

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

RICHARD ROE, ET AL.,

PLAINTIFFS,

v.

MARK T. ESPER, ET AL.,

DEFENDANTS.

CIVIL ACTION NO. 1:18-cv-01565

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO SEAL
PLAINTIFFS' REPLY AND EXHIBITS A AND B IN SUPPORT OF
THEIR MOTION TO MODIFY THE COURT'S SCHEDULING ORDER
FOR THE LIMITED PURPOSE OF TAKING A DEPOSITION OUT OF TIME**

Pursuant to Local Civil Rule 5, Plaintiffs move to seal Plaintiffs' Reply in Support of Their Motion to Modify the Court's Scheduling Order for the Limited Purpose of Taking the Deposition of Colonel Danaher Out of Time, and Exhibits A and B to that reply. In support of this motion to seal, Plaintiffs state as follows:

1. Exhibit A is an email, dated October 10, 2017, from Colonel Danaher to Lieutenant Colonel Downes, discussing the development of a memorandum on the retention of Airmen with HIV. This email includes communications made by Air Force personnel that Defendants have designated as confidential under the protective order.

2. Exhibit B is an email, dated March 16, 2018, from Colonel Danaher to Lieutenant Downes and Lieutenant Colonel Okilicz, discussing the development of a memorandum on the retention of Airmen with HIV. This email includes communications made by Air Force personnel that Defendants have designated as confidential under the protective order.

3. Plaintiffs' Reply in Support of Their Motion to Modify the Court's Scheduling Order for the Limited Purpose of Taking the Deposition of Colonel Danaher Out of Time quotes the content of these emails.

4. With this Memorandum in Support of Plaintiffs' Motion to File Under Seal, Plaintiffs have also filed a Notice of Motion to File Under Seal, Motion to File Under Seal, and a Proposed Order to seal the materials, pursuant to Local Rule 5.

5. 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). Plaintiffs have complied with these requirements.

6. First, as mentioned above, Plaintiffs have filed along with this Motion a Notice of Motion to File Under Seal. Should Defendants or any interested member of the public object to the motion, they may raise their objections with the Court.

7. Second, there are no less drastic alternatives to sealing. Plaintiffs will publicly file redacted versions of these documents so that the public may have the greatest access possible, while still protecting confidential information.

8. Third, a decision to seal these documents would be supported by Fourth Circuit precedent. The unredacted versions of these documents contain contributions made by Air Force personnel in the course of their official duties during internal policy deliberations of the Air Force. The Court has already determined in this case, and in the companion case *Harrison, et al. v. Esper, et al.*, No. 18-cv-641, that confidential deliberative documents from the Air Force are subject to the Court's protective order in this case. *See Harrison*, ECF No. 128, 175–76; *Roe*, ECF No. 158.

The protective order provides that “Protected Material . . . shall not be filed on the public record,” and “[t]o the extent that Protected Material is relied upon by the Parties in briefs, it should be redacted.” Defendants have informed Plaintiffs that Exhibits A and B are confidential. Their contents must therefore be redacted prior to being placed on the public record. Plaintiffs seek to file unredacted versions under seal for the benefit of the Court and Defendants.

Accordingly, Plaintiffs respectfully request that the Court enter an order sealing the unredacted version of their Reply in Support of Their Motion to Modify the Court’s Scheduling Order for the Limited Purpose of Taking the Deposition of Colonel Danaher Out of Time, and Exhibits A and B to that reply.

Dated: July 11, 2019

/s/ Scott Schoettes

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CERTIFICATE OF SERVICE

I certify that, on the 11th day of July, 2019, I caused this document to be filed electronically through the Court's CM/ECF system, which automatically sent a notice of electronic filing to all counsel of record.

Dated: July 11, 2019

Respectfully submitted,

/s/ John W. H. Harding

John W.H. Harding