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,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, A PROTECTIVE ORDER

On February 27, 2018, Plaintiffs moved this Court for an order clarifying the Federal Election Commission's ("FEC") legal obligations to provide Plaintiffs with a full administrative record in the matter below or, in the alternative, to grant Plaintiffs the right to such a record subject to a proposed protective order. The FEC has opposed that request, confirming its representation to counsel that it does not intend to provide Plaintiffs with a full administrative record at any time, notwithstanding its legal obligations, so long as litigation to which Plaintiffs are not parties continues. *See John Doe 1, et al. v. FEC*, No. 17-cv-2694 (ABJ) (D.D.C. Jan. 31, 2018) (the "*Doe* Litigation"). Notably, however, the FEC does not actually provide any argument in support of its position that it is not obligated to provide Plaintiffs with a full administrative record—indeed, it concedes that the proceedings in the *Doe* Litigation are not "determinative" of Plaintiffs' rights to a record here. *See* FEC Opp. at 11–12, ECF No. 14. Rather, the FEC argues that Plaintiffs' request is premature and would impose a burden on it. Its arguments, however, are unavailing. Plaintiffs' right to a full administrative record in this case is

ripe for review, and expeditious review would impose no prejudice on either the FEC or the litigants in the *Doe* Litigation and would preserve judicial resources.[1]

Turning first to the merits of Plaintiffs' request, the FEC makes no showing that it should not be granted, despite maintaining its position that, so long as the *Doe* Litigation continues, even on appeal, the FEC will refuse to comply with its obligations in this litigation to provide Plaintiffs with a complete administrative record. It maintains that position notwithstanding the Court's conclusion in the *Doe* Litigation that the *Doe* Litigation is not "determinative of whether CREW may obtain information in its [§ 30109] lawsuit." Order at 7 n.4, *Doe v. FEC*, No. 17-cv-2694 (ABJ) (D.D.C. Jan. 31, 2018). Audaciously, the FEC maintains its position while also relying on the Court's declaration that the *Doe* Litigation is not determinative here to argue that Plaintiffs' right to appeal in the *Doe* Litigation is entirely irrelevant to this matter. FEC Opp. 11–12. The FEC is committed to maintaining its position—in fact the FEC has also denied Plaintiffs' FOIA request for unredacted versions of the documents it placed in the public record from MUR 6920 because the litigation in "*Doe et al. v. FEC*, No. 17-06294 (D.D.C. Dec. 15, 2017) . . . bar[s] [the FEC] from publishing an unredacted version of investigative materials in MUR 6920." FOIA Appeal Denial, No. 2018-1-A (Mar. 6, 2018) (attached as Exhibit 1); *accord* FOIA Denial, No. 2018-024 (Jan. 12, 2018) (attached as Exhibit 2). It did so even though this Court also declared the *Doe* Litigation would not determine Plaintiffs' FOIA rights. *See* Order at

[1] The *Doe* litigants filed a procedurally improper opposition to Plaintiffs' motion. *See* Proposed Intervenor-Defs.' Opp. to Pls.' Mot. for Clarification or Protective Order and Mem. in Supp., ECF No. 13 (hereinafter, "Does' Opp."); *see also* Minute Order (D.D.C. Mar. 14, 2018) (converting improper opposition into motion for leave to file opposition). For the reasons stated in Plaintiffs' Opposition to the Proposed Intervenor Defendants' Motion to Intervene, ECF No. 17, Plaintiffs request the Court deny that request for leave to file because the *Doe* litigants have no standing here. Nonetheless, in their opposition, the *Doe* litigants merely repeat the points raised by the FEC, and thus do not provide any additional reason to delay resolution.

8 (stating "CREW's rights under FOIA may be adjudicated in its own FOIA proceedings"). In short, despite this Court's statements in the *Doe* Litigation that that litigation would not prejudice Plaintiffs, the FEC is using the existence of that litigation to avoid its legal obligations in this case.

