FILED UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1 and JOHN DOE 2,	)	
Plaintiffs,	)	Civ. No. 17-cv-2694 (ABJ)
v.	)	
FEDERAL ELECTION COMMISSION,	)	RESPONSE
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION TO SEAL

The Federal Election Commission ("FEC" or "Commission") respectfully submits this response to plaintiffs' request for a temporary restraining order and motion to seal.

I. BACKGROUND

On February 27, 2015, Citizens for Responsibility and Ethics in Washington and Anne L. Weismann (collectively, "CREW") filed an administrative complaint with the Commission alleging that an "unknown respondent" made a $1.71 million contribution in the name of the American Conservative Union ("ACU") to a political committee named Now or Never PAC in violation of the Federal Election Campaign Act's ("FECA" or "Act") prohibition on contributions in the name of another, 52 U.S.C. § 30122. After finding reason to believe that the Act was violated, the Commission authorized an investigation, which identified Government Integrity LLC ("GI LLC") as an "unknown respondent."

Discovery obtained from GI LLC led the FEC's Office of General Counsel to conclude that plaintiff John Doe 2 had a relationship with GI LLC and that John Doe 2 provided the funds for the contribution at issue to GI LLC. The FEC's Office of General Counsel served plaintiffs

with a subpoena for information on August 10, 2017 to which they refused to respond. The FEC's Office of General Counsel recommended that the Commission find reason to believe that plaintiffs violated section 30122 and to authorize commencement of a civil suit to enforce the subpoena. On September 20, 2017, two Commissioners approved those recommendations and three opposed. All five Commissioners then approved taking no action for an interim period of time.[1]

On October 24, 2017, the Commission, by a vote of 5-0, approved a global conciliation agreement with GI LLC, ACU, Now or Never PAC, and James Thomas, in his official capacity as treasurer of Now or Never PAC and in his personal capacity. GI LLC agreed not to further contest the Commission's finding that it had violated the prohibition on making contributions in the name of another and the respondents collectively agreed to pay a civil penalty of $350,000.[2] The Commission also agreed to close the file following the entry of this conciliation agreement, effectively concluding the enforcement and subpoena proceedings regarding plaintiffs. By letters dated November 3, 2017, the Commission notified these parties, as well as CREW, that the matter was closed and that "[d]ocuments related to the case will be placed on the public record in 30 days," citing the FEC's current disclosure policy, FEC, *Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702 (Aug. 2, 2016), *available at*

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1 The Commission intends to file the principal documents in dispute with the Court. Those documents support the Commission's description of the underlying administrative matter.

2 The administrative complainants have made the agreement public. *See* Conciliation Agreement, MUR 6920 (American Conservative Union), https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/11/20154839/ACU-Now-or-Never-PAC-letter-and-conciliation-agreement-11-3-17-2.pdf.

https://transition.fec.gov/law/cfr/ej_compilation/2016/notice2016-06.pdf ("*FEC Disclosure Policy*").

Thereafter, John Does 1 and 2 requested that their names be redacted from the public record. In order to carefully consider this request, the Commission refrained from publicly releasing the case file beyond the 30 days from closure (here, December 3, 2017) that ordinarily applies under the disclosure policy. After careful consideration during multiple executive sessions, the Commission determined not to deviate from its disclosure policy on December 14, 2017. That same day, the Commission notified counsel for John Does 1 and 2 of the Commission's decision. Counsel explained that its files were ordinarily required to be released within 30 days, that the administrative complainants had inquired about why the case file had not been released, and that a failure to promptly release its file could expose the Commission to allegations by CREW that such a failure is unlawful. The Commission did agree to the request by John Does 1 and 2 that it wait two business days before making the file public in the event they wanted to seek judicial intervention. The Commission notified counsel for John Does 1 and 2 that it will not release the case file including the names of John Doe 1 and John Doe 2 before 5:00 p.m. on December 18, 2017.[3]

On December 5, 2017 and again on December 15, 2017, CREW contacted the FEC requesting access to the case documents.[4] Under FECA's judicial review provision, an

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[3] Email from Charles Kitcher to William W. Taylor, et al. (Dec. 15, 2017 12:39 PM) (attached as Exh. 1).

[4] Emails from Adam Rappaport to Robert Kahn (attached as Exh. 2).

administrative complainant has 60 days from the date of dismissal of a complaint to seek judicial review of any such dismissal. 52 U.S.C. § 30109(a)(8).

