ORAL ARGUMENT SCHEDULED FEBRUARY 18, 2016

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5039

KATHRYN SACK, Appellant,

v.

DEPARTMENT OF DEFENSE,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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C.A. No. 12-1754

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties

Appellant in this case is Kathryn Sack, plaintiff in District Court. Appellee is the Department of Defense, defendant in District Court. There are no amicus curiae.

Rulings Under Review

Appellant seeks to challenge (1) a Minute Order issued by the District Court for the District of Columbia in Sack v. CIA (No. 12-537) on October 24, 2012, (2) a Minute Order issued by the District Court for the District of Columbia in Sack v. DOD (No. 12-1754) on February 19, 2013, and (3) an Amended Memorandum Opinion and issued in Sack v. DOD on December 13, 2013 and an Order granting summary judgment for Defendant-Appellee issued on December 9, 2013.

Related Cases

This case has not been before this Court previously, and counsel for the government is unaware of any related cases currently pending before this Court or any other court.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia possessed jurisdiction under 28 U.S.C. § 1331. Appellant timely filed a notice of appeal on February 15, 2014, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. May Plaintiff-Appellant Kathryn Sack challenge the order entered in Sack v. CIA (No. 12-537) that severed her claims against four other defendants in this appeal from the final order entered in Sack v. DOD (No. 12-1754)?

2. If the severance order is reviewable in this appeal, did the District Court in Sack v. CIA abuse its discretion in severing Sack's claims relating to the disposition of her FOIA requests by the CIA, the Department of Justice, OPM, and the Office of National Intelligence from her claims against DOD concerning its disposition of her FOIA request?

3. Did the District Court err in determining that Sack's action against the CIA relating to its disposition of her FOIA requests was not a related case under the applicable Local Rule?

4. Did DOD err in concluding that its Quality Assurance Program Inspection Reports were exempt from compulsory disclosure under Exemption 7(E) of the FOIA as law enforcement records that contained information that would, if disclosed, reveal

enforcement techniques and procedures that could reasonably be expected to risk circumvention of the law?

5. Was Sacks entitled to a fee waiver because her FOIA request was a request made by an educational institution and not her own personal FOIA request?

STATEMENT OF THE CASE

A. Nature of the Case and Disposition Below

On April 6, 2012, Plaintiff-Appellant Kathryn Sack brought this action under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") seeking records pertaining to the use of polygraphs by Defendant-Appellee the Department of Defense ("DOD"). In an earlier complaint (No. 12-537), Sack also named as defendants the Central Intelligence Agency ("CIA"), the Office of the Director of National Intelligence ("Office of National Intelligence"), the Office of Personnel Management ("OPM"), and the Department of Justice and challenged their dispositions of separate FOIA requests she had filed with them. On October 24, 2012, the District Court granted Defendants' motion to sever Sack's cases against four other

agencies from her FOIA action against DOD. On October 30, 2012, Sacks filed a new complaint against DOD (No. 12-1754). In a December 13, 2013 Amended Memorandum Opinion and Order, the District Court (Wilkins, J.) granted DOD's motion for summary judgment. Plaintiff appeals.

B. Statement of the Facts

1. Sack's FOIA Requests

Between September 1, 2009 and June 30, 2012, Plaintiff Kathryn Sack filed no fewer than twenty-seven FOIA requests with at least five federal agencies, namely the CIA, DOD, the Department of Justice, OPM, and the Office of National Intelligence. Although her FOIA requests were not identical, they all sought various types of records concerning polygraph programs administered by these agencies and others. According to Sacks (Br. at 5-6), most of her FOIA requests sought (1) agency records related to polygraph bias, (2), agency records containing aggregate data associated with polygraph examinations, (3) agency records related to the application of the rules of the Equal Employment Opportunity Commission to polygraph examinations, (4) OPM records related to

polygraph programs administered by federal agencies, and (5) agency records comprised of correspondence with Dr. Sheila Reed, who Sacks characterizes as a polygraph bias researcher. The agencies that received Sack's FOIA requests responded to them in different ways and on different dates.

2. Sack's District Court Actions

a. No. 12-537

On April 6, 2012, Sacks filed a FOIA action (No. 12-537) against five agency defendants, the CIA, DOD, the Department of Justice, OPM, and the Office of National Intelligence seeking records under the FOIA. See J.A. 1 (ECF 1). Sacks filed an Amended Complaint on July 12, 2012. J.A. 13.[1]

On the following day, July 13, 2012, Defendants moved to sever the action against them into separate actions against each Defendant. See J.A. 3 (ECF 9). After receiving Sack's Memorandum

[1] Sacks also filed an FOIA complaint against the CIA on February 14, 2012. In this appeal, Sacks makes reference to that earlier filed FOIA action only with respect to her challenge to the District Court's Order in Sacks v. DOD (No. 12-1754) denying her request to treat her first FOIA action against the CIA as a related case. See discussion at 26-29 infra.

in Opposition and conducting a hearing, the District Court granted the motion for severance on October 24, 2012. J.A. 125. It severed the actions because Sacks did not assert a common right to relief against the Defendants based upon the same transaction or occurrence and because severance was appropriate given the absence common issues of law or fact warranting that the actions remain in one proceeding. Sack's claims do not arise from the same transaction or occurrence because they arise from separate FOIA requests to the agencies, the agencies maintained different records that contained different responsive documents, and because the five agencies did not take any concerted action.[2] This Order made the CIA the sole defendant in the action.

