

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

RICHARD ROE; VICTOR VOE; and )  
OUTSERVE-SLDN, INC., )

Plaintiffs, )

v. )

PATRICK M. SHANAHAN, in his official )  
capacity as Acting Secretary of Defense; )  
HEATHER A. WILSON, in her official )  
capacity as Secretary of the Air Force; and )  
the UNITED STATES DEPARTMENT OF )  
DEFENSE, )

No. 1:18-cv-1565-LMB-IDD

Defendants. )

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**MEMORANDUM IN SUPPORT OF DEFENDANTS’ MOTION TO  
FILE UNDER SEAL APPENDIX PAGES 457 THROUGH 1024 ATTACHED  
TO DEFENDANTS’ MEMORANDUM IN SUPPORT OF DEFENDANTS’  
MOTION TO DISMISS AND DEFENDANTS’ OPPOSITION TO  
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Local Civil Rule 5, Defendants move the Court to seal Appendix pages 457 through 1024 (“the administrative record”) attached to Defendants’ Memorandum in Support of Defendants’ Motion to Dismiss and Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction. In support of its motion, Defendants state as follows:

1. Appendix pages 457 through 744 and 1021 through 1022 which contains the complete administrative record of the Air Force’s retention determination for Richard Roe in light of his HIV diagnosis.
2. Appendix pages 745 through 1020 and 1023 through 1024, which contains the complete administrative record of the Air Force’s retention determination for Victor Voe in light of his HIV diagnosis.

The administrative record includes substantial amounts of information that pose a risk of exposing the identity of Roe and Voe, Roe and Voe's medical records, and certain unclassified military information. Under established Fourth Circuit precedent, there are three requirements for sealing court filings: (1) public notice of the request to seal with an opportunity to object; (2) consideration of less drastic alternatives; and (3) a statement of specific findings supporting a decision to seal and rejecting alternatives to seal. *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000).

Defendants have complied with the first *Ashcraft* factor because Defendants have also filed a Notice of Under Seal Filing, this public memorandum, and a Proposed Order to seal the materials pursuant to Local Rule 5. Should Plaintiffs, or any interested member of the public object to the instant motion, he or she may raise his or her objections with the Court.

Second, this is the least drastic alternative available in compliance with the second *Ashcraft* factor. Though Defendants request that the full administrative record be sealed, it is possible to provide a redacted administrative record to ensure compliance with the second *Ashcraft* factor. Accordingly, Defendants would like time to confer with Plaintiffs regarding appropriate redactions of information that could expose the identities of Roe and Voe and their personal medical information. Though this, along with the military information at issue, form the large bulk of the administrative record and will require substantial redactions, Defendants intend to file a public, redacted version by February 1, 2019 to make public any information that does not fall into these categories.

Third, considering the items in the administrative record, the decision to seal is supported by existing Fourth Circuit precedent and the Court's January 18, 2019 Order, ECF 42.

With respect to information that could expose the identity of Roe and Voe, the Court has already considered the “discrimination facing those living openly with HIV,” found “good cause” for these plaintiffs to proceed pseudonymously, and ordered the protection of the plaintiffs’ identities. ECF No. 42 (citing *In re Knight Pub. Co.*, 743 F.2d 231,235 (4th Cir. 1984)). The administrative record contains the plaintiffs’ names, medical records, and other information that poses a reasonable risk of exposing their identities. Therefore, the Defendants request that this information be sealed or redacted consistent with the Court’s reasoning in its January 18, 2019 Order. *See id.*

The second category of information in the administrative record that should be sealed are certain non-public details of the deployment rates for various Air Force career fields. Public access to judicial records is a “qualified right” that “springs from the First Amendment and the common-law tradition that court proceedings are presumptively open to public scrutiny.” *Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014). But the common law presumption in favor of public access can be overcome by a showing that a litigant has “some significant interest that outweighs the presumption.” *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). Likewise, litigants can overcome the First Amendment right of public access to documents by showing that “denial of access [is] . . . necessitated by a compelling government interest and narrowly tailored to serve that interest.” *Id.*; *see In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986). Here, Defendants do not seek an order to seal most of the information provided by the Department of Defense and the Air Force, as evidenced by its filing of declarations, policies, regulations, and reports to Congress in the public record. Rather, the government is seeking a much more narrowly tailored order that prevents the unveiling of specific information about the worldwide deployment tempo, which the military has an interest

in protecting from public release. It is a compelling government interest to protect this unclassified information, which would, if made public, reveal the distribution of worldwide deployment rates.

Accordingly, Defendants respectfully request that the Court enter an order sealing Appendix pages 457 through 1024, and order a redacted version of these pages be filed by February 1, 2017.

DATE: January 25, 2019

Respectfully submitted,

G. ZACHARY TERWILLIGER  
United States Attorney

/s/

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this date, I filed the foregoing using the Court's CM/ECF system, which will send a notification of electronic filing (NEF) to the following counsel of record:

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**PROPOSED ORDER**

Upon consideration of Defendants’ Motion to File Under Seal Appendix pages 457 through 1024 (“the administrative record”) attached to Defendants’ Memorandum in Support of Defendants’ Motion to Dismiss and Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction, this Court GRANTS the motion, FINDING that: (1) Defendants provided sufficient notice of the request; (2) that there are no less drastic alternatives than sealing the administrative record; (3) that Roe’s and Voe’s identities should remain private consistent with the Court’s previous order, ECF No. 42, and; (4) that the government has a compelling interest in preventing the public release of certain unclassified information about military deployment rates.

Therefore, the Court ORDERS that Appendix pages 457 through 1024, attached to Defendants’ Memorandum in Support of Defendants’ Motion to Dismiss and Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction, be filed under seal. The Court further

ORDERS that Defendants shall confer with Plaintiffs regarding redaction of identifying information in the administrative record and that Defendants will publicly file a redacted version of the administrative record by February 1, 2019. Defendants may redact only information that poses a reasonable risk of exposing plaintiffs' identities or that contains sensitive information regarding military deployment rates.

Entered this \_\_\_\_ day of \_\_\_\_\_, 2019.

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The Honorable Leonie M. Brinkema  
United States District Judge