

THE WHITE HOUSE
WASHINGTON

January 17, 1995

TO : John Podesta

FROM: Marvin Krislov

Per your request. DOJ
working on analysis.

Attachment

File
Armstrong

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTT ARMSTRONG, et al.,

Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT,
et al.,

Defendants.

Civil Action No.
89-0142 (CRR)

DECLARATION OF JOHN PODESTA

I, JOHN PODESTA, declare and state as follows:

1. Since January 20, 1993, I have been Assistant to the President and Staff Secretary in the White House Office of President William J. Clinton. In these positions, I am responsible for overseeing White House personnel with records management responsibilities. I have also participated in the development of Clinton Administration guidance, practices and policy pertaining to the creation and preservation of federal and presidential records in the Executive Office of the President and the National Security Council. I submit this declaration in support of defendants' motion for a stay, pending appeal, of the District Court's order dated May 21, 1993.

2. Prior to arriving at the White House on January 20, 1993, I was familiar with the proceedings in this case, and was aware that on January 6 and 11, 1993, the District Court had entered orders which held the Bush Administration guidance for the maintenance and preservation of electronic records to be arbitrary and capricious. On or about January 21, 1993, I also became aware that on the eve of the termination of the Bush Administration,



President Bush and the former Archivist of the United States, Don Wilson, had entered into an agreement governing the disposition of back-up tapes of Bush Administration electronic materials.

3. I and other members of the White House staff are firmly committed to full implementation of the Federal Records Act and the Presidential Records Act. In order to understand what steps that commitment entailed, I and other members of the staff first had to become familiar with the records management processes of the White House and the various agencies in the Executive Office of the President. We also had to become familiar with the computer systems and networks in the White House and other components of the EOP; to learn what, if any, steps had been taken by the Bush Administration to develop new procedures for the creation and maintenance of electronic information; and to assess what, if any, new computer technologies might be introduced to facilitate internal and external communications by EOP staff.

4. It is our goal to develop a technologically advanced computer system in the Executive Office of the President which will permit a significantly larger amount of electronic material to be permanently stored and segregated, in retrievable form, than has ever been preserved in the past. We would anticipate that with more sophisticated computer technology, the burden of record-keeping for employees could be reduced, and it would become feasible to save a significantly greater range of material documenting the business of government in an electronic format. Moreover, it is our goal to implement new technology which will

automatically make it possible to associate "who knew what when" information with particular e-mail messages.

5. However, given the current state of the technology in the Executive Office of the President, to achieve these goals and develop a computer system which effectively provides for improved record keeping and improves the performance of the work of the Executive Office of the President is not a simple process. For instance, in the EOP the Administration inherited an OASIS "All-in-One" computer system which did not provide for the computerized segregation of federal and presidential records. Moreover, under the OASIS system, "read receipts" could be used to obtain the "who knew what when" information, but if the read receipts are requested on only 10% of the messages, the system will slow to the point where it would be unable to provide a satisfactory level of performance. See Sixth Declaration of James B. Wright, paragraph 9. We also inherited a situation where prior administrations had not implemented any long range plan for developing and implementing a technological capacity to segregate, store, and retrieve e-mail information in a computer system. In short, and as detailed further below and in the accompanying affidavits, given the condition of the current technology in the Executive Office of the President, the development of an enhanced system that will properly achieve the goals of this Administration is a process that requires a careful redesign of the current system, the acquisition of necessary funding, and then the appropriate testing and implementation of an enhanced system. That is not a process that

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can be completed in anywhere close to the timeframe contemplated by the district court.

6. Our introduction to EOP computer systems was interrupted, during the first week of the Administration, by the subpoena of all White House Office computer hard disk drives by the special prosecutor investigating possible wrongdoing by Bush Administration officials in connection with a review of then Governor Clinton's passport files. All existing White House Office hard disk drives were removed from individual computer stations, and were replaced by new hard disk drives several days later.

7. During the first three months of the new Administration, White House staff and new employees in the EOP agencies worked diligently to address a wide variety of urgent priorities, including the development of new guidance for EOP staff on federal and presidential records. The White House determined that it would be appropriate to issue comprehensive new guidance that would, among other things, emphasize the importance of records preservation; clarify as much as possible the distinctions between federal and presidential records; clearly state requirements governing the creation, maintenance and preservation of records; and set forth specific new guidelines addressing the creation, maintenance and preservation of electronic systems material.

8. I am aware that since mid-January, all EOP offices and the NSC had been preserving on computer back-up tape all electronic information identified in the District Court's orders as "record" material. In order to implement new procedures to preserve

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electronic systems information, however, the White House staff sought to understand not only pending court orders governing electronic systems, but also the technology requirements that would be necessary to accommodate the court's orders and the agencies' recordkeeping needs, and the costs of such technology.

9. With respect to the preservation of electronic systems information, I have been informed by members of the staff of the EOP Office of Administration that a variety of complicated technical issues must be addressed in connection with the implementation of the court's orders. Those issues are addressed in the Declaration of Arnold Shore and the Sixth Declaration of James B. Wright which are also being filed in support of the motion for a stay pending appeal. For instance, the EOP agencies have not yet developed a technological means for segregating electronic presidential records from other material and for connecting information relating to sending, receipt and content of particular e-mail information. The OASIS All-in-One system does not have the capacity to accommodate "read receipt" information for all e-mail messages.

10. As set forth more fully in the declaration of Arnold Shore, the EOP and the Office of Administration are developing new e-mail systems for the EOP component offices. I have sought to ensure that any such new e-mail systems be designed to ensure that presidential and federal records be easily segregated and be able to accommodate and maintain "read receipt" information for particular e-mail messages. I have insisted that in developing

such e-mail systems, or in making plans to connect those systems with external e-mail networks, the fullest consideration be made to the requirements of the Federal Records Act and the Presidential Records Act.

11. Substantial costs are also associated with the establishment of new procedures to preserve electronic systems material, particularly in connection with EOP electronic mail systems. These costs include fiscal expenditures described in Mr. Wright's Sixth Declaration (§7) and the Declaration of William H. Itoh (§10), as well as significant diversion of other resources from ongoing projects as explained in the Declaration of Arnold Shore (§10).

12. Aware of the technological requirements and costs of adapting the various electronic communications systems, the White House initiated a series of meetings with representatives of the White House Counsel's Office; the White House Staff Secretary's Office; the White House Records Management Office; the EOP Office of Administration; the General Counsel of the EOP Office of Administration; the National Security Council Records Management Office; and the Legal Adviser to the National Security Council. These meetings were also regularly attended by Trudy Peterson, the Acting Archivist; other members of the NARA staff; and Justice Department attorneys familiar with the orders of the District Court in this action.

13. In these meetings, it was my goal not only to ensure compliance with the District Court's orders, but also to ensure

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that the Clinton Administration provided to staff of the NSC and other EOP components the most comprehensive possible guidance on the creation, disposition and maintenance of federal records. The comprehensive nature of the guidance necessitated an equally comprehensive drafting and review process that lasted several weeks. From personal participation in the meetings, I can confirm the careful effort that was made to review the requirements of the District Court's orders, and to assess the accuracy and clarity of the proposed guidance on a line-by-line -- even word-for-word -- basis. Care was also taken to ensure that guidance for the National Security Council Staff addressed any issues that arose uniquely in the context of that entity. The proposed guidance under review was far more comprehensive than any previous guidance of which I am aware; indeed, the federal and presidential records guidance distributed totaled eighteen single-spaced, typed pages.

14. Because the district court had determined that the guidance issued by the previous administration was invalid, I decided that it was necessary promptly to issue the new guidance to the EOP staff on recordkeeping. The process of preparing federal and presidential records guidance included careful attention to the procedures for preserving electronic material. We agreed that until a long-term solution had been developed, it was important to continue the practice -- already in place -- of preserving all electronic mail ("e-mail") material on back-up tape; and the EOP and NSC guidance on both federal and presidential records was carefully drafted to ensure continuation of this practice. See

Attachment to Defts. Supplemental Exhibits 23 and 24, filed May 12, 1993.

15. The final records guidance for all EOP staff (other than NSC staff) was completed on May 5, 1993 and distributed to all EOP staff beginning May 6. The package distributed including (a) a memorandum from myself and Stephen Neuwirth of the Counsel's Office, concerning presidential records; and (b) a memorandum from David Watkins, Assistant to the President for Management and Administration, and Bruce Overton, General Counsel of the EOP Office of Administration, concerning federal records. To ensure that EOP staff members would carefully review these memoranda, we also took the extraordinary step of attaching a cover memorandum from Thomas F. McLarty, III, White House Chief of Staff, which expressly instructed all personnel in the White House and other offices in the Executive Office of the President to review these memoranda carefully and to comply with the guidance set forth therein. See Defts. Supp. Ex. 23. Similar guidance was issued for NSC staff. See Defts. Supp. Ex. 24.

