UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 17-2770 (ABJ)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION TO MOTION FOR CLARIFICATION
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, A PROTECTIVE ORDER

Defendant Federal Election Commission ("FEC" or "Commission") opposes Citizens for Responsibility and Ethics in Washington ("CREW") and Anne Weismann's (collectively, "plaintiffs") motion for clarification or, in the alternative, a protective order (Docket No. 10) ("Pls.' Mot. for Clarification"). Plaintiffs ask for clarification regarding the scope of the record of Commission proceedings on plaintiffs' administrative complaint that will be before the Court. Specifically, they seek an immediate determination whether the identities of two persons evaluated during the course of the Commission's underlying investigation will be redacted.

The Court should deny plaintiffs' request for several reasons. First, this request is premature, as plaintiffs make their request in advance of the Commission's responsive pleading deadline and thus prior to the intended filing of a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. The proper course is to resolve such a jurisdictional motion first. A ruling in the Commission's favor would entirely moot plaintiffs' request. Moreover, the Commission's anticipated motion to dismiss is based entirely on the plaintiffs'

complaint; therefore, reference to an administrative record is unnecessary. Second, plaintiffs have provided no sound justification for expediting this Court's determination regarding the scope of the administrative record. Plaintiffs' sole rationale for a decision at this time is that the Court's determination as to the scope of the administrative record is intertwined with their decision to appeal the Court's denial of their motion for intervention in a different suit. A decision that plaintiffs might view as adverse in that suit is not, however, dispositive regarding the scope of the administrative record in this case. Plaintiffs' decision whether to appeal the intervention denial in the other litigation thus should not dictate the case schedule here. As such, plaintiffs' motion for clarification should be denied.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The Commission

The Commission is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA" or "Act"). Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); to investigate possible violations of FECA, *id.* § 30109(a)(1)–(2); and to "have exclusive jurisdiction with respect to the civil enforcement of" FECA, *id.* § 30106(b)(1). FECA requires that the Commission make most decisions by majority vote and, for certain decisions including whether to go forward with enforcement proceedings, that it do so with "the affirmative vote of 4 members of the Commission." *Id.* § 30106(c).

B. FECA's Administrative Enforcement and Judicial Review Provisions

FECA provides that "[a]ny person who believes a violation . . . has occurred, may file a complaint with the Commission" alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). The filing of an administrative complaint initiates a multiple-step administrative process to determine whether any civil FECA violations have occurred. Upon receiving a complaint, the Commission must notify any person alleged in the complaint to have committed a FECA violation (*i.e.*, the "respondent") and provide fifteen days for a response. *Id.* § 30109(a)(3). After considering the complaint and any response, the Commission must then determine — by an affirmative vote of four Commissioners — whether to find there is "reason to believe" that the respondent has committed a violation of FECA and conduct "an investigation of such alleged violation." *Id.* § 30109(a)(2).

If the Commission conducts an investigation, it must then determine whether there is "probable cause to believe" that a FECA violation has occurred — a determination that also requires an affirmative vote of at least four Commissioners. 52 U.S.C. § 30109(a)(4)(A)(i). After a finding of probable cause to believe that the respondent has committed a FECA violation, the Commission is statutorily required to "attempt, for a period of at least 30 days," but "not more than 90 days," to "correct or prevent such violation by informal methods of conference, conciliation, and persuasion." *Id.* To be accepted by the Commission, any conciliation agreement requires the affirmative vote of at least four Commissioners. *Id.* If the Commission is unable to reach a conciliation agreement, FECA authorizes — also with the support of four votes — the FEC to institute a de novo civil enforcement action in federal district court. 52 U.S.C. § 30109(a)(6)(A).

If at any point the Commission decides to dismiss an administrative complaint, FECA permits "[a]ny party aggrieved" by such an order to file suit in this District against the Commission to obtain judicial review of the dismissal decision. *Id.* § 30109(a)(8)(A).

II. FACTUAL BACKGROUND

A. Matter Under Review 6920

On February 27, 2015, plaintiffs filed with the Commission an administrative complaint against the American Conservative Union ("ACU"), Now or Never PAC and James C. Thomas, III in his official capacity as treasurer, and an "Unknown Respondent," alleging that these entities violated FECA. (Compl. ¶ 24 (Docket No. 1).) Plaintiffs alleged that an Unknown Respondent contributed to Now or Never PAC in the name of ACU, that ACU permitted its name to be used to effect this contribution, and that Now or Never PAC knowingly accepted the contribution in the name of another. (*Id.*) The Commission designated plaintiffs' administrative complaint as FEC Matter Under Review ("MUR") 6920. On January 26, 2017, the Commission found reason to believe that ACU and an Unknown Respondent violated FECA's prohibition on making or accepting contributions in the name of another, and took no action at that time as to Now or Never PAC and its treasurer. (Compl. Exh. 7 (Certification, MUR 6920 (Jan. 27, 2017)).) The Office of General Counsel ("OGC") then conducted an investigation. (Compl. Exh. 2 at 2 (FEC Third General Counsel's Report, MUR 6920 (Sept. 15, 2017)).)

