

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No: 1:07-cv-01707 (HHK/JMF)
)	
EXECUTIVE OFFICE OF THE)	
PRESIDENT, et al.,)	
)	
Defendants.)	
<hr/>)	
NATIONAL SECURITY ARCHIVE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No: 1:07-cv-01577 (HHK/JMF)
)	
EXECUTIVE OFFICE OF THE)	
PRESIDENT, et al.,)	
)	
Defendants.)	
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**DEFENDANTS' CORRECTED OPPOSITION TO MOTION TO
COMPEL THE ADMINISTRATIVE RECORD**

Plaintiffs have repeatedly insisted that the relief they seek in this litigation is an order requiring defendants “to initiate action to recover lost or missing records.” Mot. to Compel [97] at 2. Indeed, the allegation that threads throughout each of the briefs plaintiffs have submitted in the more-than-100 entries on the docket has been consistent: plaintiffs have asserted some variation of the claim that “to date the White House has made no recovery efforts” to restore millions of allegedly missing emails subject to the Federal Records Act (“FRA”), see CREW’s

Emerg. Mot. for an Immediate Status Conference [98] at 4, and is therefore liable for “agency *inaction*” under the Administrative Procedure Act (“APA”) and mandamus statute. CREW’s Renewed Mot. for Leave to Conduct Expedited Discovery [93] at 8 (emphasis in original).

Millions of dollars, countless hours and productive results of an extensive email restore process, however, prove plaintiffs’ allegation untrue. In short, defendants *have* initiated the action that plaintiffs claim is wanting: defendants have expended substantial time and resources to “initiate action” to restore emails to the .pst file stores and confirm that millions of emails are not, in fact, missing as plaintiffs allege. Thus, whatever the validity of plaintiffs’ agency inaction claims when their complaints were filed, defendants have since taken significant action to restore emails and confirm the integrity of the .pst file stores.

Under controlling D.C. Circuit law, such *agency action* in the face of allegations of *agency inaction* moots any entitlement to relief and deprives this Court of subject matter jurisdiction. See Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990); Lawal v. U.S. Immigration and Naturalization Serv., Civ. No. 94-4606, 1996 WL 384917, *2 (S.D.N.Y. July 10, 1996) (“The only relief the complaint sought was a judicial order that [defendant] act. [Defendant] has acted.”). “Even where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if ‘events have so transpired that the decision will neither presently affect the parties’ rights nor have a more-than-speculative chance of affecting them in the future.’” Clarke, 915 F.2d at 701 (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). “Where intervening events preclude the Court from granting plaintiffs any effective relief, even if they were to prevail on their underlying claim, the Court must dismiss a suit as moot for want of subject

matter jurisdiction.” Citizens Alert Regarding the Environ. v. Leavitt, 355 F. Supp. 2d 366, 369 (D.D.C. 2005) (citing Church of Scientology v. United States, 506 U.S. 9, 11 (1992)). Such intervening events—action to restore emails and confirm the integrity of the .pst file stores—preclude this Court from granting plaintiffs any relief here.

Accordingly, plaintiffs, who are not entitled to an order granting relief, have no entitlement to an order compelling the production of an administrative record to review their now-moot claims. See, e.g., Citizens Alert, 355 F. Supp. 2d at 369 (“[T]his Court has an “affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority.”). Plaintiffs cannot alter this conclusion by claiming a need for jurisdictional discovery, or by attempting to amend their counts alleging agency inaction to seek review of the “more recent agency action” which was never raised or challenged in the complaints. See Mot. to Compel [97] at 7-8 (regarding jurisdictional discovery); id. at 6 (“In other words, the defense is essentially that the consequences of agency inaction have been obviated by more recent agency action. But it is all agency action that is subject to review under the APA and on the basis of the administrative record.”). Unless plaintiffs can show that defendants’ proof of “agency action” is a “disputed issue of fact” necessary for the resolution of jurisdictional issues—possible only after defendants have been afforded the opportunity to file their proof and move to dismiss—no discovery or administrative record is appropriate. Indeed, based on the facts that defendants will establish, plaintiffs cannot make that showing. Plaintiff’s motion to compel the administrative record should be denied, or, in the alternative, stayed until the motion to dismiss is resolved.

