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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JED MARGOLIN, Plaintiff, vs. CHARLES F. BOLDEN, Administrator, National Aeronautics and Space Administration, Defendant.	Case No. 3:09-cv-00421-LRH-(VPC) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Comes now Plaintiff, Jed Margolin ("Margolin"), appearing pro se, and files this MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS.

TABLE OF CONTENTS

INTRODUCTION

Margolin is the named inventor on U.S. Patent 5,904,724 **Method and apparatus for remotely piloting an aircraft** issued May 18, 1999. (Plaintiff's Complaint, Exhibit 1 at Appendix A12) The patent teaches the use of what is now called *synthetic vision* for controlling an unmanned aerial vehicle (UAV). Margolin contacted NASA in May 2003 after he became aware that NASA had used synthetic vision in the X-38 project. Although he wanted NASA to buy the patent he was told he could either offer to sell the patent to NASA or he could file a claim for compensation for NASA's use of the patent, but he could not do both. As a result, Margolin filed a claim for compensation. (Plaintiff's Complaint, Exhibit 1 at Appendix A2) Margolin was then told that an investigation would be conducted, that it would take three to six months, and that the purpose of the investigation would be to find prior art to invalidate the patent. After six months Margolin made several attempts to find out the results of the investigation but was rebuffed, and then ignored.

Subsequently, Margolin assigned the patent to Optima Technology Group and the claim against NASA went along with it. However, Margolin still wanted to know the results of NASA's investigation so, on July 1, 2008 he filed a Freedom of Information Act ("FOIA") request (Plaintiff's Complaint Exhibit 2 at Appendix A17), which was designated FOIA HQ 08-270. For some reason it was turned over to Mr. Jan McNutt in the Office of the General Counsel. In Mr. McNutt's response dated August 5, 2008 he admitted that no investigation had been done (Plaintiff's Complaint Exhibit 3 at Appendix A19) and asked Margolin to give NASA a 90-day

extension to his FOIA request. Margolin agreed. (Plaintiff's Complaint Exhibit 4 at Appendix A21)

However, despite being told several times that the requested documents were being sent out, NASA did not send any documents to Margolin until May 18, 2009. It is likely that the reason NASA finally responded to Margolin's FOIA Request is the fax he sent to Acting Administrator Christopher Scolese where he asked Mr. Scolese to confirm that he had exhausted all the administrative remedies that NASA had to offer. Margolin even stated his intention to sue NASA. (Plaintiff's Complaint Exhibit 5 at Appendix A23):

> When I file suit against NASA in the U.S. District Court For the District of Nevada I had planned to mail the Complaint to you. Since it does not seem possible to mail anything to NASA with any hope of success, will you allow me to email or fax the Complaint to you and will you waive Service?

Margolin had previously sent the letter to Mr. Scolese by Certified Mail, but USPS did not deliver it and had no explanation how or where it was lost.

Most of the documents NASA sent to Margolin were documents he already had, especially the documents Margolin had himself sent to NASA. There were other documents NASA admitted to having but refused to provide. (Plaintiff's Complaint Exhibit 6 at Appendix A27) Although 5 U.S.C. § 552(a)(6)(F) requires agencies to give an estimate of the volume of the documents being withheld, NASA failed to do so.

One of the documents that NASA withheld from Margolin is a letter dated March 19, 2009 that was sent by Gary G. Borda ("Borda") NASA Agency Counsel for Intellectual Property to Optima Technology Group ("OTG"). (Plaintiff's Complaint Exhibit 7 at Appendix A30) This

document was given to Margolin by OTG. In this letter Borda denies Claim I-222 regarding NASA's infringement of U.S. Patent 5,904,724 ('724) in the X-38 project. Margolin's FOIA 08-270 request to NASA was to produce documents relating to Claim I-222 and NASA withheld the most material document so far. The Borda letter asserts:

> "… numerous pieces of evidence were uncovered which would constitute anticipatory prior knowledge and prior art that was never considered by the U.S. Patent and Trademark Office during the prosecution of the application which matured into Patent No. 5,904,724."

and threatens, "… NASA reserves the right to introduce such evidence of invalidity in an appropriate venue, should the same become necessary." *id.*

The exemption claimed by NASA in their FOIA Response was under 5 U.S.C.§ 552(b)(5):

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

Since the Borda Patent Report purports to show that the '724 patent is invalid due to prior art, the only appropriate venues for NASA to use are the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Patent Office. When used in the Courts as a defense against patent infringement NASA would need to submit the Borda Patent Report. The Courts will not take NASA's word that "We have in our hand evidence that the patent is invalid." NASA would be required to produce the evidence. It would not need Discovery. The same is true if NASA used the Borda Patent Report at the Patent Office in a Request For Re-Examination. A request for Re-Examination may be either *ex parte* (37 CFR §1.510) or *inter parties (*35 U.S.C. § 311). They both require that NASA produce the report.

