

No. 14-5032

[ORAL ARGUMENT NOT YET SCHEDULED]

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

BARBARA FEINMAN,

Plaintiff-Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:09-cv-02047-ABJ
(Amy Berman Jackson, J.)

**BRIEF FOR *AMICI CURIAE* DOUGLAS COX, FIRST LOOK MEDIA,
INC., MUCKROCK, LLC, AND NATIONAL SECURITY COUNSELORS,
INC. IN SUPPORT OF REVERSAL**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Amici respectfully submit this certificate as to parties, rulings, and related cases:

I. Parties and Amici

The parties to this case are the Appellant Barbara Feinman and the Appellee Federal Bureau of Investigation. Amici appearing before this Court are Douglas Cox, First Look Media, Inc., MuckRock, LLC, and National Security Counselors, Inc.

II. Rulings Under Review

Appellant seeks review of the Memorandum Opinion issued by Judge Ellen Segal Huvelle on 26 January 2010.

III. Related Cases

This case was not previously before this Circuit or any other court. A separate case addressing the same matter of law is currently pending before Judge Beryl A. Howell in the U.S. District Court for the District of Columbia. *See Nat'l Sec. Counselors v. CIA*, No. 11-443 (D.D.C.).

Date: August 11, 2014

/s/ Kelly B. McClanahan
Kelly B. McClanahan, Esq.

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GLOSSARY

CIA	Central Intelligence Agency
Cox	<i>Amicus</i> Douglas Cox
FBI	Appellee Federal Bureau of Investigation
Feinman	Appellant Barbara Feinman
First Look	<i>Amicus</i> First Look Media, Inc.
FOIA	Freedom of Information Act
JMP	James Madison Project
McClanahan	Kel McClanahan
MDR	Mandatory Declassification Review
NSC	<i>Amicus</i> National Security Counselors, Inc.

AMICI CURIAE BRIEF IN SUPPORT OF REVERSAL

Douglas Cox (“Cox”), First Look Media (“First Look”), MuckRock, and National Security Counselors (“NSC”) (collectively “Amici”) respectfully submit this *Amici Curiae* Brief in Support of Appellant Barbara Feinman (“Feinman”). Both Feinman and FBI consent to the filing of this Brief.

SUMMARY OF ARGUMENT

Amici are a non-profit public interest law firm (NSC), two representatives of the news media (First Look and MuckRock), and a tenure-track professor with an accredited institution of higher learning (Cox), united in the fact that they and others like them frequently file and litigate Freedom of Information Act (“FOIA”) requests, both on their own behalf and, in NSC’s case, on behalf of clients, in order to inform and educate the public about government operations and activities. Taken together, they form a representative sample of non-commercial requesters which stand to be negatively affected if Appellee Federal Bureau of Investigation (“FBI”) or other agencies are allowed to categorically refuse to recognize legal assignment of interests in FOIA requests.

Amici fully endorse the ruling of Judge Beryl A. Howell on this issue, in particular her observations regarding the practical effects that would come from such a policy. To that end, they offer herein specific hypothetical examples culled from their collective experience to demonstrate the public harm that would come

from a ruling in FBI's favor, so as to show how an endorsement of FBI's policy would not be in the interest of good public policy.

ARGUMENT

I. *AMICI CURIAE*

In order for the Court to assign the proper weight to the arguments offered herein, Amici will first provide their credentials to demonstrate that they are both knowledgeable about this field and that they and others like them stand to be harmed by a ruling in FBI's favor.

A. NATIONAL SECURITY COUNSELORS

NSC is a public interest law firm certified by the Internal Revenue Service as a tax-exempt charitable organization. NSC was established in 2009 by its current Executive Director Kel McClanahan ("McClanahan"), Deputy Executive Director Bradley Moss,¹ and Information Director Sean Heare. NSC regularly files and litigates FOIA and Mandatory Declassification Review ("MDR") requests in its own name and on behalf of its clients, among which are representatives of the news media (including MuckRock), representatives of academic institutions (including Cox), and other non-commercial requesters.

¹ Mr. Moss is also one of Feinman's counsel of record in this case, although neither he nor his co-counsel Mark Zaid—who sits on NSC's Board of Advisors—played any role in the writing of this brief.

Prior to the establishment of NSC, McClanahan worked for the James Madison Project (“JMP”), a non-profit organization operated by Mr. Zaid. As Director of FOIA Operations, McClanahan was responsible for filing and prosecuting FOIA and MDR requests on behalf of JMP. During his tenure, he filed several FOIA and MDR requests regarding topics which were “pet projects” of his, all in JMP’s name. Because many of the agencies with which he filed these requests—including FBI and the Central Intelligence Agency (“CIA”)—have lengthy backlogs and are otherwise notoriously slow at processing such requests, several of these “pet project” requests were still being processed when McClanahan departed JMP to establish NSC with Messrs. Moss and Heare. After it was determined that nobody remaining at JMP had a particular interest in thirteen of these requests²—all of which had been in process for some time—JMP assigned all rights in the requests to NSC so that McClanahan could continue his work at his new place of employment.

