UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1 & JOHN DOE 2, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civil Action No. 17-2694 (ABJ)

ORDER

Citizens for Responsibility and Ethics in Washington ("CREW") and Anne Weismann (collectively "CREW") seek to intervene in this action as a matter of right under Federal Rule of Civil Procedure 24(a)(2). Mot. to Intervene by CREW and Mem. of P. & A. in Supp. [Dkt. # 22] ("CREW's Mot."). The case concerns whether defendant, the Federal Election Commission, may make the names of plaintiffs, John Does 1 and 2, public as part of its release of its investigative file for Matter Under Review ("MUR") 6920. CREW claims a right to intervene because it filed the administrative complaint that initiated MUR 6920. CREW's Mot. at 1–2. Both plaintiffs and defendant oppose CREW's motion, Pls.' Mem. in Opp. to CREW's Mot. [Dkt. # 33] ("Pls.' Opp."); Def. FEC's Opp. to CREW's Mot. [Dkt. # 35] ("Def.'s Opp."), and this matter is fully briefed. *See* Reply in Supp. of CREW's Mot. [Dkt. # 41] ("CREW's Reply"). For the reasons set forth below, the Court will deny the motion, but will allow CREW to file an amicus curiae brief of no more than ten pages by February 12, 2018.

I. FACTUAL BACKGROUND

In February 2015, CREW filed an administrative complaint concerning a $1.71 million contribution to a political action committee, Now or Never PAC, which CREW alleged had been made by an unknown contributor to American Conservative Union and passed through to the PAC. *See* CREW's Mot. at 2–3 (alleging the contribution violated 52 U.S.C. § 30122, which prohibits making political contributions in the name of someone other than the true contributor). The Federal Election Commission ("FEC" or the "Commission") initiated an investigation, MUR 6920, and in November 2017, it notified CREW that American Conservative Union, Now or Never PAC, and a third entity, Government Integrity, LLC, agreed as part of a conciliation agreement with the agency to pay a $350,000 civil penalty in connection with the matter. CREW's Mot. at 3. The conciliation agreement concluded the FEC investigation, and the FEC closed MUR 6920. *See* 52 U.S.C. § 30109(a)(4)(A)(i).

Pursuant to its regulations and policy, the FEC makes specific materials in its investigative files public after concluding an enforcement matter. *See* 11 C.F.R. § 111.20(a). The regulations require it to make the file public within thirty days of notifying the complainant and respondents that the matter has been terminated. *Id.* Plaintiffs' names and other identifying information appear in the MUR 6920 file, and they asked the FEC to redact their identities from the file before publishing it. *See* Compl. [Dkt. # 12]. When the FEC declined to do so, plaintiffs filed this action on December 18, 2017, seeking to enjoin the agency from releasing their names. *See* Compl. ¶ 2. In light of the thirty-day deadline for the agency to publish the enforcement file, the parties agreed that the FEC would publish the file with plaintiffs' identities redacted, pending a decision in this case. *See* Min. Order. (Dec. 18. 2017); *see also* Def. FEC's Notice [Dkt. # 20] (notice of publication).

On December 20, 2017, CREW filed a Freedom of Information Act ("FOIA") request with the FEC, requesting the unredacted administrative record for MUR 6920. CREW's Mot. at 4. On January 12, 2018, the FEC denied the FOIA request; although it was of the view that the information should be released to CREW under FOIA, it withheld release in light of its agreement to await ruling in this case. *See* Def.'s Opp. at 3, 7.

Separately, on December 22, 2017, CREW filed suit against in the FEC under 52 U.S.C. § 30109(a)(8), a provision of the Federal Election Campaign Act which allows a party "aggrieved by an order of the Commission dismissing a complaint filed by such party" to seek judicial review. *CREW v. FEC*, No. 17-2770-ABJ (D.D.C. Dec. 22, 2017), Compl. [Dkt. # 1] ("CREW's Compl.").[1] CREW's lawsuit challenges the votes of three Commissioners against finding "reason to believe the John Doe Trust and John Doe Trustee violated" federal election law, and the agency's dismissal of MUR 6920 without identifying "the true source" of the $1.7 million contribution. CREW's Compl. ¶¶ 38, 44.