The Borda Patent Report is not eligible for the Deliberative Process exemption because there is no discernable legitimate NASA policy that resulted from, or could result from, the Borda Patent

Report. The Borda Patent Report is not eligible for Attorney-Client Privilege because the manner in which Borda has threatened to use the Report requires that it be made public. For these and other good reasons the Borda Patent Report is not exempt under 5 U.S.C. § 552(b)(5).

Margolin filed a FOIA Appeal on June 10, 2009 which was received at NASA Headquarters on June 12, 2009. (Plaintiff's Complaint Exhibit 9 at Appendix A57)

On Monday, July 21, 2009, Margolin called the NASA Office of the General Counsel to inform NASA that they had failed to respond by the 20 day statutory deadline required by 5 U.S.C. § 552(a)(6)(A)(ii), and to ask what NASA's intentions were. Margolin was given misinformation and the next day received an email from Mr. Jan McNutt of the Office of the General Counsel asking for an extension. (Plaintiff's Complaint Exhibit 11 at Appendix A61) Due to the bad faith that NASA had shown to Margolin for the preceding 6+ years, Margolin said, "No." (Plaintiff's Complaint Exhibit 12 at Appendix A63)

Margolin filed a Complaint against Charles F. Bolden, Administrator, National Aeronautics and Space Administration ("General Bolden"), on July 31, 2009 under the Freedom of Information Act 5 U.S.C. § 552 (2007) for injunctive and other appropriate relief seeking the disclosure and release of agency records improperly withheld from him. It was assigned a case number which appeared on Pacer later that same day. The Complaint appeared on Pacer the next day, August 1, 2009.

On August 3, 2009 Margolin hand delivered a copy of the Summons and of the Complaint to the Reno Office of the U.S. Attorney. (Pacer Document 4) Also on August 3, 2009 he mailed copies

of the Summons and of the Complaint to Charles F. Bolden, Administrator, National Aeronautics and Space Administration, and to the Attorney General of the United States. *id.*

On August 10, 2009 Margolin received NASA's denial of his Appeal. (See Exhibit 1 at Appendix at A4) The letter was from Thomas S. Luedtke, Associate Administrator for Institutions and Management. It was dated August 5 (four days after Margolin's Complaint appeared on Pacer and two days after Margolin served the U.S. Attorney) and postmarked August 6, which was the same day the Post Office delivered Margolin's Summons and Complaint to NASA.

STATEMENT OF FACTS

Defendant filed a Motion to Dismiss based on the theory:

A. This action should be dismissed because individual agency officials are not proper defendants in actions under the Freedom of Information Act ("FOIA").

and stated:

> Plaintiff Jed Margolin has sued Charles F. Bolden, Administrator of the National Aeronautics and Space Administration ("NASA"), for failure to provide certain documents requested under FOIA. But individual agency employees are not proper party defendants in FOIA actions. *Johnson v. Commissioner of Internal Revenue,* 2002 WL 31934162 (W.D. Wash. 2002); *see also* 5 U.S.C. § 552(a)(4)(B) ("[T]he district court of the United States * * * has jurisdiction to enjoin the *agency* from withholding agency records and to order the production of any agency records improperly withheld from the complainant[.]") (emphasis added); *Hardy v. Daniels,* 2006 WL 176531 (D. Or. 2006) ("[T]he general consensus is that only a federal *agency,* and not federal officials, can be sued under FOIA.") (emphasis in original). Because plaintiff's complaint names only the NASA Administrator as a defendant, dismissal is warranted.

ARGUMENT

A. Charles F. Bolden, Administrator, National Aeronautics and Space Administration, is a proper defendant because, by statute, "… the Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof."

