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*** CURRENT THROUGH 104-126, 4/1/96, ***
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TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 47. FRAUD AND FALSE STATEMENTS

18 USCS § 1001 (1996)

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

HISTORY: (June 25, 1948, ch 645, § 1, 62 Stat. 749; Sept. 13, 1994, P.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

PRIOR LAW AND REVISION:

This section is based on Act March 4, 1909, ch 321, § 35, 35 Stat. 1095; Oct. 23, 1918, ch 194, 40 Stat. 1015; June 18, 1934, ch 587, 48 Stat. 996; April 4, 1938, ch 69, 52 Stat. 197 (former 18 U.S.C. § 80).

Former 18 U.S.C. § 80 was divided into two parts.

The provision relating to false claims was incorporated in 18 USCS § 287. Reference to persons causing or procuring was omitted as unnecessary in view of the definition of "principal" in 18 USCS § 2.

The words "or any corporation in which the United States of America is a stockholder" in were omitted as unnecessary in view of the definition of "agency" in 18 USCS § 6.

In addition to minor changes of phraseology, the maximum term of imprisonment was changed from 10 to 5 years to be consistent with comparable sections. (See note under 18 USCS 287.)

AMENDMENTS:

1994. Act Sept. 13, 1994, substituted "under this title" for "not more than \$ 10,000".

SHORT TITLES:

Act Dec. 31, 1982, P.L. 97-398, § 1, 96 Stat. 2009, provides: "This Act may be cited as the 'False Identification Crime Control Act of 1982'.". For full classification of this Act, consult USCS Tables volumes.

Act Oct. 12, 1984, P.L. 98-473, Title II, Ch XVI, § 1601, 98 Stat. 2183, provides: "This chapter may be cited as the 'Credit Card Fraud Act of 1984'.". /

For full classification of such Chapter, consult USCS Tables volumes.

Act Oct. 12, 1984, P.L. 98-473, Title II, Ch XXI, § 2101, 98 Stat. 2190, provides: "This chapter may be cited as the 'Counterfeit Access Device and § Computer Fraud and Abuse Act of 1984'.". For full classification of such Chapter, consult USCS Tables volumes.

Act Oct. 16, 1986, P.L. 99-474, § 1, 100 Stat. 1213, provides: "This Act may be cited as the 'Computer Fraud and Abuse Act of 1986'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 19, 1988, P.L. 100-700, § 1, 102 Stat. 4631, provides: "This Act may be cited as the 'Major Fraud Act of 1988'.". For full classification, consult USCS Tables volumes.

Act Oct. 23, 1989, P.L. 101-123, § 1, 103 Stat. 759, provides: "This Act may be cited as the 'Major Fraud Act Amendments of 1989'.". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 29, 1990, P.L. 101-647, Title XXV, § 2500, 104 Stat. 4859, provides: "This title may be cited as the 'Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990'.". For full classification of such title, consult USCS Tables volumes.

Act Sept. 13, 1994, P.L. 103-322, Title XXIX, § 290001(a), 108 Stat. 2097, provides: "This subtitle [title] [amending 18 USCS § 1030] may be cited as the 'Computer Abuse Amendments Act of 1994'.". For full classification of such Act, consult USCS Tables volumes.

NOTES:

CODE OF FEDERAL REGULATIONS

Commodity Credit Corporation, Department of Agriculture--Oilseeds, 7 CFR Part 1443.

Department of Veterans Affairs--Vocational rehabilitation and education, 38 CFR Part 21.

Department of the Army--Entry authorization regulation for Kwajalein Missile Range, 32 Part 525.

CROSS REFERENCES

Applicability to Canal Zone, 18 USCS § 14.

Conspiracy to defraud Government in regard to false claims, 18 USCS § 286.

Fraudulent claims, generally, 18 USCS § 287.

False claims for postal losses, 18 USCS § 288.

False claims for pensions, 18 USCS § 289.

Conspiracy to defraud United States, 18 USCS § 371.

Passports, false statements in application, 18 USCS § 1542.

Falsification of postal returns to increase compensation, 18 USCS § 1712.

False entry or certificate by revenue officer or agent, 26 USCS § 7214.

Patent declaration in lieu of oath; warning in document of punishment for willful false statements and the like under this section, 35 USCS § 25.

Public buildings, section as applicable to statements by contractors, 40 USCS § 276c.

National Science Foundation scholarships or fellowships, applicability of section to loyalty affidavits, 42 USCS § 1874.

Sentencing guidelines, Statutory Index, Sentencing Guidelines for U. S. Courts, 18 USCS Appendix.

This section is referred to in 7 USCS §§ 12a, 136h, 509, 511r, 1314i, 5662, 6519; 8 USCS § 1324a; 12 USCS § 1833a; 18 USCS §§ 981, 982, 1345, 3059A; 19 USCS §§ 2515, 3391, 3432; 22 USCS §§ 1623, 3622; 35 USCS § 25; 40 USCS § 276c; 41 USCS § 423; 42 USCS §§ 2000b-3, 2000c-6, 3426, 3795a; 43 USCS § 1212; 49 USCS § 5307.

RESEARCH GUIDE

§ FEDERAL PROCEDURE L ED:

- 10A Fed Proc L Ed, Elections and Elective Franchise § 28:313.
- 12A Fed Proc L Ed, Farms, Ranches, and Agricultural Products § 34:716.
- 13 Fed Proc L Ed, Food, Drugs, and Cosmetics §§ 35:1, 691.
- 13 Fed Proc L Ed, Foreign Relations §§ 36:17, 20, 38.
- 15 Fed Proc L Ed, Government Contracts § 39:1075.
- 16 Fed Proc L Ed, Government Officers and Employees §§ 40:113, 187, 382.
- 18 Fed Proc L Ed, Highways and Bridges, §§ 44:369, 684.
- 19 Fed Proc L Ed, Indians and Indian Affairs § 46:564.
- 20 Fed Proc L Ed, Internal Revenue §§ 48:1357, 1376.
- 22 Fed Proc L Ed, Labor and Labor Relations, §§ 52:916, 1253.
- 24 Fed Proc L Ed, Natural and Marine Resources §§ 56:46, 623, 1877, 2080.
- 25 Fed Proc L Ed, Navigable Waters § 57:428.
- 26 Fed Proc L Ed, Patents § 60:50.
- 33A Fed Proc L Ed, Witnesses §§ 80:292, 326.

AM JUR:

- 3A Am Jur 2d, Aliens and Citizens §§ 1869, 1880-1882, 1904.
- 15 Am Jur 2d, Civil Rights §§ 299, 463.
- 17 Am Jur 2d, Contempt § 109.
- 21 Am Jur 2d, Criminal Law § 205.
- 26 Am Jur 2d, Elections § 487.
- 32 Am Jur 2d, False Pretenses §§ 82--86.
- 32 Am Jur 2d, Federal Practice and Procedure § 346.
- 35 Am Jur 2d, Federal Tax Enforcement §§ 110, 115.
- 37 Am Jur 2d, Fraud and Deceit §§ 11, 185.
- 45B Am Jur 2d, Job Discrimination § 1926.
- 53 Am Jur 2d, Military, and Civil Defense § 128.
- 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 221.
- 58 Am Jur 2d, Obstructing Justice § 40.
- 59A Am Jur 2d, Partnership §§ 802, 804.
- 59A Am Jur 2d, Passports § 58.
- 60 Am Jur 2d, Patents § 294.
- 61 Am Jur 2d, Physicians, Surgeons, and Other Healers § 94.
- 61A Am Jur 2d, Pollution Control § 378.
- 69 Am Jur 2d, Securities Regulation--Federal §§ 559, 576.
- 70A Am Jur 2d, Social Security and Medicare § 1533.

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- 13 Am Jur Trials, Defending Federal Tax Evasion Cases, p. 1.
- 14 Am Jur Trials, Representing the Government Contractor, p. 437.

AM JUR PROOF OF FACTS:

- 23 Am Jur Proof of Facts, Confidence Games and Swindles, p. 1.

ANNOTATIONS:

Giving false information to federal police agency or agent as violation of 18 USC § 1001, making it a criminal offense to make false statements in any matter within the jurisdiction of any agency of the United States. 1 ALR Fed 370.

What constitutes a "material" fact for purposes of 18 USCS § 1001, relating

to falsifying or concealing facts in matter within jurisdiction of United States department or agency. 49 ALR Fed 622.

What statements fall within exculpatory denial exception to prohibition, § under 18 USCS § 1001, against knowingly and willfully making false statement which is material to matter within jurisdiction of department or agency of United States. 102 ALR Fed 742.

Giving false information to federal department or agency as violation of 18 USCS § 1001, making it criminal offense to make false statements in any matter under jurisdiction of department or agency of United States. 111 ALR Fed 295.

Filing of false insurance claims for medical services as ground for disciplinary action against dentist, physician, or other medical practitioner. 70 ALR4th 132.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense. 75 ALR4th 1067.

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I. IN GENERAL

1. Generally

Despite the fact that the criminal provisions of the False Claims Act [18 USCS §§ 287, 1001; 31 USCS § 231 and note] were altered and codified in this title, insofar as civil liability is concerned, the version of these provisions contained in R. S. § 5438 [31 USCS § 231 note] continues to be the official one. *United States v Neifert-White Co.* (1968) 390 US 228, 19 L Ed 2d 1061, 88 S Ct 959.

2. Constitutionality

Predecessor to 18 USCS § 1001 was upheld against attack on ground of vagueness; affidavits and reports required had been sufficiently described and duty enjoined had been adequately defined, so that anyone presenting such affidavits and reports to board set up under pertinent regulations was suitably charged with notice of consequence of knowingly and willfully including therein any false and fraudulent statements. *United States v Gilliland* (1941) 312 US 86, 85 L Ed 598, 61 S Ct 518.

18 USCS § 1001 is not unconstitutional on ground that its language is unclear and indefinite. *United States v Matanky* (1973, CA9 Cal) 482 F2d 1319, cert den (1973) 414 US 1039, 38 L Ed 2d 329, 94 S Ct 539, reh den (1974) 414 US 1138, 38 L Ed 2d 764, 94 S Ct 885.

18 USCS § 1001 is not overly broad because it punishes unsworn oral statements. *United States v Des Jardins* (1985, CA9 Cal) 772 F2d 578.

18 USCS § 1001 is not unconstitutional as improperly delegating legislative authority to executive branch of government, and it is not void for indefiniteness or vagueness. *United States v Houcks* (1963, WD Mo) 224 F Supp 778.

18 USCS § 1001 gives sufficient notice as to what is proscribed conduct and is not void for vagueness. *United States v Moller-Butcher* (1983, DC Mass) 560 F Supp 550.

Indictment counts for presidential aide's making false statements to Congress are proper under 18 USCS § 1001, notwithstanding argument that President's primacy in foreign affairs precludes aide's prosecution; Congress may properly inquire into President's conduct of foreign affairs and presidential aides may not intentionally mislead Congress during inquiry. *United States v North* (1988,

DC Dist Col) 708 F Supp 380.

3. Purpose

§ 18 USCS § 1001 was intended to serve vital public purpose of protecting governmental functions from frustration and distortion through deceptive practices. *Ogden v United States* (1962, CA9 Cal) 303 F2d 724.

18 USCS § 1001 serves as catch-all, reaching those false representations that might substantially impair basic functions entrusted by law to particular agency, but which are not prohibited by other statutes. *United States v Rose* (1978, CA9 Wash) 570 F2d 1358 (criticized in *United States v LeMaster* (1995, CA6 Ky) 54 F3d 1224, 1995 FED App 157P, 42 Fed Rules Evid Serv 494).

18 USCS § 1001 is designed to protect authorized functions of government departments and agencies from perversion which might result from deceptive practices enumerated. *United States v Shanks* (1979, CA2 NY) 608 F2d 73, cert den (1980) 444 US 1048, 62 L Ed 2d 736, 100 S Ct 740.

Purpose of 18 USCS § 1001 is clearly to protect Government from fraud and deceit and reach of § 1001 covers all materially false statements, including non-monetary fraud, made to any branch of Government. *United States v Fern* (1983, CA11 Fla) 696 F2d 1269, 83-1 USTC para.9151, 51 AFTR 2d 83-819.

Purpose of § 1001 is to punish those who render positive false statements designed to pervert or undermine functions of governmental departments and agencies. *United States v Harrison* (1985, ACRM) 20 MJ 710.

Purpose of § 1001 is to protect United States Government from fraud or deceit. *Lee v Denro, Inc.* (1992) 91 Md App 822, 605 A2d 1017, 7 BNA IER Cas 720, 126 CCH LC para. 57549.

4. Construction

18 USCS § 1001 is not to be interpreted narrowly or technically. *United States v Olin Corp.* (1979, WD NY) 465 F Supp 1120.

5. Nature of crime

Crime of making false and fraudulent statements under predecessor of 18 USCS § 1001 was not crime involving moral turpitude. *Hirsch v INS* (1962, CA9) 308 F2d 562.

Congress did not intend to preempt prosecution under 18 USCS § 1001 by enacting 31 USCS § 1058. *United States v Fitzgibbon* (1978, CA10 Colo) 576 F2d 279, cert den (1978) 439 US 910, 58 L Ed 2d 256, 99 S Ct 279.

Although alien who testified she had made false statement to immigration inspector admitted essential elements of offense under 18 USCS § 1001, where it was not clear alien had not admitted that there was any fraudulent statement or representation, crime which she had admitted committing was not crime involving moral turpitude. In reB---- M---- (1955, BIA) 6 I & N Dec 806.

Crime of abetting foreign visitor to make false and fraudulent statement in application for extension of stay, resulting in alien's conviction under 18 USCS § 1001, was not crime involving moral turpitude, since conviction under § 1001 would be possible without element of fraudulent intent. In re *Espinosa* (1962, BIA) 10 I & N Dec 98.

Since minimum element for conviction under 18 USCS § 1001 did not necessarily involve moral turpitude, evidence of physician's conviction for violation of § 1001 for submitting medicare claim forms to private insurance carriers who were under contract with Federal Government to process and pay medicare claims, could not, in and of itself, establish moral turpitude; however, offense that does not necessarily involve moral turpitude may nonetheless be committed by acts involving moral turpitude; where physician charged medicare for services he did

not render, it is clear that physician was charged with, and convicted of, nothing less than attempting to defraud and cheat Federal Government by false pretenses, and Board of Medical Examiners was entitled to consider fact of § such moral turpitude in fixing degree of discipline. *Matanky v Board of Medical Examiners* (1978, 2nd Dist) 79 Cal App 3d 293, 144 Cal Rptr 826.

6. Single or separate offenses; multiple violations

Only one violation of 18 USCS § 1001 occurred where statements were submitted, all of which were necessary to influence bank's action in loan application proceeding. *United States v Canas* (1979, CA1 Puerto Rico) 595 F2d 73.

Where false statements are made in distinct and separate documents requiring different proof as to each statement, filing of each false document constitutes crime under 18 USCS § 1001 and each filing may be alleged in separate count of indictment; where defendant falsely represented her name on 2 different documents, each misrepresentation constituted separate offense, because proof of each count was contained in separate document, making evidence required on one count unnecessary to prove other count, even though 2 documents were presented in same transaction and contained same falsity. *United States v Guzman* (1986, CA5 Tex) 781 F2d 428, cert den (1986) 475 US 1143, 90 L Ed 2d 343, 106 S Ct 1798.

Two convictions were proper under 18 USCS § 1001, where importer made, identical false statements to 2 separate officials denying that he had anything to declare, since each official had distinct duties and functions which were impaired at border. *United States v Salas-Camacho* (1988, CA9 Cal) 859 F2d 788, 111 ALR Fed 779.

18 USCS § 1001 does not establish 3 separate offenses, but represents alternative means of committing single offense. *United States v Olin Corp.* (1979, WD NY) 465 F Supp 1120.

7. Civil liability

Despite fact that criminal provisions of False Claims Act [18 USCS §§ 287, 1001; 31 USCS § 231 and note] were altered and codified in this title, insofar as civil liability is concerned, version of these provisions contained in R.S. § 5438 [31 USCS § 231 note] continues to be official one. *United States v Neifert-White Co.* (1968) 390 US 228, 19 L Ed 2d 1061, 88 S Ct 959.

There is no implied civil remedy for violation of 18 USCS § 1001, since there is no affirmative indication that Congress intended to furnish one. *Federal Sav. & Loan Ins. Corp. v Reeves* (1987, CA4 Md) 816 F2d 130.

There is no civil cause of action for violation of 18 USCS §§ 241, 242, 371 or 1001. *Fiorino v Turner* (1979, DC Mass) 476 F Supp 962.

Alleged breach of 18 USCS § 1001 cannot serve to provide private citizen with cause of action in civil case arising out of prior eminent domain proceeding. *Johl v Johl* (1981, DC Conn) 556 F supp 5, affd without op (1982, CA2 Conn) 697 F2d 291, cert den (1983) 459 US 1219, 75 L Ed 2d 459, 103 S Ct 1224, reh den (1983) 460 US 1105, 76 L Ed 2d 370, 103 S Ct 1807.

Defendants are summarily liable in violation of 19 USCS § 1592 with regard to intentional submission of fraudulent information to Customs Service in attempt to enter foreign orange juice concentrate into United States commerce, because material facts established by defendants' own admissions in plea bargaining criminal charge under 18 USCS § 1001 are binding in this action, and government's receipt of restitution under 18 USCS § 3663 does not exhaust its right to pursue additional civil penalties. *United States v Loesche* (1988) 12

CIT 599, 688 F Supp 649.

Government contractor can be debarred from future contracts for violation of 18 USCS § 1001; however, debarment is not automatic, agency must take close look at circumstances surrounding offense, effect of suspension and payment of § fine, length of time which has passed and person's character since offense and conviction. Bender (1976, AGBCA) 79-1 CCH BCA Dec 13801.

II. RELATION TO OTHER LAWS

8. Generally

18 USCS § 1001 does not limit its prohibition of falsification to matters which another statute or regulation requires be provided. United States v Olson (1985, CA9 Wash) 751 F2d 1126.

9. Title 10, USCS

Defense contractor had duty to disclose complete, current, and accurate data to Department of Defense, arising under 10 USCS § 2306, which was applicable to defendant's prosecution under 18 USCS § 1001. United States v Poarch (1989, CA11 Fla) 878 F2d 1355, 35 CCF para.75700.

10 USCS § 907, which criminalizes act of making false official statement, is similar in its scope and purpose to 18 USCS § 1001. United States v Harrison (1985, ACRM) 20 MJ 710.

10. Title 18, USCS

That similar misconduct involving proof of other elements is covered by 18 USCS § 1723 which provides more lenient penalty, does not bar prosecution under 18 USCS § 1001. United States v Baumgarten (1962, CA2 NY) 300 F2d 807, cert den (1962) 370 US 917, 8 L Ed 2d 499, 82 S Ct 1556.

Defendants' contention that they should have been charged under 18 USCS § 1919, which prohibits false statements to obtain unemployment benefits for prior federal service, and not under the general fraudulent statement provision, 18 USCS § 1001, which carries a greater penalty, is without merit, there being no indication in the legislative history that Congress intended to bar application of § 1001 to conduct also punished by § 1919. United States v Burnett (1974, CA9 Cal) 505 F2d 815, cert den (1975) 420 US 966, 43 L Ed 2d 445, 95 S Ct 1361.

18 USCS §§ 287, 1001, 1341, and 1343 are not mutually exclusive insofar as prosecution is concerned. United States v Computer Sciences Corp. (1982, CA4 Va) 689 F2d 1181, 68 ALR Fed 783, cert den (1983) 459 US 1105, 74 L Ed 2d 953, 103 S Ct 729 and (ovrld in part on other grounds by United States v Benny (1986, CA9 Cal) 786 F2d 1410) and (ovrld in part on other grounds by Busby v Crown Supply (1990, CA4 Va) 896 F2d 833, 114 CCH LC para. 12032).

Conviction under both 18 USCS § 1001 and 18 USCS § 1542 for same conduct is proper where each provision requires proof of one fact that other does not. United States v Ramos (1984, CA11 Fla) 725 F2d 1322, 14 Fed Rules Evid Serv 1537.

Although funds involved are CETA funds and 18 USCS § 665 deals specifically with CETA fund fraud, failure to use more specific statute is not ground for reversal of conviction under statute prohibiting willful false statements in matters within jurisdiction of any department or agency of United States (18 USCS § 1001). United States v Suggs (1985, CA11 Ga) 755 F2d 1538.

In prosecution for making false statement on Farmers Home Administration loan application, 18 USCS § 1001 was not pre-empted by 18 USCS § 1014; government had discretion to prosecute under either statute. United States v Hartness (1988, CA8 Ark) 845 F2d 158, cert den (1988) 488 US 925, 102 L Ed 2d 326, 109 S Ct 308.

18 USCS § 1001 does not apply to false statements subject to prosecution under 18 USCS § 1920. *United States v Tillman* (1993, CA11 Ga) 8 F3d 17, 7 FLW Fed C 1027.

Presence of 18 USCS § 2 allegation does not transform § 1001 into offense § requiring multiple actors. *United States v Brown* (1981, WD Wis) 521 F Supp 511.

Conspiracy to conceal by trick material facts within jurisdiction of treasury department in violation of 18 USCS § 1001 may be prosecuted as conspiracy to defraud United States in violation of 18 USCS § 371. *United States v Richter* (1985, ND Ill) 610 F Supp 480, *affd without op* (1986, CA7 Ill) 785 F2d 312 and *affd without op* (1986, CA7 Ill) 793 F2d 1296, *cert den* (1986) 479 US 855, 93 L Ed 2d 124, 107 S Ct 191.

11. -Sections 1010 and 1012

One who, not being veteran, ostensibly assisted veterans to purchase homes, but actually purchased houses for his own benefit in veterans' names, concealing facts from housing authorities, was properly convicted of violation of 42 USCS § 1524 and 18 USCS § 1001, and could not complain because he had been charged under 18 USCS § 1001 rather than 18 USCS § 1012, because, in prosecution resulting from single act which violates more than one statute, government may elect to prosecute under either. *Ehrlich v United States* (1956, CA5 Ga) 238 F2d 481.

Indictments charging defendant with knowingly making false, fictitious and fraudulent statements and representations in the submission of several fictitious bids for construction on property owned by the Department of Housing and Urban Development (HUD) were properly brought under 18 USCS § 1001 even though such indictments could have also been brought under either 18 USCS § 1010 or 1012; there is no indication in the legislative history that Congress, by creating the specific HUD false claim statutes, that is §§ 1010 and 1012, intended to disallow use of the more general false statement statute, § 1001, with its harsher penalties. *United States v Brown* (1973, CA9 Wash) 482 F2d 1359.

Defendant's contention that he should have been charged and sentenced under 18 USCS § 1012, a misdemeanor statute expressly proscribing frauds against HUD, rather than under the general felony fraud statute, 18 USCS § 1001, was without merit; § 1012 was not intended to serve as exclusive criminal remedy for frauds against HUD so as to prevent use of the harsher general statute, § 1001, where applicable. *United States v Librach* (1975, CA8 Mo) 520 F2d 550.

Although false statement made to Department of Housing and Urban Development is actionable under both 18 USCS §§ 1010 and 1001, only § 1001 governs fraudulent schemes. *United States v Waechter* (1985, CA6 Mich) 771 F2d 974.

Violation of 18 USCS § 1010 is not a lesser included offense of 18 USCS § 1001 even though it carries a lesser sentence, since there is no element of violation under § 1001 that is not also found in violation of § 1010; 18 USCS § 1010 is merely another statute under which same conduct prohibited by § 1001 can be punished. *United States v Corsino* (1987, CA1 Puerto Rico) 812 F2d 26.

Indictment which, in effect, charged that FHA mortgage insurance was obtained as result of certifications submitted to the FHA by defendant which falsely represented condition of the properties in question, was not faulty on the theory that it charged defendant under a statute of general application, that is, 18 USCS § 1001, whereas a statute of specific application carrying lesser penalty, that is, 18 USCS § 1010, was available. *United States v Clearfield* (1973, ED Pa) 358 F Supp 564.

12. -Section 1341

There is nothing in either language or legislative history of false statements statute, 18 USCS § 1001, reflecting any Congressional intent to create hierarchy of sanctions that would preempt application of mail fraud statute, 18 USCS § 1341, to submission of false statements to government § agency through use of mails; mail fraud statute proscribes different conduct and requires proof of different elements than false statements statute and government may prosecute defendant under both statutes. *United States v Weatherspoon* (1978, CA7 Ill) 581 F2d 595 (criticized in *Truck Ins. Exch. v Kafka* (1995, ND Ill) RICO Bus Disp Guide (CCH) para.8873).

Fact that certain acts may be subject to prosecution under 18 USCS § 1001 does not bar prosecution of frauds against government under 18 USCS § 1341 since to obtain conviction under mail fraud statute government must prove elements not required under 18 USCS § 1001. *United States v La Bar* (1981, MD Pa) 506 F Supp 1267, affd without op (1982, CA3 Pa) 688 F2d 826, cert den (1982) 459 US 945, 74 L Ed 2d 202, 103 S Ct 260, reh den (1982) 459 US 1093, 74 L Ed 2d 941, 103 S Ct 583.

As matter of statutory construction, more general mail fraud statute, 18 USCS § 1341, supplants 18 USCS §§ 287 and 1001 insofar as fraudulent claims against United States are concerned. *United States v La Bar* (1981, MD Pa) 521 F Supp 203, 8 Fed Rules Evid Serv 1704, affd without op (1982, CA3 Pa) 688 F2d 826, cert den (1982) 459 US 945, 74 L Ed 2d 202, 103 S Ct 260, reh den (1982) 459 US 1093, 74 L Ed 2d 941, 103 S Ct 583 and affd without op (1985, CA3 Pa) 770 F2d 1076 and affd without op (1985, CA3 Pa) 770 F2d 1076 and affd without op (1985, CA3 Pa) 770 F2d 1077.

13. Title 26, USCS

Indictment under tax law charging willful attempt to evade and defeat taxes by making false and fraudulent statements to treasury department is good in spite of 18 USCS § 1001. *United States v Beacon Brass Co.* (1952) 344 US 43, 97 L Ed 61, 73 S Ct 77, 52-2 USTC para. 9528, 42 AFTR 654.

Enactment of 26 USCS § 7206 did not repeal by implication 18 USCS § 1001 as to internal revenue matters. *Cohen v United States* (1953, CA9 Cal) 201 F2d 386, 53-1 USTC para.9165, 43 AFTR 161, cert den (1953) 345 US 951, 97 L Ed 1374, 73 S Ct 864.

Simultaneous conviction for violation of 18 USCS § 1001, derived from filing of falsified labor reports, and under 26 USCS § 7204 for falsely filing W-2 forms did not violate double jeopardy, although there was some statutory overlap, since 2 prosecutions were for separate courses of conduct, for which separate and discreet sanctions and punishment were applicable. *United States v Hughes* (1992, CA6 Ohio) 964 F2d 536, 122 CCH LC para.10306, 70 AFTR 2d 92-5059, reh, en banc, den (1992, CA6) 1992 US App LEXIS 17659 and cert den (1993, US) 122 L Ed 2d 653, 113 S Ct 1254, 124 CCH LC para.10559 and cert den (1994, US) 127 L Ed 2d 541, 114 S Ct 1191, 127 CCH LC para.11026.

14. -Section 7207

Defendants who submitted to Internal Revenue Service false writings, in form of altered checks and other documents, to substantiate improper deductions in their income tax returns, were properly charged under 18 USCS § 1001 instead of under 26 USCS § 7207 which is misdemeanor statute specifically dealing with delivering any document to IRS known to be fraudulent or false. *United States v Bettenhausen* (1974, CA10 Kan) 499 F2d 1223, 74-2 USTC para. 9544, 34 AFTR 2d 74-5415.

Government could prosecute practicing accountant, who made false statement to IRS auditor regarding charitable contribution by client, for felony under 18 USCS § 1001, rather than for misdemeanor under 26 USCS § 7207. *United States v Fern* (1983, CA11 Fla) 696 F2d 1269, 83-1 USTC para.9151, 51 AFTR 2d 83-819.

15. Title 31, USCS

§ Violation of 18 USCS § 1001 in making materially false statement to federal official is included offense within conviction under Reporting Act contained in 31 USCS §§ 5316, 5322, and may not be used to enhance penalty under § 5322. *United States v Booky* (1984, CA9 Hawaii) 733 F2d 1335.

Conviction under 31 USCS § 5322(a) for failing to report currency, does not preclude prosecution under 31 USCS § 1001 for making false statement even though same conduct caused violation of both statutory provisions, because proof of currency report violation does not necessarily include proof of trick, scheme or device to conceal material information. *United States v Salinas-Ceron* (1985, CA9 Cal) 755 F2d 726.

Proceedings under False Claims Act [31 USCS §§ 231 et seq.] are civil in nature and did not subject defendant who had pled guilty to violation of 18 USCS § 1001 to double jeopardy. *United States v Annicchiarico* (1963, DC NJ) 238 F Supp 339.

16. -Section 3729

When top officers of corporate defense subcontractor plead guilty to submitting false statements in violation of 18 USCS § 1001, officers are collaterally estopped from denying civil liability under False Claims Act (31 USCS § 3729); nor may corporation deny its liability. *United States v Di Bona* (1984, ED Pa) 614 F Supp 40.

Defendant's conviction under 18 USCS § 1001 for filing false statement does not prove that government relied on his false statements by collateral estoppel so as to subject him to civil liability under 31 USCS § 3729(a)(1), where relevant false statement was that federally guaranteed loan applicant had never been criminally charged or convicted when in fact he had, because Small Business Administration's (SBA) independent knowledge of applicant's criminal record predated its approval of secondary participation agreement, applicant's criminal record did not necessarily disqualify him from acquiring loan, and SBA's choosing not to raise material misrepresentation before approving secondary purchase of loan implies that SBA did not rely on misinformation regarding applicant's criminal record. *United States v Hill* (1987, ND Fla) 676 F Supp 1158.

Defendant's conviction under 18 USCS § 1001 for filing false statements also supports his civil liability for violating 31 USCS § 3729(a)(1) on basis of collateral estoppel, where false statements concerned prospective borrowers' down payments in transactions for which government loans were to issue and his own net worth as personal guarantor of one loan, because no reasonable jury could determine other than that government agencies relied on such statements in approving loans. *United States v Hill* (1987, ND Fla) 676 F Supp 1158.

17. Title 42, USCS

One who, not being veteran, ostensibly assisted veterans to purchase homes, but actually purchased houses for his own benefit in veterans' names, concealing facts from housing authorities, was properly convicted of violation of 42 USCS § 1524 and 18 USCS § 1001, and could not complain because he had been charged under 18 USCS § 1001 rather than 18 USCS § 1012, because, in prosecution resulting from single act which violates more than one statute, government may

elect to prosecute under either. *Ehrlich v United States* (1956, CA5 Ga) 238 F2d 481.

Where a doctor was accused of filing false and fraudulent applications for payment for professional services rendered Medicare patients, the alleged offense fell within the terms of either 18 USCS § 1001 or 42 USCS § 408(c), and prosecution could be had under either at the discretion of the prosecutor. *United States v Chakmakis* (1971, CA5 Fla) 449 F2d 315.

Enactment of 42 USCS §§ 1395 et seq. subsequent to 18 USCS § 1001 was not designed to repeal § 1001, nor was §§ 1395 et seq. designed to be exclusive remedy for making of false and material statements; so that prosecution under § 1001 is permissible even in view of other overlapping and more specific false statements statutes. *United States v Gordon* (1977, CA8 Ark) 548 F2d 743.

Defendant physician may be prosecuted for making false statement on claims submitted under medicaid and medicare programs under 18 USCS §§ 287 and 1001 rather than under specific provisions of 42 USCS § 1395 nn which covers medicare fraud. *United States v Adler* (1980, CA8 Mo) 623 F2d 1287.

In Medicaid fraud context, 42 USCS § 1396h does not preempt applicability of more general criminal statutes such as 18 USCS § 1001. *United States v Simon* (1981, ED Pa) 510 F Supp 232.

18. -Section 408

Prosecution under 18 USCS § 1001 for submission of false medicare claims was proper, and not barred by enactment of 42 USCS § 408. *United States v Radetsky* (1976, CA10 Colo) 535 F2d 556, cert den (1976) 429 US 820, 50 L Ed 2d 81, 97 S Ct 68 and (ovrld in part on other grounds by *United States v Daily* (1990, CA10 Kan) 921 F2d 994).

Fact that Social Security Act and the penal provisions thereof (42 USCS § 408) was passed subsequently to the fraud and false statements provisions (18 USCS § 1001) and both cover the same acts does not prevent prosecution under the earlier, fraud and false statements, provision. *United States v Matanky* (1972, CD Cal) 346 F Supp 116, affd (1973, CA9 Cal) 482 F2d 1319, cert den (1973) 414 US 1039, 38 L Ed 2d 329, 94 S Ct 539, reh den (1974) 414 US 1138, 38 L Ed 2d 764, 94 S Ct 885.

19. Miscellaneous

Mere fact that, in proof of acts of accused of wrongful importation, specific acts of accused were proved that may have violated 18 USCS § 1001 or any other federal civilian criminal statute, would not mean that such other specific criminal offense was or became offense against Uniform Code of Military Justice that was charged; assuming that violation of 18 USCS § 1001 was proved by evidence as to how accused accomplished his offense, that violation would not become offense charged so that two could be said to be same, and therefore, accused could not be tried by federal civil court under 18 USCS § 1001 for offense alleged and proved under Uniform Code of Military Justice. *United States v Rubenstein* (1954, US) 19 CMR 709.

Violation of 18 USCS § 1001 will support conviction under Article 134, Uniform Code of Military Justice, even where Article 132 violation fails of proof, when accused was charged with using false writing for purpose of obtaining payment of claim against United States. *United States v Hill* (1974, US) 49 CMR 230.

Defendant is not denied due process by virtue of fact that he is prosecuted under 18 USCS § 1001 for felony, rather than under overlapping misdemeanor statute, as prosecution may be brought under either statute at discretion of prosecutor. *United States v Smith* (1975, CA5 Fla) 523 F2d 771, cert den (1976)

429 US 817, 50 L Ed 2d 76, 97 S Ct 59, reh den (1976) 429 US 987, 50 L Ed 2d 599, 97 S Ct 509.

Defendant is not denied due process by virtue of fact that he is prosecuted under 18 USCS § 1001 for felony, rather than under overlapping misdemeanor statute, as prosecution may be brought under either statute at discretion of prosecutor. *United States v Smith* (1975, CA5 Fla) 523 F2d 771, cert den § (1976) 429 US 817, 50 L Ed 2d 76, 97 S Ct 59, reh den (1976) 429 US 987, 50 L Ed 2d 599, 97 S Ct 509.

15 USCS § 645(a), dealing with false statements contained in applications to Small Business Administration, does not impliedly repeal 18 USCS § 1001. *United States v Carter* (1976, CA5 Ga) 526 F2d 1276, reh den (1977, CA5 Ga) 550 F2d 1285.

Defendant was properly indicted under 18 USCS § 1001 for failing to report disability payments to Labor Department, even though 5 USCS § 8105 makes no mention of reporting of disability compensation requirements, since 18 USCS § 1001 is catch-all, reaching those false representations that might substantially impair basic functions entrusted by law to particular agency which are not prohibited by other statutes. *United States v Kappes* (1991, CA6 Ky) 936 F2d 227, reh den (1991, CA6) 1991 US App LEXIS 15277.

Count which is based on 18 USCS § 1001 is not controversy arising under any title of Stabilization Act or under regulations or orders issued thereunder. *United States v Zang* (1981, Em Ct App) 645 F2d 999.

In absence of proof that Federal Water Pollution Control Act required corporate defendant to file reports with governmental agencies, Act did not preclude government from charging corporation with violating 18 USCS § 1001. *United States v Olin Corp.* (1979, WD NY) 465 F Supp 1120.

Petitioners were properly deemed extraditable under "double criminality" requirement, where Hong Kong crimes they are charged with committing are substantially similar to United States crimes under 18 USCS §§ 1001, 1005 and 1006, because petitioners are accused of large-scale fraudulent loans scheme using international telephone and telegraph services. *Tang Yee-Chun v Immundi* (1987, SD NY) 686 F Supp 1004.

Conviction for making false statements under 18 USCS § 1001 may be used to impeach defendant in prosecution for extortion and other offenses, because conviction is admissible under FRE 609(a)(2), notwithstanding argument that circumstances are unrelated and admission would be prejudicial. *United States v Finley* (1989, ND Ill) 708 F Supp 906.

Government can prosecute alleged corporate insiders under 18 USCS § 1001 for alleged false statements concerning corporation's income and expenses in quarterly reports required under 15 USCS § 78m(a)(2), despite existence of 15 USCS § 78ff(a) which imposes criminal penalties for violations of reporting requirements, because § 1001 contains broad language and it was intended to overlap and coexist with--not to preempt--more specific false statement statutes. Unit

FOCUS - 14 OF 55 DOCUMENTS

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*** CURRENT THROUGH 104-126, 4/1/96, ***
*** EXCEPT FOR PLs 104, 106, 114, 120, 121 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 47. FRAUD AND FALSE STATEMENTS

18 USCS @ 1001 (1996)

@ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

16. The blasting agent of claim 4 wherein about 1 to about 70 parts by weight of gas entraining particles are included.

17. The blasting agent of claim 16 wherein the gas entraining particles are glass microspheres having a particle size that will at least pass through a No. 8 USS screen.

18. A process for preparing an emulsion blasting agent which comprises:

(A) preparing with a water-in-oil type emulsifying agent an emulsion of:

(1) an aqueous ammonium nitrate solution as a discontinuous emulsion phase, and

(2) a liquid carbonaceous fuel as a continuous emulsion phase;

(B) thickening by cooling said liquid carbonaceous fuel to a consistency such that a gas may be occluded therein; and

(C) occluding at least 4% by volume at 70° F. and atmospheric pressure of a gas in the thickened emulsion.

19. The process of claim 18 wherein said aqueous solution has a pH in the range from about 2 to about 8.

20. The process of claim 18 wherein the occluded gas constitutes from about 4% to about 47% by volume at 70° F. and atmospheric pressure of the thickened emulsion.

21. The process of claim 18 wherein the occluded gas constitutes from about 13% to about 33% by volume at 70° F. and atmospheric pressure of the thickened emulsion.

22. The process of claim 18 wherein the emulsion is formed of:

(a) 100 parts by weight of ammonium nitrate;

(b) about 10 parts to about 60 parts by weight of water;

(c) up to about 55 parts by weight of at least a second water soluble, emulsion compatible oxidizing material in addition to said ammonium nitrate;

(d) about 4 parts to about 45 parts by weight of a carbonaceous fuel; and

(e) about 0.75 part to about 5 parts by weight of a water-in-oil type emulsifying agent.

23. The process of claim 18 wherein the temperature of emulsion formation for the mixed components is about 100° F. to about 120° F.

24. The process of claim 18 wherein the gas is occluded in the emulsion at a temperature of about 70° F. to about 190° F.

25. The process of claim 18 wherein the emulsion is formed of:

(a) an aqueous solution of 100 parts by weight of ammonium nitrate, and up to about 36 parts by weight of at least a second water soluble, emulsion compatible oxidizing material in addition to said ammonium nitrate, dispersed, in from about 18 parts to about 44 parts by weight of water; and

(b) a carbonaceous fuel of about 5 parts to about 17 parts by weight of a carbonaceous fuel having a gas occlusion temperature from about 95° F. to about 130° F.; and

(c) about 1.3 part to about 3 parts by weight of a water-in-oil type emulsifying agent.

26. The process of claim 25 wherein said second water soluble, emulsion compatible oxidizing material is sodium nitrate.

27. The process of claim 22 wherein the fuel includes at least 2% by weight of wax having a melting point about 100° F. to about 160° F.

28. The process of claim 27 wherein a tackifying polymeric material is included in combination with the wax in the fuel phase.

29. The process of claim 22 wherein the water-in-oil type emulsifying agent is a sorbitan fatty acid ester selected from the group consisting of sorbitan monolaurate, sorbitan monooleate, sorbitan monopalmitate, sorbitan tristearate.

30. The process of claim 22 wherein gas entraining particles having a particle size that will at least pass through a No. 8 USS screen are included in an amount from about 1 to about 70 parts by weight.

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U.S. Cl. X.R.

149—21, 43, 44, 46



John F. BANZHAF, III, et
al., Plaintiffs.

v.

William F. SMITH, et al., Defendants.

Civ. A. No. 83-3161.

United States District Court,
District of Columbia.

Feb. 29, 1984.

Action was brought under the Ethics in Government Act to require the Attorney General to appoint an Independent Counsel to investigate whether criminal offenses were committed by high level officials in course of alleged transmittal of certain briefing materials from the White House to headquarters of presidential candidate. On defendants' motion to dismiss, the District Court, Harold H. Greene, J., held that: (1) plaintiffs submitted information of sufficient specificity and credibility to require the Attorney General to conduct a preliminary investigation provided for under the Act, and (2) plaintiffs had standing to bring the action.

Motion denied.

See also, D.C., 588 F.Supp. 1498.

1. Attorney General ⇐6

Plaintiffs submitted information, concerning alleged improper transmittal of certain briefing materials from the White House to headquarters of presidential candidate, of sufficient specificity and credibility to require the Attorney General to conduct a preliminary investigation provided for under the Ethics in Government Act. 28 U.S.C.A. § 591 et seq.

2. Federal Civil Procedure ⇐103

To establish standing to sue under a statute, plaintiffs must show that they suffered "injury-in-fact," that is, that they sustained some actual or threatened injury as a result of allegedly illegal conduct of defendants and that interest they seek to protect is arguably within zone of interests to be protected or regulated by the statute.

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Civil Procedure ⇐103

As a general rule, deprivation of procedural right granted by a statute constitutes sufficient injury to confer standing.

4. Attorney General ⇐9

Plaintiffs, who submitted to the Attorney General information that was plainly adequate under the Ethics in Government Act to trigger a preliminary investigation, had standing to sue under the Act when the Attorney General invaded their right by refusing to conduct that investigation. 28 U.S.C.A. § 591 et seq.

5. Federal Civil Procedure ⇐103

Where Congress has provided that, upon request of a citizen, the Government has a duty to act and the Government then fails to act, person making the request has standing to enforce his right to government action by a lawsuit in federal court.

John F. Banzhaf, III, Peter H. Meyers, Washington, D.C., for plaintiffs.

David J. Anderson, Susan Riley, U.S. Dept. of Justice, Civil Div., Washington, D.C., for defendants.

OPINION

HAROLD H. GREENE, District Judge.

This is an action under the Ethics in Government Act (Ethics Act), 28 U.S.C. §§ 591 *et seq.*, to require the Attorney General to appoint an Independent Counsel¹ to investigate whether criminal offenses were committed by high-level officials in the course of an alleged transmittal of certain briefing materials from the Carter White House to the headquarters of the then candidate for President Ronald Reagan. Presently before the Court is defendants' motion to dismiss,² in which it is claimed that plaintiffs lack standing to bring the action³ and that they have failed to submit information that is sufficiently specific and credible to cause an investigation to be conducted under the statute. For a better comprehension of the issues and the underlying facts, it is convenient to discuss these defenses in inverse order.

I

The Ethics Act was enacted in the aftermath of Watergate to establish procedures for the avoidance of the actual or perceived conflicts of interest which may arise when the Attorney General investigates alleged criminal wrongdoing by other high government officials. The Congress believed that

an independent prosecutor, who would be free from the divided loyalties which may afflict officials of the Justice Department in these circumstances, would be more likely to be guided by politically neutral principles of fairness and justice.⁴

To these ends, the statute provides in section 592(a) that if the Attorney General receives specific and credible evidence⁵ that a high-level federal official⁶ has committed a federal criminal offense, he "shall" conduct a preliminary investigation. In addition to its mandatory nature, the investigation required by the Act differs from an investigation conducted by the Department of Justice under normal circumstances in the following principal respects.

