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' OPPOSITION TO DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DEFER FILING CERTIFIED LIST OF THE CONTENTS OF THE ADMINISTRATIVE RECORD

The Local Rules of this Court provide that in a case challenging administrative action such as this one, "the agency must file a certified list of the contents of the administrative record with the Court . . . simultaneously with the filing of a dispositive motion." LCvR 7(n)(1). The Federal Election Commission ("FEC"), however, filed a dispositive motion to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim without filing the required certified list or producing a copy of the record for Plaintiffs. Rather than follow the rules of this Court or seek prior leave of Court to deviate from them, the FEC filed this untimely motion only after filing its dispositive motion.[1]

[1] Although the FEC's motion is styled as only seeking relief from the requirement to file a certified list, *see* Def. FEC Mot. to Defer Filing Certified List of Contents of the Admin. Record, ECF No. 24, the motion makes plain that the FEC also seeks relief from its obligation to produce to Plaintiffs a copy of the record at the same time, *see id.* at 4 (asking Court to "defer filing of a certified list of the contents of the administrative record (and transmitting the record)"); *id.* (citing burdens in compiling and certifying list, "and produc[ing] the full administrative record" as justification for relief).

The FEC's request to defer certification and production of the record is meritless. The FEC misstates its burden here and cites no actual basis to defer its obligations, instead relying on its assertion, ipsa dixit, that neither Plaintiffs nor the Court need the record because the FEC says so. But the Local Rules default to production of an administrative record before a plaintiff must reply to a dipositive motion because only such production can provide a level playing field where an agency has exclusive possession of the record. Indeed, the FEC has used that exclusive possession to its benefit, filing a motion that relies extensively on matters in the record—certification votes and reports by counsel, themselves relying on and citing submissions by parties, etc.—while proposing to deny Plaintiffs the ability to review that same record to discern if it contains materials relevant to Plaintiffs' opposition. While Plaintiffs cannot know what specific additional materials the record contains that would be relevant to its defense prior to review that record, there is reason to suspect the record contains relevant evidence to support Plaintiffs' arguments and evidence that would directly contradict assertions the FEC makes in its motion.

The FEC has failed to show good cause to excuse it from its obligations under the Local Rules. The record may, and likely does, contain information that could assist Plaintiffs in responding to the FEC's motion to dismiss and that could assist this Court in deciding that motion. Accordingly, Plaintiffs respectfully request the Court deny the FEC's motion to defer its obligations.

ARGUMENT

I. Production of the Record Ensures Meaningful Review

The Local Rules of this Court provide that, by default, an agency filing a dipositive motion "must file a certified list of the contents of the administrative record with the Court . . .

simultaneously with" the motion. LCvR 7(n)(1). The Local Rule is "patterned after Local Rule 17" of the D.C. Circuit, *id.* (comment), itself a mirror of Federal Rule of Appellate Procedure 17, which both mandate that an "agency must file the record . . . within 40 days after being served with a petition for review." The appellate rules apply even when an agency moves to dismiss a petition. *See, e.g.*, *Dynegy Power Mktg., Inc. v. FERC*, Nos. 04-1034, et al., 2004 WL 1920775, at *1 (D.C. Cir. Aug. 26, 2004) (per curiam) (ordering filing of record prior to completion of briefing on motion to dismiss); *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) (ordering filing of record prior to completion of briefing on motion to dismiss).[2] So too does the Local Rule. Minute Order, *Animal Legal Def. Fund ("ALDF") v. Vilsack*, No. 14-cv-01462-CKK (D.D.C. Jan. 22, 2015) (docket attached as Ex. 1) (rejecting motion to defer compliance with Local Rule 7(n) until after resolution of motion to dismiss; ordering production of record prior to filing deadline for plaintiffs' opposition to motion to dismiss); *see also* Minute Order, *ADLF*, No. 14-cv-01462-CKK (D.D.C. Feb. 20, 2015) (Ex. 1) (granting request to stay briefing on motion to dismiss