II. STATEMENT OF POSITION

Plaintiffs neither demonstrate a likelihood of success on the merits, nor present a substantial question on the issues in dispute. The FEC's disclosure obligations related to its administrative enforcement decisions and deliberations are valid. Failure to comply with those obligations subjects the Commission to potential liability from the administrative complainants, who are on record seeking the information to be disclosed and may claim a need to review the public file due to a statutory deadline for review of FEC actions. Release of the public file of the underlying matter should not be significantly impeded by plaintiffs' attempted obstruction here. At the same time, the Commission acknowledges the unique mootness danger posed by immediate disclosure, and accordingly does not object to this matter being under seal while plaintiffs' request for a temporary restraining order is examined. Even though plaintiffs are likely to lose on the merits, if the Court cannot immediately reject their requests for temporary or permanent relief and finds that some temporary protections are needed, that arrangement should take the form of a contingent protective order, as discussed below.

A. Permanent Concealment of Plaintiffs' Identities is Unwarranted.

As noted above, because this case arises out of an FEC administrative enforcement matter, the Commission is required to "make public" any "conciliation agreement" obtained by the Commission through its administrative enforcement proceedings as well as any "determination that a person has not violated" FECA. 52 U.S.C. § 30109(a)(4)(B). Commission regulations implementing FECA require the public release within 30 days of "the basis" for any "finding of no reason to believe or no probable cause to believe" or any other "terminat[ion of

Commission] proceedings." 11 C.F.R. § 111.20(a). The Commission also "reconciles" FECA with the Freedom of Information Act by having a policy regarding "the disclosure of investigatory file materials in closed cases." *AFL-CIO v. FEC*, 333 F. 3d 168, 171 (D.C. Cir. 2003) (citing the Commission's previous policy). In order to accommodate constitutional concerns, the Commission now implements these directives through a policy specifying public disclosure of only certain documents that were "integral to its decisionmaking process." *FEC Disclosure Policy*, 81 Fed. Reg. at 50703. Such documents include General Counsel's Reports that make recommendations regarding whether there is reason to believe or probable cause to believe violations occurred, memoranda and reports from the Office of General Counsel prepared in connection with a specific Matter Under Review and formally circulated for Commission consideration and deliberation, and statements of reasons issued by Commissioners. *Id.*

Plaintiffs are referenced in documents addressing whether there is reason to believe they committed violations of FECA, whether discovery should be sought from them and other parties, and whether there is probable cause to believe others committed violations of FECA. Though not named as a respondent in the administrative complaint when the complainants were unaware of the source of the contribution at issue and not formally designated by the Commission as a respondent when their identities were later revealed in the investigation, plaintiffs feature prominently in the agencies' examination of the underlying facts. The undisputed facts demonstrate the obvious public importance of making the identities of plaintiffs transparent where they appear in the Commission's deliberations.

[redacted]GI LLC, an entity already found to have unlawfully participated in the making of the contribution in the name of another. [redacted] John Doe 2 provided

the funds that GI LLC then immediately sent to the American Conservative Union. The Office of General Counsel concluded that John Doe 2 [redacted] funded GI LLC with the purpose of making political contributions for which John Doe 2 was the true source. Two Commissioners accepted this recommendation, and the memoranda from agency attorneys helps to explain their position. One Commissioner, Commissioner Weintraub, has also prepared a further statement of her reasons for voting as she did, which discussed in detail her view of plaintiffs' role in the underlying facts. John Doe 2 is also discussed extensively in General Counsel's Briefs regarding the liability of GI LLC and others because of its role in the underlying facts. Whatever the legal status of its actions, it was undoubtedly a central figure in factual circumstances that led to several persons being found to have violated FECA.

Making public the records comprising and documenting the Commission's deliberations without the redactions plaintiffs seek amply deters future violations and promotes Commission accountability. The publicity of plaintiffs' names [redacted] funder of a person found to have concealed political contributions. FECA promotes public accountability by explicitly requiring notification of the public of any "determination that a person has not violated" FECA. 52 U.S.C. § 30109(a)(4)(B), which the Commission construes to include any "finding of no reason to believe or no probable cause to believe" other "terminat[ion of Commission] proceedings," 11 C.F.R. § 111.20(a). Many respondents who are unanimously found not to have violated FECA are disclosed routinely. Plaintiffs were the subjects of a split Commission vote regarding whether there was reason to believe they had committed a violation. They are not more entitled to keep their identity confidential than those unanimously found not to have committed a violation.

The need for disclosure of those who have not been found to commit violations is made manifest in the context of the FEC by the fact that Commission dismissals of administrative complaints are subject to judicial review. 52 U.S.C. § 30109(a)(8). Under plaintiffs' logic, all such cases would need to be litigated under seal, and yet for more than 40 years they have been handled in open court. FECA's judicial review provision demonstrates decisively that disclosure is warranted for persons who have been the subject of FEC enforcement votes, in contrast with grand juries and other agencies plaintiffs cite, which may not be permitted to disclose investigated parties in response to FOIA requests.

