

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND)
 ETHICS IN WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 EXECUTIVE OFFICE OF THE)
 PRESIDENT, et al.,)
)
 Defendants.)

Civil No. 1:07cv1707 (HHK) (JMF)

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ LOCAL RULE 72(b)
OBJECTIONS TO REPORT AND RECOMMENDATIONS ON
PLAINTIFF’S MOTION FOR A TEMPORARY RESTRAINING ORDER**

After full briefing and oral argument Magistrate Judge John Facciola issued a carefully considered Report and Recommendation (“Report”) recommending that this Court issue an injunction¹ to prevent the destruction of back-up copies of the millions of deleted emails that are at the center of this litigation. The defendants have now filed objections to this Report on two grounds: (1) plaintiff CREW² failed to establish irreparable injury absent the requested TRO and (2) Judge Facciola’s proposed order sweeps too broadly because it applies to all defendants and requires that they preserve the back-up copies under conditions that will permit their eventual

¹ Although plaintiff brought its motion as a request for a temporary restraining order (“TRO”), Judge Facciola treated it as a motion for a preliminary injunction “[s]ince notice has been given and a hearing has been held . . .” Report at 1 n.1. Injunction and TRO are used herein interchangeably.

² CREW is the acronym for plaintiff Citizens for Responsibility and Ethics in Washington.

use.³ As discussed below, each of these objections is unfounded and this Court's de novo review⁴ should compel it to conclude that a TRO is necessary here to prevent irreparable injury and advance the public interest.

Defendants' objections essentially ask this Court to ignore their past conduct and systemic failure to comply with their record-keeping obligations, a failure that led directly to the destruction of millions of email records. Moreover, the objections are based on unsworn statements of counsel, which are no substitute for admissible evidence, are a complete distortion of the record before the Court and raise more questions than they answer.

BACKGROUND⁵

After filing a complaint based on the defendants' conduct over the course of years of ignoring, if not outright flouting, their statutory obligations to ensure the preservation of White House electronic records, plaintiff also sought assurances that during the pendency of this lawsuit, back-up copies of the deleted emails would be preserved. With no direct knowledge of what back-up copies might exist and in what form, plaintiff sent a letter to the director of the Office of Administration ("OA") requesting "immediate written assurances that the OA has taken, and will continue to take, all steps necessary to preserve the back-up tapes and ensure

³ See Defendants' Local Rule 72.3(b) Objections to Report and Recommendations on Plaintiff's Motion for a Temporary Restraining Order ("Ds' Objections").

⁴ Under LCvR 72.3(c), this Court is to make "a de novo determination of those portions of a magistrate judge's findings and recommendations to which objection is made . . ." Moreover, the Court is free to make this determination "based solely on the record developed before the magistrate judge, or may conduct a new hearing and receive further evidence." *Id.*

⁵ Plaintiff incorporates herein its memorandum in support of its motion for a TRO as well as its reply brief and adds below supplemental background to put defendants' objections in the proper context.

their integrity and ability to be used in restoring any missing e-mail.” Letter to Alan R. Swendiman from Anne L. Weismann, September 25, 2007 (Exhibit 2 to Memorandum in Support of Plaintiff’s Motion for a Temporary Restraining Order) (“P’s TRO Mem.”).

By letter dated October 2, 2007, defendants’ counsel responded as follows: “The Office of Administration is maintaining, and will continue to maintain for the pendency of this litigation, unless otherwise permitted by the court or agreed upon or stipulated to by the parties, all disaster recovery tapes that were in its possession as of September 25, 2007.” Letter to Anne Weismann from Helen H. Hong, October 2, 2007 (Exhibit 3 to P’s TRO Mem.). Of note, the letter used the term “disaster recovery tapes,” a term not used by the plaintiff, with no explanation of what that term means.

