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 MOTION TO SET ASIDE THE ORDER ISSUED BY MAGISTRATE JUDGE ANDERSON ON JULY 22, 2022

Empower Oversight respectfully objects to the order issued by Magistrate Judge Anderson on July 22, 2022, granting NIH's motion to place portions of the record under seal. *See* Fed. R. Civ. P. 72(a); Local Civil Rule 72. The order was issued *before* Empower Oversight timely filed its opposition to NIH's motion to seal. Empower Oversight requests that this Court set aside the order, and, for the reasons stated in its opposition (Dkt. No. 50, copy attached here), the Court should deny NIH's motion to seal portions of the record. Undersigned counsel contacted government counsel but did not receive a response as to the agency's position.

On July 15, 2022, NIH provided notice of the agency's filing of its motion to seal in accord with Local Civil Rule 5(C). *See* Notice (Dkt. No. 43). NIH notified Empower Oversight "and any interested third parties" that they may file an "opposition to the motion *within seven (7) days*" of the NIH's motion. *Id.* (emphasis added). NIH filed its motion to seal the same day—on July 15, 2022. *See* Motion (Dkt. No. 42). In its motion, NIH correctly stated: "Plaintiff *opposes* this motion." *Id.* (emphasis added).

On July 22, 2022—seven days after NIH filed its opposed motion to seal—Empower Oversight timely filed its opposition (Dkt. No. 50). But Magistrate Judge Anderson did not consider Empower Oversight's opposition because he entered an order granting NIH's motion *five minutes earlier* at 4:42 pm (EST). *See* Order (Dkt. No. 49).

Empower Oversight objects to the order as "contrary to law." Fed. R. Civ. P. 72(a); *see also Bruce v. Hartford*, 21 F. Supp. 3d 590, 593–94 (E.D. Va. 2014) (applying de novo review to legal questions). NIH has not articulated a compelling government interest for this Court to seal two names. As Empower Oversight explained in its opposition, NIH improperly seeks to seal information that is already available to the public. In response to a separate FOIA request by U.S. Right to Know, NIH previously produced completely *unredacted* emails from the Chinese researcher to the SRA Curator asking to have data removed from the Sequence Read Archive. U.S. Right to Know has a website with information about its FOIA litigation—https://usrtk.org/tag/pangolin-papers/—including links to several agency records and emails with the unredacted names that NIH now seeks to seal. *See also U.S. Right to Know v. NIH*, No. 1:20-cv-03196-CKK (D.D.C.). For example, the unredacted names can be found on page 49 of the PDF posted at https://usrtk.org/wp-content/uploads/2020/12/NCBI-Emails.pdf.

In this case, moreover, NIH acknowledged as an undisputed fact that Dr. Jesse Bloom published a manuscript online with agency records. Memo at 4, ¶ 8 (Dkt. No. 37). Bloom's manuscript includes a version of the email from the Chinese researcher to the SRA curator as "Figure 2." *See* 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.

This Court should reject NIH's attempt to limit the public's 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).

* * *

In these circumstances, NIH has failed to carry its heavy burden. This Court should set aside the order granting the agency's motion to seal, Dkt. No. 49, and it should deny NIH's motion to seal for the reasons explained in greater detail in Empower Oversight's opposition, Dkt. No. 50.

Respectfully submitted,

/s/ Jeffrey S. Beelaert
Jeffrey S. Beelaert (VSB No. 81852)
STEIN MITCHELL BEATO & MISSNER LLP
901 15th Street NW, Suite 700
Washington, DC 20005
Tel: (202) 661-0923
Fax: (202) 296-8312
Email: jbeelaert@steinmitchell.com

Attorney for Plaintiff Empower Oversight Whistleblowers & Research

July 27, 2022