Defendant's Motion to Dismiss cites two unpublished cases: *Johnson v. Commissioner of Internal Revenue,* 2002 WL 31934162 (W.D. Wash. 2002) and *Hardy v. Daniels* 2006 WL 176531 (D. Or. 2006). The issue of whether unpublished cases may be cited as precedent will be addressed later.

The Motion to Dismiss also cites 5 U.S.C. § 552(a)(4)(B):

> ("[T]he district court of the United States * * * has jurisdiction to enjoin the *agency* from withholding agency records and to order the production of any agency records improperly withheld from the complainant[.]") (emphasis added);

What is an Agency, and in particular, what is NASA? This is more than a philosophical question.

NASA has property. NASA has buildings. NASA has equipment. NASA has spacecraft. And NASA has lots and lots of data. Are these physical things NASA? Or is NASA the people who work for NASA?

The Administrative Procedure Act (5 U.S.C. § 551 (1) defines "agency" as follows:

> § 551. Definitions
>
> For the purpose 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;

or except as to the requirements of section 552 of this title -

(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

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

NASA does not fall under exceptions A - H, so NASA is an "authority of the Government of the United States, … "

It is not necessary to argue the meaning of Authority. It is safe to say that Authority is not exercised by physical things such as property, buildings, equipment, spacecraft, or data.

Authority is only exercised by People. Agencies are People. NASA is People.

According to *The National Aeronautics and Space Act,* Pub. L. No. 85-568, 72 Stat. 426 (Jul. 29, 1958) As Amended, TITLE II Sec. 202. (Available at NASA's Web Site at (http://www.nasa.gov/offices/ogc/about/space_act1.html)

(a) There is hereby established the National Aeronautics and Space Administration (hereinafter called the "Administration").

The Administration shall be headed by an Administrator, who shall be appointed from civilian life by the President by and with the advice and consent of the Senate.

Under the supervision and direction of the President, the Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof.

Margolin believes that since the Administrator is "responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof," the Administrator is ultimately responsible for NASA's failure to comply with the Freedom of Information Act. It should be noted that Margolin did not name General Bolden as the defendant personally, he named him in his capacity as NASA Administrator and sent the Summons and Complaint to NASA Headquarters. (See Pacer Document 2) Since he sent the Summons and Complaint to General Bolden he felt it necessary to put the General's name on it so that NASA would not lose it or misdirect it. (As previously noted NASA has a history of losing mail that Margolin has sent to it.)

The Freedom of Information Act recognizes that it is about people. 5 U.S.C. § 552 (a)(4)(G) states:

> (G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

If an employee who is low in the chain of command were ordered by a superior to withhold documents, who would be punished? And how far up the chain of command would the Court go? According to The National Aeronautics and Space Act (*id.*) the Administrator is ultimately responsible.

NASA also has patents. The USPTO database lists 662 patents assigned to The United States of America as represented by the "Administrator of the National Aeronautics and Space Administration." See Exhibit 2 at Appendix A12. An example is U.S. Patent 7,590,904 **Systems and methods for detecting a failure event in a field programmable gate array** issued

September 15, 2009 to Ng, et al. (The front page of the patent is Exhibit 3 at Appendix A15.) Are these patents the personal property of the NASA Administrator? Is U.S. Patent 7,590,904 General Bolden's personal patent? No, it isn't, even though it says that the Administrator owns the patent. General Bolden is the Administrator, and was on September 15, 2009 when the patent issued, but he does not personally own the patent. He "owns" the patent in the exercise of the authority given to him by The National Aeronautics and Space Act *(supra.).* This is the authority which 5 U.S.C. § 551 (1) defines as an Agency.

When NASA finally did produce a response to Margolin's FOIA Request (Plaintiff's Complaint Exhibit 6 at Appendix A27), it contained the statement:

> You may appeal this initial determination to the NASA Administrator. Your appeal must (1) be addressed to the Administrator, National Aeronautics and Space Administration, Washington, DC 20546, (2) be clearly identified on the envelope and in the letter as an "Appeal under the Freedom of Information Act", (3) include a copy of the request for the agency record and a copy of this initial adverse determination, (4) to the extent possible, state the reasons why you believe this initial determination should be reversed, and (5) be sent to the Administrator within thirty (30) calendar days of the receipt of this initial determination.