First, an Ethics Act investigation, which may last not more than ninety days,⁷ is "preliminary," that is, it is not and it may not become a full-fledged criminal investigation. Its purposes are only to weed out frivolous or groundless allegations and to determine whether the case warrants further investigation.⁸ Consequently, as soon as the Attorney General determines that the allegations are serious or have a potential chance of substantiation, his role is over; the case must be referred to a special judicial body (see *infra*) for the appointment of an Independent Counsel.⁹

view of these provisions, the Attorney General's task is ministerial.

6. That category includes the President, Vice President, members of the Cabinet, high-level Justice Department officials, the Director and the Deputy Director of the Central Intelligence Agency, the Commissioner of Internal Revenue, and various national and Presidential campaign officials. Section 591(b).

7. Section 592(b)(2). Under section 593(f), "[u]pon a showing of good cause by the Attorney General," the special division of the Court of Appeals (see *infra*) may "grant a single extension ... for a period not to exceed sixty days."

8. S.Rep. 170 at 54, 1978 U.S.Code Cong. & Ad. News at 4270.

9. S.Rep. 170, 1978 U.S.Code Cong. & Ad. News at 4270-71. See also, section 597 ("whenever a matter is in the prosecutorial jurisdiction of a [sic] independent counsel ... the Department of

Second, to ensure that the Attorney General does not conduct a full criminal investigation and thereby usurp the authority of the Independent Counsel, the Act prohibits the Attorney General from convening grand juries, plea bargaining, granting immunity, and issuing subpoenas.¹⁰

Third, if at the conclusion of an Ethics Act investigation, the Attorney General determines that further investigation or prosecution is not warranted, he must submit a memorandum containing both a summary of the information received and a summary of the results of the investigation to a special division of the U.S. Court of Appeals¹¹ which has the authority to appoint an Independent Counsel to take over any further investigation and prosecution.¹² The summary of information must be sufficiently detailed to apprise the special judicial division of the essence of the allegations and the information received by the Department of Justice; the summary of the results must be sufficiently comprehensive to enable the special judicial division to determine what efforts the Department made to determine the truth of the allegations and what, if anything, it did to uncover additional evidence.¹³ When conducting investigations not covered by the Ethics Act, the Attorney General is, of course, free to pursue his own course and reach his

Justice ... shall suspend all investigations and proceedings ...").

10. Section 592(a)(2).

11. Section 592(b)(2).

12. If, upon completion of the preliminary investigation, the Attorney General finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, he must so notify a special division of the Court of Appeals; if he finds that the matter warrants further investigation or prosecution (or if he fails to act within ninety days) he must apply to that division for the appointment of an Independent Counsel. Section 592(b)(1), (c)(1).

13. S.Rep. 170 at 56, 1978 U.S.Code Cong. & Ad. News at 4272.

14. James A. Baker, III, White House chief of staff; David Stockman, Director of the Office of

own conclusions without accounting to anyone.

The complaint in this case alleges, *inter alia*, that, according to information available on the public record, hundreds of pages of documents from the White House and the Executive Offices were removed or copied and then turned over to the 1980 Reagan campaign organization; that four of President Reagan's present or former aides¹⁴ have admitted to possessing or seeing such materials; that at least some of these aides¹⁵ knew that the documents had been taken from the Carter White House; that an operation existed to collect inside information on the Carter campaign through means of a "mole" and otherwise; and that several high Administration officials¹⁶ appear to have made contradictory statements concerning these papers. Plaintiffs claim that the individuals involved in these activities may have violated one or more federal criminal laws.¹⁷

The government argues that this information is not specific or credible, and that plaintiffs have for that reason failed to state a claim upon which relief may be granted. Indeed, the government goes so far as to assert, more pointedly, that the term "mole" has no "criminal overtones"; that there are likewise no such "overtones" to an information gathering apparatus employed by a Presidential campaign which

Management and Budget; David Gergen, White House Communications Director; and Richard Allen, former National Security Advisor.

15. *E.g.*, Baker and Stockman.

16. Plaintiffs allege that the following persons made such contradictory statements: Baker and William Casey, Director of the Central Intelligence Agency; Allen and Jerry D. Jennings, Director of the White House Office of Science and Technology; and Baker and Gergen.

17. Among the laws mentioned in the complaint are those dealing with conspiracy (section 371 of title 18); interference with nomination or election of candidate for office of President (section 595); theft of records of the United States (section 641, 654, 661, 2112); disclosure of classified or confidential information (sections 798, 1905); and removal of records (section 2071).

uses former agents of the FBI and the CIA; and that the statement of Budget Director Stockman—that briefing books were “filched”—may have had a connotation other than theft. Memorandum of Points and Authorities at 19–21.

These contentions entirely lack merit. To be sure, none of the information summarized above is sufficient, without more, to prove the guilt of any particular individual beyond a reasonable doubt; it may not even be sufficient to support the indictment of any particular individual by a grand jury. But that is not the standard that Congress had in mind when it directed that an Ethics Act investigation be conducted whenever information of high-level involvement in criminal conduct is received. In fact, the intention of the Congress is the precise opposite. The Senate Report states that

as soon as there is *any indication whatsoever* that the allegations involving a high level official may be serious or have *any potential chance of substantiation*, a special prosecutor should be appointed to take over the investigation.

(emphasis added). S.Rep. 170 at 54, 1978 U.S.Code Cong. & Ad.News at 4270.

18. It strains credulity that a prosecutor who, under any other circumstances, received information that a highly-placed public official had admitted that classified or other significant documents had been “filched” from the White House, would simply sit back on the assumption that this filching had a “connotation other than theft.” Any prosecutor, careful or careless, eager or lethargic, would on the receipt of such information conduct at least a preliminary investigation. The Attorney General’s authority under the Ethics Act may be broad; it is not unlimited. See 5 U.S.C. § 706(2)(A).

19. The media reported several days after the hearing on the motion to dismiss that the Department had concluded its eight-month investigation and had issued a three-page report stating that no evidence had been found of any plan or conspiracy by Reagan officials to obtain Carter briefing materials or any other confidential, internal Carter documents. See *Washington Post*, February 24, 1984, p. 1, col. 6; *The New York Times*, February 24, 1984, p. 1, col. 1.

20. Neither the credibility nor the specificity of the information supplied by plaintiffs is diminished by the fact that plaintiffs did not discover

There can be no question that the admissions, contradictions, and other information suggestive of criminal activity would normally generate at least a preliminary investigation to determine whether those who were seemingly implicated did, in fact, violate the law.¹⁸ If any proof of that proposition were needed, it is supplied by the Department of Justice itself. By the government’s own admission, the Department has conducted “a thorough and searching investigation of the transmittal of the briefing papers” in the course of which “over 200 interviews have been conducted and numerous criminal statutes have been considered, including those cited by plaintiffs.” Memorandum of Points and Authorities at 21–22.¹⁹

It is difficult to understand on what basis the government can conduct that kind of an investigation and yet assert at the same time that when plaintiffs furnished evidence similar to that which generated the Department’s inquiry, they failed to provide information that is sufficiently specific and credible to cause an Ethics Act investigation to be conducted.²⁰ The two types of investigations would obviously be triggered by evidence of the same or similar character.²¹ The difference between them lies

it through their own confidential or other “live” sources but compiled it from published newspaper and magazine reports. While publication in the media does not necessarily endow information with special attributes of credibility, it is not deprived of those attributes merely because there has been such publication. The Watergate episode teaches that the media sometimes have the independence and resources necessary for the preliminary collection of facts which may later be used in a more structured form by legislative, judicial, or executive officials.

21. An Ethics Act investigation would be more limited in two respects. First, it is concerned only with wrongdoing by a special class—high-ranking executive officials. In view of the array of officials named in the complaint in this case, it could not seriously be maintained that, while evidence of wrongdoing sufficient to cause a criminal investigation is present, it is not sufficient to cause an investigation of an individual subject to the Ethics Act. Second, the Ethics Act investigation is limited solely to the question whether the submitted information is sufficient to constitute grounds to investigate that a covered official committed a violation of any Federal criminal law. Section 592(a)(1).

not in the quantity or quality of the evidence required for their initiation but in the fact that at the conclusion of one the Attorney General makes his own decision as to whether or not he should prosecute, while at the conclusion of the other he must account to the special division of the Court of Appeals.

[1] For the reasons stated, the Court finds on the basis of the present record²² that plaintiffs have submitted information of sufficient specificity and credibility to require the Attorney General to conduct a preliminary investigation provided for under the Ethics Act.²³ Accordingly, defendants’ contention that the complaint fails to state a claim upon which relief may be granted is rejected.

II

The government argues that Congress did not intend to confer any private rights when it enacted the Ethics Act and that plaintiffs therefore lack standing to maintain this lawsuit.

Plaintiffs advance two theories in support of their claimed standing: (1) that they have standing as citizens,²⁴ as attorneys and officers of the court,²⁵ and as public interest lawyers whose prior legal actions helped to establish the Ethics Act,²⁶ and (2) that they have standing because they presented sufficiently specific and credible information to the Attorney General to

trigger the procedural mechanism leading to the appointment of an independent counsel under the Act. It is not necessary to explore the first theory because plaintiffs have standing under the second.

[2] To establish standing, plaintiffs must show that they suffered “injury-in-fact,” that is, that they sustained some actual or threatened injury as a result of the allegedly illegal conduct of the defendants (see, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979); and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)) and that the interest they seek to protect is arguably within the zone of interests to be protected or regulated by the statute. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

[3,4] The government acknowledges that, as a general rule, the deprivation of procedural rights granted by a statute constitutes sufficient injury to confer standing. Reply Brief at 3. See also, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 224 n. 14, 94 S.Ct. 2925, 2933 n. 14, 41

Department of Justice investigation, what additional facts should be developed, and what conclusions should be drawn from all the evidence.

24. On a related basis, plaintiffs also claim standing as voters, taxpayers, and campaign contributors.

25. It is plaintiffs’ theory that as attorneys they have a special interest in the impartial administration of justice.

26. Plaintiff John Banzhaf asserts that, as a public interest lawyer and law professor, he was perhaps the first person to raise the issue of the need for an impartial outside prosecutor to investigate the allegations against then Vice President Agnew and then President Nixon, and that these efforts and the events that followed led to the enactment of the Ethics Act.

22. It may be that the defendants’ answer to the complaint will contradict plaintiffs’ factual allegations.

23. The Justice Department’s own investigation clearly does not comply with the requirements of the Act, if for no other reason than that the Attorney General failed to file a report with the special division of the Court of Appeals. Moreover, as indicated *supra*, the Attorney General only has authority to investigate the allegations of criminal wrongdoing with a view toward making a report to that division concerning the appointment of an independent prosecutor. Accordingly, the purportedly definitive conclusions drawn by the Department of Justice on the basis of its own investigation, lack validity under the statute. Of course, in the event that an Independent Counsel is ultimately appointed, that official would decide on the extent to which he wished to rely on the facts addressed in the

L.Ed.2d 706 (1974). Accordingly, if Congress created a legal right to a preliminary investigation for persons who supply the required information, then the requisite interest for standing is found in the invasion of that right; i.e., the Attorney General's refusal to conduct that investigation as required by the Act. Thus, plaintiffs have standing²⁷ if the Ethics Act confers rights to persons who present to the Attorney General specific and credible information of high-level law violations.

That issue was considered and answered in the affirmative in the only two cases which have thus far arisen under the Act—*Nathan v. Attorney General*, 557 F.Supp. 1186 (D.D.C.1983) (Gesell, J.)²⁸ and *Dellums v. Smith*, 573 F.Supp. 1489 (N.D.Cal. 1983) (Weigel, J.). *Nathan* involved a request by the victims of a terrorist attack in Greensboro, North Carolina for an investigation of charges that high officials of the government had authorized or negligently permitted various violations of civil rights and that they had conspired to conceal their involvement. In *Dellums*, plaintiffs charged that, by supporting paramilitary operations against Nicaragua, high federal officials violated the Neutrality Act (18 U.S.C. § 960) and related statutes.

In response to arguments similar to those made in this case, Judge Gesell found the statute's limited restriction on court review²⁹ to be suggestive of an intent by the Congress not to foreclose such review in other appropriate circumstances, i.e., where the Attorney General refuses to conduct the preliminary investigation mandated by the statute. He further found that, if the Act is to be enforceable at all, it must

be through those who supply specific information, and that the plaintiffs, as victims of the alleged crime, had, for standing purposes, far more than a generalized grievance. See 557 F.Supp. at 1188-89. Based upon these conclusions, the court held that the plaintiffs had standing; and it denied the government's motion to dismiss.

Similarly, in *Dellums*, Judge Weigel concluded that Congress gave those persons who supplied the required information a procedural right to a preliminary investigation, and that the scheme of the Act—to remove certain actions and determinations from the political process into the public realm—supported a decision in favor of standing by the plaintiffs. That court, too, denied a government motion to dismiss.³⁰

[5] This Court is in agreement with the *Nathan* and *Dellums* conclusions. Where Congress has provided that, upon request of a citizen, the government has a duty to act and the government then fails to act, the person making the request has standing to enforce his right to government action³¹ by a lawsuit in federal court. This principle has been applied in such diverse areas as the Freedom of Information Act, the National Environmental Policy Act, and the False Claims Act. See, e.g., *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir.1975); *Nixon v. Sampson*, 389 F.Supp. 107, 121-22 (D.D.C.1975); see also, 31 U.S.C. § 231-35. As the court in *Dellums* correctly noted,

[t]he Ethics in Government Act ... envisions that information supplied by persons pursuant to its provisions will be

tion provides that the Attorney General's application to the special judicial division for the application of an Independent Counsel "shall not be reviewable in any court."

30. The court has also denied a motion for reconsideration.

31. The underlying interest or injury need not be an economic one. *Data Processing Service v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972).

forwarded and considered by appropriate decisionmakers named in the statute ... [and] that plaintiffs have standing because Congress conferred upon them a right to a judicial determination.

573 F.Supp. at 1095-96.

This conclusion is particularly compelling in the context of this statute when the alternative is considered,³² for if the government is right, *no one has standing* to enforce the Ethics Act.³³

This contention is supported neither by the statutory language³⁴ nor by the legislative purpose. The Ethics Act was enacted to prevent a recurrence of the Watergate abuses perpetrated by, among other individuals, the then Attorney General. It accomplishes that objective by requiring the Attorney General, upon the receipt of information that certain high officials violated criminal laws, promptly to undertake an investigation and to report thereon to a special judicial body. The obvious purpose of this procedure is to provide some check

on the Attorney General who is a political appointee of the President and who, as a member of an elected Administration, is placed in a difficult situation when called upon to investigate allegations against Administration officials.³⁵

Yet if the government's argument is correct, that entire process can be short-circuited by the simple devise of a refusal of the Attorney General (either on his own volition or on instructions from White House officials who may be the targets of the investigation) to initiate the required investigation. For if no one has standing to sue, there will be no accountability: no one could require the Attorney General to conduct a preliminary investigation in accordance with the Act, to report to the special judicial division, or to apply in appropriate cases for the appointment of Independent Counsel.³⁶

Stripped of an enforcement mechanism, the statute would be nothing more than a

32. To be sure, the Court could not find that a particular plaintiff has standing merely because otherwise no one would have standing (*Schlesinger v. Reservists*, supra, 418 U.S. at 227, 94 S.Ct. at 2935) since some matters may have deliberately been left by the Congress to the political process. But that reasoning can hardly be applied to a statute, such as this one, which was intended to remove certain decisions from that process.

33. See, e.g., Memorandum of Points and Authorities at 15-17. Upon inquiry, counsel informed the Court that in the government's view, even former President Carter, the owner or custodian of the allegedly stolen documents, would not have standing to sue.

34. The decision on the conduct of a preliminary investigation is not discretionary under the statute. Rather, the Ethics Act requires the Attorney General to conduct such an investigation whenever he is presented with specific and credible information that a covered official may have committed a crime. See note 5 supra.

35. Not only is there a potential for favoritism but there is also a danger that, to avoid the risk of a loss of public confidence, the Attorney General may bend over backwards to make harsh and unfair prosecutorial decisions against other public officials. S.Rep. No. 496, 97th Cong., 2d Sess., reprinted in 1982 U.S.Code Cong. & Ad.News at 3540-41.

36. Congressional oversight cannot accomplish these objectives. Section 595(e) provides that the members of the Judiciary Committees of the House and the Senate may request that the Attorney General apply for the appointment of an Independent Counsel. However, if the government is correct in its arguments in this case, the Committees would have no greater standing than the plaintiffs here. Indeed, it is doubtful that the Congress would be able even to enforce the statutory requirement that the Attorney General supply it with a written notification of actions taken pursuant to the congressional request and an explanation in the event no action is taken. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

The general power of congressional committees to investigate—such as that of a subcommittee of the House Committee on Post Office and Civil Service which is presently conducting an investigation into the subject of the removal of the Carter papers—is not likely to be more effective. Legislative committees have no power to prosecute, and it is problematical, in any event, whether they will receive the requisite cooperation from the Executive Branch.

As for the special division of the Court of Appeals, it has ruled that it lacks jurisdiction at the present stage of the proceedings. Order 82-3, U.S. Court of Appeals for the District of Columbia, Special Prosecutors Division, September 13, 1982.

27. Because the right to a preliminary investigation is a protected procedural right, the zone of interests prong of standing is supported here by considerations similar to those involved in the injury prong.

28. See also, *Nathan v. United States*, 563 F.Supp. 815 (D.D.C.1983). An appeal is pending, and the Court is advised that briefs have been filed and that the Court of Appeals has scheduled oral argument.

29. The only express limitation on judicial review is contained in section 592(f). That sec-

hortatory statement from the Congress to the Executive Branch.³⁷ That is not the way in which statutes, unlike resolutions or informal requests, are normally viewed. In any event, absent a direction to that effect in the Act or the legislative history, the Court is not prepared to adopt so defeatist a view of a law which had its origins in the dereliction of duty of the highest officers of the Republic and which was intended to prevent their recurrence.³⁸

III

The government finally contends that, even if *Nathan* and *Dellums* were correctly decided, and that in these cases the plaintiffs did have standing, the plaintiffs in this case do not. In that view, if plaintiffs, who are no more than citizens and lawyers, have standing, the floodgates would be open.

That argument misconceives what is involved. As indicated above, plaintiffs' standing stems not from their citizenship or their membership in the Bar; it stems from their submission to the Attorney General of information that is plainly adequate under the statute to trigger a preliminary investigation.³⁹ The question of any injury

37. The government argues that, surely, the Attorney General may be trusted to carry out the law. As a general rule that is undoubtedly true, but as the Congress discovered to its dismay during the Watergate days, not every attorney general can, under all circumstances, be counted upon to investigate vigorously and impartially. Moreover, the Ethics Act was designed to avoid both actual and perceived conflicts of interest. Where a potential conflict of interest or loyalties is present, some accountability is necessary. That the possibility of neglect by the Department of Justice of its statutory duties is not idle and unwarranted speculation appears to be affirmed, on the present record, by the events surrounding this controversy. See note 46 *infra*.

38. Actually, to the extent that the will of the Congress may be discerned from the legislative materials, Congress wanted this law to have actual force and to be more than a "pious statement of pure political import." *Nathan v. Attorney General*, *supra*, 557 F.Supp. at 1190. Because attorneys general had been reluctant or unwilling to appoint special prosecutors where this appeared to be appropriate because of inherent conflicts of interest, Congress found it

to plaintiffs apart from the Attorney General's failure to conduct a preliminary investigation in response to their request is therefore irrelevant.

Insofar as the "floodgates" argument is concerned, the requirement of specificity and credibility establishes an inherent limitation on the use of the statute and the burdens on the Attorney General. It will presumably not be a frequent occurrence that someone could or would submit a petition to the Department of Justice containing information that specifically and credibly charged one or more high-level officials with committing a federal criminal offense.⁴⁰ But on those rare occasions when such information is submitted, the Attorney General has the duty under the law to act.

To the extent that a distinction may be made between this case and *Nathan* and *Dellums*, the instant case even more clearly justifies a finding that the plaintiffs have standing to enforce the statute. Unlike the issue of American involvement in Nicaragua or the alleged violations of the civil rights laws in an alleged assault by members of the Ku Klux Klan on members

necessary to set forth those circumstances in which the Attorney General *must* conduct a preliminary investigation, report to the special judicial division, and, if the allegations warranted further investigation, apply for the appointment of an independent counsel. S.Rep. 170, 1978 U.S.Code Cong. & Ad.News at 4227. When Congress amended the Act in 1982, it reconsidered the need for the special prosecutor provisions and reaffirmed its earlier finding that "[i]t was not sufficient to rely on the President or the Attorney General to appoint a temporary special prosecutor." S.Rep. No. 97-496, *reprinted in* 1982 U.S.Code Cong. & Ad.News at 3540. See also, the general discussions regarding legislative history in *Nathan* and *Dellums*, *supra*.

39. It is not necessary to decide on the proper scope of judicial review if the issue of the specificity and credibility of the information was, unlike here, a close one.

40. Since the Ethics Act was passed in 1978, only three private enforcement actions have been filed in federal court.

of the Communist Party in North Carolina, this case involves the very evil that prompted the adoption of the Ethics Act—alleged political chicanery at the highest levels of government in the context of a political campaign.⁴¹ To hold that in that kind of situation, the Attorney General may refuse even to conduct the preliminary investigation required by that statute, either by making the patently erroneous claim that he had received no specific and credible information concerning law violations, or by arguing successfully that no one has standing to challenge his failure to act, would vitiate that which Congress had sought to achieve in the Ethics Act.

IV

It may well be that no crime was committed by anyone in connection with the transfer of documents from the White House to the campaign headquarters of the opposing candidate.⁴² After all, not every allegation of wrongdoing or even every proven incident of wrongdoing is another Watergate.

41. The involvement of high-level officials is also more apparent here than in *Nathan* (compare 557 F.Supp. at 1188) and this case, unlike *Dellums*, does not involve foreign policy questions (compare 573 F.Supp. at 1502-03).

42. The Court emphasizes that all that is ultimately involved in this lawsuit is a procedural question: who shall investigate charges and who shall decide whether to prosecute—the Attorney General or an Independent Counsel? The complaint does not allege, and this Court passes no judgment as to whether anyone is guilty of wrongdoing, nor does it have jurisdiction to decide that question.

The Court's decision is also limited in that there will not be, in any event, an interference with the prosecutorial discretion of the Attorney General. The duty to conduct a preliminary investigation is clearly distinguishable from the government's discretionary power to prosecute. First, Congress imposed a mandatory duty to conduct a preliminary investigation under the circumstances alleged to exist in this case, and to the extent that such an investigation would normally be viewed as an exercise of prosecutorial discretion, Congress intended to depart from the general rule by making it mandatory in certain limited circumstances. Second, the preliminary investigation and the decision to prosecute are two distinct steps in the statutory

Yet there may be here at least one parallel with that unhappy episode.

The Ethics Act plainly contemplates that when the Attorney General receives specific and credible information of law violations by high-level officials, he shall do no more than to conduct a limited investigation with a view solely to determining whether an Independent Counsel should be appointed. Once he has done that, he must stop. He may not conduct his own full-fledged investigation and draw his own conclusions from that investigation. The entire point of the Ethics Act is that, when there are even preliminary indications that high-level officials violated criminal laws, the decision on how to proceed further must be left to independent authority.⁴³

According to the allegations of the complaint, ample grounds exist for the conduct of an investigation leading to a determination whether an Independent Counsel ought to be appointed. The only substantive basis⁴⁴ on which the Department of Justice has defended or on which it could defend⁴⁵ its failure to conduct a preliminary investigation under the Act—that the

process. The Ethics Act does not disturb the government's discretion in the latter instance. See *Dellums v. Smith*, *supra*, 573 F.Supp. at 1499-1500. Third, there will be no interference by any court with either an investigation or a prosecution once it has begun; the statute mandates merely that these functions be carried out by a prosecutor other than the Attorney General.

It may be noted that the government acknowledged during oral argument that it makes no claim that the statute is unconstitutional.

43. This is on the common sense assumption that the Independent Counsel who has no political and other loyalties might view collected evidence differently than would an attorney general faced with allegations against his colleagues. In addition, the Independent Counsel might require the development of facts which would not be pursued under the direction of the Department of Justice.

44. In addition to the technical defense that no one has standing to question the Attorney General's decision.

45. See S.Rep. No. 97-496 at 11-12, *reprinted in* 1982 U.S.Code Cong. & Ad.News at 3537-38, 3547. But see note 22 *supra*.

evidence of wrongdoing is not sufficiently specific or credible to warrant even a preliminary inquiry—is without any reasonable basis. In short, the Department of Justice appears to have simply ignored the requirements of the Ethics Act.⁴⁶

Thus, the procedural mechanism adopted in the aftermath of Watergate for an independent, dispassionate inquiry into possible wrongdoing has been frustrated at the very outset. If the Department's decision stands, the public will never know whether the special division of the Court of Appeals would have been satisfied with the scope and the results of the inquiry and whether an Independent Counsel would or would not have found evidence of wrongdoing. The Attorney General fiat would effectively end any possibility of an independent decision. This result comports neither with the language nor with the purpose of the Ethics Act.

The motion to dismiss is denied. The defendants shall file their answer to the complaint within ten days.



46. Even if no one had standing, the Attorney General would still have his own, independent obligation under the Act. Upon coming into possession, from any source, of information concerning law violations by high-level officials, he has the responsibility under the statute to conduct a preliminary investigation and to submit the results to the special judicial division. If that had been done when the Department learned of possible law violations, and if at that juncture the special judicial division had been satisfied that the evidence was not sufficiently specific or credible for the appointment of an Independent Counsel, the statutory requirements would have been satisfied. On the other

John F. Banzhaf, III, et
al., Plaintiffs,

v.

William French Smith, et
al., Defendants.

Civ. A. No. 83-3161.

United States District Court,
District of Columbia.

May 14, 1984.

Action was brought under Ethics in Government Act to require the Attorney General to apply to special panel of United States Court of Appeals for appointment of an independent counsel to investigate whether high-ranking government officials committed federal offenses in connection with removal of briefing materials and other documents from the Carter White House to Reagan headquarters during 1980 presidential campaign. On cross motions for summary judgment, the District Court, Harold H. Greene, J., held that: (1) materials submitted to Attorney General were sufficiently specific and credible to trigger a preliminary investigation under the Act; (2) under the Act, Congress did not intend to give the Attorney General plenary, unreviewable authority to proceed or not to proceed with investigative machinery; (3) a judicial order requiring appointment of independent counsel would not be unconstitutional as violating doctrine of separation of powers; (4) Attorney General would be ordered to apply for appointment of independent counsel; and (5) Government was not

hand, if at the conclusion of the preliminary investigation unexplored evidence of law violations remained, further investigative efforts would have been required to be conducted under the aegis of an Independent Counsel. The third hypothesis—that there was insufficient evidence for the investigation—is conclusively contradicted by the fact that the Department saw a valid basis for conducting its own eight-month inquiry. The course of action evidently adopted by the Department—to merge the preliminary investigation with a full-fledged, final investigation—failed entirely to take account of the statutory mandate that the two inquiries are to be directed by two different prosecutorial entities.

entitled to a stay of the order pending appeal.

Judgment accordingly.

Judgment vacated, 737 F.2d 1167.

1. Attorney General ⇨6

Materials submitted by plaintiffs to the Attorney General were sufficiently specific and credible to trigger preliminary investigation under Ethics in Government Act as to whether high-ranking government officials committed federal offenses in connection with removal of briefing materials and other documents from the Carter White House to the Reagan headquarters during 1980 presidential campaign. 28 U.S.C.A. §§ 49, 591 et seq.

2. Attorney General ⇨2

Under the Ethics in Government Act, Congress did not intend to give the Attorney General plenary, unreviewable authority to proceed or not to proceed with appointment of an independent counsel to conduct an investigation of possible federal offenses by official and political colleagues. 28 U.S.C.A. §§ 49, 591 et seq.

3. Constitutional Law ⇨74

Under Ethics in Government Act, which provides for appointment by Attorney General of an independent counsel with respect to prosecution of alleged wrongdoing of official and political colleagues of the Attorney General, a judicial order requiring appointment of such counsel would not be unconstitutional as violating doctrine of separation of powers. U.S.C.A. Const. Art. 2, § 1, cl. 1; 28 U.S.C.A. §§ 49, 591 et seq.

4. Attorney General ⇨2

Under Ethics in Government Act section directing Attorney General to apply to the special panel of the United States Court of Appeals for appointment of an independent counsel if he finds that further investigation or prosecution is warranted, or if 90 days have elapsed from receipt of information without a determination by the Attorney General that there are no reasonable grounds to believe that further investi-

gation or prosecution was warranted, where Attorney General simply refuses to conduct an Ethics Act investigation for a period in excess of 90 days, the next step is not another investigation but an application to a special panel of the Court of Appeals for appointment of independent counsel. 5 U.S.C.A. § 592(c); 28 U.S.C.A. §§ 49, 591 et seq.

5. Attorney General ⇨2

Eight-month investigation by Department of Justice as to whether high-ranking government officials committed federal offenses in connection with removal of briefing materials and other documents from Carter White House to the Reagan headquarters during 1980 presidential campaign was sufficient to support finding that Attorney General had been presented with nonfrivolous allegations having a potential chance of substantiation that high-level officials committed federal offenses; therefore, where Attorney General refused to conduct an investigation under the Ethics in Government Act for over 90 days he would be ordered to apply to the special panel of the United States Court of Appeals for the appointment of an independent counsel to conduct an investigation. 5 U.S.C.A. § 592(c); 28 U.S.C.A. §§ 49, 591 et seq.

6. Federal Courts ⇨686

Government was not entitled to stay, pending appeal, of order directing Attorney General to apply to the special panel of the United States Court of Appeals for the appointment, under the Ethics in Government Act, of independent counsel to investigate whether certain officials covered under the Act violated federal criminal laws in connection with the transfer of documents from the Carter White House to the Reagan headquarters during the 1980 presidential campaign, as the Government failed to make a substantial showing that it was likely to succeed on the merits of its appeal, it failed to show that, without a stay, it would be irreparably injured and public interest strongly favored rapid

348d of the regulation, dated July 25, 1991, specifically authorizes the Chief of the Army Reserve to release personnel from active duty.⁹ Def.'s Exh. D. Accordingly, the plaintiff cannot prevail on this point.

Recommendation

The crux of this case is whether an Army continuation board arbitrarily and capriciously recommended that the plaintiff be separated. The Court finds that the board had ample evidence upon which to come to its conclusion. Contrary to the plaintiff's assertions, there was no material error contained in the plaintiff's record which the board reviewed.

Therefore, upon consideration of the defendant's motion for summary judgment [38], the opposition and supplement thereto, the reply, and the entire record, and in accordance with the foregoing reasoning, it is this 3rd day of January 1996.

RECOMMENDED that the defendant's motion for summary judgment [38] be **GRANTED**.

Failure to file timely objections to the findings and recommendations set forth in this report in accordance with Rule 504(b) for the United States District Court for the District of Columbia may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).



9. There was some discussion as to whether this regulation was properly authenticated. Pl.'s

Robert W. MOORE, Plaintiff,

v.

Les ASPIN, et al., Defendants.

Civil Action No. 93-1797.

United States District Court,
District of Columbia.

Feb. 22, 1996.

Document requester brought action under Freedom of Information Act (FOIA) against Department of Defense. The District Court, Sporkin, J., held that search for documents requested under FOIA was reasonable.

Motion granted.

1. Records ⇐62

Department of Defense satisfied its duties under the Freedom of Information Act (FOIA) with regard to information request by completing all required searches for the requested document, even though none of the searches yielded records responsive to the request. 5 U.S.C.A. § 552.

2. Federal Civil Procedure ⇐1829, 1835

In reviewing motion to dismiss, court must accept all well pleaded allegations of complaint as true and must construe them in light most favorable to the plaintiff. Fed. Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

3. Federal Civil Procedure ⇐1773

Court may not dismiss complaint unless it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations. Fed.Rules Civ. Proc.Rule 12(b), 28 U.S.C.A.

4. Federal Civil Procedure ⇐2481

Summary judgment is available to agency in case under Freedom of Information Act (FOIA) when agency proves that it has fully discharged its obligations under FOIA, even construing underlying facts and inferences to be drawn from them in light most favorable

Strnt. of Material Facts at 1. The defendant has convincingly shown that it was. Def.'s Exh. K.

to document requester. 5 U.S.C.A. § 552; Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

5. Records ⇐62

Adequacy of agency's search for documents requested under Freedom of Information Act (FOIA) is judged by standard of reasonableness; that is, agency must show that it conducted a search reasonably calculated to uncover all relevant documents. 5 U.S.C.A. § 552.

6. Records ⇐62

Agency responding to request under Freedom of Information Act (FOIA) must make good faith effort to conduct search for requested records and must use methods which reasonably can be expected to produce information requested, but there is no requirement that agency search every record system. 5 U.S.C.A. § 552.

7. Records ⇐62

Issue in case under Freedom of Information Act (FOIA) is not whether agency's searches uncovered responsive documents, but rather, whether searches were reasonable. 5 U.S.C.A. § 552.

8. Records ⇐65

Coupled with document requester's acknowledgement that widespread and sincere search occurred, declaration of Associate Deputy General Counsel for Department of Defense, indicating that department searched its offices and found no documents responsive to request made under Freedom of Information Act (FOIA), was sufficient to establish that department discharged its duties under FOIA. 5 U.S.C.A. § 552.

9. Records ⇐62

Standard of reasonableness applied to agency search procedures for responding to requests under Freedom of Information Act (FOIA) does not require detailed examination of every document maintained by agency. 5 U.S.C.A. § 552.

10. Records ⇐65

Once agency shows that its search for documents requested under Freedom of Information Act (FOIA) was reasonable, burden is on requester to rebut that evidence by

showing that search was not conducted in good faith; this can be done by contradicting agency's account of search procedure or by raising evidence of agency's bad faith. 5 U.S.C.A. § 552.

11. Records ⇐62

President of United States was not required, by document requester's appeal under Freedom of Information Act (FOIA) from Department of Defense's determination that it could not find requested documents, to search records under his possession and control. 5 U.S.C.A. § 552.

12. Records ⇐62

Under Freedom of Information Act (FOIA), appeal from agency's response to request must be made to head of the agency to which original request was sent. 5 U.S.C.A. § 552.

13. Records ⇐62

Sending appeal from response to Freedom of Information Act (FOIA) request to different agency does not initiate proper FOIA request for that agency to conduct a search. 5 U.S.C.A. § 552.

14. Records ⇐51

Term "agency," within meaning of Freedom of Information Act (FOIA), does not include the White House but does include executive office of the President. 5 U.S.C.A. § 552.

See publication Words and Phrases for other judicial constructions and definitions.

15. Records ⇐62

Freedom of Information Act (FOIA) does not require court to evaluate importance of requested information in determining whether search for requested information was reasonable. 5 U.S.C.A. § 552.

16. Attorney and Client ⇐21.5(2)

There was no conflict of interest, in action under Freedom of Information Act (FOIA), between counsel for agency to which document request was sent and two Attorneys General from 1904. 5 U.S.C.A. § 552.

17. Judges ¶45

Federal district judge was not disqualified from presiding over action brought under Freedom of Information Act (FOIA) even though he once was employed by two separate government agencies. 5 U.S.C.A. § 552.

Robert W. Moore, Chandler, AZ, pro se.

Suzanne Claire Nyland, U.S. Attorney's Office, Washington, DC, for defendants.

OPINION

SPORKIN, District Judge.

This matter comes before the Court on defendant United States Department of Defense's motion to dismiss the complaint as moot, or in the alternative, for summary judgment. Plaintiff Robert W. Moore, who appears before this Court *pro se*, opposes the Department of Defense's motion.

[1] Plaintiff brings suit under the Freedom of Information Act, 5 U.S.C. § 552. Specifically, plaintiff seeks two distinct items of information from the Department of Defense: 1) the Stock Transfer Book of the Panama Railroad Company and 2) information relating to the transferability of stock to and from the United States Government. The Department of Defense contends, through the Declaration of Stewart Aly, Associate General Counsel for the Department of Defense, that it completed all required searches for the requested documents and that none of the searches yielded records responsive to plaintiff's FOIA request. The Department of Defense asks this Court to dismiss the case as moot, or in the alternative, to grant summary judgment.

FACTUAL BACKGROUND

The following facts are undisputed. By a letter dated July 6, 1993 to then-Secretary of Defense Les Aspin, plaintiff made a Freedom of Information Act (FOIA) request. The FOIA request was for records relating to certain stock transactions occurring between 1895 and 1904 involving shares in the Panama Railroad Company, as well as information pertaining to who the stockholders were as of

June 15, 1993. Plaintiff also requested information relating to the transferability of stock to and from the United States Government. The Department of Defense issued an interim response, dated July 16, 1993, explaining that there was a backlog of FOIA requests and informing plaintiff that processing his request would take an unspecified amount of time.

Plaintiff then appealed to the President of the United States, sending an appeal letter to the White House. In plaintiff's appeal, he claimed that Aspin was the President's subordinate and, therefore, the President's office was the appropriate place to file an FOIA appeal from a decision made by the Secretary of Defense. The plaintiff received no response from the President.

When plaintiff filed suit in October 1993, the Department of Defense had not completed plaintiff's FOIA request. In December 1993, the Department of Defense informed plaintiff that it had completed its search and found no records responsive to plaintiff's FOIA request. Accordingly, the Department of Defense filed a motion to dismiss, or in the alternative, for summary judgment. This Court found that the Department of Defense had fulfilled its obligations under FOIA by conducting a reasonable search for responsive documents, and the case was dismissed without prejudice. Plaintiff was given thirty days to request another search for the specified documents. The search was to be conducted at plaintiff's expense. Plaintiff agreed to pay and timely reinstated his FOIA request.

The Department of Defense completed the second search and again found no documents responsive to plaintiff's request. The Department of the Army, the Executive Agent for the Department of Defense in matters relating to the Panama Canal, also conducted an independent search for responsive records. Among the offices searched were the Department of the Army Headquarters at the United States Garrison in Panama. Headquarters at the United States Army Southern Command (including the office of the Staff Judge Advocate and the Command Historian) in Panama, the Secretary of the

Army, and the Assistant Secretary of the Army. Upon completing a second search and finding no documents responsive to plaintiff's FOIA request, defendant now moves to dismiss the case as moot, or in the alternative, for summary judgment.

MOTION TO DISMISS AND SUMMARY JUDGMENT STANDARDS

[2, 3] In reviewing a motion to dismiss, a court must accept all well-pleaded allegations of the complaint as true and construe them in a light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). A court may dismiss the complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King and Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984).

[4-6] Summary judgment is available to the defendant in an FOIA case when the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester. *Miller v. United States Department of State*, 779 F.2d 1378, 1382 (8th Cir.1985), citing *Weisberg v. U.S. Department of Justice*, 705 F.2d 1344, 1350 (D.C.Cir.1983). The adequacy of the agency's search for requested documents is judged by a standard of reasonableness, i.e., the agency must show that it conducted a search reasonably calculated to uncover all relevant documents. *Id.* at 1383. The agency must show that it made a good faith effort to conduct a search for the requested records, using methods which reasonably can be expected to produce the information requested. *Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C.Cir.1990). There is no requirement that an agency search every record system. *Id.*

ANALYSIS AND DECISION

[7, 8] The issue in an FOIA case is not whether the agencies' searches uncovered responsive documents, but rather whether the searches were reasonable. *Fitzgibbon v. U.S. Secret Service*, 747 F.Supp. 51, 54

(D.D.C.1990) citing *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C.Cir.1986). The Declaration of Stewart F. Aly, Associate Deputy General Counsel for the Department of Defense, indicates that the Department of Defense searched offices at the Department of Defense's Office of General Counsel and found no responsive documents. The declaration also states that the Department of the Army, the Executive Agent for the Department of Defense in matters relating to the Panama Canal, conducted an independent search for responsive records in the Office of the General Counsel of the Army, the Office of the Staff Judge Advocate, Headquarters at the United States Army Southern Command in Panama, and the Mobile District Office of the Army Corps of Engineers. The search did not uncover any responsive documents.

Plaintiff proffered nothing to indicate that the Department of Defense's searches were unreasonable. Indeed, plaintiff appears to concede that the Department of Defense made a reasonable search. In plaintiff's proposed findings of fact, he states that the "Panama Railroad Company share certificates and stock book were not produced, because they have not been found, although widespread and sincere search has made."

[9] Based on the Aly Declaration and the plaintiff's acknowledgment of a widespread and sincere search, the Court finds that the defendant has conducted a diligent search for the documents requested and has fulfilled its obligations under FOIA to conduct a reasonable search. The standard of reasonableness which we apply to agency search procedures does not require a detailed examination of every document maintained by the agency. See *Oglesby*, 920 F.2d at 68. The standard only requires a search that is reasonably calculated to uncover the requested material. *Id.* The scope of the search appears to have been reasonably calculated to reveal the items plaintiff sought.

[10] Once the agency has shown that its search was reasonable, the burden is on the requester to rebut that evidence by a showing that the search was not conducted in good faith. *Miller*, 779 F.2d at 1383. This

can be done either by contradicting the defendant's account of the search procedure or by raising evidence of the defendant's bad faith. *Id.* at 1384. Here, plaintiff does neither. Instead, plaintiff admits the Department of Defense has made a "sincere" search. Even if Plaintiff did not concede that the defendant acted in good faith, the good faith of the agency's search is not materially disputed on the record. There is nothing in the record that contravenes the supported declarations of the Department of Defense establishing that the Department of Defense conducted a good faith, adequate search for agency records responsive to plaintiff's FOIA request and found nothing.

Plaintiff requested that the Department of Defense conduct a search of the Office(s) of the President of the United States, the public and private records of William Howard Taft, as well as other offices and agencies. As this Court indicated in its previous Order, and now reiterates, the Department of Defense is not required to respond to an FOIA request directed at other agencies.

[11, 12] Plaintiff also claims the President of the United States should have searched records under the possession and control of the President. However, the President never received a proper FOIA request. Plaintiff sent his initial FOIA request to the Secretary of Defense, although he later appealed the response to the President. This is inappropriate since an appeal must be made to the head of the agency to which the original request was sent. See 5 U.S.C. § 552(a)(6)(A)(i).

[13, 14] Sending an appeal to a different agency does not initiate a proper FOIA request for that agency to conduct a search. For an FOIA request to be processed, it must be directed to the appropriate office within an agency. If plaintiff wishes the Executive Office of the President to conduct an FOIA search for responsive documents,

1. The term "agency" within the meaning of 5 U.S.C. § 552 does not include the White House. It does, however, include the Executive Office of the President. *Nixon v. Sampson*, 389 F.Supp. 107 (D.D.C.1975), stay granted 513 F.2d 430 (D.C.Cir.1975).

plaintiff must properly submit an FOIA request to that agency.¹

[15] Plaintiff opposes dismissal in this case because he claims the criminal as well as political implications of the materials he seeks pursuant to the FOIA are too great. There is nothing in the FOIA, however, that requires a court to evaluate the importance of requested information. The only issue before this Court is whether or not the search was reasonable.

[16] Plaintiff claims that defendants' counsel have a conflict of interest in this case because of an association between Department of Defense attorneys and Attorneys General Russell and Day.² Plaintiff claims that Attorneys General Russell and Day are defense counsels' "predecessors in office" since defense counsel are "receiving their pay [in] one form or another [as] Attorneys General." Plaintiff argues there is an inherent conflict of interest because it was Attorneys General Russell and Day who allegedly received in 1904 the stock which is the subject of plaintiff's FOIA request. The Court fails to see the conflict between the defendants' counsel here, and two Attorneys General from 1904.

[17] Plaintiff also contends that the Judge in this case should recuse himself due to a conflict of interest. Plaintiff claims that because the Judge was once employed by two separate government agencies, the Judge "never ceases to represent the government" and should recuse himself in this case. Merely because this judicial officer once worked, over ten years ago, for the Executive Branch of the government does not mean he is precluded from deciding cases under the Freedom of Information Act. Although this Court would not be adverse to higher authority accepting plaintiff's argument and excusing this Court from hearing and deciding cases brought under the FOIA, that event has not yet occurred.

2. Special Assistant Attorney General Charles W. Russell and Assistant to the Attorney General William Alonzo Day were allegedly sent to France in May of 1904 by the Justice Department to receive shares of the Panama Railroad Company.