On April 16, 2013, the CIA moved for summary judgment. J.A. 7 (ECF 26). After receiving Sack's Memorandum in Opposition, on June 17, 2014, the District Court granted the motion in part and denied it in part. J.A. 9 (ECF 43). On July 23, 2014, the CIA filed a second motion for summary judgment. J.A. 9 (ECF 45). After

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[2] The District Court's Minute Order granting severance referred to the transcript of the hearing held that same day on Defendants' Motion for its "reasons stated in open court." J.A. 125

receiving Sack's Memorandum in Opposition, on September 16, 2014, the District Court again granted this motion in part and denied it in part. J.A. 10 (ECF 47). After the CIA took additional actions in conformity with the District Court's two orders, the District Court issued a Memorandum Opinion and Order on August 26, 2015. J.A. 12 (ECF 65).

b. No. 12-1754

On October 30, 2012, shortly after the District Court severed her claims against the Defendants other than the CIA from her action against that agency (No. 12-537), Sacks filed a FOIA action (No. 12-1754) against DOD seeking records identified in her FOIA request to it. J.A. 133. DOD was the sole defendant in that action. On that same day, Sacks moved to have her action against the CIA, in which DOD had been a defendant, treated as a related case. J.A. 144.

Three months later, on February 4, 2013, Sacks moved to have the District Court treat her other FOIA action against the CIA (No. 12-244) as a related case in her action against DOD. J.A. 176. After conducting a hearing, the District Court denied the request in

a February 19, 2013 Minute Order. It cited Sack's failure to identify the proposed related case when she filed her complaint against DOD and the absence of predominant common issues of fact or law. J.A. 205.

DOD moved for summary judgment on March 22, 2013. J.A. 207. With respect to certain disputed records, including Quality Assurance Program Inspection Reports prepared by DOD, the agency relied on Exemption 7(E), which exempts law enforcement information which would disclose techniques and procedures for law enforcement investigations or prosecutions or guidelines applicable to them if disclosure could reasonably be expected to risk circumvention of the law.

After receiving Sack's Memorandum in Opposition, the District Court granted summary judgment in DOD's favor on December 9, 2013. J.A. 407. In an Amended Memorandum Opinion issued on December 13, 2013 the District Court explained its conclusion that disclosure of the DOD's Quality Assurance Program Inspection Reports posed a risk of impairing law enforcement investigations or prosecutions because disclosure could diminish the effectiveness of

the polygraph examinations as an investigative tool by the agencies that these reports discussed. J.A. 426-427. Sacks filed a notice of appeal from that order on February 15, 2014. J.A. 435.

The District Court also upheld DOD's refusal to grant Sacks a fee waiver. Sacks asserted that she was entitled to a fee waiver because her FOIA request was made by an educational institution, namely the University of Virginia where Sacks was a Ph D. candidate in the Department of Politics. After observing that Sacks carried the burden of proof to show that she was entitled to a fee waiver, the District Court held that that she had failed to discharge that burden. It characterized her initial evidence of her right to a fee waiver as "conclusory." Addressing a letter from the University of Virginia that Sacks forwarded to support her fee waiver request, the District Court found it insufficient as well. In particular, the District Court cited the failure to identify the research that Sack's FOIA request would aid or the staff member who conducted the research. It concluded that the request reflected Sack's own student research, not the University's work. J.A. 431-432. Because Sacks had paid no costs and had not agreed to pay any costs at a future date, the

District Court upheld DOD's decision not to credit her with two hours of free search time because it had properly deferred processing the FOIA request absent an agreement on how to allocate the fees.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction over Sack's appeal from an order that the District Court issued in another action that severed her claims against DOD from her claims against the CIA, the Department of Justice, OPM, and the Office of National Intelligence. Although her appeal from the final order entered in her FOIA action against DOD permits her to challenge interlocutory orders entered in that action, the October 24, 2014 Order entered in Sack v. CIA (No. 12-537) that severed her action against the CIA from her actions against four other agencies and required her to refile those actions separately was not entered in her action against DOD. Therefore, Sack may appeal that severance order only in an appeal from a final judgment in that action. She has not done so, in all likelihood because she did not file a timely notice of appeal from the

final judgment in that action. Furthermore, because the actions that she asserts were severed erroneously have now proceeded to final judgment, her appeal from the 2012 severance order is moot given this Court's inability to provide meaningful relief.

Even if Sack may challenge that order, this Court should affirm sustain it because the District Court did not abuse its discretion in granting the motion for severance. Severance is appropriate unless (1) a plaintiff asserts a common right to relief against multiple defendants based upon the same transaction or occurrence and (2) there are common issues of law or fact that will arise as to all defendants. Sack's claims do not arise from the same transaction or occurrence because (1) they arise from separate FOIA requests to separate agencies and components within them, (2) the agencies maintained different records that contained different responsive documents, and (3) because the five agencies did not take any concerted action.

