IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON	)	
and	)	
ANNE L. WEISMANN	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 17-cv-02770 (ABJ)
FEDERAL ELECTION COMMISSION	)	
Defendant,	)	
JOHN DOE 1	)	
and	)	
JOHN DOE 2	)	
Proposed Intervenor-Defendants	)	

PROPOSED INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION OR PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT

As proposed Intervenor-Defendants in this case,[1] John Doe 1 and John Doe 2 (together, "John Does"), by and through undersigned counsel, respectfully submit this memorandum of

[1] John Doe 1 and John Doe 2 filed a Motion to Intervene on March 1, 2018, *see* Dkt. 11, which is still pending before this Court. Given that the filing of Plaintiffs' present motion – which bears directly on the central question in this litigation – precedes this Court's ruling on the Motion to Intervene, John Does respectfully request that the Court adjudicate the pending Motion to Intervene first. Moreover, Plaintiffs' motion is premature. The certified list of the contents of the administrative record is not due until thirty days after the FEC serves its responsive pleading, assuming that it files an answer and not a motion to dismiss that is not based on the content of the

points and authorities in opposition to the motion by Citizens for Responsibility and Ethics in Washington and Anne Weismann (collectively, "CREW") for clarification or a protective order ("Plaintiffs' Motion"). *See* Dkt. 10.

Plaintiffs' Motion represents a transparent effort to circumvent the agreement that John Does and the Federal Election Commission ("FEC") entered into, with this Court's approval, in the related case *John Doe 1, et al. v. FEC*, No. 17-cv-2694-ABJ (the "Related Litigation"). This Court had pending before it at that time a motion by John Does for a temporary restraining order, which was rendered moot only because the FEC and John Does voluntarily agreed that, until further order of the Court, the FEC would redact John Does' names and other identifying information from the investigative file in Matter Under Review ("MUR") 6920. *See* Minute Order, *John Doe 1, et al. v. FEC*, No. 17-cv-2694-ABJ (D.D.C. Dec. 18, 2017). Release of the full administrative record in the instant action, whether subject to a protective order or not, will result in the disclosure of John Does' identities to members of the public (Plaintiffs)—the very issue that occasioned the motion for temporary restraining order, and which is currently under dispute in the Related Litigation. To grant the "clarification" sought here by Plaintiffs will render John Does' agreement with the Commission meaningless, and necessitate a renewal of John Does' motion for a temporary restraining order in the Related Litigation. Contrary to Plaintiffs' assertion that this

administrative record. *See* LCvR 7(n)(1). Plaintiffs should not be permitted to avoid a response from John Does, who are real parties in interest to the disclosure CREW seeks, by filing their premature motion for "clarification" of the administrative record before this Court has ruled on the John Does' timely motion to intervene. John Does' Opposition to the pending Motion for Clarification or, in the Alternative, a Protective Order as prospective intervenors is proper, because John Does asserted their interest in protecting their identities from disclosure in the instant action as an independent ground supporting their motion to intervene. *See* Dkt. 11 at 7-8. John Does' Opposition is critical to effectuating that interest and is consistent with the relief sought in their motion to intervene. In the alternative, John Does respectfully request that the Court consider this Opposition as a motion to intervene for purposes of opposing Plaintiff's Motion.

clarification will *avoid* the waste of judicial resources, this motion is itself a collateral effort to re-litigate an issue this Court has already resolved.

Plaintiffs suggest they need relief in the instant matter urgently to avoid seeking an appeal in the Related Litigation to protect their alleged rights. *See* Pls.' Mot. for Clarification or, in the Alternative, a Protective Order 2 (Feb. 27, 2018) [Dkt. 10]. But in denying Plaintiffs' motion to intervene in the Related Litigation, this Court expressly held that Plaintiffs' rights would be adequately represented by the Commission. *See* Order 8-11, *John Doe 1, et al.*, No. 17-cv-2694-ABJ (Jan. 31, 2018) [Dkt. 44]. Moreover, Plaintiffs could not receive the relief that they seek here through their intervention motion in the related case: even if Plaintiffs successfully intervene, they will not learn John Does' identities absent a ruling by this Court on the merits. Thus, Plaintiffs' motion here merely represents an unnecessary and premature attempt to make an end-run around the pending Related Litigation, and this Court's ruling denying Plaintiffs' motion to intervene in that case. This attempt also takes the form of a particularly odd request—asking the Court to clarify what another *party* – the FEC – meant by its prior representations to this Court and the John Does. To the extent Plaintiffs are unclear on the impact and meaning of the Commission's statement, Plaintiffs can simply look to the FEC's response to their FOIA request. *See* Reply in Supp. Mot. to Intervene, Ex. 1, FOIA Denial, *John Doe 1, et al.*, No. 17-cv-2694-ABJ (Jan. 31, 2018) [Dkt. 41-1] ("Pursuant to an order of the district court, entered December 18, 2017, the Commission is currently barred from publishing an unredacted version of the investigative materials in MUR 6920 it would otherwise disclose on the public record. We must therefore deny your request under the district court's order." (internal citation omitted)).