Based on information OGC obtained during its investigation, on July 11, 2017, the Commission found the entity Government Integrity, LLC was the Unknown Respondent in its previous reason-to-believe finding and substituted its name into that finding. (Compl. Exh. 6 (Certification, MUR No. 6920 (July 12, 2017)).) The Commission also approved a Factual and Legal Analysis for supporting its reason to believe that Government Integrity, LLC violated

FECA by making a contribution in the name of another; that Thomas in his personal capacity knowingly and willfully violated FECA by knowingly helping or assisting in the making of a contribution in the name of another; and that Now or Never PAC, Thomas in his official capacity as treasurer, and Thomas in his personal capacity knowingly and willfully violated FECA by accepting a contribution in the name of another and failing to properly report that contribution. (*Id.*)

After subsequent investigation, the Commission found probable cause to believe that ACU violated FECA and authorized OGC to pursue conciliation with ACU. (Compl. Exh. 4 (Certification, MUR No. 6920 (Sept.21, 2017)).) The Commission further authorized OGC to engage in pre-probable cause conciliation with Government Integrity, LLC, Now or Never PAC, and Thomas. (*Id*.) The Commission also considered whether to find reason to believe a trust and its trustee had made contributions in the name of another or assisted in the making of such contributions, as well as whether to authorize a subpoena enforcement action against an individual, but lacked the required votes to take those actions and agreed not to take any further action on those questions at that time. (*Id.*)

On October 24, 2017, the Commission approved a conciliation agreement with all persons who had been previously designated respondents in the matter: ACU, Government Integrity, LLC, Thomas in his personal capacity, and Now or Never PAC and Thomas in his official capacity as treasurer. (Compl. Exh. 8 (Certification, MUR No. 6920 (Oct. 24, 2017)).) The Commission then closed the file. (*Id*.) Pursuant to this conciliation agreement, the Commission issued a civil penalty in the amount of $350,000 against these respondents. (Compl. Exh. 3 (Conciliation Agreement, MUR 6920 (Oct. 31, 2017)).)

B. The Doe Litigation Involving Redaction of the Doe Entities' Identities from the Public Record

After the Commission closed the file and as it prepared to make MUR 6920 documents public, John Doe 1 and John Doe 2 ("Doe entities"), the trust and trustee who were the subjects of a Commission reason-to-believe vote, objected to disclosure of their identities through inclusion of references to them in the public file. When the Commission did not agree to redact their identities, the Doe entities filed suit. (*See John Doe 1, et al. v. FEC* ("Disclosure Litigation"), No. 17-2694, FEC's Resp. to Mot. for TRO and Mot. to Seal at 1-4 (Docket No. 16) (unsealed redacted version).) On December 18, 2017, following a hearing on the parties' initial expedited briefing on the Doe entities' motions for temporary restraining order and preliminary injunction and to seal the case, the Court issued an order pursuant to which the Commission would redact the Doe entities' names and other identifying information from its public administrative case file pending further order of the Court. In accordance with the Court's instructions, redacted documents from the Commission's file in MUR 6920 were published on December 22, 2017. (*See* Disclosure Litigation, FEC Notice (Dec. 22, 2017) (Docket No. 20).) On January 3, 2018, the plaintiffs in the instant matter filed a motion to intervene in that litigation, which the Court denied. (*See* Disclosure Litigation, Order (Jan. 31, 2018) (Docket No. 44).)

C. Plaintiffs' Court Challenge to the Commission's Resolution of Their Administrative Complaint

On December 22, 2017, plaintiffs filed the instant complaint pursuant to 52 U.S.C. § 30109(a)(8) and the Administrative Procedure Act against the Commission, seeking judicial review of the Commission's resolution of MUR 6920. In this action, plaintiffs seek review of the Commission's alleged failure to find reason to believe that the Doe entities violated FECA for making a contribution in the name of another, Compl. ¶ 37, and that the Commission did not

"confirm[]" that the Doe entities were the true source of the contribution to Now or Never PAC, *id*. ¶¶ 43, 44. Plaintiffs challenge the Commission's resolution of their administrative complaint by means of the global conciliation agreement as arbitrary, capricious, an abuse of discretion, and contrary to law. Plaintiffs noticed this dismissal suit as a related case to the pending litigation brought by the Doe entities, and the case was assigned to this Court. The Commission's responsive pleading is due on March 30, 2018. On March 1, 2018, the Doe entities filed a motion to intervene which is currently pending before the Court, along with a proposed motion to dismiss. (Doe Mot. to Intervene and Proposed Mot. to Dismiss (Docket No. 11, 11-1).)