Although Sack also challenges the District Court's determination that her action was not a related case to her earlier filed FOIA action against the CIA, that determination was correct for

the same reasons that support its severance order. Under the applicable Rule, Local Civil Rule 40.5, a District Court's determination to treat cases as related cases depends on whether (1) the cases involve common property, (2) present common factual issues, (3) arise from the same transaction or occurrence, or (4) involve the same patent. Here, the cases were not related because they did not involve the same transaction or the same facts.

As to Sack's only substantive challenge, DOD correctly withheld the disputed records based on Exemption 7(E), which covers law enforcement information which would disclose techniques and procedures for law enforcement investigations or prosecutions or guidelines applicable to them if disclosure could reasonably be expected to risk circumvention of the law. Disclosure of DOD's Quality Assurance Program Inspection Reports posed that risk because that disclosure could diminish the effectiveness of the polygraph examinations as an investigative tool by the agencies discussed in these reports.

Although Sack also challenges DOD's denial of her fee waiver request, the agency's decision was correct. Based on the

information she provided, DOD determined that Sack's FIOIA request was not a request by an educational institution, the entity entitled to a fee waiver. Sack's evidence suggested that she sought the information as Ph D. candidate, not as a staff member of the University of Virginia or for the research of a staff member. The faculty member letter to the effect that Sack's research was not "inconsistent" with the goals of the university's Department of Politics was insufficient to show that the FOIA request supported the university's research, not that of a university student. DOD also properly denied Sack's request for a waiver of fees for two hours of searches. DOD applied a policy in its regulations limiting fee waivers and authorizing processing of FOIA requests only after a requester and DOD agreed on payment of fees. Because that did not occur, the agency acted properly.

ARGUMENT

Standard of Review

The District Court's order severing Sack's actions is reviewable for abuse of discretion if it is subject to review in this appeal.[3] Its order granting summary judgment in favor of DOD based on Exemption 7(E) is subject to *de novo* review as is its decision denying Plaintiff's request for a fee waiver.[4]

I. THE DISTRICT COURT'S SEVERANCE ORDER ENTERED IN SACK v. CIA IS NOT SUBJECT TO APPELLATE REVIEW IN THIS APPEAL FROM A FINAL ORDER IN SACK v. DOD.

Sacks appeals from the final order entered by the District Court in her action against DOD. Thus, the caption of her February 15, 2014 notice of appeal Sack identifies Kathryn Sack as Plaintiff and DOD as Defendant. J.A. 435. And the notice of appeal refers to her appeal "from the final judgment of this court entered on the 13

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[3] See Acevado-Garcia v. Monroig, 351 F.3d 547 (1st Cir. 2003).
[4] See Ancient Coin Collectors Guild v. United States Department of State, 641 F.3d 504, 509 (D.C. Cir. 2011) (review of summary judgment); Judicial Watch v. United States Department of Justice, 185 F.Supp. 2d 54, 59 (D.D.C. 2002) (review of denial of fee waiver). But see Judicial Watch v. United States Department of Justice, 122 F. Supp. 2d 5, 11-12 (D.D.C. 2000) (fee waiver determination reviewed under arbitrary and capricious standard).

day of December, 2013 in favor of Defendant against said Plaintiff." J.A. 435. Although an appellant may challenge interlocutory orders entered before entry of a final order in an appeal from a final order, Sack now seeks to challenge an order entered in another action, Sack v. CIA (No. 12-537).

No appellant may do that. To begin with, Sack's notice of appeal does not identify the order she now seeks to challenge. Identifying the order would necessarily require identifying the proceeding in which it was entered, i.e., Sack v. CIA (No. 12-537). Given Sack's failure to identify that order as the subject of this appeal in her notice of appeal, which vests this Court with jurisdiction and identifies what it will review, this Court lacks jurisdiction to entertain a challenge to the severance order entered in Sack's action against the CIA.

Sack's justifications for her novel effort to obtain appellate review of an order entered in a separate action against the CIA in her appeal from a final order in her action against DOD conflicts with fundamental principles that govern appellate review. Although Sacks argues (Br. 17) that judicial economy and public policy favor

allowing her to appeal from the severance order in her action against the CIA in this appeal, allowing that is so impractical that it is inimical to those interests. After all, absent extraordinary circumstances, this Court conducts its review based on the record before the district court. But the severance order was not issued in Sack's action against DOD.