Notably, the FEC here cites nothing to support its position. It cites no authority that its voluntary representation in separate litigation serves to nullify Plaintiffs' rights to a full administrative record here. It also cites no authority that says Plaintiffs cannot receive this full record, either in a publishable form or pursuant to protective order, simply because it is involved in litigation with a third-party.[2] Rather, the FEC asks this Court to delay resolution of this question until later. It says the issue is premature, that it would be a great burden to the FEC to resolve this issue now, and that no motion may proceed since it thinks it might challenge the Court's subject matter jurisdiction. Yet its arguments are unavailing.

First, the issue is ripe for review. "Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the

[2] Nor do the *Doe* litigants identify any basis in their proposed brief. The cases they cite regarding redacted records relate to redactions in publicly filed documents, or those where one plaintiff is denied access to the trade secrets of another plaintiff. *See, e.g., Ranbaxy Lab., Ltd. v. Burwell*, 82 F. Supp. 3d 159, 163 n.3 (D.D.C. 2015) (noting portions of the record containing trade secrets were "unavailable to the public" or to "one or more parties to this case"); *Serono Lab., Inc. v. Shalala*, 35 F. Supp. 2d 1, 4-5 (D.D.C. 1999) (allowing agency to withhold one party's trade secrets from another, but requiring agency to provide "an unexpurgated record which contains the entire record" and to provide copies redacting one plaintiff's trade secrets from the record provided to the other plaintiff). Indeed, one case they cite holds that an agency *must* release to plaintiffs "personal information" of the sort the *Doe* litigants seek to avoid here if that information was "before the decision-makers at the time of the challenged decision." *Pub. Emps. for Envtl. Responsibility v. Beaudreau*, No. 10-cv-1067 RBW/DAR, 2012 WL 12942599, at *7 (D.D.C. Nov. 9, 2012); Does' Opp. at 4. It is indisputable the *Doe* litigants' identities were before the Commission when it made its decision that is the subject of the challenge here. *See, e.g.*, Third General Counsel's Report at 12, MUR 6920 (Sept. 15, 2017), http://eqs.fec.gov/eqsdocsMUR/17044435484.pdf.

hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). An issue is "fit for judicial resolution," under the first prong of the ripeness inquiry, if it is "essentially legal" and the agency action is "sufficiently final." *Atlantic Richfield Co. v. U.S. Dep't of Energy*, 769 F.2d 771, 783 (D.C. Cir. 1984). Here, the issue before the Court is one that is essentially legal—does the existence of the *Doe* Litigation release the FEC from its obligations under the Federal Election Campaign Act ("FECA") and the Administrative Procedures Act ("APA") to provide Plaintiffs with a full administrative record? *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). There is thus no need for "a particularized factual record to assist . . . in deciding the only issue presented." *Atlantic Richfield Co.*, 769 F.2d at 783. Despite the FEC's representations, *see* FEC Opp. at 10, Plaintiffs' motion does not require it to identify, gather, or produce any documents. The FEC's duty to perform those tasks would still be governed by Local Civil Rule 7(n).

That issue is also sufficiently final. In the meet and confer between counsel before filing this motion, the FEC represented its conclusion that the existence of the *Doe* Litigation released it from its legal obligations to produce a full and unredacted administrative record. In its opposition, the FEC does not suggest that the conclusion was at all tentative or subject to change. The FEC, "for all practical purposes, made a final determination" as to its legal obligations under the APA. *Atlantic Richfield Co.*, 769 F.2d at 783. The issue is thus sufficiently final to decide.