Cite as 916 F.Supp. 37 (D.D.C.)

The Court finds the defendants conducted a search that was reasonably calculated to uncover relevant documents, and the search was made in good faith. Defendant's motion for summary judgment will be granted.



Joan BLOCKER d/b/a Small World
Christian Childcare Center,
Plaintiff,

v.

SMALL BUSINESS ADMINISTRATION
and Dayton Watkins, in her capacity as
Administrator of the Small Business Administration, Defendants.

Civ. Action No. 95-1954 (CRR).

United States District Court,
District of Columbia.

March 1, 1996.

Owner of for-profit day care center that provided sectarian curriculum brought action against Small Business Administration (SBA) and its administrator, alleging that denial of SBA guaranty for loan to owner violated her rights under First Amendment, due process clause, equal protection guarantee of Fifth Amendment, Religious Freedom Restoration Act, and Administrative Procedures Act (APA). On cross-motions for summary judgment, the District Court, Charles R. Richey, J., held that: (1) action was moot when owner received from bank the same loan for which she originally applied, albeit without SBA guaranty, and (2) owner's financial loss from overdraft charges was not fairly traceable to defendants' actions, and, thus, owner lacked standing to challenge denial of guaranty.

Defendants' motion granted; owner's motion denied.

1. Federal Courts ⇨12.1

No principle is more fundamental to judiciary's proper role in our system of government than constitutional limitation of federal court jurisdiction to actual cases and controversies.

2. Federal Courts ⇨12.1

"Case or controversy" requirement defines with respect to Judicial Branch the idea of separation of powers on which federal government is based.

3. Constitutional Law ⇨68(1)

Federal Civil Procedure ⇨103.2

Federal Courts ⇨12.1

Standing, mootness, ripeness and political question are threshold inquiries that must be answered by reference to Article III notion that federal courts may exercise power only in last resort and as a necessity. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Federal Courts ⇨12.1

Mootness doctrine constitutes part of "case or controversy" limitation on federal court's jurisdiction.

5. Federal Courts ⇨12.1

In general, case is moot when issues presented are no longer "alive" or parties lack cognizable interest in outcome.

6. Federal Courts ⇨12.1

Case may become moot in one of two ways: wrongful conduct may pass without possibility of repetition, or circumstances may be such that judgment would no longer affect rights of party.

7. Federal Courts ⇨13

Claim by owner of day care center that denial by Small Business Administration (SBA) of loan guaranty deprived her of rights guaranteed by First and Fifth Amendments, Religious Freedom Restoration Act, and Administrative Procedures Act (APA) was moot, where owner received from bank the same loan for which she originally applied, albeit without SBA guaranty, and, thus, there remained no case or controversy regarding owner's application for loan guaranty. U.S.C.A. Const. Amends. 1, 5; Religious Freedom Restoration Act of 1993, § 3,

TITLES OF
UNITED STATES CODE
AND
UNITED STATES CODE ANNOTATED

- | | |
|---|---|
| 1. General Provisions. | 28. Judiciary and Judicial Procedure. |
| 2. The Congress. | 29. Labor. |
| 3. The President. | 30. Mineral Lands and Mining. |
| 4. Flag and Seal, Seat of Government, and the States. | 31. Money and Finance. |
| 5. Government Organization and Employees. | 32. National Guard. |
| 6. Surety Bonds. | 33. Navigation and Navigable Waters. |
| 7. Agriculture. | 34. Navy (<i>See Title 10, Armed Forces</i>). |
| 8. Aliens and Nationality. | 35. Patents. |
| 9. Arbitration. | 36. Patriotic Societies and Observances. |
| 10. Armed Forces. | 37. Pay and Allowances of the Uniformed Services. |
| 11. Bankruptcy. | 38. Veterans' Benefits. |
| 12. Banks and Banking. | 39. Postal Service. |
| 13. Census. | 40. Public Buildings, Property, and Works. |
| 14. Coast Guard. | 41. Public Contracts. |
| 15. Commerce and Trade. | 42. The Public Health and Welfare. |
| 16. Conservation. | 43. Public Lands. |
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| 18. Crimes and Criminal Procedure. | 45. Railroads. |
| 19. Customs Duties. | 46. Shipping. |
| 20. Education. | 47. Telegraphs, Telephones, and Radiotelegraphs. |
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| 23. Highways. | 50. War and National Defense. |
| 24. Hospitals, Asylums, and Cemeteries. | |
| 25. Indians. | |
| 26. Internal Revenue Code. | |
| 27. Intoxicating Liquors. | |

UNITED STATES CODE ANNOTATED

Title 18
Crimes and Criminal Procedure
§§ 700 to 1080
(1976)

Official Revision and Codification of the
Laws relating to the Judiciary and Judicial Procedure,
Under Arrangement of Official Code of
the Laws of the United States
with
Annotations from Federal and State Courts

18 USC § 798 — disclosure of
codes & cryptographic
info.

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Library References

War and National Defense § 48.

C.J.S. War and National Defense § 56.

§ 797. Publication and sale of photographs of defense installations

On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

June 25, 1948, c. 645, 62 Stat. 738.

Historical and Revision Notes

Reviser's Note. Based on sections 45 and 45b of Title 50, U.S.C., 1940 ed., War and National Defense (Jan. 12, 1938, c. 2, §§ 1, 3, 52 Stat. 3).

Punishment provision of section 45 of Title 50, U.S.C., 1940 ed., War and National Defense, is repeated. Words "upon conviction" were deleted as surplusage.

since punishment cannot be imposed until a conviction is secured.

Minor changes were made in phrasing.

Canal Zone. Applicability of section to Canal Zone, see section 14 of this title.

Library References

War and National Defense § 48.

C.J.S. War and National Defense § 56.

§ 798. Disclosure of Classified Information

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.

Added Oct. 31, 1951, c. 655, § 24(a), 65 Stat. 719.

So enacted. See second section 798 enacted on June 30, 1953, set out below.

Historical Note

Canal Zone. Applicability of section to Canal Zone, see section 14 of this title.

Legislative History. For legislative history and purpose of Act Oct. 31, 1951, see 1951 U.S. Code Cong. and Adm. News, p. 2578.

Cross References

Disclosure of classified information by government officer or employee, see section 783 of Title 50, War and National Defense.
 Federal retirement benefits, forfeiture upon conviction of offenses described under this section, see section 8312 of Title 5, Government Organization and Employees.
 Veterans' benefits, forfeiture upon conviction under this section, see section 3505 of Title 38, Veterans' Benefits.

Library References

War and National Defense 48. C.J.S. War and National Defense § 56.

Code of Federal Regulations

Availability of information, National Security Agency, see 32 CFR 290a.1 et seq.

Notes of Decisions**Historical documents 1****Industrial security clearance program 2****Injunctions 3****1. Historical documents**

This section did not have application to or proscribe publication of historical documents pertaining to the war in Vietnam and the Tonkin Gulf incident. *U. S. v. New York Times Co.*, D.C.N.Y.1971, 328 F.Supp. 324, remanded 444 F.2d 544, reversed and remanded 91 S.Ct. 2140, 403 U.S. 713, 29 L.Ed.2d 822.

2. Industrial security clearance program

The National Security Act, former section 171 et seq. of Title 5 [now section 131 et seq. of Title 10], and the Armed Service Procurement Act, section 2301 et seq. of Title 10, together with this section making it a crime to communicate intelligence information to unauthorized persons and section 783 of Title 50 making it a crime for officer or employee of United States to communicate classified information to agents of foreign governments or Communist organizations do not

authorize Department of Defense to create industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied traditional procedural safeguards of confrontation and cross-examination. *Greene v. McElroy*, App.D.C.1959, 79 S.Ct. 1400, 160 U.S. 474, 3 L.Ed.2d 1377.

3. Injunctions

A newspaper would not be preliminarily enjoined from publishing certain government documents relating to Vietnam and the Tonkin Gulf incident on basis of application of this section where there was no reasonable likelihood of government successfully proving willful belief that information to be published could be used to injury of the United States or advantage of any foreign nation. *U. S. v. New York Times Co.*, D.C.N.Y.1971, 328 F.Supp. 324, remanded 444 F.2d 544, reversed and remanded 91 S.Ct. 2140, 403 U.S. 713, 29 L.Ed.2d 822.

§ 798. Temporary extension of section 794¹

The provisions of section 794 of this title, as amended and extended by section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Con-

gress, and acts which would give rise to legal consequences and penalties under section 794 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

Added June 30, 1953, c. 175, § 4, 67 Stat. 133.

¹ So enacted. See first section 798 enacted on Oct. 31, 1951, set out above.

Historical Note

References in Text. Section 1(a) (29) of the Emergency Powers Continuation Act (66 Stat. 333) as further amended by Public Law 12, Eighty-third Congress, referred to in text, was formerly set out as a note under section 791 of this title and was repealed by Act June 30, 1953, c. 175, § 7, 67 Stat. 134.

Proc. 2912, 3 C.F.R., 1950 Supp., p. 71, referred to in text, is an erroneous citation. It should refer to Proc. 2914 which

is set out as a note preceding section 1 of Appendix to Title 50, War and National Defense.

Canal Zone. Applicability of section to Canal Zone, see section 14 of this title.

Legislative History. For legislative history and purpose of Act June 30, 1953, see 1953 U.S.Code Cong. and Adm.News, p. 1779.

§ 799. Violation of regulations of National Aeronautics and Space Administration

Whoever willfully shall violate, attempt to violate, or conspire to violate any regulation or order promulgated by the Administrator of the National Aeronautics and Space Administration for the protection or security of any laboratory, station, base or other facility, or part thereof, or any aircraft, missile, spacecraft, or similar vehicle, or part thereof, or other property or equipment in the custody of the Administration, or any real or personal property or equipment in the custody of any contractor under any contract with the Administration or any subcontractor of any such contractor, shall be fined not more than \$5,000, or imprisoned not more than one year, or both.

Added Pub.L. 85-568, Title III, § 304(c)(1), July 29, 1958, 72 Stat. 434.

Historical Note

Codification. Section was added by subsec. (c) of section 304 of Pub.L. 85-568. Subsecs. (a) and (b) of section 304 are classified to section 2455 of Title 42, The Public Health and Welfare. Subsec. (d) of section 304 is classified to section 1114 of this title. Subsec. (e) of section 304 is classified to section 2456 of Title 42.

Canal Zone. Applicability of section to Canal Zone, see section 14 of this title.

Legislative History. For legislative history and purpose of Pub.L. 85-568, see 1958 U.S.Code Cong. and Adm.News, p. 3160.

Library References

Conspiracy 23.

War and National Defense 48.

C.J.S. Conspiracy § 42.

C.J.S. War and National Defense § 56.

Code of Federal Regulations

Extraterrestrial exposure, safety precautions, violations, see 14 CFR 1211.100 et seq.
 NASA security areas, designation, etc., 14 CFR 1203a.100 et seq.

UNITED STATES CODE ANNOTATED

Title 18
Crimes and Criminal Procedure
§§ 700 to 1080

1996
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HISTORICAL AND STATUTORY NOTES

1994 Amendments

Pub.L. 103-322, § 330016(1)(H), substituted "under this title" for "not more than \$1,000".

Legislative History

For legislative history and purpose of Pub.L. 103-322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 798. Disclosure of classified information

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

[See main volume for text of (1) to (3)]

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined under this title or imprisoned not more than ten years, or both.

[See main volume for text of (b) and (c)]

(d)(1) Any person convicted of a violation of this section shall forfeit to the United States irrespective of any provision of State law—

(A) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and

(B) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1).

(3) Except as provided in paragraph (4), the provisions of subsections (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(b), (c), and (e)-(p)), shall apply to—

(A) property subject to forfeiture under this subsection;

(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property, if not inconsistent with this subsection.

(4) Notwithstanding section 524(c) of title 28, there shall be deposited in the Crime Victims Fund established under section 1402 of the Victims of Crime Act of 1984 (42 U.S.C. 10601) all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale authorized by law.

(5) As used in this subsection, the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(As amended Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147; Oct. 14, 1994, Pub.L. 103-359, Title VIII, § 804(a), 108 Stat. 3439.)

HISTORICAL AND STATUTORY NOTES

References in Text

Subsection (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (d)(3), are classified to section 853(b), (c), and (e) through (p) of Title 21, Food and Drugs.

Codification

Another section 798 of this title, as added June 30, 1953, § 4, was renumbered section 798A of this title.

1994 Amendments

Subsec. (a). Pub.L. 103-322, § 330016(1)(L), struck out "not more than \$10,000" and inserted "under this title" following "shall be fined".

Subsec. (d). Pub.L. 103-359, § 804(a), added subsec. (d).

Legislative History

For legislative history and purpose of Pub.L. 103-322, see 1994 U.S. Code Cong. and Adm. News, p. 1801; Pub.L. 103-359, 1994 U.S. Code Cong. and Adm. News, p. 2703.

CROSS REFERENCES

"Act of espionage" defined as in this section of purposes of access to classified information, see 18 USCA § 3077.

"Aggravated felony" defined as in this section for purposes of immigration, see 8 USCA § 1101.

Optional venue for espionage and related offenses on the high seas, see 18 USCA § 3239.

FEDERAL SENTENCING GUIDELINES

See § 2M3.6.

NOTES OF DECISIONS

Classification of information 4
Discovery and inspection 5

4. Classification of information

Under provision of this section for penalty for unauthorized disclosure of classified information concerning design, construction, use, maintenance, or repair of any device, apparatus or appliance used or prepared or planned for use by the United States for cryptographic or communication intelligence purposes, fact of classification of document or documents satisfies classification element of offense, and propriety of classification is irrelevant. *U. S. v. Boyce*, C.A.9 (Cal.) 1979, 594 F.2d 1246, certiorari denied 100 S.Ct. 112, 444 U.S. 855, 62 L.Ed.2d 73.

5. Discovery and inspection

In prosecution growing out of conspiracy to sell classified information, discovery was not shown to have been improperly denied defendant though prosecution required that documents subject to inspection remain in governmental possession and a few materials were sealed, the trial court having examined the sealed materials in camera and an independent review of the same documents by the Court of Appeals having led also to the conclusion that the documents contained no exculpatory matter. *U. S. v. Boyce*, C.A.9 (Cal.) 1979, 594 F.2d 1246, certiorari denied 100 S.Ct. 112, 444 U.S. 855, 62 L.Ed.2d 73.

State secrets privilege barred patent holder, who brought action against government under Invention Secrecy Act, from discovery of information about design, construction, and use of government's cryptographic encoding devices; information fell within scope of privilege, and information requested, if disclosed, would pose reasonable danger to national defense, intelligence-gathering capabilities, and diplomatic relations. *Clift v. U.S.*, D.Conn.1991, 808 F.Supp. 101.

§ 798A. Temporary extension of section 794

The provisions of section 794 of this title, as amended and extended by section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912. 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under section 794 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

(Added June 30, 1953, c. 175, § 4, 67 Stat. 133, § 798, renumbered 798A, Pub.L. 101-647, Title XXXV, § 3519(a), Nov. 29, 1990, 104 Stat. 4923.)

HISTORICAL AND STATUTORY NOTES

1990 Amendment

Pub.L. 101-647 renumbered section 798 of this title, as added June 30, 1953, § 4, as this section.

§ 799. Violation of regulations of National Aeronautics and Space Administration

Whoever willfully shall violate, attempt to violate, or conspire to violate any regulation or order promulgated by the Administrator of the National Aeronautics and Space Administration for the protection or security of any laboratory, station, base or other facility, or part thereof, or any aircraft, missile, spacecraft, or similar vehicle, or part thereof, or other property or equipment in the custody of the Administration, or any real or personal property or equipment in the custody of any contractor under any contract with the Administration or any subcontractor of any such contractor, shall be fined under this title, or imprisoned not more than one year, or both.

(As amended Pub.L. 103-322, Title XXXIII, § 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147.)

code of federal regulations

**Administrative
Personnel**

51

PART 1200 TO END

Revised as of January 1, 1996

6

(Reserved)

**CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT
AS OF JANUARY 1, 1996**

With Ancillaries

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CHAPTER XV—OFFICE OF ADMINISTRATION, EXECUTIVE OFFICE OF THE PRESIDENT

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PART 2500—INFORMATION SECURITY REGULATION

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2500.3 Original classification.
2500.5 Derivative classification.
2500.7 Declassification and downgrading.
2500.9 Safeguarding.
2500.11 Implementation and review.

AUTHORITY: Executive Order 12356, 3 CFR, 1982 COMP., p. 166.

SOURCE: 44 FR 50039, Aug. 27, 1979; 45 FR 20453, Mar. 28, 1980; 45 FR 22873, Apr. 4, 1980, unless otherwise noted.

§ 2500.1 Introduction.

(a) *References.* (1) Executive Order 12065, "National Security Information", dated June 28, 1978.

(2) Information Security Oversight Office Directive No. 1, "National Security Information", dated October 2, 1978.

(b) *Purpose.* The purpose of this regulation is to ensure, consistent with the authorities listed in section (a), that national security information held by the Office of Administration is protected to the extent necessary to safeguard the national security.

(c) *Applicability.* This regulation governs the Office of Administration. Together with the authorities listed in section (a), it establishes the policies and procedures for safeguarding of information that is under the control of the Office of Administration.

§ 2500.3 Original classification.

No one in the Office of Administration has been granted authority for original classification of information.

§ 2500.5 Derivative classification.

The Office of Administration serves only as the temporary physical custodian of classified information which originated in other agencies of the Executive Office of the President. Therefore, no one in the Office of Administration incorporates, restates, paraphrases or generates in a new form information which is already classified.

§ 2500.7 Declassification and downgrading.

(a) *Declassification authority.* No one in the Office of Administration has the

authority to declassify or downgrade classified information.

(b) *Mandatory review for declassification.* (1) Requests for mandatory review of national security information contained in the records of any Executive Office of the President (EOP) agency for which OA provides services must be in writing and addressed to the Security Officer, OA, 725 17th Street, NW., Washington, DC 20503. Those agencies for which OA provides services include the Council of Economic Advisors, the Council on Environmental Quality, the Office of Administration, and the Office of the United States Trade Representative.

(2) The OA Security Officer will receive and monitor all requests for mandatory review for declassification of information as received by the EOP agencies named above.

(3) Requests for mandatory review for declassification of classified information contained in the records of any other Executive Office of the President agency for which OA provides services should be addressed directly to the agency which is the owner of the record, in accordance with that agency's published Information Security Regulation.

[44 FR 50039, Aug. 27, 1979; 45 FR 20453, Mar. 28, 1980; 45 FR 22873, Apr. 4, 1980, as amended at 56 FR 8101, Feb. 27, 1991]

§ 2500.9 Safeguarding.

The Office of Administration shall protect information in its custody against unauthorized disclosure commensurate with its level of classification.

§ 2500.11 Implementation and review.

The Information Security Oversight Committee of the Office of Administration shall be chaired by the agency's General Counsel. The Committee shall be responsible for acting on all suggestions and complaints concerning the administration of the information security program. The chairperson shall also be responsible for conducting an active oversight program to ensure effective implementation of Executive Order 12356.

[44 FR 50039, Aug. 27, 1979; 45 FR 20453, Mar. 28, 1980; 45 FR 22873, Apr. 4, 1980, as amended at 56 FR 8101, Feb. 27, 1991]

PART 2502—AVAILABILITY OF RECORDS

Subpart A—Production or Disclosure of Records Under the Freedom of Information Act, 5 U.S.C. 552

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AUTHORITY: 5 U.S.C. 552, as amended by Pub. L. 93-502 and Pub. L. 99-570.

SOURCE: 45 FR 47112, July 14, 1980, unless otherwise noted.

Subpart A—Production or Disclosure of Records Under the Freedom of Information Act, 5 U.S.C. 552

§ 2502.1 Definitions.

(a) *Office* or *OA* means the Office of Administration, Executive Office of the President;

(b) *Agency* means agency as defined in 5 U.S.C. 552(e);

(c) *Workday* means those days when the Office is open for the conduct of government business, and does not include Saturdays, Sundays and legal public holidays;

(d) *FOIA* means Freedom of Information Act, 5 U.S.C. 552, as amended.

[45 FR 47112, July 14, 1980, as amended at 49 FR 28233, July 11, 1984]

§ 2502.2 Purpose and scope.

This subpart contains the regulations of the Office of Administration, Executive Office of the President, implementing 5 U.S.C. 552. The regulations of this subpart describe the procedures by which records may be obtained from all organizational units within the Office of Administration. Official records of the Office made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. To the extent that it is not prohibited by other laws the Office also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

[45 FR 47112, July 14, 1980. Redesignated at 49 FR 28233, July 11, 1984]

§ 2502.3 Organization and functions.

(a) The Office of Administration (OA) was created by Reorganization Plan No. 1 of 1977 and Executive Order 12028. Its primary function is to provide common administrative and support services for the various agencies and offices of the Executive Office of the President. It consists of:

- (1) Office of the Director
- (2) Office of the Deputy Director
- (3) Office of the Executive Secretary
- (4) Office of the General Counsel
- (5) Six Directors and their staffs, who are responsible for the following divisions:
 - (i) Administrative Operations
 - (ii) Facilities Management
 - (iii) Financial Management
 - (iv) Information Resources Management
 - (v) Library and Information Services
 - (vi) Personnel Management
- (b) The Office has no field organization. Offices are presently located in the Old Executive Office Building, 17th

and Pennsylvania Avenue NW., 20500, and in the New Executive Office Building, 725 17th Street NW., Washington, DC 20503. Regular office hours are from 9:00 a.m. to 5:30 p.m., Monday through Friday. Both buildings are under security control. Persons desiring access are encouraged to make advance arrangements by telephone with the office they plan to visit.

[49 FR 28233, July 11, 1984; 49 FR 29769, July 24, 1984, as amended at 56 FR 5741 and 5742, Feb. 13, 1991]

§2502.4 Public reference facilities and current index.

(a) The Office maintains a public reading area located in the Executive Office of the President Library, Room G-102, New Executive Office Building, 725 17th Street NW., Washington, DC, and makes available for public inspection and copying a copy of all material required by 5 U.S.C. 552(a)(2), including all documents published by OA in the FEDERAL REGISTER and currently in effect.

(b) The FOIA Officer or his or her designee shall maintain files containing all materials required to be retained by or furnished to the FOIA Officer under this subpart. The material shall be filed by chronological number of request within each calendar year, indexed according to the exceptions asserted, and, to the extent feasible, indexed according to the type of records requested.

(c) The FOIA Officer shall also maintain a file open to the public, which shall contain copies of all grants or denials of appeals by the Office.

[49 FR 28233, July 11, 1984, as amended at 56 FR 5742, Feb. 13, 1991]

§2502.5 Records of other Agencies.

Requests for records that originated in another Agency and are in the custody of the Office of Administration, will be referred to that Agency for processing, and the person submitting the request shall be so notified. The decision made by that Agency with respect to such records will be honored by the Office of Administration.

[45 FR 47112, July 14, 1980. Redesignated at 49 FR 28233, July 11, 1984]

§2502.6 How to request records—form and content.

(a) A request made under the FOIA must be submitted in writing, addressed to: FOIA Officer, Office of Administration, 725 17th Street NW., Washington, DC 20503. The words "FOIA REQUEST" should be clearly marked on both the letter and the envelope. Due to security measures at the Old and New Executive Office Buildings, requests made in person should be delivered to Room G-1, at the above address.

(b) Any Office employee or official who receives a FOIA Request shall promptly forward it to the FOIA Officer, at the above address. Any Office employee or official who receives an oral request made under the FOIA shall inform the person making the request of the provisions of this subpart requiring a written request according to the procedures set out herein.

(c) Each request must reasonably describe the record(s) sought, including when known: Agency/individual originating the record, date, subject matter, type of document, location, and any other pertinent information which would assist in promptly locating the record(s).

(d) When a request is not considered reasonably descriptive, or requires the production of voluminous records, or places an extraordinary burden on the Office of Administration, seriously interfering with its normal functioning to the detriment of the business of the Government, the Office may require the person or agent making the FOIA request to confer with an Office representative in order to attempt to verify, and, if possible, narrow the scope of the request.

(e) Upon receipt of the FOIA request, the FOIA Officer will make an initial determination of which officials and offices may be involved in the search and reviewing procedures. The FOIA Officer will circulate the request to all offices so identified and any others the FOIA Officer later determines should be notified.

[49 FR 28233, July 11, 1984, as amended at 56 FR 5742, Feb. 13, 1991]

§2502.7 Initial determination.

The General Counsel or his or her designee shall have the authority to approve or deny requests received pursuant to these regulations. The decision of the General Counsel shall be final, subject only to administrative review as provided in §2502.10.

[45 FR 47112, July 14, 1980. Redesignated and amended at 49 FR 28234, July 11, 1984; 56 FR 5742, Feb. 13, 1991]

§2502.8 Prompt response.

(a) The General Counsel or his or her designee shall either approve or deny a request for records within 10 working days after receipt of the request unless additional time is required for one of the following reasons:

(1) It is necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(2) It is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(b) When additional time is required for one of the reasons stated in paragraph (a) of this section, the General Counsel or his or her designee shall acknowledge receipt of the request within the 10 workday period and include a brief explanation of the reason for the delay, indicating the date by which a determination will be forthcoming. An extended deadline adopted for one of the reasons set forth above may not exceed 10 additional workdays.

[45 FR 47112, July 14, 1980. Redesignated and amended at 49 FR 28234, July 11, 1984]

§2502.9 Responses—form and content.

(a) When a requested record has been identified and is available, the General Counsel or his or her designee shall notify the person making the request as to where and when the record is available for inspection or the copies will be available. The notification shall also advise the person making the request of any fees assessed under §2502.13 hereof.

(b) A denial or partial denial of a request for a record shall be in writing

signed by the General Counsel or his or her designee and shall include:

(1) The name and title of the person making the determination;

(2) A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record, and a brief explanation of how the exemption applies to the record withheld; or

(3) A statement that, after diligent effort, the requested records have not been found or have not been adequately examined during the time allowed by §2502.9, and that the denial will be reconsidered as soon as the search or examination is complete;

(4) A statement that no agency records are responsive to the request.

(5) A statement that the denial may be appealed to the Deputy Director within 30 days of receipt of the denial or partial denial.

If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the person making the request shall be so notified and the legal authority for disposition shall be cited.

[45 FR 47112, July 14, 1980. Redesignated and amended at 49 FR 28234, July 11, 1984; 56 FR 5742, Feb. 13, 1991]

§2502.10 Appeals to the Deputy Director from initial denials.

(a) When the General Counsel or his or her designee had denied a request for records in whole or in part, the person making the request may, within 30 days of its receipt, appeal the denial to the Deputy Director. The appeal must be in writing, addressed to the Deputy Director, Office of Administration, 725 17th Street NW., Washington, DC 20503 and clearly labeled as a "Freedom of Information Act Appeal".

(b) The Deputy Director will act upon the appeal within 20 workdays of its receipt. The Deputy Director may extend the 20 day period of time by any number of workdays which could have been claimed and consumed by the General Counsel or his or her designee under §2502.9 but which were not claimed and consumed in making the initial determination. The Office of Administration's action on an appeal shall be in

writing, signed by the Deputy Director of the Office.

(c) If the decision is in favor of the person making the request, the Deputy Director shall order records promptly made available to the person making the request.

(d) A denial in whole or in part of a request on appeal shall set forth the exemption relied on and a brief explanation of how the exemption applied to the records withheld and the reasons for asserting it, if different from that described by the General Counsel or his or her designee under § 2502.10. The denial shall state that the person making the request may, if dissatisfied with the decision on appeal, file a civil action in the district in which the person resides or has his principal place of business, in the district where the records are located, or in the District of Columbia.

(e) No personal appearance, oral argument or hearing will ordinarily be permitted in connection with an appeal to the Office of Administration.

(f) On appeal, the Office may reduce any fees previously assessed.

[45 FR 47112, July 14, 1980. Redesignated and amended at 49 FR 28234, July 11, 1984; 56 FR 5742, Feb. 13, 1991]

CHARGES FOR SEARCH AND REPRODUCTION

§ 2502.11 Definitions.

For the purpose of this part:

(a) All the terms defined in the Freedom of Information Act apply.

(b) A *statute specifically providing for setting the level of fees for particular types of records* (5 U.S.C. 552(a)(4)(vi)) means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of agencies in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services that are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return overdue revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

Statutes, such as the User Fee Statute, which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supersede the Freedom of Information Act under section (a)(4)(A)(vi) of that statute.

(c) The term *direct costs* means those expenditures that OA incurs in searching for and duplicating (and in the case of commercial requestors, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(d) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. OA employees should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requestor. For example, employees should not engage in a line-by-line search when merely duplicating an entire document would prove the least expensive and quicker method of complying with a request. *Search* should be distinguished, moreover, from *review* of material in order to determine whether the material is exempt from disclosure (see paragraph (f) of this section). Searches may be done manually or by computer using existing programming.

(e) The term *duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable (e.g. magnetic tape or disk), among others.

The copy provided must be in a form that is reasonably usable by the requestors.

(f) The term *review* refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (g) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, (e.g., doing all that is necessary to excise them and otherwise prepare them for release). Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(g) The term *'commercial use' request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requestor or the person on whose behalf the request is made. In determining whether the requestor properly belongs in this category, OA must determine the use to which a requestor will put the documents requested. Moreover, where an OA employee has reasonable cause to doubt the use to which a requestor will put the records sought, or where that use is not clear from the request itself, the employee should seek additional clarification before assigning the request to a specific category.

(h) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, that operates a program or programs of scholarly research.

(i) The term *non-commercial scientific institution* refers to an institution that is not operated on a commercial basis (as that term is referenced in paragraph (g) of this section) and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(j) The term *representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or

broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of news) who make their products available for purchase and subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of *free lance* journalists, they may be regarded as working for a news organization, if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but OA may also look to the past publication record of a requestor in making this determination.

[56 FR 5742, Feb. 13, 1991]

§ 2502.12 Fees to be charged—general.

OA should charge fees that recoup the full allowable direct costs it incurs. Moreover, it shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. When documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in § 2502.11(b)), such as the NTIS, OA should inform requestors of the steps necessary to obtain records from those sources.

(a) *Manual searches for records.* OA will charge at the salary rate(s) (i.e., basic pay plus 16 percent) of the employee(s) making the search.

(b) *Computer searches for records.* OA will charge at the actual direct cost of providing this service. This will include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search.

(c) *Review of records.* Only requestors who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; i.e., the review undertaken the first time OA analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review are assessable.

(d) *Duplication of records.* Records will be duplicated at a rate of \$.15 per page. For copies prepared by computer such as tapes or printouts, OA shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, OA will charge the actual direct costs of producing the document(s). If OA estimates that duplication charges are likely to exceed \$25.00, it shall notify the requestor of the estimated amount of fees, unless the requestor has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requestor the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(e) *Other charges.* OA will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies;

(2) Sending records by special methods such as express mail.

(f) Remittances shall be in the form of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed or delivered to the FOIA Officer, Office of Administration, 725 17th Street, NW., Washington, DC 20503.

(g) A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.

(h) *Restrictions on assessing fees.* With the exception of requestors seeking documents for a commercial use, OA will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, OA will not charge fees to any requestor, including commercial use requestors, if the cost of collecting a fee would be equal to or greater than the fee itself.

(1) The elements to be considered in determining whether the "cost of collecting a fee" are the administrative costs of receiving and recording a requestor's remittance, and processing the fee for deposit in the Treasury Department's special account.

(2) For purposes of these restrictions on assessment of fees, the word "pages" refers to copies of "8½ x 11" or "11 x 14." Thus, requestors are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout does meet the terms of the restriction.

(3) Similarly, the term "search time" in this context has as its basis, manual search. To apply this term to searches made by computer, OA will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of a search (including the operator time and the cost of operating the computer to process the request) equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, OA will begin assessing charges for a computer search.

[56 FR 5742, Feb. 13, 1991]

§ 2502.13 Fees to be charged—categories of requestors.

There are four categories of FOIA requestors: commercial use requestors; educational and non-commercial scientific institutions; representatives of the news media; and all other requestors. The specific levels of fees for each of these categories are:

(a) *Commercial use requestors.* When OA receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Requestors must reasonably

describe the records sought. Commercial use requestors are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. OA may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see § 2502.14).

(b) *Educational and non-commercial scientific institution requestors.* OA shall provide documents to requestors in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requestors must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly if the request is from an education institution) or scientific (if the request is from a non-commercial scientific institution) research. Requestors must reasonably describe the records sought.

(c) *Requestors who are representatives of the news media.* OA shall provide documents to requestors in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requestor must meet the criteria in § 2502.11(j), and his or her request must not be made for commercial use. In reference to this class of requestors a request for records supporting the news dissemination function of the requestor shall not be considered to be a request that is for a commercial use. Requestors must reasonably describe the records sought.

(d) *All other requestors.* OA shall charge requestors who do not fit into any of the categories above fees that recover the full, reasonable, direct cost of searching for and reproducing the records that are responsive to the request, except that the first 100 pages and the first two hours of search time shall be furnished without charge. Moreover, requests for records about the requestors filed in OA's system of records will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction. Requestors must reasonably describe the records sought.

[56 FR 5742, Feb. 13, 1991]

§ 2502.14 Miscellaneous fee provisions.

(a) *Charging interest—notice and rate.* OA may begin assessing interest on an unpaid bill starting on the 31st day of the month following the date on which billing was sent. The fact that the fee has been received by OA within the thirty day grace period, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of billing.

(b) *Charges for an unsuccessful search.* OA may assess charges for time spent searching, even if it fails to locate the records or if records located are determined to be exempt from disclosure. If OA estimates that search charges are likely to exceed \$25.00, it shall notify the requestor of the estimated amount of fees, unless the requestor has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requestor the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(c) *Aggregation results.* A requestor may not file multiple requests at the same time, each seeking portions of a document or documents solely in order to avoid payment of fees. When OA reasonably believes that a requestor, or on rare occasions, a group of requestors acting in concert is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, OA may aggregate any such request and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(d) *Advance payments.* OA may not require a requestor to make an advance payment, i.e., payment before work is commenced or continued on a request unless:

(1) OA estimates or determines that allowable charges that a requestor may be required to pay are likely to exceed \$250.00. Then, OA will notify the requestor of the likely cost and obtain satisfactory assurance of full payment where the requestor has a history of prompt payment of FOIA fees, or require an advance payment of an

amount up to the full estimated charges in the case of requestors with no history of payment; or

(2) A requestor has previously failed to pay a fee charged in a timely fashion (i.e., within thirty days of the date of the billing). OA may require the requestor to pay the full amount owed plus any applicable interest as provided above or demonstrate that he or she has in fact paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request, or a pending request from that requestor.

When OA acts under paragraph (d) (1) or (2) of this section, the administrative time limits prescribed in the FOIA, 5 U.S.C. 552(a)(6) (i.e., ten working days from receipt of initial request and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after OA has received fee payments described above.

(e) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).* OA should comply with the provisions of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

[56 FR 5744, Feb. 13, 1991]

§2502.15 Waiver or reduction of charges.

Fees otherwise chargeable in connection with a request for disclosure of a record shall be waived or reduced where it is determined that disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requestor.

[56 FR 5744, Feb. 13, 1991]

§2502.16 Information to be disclosed.

(a) In general, all records of the Office of Administration are available to the public, as required by the Freedom of Information Act. However, the Office claims the right, where it is applicable, to withhold material under the provisions specified in the Freedom of Information Act as amended (5 U.S.C. 552(b)).

(b) *Records from Non-U.S. Government Source.* (1) Upon receipt of a request for a record that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, including a contract proposal or contract material, the Office will contact the source of the requested record or information requesting advice as to whether release of the record would adversely affect the source's competitive position or invade anyone's privacy. Subsequent to receipt of such advice, the Office will independently examine the requested document and will notify the requester of the final decision.

(2) OA personnel will generally consider two exemptions in the FOIA in deciding whether to withhold from disclosure material from a non-U.S. Government source. Exemption 4 permits withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Exemption 6 permits withholding certain information, the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." The source whose material has been requested will be asked to supply convincing justification for any material it wishes withheld under the Act, in accordance with the following general guidelines.

(i) For consideration under exemption 4, the supplier of the record or information should identify material that would be likely to cause substantial harm to its present or future competitive position if it were released. If a contractor, the provider should assume that the material will be released to a competitor, even if that is not always the case. A contractor must provide detailed information on why release would be harmful, e.g., the general custom or usage in the business; the number and situation of the persons who have access to the information; the type and degree of risk of financial injury that release would cause; and the length of time the information will need to be kept confidential.

(A) In this respect, the Office of Administration will—as a general rule—look favorably upon recommendations for withholding information about

ideas, methods, and processes that are unique; about equipment, materials, or systems that are potentially patentable; or about a unique use of equipment which is specifically outlined.

(B) OA will not withhold information that is known through custom or usage in the relevant trade, business, or profession, or information that is generally known to any reasonably educated person. Self-evident statements or reviews of the general state of the art will not ordinarily be withheld.

(C) OA will withhold all cost data submitted except the total estimated cost for each year of the contract. Where appropriate, OA will release unit pricing data except where that information would disclose confidential information such as profit margins. It will release these total estimated costs and ordinarily release explanatory material and headings associated with the cost data, withholding only the figures themselves. If a contractor believes some of the explanatory material should be withheld, that material must be identified and a justification be presented as to why it should not be released.

(ii) *Exemption 6* is not a blanket exemption for all personal information. The Office will balance the need to keep a person's private affairs from unnecessary public scrutiny with protection of the public's right to information on Government records.

(A) As a general practice, the Office will release information about any person named in a contract itself or about any person who signed a contract as well as information given in a proposal about any officer of a corporation submitting that proposal. Except for names and other identifying details, the Office usually releases all information in resumes concerning employees, including education and experience. Efforts will be made to identify information that should be deleted and offerors are urged to point out such material for guidance. Any information in the proposal which might constitute an unwarranted invasion of personal privacy if released should be identified and a justification for non-release provided in order to receive proper consideration.

(B) The Office can protect the names of and identifying details about other staff members who are described in a contract proposal if it is clear that identification of these employees would assist competitors in raiding and hiring them away. In this regard, names and other identifying details could be protected under Exemption 4 (harmful to competitive position) and also under Exemption 6 (it would be an unwarranted invasion of personal privacy to release them). In such a case, the Office would withhold names, home addresses, salaries, telephone numbers, social security numbers, marital status and, if these served to identify them, perhaps some details about past employment or professional activities of these persons.

[45 FR 47112, July 14, 1980. Redesignated and amended at 49 FR 28234, July 11, 1984. Redesignated and amended at 56 FR 5744, Feb. 13, 1991]

§2502.17 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in 552(b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence and matters involving personal privacy.

(b) Executive Order 12028 (December 4, 1977) provides that the Office of Administration shall upon request, assist the White House office in performing its role of providing those administrative services which are primarily in direct support of the President. Due to this role of providing direct support of the President, members of the public should presume that communications between the Director of the Office of Administration and the President (and their staffs) are confidential or ordinarily will not be released; they will usually fall, at a minimum, within Exemption 5 of the Act.

(c) The records of the Office of Administration which are part of systems of records subject to the Privacy Act of 1974 are exempt from disclosure to the

public except as provided by 5 CFR part 2504.

[45 FR 47112, July 14, 1980. Redesignated at 49 FR 28235, July 11, 1984, and further redesignated at 56 FR 5744, Feb. 13, 1991].

§ 2502.18 Deletion of exempted information.

Where requested, records contain matters which are exempted under 5 U.S.C. 552(b) but which matters are reasonably segregable from the remainder of the records, they shall be disclosed by the Office with deletions. To each such record, the Office shall attach a written justification for making deletions. A single such justification shall suffice for deletions made in a group of similar or related records.

[45 FR 47112, July 14, 1980. Redesignated at 49 FR 28235, July 11, 1984, and further redesignated 56 FR 5744, Feb. 13, 1991].

§ 2502.19 Annual report.

The General Counsel or his or her designee shall annually on or before March 1, submit a Freedom of Information report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate. The report shall include those matters required by 5 U.S.C. 552(d).

[45 FR 47112, July 14, 1980. Redesignated and amended at 49 FR 28235, July 11, 1984. Redesignated at 56 FR 5744, Feb. 13, 1991].

Subpart B—Production in Response to Subpoenas or Demands of Courts or Other Authorities

§ 2502.30 Purpose and scope.

This subpart contains the regulations of the Office concerning procedures to be followed when a subpoena, order or other demand (hereinafter in this subpart referred to as a "demand") of a court or other authority is issued for the production or disclosure of:

(a) Any material contained in the files of the Office of Administration;

(b) Any information relating to materials contained in the files of the Office; or

(c) Any information or material acquired by any person while such person as an employee of the Office of Administration as a part of the performance

of his official duties or because of his official status.

§ 2502.31 Production prohibited unless approved by the Deputy Director.

No employee or former employee of the Office of Administration shall, in response to a demand of a court or other authority, produce any material contained in the files of the Office of Administration or disclose any information or produce any material acquired as part of the performance of his official status without the prior approval of the Deputy Director.

[45 FR 47112, July 14, 1980, as amended at 56 FR 5744, Feb. 13, 1991].

§ 2502.32 Procedure in the event of a demand for disclosure.

(a) Whenever a demand is made upon an employee or former employee of the Office of Administration for the production of material or the disclosure of information described in § 2502.31, he shall immediately notify the Deputy Director. If possible, the Deputy Director shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If response to the demand is required before instructions from the Deputy Director are received, an attorney designated for that purpose by the Office of Administration shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the Deputy Director. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the Deputy Director.

[45 FR 47112, July 14, 1980, as amended at 56 FR 5744, Feb. 13, 1991].

§ 2502.33 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 2502.32(b) pending receipt of instructions from the Deputy

Director, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the Deputy Director not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand. (United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

[45 FR 47112, July 14, 1980, as amended at 56 FR 5744, Feb. 13, 1991].

PART 2504—PRIVACY ACT REGULATIONS

Sec.

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AUTHORITY: 5 U.S.C. 552a.

SOURCE: 45 FR 41121, June 18, 1980, unless otherwise noted.

§ 2504.1 Purpose and scope.

These regulations implement the Privacy Act of 1974, 5 U.S.C. 552a. The regulations apply to all records maintained by the Office of Administration that are contained in a system of records, and that contain information about an individual. The regulations also establish procedures that (a) authorize an individual's access to records maintained about him; (b) limit the access of other persons to

those records, and (c) permit an individual to request the amendment or correction of records about him.

§ 2504.2 Definitions.

For the purposes of this part—(a) *Office* means the Office of Administration, Executive Office of the President;

(b) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

(c) *Maintain* means collect, use or distribute;

(d) *Record* means any item collection or grouping of information about an individual that is maintained by the Office, including but not limited to education, financial transactions, medical history, and criminal or employment history and that contains the individual's name, identifying number, symbol, or other identifiers assigned to the individual, such as a finger or voice print or photograph;

(e) *System of records* means a group of any records controlled by the Office and from which information is retrieved by the name of the individual;

(f) *System manager* means the employee of the Office who is responsible for the maintenance, collection, use or distribution of information contained in a system of records;

(g) *Routine use* means, with respect to the disclosure of a record, the use of that record for a purpose consistent with the purpose for which it was collected;

(h) *Subject individual* means the individual by whose name or other personal identifier a record is maintained or retrieved;

(i) *Statistical record* means record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13 U.S.C.;

(j) *Agency* means agency as defined in 5 U.S.C. 552(e);

(k) *Work days* as used in calculating the date when response is due does not include Saturdays, Sundays and legal public holidays.

§ 2504.3 Annual notice of systems of records maintained.

The Office will publish in the FEDERAL REGISTER upon establishment or revision a notice of the existence and character of the systems of records the Office maintains. The notices shall include (1) the system name, (2) the system location, (3) the categories of individuals covered by the system, (4) the categories of records in the system, (5) the Office's authority to maintain the system, (6) the routine uses of the system, (7) the Office's policies and practice for maintenance of the system, (8) the system manager, (9) the procedures for notification, access to and correction of records in the system, and (10) the sources of information for the system.

[45 FR 47112, July 14, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.4 Determining if an individual is the subject of a record.

