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

PLAINTIFF CAUSE OF ACTION INSTITUTE'S MOTION TO STRIKE, OR, IN THE ALTERNATIVE, FOR A *DAUBERT* HEARING

Plaintiff Cause of Action Institute ("CoA Institute") respectfully moves the Court to strike the opinion testimony in declarations of Federal Bureau of Investigation ("FBI") Assistant Director E.W. Priestap and to exclude those opinions from the consideration of the pending motions and cross-motions. Or, in the alternative, CoA Institute respectfully moves the Court to

hold a *Daubert* hearing to review those opinions' admissibility. Pursuant to Local Rule 7(m), CoA Institute consulted Defendants counsel, who indicated Defendants oppose this motion.

FACTS

FBI Assistant Director E.W. Priestap offers several opinions that Defendants rely on to support their dispositive motion and to oppose CoA Institute's cross-motion for summary judgment. In his first declaration, Mr. Priestap states that "[i]t is my *opinion* that there are no further investigative actions that can be undertaken by the FBI to recover additional Clinton work-related e-mails which would be meaningful to the investigation, as described above." [First] Priestap Decl. ¶ 14, ECF No. 33-2 (emphasis added). The investigation Mr. Priestap is referencing is "the potential unauthorized transmission and storage of classified information on the personal e-mail server of former Secretary Clinton." *Id*. He is not referencing a record-recovery effort pursuant to the Federal Records Act ("FRA"). Mr. Priestap offers two more opinions in his third declaration, stating "[i]t is my *opinion* that the FBI undertook all reasonable and comprehensive efforts to recover e-mail communications relevant to its investigation of the potential unauthorized transmission and storage of classified information on the personal e-mail server of former Secretary Clinton," and "[i]t is my *opinion* that there were no further steps that could have been reasonably undertaken by the FBI that would have recovered additional Clinton work-related e-mails." [Third] Priestap Decl. ¶ 12, ECF No. 52-1 (both emphases added).

Defendants rely on these opinions multiple times to support their hybrid dispositive motion and to oppose CoA Institute's cross-motion for summary judgment. For example, Defendants argue that "[t]he FBI now affirms that, *in its belief*, there are no investigative actions that can be undertaken that are reasonably likely to yield any meaningful additional emails or other records." Mem. in Supp. of Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., at

18–19, ECF No. 33-1 (citing [First] Priestap Decl. ¶ 14) (emphasis added) [hereinafter Defs.' Dispositive Mot.]. Defendants mischaracterize Mr. Priestap's opinion here. He did not say "there are no investigative actions that can be undertaken" to recover records; he opined that he believed that no such actions could be "undertaken *by the FBI*." Defendants further offer "that the FBI is not aware of any unrecovered Clinton email records outside governmental custody that could reasonably be pursued." *Id*. at 22 (citing [First] Priestap Decl. ¶ 14); *see id*. at 19 ("In fact . . . the FBI, has already acted to locate and recover all potentially work-related emails and records that can be located and recovered, and its work has been completed.") (citing [First] Priestap Decl. ¶ 14); *id*. at 20 ("[T]here is nothing more that the FBI would do to recover [records] in the event of a referral to the Attorney General.") (citing [First] Priestap Decl. ¶ 14); *id*. at 21 ("[T]he FBI's investigation leaves no room to believe that any further meaningful avenues exist that would actually yield more email records.") (citing [First] Priestap Decl. ¶ 14).

ARGUMENT

I. Mr. Priestap's opinions are inadmissible because they are both irrelevant and unreliable

Only a qualified expert may offer opinion testimony. Fed. R. Evid. 702. And that expert may only offer opinions if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." *Id*.

Opinion "testimony that is both relevant and reliable must be admitted and testimony that is irrelevant or unreliable must be excluded." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 151 (1997) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993)). This standard applies

not only to scientific opinions but all expert testimony, including those based on technical and other specialized knowledge. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999). But "[o]pinion testimony providing legal conclusions is not admissible." *Kansas v. Colorado*, No. 105, 1994 WL 16189353, at *155 (U.S. Oct. 3, 1994) (collecting cases). "[T]rial courts act as gatekeepers" to exclude opinion testimony that fails this test. *Patteson v. Maloney*, 968 F. Supp. 2d 169, 173 (D.D.C. 2013) (citing *Daubert*, 509 U.S. at 589).