D. Plaintiffs' Freedom of Information Act Request for Public Record Unredacted as to Doe Entities' Identities

Plaintiffs submitted a Freedom of Information Act ("FOIA") request to the Commission seeking an unredacted copy of the public record in MUR 6920, which would include the identities of the Doe entities. On January 12, 2018, the FEC denied CREW's FOIA request in light of this pending litigation and notified plaintiffs that they may administratively appeal. CREW appealed this FOIA decision on January 23, 2018, and the Commission subsequently denied this appeal.

ARGUMENT

I. A DETERMINATION AS TO THE SCOPE OF THE ADMINISTRATIVE RECORD IS PREMATURE BECAUSE WHETHER THE COURT HAS JURISDICTION TO HEAR THIS CASE MUST BE DETERMINED FIRST

Rather than permitting the Commission to determine whether to bring jurisdictional issues to the Court's attention in a preliminary motion, plaintiffs seek to advance the Court's consideration of potentially disputed record issues before jurisdiction has been established.

Given the Commission's intention to contest plaintiffs' assertion of jurisdiction here, plaintiffs' proposed relief is unwarranted at this time.

In this action, plaintiffs seek review of the Commission's resolution of their administrative complaint. Pursuant to an unopposed extension of time, the Commission's responsive pleading is not due until March 30. (Minute Order, Feb. 27, 2018.) The Commission intends to submit a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). The Commission's motion to dismiss will focus in part on whether this Court has jurisdiction to hear this case. Proposed intervenor-defendants, the Doe entities, have also lodged a motion to dismiss the case that will be filed should their motion for intervention be granted. (Proposed Intervenor-Defs.' Mot. to Dismiss (Docket No. 11-1).)

It has long been settled that the Court must satisfy itself that it has jurisdiction over an action before it can proceed to consider the merits. As the Supreme Court explained, "[w]ithout jurisdiction the court cannot proceed at all in any cause. . . . [W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation and internal quotation marks omitted). The question of jurisdiction is thus one that "the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Id.* (citation and internal quotation marks omitted). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). If the Court agrees with the Commission here and concludes that it lacks jurisdiction over this action, "the court

cannot proceed" and must dismiss the case. *Steel Co.*, 523 U.S. at 94 (citation and internal quotation marks omitted).

Since the Commission's dismissal motion will be premised entirely on plaintiffs' civil complaint, the Court may decide whether it lacks jurisdiction without resort to the administrative record in the underlying administrative matter. In cases involving judicial review of administrative actions, the Local Civil Rules generally require an agency to file a certified list of the contents of the administrative record (and to provide relevant portions of that record to plaintiffs' counsel) within 30 days following service of the answer to the complaint or contemporaneously with the filing of a dispositive motion, whichever occurs first, "unless otherwise ordered by the Court." LCvR 7(n)(1). Review of the administrative record here will be unnecessary for the Court to decide the jurisdictional motion. *See Campaign Legal Ctr. v. FEC*, 245 F. Supp. 3d 119, 125-26 (D.D.C. 2017) (granting in part FEC motion to dismiss without resort to administrative records in two dismissed underlying administrative matters). If the Court were to grant the Commission's planned motion, then, that decision would render unnecessary any review of the full administrative record or the certified list of the record's contents. For this reason, the Commission also will be filing a motion to defer filing of the certified list of the administrative record documents pending the Court's disposition of the Commission's motion to dismiss.

Under these circumstances, a decision granting the Commission's motion to dismiss would render the administrative record, and plaintiffs' motion for clarification, entirely unnecessary. *See Campaign Legal Ctr.*, 245 F. Supp. 3d at 129 (finding motion to defer transmission of the administrative record moot). The time and effort required for the agency to compile, certify, and produce the record documents in this case would be substantial. Although

some documents from the Commission's large administrative file in the underlying enforcement matter have already been publicly released, those documents were selected solely based upon the Commission's disclosure policy, which lists certain documents routinely published by the Commission at the conclusion of every closed enforcement case. In contrast, the additional effort which would be required to review the Commission's full administrative files here, and to compile, certify and produce the full administrative record would impose substantial and potentially unnecessary additional burdens upon the agency. In fact, the Commission cannot certify the accuracy and completeness of a list of certified record documents without performing a full review of its files, which reside with multiple custodians. Production of the contents of the record also would require additional time to review record documents for information that would need to be redacted, such as personally identifiable information and material subject to attorney-client, work product, and other privileges. *See* LCvR 5.4(f).