(a) Individuals desiring to know if a specific system of records maintained by the Office contains a record pertaining to them should address inquiries to the Privacy Act Officer, Office of Administration, Washington, DC 20503.

(b) Inquiries must be in writing and the words "PRIVACY ACT REQUEST" should be printed on both the letter and the envelope. The request letter should contain the complete name and identifying number of the pertinent system as published in the annual FEDERAL REGISTER notice describing the Office's Systems of Records; the full name and address of the subject individual; a brief description of the nature, time, place and circumstances of the individual's prior association with the Office; and any other information the individual believes would help the Privacy Act Officer determine whether the information about the individual is included in the system of records. In instances when the information is insufficient to ensure disclosure to the subject individual to whom the record pertains, the Office reserves the right to ask the requestor for additional identifying information.

(c) To the extent possible, the Privacy Act Officer will answer or acknowledge the inquiry within 10 work days of its receipt by the Office. When

the response cannot be made within 10 work days, the Privacy Act Officer will provide the requestor with the date when a response may be expected and, whenever possible, the specific reasons for the delay.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.5 Granting access to a record.

(a) An individual requesting access to a record about himself in a system of records maintained by the Office should submit the request in writing to the Privacy Act Officer. Due to security measures at the Old and New Executive Office Buildings, requests made in person can only be accepted from current Office employees, who should make access requests to the Privacy Act Officer on regularly scheduled work days between 9:00 a.m. and 5:30 p.m.

(b) The request for access should contain the same information set forth in § 2504.4(b). However, if the request for access follows a request made under § 2504.4(a) and (b) of this part, the same identifying information need not be included: *Provided*, That a copy of the prior request or a copy of the Office's response to that request is attached. The request should state if a copy of the record is desired.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.6 Special procedures for medical records.

(a) When the Privacy Act Officer receives a request from an individual for access to those official medical records which belong to the Office of Personnel Management and are described in Chapter 339, Federal Personnel Manual (medical records about entrance qualification or fitness for duty, or medical records which are otherwise filed in the Official Personnel Folder), the pertinent records shall be referred to a Federal Medical Officer for review and determination in accordance with this section. If no Federal Medical Officer is available to make the determination required by this section, the Privacy Act Officer shall refer the request and the medical reports concerned to the

Office of Personnel Management for determination.

(b) If, in the opinion of a Federal Medical Officer, medical records requested by the subject individual indicate a condition about which a prudent physician would hesitate to inform a person suffering from such a condition of its exact nature and probable outcome, the Privacy Act Officer shall not release the medical information to the subject individual nor to any person other than a physician designated in writing by the subject individual, his guardian, or conservator.

(c) If, in the opinion of a Federal Medical Officer, the medical information does not indicate the presence of any condition which would cause a prudent physician to hesitate to inform a person suffering from such a condition of its exact nature and probable outcome, the Privacy Act Officer shall release it to the subject individual or to any person, firm, or organization which the individual authorizes in writing to receive it.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.7 Granting access when accompanied by another individual.

An individual who wishes to have a person of his choosing review, accompany him (or her) in reviewing, or obtain a copy of a record must, prior to the disclosure, sign a statement authorizing the disclosure of his record. The statement shall be maintained with the record.

§ 2504.8 Action on request.

(a) The Privacy Act Officer shall acknowledge requests for access within 10 work days of its receipt by the Office. At a minimum, the acknowledgement shall include:

(1) When and where the records will be available;

(2) The name, title and telephone number of the official who will make the records available;

(3) Whether access will be granted only through providing a copy of the record through the mail, or only by examination of the record in person if the Privacy Act Officer after consulting with the appropriate system manager,

has determined the requestor's access would not be unduly impeded;

(4) Fee, if any, charged for copies. (See § 2504.17); and

(5) Identification documentation required to verify the identity of the requestor (see § 2504.9).

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.9 Identification requirements.

(a) A requestor should be prepared to identify himself (or herself) by signature, i.e., to note by signature the date of access and/or to produce two other legal forms of identification (driver's license, employee identification, annuitant card, passport, etc.).

(b) If an individual is unable to produce adequate identification, the individual shall sign a statement asserting identity and acknowledging that knowingly or willfully seeking or obtaining access to records about another person under false pretenses may result in a fine of up to \$5,000 (see § 2504.18). In addition, depending upon the sensitivity of the records, the Privacy Act Officer after consulting with the appropriate system manager, may require further reasonable assurances, such as statements of other individuals who can attest to the identity of the requestor.

(c) If access is granted by mail, the identity of the requestor shall be verified by comparing signatures. If, in the opinion of the Privacy Act Officer, after consulting with the appropriate system manager, the granting of access through the mail may result in harm or embarrassment if disclosed to a person other than the subject individual, a notarized statement of identity or some other similar assurance of identity will be required.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.10 Access of others to records about an individual.

(a) No official or employee of the Office shall disclose any record to any person or to another agency without the express written consent of the subject individual, unless the disclosure is:

(1) To officers or employees of the Office who need the information to perform their official duties;

(2) Under the requirements of the Freedom of Information Act;

(3) For a routine use that has been published in a notice in the FEDERAL REGISTER;

(4) To the Bureau of the Census for uses under title 13 of the United States Code;

(5) To a person or agency who has given the Office advance written notice of the purpose of the request and certification that the record will be used only for statistical purposes. (In addition to deleting personal identifying information from records released for statistical purposes, the Privacy Act Officer shall ensure that the identity of the individual cannot reasonably be deduced by combining various statistical records);

(6) To the National Archives of the United States if a record has sufficient historical or other value to be preserved by the United States Government, or to the Privacy Act Officer (or a designee) to determine whether the record has that value;

(7) In response to written request, that identifies the record and the purpose of the request, made by another agency or instrumentality of any Government jurisdiction within or under the control of the United States for civil or criminal law enforcement activity, if that activity is authorized by law;

(8) To a person who, showing compelling circumstances, needs the information to prevent harm to the health or safety of an individual, but not necessarily the individual to whom the record pertains (upon such disclosure, a notification shall be sent to the last known address of the subject individual);

(9) To either House of Congress, or to a Congressional committee or subcommittee if the subject matter is within its jurisdiction;

(10) To the Comptroller General, or an authorized representative, to carry out the duties of the General Accounting Office;

(11) Pursuant to a court order; or

(12) To a consumer reporting agency in accordance with section 3711(f) of title 31.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.11 Access to the accounting of disclosures from records.

Rules governing access to the accounting of disclosures are the same as those granting access to the records.

§ 2504.12 Denials of access.

(a) The Privacy Act Officer may deny an individual access to his (or her) record if: (1) In the opinion of the Privacy Act Officer, the individual seeking access has not provided sufficient identification documentation to permit access; or

(2) The Office has published rules in the FEDERAL REGISTER exempting the pertinent system of records from the access requirement.

(b) If access is denied, the requestor shall be informed of the reasons for denial and the procedures to obtain a review of the denial (see § 2504.15).

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.13 Requirements for requests to amend records.

(a) Individuals who desire to correct or amend a record pertaining to them should submit a written request to the Privacy Act Officer, Office of Administration, Washington, DC 20503. The words "PRIVACY ACT—REQUEST TO AMEND RECORD" should be written on the letter and the envelope.

(b) The request for amendment or correction of the record must state the exact name of the system of records as published in the FEDERAL REGISTER; a precise description of the record proposed for amendment; a brief statement describing the information the requestor believes to be inaccurate or incomplete, and why; and, the amendment or correction desired. If the request to amend the record is the result of the individual's having accessed the record in accordance with §§ 2504.5, 2504.6, 2504.7, 2504.8 of this part, copies of previous correspondence between the requestor and the Office should be attached, if possible.

(c) Individuals needing assistance in preparing a request to amend a record may contact the Privacy Act Officer at the address cited in § 2504.13(a) of this part.

(d) If the individual's identity has not been previously verified, the Office may require identification documentation as described in § 2504.9.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.14 Action on request to amend a record.

(a) A request for amendment of a record will be acknowledged within 10 work days of its receipt by the Office. If a decision cannot be made within this time, the requestor will be informed by mail of the reasons for the delay and the date when a reply can be expected, normally within 30 work days from receipt of the request.

(b) The final response will include the Office's determination of whether to grant or deny the request. If the request is denied, the response will include:

(1) The reasons for the decision;

(2) The name and address of the official to whom an appeal should be directed;

(3) The name and address of the official designated to assist the individual in preparing the appeal;

(4) A description of the appeal process within the Office; and

(5) A description of any other procedures which may be required of the individual in order to process the appeal.

§ 2504.15 Procedures for appeal of determination deny access to or amendment of records.

(a) Individuals who disagree with the refusal of the Office to grant them access to or to amend a record about them should submit a written request for review to the Privacy Act Officer, Office of Administration, Washington, DC 20503. The words "PRIVACY ACT—APPEAL" should be written on the letter and the envelope. Individuals desiring assistance preparing their appeal should contact the Privacy Act Officer.

(b) The appeal letter must be received by the Office within 30 calendar days from the date the requestor re-

ceived the notice of denial. At a minimum, the appeal letter should identify:

(1) The records involved;

(2) The date of the initial request for access to or amendment of the record;

(3) The date of the Office denial of that request; and

(4) The reasons supporting the request for reversal of the Office's decision.

Copies of previous correspondence from the Office denying the request to access or amend the record should also be attached, if possible.

(c) The Office reserves the right to dispose of correspondence concerning the request to access or amend a record if no request for review of the Office's decision is received within 180 days of the decision date. Therefore, a request for review received after 180 days may, at the discretion of the Privacy Act Officer, be treated as an initial request to access or amend a record.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§ 2504.16 Appeals process.

(a) Within 20 work days of receiving the request for review, a review group composed of the Privacy Act Officer, the General Counsel and the Official having operational control over the record, will propose a determination on the appeal for the Director's final decision. If a final determination cannot be made in 20 days, the requestor will be informed of the reasons for the delay and the date on which a final decision can be expected. Such extensions are unusual, and should not exceed an additional 30 work days.

(b) If the original request was for access and the initial determination is reversed, the procedures in § 2504.8 will be followed. If the initial determination is upheld, the requestor will be so informed and advised of the right to judicial review pursuant to 5 U.S.C. 552a(g).

(c) If the initial denial of a request to amend a record is reversed, the Office will correct the record as requested and advise the individual of the correction. If the original decision is upheld, the requestor will be so advised and informed in writing of the right to judicial review pursuant to 5 U.S.C. 552a(g). In addition, the requestor will be ad-

vised of his (or her) right to file a concise statement of disagreement with the Director. The statement of disagreement should include an explanation of why the requestor believes the record is inaccurate, irrelevant, untimely or incomplete. The Director shall maintain the statement of disagreement with the disputed record, and shall include a copy of the statement of disagreement in any disclosure of the record. Additionally, the Privacy Act Officer shall provide a copy of the statement of disagreement to any person or agency to whom the record has been disclosed, if the disclosure was made pursuant to §2504.10 (5 U.S.C. 552(a)(c)).

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§2504.17 Fees.

(a) Individuals will not be charged for:

(1) The search and review of the record;

(2) Any copies produced to make the record available for access;

(3) Copies of the requested record if access can only be accomplished by providing a copy through the mail; and

(4) Copies of three (3) or less pages of a requested record.

(b) Records will be photocopied for 10¢ per page for four pages or more (except for paragraphs (a), (1), (2), (3), (4) of this section). If the record is larger than 8½ × 14 inches, the fee will be the cost of reproducing the record through Government or commercial sources.

(c) Fees shall be paid in full prior to issuance of requested copies. Payment shall be by personal check or money order payable to the Treasurer of the United States, and mailed or delivered to the Deputy Director, Office of Administration, Washington, DC 20503.

(d) The Deputy Director may waive the fee if: (1) The cost of collecting the fee exceeds the amount collected; or

(2) The production of the copies at no charge is in the best interest of the government.

(e) A receipt will be furnished on request.

[45 FR 41121, June 18, 1980, as amended at 49 FR 28235, July 11, 1984]

§2504.18 Penalties.

(a) Title 18, U.S.C. 1001, Crimes and Criminal Procedures, makes it a criminal offense, subject to a maximum fine of \$10,000 or imprisonment for not more than five years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representation in any matter within the jurisdiction of any agency of the United States. Section (1)(3) of the Privacy Act (5 U.S.C. 552a) makes it a misdemeanor, subject to a maximum fine of \$5,000 to knowingly and willfully request or obtain any record concerning an individual under false pretenses. Sections (1) (1) and (2) or 5 U.S.C. 552a provide penalties for violations by agency employees of the Privacy Act or regulations established thereunder.

CHAPTER XVI—OFFICE OF GOVERNMENT ETHICS

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SHEPARD'S UNITED STATES CITATIONS STATUTES—COURT RULES

A COMPILATION OF CITATIONS

TO

UNITED STATES CONSTITUTION, UNITED STATES CODE, TARIFF SCHEDULES OF THE UNITED STATES, UNITED STATES STATUTES AT LARGE, UNITED STATES TREATIES AND OTHER INTERNATIONAL AGREEMENTS, GENERAL ORDERS IN BANKRUPTCY AND COURT RULES

THE CITATIONS

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FEDERAL REPORTER
FEDERAL SUPPLEMENT
FEDERAL RULES DECISIONS
BANKRUPTCY REPORTER
MILITARY JUSTICE REPORTER
COURT OF CUSTOMS AND PATENT APPEALS REPORTS (Patents)
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5 USC § 552a(i)

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**SHEPARD'S
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STATUTES—COURT RULES**

**A COMPILATION OF CITATIONS
TO**

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5 USC § 502 a (i)

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Continued

SHEPARD'S UNITED STATES CITATIONS STATUTES — COURT RULES

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§ 848n	[4072	§ 552a	733FS1164	Cir. 3	941F2d52	Subsec. c	918F2d158	936F2d1360	773FS450
to F	Cir. DC	et seq.	742FS414	Cir. 1	886F2d547	Subd. 3	Subd. 1	718FS94	Cir. 2
DC	726FS857	Cir. 2	776FS1209	Cir. 3	886F2d547	Cir. 10	Cir. DC	Cir. 3	743FS169
2d731	758FS4	743FS169	Cir. 7	886F2d547	760FS193	884F2d1450	893F2d373	886F2d550	Cir. 7
2798	Cir. 2	Cir. 6	742FS451	Cir. 4	Subsec. d	Cir. 1	920F2d31	891F2d1084	764FS1327
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2d547	Cir. 4	754FS579	900F2d1236	Cir. 9	936F2d1351	Cir. 3	735FS1078	721FS754	Cir. 11
2d334	Cir. 9	Cir. 7	944F2d420	890F2d1078	952F2d1425	886F2d547	752FS24	Cir. 9	718FS1543
2d1008	761FS1444	914F2d984	765FS997	Subsec. b	748FS886	Cir. 4	756FS596	890F2d1077	Subsec. i
2d573	Subd. 8	Cir. Fed.	114BRW629	103LZ791	772FS664	Cir. 9	Cir. 2	Cir. 11	Cir. DC
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2d986	938F2d291	§ 552a	885F2d1420	884F2d1450	768FS530	890F2d1078	765FS1227	Cir. DC	756FS596
2d856	Cir. 2	486US21	890F2d1076	936F2d1352	Cir. 7	Subd. 5	Cir. 4	718FS96	Subsec. j
S33	762FS1088	100LZ20	905F2d1258	718FS93	914F2d986	Cir. DC	721FS753	§ A	Cir. DC
S59	770FS135	103LZ784	909F2d384	748FS885	Subd. 1	936F2d1350	Cir. 6	Cir. DC	893F2d373
2d241	Cir. 3	59USLW	923F2d759	755FS10	Cir. DC	952F2d1424	742FS416	920F2d31	756FS595
S15	109BRW664	[4470	938F2d1007	772FS664	893F2d373	718FS93	Cir. 7	936F2d1350	772FS666
S8	Cir. 9	130FRD190	751FS1417	773FS458	936F2d1350	Cir. 4	929F2d305	718FS94	Cir. 3
S592	119BRW734	139FRD473	760FS825	Cir. 1	718FS93	899F2d287	Cir. 10	735FS1078	765FS1227
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S8	902F2d1007	908F2d560	886F2d546	886F2d546	Cir. 4	765FS999			

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1. FEDERAL LABOR RELS. AUTH. v. U.S. DOD, Nos. 90-3893, 90-3966., UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, 977 F.2d 545; 1992 U.S. App. LEXIS 30157; 141 L.R.R.M. 2858; 6 Fla. Law W. Fed. C 1346, November 18, 1992, Decided, As Corrected. Suggestion for Rehearing En Banc Denied March 19, 1993, Reported at 1993 U.S. App. LEXIS 8580.
2. UNT v. AEROSPACE CORP., No. 82-6087, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 765 F.2d 1440; 2 Fed. R. Serv. 3d (Callaghan) 524; 38 Fair Empl. Prac. Cas. (BNA) 999; 37 Empl. Prac. Dec. (CCH) P35,427, July 19, 1985
3. BARTEL v. FAA, Nos. 82-2473, 82-2481, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, 725 F.2d 1403; 223 U.S. App. D.C. 297, November 3, 1983, Argued, January 17, 1984, Decided
4. NAKASH v. UNITED STATES DOJ, No. 88 Civ. 1481 (CHT), UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 708 F. Supp. 1354; 1988 U.S. Dist. LEXIS 13360, November 30, 1988, Decided, November 30, 1988, Filed
5. LAPIN v. TAYLOR, Civ. No. 78-0337, UNITED STATES DISTRICT COURT, DISTRICT OF HAWAII, 475 F. Supp. 446, July 31, 1979

The result I suggest finds additional support in cases which already have held that the guardian *ad litem*'s costs and fees may be taxed against the prevailing party. The only unique factor which distinguishes these cases from the present one is that in the former the infant was a defendant rather than a plaintiff. In *Metropolitan Casualty Insurance Co. v. Buscher*, 15 Fed.Serv. (Callaghan) 54d.143, Case 1 (N.D.Ill.1950), the court concluded that the defendant's guardian *ad litem*'s fees should be paid by the prevailing plaintiff. The court concluded that justice and equity demanded this result.

It should be remembered that it was plaintiff's action in instituting suit that required the appointment by the court of a guardian *ad litem* to protect the interests of the minor defendant. Since defendants had no choice as to whether or not a guardian should be appointed, it seems reasonable that the plaintiff, who made the appointment necessary should bear the relatively small expense of his fee.

Id. State courts have reached similar conclusions. See, e.g., *Minns v. Minns*, 615 S.W.2d 893 (Tex.Civ.App.1981). Again, the focus is not on which party prevailed, but rather on the guardian's function. That function remains the same whether the child is the plaintiff or the defendant.

My dissent stems from the failure of the majority to focus on the guardian's role. The result I urge is consistent with the court's obligation to protect minors. This does not break new ground—it merely extends established precedent. Courts have awarded the guardian's fee as costs where the guardian's ward prevailed. Courts also have awarded fees where the guardian's ward lost, but the guardian was associated with the infant defendants. Only one major pattern is absent—the situation where the guardian's ward lost, but the guardian was associated with the infant plaintiffs. There is no logical distinction which mandates that, in this category, the courts do not have discretion to award guardianship fees. The infant is still a ward of the court and the guardian is still a

court officer charged with the infant's protection.

The majority opinion implies that its result is required by Rule 54(d) of the Federal Rules of Civil Procedure. Nothing in that Rule, however, compels the majority's conclusion. Contrariwise, the Rule supports the result suggested by this dissent. In pertinent part, Rule 54(d) provides:

Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.

FED.R.Civ.P. 54(d). Certainly, the Rule, as interpreted, creates a heavy presumption in favor of awarding costs to the prevailing party. *Sun Ship, Inc. v. Lehman*, 655 F.2d 1311 (D.C.Cir.1981). That presumption, however, is rebuttable. The last clause of the Rule confers on the trial court a measure of discretion to allocate the costs other than in favor of the prevailing party. See, e.g., *Breeland v. Hide-A-Way Lake Inc.*, 585 F.2d 716 (5th Cir.1978) (implying that if a trial court justifies its actions, an award of costs to the loser would be permissible), *modified in other respects*, 593 F.2d 22 (5th Cir.1979). This court recently discussed the discretionary scope of Rule 54(d). In *Baez v. United States*, 684 F.2d 999 (D.C.Cir. 1982) (en banc), the issue was the discretion permitted under Rule 39 of the Federal Rules of Appellate Procedure. In the course of the analysis, however, the court focused on Rule 54(d). The court noted that "[w]hen law and equity merged in 1951 the Federal Rules of Civil Procedure adopted both equity's discretionary standard for awarding costs and the common law presumption favoring the award of litigation costs to the prevailing party." *Id.* at 1003. See generally *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964). The "unless otherwise directs" qualification in the Rule sets forth an equitable principle that allows the court to use concepts formerly applied in suits in equity and, when appropriate, to overcome the presumption of awarding costs to the prevailing party. See generally

6 J. MOORE, FEDERAL PRACTICE ¶ 54.70[5], at 1312, 1320 (2d ed. 1976). Thus, if a court at equity had the power to tax guardian's fees as costs against the prevailing party, then a federal district court is similarly empowered. To determine the scope of this equitable discretion, it is therefore useful to examine the way in which state courts have treated the issue of guardians' fees.

In the states, where equity exists, a guardian *ad litem* is entitled to fees for services rendered. Under special circumstances, the court may assess and tax guardian fees against successful parties. *Tracy v. Martin*, 239 S.W.2d 567, 569 (Mo. App.1951), *rev'd on other grounds*, 363 Mo. 108, 249 S.W.2d 321 (1952). Cf. *In re Ogi-er's Estate*, 175 Neb. 883, 125 N.W.2d 68 (1963) (circumstances of case determine amount and source of guardian's fees). But see *Wood v. Cordello*, 91 A.D.2d 1178, 459 N.Y.S.2d 150 (1983). To deviate from the general rule that costs are to be awarded to the prevailing party, the circumstances must "reveal some consideration in equity and good conscience." *Tracy v. Martin*, 239 S.W.2d at 569. The interplay between equity and Rule 54(d) is illustrated in *Metropolitan Casualty Insurance Co. v. Buscher*, *supra*. Applying principles of equity through Rule 54(d), the court held that it had the discretion to assess the defendant's guardian *ad litem*'s fees against the prevailing plaintiff.

The mere presence of a guardian *ad litem*, however, does not inevitably lead to the award of fees. The assessment of guardianship fees against the prevailing party is a matter within the trial court's equitable discretion. For example, equitable considerations are the heaviest where, as in the instant case, the guardian, at the court's behest, invests substantial time and effort to ease the course of complex litigation. In contrast, equity probably would not encourage the taxation of guardianship fees when the guardian presses a frivolous or vexatious argument.

I would hold that the amount of, and source for, the guardian's fees is best left within the discretion of the trial court.

This conclusion merely reflects equitable principles, which a federal court may apply pursuant to Rule 54(d). Moreover, this result, unlike that of the majority, would permit courts to fulfill their common law obligation to protect minors.

The majority concludes that the infants were not prevailing parties and thus reverses the district court. I agree with the majority that, at this time, the foreign children cannot be deemed prevailing parties. That conclusion, however, is irrelevant since the guardian *ad litem* should be able to collect fees even if the ward loses. I would remand the case so that the district court could consider whether this is an appropriate time to award fees to a "non-prevailing" guardian.

Richard C. BARTEL, Appellant
v.
FEDERAL AVIATION ADMINISTRATION, et al.
Richard C. BARTEL, Appellant
v.
UNITED STATES of America.
Nos. 82-2473, 82-2481.
United States Court of Appeals,
District of Columbia Circuit.
Argued Nov. 3, 1983.
Decided Jan. 17, 1984.

Former Federal Aviation Administration employee brought action against FAA and FAA official alleging violation of the Privacy Act. The United States District Court for the District of Columbia, Harold H. Greene, J., entered summary judgment in favor of defendants, and appeal was taken. The Court of Appeals, Wald, Circuit

to the individual named in the record at his request.

5 U.S.C. § 552a(c). Bartel responds that the Act only prescribes dissemination of accountings upon request by the inspectors whose files he obtained, and that the FAA's *sua sponte* decision to send the letters was thus not required.

In this case, however, we need not decide if *sua sponte* dissemination of accountings is permitted by the Act or if so under what conditions. Even if we agreed with the appellees that the *sua sponte* action of the FAA in informing individuals that their files have been wrongfully disclosed—to the extent of revealing the person to whom they were disclosed and the purpose of the disclosure—does not violate the Act, we cannot dismiss Bartel's claim on that ground. The recipients of the Vincent letters were statutorily entitled at most to an accurate accounting provided for by the Act. 5 U.S.C. § 552a(c). The Vincent letters, however, divulge more than the statutory prescribed name, address and reason for disclosure of the airman files. They indicate the fact that Bartel was investigated, that the investigation led to some determination of impropriety, and even that Bartel may have acted criminally in gaining access to the addressees' airman files.¹⁹ Therefore we reject the appellees' attempts to characterize them as mere accountings of disclosures provided for by the Act.

D. The Phone Conversations As Disclosures of Records

Although the Vincent and Cheshire phone conversations involve different factual situ-

9. The Privacy Act includes criminal sanctions for wrongfully gaining access to a record. Among those sanctions, it provides:

Any person who knowingly and willfully requests or obtains any record concerning an individual under false pretenses shall be guilty of a misdemeanor and fined not more than \$5000.

5 U.S.C. § 552a(i)(3).

10. Bartel may maintain an action against Vincent, in his personal capacity, under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The government is shielded from suit for monetary

actions from the Vincent letters, a resolution of whether they constitute disclosures of records under the Privacy Act requires an analysis similar to but in some respects simpler than the one we have applied to the letters. Since the conversations were not held with persons whose files were revealed to Bartel, they could not be considered accountings provided for by section 552a(c). Other than this, we know less about the phone conversations than about the letters: While there are copies of letters in the record, there are no transcripts of the phone conversations, and the record is equally silent about the context within which those conversations occurred or precisely what was said. Thus, we remand to the district court for an initial decision on the mixed fact-law question of whether the phone conversations were disclosures of records under the Privacy Act.

III. DUE PROCESS CLAIM

[5] Bartel sued Vincent, in his personal capacity,²⁰ for intentionally denying him due process when Vincent made and disclosed the "determination" of wrongdoing, thereby besmirching Bartel's reputation, and then used that determination as a reason to deny Bartel a job at the level commensurate with his experience and qualifications. Bartel recognizes that neither denial of a government job by itself nor wrongful dissemination of information which results in injury to reputation alone infringes interests protected by the due process clause. He claims, however, that when

damages, however, by sovereign immunity. Bartel cannot sue the United States or Vincent in his official capacity for damages resulting from violations of his due process rights since the due process clause does not create a government obligation from which "it naturally follows that the Government should be liable in damages for a breach of its duties." *United States v. Mitchell*, — U.S. —, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); see also *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953-954, 47 L.Ed.2d 114 (1976); *Doe v. United States Civil Service Commission*, 483 F.Supp. 539, 562 & n. 19 (S.D.N.Y.1980).

the two are combined, a protected interest is infringed. The district court disagreed, stating simply that under *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), Bartel did not state a compensable constitutional claim.

We agree that *Paul v. Davis* is controlling precedent in this suit, but we read that case differently from the district court. Where the government injures a person's reputation and in so doing effects "a removal, extinguishment, or significant alteration of an interest recognized and protected by . . . law," it must give the person his procedural due. *Mosrie v. Barry*, 718 F.2d 1151 (D.C. Cir.1983). See also, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) (posting that person is an "excessive drinker," thereby depriving her of the right to purchase alcoholic beverages, deprives her of "liberty" for purposes of due process); *Conset Corp. v. Community Services Administration*, 655 F.2d 1291 (D.C.Cir.1981) (due process guarantees apply to memorandum calling into question integrity, honesty or business reputation where it effectively denies contractor all government contract work); *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C.Cir.1980) (same). After reviewing Bartel's complaint, we disagree with the district court's conclusion that it alleges no compensable due process violation.

[6] The complaint states that Bartel was denied a specific government job because of the Vincent letter to Barber. It further states that he was denied his (legally cognizable) right to reemployment with the FAA at the GS-13 level: He was rehired only in a temporary GS-12 position. The crux of the complaint, as we read it, is that Bartel was not considered for FAA employment on a basis equal with others of equivalent skill and experience—i.e., that he

21. We make no judgment about which, if any, of Bartel's allegations of due process violations survive the holding in *Bush*. *Bush* was decided after the parties filed their briefs, so that we are without the benefit of their analyses of the preemption of Bartel's claims by the statutory civil service scheme. Rather than speculate

was wrongfully denied the "right to be considered for government [employment] in common with all other persons." *Mosrie*, 718 F.2d at 1161. For an individual whose entire career revolved around aviation, this denial may have effectively abridged his freedom to take advantage of public employment. See *Old Dominion*, 631 F.2d at 964. Moreover, the refusal of the FAA, Southern Division to hire Bartel for the same reasons despite his "best qualified" rating may itself have effectively extinguished a legally recognized and protected interest.

We thus remand for the district court to ascertain whether conduct of FAA officials denied Bartel a legally recognized interest, and if so, whether he was given his procedural due. In doing so, we realize that Bartel's due process claims to some extent may be based on wrongs for which he has already sought redress before the Merit Systems Protection Board. The administrative scheme which Congress established to protect civil servants' rights preempts a constitutional claim for damages based on conduct remediable under that scheme. See *Bush v. Lucas*, — U.S. —, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). The district court, however, must entertain Bartel's due process claims for damages attributable to wrongful conduct for which that scheme provides no remedy, along with those for injunctive relief.²¹ *Bush*, 103 S.Ct. at 2418 (Marshall, J., concurring) ("nothing in the decision . . . foreclose[s] a federal employee from pursuing a *Bivens* remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme").

Bartel claims, in addition, that the phone conversations with the investigator from Flight Resources also gave rise to a due process violation. Under the law in this circuit, that is not the case. See *Mosrie*, 718

solely on the basis of Bartel's *pro se* complaint as to the precise violations of due process he alleges, we think the wiser course of action is for the district court to decide initially the extent to which alleged violations are administratively remediable and hence barred in this case.

outcome, the deluge argument cannot influence the decision here in view of the reasoning in *Jamison* and *Buell*.

At least one circuit has declined to recognize the tort of intentional infliction of emotional distress under the FELA where no physical injury was alleged. *Adkins v. Board System R.R.*, 821 F.2d 340 (6th Cir.1987), cert. denied, — U.S. —, 108 S.Ct. 452, 98 L.Ed.2d 392; *Antalek v. Norfolk and Western Co.*, No. 84-3057 (6th Cir. Aug. 30, 1984) (742 F.2d 1454 [table]) (discussed in *Adkins*, 821 F.2d at 341-42). In *Adkins*, a former railroad employee sued his former employer for intentional infliction stemming from a threatened discharge lacking any physical dimension such as assault. 821 F.2d at 341; see also *Antalek*, slip op. at 2-3; *Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir.1985), cert. denied, 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788 (1987), and declined to hold such a tort cognizable under the FELA, *id.* at 342; see also *Antalek*, slip op. at 2-3.

This Court is unpersuaded that *Adkins* lives the issues presented here for two reasons. First, that court's analysis was quite narrow, failing to consider *Jamison*'s sweeping language as well as *Jamison*'s interplay with *Buell*. Second, Teague has asserted physical injury. Thus, while this Court expresses no opinion whether the infliction of purely emotional injury is cognizable under the FELA, see *Buell*, 107 S.Ct. at 1417-18 (discussing, but not deciding, the question), it holds that Teague's claim, including as it does an assertion of physical injury, may not be dismissed. Indeed, the Supreme Court's reasoning in *Jamison*, standing unrenounced, requires no less. While the vintage is old, good law like good wine may be supposed to improve with age. Until the Supreme

job occurring over a period of months or years." *Kelly's Case*, 17 Mass.App.Ct. 727, 730, 462 N.E.2d 348 (1984) (involving psychiatric trauma following a layoff notice and subsequent departmental transfer). The Massachusetts legislature promptly narrowed the opportunity for workers compensation as follows: "No mental or emotional disability arising principally out of a bona fide personnel action including a transfer, promotion, demotion, or termination except

Court pronounces the vintage soured, this Court will follow it.

IV. Conclusion

AMTRAK's motion to dismiss Teague's claims brought pursuant to the FELA (C.A. No. 88-0661-Y) is DENIED in its entirety. In view of the ruling that Teague's claims can be addressed under the FELA, his claims under Massachusetts common law are preempted by the federal enactment. Accordingly, AMTRAK's motion to dismiss the Teagues' action based on state law claims of intentional and negligent infliction of emotional distress (C.A. No. 88-1543-Y) is GRANTED.



Avi NAKASHI, et al., Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

No. 88 Civ. 1481 (CHT).

United States District Court,
S.D. New York.

Nov. 30, 1988.

Plaintiffs brought action under Privacy Act to recover costs of investigating and obtaining redress for Department of Justice's release of allegedly sensitive information to litigation adversaries and business competitors. Department moved to dismiss complaint and to stay proceedings pending conclusion of related criminal pro-

such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury [compensable under the Massachusetts Workers' Compensation Act]. Mass.Gen.Laws ch. 152, sec. 1(7A) as amended by 1986 Mass. Stat. ch. 662, sec. 6.

Surely, if the deluge is imminent, the Congress of the United States will be equally adept as its Massachusetts counterpart in balancing the competing societal interests at issue.

ceedings. Plaintiffs cross-moved for Rule 11 sanctions. The District Court, Tenney, J., held that: (1) Department could not exempt itself from civil remedies provision of Act; (2) Department Regulation was not general exemption from civil remedies provision; and (3) plaintiffs' motion for Rule 11 sanctions itself violated Rule 11.

Motions denied.

1. Records ¶31

Department of Justice could not exempt itself from civil remedies provision of Privacy Act, even though general exemption provision did not prohibit exemption from civil remedies provision, and even though general exemption provision prohibited exemption from criminal liability provision. 5 U.S.C.A. § 552a(g, i, j).

2. Records ¶31

Department of Justice regulation exempting certain systems of records from civil remedies provision of Privacy Act exempted Department from civil liability provision only to extent that it had already exempted itself from stated access provisions and did not exempt Department from civil liability for violation of disclosure provisions of Act; general heading of regulation was "limited access." 5 U.S.C.A. §§ 552a, 552a(b), (b)(11), (d)(1-5), (g, j).

3. Federal Civil Procedure ¶1271

Department of Justice in action to recover for disclosure of sensitive information to plaintiffs' litigation adversaries and business competitors was not entitled to stay of discovery about events occurring after adversary sought discovery from Government, about Government's process for interpreting discovery documents and orders, and about circumstances surrounding actual inspection and disclosure of documents; plaintiffs' discovery in those areas would not pose any threat to grand jury investigation of plaintiffs. 5 U.S.C.A. § 552a.

4. Federal Civil Procedure ¶2721

Plaintiffs' Rule 11 motion in Privacy Act case against Department of Justice violated Rule 11 and justified sanctions on

court's own motion; Rule 11 motion sought sanctions for Department's motion to dismiss, which claimed exemption from civil remedies provision of Act, and for Department's motion to stay discovery; issue raised in motion to dismiss had been addressed in only one other case in dictum in another circuit; plaintiffs were well aware of possible impact of case on related grand jury proceedings and acted as if Department's submissions for in camera review were not even part of record; and plaintiffs filed 27-page brief and affidavits in opposition to Department's motions. 5 U.S.C.A. §§ 552a, 552a(g)(1); Fed.Rules Civ.Proc. Rule 11, 28 U.S.C.A.

5. Federal Civil Procedure ¶2721

Requests for sanctions seek court orders and are, therefore, subject to same Rule 11 analysis as all other motions. Fed. Rules Civ.Proc.Rules 7(b), 11, 28 U.S.C.A.

6. Federal Civil Procedure ¶2721

In determining whether request for sanctions constitutes independent violation of Rule 11, court must determine whether competent attorney would have concluded that request was destined to fail at time it was signed. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

7. Federal Civil Procedure ¶2721

Attorney who contemplates filing Rule 11 motion must consider very liberal standards that will govern court's review of validity of substantive motion under attack and must resolve all doubts about validity of that motion in favor of signer. Fed. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

8. Federal Civil Procedure ¶2721

Attorneys have no continuing obligation under Rule 11 to update previously filed documents. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

9. Federal Civil Procedure ¶2721

Asserting request for strategic reasons when there is any colorable argument supporting adversary's position constitutes "improper purpose" within meaning of

Rule 11. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Civil Procedure §2721

Attorneys who choose to submit marginal request for sanctions before court's decision on underlying motion, in misguided hope of persuading court on merits, run risk of violating Rule 11. Fed.Rules Civ. Proc.Rule 11, 28 U.S.C.A.

Jones, Day, Reavis & Pogue, New York City (Robert Layton, Robert Deberardine, of counsel), for plaintiffs.

Rudolph W. Giuliani, U.S. Atty., S.D. N.Y., New York City (Helen M. Toor, Asst. U.S. Atty., of counsel), for defendant.

OPINION

TENNEY, District Judge.

Plaintiffs, Avi, Ralph and Joe Nakash bring this action under the Privacy Act of 1974, 5 U.S.C. § 552a(g)(1) (1983), claiming that defendant, the United States Department of Justice, wrongfully disclosed information about them to third parties. The Justice Department is represented by the United States Attorney (the "Government"), which also had a role in the development of the facts underlying this case. The Government has moved to dismiss the complaint on the ground that the Justice Department is exempt from the application of relevant provisions of the Act. In the alternative, it has moved to stay the proceedings pending the conclusion of related criminal proceedings. Plaintiffs have cross-moved for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure, claiming that the Government's motions were meritless. For the reasons stated below, all three of these motions are denied. In addition, the court *sua sponte* finds that counsel for plaintiffs have violated Rule 11 by moving for sanctions against the Government.

1. The action, entitled *George Marciano, et al. v. Joe Nakash, et al.*, Case No. C524 347, is currently pending in the Superior Court of the State of

BACKGROUND

Plaintiffs are the principal owners of Jordache Enterprises, Inc., the importer and manufacturer of a line of clothing made popular by an advertising campaign touting "the Jordache look" as the type that consumers "would like to know better." The Government, at least, was intrigued and obtained a search warrant authorizing the seizure of records from Jordache's offices in New York and New Jersey. During the execution of that warrant in January of 1986, Government agents impounded approximately 450 boxes of documents, 1350 reels of computer tapes and other information. The seized materials remain in the custody of the Government in the Southern District of New York.

At the time of the seizure plaintiffs were already embroiled in a civil lawsuit in California state court brought by their competitors, Georges, Maurice, Armand and Paul Marciano (the "California action"). See Affidavit of Robert Layton, sworn to July [date omitted] 1988 ("Layton Aff.") Exh. B. at 2.¹ The substance of that dispute is not in the record before this court, but plaintiffs claim that some of the seized records contained privileged material addressing "highly sensitive matters" such as internal discussions of settlement terms and strategies for discovery in the California action. Complaint ¶ 31. They also allege that the documents contained confidential business communications, trade secrets and other "highly sensitive information." *Id.*

During the course of the California action, the Marcianos sought discovery from the Nakashes of several categories of documents that encompassed items seized pursuant to the search warrant. Those efforts culminated in the Marciano's issuance of a subpoena to the Custodian of Records for the United States Attorney for the Southern District of New York. For reasons not relevant to the resolution of these motions, the Nakashes moved to quash that subpoena. Judge John F. Keenan denied their

California for the County of Los Angeles. Complaint ¶ 15.

motion and ordered the Government to produce the documents, concluding as follows:

To the extent that the seized documents are discoverable under the California court's order, copies should be produced pursuant to the subpoena duces tecum. Any argument that the documents are not responsive to the California court's order should be addressed to that forum.

John Doe, Inc., Subsidiaries and Affiliated Companies v. United States, Cr. Misc. No. 1 p. 10 (LLS), slip op. at 7 (S.D. N.Y. July 27, 1987) (sealed order denying motion to quash) (emphasis added).² Plaintiffs allege that the California court's order referred to in Judge Keenan's order expressly exempted from discovery all documents subject to any type of privilege. Complaint ¶ 16. They also allege that they notified the Government by letter dated August 4, 1987, that the seized materials contained numerous documents not covered by Judge Keenan's order. *Id.* ¶ 21. The Government evidently never responded to this letter. *Id.* ¶ 22.

On October 9, 1987, under the Government's supervision, civil attorneys for the Marcianos reviewed the seized materials. The attorneys designated for photocopying and subsequently received 26,000 pages of documents, including some of the highly sensitive and privileged documents described above. These events occurred without plaintiffs' knowledge, although nothing in Judge Keenan's order required the Government to provide notice that it was complying with the subpoena. In fact, plaintiffs did not learn that any of the seized documents had been turned over to the Marcianos until the latter used them during a deposition in the California action.

2. Because of the pendency of a related grand jury investigation, a significant portion of the briefs, affidavits and other documents in this case are presently under seal. Nevertheless, the bulk of these materials consist of public information and matters that do not require sealing. Furthermore, none of the properly sealed information is determinative of the issues before the court. Therefore, rather than seal this opinion unnecessarily, the court has included in it only those materials it has deemed appropriate for disclosure. Its limited references to such doc-

Plaintiffs will presumably receive adequate protection against the use of privileged or improperly obtained evidence from the California courts.³ They have brought this independent action under the Privacy Act seeking compensation for the costs of investigating and obtaining redress for the disclosure and for other damages resulting from the release of sensitive information to their litigation adversaries and business competitors.

DISCUSSION

I. Motion to Dismiss

A. The Privacy Act

1. Substantive Rights

The Privacy Act, 5 U.S.C. § 552a (1983) (the "Act"), governs the collection and dissemination of information about individuals by the federal government. It serves three functions relevant to this lawsuit. First, it provides certain rights of access to such information, *id.* § 552a(d)(1), grants individuals about whom such information pertains the right to request amendment of erroneous material, *id.* § 552a(d)(2), and provides procedures under which denials of such requests to amend may be challenged, *id.* § 552a(d)(3)-(5).

Second, the Act restricts the ability of the government to disclose such information to third parties. Subsection (b) of the Act states, in pertinent part:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the

uments should not be interpreted as a modification of the relevant sealing orders.

3. Plaintiffs have stated that the California courts have determined that the documents were, "in part, attorney-client privileged" and were, "in toto, improperly obtained from the Government." Plaintiff's Memorandum in Opposition to Motion to Dismiss or Stay ("Pl. Mem.") at 4 n. 2.

record pertains, unless disclosure of the record would be—

(11) pursuant to the order of a court of competent jurisdiction....

5 U.S.C. § 552a(b). Plaintiffs never authorized the disclosure of the documents in this case. See Complaint ¶ 43. Furthermore, they allege that the disclosure was not authorized by the orders of the California courts or Judge Keenan. Therefore, plaintiffs' allegations establish a violation of subsection (b), the anti-disclosure provision.

Third, the Act provides civil remedies for violations not only of the access provisions but the anti-disclosure provisions as well. Subsection (g) of the Act states, in relevant part:

Civil remedies

Whenever any agency

(A) makes a determination under [this Act] not to amend an individual's record in accordance with his request, or fails to make such review in conformity with [the Act];

(B) refuses to comply with an individual request [to review his or her records];

(C) fails to maintain any record concerning any individual with [the requisite] accuracy, relevance, timeliness, and completeness ...; or

(D) fails to comply with any other provision of this [Act], or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

4. The Act also provides criminal penalties for certain disclosures, 5 U.S.C. § 552a(i)(1), and failures to maintain files without revealing their existence, *id.* § 552a(i)(2), as well as for obtaining access to records under false pretenses, *id.* § 552a(i)(3).

5. There are at least suggestions in the legislative history of the Act that this assumption may not be correct:

5 U.S.C. § 552a(g)(1) (emphasis added).⁴ Thus, these provisions in the Act provide plaintiffs with the right to bring this lawsuit to seek damages for the release of the seized documents.

