants have a mandatory obligation to refer the matter to the Attorney General. *See Judicial Watch II*, 844 F.3d at 955 (Defendants must grab the tree and try to "shake loose a few more emails[.]").

Defendants obfuscate the issue by introducing a new concept—"real-world fatal loss"—to claim that they have established the inability to recover the BlackBerry emails. Defs.' Opp'n to Cross-Mots. at 7. But there is no distinction between "real-world fatal loss" and the fatal loss the D.C. Circuit requires Defendants to establish if they wish to avoid referral to the Attorney General. Either Defendants can affirmatively establish the emails are lost and they have no remaining FRA duties, or they cannot do so and the mandatory obligation to refer to the Attorney General attaches. D.C. Circuit precedent leaves no room for some kind of intermediate position.

Defendants further contend that "because agencies do not inventory each piece of information or record created or received by each employee, it is impossible to know the entirety of what may be missing or destroyed and therefore impossible to know when that entirety has been recovered or determined to be irretrievably lost." Defs.' Opp'n to Cross-Mots. at 7 (citing Second Brewer Decl. ¶ 13). Whether or to what extent that may be true as a general matter, the contention is inapposite here because the FBI Clinton Email Report, which Defendants say forms part of the administrative record of this case, contradicts Defendants' position. As the report

explains, "Clinton only provided State her work-related e-mails dated after March 18, 2009. [The BlackBerry] [e]mails from January 21, 2009 to March 18, 2009 were not produced to State or the FBI . . . . 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*." CoA Inst.'s Cross-Mot. at 7 (citing Ex. A. to [First] Decl. of E.W. Priestap, Fed. Bureau of Investigation, at 20 n.bbb, ECF No. 33-2) (emphasis added). The available evidence thus demonstrates both that the Blackberry emails exist and that they have not been recovered; Defendants have not established otherwise.

Finally, Defendants improperly characterize the relief CoA Institute requests, arguing that "plaintiff's attempts to force the Court to order a forensic recovery action as to the BlackBerry emails should be rejected." Defs.' Opp'n to Cross-Mots. at 9. CoA Institute made no such attempt. The FRA provides that the relief available to CoA Institute is a court-ordered referral of this matter to the Attorney General, and that is all it has ever sought. In referring to the Blackberry Emails, potential forensic recovery efforts Defendants have not conducted, and the evidentiary limitations of bare references to "subpoenas," CoA Institute is pointing out that Defendants have not established the fatal loss of all the unlawfully removed emails. It has not and is not arguing that this Court must order Defendants to undertake more extensive recovery efforts on its own or to pursue a specific kind of recovery effort. The time for that kind of agency action is past. It is now time to involve the Attorney General, who is the proper official to determine how to proceed from here. *See, e.g.*, CoA Inst.'s Cross-Mot. at 8 ("Further investigation by the Attorney General would then be necessary to determine if forensic recovery would be possible . . . or whether the records are irretrievably lost.").

C. Defendants have not provided evidence that their refusal to refer this matter to the Attorney General was a decision made at the administrative level

Defendants respond to CoA Institute's arguments about the inadmissibility of the evidence they have offered to support their decision not to refer this matter to the Attorney General by arguing that this is an Administrative Procedure Act ("APA") case, that judicial review in such cases is limited to the administrative record, and that they may rely on inadmissible evidence at the administrative stage. Defs.' Opp'n to Cross-Mots. at 12–14, 21.

Defendants are correct that this is an APA case. *See Armstrong*, 924 F.2d at 297 (holding "the APA authorizes the district court to entertain a properly pleaded claim that the Archivist or an agency head has breached the statutory duty . . . to recover records unlawfully removed from an agency."). But Defendants offer no evidence from the administrative level to show that they made the determination not to refer to this matter to the Attorney General outside the context of this litigation. Instead, what Defendants do offer are *post hoc* rationalizations in the form of declarations, which is insufficient to support an administrative action.

CoA Institute brought suit under the APA asking the Court "to compel agency action unlawfully withheld or unreasonably delayed." CoA Inst. Compl. ¶ 19, ECF No. 1 in Docket 15-1068 (citing 5 U.S.C. §§ 702, 706). Judicial review of an agency action under the APA is based on the "whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. The Court examines the "full administrative record that was before the Secretary at the time he made his decision." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) [hereinafter *Overton Park*]).

