IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

EMPOWER OVERSIGHT WHISTLEBLOWERS & RESEARCH,	)	
Plaintiff,	)	
v.	)	No. 1:21-CV-1275-LMB/JFA
NATIONAL INSTITUTES OF HEALTH	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO SEAL

This Court should deny NIH's motion to seal portions of Empower Oversight's opposition to summary judgment, s*ee* Dkt. Nos. 42–44, because NIH has not articulated "a compelling government interest" that justifies sealing two names in an email that *the agency* previously provided to Empower Oversight in response to its FOIA request, *Ross v. Hilton Head Island Dev. Co., LLC*, No. 9:15-cv-2446-BHH, 2019 WL 5872171, at *8 (D.S.C. Jan. 3, 2019). "The public's right of access to judicial records and documents may be abrogated only in unusual circumstances." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 182 (4th Cir. 1988). This case presents no such circumstances.

NIH claims that it "inadvertently failed to redact the two names." Memo at 4 (Dkt. No. 44). Apparently, NIH believes that it "could have invoked a statutory exemption but inadvertently failed to do so" when it produced the email to Empower Oversight. *Sierra Club v. EPA*, 505 F. Supp. 3d 982, 991 (N.D. Cal. 2020). NIH now asks the Court to correct its purported error by entering an order that seals "portions of Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Dkt. 47) and a portion of one of the accompanying exhibits (Exhibit C, Dkt. 47-3)." Memo at 1 (Dkt. No. 44). This Court should deny that request.

Undoubtedly, the Court "has supervisory power over its own records and files." *Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 599 (1978). But, as a practical matter, "the public has already had access to the information contained in the records." *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (citing *Warner Comms., Inc.*, 435 U.S. at 597–608). Even if this Court were to grant NIH's motion to seal portions of Empower Oversight's opposition to summary judgment, "the proverbial cat is already out of the bag." *Vazquez v. City of New York*, No. 10-cv-6277 (JMF), 2014 WL 11510954, at *1 (S.D.N.Y. May 2, 2014). NIH has not asked the Court to "claw back" the records purportedly lacking the agency's intended redactions that it claims to have mistakenly failed to make. *Sierra Club*, 505 F. Supp. 3d at 984. And even if the Court were to construe the agency's motion as requesting that relief, NIH has not carried its "heavy burden to obtain such an order." *Id.* at 992. The motion should be denied.

BACKGROUND

Congress enacted FOIA to "facilitate public access to Government documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The "crystal clear" objective of FOIA is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted).

Public access to agency records under FOIA does not apply to certain matters that fall within discrete categories of statutory exemptions. 5 U.S.C. § 552(b). These exemptions "must be narrowly construed." *Milner v. Dep't of the Navy*, 562 U.S. 562, 564 (2011) (internal quotation marks omitted). Relevant here, Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). FOIA's "public interest in disclosure must prevail" unless the purported invasion of privacy is *clearly unwarranted*. *Ray*, 502 U.S. at 177. "This exemption

creates a heavy burden" for the agency; "indeed, under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (internal quotation marks omitted).

An agency may rely on Exemption 6 only to withhold records that implicate "significant privacy interests," as opposed to *de minimis* privacy interests. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). If no significant privacy interest is implicated, "FOIA demands disclosure." *Id.* Under Exemption 6, agency correspondence—such as an email message—"does not become personal solely because it identifies government employees." *Aguirre v. SEC*, 551 F. Supp. 2d 33, 54 (D.D.C. 2008).

ARGUMENT

NIH suggests that this Court should "maintain the status quo" by issuing an order that seals portions of Empower Oversight's opposition to the agency's motion for summary judgment. Memo at 5 (Dkt. No. 44). Yet NIH has it exactly backwards. The "status quo" is that the agency produced an email in response to Empower Oversight's FOIA request, and Empower Oversight properly relied on the email that it lawfully obtained under the Act. Evidently, NIH regrets the version of the email that it produced because the agency now claims that it made a "mistake" by failing to redact two names. *Id.* at 4. NIH seeks an order from this Court to *overturn* the status quo—it wants this Court to undo the agency's purported "mistake."

"Many mistakes by litigants have consequences." *Sierra Club*, 505 F. Supp. 3d at 991. In the unique circumstances of this case, it would be inappropriate for the Court "to undo" NIH's purported mistake by sealing portions of the record. *Id.* This Court should reject NIH's request because the agency has not satisfied "the more rigorous First Amendment standard" to seal portions of documents that agency itself already has produced. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988).

The public has a well-established First Amendment "right of access" to judicial records and documents. *Va. Dep't of State Police v. Washington Post*, 386 F.3d 567, 578 (4th Cir. 2004). NIH has not articulated a "compelling governmental interest" to justify an order from this Court sealing the two names. *Id.* at 579. It is "not enough," *id.*, for NIH merely to claim that the individual names reveal nothing "about how NIH operates," Memo at 4 (Dkt. No. 44). NIH has not carried its heavy burden, as the agency has not provided "specific underlying reasons" explaining how the integrity of the agency's operation "reasonably could be affected by the release of such information." *Va. Dep't of State Police*, 386 F.3d at 579. Nor could NIH reasonably make such a claim.