Turning to the second factor, delaying resolution of this matter would cause significant prejudice to Plaintiffs. As Plaintiffs noted in their opening brief, the time for Plaintiffs to appeal the denial of their right to intervene in the *Doe* Litigation is fast approaching. With the extension of the FEC's deadline to respond here, that right will expire before the FEC makes any

production of the record. If Plaintiffs let the time to seek appellate relief in the *Doe* Litigation expire, Plaintiffs will be seriously hampered in their ability to protect their rights to a full record here. The FEC has already stated that it will use the existence of the *Doe* Litigation to withhold the record from Plaintiffs in this case, and will continue to do so while the *Doe* Litigation is on appeal. *See* [Proposed] Pls.' Mem. In Response to New Issues Raised in Defs.' Surreply and in Supp. of Mot. for P.I. at 10 n.7, *Doe v. FEC*, 17-cv-2694 (ABJ) (D.D.C. Jan. 24, 2018) (hereinafter, "*Does'* Surreply") (stating the *Doe* litigants plan to appeal any adverse ruling). While Plaintiffs might succeed in convincing the Court to order the FEC to provide Plaintiffs with a full copy of the administrative record notwithstanding the *Doe* Litigation, Plaintiffs should not be required to sacrifice their legal rights on that gamble.

The FEC also suggests that there would be no prejudice to Plaintiffs because they are not planning to withhold any part of the record they think would be useful to Plaintiffs. That judgment is not for the FEC to make, however. It must provide Plaintiffs with "neither more nor less information than . . . the agency [had] when it made its decision." *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam); *see also Beaudreau*, 2012 WL 12942599, at *7 (ordering defendant to include in the agency record produced to plaintiffs any "'personal information' [that] was before the decision-makers at the time of the challenged decision").[3] Nor is it accurate to say that the information it plans to withhold is irrelevant.

[3] Of course, there may be limits to what Plaintiffs or the FEC place on the public docket. *See, e.g.*, LCvR 5.4(f) (imposing on parties the duty to redact personal information from public filings and to submit unredacted copies under seal); *see also Ranbaxy Lab., Ltd.*, 82 F. Supp. 3d at 163 n.3 (noting portions of the administrative record that "contain confidential or sensitive material" are "unavailable to the public"). That has no bearing on what documents the FEC must provide to Plaintiffs, however. *Beaudreau*, 2012 WL 12942599, at *7 (ordering agency to provide Plaintiffs with "personal information 'such as personal e-mail addresses and cell phone numbers'" as long as that information was "before the decision-makers at the time of the challenged decision").

The identities of the unknown respondents below bear on a central question before the Court here: whether three commissioners acted contrary to law in refusing to adopt their general counsel's recommendation to find reason to believe that the unknown respondents violated the FECA. The public record related to that question is replete with redactions—often compromising multiple lines of text, *see, e.g.*, Third General Counsel's Report at 12, MUR 6920 (Sept. 15, 2017), http://eqs.fec.gov/eqsdocsMUR/17044435484.pdf (showing three fully redacted lines of text, with most of a fourth line redacted and parts of six other lines redacted)—that were presumably all removed because they shed light on the unknown respondents' identities. Indeed, the very first sentence in the FEC staff's report for why they recommended finding reason to believe—*i.e.*, the principal reason they thought the FEC should investigate the unknown respondents—is redacted. *See id.* at 10. ("The record supports a reasonable interference [redacted] was the true source of funds GI LLC funneled through ACU. [Entire next sentence redacted].").[4] Presumably that sentence recommended reason to believe due to some fact about the unknown respondents' identities, otherwise it would not have been redacted. Clearly, whatever issue the FEC staff identified was not sufficient for the three commissioners who

[4] This is not the only substantive redaction. The FEC staff also recommended finding reason to believe the unknown respondent acted as conduits in violation of the FECA, but most of that reasoning is redacted. *See, e.g.*, *id.* at 13 ("Even if currently unknown facts were to suggest that GI LLC, and not [redacted] was the true source of the funds, the record provides a reasonable inference that [redacted] assisted in making a contribution in the name of another. The Commission has noted that the regulation prohibiting assisting in the making of a contribution in the name of another applies to those who 'initiate or instigate or have some significant participation' in making such a contribution. [Next two-plus lines of text redacted]. Further, [redacted] has refused to respond . . . .").

decided against investigating the unknown respondents, but Plaintiffs cannot test the reasonableness of that conclusion unless they have access to that reasoning.[5]