It has been a bedrock APA principle for fifty years that agencies may not rely on litigation affidavits as *post hoc* rationalizations for agency decisions because such affidavits do not constitute the whole record that was before the agency decisionmakers at the time they made

their decision. *See Overton Park*, 401 U.S. at 419–20. Agencies may, however, use litigation affidavits to describe the administrative process when there are no "formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves." *Id*. at 420 (citing *Shaughnessy v. Accardi*, 349 U.S. 280 (1955)); *see also Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) ("The new materials should be merely explanatory of the original record and should contain no new rationalizations.").

When a suit is brought for failure to act, as opposed to challenging an affirmative action by an agency, it can be more difficult to locate when exactly in time and space the administrative decision not to act was made and thus what "whole record" the Court is to review to determine the sufficiency of the basis for that decision. *See Stout v. U.S. Forest Serv.*, 869 F. Supp. 2d 1271, 1276 (D. Or. 2012) ("The court's review of this claim is also limited to the administrative record, however, because plaintiffs allege a failure to act, there is no final decision and no end date for the administrative record."). Helpfully, Defendants have narrowed that thorny question in this case to a single day: April 24, 2017.[2]

Unlike past FRA cases, *see, e.g.*, *Citizens for Responsibility & Ethics in Wash. v. Sec. & Exch. Comm'n*, 916 F. Supp. 2d 141, 150 (D.D.C. 2013) ("the administrative record filed in this case reveals . . ."), the agencies in this case have not filed an administrative record. Instead, they aver that they based their decision not to refer this matter to the Attorney General on two items:

[2] In truth, it is likely that Defendants made multiple decisions not to act. They may have decided not to refer this matter to the Attorney General independent of this litigation, although they offer no evidence of that. They must have made the decision not to act when confronted with the two complaints in this case when they decided to file a motion to dismiss in September 2015. *See* Mem. in Supp. of Defs.' Mot. to Dismiss, ECF No. 9-1. And they must have again decided not to act after the D.C. Circuit held this case was not moot and Defendants decided to file the current dispositive motion. It is Defendants' decision of April 24, 2017 that is currently under review, however, and the only one for which they offer any evidence and arguments.

the FBI Clinton Email Report and the First Priestap Declaration. *See* [First] Brewer Decl. ¶ 4, ECF No. 33-3 (basing decision that no further records can be recovered on "examination of the publicly available, unclassified version of the [FBI Clinton Email Report] . . . dated July 2016, and the information included in the [First] Declaration of E.W. Priestap[.]"); [First] Stein Decl. ¶ 3, ECF No. 33-4 (same); Second Brewer Decl. ¶ 3, ECF No. 42-1 (same); Second Stein Decl. ¶ 3, ECF No. 42-2 (same).

Mr. Priestap did not finalize, sign, and swear to the truthfulness of his first declaration until April 24, 2017. Defendants therefore could not have relied on that declaration to make their determination not to not refer this case to the Attorney General until that date. *See* [First] Priestap Decl. at 9. Coincidentally, Defendants' declarants also signed their first declarations on that same day. *See* [First] Brewer Decl. at 3; [First] Stein Decl. at 3. Defendants ask the Court to believe that Messrs. Brewer and Stein reviewed the First Priestap Declaration on April 24, 2017, made the administrative decision that no further action was warranted based on the information in that declaration, and then swore out declarations to that effect, all in the same day. Such a claim strains credulity. The more reasonable conclusion is that all three declarations were prepared solely for the purpose of this litigation and are being used to provide a *post hoc* rationalization to support Defendants' litigation position. If Defendants have any documents from the administrative level evidencing that there was an administrative decision, however informal, on April 24, 2017 that shows they truly relied on the First Priestap Declaration and the FBI Clinton Email Report to make their decision, they have not provided those documents in the record of this case. The absence of evidence speaks volumes.

As Defendants have not shown that their declarations are anything more than *post hoc* rationalizations created solely to respond to this lawsuit, they are left with reliance on the FBI

Clinton Email Report, which for the reasons stated in CoA Institute's opposition to Defendant's dispositive motion, does not establish the fatal loss of the relevant email records. *See* CoA Inst.'s Cross-Mot. at 5-17; *supra* § I.B; *infra* § I.D. Defendants have failed to carry their burden to establish that they have sufficient basis to support their decision not to refer this matter to the Attorney General. Accordingly, summary judgment for CoA Institute is warranted.