16. This Administration is considering developing more technologically advanced recordkeeping systems, and would issue additional guidance as we are able to acquire and implement those systems. It is and has been the intent of the Clinton Administration to conduct a comprehensive review of electronic systems management in the Executive Office of the President and to develop policies and practices for the Clinton administration as a whole that will ensure that all electronic systems material is

preserved in usable form. The development of such policies and practices will, of course, need to occur in conjunction with the development of appropriate technical solutions for the various computer systems in the Executive Office of the President agencies, including the new computer systems that the Office of Administration is already considering (see Declaration of Arnold Shore, ¶10.e) to improve the technological and internal and external e-mail capabilities of the White House and other Executive Office of the President components. Upgrading these technological capabilities is a high priority of this administration, and we have created an interagency task force to assess and propose potential advancements in this area.

17. I expect that the Clinton Administration, after it conducts its comprehensive policy and technology review, will be able to dramatically upgrade the quality of its computer systems. We would anticipate that with more sophisticated computer technology, the burden of record keeping for employees will be reduced, and it will become feasible to save a greater range of material documenting the business of government in an electronic format. Moreover, as previously noted, it is our goal to implement new technology which will automatically make it possible to associate "who knew what when" information with particular e-mail messages. However, I do not believe it is possible by June 21 -- the deadline set by the district court -- to develop, in a coherent manner, a comprehensive new system for segregating electronic presidential and federal records; for maintaining "read receipt"

information for e-mail messages; or for connecting the sending, receipt and content information for particular e-mail information. As discussed above, the development of such a system requires the solution to several complicated and expensive technical problems. Existing appropriations to the Executive Office of the President for the current fiscal year are insufficient to support the immediate implementation of a new system for preserving electronic information.

18. I believe that a stay of the District Court's May 21 order is critical, not only because it would not be possible to comply fully with what this court intended in the January 6 and 11 orders by June 21, but also because the May 21 order would require the Executive Office of the President to devote inordinate resources to attempting to comply by that date. This Administration is firmly committed to full compliance with the federal and presidential records statutes. But staff and resources would need to be diverted from other equally important Administration initiatives were the process of developing a new system for preserving electronic information to be subject to a June 21 deadline. Moreover, because individuals in components of the Executive Office of the President not subject to the court's orders -- including the White House -- also use the Office of Administration's OASIS All-in-One communications system, significant down-time of the All-in-One system to implement interim software "fixes" to the system, until comprehensive review of the electronic systems management is complete, will interfere with

White House operations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

5-28-93
DATE

John Podesta
JOHN PODESTA

THE WHITE HOUSE
WASHINGTON

January 13, 1995

TO : John Podesta
FROM: Marvin Krislov

Per discussion.

Attachment

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U.S. Department of Justice
Civil Division

Washington, D.C. 20530

January 12, 1995

~~PRIVILEGED AND CONFIDENTIAL~~

Attorney-Client Communication
Attorney Work-Product

Via Telecopier

Marvin Krislov
Assistant Counsel to the President
Old Executive Office Bldg., Rm. 128
Washington, D.C.

Re: American Historical Ass'n v. Peterson (D.D.C.)

Dear Marvin:

At the meeting held yesterday, you requested that we outline options with respect to the defense of the AHA lawsuit challenging the Bush-Wilson Agreement, especially in light of the interrelationship between the subject matter of the new suit and the ongoing proceedings in Armstrong v EOP. As we all recognized at the meeting, the government is now at a critical juncture in this litigation due to the filing on January 9 of plaintiffs' summary judgment motion, which must be responded to by January 20, unless an extension of time is obtained from the Court.

I hope that the attached paper will assist you in your efforts to reach an early consensus position on this litigation. Beyond DOJ taking the lead in preparing a possible response brief on the merits, please let us know if we can be of further assistance. As you know, Richard Lepley reports that Jim Cicconi has expressed an interest in discussing ways to reach a consensual resolution of this matter.

Sincerely,

David J. Anderson
David J. Anderson
Director

Federal Programs Branch

cc: Paul Colborn, OLC

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MARKING INITIALS: DB DATE: 5/24/8

**OPTIONS FOR FURTHER HANDLING OF
AMERICAN HISTORICAL ASS'N V. PETERSON (D.D.C.)**

Background

The AHA lawsuit challenges the four party Memorandum of Agreement, executed on January 20, 1993, between former President George Bush, former Archivist Don Wilson, as well as representatives of the National Security Council and the Office of Administration (hereafter the "Bush-Wilson Agreement" or "Agreement"), on the ground that it is inconsistent with the provisions of the Presidential Records Act ("PRA"), 44 U.S.C. 2201 et seq.

The Bush-Wilson Agreement was the legal instrument by which former President Bush transferred two sets of materials in electronic form at the end of his Administration in the context of the injunctive orders entered on January 6 & 11, 1993 in Armstrong v. EOP, and a subpoena issued by the Office of Independent Counsel ("OIC"). Under Schedules A and B attached to the Agreement, computer backup tapes at issue in the Armstrong litigation containing copies of both White House and EOP agency E-mail, as well as copies of other presidential and EOP agency data, were transferred to the National Archives and Records Administration ("NARA"). Under Schedule C of the Agreement, certain subpoenaed hard drives from White House office personal computers were transferred to the FBI for safekeeping during the then-pending OIC investigation.

The Agreement designates presidential E-mail and other data on the Armstrong backup tapes in Schedules A and B as "presidential information," not "presidential records" as the latter term is used in the PRA. Compare Agreement at VI.1 with 44 U.S.C. § 2201(2). The Agreement provides that "George Bush shall retain exclusive legal control of all Presidential information and all derivative information in whatever form, contained on the materials," Agreement at I.5, and further provides that NARA "shall segregate Presidential from non-Presidential information," in a manner that contemplates that all presidential materials will be designated first, with George Bush participating in the decision-making process. Id. at II.4 & 4(a). Ultimate disposition of the information on the backup tapes is deferred under the Agreement pending conclusion of the Armstrong litigation.

For the Schedule C hard drives, the Agreement states that, at the conclusion of the OIC investigation, the hard drives "shall be transferred to NARA as personal records of George Bush." Id. at I.7.

Subsequent to execution of the Bush-Wilson Agreement, in August 1993, the U.S. Court of Appeals for the District of Columbia affirmed the holding of the district court in Armstrong that prior electronic recordkeeping policies for EOP federal agencies were

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arbitrary and capricious under the Federal Records Act ("FRA"). Armstrong v. EOP, 1 F.3d 1274 ("Armstrong II"). As a result of that holding, the backup tapes at issue in the Armstrong litigation have been deemed to contain E-mail "record" material worthy of long-term preservation.

The presidential materials subject to the Agreement can be divided into three categories. First, for practical reasons, defendants in Armstrong will end up restoring and converting to an accessible format presidential E-mail along with EOP agency E-mail. No commitment has been made, however, regarding the ultimate disposition of such restored presidential information. Second, the restoration, conversion and disposition of presidential information in Schedules A and B other than E-mail (approximately 2,350 backup tapes) is not implicated in Armstrong, and how it is handled depends entirely on the fate of the Agreement. Third, Schedule C materials in the custody of OIC will be transferred to NARA in the near future. All other OIC materials are to be transferred to NARA and considered to be agency records subject to the FOIA.

Discussion

The government would appear to have three litigation options in connection with the AHA suit.

OPTION A: Obtain former President Bush's consent to treat Schedule A & B backup tapes consistently with the PRA, and treat the Schedule C hard drives consistently with either PRA or OIC's governing statute.

Pros: + Would moot the lawsuit, thereby eliminating risk of a bad decision in a hard case presented to a generally hostile district court

+ Archivist already proceeding consistently with PRA for Schedule A & B E-mail

+ Would ensure eventual public access to Bush Administration presidential E-mail (see 44 U.S.C. § 2204), and possibly earlier access to OIC materials under FOIA

+ Would reduce President Bush's litigation expenses

Cons: - Sets precedent of considering mere copies of presidential records contained on backup tapes to be "presidential records." It could be argued that

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this position would require future notice to the Archivist when such "presidential records" are to be destroyed, as would be the case in routine recycling of backup tapes. See 44 U.S.C. § 2203(c). However, because the Clinton Administration preserves presidential E-mail with transmission/receipt data, which the Bush Administration did not, current procedures are distinguishable.

- For Schedule C hard drives, Bush's representative (Cicconi) has opposed treating materials involuntarily transferred outside of presidential custody due to pending investigations as agency records of NARA

OPTION B: Defend lawsuit on the merits.