{Emphasis added}

As a result, when Margolin's Appeal was ignored it was reasonable and consistent to name the Administrator as the Defendant.

Margolin did not name General Bolden lightly. General Bolden did not become NASA Administrator until July 17, 2009. NASA's bad faith toward Margolin and their refusal to comply with the Freedom of Information Act began long before that. Unfortunately, failure to name the correct head of an agency at the time a lawsuit is filed can be grounds for having the

case dismissed. This goes back a long way. See Exhibit 4 at Appendix A17 for a page from "**Suing the 'Wrong' Defendant in Judicial Review of Federal Administrative Action: Proposals For Reform**" by Clark Byse published in the Harvard Law Review in 1963.

General Bolden has had a long and distinguished career of service to our country as a Marine Officer and aviator, and a NASA astronaut. He is a decorated hero. The events that made this lawsuit necessary did not happen on his watch but, unfortunately, he gets stuck with it.

And, finally, the U.S. Attorney bases his (her) Motion to Dismiss on the statement, "But individual agency employees are not proper party defendants in FOIA actions." (Motion to Dismiss) General Bolden is not an employee. He is the Boss.

B. Rule 4(h)(i)(2)} Summons of the Federal Rules of Civil Procedure (2008) requires "To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee."

{Emphasis added)

Since the requirement "To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee," Margolin did just that. He sent it to the head of the agency, Charles F. Bolden. Since he sent the summons and complaint to Charles F. Bolden he felt it necessary to put Administrator Bolden's name on it so that NASA would not lose it or misdirect it. (NASA has a history of losing the mail that Margolin has sent to it.) Had Margolin sued

General Bolden as an individual it would not have been necessary to serve the Attorney General and the U.S. Attorney. (Pacer Document 4)

Rule 4(h)(i)(2) lists both "officer" and "employee," so they must be different. As shown in Section A, NASA Administrator Bolden is an officer (the Boss), not an employee.

C. The two cases cited by the U.S. Attorney [*Johnson v. Commissioner of Internal Revenue,* 2002 WL 31934162 (W.D. Wash. 2002) and *Hardy v. Daniels,* 2006 WL 176531 (D. Or. 2006)] are both unpublished decisions.

The two cases cited by the U.S. Attorney [*Johnson v. Commissioner of Internal Revenue,* 2002 WL 31934162 (W.D. Wash. 2002) and *Hardy v. Daniels,* 2006 WL 176531 (D. Or. 2006)] are both unpublished decisions. Apparently, the issue of whether unpublished opinions can be cited as precedent may still be controversial, even after *Symbol Technologies Inc v. Lemelson Medical Education & Research Foundation* 277 F.3d 1361.

In *Anastasoff v. United States* 223 F.3d 898 (8th Cir. 2000) the Court ruled (¶18) that the 8th Circuit Rule 28A(i), which declared that unpublished decisions were not precedent, was unconstitutional.

A few years later this issue came up again in *Symbol Technologies Inc v. Lemelson Medical Education & Research Foundation* 277 F.3d 1361 (Fed Cir. 2002). The Court disagreed with the 8th Circuit and concluded (¶ 24):

> Unpublished, or as this court calls them, nonprecedential decisions do not give the judiciary free will to reinvent the law; they merely permit a judgment about whether a case contributes significantly to the body of law. See Fed. Cir. R. 47.6(b). They allow panels to determine if future panels and subordinate tribunals are to be bound by the ruling; the panel

> is still obligated to follow controlling precedent. This is a far cry from turning our back on precedent. Courts contribute to the growing imprecision, uncertainty and unpredictability of the law by issuing repetitive opinions on subjects that have been thoroughly irrigated. In our view, ideally once a principle has been established, it is up to the courts thereafter to apply it in cases coming before them and at most to explain their decisions to the parties, not to add to the explosion of legal opinions.** Accordingly, we decline to consider the nonprecedential cases cited by Lemelson.

Since Courts still have some decisions unpublished, it is reasonable to assume they do this to indicate they do not want the decisions used as precedent. However, because most Courts now keep their records in electronic format it would make things easier for those without expensive Westlaw subscriptions if all Court decisions were published, and those which the Court did not want to be used as precedent contained the statement, "Not to Be Used as Precedent."