Indeed, the unknown respondents confirm the vital nature of their identities. In their proposed opposition brief, the unknown respondents confirm that a motivating factor for them to seek relief in the *Doe* Litigation was to keep their identities out of Plaintiffs' hands. *See* Does' Opp. at 2. The only basis the unknown respondents would have to keep their identities from Plaintiffs is to prevent Plaintiffs from mounting a fulsome challenge to the FEC's dismissal below: one that might result in a reason to believe finding against them on remand. The unknown respondents know that keeping the knowledge of their identities out of Plaintiffs' hands will hobble Plaintiffs' case here, proving they know their identities are a key piece of evidence to this case.

The importance of the unknown respondents' identities is further demonstrated by the importance of the identities of the other individuals that were subject to the FEC investigation below. For example, one basis for the Commission's finding reason to believe James Thomas knowingly and willfully violated the FECA is that it recognized Thomas's relationship with two entities involved in the contribution, and because of his experience with other political committees in the past. *See, e.g.*, Notification with General Counsel's Brief to Now or Never PAC and James C. Thomas, in his official capacity as treasurer at 2–3, MUR 6920 (Oct. 6, 2017) https://www.fec.gov/files/legal/murs/current/100487855.pdf (noting reason to believe finding based, in part, on Thomas's relationship with GI LLC and Now or Never PAC, and his

[5] As detailed in Plaintiffs Opposition to the Proposed Intervenor Defendants' Motion to Proceed Under a Pseudonym, the unknown respondents' identities are also relevant to the question of whether other individuals are aware of their political activities. *See* Pls.' Opp. to the Proposed Intervenor Defs.' Mot. to Proceed Under a Pseudonym at 5, ECF No. 18.

experience with political committees). Those connections could only have been made because the FEC had knowledge of Thomas's identity and thus his relationships. It is quite possible the unknown respondents also enjoy significant relationships with other parties in this case, *see, e.g.*, *id.* at 3 (noting at least one *Doe* litigant "funded GI LLC"); Circulation of Discovery Documents at 2, MUR 6920 (Aug. 4, 2017), http://eqs.fec.gov/eqsdocsMUR/17044435462.pdf (stating *Doe* litigant "appointed GI LLC's now-deceased principal"), and have extensive experience with political contributions. Such facts would support finding reason to believe a violation occurred, strengthening CREW's argument that the FEC's failure to do so was contrary to law. However, without access to the unknown respondents' identities, CREW will not be able to make important arguments such as this.

Plaintiffs have used knowledge of the contributing entity in the past to prove an earmarked contribution was in violation of the FECA. In one administrative matter, Plaintiffs used public comments of a contributor to show that contributions to various social welfare groups were in fact earmarked to fund independent expenditures—political advertisements that impose their own reporting obligations under the FECA. *See, e.g.*, Conciliation Agreement, MUR 6816 (June 21, 2016), http://eqs.fec.gov/eqsdocsMUR/16044397368.pdf. Plaintiffs were only able to make that connection because they could connect public comments to political ads, requiring them to know the identities of both the organization running the ads and the contributor. Here, it is quite possible the unknown respondents have made public comments showing that money they passed to the GI LLC was intended to be passed along to Now or Never PAC, statements of which the FEC would have been aware and which would have been unreasonable for the FEC to ignore. Alternatively, Plaintiffs could show that the unknown respondents have engaged in other reported political activity, perhaps in support of the same

candidates aided by Now or Never PAC—information readily available to the FEC. Such a showing would bolster the conclusion that their contribution to GI LLC was a transfer with similar purposes and that it would be arbitrary and capricious for the Commission to ignore such activity. There may be other uses, but Plaintiffs cannot be expected to know the exact usefulness of the unknown respondents' identities before they are apprised of them.