In the interest of economy, this Court should defer any determination as to the scope of the administrative record by denying plaintiffs' motion for clarification. The Court of Appeals has allowed for dispositive motions without requiring that the administrative record be filed. *See, e.g., Wisc. Elec. Power Co. v. Dep't of Energy*, No. 99-1342, 1999 WL 1125165, at *1 (D.C. Cir. Nov. 24, 1999) (per curiam) (granting motion to defer filing the certified index pending resolution of motion to dismiss); *see also Dynegy Power Mktg., Inc. v. FERC*, Nos. 04-1034, *et al.*, 2004 WL 1920775, at *1 (D.C. Cir. Aug. 26, 2004) (per curiam) (granting motion to defer filing the certified index after appellants moved to dismiss).

This court has done the same. For example, in *People for the Ethical Treatment of Animals, Inc. v. U.S. Fish and Wildlife Service*, 59 F. Supp. 3d 91 (D.D.C. 2014) ("*PETA*"), the court excused the agency from the former requirement to file a certified copy of the contents of

the administrative record simultaneously with the agency's motion to dismiss under Rule 12(b). Order, *PETA* (Docket No. 21) (D.D.C. July 18, 2014); *see also Mdewakanton Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116, 123 n.12 (D.D.C. 2017) (construing motion to dismiss to include motion for waiver from LCvR 7(n), and granting the motion "because the administrative record [wa]s not necessary for [the court's] decision").

Finally, a decision on plaintiffs' motion for clarification may be moot if the Court resolves the issues in the disclosure litigation involving the Doe entities. If the Commission were to prevail in the *Doe* litigation, that decision would be outcome-determinative as to the scope of the administrative record with regard to the Doe entities' identities in this matter. (*See* Disclosure Litigation, Order, No. 17-2694 (Jan. 31, 2018) at 7 n.4 (Docket No. 44).) [1]

II. PLAINTIFFS HAVE ASSERTED NO SOUND JUSTIFICATION FOR REQUESTING THAT THE COURT DECIDE THE SCOPE OF THE ADMINISTRATIVE RECORD AT THIS TIME

Plaintiffs claim to require the Court's determination on the scope of the administrative record now on the ground that plaintiffs "may be forced to seek appeal" of the Court's denial of their intervention motion in the Disclosure Litigation "to protect their rights to the record in this litigation," Pls.' Mot. for Clarification at 2, but plaintiffs have not presented just cause for expediting a determination here. The scope of the administrative record here is not as connected to plaintiffs' decision whether to appeal the Court's denial of its motion for intervention in the Disclosure Litigation as they indicate. In the course of making that ruling, the Court already concluded that a decision in the Doe entities' favor in that case would not be "determinative" of

[1] If, on the other hand, the Court were to determine that an interim protective order is appropriate here, the Commission respectfully requests further time for the parties to meet and confer regarding the terms of such an interim order. Further conferral in advance of the filing of plaintiffs' motion — for the contingency that the Court may issue such an order — would have been inconsistent with the efficiency grounds of the Commission's opposition.

whether CREW could learn the identities of the John Does in this case. (*See* Order, No. 17-2694 (Jan. 31, 2018) at 7 n.4 (Docket No. 44).) To be sure, disclosure in this case would moot the Disclosure Litigation, but postponement of a decision on the contours of the record here does not mean that plaintiffs must learn the Doe identities through that case. (*Id.*) Indeed, the Court has also already held that plaintiffs have no legally protected interest of their own in that case about the Commission's "public release of the bulk of the MUR 6920 file." (*Id.* at 7.) Plaintiffs may wish to revisit that ruling, but that desire need not dictate the schedule in this case.

CONCLUSION

Plaintiffs' motion for clarification is premature, and any determination on the scope of the administrative record should be deferred. For the foregoing reasons, the Court should deny the plaintiffs' Motion for Clarification.

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of plaintiffs' motion for clarification or, in the alternative, a protective order (Docket No. 10), defendant Federal Election Commission's opposition thereto, and the entire record in this matter, it is hereby ordered that plaintiffs' motion is denied.

So ordered.

_____
Honorable Amy Berman Jackson
United States District Judge

Dated: _____, 2018