II. STANDARD OF REVIEW OF MOTIONS TO INTEREVE BY RIGHT

Rule 24(a)(2) requires a court to permit intervention on a timely motion to anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

1 CREW's lawsuit is also pending before this Court.

III. CREW DOES NOT SATISFY THE REQUIREMENTS TO INTERVENE AS OF RIGHT.

Courts in this Circuit apply a four-prong test when deciding motions to intervene as of right: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008), quoting *SEC v. Prudential Sec. Inc.*, 136 F.3d 153, 156 (D.C. Cir. 1998) (calling these the "four prerequisites to intervene as of right"). The Court holds that CREW's motion satisfies the first prerequisite to intervene as of right but not the other three.

A. CREW's motion was timely.

Plaintiffs assert that CREW's motion is untimely and that allowing it to intervene now will cause undue delay since briefing on the merits is complete. Pls.' Opp. at 2–3. The Court disagrees, and it will not predicate its denial of the motion on this basis.

The timeliness requirement "is aimed primarily at preventing potential intervenors from unduly disrupting litigation, to the unfair detriment of the existing parties." *Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (citation omitted); *see also WildEarth Guardians v. Jewell*, 320 F.R.D. 1, 3 (D.D.C. 2017) (discussing prejudice as a factor in determining whether motion was timely). But granting CREW's motion at this time would not prejudice any parties.

Plaintiffs' motion for a temporary restraining order necessitated an expedited schedule for this case, *see* Fed. R. Civ. Pro. 65(b), but the need for expedition has been alleviated. The FEC's obligation to publish the MUR 6920 file within thirty days of notice has been addressed with the publication of a redacted version of the file pending a ruling in this case. *See* Min. Order (Dec. 18, 2017). The redaction of the names rendered plaintiffs' motion for a temporary restraining

order moot, and their motion for a preliminary injunction has been merged with the merits of the case. *Id.* Plaintiffs' interest are fully protected no matter how long it takes to decide the case.

Finally, the Court notes that the parties have filed a succession of supplemental pleadings that extended the briefing on the merits after CREW had filed its motion to intervene. *See* Def.'s Surreply [Dkt. # 37]; Pls.' Response to Surreply [Dkt. # 42]. The Court needs time to review all of these briefs and write its opinion in any event. Since the Court can consider arguments submitted by CREW along with the rest of the pleadings, it finds that the request to intervene is not untimely and that no party will prejudiced by CREW's arrival on the scene. But CREW has not satisfied the other requirements to intervene as of right.

B. CREW has not demonstrated a legally protected interest in this case, which this case threatens to impair.

The second and third requirements to intervene by right require CREW to show a legally protected interest in the case, which the case threatens to impair. *See Karsner*, 532 F.3d at 885. This litigation concerns just one issue: the FEC's disclosure requirements and the application of those requirements to plaintiffs. Plaintiffs are asserting both a privacy interest and a First Amendment interest in their anonymity, and the FEC is advancing the public's right to know their identities. *See* Pls.' Mot. for TRO [Dkt. # 13]; Def.'s Response to Mot. for TRO [Dkt. # 16]; Def.'s Surreply. Since CREW is also seeking to vindicate the public's right to the same

information,[2] and it has failed to identify a legally protected interest of its own that is at stake, intervention as of right will be denied.

CREW acknowledges that the disclosure rules "benefit the public as a whole," CREW's Mot. at 6, but it also asserts its own more narrow interest: the organization claims a statutory right "to know precisely what plaintiffs seek to conceal – the source of the $1.71 million contribution"[3] and "to seek judicial review of the FEC's failure to take enforcement action against the funders of the $1.71 million contribution to Now or Never PAC." CREW's Mot. at 5, 7. But CREW is already seeking judicial review of that alleged failure in its own case, and the outcome of this litigation will not impair its ability to pursue that action in any way.