The two unpublished decisions cited by the U.S. Attorney are: *Hardy v. Daniels,* 2006 WL 176531 (D. Or. 2006) and *Johnson v. Commissioner of Internal Revenue,* 2002 WL 31934162 (W.D. Wash. 2002).

In *Hardy v. Daniels* the defendants do not include Harley G. Lappin who was (and still is) the Director of the Bureau of Prisons. See Exhibit 5 at Appendix A20. Margolin has named the NASA Administrator as defendant for the reasons previously given, not his subordinates, whether they are officers or employees.

In *Johnson v. Commissioner of Internal Revenue* the Court cited *Thompson v. Walbran*, 990 F.2d 403, 405 and *Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir. 1987) in its statement that "individual agency employees are not proper party defendants in FOIA actions." In *Thompson*, the named defendant was federal prosecutor Joseph Walbran (¶ 1), not the Attorney General. In *Petrus* the

individuals named as defendants include the Secretary of the United States Department of Health and Human Services, three other officials or former officials of HHS, a former Medicare official, and an FBI official. The Court decided:

(¶4):

> Several district courts have held that individual officers of federal agencies are not proper parties to a FOIA action.5 The Seventh and Tenth Circuits have held that individual agency officers or employees are not proper parties to a Privacy Act action.6

(¶5):

> We find the reasoning of these opinions persuasive. The plain language of the statute authorizes actions against agencies, and it was not error for the district court to limit the statutory cause of action to its terms.

(¶ 7):

> We hold, however, that Petrus should be given an opportunity to amend his complaint to name one or more agencies as defendants, should he choose to do so.

Finally, a case that has been published and is citable. Unfortunately, the U.S. Attorney did not cite it. Even so, only one of the *Petrus* defendants was the current head of an agency, "Several district courts" (*Petrus* at ¶4) does not mean all of them, and the Court made an important decision based on the "plain language" (*Petrus* at ¶5) of a term whose meaning is not as plain as it appears to be.

Since *Petrus*, plaintiffs seem to have concocted a magic formula to get around it. Instead of naming "So-and-So, Secretary of the Whatever Agency" they name "So-and-So, Secretary of the Whatever Agency (in his or her official capacity as Secretary of the Whatever Agency)". Or they name "So-and-So, Secretary of the Whatever Agency, and the Whatever Agency."

An example of the former is *Baptist Health v. Tommy G. Thompson, in his official capacity as Secretary, United States Department of Health and Human Services*, 458 F.3d 768 (8th Cir. 2006).

An example of the latter is *Tafas v. Doll*, now being heard in the Court of Appeals for the Federal Circuit as No. 2008-1352. Plaintiffs Tafas and GlaxoSmithKline name JOHN J. DOLL, Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent & Trademark Office, and UNITED STATES PATENT AND TRADEMARK OFFICE as the Defendants.

An example that is exactly on-point is *John Doe Inc., et al. v. Mukasey, et al.*, heard in the U.S. Court of Appeals for the Second Circuit, Docket No. 07-4943-cv, decided December 15, 2008. This is a Freedom of information Act case which lists:

> JOHN DOE, INC., JOHN DOE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
>
> Plaintiffs-Appellees,
>
> v.
>
> MICHAEL B. MUKASEY, in his official capacity as U.S. Attorney General of the United States,
>
> ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation,
>
> VALERIE E. CAPRONI, in her official capacity as General Counsel of the Federal Bureau of Investigation,
>
> Defendants-Appellants.

The first page of the decision is Exhibit 6 at Appendix A22.

For the reasons given in **Section A (Charles F. Bolden, Administrator, National Aeronautics and Space Administration, is a proper defendant…)** is there any doubt that Margolin named him in his official capacity? If there is a difference between "CHARLES F. BOLDEN, Administrator, National Aeronautics and Space Administration," and "CHARLES F. BOLDEN, in his official capacity as Administrator, National Aeronautics and Space Administration," it is a distinction without a difference.

Nonetheless, in order to avoid wasting the Court's time, Margolin is filing, concurrently with this Opposition, a Motion Requesting Leave to File an Amended Complaint.

D. Plaintiff is likely to prevail on the merits

As a result of Defendant's Motion to Dismiss, this Court issued a Klingele Minute Order (Pacer Document 10) informing Margolin of the requirements of *Klingele v. Eikenberry* 849 F.2d 409 (9th Cir. 1988) and *Rand v. Rowland* 154 F.3d 952 (9th Cir. 1998). Margolin thanks the Court for this courtesy.