The Assignment of Rights letters used for each request were based on a common template, which, in the representative case of FBI, read, in pertinent part:

² Five with CIA, four with the Defense Intelligence Agency, one with the Department of Justice Office of Information Policy, one with FBI, one with the National Geospatial-Intelligence Agency, and one with the Office of the Secretary of Defense/Joint Staff.

This document constitutes an Assignment of Rights (“AOR”) pertaining exclusively to the above indicated Freedom of Information Act (“FOIA”) request submitted by the James Madison Project (“JMP”) to the Federal Bureau of Investigation (“FBI”) on 6 February 2009.

Effective immediately, JMP is assigning to National Security Counselors (“NSC”) any and all rights, benefits, and interests derived from this FOIA request. JMP is transferring to NSC the ability and right to pursue any administrative or legal methods at its disposal relative to this FOIA request, and JMP is surrendering any claims it may have with respect to this FOIA request. All FBI and DOJ correspondence pertaining to this FOIA request should now be addressed to NSC Executive Director Kel McClanahan at the above indicated address.

Nothing in this AOR should be construed as assigning any other rights, benefits, or interests, whether contractual or personal, between JMP and NSC. Nothing in this AOR should be construed as contravening any obligations imposed by law upon either JMP or NSC.

Every agency except CIA—including FBI—recognized and honored these assignments. Only CIA refused to honor the assignments. Accordingly, NSC sued CIA to force it to honor one of the assignments, resulting in the Memorandum Opinions written by Judge Beryl A. Howell in the case *NSC v. CIA*, No. 11-443 (D.D.C.), upon which Feinman largely relies in this appeal.³

³ To avoid running afoul of Circuit rules regarding the introduction of new evidence not present in the record below, Amici will not attach exhibits to prove any factual assertions in this brief. However, should the Court find that it would benefit from the supporting evidence, Amici stand ready to supplement the record. Amici do respectfully ask the Court, however, to take judicial notice of the record from the *NSC v. CIA* case, as it provides a significant amount of context for Judge Howell’s Opinions. For example, the record in that case includes ample factual support for

B. FIRST LOOK MEDIA

First Look is a non-profit news media outlet. First Look currently has one active digital magazine, *The Intercept* (<https://firstlook.org/theintercept/>), and a second digital magazine is slated to debut later this year. As a media outlet which was only established in February of this year, a significant number of First Look's journalists and editors recently arrived from other media outlets, including *Intercept* Editor-in-Chief John Cook (former Editor-in-Chief for *Gawker*) and journalists Dan Froomkin (former Senior Washington Correspondent for the *Huffington Post*), Glenn Greenwald (former columnist for *The Guardian*), and Jeremy Scahill (former National Security Correspondent for *Nation Magazine*).

C. MUCKROCK

MuckRock, through its imprint MuckRock News, is a recognized online media outlet which publishes original news content on a daily basis on its website <http://www.muckrock.com>. In addition to working for MuckRock, multiple members of its editorial and journalistic staff, including founder Michael Morisy and Editor Shawn Musgrave, also work as freelance journalists whose work is

NSC's above allegation that all but one of the agencies which received its assignments, *including FBI*, recognized and honored those assignments, at the same *exact* time that FBI was attempting to convince Judge Huvelle of the inestimable harm that would befall it if it was forced to honor assignments in the instant case. *See Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 259 (D.D.C. 2012) (referring to NSC's factual evidence) [hereinafter *NSC*].

regularly published in several other online and print news outlets, such as the *Boston Globe* and VICE Media.

Additionally, as part of its “non-news” business, MuckRock provides administrative FOIA services to requesters (including representatives of the news media, academic requesters, and other non-commercial requesters) for a fee, including: helping them file requests and appeals; tracking the processing of their requests; organizing, digitizing, and hosting any released documents; and other similar services. In these instances, MuckRock is not considered the “requester” but only an agent of the requester.⁴

D. DOUGLAS COX

Cox is a tenure-track Associate Law Library Professor at the City University of New York School of Law. He regularly files FOIA requests as part of his ongoing research on the intersection of information policy and national security, including issues related to the legal status of documents captured in armed conflict, international legal protections for cultural property, the laws governing the

⁴ For example, if John Smith, a freelance journalist, pays MuckRock for these services, MuckRock will file and prosecute a request *on behalf of* Mr. Smith, but Mr. Smith will be considered to be the “official” requester. Mr. Smith will have to independently qualify for the news media fee category he seeks; MuckRock’s status as a representative of the news media will not play any role in the agency’s consideration of Mr. Smith’s eligibility for preferred fee status. Similarly, if privacy waivers are involved, they will have to authorize the agency to release records to *Mr. Smith*, not MuckRock.

preservation of government records and archives, and FOIA. *See, e.g., Douglas Cox, Burn After Viewing: The CIA's Destruction of the Abu Zubaydah Tapes & the Law of Federal Records*, 5 J. Nat'l Sec. L. & Pol'y 131 (2011) (discussing federal records laws and agency records control schedules obtained via FOIA). He also writes the *Document Exploitation* blog (<http://www.docexblog.com/>) about topics related to his research interests.