In contrast, there is no prejudice to the FEC if the Court were to address Plaintiffs' motion now. The FEC cites as its only burden its need to "review the Commission's full administrative files here, and to compile, certify, and produce the full administrative record." FEC Opp. at 10. Plaintiffs, however, are not asking the FEC to review its file, or to compile, certify, or produce anything at this time. Plaintiffs acknowledge that the FEC's obligation to do that is subject to Local Civil Rule 7(n)(1), which provides the FEC must certify that list "within 30 days following service of the answer to the complaint or simultaneously with the filing of a dipositive motion, whichever comes first." Plaintiffs here seek only a clarification of their legal rights and of the impact of the *Doe* Litigation on those legal rights, or at least preservation of their legal rights pursuant to a protective order. The FEC identifies no prejudice to it from timely provision of that relief.

Nor, for that matter, are the unknown respondents prejudiced by the relief the Plaintiffs seek here. They challenge in the *Doe* Litigation only the FEC's public release of the investigative file pursuant to the agency's statutory obligation to publish the file upon the closing of a case. *See* Compl. ¶ 4, *Doe v. FEC*, No. 17-cv-2694 (ABJ) (D.D.C. filed Dec. 19, 2017) ("Plaintiffs seek the protection of this Court to enjoin the Commission from publicly releasing their names."); *id.* ¶ 33 (challenging action as improper under agency guidelines for proactive release of investigatory files at close of matter); *see also* Order at 7 n.4, 8 (finding *Doe* Litigation

is not "determinative" of the scope of the record in § 30109 litigation or documents that may be released subject to a FOIA request). Nothing in the relief Plaintiffs seek here prejudges that question. Indeed, Plaintiffs have even offered to agree to a protective order to protect their rights to litigate here while ensuring the unknown respondents' identities are not published. The proposed protective order is identical to protective orders entered in other FEC matters. *See, e.g.*, Protective Order, *CREW v. FEC*, No. 16-cv-2255 (CRC) (D.D.C. June 6, 2017). In fact, the FEC has used this type of protective order to provide Plaintiffs with access to records about an *ongoing* investigation expressly subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A) in cases where Plaintiffs challenge the FEC's failure to act. *See id.* There is no reason then that providing Plaintiffs with records not protected by any statutory provision under an identical protective order would prejudice the unknown respondents.[6]

Further, Plaintiffs seek this relief to preserve judicial resources. As noted, without this relief, Plaintiffs will be required to seek appellate relief in the *Doe* Litigation to preserve their rights. Further, if the Court does not provide relief now, Plaintiffs' dispute with the FEC about the scope of the record would remain and the issue will be before the Court again at a later time. Of course, Plaintiffs acknowledge that the Court could moot this issue if it decides to issue a judgment in the *Doe* Litigation in favor of the FEC and discloses the identities of the unknown

[6] The *Doe* Litigants cite *Serono* as authority for the proposition that a protective order is insufficient to protect their privacy interests, but the court in that case in fact issued a protective order providing for the release of every part of the record to at least one plaintiff. 35 F. Supp. 2d at 5. Further, *Serono* only found this restrictive order was justified by the fact that "statutory protection afforded trade secrets trumps the interest in the complete record," *id.* at 3, yet the *Doe* litigants cite no statutory protection here. They also cite *In re Grand Jury Subpoena No 11116275*, though that case is inapposite as it related to an issue not relevant to this motion: whether a plaintiff can sue pseudonymously when its identity is the very subject of the case. 846 F. Supp. 2d 1, 4 n.6 (D.D.C. 2012). That case may relate to the *Doe* Litigation, but it has no bearing here where the subject of the case is the FEC's dismissal.

respondents, but the *Doe* litigants have also promised to appeal any adverse judgment in that litigation, which would mean the issue will likely remain alive for months, if not longer. *Does'* Surreply at 10. Settling this issue now promises to take this issue off the Court's docket.[7]