The second paragraph appears to apply to this case:

> Pursuant to the last sentence in Fed. R. Civ. P. 12(b), if evidence is submitted with a motion to dismiss and considered by the court, then the motion will be treated as a motion for summary judgment. The same is true regarding a motion for judgment on the pleadings. See Fed. R. Civ. P. 12(c). **This notice is issued, in part, to alert the plaintiff that if defendants have submitted evidence in support of a motion to dismiss or a motion for judgment on the pleadings, then the court may treat the pending motion as a motion for summary judgment. If the court grants summary judgment, then judgment may be entered against plaintiff and this lawsuit will end without trial.** This notice contains important information about what you need to do to oppose the motion. Please read it carefully.

Thus, Margolin must treat Defendant's Motion to Dismiss as a Motion For Summary Judgement.

However, since the Defendant has yet to Answer the Complaint this places Margolin in the awkward position of having to respond to legal arguments that, technically, have not yet been made.

In NASA's response to Margolin's FOIA Request, documents were withheld citing 5 U.S.C. § 552(b)(5) (See Plaintiff's Complaint at Appendix A27):

> It has been determined that portions of the records found responsive to your request contain information which is exempt from disclosure under the deliberative process privilege of Exemption 5. This privilege covers advisory opinions, recommendations, and deliberations, which are part of the government decision-making process, 5. U.S.C.§552(b)(5).

5 U.S.C.§ 552(b)(5) was also cited in NASA's Denial of Margolin's Appeal ("Denial"), received by Margolin on August 10, 2009 in a letter from Thomas S. Luedtke, Associate Administrator for Institutions and Management. (See Exhibit 1 Appendix at A4) NASA's Denial was dated August 5 (four days after Margolin's Complaint appeared on Pacer and two days after Margolin served the U.S. Attorney) and postmarked August 6, which was the same day the Post Office delivered Margolin's Summons and Complaint to NASA.

The exemption under 5 U.S.C.§552(b)(5) is for:

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

The "Inter-Agency or Intra-Agency" Threshold Requirement

The threshold issue under Exemption 5 is whether a record is of the type intended to be covered by the phrase "inter-agency or intra-agency memorandums" -- a phrase which appears to encompass only documents generated by an agency and not documents circulated beyond the executive branch. *See United States Dep't of Justice v. Julian*, 486 U.S. 1, 19 n.1 (1988).

However, the Supreme Court shed light on this issue when it ruled on the contours of Exemption 5's "inter-agency or intra-agency" threshold requirement for the first time in *Department of the Interior v. Klamath Water Users Protective Ass'n.* 532 U.S. 1 (2001). In a unanimous decision, the Court ruled that the threshold of Exemption 5 did not encompass communications between the Department of the Interior and several Indian tribes which, in making their views known to the Department on certain matters of administrative decisionmaking, not only had "their own, albeit entirely legitimate, interests in mind," (*Klamath*, 532 U.S. at 12) but also were "seeking a Government benefit at the expense of other applicants." (Id. at 12 n.4)

Thus, records submitted to the agency by the Tribes, as "outside consultants," did not qualify for attorney work-product and deliberative process privilege protection in the case. (Id. at 16)

If the Borda Patent Report was prepared wholly or in part by Mike Abernathy of Rapid Imaging Software or by any other outside contractor or consultant it would not qualify as inter-agency or intra-agency memorandums or letters because Abernathy (or other outsiders) have an interest in having U.S. Patents 5,566,073 and 5,904,724 declared invalid.

Given NASA's association with Mr. Abernathy on the X-38 project (the subject of the I-222 claim) and NASA's refusal to produce documents relating to Mr. Abernathy it is reasonable to believe that Mr. Abernathy may have had a hand in producing the Borda Patent Report.

Deliberative Process Privilege

The most commonly invoked privilege incorporated within Exemption 5 is the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of agency

decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See, e.g., Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982*); Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc). Logically flowing from the foregoing policy considerations is the privilege's protection of the "decision making processes of government agencies." *Sears*, 421 U.S. at 150 In concept, the privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm. *See, e.g., Nat'l Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process.")