II. ALLOWING AGENCIES TO CATEGORICALLY REFUSE TO RECOGNIZE ASSIGNMENTS OF RIGHTS IN FOIA REQUESTS IS BAD PUBLIC POLICY

Because Feinman has already addressed any legal arguments Amici would raise, this Brief will be limited to public policy arguments, in which Amici will provide examples of the types of harm which would ensue if agencies were allowed to do as FBI has done here. Simply put, Amici wholeheartedly endorse Judge Howell's Memorandum Opinions on this matter in *NSC v. CIA*, most notably the following passage:

Recognizing that human beings, rather than corporate entities, perform the actual work on FOIA requests, an organizational interest in a FOIA request may often be attached to the work of a single employee or small group of employees who, in turn, may choose to perform their work for more than one organizational principal while a request is pending. Thus, as the plaintiff points out, not honoring the assignability of FOIA requests between organizations, when the sole reason for the assignment is to keep a request with the person or persons who have assumed stewardship of that request, could present a large swath of professional FOIA requesters with a Morton's fork: either forfeit the freedom to transfer organizations or forfeit the right to

pursue a pending request for information under the FOIA.¹² The former option would needlessly and severely restrict employees' freedom to change organizations, while the latter option would undermine the essential purpose of the FOIA.

¹² The plaintiff offers the example of a journalist who files a FOIA request in her newspaper's name and then goes to work for a new newspaper. This situation would apply equally to an academic who works for multiple institutions of higher learning, a lawyer who works for more than one law firm, or any number of other situations that could arise in the context of FOIA litigation. Another scenario likely to arise in FOIA litigation would be that Corporation A requests information (*e.g.*, relating to a government contract that the corporation did not secure in a bidding process) and, after the request is filed, Corporation A merges with Corporation B, such that Corporation A ceases to exist. Under the rule articulated in *Feinman*, the successor corporation (Corporation B) would have to start the process all over again, even if the request had been outstanding for several months or years.

NSC, 898 F. Supp. 2d at 257 & n.12 (internal citations omitted). To that end, this Brief will provide specific hypothetical examples drawn from Amici's collective experience to demonstrate the reasonableness of Judge Howell's stated concerns.⁵

A. JOURNALIST MOBILITY

It is a simple reality of the journalism field that reporters and editors move from one job to another, often frequently; the mere formation of First Look using a significant percentage of professionals coming from other outlets is a perfect

⁵ Because the fact pattern of *NSC v. CIA* involved an *actual* example of this happening to NSC, the Court is respectfully referred to Judge Howell's Opinions (and the record in that case) for a description of that situation. Therefore, the scenario present in that case will not be discussed among these hypotheticals.

example of this phenomenon. While many journalists work on tasks which would remain of interest to their employers even after their departure, many do not, and it is not uncommon for a media outlet to receive records responsive to a former employee's FOIA request⁶ and simply throw them away because nobody currently working there is interested in the subject matter. However, the former employee may still have a vested interest in the records; perhaps she is writing a book on the matter, or perhaps she is still working the same beat for a different outlet. In such a situation, the most logical course of action for the outlet to take when the journalist leaves, assuming that it recognizes that it no longer cares what happens to the request, is to assign all rights in the request to either a) the journalist herself; or b) her new employer. The outlet loses nothing in the bargain, the journalist is free to prosecute the request as actively or passively as she likes and to use the responsive records in a timely fashion, and the public benefits from any disclosures sooner than it would if the journalist or her new employer were required to file a new request and go to the back of the line.

Contrariwise, in a situation where a journalist changes jobs relatively frequently (high mobility is quite common, especially among digital media outlets), the public may *never* benefit from the disclosures, because she does not stay at any

⁶ Many journalists file FOIA requests in the names of their respective media outlets and not in their personal names to preserve the outlet's interest. Many media outlets

one job long enough for her request to complete processing. For example, if an agency's standard processing time for a FOIA request from receipt to completion is four years, the following timeline would not be unrealistic:

- 2001 - Journalist files a FOIA request for Employer A for records created in 1999.
- 2004 - Journalist moves to Employer B while the request is being processed. She refiles a duplicate request for Employer B.
- 2007 - Journalist moves to Employer C while the duplicate request is being processed. She refiles a second duplicate request for Employer C.
- 2010 - Journalist moves to Employer D while the second duplicate request is being processed. She refiles a third duplicate request for Employer D.
- 2014 - Journalist receives records because she still works for Employer D. She writes a story about them, and the public finally learns about an event from the last century.

