

**United States Court of Appeals
District of Columbia Circuit**

333 Constitution Avenue, NW Washington, DC 20001-2866
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Sai
Petitioner

v.

Case Number: 14-1005

United States Postal Service (USPS)
Respondent

Response to USPS' motion to dismiss

Earlier today, USPS filed a motion to dismiss this case, claiming that this Court lacks jurisdiction.¹

First, the USPS' motion is untimely, and does not affect their mandate under FRAP 17 to have already filed the record with the Court. The FOIA deems delays to be a *prima facie* harm to requesters. Accordingly, my motion for determination and order to compel is not moot, as I am harmed by USPS' failure to timely respond, and regardless of what court this case proceeds in, the record will need to be filed. In the meantime, USPS' duties under FRAP 17 are preserved, were not timely contested, and have not been obeyed.

Second, although USPS is correct that 5 USC § 552(a)(4)(B) grants jurisdiction to the D.C. District Court to hear any action under the FOIA (even when there *is* no agency decision, such as when an agency fails to respond), that statute is not exclusive.

¹ USPS' motion to dismiss was labeled as case #12-1110. That refers to *Venice Stakeholders Assoc. et al v. PRC*, in which I have no part.

USPS' denial of my request is itself an agency decision reviewable by this court under the Administrative Procedure Act.

Also at issue in this case is the facial invalidity of 39 CFR 265.9(g)(3)(v), on which basis my request for public interest fee waiver was denied.² That regulation purports to require a determination as to a requester's "personal interest", a requirement nowhere supported in the FOIA and explicitly forbidden by controlling case law both in this circuit and the Supreme Court.³

Accordingly, this case also raises questions of arbitrary and capricious action under the APA, in which USPS abused and/or exceeded its authority. FRAP 15, 28 USC 2344, and 5 USC 551 *et seq.*, all grant this court jurisdiction to hear petitions for review of agency decisions and APA actions, and USPS admits that it has made a reviewable decision that is the subject of this case.

² See USPS denial letter, p 2-3: "Based on the statements you have submitted, it appears that the requested records would primarily be used within the limited context of an administrative hearing in which you have an interest. Accordingly, there is no basis to warrant a fee waiver."

The only authority cited for this was *Brunsilus v. DOE*, No. 07-5362, 2008 U.S. App. LEXIS 15314, at *2 (D.C. Cir. 2008), which was predicated on indigence and private litigation interest for commercial gain — neither of which were claimed as bases for my fee waiver request.

³ *Department of Justice v. Reporters' Commission for Freedom of the Press*, 489 US 749 (1989):

754 "The statute known as the FOIA is actually a part of the Administrative Procedure Act.";

771 "Our previous decisions establish that whether an invasion of privacy is warranted *cannot turn on the purposes for which the request for information is made*. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, *the identity of the requesting party has no bearing on the merits of his or her FOIA request.*" (emphasis added)

National Labor Relations Board v. Sears, Roebuck & Co., 421 US 132, 143 n. 10 (1975): "Sears' rights under the Act are neither increased *nor decreased* by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public." (emphasis added)

Therefore, I move that the Court deny USPS' motion to dismiss, and proceed with this case.

Granting USPS' motion to dismiss would irreparably harm me, as the time for initial filing of a petition for review of the decision at issue has now expired. *Pro se* cases are entitled to liberal construction, especially as to matters of procedure.⁴ If I have filed this matter with the wrong court, that is a harmless error for which I am protected by FRAP 4(d) — which would consider this matter filed in the US Dist. Ct. D.C. (USPS' preferred jurisdiction) on the date that it was received by the US Ct. App. D.C., thus preserving my standing. If this action had been filed in the US Dist. Ct. D.C., an answer to my complaint would have been already due.

Therefore, if the Court concurs with USPS that it lacks jurisdiction, I move that the Court deny USPS' motion to dismiss, remove this case to the US Dist. Ct. D.C., determine that USPS failed to comply with FRAP 17 and order USPS to immediately file the record with that court, order USPS to immediately file an answer to my complaint, and order the US Dist. Ct. D.C. to grant me continued access to CM/ECF.

Respectfully submitted,
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⁴ Likewise, if the clarification of my complaint elucidated here — i.e. my claims under the APA and my contention of the facial legality of 39 CFR 265.9(g)(3)(v) (and USPS' abusing and/or exceeding agency discretion in its enactment) — are deemed outside the scope of my initial petition for review, I hereby request that the Court amend my complaint accordingly. See e.g. *Foman v. Davis*, 371 US 178, 182 (1962).