Sack cannot credibly assert that requiring her to challenge the severance order entered in Sack v. CIA an appeal from a final judgment in that action works an unfair surprise upon her or impermissibly delays appellate review. Although she asserts (Br. 18) that there was ambiguity concerning whether the severance order was part of the record in her actions against the agencies other than the CIA, she had no reasonable basis to believe that the severance order was part of the record in those actions. The District Court severed Sack's FOIA action against DOD from her FOIA action against the CIA on October 24, 2012. Sack never moved to have the order entered in her action against DOD or against the two other agencies she sued. Furthermore, in Sack's action against DOD, the District Court denied her motion to treat her earlier filed

FOIA action against the CIA as a related case. Therefore, Sacks cannot claim either that the severance order in Sack v. CIA was part of the record in her other suits or that she always believed that she could commingle her separate cases in one appellate proceeding.[5]

Although Sack alludes to the delay necessitated by the rule that collateral orders are not reviewable until entry of final judgment, that principle has no special force to buttress her contention that a party may challenge a collateral order entered in one proceeding as soon as a final judgment is issued in any other proceeding that is somehow related to it. And although Sack also asserts that the order was erroneous, the merits of that order are unrelated to when and how she may appeal it.

Sack's effort to secure appellate review of the severance order entered in her action against the CIA is undoubtedly prompted by

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[5] Although Sack cites a leading treatise to suggest that the commingling on appeal she urges is permissible, that treatise actually suggests the exact opposite, i.e., that independent, separate cases must each be treated as separate and independent. 15B Wright & Miller, Federal Practice and Procedure § 3914.20 (2015)(final judgment occurs "upon complete disposition of *any single* * * * *case*") (emphasis added).

her failure to timely file a notice of appeal from the final order in that action. In its August 26, 2015 Order, the District Court held that Sack had not timely filed a notice of appeal from the final order in that action (No. 12-547). ECF 65.[6]

If accepted, Sack's argument that she could elect to challenge the severance order in any of her four other actions would create a glaring anomaly. Sack could have chosen not to refile those actions and pursued only her FOIA claims against the CIA. Had she done so, presumably she would be entitled to challenge the severance order on appeal from a final judgment in that action. Under appellate practice in the federal court system, an aggrieved party may appeal from a final judgment (and non-final orders entered in it) in an appeal from the final judgment in that action. But under the logic of Sack's analysis, a similarly situated party could appeal from such an order in more than one action.

[6] We attach a copy of that order as an addendum to Appellee's Brief.

II. THE ORDER SEVERING SACK'S CLAIMS BASED ON HER FOIA REQUEST TO THE CIA FROM HER CLAIMS BASED ON HER FOIA REQUESTS TO FIVE OTHER AGENCIES WAS A PROPER EXERCISE OF THE DISTRICT COURT'S DISCRETION.

The Federal Rules of Civil Procedure authorize a district court to "sever any claim against a party."[7] In exercising that authority, the standards in Rule 20 of the Federal Rules of Civil Procedure governing permissive joinder provide guidance.[8] Under the two-part test in Rule 20 for determining whether parties should be joined, joinder is appropriate where (1) a plaintiff asserts a common right to relief against multiple defendants based on the same transaction or occurrence or a series of transactions or occurrences, and (2) where a question of law or fact common to all defendants will arise.[9] For joinder to be proper, the cases must meet both parts of the test.[10]

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[7] Fed. R. Civ. P. 21.

[8] See Davidson v. District of Columbia, 736 F. Supp. 2d 115, 119 (D.D.C. 2010).

[9] See Spaeth v. Michigan State University College of Law, 845 F.Supp. 2d 48, 53 (D.D.C. 2012) (hereinafter "Spaeth v. Michigan State").

[10] See Bass v. Anoka County, 998 F.Supp. 2d 813, 825 (D. Minn. 2014); Mesa Computer Utilities, Inc. v. Western Union Computer Utilities, Inc., 67 F.R.D. 634, 636 (D. Del. 1975); Kenvin v. Newberger, Loeb & Co., 37 F.R.D. 473, 475 (S.D.N.Y. 1965).

In determining whether a right to relief arises from the same transaction or occurrence, a court assesses whether the defendants engaged in joint action. Thus, a plaintiff "cannot join defendants who simply engaged in similar types of behavior, but who are otherwise unrelated; some allegation of concerted action between defendants is required."[11]

Sack could not show that her claims against the five agencies who received her FOIA requests arose from the same transaction or series of transactions. To show that two FOIA actions arise from the same transaction or occurrence, there must be concerted action by recipients of similar FOIA requests. An allegation that several agencies responded similarly to similar FOIA requests, however, does not assert that the agencies took concerted action in answering the requests. The party seeking joinder must allege concerted action by the defendants, not merely the similar conduct Sacks alleges.[12] Tellingly, Sack does not allege that the five agencies she named as co-defendants responded to

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[11] See Spaeth v. Michigan State, 845 F.Supp. 2d at 53.

[12] See Grynberg v. Alaska Pipeline Co., 1997 WL 33763820 at * 1 (D.D.C. March 27, 1997); Spaeth v. Michigan State, 845 F.Supp.2d at 53-54 (rejection of plaintiff's employment applications by multiple defendants insufficient to show same transaction or occurrence).

her only after conferring with each other and adopting a common approach to answering her FOIA requests.

Neither did Sack allege that each agency had the same responsive records in its files. She has only claimed that their files contained some records in common. (Br. 24) Given that each agency had different responsive records, Sacks could not assert that her claims against the five agencies arose from a common transaction.