In the above scenario, not only has the journalist *definitely* been harmed by the delay, but the public has also been harmed; if she had not stayed at Employer D an extra year, there is no telling when this information would have been

actively *require* this as part of the employment contract.

disseminated. Additionally, and perhaps most perversely, the *agency* has been harmed, because it has had to process *four separate FOIA requests* for the same records, which added even more to its backlog.⁷

Freelance journalists present a related but slightly different challenge. If a freelance journalist files a FOIA request in his own name and then goes to work full-time for a media outlet while it is being processed, he may wish to assign rights in the request to the outlet to more effectively prosecute the request. The outlet would likely be in a better position to aggressively prosecute, and even litigate, the request, leading to a faster resolution of the request and faster dissemination of any released information to the public. However, the media outlet, being a business, would also be less likely to sink significant resources into pursuit of the request if it had no cognizable legal interest in the outcome, which, for all practical purposes, means that the journalist and the public are harmed by the delayed completion of the request.

In the current journalism market, reporters and editors often change jobs far more quickly than large agencies process complex, newsworthy FOIA requests. As

⁷ In *NSC v. CIA*, CIA argued that this damage was mitigated by its alleged practice of “piggybacking” duplicate requests on previous requests. However, NSC offered evidence to show that this alleged practice was not universal throughout the federal government and was not even consistently applied at CIA.

a result, there is a direct line of causality between an agency policy of refusing to recognize assignments and harm to the public interest.

B. ACADEMIC SUCCESSION

Academic professionals face a similar scenario as journalists, and so this Brief will not rehash that argument here, except to say that it is often *worse* for academics, because many hold simultaneous academic positions in multiple institutions. Because of that, academics face the constant threat that if they leave a particular institution (voluntarily or involuntarily), they may lose some of the spoils of their research simply because they filed FOIA requests in *that* institution's name instead of another. Consequently, their research is hampered, which means that it takes longer for them to publish their results and increase public knowledge in the field.

Because of this constant threat, many academics will file requests in their own names and not those of their institutions, since there is little disincentive to the practice; most agencies will award academic fee status to an academic professional requesting records in his own name without requiring that his institution be "the requester." However, this practice can yield unexpected problems if an academic leaves an institution before his work is complete. He may wish to assign the rights in a request to someone else in the institution who is taking over his research, or, if he is working *under* someone, such as in a postdoctoral program, it would likely be

appropriate for him to assign the rights to the primary researcher so that the research can continue after his departure. Not allowing him to do so sets the research back and delays any public benefit which would accrue from it.

CONCLUSION

In conclusion, Amici maintain that a policy of categorically refusing to recognize and honor proper assignments⁸ in FOIA requests causes public harm in exchange for no appreciable benefit. Amici are aware of no agency which has been able to provide specific evidence of harm from recognizing assignments, and yet the potential for delaying—possibly indefinitely—disclosures works to a real and demonstrable public detriment. Accordingly, the Court should follow Judge Howell’s lead and find that FBI’s policy of refusing to recognize assignments in FOIA requests is a violation of FOIA and sound public policy.

⁸ Amici, like Feinman, acknowledge that agencies may have good reason to refuse to recognize *specific* assignments in *specific* requests based on the pertinent facts of each situation. Amici merely argue that agencies should not be able to refuse to recognize assignments simply because they “do not recognize assignments.”

Date: August 11, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2694 words, excluding all exempted parts.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: August 11, 2014

/s/ Kelly B. McClanahan
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Counsel for Amici

CORPORATE DISCLOSURE STATEMENT

First Look Media, Inc. is a non-profit media outlet. MuckRock, LLC, operates as a media outlet through its imprint MuckRock News and also performs services for FOIA requesters for a fee. National Security Counselors, Inc. is a non-profit public interest law firm.

No publicly-held corporation holds an interest of 10% or more in First Look Media, Inc., MuckRock, LLC, or National Security Counselors, Inc. There are no parent companies, subsidiaries, or affiliates of these corporations with any outstanding securities in the hands of the public.

Date: August 11, 2014

/s/ Kelly B. McClanahan
Kelly B. McClanahan, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August, 2014, I filed the foregoing with the Court's Electronic Case Filing system, causing a copy to be served via electronic mail on Appellant's and Appellee's counsel of record.

Date: August 11, 2014

Respectfully submitted,

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