[2] The FEC oddly cites the two appellate cases as proof that agencies are excused from complying with Federal Rule of Appellate Procedure 17 (and, by analog, Local Rule 7(n)) whenever they move to dismiss, *see* FEC Br. at 4–5, but the cases directly contravene the FEC's position. In those cases, while the courts allowed the agencies to defer production of the record for a short period (21 days and 10 days, respectively)—presumably to accommodate some practical burden in meeting the technical requirements of Rule 17—the courts still required the agencies to produce their records prior to the parties' briefs on the motion to dismiss. Docket, *Dynegy Power Mktg., Inc.*, Nos. 04-1034, et al. (attached as Ex. 2) (per curiam order filed August 26, 2004 requiring parties to "address in briefs issues presented in motion to dismiss"; index of record filed September 15, 2004; scheduling order issued March 23, 2005 setting schedule for briefs); *see* Docket, *Wisc. Elec. Power Co.*, No. 99-1342 (attached as Ex. 3) (per curiam order filed November 24, 1999 referring motion to dismiss to merits panel; index filed December 6, 1999; scheduling order issued December 7, 1999 setting schedule for briefs). The FEC's representation that the appellate court orders are authority for their proposition that an agency need not produce a record before a plaintiff must respond to and a court resolves a motion to dismiss is simply incorrect.

pending production of complete administrative record). The appellate rules, like the Local Rule, exist to ensure "meaningful review" of any dispositive motion. *NLRB v. Int'l Broth. Of Elec. Workers, Local Union 16, AFL-CIO*, 425 F.3d 1035, 1039 (7th Cir. 2005).

The Local Rule recognizes that such meaningful review requires both parties' access to the record, particularly where a defendant challenges the subject matter jurisdiction of the Court as the FEC does here. *Mullen v. Bureau of Prisons*, 843 F. Supp. 2d 112, 115 (D.D.C. 2012) (noting motion to dismiss for lack of jurisdiction is a dipositive motion). A plaintiff is not limited to the pleadings to defend a motion to dismiss under Rule 12(b)(1), and a plaintiff may "supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supported of plaintiffs' standing." *Warth v. Seldin*, 422 U.S. 490, 501–02 (1975); *Miller v. Smith*, 952 F. Supp. 2d 275, 281 (D.D.C. 2013) ("When considering a motion to dismiss for lack of subject matter jurisdiction . . . the court is not limited to the allegations of the complaint." (internal quotation marks omitted)). That is why courts have not only denied relief from Local Rule 7(n) but have in fact compelled production of agency records when confronted with a motion to dismiss for lack of subject matter jurisdiction. *Vargus v. McHugh*, 87 F. Supp. 3d 298, 300 (D.D.C. 2015) (granting motion to compel production filed after government filed motion to dismiss for lack of jurisdiction); *see also NRDC, Inc. v. Train*, 519 F.2d 287, 291–92 (D.C. Cir. 1975) (reversing district court's dismissal for lack of jurisdiction where agency had not produced record); *Biodiversity Legal Found. v. Norton*, 180 F. Supp. 2d 7, 11–12 (D.D.C. 2001) (compelling production of record notwithstanding defendants' assertion that there was no final agency action to review, and thus no jurisdiction).

Indeed, even in cases that do not involve review of agency action—and thus do not enjoy the presumption of production afforded by the Local Rule—a plaintiff may obtain substantial

discovery to support subject matter jurisdiction upon meeting a relatively low threshold: demonstrating "a good faith belief such discovery will enable it to show" jurisdiction. *FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1093–94 (D.C. Cir. 2008). Courts typically permit jurisdictional discovery where "the record . . . before the court is plainly inadequate," and the party seeking discovery "may be able to present new facts to bolster [its] theory" regarding jurisdiction. *GTE New Media Serv. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1352 (D.C. Cir. 2000). Where there is no record before the court—because it remains in the exclusive possession of the defendant—then the record is plainly inadequate. If courts routinely allow plaintiffs to seek document productions and depositions where jurisdiction is at issue, then production of the administrative record, as mandated by the Local Rules, is certainly appropriate.

