

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-00569 (KBJ)
)	
NATIONAL SECURITY AGENCY)	
)	
and)	
)	
CENTRAL INTELLIGENCE AGENCY)	
)	
Defendants.)	

**PLAINTIFF’S RESPONSE TO THE DEFENDANTS’
RESPONSE TO THE ORDER TO SHOW CAUSE**

In the Defendants’ view, two civil cases are “related” pursuant to LCvR 40.5 so long as there is some factual connection between them. That is not and should not be the law in this District. The Defendants’ argument fails for three reasons.

First, “[t]he general rule governing all new cases filed in this courthouse is that they are to be randomly assigned.” *United States v. Volvo Constr. Equip. Ab*, 922 F. Supp. 2d 67, 68 (D.D.C. 2013) (quoting *Tripp v. Exec. Office of President*, 196 F.R.D. 201, 202 (D.D.C. 2000) (three-judge calendar committee). As explained in *Tripp*, the “fundamental rationale” of random assignment is “to ensure greater public confidence in the integrity of the judicial process” by “guarantee[ing] fair and equal distribution of cases to all judges, avoid[ing] public perception or appearance of favoritism in assignments, and reduc[ing] opportunities for judge-shopping.” *Tripp*, 196 F.R.D. at 202. Because LCvR 40.5 crafts an exception to that general rule, “[t]he party requesting related-case designation and seeking to avoid random assignment

bears the burden of showing that the cases are related under a provision of Local Civil Rule 40.5." *Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 140 (D.D.C. 2010) (citing *Judicial Watch, Inc. v. Rossotti*, 2002 U.S. Dist. LEXIS 16574, 2002 WL 31100839, at *1 (D.D.C.)).

Second, because of the powerful rationale supporting random assignment of cases, the defendants' burden of satisfying the "common issues of fact" standard should be applied rigorously. Some common issues are not enough. The commonality should be so close that considerations of efficiency substantially outweigh the need to advance public confidence in the process by which judges are assigned cases. That guiding principle made the case upon which Defendants' rely, *Singh v. McConville*, 187 F. Supp. 3d 152 (D.D.C. 2016), an easy one. There, two separate cases involved Sikhs who rested on the same constitutional and statutory provisions to seek accommodations from the Army's uniform and grooming standards. It was not difficult to conclude that the cases were related.

FOIA cases are, perhaps uniquely, well-suited for both a rigorous and objective interpretation of the "common issue of fact" standard. Because FOIA cases involve a category-by-category or even a more granular page-by-page evaluation of record requests and the results of those requests, application of the "common issues of fact" standard should be guided by the extent of overlap of the FOIA requests. The Defendants err by, instead, evaluating commonality at a much higher level of generality.

It is not enough that CREW and the plaintiff in *The James Madison Project, et al. v. Central Intelligence Agency, et al.*, Case No. 17-01231 (ABJ) (D.D.C.), sought documents connected to the same meeting, and drew the same *Glomar* defense. Commonality is too easy to find at that level of generality. In FOIA cases, the court can objectively compare the FOIA

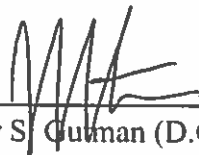
requests for the degree of overlap. For reasons discussed at length in Plaintiff's Opposition to Defendants' Motion to Stay, the two requests are far from overlapping; CREW's is significantly broader. Plaintiff's Opposition to Defendants' Motion to Stay Proceedings [Docket 11] at 6-9. And, in this particular context, unlike the James Madison Project, CREW sought both potentially classified and unclassified records, rendering the *Glomar* analysis different for the latter. *Id.* at 8-9. When viewed at an appropriate level of specificity, it is plain that the two cases are far less related than the Defendants contend.

Third, a related case designation visits real harm on CREW. A stay in this court is objectionable because it may delay CREW from briefing the issues, including the unique issues, it has presented here. *Id.* at 12-14. But, a stay pending resolution of *James Madison Project* would not preclude CREW from eventually presenting its position. A related case designation, however, casts CREW into an even less certain environment. The briefing in *James Madison Project* has been concluded for months. With the imprimatur of a related case designation, there is no reason to expect the receiving court to reopen briefing to entertain CREW's arguments. If the *James Madison Project* court rules for the government, the related case designation adds weight to its inevitable argument that the decision disposes of this case without need for further briefing. Any result that does not permit CREW to advance its claims and arguments would be profoundly unfair.

Fortunately, such a result can easily be avoided by not beginning to travel down the road that may lead there. Denying the related case designation, denying the motion for stay and allowing the parties simply to brief and argue the unique issues this case presents is the fairest route and the one that adheres most closely to the purpose and spirit of LCvR 40.5.

Respectfully Submitted,

By:



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