

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

IN RE: U.S. OFFICE OF
PERSONNEL MANAGEMENT
DATA SECURITY BREACH
LITIGATION

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Nos. 17-5217, 17-5232

JOINT PROPOSAL ON BRIEFING

The parties submit this response to the Court's Order of January 31, 2018, regarding proposed briefing formats. This consolidated appeal involves two lawsuits that raise entirely distinct legal claims.

Accordingly, the two cases proceeded below with separate complaints and separate briefing. For purposes of this appeal, the parties likewise propose separate briefing on the same schedule, which will entail minimal duplication for the reasons set forth below.

These are appeals in separate civil actions that assert distinct claims arising out of the same data security breach. One case was filed by the National Treasury Employees Union (NTEU) and three individuals ("NTEU Plaintiffs") against the Director of the U.S. Office of Personnel Management ("OPM"). NTEU, et al. v. Archuleta, No. 17-5217. The other case was filed by the American Federation of

Government Employees, AFL-CIO and 38 individuals (“Class Plaintiffs”) against OPM and KeyPoint Government Solutions, Inc. (“KeyPoint”). AFGE, et al. v. Office of Personnel Management, et al., No. 17-5232 (“CAC”). Appeals from the dismissal of these two cases have been consolidated in this Court.

I. Briefing for Appellants.

The NTEU Plaintiffs and Class Plaintiffs have met and conferred, and respectfully seek leave to file separate briefs with minimal duplication. Under this proposal, NTEU Plaintiffs would file one principal brief and one reply brief, and the Class Plaintiffs also would file one principal brief and one reply brief. The word limits of Rule 32(a)(7) would apply to the briefing for each set of appellants.

Defendants-Appellees OPM and KeyPoint do not oppose this proposal.

In support of their request, the two groups of appellants state as follows:

1. Although both cases stem from the same OPM data breaches, the legal claims at issue in the NTEU Plaintiffs’ appeal and in the Class Plaintiffs’ appeal are different. The NTEU Plaintiffs’ amended

complaint alleged a single claim of a violation of the constitutional right to informational privacy. See NTEU Plaintiffs' Amended Complaint (Dkt. #75). The Class Plaintiffs' amended complaint did not allege any constitutional violations. Instead, the Class Plaintiffs asserted claims for violations of federal statutes (the Privacy Act, the Administrative Procedure Act, and the Fair Credit Reporting Act) and state statutes (unfair and deceptive trade practices statutes and data breach notification statutes), as well as common law claims for negligence, negligent misrepresentation and concealment, invasion of privacy, and breach of contract. See CAC (Dkt. #63).

None of the legal claims in these two cases overlaps. Plaintiffs respectfully submit that it would be neither prudent nor efficient to consolidate briefing when the arguments and authority presented in the two cases will be significantly different.

2. The Class Plaintiffs have already narrowed the issues in this appeal by forgoing any challenge to the district court's dismissal of their claims against OPM for breach of contract and for forward-looking equitable relief under the Administrative Procedure Act.

3. Unlike the NTEU Plaintiffs, the Class Plaintiffs sued a private contractor, KeyPoint, raising unique questions of derivative sovereign immunity. The district court found that this immunity applied, and the Class Plaintiffs assign error to that ruling on appeal.

4. Also unlike the NTEU Plaintiffs, the Class Plaintiffs asserted damage claims against OPM under the Privacy Act, and the district court dismissed those claims as well. The Class Plaintiffs challenge the dismissal of their Privacy Act claims on appeal.

5. Although both cases involve issues relating to plaintiffs' standing to sue, the standing arguments are not fully aligned. The NTEU Plaintiffs argue, for example, that standing arose when the alleged constitutional violation took place. The Class Plaintiffs do not bring a constitutional claim and therefore will not be making that argument. The Class Plaintiffs argue that standing arose under the Privacy Act upon release of their information, and they also assert standing to bring damage claims generally against both OPM and KeyPoint. The NTEU Plaintiffs do not bring a Privacy Act claim or any claim for damages against either OPM or KeyPoint and therefore will not be making these arguments.

6. The district court recognized the essential differences between the two actions. The class action suits brought by AFGE and 38 individuals were consolidated, and the NTEU Plaintiffs filed separate briefing in response to the government's motion to dismiss (on the same schedule as the Class Plaintiffs). See Order, In re: OPM Data Security Breach Litigation, Misc. Action No. 15-1394 (D.D.C. Dec. 14, 2015) (Docket # 19). The district court also allowed separate oral argument on the motions to dismiss, which were heard on the same days. See Minute Orders (May 17, 2016 & Aug. 2, 2016). Appellants respectfully submit that this Court should adopt a similar approach.

II. Briefing for Appellees

OPM and KeyPoint have met and conferred, and respectfully seek leave to file separate answering briefs. Like the appellants, OPM and KeyPoint also ask that the briefs be considered separately for purposes of compliance with Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. We assure the Court that we will make every effort to avoid unnecessary duplication of arguments and will endeavor to keep the word count reasonable.