Given the significant concerns and questions this letter raises, plaintiff again wrote to defendants on October 2, 2007. Letter to Helen H. Hong from Anne L. Weismann, October 2, 2007 (Exhibit 4 to P’s TRO Mem.). First, CREW explained that the “back-up tapes” referenced in its initial letter “were all of those tapes that contain any of the emails missing from White House servers from March 2003 through the present.” Id. In light of defendants’ use of a different term, CREW asked for an explanation of what defendants meant by “disaster recovery tapes” and how that term differs, if at all, from “back-up tapes” as defined therein by CREW. Id. CREW explained that this information is “especially critical information as it will dictate whether and to what extent the OA and the EOP are preserving all of the back-up tapes that contain any of the missing emails.” Id. Second, CREW asked if there are additional back-up tapes or disaster recovery tapes that may contain the deleted emails and that were not in the OA’s possession as of September 27, 2007. Id. CREW further requested assurances “that the

tapes are being maintained in an appropriate environment that assures their continued integrity.”

Id.

CREW’s questions went unanswered. Instead, by letter dated October 3, 2007, defendants’ counsel reiterated that the OA “is maintaining and will continue to maintain for the pendency of this litigation . . . and in a manner that complies in all respects with Rule 26, all disaster recovery tapes -- the Office of Administration’s only so-called “back up” tapes, as referenced in your letters -- that were in the Office of Administration’s possession as of September 25, 2007.” Letter to Anne Weismann from Helen H. Hong, October 3, 2007 (Exhibit 5 to P’s TRO Mem.).

The defendants’ refusal to given written responses to plaintiff’s questions led plaintiff to propose a telephone discussion. See Email from Anne Weismann to Helen H. Hong, October 5, 2007 (Exhibit 6 to P’s TRO Mem.). As a starting point for such discussion, plaintiff identified a list of questions still unanswered, that included the following: (1) an explanation of what “disaster recovery tapes” are and how they differ, if at all, from “customary back-ups of the EOP e-mail system”; (2) the time period covered by the disaster recovery tapes; (3) whether there are disaster recovery tapes elsewhere, including in the possession of a third-party contractor; (4) whether there are back-up copies of disaster recovery tapes elsewhere; (5) the mediums on which back-up copies are stored; and (6) whether those other mediums are also being preserved. Id.

Defendants refused to have a telephone discussion or otherwise answer plaintiff’s questions, beyond stating that disaster recovery tapes for emails generated within EOP components after September 25, 2007, have been maintained. Email from Helen Hong to Anne Weismann, October 9, 2007 (Exhibit 7 to P’s TRO Mem.).

In view of the defendants' complete failure to provide adequate assurances that back-up copies of the deleted emails are being preserved, plaintiff filed a motion for a TRO seeking a preservation order. After full briefing, a hearing on plaintiff's motion was held on October 17, 2007, before Magistrate Judge John Facciola. At that hearing, counsel for the defendants admitted that "there are additional backup tapes in addition to the ones that were in the Office of Administration's possession on September 25th." Transcript of Motions Hearing, October 17, 2007, p. 5 ("Transcript") (attached as Exhibit 1). Defendants' counsel, however, never explained what those additional back-up tapes consist of. Defendants' counsel also reiterated that "all of the backup tapes, or the disaster recovery tapes, in the Office of Administration's possession before September 25th, 2007, are being and will continue to be maintained during the course of this litigation." Id. at 7. Plaintiff's counsel, in turn, explained that plaintiff was seeking preservation of "whatever backup media the institution of the Executive Office of the President, through the Office of Administration, is our understanding, uses to preserve data that can be used forensically for . . . recovery." Id. at 10. At no time during the hearing did defendants' counsel identify anything about the universe of tapes it was proposing to preserve, including the time-period of those tapes and whether they are the only potential source of copies of the deleted emails. See id. at 25.

On October 23, 2007, defendants filed objections to the report and recommendations of Judge Facciola. In that document defendants, through their counsel, offered a new definition of disaster recovery tapes, namely those "relating to the official, unclassified Executive Office of the President email system" that "are media in the care, custody *and* control of the Office of Administration created with the intention of restoring *systems* in the event of a disaster and [that]

may potentially be used to restore data that may not have been otherwise preserved.” Ds’ Objections at 2 n.1 (emphasis added). Defendants did not explain what the unclassified EOP email system is.

1. Judge Facciola Properly Concluded That Absent the Requested TRO, Plaintiff is Threatened With Irreparable Injury.

According to the defendants, Judge Facciola’s recommended order is “wholly improper,” Ds’ Objections at 4, because it was not based on any declaration or evidence of harm and ignores “defendants’ repeated commitments to plaintiff to maintain the disaster recovery tapes” and their “offer to provide a declaration -- under penalty of perjury -- committing to continue to preserve disaster recovery tapes.” Id. at 4. Citing to cases where courts have found no irreparable harm to justify a preliminary injunction, defendants argue that the same conclusion is compelled here. Id. at 3-4. Defendants are wrong as a matter of fact and law.

