

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND )  
ETHICS IN WASHINGTON, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
U.S. DEPARTMENT OF JUSTICE, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action No. 17-0432 (TNM)

**DEFENDANT’S STATEMENT CONCERNING RELATEDNESS**

On February 2, 2018, this Court directed the parties to file a statement regarding whether this case is related to *Campaign for Accountability v. Department of Justice*, No. 16-1068 (KBJ) (“*CfA*”). Plaintiff did not designate this case as related to *CfA* when it filed the complaint. On October 31, 2017—more than two months after completion of briefing on Defendant’s motion to dismiss—Plaintiff suggested for the first time that the two cases “may” be related. ECF No. 21 at 1. Plaintiff’s latest filing does not take a position on this question, but suggests that assigning both cases “to the same district judge seems most sensible.” ECF No. 22 at 3.

The Government submits that the two cases are not related within the meaning of LCvR 40.5 but that, even if they were, there is no good cause for transferring the case at this late stage. *See* LCvR 40.5(c)(2). In fact, the opposite is true. There is good reason to keep the case before this Court, because the Government’s motion to dismiss is fully briefed and ripe for decision, while the parties in *CfA* are just beginning briefing on a motion to dismiss, regarding a complaint that presents discrete categories of Office of Legal Counsel (“OLC”) records not specifically identified in Plaintiff’s complaint here.

1. As an initial matter, Defendant agrees with Plaintiff that application of LCvR 40.5's related-case definition here is "somewhat uncertain." ECF No. 22 at 2. LCvR 40.5(a)(3) provides in relevant part that cases are deemed related and subject to assignment to the same judge when they "involve common issues of fact[.]" LCvR 40.5(a)(3). The rule does not encompass cases involving common issues of *law*. Although Freedom of Information Act ("FOIA") cases seeking overlapping records may include some factual similarities, the application of the FOIA and its exemptions to particular records is principally an issue of law. That is particularly true here, since Plaintiff's complaint does not identify any particular records and the parties' briefing has focused on the applicability of the affirmative disclosure provisions found at 5 U.S.C. § 552(a)(2) and FOIA Exemption 5 to OLC advice documents.

2. Even if the two cases could be deemed related within the meaning of LCvR 40.5(a)(3), transfer of this case now is not warranted. LCvR 40.5(c)(1) provides that, when the existence of a related case is noted at the time a case is filed, the second case "shall" be assigned to "the judge to whom the oldest related case is assigned," at least for the purpose of determining whether the two cases are related. But when the existence of a related case is noted at a later time, the Local Rules provide in permissive terms that "the judge having the later-numbered case *may* transfer" it to the Calendar and Case Management Committee; that Committee must then assign the case to the Judge with the earlier case only if "good cause exists for the transfer." LCvR 40.5(c)(2) (emphasis added).

3. No such good cause exists here. As a threshold matter, Plaintiff did not designate this case as related to *CfA* when Plaintiff filed its complaint, and Plaintiff never suggested that the two cases were related during the motion to dismiss briefing—even though the original complaint

in *CfA* and the Complaint in this case were both signed by the same attorney,<sup>1</sup> and even when the Government flagged the existence of *CfA* in its motion to dismiss briefing (*see* ECF No. 8-1 at 6). Plaintiff now contends that it did not previously designate this case as related to *CfA* because, unlike *CfA*'s amended complaint (which seeks disclosure of records to *CfA*), *CfA*'s original complaint sought an order that DOJ disclose OLC opinions to the public as a whole (which the D.C. Circuit has held that FOIA does not permit). But the relatedness analysis under LCvR 40.5(a)(3) has nothing to do with whether the cases are seeking identical relief. And even if it did, this distinction has little practical import; the party to whom documents are disclosed under FOIA can make them public and, in any event, FOIA requires agencies to publish documents that have been requested three or more times or are likely to become the subject of subsequent requests.<sup>2</sup>

4. Indeed, any differences between the two actions are greater now than before *CfA* filed its amended complaint. Unlike Plaintiff's complaint in this case—which seeks *all* “formal written opinions” as described in OLC's Best Practices Memorandum, ECF No. 1 ¶ 27—the amended complaint in *CfA* identifies and describes five purported categories of formal written opinions that *CfA* believes must be disclosed. *CfA*, ECF No. 22 ¶¶ 35-49. It is thus not correct that the legal issues in the two cases are “identical.” ECF No. 22 at 2. As the Government has explained in its motion to dismiss filings, Plaintiff's complaint here is fundamentally defective because the theory pled in that complaint—that *all* OLC formal written opinions are subject to disclosure—is foreclosed by binding precedent and any alternative arguments are neither ripe for review nor adequately pled. *See, e.g.*, ECF No. 14 at 3-10. By contrast, although the Government

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<sup>1</sup> Compare ECF No. 1 at 9, with *CfA*, ECF No. 1 at 12.

<sup>2</sup> *See* 5 U.S.C. § 552(a)(2)(D)(ii).

has moved to dismiss CfA's amended complaint, *see CfA*, ECF No. 29, that complaint at least purports to identify some categories of opinions that CfA believes are subject to disclosure.

5. Finally, and relatedly, transferring this case now would be highly inefficient. To be sure, the Government does sometimes seek consolidation of cases that call for overlapping records, but not where the cases are in a very different procedural posture, as they are here. Dispositive briefing on CfA's amended complaint has just begun; the Government filed its motion to dismiss on February 13. In addition, CfA's operative pleading was specifically amended in response to Judge Jackson's earlier decision in that case. By contrast, the Government's motion to dismiss in this case is fully briefed, including a sur-reply, and ripe for decision. Indeed, Plaintiff acknowledges that it "does not oppose proceeding separately" with the two cases. ECF No. 22 at 3. Under these circumstances, the Government respectfully submits that it would not be productive at this late stage to transfer a different case, with a different Complaint, that is the subject of a fully briefed motion to dismiss.

Respectfully submitted,

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