BACKGROUND

I. Statutory Framework: Federal Records Act

The provisions of the FRA were enacted to establish “standards and procedures to assure efficient and effective records management.” 44 U.S.C. § 2902. Those standards and procedures were prescribed to attain “[a]ccurate and complete documentation of the policies and transactions of the Federal Government” and for the “[j]udicious preservation and disposal of records.” *Id.* § 2902(1), (5). Consistent with these goals, the head of each Federal agency is tasked to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency[.]” *Id.* § 3101. Balanced against these obligations, agency heads are charged with providing for “economical and efficient management of the records of the agency.” *Id.* § 3102. Accordingly, the FRA does not require an agency to “save ‘every scrap of paper,’” *Armstrong v. EOP*, 1 F.3d 1274, 1287 (D.C. Cir. 1993), but simply to preserve records “to the extent required to document the organization, functions, policies, decisions, procedures and essential transactions of the agency.” 36 C.F.R. § 1220.14 (2002) (emphasis added).

The reach of the FRA depends in part on whether a document is a “record” within the meaning of the FRA. 44 U.S.C. § 3301. Documentary materials are considered “records” subject to preservation when they meet two conditions: they are (1) “made or received by an agency . . . under Federal law or in connection with the transaction of agency business; and (2) are “preserved or are appropriate for preservation as evidence of agency organization and activities or because of the value of the information they contain.” *See* 36 C.F.R. § 1222.34(b).

To facilitate economical and efficient preservation of records, agency heads and the

Archivist of the United States are directed by the FRA to promulgate guidelines for disposal of non-records and schedules for records authorized for disposal. See 44 U.S.C. §§ 3302, 3303, 3303a. But the FRA does not demand absolute compliance with its prescriptions. Rather, as the D.C. Circuit has recognized “the determination of whether a variety of particular documents or computer entries are, in fact, records must be made by agency staff on a daily basis, and some innocent mistakes are bound to occur. Consequently, the fact that some record material may have been destroyed does not compel a finding that the guidelines are arbitrary and capricious.” Armstrong v. EOP, 924 F.2d 282, 297 n.14 (D.C. Cir. 1991). Indeed, Congress’s command to balance the economies of records management against the interest in preserving records does not permit any alternative conclusion. See, e.g., Rogers v. Peck, 199 U.S. 425, 436 (1905) (“Statutes should be given a reasonable construction with a view to make effectual the legislative intent in their enactment.”).

Nor does the FRA require agencies to maintain electronic recordkeeping systems to preserve federal records, or to operate recordkeeping systems like “ARMS” as plaintiffs contend. Public Citizen v. Carlin, 184 F.3d 900, 910 (D.C. Cir. 1999) (“[W]e do not think the Archivist must, under the RDA [which comprises part of the FRA], require agencies to establish electronic recordkeeping systems. Nor do we think it unreasonable for the Archivist to permit each agency to choose, based upon its own operational needs, whether to use electronic or paper recordkeeping systems.”), cert denied 529 U.S. 1003 (2000).

The FRA also incorporates enforcement mechanisms for the unlawful removal or destruction of records that should otherwise have been preserved. See, e.g., 44 U.S.C. § 3106. If the head of the agency becomes aware or has reason to believe any “actual, impending, or

threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency” has occurred, she, along with the Archivist, may “initiate action through the Attorney General for the recovery of records[.]” Id. Similarly, “[i]n any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.” 44 U.S.C. § 2905(a). The Archivist or the agency head need not, however,

initially attempt to prevent the unlawful action by seeking the initiation of legal action. Instead, the FRA contemplates that the agency head and Archivist may proceed first by invoking the agency's “safeguards against the removal or loss of records,” 44 U.S.C. § 3105, and taking such intra-agency actions as disciplining the staff involved in the unlawful action, increasing oversight by higher agency officials, or threatening legal action.

Armstrong, 924 F.2d at 296 n.12. This administrative scheme is exclusive; a court cannot itself order the recovery or retrieval of records that may have been removed or destroyed, but must instead rely on the detailed processes set forth in the FRA and initiated by the agency heads, Archivist and Attorney General. See Armstrong, 924 F.2d at 294 (“Because it would clearly contravene this system of administrative enforcement to authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records, we hold that the FRA precludes judicial review of such actions.”). Thus, relief under the FRA would trigger, at most, obligations for defendants to initiate action through the Attorney General, who would, in turn, determine what action was appropriate under the circumstances. 44 U.S.C. § 3106; see also Armstrong, 924 F.2d at 296. A court, therefore, cannot order the recovery or retrieval of any records.