NTEU Plaintiffs and Class Plaintiffs do not oppose this proposal.

In support of their request, the U.S. Office of Personnel Management states as follows:

1. The Department of Justice is charged with representing the interests of the United States. *See* 28 U.S.C. §§ 517, 518, 519.

Advancing the government's interpretation of federal statutes and the Constitution is one of the Department's most important responsibilities. The strategy for handling litigation involving the federal government must be within the exclusive control of attorneys for the United States. Accordingly, the United States respectfully requests leave to file a separate brief and to dispense with the need to designate a single lead counsel for appellees. We will make every effort to coordinate with KeyPoint to avoid duplication.

2. OPM also joins the further reasons offered by KeyPoint below.

In support of its request, KeyPoint respectfully states as follows:

1. Joint briefing by the appellees would be impracticable in this case because OPM is a federal agency and KeyPoint is a private contractor. To be sure, KeyPoint would endeavor to confer with OPM in an effort to avoid or reduce duplicative briefing. Due to the federal government's unique procedures for preparing and reviewing appellate

briefs, however, KeyPoint understands that it could not be assured that it would have an opportunity to review OPM's draft in advance of filing. KeyPoint further understands that the government might not be in a position to accommodate changes or include arguments KeyPoint might regard as necessary to reflect in any joint briefing filed with OPM. As a result, separate briefing is essential to ensure that KeyPoint is able to present its arguments in this appeal.

2. KeyPoint and OPM will brief different arguments. As appellants note above, the claims against KeyPoint raise unique issues. Although the district court dismissed claims against both OPM and KeyPoint for a lack of standing, the court also dismissed claims against KeyPoint on the independent ground of government contractor immunity. See Mem. Op., In re: OPM Data Security Breach Litigation, Misc. Action No. 15-1394 at 52, 67–72 (D.D.C. Sept. 19, 2015) (Docket # 117). Only KeyPoint will brief the issue of contractor immunity. At least some of the standing arguments advanced by KeyPoint and OPM are also likely to differ because the Class Plaintiffs claim that their personal information was stolen from OPM, but not from KeyPoint. In addition, the Class Plaintiffs assert entirely different claims against

KeyPoint and OPM. Whereas the Class Plaintiffs claim that OPM violated the Privacy Act and the Administrative Procedure Act, their claims against KeyPoint rest on a host of different common law theories (e.g., negligence and breach of contract) and statutory claims, including claims under state statutes governing trade practices and data security. See id. at 13. The different claims against KeyPoint and OPM might also necessitate different arguments.

3. As a result of these differences and the impracticality of the federal government briefing jointly with private parties, OPM and KeyPoint filed separate briefs in the district court, made distinct arguments, and delivered separate oral arguments at both of the district court's hearings on the motions to dismiss. KeyPoint respectfully submits that allowing separate briefing and argument by the appellees would also be appropriate in this appeal.

IV. Length of Briefs.

All parties propose that they be subject to the word and page limitations of Rule 32 of the Federal Rules of Appellate Procedure and of the D.C. Circuit Rules, unless a party separately requests (and receives) leave from this Court to exceed those limitations.

The Class Plaintiffs estimate that their opening brief will require the following word allotment on the issues they intend to raise:

- Non-argument sections (e.g., statement of jurisdiction, statement of the case): 3,000 words
- Standing: 4,000 words
- Contractor Immunity: 3,000 words
- Privacy Act: 3,000 words

The NTEU Plaintiffs estimate that their opening brief will require the following word allotment on the issues they intend to raise:

- Non-argument sections (e.g., statement of jurisdiction, statement of the case): 3,500 words
- Standing: 4,000 words
- Constitutional Claim: 5,500 words

OPM's word allotment will depend on the arguments briefed by the appellants. OPM currently estimates that its brief will require the following word allotment:

- Non-argument sections: 3,000 words
- Article III Standing: 5,000 words
- Merits Claims: 5,000 words

KeyPoint's word allotment will also depend on the arguments briefed by the appellants. KeyPoint currently estimates that its brief will require the following word allotment:

- Non-argument sections: 3,000 words
- Article III Standing: 5,000 words
- Contractor Immunity: 5,000 words

V. Briefing Schedule

All parties propose the following proposed briefing schedule: (1) principal appellant briefs to be due 40 days after the Court enters a scheduling order; (2) answering appellee briefs to be due 40 days after the opening briefs are filed; (3) appellant reply briefs to be due 20 days after the opposing appellee briefs are filed; and (4) argument to be heard on the same date, to be determined by the Court, with each group of appellants and appellees afforded separate time for argument.

Respectfully submitted,

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March 2, 2018

CERTIFICATE OF SERVICE

I certify that, on March 2, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF system, and the document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

I further certify that the concurrence in this filing has been obtained from all counsel listed above.

/s/ Daniel C. Girard
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