Traditionally, the courts have established two fundamental requirements, both of which must be met, for the deliberative process privilege to be invoked. *See Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative." (citing *Petroleum Info. Corp. v. United States Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992))).

First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." (*Jordan*, 591 F.2d at 774) Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). The burden is upon the agency to show that the information in question satisfies both requirements. *See Coastal States*, 617 F.2d at 866.

In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." *(Id.* at 868) On this point, the Supreme Court has been very clear:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process. *Sears*, 421 U.S. at 151 n.18

Thus, so long as a document is generated as part of such a continuing process of agency decisionmaking, Exemption 5 can be applicable. *See, e.g., Casad v. HHS*, 301 F.3d 1247, 1252 (10th Cir. 2002) (holding that deliberative process privilege protects redacted portions of "summary statements" created prior to NIH's research grant funding decisions). However, in a particularly instructive decision, *Access Reports v. Department of Justice*, (926 F.2d 1192, 1196 (D.C. Cir. 1991)) the D.C. Circuit emphasized the importance of identifying the larger process to which a document sometimes contributes. *id.* at ¶6,¶18.

The Borda letter asserts:

> "… numerous pieces of evidence were uncovered which would constitute anticipatory prior knowledge and prior art that was never considered by the U.S. Patent and Trademark Office during the prosecution of the application which matured into Patent No. 5,904,724."

and threatens, "… NASA reserves the right to introduce such evidence of invalidity in an appropriate venue, should the same become necessary." *id.*

The Borda Patent Report is not eligible for the Deliberative Process exemption because there is no discernable legitimate NASA policy that resulted from, or could result from, the Borda Patent Report.

Attorney Work-Product Privilege

The second traditional privilege incorporated into Exemption 5 is the attorney work-product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation. See *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947); Fed. R. Civ. P. 26(b)(3) (codifying privilege in Federal Rules of Civil Procedure). A good explanation can be found in *Martin v. Office of Special Counsel Merit Systems Protection Board,* 819 F.2d 1181, 260 U.S.App.D.C. 382. (U.S. App. D.C., 1987) From ¶11:

> FOIA Exemption (b)(5) protects from disclosure those "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. Sec. 552(b)(5) (1982). Though the Supreme Court has noted that this language "clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency," Mink, 410 U.S. at 86, 93 S.Ct. at 835, the exact relationship between ordinary civil discovery and Exemption (b)(5), particularly the application of discovery privileges under the exemption, has bedeviled the courts since the Act's inception. Id. The Supreme Court, seeing the need for a broadly sweeping rule on the matter, has insisted that the needs of a particular plaintiff are not relevant to the exemption's applicability, and has held repeatedly that only documents "normally" or "routinely" disclosable in civil discovery fall outside the protection of the exemption. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 & n. 16, 95 S.Ct. 1504, 1515 & n. 16, 44 L.Ed.2d 29 (1975); FTC v. Grolier Inc., 462 U.S. 19, 26, 103 S.Ct.

2209, 2213, 76 L.Ed.2d 387 (1983); United States v. Weber Aircraft Corp., 465 U.S. 792, 799, 104 S.Ct. 1488, 1492, 79 L.Ed.2d 814 (1984).

(Emphasis added)

Therefore, if a document is "normally" or "routinely" available through Discovery, it is not exempt from production under 5 U.S.C. Sec. 552(b)(5).

The Borda Patent Report purports to show that the '724 patent is invalid due to prior art, and "… NASA reserves the right to introduce such evidence of invalidity in an appropriate venue, should the same become necessary." The only appropriate venues for NASA to use are the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Patent Office. When used in the Courts as a defense against patent infringement NASA would need to submit the Borda Patent Report. The Courts will not take NASA's word that "We have in our hand evidence that the patent is invalid." NASA would be required to produce the evidence. It would not even need Discovery. The same is true if NASA used the Borda Patent Report at the Patent Office in a Request For Re-Examination. A request for Re-Examination may be either *ex parte* (37 CFR § 1.510) or *inter parties (*35 U.S.C. § 311). They both require that NASA produce the report.

The Borda Patent Report is not eligible for Attorney Work-Product Privilege because the manner in which Borda has threatened to use the Report requires that it be made public.