The fact that the actions against each agency had not reached the same stage in the production and litigation process also weighed against determining that they shared the required commonality. Several agencies, including the CIA and OPM, had not yet produced responsive records. J.A. 15-18 (CIA) J.A. 29 (OPM). Other agencies notified Sacks that they had been unable to locate any responsive records. J.A. 16, 33 (CIA); J.A. 19 (NSA); J.A. 24, 34 (FBI); J.A. 28-29 (OSD); J.A. 30 (DOD); J.A. 31 (Department of Justice). One agency had denied her request for a fee waiver. J.A. 21-22 (NSA). These factual distinctions all supported severing Sack's actions against the five agencies and adjudicating them separately.

With reference to the second factor – common questions of fact or law – Sacks cites the likelihood that the agencies might rely on similar grounds to withhold records. (Br. 19) But if that alone sufficed to join actions or deny severance, many FOIA cases would be consolidated.

In fact, to determine the legality of an agency's disposition of any single FOIA request, a court must examine that *agency's* response based on the content of *its* records and the reasons justifying the applicability of any exemptions based on *its* declarations. That some portions of the explanations of two agencies are similar or that their files contain some documents in common is not enough to support joinder or avoid severance.

The District Court's analysis supported granting the severance motion. It explained that Sack had filed nearly thirty FOIA requests with five agencies and with separate components in many instances. J.A. 80-81. The subjects of her requests varied in their particulars. Some were very recent while she filed others several years before. J.A. 78-79. Therefore, it concluded that denial of the motion for severance would be prejudicial to the five agency defendants. J.A. 80.

In contrast, Sack's arguments for denying severance are unpersuasive. Although the five agencies might offer similar arguments to defend their actions, such commonality is insufficient to warrant consolidating them.[13]

Sack also asserts (Br. 19) that severance was erroneous because all her FOIA requests were at least similar and all reflected her particular interest in agency use of polygraph examinations. But just as a requester's reasons for seeking records are irrelevant to his right to obtain them under the FOIA, the fact that all Sack's requests reflect a common purpose or goal is irrelevant to whether multiple FOIA actions should be consolidated.[14] After all, because a district court would assess the sufficiency of each agency's response to Sack's FOIA request, it is the commonality of those responses that matters, not what Sack sought or why she sought it.

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[13] See Cooper v. Fitzgerald, 266 F.R.D. 86, 91 (E.D. Pa. 2010).
[14] See United States Department of Justice v. Reporters Committee For Freedom of the Press, 489 U.S. 749, 771 (1989).

Although consolidating cases may on occasion promote judicial efficiency, that benefit would not occur here.[15] After all, when the District Court issued the severance order, each of Sack's five actions occupied a different procedural status, and the agencies had not responded identically. And, each agency had its own, unique set of responsive records. Finally, if the actions had remained combined, no final judgment could be entered until the claims against the last agency were adjudicated. Here, severance, not consolidation, promoted judicial efficiency.

The authorities on which Sack chiefly relies offer little support for her argument. She cites M.K. v. Tenet[16] only for the general principle that broad application of joinder is encouraged under Fed. R. Civ. P.

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[15] As the District Court observed, Sack errs in relying on actions in which other district courts have accepted joinder of FOIA claims against more than one agency. Like all such actions, these actions depend on the particular facts affecting whether joinder is appropriate. Sack, however, offers no description of most of them. Nor does she discuss the analysis that supported the result in them. See J.A. 77-79. As the District Court explained, Marcusse v. Department of Justice, (D.D.C. No. 12-1205, Aug. 28, 2012), was an action brought by a prisoner pro se and involved FOIA requests to several agencies all seeking records related to his criminal sentence. J.A. 77.

[16] 216 F.R.D. 133 (D.D.C. 2012).

20. Her other principal authority reflects dicta in an order in which the district court granted a severance motion. In the discussion on which Sacks relies, the district court commented that whether defendants engaged in concerted action is not a separate requirement for joinder under Rule 20 but is a component of the determination whether the action involves the same transaction or occurrence.[17]

Furthermore, Sack's challenge to the severance order may be moot. Where a court "can provide no effective remedy " to address a plaintiff's claim, his action is moot.[18] The District Court entered its order severing Sack's action on October 24, 2012. J.A. 125. Her actions have all progressed since then and most have ended. Thus, the District Court granted judgment in favor of DOD in Sack v. DOD (No. 12-1754) on December 13, 2013. J.A. 408. In Sack v. CIA, (No. 12-244), her first suit against the agency, the District Court granted summary judgment on June 1, 2015. ECF 48. And in Sack v. CIA (No. 12-537), her second suit against the agency, the District Court entered final judgment on

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[17] Moskovitz v. Holman, 2015 WL 4255100 at * 4-5 (D.D.C. July 13, 2015).

[18] See, e.g., Mittelman v. Postal Regulatory Commission, 757 F.3d 300, 303 (D.C. Cir. 2014).

September 16, 2014. ECF 47, 65.