The Court notes at the outset that CREW's argument that its statutory right to know the source of the $1.71 million constitutes its interest in this case assumes that the Doe plaintiffs were in fact the source of the contribution. But this is not what CREW alleged in its lawsuit against the FEC. *See* CREW's Compl. ¶¶ 3, 4 (alleging that the agency's failure to "conclude whether the John Doe Trust . . . or whether *some other entity or entities*" are the unknown respondents in its

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2 "CREW is committed to protecting the right of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, protecting our political system against corruption, and reducing the influence of money in politics. . . . To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information about public officials and their actions, and the outside influences that have been brought to bear on those actions. . . . Publicizing violations of the FECA and filing complaints with the FEC service CREW's mission of keeping the public, and voters in particular, informed about individuals and entities that violate campaign finance laws." CREW's Compl. ¶¶ 7, 8, 10.

3 CREW also asserts a right to know the identity of anyone who acted as a conduit for the contribution. CREW's Reply at 4.

administrative complaint is contrary to law) (emphasis added); *id.* ¶ 43 (alleging the investigation did not confirm whether the trust was the true source or if the contribution "originated elsewhere").

Moreover, the issue to be resolved in this case is whether the FEC is authorized to disclose plaintiffs' identities as part of its public release of the bulk of the MUR 6920 file. The question of who may have served as the "true source" of the contribution is a different question, and CREW's own lawsuit asks whether the FEC was statutorily obligated to find that out. *See* CREW's Compl. ¶ 46 (seeking a declaration that the FEC violated the statute by not determining the true source of the contribution and an order for the agency to conform to the declaration).

CREW asserts that a ruling in plaintiffs' favor here would make it "exceedingly difficult" for it to prosecute its lawsuit against the FEC, CREW's Mot. at 9, and prevent it "from ever learning [plaintiffs'] identities." CREW's Reply at 5. But CREW has not demonstrated how a decision in this case could impair its ability to challenge the FEC's resolution of its administrative complaint. CREW does not explain why it would be more difficult to debate the legal issues it has raised using pseudonyms, and it has not shown that a ruling for plaintiffs in this case would preclude a later determination in the CREW case that more disclosure is required.[4]

CREW argues that allowing it to intervene in this case would be consistent with cases granting FOIA requesters intervention in reverse FOIA cases. CREW's Mot. at 9. A reverse FOIA case is an action in which a person whose information is about to be disclosed pursuant to FOIA seeks to enjoin the government from disclosing the information. *Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008). But while plaintiffs have cited FOIA case

4 To be sure, a ruling in the FEC's favor in this case would prevent any dispute about whether plaintiffs' identities would need to be redacted in the administrative record in CREW's lawsuit. But a decision in plaintiffs' favor here is not determinative of whether CREW's may obtain that information in its lawsuit.

law in various pleadings, they are relying on the language of the Federal Election Campaign Act, and this is not a reverse FOIA case. The decision here will turn on different legal principles, *see AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) (holding that the fact that the FEC "redacts information falling under one or more FOIA exemptions is no answer, since the Freedom of Information Act does little to protect the First Amendment interests at issue"), and CREW's rights under FOIA may be adjudicated in its own FOIA proceedings.

In sum, the Court holds that CREW does not have a legally protected interest that this action threatens to impair. At bottom, CREW's interest is the public's interest in having the FEC comply with its disclosure requirements under the law. This important but general public interest alone does not provide CREW grounds to intervene in this case. *See Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 149–50 (1967) ("It has been the consistent policy of this Court to deny intervention to a person seeking to assert some general public interest in a suit in which a public authority charged with the vindication of that interest is already a party."); *Envtl. Def. Fund, Inc. v. Costle*, 79 F.R.D. 235, 243 (D.D.C.), *aff'd*, 12 E.R.C. 1255 (D.C. Cir. 1978) (holding that intervention should be denied to entities seeking to "represent general interests shared by the entire populations of the intervening states"). The Court will deny CREW's motion to intervene for this reason.

C. The FEC is an adequate representative of CREW's interests.

The Court will also deny the motion because it finds that the FEC can adequately represent CREW's interest in this case. Courts in this Circuit have found that this requirement has been established in cases where the government's and the intervenor's interests may diverge during the course of litigation or if the intervenor's individual interests in the matter are narrower than those of the government. *See e.g., Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir.