Moreover, Plaintiffs' assertion that it is entitled to an unredacted copy of the administrative record pertaining to MUR 6920 is also unfounded. While a reviewing court in an APA case should

consider the full administrative record, courts routinely recognize that redactions to the record may be necessary for various reasons (such as privacy or confidentiality), and confidential information in the record may be withheld even from parties to a case. *See, e.g.*, *Ranbaxy Labs., Ltd v. Burwell*, 82 F. Supp. 3d 159, 163 n.3 (D.D.C. 2015) (noting that "[p]ortions of the [Administrative Record] in this matter contain confidential or sensitive information, which portions are unavailable to the public and, in some cases, to one or more of the parties to this case."); *Pub. Emps. for Envtl. Responsibility v. Beaudreau*, No. 10-cv-1067, 2012 WL 12942599, at *7 (D.D.C. Nov. 9, 2012) (redactions for personal information such as personal e-mail addresses and cell phone numbers "were proper as long as the redacted information was not 'directly or indirectly considered by agency decision-makers' during the challenged decisions."). Local rules even *require* the exclusion or redaction from all filings of certain personal identifiers. *See* LCvR 5.4(f). Plaintiffs misunderstand the purpose of the APA's "whole record" requirement. *See* 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party"). Courts must review the full administrative record because reviewing less than the full record "might allow a party to withhold evidence unfavorable to its case." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). The redaction of John Does' names here in no way impairs the Court's ability to review or evaluate the administrative record, or Plaintiffs' legal arguments stemming therefrom, because John Does' identities are, in fact, already known to the Court.

Further, Plaintiffs have offered no basis whatsoever as to why John Does' identities are important or necessary in order for Plaintiffs fairly to litigate their action under 52 U.S.C. § 30109(a)(8). The redaction of names and contact information does not impede a party's ability to challenge an agency's basis for a decision or a court's ability to meaningfully review it where "the context of a . . . document is often quite clear from reading the documents." *See Pharm. Research*

& Mfrs. of Am. v. FTC, 790 F.3d 198, 210-11 (D.C. Cir. 2015). The impediment is even smaller where the individual has already relied on the documents in formulating its challenge. *Id*. at 211 (emphasizing from appellee's brief that "[n]ot only is the [redacted] database publicly available, but [appellant] itself *actually used it* in formulating its comments on the Rule" (emphasis in original) (citation omitted)). In the Related Litigation, this Court already has acknowledged that the redacted record in MUR 6920 is sufficient for Plaintiffs to challenge the FEC's allegedly unlawful dismissal of any portion of their complaint. *See* Order at 7, *John Doe 1, et al.*, No. 17-cv-2694-ABJ (Jan. 31, 2018) [Dkt. 44] ("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 . . . .").

Contrary to Plaintiffs' repeated mischaracterizations, John Does are not now, nor have they ever been, respondents to MUR 6920. As non-respondent, third-party witnesses in an FEC investigation, John Does have substantial and protectable privacy interests prohibiting disclosure of their identities to the public.[2] As previously briefed, the Commission has no lawful basis for disclosing John Does' identities, and disclosure of John Does' names is forbidden by FECA, FOIA, and the categorical rule against disclosure of the identities of witnesses, subjects, and others in law enforcement files. *See* Pls.' Emergency Mot. for TRO & Prelim. Inj. at 6-13, *John Doe 1, et al.*, No. 17-cv-2694-ABJ (Dec. 19, 2017) [Dkt. 13]; Pls.' Reply in Supp. of Mot. for Prelim. Inj. at 10-15, *John Doe 1, et al.*, No. 17-cv-2694-ABJ (Jan. 3, 2018) [Dkt. 25]. Notwithstanding the general rule that a court is to review the "whole record," an agency may not release an administrative

[2] The issue of John Does' interests in non-disclosure of their identities has been extensively briefed in the Related Litigation, and due to this Court's familiarity with the issue, we do not reprise these arguments here.

record that contains information required to be withheld under statute. *Cf. Serono Labs., Inc. v. Shalala*, 35 F. Supp. 2d 1, 3-4 (D.D.C. 1999) (holding that a statutory obligation to protect trade secrets required agency to purge administrative record of trade secrets before filing record for review by anyone else, and rejecting the possibility of a protective order because "a protective order restricting access to those secrets cannot excuse the [agency] from fulfilling its statutory obligation"). Any protective order, however drafted, will be insufficient to protect John Does' privacy rights because disclosure of their identities is prohibited by statute and is the very subject of the dispute in the Related Litigation. *Cf. In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 4 n.6 (D.D.C. 2012) (allowing an intervenor to anonymously move to quash a grand jury subpoena for records pertaining to his identity, explaining that "in this case, [the movant's] identity is unknown to the government or the grand jury, and it is that very anonymity that is the subject of the dispute").

The Plaintiffs have proposed in the alternative a particularly porous protective order that would allow Plaintiffs to disclose and use John Does' identities freely in any litigation related to the facts of MUR 6920. *See* [Proposed] Protective Order ¶¶ 3, 6 (Feb. 27, 2018) [Dkt. 10-1]. This is precisely the harm that John Does seek to avoid in this and the Related Litigation. One of Plaintiffs' primary activities is engaging in "aggressive legal action," *see Who We Are: About Us*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, https://www.citizensforethics.org/who-we-are/ (last accessed Mar. 8, 2018), virtually assuring that John Does' identities will be used in future litigation, all without running afoul of the terms of Plaintiffs' proposed protective order. Further, the proposed order would allow Plaintiffs to distribute this information to any third party pursuant to a subpoena, handing off any responsibility to refuse to comply to the FEC, which will have no interest in or incentive to quash a subpoena at

its own expense. *See* [Proposed] Protective Order ¶ 9 (Feb. 27, 2018) [Dkt. 10-1]. A protective order—particularly one as feeble as Plaintiffs propose—cannot possibly be expected to protect the interests at stake here.

For the reasons stated above, Plaintiffs' Motion for Clarification or, in the Alternative, a Protective Order should be denied.

March 13, 2018

Respectfully submitted,

/s/ William Taylor, III
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2018, I served the foregoing papers on all counsel of record in this case by filing them in the Court's electronic filing system, which served these same papers on counsel of record.

/s/ Kathleen Cooperstein
Kathleen Cooperstein