- Pros: + Preserves important constitutional and statutory arguments regarding the limits of judicial power to review a President's recordkeeping decisions with respect to management and disposition of presidential materials
- + Government has strong threshold jurisdictional arguments in light of Armstrong appellate decisions
 - + Bush Administration recordkeeping practices, which ensured hard copy printouts of E-mail would be retained as presidential "record" copies, are defensible notwithstanding loss in Armstrong on this issue in the FRA context
- Cons: - Because the case is before a hostile district court, may have to appeal to get a fair hearing
- Possibility that litigation will adversely affect Armstrong litigation, either by delaying planned restoration of tapes or by focussing Court on slow pace of Armstrong remedial efforts

Option C: Agree with Plaintiffs that Bush-Wilson Agreement is null and void (in whole or in part), and unilaterally adhere to provisions of PRA (for Schedule A and B Materials) and PRA and/or OIC Statute (for Schedule C Materials)

- Pros: + Would moot the lawsuit, eliminating possibility of adverse decision

- 4 -

- + Archivist already proceeding consistently with PRA for Schedule A & B E-mail
 - + Would ensure eventual public access to Bush Administration presidential E-mail (see 44 U.S.C. § 2204), and possibly earlier access to OIC materials under FOIA
- Cons:
- Fails to preserve institutional interest of Presidency to limit judicial power over presidential recordkeeping
 - May require former President to intervene in defense of Agreement
 - Increases risk that remainder of the 2,350 preserved Bush era backup tapes transferred to NARA will have to be restored and converted insofar as they contain "presidential records"

MAR 31 1993

Mr. Stuart E. Schiffer
Acting Assistant Attorney General
Civil Division
Department of Justice
Washington, DC 20530

Dear Mr. Schiffer:

Because of the expedited appeal in the case of Armstrong v. Executive Office of the President, I believe it is essential that we meet at your earliest convenience to discuss the relationship of that case to the Memorandum of Agreement signed on January 20, 1993, covering certain Bush Administration computer backup tapes and other electronic materials. I also have a number of concerns about the Agreement itself, as outlined below.

The Memorandum of Agreement between the National Archives and Records Administration, the National Security Council, the Office of Administration, and George Bush, signed on January 20, 1993, uses the term "derivative information" in Section I, provisions 5 and 6. The term is not defined in the Agreement, and no reference to another established definition is provided. While the term "derivative classification" is defined in Part 2, Sec. 2.1 (a) of Executive Order 12356, that definition is limited to the issue of national security information. In view of the lack of definition and the persistent questions that the lack of definition raises, I believe that the phrase "and all derivative information in whatever form" should be eliminated in both provisions 5 and 6.

Also in Section I, provision 7 states that "at the conclusion of the investigation described in paragraph v.6, materials in Schedule C shall be transferred to NARA as personal records of George Bush." The term "personal records" is defined in 44 U.S.C. 2201 (3) as "all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." At this time the National Archives does not know what materials are contained on the hard disks that are described in Schedule C only as "hard disks used by personnel of the White House Office and the Office of Policy Development during the Bush Administration." Until the National Archives can review the materials and determine whether they are "Presidential records" or "personal records," we cannot guarantee that all the materials covered by Schedule C are, in fact, "personal records."

Section II provides guidelines for access to the information on the material. In provision 4, the National Archives agrees to "segregate Presidential from non-Presidential information" and to develop procedures for such segregation. The provision further states that the procedure "shall include a provision by which NARA performs an initial review of the material (or the responsive portions thereof), identifies Presidential materials, then permits George Bush or his designee to review the materials to ensure that all Presidential materials have been properly identified by NARA." As you are well aware, the Government is appealing Judge Richey's decision in the District Court that information on the PROFS, OASIS and A-1 systems meets the statutory definition of a Federal record. The Presidential Records Act states that the term "Presidential records" does not include any documentary materials that are "official records of an agency" (44 U.S.C. 2201(2)(B)(i)). Therefore, if Judge Richey's position is sustained, in order to segregate Presidential from non-Presidential information on the materials NARA will first have to determine what are the Federal records on the tapes, disks, and other media.

Finally, Section III, provision 3, states that "Presidential information on the materials shall be disposed of in accordance with instructions of George Bush or his designee." Once again the lack of a definition is troublesome. If "presidential information" is equivalent to "personal records," this provision would appear to be correct. If, however, "Presidential information" means all of the information on the media that is not actually or potentially a Federal record, this would appear to conflict with 44 U.S.C. 2203 (f)(1) and (3) where it is specified that upon conclusion of a President's term of office the Archivist of the United States assumes responsibility for the custody and disposition of Presidential records. To whatever extent Presidential records are determined to be among the media covered by the Memorandum of Agreement, their disposition is controlled by the Presidential Records Act.

I appreciate your attention to this matter. Please let me know when a meeting on the Memorandum and the Armstrong case can be arranged.

Sincerely,

Trudy Huskamp Peterson

TRUDY HUSKAMP PETERSON
Acting Archivist
of the United States

cc: Official File - N DOC:AG:wp
 Reading File - N FILECODE:
N:THPeterson:paf 501-5130 3/31/93

THE WHITE HOUSE
WASHINGTON

DATE: 12/19/94

94 DEC 19 P 6:17

TO: John Podesta

FROM: Marvin Krislov
White House Counsel
Room 128, OEOB, x7900

- ☐ FYI
- ☐ Appropriate Action
- ☐ Let's Discuss
- ☐ Per Our Conversation
- ☐ Per Your Request
- ☐ Please Return
- ☒ Other FOR REVIEW & COMMENT



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF ADMINISTRATION

Washington, D.C. 20503

12-16-94

Marrin,

This was written jointly
by Jason and me. It would
go under my signature to the
referenced FOIA officer by name.
All relevant counsel have been
notified except Elizabeth Blang (CEP).
Chris has reviewed and raised no
objections.

Brune

ATTORNEY CLIENT COMMUNICATION
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D R A F T -- 12/13/94

TO: FOIA Officers for OA, CEQ, OMB, ONDCP, OSTP, USTR

[TEXT OF FOIA NOTICE TO EOP AGENCIES SUBJECT TO FOIA]

SUBJECT: Handling FOIA Requests Involving Preserved E-mail
Records on the Armstrong Backup Tapes

As you are aware, due to various orders entered in the lawsuit Armstrong v. Executive Office of the President, Civ. No. 89-0142 (D.D.C.) (Richey, J.), the National Archives and Records Administration (NARA), as well as components of the Executive Office of the President (EOP), have been enjoined to preserve system backup tapes of various "electronic communications systems" utilized by EOP agencies (e.g. the former PROFS systems and the current OASIS/All-in-1 system). These backup tapes, containing "E-mail" records from the Reagan, Bush, and Clinton Administrations, are currently housed both at NARA and within the EOP.

Plans are underway to restore E-mail records, including those on the backup tapes of the PROFS and All-in-1 systems, to an electronic format that allows accessioning to NARA, where appropriate, and access by the agencies to those electronic records generated by their users or received by their users. However, until restoration and conversion of all such E-mail records to an accessible format is accomplished, the ability to respond to FOIA requests involving any of these records will necessarily be limited. Under these circumstances, it is important that guidance from legal counsel be sought in all cases of FOIA requests which have as potentially responsive records any E-mail records on the preserved Armstrong backup tapes, in order to best ensure compliance with FOIA obligations.

Accordingly, upon receipt by a FOIA officer of any FOIA request which potentially involves a search for E-mail records of the Reagan, Bush, or Clinton Administrations on the preserved Armstrong backups, the FOIA officer is requested to contact legal counsel regarding the proper handling and disposition of all such requests.

In addition, as of July 14, 1994, when approved recordkeeping guidance covering E-mail created or received on EOP's OASIS/All-in-1 system, as well as on similar systems maintained by OSTP and USTR, went into effect, E-mail messages preserved on separate electronic databases can be queried to respond to any FOIA requests involving E-mail as potentially responsive. You will

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MARKING INITIALS: OB DATE: 5/24/18

want to ensure that you institute searches for E-mail on these databases as appropriate under a given request.

Questions regarding this notice may be directed to your legal counsel.

cc: [to corresponding counsel for agencies listed above]

THE WHITE HOUSE
WASHINGTON

John,

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Fyi

Chris G



U.S. Department of Justice
Civil Division

DJA:EAP:jrb
145-1-2062

Washington, D.C. 20530

Telephone:
(202) 514-3354

January 4, 1995

ATTORNEY CLIENT COMMUNICATION
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Christopher Cerf, Esq.
General Counsel
Office of Administration
Old Executive Office Building, Rm. 479
725 17th St., N.W.
Washington, D.C. 20503

Dear Chris:

Re: OA's Restoration Plan for Records on the Backup
Tapes Preserved Pursuant To Orders Entered in
Armstrong v. Executive Office of the President,
Civ. No. 89-0142 (D.D.C.)