FECA's judicial review provision also includes a timeline that prevented the Commission from agreeing to further delay resolution of plaintiffs' objections. There may be jurisdictional and other defenses to any claim the administrative complainants may make here that they can challenge the Commission's handling of a MUR which culminated with a conciliation agreement with some parties, but whether to initiate such an action is CREW's determination. In order to make that decision, it is entitled to the information from the Commission's deliberations that is ordinarily made public. CREW's deadline for filing such an action is on or about January 2, 2018. Withholding the MUR file from the public record or posting an incomplete one could expose the FEC to allegations by CREW that the agency had unlawfully withheld information material to its rights as a potential petitioner for review of the Commission's closure of the relevant MUR file.

Plaintiffs' submissions obfuscate such issues here and rely on a series of inapt or mischaracterized authorities. 11 C.F.R. § 5.4(a)(4), which incorporates by reference FOIA exemptions, was struck down and has been explicitly superseded by the *FEC Disclosure Policy*. *In re Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001) and 52 U.S.C. § 30109(a)(12)(A) involve the

maintenance of confidentiality only while an enforcement matter is still pending. The portion of the district court opinion in *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001), which held that FECA's confidentiality provision does not lapse at the time the Commission terminates an investigation, was overturned on appeal. *See AFL-CIO v. FEC*, 333 F.3d 168, 174, 179 (D.C. Cir. 2003) (finding the Commission may permissibly conclude that FECA's confidentiality provision applies only to pending litigation). Plaintiffs present no nonfrivolous reason for reversal of this aspect of the opinion from the Court of Appeals, let alone one that is likely to succeed. The Court of Appeals in *AFL-CIO* also found constitutionally problematic the FEC's then-blanket disclosure policy leading to release of internal political strategy documents and volunteer lists that had been subpoenaed (many of which had not even been reviewed by investigators), in a situation where the Court credited the evidence of a potential chilling effect and all respondents had been dismissed. *Id.* at 170-71, 176-78. Here, by contrast, the Commission proposes to disclose its own reports pursuant to a carefully tailored policy and with references to persons who featured prominently in the underlying facts and were themselves subject to a split vote of Commissioners regarding whether there was reason to believe they had themselves committed the violation alleged in the administrative complaint. John Doe 1's purported reputational harm is not distinct from that of any person who has some involvement in a scheme in which others are found to have committed substantial violations. The issues in *AFL-CIO* could scarcely be further afield. Plaintiffs rely heavily on each of the points rebutted above, demonstrating that none of their authorities create even a tenuous connection to a credible issue in need of litigation.

For all of these reasons, plaintiffs do not demonstrate a likelihood of success or raise a substantial issue. Given the public purposes cited above, a temporary restraining order is similarly neither in the public interest nor demonstrated by the equities.

B. Sealing in this Case Should Be For the Limited Purpose of Sealing References and Should Expire at the Conclusion of the Case.

Although plaintiffs are not likely to ultimately succeed, the Commission recognizes the unique mootness danger posed by disclosure issues. The Commission thus does not object to this entire case being under seal while the Court determines whether to grant plaintiffs' request for a temporary restraining order. If plaintiffs' request for both temporary and permanent relief cannot be quickly rejected, however, any order establishing an interim arrangement while the Court reviews the positions of the parties should deviate substantially from plaintiffs' proposal. If the Court finds that such an arrangement is appropriate, any order issued should take the form of a contingent protective order rather than a temporary restraining order (which requires a finding of a likelihood of success) and should permit maximal public disclosure in the interim.

Any interim relief ordered by the Court should take the form of a contingent protective order, with the contingency being the Court's ultimate resolution of the issues in this case. If such an order is entered, the FEC submits that it should entail placing matters under seal and preventing public disclosure while the Court reaches a final determination of plaintiffs' claims. Sealing references to John Doe 1 and John Doe 2 in the FEC's administrative record and filings in this Court is sufficient to accommodate plaintiffs' interests during the pendency of litigation. Plaintiffs' pseudonymous motion seeks only to have their identities sealed in public filings, not in sealed filings. A limited sealing order would also permit the FEC to file the administrative case file in unredacted form under seal so that it may be reviewed by this Court and the parties.

Partially sealing the case would also enable redacted versions of filings to be placed on the public record. The FEC requests that any such order enable the FEC to publish the administrative case materials it would ordinarily make public on its website with redactions where John Doe 1 and John Doe 2 are named. The FEC further requests that it be allowed to notify administrative complainants CREW that any such redacted version of the administrative case file is the subject of this litigation, and, in addition, that the Commission be allowed generally to note that the redacted version of any public administrative case file published on the FEC's website is the subject of this litigation.

CONCLUSION

For the foregoing reasons, any relief ordered by the Court should be consistent with the foregoing considerations.

Respectfully submitted,

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December 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2017, I served the foregoing papers that were filed with the Court under seal, by sending these materials by email to the following counsel, who have consented to receive service by email:

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