

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
NATIONAL SECURITY COUNSELORS,)	
)	
Plaintiff,)	
)	
v.)	No. 1:11-cv-00443 (BAH)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

**REPLY IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS CLAIMS ONE AND
TWO OF PLAINTIFF’S COMPLAINT**

INTRODUCTION

In its Partial Motion to Dismiss, Defendant Central Intelligence Agency (“CIA”) established that, because Freedom of Information Act (“FOIA”) rights are not assignable, Plaintiff National Security Counselors (“NSC”) lacks standing to bring Counts One and Two of its complaint. In its Opposition, NSC concedes that there is no case law directly supporting its claim to standing. NSC also acknowledges that the only case to consider whether FOIA rights are assignable is Feinman v. FBI, 169 F.Supp. 2d 169, (D.D.C. 2010). In Feinman, Judge Huvelle concluded that FOIA rights are not assignable and dismissed for lack of standing a plaintiff who had brought a FOIA claim based on allegedly assigned FOIA rights.

NSC devotes the majority of its lengthy Opposition Brief to first attacking the Court’s decision in Feinman and then trying to distinguish it from this action. Both efforts are unpersuasive. Judge Huvelle based her decision in Feinman squarely on the language of the FOIA and legitimate policy concerns, and NSC’s citations to inapposite case law and irrelevant

allegations of isolated incidents in which agencies have accepted the assignment of FOIA rights fail to undermine the sound reasoning of the Court's decision. NSC's attempts to distinguish Feinman from this action are equally unpersuasive. As Feinman was correctly decided and is directly on point, the Court should conclude that FOIA rights are not assignable and dismiss Counts One and Two of NSC's complaint for lack of standing.

Even if the Court concludes that FOIA rights are assignable, it should still dismiss Count Two, NSC's "FOIA/APA/Mandamus" claim. The APA and Mandamus components of Count Two are subject to dismissal because FOIA provides an adequate alternative remedy, and the FOIA component should be dismissed for failure to state a claim upon which relief can be granted.

I. NSC Lacks Standing to Bring Counts One and Two.

On the issue of standing, there is only one contested question before the Court: whether the FOIA permits the assignments of FOIA rights. NSC acknowledges in its Opposition that if FOIA rights cannot be assigned, it lacks standing to bring Counts One and Two. NSC's Opposition, pgs. 4, 29. On the issue of whether FOIA rights can be assigned, NSC makes a telling concession in its Opposition Brief: "As an initial matter, Defendant is correct that there is no case law that directly supports the notion that NSC has standing." NSC's Opposition, pg. 6. NSC also recognizes that the only case where a court has directly addressed whether FOIA rights are assignable is Feinman, 680 F.Supp. 2d 169, a case in which Judge Huvelle refused to recognize the assignment of FOIA rights and dismissed for lack of standing a plaintiff whose FOIA claim was based on an alleged assignment. NSC's Opposition, pg. 6.

Because there are no cases that directly support its position, NSC's devotes the majority

of its Opposition to attacking the Court's Feinman decision and trying to distinguish it from this case. But NSC's attacks on the Feinman decision are misplaced and its attempts to distinguish this action from Feinman are unpersuasive. Feinman is correctly decided and directly on point. Accordingly, the Court should conclude that FOIA rights cannot be transferred and should dismiss Counts One and Two for lack of standing.

A. Feinman was correctly decided.

NSC begins its assault on the Feinman decision by citing to a host of cases outside of the FOIA context in which courts addressed the assignment of rights or claims. NSC's Opposition, pgs. 5-6, citing Sprint Commc'ns Co., L.P. v. APPC Servs., Inc., 554 U.S. 269, 273 (2008) (assignment of telephone service contracts); Berger v. Weinstein, No. 07-994, 2008 WL 3183404, *3 n.4 (E.D. Pa. Aug. 6, 2008) (assignment of claims arising from alleged loans); Washington Hosp. Ctr. Corp. v. Group Hospitalization & Med. Servs., Inc., 758 F. Supp. 750, 752 n.2 (D.D.C. 1991) (assignment of ERISA claims for health benefits). As Judge Huvelle correctly pointed out, however, inapposite cases do "not answer the question of whether FOIA in particular should interpreted so as to permit assignment." Feinman, 680 F.Supp. 2d 174.¹

Next NSC argues that the Feinman Court misapplied the D.C. Circuit's opinion in Sinto v. Dep't of Justice, 176 F.3d 512 (D.C. Cir. 1999). NSC's Opposition, pg. 7-10. In Sinto, the plaintiff in a FOIA action against the government, Thomas Sinto, passed away while the litigation was ongoing. Id. at 512. The government moved to dismiss the action as moot, and

¹ Nearly all of the arguments in NSC's Opposition parallel arguments that were raised by the plaintiffs in Feinman and ultimately rejected by Judge Huvelle. See Feinman v. F.B.I., et al., Civil Action 09-2047, Plaintiffs' Opposition to Defendants Partial Motion to dismiss, Dkt. No. 6; Plaintiff Barbara Feinman's Motion for Certification of Interlocutory Appeal, Dkt. No. 13.