You have asked for our views as to the legal sufficiency of the plans of the Office of Administration ("OA") in proceeding with the restoration of electronic records residing on backup tapes from the Reagan, Bush, and Clinton Administrations preserved pursuant to various orders entered in the above-captioned case.

Our full analysis of the issues involved in restoration is attached. As we state therein, we believe that OA's general approach to restoration is legally sound, in that it comports with our understanding of OA's obligations both under the orders extant in the Armstrong litigation as well as under the Federal Records Act. If OA fulfills the requirements which already have been agreed to as part of the Stipulation and Order dated January 27, 1994, we believe that no legal impediment presently exists to OA going forward with its restoration plans. Moreover, the litigation risk of failing to do so outweighs any potential risks associated with attempting to wait for complete "closure" with plaintiffs in the litigation over the scope of restoration.

Accordingly, we believe that OA's current contemplated plans to restore "electronic mail" records (as defined in the attached document), on 31 Reagan era PROFS and 484 Bush era VAX OASIS/All-in-One backup tapes in NARA's current custody, as well as on the

- 1 -

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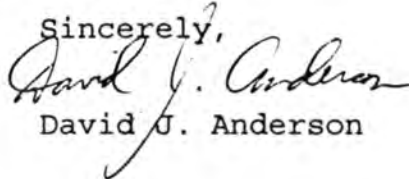
MARKING INITIALS: DB DATE: 5/24/8

16,136 Clinton Administration VAX tapes in OA's custody created on or before July 14, 1994, when recordkeeping guidance was issued, will meet OA's legal obligations pursuant to Armstrong.

We recommend that our offices continue to work closely together to ensure that OA's intended restoration efforts remain in compliance with the district court's orders and existing law. To this end, we stand ready to work with you and your staff on all Armstrong matters related to restoration.

If you have any specific questions or concerns regarding this opinion, please do not hesitate to contact us.

Sincerely,

A handwritten signature in cursive script, appearing to read "David J. Anderson".

David J. Anderson

Enclosure



U.S. Department of Justice
Civil Division

Washington, D.C. 20530

145-1-2062
DJA:EAP:jrb

January 4, 1995

ATTORNEY-CLIENT COMMUNICATION
~~PRIVILEGED AND CONFIDENTIAL~~

MEMORANDUM

To: Christopher Cerf, Esq.
Office of Administration
Executive Office of the President

From: David J. Anderson
Director, Federal Programs Branch
Department of Justice

Re: OA's Restoration Plan for Records on the Backup
Tapes Preserved Pursuant To Orders Entered in
Armstrong v. Executive Office of the President,
Civ. No. 89-0142 (D.D.C.)

You have asked for our views as to the legal sufficiency of the plans of the Office of Administration ("OA") in proceeding with the restoration of electronic records residing on backup tapes from the Reagan, Bush, and Clinton Administrations preserved pursuant to various orders entered in Armstrong. We understand that OA desires our opinion as a condition to proceeding further in its ongoing restoration planning, which involves, at least in part, entering into a contract with a private vendor pursuant to federal procurement regulations, to restore Bush and Clinton Administration electronic mail records on the preserved tapes.

As you are aware, lawyers from Federal Programs Branch have been in contact with OA staff regarding OA's ongoing deliberations regarding restoration. This collaborative process has included several meetings with you and your staff to discuss OA's restoration plans, as well as our prior participation in meetings held between OA and the staff of Information Management Consultants ("IMC"), in connection with their preparation of a "requirements analysis."¹

For the reasons set out below, we believe that OA's general

¹ See "Backup Tape Recovery Project: Requirements and Alternatives Analysis," prepared by IMC, dated September 23, 1994 ("IMC Requirements Analysis").

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: DB DATE: 5/24/98

approach to restoration is legally sound, in that it comports with our understanding of OA's obligations both under the orders extant in the Armstrong litigation as well as under the Federal Records Act. If OA fulfills the requirements which already have been agreed to as part of the Stipulation and Order dated January 27, 1994, we believe that no legal impediment presently exists to OA going forward with its restoration plans. Moreover, the litigation risk of failing to do so outweighs any potential risks associated with attempting to wait for complete "closure" with plaintiffs in the litigation over the scope of restoration.

In order to assess OA's restoration efforts, in Part I, below, we review our understanding of the scope of the prior orders of the courts, especially with respect to how they reveal the courts' assumptions regarding the need for restoration, and therefore affect the general contours of the restoration effort. In Part II, we review certain relevant legal considerations in undertaking restoration, and specifically evaluate OA's plans against this legal backdrop. Finally, in Part III, we make certain additional recommendations in light of the present posture of the lawsuit.

I. BACKGROUND: PRIOR PROCEEDINGS

At its core, the Armstrong litigation involves a challenge under the Federal Records Act ("FRA"), 44 U.S.C. §§ 2201 et seq., 2901 et seq., 3101 et seq., and 3301 et seq., to the electronic recordkeeping policy of all agency components of the EOP with respect to "electronic mail" ("E-mail") communications.² The Office of Administration is a named defendant in the litigation, along with the "EOP,"³ the National Security Council ("NSC"), the White House Communications Agency ("WHCA"), and the Archivist of the United States. At the lawsuit's inception on January 19, 1989, the last day of the Reagan Administration, a temporary restraining order was issued prohibiting destruction of backup tapes created for two PROFS communications systems, one administered by OA (on behalf of the EOP), and one by WHCA (on behalf of NSC).⁴ Later,

² We discuss below, in Part II.A, the ambiguity which exists in the definition of what constitutes "E-mail" to be restored in the context of the litigation.

³ See Armstrong v. EOP, 1 F.3d 1274, 1282 n.4 (D.C. Cir. 1993) (appellate panel held that the "EOP" as an entity was a proper party to the lawsuit).

⁴ A FOIA request for all materials on the Reagan PROFS systems was filed that same day, and later merged into the civil action. The reasonableness of plaintiffs' original FOIA request or subsequent amendments to the request was never adjudicated; instead, plaintiffs agreed to narrow their request and defendants agreed to process the request pursuant to a Stipulation and Order,

on remand from the Court of Appeals,⁵ the district court granted plaintiffs' motion to file their Third Amended Complaint, which included within the scope of the lawsuit all "automated office communication systems" maintained in the EOP (including OASIS, PROFS, and any other E-mail systems such as existing local area networks ("LANs")). Armstrong v. EOP, 807 F. Supp. 816, 818 (D.D.C. 1992). A second TRO was also requested and granted on November 20, 1992, by which the district court ordered the retention of all Bush Administration backup tapes then in existence or created thereafter for the OASIS/All-in-One and PROFS E-mail systems. Id. at 823.⁶

On January 6, 1993, the district court entered a declaratory judgment against defendants, holding that defendants' recordkeeping guidelines were "inadequate," "not reasonable," and "arbitrary and capricious and contrary to law in that they permit the destruction of records contrary to the Federal Records Act." Armstrong v. EOP, 810 F. Supp. 335, 350 (D.D.C. 1993). The basis for the district court's holding was that the electronic version of E-mail records must be managed separately as "record" material under the FRA, because additional transmittal, receipt, and distribution information associated with such E-mail messages had not been preserved in hard copy printouts of E-mail under the EOP's then-existing recordkeeping practices. See 810 F. Supp. at 341 ("[s]uch [additional] information can be of tremendous historical value in demonstrating what agency personal (sic) were involved in making a particular policy decision and what officials knew, and when they knew it").

As amended on January 11, 1993, the district court further ordered in relevant part that:

(a) the Archivist "shall immediately . . . take all necessary steps to preserve, without erasure, all electronic Federal Records

filed January 27, 1994. OA has completed its FOIA processing pursuant to the Stipulation.

⁵ The Court of Appeals in Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991), determined certain threshold issues in the lawsuit, holding inter alia that plaintiffs could not sue under the Presidential Records Act ("PRA"), 44 U.S.C. § 2201 et seq., to enforce recordkeeping practices of components of the EOP which solely advise and assist the President.

⁶ Following plaintiffs' proposed order and over defendants' objections, the language of the second TRO as adopted by the district court states that computer backup tapes "created from" electronic communications systems known as "OASIS," as well as from "All-in-One," are covered within the scope of the district court's order. 807 F. Supp. at 823.

generated at the defendant Agencies to date, except purely Presidential Records"; and

(b) defendants were enjoined from "removing, deleting, or altering information on their electronic communications systems" until such time as the Archivist acted to prevent destruction of federal records on the preserved backup tapes pursuant to the two TROs as entered.