Given all the events that have occurred in the thirty-eight months since the District Court severed these actions, this Court could not provide effective relief even if it concluded that the District Court erred in severing them. Tellingly, Sack neither explains how the severance order prejudiced her rights nor, more important, how an appellate determination that the severance was erroneous could affect matters now.[19]

III. THE DISTRICT COURT'S DECISION NOT TO TREAT SACK'S ACTIONS AS RELATED CASES WAS WITHIN ITS DISCRETION.

In challenging the District Court's denial of her request to treat her FOIA action against the CIA as a related case to this FOIA action against DOD, Sack essentially recasts her challenge to the

[19] The District Court severed Sack's actions and required her to file separate actions against the named defendants other than the CIA if she wished to pursue claims against them. Sack never explains how that decision adversely affected her substantive rights, i.e., her right to obtain records under the FOIA. After all, no obstacle barred Sack from calling to the Court's attention in one of her FOIA actions any pleadings or orders entered in another of her actions if it had relevance. Not only does Sack fail to explain what action this Court should direct the District Court to take on remand if she prevails, neither does she describe the past injury she suffered because of the severance order.

severance order. Local Civil Rule 40.5 governs requests to designate an action as a related case. As to civil cases, the Rule defines a "related case" to include either of two or more cases when the earliest case is still pending on the merits and the cases (1) relate to common property, (2) involve common issues of fact, (3) grow out of the same event or transaction, or (4) involve the validity or infringement of the same patent. Local Civil Rule 40.4(a)(3). As a procedural requirement, Local Civil Rule 40.5 requires the plaintiff to provide notification of any related case when he files the later action. Local Civil Rule 40.4(b)(2).

The definition of related cases Under Local Civil Rule 40.5 bears strong resemblance to the standards governing permissive joinder under Fed. R. Civ. P. 20, discussed at pages 14-15 supra. As we have discussed, in granting the severance motion, the District Court concluded that Sack's separate FOIA requests to the CIA, DOD, OPM, the Office of National Intelligence, and the Department of Justice did not arise from the same transaction and did not involve questions of law or fact common to all defendants. J.A. 125; 205.

The District Court relied on the same rationale to deny Sack's request to treat her earlier filed action against the CIA as a related case. At the hearing the preceded entry of the Minute Order Sacks challenges, the District Court explained that Sack's first action against the CIA was not related to her action against DOD because any common fact issues would not predominate and because she failed to designate the earlier filed action as a related case when she filed her action against DOD. J.A. 189-190. It also explained that treating the cases as related after it had already issued a briefing schedule with the parties' consent could delay its disposition of the FOIA action against DOD. J.A. 190-191.

In seeking treatment of her earlier action against the CIA as a related case to her FOIA action against DOD, Sack chiefly argued (1) that the agencies had some records in common and (2) that each agency had referred certain records to the other for input before responding to her FOIA requests. J.A. 196, 200. But the District Court correctly concluded that any overlap in the records held by the two agencies did not warrant treatment as related cases. It knew

that the parties had agreed to accept the District Court's disposition of certain commonly held records in the first action to address them as dispositive of Sack's right to obtain them under FOIA in her other actions, too. J.A. 6 (ECF 22 at 2).

As to Sack's alternative argument, an agency that possesses records that originated in another agency almost invariably consults with the originating agency before determining whether particular exemptions to the FOIA apply. The fact that an agency engaged in that process does not show, however, that the agencies engaged in concerted action before the recipient of a FOIA request responded to it. Absent such concerted action, separate FOIA cases are neither related nor amenable to treatment in a single action.

Finally, Sack's appeal from this related cases order is also moot because this Court no longer can provide effective relief for the same reasons we addressed in discussing the severance order. Given what has occurred in these actions during the thirty-four months since the District Court denied Sack's request to treat the cases as related cases, this Court can no longer provide meaningful relief.

IV. THE DISTRICT COURT CORRECTLY HELD THAT EXEMPTION 7(E) COVERED DOD'S QUALITY ASSURANCE PROGRAM INSPECTION REPORTS BECAUSE THEY ARE LAW ENFORCEMENT RECORDS WHICH IF DISCLOSED COULD REASONABLY BE EXPECTED TO RISK CIRUMVENTION OF THE LAW.

An agency that relies on a FOIA exemption to withhold a responsive record bears the burden of proving its applicability.[20] It may discharge that burden by submitting a plausible, uncontradicted declaration that is reasonably specific and bears a logical relation to the claimed exemption.[21]

Sack challenges DOD's nondisclosure of Quality Assurance Program Inspection Reports ("Inspection Reports") based on Exemption 7(E). Exemption 7(E) encompasses law enforcement records that contain information which would disclose techniques and procedures for law enforcement investigations or prosecutions or guidelines applicable to them if such disclosure could reasonably be expected to risk circumvention of the law. As the District Court recognized, disclosure of DOD's Inspection Reports posed that risk

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[20] See Ancient Coin Collectors Guild v. United States Department of State, 641 F.3d at 509.

[21] Id.; Judicial Watch v. United States Department of Defense, 715 F.3d 937, 941 (D.C. Cir. 2013), cert. denied, 134 S. Ct. 900 (2014).

because their disclosure could diminish the effectiveness of the polygraph examinations as an investigative tool by the agencies discussed in these reports.

