

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

DAVID W.R. BROWN, )  
 )  
 Plaintiff, )  
 )  
 v. ) CASE NO. 8:03-CV-2501-T-23EAJ  
 )  
 UNITED STATES DEPARTMENT OF )  
 COMMERCE, et at., )  
 )  
 Defendants. )

**FEDERAL DEFENDANTS' PARTIAL OBJECTION TO THE  
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Federal Defendants, the Department of Commerce ("DOC"), Department of Justice ("DOJ"), General Accounting Office ("GAO"), Office of Management and Budget ("OMB"), and U.S. Patent and Trademark Office ("USPTO"), by Paul I. Perez, United States Attorney for the Middle District of Florida, through the undersigned Assistant United States Attorney, pursuant to Fed. R. Civ. P. 72(a), respectfully object to the Magistrate Judge's report and recommendation dated June 30, 2004. While the United States Magistrate Judge, the Honorable Elizabeth A. Jenkins, painstakingly and in overwhelming part properly reviewed plaintiff's unusual complaint and defendants' motion to dismiss, the federal defendants respectfully suggest that her decision not to grant the Federal Defendants' motion to dismiss on Count 14 was erroneous. See Magistrate Judge's Report and Recommendation ("R&R") at 31.

The fact that the R&R permits Plaintiff leave to amend as to several claims that were deficient suggests that there would be no prejudice to having him amend Count 14 as well. See R&R at 13,14, 26, 29, 33, 35. Evaluated in light of all the facts and

circumstances, including Plaintiff's 18-Count complaint and his copious exhibits, there should be no harm in the court asking him to plead again with more specificity.

Plaintiff, in Count 14 of his complaint, alleges a violation of the Privacy Act. However, he incorrectly cites the Open Meetings Statute, 5 U.S.C. § 552b(b), and argues that USPTO and OMB engaged in inter-agency discussions of the Plaintiff's *non-compatible* private information without his consent in violation of the statute. Dkt. 8 ¶¶139, 141. Assuming that the Plaintiff actually intended to cite the Privacy Act, 5 U.S.C. § 552a, there is no discussion contained in the statute of *compatible* versus *non-compatible* information and thus the thrust of Plaintiff's argument is lost.

For Plaintiff to establish a prima facie case under the Privacy Act, the Plaintiff must allege and prove (1) a violation of the Act; (2) an adverse effect as a result of the violation; and (3) that the violation was intentional and willful. *Johnston v. IRS*, 1999 WL 357917 at 3 (M.D.Fla.) The burden of proof is on the Plaintiff. *Id.*

Plaintiff's complaint merely references discussions that allegedly took place between USPTO and OMB regarding a vaguely described topic supposedly pertaining to plaintiff. Dkt. 8 ¶¶135, 137. He does not allege facts concerning how the Act was actually violated, or what adverse effects he suffered as a result of the violation, or how the violation was intentional and willful.

As it relates to the Privacy Act, Count 14 of the Complaint alleges that an OMB employee left a message on Plaintiff's answering machine informing him that "I had some discussions with the PTO and they, from my opinion as best as I could tell . . . responded very well to your concerns." Complaint, paragraph 135. It is clear from other paragraphs of the Count that Plaintiff is alleging that the "discussions" concerned OMB's

review and approval of USPTO form PTO/SB/65 under the Paperwork Reduction Act. In the context of the pleadings, especially the exhibits to Plaintiff's original Complaint, it is clear that Count 14 of the Complaint cannot reasonably be read to allege any facts which, if proven, would establish a violation of the Privacy Act.

Furthermore, where Plaintiff has alleged no pending litigation at the time, he cannot reasonably suggest that any OMB and USPTO discussions related to anything other than Plaintiff's FOIA requests and commentary.