Sinto's attorney opposed the motion and sought to substitute Thomas Sinto's son Frank as the plaintiff. Id. The District Court denied plaintiff's counsel's motion to substitute and granted the government's motion to dismiss. Id. Frank Sinto then appealed the dismissal to the D.C. Circuit. Id. The D.C. Circuit noted that Frank could not have joined his father's law suit as a plaintiff because he did not have a claim that his FOIA rights had been violated and, even if he had such a claim, he had not exhausted his administrative remedies. Id. at 516. The Court concluded, however, that based on Rule 25 of the Federal Rules of Civil Procedure, Frank could potentially be substituted for his father if he was found to be his father's successor or legal representative. Id.

NSC argues that because the D.C. Circuit recognized that FOIA rights could survive a FOIA requesters death, the Court's decision in Sinto supports its argument that FOIA rights can be assigned. NSC's Opposition, pg. 8. But NSC's argument is inconsistent with the facts and holding in Sinto. In Sinto, the Court held that if an individual brings a law suit under the FOIA and dies during the course of the litigation, his successor or legal representative may continue to represent his interests in the litigation as provided under Rule 25. As Judge Huvelle noted in Feinman, the Sinto Court rejected Frank Sinto's request to be substituted as a plaintiff when his father died and remanded to the district court to determine whether Frank was his father's legal representative. Feinman, 680 F.Supp.2d 175, n.2. When examined closely, the Sinto decision stands for the proposition that an appropriate legal representative can continue to represent the interests of a deceased FOIA litigant, not that FOIA rights or claims can be transferred from one person to another.

NSC also attacks the policy concerns that helped motivate the Feinman Court's decision

that FOIA rights are not assignable. In Feinman the Court explained that the identify of a requester is relevant in determining whether the requester must pay search and duplication fees. Feinman, 680 F.Supp. 2d at 175. Allowing the assignment of FOIA claims could allow FOIA requesters who are subject to such fees to piggyback on requests submitted by requesters who are exempt from them. Id. In addition, a FOIA requester's identity is important when an agency determines whether to invoke exemptions based on personal privacy concerns, as such exemptions should not be invoked against first-party requesters. Id. The Feinman Court also noted that allowing for the assignment of FOIA rights "would multiply opportunities for mistake and mischief." Id. If FOIA administrators took every claim that FOIA rights had been assigned at face value, original FOIA requesters could find themselves improperly excluded from the FOIA process without even knowing it. Id. On the other hand, "it would be unreasonable to expect overburdened FOIA administrators to verify the validity of an assignment by determining whether it complies with local law and reflects the original requesters's actual intent." Id.

NSC attempts to show that the Feinman Court's policy concerns were misplaced by alleging instances in which agencies appear to have allowed parties who claimed to have been assigned FOIA rights to participate in the FOIA administrative process. NSC's Opposition, pgs. 15-19. But isolated incidents and anecdotal evidence are insufficient to prove that the Feinman Court's policy concerns are misplaced. Even if NSC's allegations are accepted as true and agencies have in a handful of incidents allowed FOIA assignees to participate in the FOIA administrative process, such instances do not invalidate the broad policy concerns that the

Feinman Court identified based on the language and requirements of the FOIA.²

The Feinman Court issued a well-reasoned opinion based on the language of the FOIA and legitimate policy concerns, and NSC's attempts to attack it using inapposite case law and irrelevant factual allegations are misplaced and unpersuasive. As the Feinman Court properly determined that FOIA rights cannot be assigned, this Court should reach the same conclusion and dismiss Counts One and Two of NSC's complaint for lack of standing.

B. Feinman is Directly on Point

After attempting to argue that Feinman was wrongly decided, NSC makes the alternative argument that Feinman is distinguishable from this action. First, NSC argues that this case differs from Feinman because NSC's President Kel McClanahan's name appears on the FOIA request submitted by the James Madison Project ("JMP"), and because McClanahan invested significant time and effort in the request. NSC's Opposition, pg. 23, 26. NSC's argument overlooks the fact that NSC, not McClanahan, is the plaintiff in this case. This Court recently recognized that, in the context of FOIA litigation, an organization and its President are separate entities for purposes of standing. In SAE Productions, Inc. v. F.B.I., 589 F. Supp.2d 76, 80 (D.D.C. 2008), the Court concluded that a corporation lacked standing where the corporation's president did not indicate that he was submitting a FOIA request on the corporation's behalf.