II. SCOPE OF PLAINTIFFS' CLAIMS

On September 5, 2007, NSA filed an eight-count complaint, charging in the first four counts that defendants had failed their duties to initiate action through the Attorney General to preserve and restore FRA records allegedly missing “from the White House servers since March 2003 through the present.” NSA Compl. ¶¶ 36, 44-68. Specifically, in counts one and two, NSA alleges that defendants violated 44 U.S.C. §§ 2905 and 3106 by failing to “request that the attorney general initiate action or seek other legal redress to recover” emails allegedly deleted or missing from “White House servers.” NSA Compl. ¶ 18. Plaintiffs seek relief for the alleged “agency inaction” in the form of a declaratory order that defendants violated their statutory responsibility under the Federal Records Act and an injunctive order “compelling” defendants to “request that the attorney general initiate action, or seek other legal redress, to recover the deleted e-mails.” NSA Compl. ¶¶ 44-54. In counts three and four, NSA seeks a writ of mandamus ordering defendants to request the Attorney General to initiate action under 44 U.S.C. §§ 2905 and 3106 to recover the allegedly deleted or missing emails. NSA Compl. ¶¶ 61, 68.

In the latter four counts, NSA seeks to compel defendants to establish an “adequate archival system . . . for the archival and preservation of e-mails.” *Id.* ¶¶ 69-98. NSA contends specifically in counts five and six that defendants have failed install an “adequate system for preserving and archiving” federal records, thereby “harming [NSA] by denying it future access to these important historical documents.” NSA Compl. ¶¶ 74, 81. In counts seven and eight, NSA requests a writ of mandamus ordering defendants to comply with provisions of the FRA.

ARGUMENT

I. THE FIRST FOUR CLAIMS ARE MOOT AND NO ADMINISTRATIVE RECORD IS REQUIRED TO JUDICIALLY REVIEW THE MOOT CLAIMS

Plaintiff seeks production of an administrative record to permit the Court to review the merits of plaintiffs' first four "agency inaction" claims and to resolve any factual disputes. See Mot. to Compel [97] at 6-9. As described further below, however, defendants' actions since the inception of the case moot the claims and deprive this Court of subject matter jurisdiction to entertain them. Without a "live" dispute before it, the Court has no need for a record to review the claims before it, and indeed, cannot compel the administrative record in furtherance of reviewing or to award relief on the first four claims.

"Article III, section 2 of the Constitution limits federal courts to deciding 'actual ongoing controversies.'" Alliance for Democracy v. FEC, 335 F. Supp. 2d 39, 42 (D.D.C. 2004) (quoting 21st Century Telesis v. FCC, 318 F.3d 192, 198 (D.C. Cir. 2003)). Accordingly, "[e]ven where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Clarke, 915 F.2d at 701 (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). "Where intervening events preclude the Court from granting plaintiffs any effective relief, even if they were to prevail on their underlying claim, the Court must dismiss a suit as moot for want of subject matter jurisdiction." Citizens Alert Regarding the Environ. v. Leavitt, 355 F. Supp. 2d 366, 369 (D.D.C. 2005) (citing Church of Scientology v. United States, 506 U.S. 9, 11 (1992)). A "federal court has no power to render advisory opinions

[or] . . . decide questions that cannot affect the rights of the litigants in the case before them.” Nat’l Black Police Ass’n v. District of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997).

The mootness doctrine prohibits review of both injunctive and declaratory requests for relief, as plaintiffs seek here. “Where a plaintiff’s specific claim is moot and otherwise fully resolved, . . . [and] a plaintiff has made no challenge to some ongoing underlying policy, but merely attacks an isolated agency action, then the mootness of the specific claim moots any claim for declaratory judgment that the specific action was unlawful[.]” American Postal Workers Union v. United States Postal Serv., Civ. No. 06-726, 2007 WL 2007578 (D.D.C. July 6, 2007) (quoting City of Houston, Texas v. Dep’t of Housing & Urban Devel., 24 F.3d 1421, 1429 (D.C. Cir. 1994)); see also Fraternal Order of Police v. Rubin, 134 F. Supp. 2d 39, 41-42 (D.D.C. 2001) (“When a plaintiff attacks an isolated action, rather than an ongoing policy, ‘the resolution of the claim moots any request for declaratory relief.’”); Del Monte Fresh Produce Co. v. United States, 565 F. Supp. 2d 106, 110 (D.D.C. 2008).