Exemption 7(E) "sets a relatively low bar for the agency to justify withholding: 'Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law."[22] To justify that exemption's applicability, an agency need only show that disclosing the information "could reasonably be expected to risk circumvention of the law."[23] As this Court has noted, in assessing an agency's grounds for withholding records under Exemption 7(E), the courts give executive branch declarations substantial deference concerning the predictive harm to national security of potential disclosure of law enforcement

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[22] Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011) (quoting Mayer Brown LLP v. IRS, 562 F.3d 1190, 1194 (D.C. Cir. 2009).
[23] Mayer Brown LLP v. IRS, 562 F.3d at 1192.

records.[24]

The Inspection Reports assess the strengths and weaknesses of the polygraph usage programs of other agencies. The declarations that DOD provided showed that disclosing these records posed that risk. Alesia Williams, the Chief of the FOIA Services Section in the Declassification Services Branch of DOD's Defense Intelligence Agency ("DIA") explained that risk in her initial declaration:

> Exemption 7(E) was asserted to protect the details concerning the use of polygraph technology to test the credibility of employees. DIA's credibility assessment officials believe that disclosure of this particular information could diminish the effectiveness of the polygraph examination as an investigative tool by allowing the general public to discern when agencies are likely to utilize this tool.

J.A. 227-228.

As Williams elaborated, the Inspection Reports discuss and evaluate polygraph programs of other agencies in order "to identify the potential weaknesses or vulnerabilities that may allow bad actors to fool that agency and conduct illegal activities without

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[24] See Center for National Security Studies v. Department of Justice, 331 F.3d 912, 927 (D.C. Cir. 2003).

detection." J.A. 228. "If this information was disclosed to the general public, * * * a determined bad actor could identify agencies with greater polygraph program vulnerabilities. These vulnerabilities could then be exploited." J.A. 228.

In upholding the agency's nondisclosure determinations, the District Court rejected Sack's counterarguments. Sack argued below that polygraph examinations may be more critical in connection with criminal investigations than in other contexts, like employment decisions. J.A. 287. But the importance of the Inspection Reports compared to some other records matter little here. Sack avoids suggesting either that these reports on polygraph examination programs are unimportant or that disclosing them could not compromise their use as a law enforcement technique. As the District Court noted, this Court has "upheld the invocation of Exemption 7(E) to withhold information that could reasonably be expected to allow insight into the CIA's clearance and investigatory processes used during the background investigations of its officers." J.A. 426.[25]

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[25] See Morley v. CIA, 508 F.3d 1108, 1128-29 (D.C. Cir. 2007).

Moreover, these concerns relate to the effectiveness of background investigations conducted by federal law enforcement agencies, which often rely on polygraph examinations. As the District Court recognized, such concerns are at their zenith here. J.A. 426.

The District Court explained that potential lawbreakers could easily exploit details about how particular agencies administer their polygraph programs "to subvert the background screening process, thereby gaining access to sensitive (if not classified) information that could be used to harm national security and homeland security interests." J.A. 426-427.

Sack also argues (Br. 31-32) that DOD failed to disclose reasonably segregable, non-sensitive information in these Inspection Reports. According to Sack, disclosing information concerning how an agency has corrected a problem in its polygraph program could not pose any possible risk.

The District Court found otherwise, however. It determined that forcing DOD to release details about the strengths or vulnerabilities of polygraph programs of different agencies might

arm subversive persons with advance knowledge to guide them in directing their efforts toward any weaknesses and away from agency strengths, including any deficiencies recently corrected. J.A. 427. An agency need not jeopardize the future effectiveness of law enforcement techniques like polygraph examinations by disclosing information in a record that Exemption 7(E) protects unless it is reasonably segregable, i.e., because disclosing that excerpt poses no risk to the effectiveness of law enforcement investigative techniques.

V. SACK WAS NOT ENTITLED TO A FEE WAIVER BECAUSE HER FOIA REQUEST WAS NOT MADE BY AN EDUCATIONAL INSTITUTION.

Although it gave her several opportunities to make the required showing, the District Court ultimately concluded that Sack failed to meet the criteria for a fee waiver because no educational institution had made that request. Under the FOIA, when records are sought for commercial use, an agency generally may assess fees for reasonable charges for document search, duplication, and review.[26] But fees are reduced for certain categories of requesters. As relevant here, fees are limited to reasonable, standard charges

[26] See 5 U.S.C. 552(a)(4)(A)(ii)(I).

for document duplication "when records are not sought for commercial use and the request is made by an educational * * * institution."[27] Thus, where an educational institution files the request, it is not assessed fees for agency time expended to locate and review potentially responsive records.[28]

In challenging DOD's denial of her fee waiver request, Sack contends that DOD erred in determining that this FOIA request was not a request by the University of Virginia, where Sack was then a Ph D. candidate.