² NSC seems to recognize the limited usefulness of its allegations that agencies have occasionally allowed FOIA assignees to participate in the FOIA administrative process because it turns quickly from using those allegations to make policy arguments to trotting them out as an excuse to launch unnecessary and inappropriate attacks on the CIA's practices and motives. See NSC's Opposition, pg. 19 ("When viewed through this lens, it becomes clear that Defendant's position has less to do with an honest belief that 'both case law and strong policy concerns counsel against permitting such assignments' (Def.'s Mem. at 5) and more to do with a long tradition of using procedural obstacles to obstruct the FOIA process.").

Here, NSC does not allege that its name appeared on the original FOIA request submitted by JMP or that it invested significant time or resources in the request. As NSC, not McClanahan, is listed as the plaintiff in this matter, McClanahan's involvement in the filing of JMP's original request is irrelevant.

NSC next argues that this case differs from Feinman because NSC and JMP have the same interests and purposes. NSC's Opposition, pgs. 24-25. In support of its argument, NSC alleges that the same people are involved with both JMP and NSC and that the two organizations share similar mission statements. The fact that JMP and NSC have overlapping officers and similar mission statements does not mean that their interests are aligned in regard to the specific FOIA request at issue in Count One. Indeed, in NSC's complaint, it alleges that JMP assigned its FOIA rights to NSC because "JMP no longer had an interest in the records responsive to this FOIA request." Complaint, ¶ 12. As NSC has filed this lawsuit, it clearly has an interest in the contested FOIA request, and its interests and those of JMP with regard the FOIA request at issue appear to be drastically different.

Finally, NSC argues that this action should be distinguished from Feinman because NSC aggressively attempted to prosecute the request administratively before being informed of the CIA's refusal to recognize the assignment of FOIA rights. NSC's Opposition, pg. 27. This argument misses the mark for at least two reasons. As an initial matter, the plaintiff in Feinman also attempted to prosecute the FOIA request at issue by corresponding with the FBI regarding the alleged assignment of FOIA rights. See Feinman, 680 F.Supp.2d 171. More importantly, NSC has not shown how its actions in aggressively attempting to prosecute the request would have led the Feinman Court to reach a different conclusion in this case.

The Feinman Court addressed the exact question that is before the Court here - whether FOIA rights can be assigned. Its opinion is directly on point and should be followed in this action.

II. Even If the Court Determines that FOIA Rights Can Be Assigned, Claim Two Should Be Dismissed.

NSC acknowledges that if the Court determines that FOIA rights cannot be assigned, it should dismiss Count Two. NSC's Opposition, pg. 29. But even if the Court concludes that FOIA claims can be assigned, it should still dismiss NSC's "FOIA/APA/Mandamus" claim. As set forth in CIA's Partial Motion to dismiss, neither APA nor Mandamus review is available if there is another adequate remedy available to the plaintiff. See e.g., Physicians Comm. for Responsible Med. v. U.S. Dep't of Health and Human Servs., 480 F. Supp. 2d 119, 121 n.2 (D.D.C. 2007) ("[A]lthough the APA governs judicial review generally of 'final agency action,' review under the APA is limited to those agency actions for which there is no adequate remedy in court."); Auburn Regional Medical Center v. Sebelius, 686 F.Supp. 2d 55, 71 (D.D.C. 2010) ("[A] court has jurisdiction to grant mandamus relief only if ... there is no other adequate remedy available to plaintiff."). Here, NSC has a remedy for CIA's refusal to recognize the assignment of FOIA rights: a FOIA records denial claim. NSC has brought just such a claim in Count One, and because it has an adequate remedy under FOIA, the APA and Mandamus portions of Count Two should be dismissed.

Similarly, as set forth in CIA's Partial Motion to dismiss, the FOIA component of Count Two should be dismissed for failure to state a claim. CIA's alleged policy is consistent with the language and intent of the FOIA and the only case directly addressing whether FOIA rights can be assigned. See Feinman, 680 F.Supp.2d 169. Accordingly, NSC cannot show that CIA's

alleged policy violates the FOIA or any rights or interests created under it. Moreover, to the extent NSC seeks the type of FOIA “policy or practice” review recognized by the D.C. Circuit in Payne Enterprises, Inc. v. United States, 837 F.2d 486 (D.C. Cir. 1988), see NSC’s Opposition pgs. 29-32, NSC has not pled and cannot show that the CIA has participated in the type of consistent, intentional violation of the text and spirit of the FOIA that triggers such review.

CONCLUSION

For all the reasons stated above, the Court should grant CIA’s Partial Motion to Dismiss and dismiss Counts One and Two of NSC’s complaint.

dismissed.

Dated: July 1, 2011

Respectfully submitted,

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