In its motion, the FEC cites three cases to support its claim that courts typically defer production of the record, notwithstanding the Local Rule, whenever an agency challenges a court's subject matter jurisdiction, yet each is distinguishable. FEC Br. at 5. First, they cite *Campaign Legal Center v. FEC*, 245 F. Supp. 3d 119 (D.D.C. 2017), but in that case the court actually denied the motion to defer the record as moot. *Id.* at 129. The reason it was moot was because the plaintiffs in *Campaign Legal Center* did not seek an extension to respond to the motion to dismiss to allow for the court to first resolve the motion to defer. *See* Consent Mot. to Extend Filing Deadlines, *Campaign Legal Center v. FEC*, No. 1:16-cv-00752-JDB (D.D.C. July 8, 2016) (attached as Ex. 4) (requesting extension of deadline to oppose motion to dismiss but only to accommodate counsel's schedule); *see also* Docket, *Campaign Legal Center v. FEC*, No. 1:16-cv-00752-JDB (attached as Ex. 5) (reflecting no other requests for extension). By failing to request an extension, the plaintiffs essentially conceded that the record was not necessary for their opposition. *See, e.g.*, *Vargus*, 87 F. Supp. at 303 n.2 (distinguishing case where plaintiff

"had gone ahead and filed an opposition to the defendant's 12(b) motion without waiting for the Court to rule on the motion to compel production" and thus conceded the record need not produced). Here, in contrast, Plaintiffs have specifically requested an extension of their time to oppose the motion to dismiss for the explicit reason of allowing the Court to first resolve this motion to defer. *See* Joint Motion to Set a Briefing Schedule for Def. FEC's Mot. to Dismiss, ECF No. 26; *see also* Docket, *ALDF*, No. 1:14-cv-01462-CKK (Ex. 1) (showing extension sought for opposition to motion to dismiss, resolving motion to defer record prior to filing opposition); Proposed Order, *ALDF*, No. 1:14-cv-01462-CKK (D.D.C. Jan. 13, 2015) (attached as Ex. 6) (requesting plaintiff's deadline to oppose motion to dismiss be scheduled after production of record); Minute Order, *ALDF*, No. 1:14-cv-01462-CKK (D.D.C. Jan. 22, 2015) (Ex. 1) (rejecting motion to defer and ordering production of record prior to deadline to oppose motion to dismiss); Minute Order, *ADLF*, No. 14-cv-01462-CKK (D.D.C. Feb. 20, 2015) (Ex. 1) (granting extension of time to reply to motion to dismiss until complete record produced).[3]

Similarly, in *Mdewaken Sioux Indians of Minn. v. Zinke*, 264 F. Supp. 3d 116 (D.D.C. 2007), the plaintiff filed its opposition to the motion to dismiss without moving to compel production of the record or otherwise seeking relief from the agency's failure to comply with Local Rule 7(n). *See* Docket, *Mdewaken Sioux Indians of Minn. v. Zinke*, No. 1:16-cv-02323-RC

[3] It is likely that the plaintiffs in *Campaign Legal Center* did not object because the administrative matter below was resolved at the reason to believe stage, 245 F. Supp. 3d at 123—the earliest possible point of resolution—and thus the record likely contained few if any materials beyond those disclosed on the agency's website. Indeed, the Court was able to rule on the motion to dismiss because the publicly available record was nearly the entire record and was sufficient for it to conclusively resolve the motion. *Id.* at 126. That is not the case here. *See* FEC Br. at 4 (noting record here contains many materials beyond those published online).

(attached as Ex. 7).[4] The same is true in *PETA v. U.S. Fish and Wildlife Serv.*, 59 F. Supp. 3d 91 (D.D.C. 2014), where the plaintiff filed its opposition to the pending motion to dismiss prior to resolution of the agency's motion to defer production of the record, and did not seek an extension to allow the motion to defer to be resolved first, *see* Docket, *PETA v. U.S. Fish and Wildlife Serv.*, No. 1:13-01209-RCL (attached as Ex. 8) (showing opposition to motion to dismiss filed December 6, 2013; court's resolution of motion to defer not issued until July 18, 2014). Understandably, where a plaintiff waives objection to the failure to comply with Local Rule 7(n) by not requesting an extension of its deadline to oppose a motion to dismiss, courts will consider the motion to dismiss on the record before it. Plaintiffs here, however, have sought that extension and strenuously object to the prejudice of opposing the FEC's motion to dismiss without access to the record as required by Local Rule 7(n).