NIH appears to believe that the agency has a compelling governmental interest in defending its interpretation of Exemption 6 "until Judge Brinkema finds the information should be disclosed." Memo at 4 (Dkt. No. 44). But the *agency itself* already disclosed the two names when it produced the email to Empower Oversight after NIH's FOIA Officer personally "reviewed all documents." Garcia-Malene Suppl. Declaration at ¶ 3 (Dkt. No. 37-2). Given "the specific facts and circumstances" of this FOIA case, NIH has "failed to present a compelling governmental interest that is sufficient" for this Court to seal portions of the record that the agency correctly produced in accord with FOIA. *Va. Dep't of State Police*, 386 F.3d at 579.

The parties disagree as to the scope of Exemption 6, but that disagreement does not support an order to seal portions of this record. Empower Oversight challenges NIH's reliance on Exemption 6 to redact the names of the curator and the Chinese researcher because the agency purported to redact the names based on its concern about "the heightened public scrutiny with anything remotely related to COVID-19." Garcia-Malene Suppl. Declaration at ¶ 51 (Dkt. No. 37-2). As Empower Oversight pointed out, FOIA "provides no such 'heightened' protections because of COVID-19 or other matters that may be within NIH's purview." Opp. at 25 (Dkt.

No. 41). NIH claims to be concerned about "avoiding harassment or media scrutiny," Memo. at 4 (Dkt. No. 44), but those concerns relate to *the merits* of the agency's reliance on Exemption 6, which this Court must construe narrowly, *Milner*, 562 U.S. at 564. NIH conflates apples with oranges in suggesting that those concerns somehow warrant sealing portions of the record. In fact, the same information already may be found online.

In the email that NIH now seeks to partially seal, an external non-NIH party (Jesse Bloom) wrote Steve Sherry "to inquire about some more deleted deep sequencing runs from China." Opp. Ex. C (Dkt. No. 41-3). Bloom specifically identified "two runs related to pangolin coronavirus sequences from China" and he questioned the "stated rationale" provided by the Chinese researcher for removing those sequences from the SRA. *Id.* Neither the Chinese researcher's name nor his request to remove the data was confidential information. That information was accessible to those outside of NIH, including Jesse Bloom.

Efforts to study and to understand the pangolin coronavirus were also public. Indeed, several Chinese researchers authored an article seeking to understand the ongoing global pandemic based on their research of a "coronavirus from pangolins—the most-trafficked mammal in the illegal wildlife trade." Kangpeng Xiao, et al., *Isolation of SARS-CoV-2-related Coronavirus from Malayan Pangolins*, Nature (May 7, 2020), https://www.nature.com/articles/s41586-020-2313-x. The researchers concluded that the pangolin coronavirus "could represent a future threat to public health if wildlife trade is not effectively controlled." *Id.* NIH now asks this Court to seal the name of a researcher publicly listed as an author of that article.

None of this public information should be sealed, however, as NIH defeats its own argument. In support of its motion for summary judgment, NIH submitted a statement of *undisputed facts*, acknowledging that Bloom had published a manuscript available to the public online. Memo at 4, ¶ 8 (Dkt. No. 37). "The SRA,"

Bloom explained, "is designed as a permanent archive of deep sequencing data." Jesse Bloom, BIORXIV, *Recovery of Deleted Deep Sequencing Data Sheds More Light On The Early Wuhan SARS-CoV-2 Epidemic* (June 22, 2021), https://www.biorxiv.org/content /10.1101/2021.06.18.449051v1.full. Data uploaded to the SRA "can only be deleted by e-mailing SRA staff." *Id.* Bloom provided an example of an email (Figure 2) "between the lead author of the pangolin coronavirus paper Xiao et al. (2020) and SRA staff." *Id.* And Bloom correctly pointed out that the "lead author" of that paper had requested that SRA staff delete "two sequencing runs" from the pangolin coronavirus. *Id.* Thus, the information that NIH now seeks to seal was already public *before* it produced the relevant email to Empower Oversight.

In its opposition to NIH's motion for summary judgment, Empower Oversight properly argued that public interest in disclosure outweighs any *de minimis* privacy interest in redacting the name of the Chinese researcher and the NIH curator from the email that NIH produced (Dkt. No. 41-3). As Senators Grassley, Blackburn, and Marshall explained, the public has a significant interest in understanding the reason why early genetic sequences for COVID-19 were removed from the NIH's database. "Simply put, the American people deserve to know what their government knows about the origins of this global illness." Amended Compl. Ex. G (Dkt. No. 16-7) (June 28, 2021 letter). NIH may disagree as to the significance of the public's interest, but that does not justify an order to seal portions of the record containing information already available to the public online.

NIH relies on *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000), yet the circumstances of that case are easily distinguishable. There, the parties entered into a confidential settlement agreement and *jointly* "moved the district court for permission to file and maintain the settlement agreement and related documents under seal." *Ashcraft*, 218 F.3d at 292. A reporter obtained a copy of the confidential settlement agreement, and the district court entered a contempt order against the

reporter and a newspaper. The Fourth Circuit reversed the district court's order because the district court "did not comply with the requirements set forth in *Knight* and *Stone* for sealing court documents." *Id.* at 302.

NIH argues that it satisfies the "*Ashcraft* factors." Memo at 4 (Dkt. No. 44). Yet that argument does not get the agency very far. The so-called *Ashcraft* factors are meant only to "ensure that the decision to seal records will not be made lightly." *Stone*, 855 F.2d at 182. Here, NIH has "failed to present a compelling governmental interest" that supports sealing portions of an email that the agency properly produced in compliance with FOIA. *Va. Dep't of State Police*, 386 F.3d at 579. The motion therefore should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny NIH's motion to seal portions of the record.

Respectfully submitted,

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