First, defendants conveniently ignore the genesis of this lawsuit: a course of conduct over at least two and one-half years in which a huge volume of email records inexplicably went missing and the defendants’ concomitant refusal to restore the deleted emails or install an appropriate and effective electronic records management system that would prevent further deletions of White House records. In other words, defendants’ flagrant disregard for their record-keeping obligations, a disregard that has already resulted in a loss of important historical records, more than justifies the threat plaintiff and the public face that the only remaining copies of the deleted emails will also go missing absent a preservation order.

Moreover, in the face of plaintiff’s repeated and legitimate requests for adequate assurances and information, defendants offered something far short of what they now characterize as “unambiguous commitments.” Ds’ Objections at 2. To the contrary, defendants

committed only to maintain whatever “disaster recovery tapes” the OA had in its possession on September 25, 2007 (the date this lawsuit was filed) and refused to identify anything about that universe of tapes, including what time-periods they cover or whether they are the only back-up copies that exist for the deleted emails. As plaintiff’s counsel explained at the hearing, the so-called assurances of the defendants cannot be deemed “adequate” where “we still do not know what the body of existing backup recovery tapes, whether we call them disaster recovery tapes or backup tape[s] . . . we don’t know what they are” and whether “any and all copies, if they exist, would still be [with the OA].” Transcript at p. 25.

Defendants’ latest iteration⁶ of what they are voluntarily willing to preserve (disaster recovery tapes for the “official, unclassified EOP email system”), made at the proverbial 11th hour, not only falls far short of answering critical questions but, in fact, raises a host of red flags that suggest defendants are attempting to narrow their commitment even further. For example, defendants now define disaster recovery tapes as those “created with the intention of restoring *systems* in the event of a disaster.” Ds’ Objections at 2 n.1 (emphasis added). Read literally, this could refer to tapes that back up programs used for data recovery, not the actual data itself. Plaintiff’s TRO, by contrast, seeks the preservation of the actual data, specifically copies of the millions of deleted emails.

Also unknown is whether these newly defined disaster recovery tapes are back-ups of the email system itself, which will capture only those email messages currently in the system, or are back-ups of the file server files in which the emails at issue here were stored after being

⁶ In fact, it is the inadmissible iteration of their counsel, completely unsupported by any factual evidence of record.

extracted from the email system. Only back-ups of the file server files will provide a comprehensive set of emails.

Further, the defendants have still not identified precisely what the OA had in its “possession, custody *and* control”⁷ as of September 25, 2007, a date they selected based on their assessment that any obligation they have to preserve evidence pursuant to Rule 26 of the Federal Rules of Civil Procedure commences when this suit was filed. As set forth in CREW’s briefs in support of its TRO, the preservation order CREW seeks is not premised on discovery obligations, but rather on the significant threat that absent such relief CREW will not be able to get full and effective relief if it prevails in this lawsuit. Accordingly, if the OA did not have in its possession, custody or control the full complement of back-up copies for the deleted emails, it is necessary and appropriate to consider all other copies that may exist, whether or not they are on “disaster recovery tapes.” The defendants’ persistence in withholding obviously critical information belies their claim that an injunction is unwarranted because they have offered adequate assurances.

Defendants’ objections are also without legal support. All of the cases defendants cite are either inapposite or actually support Judge Facciola’s conclusion that absent an injunction plaintiff will suffer irreparable injury. In District 50, UMW v. UMW, for example, the D.C. Circuit reversed a grant of preliminary injunctive relief because there was no support in the

⁷ The defendants’ latest commitment is tied to tapes “in the care, custody and control” of the OA. Id. The obligation that Judge Facciola’s proposed order imposes on the defendants, however, would extend to those tapes in the care, custody *or* control of any defendant and not just the OA. This wording difference is not insignificant; to the extent the EOP has transferred back-up copies off-site they could be construed as no longer in the custody of the OA and so would fall outside the OA’s commitment, but not that which Judge Facciola recommends imposing.