In sum, the Local Rules provide for production of the record before the court considers any dispositive motion. To be released from its obligations, the FEC must at least show good cause and that there is no good faith belief that there is anything in the record relevant to its motion. The FEC has not and cannot do that.

II. The FEC Fails to Show any Good Cause to Excuse Its Failure to Comply with the Local Rules

As justification for its failure to comply with Local Rule 7(n), the FEC essentially argues (1) that the record is not relevant because that is what it has decided and (2) that it would be too

[4] Although the plaintiff noted the agency's failure to comply with its Local Rule 7(n) obligations in its opposition to the motion to dismiss, *see* Pls.' Mem. in Opp. to Fed. Def.'s Mot. to Dismiss, *Mdewaken Sioux Indians of Minn. v. Zinke*, No. 1:16-cv-02323-RC (D.D.C. Mar. 17, 2017), the plaintiff did not seek relief from the failure to comply with the rule prior to filing its opposition to the motion to dismiss.

burdensome to comply with the Local Rule. Yet it fails to substantiate these claims. Finally, it's position here would effectively nullify Local Rule 7(n).

A. The Record is Relevant to the FEC's Motion

First, while the FEC may believe the record is not relevant, that is not a decision for the FEC to make unilaterally. The Local Rules require production because in challenges to administrative action like this, the record is exclusively in the possession of the defendant. The Local Rules recognize that failure to provide Plaintiffs with equal access to that record severely prejudices Plaintiffs.

Indeed, the FEC's motion to dismiss demonstrates the importance of the record because the FEC cites to portions of the record throughout its motion. For example, the FEC cites to certifications of votes, FEC Mot. to Dismiss at 4–6, 15, 18 (ECF No. 22), and to a report of the FEC's Office of General Counsel, *id.* at 4–5, which itself refers to and relies on numerous other documents in the record (most of which have not been made public or available to Plaintiffs), *see, e.g.*, Compl. Ex. 2 at 3 n.8 (citing unpublished response from American Conservative Union), *id.* at 4 nn.9–17 (citing unpublished interrogatory responses and unreported telephone conversation). The agency's reliance on materials in the record underscores that the record must be produced so that Plaintiffs have an adequate opportunity to oppose the FEC's dispositive motion. *Vargus*, 87 F. Supp. 3d at 301.

Moreover, the FEC's motion rests on arguments that necessarily require extensive review of the record. For example, the FEC argues that its decision not to pursue enforcement against the Doe entities (or against the true source of the contribution, if an entity other than the Doe entities) is subject to its "prosecutorial discretion." FEC Mot. to Dismiss at 14. Yet even an exercise of prosecutorial discretion is subject to review to determine whether it is arbitrary and

capricious. *See CREW v. FEC*, 209 F. Supp. 3d 77, 88 n.7 (D.D.C. 2016) (finding agency's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) is only "presumptively unreviewable" but may be rebutted, and that the "FECA's express provision for judicial review . . . is just such a rebuttal"); *La Botz v. FEC*, 61 F. Supp. 3d 21, 33 n.5 (D.D.C. 2014) (noting FEC's exercise of prosecutorial may be found arbitrary and capricious); *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) (prosecutorial discretion must be based on "reasonable grounds"); *Antosh v. FEC*, 599 F. Supp. 850, 856 n.5 (D.D.C. 1984) ("While the Commission is vested with some prosecutorial discretion, its actions cannot escape review."). Accordingly, the FEC's motion would require the Court decide whether the FEC's exercise of prosecutorial discretion is arbitrary or capricious. "Without the administrative record," however, "the [C]ourt is unable to perform this function." *Swedish Am. Hosp. v. Sebelius*, 691 F. Supp. 2d 80, 88 (D.D.C. 2010) (compelling production of record before consideration of defendant's motion to dismiss).[5]