Those established principles required dismissal of moot agency inaction claims in Alliance for Democracy v. Federal Election Commission. 335 F. Supp. 2d at 43. There, plaintiffs complained that the defendant agency, the Federal Election Commission, “failed to act or delayed in acting” as required by the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 437(g)(A)(8) (“FECA”). As here, FECA “allow[ed] for *limited judicial review* of whether the Commission’s ‘failure to act’ on an administrative complaint is ‘contrary to law.’” Id. at 43 (emphasis added); see also Armstrong, 924 F.2d at 295 (limited review under FRA). The court determined that the FEC had provided evidence that it had “completed all the actions delay of which could arguably be found ‘contrary to law’” under FECA, and because “the FEC has taken

action, so it can no longer be said to have failed to act.” Alliance for Democracy, 335 F. Supp. 2d at 43. Because FECA limited relief to an “order in which the court may declare . . . the failure to act is contrary to law and may direct the Commission to conform with such a declaration within 30 days,” “the order the Circuit court speaks of would be nothing more than an order directing the FEC to do what it has already done.” Id. The court dismissed the claims as moot and for want of subject matter jurisdiction. See also Lawal, 1996 WL 384917 at *2 (“Assuming that subject matter jurisdiction otherwise exists, it is lacking in the case at bar because plaintiffs’ action is moot. The only relief that the complaint sought was a judicial order that the INS act. The INS has acted.”); Johnson v. Philadelphia Housing Authority, Civ. No. 93-2296, 1995 WL 395950, *2 (E.D. Pa. June 29, 1995) (“Since the action plaintiff sought to be compelled – the issuance of regulations – has in fact been accomplished, any claim brought pursuant to 706(1) is now moot.”).

The same controlling principles compel the same result here.

As defendants will establish in their motion to dismiss, the Office of Chief Information Officer (“OCIO”) in the Office of Administration engaged in a deliberate effort—at serious expense in terms of time, money and resources—to address the concerns initially flagged in the 2005 review that grounds plaintiffs’ complaints. The 2005 review attempted to identify the number of e-mail messages archived in .PST files by various Executive Office of the President (“EOP”) components for dates ranging between January 1, 2003 and August 10, 2005, and concluded that 702 component days between January 1, 2003 and August 10, 2005 had “low” message counts in the EOP email system, including 473 component days had zero message counts.

Through a three-phased email recovery process, OCIO determined that the 2005 review was flawed and limited. For example, the OCIO discovered that the counting tool used for the 2005 review had a message count limit of 32,000 e-mail messages per day in a .PST file. But because large .PST files did contain more than 32,000 messages, the tool used for the 2005 review failed to “count” those messages and attribute them to components for specific days. Moreover, the 2005 review apparently relied on the name of the .PST file to allocate all of the individual e-mail messages contained within a file to the component named in the file, although a more precise tool developed by the OCIO in 2008 confirmed that e-mail messages within a .PST file were more accurately and precisely assigned to components based on message header information. The 2005 review also left approximately 10 million messages unallocated because the .PST file name could not be used for assignment of email messages, and relied on a “27-day rolling average” to statistically predict which days were “low,” though the approach failed to account for seasonal variations in the time-series data.

As a result of the technical limitations of the 2005 review, 14 million messages that existed in the EOP email system in 2005 were not counted in the 2005 review. Accordingly, the 2005 review presented inaccurate message counts, concluding that approximately 81 million messages existed in the EOP e-mail system in 2005 when, in fact, approximately 95 million e-mail messages were preserved in the EOP e-mail system. Those “14 million” messages were therefore never “missing,” but simply uncounted in the 2005 review. Through the email recovery process, OCIO was also able to allocate messages more precisely using a “PST Inventory Verification and Investigation Tool” that looked at message header information to associate individual messages with EOP components. Based on these more accurate counts, the

OCIO applied an “Auto-Regressive Integrated Moving Average” (“ARIMA”), a statistical approach used widely for large data pools with time-series components to determine which, if any, component days could be considered statistically low. Based on the analysis of the statistical model and additional email recovery process efforts, the OCIO concluded that 21 calendar days (covering 48 component days) could be considered statistically “low.”