2. Exemptions Under the Act

The analysis does not end here, however, because the Act also permits eligible agencies, such as the Justice Department, to exempt themselves from some of its requirements. Agencies may avail themselves of this right under two provisions: a list of specific exemptions, none of which apply to this case, 5 U.S.C. § 552a(k), or a general exemption section, which is the subject of this motion to dismiss, *id.* § 552a(j). The issue is whether the general exemption provision is as broad as the Government asserts. Assuming that it is, a secondary question is whether the Justice Department has fully availed itself of its protection. For the reasons discussed below, the court finds that the answer to both of these questions is no.

The Act pertains only to "systems of records" and the exemption provision applies only to systems of records such as "reports" that have been compiled by the government itself. The information in this case consists of documents generated by plaintiffs, which were merely in the custody of the Justice Department. Under these circumstances, the court has some doubt that the Privacy Act was intended to encompass these types of records. Nevertheless, for the purposes of this motion, both sides have conceded that the seized records fall within the language of both the Act and the Justice Department regulations. See Defendant's Memorandum in Support of Motion to Dismiss or Stay ("Def. Mem.") at 5 & n. 3; Complaint ¶ 41. Accordingly, the court has assumed in this opinion, without deciding, that this is the case.⁵

MR. ERLÉNBOEN. Mr. Chairman, as I understand it, the purpose of the amendment [5 U.S.C. § 552a(d)(5)] is to protect, as an example, the file of the U.S. Attorney or the solicitor that is prepared in anticipation of the defense of a suit against the United States for accident or some such thing?

MR. BUTLER. That is the subject we have in mind.

[1] The general exemption provision provides that the head of any eligible agency may promulgate rules

to exempt any system of records within the agency from any part of this [Act] except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is [maintained by an agency whose principal function is law enforcement and has been] compiled for the purposes of a criminal investigation, including reports of informants and investigators....

Id. (emphasis added). The Government notes that subsection (g), the civil remedies provision, is not among those excluded from the application of the general exemption provision. It argues that the language of the general exemption provision is broad enough to permit the Justice Department to exempt itself from the application of any provision in the Act that has not been expressly excluded. Under its interpretation, even though the Justice Department could not exempt itself from the requirements of the anti-disclosure provision, it could exempt itself from any civil liability for violating it, or for that matter, any other provision of the Act—in essence, immunizing itself from all possible civil liability under the Act.

Certainly subsection (g) is "conspicuously absent" from the list of exclusions in the general exemption provision. See *Tijerina v. Walters*, 821 F.2d 789, 795 (D.C.Cir. 1987). The crucial question is why. The Government insists that the language and, therefore, the intent of Congress is "clear and unequivocal," concluding that it deliberately and purposely chose to omit subsection (g). See Defendant's Reply Memorandum in Support of Motion to Dismiss or Stay ("Def. Reply Mem.") at 6-7. Plaintiffs respond that subsection (g) has no relevance to the exemption provision and

MR. ERLÉNBOEN. I appreciate the gentleman's concern. I think it is a real concern, and that protection ought to be afforded.

The only problem I find with that amendment is this: It would presuppose we intended the defining of "record system" to preclude [sic] that type of record. I do not think we did.

find no significance in its absence. See Pl. Mem. at 11.

3. Legislative History

The Government's interpretation is grounded only in linguistics. While language analysis is an important element of statutory interpretation, it is not the only one; the construction of an act must be consistent with its underlying purpose and legislative history. The Government's interpretation conflicts with the basic purpose of the Privacy Act and has absolutely no support in its legislative history. Therefore, the court rejects it.

The Privacy Act was a product of the post-Watergate reform era and represented an effort by the Congress to begin to control the collection and dissemination of information about individuals by the federal government. The perceived disregard of fundamental privacy rights by federal officials was noted as one of the reasons for introducing this legislation. As Representative Moorhead, who presented the House bill, remarked:

It seems to me that the events of the past several years have a lesson in them. Americans want to see more credibility in Government, and they want to see the removal of any undue Government power which could be used to invade their personal privacy.

120 Cong.Rec. 36,644 (1974). The Privacy Act was intended to control such abuse by making the federal government accountable for its actions. Representative Moorhead continued to explain the purpose of the Act as follows:

This landmark legislation, H.R. 16373, is a first step in that direction. It is in total harmony with the spirit of the Constitution. It gives individuals as a matter of right some meaningful control

Frankly, I do not think the attorney's files that are collected in anticipation of a lawsuit should be subject to the application of the act in any instance, much less the access provision. It is our concern in the access provision that it may then presuppose it is covered in the other provisions, and I do not think it should be.

120 Cong.Rec. 36, 960 (1974).

over how the Federal Government utilizes personal information about them. *Id.* (emphasis added).

With the introduction of this legislation, Congress began the process of opening up the government's files. The unprecedented civil remedies provision would eventually give individuals a powerful tool to use in gaining access to government files; therefore, it was very clear that the Act had to provide the government a method to avoid exposing legitimately secret information and the legislative history establishes that the general exemption provision was included to address this concern.

Delving into the legislative history does not eliminate the considerable difficulty of trying to establish a negative. There is no discussion in which Congress explicitly states that an agency cannot do what the Government claims the Justice Department does. Conversely, however, there is a lutely no indication in the extensive debates and reports of either the House or Senate that Congress even considered such a disturbing possibility. That is a compelling reason not to construe the Act in a manner that permits it to occur.

The link between the access and general exemption provisions is evident in statements made during the House debates.⁶ At one point, Representative Abzug, one of the bill's sponsors, sought to eliminate the *per se* application of the general exemption section to the records of the Central Intelligence Agency, see 5 U.S.C. § 552a(j)(1); 120 Cong.Rec. 36,960 (1974). She did not believe that the mere fact that records were maintained by the CIA merited an automatic exemption from most of the pro-

visions of the Act. Although she ultimately failed in this effort, she argued that "exemptions should relate to the type of data sought to be protected from disclosure, not to the agency maintaining such records," 120 Cong.Rec. 36,960, an accurate characterization of the operation of the Act.

The opposition to her proposed amendment concentrated exclusively on the repercussions that open access would have on the operations of the CIA.⁷ In rebuttal, Representative Abzug again stressed that "[a] blanket exemption for any agency even or especially this one agency has no place in this bill." 120 Cong.Rec. 36,961. Representative Moorhead, who sponsored the bill, was the last member to speak in opposition to the amendment. He responded to Representative Abzug's comments as follows:

Let me explain to the Members that the CIA is not entirely exempt under this bill. The agencies listed under general exemptions are affirmatively subject to the major disclosure and the requirement section of the act. The CIA must follow the conditions of disclosure, or I should say nondisclosure, as enumerated in subsection (b) of the bill. This is a major provision of the bill with which the Agency must be in compliance—with what the Agency may or may not do with their records.

Id. (emphasis added). Almost immediately thereafter, the proposed amendment was rejected. *Id.*

The character and timing of Representative Moorhead's remarks suggest not only

6. The House deliberations are particularly important in questions involving the Privacy Act. The sponsors and floor managers of the initial bills in both houses felt it imperative for some privacy legislation to be enacted before the congressional session came to an end. Since the session was drawing to a close, however, they realized that they would not be able to resolve the complex differences between the House and versions so the Senate agreed to adopt the House bill. See 120 Cong.Rec. 40,880 (1974) (remarks of Rep. Moorhead). Accordingly, the resulting legislation, even with some Senate amendments, "retain[s] the basic thrust of the House version..." *Id.*

7. For example, one representative argued that "[t]he fact is, we ought not limit the United States to carrying on the activities of the Central Intelligence Agency in such a way that its files are kept under cellophane." 120 Cong.Rec. 36,961 (remarks of Rep. Erlenborn). Another stated that "I just do not believe that anyone has the right or should have the right to go in and expose the most sensitive area in the protection of our national security." *Id.* (remarks of Rep. Holifield).

that the House was most concerned with access but, contrary to the Government's assertions, see Def. Reply Mem. at 8 n. 4, that it considered enforcement of the disclosure provisions to be an important aspect of the Act. While these types of contemporaneous comments are not controlling, see *Berger v. Heckler*, 771 F.2d 1556, 1574 (2d Cir.1985), they are consistent with the House report, which stated:

Only records maintained by the Central Intelligence Agency and criminal justice records could be so exempted. Even they would be subject to the requirements relating to conditions of disclosure.... The Committee believes that such a broad [exemption] is permissible for these two types of records because they contain particularly sensitive information. C.I.A. files may include the most delicate information regarding national security.... The Committee also wishes to stress that this section is not intended to require the C.I.A. and criminal justice agencies to withhold all their [personnel] records from the individuals to whom they pertain. We urge those agencies to keep open whatever files are presently open and to make available in the future whatever files can be made available without clearly infringing on the ability of the agencies to fulfill their missions.

H.R.Rep. No. 93-1416, 93d Cong., 2d Sess. 18, quoted in *Tijerina v. Walters*, 821 F.2d 789, 796 (D.C.Cir.1987) (emphasis added). As the Senate report reveals, the civil remedies provision was intended to be the Act's primary enforcement mechanism:

[T]his bill not only establishes certain administrative requirements and grants certain rights to citizens, but gives authority to the citizen to defend his rights by taking the initiative of court action. Such a right is doubly important since the revised bill gives no enforcement authority to the [proposed Privacy] Commission.

8. The provisions excluded in the general exemption provision serve the following functions: Subsection (b) prohibits disclosure of information except under specified conditions;

S.Rep. No. 1183, 93d Cong., 2d Sess. 82, reprinted in 1974 U.S.Code Cong. & Admin.News 6916, 6996 (emphasis added). In light of the importance Congress attached to the anti-disclosure and the civil remedy provisions, it would indeed be anomalous to conclude that it also intended, without any comment or explanation, to weaken them by permitting eligible agencies to exempt themselves from the Act's civil enforcement procedures.

4. Prior Decisions

The Government's interpretation was rejected by the Court of Appeals for the District of Columbia in *Tijerina v. Walters*, 821 F.2d 789, 797 (D.C.Cir.1987). In that case, the court noted that if it adopted the Government's position, eligible agencies would acquire a "license to defang completely the strict limitations on disclosure that Congress intended to impose." *Id.* at 797. Instead, it concluded that the general exemption provision had no applicability to subsection (g). It stated:

Subsection (j) only permits an agency to exempt a system of records from the requirements set out in other provisions of the Act. Subsection (g), the Act's civil remedies provision, does not regulate systems of records. It is a derivative provision directed not towards agencies but towards courts and aggrieved individuals: the subsection provides a grant of jurisdiction and a waiver of sovereign immunity for suits alleging certain violations under the Act. It simply makes no sense for an agency to use subsection (j) to exempt a system of records from civil liability: records are not subject to civil liability under the Act; the United States is.

Id. at 795-96 (emphasis in original).

The *Tijerina* court's rationale is largely supported by an examination of the sections that Congress believed would have remained subject to the exemption provision had they not been expressly excluded.⁸

Subsections (c)(1) and (2) govern the maintenance of records of each such disclosure; Subsections (e)(4)(A) through (F) require publication in the Federal Register of the exist-

Contrary to the *Tijerina* court's observation, however, not all of them are logically applicable only to "systems of records," but each imposes duties or restrictions concerning such records that must be followed by the agencies and their employees. In contrast, aside from establishing jurisdiction in federal courts and setting other procedures for litigation, subsection (g) simply provides a cause of action to aggrieved individuals. It does not impose any substantive duties or restrictions on agencies or their employees. Therefore, it is not within the class of provisions intended to have been subject to the general exemption provision. Since it could never have fallen within its terms in the first place, there would have been no reason for Congress to have excluded it from the application of the general exemption provision.

In addition, Congress could not have anticipated that agencies would consider exempting themselves from the civil remedies provision absent a concurrent and permissible exemption from one of the Act's substantive provisions. Once an agency has chosen to exempt records from a substantive provision, there is no logical reason to seek an independent exemption from civil liability: since the agency cannot commit a substantive violation *a fortiori* it cannot be subject to any possible civil liability. These points support the *Tijerina* court's overall conclusion that subsection (g) was not within the class of provisions subject to the application of the general exemption provision.

None of the cases cited by the Government provide adequate support for its interpretation of the Act. In *Kimberlin v. United States Department of Justice*, 788 F.2d 434, 436 n. 2 (7th Cir.), *cert. denied*, 478 U.S. 1009, 106 S.Ct. 3306, 92 L.Ed.2d 719 (1986), *Alexander v. United States*,

ence and character of, and the access procedures for, systems of records maintained by agencies; Subsection (e)(6) requires reasonable efforts to ensure accuracy and completeness of information prior to any permitted disclosure; Subsection (e)(7) prohibits the maintenance of any records concerning the exercise of First Amendment rights;

787 F.2d 1349, 1351-52 (9th Cir.1986), and *Wentz v. The Department of Justice*, 772 F.2d 335, 338 (7th Cir.1985), *cert. denied*, 475 U.S. 1086, 106 S.Ct. 1470, 89 L.Ed.2d 726 (1986), the courts merely held that—contrary to the circumstances in this case—the information involved was exempt from substantive provisions of the Privacy Act. The language upon which the Government relies in *Ryan v. Department of Justice*, 595 F.2d 954 (4th Cir.1979), is no more than dictum concerning an issue about which the court provided no analysis. *See id.*, 595 F.2d at 958 (stating that "while the Justice Department had the authority to completely exempt JUSTICE/CRT-001 from the application of all of the civil remedies," it had not done so in that case) (emphasis in original). Therefore, *Tijerina* is the only reported case in which the question before this court has been addressed. Although not binding upon this court, its reasoning is persuasive and thoroughly supported by the legislative history and purpose underlying the Act.

5. *The Apparent Anomaly in the Use of Subsection (i)*

The Government argues that none of this reasoning or precedent can explain the presence of subsection (i), the criminal liability provision, in the list of exclusions in the general exemption provision. It asserts that by excluding criminal penalties but not civil remedies Congress "clearly distinguished" between the two, intending to permit eligible agencies to exempt themselves from civil but not criminal remedies. Def. Reply Mem. at 9. Although this argument merits some discussion, it does not have the significance claimed by the Government.

Subsection (i) was not discussed in the *Tijerina* decision and is difficult to reconcile with it. As the Government notes, in

Subsection (e)(9) requires the establishment of rules of conduct for personnel involved in the maintenance of any system of records; Subsection (e)(10) requires the implementation of safeguards to protect the integrity of any such systems; Subsection (i) imposes criminal penalties for certain violations. *See supra* note 4.

See 5 U.S.C. § 552a(j).

the context of the general exemption provision, criminal remedies are similar to civil remedies, in that neither are intuitively "systems of records." The presence of subsection (i), therefore, undermines the premise of the *Tijerina* court that systems of records cannot be subject to penalties of any kind and its conclusion that the civil remedies provision could not be subject to the terms of the general exclusion provision. If nothing else, Congress' decision to exclude subsection (i) from the general exemptions provision reveals an implicit assumption that it could have applied to criminal penalties.

Even under this court's determination of the scope of the general exemption provision, the presence of subsection (i) presents analytical difficulties. Like the civil remedies provision, it does not impose any substantive duties or requirements on an agency or its employees. It simply specifies the possible consequences of certain conduct and provides a legal remedy, in this case, a criminal action by the government. Despite these apparent inconsistencies, the presence of subsection (i) does not compel a different result than that reached in *Tijerina*.

The rationale for including subsection (i) in the list of exclusions in the general exemption provision was not nearly as well-considered as the Government has suggested. It was added to the growing list of exclusions⁹ for no other reason than to close a perceived but nonexistent loophole. The entire and brief discussion concerning the addition of subsection (i) was as follows:

9. As the following excerpts reveal, the list of exclusions in the general exemptions provision expanded as the House bill moved through the legislative process.

Except for subsections (c)(1) and (c)(3), the provisions of this section shall not apply to any record or system of records which is.... H.R. 16373, 93d Cong., 2d Sess. § (i) at 14 (1974) (superseded text).

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, to exempt any system of records within the agency from any part of this section except subsections (b) and (e)(2)(A) through (F) if the system of records is....

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I offer a technical amendment.

The Clerk read as follows:

Amendment offered by MR. MOORHEAD of Pennsylvania: On page 33, line 2, after "(F)" insert "and (i)".

On page 30, line 24, strike "(j) or".¹⁰

Mr. MOORHEAD of Pennsylvania. Mr. Chairman, I will be brief in explaining this amendment, which has been previously discussed with the minority side. Very simply, it tightens up a part of the bill where a loophole might exist. It provides that if the head of an agency utilizes the authority under subsection (j) of the bill to exempt a system of records from this law, such action shall not exempt the particular agency from safeguards to the public against abuse of such exemption authority as provided in subsection (i), imposing criminal penalties for violations of the act.

I trust that the amendment will be adopted.

Mr. ERLNBORN. Mr. Chairman, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman from Illinois.

Mr. ERLNBORN. I thank the gentleman for yielding to me. I do support the amendment.

The CHAIRMAN. The question is on the amendment offered by the gentleman from Pennsylvania (MR. MOORHEAD).

The amendment was agreed to.

120 Cong.Rec. 36,655 (1974).

The basis for Representative Moorhead's concerns and the efficacy of his proposed

Id. § (j) at 32-33 (superseding text).

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is....

5 U.S.C. § 552a(j) (1983).

10. This second change simply corrected a drafting error in an unrelated section of the bill.

solution are not particularly clear. It appears that he was troubled by the possibility that agency heads might exempt their records for improper purposes and wanted to be sure that criminal provisions were available to deter such conduct. His efforts might have been in vain since the criminal provisions in the Act do not cover any type of "abuse of exemption authority." See 5 U.S.C. § 552a(i). Nevertheless, no matter what he perceived the loophole to be, he offered the amendment only as a "technical" matter to close it, not for any other purpose.

In light of the proffered rationale for the change, it would be no more than rank speculation to suppose that it was also intended to negate the otherwise clear and undeniable legislative intent in favor of individual enforcement. The court finds it significant that much of the drafting of the Act occurred in the haste of the closing days of the congressional session. See 120 Cong. Rec. 40,411-12 (remarks of Sen. Hruska); *id.* at 40,880 (remarks of Rep. Moorhead). As one member admitted, for example, "[m]any of the changes pertaining to law enforcement may have been inadvertently included with [sic] a full realization of their total effect." *Id.* at 40,411 (remarks of Sen. Hruska). As one of the Act's sponsors admitted, the legislation in its final form was "far from perfect." *Id.* at 40,886 (remarks of Rep. Koch). In this context, relatively little weight can be given to the last-minute and largely inexplicable addition of subsection (i) to the list of exclusions in the general exemption provision.

Therefore, while the Government's inference regarding the presence of subsection (i) deserves consideration, it is, in the end, no more than an abstract concept in conflict with and outweighed by the legislative history of the Act. As the Supreme Court has stated, "the canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language." *United States v.*

Brown, 333 U.S. 18, 25-26, 68 S.Ct. 376, 380, 92 L.Ed. 442 (1948). The Court of Appeals for the District of Columbia has similarly explained that "in interpreting legislation courts are not straitjacketed by Congress' choice of words. When the language used so conflicts with evidenced congressional intent that a mistake in draftsmanship is obvious, courts may remedy the mistake." *Symons v. Chrysler Corporation Loan Guarantee Board*, 670 F.2d 238, 242 (D.C.Cir.1981); *accord United States v. Babcock*, 530 F.2d 1051, 1053 (D.C.Cir.1976). Although the court is not reading subsection (i) out of the list of exclusions, it concludes that it has no relevance to the questions concerning the application of the civil remedies provision.

B. The Justice Department Regulations

[2] Even if the Privacy Act permitted the result claimed by the Government, plaintiffs would still have a cause of action because the Government's assertion that the Justice Department has fully exempted itself from all civil liability is belied by the context and language of the relevant regulations.

Under the Act, agencies claiming exemptions under the general exemption provision must publish the justification for doing so. See 5 U.S.C. § 552a(f). The pertinent Department of Justice regulation states:

§ 16.81 Exemption of United States Attorneys Systems—limited access.

(a) The following systems of records are exempt from 5 U.S.C. 552a(c)(3) and (4), (d), (e)(1), (2) and (3), (e)(4)(G) and (H), (e)(5) and (8), (f), and (g):

(2) Civil Case Files (JUSTICE/USA-005).

(4) Criminal Case Files (JUSTICE/USA-007).

(6) Major Crimes Division Investigative Files (JUSTICE/USA-010).

(b) Exemptions from the particular subsections are justified for the following reasons:

(3) From subsection (d) because access to the records contained in these systems would inform the subject of a criminal or civil investigation, matter or case of the existence of such, and provide the subject with information that might enable him to avoid detection, apprehension or legal obligations, and present a serious impediment to law enforcement and other civil remedies. Amendment of the records would interfere with ongoing criminal law enforcement proceedings and impose an impossible administrative burden by requiring criminal investigations to be continuously reinvestigated.

(10) From subsection (f) because this system has been exempted from the individual access provisions of subsection (d).

(11) From subsection (g) because these systems of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

28 C.F.R. § 16.81 (1987) (emphasis added). The justification for the purported exemption thus supports it only to the extent that it exempts records from the Act's access requirements.

As previously discussed, once an agency exempts a system of records from a substantive provision, there can be no violation of it and, accordingly, no possible civil liability. Therefore, it was not necessary for the Justice Department even to have exempted itself from subsection (g) for any purposes. Nevertheless, the Act did not expressly "prohibit" such exemption, so the Justice Department apparently took advantage of every perceived opportunity under it to protect itself from liability and eliminated all possible sources, real or imagined. Nevertheless, it is equally apparent that the exemption of subsection (g) was intended to be only as broad as was necessary to preclude the possibility of civil liability arising

under the stated access positions. See *Ryan v. Department of Justice*, 595 F.2d 954, 958 (4th Cir.1979); *see also Tijerina*, 821 F.2d at 796 (stating that "[n]one of the purposes the VA cited is remotely served by allowing the agency to escape civil liability for violations of the disclosure or accuracy requirements of the Act").

In urging that the regulation was intended to exempt the Justice Department from liability for wrongful disclosures, the Government asserts that the justification may be read disjunctively, so that it expresses two distinct rationales. See Def. Reply Mem. at 11. It further claims that the initial clause—that the relevant records "are compiled for law enforcement purposes"—can stand alone as a justification for the broader interpretation of the claimed exemption. The court need not decide what, if any, authority it has to determine whether this would provide a legally sufficient basis for the claimed exemption, since the Government's interpretation is inconsistent with the fact that it falls under the regulation's general heading: "limited access." It is far more likely, and the court finds, that the Justice Department intended to exempt itself from subsection (g) only to the extent that it had already exempted itself from the stated access provisions. Therefore, even if it had assumed that it had the power to do so, the Justice Department did not enact regulations that would immunize it from this lawsuit.

II. Motion to Stay

[3] The Government's motion to stay is based on concerns about the possible effects of discovery on the integrity of the related grand jury investigation. Some of these concerns would appear to be justifiable if plaintiffs insisted on pursuing the fairly wide net that they have indicated they intend to cast in discovery, *see* Def. Mem. at 14. Plaintiffs have also indicated that they are willing to narrow discovery to address those concerns, *see* Pl. Mem. at 20-21, however, and the court believes that an appropriately limited process will not

interfere with the related criminal proceedings.

Courts are often requested to limit civil proceedings arising out of the same or related transactions as those involved in a pending criminal proceeding. See, e.g., *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352, 353 (S.D.N.Y.1966); see also *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 380 n. 4 (D.D.C. 1977) (limiting civil discovery during grand jury investigation). When the Government requests such a stay, it is usually because of concerns that (1) the broad disclosure of the essentials of the prosecution's case may

(1) to perjury and manufactured evidence; (2) the revelation of the identity of prospective witnesses may create the opportunity for intimidation; and (3) the criminal defendants may unfairly surprise the prosecution at trial with information developed through discovery, while the self-incrimination privilege would effectively block any attempts by the Government to discover relevant evidence from the defendants. See *Founding Church of Scientology*, 77 F.R.D. at 381. The determination of how

to address these considerations is within the discretion of the court and should be made in light of the particular circumstances of each case. *Securities & Exchange Comm'n v. Dresser Industries*, 628 F.2d 1368, 1375 (D.C.Cir.) (en banc), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). Nevertheless, the Government is not entitled to any particular type of relief; the court may elect to stay the civil proceedings in their entirety, postpone discovery or impose appropriate protective orders and conditions. *Id.*

In this case, the possible areas of investigation may be divided into two categories: those events occurring before the Marcianos propounded their discovery requests

11. The Government has raised its specific concerns and other legal arguments in its *in camera* submissions, which cannot be addressed in this opinion. These are discussed separately in a sealed addendum to this opinion, a copy of which has been provided to the Government.

12. For example, most of the areas of concern are completely irrelevant to the issues underlying this lawsuit and may, accordingly, be ex-

and those occurring thereafter. Based upon a review of the *in camera* submissions, the court has determined that the grand jury's investigation has no relation to the events in the latter category, so that plaintiffs could discover, for example, the process by which the Government interpreted the discovery documents and orders and the circumstances surrounding the actual inspection and disclosure of the seized documents. Therefore, it may proceed in these limited areas without posing any threat to the grand jury investigation.¹¹ See *Texaco, Inc. v. Borda*, 383 F.2d 607, 608-10 (3d Cir.1967) (staying discovery except for deposition of one individual).

The court recognizes that some witnesses with knowledge of properly discoverable facts may also have knowledge of facts pertaining to the criminal investigation that should not be revealed. Moreover, there may be instances in which the mere act of asserting the right not to answer certain questions may be revealing in and of itself. Nevertheless, based on the information presently before the court it appears that such concerns may be addressed with appropriate limiting orders.¹² In any event, almost all of the relevant facts are undisputed, which should obviate the need for very extensive discovery.

III. Request for Sanctions

[4] In a tactic becoming all too familiar, plaintiffs have attempted to bolster their meritorious response to the Government's motions with an utterly frivolous and unwarranted request for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. That request is summarily denied. In addition, the court finds that by bringing a Rule 11 motion plaintiffs have contravened the very standards that they have accused the Government of violating.

cluded from discovery. In addition, once the permissible areas of investigation are determined, the government may be able to produce witnesses whose knowledge is limited only to these areas. If necessary, the court may allow plaintiffs to explore certain areas only through interrogatories, which will provide the government a significant degree of control in framing responses.

Accordingly, on its own motion, the court finds plaintiffs to be in violation of Rule 11 and imposes sanctions.

Aside from the fact that their motion has no legally cognizable basis in law or fact, plaintiffs have completely disregarded the court's participation in the Government's decision to file its motions. During a conference before Judge John M. Walker of this court, the Government sought and was granted permission to move to dismiss the complaint on the grounds addressed in this opinion. See Declaration of Helen M. Toor, executed July 29, 1988, ¶¶ 3-4 ("Toor Declaration"). Plaintiffs concede that Judge Walker "did state that the motion to dismiss raised issue as to the legal validity of the complaint and would have to be decided." Layton Aff. ¶ 8. Plaintiffs dispute the Government's claim that Judge Walker also authorized the motion to stay, see Toor Declaration ¶¶ 3-4, but they do not contend that the Government was in any manner denied permission to file such a motion. See Layton Aff. ¶ 7. During the conference, Judge Walker apparently suggested that discovery might be able to proceed under conditions such as those articulated in this opinion, see Layton Aff. ¶ 8, but he also apparently considered the issues raised by the anticipated motions significant enough to merit a stay of discovery pending their resolution. Toor Decl. ¶ 5.

Relations between plaintiffs and the Government have been somewhat contentious. See, e.g., Letter from Robert Layton, Esq. to Helen M. Toor, Esq., dated June 7, 1988 (Layton Aff. Exh. B) ("Layton letter"); Letter from Helen M. Toor, Esq. to Robert Layton, Esq., dated June 14, 1988 (Layton Aff. Exh. C) ("Toor letter"). For example, each side accuses the other of misrepresenting prior conversations. See Toor Letter at 1-2; Toor Decl. ¶¶ 2, 8; Layton Aff. ¶ 7. This may have been a contributing but improper factor in plaintiffs' decision to seek sanctions. Furthermore, plaintiffs had been trying without success to move discovery along and were clearly frustrated by the possibility of a new reason for delay. See Layton Aff. ¶¶ 2-6. This might have led them to hope that including a Rule 11 motion would con-

vince the court of the strength of their arguments and prompt a summary denial of the Government's motions.

In an effort to dissuade the Government from filing the motions, plaintiffs drafted a brief letter citing two cases supporting its own belief that the exemption argument was "meritless." See Layton letter at 3. Plaintiffs now claim that they also raised the issue of Rule 11 sanctions at some point before the Government filed its motions. See Layton Aff. ¶ 9. There is no indication in any of the correspondence that this occurred, however, and the Government claims that the issue did not actually surface until several days before plaintiffs' responses to the Government's motions were due. See Toor Decl. ¶ 8.

The Government eventually filed its motions accompanied by a seventeen-page brief and several declarations, one of which was submitted for *in camera* review only. In their opposing brief, plaintiffs requested Rule 11 sanctions, arguing that the Government's motion to dismiss was "repudiated by the language of the statute, the legislative history of the Privacy Act, and by all the cases cited by its own counsel." Pl. Mem. at 24-25. They also argued that the motion to stay was "even more frivolous" since—as they characterized it—Judge Walker had "frowned" during the conference on the Government's interest in a stay. *Id.* at 25. Plaintiffs also argued that "by its failure to do more than argue for the stay in abstract terms and with bare allegations, defendant implicitly concede[d] that it has no factual basis to support its claim that discovery in this civil action will interfere in some way with the Government's criminal investigation." *Id.*

Plaintiffs' request for sanctions under Rule 11 was completely unwarranted under either of the grounds asserted. Under Rule 11 an attorney's signature on a motion signifies

that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the exten-

sion, modification, or reversal of existing law, and that it is not interposed for any improper purpose....

Fed.R.Civ.P. 11.

[5, 6] Requests for sanctions seek court orders and are, therefore, subject to the same Rule 11 analysis as all other motions. See Fed.R.Civ.P. 7(b), 11. The Court of Appeals of this Circuit has indicated that sanctions shall be imposed whenever "it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands...." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985), *cert. denied*, — U.S. —, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987). In determining whether requests for sanctions constitute independent violations of the Rule, courts must determine whether at the time the request was signed a competent attorney would have concluded that it "was destined to fail." *Id.*, 762 F.2d at 254; see *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir.1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987). If this would have been the case, then pursuing it constitutes a violation of Rule 11, mandating the imposition of sanctions. See *Eastway*, 762 F.2d at 254 & n. 7.

[7] An attorney who contemplates filing a Rule 11 motion must consider the very liberal standards that will govern the court's review of the validity of the substantive motion under attack. As the *Eastway* court stated, Rule 11 is "not intend[ed] to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law." 762 F.2d at 254. Accordingly, courts are generally very lenient in deciding whether the target motion was justifiable at the time it was signed. For example, the Sec-

ond Circuit has held that "[c]ourts must strive to avoid the wisdom of hindsight" and has mandated that "any and all doubts must be resolved in favor of the signer." *Id.* A leading treatise also cautions: "sanctions are inappropriate where there are differing interpretations of the law or where contrary controlling authority is not obvious. In determining whether a filing is frivolous, courts are to resolve ambiguities in favor of the filing party." 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 11.02[3] (2d ed. 1987) (footnotes omitted). Before filing a Rule 11 motion, an attorney must also examine the target document under these very forgiving standards.

[8] In their zeal to underscore the strength of their responses to the Government's motions, plaintiffs failed to heed that directive. Although their logic was appealing, there was scant authority for plaintiffs' position. The language of the Act was, at best, ambiguous. Moreover, the issue raised in the Government's motion to dismiss had been addressed in only one other case, in another circuit, and there was dictum, at least, in the cases of other circuits that would have supported the Government's interpretation.¹³ Finally, the Government's position was supported by an arguable interpretation of Justice Department regulations that could have been promulgated only if that agency had first determined that the Act permitted the kind of exemption claimed in this case. Therefore, it should have been clear to plaintiffs that there was an ample basis for the Government to file the motion to dismiss.

Similarly, the Government had sufficient grounds upon which to assert its motion to stay. Plaintiffs' allegations that the lack of detail revealed a lack of merit completely disregarded the constraints under which the Government was able to disclose its

ment Group, 854 F.2d 1452, 1472 (2d Cir.1988); *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir.1986). *Contra Robinson v. Nat'l Cash Register Co.*, 308 F.2d 1119, 1127 (5th Cir.1987); see *Calloway*, 854 F.2d at 1470 n. 6 (noting contrary authority). Accordingly, the subsection (i) argument cannot be a factor in determining the validity of plaintiffs' request. But see *infra* note 14.

13. The Government's strongest argument—that concerning subsection (i)—was not raised until after plaintiffs had filed their request for sanctions. Therefore, it would be unreasonable to presume that they were, or should have been, aware of it when they signed their request. In this circuit, attorneys have no continuing obligation under Rule 11 to update previously filed documents. See *Calloway v. Marvel Entertain-*

factual support. At the time that the Government filed its motions, plaintiffs were well aware of its concerns about the possible impact of this case on the related grand jury proceedings. See *Layton-Aff.* ¶¶ 7-8. Plaintiffs knew that the Government had submitted supporting evidence for *in camera* review only, see Letter from Helen M. Toor, Esq. to Hon. John M. Walker, Jr., dated June 24, 1988 (with copy to Robert Layton, Esq.); Notice of Motion to Dismiss or Stay, dated June 23, 1988, yet they acted as if these submissions were not even a part of the record. This lack of candor was unjustifiable.

To have succeeded on their motion, plaintiffs needed to establish that the Government's motions were so weak that reasonable attorneys could not have disagreed on their eventual outcome. Their own actions suggest that they did not possess that confidence. One might have expected that a motion that was so meritless as to deserve sanctions would warrant only a one- or two-page memorandum recommending dismissal. Yet plaintiffs felt compelled to file a twenty-seven-page brief and two affidavits in opposition. Furthermore, when the Government was provided the opportunity to present oral argument on its motions, it indicated that it did not wish to do so. See Letter from Robert DeBerardine, Esq., to Hon. John M. Walker, dated July 20, 1988. Knowing this, plaintiffs still specifically requested oral argument, *id.*, actions that spoke louder than the words they used in their request for sanctions. Cf. *Oliveri*, 803 F.2d at 1280 (denying sanctions when "defendants waited until after jury selection before moving to dismiss those claims they now urge to be so patently frivolous as to require sanctions for merely asserting them").¹⁴

It is not enough that plaintiffs subjectively perceived the Government's arguments to have been unpersuasive, even

manifestly so. See *Eastway*, 762 F.2d at 253. The relevant inquiry was whether the proper disposition was so overwhelmingly clear that no reasonable attorney could have concluded that the target motion had any chance of success. *Id.* Plaintiffs misguidedly believed that the ambiguities in the Act were so clearly outweighed by indirect evidence in the legislative history and the lone opinion of another jurisdiction that a second court passing on the matter could not possibly have disagreed with this analysis. The depth of analysis in this opinion attests to the fact that this court, at least, did not find the answer to be that obvious.

Plaintiffs' request is not protected by the lenient standards governing the review of target motions in a typical Rule 11 determination. As noted above, those standards are designed to foster the creativity necessary for effective advocacy on the merits of a case. See *Eastway*, 762 F.2d at 254. There is no reason to encourage creativity in formulating Rule 11 requests. If anything, such litigation should be discouraged since it only detracts from "the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. In this case the Government had to seek an additional three days to respond specifically to the request for sanctions. See Letter from Helen M. Toor, Esq., to Hon. John M. Walker, Jr., dated July 25, 1988. The response covered five of the nineteen pages of the Government's reply brief. The Office of the United States Attorney can no more afford the time to respond to meritless motions than can any other law firm or business. Forcing it to devote any time to this frivolous request for sanctions caused a regrettable waste of resources, precisely the type of result that Rule 11 was designed to avoid.

In addition, requests for sanctions necessarily carry with them accusations of

14. Once plaintiffs requested argument, the government attended and argued not only in support of its motions but in opposition to the Rule 11 motion. Counsel for plaintiffs chose not to address the Rule 11 issue and stood silently when the Government rhetorically asked whether plaintiffs were still pressing the

point. By this time, plaintiffs were aware of the merit of the Government's subsection (i) argument. Had they declined an *express* request to withdraw the motion at this point, they would have independently violated Rule 11 for pursuing a motion after learning that it had become groundless. *Calloway*, 854 F.2d at 1472.

wrongdoing on the part of an attorney, which can breed personal animosity between counsel. Cf. *Oliveri*, 803 F.2d at 1280 (stating that "[c]ourts should be sensitive to the impact of sanctions on attorneys. They can be economically punishing, as well as professionally harmful"). Memorializing attacks upon the competence or integrity or another lawyer in a Rule 11 request only reduces the opportunities for future cooperation. In this case, for example, plaintiffs stated that "the sole purpose of this motion is to delay prosecution of this action." Pl. Mem. at 23. They further commented that "[i]t is, to put it mildly, extremely questionable whether the Government's motion to stay this action ... was made in good faith." *Id.* at 25. In fact, the conduct of the Assistant on this matter has been nothing less than exemplary. Her well-reasoned arguments certainly provided no hint of the improper motives that plaintiffs have tried to impute. Allowing adversaries an unrestricted ability to initiate a process in which competent attorneys must justify, under the threat of sanctions, actions taken in good faith, does not serve the purposes of Rule 11. The Rule was intended to reduce, rather than contribute to, such abuse of the legal system. That is why requests for sanctions must be treated seriously and controlled appropriately.

[9,10] A request for sanctions under Rule 11 is not a tactical device. Asserting a request for strategic reasons when there is any colorable argument supporting an adversary's position constitutes an "improper purpose" within the meaning of the Rule. When a substantive motion is involved, courts are best able to rule on requests for sanctions after deciding the underlying motion. See Fed.R.Civ.P. 11 advisory committee's notes to 1983 amendment (stating that requests for sanctions will be determined "in the case of motions at the time when the motion is decided or shortly thereafter"). Attorneys who choose to submit marginal requests for sanctions before that time, in the misguided hope that they will help persuade the court on the merits, run a risk of violating the Rule. No matter when a request is

made, however, if, as in this case, it is patently clear at its inception that it is doomed to fail, pursuing it will constitute an independent violation of the Rule, mandating the imposition of appropriate sanctions. See *Eastway*, 762 F.2d at 254.

CONCLUSION

For the reasons discussed above, the Government's motions to dismiss and stay and plaintiffs' request for sanctions are denied. Plaintiffs are ordered to submit to the Government and the court, within ten days of the date of this opinion, a list of proposed deposition witnesses and anticipated areas of inquiry. The Government must notify the court of any objections to plaintiffs' submission within five days after their receipt, and may do so *in camera* if desired. Discovery is stayed until such time as the court issues appropriate protective orders and, if necessary, schedules a conference to establish the parameters of discovery. The Government may submit certain pleadings *in camera* under the conditions described in the sealed addendum to this opinion. If warranted, the court may then grant leave to the Government to renew its application for a stay.

The court finds counsel for plaintiffs to be in violation of Rule 11 and orders them to compensate the Government for the costs, including attorney's fees, reasonably incurred in responding to the request for sanctions. Accordingly, the Government is ordered to submit to plaintiff and the court, within ten days of the date of this opinion, an accounting of its expenses. If plaintiffs have any objections to the Government's estimate they must file them within five days of their receipt.

So Ordered.



NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., Plaintiff,

v.

A.M. and Patsy DELOACH and 43 related cases (Barrick Jacksonville Limited Partnership, Case Nos. 86 Civ. 2272, 2284, 2285, 7206, 7207, 7208, 7209, 7210, 7211, 7212, 7213, 7214, 7215, 7216, 7217, 7218, 7219, 7220, 7221, 7222, 7223, 7224, 7229, 7244, 7245, 7246, 7247, 7248, 7249, 7250, 7251, 7252, 7253, 7254, 7255, 7256, 7257, 7332, 7504, 7506, 7507, 7529, 8546), Defendants.

Nos. 86 Civ. 2271 (LLS), 86 Civ. 2272, 86 Civ. 2284, 86 Civ. 2285, 86 Civ. 7206—86 Civ. 7224, 86 Civ. 7229, 86 Civ. 7244—86 Civ. 7257, 86 Civ. 7332, 86 Civ. 7504, 86 Civ. 7506, 86 Civ. 7507, 86 Civ. 7529 and 86 Civ. 8546.

United States District Court,
S.D. New York.

Feb. 25, 1989.

Financial guarantee surety of limited partners brought suit against partners to recover on notes which it had guaranteed, under either indemnity provision of surety agreement or as subrogees of notes. Partners asserted aider and abettor securities violation, state fraud, and third-party counterclaims. The District Court, Stanton, J., held that: (1) limited partnership was not agent of financial guarantee surety which would impose aider and abettor liability for partnership's violations of securities law; (2) surety's failure to disclose information regarding financial instability of limited partnership did not impose aider and abettor liability on it; (3) there was no evidence that surety made insertions, deletions, or alterations to partnership confidential private placement memorandum; (4) state law counterclaims were not valid; and (5) partners could not assert third-party counterclaim.

So ordered.

1. Principal and Surety ¶66(1)

Financial guarantee surety to individual limited partners did not have duty to disclose information about limited partnership's financial instability and potential wrongdoings to partners, but merely had duty to cure limited partners' defaults on their notes assigned by partnership to lender should they occur.

2. Securities Regulation ¶60.41

Limited partnership was not agent of individual limited partner's financial guarantee surety sufficient to impose aiding and abetting securities liability on surety following partnership's failure to abide by agreement and pay partners' interest payments under partnership agreement to lender to whom partners' notes had been assigned, notwithstanding partnership's assistance in obtaining individual partners' signatures on surety forms and its collection of surety premium payments. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

3. Securities Regulation ¶60.41

Absent evidence that financial guarantee surety of individual limited partners made insertions, deletions, or alterations to partnership confidential private placement memorandum, limited partnership was not considered agent of surety which would impose aider and abettor security liability on surety for any of partnership's securities law violations. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

4. Securities Regulation ¶60.41

To establish aiding and abetting liability counterclaim under federal securities laws, defendants must prove three elements: securities law violation by primary party, scienter on part of aider and abettor, and substantial assistance by aider and abettor in primary violation. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

5. Securities Regulation ¶60.45(2)

Required degree of scienter and assistance necessary to find party liable for security violations as aider and abettor varies according to whether alleged aider and

some other way directly participated in the misconduct. *Hays, supra*, at 874.

Defendant Chapman argues in his brief that he should not be held liable because of this higher standard set out in *Hays*. The Supreme Court in *Parratt* clearly rejected this higher threshold standard. Liability on negligence is sufficient, and the *Parratt* case undermines our decision in *Hays*. We need not decide, however, whether the District Court correctly found that Director Chapman was guilty of simple negligence by failing to prevent the assault on the plaintiffs. We need not reach this question because Director Chapman is protected by the qualified immunity.

In *Procunier, supra*, the Supreme Court reaffirmed that governmental officers have immunity if they acted in good faith:

It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 562, 98 S.Ct. at 859-860 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

[2] Director Chapman acted in good faith and is accordingly entitled to immunity. The record is clear that he knew nothing whatsoever about Officer Allen—including Allen's instability. Director Chapman assumed his office only six months prior to the incident with the plaintiffs. He was in the process of instituting significant changes to stop police brutality in Memphis. He played no personal role in the actual incident; he executed his supervisory functions in good faith and with diligence in order to prevent just this type of citizen abuse. We can find no indication in the record that he acted with anything other than good faith during his short tenure in office prior to the incident.

[3] The plaintiffs' argument that the qualified immunity is inapplicable simply because they sued Chapman in his official capacity is unavailing. Under *Owen v. City*

of *Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), a municipality is not entitled to claim the qualified immunity that the city's agents can assert. But this is a suit against an individual, not the city. In reality, plaintiffs are attempting to amend their complaint so as to treat the Police Director as though he were the City in order to avoid the qualified immunity which shields Director Chapman. Such an argument is without support in precedent or reason.