Similarly, an essential claim in the FEC's motion to dismiss is that the Doe entities were not respondents in the administrative proceeding below. FEC Mot. to Dismiss at 15, 18–20 (claiming that the Doe entities were "non-respondent[s]" and thus the FEC's failure to enforce against them was not a dismissal). The FEC admits, however, that "[w]hether the John Does were . . . designated as respondents has been a subject of dispute, including amongst the Commissioners." FEC Mot. to Dismiss at 18. Presumably it is a matter of dispute because the

[5] While the court in *Swedish American Hospital* dismissed some claims without access to the record, *id.*, the plaintiffs there had failed to request a stay of briefing and had instead "gone ahead and filed an opposition," thereby waiving their objection to the agency's failure to comply with Local Rule 7(n). *Vargus*, 87 F. Supp. 3d at 303 n.2. Even with this waiver, however, the Court found it could not resolve a motion to dismiss premised on the reasonableness of agency action without access to the full record. *Swedish Am. Hosp.*, 691 F. Supp. 2d at 88.

record contains evidence at least suggesting the Doe entities were in fact identified as respondents to Plaintiffs' complaint.

Indeed, evidence in the public record—sparse as it is—contravenes the FEC's representation that the Doe entities were non-respondents. According to the Third General Counsel's Report, the Doe entities were in fact identified and treated as respondents during the FEC investigation, though the exact timing is not publicly known and would be more fully revealed by the administrative record. *See* Compl. Ex. 2 (Third General Counsel's Report) at 3 n.5. Per that report, "[redacted]," presumably the Doe entities, "received notice of the Complaint along with the Commission's reason to believe findings as to Unknown Respondents and the later reason to believe findings as to GI LLC." *Id.* Under the FECA, only the "person alleged in the complaint to have committed [the alleged] violation" shall be given notice of the complaint. 52 U.S.C. § 30109(a)(1). Similarly, only the person subject to a reason to believe finding is notified of that finding. *Id.* § 30109(a)(2). In fact, it is unlawful for the Commission to inform any non-respondent about the investigation or the agency's findings without consent of the subject of the investigation. *Id.* § 30109(a)(12)(A). There is no evidence of any such consent. Thus, the only lawful explanation is that the FEC identified the Doe entities as individuals who committed a violation alleged in Plaintiffs' complaint, *i.e.*, identified them as respondents, before they shared the agency's findings with the Doe entities. Of course, access to the full record would shed light on this admittedly ambiguous reference in a footnote that is heavily redacted.[6]

[6] In noting this information is relevant to responding to the FEC, Plaintiffs do not concede that the Court would only have jurisdiction over this matter if the Doe entities were in fact identified as respondents by the FEC. Rather, Plaintiffs merely point out that, insofar as the FEC's motion depends on that proposition, the record is likely to contain highly relevant material that could foreclose the FEC's arguments.

In sum, the FEC has failed to show that Plaintiffs have no basis for a good faith belief that the record contains materials that could be relevant to responding to the FEC's motion to dismiss. Rather, its motion conclusively demonstrates the relevance of these materials to Plaintiffs' opposition.

B. The FEC Fails to Support its Claims of Excessive Burden of Compliance

In addition to claiming the record is irrelevant to its dipositive motion, the FEC argues that compliance with Local Rule 7(n) is overly burdensome. FEC Br. at 4. Yet besides the bare recitation of burden, the FEC fails to make any showing that its burden is excessive or dissimilar from all other agencies who must comply with the Local Rules.

The FEC notes that the record here is larger than the documents published on its website because Plaintiffs' complaint led to an investigation spanning more than two years. FEC Br. at 4; Compl. ¶¶ 24, 30. It claims the size of the record means it has had insufficient time to comply. FEC Br. at 4 (complaining of time required to fulfill its obligations). Yet the FEC had notice of this suit and its obligations to comply with Local Rule 7(n) for (at least) seventy-four days, longer than the rules typically allow for a response and production. *See* Proof of Serv. (D.D.C. Jan. 11, 2018) ECF No. 5 (showing service on FEC on January 5, 2018); *see also* Fed. R. Civ. P. 12(a)(2). Indeed, the FEC anticipated this suit for much longer. *See* Def. FEC's Response to Mot. for TRO and Mot. to Seal at 7, *Doe v. FEC*, No. 17-cv-2694 (D.D.C. filed Dec. 20, 2017) (discussing likelihood of this suit). Moreover, Plaintiffs offered the FEC additional time to respond to Plaintiffs' complaint if that time were necessary—an offer the FEC refused. Given Plaintiffs' flexibility on time and the copious time already elapsed, the FEC cannot show that the burden of production is excessive.