After the district court's denial of a stay by order of January 14, 1993, the court of appeals granted a partial stay allowing defendants to delete E-mail from their electronic communications systems "so long as the information is preserved in identical form, pending the disposition of this appeal." The court of appeals further noted that "the creation of magnetic backup tapes does not fulfill the conditions imposed by this order unless such tapes faithfully replicate all information removed, deleted, or altered. . . ." Order of January 15, 1993. Pursuant to the partial stay, all agency components of EOP (including OA) continued the practice, initiated under the second TRO, of preserving E-mail messages in the form of backup tapes or other storage devices.⁷

On or about January 19, 1993, pursuant to agreements with former Presidents Reagan and Bush, backup tapes and storage devices containing presidential materials which had been retained by OA, NSC, and WHCA pursuant to the prior orders of the district court (including the two TROs), were transferred to NARA. Under the agreement executed between former President Bush, OA, NSC, and the former Archivist (the "Bush-Wilson agreement"), NARA agreed to segregate presidential materials from federal records on the tapes prior to access being given to any other party. NARA currently is the custodian of just under 6,000 tapes and hard disk drives which were transferred pursuant to these agreements, including 32 OA PROFS tapes from the Reagan era, and 2,836 VAX tapes from the Bush era (a subset of which contain electronic mail from the All-in-One system) (see discussion in Part II.B, below).⁸ In turn, OA is the present custodian of 16,136 VAX tapes containing electronic mail in whole or in part, created after the onset of the Clinton

⁷ Affected components and their E-mail systems included: OA (for its All-in-One system): NSC (A-1 and White House Situation Room cc:mail system); the Office of the United States Trade Representative (USTR) (in-house DG classified/unclassified systems); the Office of Science and Technology Policy (OSTP) (LAN cc:mail and National Space Council LAN); Office of National Drug Control Policy (ONDCP) (PROFS system); and OMB (two LANs utilized through June 1993).

⁸ OA is also presently the custodian of certain Bush Administration backup tapes containing federal records which were not transferred to NARA, namely, tapes from the ONDCP PROFS system.

Administration and through the issuance of approved recordkeeping guidance. These also include both presidential and federal E-mail.

On May 21, 1993, the district court held defendants in civil contempt for failing to issue adequate recordkeeping guidance pursuant to its orders of January 6 and 11, 1993, and for failing to take sufficient actions to ensure the continued preservation of the Reagan era tapes pursuant to the transfer of the tapes to NARA. Armstrong v. EOP, 821 F. Supp. 761 (D.D.C. 1993). In relevant part, the district court found that:

Pursuant to Orders and stipulations in this case, the Defendants have been storing information from their electronic communications systems onto backup tapes for some time. The backup tapes are designed to preserve the information from the electronic communications systems and to ensure that any federal records on these systems are preserved pending the resolution of this lawsuit. Similarly, the interim guidance . . . ensures that all the information created on the electronic communication systems at the Defendant agencies will also be preserved on backup tapes.

However, the interim guidance does not fully comply with the statutory command of the FRA and the Orders of the Court. This interim guidance makes no effort to separate federal records from other material or to integrate the Defendants' electronic recordkeeping systems and their recordkeeping guidance. . . .

Id. at 767. The district court proceeded to order defendants to take appropriate actions "includ[ing] but not limited to" issuing "new, appropriate, and proper guidelines for the management of electronic federal records." Id. at 774. In a later opinion denying defendants' motion for an emergency stay, the district court further observed that:

Since the Defendants have not formulated new and proper FRA guidelines, all materials created by the Defendant agencies are being saved onto backup tapes, which will make any retrieval of federal records stored therein problematic, because of the volume of the information and because the tapes contain presidential records which the Defendant Archivist wishes to segregate out before the

tapes are returned to the Defendant agencies.

Armstrong v EOP, 823 F. Supp. 4, 9 (D.D.C. 1993); see also id. at 7.⁹

On August 13, 1993, the court of appeals affirmed the district court's central holding that existing recordkeeping practices were arbitrary and capricious and not in compliance with the FRA. In doing so, the appellate panel specifically stated that:

[I]f the agencies' policy of printing on-screen information did not result in 'papering' all federal records materials, then at least some federal records will be permanently lost or destroyed unless the electronic backup records, currently being retained pursuant to the district court's orders, are preserved.

Armstrong, 1 F.3d at 1282 (emphasis in original).

On remand, the parties entered into a subsequent Stipulation, approved by the district court, which allowed for continued preservation of E-mail communications in the form of backup tapes and other storage devices, pending the issuance of appropriate recordkeeping guidance under the FRA. Stipulation and Order, endorsed September 30, 1993. The Stipulation also committed the parties to entering into good faith negotiations over all remaining issues in the litigation, including with respect to recordkeeping guidance and defendants' ultimate obligations with respect to preservation and restoration of the backup tapes.¹⁰

On January 27, 1994, the district court endorsed a Stipulation and Order entered into by the parties, in which defendants committed to taking certain future actions with respect to the preserved backup tapes, including but not limited to: preserving the backup tapes in accordance with procedures and standards applicable to Federal records (without prejudice to defendants' position that some of the materials on the backup tapes may be outside the scope of the FRA), see id. ¶¶ 11, 12; not disposing of the backup tapes unless provision has been made for public notice in the form of

⁹ The district court's findings of contempt were later stayed and vacated with respect to the failure to issue recordkeeping guidance, on the narrow ground that defendants "were never directly ordered to promulgate new regulations." Armstrong, 1 F.3d at 1289.

¹⁰ Pursuant to these negotiations, defendants submitted to plaintiffs a settlement plan for restoration of the backup tapes, which plaintiffs rejected as inadequate. See n.23, below.

disposition schedules, with express notice to plaintiffs, see id. ¶ 11; and that prior to the start of copying data to a "format appropriate for accessioning by NARA," defendants provide plaintiffs with a "description of the documentation relied on" as set out in id., ¶ 15.

On June 7, 1994, NARA entered into a further Stipulation and Order, in which it committed to engaging in preservation copying and verification of the internal labels of all Reagan and Bush materials in its custody by set deadlines, and no later than January 31, 1995 in all instances. All OA tapes in the custody of NARA have been subject to NARA's ongoing copying and verification efforts. An independent expert has been appointed pursuant to this Stipulation to oversee these processes.

On July 14, 1994, OA issued electronic recordkeeping guidance (with the Archivist's approval), which provided for all E-mail records on the OASIS/All-in-One system being in turn retained in a separate, automated records management system ("ARMS"), in substitution for the regime of records being maintained solely in the form of backup tapes. Plaintiffs declined to challenge any aspect of OA's current guidance as inconsistent with the law of the case or the provisions of the FRA.¹¹

II. DISCUSSION

A. Legal Requirement to Restore Federal Records On The Preserved Backup Tapes

No serious question exists, nor does OA dispute, that defendants, including OA, are obligated under the law of the case to engage in reasonable efforts to recover certain federal record materials on the backup tapes preserved under the injunctions entered by the district court, and to convert such materials into a format appropriate for either accessioning by NARA or integration into EOP agency files. The underlying premise of both the district and appellate holdings was that E-mail records of "substantive importance," Armstrong, 1 F.3d at 1274 n.7, generated by (at a minimum) "two administrations over a seven-year period," id. at 1283, have not been adequately preserved under existing recordkeeping policies. A fortiori, to the extent that E-mail records preserved on backup tapes constitute records of sufficient

¹¹ In a consent Order filed June 22, 1994, plaintiffs were to file a motion by July 28, 1994, if they had any "objections to provisions of the new recordkeeping system[] implemented by the Office of Administration" Plaintiffs elected not to do so. See also Transcript of Hearing in Armstrong v. EOP, October 26, 1994, at p. 10 (plaintiffs' counsel acknowledges that all components of EOP except for NSC have "instituted new guidelines in conformance with" the Court's prior January 6, 1993 opinion.)

enduring value to warrant continued preservation (as either permanent or long-term temporary records), defendants will cure their FRA obligations only when (a) additional actions are taken to recover the presumptively "lost" E-mail records from the preserved backup tapes, and (b) integrate such records into existing recordkeeping systems in accordance with NARA guidance (including accessioning by NARA in the case of records deemed "permanent" in nature). See generally 36 C.F.R. §§ 1220, 1222; id. at § 1222.50(b)(7) (regulations generally require appropriate management of federal records, and specifically require separation of record, nonrecord and personal materials).¹²

With respect to Clinton Administration E-mail records preserved on backup tapes by virtue of the partial stay granted by the Court of Appeals on January 15, 1993 and subsequent stipulation of the parties, defendants would similarly now be obligated to take

¹² Subject to one important exception, continued preservation of "record" materials in the form of backup tapes without undertaking restoration and recovery efforts is inconsistent with defendants' longstanding position in the litigation that data on backup tapes is in an inaccessible format for purposes of agency use, and that as a general matter it is unreasonable to expect that agencies would restore data preserved on backup tapes in response to FOIA requests. See Defs.' Memorandum in Support of Summary Judgment on the FOIA Count (filed July 2, 1992) (withdrawn pursuant to Jan. 27, 1994 Stipulation and Order). Indeed, defendants' posture in successfully obtaining a partial stay from the court of appeals was that E-mail records would be preserved in the form of backup tapes as an alternative to the lower court prohibiting deletions off the live systems; having lost on the merits in the appellate court, defendants are in no position to ignore their present obligations to restore the federal records so preserved.

