

**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 SUPPLEMENTAL ADMINISTRATIVE RECORD PAGES A-1069  
THROUGH A-1074 FILED SIMULTANEOUSLY WITH DEFENDANTS’ NOTICE OF  
FILING OF SUPPLEMENTAL ADMINISTRATIVE RECORD**

Pursuant to Local Civil Rule 5, Defendants move the Court to seal Supplemental Administrative Record pages A-1069 through A-1074 filed simultaneously with the Defendants’ Notice of Filing of Supplemental Administrative Record. In support of its motion, Defendants state as follows:

1. Supplemental Administrative Record pages A-1069 through A-1070 contain the Air Force Personnel Board voting sheet used as part of the Air Force’s retention determination for Richard Roe in light of his HIV diagnosis and accompanying certification statement.
2. Supplemental Administrative Record pages A-1071 through A-1074 contain the Air Force Personnel Board voting sheet used as part of the Air Force’s retention

determination for Victor Voe in light of his HIV diagnosis and accompanying certification statement.

The Supplemental Administrative Record contains information that discloses the identity of plaintiffs Roe and Voe and the identities of voting members of the Air Force Personnel Board. 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 supplemental 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 disclose the identities of Roe and Voe and their personal medical information. Defendants intend to file a public, redacted version by March 8, 2019 to make public any information that does not fall into these categories.

Third, considering the identities revealed in the Supplemental Administrative Record, the decision to seal is supported by existing Fourth Circuit precedent, the Court's January 18, 2019 Order, ECF No. 42, the Court's January 28, 2019 Order, ECF No. 59.

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 Supplemental Administrative Record contains the plaintiffs’ names and other identifying information. Therefore, the Defendants request that this information be sealed or redacted consistent with the Court’s reasoning in its January 18, 2019 Order and its January 28, 2019 Order, ECF No. 59. *See id.*

The second category of information in the administrative record that should be sealed is the identities of the voting members of the Air Force Personnel Board. 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, the Government is seeking a narrowly tailored order that prevents the unveiling of the identities of the voting members of the Air Force Personnel Board, who are third parties in this litigation. *See Decl. of Col. John P. Russo, Ex. A, ¶ 6.* If the identity of the voting members became public, there is the potential for harassment of these members or that future voting members would be chilled from willingly participating in Air Force Personnel Boards. *Id.*

For these reasons, the Defendants have a compelling interest in protecting these identities from the public.

Accordingly, Defendants respectfully request that the Court enter an order sealing Appendix pages A-1069 through A-1074, and order a redacted version of these pages be filed by March 8, 2019.

DATE: March 1, 2019

Respectfully submitted,

G. ZACHARY TERWILLIGER  
United States Attorney

/s/

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*Counsel for the Government*





position, for a short period, I performed duties as the Chief Innovation Officer, and prior to that, performed duties as a Personnel Officer.

2. In the exercise of my official duties, I have been made aware of this lawsuit by counsel from the Air Force's Litigation Division.

3. The information in this declaration is based on my personal knowledge and upon my personal review of information made available to me in my official capacity.

4. I base this declaration on my personal knowledge and on information made available to me in the performance of my official duties, my background, training, and experience.

#### **Purpose of this Declaration**

5. I hereby request that the names of the 15 voting members contained in the pages A-1069 through A-1074 attached to Defendants' Notice of Filing of Supplemental Administrative Record be sealed on the record in an effort to maintain the privacy of those individuals.

6. The names of the voting members should be held under seal primarily because releasing these names to the general public may cause all or some members to be harassed for the way they have voted regarding HIV cases. Without assurance that their opinions on aspects of the HIV policy would be protected from disclosure, voting members will be much less likely to participate in Air Force Personnel Boards in the future. Additionally, with this lawsuit in place, these members may be asked or pressured by the media to provide public comment. Releasing the names of voting members would have a chilling effect on not only the voting members for these specific cases, but on future voting members as well.

7. For the above reasons, I request that the names of the voting members be held under seal.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 28th of February, 2019

2/28/2019

X *John P. Russo*

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JOHN P. RUSSO, Colonel, USAF  
Chief, Air Force Personnel Board  
Signed by: RUSSO.JOHN.PAUL.1019536706