First, the court must determine if the opinion is relevant. "Expert testimony is relevant if it will assist the trier of fact to understand the evidence presented." *Heller v. Dist. of Columbia*, 952 F. Supp. 2d 133, 139–40 (D.D.C. 2013). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591. The Supreme Court has described this question "as one of 'fit.'" *Id*.

Second, the court must determine if the opinion is reliable. Courts may consider "several factors in determining the reliability of expert testimony, including 'testing, peer review, error rates, and "acceptability" in the relevant scientific community.'" *Houlahan v. World Wide Ass'n of Specialty Programs & Sch.*, No. 4-1161, 2007 WL 4730934, at *2 (D.D.C. May 30, 2007) (citing *Kumho Tire*, 526 U.S. at 141). But "[t]hese factors are neither exclusive nor dispositive, and their application depends on the particular facts of each case." *Groobert v. President & Directors of Georgetown Coll.*, 219 F. Supp. 2d 1, 6 (D.D.C. 2002). "While the way in which 'reliability is evaluated may vary from case to case,' in all cases, 'the trial judge must find that the proffered testimony is properly grounded, well-reasoned and not speculative before it can be admitted.'" *Heller*, 952 F. Supp. 2d at 140 (alterations omitted) (citing *United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004); Fed. R. Evid. 702 advisory committee's note). A court may exclude opinion testimony if "there is simply too great an analytical gap between the data

and the opinion proffered." *Id*. at 140–41 (citing *Joy v. Bell Helicopter Textron Inc*., 999 F.2d 549, 567 (D.C. Cir. 1993); *Groobert*, 219 F. Supp. 2d at 6); *see Joiner*, 522 U.S. at 137 ("Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

Here, Mr. Priestap's opinions fail both the relevancy and reliability requirements. His opinions are not relevant because they express his belief about the sufficiency of the FBI's investigation into the improper use and storage of classified information, which is not at issue in this case. Mr. Priestap stated "[i]t is [his] opinion that the FBI undertook all reasonable and comprehensive efforts to recover e-mail communications *relevant to its investigation* of the potential unauthorized transmission and storage of classified information on the personal e-mail server of former Secretary Clinton." [Third] Priestap Decl. ¶ 12 (emphasis added); *see* [First] Priestap Decl. ¶ 14 (same). This opinion is irrelevant to this case because CoA Institute is not challenging either the sufficiency of FBI's "investigation of the potential unauthorized transmission and storage of classified information" or Secretary Clinton's handling of classified information. Instead, CoA Institute is challenging whether agency heads at the State Department and National Archives and Records Administration ("NARA") neglected their obligations under the FRA to refer this matter to the Attorney General when they failed to recover unlawfully removed federal records. The universe of records relevant to the FBI's investigation is no doubt much smaller than those relevant to the FRA inquiry in this case.[1]

[1] Defendants argue that "many of [the unrecovered BlackBerry Emails] are not likely to be permanent Federal records[.]" 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. at 8, ECF No. 41. But 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.

Mr. Priestap also states that "[i]t is [his] opinion that there were no further steps that could have been reasonably *undertaken by the FBI* that would have recovered additional Clinton work-related e-mails." [Third] Priestap Decl. ¶ 12 (emphasis added); *see* Defs.' Dispositive Mot. at 20 ("[T]here is nothing more that the FBI would do to recover [records] in the event of a referral to the Attorney General."). This opinion, and Defendants' attempted reliance on it, is also irrelevant because the FBI is neither a party to his case nor does it have any statutory duties under the FRA. Whether the FBI would take additional steps to recover records is of no moment to the question of whether the Attorney General would do so. The FBI does not speak for the Attorney General, and Mr. Priestap's opinion could not and does not address the Attorney General's response or responsibilities. *See Estate of Gaither ex rel. Gaither v. Dist. of Columbia*, 831 F. Supp. 2d 56, 64 (D.D.C. 2011) (excluding opinion testimony about how a "reasonable judge" would have ruled on the case, as it was not based on reliable principles and methods).