OCIO, through contractors, restored data from disaster recovery back up tapes for those 21 calendar days and is currently de-duplicating and allocating the results of that recovery. The email recovery process has confirmed that: compared to the 2005 review concluding that 702 component days had problematic “low” message counts, OCIO’s email recovery process has identified that 48 component-days are potentially “low”; compared to the 473 “zero” message count days identified in 2005, OCIO has identified only 7 (and of those, only 4 were statistically problematic). Based on these results, OCIO engaged in the limited restoration of e-mail messages from the disaster recovery back-up tapes. In short, defendants have “initiated action” within the meaning of the FRA.¹ Because plaintiffs’ claims are moot, they must be dismissed and no administrative record should be produced to review those moot claims. At a minimum,

¹ Moreover, as the D.C. Circuit explained in Armstrong, too, the limited judicial review of “the agency head’s or Archivist’s refusal to seek the initiation of an enforcement action by the Attorney General” is to trigger the *administrative* and Congressional oversight provisions of the FRA. “Unless the Archivist notifies the agency head (and, if necessary, Congress) and requests the Attorney General to initiate legal action, the administrative enforcement and congressional oversight provisions will not be triggered, and there will be no effective way to prevent the destruction or removal of records.” Armstrong, 924 F.2d at 295. It is indisputable, however, that the Attorney General has been made aware of plaintiffs’ claims, see, e.g., Ex. 1 (Feb. 4, 2008 Letter from CREW to the Attorney General), or that the United States House of Representatives Committee on Oversight and Government Reform has been investigating plaintiffs’ claims. See id. (Ex. 2 (attached to letter) (January 17, 2008 Letter from Chairman Waxman to Counsel to the President)). Whatever notification would be ordered as relief on plaintiffs’ first four claims has evidently been accomplished.

this Court should stay the motion to compel production of the administrative record until the motion to dismiss is resolved.

II. PLAINTIFFS HAVE NOT ALLEGED AGENCY ACTION TO SEEK JUDICIAL REVIEW ON THEIR FIRST FOUR CLAIMS AND MAY NOT AMEND THEIR COMPLAINT TO ADD AGENCY ACTION REVIEW, WHICH IS FORECLOSED BY THE FEDERAL RECORDS ACT

Plaintiffs cannot evade the consequences of defendants' action on their agency inaction claims by reframing them in their brief as claims seeking review of agency action. As this court has made clear, the "allegations in the complaint, rather than the briefs, dictate what specific claims are before the court." Del Monte, 565 F. Supp. 2d at 110; see also Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) (holding that claims raised for the first time in an opposition to a dispositive motion are not properly before the court); Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996); Fisher v. Metro. Life Ins. Co., 895 F.2d 1073, 1078 (5th Cir. 1990); Arbitraje Casa de Cambio, S.A. v. United States Postal Serv., 297 F. Supp. 2d 165, 170 (D.D.C. 2003). Particularly where "plaintiffs are resisting a mootness claim . . . they must be estopped to assert a broader notion of their injury than the one on which they originally sought relief." Clarke, 915 F.2d at 703 (noting that without this limitation, "[t]he opportunities for manipulation are great").

Plaintiffs have made clear that they seek an order on their first four claims based on allegations of agency inaction. Thus, plaintiffs have claimed that

- "Despite having notice that over five million e-mail records have been deleted, the Archivist has neither assisted the EOP nor the heads of its component agencies such as the OA in initiating action through the Attorney General to recover e-mails, nor has the Archivist requested the Attorney General to initiate action after the failure of the EOP and its component agencies to act within a reasonable time." NSA Compl. ¶ 47.

- “By failing to restore the deleted e-mails, Defendant Archivist has violated his duty under 44 U.S.C. § 2905 to request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails, thereby harming Plaintiff by denying it future access to these important historical documents.” NSA Compl. ¶ 48; see also id. ¶ 60.
- “Plaintiff is therefore entitled to relief in the form of a declaratory order that Defendant Archivist is in violation of his statutory responsibility under 44 U.S.C. § 2905, and an injunctive order compelling Defendant Archivist pursuant to that statute to request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails.” NSA Compl. ¶ 49; see also id. ¶ 61.
- “By failing to restore the deleted e-mails, Defendants EOP and OA have violated their duty under 44 U.S.C. § 3106 to request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails, thereby harming Plaintiff by denying it future access to these important historical documents.” NSA Compl. ¶ 53; see also id. ¶ 67.
- “Plaintiff is therefore entitled to relief in the form of a declaratory order that Defendants EOP and OA are in violation of their statutory responsibility under 44 U.S.C. § 3106, and an injunctive order compelling Defendants EOP and OA pursuant to that statute to request that the Attorney General initiate action, or seek other legal redress, to recover the deleted e-mails.” NSA Compl. ¶ 54; see also id. ¶ 68.