III. The Damages Issue

In his Report and Recommendation on damages, the Magistrate refused to allow plaintiffs' damage award against Allen to reflect the fact that the injury to their dignity, the insult to their person was greater because the assault was carried out by a police officer acting under color of law. The Magistrate based this decision on *Carey v. Phipus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), which holds that a successful plaintiff in a procedural due process § 1983 action is entitled to recover only nominal damages in the absence of proof of actual injury. The Court observed that although the law recognizes the importance to organized society that certain "absolute rights" be protected, "substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights." *Id.* at 266, 98 S.Ct. at 1054. Citing the *Phipus* Court's emphasis on actual injury and the compensation principle, the Magistrate and the District Court appear to have concluded that damages may only include actual or special damages for the physical injury involved and may not reflect injury to the dignity of the person which arises when a police officer under color of law assaults a citizen.

[4] We believe that the Magistrate erred in refusing to consider fully the nature of the wrong in measuring damages. In addition to providing compensation for plaintiffs who incur tangible physical or economic injury, the common law for centuries has permitted recovery for invasions of

a wide array of intangible "dignitary interests;" in such cases, injury is presumed. See D. Dobbs, *Law of Remedies* § 7.3, at 528 (1973). The *Phipus* case has not disturbed this principle as it pertains to constitutional tort actions in general. On the contrary, the Supreme Court stressed that common law rules "defining the elements of damages and prerequisites for their recovery provide the appropriate starting point for the inquiry under § 1983 as well." *Carey v. Phipus, supra*, 435 U.S. at 257-58, 98 S.Ct. at 1049. Moreover, the Court explicitly limited its decision in *Phipus* by noting that "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 264-65, 98 S.Ct. at 1053.

Unlike *Phipus*, the instant assault and battery case entails actions by a Memphis police officer which clearly violated plaintiffs' substantive rights to enjoy the security of life and limb. At common law, general as distinguished from special damages were allowed. See D. Dobbs, *supra*, at 528. In such cases, two other circuit courts have held that § 1983 plaintiffs may recover substantial general money damages as compensation for the wrong. See *Corriz v. Naranjo*, 667 F.2d 892, 897-98 (10th Cir.1981), *cert. dismissed*, — U.S. —, 103 S.Ct. 5, 73 L.Ed.2d 1394 (1982); *Herrera v. Valentine*, 653 F.2d 1220, 1227-31 (8th Cir.1981). We agree with the Tenth and Eighth Circuits that there is a qualitative and quantitative difference between injury suffered as a result of a wrong for which the common law did not allow general damages and an injury resulting from an intentional battery by a police officer. This common law distinction must continue to play a role in the awarding of compensatory damages in § 1983 actions. See D. Dobbs, *supra*, at 531 (1973).

We, therefore, reverse the District Court's judgment regarding compensatory damages and remand the case so that the nature of the wrong may be considered in computing plaintiffs' compensatory damage

award. Because of our holding in Part I of this opinion that defendant Chapman is immune to this suit, the remand regarding damages pertains only to defendant Allen.

Accordingly, the decision of the District Court is reversed and the case remanded for further proceedings consistent with this opinion.



Richard L. WINDSOR,
Plaintiff-Appellant,

v.

THE TENNESSEAN, et al.,
Defendants-Appellees.

No. 81-5668.

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 12, 1982.

Decided Oct. 12, 1983.

Rehearing Denied Jan. 23, 1984.

Former assistant United States attorney brought action against newspaper, newspaper's publisher, two of newspaper's employees, and former United States attorney under federal and state law to recover damages arising out of his dismissal from federal employment. The United States District Court for the Middle District of Tennessee, William K. Thomas, J., entered an order dismissing federal constitutional and statutory claims and remanding state claims, with one exception, to state court from which action had been removed. An appeal was taken from dismissal of the federal constitutional and statutory claims. The Court of Appeals, Contie, Circuit Judge, held that: (1) assistant United States attorney was not entitled to procedural due process before being terminated; (2) assistant United States attorney failed to state a claim under statute providing

rules governing what information a federal agency may keep about employees, circumstances and procedures under which information may be released, and safeguards required in order to insure that all information is accurate; (3) conspiracy to harm assistant United States attorney's reputation on account of lawful discharge of his duties was actionable under civil rights statute; and (4) all defendants had a valid defense to action under civil rights statute.

Affirmed.

Opinion on Rehearing, 6th Cir., 726 F.2d 277.

George Clifton Edwards, Jr., Chief Judge, concurred and filed an opinion.

Moynahan, Chief District Judge, sitting by designation, concurred in part, dissented in part, and filed an opinion.

1. Federal Civil Procedure $\Rightarrow$ 1835

When evaluating a motion to dismiss for failure to state a claim upon which relief can be granted, factual allegations in complaint must be regarded as true. Fed. Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Civil Procedure $\Rightarrow$ 1773

A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

3. Constitutional Law $\Rightarrow$ 277(2), 278.4(3)

In view of fact that United States Attorney General's power to remove assistant United States attorneys is unconditional, removed assistant United States attorney possessed no legitimate property or liberty entitlement in his position which would entitle him to procedural due process before being terminated. U.S.C.A. Const.Amend. 5; 28 U.S.C.A. § 542(b).

4. Records $\Rightarrow$ 31

In view of fact that term "agency" in civil damage action section of statute providing rules concerning what information a federal agency may keep about employees, circumstances and procedures under which

that information may be released, and safeguards required in order to insure that all information is accurate does not encompass individual government officials such as United States attorneys, assistant United States attorney's suit under such statute against United States attorney would be dismissed for failure to state a claim upon which relief could be granted. 5 U.S.C.A. § 552a; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

5. Conspiracy $\Rightarrow$ 18

Complaint alleging conspiracy to harm assistant United States attorney's reputation on account of lawful discharge of his duties stated claim upon which relief could be granted under civil rights statute. 42 U.S.C.A. § 1985(1).

6. Conspiracy $\Rightarrow$ 7.6

Conspiracy to harm a federal official's reputation on account of lawful discharge of his duties or while engaged in lawful discharge thereof is actionable under civil rights statute. 42 U.S.C.A. § 1985(1).

7. Conspiracy $\Rightarrow$ 13

Where the two telephone conversations between a private citizen and United States attorney which assistant United States attorney alleged were part of scheme to defame him and thereby procure his discharge occurred months before alleged conspiracy, conversations could not be considered part of scheme, and private citizen could not be liable under civil rights statute for making the calls. 42 U.S.C.A. § 1985(1).

8. Constitutional Law $\Rightarrow$ 91

A private person who conspires deliberately to defame a federal official in order to discredit that official in eyes of his superiors is not protected by First Amendment right to petition for redress of grievances. (Per Contie, Circuit Judge, with one Judge concurring in result). U.S.C.A. Const. Amend. 1; 42 U.S.C.A. § 1985(1).

9. Constitutional Law $\Rightarrow$ 91

In assistant United States attorney's action against newspaper and two of newspaper's employees under civil rights statute, First Amendment right to petition for re-

dress of grievances did not protect newspaper and its employees from suit for their part in alleged conspiracy to defame a federal official. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1985(1).

10. Judgment $\Rightarrow$ 828(3.49)

Where Tennessee Court of Appeals had previously held that newspaper articles which formed basis of assistant United States attorney's action against newspaper, newspaper's publisher, and two employees of newspaper for conspiring to harm a federal official's reputation were not defamatory, assistant United States attorney was collaterally estopped in federal litigation from proving that newspaper articles were defamatory. 42 U.S.C.A. § 1985(1).

11. Civil Rights $\Rightarrow$ 13.8(1)

United States $\Rightarrow$ 50

Generally, executive branch officials are entitled only to qualified immunity from liability for violation of citizens' federal constitutional rights save in those exceptional situations where it is demonstrated that absolute immunity is essential for conduct of public business.

12. Civil Rights $\Rightarrow$ 13.13(1)

United States $\Rightarrow$ 50

Federal official seeking absolute immunity from liability for violation of citizens' federal constitutional or statutory rights bears burden of showing that public policy requires an exemption of that scope.

13. District and Prosecuting Attorneys $\Rightarrow$ 10

Since duty of recommending hiring or firing of assistant United States attorney is a classic example of an administrative function, United States attorney was not entitled to absolute immunity for alleged violation of assistant United States attorney's federal statutory rights arising out of latter's dismissal.

14. Conspiracy $\Rightarrow$ 13

Where, at time United States attorney took actions alleged by assistant United States attorney to have constituted conspir-

acy to defame him and effect his discharge, a reasonable person would not have known that an agreement to defame a federal official in order to effect that person's discharge from federal employment violated civil rights statute, United States attorney did not transgress a clearly established federal statutory right, and was entitled to immunity from liability. 42 U.S.C.A. § 1985(1).

Robert L. Huskey, Manchester, Tenn., for plaintiff-appellant.

Joe B. Brown, U.S. Atty., Aaron Wyck-off, Nashville, Tenn., Barbara L. Herwig, R. Joseph Sher (argued), Civ. Div., Torts Branch, Washington, D.C., Alfred H. Knight, III (argued), Marian F. Harrison, Nashville, Tenn., for defendants-appellees.

Before EDWARDS and CONTIE, Circuit Judges, and MOYNAHAN, Chief District Judge.*

CONTIE, Circuit Judge.

Plaintiff Windsor, a former assistant United States attorney, appeals a district court order dismissing his complaint for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Appellees are *The Tennessean*, a newspaper; John Seigenthaler, its publisher; Wayne Whitt and Carol Clurman, two of the newspaper's employees; and Hal Hardin, former United States attorney for the Middle District of Tennessee. The complaint raises claims for damages under the fifth amendment's due process clause, under 42 U.S.C. § 1985(1), under 5 U.S.C. § 552a and under state law for defamation, malicious interference with employment and "outrageous conduct." The district court dismissed the federal constitutional and statutory claims. It remanded the state claims, with one exception, to the state court from which the action had been removed. Windsor does not appeal the remand. The state claims against Hardin were dismissed on the

Eastern District of Kentucky sitting by designation.

* The Honorable Bernard T. Moynahan, Jr., Chief Judge, United States District Court for the

ground of absolute immunity rather than remanded.

[1,2] When evaluating a motion to dismiss brought pursuant to rule 12(b)(6), the factual allegations in the complaint must be regarded as true. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247 (1965). The claim should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). Windsor's complaint alleges that the defendants conspired either to remove him from his position as assistant United States attorney (AUSA) or to force him to resign.

After Hardin was appointed United States attorney in 1977, Windsor, who had been appointed in 1974, accused Hardin of favoritism toward certain defendants, attorneys and political parties. Tension between the two increased because of separate incidents involving John Seigenthaler, publisher of *The Tennessean* and a prominent political figure. In early 1979, Windsor mentioned certain matters about Seigenthaler to a local government attorney. When Seigenthaler learned of this discussion, he called Hardin in anger and claimed that Windsor had disparaged him. In January, 1980, a grand jury witness told Seigenthaler that Windsor had presented evidence to the grand jury linking Seigenthaler to a bingo operation. The latter again became highly upset and complained vociferously to Hardin. Hardin then stormed into Windsor's office and demanded an explanation about why Seigenthaler's name had been mentioned before the grand jury. Plaintiff claims that after this time, Hardin feared Seigenthaler and tried to appease him.

1. Neither the Deputy Attorney General nor the other official are parties in this case.

2. The reasons were: 1) drafting a legally insufficient search warrant, 2) issuing grand jury subpoenas for previously suppressed evidence in defiance of a court order, 3) subpoenaing

In June, 1980, Windsor was called to testify at a suppression hearing in an insurance fraud case. During this proceeding, the trial Judge expressed concern about prosecutorial misconduct on Windsor's part. Allegedly seizing on the opportunity for revenge against the plaintiff, Seigenthaler caused *The Tennessean* to make "daily fanfare" of these charges while ignoring plaintiff's thorough and satisfactory explanations. In addition, Windsor contends that the newspaper knowingly and/or recklessly made blatantly false statements about him for the dual purposes of injuring his reputation and pressuring Hardin to discharge him.

Hardin, "partially as a result of the pressure put upon him by [Seigenthaler] and partially due to his own friction with [the] Plaintiff joined with and conspired with the other Defendants" (App. at 19) to force Windsor from his job. In furtherance of this conspiracy, Hardin had the insurance fraud case dismissed and the newspaper continued to print defamatory material about plaintiff. In July, 1980, Hardin attended a United States attorneys conference in Oregon. At this meeting, and in furtherance of the conspiracy, Hardin presented to the Deputy Attorney General of the United States and another high official the false and defamatory news articles. He suggested that Windsor be terminated. Hardin also prepared a letter addressed to the plaintiff which stated four reasons for the discharge.²

Windsor was next ordered to go to Washington, D.C. in order to meet with Deputy Attorney General Renfrew. Renfrew purportedly told Windsor that the latter was not entitled to due process and that all factual determinations had been made. Plaintiff was given the option of resigning within ten days or being fired and having the damaging letter placed in his personnel

himself to the grand jury and then presenting suppressed evidence and 4) drafting a discourteous memorandum to the court. Windsor contests the validity of all of these grounds for termination which allegedly were based on articles in *The Tennessean*.

file. Several days later, Windsor resigned and the letter was discarded. Windsor sued in state court and the action was removed on December 31, 1980.

I.

[3] Windsor initially contends that he was entitled to procedural due process under the fifth amendment before being terminated. The district court found, however, that since plaintiff possessed no legitimate property or liberty entitlement, due process was not necessary. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 35 L.Ed.2d 548 (1972). We agree with the district court.

Windsor possesses no property entitlement because the Attorney General's power to remove assistant United States attorneys is unconditional. 28 U.S.C. § 542(b). This prerogative has in turn been delegated to the Deputy Attorney General, 28 CFR § 0.15(b)(3)(i), who exercised that authority in this case. When a supervisor possesses unconditional power to discharge a subordinate, that employee obviously has no entitlement to his job.

Nor does plaintiff possess a liberty interest. Such an interest could arise if false reasons for the discharge were publicly disseminated, thus stigmatizing Windsor and foreclosing other employment opportunities.

3. On appeal, plaintiff also claims that he is entitled to damages because the government did not follow the procedures required by 5 U.S.C. § 4303, a section of the Performance Rating Act. Since Windsor did not present this claim in his complaint and since the district court did not decide the question, we decline to consider the issue. Were we to decide, however, we would hold that section 4303 does not apply in this case. That statute deals with personnel actions based upon unacceptable performance ratings. The procedural safeguards mandated by that provision apply to removals and reductions in grade affected under that section. Windsor's termination was affected not under that section but under the Attorney General's unconditional power to discharge assistant United States attorneys. 28 U.S.C. § 542(b). Plaintiff therefore has no claim under 5 U.S.C. § 4303. Cf. *Schaefer v. United States*, 633 F.2d 945, 224 Ct.Cl. 541 (1980) (since the Veterans Preference Act and the Performance Rating Act provide separate means of terminating an employee, a discharge

See, e.g., *Roth*, 408 U.S. at 572-73, 92 S.Ct. at 2706-2707. Windsor does not allege, however, that the reasons for the discharge were publicly disclosed. Consequently, even if the reasons were untrue or fabricated, Windsor has not pleaded a protectible liberty interest in his professional reputation. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). Since Windsor has no protectible property or liberty interest in continued employment, this court need not discuss what process would be due were plaintiff to possess such an interest.

II.

In his amended complaint, Windsor seeks damages for an alleged violation of 5 U.S.C. § 552a.³ This statute provides rules concerning what information a federal agency may keep about employees, the circumstances and procedures under which that information may be released and the safeguards required in order to insure that all information is accurate. Windsor alleges that Hal Hardin improperly released inaccurate information from Windsor's personnel file in violation of section 522a(e)(5) and (10).⁴ Nevertheless, the district court correctly held that plaintiff has stated no claim upon which relief can be granted under that language.

under the Veterans Preference Act need not comply with the provisions of the Performance Rating Act).

4. These provisions read:

Agency Requirements. Each agency that maintains a system of records shall—

5. Maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

10. Establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial embarrassment, inconvenience, or unfairness to any individual on whom information is maintained....

[4] Section 552a sets forth remedies for violations of its provisions. A civil damage action may be brought solely against an "agency." 5 U.S.C. § 552a(g). The term "agency" does not encompass individual government officials such as Hardin. *Bruce v. United States*, 621 F.2d 914, 916 n. 2 (8th Cir.1980); *Parks v. United States Internal Revenue Service*, 618 F.2d 677, 684 (10th Cir.1980). Since Windsor has not sued the agency for which he worked and since Congress could have exposed individuals to civil liability under section 552a(g) but chose not to do so,⁵ plaintiff has not stated a claim under section 552a even if the defendants violated that section in this case.⁶

Windsor claims in the alternative, however, that by conspiring to violate section 552a(e)(5) and (10), the defendants infringed upon his constitutional right to privacy. This argument is without merit. While Windsor relies on a congressional finding in the Privacy Act of 1974 that the right to privacy is a personal and fundamental constitutional right, the district court correctly held that this finding does not transform every section 552a violation into a constitutional tort. The Supreme Court in *Paul v. Davis*, 424 U.S. 693, 712-13, 96 S.Ct. 1155, 1165-1166, 47 L.Ed.2d 405 (1976), held that its right to privacy cases prohibited certain restrictions on personal freedom in "matters relating to marriage, procreation, contraception, family relationships and child rearing and education." As was the plaintiff's claim in *Paul v. Davis*, Windsor's action is "far afield from this line of decisions" because the claim involves not a substantive restriction on Windsor's freedom in the areas delineated but rather a procedural constraint on the government's authority to collect, hold and distribute information about its employees. See *id.* at 713, 96 S.Ct.

5. If Congress had wanted to subject officials to individual liability, it knew how to do so: For instance, federal officials are subject to the criminal provisions of 5 U.S.C. § 552a(i).

6. We believe that no such infraction occurred. The gravamen of the complaint is that the defendants conspired to present the defamatory newspaper articles to the Deputy Attorney General in order to secure Windsor's discharge. These articles surely were taken, however, not

at 1166. Even if defendants transgressed section 552a, that violation would not implicate Windsor's constitutional right to privacy.

III.

Windsor also claims that the defendants violated 42 U.S.C. § 1985(1) by conspiring to injure the appellant "in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof...." The injury claimed is that defendants conspired to print and did print defamatory newspaper articles about Windsor, knowing the information to be false or with reckless disregard of its truth or falsity. These articles were then used to convince Justice Department officials in Washington, D.C., to terminate appellant. It should be noted that § 1985(1) provides only for damages. Accordingly, plaintiff may not seek reinstatement under that section and thereby circumvent 28 U.S.C. § 542.

Defendants initially contend that the complaint inadequately alleges conspiracy. While this point was raised before the district court, that court did not discuss it. Both the federal and private appellees argue that the complaint alleges not an agreement between Hardin, Seigenthaler and the other parties, but only a cause and effect relationship wherein Hardin acted independently in response to pressure from the private appellees. The complaint clearly alleges, however, that Hardin conspired and joined with the private defendants in order to drive Windsor from office (App. at 19). That Hardin's partial motive for joining the conspiracy may have been his fear of Seigenthaler cannot obscure the fact that he is alleged to have agreed. Furthermore,

from Windsor's personnel file, but from the public domain. Since defendants did not transgress section 552a, they would not be liable even if that section provided for individual liability in damages. Moreover, since no violation occurred, this allegation is irrelevant to the questions of section 1985(1) liability or of Hardin's possible immunity, although Windsor contends to the contrary.

Windsor claims that Hardin's personal dislike for appellant contributed to the decision to join.

[5] The private defendants also contend that appellant's conspiracy allegations are conclusory and are therefore inadequate. See *Blackburn v. Fisk University*, 443 F.2d 121, 124 (6th Cir.1971). Although the complaint does not state the exact time and place of the agreement, it does allege that Hardin and the other defendants were in contact with each other throughout the time period in question regarding the Windsor problem. Under the facts of this case, we hold that appellant has adequately pleaded conspiracy.

The district court held that the complaint does not state a claim upon which relief can be granted because section 1985(1) was intended by the 42nd Congress to deal only with violent or physical interference with a federal officer's ability to perform his job. See *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334-36 (7th Cir.1977), cert. denied, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977). Consequently, the court held that injuries to reputation are not actionable under section 1985(1).

[6] The Seventh Circuit in *Stern* no doubt stated that the problem upon which the 42nd Congress focused did not include unjustified attacks on a federal official's reputation:

It would, in fact, surprise us if any member of that Congress ever specifically contemplated the application of the provisions which became section 1985(1) to a conspiracy to defame and discredit a revenue officer to his superiors. [*Id.* at 1335.]

The *Stern* court nevertheless refused to hold that a conspiracy to defame an Internal Revenue Service officer, which resulted in an adverse employment action being tak-

7. The district court also held that the complaint does not state a cause of action because transgressions of section 1985(1) would also constitute violations of 18 U.S.C. § 372, a criminal provision and counterpart to section 1985(1) having nearly identical language. The court felt that holding persons and media organiza-

en against that officer, was not cognizable under section 1985(1) for that reason. Although post-civil war violence in the South induced Congress to act, it responded by passing a statute "cast in general language of broad applicability ... and unlimited duration." *Id.* Moreover, construing section 1985(1) to encompass the claim raised in Windsor's complaint is consistent with the Supreme Court's approach toward the Reconstruction civil rights statutes. In *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 1796, 29 L.Ed.2d 338 (1971), for example, the court stated that those statutes should be accorded "a sweep as broad as their language." Defamation has long been regarded in American jurisprudence as an injury to the person. Hence we hold that a conspiracy to harm a federal official's reputation on account of his lawful discharge of his duties, or while engaged in the lawful discharge thereof, is actionable under 42 U.S.C. § 1985(1).⁷

In its opinion, the district court further expressed concern that exposing Seigenthaler to liability for telephoning Hardin in order to complain about Windsor would infringe upon Seigenthaler's first amendment right to petition for redress of grievances. The court again referred to *Stern*, which held that although it was otherwise possible to state a claim for conspiracy to defame a federal official under section 1985(1), no cause of action was stated in that case because the threats of suit and of potential liability imposed too great a burden upon the first amendment rights of the private persons who complained about IRS agent Stern. *Id.* at 1344.

[7, 8] We agree with the district court's conclusion but not its reasoning. Windsor admits (appellant's brief at 31) that since the two telephone conversations occurred

tions criminally liable for defamation would raise grave constitutional questions. Since no defendant in this case has been criminally prosecuted, however, the problem of construing 18 U.S.C. § 372 is not before us. We will await the appropriate case before dealing with that issue.

months before the alleged conspiracy, the conversations cannot be considered part of the scheme to defame the defendant and thereby to procure his discharge. Thus Seigenthaler cannot be liable under section 1985(1) for making the two telephone calls. We disagree, however, with the notion that a private person who conspires deliberately to defame a federal official in order to discredit that official in the eyes of his superiors is protected by the first amendment right to petition for redress of grievances.

In *White v. Nicholls*, 44 U.S. (3 How.) 266, 11 L.Ed. 591 (1845), the defendants wrote defamatory letters to the President of the United States in order to procure the discharge of the plaintiff, a federal customs officer. Upon being fired, White sued for libel, alleging that the defendants had transmitted what they knew to be false information. Defendants contended that their actions were absolutely protected by their rights to petition for redress of grievances and to comment upon the fitness of public officials. The court rejected their argument. Though one who unintentionally defamed an official when presenting a complaint would be protected, a person who deliberately did so would not. The court reversed and remanded the case for trial.⁸

Although *White v. Nicholls* obviously was not a section 1985(1) action, it is nonetheless analogous to the present case. In both cases, the complaint charged the defendants with deliberately attempting to procure the discharge of a federal official through defamation. Section 1985(1) additionally requires that a conspiracy be present. We therefore hold that the first amendment right to petition for redress of grievances does not protect from section 1985(1) liability those who conspire intentionally to defame a federal officer in order to effect that official's discharge. To the extent that *Stern* holds to the contrary, we decline to follow it.

8. *White v. Nicholls* has not been overruled. The Supreme Court cited the case fairly recent-

[9] For the same reason that the district court ruled that Seigenthaler could not be held liable for the two telephone calls, it held that *The Tennessean* and its employees could not be sued under section 1985(1) for their part in the alleged conspiracy. In light of the foregoing discussion of *White v. Nicholls*, this decision was error. The private appellees are of course entitled to the protections required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). They therefore may not be held liable for conspiring to print and use defamatory newspaper articles unless they knew the information contained in the articles was false or unless they printed the information with reckless disregard of whether it was true or false. Though the *New York Times* case dealt with state tort law, the rule annunciated is a constitutional test. We see no reason not to apply that test to section 1985(1) actions.

IV.

[10] Although the plaintiff has stated a cause of action under § 1985(1), we hold that each appellee has a valid defense. We first consider the private defendants. Subsequent to the oral argument in this case, the Tennessee Court of Appeals held that the newspaper articles which form the basis of Windsor's federal action were not defamatory under the *New York Times* test. *Windsor v. The Tennessean*, (Tenn.App., filed April 26, 1983). As to the private defendants, therefore, the plaintiff is collaterally estopped in the present litigation to prove that the articles are defamatory. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597-98, 68 S.Ct. 715, 719-720, 92 L.Ed. 898 (1948). Accordingly, the plaintiff's § 1985(1) claim against these defendants must fail; even if Hardin and the media defendants agreed to print and use the newspaper articles at issue in order to procure Windsor's discharge, they agreed to engage in constitutionally protected

ly. See *Herbert v. Lando*, 441 U.S. 153, 163 n.

Cite as 719 F.2d 155 (1)

speech. Such activity cannot form the basis of a § 1985(1) action.⁹

Whether Hardin is entitled to assert collateral estoppel is a question we need not reach because the § 1985(1) claim against him can be disposed of without reaching the merits. The district court held that Hardin is absolutely immune from liability in light of the plurality opinion in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). Plaintiffs in that case brought a common law libel action against a federal official over the contents of an unfavorable press release issued by that official. The Court held that because this discretionary conduct lay "within the outer perimeter of petitioner's line of duty," *id.* at 575, 79 S.Ct. at 1341, he was entitled to absolute immunity despite allegations of malice in the complaint. The district court applied *Barr* to the present case and held that since forwarding complaints about Windsor's conduct to the Deputy Attorney General was well within the scope of Hardin's duties, the latter was entitled to absolute immunity from liability under both state law and section 1985(1).

Insofar as it relied upon *Barr* in dismissing the state law claims against Hardin, the district court ruled correctly. See *Granger v. Marek*, 583 F.2d 781 (6th Cir.1978). The district court erred, however, in dismissing the § 1985(1) claim on the basis of absolute immunity. In reaching its decision, the district court distinguished *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). The Supreme Court held in *Butz* that although a federal official remained absolutely immune from liability under state tort law for discretionary actions done within the scope of his authority, such an official merited only qualified immunity for actions taken in violation of the federal constitution. The district court in the

present case reasoned that since Windsor has alleged a federal statutory violation rather than a federal constitutional violation, *Butz*, is inapposite and *Barr* controls. We disagree.

Although *Butz* involved solely a constitutional violation, the court commented:

It is apparent also that a quite different question would have been presented had the officer [in *Barr*] ignored an express statutory or constitutional limitation on his authority. [*Id.* at 489, 98 S.Ct. at 2902 (emphasis supplied).]

Thus the court in *Butz* left open the possibility that federal officials would not be absolutely immune from liability for violating citizens' federal statutory rights. The court held that absolute immunity generally would not be available in such cases in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). *Harlow* involved a suit against Presidential aides Bryce Harlow and Alexander Butterfield for conspiring to have Fitzgerald discharged from his job with the Air Force. Plaintiff alleged that defendants were civilly liable for violating the first amendment and both 5 U.S.C. § 7211 and 18 U.S.C. § 1505. Although the court mentioned that *Barr* had granted federal officials absolute immunity from suits at common law, *id.* at 2733, the court held that federal officials who violate statutory or constitutional rights usually merit only qualified immunity. We therefore hold that *Barr* does not control the present case and that Hardin's absolute immunity claim must be evaluated in light of the more recent Supreme Court decisions.¹⁰

[11-13] The general rule is that executive branch officials are entitled only to qualified immunity save in "those excep-

10, 99 S.Ct. 1635, 1642 n. 10, 60 L.Ed.2d 115 (1979).

9. One might claim that the defendants could have conspired to defame the plaintiff in violation of § 1985(1) even though these particular newspaper articles were not defamatory. Since the only overt acts pleaded by Windsor were the publication and use of these articles, this potential argument must be rejected.

10. In fairness to the district court, *Harlow* and its companion case, *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), were decided after the decision in the present case. This court has held that *Harlow* applies retroactively. *Wolfel v. Sanborn*, 691 F.2d 270, 272 (6th Cir.1982).

tional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Butz*, 438 U.S. at 507, 98 S.Ct. at 2911. Federal officials seeking absolute immunity "bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 506, 98 S.Ct. at 2911; see also *Harlow*, 102 S.Ct. at 2733, 2735-36. Although the Supreme Court has held that the function of advocating for the conviction of criminal defendants is of such a nature that prosecutors enjoy absolute immunity in discharging that responsibility, *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976),¹¹ the courts of appeals have generally held that prosecutors acting in their investigative or administrative capacities merit only qualified immunity. See *Delums v. Powell*, 660 F.2d 802 (D.C.Cir.1981); *Mancini v. Lester*, 630 F.2d 990 (3d Cir.1980); *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir.1980), cert. denied, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981); *Lee v. Willins*, 617 F.2d 320 (2d Cir.1980), cert. denied, 449 U.S. 861, 101 S.Ct. 165, 66 L.Ed.2d 78 (1980); *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir.1979), cert. denied, 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981); *Jacobson v. Rose*, 592 F.2d 515 (9th Cir.1978), cert. denied, 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979). While the Supreme Court did not accept or reject the validity of this distinction in *Imbler*, 424 U.S. at 430-31, 98 S.Ct. at 994-995, it appeared willing to endorse the distinction in *Harlow*. 102 S.Ct. at 2735 n. 16. Since the duty of recommending the hiring or firing of assistant United States attorneys is a classic example of an administrative function, Hardin is not entitled to absolute immunity in this case.

This conclusion is buttressed by directly applying the criteria which the Supreme Court has found to be relevant in adjudicat-

11. Although *Imbler* involved a state prosecutor rather than a United States Attorney, this distinction is irrelevant. See *Harlow*, 102 S.Ct. at 2338-39 n. 30; *Butz*, 438 U.S. at 504, 98 S.Ct. at 2909.

ing immunity questions. A decision on immunity must be:

Predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. [*Imbler*, 424 U.S. at 421, 96 S.Ct. at 748.]

In addition, this court must consider public policy arguments. *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 2701, 73 L.Ed.2d 349 (1982).¹²

As has been indicated, prosecuting attorneys have traditionally been accorded absolute immunity only when performing their quasi-judicial functions. One justification for this protection is that prosecutors must be insulated from the threat of retaliatory lawsuits by disgruntled defendants. To permit such suits would deter government prosecutors from vigorously enforcing the law and would require those attorneys to spend inordinate amounts of time defending against civil liability. See *Butz*, 438 U.S. at 508-10, 98 S.Ct. at 2911-2912; *Imbler*, 424 U.S. at 424-25, 96 S.Ct. at 992.

Even though Hardin was performing only an administrative function in this case, he contends that he deserved protection from retaliatory lawsuits foreseeably stemming from the discharge of his duty to make personnel recommendations, favorable or unfavorable, to the Deputy Attorney General. In support of this claim, Hardin cites *Lawrence v. Acree*, 665 F.2d 1319 (D.C.Cir.1981), a section 1985(1) case in which a former regional commissioner of the United States Customs Service sued his superiors for conspiring to force him to resign. The complaint alleged that the defendants had filed an unwarranted adverse performance evaluation about the plaintiff. The court held the defendants absolutely immune because:

The strong governmental interest in having a frank and honest assessment of

12. The court in *Nixon* also held that constitutional and statutory provisions can be relevant to immunity questions. The parties have not cited, and this court has not found, any constitutional or statutory provision which would control this case.

federal employee work performance is absolutely essential to the proper rendering of federal services to our citizens. A supervisor's candid evaluation promotes efficient government by enabling an agency to identify and reward truly outstanding performance and to identify and correct, and on occasion dispense with, performance that is unsatisfactory. The judgment might be distorted if their immunity from damages arising from that decision was less than complete. [*Id.* at 1327.]

While this argument is not without force, it has been blunted by the *Harlow* decision. Of critical importance is that *Harlow* involved an alleged conspiracy to drive a plaintiff from federal employment. Yet the court accorded the defendants only qualified immunity. If Presidential advisors are only entitled to qualified immunity for their participation in personnel decisions, then United States Attorneys should be treated similarly.

Secondly, the burden of retaliatory lawsuits filed by former employees is reduced by the operation of the new qualified immunity standard promulgated in *Harlow*. The test is:

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [*Id.* 102 S.Ct. at 2738.]

The trial judge is to apply this purely objective test as a matter of law before discovery occurs. If the law which the defendant is alleged to have violated is clearly established, then the qualified immunity defense should fail and discovery should proceed. If the law is not clearly established, the defendant is immune. The court held that this procedure will adequately protect government officials from insubstantial claims which in the future can be resolved by summary judgment. *Id.* at 2739. The barriers to summary judgment presented by

the discarded mixed objective-subjective test, *id.* at 2737-38, no longer exist.

Another factor weighing in favor of qualified immunity is that Windsor has no remedy for the alleged injury caused by Hardin other than a section 1985(1) action; for we have already held that Windsor's constitutional, Privacy Act and state law claims against Hardin were properly dismissed. The presence or absence of alternative remedies has played an important role in the Supreme Court's decisions regarding official immunity. *Nixon*, 102 S.Ct. at 2706 n. 38. Furthermore, *Lawrence v. Acree* is distinguishable on this ground because the court in that case specifically found that plaintiff had an alternative remedy under the Performance Rating Act. 665 F.2d at 1327. Accordingly, we hold that former United States Attorney Hardin may only assert qualified immunity as set forth in *Harlow*.

Since Hardin's entitlement to immunity is a question of law, we will address the matter rather than require the district court to decide the point on remand. This court is unaware of any case in which a federal official has successfully been sued under section 1985(1) for conspiring to defame a subordinate and to effect the latter's discharge. Although the Seventh Circuit held in *Stern* that injuries to reputation are cognizable under section 1985(1), that case was dismissed upon first amendment grounds which we have declined to follow. Nor were the defendants in that litigation employed in government service.

[14] Consequently, we hold that a reasonable person would not have known in 1980 that an agreement to defame a federal official in order to effect that person's discharge from federal employment violated section 1985(1). Since Hardin did not transgress a clearly established federal statutory right, *Harlow* requires immunity for Hardin in the present case. Similar violations by federal officials or employees will, however, be actionable in the future.

V.

The district court properly dismissed Windsor's claims against all defendants

which were based upon the federal constitution and 5 U.S.C. § 552a. It also correctly dismissed the state law claims against Hardin. Although the plaintiff has stated a claim under 42 U.S.C. § 1985(1), each appellee possesses a complete defense. Accordingly, the judgment of the district court is **AFFIRMED**.

GEORGE CLIFTON EDWARDS, Jr.,
Circuit Judge, concurring.

I concur in Judge Contie's opinion for the court. I write separately only to note that I would accept the First Amendment reasoning of the majority in *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-43 (7th Cir.1977), cert. denied, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977), as alternative ground for support of the conclusion set forth in Section V. of Judge Contie's opinion.

MOYNAHAN, Chief District Judge, concurring in part and dissenting in part.

I concur in the result reached in Judge Contie's opinion, but dissent from that portion thereof which holds that the defendant, Hardin, was not entitled to claim absolute immunity in connection with the § 1985(1) claim.

I am convinced that subjecting the United States Attorney to potential liability for relaying complaints regarding the actions of his Assistant to a Deputy Attorney General is a dangerous precedent and represents a serious erosion of the powers and responsibilities of the United States Attorney.

I am further convinced that such disposition of this case may well provoke extensive litigation and necessitate diversion of the Prosecutor's efforts from the duties of his office to defending himself against baseless suits by disgruntled employees.

I find nothing in the cases cited in the majority opinion, including *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) which militates against this conclusion.

As this expressly prospective ruling promulgated by the majority opinion is of critical importance to the Officers of the Criminal Justice System, I question whether it should be disposed of by a panel rather than by the full Court.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Randall Lewis CROWDER,
Defendant-Appellant.

No. 81-5186.

United States Court of Appeals,
Sixth Circuit.

Argued June 20, 1983.

Decided Oct. 13, 1983.

Defendant was convicted in the United States District Court for the Western District of Kentucky, James F. Gordon, J., of two counts of interstate transportation of a motor vehicle, and two counts of receiving, concealing and storing a motor vehicle moving in interstate commerce, knowing it to have been stolen, and he appealed. A panel of the Court of Appeals, 691 F.2d 280, reversed, but on rehearing, the Court of Appeals, Lively, Chief Judge, held that: (1) testimony that defendant told FBI agent he did not desire to discuss matter for which he was arrested and that he chose to stand by his statement to state police did not violate defendant's Fifth Amendment right to remain silent, and thus was admissible, and (2) error in instruction that, *inter alia*, man is held to intend natural consequences which flow from his own acts, was harmless.

Affirmed.

Contie, Circuit Judge, filed opinion concurring in part and dissenting in part.

John W. Peck, Senior Circuit Judge, dissented and filed an opinion in which Keith and Jones, Circuit Judges, joined.

1. Criminal Law — 407(1)

Testimony that defendant told FBI agent he did not desire to discuss matter for which he was arrested and that he chose to stand by his statement to state police did not violate defendant's Fifth Amendment right to remain silent, and thus was admissible, because defendant never exercised his Fifth Amendment right to remain silent as he was advised he had right to do so. U.S. C.A. Const.Amend. 5.

2. Criminal Law — 778(5)

Any instruction which jury may interpret as advising that burden-shifting presumption exists is erroneous.

3. Criminal Law — 778(6)

When intent is an element of an offense it is constitutional error to charge jury that this element may be supplied by presumption rather than requiring prosecution to prove it by evidence, direct or circumstantial.

4. Criminal Law — 1165(1)

Constitutional error may be held harmless only if it is harmless beyond reasonable doubt.

5. Criminal Law — 778(5)

Instruction that, *inter alia*, a man is held to intend natural consequences which flow from his own acts was erroneous as allowing jury to interpret that a burden-shifting presumption exists; however, such error was harmless, because Government was required to prove defendant's wrongful transportation and possession of equipment totally aside from any presumed consequences of his acts, and those elements were proved by evidence of defendant's conflicting stories to disinterested witnesses and by inferences drawn from all the proof, not by any presumption that he intended natural consequences of his acts.

Thomas L. Osborne, argued, Osborne, Deatherage & Fletcher, Paducah, Ky., for defendant-appellant.

Alexander P. Taft, U.S. Atty., Alan E. Sears, argued, Asst. U.S. Atty., Louisville, Ky., for plaintiff-appellee.

Before LIVELY, Chief Judge, EDWARDS, ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, and WELLFORD, Circuit Judges, and PECK, Senior Circuit Judge.

LIVELY, Chief Judge.

A panel of this court reversed Crowder's conviction on two counts of interstate transportation of a motor vehicle, knowing it to have been stolen (18 U.S.C. § 2312), and two counts of receiving, concealing and storing a motor vehicle moving in interstate commerce, knowing it to have been stolen (18 U.S.C. § 2313), 691 F.2d 280. The government filed a petition for rehearing, with a suggestion that the case be reheard *en banc*. Rules 40 and 35, F.R.A.P. This court granted the petition for rehearing and directed that the case be reheard *en banc*. The effect of this action by the court was to vacate the previous opinion and judgment of this court and to restore the case on the docket as a pending appeal. Rule 14, Rules of the Sixth Circuit. The court received supplemental briefs from the parties and heard additional oral argument, after which the case was submitted for decision. We now affirm the judgment of the district court.

I.

A.

Two pieces of construction equipment, a dump truck and a front end loader mounted on a trailer, were stolen from a work site in South Holland, Illinois between June 28 and July 1, 1930. The owner testified that the equipment was last seen at the job at about noon on June 28, a Saturday, and was discovered missing at 7:00 a.m. on Tuesday, July 1. The stolen equipment was recovered by a Kentucky State Police Officer,

the other, the two groups are in one important respect quite dissimilar.

Alabama Electric, 684 F.2d at 27.

Contrary to the Cities' contention, the Commission adequately explained the basis for ordering and approving a multi-class rate design. The Commission's rationale on the rate design issue is readily discernable from its opinions and decisions entered in the course of the rate proceedings. Throughout its decision-making process, the Commission repeatedly emphasized its goal of a rate design that produced the same approximate earned rate of return from each wholesale customer. The Commission's final order is sufficiently clear so that we are not required to speculate as to its basis. See *Lodi Truck Service, Inc. v. United States*, 706 F.2d 898, 901 (9th Cir. 1983).

[4] In addition, the Commission's decision is founded on substantial evidence. The determinative set of facts did not become available until the submission of the First Compliance Filing, which produced significant disparities in the rates of return from each of the wholesale customers. The city of Vernon, another wholesale customer of Edison and an intervenor in the rate proceeding, objected to the single-class rate design, noting that it would be required to pay annual charges that exceeded by \$1,600,000 Edison's revenue requirement from Vernon during the two-year locked-in period. A primary beneficiary of this subsidization by Vernon would have been the city of Riverside. The significant disparity justifies the Commission's decision to order and thereafter approve a multi-class rate design.

The Commission's order is **AFFIRMED**.

Erik UNT, Plaintiff-Appellant,

v.

The AEROSPACE CORPORATION, United States Air Force, Space and Missile Systems Organization, and Air Force Systems Command, Defendants-Appellees.

No. 82-6087.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 7, 1985.

Decided July 19, 1985.

Employee of not-for-profit corporation engaged in business with the United States brought action under Title VII and Privacy Act against his employer, the United States Air Force and government agencies. The United States District Court for the Central District of California, Robert M. Takasugi, J., entered judgment in favor of defendants on Title VII claim, and dismissed claim for violation of the Privacy Act. On appeal, the Court of Appeals, Poole, Circuit Judge, held that: (1) district court's findings that employee was not subject to retaliatory conduct by employer were not clearly erroneous; (2) private right of civil action created by the Privacy Act is specifically limited to actions against agencies of the United States government; (3) employer, a not-for-profit corporation engaged in business with the United States, was not an agency of the government within the definition of the Privacy Act; and (4) letter written by employee to government agency was not a "record" afforded protection within meaning of the Privacy Act, and therefore its disclosure was not in violation of the statute.

Affirmed.

Ferguson, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⇐858

Clearly erroneous standard, and not abuse of discretion standard, applied in re-

viewing district court decision that employee was not the subject of retaliatory discrimination, as the complex issue of retaliation involved factual inquiry into employer's motivation and intent. Fed.Rules Civ. Proc.Rule 52(a), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2282

Federal Civil Rule 52(a), which requires court in all actions tried upon facts without jury to find the facts specially, requires court to state its findings sufficient to indicate the factual basis for its ultimate conclusion. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

3. Federal Civil Procedure ⇐2282

Under Federal Civil Rule 52(a), which requires the court in all actions tried upon the facts without a jury to find the facts specially, the findings must be explicit enough to give appellate court a clear understanding of basis of trial court's decision, and to enable it to determine the ground on which the trial court reached its decision. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

4. Federal Civil Procedure ⇐2282

District court's findings in support of its conclusion that employee was not the subject of retaliatory discrimination, though consisting mainly of mere conclusions, preceded only by an unhelpful chronology of events, were sufficient to comply with Federal Civil Rule 52(a), which requires the court to find the facts specially in all actions tried upon the facts without a jury, as the basis for the court's decision was clear, and record gave substantial and unequivocal support for ultimate conclusion that employer's actions against employee were justified and that no retaliatory motive was involved. Fed.Rules Civ. Proc.Rule 52(a), 28 U.S.C.A.

5. Federal Civil Procedure ⇐2280

Verbatim adoption of findings suggested by a party is not automatically objectionable so long as those findings are supported by the record.

6. Federal Courts ⇐848

Because the Court of Appeals applies the clearly erroneous standard when reviewing factual findings, it cannot affirm a

district court whose findings are "skeletal" or conclusory unless the record clearly reflects basis for trial court's determinations.