D. The Third Priestap Declaration does not establish fatal loss, and the Court may not consider it when resolving the pending summary judgment motions

In response to CoA Institute's arguments that the State Department and NARA staff declarations, the First Priestap Declaration, and the FBI Clinton Email Report do not establish fatal loss, Defendants submitted a Second Priestap Declaration *in camera* and *ex parte*. *See* Notice of Submission of Decl. for *In Camera* Inspection, ECF No. 44. Plaintiffs moved for public production of that declaration, and the Court ordered that Defendants "shall submit an unredacted copy of the Second Priestap Declaration, subject to the limited exception specified" in the Court's opinion. *See* Order, ECF No. 49. Instead of complying with the Court's order and producing "an unredacted copy of the Second Priestap Declaration," and without moving the Court for leave to amend or for relief from the governing order, Defendants withdrew the Second Priestap Declaration and filed a Third Priestap Declaration. *See* Am. Suppl. Decl. of E.W. Priestap, ECF No. 52-1 [hereinafter Third Priestap Declaration].

The Third Priestap Declaration is irrelevant to the Court's consideration of Defendants' motion for summary judgment and CoA Institute's cross-motion for summary judgment. As Defendants themselves have argued, review on the merits of this case is limited to the administrative record (*i.e.*, the materials Defendants aver they reviewed when making their most-recent decision not to refer this matter to the Attorney General). Defendants have stated that their review was limited to the First Priestap Declaration and the FBI Clinton Email Report.

Therefore, any further information revealed in the Third Priestap Declaration may not be considered on either of the pending motions for summary judgment.

As it relates to Defendants' motion to dismiss, the Third Priestap Declaration fares no better than Defendants' prior submissions in establishing fatal loss of unrecovered email records.

First, the FRA requires referral to the Attorney General, not to the FBI. Both the agency head and the Archivist have a mandatory, non-discretionary obligation to "initiate action through the Attorney General" for the recovery of unlawfully removed records. 44 U.S.C. §§ 2905(a), 3106. Although the FBI is a component of the Department of Justice, it is overseen by a director who operates with considerable independent operational control and independent judgment from the Attorney General. Thus, the fact that the FBI may have taken some actions to recover records does not absolve Defendants of their statutory obligation to refer the matter to the Attorney General. Indeed, where an agency and a sub-component of the Department of Justice have failed to recover all unlawfully removed records, that is exactly the time to engage with the top law enforcement official of the United States government—and it is precisely what the FRA commands. In this particular investigation, former Attorney General Loretta Lynch was not involved in any part of the FBI investigation.[3] Further, there has been a change in administration and the new Attorney General also has not had an opportunity to review the matter. Therefore, since the government official statutorily required to receive the referral from Defendants has not received a referral or conducted the necessary review, the FBI's conclusions are insufficient to fulfill Defendants' FRA obligations.

[3] When asked about her role in the Clinton email investigation, General Lynch responded: "I don't have a role in those findings or coming up with those findings. . . . I will be briefed on it and I will be accepting their recommendations." Julian Hattem, Attorney general says she will defer to FBI on Clinton emails, *The Hill*, July 1, 2016, http://bit.ly/2wsLvZO.

Second, the FBI's investigation was not designed to recover all of the federal records unlawfully removed by Secretary Clinton. Instead, the investigation had a narrow focus on "determining: 1) whether classified information was transmitted or stored on unclassified systems in violation of federal statutes; and 2) whether classified information was compromised by unauthorized individuals[.]" [Third] Priestap Decl. ¶ 3; *see also id*. ¶ 5 ("The FBI's use of legal process was limited due to the scope of the investigation and the need to establish that sufficient probable cause existed to believe classified e-mails resided within any identified e-mail account[.]"); *id*. ¶ 6 ("the FBI's investigation was limited and focused on any potential unauthorized transmission and storage of classified information"). By its very nature and the FBI's own admission, therefore, the FBI investigation was not an FRA effort under 44 U.S.C. §§ 2905(a), 3106 to recover unlawfully removed federal records. Most tellingly, the legal process the FBI employed was unable to secure the content of the records and only sought transactional information (*i.e*., to/from/headers/subject lines of e-mails). *See id*. ¶ 9 ("the FBI cannot request [e-mail] content via a grand jury subpoena"). The FBI's criminal investigation also proceeded under Title 18 and was limited by 18 U.S.C. § 2703. An effort under the FRA, by contrast, would be one seeking to recover unlawfully removed records (*i.e*., government property) and would not face the same limitations. And, in any event, these are questions for the Attorney General to resolve once Defendants have met their FRA obligations and referred the matter to him.