The only exception to this general scheme might consist of E-mail which have been appraised to be short-term, temporary records, and which NARA would otherwise be prepared to authorize as suitable for immediate destruction. In such cases, while there is certainly litigation risk involved in doing so, we believe it would be legally permissible for one or more EOP components to proceed with development of a disposition schedule or schedules in lieu of now undertaking wholesale restoration of these records; provided, however, that NARA participates in appraising the E-mail records in question (including based on "sampling" as appropriate). We do not understand this exception to apply across-the-board to E-mail records on the OA PROFS and OASIS/All-in-One systems, however, inasmuch as OA concedes that at least some undetermined percentage of E-mail records on those systems should be considered permanent and/or long-term temporary records.

additional steps to ensure that Clinton Administration E-mail records preserved on backup tapes created through the date of issuance of "curative" recordkeeping guidance (on July 14, 1994) are converted into an accessible format.

Apart from these general propositions, however, there are at least four over-arching questions regarding the scope of restoration of relevance to OA's restoration planning.

- (1) What constitutes "electronic mail" which may be required to be restored?

Due in part to the fact that in its January 1993 injunction, the Court enjoined deletion of "information" on defendants' "electronic communication systems," in lieu of using the terms "electronic mail" and "E-mail system," there is some ambiguity as to what categories of electronic record information within the scope of the district court's orders are required to be restored.¹³ At a minimum, however, the following categories of data would appear to form the "core" of what constitutes "electronic mail" data in the context of Armstrong:

- (a) non-duplicative¹⁴ texts of E-mail messages
- (b) subject headings of messages
- (c) identity of a sender (full names or, if unavailable, names in user directories)
- (d) identity of recipients (full names of all "cc's" and "bcc's" or, if unavailable, names in distribution lists, personal groups, or in user directories)

¹³ The proposed NARA definition of "electronic mail" specifically excludes both word processing files not otherwise communicated across an E-mail network, and all file transfer applications, the latter of which includes the sending of word processing documents from user to user via using operating system "path" commands. See 59 Fed. Reg. 13,906, 13,907 (Mar. 24, 1994). Moreover, as pointed out above, elsewhere in its original injunction the district court chose to use the phrase "all electronic records" in connection with the Archivist's obligations. Plaintiffs have chosen not to press any argument with respect to NARA's narrower definition of "E-mail" to date, nor has reconciliation of the meaning of the district court's ordering paragraphs been the subject of litigation in Armstrong.

¹⁴ Truly "duplicative" E-mail, i.e., multiple copies of the identical version of an E-mail message which reside on successive backup tapes, would not need to be restored. However, defendants must ensure that any programming to ferret out such "duplicates" treats this category narrowly (e.g., a forwarded E-mail message is not to be construed as identical to the original, since different transmission data will be generated as between the two).

- (e) date, and time (if available) of transmission
- (f) if requested, "read receipts" indicating date and/or time message opened
- (g) full text of attachments to messages¹⁵
- (h) text of "documents" created on the E-mail system
- (i) authors of "documents" (full names or, if unavailable, in user directories)
- (j) federal record calendar or scheduling information (i.e., information contained on shared calendars).¹⁶

Any restoration plan will need to ensure that the parameters of the

¹⁵ We recognize that an issue may arise as to the technical feasibility of the conversion of all attachments to ASCII or some other NARA-authorized generic format. Defendants cannot be expected to perform the impossible; however, apart from technical considerations, there is some legal risk associated with reliance on defendants' inability to accomplish full conversion based on arguments grounded on present available resources.

¹⁶ We also recognize that certain backups may possibly also contain information in categories (a) through (j) which users had intended to be "deleted," where the materials were not actually physically deleted (i.e., overwritten) on the disk at the time backups were made, and thus may be retrievable using special restoration utility programs. For the vast majority of OA's Armstrong tapes, no need appears to exist for contemplating such extraordinary restoration actions, since we understand that E-mail deleted by users was in fact captured in what is known as the All-in-One "wastebasket folder." After January 19, 1993, all such "deleted" E-mail was captured on the OA backup tapes by OA requiring that backups be made prior to the "dumping" of the wastebasket. See OA Response to Pls.' Second Set of Compliance Interrogs., # 9. For the period between November 20, 1992 and January 19, 1993, we are informed that wastebasket folder information may or may not have been captured on backups, depending on the vagaries of the timing of particular backups. To the extent that "wastebasket" information was in fact so captured, OA anticipates having no special difficulty in retrieving "deleted" E-mail. With respect to OA's 32 PROFS tapes there is, however, at present an open issue as to whether it is reasonably feasible to recover "deleted" PROFS E-mail using a special restoration utility. Given plaintiffs' stated position that any "deleted" data should be recovered as potential federal record material, see, e.g., correspondence dated December 8, 1994 from Michael Tankersley to Thomas McKim, OA should be on notice that it is likely to be pressed in the litigation to provide a justification (based on technical or fiscal concerns) for not engaging in such extraordinary restoration efforts for the PROFS tapes.

search will capture all categories of E-mail listed above.¹⁷

Beyond this core set of records and associated data, there are a number of other categories of information residing on OA's backup tapes within the scope of what is considered to be "E-mail related" applications, for which an argument might be advanced, based on the unique context of this lawsuit and the holdings of the Court, that defendants have an obligation to restore. These would include:

- (k) additional applications identified on user menus on the All-in-One system, including phone messages, pager requests, suggestion box items, WAVES requests, directory change requests
- (l) newswires transmitted or available to users
- (m) logs or indices of E-mail files or folders which would have been captured on backups
- (n) created but unsent E-mail messages
- (o) calendar authorization files
- (p) various user set-up files, including logon/logoff data
- (q) user directories
- (r) other user-generated data of a temporary record nature.¹⁸

We believe that OA may permissibly argue under the FRA that data in categories (k) through (r) constitute either duplicative, non-record material, or record material of a sufficiently temporary nature that extraordinary restoration efforts would not be required (absent plaintiffs' FOIA request and the district court's injunction to preserve such materials).¹⁹ In the case of all

¹⁷ Additionally, for purposes of accomplishing restoration, we assume it will be necessary to restore certain systems files or data, which may or may not reside on the identical tapes that contain the above E-mail categories of data.

¹⁸ For the latter category, see, e.g., IMC Requirements Analysis at 26.

¹⁹ We note, however, that plaintiffs' February 1992 amended FOIA request directed to OA embraced data not only in categories (a) through (j), but in the above provisionally excluded categories (o), (p), and (q). Assuming that plaintiffs' FOIA request was valid, the request therefore highlights the distinction as between what constitutes "agency record," as opposed to "federal record," materials. See Bureau of National Affairs v. Dep't of Justice, 742 F.2d 1484, 1495 (D.C. Cir. 1984) (term "agency record" under FOIA embraces both "records" and "nonrecords" under FRA, but noting that the "Supreme Court [has] expressly left open the question of whether 'nonrecord materials' are 'agency records' under the FOIA

"record" material, however, defendants would be required to account for the disposition of such material either by pointing to a General Record Schedule, or proceeding to develop appropriate disposition schedules covering all such categories of materials. See 44 U.S.C. §§ 3303, 3303a. Of course, to the extent that OA intends nevertheless to proceed to restore data in one or more of categories (k) through (r), such action will narrow any remaining controversy regarding the scope of restoration.

(2) What obligation do defendants have to restore
"presidential" E-mail?

Aside from the issue still in litigation regarding NSC's status as a "presidential" component of EOP, there remains the issue of what obligation, if any, do the remaining components of EOP have to restore "presidential" E-mail residing on the preserved backup tapes. As stated above, OA's backup tapes from the Reagan, Bush, and Clinton Administrations contain both presidential materials²⁰ (where such materials consist in the main of E-mail from users in various subcomponents of the White House Office, the Office of the Vice President, and the Office of Policy Development), as well as federal records.