Finally, the FEC argues that its plans to challenge subject matter jurisdiction render this issue premature. FEC Opp. at 8. The FEC, however, identities no authority that says a court is divested from authority to decide pending motions simply because a party has threatened to challenge a court's subject matter jurisdiction. Indeed, authority demonstrates exactly the opposite, even where an actual challenge is pending. *See, e.g., The District of Columbia and State of Maryland v. Trump*, No. 17-cv-1596-PJM (D.M.D. Mar. 12, 2018) (deciding motion to amend complaint despite pending motion to dismiss for lack of subjection matter jurisdiction); *Steinbuch v. Cutler*, No. 1:05-cv-970, 2006 WL 1805554, (D.D.C. June 29, 2006) (issuing order on motion for protective order while motion to dismiss for lack of subject matter jurisdiction was pending). The FEC's plans to challenge subject matter jurisdiction have no bearing on the propriety of the relief Plaintiffs seek here.[8]

Moreover, any forthcoming motion to dismiss for lack of subject matter jurisdiction would not moot the question about the scope of the record; rather, it would make the issue even more pressing. Under the Local Rules, the FEC must certify the scope of the administrative record "simultaneously with the filing of a dispositive motion." LCvR 7(n)(1). A motion to dismiss on subject matter jurisdiction grounds is a dispositive motion. *Mullen v. Bureau of*

[7] The *Doe* litigants, for their part, have threatened to file additional motions if the Court provides Plaintiffs with relief here. *See* Does' Opp. The remedy to this threat to waste judicial resources, however, is not to deprive Plaintiffs of their legal rights, but to sanction the *Doe* litigants if and when they carry out their threat.

[8] Further, Plaintiffs will address whatever arguments the FEC raises to attack the Court's subject matter jurisdiction if and when that attack is made, and merely note here that a subject matter challenge lacks merit.

Prisons, 843 F. Supp.2d 112, 115 (D.D.C. 2012). Accordingly, in the event the FEC moves to dismiss here, the FEC must simultaneously certify to the Court and to Plaintiffs a list of all documents it believes are part of the record in this matter, as well as certify what redactions it intends to impose on such documents. *See, e.g.*, Def. FEC Certified List of Contents of the Admin. Records in Matters Under Review 6391 and 6471 at 6 n.†, *CREW v. FEC*, No. 15-cv-2038 (RC) (D.D.C. Mar. 22, 2016) (noting documents in certified list contain redactions "to protect personally identifying information and other sensitive materials," specifically, the identities of contributors who were not the subject of any reason to believe determination below, were not discussed in any decision-making documents, and were not before the Commission at the time of its decision). Moreover, as the Court is not confined to the pleadings on a 12(b)(1) challenge, Plaintiffs must have access to that record to ensure a proper defense to that challenge. Thus, the FEC's suggestion that its potential challenge to subject matter jurisdiction could moot Plaintiffs' request for relief is simply mistaken—that determination must be made before or at least contemporaneously with the filing of a dispositive motion.[9]

In short, the FEC fails to provide any justification for its position that the pending *Doe* Litigation relieves it of its obligations to provide a full and complete administrative record to Plaintiffs. The FEC's attempts to kick this can down the road—prejudicing Plaintiffs' legal rights to challenge that refusal and depriving Plaintiffs of the record they will need to litigate the case here—are unmeritorious. Accordingly, Plaintiffs respectfully request the Court resolve this dispute without delay and declare that Plaintiffs' legal rights to the administrative record here are to the full and complete record, without redaction of the identities of any individuals subject to a

[9] While the FEC must make that determination contemporaneously with any motion it files on March 30, that would still come too late for Plaintiffs to exercise their right to seek appellate relief in the *Doe* Litigation.

reason to believe determination below, or, in the alternative, to grant Plaintiffs access to such a record subject to the terms of the proposed Protective Order.

March 15, 2018

Respectfully submitted,

/s/ Stuart McPhail
Stuart McPhail (D.C Bar No. 1032529)
smcphail@citizensforethics.org
Adam Rappaport (D.C. Bar. No. 479866)
arappaport@citizensforethics.org
Citizens for Responsibility and Ethics in Washington
455 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 408-5565
Fax: (202) 588-5020

Counsel for Plaintiffs Citizens for Responsibility and Ethics in Washington and Anne Weismann