The FEC identifies no reason why, in the months before its answer was due, it could not make any progress on reviewing and compiling the record. Nor does the FEC put forth any facts to support its claim of burden. For example, the FEC has not revealed the number of pages the record might contain or any other reason why the burden of reviewing the producing the record in this case would be excessive or undue. Nor has it offered even a partial record of those documents it has had time identify and review. Rather, the FEC simply ignored the rules of this Court and hoped the Court will approve its breach after the fact.

Finally, the FEC's hope is also futile. Plaintiffs have already filed a request under the Freedom of Information Act ("FOIA") for all records in the below administrative matter. Accordingly, the agency will be required to conduct the review and production that it seeks to avoid here. Of course, it is unclear when Plaintiffs will receive documents responsive to their FOIA request, and thus uncertain whether Plaintiffs will have those documents in time to respond to the FEC's motion to dismiss. Further, such records may be subject to FOIA exemptions that would not apply to production under Local Rule 7(n). Thus, Plaintiffs' FOIA request in no way moots Plaintiffs' needs here, ameliorates the prejudice to Plaintiffs in deferring production, or otherwise releases the FEC of its obligation to comply with Local Rule 7(n). It does, however, moot the agency's claims of burden. Whether or not the Court defers compliance with Local Rule 7(n), the FEC will have to do the work to ensure transparency to which Plaintiffs are legally entitled.

Accordingly, the FEC fails to demonstrate any unique or excessive burden in complying with Local Rule 7(n). Its bare recitation of burden is insufficient to warrant release of its obligations under the Local Rules.

C. The FEC's Argument Nullifies Local Rule 7(n)

Finally, the FEC's position here would render Local Rule 7(n) a nullity. The rule requires a certified list and transmittal of the record along with any "dispositive motion." LCvR 7(n)(1). As the FEC sees it, however, as long as an agency believes it will win its motion, it need not comply with the rule at all. *See* FEC Br. at 4 (requesting to defer record on assumption that the FEC will succeed in its motion and thus production is "unnecessary"). That position would eviscerate the Local Rule.

Local Rule 7(n) explicitly addresses the agency's burden when it files a dipositive motion rather than an answer. LCvR 7(n)(1) (requiring record within thirty days of answer, otherwise simultaneously with dispositive motion). Thus, the Local Rule expressly contemplates the burden an agency will bear when it seeks to dismiss a case before there is a responsive pleading or other procedures. It would be absurd to read the Local Rule as permitting an agency to avoid its obligations merely because it seeks to dismiss a case—the exception would swallow the rule.

Nor is there some exception for when an agency thinks its motion will succeed. Plaintiffs would hope the FEC is not in the habit of filing meritless dispositive motions that it expects to fail. Rather, any dispositive motion is almost certainly filed with the expectation that it will resolve the case and obviate the need for any future proceedings. Yet the Local Rules still require the agency to file a certified list and transmit the record "simultaneously" with the dipositive motion. LCvR 7(n)(1).

In short, the FEC's assertion that its belief in the likely success of its dispositive motion should shield it from its duties under the Local Rules fails to hold water.

CONCLUSION

The Local Rule requires production by default because it recognizes that cases involving administrative actions present a unique challenge: the record is almost always in the exclusive control of the defendant. To ensure a level playing field and meaningful review of any dispositive motion, the Local Rule requires production simultaneously with the filing of a dipositive motion. The FEC is already in breach of that legal obligation. Plaintiffs respectfully request the Court reject the FEC's request to remain in breach.

Respectfully submitted,

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