Third, the Third Priestap Declaration makes no mention of forensic recovery efforts either by the subpoena targets or the federal government. CoA Institute argued in its cross-motion that without conducting a forensic review of the servers in question it is impossible to establish fatal loss. *See, e.g*., CoA Inst.'s Cross-Mot. at 6 ("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*. at 8 ("Further investigation by the Attorney General would then be necessary to determine if forensic recovery would be possible . . . or whether the records are irretrievably lost.").

Defendants respond with three arguments. *See* Defs.' Opp'n to Cross-Mots. at 5–9. First, Defendants contend "there is simply no evidence that there remain any extent 'unlawfully removed' records" that warrant forensic recovery. *Id*. at 5. This argument flips the burden of proof and improperly puts the onus on CoA Institute to prove that such records still exist. *See Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) ("The burden of establishing mootness rests on the party that raises the issue. It is a 'heavy' burden.") (citations omitted); *see also Judicial Watch II*, 844 F.3d at 956 (the agency must "establish their fatal loss"). CoA Institute has adequately pled that Secretary Clinton unlawfully housed federal records on her BlackBerry email accounts and that the State Department has not recovered all of those records. Defendants have never denied those facts, and the FBI Clinton Email Report upon which they rely expressly supports those facts. Defendants also are the parties who moved to dismiss based on mootness; it is thus their burden to prove that those emails are fatally lost.

Defendants' only attempt to respond on point is to contend that responses from the service providers that the emails were not actively maintained proves fatal loss. Defs.' Opp'n to Cross-Mots. at 5, 7. But as this case demonstrates with the Clinton email server, the mere fact that an operator states that it has deleted email records does not prove that those emails are unrecoverable. The nature of electronic records and the computer hardware on which they are maintained allows for forensic recovery of deleted files. Forensic review is thus exactly the method that should be employed to establish whether or not the email records at issue can be

recovered. But it is not CoA Institute's burden to conduct that forensic review to prove emails are still present. It is sufficient to defeat Defendants' claim of fatal loss and their motion to dismiss that CoA Institute has identified the location of unrecovered records and the method of review that Defendants have not exhausted. The Third Priestap Declaration makes no mention of any requested or conducted forensic review and thus cannot be relied on to establish fatal loss.

Second, Defendants argue that even if a "forensic task could be requested or obtained through the legal process available to the government and even if a few scraps of email *could* potentially be recovered (and there is no evidence that is so), the minimal results obtained would not justify the burden and expense." *Id*. at 6–7; *see also id*. at 8 (bemoaning the potentially "extensive amount of time or resources" required). As argued above, it is not for Defendants or this Court to determine whether further recovery efforts are worth the time and expense. That is a decision for the Attorney General. The only avenue open to Defendants at this point is referral to the Attorney General, a mandatory obligation under the FRA. Moreover, even if only "a few scraps," the D.C. Circuit made it clear that Defendants must grab the tree and try to "shake loose a few more emails[.]" *Judicial Watch II*, 844 F.3d at 955. To find otherwise "would flip *Armstrong* on its head and carve out enormous agency discretion from a supposedly mandatory rule." *Id*. at 956.

Finally, Defendants claim CoA Institute is seeking "a specific type of referral under the FRA . . . by asking for enforcement action by the Attorney General specifically *against BlackBerry and AT&T*." Defs.' Opp'n to Cross-Mots. at 8 (emphasis in original). CoA Institute has made no such request and is entitled to no such relief. The FRA provides that Defendants have a statutory obligation to refer this matter to the Attorney General. CoA Institute's suit is under Section 702(1) of the APA and its relief is limited to an order from this Court compelling

Defendants to perform that non-discretionary statutory obligation. CoA Institute, in other words, "seeks precisely the relief outlined in FRA and upheld by the D.C. Circuit: an order requiring the Archivist and agency head to ask the Attorney General to initiate legal action." *Citizens for Responsibility & Ethics in Wash v. Exec. Office of President*, 587 F. Supp. 2d 48, 62 (D.D.C. 2008) (citing *Armstrong*, 924 F.2d at 295, 296 & n.12).