Further, in their prayer for relief, plaintiffs have requested that the Court “declare the *inaction* of all defendants to restore deleted e-mail records a violation of federal law” and seek an “order, in the form of injunctive and mandamus relief, all defendants to restore deleted e-mails from the back-up tapes and to maintain and preserve the federal and presidential records comprised therein.” Id. at 27 (emphasis added). Plaintiffs cannot therefore diverge from the scope of its complaint to reframe the controversy as a broader request for review of agency action. See Mot. to Compel [97] at 6 (“To the contrary, Defendants allege they are now taking action sufficient to bring them into compliance with the FRA – compliance which the Plaintiff disputes. Thus, if the Archive prevails, the Court may still issue effective injunctive relief. In other words, the defense is essentially that the consequences of agency inaction have been obviated by more recent

agency action. But it is all agency action that is subject to review under the APA and on the basis of an administrative record.”).

This is particularly so in light of the limitation of review under the Federal Records Act. As the D.C. Circuit has made clear, the “FRA contains a prescribed method of action” when allegations arise that an agency is not retaining records: “it requires the agency head, in the first instance, and then the Archivist to request that the Attorney General initiate an action to prevent the destruction of documents, thereby precluding private litigants from suing directly to enjoin agency actions in contravention of agency guidelines.” Armstrong, 924 F.2d at 294. Because private actions to seek restoral of records “would clearly contravene th[e] system of administrative enforcement” set forth in the FRA, the D.C. Circuit has instructed that the FRA does not “authorize private litigants to invoke federal courts to prevent an agency official from improperly destroying or removing records[.]” Id. The limited claim permitted under the FRA for alleged disposal violations is “to permit judicial review of the agency head’s or Archivist’s refusal to seek the initiation of an enforcement action by the Attorney General.” Id. That limited review “reinforces the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions will operate as Congress intended.” Id.

Notwithstanding the bar on amending plaintiffs’ agency inaction claims now, any attempt to amend the claims to seek judicial review of defendants’ administrative actions is precluded by the FRA itself. At bottom, any request for review of defendants’ actions would amount to an impermissible attempt to “invoke the federal courts to prevent an agency official from improperly destroying or removing records.” Armstrong, 924 F.2d at 294. Accordingly,

plaintiffs are not entitled to an administrative record to review “more recent agency action.” Mot. to Compel [97] at 6.

III. JURISDICTIONAL DISCOVERY DOES NOT SUPPORT PRODUCTION OF AN ADMINISTRATIVE RECORD ON PLAINTIFFS’ AGENCY INACTION CLAIMS

Finally, plaintiffs suggest that “production of the administrative record” is, “in the first instance,” appropriate for jurisdictional discovery. Mot. to Compel [97] at 8-9. But, absent review of the evidence that defendants provide first, plaintiffs and the Court cannot predict whether additional evidence will be necessary to resolve any disputed issues. Indeed, it cannot be known whether any disputed issues will persist after defendants file their motion to dismiss at all. And whatever the scope of the dispute, it is unlikely that an “administrative” record going to the agency inaction claims would be required to resolve any dispute. When a movant, as defendants, “challenges the factual basis for jurisdiction, the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant, but must go beyond the pleadings and resolve *any disputed issues of fact the resolution of which is necessary to a ruling* upon the motion to dismiss.” Erby v. United States, 424 F. Supp. 2d 180, 183 (D.D.C. 2006) (emphasis added). Only “disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss” could warrant any discovery, if necessary, which would be different in kind and scope from an administrative record on the first four claims. Id. At a minimum, plaintiffs should review defendants’ evidence that their first four claims are moot before seeking any jurisdictional discovery. Plaintiffs’ motion to compel the administrative record should be denied.

* * *

On the latter four claims, defendants have committed to providing an administrative record of the standards, procedures and guidelines with respect to the management of federal records among the EOP FRA components. Given the imminent change in Administration, judicial economy and efficiency may be served, too, by providing time for the new Administration to review whether it intends to implement any changes to management of federal records within the Executive Office of the President. Nonetheless, defendants will produce an administrative record on the latter four claims when they move for summary judgment.

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CONCLUSION

For the foregoing reasons, plaintiff's motion compel production of the administrative record should be denied.

Respectfully submitted this 15th day of January, 2009.

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