7. Master and Servant ⇐40(3)

District court was not clearly erroneous in its findings that record did not support employee's claim of retaliatory conduct by employer in violation of Title VII [42 U.S.C.A. § 2000e et seq.] either because of his opposition to unlawful employment practices or participation in procedures to remedy employment discrimination. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐9.10

An employee is not protected by Title VII [42 U.S.C.A. § 2000e et seq.] when he violates legitimate company rules, knowingly disobeys company orders, disrupts the work environment of his employer, or willfully interferes with attainment of employer's goals. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐43

Once employer articulated proper reason for disciplining employee, employee had burden of proving that stated reason was only a pretext for discrimination prohibited under Title VII [42 U.S.C.A. § 2000e et seq.]. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Federal Courts ⇐776

Court of Appeals reviews de novo a dismissal for failure to state a claim upon which relief can be granted by inquiring whether it is certain that no relief could be granted to appellant under any set of facts.

11. Records ⇐31

Private right of civil action created by the Privacy Act [5 U.S.C.A. § 552a] is specifically limited to actions against agencies of the United States; therefore, the civil remedy provisions of the statute do not apply against private individuals, state agencies, private entities, or state and local officials.



teriorating performance between the date the raise was recommended and the date that it was to become effective. Other employees showing substandard performance were also given raises less than originally projected. Thus, the court's finding on this issue of fact is not clearly erroneous.

Transfer. The trial court concluded that Unt's transfer to another division in February 1976 was justified by legitimate business reasons. This finding is supported by evidence of Unt's poor performance in the GPS Program Office. Aerospace management rated Unt's performance in the program office below average. This evaluation was reinforced by Unt's two unauthorized communications with the Air Force. Unt's writing to the Air Force violated a company policy that such written communication be approved by management. His supervisors believed that the violations jeopardized the very sensitive working relationship between the company and the Air Force. Testimony at trial supports the conclusion that appellant's filing of a grievance against Aerospace was not a factor in Unt's transfer to a different division.

Restricted Communication. About the time of his transfer, Unt was directed both orally and in writing not to communicate with SAMSO concerning business matters. The trial court found that this directive was justified by legitimate reasons. SAMSO is Aerospace's primary customer with whom Aerospace was attempting to improve its working relationship. There was testimony that Unt's communications with SAMSO negatively impacted upon the goal of improved relations. Thus, the trial court could reasonably have concluded that the decision to restrict appellant's communication with the Air Force was not based on retaliatory motives, but rather on a desire to avoid jeopardizing its business interests.

Discharge. The trial court found that Unt's June 16, 1977, letter to the Commander of SAMSO violated an explicit company directive, contained false allegations of misconduct by Aerospace management, and was the ground for appellant's subsequent termination. The record supports this conclusion. In his letter, Unt alleged

no acts of discriminatory conduct by Aerospace, but merely that Aerospace management had made certain "phony charges" against him to destroy his career. He charged several violations of law by Aerospace management, and requested that SAMSO take action on his claims of mismanagement and assist him concerning certain invention rights. Unt did not inform or seek the approval of his supervisors before sending the communication.

[8] Appellant claims that the object of his letter was to secure information substantiating his EEOC grievance or, in the alternative, that the letter constituted protected opposition to what he reasonably believed to be unlawful employment practices. Even if this were so, Aerospace articulated a legitimate, independent, and nondiscriminatory basis for the termination. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 & 257, 101 S.Ct. 1089, 1093 & 1096, 67 L.Ed.2d 207 (1981); *E.E.O.C. v. Crown Zellerbach*, 720 F.2d 1008, 1012 (9th Cir.1983). An employee is not protected by Title VII when he violates legitimate company rules, knowingly disobeys company orders, disrupts the work environment of his employer, or willfully interferes with the attainment of the employer's goals. See *Crown Zellerbach*, 720 F.2d at 1015; *Smith v. Singer Co.*, 650 F.2d 214, 217 (9th Cir. 1981); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C.Cir.1980); *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 230-34 (1st Cir. 1976).

[9] Once Aerospace articulated a proper reason for disciplining Unt, appellant had the burden of proving that the stated reason was only a pretext for discrimination. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095; *Crown Zellerbach*, 720 F.2d at 1012. The trial court determined that this burden was not satisfied, and the record supports that finding.

Fair hearing and Documentation. Finally, the trial court concluded that Unt's grievances were handled no differently than grievances filed by other employees,

and that the procedures employed in his case were justified by legitimate business reasons. The record is replete with evidence that supports this finding.

C. Conclusion

The trial court determined that Aerospace did not discriminate or retaliate against Unt because of his opposition to unlawful employment practices or his participation in the grievance process. This factual conclusion is not clearly erroneous. It is apparent that Aerospace disciplined the appellant because of well documented performance deficiencies that were of legitimate concern to Aerospace management, and not because of any motive of reprisal for appellant's exercise of his Title VII rights. The trial court's findings of fact have provided us with a sufficient basis for determining the ground on which the court reached its decision, and we therefore affirm the judgment on this issue.

II. PRIVACY ACT

[10] Appellant's second argument is that the district court erred in dismissing his claim for violation of the Privacy Act, 5 U.S.C. § 552a, against Aerospace, the Air Force, SAMSO, and Air Force Systems Command. We review *de novo* a dismissal for failure to state a claim upon which relief can be granted by inquiring whether it is certain that no relief could be granted to appellants under any set of facts. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1399 (9th Cir. 1985); *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369, 1372 (9th Cir.1981).

Frank Bane, SAMSO Contract Management Officer, advised Aerospace on June 20, 1977, that Unt had written to SAMSO on June 16 regarding his disputes with Aerospace. Aerospace requested a copy of the letter, but Bane refused. Aerospace then made a formal request for the letter pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The SAMSO legal department concluded that there was no ground for withholding the letter, and on July 1, 1977, it was delivered to Aerospace.

Appellant claims this violated section 552a(b) of the Privacy Act, which reads: No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the written consent of, the individual to whom the record pertains * * *.

5 U.S.C. § 552a(b). This provision is subject to a number of exceptions, none of which apply here.

A. Dismissal of Aerospace

The district court dismissed appellant's Privacy Act claim against Aerospace because it found that the Act creates a right of action only against a governmental entity. We agree.

The Privacy Act, § 552a(a)(1), defines the term "agency" by reference to 5 U.S.C. § 552(e), which provides:

For purposes of this section, the term "agency" * * * includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

[11] The private right of civil action created by the Act is specifically limited to actions against agencies of the United States Government. The civil remedy provisions of the statute do not apply against private individuals, *Bruce v. United States*, 621 F.2d 914, 916 n. 2 (8th Cir.1980); state agencies, *St. Michael's Convalescent Hospital*, 643 F.2d at 1373 (9th Cir.1981); private entities, *Irwin Memorial Blood Bank of the San Francisco Medical Society v. American National Red Cross*, 640 F.2d 1051, 1057-58 (9th Cir.1981) (American National Red Cross) and *United States v. Miller*, 643 F.2d 713, 715 n. 1 (10th Cir. 1981) (national banks); or state and local officials, *Polchowski v. Gorris*, 714 F.2d 749, 752 (7th Cir.1983).

[12] Aerospace is a private not-for-profit corporation which does business with the

United States Government. It is not an agency of the government within the definition of the Privacy Act. Nor does the mere fact that Aerospace receives funding and is regulated to some extent by the federal government bring it within the reaches of the Act.

In *St. Michael's Convalescent Hospital*, we held that federal regulation of state agencies administering the Medicaid program in California did not subject those agencies to the provisions of the Privacy Act, stating that:

Federal funding reaches a countless number of activities of local and state governments. To assure that the federal funds are spent for the purposes for which they were intended, extensive federal regulations are promulgated and must be complied with. However, those regulations do not convert acts of local and state governmental bodies into federal governmental acts. *United States v. Orleans*, 425 U.S. 807, 816, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390 (1976); *Forsham v. Harris*, 445 U.S. 169, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980). "[E]xtensive, detailed and virtually day-to-day supervision" by the federal government is needed before "agency" status could be said to attach.

643 F.2d at 1373-74 (citations omitted).

Even though Medi-Cal, the Medicaid program in California, received federal financial support and was highly regulated by the federal government, we concluded that the government did not exercise extensive supervision and control over the program sufficient to characterize the administrative bodies as federal agencies under the Privacy Act. See *Irwin Memorial Blood Bank*, 640 F.2d at 1057-58 (American National Red Cross, though a close ally of the United States, is not an "agency" for purposes of the Freedom of Information Act because its operations are not subject to substantial control or supervision). Similarly here, appellant has failed to demonstrate that the federal government's control over Aerospace, a private corporation, is sufficiently pervasive to confer governmental agency status upon it.

Appellant also contends that Aerospace violated § 552a(i)(3) of the Privacy Act, which provides:

Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000.00.

[13] Appellant's attempt to state a claim against Aerospace under this provision of the Act is futile. This section provides for criminal penalties only, and generates no civil right of action. Moreover, the information that Aerospace obtained from SAMSO was about itself, not about "an individual," as required here.

B. Dismissal of the Air Force, SAMSO, and Air Force Systems Command

On September 3, 1980, the trial court, without stating its reasons, also granted dismissal of appellant's Privacy Act claims against the Air Force, SAMSO, and Air Force Systems Command. We affirm.

[14] The government appellees argue that Unt's letter was not a "record" contained in a "system of records" under 5 U.S.C. § 552a(b), and therefore, that the disclosure to Aerospace was proper. Because we find that the letter failed to satisfy the initial requirement that it be a "record" afforded protection within the meaning of the Act, we conclude that disclosure was not in violation of the statute.

A "record" is defined under § 552a(a)(4) as:

... any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. (emphasis added).

An "individual" is a "citizen of the United States or an alien lawfully admitted for

permanent residence." 5 U.S.C. § 552a(a)(2). Consequently, for appellant's letter to be subject to restrictive disclosure, it must reflect some quality or characteristic about him. See *Boyd v. Secretary of the Navy*, 709 F.2d 684, 686 (11th Cir.1983), cert. denied, — U.S. —, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984). The letter, however, is not about Unt. Rather, it is clearly about Aerospace, a private corporation, and not an individual within the meaning of the statute. The letter reflects directly on the performance by Aerospace of its contract with the government, and only indirectly on any quality or characteristic possessed by appellant. While Unt's letter mentions his difficulties with Aerospace management, this fact does not change the communication into an item about him. The subject is Aerospace and was "about" Aerospace. Because appellant has failed to demonstrate that his letter to SAMSO was a "record" pursuant to § 552a(a)(2) & (4), we conclude that the district court was correct in dismissing his Privacy Act claims against the government appellees.

III. SANCTIONS FOR FRIVOLOUS APPEAL

Aerospace has requested an award of attorneys' fees and costs under Rule 38 of the Federal Rules of Appellate Procedure, which provides that:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to appellee.

Aerospace claims that Unt's appeal is frivolous because (1) the Privacy Act explicitly creates a civil right of action against governmental agencies only, not against private corporations, and (2) appellant challenges findings of fact that are clearly supported by the record.

[15, 16] An appeal is frivolous when the arguments are entirely without merit and when the result is obvious. *N.L.R.B. v. Catalina Yachts*, 679 F.2d 180, 182 (9th Cir.1982); *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir.1981). While the disposition of Unt's Privacy Act claim against Aerospace is obvious because pri-

vate entities are not subject to the Act, the resolution of his Title VII claim is not so clear. Consequently, we decline to award damages against appellant.

The judgment of the district court is **AFFIRMED**.

FERGUSON, Circuit Judge, dissenting:

Unt wrote a letter to the Air Force in which he blew the whistle on his employer, The Aerospace Corp., a defense contractor. The Air Force received Unt's letter and promptly revealed it to the Aerospace Corp. without Unt's permission. Aerospace then fired him. The majority holds that despite the Air Force's undisputed ability to receive, maintain, retrieve, and reveal Unt's letter, which discloses that Unt is a whistleblower, to the very employer about which Unt was complaining, Unt's claim fails because the letter was not "about" Unt.

I dissent from this holding in Part II(B) of the opinion. I concur in Part I because it upholds the district court's finding of no discrimination, but I disagree with the dicta in that portion that might undermine federal protection for an employee's right to blow the whistle on his employer. I concur in Part II(A) of the opinion, but I disagree with its dicta concerning the nature of Unt's letter.

The plain language of the Act encompasses Unt's letter. Section 552a(b) provides: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." The Privacy Act's definition includes Unt's letter within its definitions of both "record" and "system of records." The majority did not discuss both parts of the statute because it held that the first requirement precluded coverage. Because I read the Act as encompassing Unt's letter, I address each of the Act's requirements—of a "record" and of a "system of records"—in turn.

strict where they were not carrying on business in the sense which had heretofore been held necessary to confer jurisdiction." *St. Louis Southwestern Railway Co. v. Alexander*, 227 U.S. 218, 33 S.Ct. 245, 57 L.Ed. 486 (1913).

Thus, for purposes of establishing jurisdiction pursuant to the Massachusetts Long Arm Statute, the activities of connecting carriers within Massachusetts are not attributable to the defendant and plaintiff must establish that the controversy has arisen from some conduct of the defendant which satisfies the Massachusetts statute. Plaintiff has failed to do so.

[6] Plaintiff's complaint sets forth no facts which bring the defendant within the personal jurisdiction of this court and no affidavit or evidence of any kind has been offered to supplement the complaint. Furthermore, the affidavit offered by the defendant sets forth no facts which would be a basis for jurisdiction under the Massachusetts Long Arm Statute. I rule that plaintiff has not sustained its burden, and that therefore, defendant's motion to dismiss should be allowed. Order accordingly.



Jake LAPIN, Plaintiff,

v.

Jeffrey M. TAYLOR, Defendant.

Civ. No. 78-0337.

United States District Court,
D. Hawaii.

July 31, 1979.

Action was brought against attorney, alleging that attorney removed documents from plaintiff's Department of Labor medical file under false pretenses in violation of Privacy Act and the civil rights laws. The

District Court, Samuel P. King, J., held that: (1) the Privacy Act provision, barring obtaining a record under false pretenses was solely a penal provision and created no private right of action, and (2) absent an allegation that the attorney was involved in a conspiracy to deprive plaintiff of a legally protected right or that the actions of the alleged conspirators were motivated by an invidiously discriminatory animus, no cause of action was stated under the civil rights laws.

Dismissed with leave to amend complaint.

1. Torts — 24

Privacy Act provision that: "[a]ny person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000. . . ." was solely penal provision and created no private right of action. 5 U.S.C.A. § 552a(i)(3).

2. Conspiracy — 15

Federal employee "whistle blowers" are "class" within meaning of civil rights statute affording remedy for conspiracy to deprive person or class of persons of equal protection or equal privileges and immunities. 42 U.S.C.A. § 1985(3).

3. Conspiracy — 18

Complaint did not state cause of action for violation of civil rights, absent allegation that defendant was involved in conspiracy to deprive plaintiff of legally protected right or that actions of alleged conspirators were motivated by an invidiously discriminatory animus. 42 U.S.C.A. § 1985(3).

Jake Lapin, pro se.

William H. Dodd, Stephen T. Robinson,
Honolulu, Hawaii, for defendant.

ORDER MODIFYING ORDER OF DISMISSAL AND GRANTING LEAVE TO AMEND COMPLAINT

SAMUEL P. KING, District Judge.

On September 5, 1978, plaintiff Jake Lapin, a citizen of Hawaii, filed this lawsuit

against Jeffrey M. Taylor, Esq., a local attorney who represented a brokerage firm, Wedbush, Noble, Cooke, Inc., and one of its investment executives, Gregory F. Kowal, in another lawsuit brought by Lapin in this Court (Civil No. 77-0421). In the instant case, plaintiff alleges that, during the course of defendant's representation of his clients in Civil No. 77-0421, defendant Taylor, *inter alia*, removed from the plaintiff's Department of Labor medical file at least 20 confidential documents that are privileged under the Privacy Act. 5 U.S.C. §§ 552 and 552a.¹ Plaintiff alleges that this removal of the documents was accomplished under false pretenses and by perpetrating a fraud upon this Court and that these documents were to be used to attack the reputation, character and credibility of the plaintiff.² The complaint contends that the alleged acts of defendant violated plaintiff's civil rights contrary to the Civil Rights Acts, 42 U.S.C. §§ 1981-1995, and that this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, and 1343.

On March 19, 1979, defendant filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the grounds that: (1) the

complaint filed herein fails to state a claim against defendant upon which relief can be granted; and (2) this Court lacks subject matter jurisdiction over the complaint filed herein. On May 25, 1979, plaintiff filed a memorandum in opposition to defendant's motion. Plaintiff argued that his complaint includes claims under the Privacy Act, 5 U.S.C. § 552a(i)(3), and the Civil Rights Act of 1861, 42 U.S.C. §§ 1985 and 1986, and that this Court has jurisdiction pursuant to 5 U.S.C. §§ 552a(i)(3) and 7102, 28 U.S.C. §§ 1331 and 1343, and the common law of torts. A hearing was held on June 4, 1979.

On June 5, 1979, an Order of Dismissal was filed which held that plaintiff had failed to state a federal claim pursuant to either the Privacy Act or the Civil Rights Act of 1861. It was therefore ordered that plaintiff's action be dismissed with prejudice as to the federal claims and without prejudice as to the pendent state claims.³

On June 12, plaintiff filed a Motion for Reconsideration of the Order of Dismissal in light of two recent Ninth Circuit cases that elucidate the requirements of a § 1985(3) claim: *Life Insurance Company of*

with the Naval Audit Office, Honolulu, which was desirous of attacking the reputation, character, and credibility of the Plaintiff. Jake Lapin, in order to prevent his restoration to duty, and provided to the Naval Audit Office, Honolulu certain false information which was used in an attempt to attack the reputation, character, and credibility of the Plaintiff.

Nevertheless, Jeffrey Taylor was the only named defendant in this action.

2. Plaintiff also alleged in oral argument that these documents might be used to hinder his attempt to regain his federal job. See note 8 *infra*.

3. The Order of Dismissal noted that:

[P]laintiff has brought several common law tort claims herein, including invasion of privacy, abuse of process and defamation of character. Because of the disposition of plaintiff's federal claims, it is inappropriate for this Court to retain jurisdiction over any pendent state law claims. These claims will be dismissed without prejudice to enable plaintiff to pursue them in state court.

1. Plaintiff also contended that defendant:

- "Informed the Court that Plaintiff, Jake Lapin, was obstructing justice by keeping him from depositing certain information from the employees of the Naval Audit Office" when this was untrue;
- Informed the Court that he would submit affidavits from certain employees of the Naval Audit Office when in fact he could not get the affidavits signed because the information therein was false;
- "[J]oined forces with certain employees of the Naval Audit Office, Honolulu desirous of attacking Plaintiff's, Jake Lapin's, credibility, reputation, and character for the purpose of having certain Counts in Civil No. 77-0421 dismissed by this Court;"
- Refused to accept a reasonable settlement offer and instead "continued the suit in such a manner that indicated an objective of initiating a reprisal abuse-of-process suit against the Plaintiff;"
- Requested plaintiff to stipulate that certain counts of plaintiff's complaint were dismissed with prejudice when this was untrue.

Plaintiff also alleged

[t]hat Wedbush, Noble, Cooke, Inc., through action by one of its employees, joined forces

North America v. Reichardt, 591 F.2d 499 (9th Cir. 1979) and *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979). Because neither of these cases had been raised nor argued by either side at the June 4 hearing, I requested that each party brief these cases. A second hearing was held on July 20. In light of the teaching of these cases, I conclude that plaintiff can state a federal cause of action under § 1985(3).

[1] Plaintiff first alleges that he raises claims under 5 U.S.C. § 552a(i)(3) over which this Court has jurisdiction pursuant to 5 U.S.C. § 552a and 28 U.S.C. § 1331. This statute provides that: "[a]ny person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000." This argument is unpersuasive. I conclude that this section of the Privacy Act is solely a penal provision and creates no private right of action. *Rowe v. Tennessee*, 431 F.Supp. 1257, 1264 (E.D.Tenn.1977); see *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); cf. *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 926 (9th Cir. 1975) (a similar section of the Immigration and Nationality Act, 8 U.S.C. § 1324, was held to be solely a penal provision that creates no private right of action).⁴

[2] Plaintiff next contends that his complaint states a cause of action pursuant to 42 U.S.C. §§ 1985 and 1986. An examination of these provisions indicates that § 1985(3) is the only one which plaintiff's complaint could conceivably satisfy.

In order to state a claim under § 1985(3) a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of

the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Griffin v. Breckinridge, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-1799, 29 L.Ed.2d 338 (1971). The *Griffin* Court concluded that the statute was meant to cover private conspiracies but it was not "intended to apply to all tortious, conspiratorial interferences with the rights of others." *Id.* at 101, 91 S.Ct. at 1798. Consequently, the Court interpreted the second element of the cause of action in a way that would give full effect to the congressional purpose.

The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Id. at 102, 91 S.Ct. at 1798 (footnotes omitted).

The *Griffin* Court did not explain what might be considered a deprivation of equal protection by private persons. See *id.* at 97, 91 S.Ct. 1790. The Ninth Circuit has held that "the first requirement of [the] second element of § 1985(3) [requires] the deprivation of any legally protected right." *Life Insurance Company of North America v. Reichardt*, 591 F.2d 499, 503 (9th Cir. 1979). "In *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 926, (9th Cir. 1975), this court explained *Griffin* as creating a cause of action for any tortious interference with a legally protected right if motivated by the requisite class-based animus." *Reichardt*, 591

Members of Congress and to furnish information to either House of Congress. This provision is also of no help to plaintiff.

F.2d at 503. Plaintiff herein satisfies this first requirement by alleging the tortious interference of his right to privacy.⁵

Because *Griffin* dealt with allegations by blacks of a conspiracy to deprive them of their civil rights, the Supreme Court did not articulate what non-racial "class-based, invidiously discriminatory animus" would be actionable under § 1985(3). The Ninth Circuit has held that the coverage of § 1985(3) is to be determined by the "principle underlying its adoption: the Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights." *DeSantis v. Pacific Telephone & Telegraph Company*, 608 F.2d 327 at 331 (9th Cir. 1979).⁶ Such a "Governmental determination" can be made by either the federal courts or Congress. See *id.*⁷

5. The complaint also alleged that defendant acted to deprive plaintiff of his federal right to contract. See note 1 *supra*. Plaintiff relies upon the Constitutional language of Article I, Section 10, stating that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts" as the basis for a federal right to contract. I am unfamiliar with any authority that supports the existence of this purported federal right. Nevertheless, plaintiff's allegations sound in tort and would form the basis of several pendent state law claims. See note 3 *supra*.

6. The Ninth Circuit noted that "[t]he forerunner of § 1985(3) . . . was intended to provide special federal assistance to southern blacks and their allies in protecting their rights under the Fourteenth Amendment and other reconstruction legislation against the Ku Klux Klan and others organized to thwart reconstruction efforts." *DeSantis*, at 331.

7. The *Reichardt* Court held that plaintiffs alleging a conspiracy to deprive women of equal rights could invoke § 1985(3). The Court noted several federal court-made determinations that "gender-based classifications may result in invidious discrimination." 591 F.2d at 505. The Court could also have relied upon the Congressional prohibition against sex discrimination of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* Conversely, the *DeSantis* Court held that homosexuals were not a "class" within the meaning of § 1985(3). After examining the applicable case law and Congressional legislation, the court concluded that "it cannot be said that homosexuals have been

Plaintiff contends that he is a member of the "whistle blower" class (*viz.*, "Federal employees who disclose illegal or improper government activities")⁸ and that this class is within the ambit of § 1985(3) protection. Plaintiff asserts that the requisite "Governmental determination" of warranted "special federal assistance" is incorporated in the Civil Service Reform Act of 1978 whereby Congress created the Merit Systems Protection Board to protect whistle blowers. 5 U.S.C. §§ 1201-09 (1978).

I find plaintiff's argument to be persuasive. The legislative history of this statute clearly indicates that Congress concluded that federal employees who are whistle blowers need special protection.⁹ This Congressional determination satisfies the Ninth Circuit test for class-based, invidiously discriminatory animus actionable under

afforded special federal assistance in protecting their civil rights." *DeSantis*, at 331.

8. Although plaintiff is not currently employed by the federal government, most of his "whistle blowing" activities occurred while he was a naval auditor at Pearl Harbor prior to his resignation in 1976. He is currently involved in administrative proceedings in an attempt to get his job back.

9. The Senate Report stated that this statute gives the Merit Systems Protection Board and the Special Counsel explicit authority to protect whistle blowers—Federal employees who disclose illegal or improper government activities. Often, the whistle blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss.

Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service.

[This statute] will establish significant protections for whistle blowers. For the first time, and by statute, the Federal Government is given the mandate—through the Special Counsel of the Merit Systems Protection Board—to protect whistle blowers from improper reprisals.

S.Rep.No. 969, 95th Cong., 2d Sess. 8, reprinted in [1978] U.S. Code Cong. & Admin. News, pp. 2723, 2730.

§ 1985(3).¹⁰ Therefore, I conclude that whistle blowers as defined herein are a "class" within the meaning of § 1985(3).¹¹

[3] Nevertheless, plaintiff's complaint fails to properly state a claim under

10. The constitutionality of this interpretation of § 1985(3) has not yet been determined. The *DeSantis* Court did not have to reach that issue because of its conclusion that homosexuals did not satisfy the Ninth Circuit test. In *Reichardt*, the plaintiffs argued that both the Commerce Clause and section 5 of the Fourteenth Amendment authorize Congress to reach the alleged invidious discrimination against women. The *Reichardt* Court, however, specifically refused to resolve this issue because the appeal was interlocutory and the question had neither been addressed nor certified by the district court.

The *Reichardt* Court cited several decisions from other circuits that have interpreted § 1985(3) more broadly and "have not limited its protection to racial or otherwise suspect classifications." 591 F.2d at 505 (footnote omitted); see *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) (political opponents are a sufficient class); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973) (supporters of a political candidate); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) (a single family); *Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971) (married couple). Nevertheless, none of these decisions even address the issue of the constitutionality of their expansive interpretations of § 1985(3).

The constitutionality of the extension of § 1985(3) coverage to federal employee whistle blowers might be derived from the same constitutional provision that authorized the enactment of the Civil Service Reform Act of 1978. Neither the Act nor its legislative history specifically states the constitutional provision that authorizes its enactment. See Pub.L. No. 95-454, 92 Stat. 1111 (1978); S.Rep. No. 969, 95th Cong., 2d Sess. reprinted in [1978] U.S. Code Cong. & Admin. News, p. 2723; H. Conf. Rep. No. 1717, 95th Cong., 2d Sess. reprinted in [1978] U.S. Code Cong. & Admin. News, p. 2860. Nevertheless, the source of Congressional power for passing this law is probably the "necessary and proper clause" of the Constitution. U.S. Const., Art. I, § 8, cl. 18; cf. *Butler v. White*, 83 F. 578 (C.C.W.Va.1897), reversed on other grounds, 171 U.S. 379, 18 S.Ct. 949, 43 L.Ed. 204 (1898) (the establishment of the Civil Service Commission is within the general powers conferred upon Congress by the necessary and proper clause of the Constitution). In any event, the constitutionality of this statute does not necessarily imply that the extension of § 1985(3) coverage to federal employee whistle blowers is also constitutional. The protection afforded whistle blowers by this new statute is from reprisals by other federal employees. If the underlying constitutional authority for the Congressional enactment of this statute in-

cludes the power to protect federal employees from reprisals, then it should also justify an interpretation of § 1985(3) that similarly protects them from private conspiracies; however, if this Congressional power only extends to restraining federal employees from taking retaliatory actions, then it will be necessary to find another source of constitutional power for this § 1985(3) interpretation. In any event, this constitutional question should be addressed only after a trial on the merits because of the advantages of having a full record and the possibility that a judgment for defendant would make it unnecessary to reach the question. *Reichardt*, 591 F.2d at 506.

11. This decision specifically does not address the question of whether whistle blowers who are not employed by the federal government are within the ambit of § 1985(3) protection. In order to satisfy the Ninth Circuit test, it will be necessary for them to find another "Governmental determination" that they need special federal protection of their civil rights because the Civil Service Reform Act of 1978 does not extend to them. Furthermore, the constitutional justification for such an interpretation of § 1985(3) probably could not be derived from the Congressional authority to enact that Civil Service legislation. See note 10 *supra*.

12. There are only two instances in the complaint where a possible conspiracy allegation is even elliptically alluded to by plaintiff. In paragraph 12 of his complaint, plaintiff alleges that defendant "joined forces with certain employees of the Naval Audit Office, Honolulu desirous of attacking the Plaintiff's credibility, reputation and character for the purpose of having certain Counts in Civil No. 77-0421 dismissed by this court." See note 1 *supra*. Although this allegation might be interpreted to allege a conspiracy, its alleged purpose was not to deprive plaintiff of any legally protected right. In paragraph 8 of his complaint, plaintiff alleges "[t]hat Wedbush, Noble, Cooke, Inc., through action by one of its employees, joined forces with the Naval Audit Office in order to prevent his restoration to duty, and provided to the Naval Audit Office certain false information which was used in an attempt to attack the reputation, character, and credibility of the Plaintiff." See note 1 *supra*. Although this allegation also alludes to a conspiracy, it is unclear how, if at all, defendant is involved in

Cite as 475 F.Supp. 451 (1979)

cally allege that the actions of the conspirators were motivated by an invidiously discriminatory animus against him as a federal employee whistleblower. Thus, the original complaint still fails to state a claim under § 1985(3) or any other statute and should be dismissed; however, because these defects could be cured, it is appropriate in this instance to grant plaintiff leave to amend his complaint. I conclude that the Order of Dismissal entered on June 5 should be modified to grant plaintiff 60 days from the entry of this order to amend his complaint.

It is so ordered.



JUNEAU SQUARE CORP., Wil-Ten Co., Inc., Ralph W. Conway, Hal Bradley & Associates, Inc., Emil Bartel, Anna Bartel, Vione Perry, as Administratrix of the Estate of Thomas H. Perry, Plaintiffs,

v.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, First Wisconsin Development Corporation, First Wisconsin Corporation, Marshall-Michigan Company, Inc., Marshall-Wisconsin Company, Inc., Defendants.

Civ. A. No. 72-C-533.

United States District Court,
E. D. Wisconsin.

July 31, 1979.

Plaintiffs brought antitrust action, alleging that defendants had entered into contract, combination, or conspiracy which had unreasonably restrained trade or commerce in the leasing of office rental space

this activity. Furthermore, it is difficult to make any assumptions in this regard because

in the central business district of Milwaukee. After jury returned verdict in favor of defendants, plaintiff filed motion for new trial on all issues. The District Court, Warren, J., held that: (1) trial court properly instructed jury concerning restraint of trade; (2) addition of certain language to instruction after close of final argument did not constitute prejudicial error; (3) jury was properly instructed not to consider character of defendants' acts under laws other than antitrust laws; (4) it was not error to refuse to instruct jury about unfair competition as a per se violation of the Sherman Act; (5) jury was properly instructed that it could not find that certain defendant was member of alleged conspiracy; (6) jury was properly instructed concerning mortgage foreclosure loan; (7) hearsay evidence was inadmissible; (8) limitations set on cross-examination were not erroneous, and (9) time restrictions on trial in closing argument did not constitute error.

Motion for new trial denied.

1. Federal Civil Procedure § 2313

Timely motion for new trial is addressed to sound discretion of the trial court.

2. Federal Courts § 891

Question of whether error is "harmless" is to be resolved in the context of the individual case; where it appears that error in no way influenced jurors or had but slight effect upon them, verdict and judgment are to be affirmed.

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Civil Procedure § 2311

Under rule governing motion for new trial, new trial should not be granted unless trial court finds that refusal to take such action is inconsistent with substantial justice. Fed.Rules Civ.Proc. rule 61, 28 U.S.C.A.

Taylor is the only defendant named in the complaint.

cording to section 174.12(d) of the customs regulations, the appropriate customs officer for the filing of the protests in this case would be either the district director at Cleveland or the port director at Toledo where the involved entries were made.

[1, 2] Although customs officials are not required to advise importers as to the nature and extent of their rights, see *Flagstaff Liquor Company v. United States*, 73 Cust.Ct. 132, 137, C.D. 4563, 388 F.Supp. 554 (1974), and cases cited on page 138, nevertheless, the rights of importers will not be forfeited as a consequence of deceptive or improper practices indulged in by customs officials. See *A. H. Burr v. United States*, 9 Cust.Ct. 13, 19-20, C.D. 651 (1942) [improper delay by customs officials in time-stamping the importer's entry papers until after the closing of a cattle quota]; *Henry A. Wess, Inc. v. United States*, 25 Cust.Ct. 34, 37, C.D. 1259 (1950) [examination of merchandise by the wrong customs official acting under color of authority]; and *Snake King v. United States*, 18 Cust.Ct. 33, 35, C.D. 1041 (1947) [acceptance of protest by

deputy collector after the regulation closing hour on the 60th day after liquidation]. If full credence be given to the allegations in the third paragraph of the complaint in this case it is clear that the ends of justice as well as the objective of the statute of limitations will be ill served by a declination of jurisdiction on the part of the court. But at this point in the proceedings a judgment in the matter either way is premature, there being no evidentiary record before the court in connection with this motion.

However, inasmuch as defendant has procured a postponement in the joinder of issue under a commitment to answer the complaint, it is appropriate that it be required to do so. Accordingly, defendant's motion to dismiss is denied, without prejudice, however, to raising the jurisdictional issue herein by way of its answer.



Jerry L. ROWE

v.

STATE OF TENNESSEE et al.

Civ. No. 3-76-120.

United States District Court,
E. D. Tennessee, N. D.

March 8, 1977.

National guard technician brought action against other members of the national guard to recover for alleged denial of civil rights and unfair labor practices. The District Court, Robert L. Taylor, J., held that: (1) with the exception of flight surgeon, all of the defendants had been acting under color of federal, rather than state, law at the time of the alleged denial of civil rights so that their activity was not within the purview of federal civil rights statute; (2) it would be inappropriate for civilian court to inquire into the motives behind a military flight surgeon's decision to investigate a serviceman's physical and mental fitness to pilot an airplane; and (3) the national guard technician was required to exhaust remedies under executive order dealing with representation of federal employees by labor organizations before he could maintain court action for alleged interference of his right to join a union and alleged retaliation for the filing of a grievance and an unfair labor practice charge.

Dismissed.

1. Conspiracy ⇐ 18

Before a complaint states a cause of action under federal civil rights conspiracy statute, it must allege some racial or other class-based, invidiously discriminatory animus behind the conspirators' actions. 42 U.S.C.A. § 1985(3).

2. Conspiracy ⇐ 13

Absent cause of action for conspiracy to deny civil rights, there could be no cause of action for alleged failure to prevent the denial of civil rights. 42 U.S.C.A. §§ 1985(3), 1986.

3. Civil Rights ⇐ 13.1

Deprivations of civil rights occurring under color of federal law are not actionable under federal civil rights statute. 42 U.S.C.A. § 1983.

4. Militia ⇐ 12

Provision of the National Guard Technicians Act that the Secretary of the Army or Air Force shall designate the adjutants general of the various states to employ and administer the technician program was intended to give the adjutants general, who are state employees, the federal statutory function of employing federal employees; the supervisory authority conferred upon adjutants general by federal law includes the authority to effect reductions in force. 32 U.S.C.A. § 709(b, c), (e)(4).

5. Militia ⇐ 12

Provision of the National Guard Technicians Act that a technician employed under the act is an employee of the United States but occupies a position outside the competitive service if the technician is required to be a member of the national guard was intended to clarify the status of national guard technicians in situations in which they are named as defendants in civil suits for acts committed during the course of their employment. 32 U.S.C.A. § 709(d).

6. Civil Rights ⇐ 13.4(1)

Actions of state adjutant general who allegedly misused his power in effecting reduction in force which resulted in loss of job by national guard technician and actions of civilian technician personnel officer who allegedly engaged in similar activity were taken under color of federal law, and not under color of state law, and thus did not come within proscription of federal civil rights statute. 32 U.S.C.A. § 709(c); 42 U.S.C.A. §§ 1983, 1985(3).

7. Civil Rights ⇐ 13.4(1)

Actions allegedly taken by certain national guard technicians, in their capacity as technicians, in response to plaintiff's conduct as a technician were not taken under color of state law, but rather under color of

ularly in areas involving military expertise and judgment.

In summary, other than plaintiff's claims under the Privacy Act and Executive Order 11491, which will be discussed below, plaintiff relies solely upon 42 U.S.C. § 1983 to challenge defendants' actions and solely upon 28 U.S.C. § 1343(3) to invoke the jurisdiction of this Court to seek redress for those alleged actions. For the reasons stated above, plaintiff has failed to bring his contentions within the purview of those statutes.

As previously indicated, plaintiff has complained of various alleged violations of the Privacy Act by the defendants. The Privacy Act, 5 U.S.C. § 552a requires every Federal agency that maintains a system of records to publish procedures for their disclosure to private individuals. Civil remedies can be brought only against the agency. 5 U.S.C. § 552a(g)(1). The only penalties provided against individuals, rather than agencies, are criminal penalties. 5 U.S.C. § 552a(i)(1). The regulations promulgated by the Department of the Air Force provide for civil sanctions against the Department of the Air Force when its agents or employees violate the terms of the Privacy Act. 32 C.F.R. § 806b.6.

[12] The Secretary of the Department of the Air Force is thus the only proper party in a civil action by a civilian federal technician alleging violation of the Privacy Act, and the individual defendants in this action are not personally liable under the Privacy Act. Therefore, the plaintiff has failed properly to invoke the jurisdiction of this Court to seek redress for alleged Privacy Act violations.

Executive Order 11491, As Amended

A reading of the entire record discloses that plaintiff is contending that defendants violated Executive Order 11491 by "interfering with his right" to join the union which represents civilian technicians, and by abusing, harassing and intimidating him

because he filed various grievances and an unfair labor practice charge.⁶

Executive Order 11491, as amended, Executive Orders 11616, 11636 and 11838, provides for the representation of certain governmental employees (including National Guard Technicians) by labor organizations. Labor organizations and the agency involved are required by the terms of the Order to publish policies and regulations, including policies covering the negotiation of disputes and the arbitration of grievances. Under the authority of this Order, an agreement was reached between the Adjutant General of the Tennessee Air National Guard (the employer pursuant to 32 U.S.C. § 709) and the National Association of Government Employees, Local R5-165.

Article XIII of the Collective Bargaining Agreement sets forth the grievance procedure to be followed. Five procedural steps are set forth, beginning with an informal discussion of the grievance and culminating with a Board of Review hearing. By the terms of the Agreement, Board decisions are final and binding as to all grievable matters except to the extent that they may be appealed to the Federal Labor Relations Council pursuant to Executive Order 11491, as amended.

Section 19 of Executive Order 11491 prohibits certain unfair labor practices by the governmental agency involved. The agency is prohibited from interfering with an employee's exercise of rights assured by the Executive Order and is further prohibited from encouraging or discouraging membership in a labor organization by discrimination in hiring, tenure, promotion or other conditions of employment. Section 19 further prohibits the agency from discriminating in any manner against the employee because he filed a complaint under the terms of the Executive Order.

[13] Unfair labor practice charges must first be filed with the Assistant Secretary of Labor for Labor-Management Relations.

6. Plaintiff has failed to allege the jurisdictional statute which he relies upon to assert his claim under Executive Order 11491.

Executive Order 11491 § 6(a)(4); § 19(d). The Secretary's decision may then be appealed to the Federal Labor Relations Council. *Id.* § 4(c).

With respect to the first alleged violation of the Executive Order, plaintiff contends that he was a member of the Collective Bargaining Unit from late 1973 through August 31, 1975, during which time union dues were deducted from his wages. Sometime in late 1975, the Collective Bargaining Unit withdrew from representing plaintiff because it was determined that he was a "supervisor" and therefore was ineligible for membership under Section 1 of the Collective Bargaining Agreement. Thereafter, "a decision" was made that he had no right to file a grievance under the negotiated procedure, and he should have filed his grievance under the state procedure. Plaintiff has not specified which individual or entity made this decision. It was later determined that the time for filing a grievance under the state procedure had expired.

[14] The complaint must be dismissed to the extent that it can be construed to allege that plaintiff's being declared a supervisor interfered with his right to join a union. Eligibility for union membership is controlled by the terms of the Collective Bargaining Agreement, and all disputes concerning this matter must be resolved through the procedures set forth in the Agreement and Executive Order 11491.

[15] The complaint must also be dismissed to the extent that it alleges that defendants Akin and Wallace interfered with plaintiff's becoming a member of the union. There is no indication that plaintiff exhausted any available remedies against these defendants for their alleged interference. Interference with an employee's efforts to join a union constitutes an unfair labor practice under § 19 of Executive Order 11491. His remedy, therefore, would be to file an unfair labor practice charge with the Assistant Secretary of Labor for Labor-Management Relations. *Cf. Montana Chapter of Ass'n of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165 (9th Cir. 1975).

[16] The second violation of Executive Order 11491 alleged by plaintiff is that defendant Wallis, acting in concert with defendants Wallace and Akin and others, subjected him to various acts of harassment, abuse and intimidation because he filed grievances and an unfair labor practice charge. Any discipline or discrimination levied against plaintiff because he filed a complaint under Executive Order 11491 is specifically defined as an unfair labor practice under § 19 of the Executive Order. Again, plaintiff has not demonstrated that he fully exhausted his remedies as to these matters. Should it be determined that plaintiff was covered by the Executive Order at any of the times in question, his remedy would be to file an unfair labor practice charge under § 19. Should it be determined that he is not covered by the Executive Order, the defendants cannot be charged with a violation thereof.

For the foregoing reasons, it is ORDERED that this case be, and the same hereby is, dismissed.

Order accordingly.



Joseph C. SPENCER, Plaintiff,

v.

GENERAL ELECTRIC COMPANY,
Defendant.

Civ. A. No. 74-174.

United States District Court,
W. D. Virginia,
Roanoke Division.

April 5, 1977.

Employee brought employment discrimination action against employer. The District Court, Dalton, J., held that: (1) plaintiff employee failed to establish by

as applicable." *United States v. Johnson*, 934 F.2d 1237, 1239 (11th Cir.1991) (citing U.S.S.G. § 4A1.3). The court should examine the next criminal history category and determine if the defendant "closely resembles defendants in that category." U.S.S.G. § 4A1.3. "If the court determines that the defendant's criminal history fits that category, then the court must sentence the defendant within the range called for by the Guidelines...." *Johnson*, 934 F.2d at 1239. These findings must be shared with the defendant on the record. *Id.* at n. 7. Because the district court failed to follow this procedure, the increase from criminal history category I to II was in error and will require remand for re-sentencing to enable the district judge to comply with the requirements of the Sentencing Guidelines.

2. Upward Departure from the Base Offense Level

Huang also argues that the district court erred in departing upward by two offense levels from his base offense level of seven due to the number of aliens involved and his previous smuggling activity.

A sentencing court may depart from the Sentencing Guidelines if the court determines "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); see also U.S.S.G. § 5K2.0.

[4] In *United States v. Weaver*, 920 F.2d 1570 (11th Cir.1991), this court set forth a three-part test for evaluating a district court's decision to depart from the applicable Sentencing Guidelines range. First, we review *de novo* the district court's ruling that the guidelines did not adequately consider a particular factor in establishing the base offense level. This omission by the guidelines authorizes the district court's departure. *Id.* at 1573. Second, we must review for clear error the factual findings supporting the departure. *Id.* Finally, we review the reasonableness

of the district court's departure given the legal and factual posture of the case.

[5] The sentencing court correctly interpreted the guidelines to allow for an upward departure from the base offense level. The commentary to the guidelines instructs that the Commission did not consider offenses involving large numbers of aliens and an upward departure may be appropriate in this circumstance. U.S.S.G. § 2L1.1, comment (n. 8). Nothing in the commentary to the guidelines explicitly requires that the large number of aliens be transported in one trip. See *United States v. Martinez-Gonzalez*, 962 F.2d 874, 876 (9th Cir.1992).