On August 15, 2002, a notice was published in the Federal Register seeking public comments on a proposed revision to a USPTO information collection concerning petitions to accept delayed payment of maintenance fees. Original Complaint, Exhibit 34; 67 F.R. 53342. The notice stated that "[c]omments provided in response to this notice will be summarized or included in the request for OMB approval of this information collection; they will also become a matter of public record." Original Complaint, Exhibit 34; 67 F.R. at 53344-45. Plaintiff submitted a 35-page comment, dated September 3, 2002, in response to the notice. (Original Complaint, Exhibit 35. The comment detailed Plaintiff's numerous objections to the information collection. *Id.* It also included copies of the two USPTO decisions concerning Plaintiff's maintenance fee petition. *Id.* The first page of the comment referred the reader to Plaintiff's website, [www.patentofficelawsuit.com](http://www.patentofficelawsuit.com), where, the comment asserted "full backup documentation" was available. *Id.* As contemplated by the Federal Register notice, the USPTO forwarded a complete copy of all public comments received to OMB as an attachment to its approval request for the information collection. Original Complaint, Exhibit 27, page 7 (at annotation 1).

Plaintiff has not alleged that the USPTO's forwarding of his comment to OMB violated the Privacy Act. Indeed, in view of the fact that a central theme of the Complaint is that OMB approved the information collection notwithstanding the concerns raised in his comment, Plaintiff could hardly do so. Rather, Plaintiff alleges that the USPTO and OMB violated the Privacy Act by discussing his concerns. Under certain circumstances, the Privacy Act prohibits disclosure of information about an individual.<sup>1</sup> Nothing in the act prohibits discussion of information as such. Under the circumstances here, the USPTO-OMB discussion of information contained in Plaintiff's public comment could not constitute a "disclosure" of information covered by the Privacy Act, because both agencies already possessed the information discussed. Pellerin v. Veterans Administration, 790 F.2d 1553, 1556 (11th Cir. 1986).

Please note that plaintiff's case will go forward at least as to Count 2, even if this partial objection is sustained. Count 2 is essentially a Freedom of Information Act claim. If Count 2 is all that remains of plaintiff's case, then this case should be transferred to "Track One" under Local Rule 3.05 and disposed of in the manner typical of FOIA cases. If Count 14 is permitted to go forward unconditionally, then it will likely remain a Track Two claim, and in view of the partial administrative record already reflected by

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<sup>1</sup> Specifically, subject to numerous exceptions, the Privacy Act prohibits the disclosure of any "record" that is contained in a "system of records." 5 U.S.C. § 552a(b). A "record" includes only "information about an individual." 5 U.S.C. § 552a(a)(4). "System of records" is defined for purposes of the Act as "a group of records under the control of any agency from which information is retrieved by the name of the individual [or by some other individual identifier]." 5 U.S.C. § 552a(a)(5). The Government concedes neither that the Plaintiff's public comment was a "record" in a "system of records," nor that discussion of the legal and policy issues raised in Plaintiff's comment included discussion of information "about" Plaintiff. Full analysis of these issues, however, would require introduction of evidence beyond the pleadings.

plaintiff's copious exhibits and the caustic nature of his filings, one can only imagine the nature of discovery in a Track Two case. Plaintiff should be permitted to proceed on such a case only upon proper pleading of the same. Defendants respectfully suggest that under all of the facts and circumstances, Count 14 should either be dismissed outright or plaintiff should be required to plead it anew.

**WHEREFORE**, the Federal Defendants respectfully urge this Court to adopt the Magistrate Judge's report and recommendation in all respects except insofar as it recommends denial of the motion to dismiss count 14 of plaintiff's amended complaint. With respect to Count 14, federal defendants respectfully request that this Honorable Court either grant the motion to dismiss outright or grant the same with leave of court to amend count 14 within such period of days as the Court deems appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this Federal Defendants' Partial Objection to Magistrate Judge's Report and Recommendation has been filed electronically and that a copy of the same, together with the receipt of electronic filing, has been mailed this \_\_\_\_\_ day of July, 2004, to the following:

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