Mr. Priestap's opinion also does not reliably establish that it is impossible to "recover[] additional Clinton work-related e-mails" (*i.e.*, in FRA parlance, that they are fatally lost). [Third] Priestap Decl. ¶ 12. Mr. Priestap's opinion that the federal records Secretary Clinton unlawfully removed from the State Department cannot be recovered is based solely on responses to grand jury subpoenas by companies that provided Secretary Clinton with BlackBerry email service. Neither of Mr. Priestap's declarations establish that he has any qualifications as a computer technician or that he has any technical and other specialized knowledge in the workings of email systems or forensic email recovery. *See* [First] Priestap Decl. ¶¶ 1–2; [Third] Priestap Decl. ¶¶ 1–2. Mr. Priestap also does not disclose any data relied on when forming this opinion, only that someone else told him that the emails had not been saved. Reliance on as-of-yet undisclosed statements from companies that provided Secretary Clinton's BlackBerry email

service is not a basis for Mr. Priestap to offer expert opinion testimony about the recoverability of emails on those systems.

II. The Court should permit a *Daubert* hearing before accepting Mr. Priestap's opinion testimony

If the Court does not agree that is clear from the face of Mr. Priestap's declarations that his opinions are inadmissible, CoA Institute respectfully moves that the Court hold a *Daubert* hearing so that CoA Institute may *voir dire* Mr. Priestap and probe his qualifications to offer opinion testimony and his basis in forming those opinions.

Although "[d]istrict courts are not required to hold a *Daubert* hearing before ruling on the admissibility of" opinion testimony, *United States v. Machado-Erazo*, 950 F. Supp. 2d 49, 52 (D.D.C. 2013) (citation omitted), they enjoy a wide "latitude in deciding *how* to test an expert's reliability, and to decide whether or when . . . proceedings are needed to investigate reliability[.]" *Kumho Tire*, 526 U.S. at 152. Hearings may be necessary when the issues are novel or complex. *See Bell v. Gonzales*, No. 03-163, 2005 WL 3555490, at *16 n.16 (D.D.C. Dec. 23, 2005). *Daubert* hearings are also invaluable vehicles for courts to distinguish between admissible factual testimony and inadmissible opinions. *See Evans v. Wash. Metro. Area Transit Auth.*, 674 F. Supp. 2d 175, 179–80 (D.D.C. 2009) (excluding opinion testimony after *Daubert* hearing because "the jury [was] just as competent to consider and weigh the evidence as [was] [the] expert witness and just as well qualified to draw the necessary conclusions therefrom") (quoting *Henkel v. Varner*, 138 F.2d 934, 935 (D.C. Cir. 1943)).

Regardless of whether a trial court holds a *Daubert* hearing, "one aspect of the necessary procedure is clear: the trial court should identify for the record the factors bearing on reliability that it relied upon in reaching a determination." *Machado-Erazo*, 950 F. Supp. 2d at 53 (citing 29 Wright & Miller, Federal Practice & Procedure: Evidence § 6266 (1st ed. & Supp.)). The

court in *Machado-Erazo* found a *Daubert* hearing unnecessary, in part, because "another judge of this Court recently rejected nearly identical arguments without a *Daubert* hearing" and because a district court in Florida allowed "the exact type of testimony [the expert] would offer [in *Machado-Erazo*], again rejecting nearly identical *Daubert* arguments." *Id*. at 55 (citing *United States v. Jones*, 918 F.Supp.2d 1 (D.D.C. 2013); *United States v. Davis*, No. 11–60285, 2013 WL 2156659 (S.D. Fla. May 17, 2013)).

Here, it is unclear what, if any, qualifications Mr. Priestap has to offer opinion testimony on whether it is possible to recover more unlawfully removed federal records. It is further unclear what substantive responses he received from companies that provided BlackBerry email service to Secretary Clinton, other than that the emails were created or received outside the normal retention period. And, finally, the type of opinion testimony Mr. Priestap has offered here has not previously been subjected to the necessary searching review by a gatekeeping federal judge in other circumstances and thus has no external indicia of reliability but instead hangs in the air of its own weight. If the Court does not agree that Defendants have offered inadmissible opinion testimony, CoA Institute should be offered an opportunity to *voir dire* Mr. Priestap prior to the Court accepting his opinion testimony.

CONCLUSION

As Mr. Priestap's opinions are both irrelevant and unreliable, the Court should strike them from the record and refrain from relying upon them in its consideration of the pending motions and cross-motions. In the alternative, the Court should hold a *Daubert* hearing to determine the admissibility of Mr. Priestap's opinion testimony.

Date: September 27, 2017

Respectfully submitted,

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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
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