Attorney-Client Privilege

The third traditional privilege incorporated into Exemption 5 concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) Unlike the attorney work-product privilege, the attorney-client privilege is not limited to the context of litigation. *See, e.g., Mead Data*, 566 F.2d at 252-53 (distinguishing attorney-client privilege from attorney work-product privilege, which is limited to litigation context) Moreover, although it fundamentally applies to facts divulged by a client to his attorney, this privilege also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, *See, e.g., Jernigan v. Dep't of the Air Force*, No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998) (holding that privilege covers agency attorney's legal review of internal "Social Action" investigation) as well as communications between attorneys that reflect client-supplied information. *See, e.g., McErlean v. United States Dep't of Justice*, No. 97-7831, 1999 WL 791680, at *7 (S.D.N.Y. Sept. 30, 1999)

As with Attorney Work-Product Privilege, the Borda Patent Report is not eligible for Attorney-Client Privilege because the manner in which Borda has threatened to use the Report requires that it be made public.

The Borda Patent Report is not eligible for the Deliberative Process exemption because there is no discernable legitimate NASA policy that resulted from, or could result from, the Borda Patent Report. The Borda Patent Report is not eligible for Attorney Work-Product Privilege or

Attorney-Client Privilege because the manner in which Borda has threatened to use the Report requires that it be made public. Therefore, the Borda Patent Report is not exempt under 5 U.S.C. § 552(b)(5).

E. NASA and the U.S. Attorney are defying the orders of the President of the United States.

A memorandum was issued by the President of the United States dated January 21, 2009 (See Exhibit 7 at Appendix A24):

> *Administration of Barack H. Obama, 2009*
> **Memorandum on the Freedom of Information Act**
> *January 21, 2009*
> *Memorandum for the Heads of Executive Departments and Agencies*
> *Subject:* Freedom of Information Act

where the President ordered:

> .
> .
> .
> The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.
>
> All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.
>
> The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

> I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.
>
> .
>
> .
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> .
>
> [Filed with the Office of the Federal Register, 11:15 a.m., January 23, 2009]
>
> NOTE: This memorandum was released by the Office of the Press Secretary on January 22, and it was published in the *Federal Register* on January 26.
>
> *Categories:* Communications to Federal Agencies : Freedom of Information Act, memorandum.
>
> *Subjects:* Freedom of Information Act.
>
> *DCPD Number:* DCPD200900009.

The memo was obtained from GPO Access, a service of the government printing office at:

www.gpoaccess.gov/presdocs/2009/DCPD200900009.pdf

The Attorney General of the United States issued new guidelines in a memorandum dated March 19, 2009. (See Exhibit 8 at Appendix A27).

The President's memo ends with the statement:

> This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Attorney General's memo ends with words to the same effect.

That's fine. Margolin is not asking for any additional rights. He is only asking that his existing rights be observed. If NASA and the U.S. Attorney would read these memos and comply with them he (she) could save everyone from wasting a great deal more time.

F. Other

In the U.S. Attorney's Motion to Dismiss CERTIFICATE OF SERVICE he (she) has listed Margolin's mailing as:

> JED MARGOLIN
> 1981 Empire Rd.
> Virginia City Highlands, NV 89521-7430

(Emphasis added)

Although Margolin lives in the Virginia City Highlands, that is not his mailing address. USPS claims that "Virginia City Highlands" is too long to fit in their computer. Margolin's correct mailing address is "VC Highlands." This is the address that Margolin has consistently used in these proceedings. Margolin can also use a mailing address of "Reno, NV" but has not done so here. (The zip code is the same, and is a Reno zip code even though Margolin lives in Storey County.) Mail that is sent to an incorrect mailing address has even less chance of being delivered than mail that is properly addressed. The U.S. Attorney is requested to correct his (her) records.

IV. CONCLUSION

DEFENDANT has failed to show a valid reason for dismissing the case and Margolin is likely to prevail on the merits of the case.

Respectfully submitted,

/Jed Margolin/

Jed Margolin, plaintiff pro se
1981 Empire Rd.
VC Highlands, NV 89521-7430
775-847-7845
jm@jmargolin.com

Dated: September 24, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS** has been made by electronic notification through the Court's electronic filing system on September 24, 2009.

/Jed Margolin/

Jed Margolin

V. TABLE OF AUTHORITIES

Cases

Statutes