But, based on all the information it received from Sack, DOD's determination was correct. DOD's regulations define an "educational institution" as a

> pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.[29]

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[27] 5 U.S.C. 552(a)(4)(A)(ii)(II).
[28] See National Security Archive v. United States Department of Defense, 880 F.2d 1381, 1382-83 (D.C. Cir. 1989).
[29] 32 C.F.R. § 286.28(e)(4).

Under OMB guidelines, which every agency's regulations must follow, a request by an educational institution may include a request made by a representative acting on behalf of the institution if it "serves a scholarly research goal of the institution."[30] Legislative history of the relevant fee waiver criteria confirms this proposition: "A request made by a professor or other member of the professional staff of an educational * * * institution should be presumed to have been made by the institution."[31]

Because the recurring question whether a student's FOIA request is made on behalf of the educational institution he attends or one he makes for himself may present a close question, OMB's Guidelines address that issue. "The institutional versus individual test would apply to student requests * * * . A student who makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal and the request would not qualify * * * ." [32] The Justice Department FOIA Guide draws the

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[30] OMB Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,014 (March 27, 1987).
[31] 132 Cong. Rec. S14298 (Sept. 30, 1986) (remarks Senator Leahy).
[32] 52 Fed. Reg. at 10,014.

same distinction: "To qualify for inclusion in this fee subcategory, the request must serve a scholarly research goal of the institution, not an individual goal. Thus, a student seeking inclusion in this subcategory, who 'makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal,' and would not qualify as an educational institution requester."[33]

Based on the information she provided, DOD determined that Sack did not make a FOIA request on behalf of the University of Virginia, where she was a Ph D. candidate in the Department of Politics. Initially, Sack offered no evidence that the request was made by an educational institution other than "her own conclusory assertion." J.A. 431. Subsequently, Sack forwarded a letter on University of Virginia letterhead signed by the Director of Graduate Studies in the Department of Politics, stating that Sack's research objectives were "consistent with U Va.'s scholarly research goals," were submitted "on behalf of [the] institution," and that she was

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[33] United States Department of Justice, Guide to the Freedom of Information Act, p.102 (2009).

"acting as a representative of the University of Virginia Department of Politics." J.A. 273.

In concluding that this evidence did not show that Sack made this FOIA request on behalf of the University of Virginia, the District Court properly weighed the totality of the evidence. First it observed that "Sack, as the requester, had the burden of proof on this issue, and her proof was simply insufficient." J.A. 432. After deeming her initial proffer conclusory and inadequate, the District Court concluded that the letter from the University's Department of Politics did not show that the request was made on behalf of the school. First, the signer, who was not the Chairman of the Department, did not identify the university research project that this FOIA request might advance or the faculty member who was pursuing the research. J.A. 432. Second, the portion of the letter that described Sack's research as "consistent with the goals of the institution" was too vague and conclusory to support the inference that the FOIA request furthered the institution Sack attended, and not her "individual research goal." J.A. 432. After all, a standard that equated all research not "inconsistent with the goals of the

school" with research "of the university" would exclude very little.

In applying the fee waiver standard, an agency must be mindful that the goal of the educational institution fee waiver is to support research by an educational institution, not all student research. Here, DOD properly concluded that this FOIA request supported Sack's research aimed at helping her fulfill the requirements for her degree. However laudable that goal, it differs from the purpose of the educational institution exception, i.e., to foster research by educational institutions.

Because the District Court correctly determined that Sack was not entitled to the educational institution fee waiver, it also correctly denied her request for two hours of services on her FOIA request without fees. Under DOD's regulations, "a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Component."[34] DOD required Sack to pay $440, one-half the total amount of the agency's estimated costs, minus two free hours of time. J.A. 433.

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[34] 32 C.F.R. § 286,28(e)(2)(i)(B).

Sack, however, refused either to pay fees or commit to making payment at a future date. J.A. 433. As the District Court recognized, the FOIA does not forbid an agency from requiring a requester to make payment and clarify the scope of a FOIA request before it conducts a search for responsive records. J.A. 433.[35]

Given her refusal to make payment or agree to do so in the future, DOD had no duty to initiate processing of Sack's FOIA request.

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[35] See Chaplin v. Stewart, 796 F.Supp. 2d 209, 211-12 (D.D.C. 2011); Saldana v. Federal Bureau of Prisons, 715 F.Supp. 2d 10, 16-17 (D.D.C. 2010).

CONCLUSION

For these reasons, DOD respectfully requests that this Court affirm the decision of the District Court.

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CERTIFICATE OF COMPLIANCE

In conformity with Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I certify that the foregoing Brief for Appellees complies with the type-volume limitation in Rule 32(a)(7)(B) as follows: the type face is Bookman Old Style, fourteen point font and the number of words in this Brief does not exceed 7,819 as calculated under Rule 32(a)(7)(B)(iii). The text of the hard copy of this Brief and the text of the PDF version of the Brief filed electronically through the ECF system are identical.

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CERTIFICATE OF BAR MEMBERSHIP

Because counsel for Defendants-Appellees are federal government attorneys, the Rules of this Court do not require them to be members of the Bar of this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December 2015, I served the foregoing Brief for Appellee through this Court's Electronic Case Filing System upon:

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