2003); *id.* at 736 n.9 (listing cases). While the standard for meeting this requirement is "not onerous," *Fund for Animals*, 322 F.3d at 735, quoting *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986), it is not satisfied when "it is clear that the party will provide adequate representation for the absentee." *United States v. AT&T*, 642 F.2d 1285, 1293 (D.C. Cir. 1980). "Adequacy of representation must be assessed in relation to the specific purpose that intervention will serve" in the specific case at hand. *Id.*

CREW argues that because it is adverse to the FEC in its section 30109 lawsuit, the FEC cannot adequately represent CREW's interests here. CREW's Mot. at 11. But this argument is unpersuasive because on the matter at issue in this case, CREW's position is identical to that of the agency, and the FEC has been adamant in its position that the disclosure of plaintiffs' names is consistent with the Federal Election Campaign Act and the Constitution. CREW also posits that the agency is unlikely to appeal if plaintiffs prevail, and it suggests that this is another reason the FEC cannot be depended upon to represent its interests. CREW's Mot. at 12 (asserting that "it appears that the FEC has not appealed a district court judgment" in more than ten years). But this is a speculative concern; the FEC observes that many adverse district court decisions are not appealed because they are resolved on remand, and it points out that the specific disclosure policy being defended here was adopted by a unanimous vote of the Commission. Def.'s Opp. at 9–10.

CREW relies on *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312 (D.C. Cir. 2015) in support of its position, CREW's Mot. at 10–12, but *Crossroads* does not apply. In that case, Public Citizen filed an administrative complaint with the FEC against Crossroads Grassroots Policy Strategies. When the FEC dismissed the administrative complaint, Public Citizen sued and Crossroads moved to intervene as of right. 788 F.3d at 315. The district court held that the FEC could adequately represent Crossroad's interests because their interests were aligned in defending

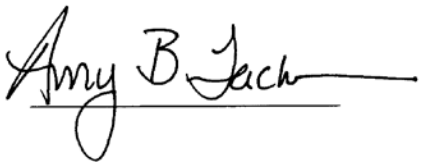
the legality of the FEC's dismissal order. 788 F.3d at 321. The Circuit Court reversed, holding that the district court applied the wrong legal standard by "treating general alignment as dispositive." *Id.* It found that even though the FEC and Crossroads agreed on the dismissal of the administrative complaint, they had different interests, because "they disagree[d] about the extent of the Commission's regulatory power, the scope of the administrative record, and post-judgment strategy." *Id.* The issues in that case involved "the under-enforcement of federal law and the authority of the FEC," and if Public Citizen prevailed, the FEC "could seek to regulate Crossroads directly and immediately." *Id.*

This case is easily distinguishable. It does not address the legality of the dismissal of CREW's complaint (CREW's lawsuit does), and CREW is not regulated by FEC. CREW and the FEC agree that the agency's policy requires disclosure, not only in this case but generally. *See* CREW's § 30109 Compl. ¶ 8 (explaining that CREW educates voters by "exposing the special interests" that influenced elections and elected officials). And unlike in *Crossroads*, the outcome of this case will impose no direct consequences to CREW, either in enforcing its rights under section 30109, FOIA, or otherwise. CREW has made clear that "the specific purpose that intervention will serve," *AT&T*, 642 F.2d at 1293, is to exercise its rights under section 30109 and FOIA. CREW's Mot. at 5–10. As explained above, the outcome of this case will not determine CREW's exercise of those rights, and CREW's interest in the case is a general public interest, which the FEC's is fully capable of representing. *See Fund for Animals*, 322 F.3d at 737 (D.C. Cir. 2003), quoting *Dimond*, 792 F.2d at 192–93 (holding that the government "is charged by law with representing the public interest of its citizens" and "would be shirking its duty were it to advance [a] narrower interest at the expense of its representation of the general public interest"). The specific purpose that intervention by CREW would serve does not warrant a finding that the

agency cannot adequately represent CREW's interest here. CREW's interest is not sufficiently different from the FEC's that its interest will not be adequately represented by the FEC in this case.

CONCLUSION

For the reasons stated above, movants' motion to intervene is DENIED. Movant is permitted to file an amicus brief by February 12, 2018.



AMY BERMAN JACKSON
United States District Judge

DATE: January 31, 2018