

**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

Counter-response to USPS' motion to dismiss

Earlier today, USPS filed a response to my opposition to their motion to dismiss. First, as to matters I do not contend:

1. USPS' response deadlines should begin from when they were served notice by the clerk, i.e. January 13th. The deadline for FRAP 17 filing of record was "within 40 days after *being served* with a petition for review" (absent a court ruling otherwise), i.e. February 22nd.

The Court's Rule 27(g)(1) deadline for filing a motion to dismiss is 45 days from the date of *docketing*, i.e. February 21st, but it is reasonable to accept USPS' filing on February 25th, as it is within 45 days from the date of notice, i.e. February 27th.

As the timeliness of USPS' *motion to dismiss* was only slightly off (if one reads the deadline strictly), I do not object to the timeliness of the motion to dismiss itself. I hope the court and USPS will show similar leniency to any procedural defects on my part.

2. The issue of jurisdiction should be resolved before considering substantive (non-procedural)

pleadings. Denying a motion to dismiss purely on the basis of untimeliness would harm the overall expeditiousness of this proceeding, and ensuring that a case is heard in its proper venue is one of the very first things that should be resolved in any case.

3. I do not claim that harm in itself confers jurisdiction. Rather, it goes to whether this case should be moved rather than dismissed, if the Court believes it lacks jurisdiction.

USPS' reply misrepresents my argument, is incorrect as a matter of law, and compels response:

1. In my objection's first part, I said that USPS' motion was untimely *with respect to its FRAP 17 obligations* — not with respect to its *motion to dismiss*. That is plainly true, and no further authority need be cited, as the authority is from the Court's rule 17(b) and FRAP 17.

USPS' mere "belief" that the court would dismiss the case *sua sponte* is not a reasonable basis for its untimeliness in filing the record as mandated by law. The Court's silence can *only* be taken to mean that its normal deadlines are in effect.¹ If USPS believed that it should not have to file the record, it should have filed a motion to that effect *before* the deadline lapsed, as permitted by FRAP 17(a). USPS failed to do so.

USPS continues this failure to obey FRAP 17. Having neither sought or obtained an extension under FRAP 17(a), nor an order of dismissal, its obligations under FRAP 17 continue. Wherever this case is heard, the record will need to be filed, and USPS' continued failure to file the record delays the resolution of this matter.

In the interest of good faith, speed, and curing USPS' fault, I have simultaneously filed a motion to

¹ Even *pro se* litigants, generally given wide leeway on procedural matters, are routinely held to strict filing deadlines. This should surely apply even more so to the government.

supplement the record with the complete record in this case, and an index thereof.

2. 39 USC 401(a) does not apply here — unless the USPS claims that both its failure to obey FOIA deadlines, original denial, denial on appeal, and APA rulemaking creating 39 CFR 265.9(g)(3)(v) all "deal[] with public or Federal contracts, property, works, officers, employees, budgets, or funds". If it does claim so, USPS has failed to justify it.

To the contrary, 39 USC 401(b)(1) explicitly states that 5 USC 552 *does* apply to the Postal Service, and as cited previously, the Supreme Court stated that "the statute known as the FOIA is actually a part of the Administrative Procedure Act" (*DoJ v. Reporters' Comm. for for Freedom of the Press*, 489 US 749, 754 (1989)). Accordingly, I have *parallel* rights under both 5 USC 552 itself *and* under the APA more generally.

3. My APA rulemaking claim is not "simply a restatement" of my FOIA denial claim. Were USPS' FOIA regulation *per se* lawful — and I contend that it is not — USPS could still have *improperly denied* my FOIA request. It necessarily follows that the *prima facie* lawfulness of the rule itself (and the rulemaking that created it) is a distinct claim.

The two are even severable. Were USPS to now provide me, for free, with all materials I requested, I would *still* have a continued claim under both the FOIA and APA. *CREW v FEC*, 475 F. 3d 337 (D.C. Cir. 2007).

4. If the Court decides that it lacks jurisdiction, it is in the best interests of justice, and significantly more expeditious, to move this case to the District Court with a reasonable schedule set for me to file an amended complaint and for USPS to file the record and an answer, rather than dismissing it.

The FOIA construes delay as a *prima facie* harm, and USPS' delays have already violated Federal law *five times*². Requiring me to re-file this case would serve no purpose other than to further delay its resolution.

When I filed this case, it was reviewed (and approved for filing) by the Court's Deputy Special Counsel. I reasonably relied on that review to include a consideration under FRAP 4(d) and 15 — i.e. that if I filed by mistake in the Court of Appeals where I should have filed in the District Court, my petition for review would be moved to the District Court, where it would be construed as a complaint, given a reasonable opportunity to be amended, and proceed expeditiously.

Original jurisdiction is a highly technical matter of procedure, for which multiple cures are explicitly provided (FRAP 4(d), 28 USC 1631³, motion for change of venue, etc). USPS' contention that a

² 1. FRAP 17, above

2, 3. My original FOIA request for expedited processing sent 2013-10-18 was not responded to, nor *any* determine issued, until 2013-11-25. (Violating both the 10 calendar day and 20 working day FOIA provisions.)

4. My 2013-11-25 appeal of USPS' final determination re. expedited processing was not responded to until 2013-12-12.

5. My 2014-01-10 request for clarification has *still* not been responded to (and has thus constructively exhausted administrative remedy, and is included in this suit).

³ *Wydra v. Law Enforcement Assistance Admin.*, 722 F. 2d 834 (D.C. Cir. 1983): "When Congress passed the Federal Courts Improvement Act of 1982, it enacted a broad provision permitting "transfer to cure lack of jurisdiction." 28 U.S.C. § 1631. The Act empowers any federal court, when an action or appeal is filed over which it lacks jurisdiction, to transfer such action to the appropriate court whenever "it is in the interest of justice." The action or appeal then proceeds in that court as if it had been filed on the same date on which it was actually filed in the transferring court. Transfer to the Claims Court would clearly be "in the interest of justice" in this case."

Sharon v. United States, 802 F.2d 1467, 1468 (D.C. Cir. 1986): "Transfer is warranted when it would aid litigants who were confused about the proper forum for review."

Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1442 (D.C. Cir. 1988): Transfer is

"petition for review" *materially* differs from a "complaint" is without merit. The two are simply different stylings given by the appellate and district courts to the same substantive act: a request for judicial review of agency actions.

USPS does not contest that the District Court has jurisdiction, nor that I could have originally filed there; they contest only my claim that its jurisdiction is non-exclusive. If this court decides that it lacks jurisdiction over *any* of my claims, then moving the case to the District Court would not harm USPS, reduce burden on both me and the courts, expedite the case, and serve the best interests of justice.

Respectfully submitted,
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“the fairest and most appropriate course” when petitioners made an “understandable mistake” in “seeking initial review in this court”.

Ramos-Velez v. Department of Justice, 826 F.Supp. 615 (D. P.R. 1993): "Defendant relies exclusively on the fact that the plaintiff's filing period has not expired, in requesting that the case be dismissed instead of transferred. Under 28 U.S.C. § 1631, it is not imperative that the filing period for the action being considered have expired in order to transfer the case. Other purposes underlying the enactment of section 1631 are to save time, effort, and the expenses of multiple filings. ... In order to refile, plaintiff would have to duplicate his efforts ... [and be denied] an earlier filing date which could have a negative impact on his action. ... As a general rule, once the jurisdictional question is resolved, case law interpreting section 1631 favors transferring an action rather than dismissing it."