record for the plaintiff's claim that the embarrassment and confusion that would result absent an injunction would be irreparable. 412 F.2d 165, 167 (D.C. Cir. 1969). In other words, the issue was whether the alleged harm was irreparable, not whether it was too speculative. Similarly in Nichols v. AID, 18 F.Supp.2d 1, 5 (D.D.C. 1998) (cited at Ds' Objections, p. 4), the court was considering whether an allegation of a temporary lack of income was irreparable. See also Judicial Watch, Inc. v. U.S. Dep't of Homeland Security, 2007 U.S. Dist. LEXIS 70446, *2-3 (D.D.C. 2007) (cited at Ds' Objections, p. 4) (agency delay in processing plaintiff's Freedom of Information Act request was not irreparable where information was not time-sensitive). By contrast, the threat that the back-up media will be obliterated here is "a text book example of irreparable harm." Report at p. 3.

In Wis. Gas Co. v. FERC, also cited by defendants (Ds' Objections at 4), the D.C. Circuit explained that an adequate showing that irreparable harm was "'likely' to occur" was made where the movant demonstrates "that the harm has occurred in the past and is likely to occur again . . ." 758 F.2d 669, 674 (D.C. Cir. 1985). This is precisely the showing plaintiff has made here. As explained above, plaintiff's request for a preservation order is premised on the millions of email records that have already been deleted and a course of conduct that includes defendants' failure to give adequate assurances that absent the requested relief all necessary and appropriate back-up copies will be preserved.

In sum, Judge Facciola properly concluded that a preservation order is both necessary and appropriate given the irreparable harm that would fall to the plaintiff (and the public) absent such relief. The defendants' objections, far from offering a basis to reject that conclusion, highlight even further the need for injunctive relief.

2. The Proposed Order Fully Complies With Rule 65(d).

Defendants also object to Judge Facciola's proposed order, arguing that it sweeps too broadly because it is not limited to the OA and requires them to "preserve the media under conditions that will permit their eventual use, if necessary[.]" Ds' Objections at p. 7. These objections are equally unfounded.

First, the defendants in this lawsuit include not only the OA, but the Executive Office of the President ("EOP") and its multiple components.⁸ As alleged in the complaint, the deleted emails came from multiple EOP components. Complaint, ¶¶ 33-34. Absent definitive evidence that the only still-existing copies of these deleted emails are in the possession, custody or control of the OA, there is no basis to limit any preservation obligation to the OA.⁹

Second, the defendants' objections to the requirement that they "preserve the media under conditions that will permit their eventual use . . ." make no sense. Defendants state¹⁰ that the OA already "is taking reasonable and appropriate steps to preserve the disaster recovery tapes under conditions that will permit their eventual use, if necessary . . ." Ds' Objections at p. 7. How, then, can there be any legitimate ambiguity about what this proposed order would

⁸ Included within the EOP are the following offices and agencies: Council of Economic Advisers, Council on Environmental Quality, Office of Administration, Office of Management and Budget, Office of National Drug Control Policy, Office of Science and Technology Policy, President's Foreign Intelligence Advisory Board, United States Trade Representative and White House Office.

⁹ The written statement by defendants' counsel that the OA "has the care, custody and control of all existing disaster recovery tapes that may contain emails from the official, unclassified [EOP] system," Ds' Objections at p. 7, not only fails to speak to all existing copies or explain precisely what is covered by the existing disaster recovery tapes, but is not admissible evidence. See, e.g., Rule 801 of the Rules of Evidence.

¹⁰ Again, this statement is through their counsel with no factual support in the record to back it up.

require?

If clarification is warranted, however, plaintiff suggests that the order be modified to state that defendants are required to “preserve the media under conditions that will permit their eventual use, if necessary, *including conditions that will allow the extraction and reading of the data stored on the media.*” This additional language will eliminate any claimed ambiguity.

CONCLUSION

For the foregoing reasons and those set forth in plaintiff’s motion for a TRO and reply brief, plaintiff’s motion should be granted and the Court should enter Judge Facciola’s recommended order. If the Court determines that a hearing on these issues would be useful, plaintiff is prepared to offer expert testimony to explain what preservation obligations make sense in this case and why.

Respectfully submitted,

/s/

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