[6] The sentencing court's factual determination that Huang had smuggled a "large number of aliens" is not clearly erroneous. Although this court has not previously ruled on what constitutes a "large number of aliens," Huang himself admitted to smuggling aliens into the United States on ten previous occasions, which, based on the May 3, 1991 trip with ten aliens, could put the number of aliens Huang has smuggled into the United States as high as one hundred. See *id.* (146 aliens transported over a period of over one month constitutes a "large number of aliens"); *United States v. Hernandez*, 943 F.2d 1, 2 (5th Cir.1991) (twenty-one aliens warranted upward departure); *United States v. Lopez-Escobar*, 884 F.2d 170, 173 (5th Cir.1989) (35 aliens warranted an upward departure).

[7] We also find that the extent of the departure was reasonable. With the base offense level increased from seven to nine, the sentencing range increased from one to seven months to six to twelve months. Given the number of aliens Huang attempted to smuggle on the occasion of his arrest, and his pattern and practice of smuggling aliens into the United States, the potential increase to a twelve month sentence was not unreasonable.

3. Double Counting of the Defendant's Prior Smuggling Activity

[8] Finally, Huang asserts that the district court erred by relying upon the same

previous smuggling activity to depart upward from both the base offense level and the criminal history category. Double counting is allowed if the Commission intended the result and the Commission's intended result is permissible because "each section concerns conceptually separate notions relating to sentencing." *United States v. Adeleke*, 968 F.2d 1159, 1161 (11th Cir.1992) (citing *United States v. Amufua*, 935 F.2d 1199, 1201 (11th Cir.1991); *United States v. Goolsby*, 908 F.2d 861 (11th Cir.1990)).

[9] The *Adeleke* court held that the Commission clearly intended that a defendant's prior criminal conduct count against him under both the criminal history section and § 2L1.2 (unlawfully entering or remaining in the United States). "The criminal history section is designed to punish likely recidivists more severely while enhancement under § 2L1.2 is designed to deter aliens who have been convicted of a felony from re-entering the United States." *Adeleke*, 968 F.2d at 1161. Here, Huang's base offense level was increased under § 2L1.1 (n. 8) due to the large number of aliens he has admitted to smuggling into the United States. The holding in *Adeleke* applies with equal force here. The upward departure of the base offense level reflected the seriousness of Huang's crime, given his admitted smuggling of aliens on at least ten occasions; the criminal history adjustment indicated an attempt by the sentencing judge to deter Huang from future smuggling activity.²

CONCLUSION

For the reasons stated, we AFFIRM the district court's decision to increase the base offense level from seven to nine but we REVERSE the court's upward departure from criminal history category I to II. Therefore, appellant's sentence is VACATED and REMANDED to the district court

2. Our ruling vacating the upward departure from criminal history category I to II does not moot the question of double counting because the sentencing judge erred mainly in form, not

for re-sentencing in a manner consistent with this opinion.



FEDERAL LABOR RELATIONS AUTHORITY, Petitioner.

v.

U.S. DEPARTMENT OF DEFENSE, U.S. Department of the Navy, Pensacola Navy Exchange, Pensacola, Florida, Respondent.

U.S. DEPARTMENT OF DEFENSE, U.S. Department of the Navy, Pensacola Navy Exchange, Pensacola, Florida, Petitioner.

v.

FEDERAL LABOR RELATIONS AUTHORITY, Respondent.

Nos. 90-3893, 90-3966.

United States Court of Appeals,
Eleventh Circuit.

Nov. 18, 1992.

Union representing federal government employees sought list from employer of names and home addresses of all employees in bargaining unit. Employer refused. Union filed unfair labor practice charges. The Federal Labor Relations Authority (FLRA) affirmed order of administrative law judge (ALJ) and ordered employer to release requested information. Employer petitioned for review. The Court of Appeals, Edmondson, Circuit Judge, held that federal government employees' privacy interest in their home address was important, and, thus, was exempt from disclosure under the Freedom of Information Act

in substance, in failing to state for the record how Huang's criminal history compared to those in criminal history category II.

(FOIA) and the Privacy Act to employees' union without the employees' consent.

Application for enforcement denied.

Atkins, Senior District Judge, sitting by designation, dissented with opinion.

1. Records ⇐58, 64

Union representing federal government employees was not entitled under the Freedom of Information Act (FOIA) to disclosure of home addresses of employees without the employees' consent, notwithstanding contention that government might be operating irregularly; public interest side of balance carried little weight, and mere speculation that government could be operating irregularly was not sufficient to outweigh demonstrably significant invasion of privacy. 5 U.S.C.A. §§ 552, 552(a)(4)(B), (b), (b)(6), 552a(b), (b)(2).

2. Records ⇐58

Court had no authority to override Freedom of Information Act (FOIA) principles under the Federal Service Labor Management Relations Statute and disclose information about government employees. 5 U.S.C.A. §§ 552a, 7101-7135, 7114(b)(4)(B).

3. Records ⇐31, 58

Federal government employees' privacy interest in home address was important, and, thus, was exempt from disclosure under the Freedom of Information Act and the Privacy Act to employees' union without the employees' consent. 5 U.S.C.A. §§ 552a, 7101-7135, 7114(a)(1), (b)(4)(B), 7116(a)(1, 5, 8), 7118(a)(7).

4. Records ⇐31, 58

Union representing federal government employees was not entitled to addresses of the employees without their consent under the Freedom of Information Act (FOIA) or Privacy Act, notwithstanding contention that it would be improper to have discrepancy between private sector employers, who are required to release addresses of bargaining unit employees to union, and government employers; policy

consideration could not override statutory requirements. 5 U.S.C.A. §§ 552a, 7101-7135, 7114(a)(1), (b)(4)(B), 7116(a)(1, 5, 8), 7118(a)(7).

Pamela P. Johnson, William E. Persina and William R. Tobey, Federal Labor Relations Authority, Washington, D.C., for Federal Labor Relations Authority.

Sandra Wien Simon, Leonard Schaitman, and Lori M. Beranek, U.S. Dept. of Justice, Appellate Staff/Civ. Div., Washington, D.C., for U.S. Dept. of Defense, U.S. Dept. of Navy and Pensacola Navy Exchange.

Gregory O'Duden, Director of Litigation and Elaine Kaplan, Washington, D.C., for amicus, Nat. Treasury Employees Union.

Petition for Review of an Order and Application for Enforcement of the Federal Labor Relations Authority.

Before FAY and EDMONDSON, Circuit Judges, and ATKINS, Senior District Judge.

EDMONDSON, Circuit Judge:

This case is about the privacy interests of federal government employees. The question presented is whether federal agencies are required by statute to release employees' home addresses to unions, which are the employees' exclusive representatives, without the employees' consent.

In 1988, the United Food and Commercial Workers Union asked that the Department of the Navy's Pensacola Naval Exchange (Naval Exchange) provide a list of the names and home addresses of all employees in the bargaining unit. The union already had addresses of union members but wanted the addresses of nonmembers in the relevant bargaining unit to communicate with them; the union is responsible for representing the interests of all employees in its bargaining unit without regard to labor organization membership. See 5 U.S.C. § 7114(a)(1).

ting by designation.

When the Naval Exchange refused, the union filed unfair labor practice charges against the Department of Defense, the Department of the Navy, and the Naval Exchange.¹ The case went to an administrative law judge (ALJ), who granted summary judgment in favor of the union.

The FLRA affirmed the ALJ and ordered the Naval Exchange to release the requested information. We granted defendants' petition for review of the FLRA decision and now DENY the FLRA's application for enforcement.

DISCUSSION

The Federal Service Labor Management Relations Statute (Labor Statute) governs collective bargaining in the public sector. See 5 U.S.C. §§ 7101-7135. The statute requires federal agencies to "furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data which is reasonably available and necessary for proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 5 U.S.C. § 7114(b)(4)(B) (emphasis added). We believe the disclosure requested in this case is prohibited by the Privacy Act of 1974 and, by virtue of its incorporation into the Privacy Act, the Freedom of Information Act (FOIA).²

[1] The Privacy Act of 1974 generally prohibits disclosure of personal information about federal employees without their consent. See 5 U.S.C. § 552a(b). Exceptions to the Privacy Act include disclosures required by FOIA. See 5 U.S.C. § 552a(b)(2). In turn, FOIA itself exempts from disclo-

sure certain information. See 5 U.S.C. § 552(b). At issue in this case is FOIA's exemption 6, which protects "personnel and medical files and similar files"³ when "a balancing of individual privacy interests against the public interest in disclosure reveals that disclosure of the information constitutes a 'clearly unwarranted invasion of privacy.'" *Cochran v. United States*, 770 F.2d 949, 955 (11th Cir.1985) (citations omitted); see also 5 U.S.C. § 552(b)(6).

The balancing of these interests is guided by the Supreme Court's recent decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). *Reporters Committee* stressed that "FOIA's central purpose is to ensure that the Government's activities be open to the sharp eye of public scrutiny." *Id.* at 774, 109 S.Ct. at 1482. In other words, the public interest under FOIA

must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" ... This basic policy of "full agency disclosure unless information is exempted under clearly delineated statutory language" ... indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

755, 109 S.Ct. 1468, 1472, 103 L.Ed.2d 774 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)).

1. The charges alleged violations of 5 U.S.C. § 7116(a)(1), (5), and (8): interference with the employees' organization and bargaining rights, refusal to consult or negotiate in good faith with a labor organization, and otherwise failing or refusing to comply with the Federal Service Labor Management Relations Statute.

2. The FLRA is not authorized to interpret either the Privacy Act or the Freedom of Information Act (FOIA); we therefore review disclosure requests that implicate these acts de novo. See *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749,

3. Home addresses generally have been categorized as "similar files" at least potentially protected by exemption 6. See *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C.Cir.1991), cert. denied, — U.S. —, 112 S.Ct. 912, 116 L.Ed.2d 812 (1992); *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C.Cir.1989), cert. denied, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 135 (3d Cir.1974).

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sit-

In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

Id. at 772, 109 S.Ct. at 1481 (citations and footnotes omitted). Because employee addresses say nothing about a federal agency's character or function, under *Reporters Committee*, the public interest side of the balance here carries little weight.⁴

The FLRA says the union's request is proper under FOIA because the addresses could be used not only for union information and recruiting, but also for contacting federal employees to learn something about the government. But with no allegation that the government might be operating irregularly, the union cannot establish public interest based on something so tenuous. "Mere speculation about hypothetical public benefits cannot outweigh demonstrably significant invasion of privacy." *United States Dep't of State v. Ray*, — U.S. —, 112 S.Ct. 541, 549, 116 L.Ed.2d 526 (1991) (requestor based public interest in part upon hope that they or others might "be able to use that information to obtain additional information outside the government files"). In the light of the *Reporters Committee* opinion, we see no FOIA-related public interest that can be served by giving the union a listing of employee home addresses.

[2] The FLRA also argues that because the request for information in *Reporters Committee* arose solely under FOIA, that decision does not control cases where the

4. *Reporters Committee* involved FOIA exemption 7(C) for law enforcement information and its application to "rap sheets," which are criminal identification records that include the subject's history of arrests, charges, convictions, and incarcerations. The Supreme Court has reaffirmed its position on FOIA requests in the context of exemption 6 in *United States Dep't of State v. Ray*, — U.S. —, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991). See also *Hopkins v. United*

requestor has a separate statutory basis (such as the Labor Statute) to obtain disclosure of information from the government. When this separate statutory basis exists, the FLRA would have us ignore FOIA public interest concerns and instead consider the Labor Statute's public interest in fostering collective bargaining. See *FLRA v. United States Dep't of the Navy*, 966 F.2d 747 (3d Cir.1992) (*en banc*) [hereinafter *Third Circuit Dep't of Navy*]; *FLRA v. United States Dep't of the Navy*, 958 F.2d 1490 (9th Cir.1992) [hereinafter *Ninth Circuit Dep't of Navy*]; *FLRA v. United States Dep't of Commerce*, 954 F.2d 994 (4th Cir.1992), *vacated and reh'g en banc granted*, 966 F.2d 134 (1992). But we find no authority for allowing Labor Statute principles to override FOIA principles and, in turn, the Privacy Act. Such an interpretation contravenes the Labor Statute's own rule that disclosure be allowed only "to the extent not prohibited by law." 5 U.S.C. § 7114(b)(4)(B). FOIA and the Privacy Act, in our view, prohibit the disclosure.

Congress specifically excluded certain statutes from the constraints of the Privacy Act, see, e.g., 5 U.S.C. §§ 552(b)(2) (FOIA), and 552a(b)(12) (Debt Collection Act, 31 U.S.C. 3711(f)), and could have excluded the Labor Statute had it so desired. The FLRA's argument would force the court to create this exception instead. See *FLRA v. United States Dep't of the Treasury*, 884 F.2d 1446, 1453 (D.C.Cir.1989) [hereinafter *Dep't of Treasury*], *cert. denied*, 493 U.S. 1055, 110 S.Ct. 863, 107 L.Ed.2d 947 (1990). We decline to create an exemption when Congress did not.

[3] With the public interest in home address disclosure eliminated, we are left with the other side of the balance: the privacy interest in a home address.⁵ The

States Dep't of Housing and Urban Development, 929 F.2d 81, 86-88 (2d Cir.1991).

5. Courts have attributed a wide range of weights to the privacy interest inherent in one's home address. See *FLRA v. United States Dep't of the Navy*, 941 F.2d 49, 56 (1st Cir.1991) [hereinafter *First Circuit Dep't of Navy*] (collecting cases calling privacy interest "significant," "minuscule," "cognizable," "strong," and "modest").

FLRA says that a home address listing is one of the least private things about a person because it is often available in various directories or mailing lists. But frequently this kind of information is *unavailable* because the person has made a genuine effort to keep the information private—by getting an unlisted telephone number or asking to be removed from mailing lists. Just because information "is not wholly private" does not mean that a person has no interest in limiting disclosure or dissemination of the information." *Reporters Committee*, 489 U.S. at 770, 109 S.Ct. at 1480 (citation omitted).

If one does not want one's residence to be known, the importance of its being unknown seems to go to the core of privacy. Also, an address tells much more than just where a person lives. It is an indicator of one's choice of neighborhoods and one's affluence. See also *Ninth Circuit Dep't of Navy*, 958 F.2d at 1498 (Fernandez, J., dissenting) (address lists for union reveal that employee works for particular government agency, and depending on focus of union, what kind of work employee does). And "[a]lthough the purpose for which plaintiff seeks the requested information may be

salutary, 'one need only assume that business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly, a list of qualified prospects for all the special goods, services, and causes likely to appeal to [the group in question].'" *Retired Officers Ass'n v. Department of Navy*, 744 F.Supp. 1, 2 (D.D.C.1990), a proposition with which we are all the more concerned because the employee who does not wish his address released has limited means of preventing disclosure.⁶

For all these reasons, we think the privacy interest in a home address is important. And even if we found that interest to be minimal, it "cannot be outweighed by a public interest in disclosure—whatever its weight or significance—that falls outside of the FOIA-cognizable public interest in permitting the people to know what their government is up to." *United States v. Department of the Navy*, 941 F.2d 49, 57 (1st Cir.1991) [hereinafter *First Circuit Dep't of Navy*]. We therefore agree with those circuits that have concluded that this information is exempt from FOIA disclosure because it does not comport with

cannot meet this substantial burden has no effective recourse against the union through decertification.

Amicus National Treasury Employees Union suggests that the federal agency can restrict the union's use of the information by obtaining a promise of confidentiality before release or as part of a collective bargaining agreement. This kind of agreement has been upheld in the private sector. See *NLRB v. New England Newspapers, Inc.*, 856 F.2d 409, 414 (1st Cir.1988). But public and private sector labor law do not parallel each other in all respects, see *infra*; more important, this argument ignores *Reporters Committee's* finding that neither the purposes for which the request is made nor the "identity of the requesting party has [any] bearing on the merits of his or her FOIA request." *Reporters Committee*, 489 U.S. at 771, 109 S.Ct. at 1480. So, probably neither this court nor the federal employer could limit release solely to a particular requester once that release was found to be lawful under FOIA. Because we doubt that the union's release of addresses to a third party would constitute an unfair labor practice, the FLRA's powers to take "such other action as may carry out the purpose of [the labor statute]," 5 U.S.C. § 7118(a)(7), would also appear to be unavailable.

6. The question of what powers individual employees might have to stop disclosure by the union or to obtain remedies for disclosures by the union is not before us and does not determine the outcome of this case. We have thought about the question some, however. The Privacy Act provides for criminal liability for "[a]ny person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses." See 5 U.S.C. § 552a(i)(3). As a penal provision, however, this section seems to provide no private right of action. See *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369 (9th Cir.1981). And a union's failure to articulate fully all of its future uses for the information is unlikely to rise to the level of "willful" and "knowing" misconduct. So, it is not plain to us that, for example, a union would be acting wrongfully by selling address information and using the proceeds for the benefit of the employees it represents.

The aggrieved employee who objects to release of his or her address may attempt to decertify the union. But to decertify, 30% of the members of the bargaining unit must allege that the union no longer represents the majority and must obtain permission to hold a decertification election from the FLRA. A majority of employees must then vote in favor of decertification. See 5 U.S.C. § 7111. An employee who

FOIA's chief requirement; disclosure is also prohibited by the Privacy Act. See *FLRA v. United States Dep't of the Navy*, 963 F.2d 124 (6th Cir.1992); *FLRA v. United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir.1992); *United States Dep't of Navy v. FLRA*, 975 F.2d 348 (7th Cir.1992); First Circuit *Dep't of Navy*, 941 F.2d at 57-58; *Dep't of Treasury*, 884 F.2d at 1453.

[4] In a final bid to strike a balance favoring disclosure, the FLRA points out that private sector employers are required by law to release the addresses of bargaining unit employees to the union and argues that a discrepancy between federal and private sector unions for purposes of this type of disclosure is improper. Whatever our own view may be about this discrepancy, this kind of public policy consideration cannot overrule what we see as statutory requirements. Our job in this case is not to make policy, but to interpret the statutes.

In addition, parity is not required between federal sector and private sector employees; address disclosure is not the only area in which the two are treated differently. For example, federal employees cannot strike, see 5 U.S.C. § 7116(b)(7), or bargain over wages, see 5 U.S.C. §§ 7102(2), 7103(a)(14). See also *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 534, 109 S.Ct. 1282, 1287, 103 L.Ed.2d 539 (1989) (labor statute "is not a carbon copy of the NLRA, nor is the authority of the FLRA the same as that of the NLRB"); *Social Security Admin. v. FLRA*, 956 F.2d 1280, 1286 (4th Cir.1992) (federal labor statute "contains no indication that it is to be read *in pari materia* with" NLRA) (quoting *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 648, 110 S.Ct. 2043, 2047, 109 L.Ed.2d 659 (1990)).

[P]ersons who work for the federal government have an interest in preserving control over dissemination of their employer identification and home addresses which is different and perhaps more substantial than private sector employees. Federal employees may often discover that they are regarded as the personification of Government policies and thus the

unwilling targets of persons or groups who oppose those policies. One can reasonably conclude that Congress thought of this distinction when it specifically prohibited in the Labor Statute the disclosure of information protected by other laws, most notably the Privacy Act. There is no such general prohibition under the National Labor Relations Act governing the private sector.

Third Circuit *Dep't of Navy*, 966 F.2d at 773 (Rosenn, J., dissenting).

CONCLUSION

The Naval Exchange committed no unfair labor practice when it refused to provide home addresses of bargaining unit employees. The FLRA's application for enforcement is DENIED.

ATKINS, Senior District Judge, dissenting:

I respectfully dissent because I agree with the reasoning set forth in the recent opinions of the Third and Ninth Circuits. See *FLRA v. United States Dep't of the Navy*, 966 F.2d 747 (3rd Cir.1992) (en banc) [hereinafter *Third Circuit Dep't of Navy*]; *FLRA v. United States Dep't of the Navy*, 958 F.2d 1490 (9th Cir.1992) [hereinafter *Ninth Circuit Dep't of Navy*]. Most importantly, I agree with these circuits that where a union requests information from a federal agency pursuant to the Labor Statute, the case of *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), does not limit our public-interest consideration to information revealing "what the government is up to," regardless of the purposes or identity of the requesting party. See *Third Circuit Dep't of Navy*, 966 F.2d at 757-58; *Ninth Circuit Dep't of Navy*, 958 F.2d at 1495-96. Moreover, given the union's purpose in requesting the information and the strong public interest in collective bargaining, see 5 U.S.C. § 7101(a)(1), I do not believe that "a balancing of individual privacy interests against the public interest in disclosure reveals that disclosure of the information constitutes a clearly unwarranted invasion

of privacy." *Cochran v. United States*, 770 F.2d 949, 955 (11th Cir.1985) (quoting 5 U.S.C. § 552(b)(6)). Accordingly, I would enforce the FLRA's application for enforcement.



Charles Edwin LEE, Kathleen Otts
Lee, Plaintiffs-Appellees,
Cross-Appellants,

v.

UNITED STATES of America, United
States Department of the Navy, Service-
men's Group Life Insurance, Defen-
dants,

Prudential Insurance Company, Service-
men's Group Life Insurance Division,
Defendant-Appellant, Cross-Appellee.

No. 91-7077.

United States Court of Appeals,
Eleventh Circuit.

Nov. 18, 1992.

Insurer appealed from judgment of the United States District Court for the Northern District of Alabama, No. 89-N-1857-J, Edwin L. Nelson, J., permitting parents of deceased service member to recover life insurance benefits from his Servicemen's Group Life Insurance (SGLI) policy. The Court of Appeals held that: (1) in determining whether coverage under policy terminated because insured service member was absent without leave for a period of more than 31 days, standard military method of counting first day of absence as whole day applied, rather than civil procedure rule which excludes first day in computing period of time, and (2) at time of his death, service member was absent for 31 days, 14 hours and 34 minutes, and thus coverage terminated prior to his death.

Reversed and remanded.

Opinion, 967 F.2d 1569, vacated.

1. Time ⇐9(1)

Generally, civil procedure rule excluding first day in computing a period of time applies to all federal statutes enacted or amended subsequent to promulgation of rule. Fed.Rules Civ.Proc.Rule 6(a), 28 U.S.C.A.

2. Armed Services ⇐84

Since Congress incorporated unique military term "absence without leave" in statute governing Servicemen's Group Life Insurance policy, without providing any specific definition, it must be concluded that Congress intended that courts construing SGLI provision that coverage terminates "at the end of the thirty-first day of a continuous period of absence without leave" rely on definition of "absence without leave" found in the military justice system. 38 U.S.C.(1988 Ed.) § 768(a)(1)(B)(i).

3. Armed Services ⇐84

Time ⇐9(10), 11

In determining whether Servicemen's Group Life Insurance (SGLI) policy was terminated because insured service member was absent without leave for period of more than 31 days, standard military method of counting first day of absence as a whole day applied, rather than civil procedure rule which excludes first day in computing period of time. 38 U.S.C.(1988 Ed.) § 768(a)(1)(B)(i); Fed.Rules Civ.Proc.Rule 6(a), 28 U.S.C.A.

J. Mason Davis, Jr., John R. Chiles, James Stanley Roberts, Jr., Birmingham, Ala., for appellant.

Timothy Ray Wadsworth, Sulligent, Ala., for appellee.

Appeals from the United States District Court for the Northern District of Alabama.

to the terms of the collective bargaining agreement until June 1973. The parties did not meet to renegotiate once the settlement agreement expired. The alleged breach did not occur until 1975, long after the settlement agreement expired. Appellants offered no facts to show that Crown and Universal were joint employers. The business relationship of Crown and Universal was close and interconnected. But appellants produced no evidence of joint ownership or control of the two companies. Although Crown necessarily directed the drivers to some extent, the trucking company was in control of their wages, benefits, and working conditions. On this record, no issue is raised that Crown and Universal were joint employers of the drivers. *Rusom v. Sears, Roebuck & Co.*, 558 F.2d 439, 443 (8th Cir.), cert. denied, 434 U.S. 955, 98 S.Ct. 481, 54 L.Ed.2d 313 (1977); *NLRB v. Triumph Curing Center*, 571 F.2d 462, 467-68 (9th Cir. 1978).

[13,14] The district court also granted summary judgment to Crown on the fraud claim, ruling that appellants had not shown facts raising a triable issue of fraud based upon the Oakes letter and the 1973 settlement agreement. We agree. Appellants failed to produce any evidence of fraudulent intent. Appellants argue that fraudulent intent may be inferred from Crown's eventual failure to perform according to its promises. It is true that fraud may be inferred from an immediate failure to perform a promise. *Santoro v. Carbone*, 22 Cal.App.3d 721, 99 Cal.Rptr. 488 (1972); *Roberts v. Salot*, 166 Cal.App.2d 294, 333 P.2d 232 (1958). In this case, however, Crown initially performed in accordance with the promises made in the documents. In 1973, Crown did arrange for appellants to retain their jobs when Crown switched driver supply companies, just as the Oakes letter indicated it would. Crown did abide by the terms of the 1973 settlement agreement, until it expired in June 1973. Crown's initial performance in accordance with its promises negates any possible in-

ference of fraud. See *Justheim Petroleum Co. v. Hammond*, 227 F.2d 629 (10th Cir. 1955).

[15] Appellants also allege that Universal was liable for breach of contract. The district court was correct to dismiss this claim. Appellants failed to allege a contract which was breached by Universal. Appellants' basic complaint was that they lost their jobs because of Crown's decision to discontinue its contract with Universal. Universal did lay off appellants as a result of Crown's decision. But under the collective bargaining agreement, Universal was entitled to lay off the drivers because of lack of work. Appellants did not allege that Universal had work for the drivers and still laid them off. Nor did appellants point to any other contractual duty which Universal may have breached by laying them off. Therefore, appellants failed to state a claim of breach of contract against Universal.

CONSPIRACY CLAIMS

[16,17] The district court granted summary judgment against appellants on their claims that the appellees conspired to breach the collective bargaining agreement. The court was correct in holding that federal courts do not have jurisdiction to entertain claims of conspiracy under § 301. *Rusom v. Sears, Roebuck & Co.*, 558 F.2d at 441 n.3; *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1253 (2d Cir. 1970), cert. denied sub nom. *United Steelworkers of America v. Abrams*, 401 U.S. 1009, 91 S.Ct. 1253, 28 L.Ed.2d 545 (1971). The court did not abuse its discretion in dismissing the pending state claims of conspiracy. *Hodge v. Mountain States Telephone & Telegraph Co.*, 555 F.2d 254, 262 (9th Cir. 1977).

CLAIMS AGAINST THE UNION

Appellants contend that the union breached its duty of fair representation by settling the 1973 unfair labor practice charge and by failing to file a grievance

over the termination of their employment in 1975. The district court granted summary judgment for the union. We affirm.

[18] Any claim based upon the settlement of the 1973 unfair labor practice charge is barred by the statute of limitations. The proper statute of limitations is Cal.Civ.Code § 338 which provides a three-year limit for liabilities created by statute. *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 753 (9th Cir. 1978). The complaint in this suit was filed on March 26, 1976, more than three years after the March 8, 1973, settlement agreement to which appellants object.

[19,20] The union did fail to process a grievance against Crown over the termination of appellants' employment in 1975. Instead, the union filed an unfair labor practice charge with the NLRB. That action does not show a breach of the union's duty to represent appellants fairly. A union's decision not to file a grievance is wrongful only when the union's treatment of individual employees has been arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. at 190, 87 S.Ct. at 916; *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756-57 (9th Cir. 1977). In this case, no facts are offered to indicate that the union's conduct was arbitrary, discriminatory, or in bad faith. The union filed a complaint with the NLRB, rather than a grievance, for tactical reasons. The union's attorney felt that course of action would be more effective because the sophisticated legal theories needed to establish a contract with Crown would appeal more to the NLRB than to the lay persons on a grievance committee. We think that uncontroverted facts show this decision to be a reasonable one, particularly in light of our conclusion that Crown was not bound by the terms of the collective bargaining agreement which established the grievance process. The union did not breach its duty of fair representation by not filing a grievance.

AFFIRMED.

ST. MICHAEL'S CONVALESCENT HOSPITAL, a California corporation, St. Therese Convalescent Hospital, a California corporation, Margaret Carlson, doing business as St. Luke's Convalescent Hospital, and all others similarly situated, Plaintiffs-Appellants,

v.

The STATE OF CALIFORNIA, Edmund G. Brown, Jr., in his official capacity as the Governor of the State of California; the California Department of Health, the California Department of Benefit Payments, and the California Health Facilities Commission, the Department of Health, Education and Welfare, and Joseph Califano, in his official capacity as the Secretary of Health, Education and Welfare, Defendants-Appellees.

No. 79-4195.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 9, 1980.

Decided May 1, 1981.

Action was brought by health care providers who were reimbursed by State through medi-Cal program in California to enjoin release of cost information to requesting public. The United States District Court for the Northern District of California, Spencer Williams, J., found that plaintiffs had not alleged valid federal claims, denied motion to amend, and declined to exercise pendent jurisdiction over State claims, and plaintiffs appealed. The Court of Appeals, J. Blaine Anderson, Circuit Judge, held that: (1) health care providers had no standing to raise claim under Privacy Act; (2) no private right of action exists to enjoin agency disclosure of information under either Freedom of Information Act or Privacy Act; (3) no cognizable constitutional right of privacy was implicated; but (4) providers should have been allowed to

amend complaint on issue whether disclosure of cost information would infringe upon constitutional property right that they might possess in cost information.

Affirmed in part and remanded in part.

1. Federal Courts ⇐763, 794

On appeal from order dismissing complaint for failure to state claim, complaint will be construed favorably to appellants and standard to be applied is whether it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of claims.

2. Records ⇐50

Freedom of Information Act generally provides for mandatory disclosure of information held by federal agencies, unless requested material is exempt. 5 U.S.C.A. § 552.

3. Records ⇐35

Health care providers who were reimbursed by State through medi-Cal program in California for services performed, and who were corporations or sole proprietorships, were not "individuals" and thus lacked standing to raise claim concerning release of cost information to requesting public under the Privacy Act, which only applies to records of individuals. 5 U.S.C.A. § 552a(a)(2), (g)(1).

See publication Words and Phrases for other judicial constructions and definitions.

4. Records ⇐35

No private right of action exists to enjoin agency disclosures of information under either the Freedom of Information Act or the Privacy Act. 5 U.S.C.A. §§ 552, 552a.

5. Records ⇐51

Freedom of Information Act and Privacy Act apply only to agencies and under applicable definitions, "agency" did not en-

compass State agencies or bodies such as ones that health care providers sought to enjoin from releasing to the public certain cost information provided in connection with medi-Cal program. 5 U.S.C.A. §§ 551(1), 552(e).

See publication Words and Phrases for other judicial constructions and definitions.

6. Records ⇐31, 51

Federal regulations, which are promulgated to assure that federal funds are spent for purposes intended, do not convert acts of local and State governmental bodies into federal governmental acts and thus federal regulations applicable to medicaid program did not subject State agencies to provisions of Freedom of Information Act and Privacy Act in connection with cost information furnished by providers under medi-Cal program. 5 U.S.C.A. §§ 551(1), 552(e).

7. Records ⇐31

Since State agencies which administered medicaid program in California were not federal agencies, no basis existed to justify transforming officers and employees of those State agencies into federal officers and employees for purposes of statutes which provide that neither Secretary of Health, Education and Welfare nor any of its officers or employees shall disclose any information obtained except as prescribed by regulations, and which make criminal the disclosure of confidential information by officers or employees of the United States unless such disclosure is authorized by law. 18 U.S.C.A. § 1905; Social Security Act, § 1106, 42 U.S.C.A. § 1306.

8. Constitutional Law ⇐277(1), 278(1.2)

Trade secret information can constitute property within meaning of Fifth and Fourteenth Amendments, and thus failure to provide adequate protection to assure its confidentiality, when disclosure is compelled by the government, can amount to unconstitutional taking of property. U.S.C.A. Const. Amends. 5, 14.

9. Federal Civil Procedure ⇐840

Where no responsive pleading was filed to complaint and motion to amend com-

Cite as 643 F.2d 1369 (1981)

plaint was filed before motion to dismiss was granted, motion to amend complaint by adding allegations that health care providers' constitutional right to be secure in their property would be violated by disclosure of cost information to public, on theory that cost information contained confidential and trade secret information, should have been granted. U.S.C.A. Const. Amends. 5, 14; Fed. Rules Civ. Proc., Rule 15(a), 28 U.S.C.A.

10. Constitutional Law ⇐82(7)

Claim of health care providers, who did not challenge disclosure of cost information to state agencies under medi-Cal program but rather complained of subsequent availability of information to public, and whose claim was not based on any contention that public disclosure of cost information would restrict their freedom of action in sphere contended to be private, did not implicate any cognizable constitutional right of privacy that would prevent public disclosure of cost information.

Orrin L. Grover, San Francisco, Cal., for plaintiffs-appellants.

Ralph M. Johnson, Deputy Atty. Gen., San Francisco, Cal., John M. Fredenburg, Gen. Counsel, Sacramento, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before ANDERSON and TANG, Circuit Judges, and MURRAY,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

The plaintiffs-appellants are three health care providers who are reimbursed by the state through Medi-Cal, the Medicare program in California, for services they per-

* The Honorable William D. Murray, Senior United States District Judge for the District of Mon-

form. They sought to enjoin the defendants-appellees, the California Department of Health Services (DHS), and the California Health Facilities Commission (the Commission), from releasing to the requesting public certain cost information which the plaintiffs had provided to the defendants. The plaintiffs also named the Department of Health, Education and Welfare (HEW) and its Secretary as defendants; however, HEW and its Secretary were never served and the plaintiffs ultimately voluntarily dismissed the federal defendants. Therefore, the only appellees are the state parties, and the only information involved is the information that was submitted to and is held by DHS and the Commission.

I. FACTS

DHS is the state agency that has responsibility for administering the Medi-Cal program. California Welfare and Institutions Code section 10722. Under Medi-Cal, DHS reimburses health care providers who extend covered services to eligible Medi-Cal recipients. To determine rates of reimbursement for the services, DHS requires providers to provide the type of cost information which is the subject of this suit. These records are then open to inspection by the public.

Apart from the requirements of DHS Medi-Cal, health care providers are also required to submit the same or similar cost information to the Commission pursuant to the California Health Facilities Disclosure Act. California Health and Safety Code section 440 et seq. The Health Facility Disclosure Act was enacted in response to rapidly increasing health care costs. *Wilson v. California Health Facilities Commission*, 110 Cal.App.3d 317, 167 Cal.Rptr. 801 (Ct. of App. 1st App. Div., 1980). "The disclosure aspects, based upon a uniform accounting and reporting system, were an attempt to provide the public and the government with

tana, sitting by designation.

the necessary data to make sound judgments for the planning and purchase of hospital services." *Id.*

Plaintiffs' complaint was dismissed for failure to state a claim upon which relief could be granted. The court ruled that:

1. the provisions of the Freedom of Information Act, 5 U.S.C. § 552, did not apply to a state administering a program like Medi-Cal, even though the program was partially funded by federal grants;
2. the provisions of the Federal Privacy Act, 5 U.S.C. § 552a, did not apply to a state administering a program like Medi-Cal because it only applied to federal agencies; it prohibited disclosure of records of individuals and not entities; and state grantees of Medicaid funds were specifically exempt from the Privacy Act;
3. there was no cognizable right of privacy created by the First, Fourth, Fifth, or Fourteenth Amendments to the United States Constitution that would prohibit the public disclosure of the cost information.

The district court also denied the plaintiffs' motion for a summary judgment, motion to amend the complaint, and motion to certify the class. Additionally, because it found that the plaintiffs had not alleged valid federal claims, the district court declined to exercise its pendent jurisdiction over the plaintiffs' state claims.

On appeal, the appellants contend that federal laws governing the disclosure of government-held information, 5 U.S.C. § 552, the Freedom of Information Act (FOIA), 5 U.S.C. § 552a, the Privacy Act (Privacy Act), 18 U.S.C. § 1905 (providing criminal sanctions for the disclosure of confidential information by federal employees) (§ 1905), 42 U.S.C. § 1306 (concerning the disclosure of information in the possession of the Department of Health, Education and Welfare) (§ 1306), are applicable to the state agencies involved and that those laws

prohibit the disclosure of the cost information.

Appellants also argue that the Constitution protects their right of privacy and their property interest in the information and prohibits the disclosure of the information. By raising the argument concerning the property interest, a claim which was only alleged in their proffered amended complaint, we regard this appeal as also challenging the denial of the motion to amend.

We affirm the district court's dismissal of the complaint as to the federal statutory claims and the constitutional privacy claim; however, we remand to allow plaintiffs to amend their complaint regarding the alleged property interest in the cost information.

II. DISCUSSION

A. Standard of Review

[1] This appeal is before us from an order dismissing the complaint for failure to state a claim upon which relief can be granted. Therefore, the complaint will be construed favorably to the appellants and the standard we apply is "whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of [appellants'] claims." *De La Cruz v. Torrey*, 582 F.2d 45, 48 (9th Cir.), cert. denied, 441 U.S. 965, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979).

B. The Federal Laws

[2] The FOIA, generally, provides for the mandatory disclosure of information held by federal agencies, unless the requested material is exempt from mandatory disclosure by one of the nine exemption provisions in the FOIA. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-221, 98 S.Ct. 2311, 2316, 57 L.Ed.2d 159 (1978); 5 U.S.C. § 552.

The Privacy Act, on the other hand, generally prevents a federal agency's disclosure

Cite as 643 F.2d 1369 (1981)

of information pertaining to an individual unless the individual has made a request or has given consent to disclosure in writing, or unless disclosure is provided for under the exceptions to the Privacy Act. 5 U.S.C. § 552a, § 552a(b)(1)-(11).

Section 1306 states, in pertinent part, that neither the Secretary of HEW nor any of its officers or employees shall disclose any information obtained by them in the discharge of their duties under the Social Security Act except as the Secretary of HEW may by regulations prescribe. Criminal sanctions are authorized for its enforcement. 42 U.S.C. § 1306.

Section 1905 makes criminal the disclosure of confidential information by officers or employees of the United States unless such disclosure is authorized by law. 18 U.S.C. § 1905.

Appellants contend that under these statutes, the cost information was prohibited from being disclosed and the district court erred in dismissing the suit and denying injunctive relief. We determine, however, that these statutes provided no basis upon which relief could have been granted.

[3] First, the Privacy Act only applies to records of individuals—a citizen of the United States or an alien lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2); 5 U.S.C. § 552a(g)(1). The

1. Section 551(1) provides that:

"For the purposes of this subchapter—

- (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
 - (A) the Congress;
 - (B) the courts of the United States;
 - (C) the governments of the territories or possessions of the United States;
 - (D) the government of the District of Columbia;
 - (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
 - (F) courts martial and military commissions;
 - (G) military authority exercised in the field in time of war or in occupied territory; or

appellants, who are corporations or sole proprietorships, are not "individuals" and thus lack standing to raise a claim under the Privacy Act. *Cell Associates v. National Institutes, etc.*, 579 F.2d 1155, 1157 (9th Cir. 1978).

[4] Second, there is no private right of action to enjoin agency disclosures of information under either the FOIA or § 1905. *Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). And, it is very doubtful that a private right of action may be inferred under § 1306. See, *Id.* at 316-317, 99 S.Ct. at 1725.

[5] Moreover, the FOIA and the Privacy Act apply only to "agencies" as that term is defined under 5 U.S.C. § 551(1)¹ and 5 U.S.C. § 552(e).² Under these definitions, "agency" does not encompass state agencies or bodies.

Appellants, however, argue that the federal funds received through the Medicaid program and Medicaid's pervasive statutory and regulatory scheme necessarily subjects the DHS and the Commission to the provisions of the FOIA and the Privacy Act.

[6] Federal funding reaches a count number of activities of local and state governments. To assure that the federal funds are spent for the purposes for which they were intended, extensive federal regu-

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1844, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

2. Section 552(e) provides that:

"For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

lations are promulgated and must be complied with. However, those regulations do not convert acts of local and state governmental bodies into federal governmental acts." *United States v. Orleans*, 425 U.S. 807, 816, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390 (1976); *Forsham v. Harris*, 445 U.S. 169, 100 S.Ct. 978, 63 L.Ed.2d 293 (1980). "[E]xtensive, detailed and virtually day-to-day supervision" by the federal government is needed before "agency" status could be said to attach. *Forsham v. Harris*, 100 S.Ct. at 984, 63 L.Ed.2d at 304; *United States v. Orleans*; see, *Housing Authority of City of Seattle v. State of Washington*, 629 F.2d 1307 (9th Cir. 1980).

Medi-Cal, the Medicaid program in California, is a state-administered program which receives federal financial support and which is also highly regulated by the federal government. However, the appellants do not contend nor does it appear that the federal government exercises the "extensive, detailed and virtually day-to-day supervision" over the program that is needed to characterize the state bodies as federal agencies. Thus we agree with the district court that neither the DHS nor the Commission are "agencies."

[7] Similarly, § 1306 and § 1905 apply only to federal employees. Since the DHS and the Commission are not federal agencies we find no basis to justify transforming the officers and employees of those state bodies into federal officers and employees.

The district court correctly dismissed that portion of the complaint which was based upon the federal statutory provisions.

C. Constitutional Prohibitions to Disclosure

1. Property Interest

[8] Trade secret information can be considered property within the meaning of the fifth and fourteenth amendments. *Wearly v. FTC*, 462 F.Supp. 589, 597-598 (D.N.J.

1978), *vacated on other grounds*, 616 F.2d 662 (3d Cir. 1980). Thus "[f]ailure to provide adequate protection to assure [its] confidentiality, when disclosure is compelled by the government, [can amount] to an unconstitutional 'taking' of property by destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors." *Wearly v. FTC*, 462 F.Supp. at 598.

[9] In their proffered amended complaint, appellants alleged that their constitutional right to be secure in their property would be violated by the disclosure of the cost information to the public. They contend on appeal that the cost information contains confidential and trade secret information.

The motion to amend the complaint should have been granted. No responsive pleading was filed to the complaint and the motion to amend the complaint was filed before the motion to dismiss was granted. "Under Rule 15(a), F.R.Civ.Proc., a party may amend his pleading once as a matter of course at any time before a responsive pleading is served. A motion to dismiss is not a 'responsive pleading' within the meaning of the rule." *Nolen v. Fitzharris*, 450 F.2d 958 (9th Cir. 1971); see also *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980).

We, therefore, vacate the district court's order denying leave to amend and remand this issue to the district court.

2. Privacy Right

[10] Appellants also contend that their constitutional right to privacy will be violated by the disclosure of the cost information to the public. They do not cite any cases which could be said to confer a federal right of privacy that would prevent the public disclosure of the cost information, and we have found none. However, the following quote from the Supreme Court's decision in *Paul v. Davis*, 424 U.S. 693, 712-713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976), is instructive:

"While there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power. See *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. See *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); *Terry v. Ohio*, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968). And our other 'right of privacy' cases, while defying categorical description, deal generally with substantive aspects of the Fourteenth Amendment. In *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' as described in *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The activities detailed as being within this definition were ones very different from that for which respondent claims constitutional protection—matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.

"Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting

charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner."

Appellants do not challenge the disclosure of the cost information to the government, but rather complain of the subsequent availability of the information to the public. As in *Paul v. Davis*, their claim is not based upon any contention that the public disclosure of the cost information will "restrict [their] freedom of action in a sphere contended to be private." We conclude that no cognizable constitutional right of privacy is implicated here.³

III. CONCLUSION

We remand to the district court with leave to plaintiffs to amend the complaint on the issue of whether the disclosure of the cost information will infringe upon a constitutional property interest that the appellants may possess in the cost information. The district court's dismissal of all the other federal claims is AFFIRMED.



3. Even if it could be said that a privacy interest is infringed upon, we determine that the State's legitimate needs for the information:

1. to set the reimbursement rates for Medi-Cal services provided by health care providers such as appellants; and
2. to accomplish the purposes of the Health Care Facilities Disclosure Act "[of enabling] public agencies and private citizens to make informed decisions about planning and purchasing health care; [of encouraging] public and private third party

payors to use this information to ascertain fair and reasonable premium rate; and [of insuring] that the total cost of health care is reasonably related to the total services offered, *Wilson v. California Health Facilities Commission*, *supra*. outweigh the privacy interest that appellants may possess in this situation. See *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir.), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979).