As Defendants have not established the fatal loss of the Blackberry Emails, the Court should grant CoA institute's cross-motion for summary judgment.

II. The discovery sought is reasonable in scope and necessary given the case's posture

In its cross-motion, CoA Institute asked the Court to allow limited, targeted discovery if the record before the Court was insufficient to resolve the case in its favor. *See* CoA Inst.'s Cross-Mot. at 19–24. CoA Institute styled its discovery request as either jurisdictional in nature or under Rule 56(d), depending on how the Court construes Defendants' motion. *Id*. at 19.

As it relates to Defendants' motion to dismiss, CoA Institute sought discovery to address Defendants' factual challenge to the Court's jurisdiction by exploring "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." *Id*. at 21. In the alternative, if the Court construes Defendants' motion as one for summary judgment, CoA Institute sought Rule 56(d) discovery "because Defendants place their hope for . . . summary judgment on two vaguely worded and uncertain statements: that the FBI 'obtained Grand Jury subpoenas related to the Blackberry e-mail accounts,' and that 'a review of the iMac was conducted[.]' . . . 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." *Id*. at 23 (citing [First] Priestap Decl. ¶¶ 4, 7).

In response to CoA Institute's limited, targeted discovery request, Defendants claim that the "information provided by the FBI more than satisfies NARA's standards as to what are sufficient representations to close out allegations of unauthorized destruction or removal of federal records" and thus discovery should be "denied as unwarranted, unduly burdensome, and not relevant to this administrative record review case." Defs.' Opp'n to Cross-Mots. at 19.

Defendants raise three arguments to oppose CoA Institute's discovery request. First, they claim that "plaintiff has pointed to no evidence that additional federal records exist. Rather, it seeks discovery to try to find such evidence[.]" *Id*. at 19. As it applies to CoA Institute's jurisdictional discovery request, this critique is inapposite because it is Defendants' burden to establish the fatal loss of the emails. *Nichols*, 142 F.3d at 459 ("The burden of establishing mootness rests on the party that raises the issue. It is a 'heavy' burden.") (citations omitted). Defendants' challenge to the Court's jurisdiction is a factual one, and 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). In addition, the FBI Clinton Email Report—the very document Defendants rely on to support their decision not to refer this matter to the Attorney General—provides sufficient evidence of the existence of the Blackberry Emails to support discovery on whether "additional federal records exist."

Second, Defendants argue that the so-called "burden of the proposed discovery" will outweigh any benefit that might be gained through the discovery. Defs.' Opp'n to Cross-Mots. at 20. But CoA Institute has not asked for any out-of-the-ordinary discovery. As described in the Declaration of John J. Vecchione, the purpose of the discovery is "to determine the complete set of facts necessary to defend against Defendants' dispositive motion." Vecchione Decl. ¶ 4, ECF No. 35-3. The subject of the discovery request is limited to two matters: the actual efforts

to secure or establish the fatal loss of the Blackberry emails and the same efforts with respect to the iMac computer. *Id.* ¶ 5. The requested methods of the discovery are typical interrogatories, document requests, and depositions. Given the limited subject of the request and the fact that almost all the information pertinent to Defendants' motion remains with them, CoA Institute's right to defend against the motion can only be vindicated by a grant of its discovery motion.

Third, and finally, Defendants argue that if the Court considers this case under Rule 56, the review would be constrained to the administrative record and courts typically do not allow discovery in APA cases. Defs.' Opp'n to Cross-Mots. at 21. Defendants continue that "if the Court finds that NARA's and State's determinations are not supported, the FRA provides that the proper step is to require the agencies to comply with the FRA (by initiating an enforcement action), not to order discovery." *Id.* CoA Institute agrees that if the Court finds Defendants have not provided sufficient support in the administrative record for their inaction then the proper course is to grant CoA Institute's cross-motion for summary judgment and require referral to the Attorney General. To the extent the Court remains undecided, however, discovery is proper for the reasons stated—and otherwise left unrebutted—in CoA Institute's motion for jurisdictional discovery and the Declaration of John J. Vecchione.

CONCLUSION

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

Date: September 27, 2017

Respectfully submitted,

/s/ John J. Vecchione
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CERTIFICATE OF SERVICE

I hereby certify that 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: September 27, 2017

/s/ John J. Vecchione
John J. Vecchione