As a starting proposition, the Court expressly has acknowledged its lack of jurisdiction over presidential records, and that "the requirement that Defendants preserve information on their electronic communications systems does not extend to components of the EOP whose sole responsibility is to advise the President," see Order of January 11, 1993 (and as incorporated into the Order of September 30, 1993). Nevertheless, the Court has also stated that it does "have jurisdiction to authorize the preservation of these [presidential] materials until the Archivist can ensure that federal records are not destroyed." Armstrong, 810 F. Supp. at 349.

It follows that in undertaking restoration, defendants will necessarily have the obligation to segregate federal and presidential E-mail for the purpose of identifying what federal E-mail

and thus subject to disclosure," id. at 1493, quoting Forsham v. Harris, 445 U.S. 169, 183 n.14 (1980)).

²⁰ The term presidential "materials" is meant here to encompass both presidential records under the PRA as well as presidential "non-record" materials. The position of the Reagan and Bush Administrations was that all presidential materials on the preserved backup tapes were "non-record" in nature; the present Administration has stated in correspondence with plaintiffs that it intends to treat E-mail records on backup tapes created after January 20, 1993 under the terms of the PRA. See correspondence from Mark I. Levy to Alan B. Morrison, dated November 5, 1993.

is to be restored pursuant to the Court's order,²¹ In the case of user accounts on the OA PROFS and OASIS/All-in-One systems, we understand that no major theoretical or technical issues exist with respect to segregating such accounts.²²

Beyond the requirements of the district court's orders, plaintiffs have maintained the consistent position that restoration of presidential E-mail is required under the PRA, and that the Archivist has a duty to see that such restoration is carried out. See, e.g., Letter of August 3, 1993, from Michael E. Tankersley to Jason R. Baron. Without taking a legal position on the matter, and irrespective of the Court's jurisdiction, defendants have, however, further represented to plaintiffs in recent correspondence that as part of any "settlement" of the litigation, they intend to go forward with restoration and conversion to an accessible format of presidential E-mail on the preserved backup tapes. See Letter of November 3, 1994 from John A. Rogovin to Alan B. Morrison. Barring unforeseen circumstances, and subject to the remarks in n.21, above, defendants' restoration plan therefore should reflect this

²¹ Governing law, although not speaking directly to this question, strongly suggests that materials covered by the FRA and by the PRA should be segregated, consistent with how records are otherwise managed. See, e.g., 44 U.S.C. § 2203(b) ("to the extent practicable" presidential records are to be so categorized upon receipt as distinct from "personal" records and be "filed separately"); 36 C.F.R. § 1222.50(b)(7). Additionally, for Bush era tapes only, the Bush-Wilson agreement calls for segregation to occur prior to access being afforded to the underlying substantive materials. The language of the Agreement reads that subject to certain exceptions, "NARA shall segregate Presidential from non-Presidential information before providing access to NSC, OA, or any third party to any non-Presidential information contained on the materials." Bush-Wilson Agreement at II.4. The exceptions include where a court order requires access or otherwise precludes segregation, as well as "whenever the parties agree to waive these requirements in a particular case." Id. at II.4(c)(iv). The legal validity of the Bush-Wilson agreement is currently the subject of litigation in American Historical Association v. Peterson, Civ. No. 94-2671 (D.D.C.). In light of the latter suit, OA should confer with DOJ on all issues arising under the Agreement.

²² There may be minor questions at the margins as to what E-mail should be considered "federal" as opposed to "presidential." For example, we understand that certain attachments to E-mail, as well as E-mail sent to 5 or more users on the All-in-One system, reside in a common area on the tapes, making such segregation infeasible if not impossible. See Third Declaration of James B. Wright, dated December 8, 1992, at ¶ 3. In all questionable cases, we believe defendants should err on the side of presuming E-mail to be covered within the scope of the district court's orders.

further understanding.

- (3) What additional obligations do defendants have to restore remaining "non-E-mail" data (presidential or federal) residing on the backups?

Notwithstanding the literal language of the second ordering paragraph in the district court's January 11, 1993 injunctive decree concerning the Archivist's duty to preserve "all electronic Federal records generated at the defendant Agencies to date," the history of the litigation supports the view that the district court's holdings have been limited to striking down past recordkeeping practices solely regarding the printing out of E-mail. Defendants therefore would be expected to be able to advance strong arguments that the Armstrong suit, at its outer perimeter, involves solely the restoration (or disposition in accordance with published schedules) of data within the scope of categories (a) through (r), above.

Nevertheless, for a variety of reasons (including certain technical reasons relating to the nature of how backups were made), EOP components have proceeded to transfer to NARA and/or otherwise preserve a large number of backup tapes which in whole or in part contain additional, "non-E-mail" categories of data. Based on the information made available to us, these categories include but are not limited to:

- (s) Presidential databases (including on the OA tapes four categories of presidential personnel data, scheduling data, presidential remarks, and a calendar of residence events)
- (t) Other types of federal databases²³
- (u) Systems software and related applications (not otherwise necessary to restore E-mail in categories (a) through (j))
- (v) Other types of short-term, administrative applications
- (w) Duplicative data of any type
- (x) Internal labels only in cases of otherwise blank tapes.²⁴

²³ OA has informed us that it believes there to be no "word processing" files on the preserved OA tapes. It should be noted for the record, however, that plaintiffs believe "word processing" files are within the scope of the district court's holding -- if not its injunction. See, e.g., Letter of August 3, 1994.

²⁴ Consistent with this general scheme, defendants took the position in forwarding to plaintiffs their "Restoration Plan" and "Addendum" settlement proposals (dated March 14, 1994 and April 4, 1994, respectively), that all information on the preserved backup tapes will be restored, except for information in what amounts to the above excluded categories. Plaintiffs have in turn challenged defendants' Restoration Plan as insufficiently detailed, while

Category (s) presidential database information is clearly beyond the scope of any order of the Court, by virtue of its "presidential" character alone. Whether NARA and OA consider it necessary to otherwise restore this data pursuant to the PRA is a question to be reserved for future decision.²⁵

In our view, the remaining information categories (s) through (x) consist of nonrecord or federal record materials not covered under the specific orders entered in Armstrong. Moreover, to the extent the data in these categories can be said to be within the scope of existing General Record Schedules or specific agency disposition schedules, no general obligation under the FRA exists to restore such data. Barring a further compromise in settlement negotiations or the imposition of a future court order to the contrary, we recommend that EOP components proceed in their restoration efforts without regard to recovery of information in these categories. However, where existing agency schedules have failed to account for the disposition of unique versions of electronic record data contained on one or more "live" computer systems or databases, we believe the prudent course, consistent with the requirement of the FRA, would be to consider development of appropriate disposition schedules which fully account for the various electronic applications involved.

(4) What additional legal requirements exist with respect to restoration?

As we understand it, the ultimate goal of restoration will be to convert E-mail records from their present form on the preserved backup tapes to a generic medium and format acceptable to NARA for purposes of potential permanent accessioning. Such restoration will in turn essentially result in the creation of one or more databases of records which will be searchable (for purposes of future FOIA or other requests) in a manner consistent with what is

reserving their position that the exclusions are inconsistent with the district court's orders and/or governing law. See Letter of August 3, 1994.

²⁵ In the Levy-Morrison correspondence dated November 5, 1993, on behalf of NARA we represented that "it is the position of the present Acting Archivist that she does not intend to initiate any action which would cause the destruction of historically significant presidential materials" on the backups. Additional representations along these same lines have been recently made by the Acting Archivist in connection with proceedings in the AHA v. Peterson litigation. See also 44 U.S.C. § 2203(f)(3) (Archivist is authorized to dispose of presidential records "which he has appraised and determined to have insufficient administrative, historical, informational or evidentiary value to warrant their continued preservation").

prescribed for electronic records generally under NARA regulations. See 36 C.F.R. §§ 1228.188; 1234.22.

Apart from this overall restoration "requirement," we note three other procedural matters which defendants have stipulated to either in a court order or by agreement.

First, as stated above, defendants have stipulated that they will obtain "all documentation necessary to adequately service and interpret" data to be copied to an accessionable format as part of restoration, including documentation in four specific categories.²⁶ Defendants have further stipulated to providing plaintiffs with advance notice of a description of documentation being relied upon 30 days prior to copying data to tapes in an accessionable format, the latter of which is governed by NARA regulations at 36 C.F.R. 1228.188. Id.

Second, defendants have stipulated to not disposing of backup tapes, or duplicate copies thereof, unless a disposition schedule has been published in the Federal Register with opportunity for comments, either under GRS 20 or as part of a separate schedule, with separate notice expressly sent to plaintiffs. Id. at ¶ 11. (The stipulation expressly applies to all backups retained under the Court's orders, "regardless of whether they contain 'electronic mail' or 'e-mail.'" Id.)

Third, with respect to materials within the scope of the Bush-Wilson agreement, apart from the segregation of records provisions referenced above, additional special notice provisions apply relating to access rights to the backup tape materials. See Agreement, II.2 (providing for 10 day prior notice to all parties by certified mail). We note also that the Agreement contemplates that "all agency information on the materials shall be disposed of in accordance with instructions from NSC, OA, any any interested originating agency, or, if the information is ultimately determined to be a record, pursuant to a proper records schedule." Id. at III.2. See also id., Part III.1, 3, and 4.

Finally, while not required by existing court order, we believe it would be prudent, for purposes of defending OA's actions

²⁶ These categories being all documentation "necessary to (i) identify the hardware, operating system, and storage subsystem used to produce each file transferred; (ii) determine the format and contents of internal labels on the backup tapes; (iii) specify the structure of the files used by applications software and retrieve data from such files; and (iv) determine how files were written, how logical files are mapped onto the files transferred, how logical files are identified, and how the proper sequence of randomly stored segments of a logical file is determined." Stipulation and Order of January 27, 1994, ¶ 15.

in any potential subsequent litigation, that OA consider utilization of one or more "quality control" mechanisms to account for all restoration actions taken by OA or its contractor(s). For example, an "audit trail" procedure could be put into place to record what inclusions and exclusions of data have been made. Consideration should also be given to utilizing and expanding upon in a consistent format NARA's existing databases of information, compiled in the course of undertaking preservation copying and verification efforts.

B. OA's Restoration Plan Appears To Be Consistent With The Above-Stated Legal Requirements

Based on the information provided to us to date (consisting of the IMC requirements analysis, and subsequent oral conversations with OA staff), we believe that OA's current contemplated plans for restoration of the PROFS and OASIS/All-in-One tapes are consistent with and otherwise meet the legal requirements set out in Part II.A, above.

With respect to Reagan and Bush era tapes, OA's documentation accompanying the transfer to NARA of those tapes indicates that what was transferred included:

- (i) 32 Reagan era PROFS tapes (31 of which contain "electronic mail" in categories (a) through (j), as well as one additional "accounting" tape);
- (ii) 484 Bush era VAX All-in-One tapes (containing "electronic mail" in categories (a) through (r)); and
- (iii) 2,352 backups of all other data on OA's VAX computer (containing data in categories (s) through (x)).

For Clinton era tapes in the custody of OA, we understand that what has been retained includes:

- (iv) 3,341 VAX All-in-One tapes (circa 1993, containing "electronic mail" in categories (a) through (r)); and
- (v) 12,795 VAX tapes (up through July 14, 1994), containing both "electronic mail" in categories (a) through (r) as well as additional computer data in categories (s) through (x)).

On the assumption that OA will in its restoration plan follow the categories of inclusions and exclusions contained in the IMC Requirements Analysis at page 26, we believe that OA's plan exceeds the minimum requirements imposed by the district court's orders

with respect to the restoration of E-mail as analyzed above.²⁷ In so concluding, we note that OA has no intent to generally restore any of the 2,352 tapes as set out in (iii) above, since such tapes contain only data in excluded categories (s) through (x); nor does OA intend to restore any data on the 12,795 Clinton VAX tapes beyond electronic mail in categories (a) through (k). OA does intend to restore presidential E-mail on all PROFS and All-in-One tapes. As discussed previously, OA staff will need to be in a position to document or certify that all electronic mail in required categories (a) through (j) has been accounted for, notwithstanding the above intended exclusions from restoration.²⁸

More generally, we believe that, if in undertaking restoration OA adheres to the procedures discussed in the IMC requirements analysis at pages 21-22, 29-49, 55-62, and Appendix B, OA will be acting fully consistently with the district court's orders.

Finally, no order of the district court presently compels restoration under any specified timeframes. The IMC requirements analysis suggests that PROFS tape restoration will take up to 3 months, and All-in-One tape restoration will take up to 4 years (beyond the contemplated procurement process) to complete. See pp. 4-5 & Appendix D. We understand that OA intends to proceed with in-house restoration of its PROFS tapes, and with utilizing a private vendor for Bush and Clinton era VAX/All-in-One tapes. While OA is not compelled to adhere to these or any other time frames for restoration, we would urge that maximum attention be

²⁷ For example, the chart makes clear that OA intends to restore certain electronic mail data in category (k), above, which does not necessarily seem otherwise compelled as within the scope of restoration.

²⁸ The quantum of proof which may be necessary for OA to establish that it has restored all the required electronic mail beyond any need for further legal scrutiny is certainly an open legal question. We understand that OA presently has plans to inventory or appraise the electronic applications which are resident on the Clinton era VAX system, with an eye towards what was resident on the Bush era system as well. While we believe that this action may be deemed sufficient to comply with the minimum requirements of the FRA and NARA regulations regarding appraisal prior to disposition of potential electronic record materials, we nevertheless recommend that NARA be further consulted concerning OA's planned actions, in order that OA and NARA jointly establish the level of documentation sufficient to defeat any collateral attack on the scope of OA's restoration. For example, NARA may yet recommend that data on a small number of restored "non-E-mail" backup tapes in category (iii) be examined, for the purpose of establishing what general categories of information exist on those tapes.

given to proceeding with OA's overall restoration efforts, given plaintiffs' past success in convincing the district court that there has been unwarranted governmental procrastination. See, e.g., Armstrong, 821 F. Supp. at 5 (the Court "finds that the Defendants have dillydallied, done little and delayed for the past five months rather than make serious efforts to comply with this Court's prior Orders . . . ").²⁹

²⁹ Any doubt as to how plaintiffs will characterize further delay in initiating restoration actions is dispelled by the following excerpt from their prior Motion to Show Cause for Contempt:

[D]efendants continue to treat the materials preserved on backup tapes as if they were merely subject to a temporary restraining order, rather than subject to a decision on the merits holding that they contain Federal record material. As described above, no steps have been taken to treat the materials as Federal records. . . . The defendants have simply shelved the tapes, as was done for the last four years following the 1989 TRO -- as if the Court never decided the merits. * *

* *

This conduct is flatly inconsistent with this Court's injunction. The Court's mandate did not provide for the agencies to continue to store backup tapes and collect additional tapes indefinitely. Such action merely continues defendants' violation of the Federal Records Act, which requires that Federal records be properly identified, separated from personal and nonrecord material, clearly labeled, and appropriately maintained. See 35 C.F.R. § 122.50(b)(7), (8). The Court's injunction requires that the Archivist and the agencies take immediate action to apply these and other requirements governing Federal records to the electronic communications systems at issue here. Their continued refusal to do so violates the Court's Order and impairs plaintiffs' rights to have the Federal records properly maintained and preserved so that can be accessible as part of the historical record of the Federal government.

Pls.' Memorandum in Support of Motion to Show Cause and to Enforce Injunction at 44 (filed April 1, 1993) (emphasis in original).

III. ADDITIONAL RECOMMENDATIONS

The Armstrong suit has resulted in OA obtaining appropriations from Congress for the purpose to restoration of records on the preserved backup tapes. Compliance with the district court's orders as they implicate the restoration efforts to come will in turn involve a substantial amount of time and resources devoted to accomplishing OA's mission. While we believe the currently contemplated OA restoration plan is consistent with the orders of the district court and with the law as established by the FRA (and PRA), we nevertheless believe that it would also be prudent for OA to continue to work closely with DOJ in the coming months to further develop a concrete "statement of work" for the PROFS and All-in-One tapes needing to be restored, given especially (a) the complexity of the technical, policy, and legal issues involved in the scope of restoration; (b) the expected scrutiny which plaintiffs can be expected to bring to bear on issues relating to the scope, schedule, and/or procedure for restoration, with whatever attendant litigation risk exists; and (c) the fact that "settlement" discussions regarding any and all related restoration issues are currently in a state of flux, and may remain so for some time to come. Such a "statement" will be especially useful in furtherance of defendants' representations that we would share with plaintiffs a general description of our restoration actions and intended plans. See Letter of December 1, 1994, from John A. Rogovin to Alan B. Morrison.

We further recommend that OA consult with NARA at every opportunity, especially given NARA's custodianship of the Reagan and Bush era tapes, as well as the latter's general expertise and its special expertise developed in connection with ongoing efforts in compliance with the June 7, 1994 Stipulation and other outstanding orders of the district court.