

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

David W. R. Brown,

Plaintiff,

v.

Case Number: 8:03-cv-2501-T-23EAJ

United States Department of Commerce,  
United States General Accounting Office,  
United States Office of Management and Budget,  
United States Patent and Trademark Office,  
Galaxy Scientific Corporation,

Defendants.

Plaintiff demands oral arguments.

Plaintiff demands a court reporter at all  
proceedings, including in-chambers.

Plaintiff demands that the Court make findings of  
fact and conclusions of law.

/

AMENDED COMPLAINT

1. The Plaintiff is:

David W. R. Brown ("Brown")

1805 Burlington Cir

Sun City Center FL 33573-5219

Phone: (813) 634-6048

2. The Defendants are:

United States Department of Commerce ("Commerce")

14th & Constitution Av NW

Washington DC 20230-0001

U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

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United States General Accounting Office ("GAO")

441 G St NW

Washington DC 20548-0001

United States Office of Management and Budget ("OMB")

725 17th St NW

Washington DC 20503-0001

United States Patent and Trademark Office ("USPTO")

PO Box 15667

Arlington VA 22215-0667

Galaxy Scientific Corporation ("Galaxy")

3120 Fire Rd

Egg Harbor Township NJ 08234-5886

### **JURISDICTION AND VENUE**

3. The Tampa Division has jurisdiction and venue over this action under:

Paperwork Reduction Act ("PRA"): 44 USC 3512.

Administrative Procedure Act ("APA"): 5 USC 702, 5 USC 703.

Internal Revenue Code: 26 USC 7431.

Federal Question: 28 USC 1331.

Freedom of Information Act ("FOIA"): 5 USC 552(a)(4)(b).

Privacy Act ("PA"): 5 USC 552a(g)(1)(D).

### **BACKGROUND FOR AMENDED COMPLAINT**

4. In Docket ("Dkt") 67, the court issued an order based on the Magistrate's Report and Recommendation ("R&R") (Dkt 60).

5. Count 2 of the previous Complaint (Dkt 8) was sustained. It alleged that the "USPTO's FOIA staff conspired to withhold releasable documents from Plaintiff."

6. Counts 1, 3, 6 through 11, and 15 (Dkt 8) were dismissed because the Magistrate couldn't "decipher" causes of action and basis for relief. Brown has recently filed a Motion for Oral Arguments and Motion for Reconsideration for these nine counts.

7. Counts 4, 5, 12 through 14, and 16 through 18 (Dkt 8) were "dismissed without prejudice" and Brown was given leave to file this Amended Complaint.

8. The dismissal of Count 17 and 18 will not be challenged or repleaded here.

#### **GALAXY AS A DEFENDANT**

9. Galaxy is named as a defendant in counts 1 to 7 only.

10. The Court must be vigilant that Galaxy doesn't again attempt to deceive the court (as they did in Dkt 40) by suggesting that they are not beholden to FOIA. Brown has never alleged any specific connection between Galaxy and FOIA. Galaxy's wrongdoing is, *inter alia*, in the areas of the Paperwork Reduction Act and the Privacy Act.

11. Galaxy has been a contractor of the USPTO for the content and processing of Form PTO/SB/65 since at least April of **1999**. [Brown used the form in May of **2000**.] Galaxy is paid to "handle [USPTO] systems support, including ... data and records management...." (Exhibit 1).

12. Galaxy is a major contributor to the content and processing of '65.

13. The court is directed to review Exhibit 2 to see how Rob Flax, a Galaxy employee, is participating with USPTO employees to set the content of '65.

14. In Norman v. U.S. v. Elwyn Industries, (E.D. Penn 95-cv-04111, Appeal 3rd Cir. 1996 No. 96-1645) ("Norman v. U.S."), the court wrote "The critical factor used to

distinguish a federal agency employee from an independent contractor is whether the government has the power 'to control the detailed physical performance of the contractor.'" And "the question here is not whether the [contractor] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal government."

15. Galaxy has a very close working relationship with the USPTO.

16. In fact, it is so close that Galaxy employees who work with the USPTO ("Galaxy employees") even have USPTO email addresses. For example: Rob.Flux@uspto.gov. And even email between these Galaxy employees (Exhibit 3) is stored on the Patent Office's computer, not Galaxy's.

17. And federal employees do supervise Galaxy's day-to-day operations. For example, Exhibit 4 is an email from a federal employee to a Galaxy employee. In it the federal employee gives a very mundane instruction to a Galaxy employee: "One item that we wanted to bring to your attention is that when you have a 'reinstatement' then there are no 'current' inventory hours. ... So, please change your file accordingly."

18. Brown *alleges* that Galaxy employees are essentially USPTO "employees" (Norman v. U.S.). As "employees," they must comply with the Paperwork Reduction Act and the Privacy Act.

19. Brown *alleges* that Galaxy is part-and-parcel of the USPTO's activities regarding the content and processing of '65. They must be considered on a par with the USPTO as a defendant (Norman v. U.S.).

20. In Cruz v. Beto 405 U.S. 319, 322 (1972), the court held that the *allegations* of a *pro se* complaint "must" be taken as true for purposes of a motion to dismiss.

21. Since Brown is proceeding *pro se*, Galaxy cannot be dismissed.

### **ADMINISTRATIVE PROCEDURE ACT**

22. The Administrative Procedure Act ("APA") is cited in a number of the complaints as a source for relief. The complete APA is included as Exhibit 5. [If I didn't know better, I would say that Congress wrote that law specifically for the instant action.]

23. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of [the PRA and/or PA], is entitled to judicial review thereof." 5 USC 702.

24. Quoting from the Attorney General's Manual on the Administrative Procedure Act: "The net effect [of the language of the APA], clearly intended by the Congress, is to provide for a dovetailing of the general provision of the Administrative Procedure Act with the particular statutory provisions [for judicial review] which the Congress has molded for special situations."

25. The intent of the APA is to make reviewable any decisive agency action when judicial review is not otherwise available. That is mostly the situation in the instant action.

### **U.S. v. SINGLETON**

26. Some of the following complaints cite *United States v. Singleton*, 165 F.3d 1297, 1299 (10<sup>th</sup> Cir. 1999) ("U.S. v. Singleton"). (Exhibit 6).

27. Many of the Criminal Code provisions apply to "whoever." (Exhibit 7). For example: "... whoever ... knowingly and willfully makes any materially false, fictitious, or fraudulent statement or representation shall be fined under this title or imprisoned not more than 5 years, or both." 18 USC 1001(a)(2).

28. In Docket 25 (top of page 6), the defendants attempted to deceive the court (*which by the way is a violation of Rule 11(b), Fed.R.Civ.P.*). They stated that "The term "whoever" ... does not encompass the United States."

29. U.S. v. Singleton is the definitive case law on the meaning of "whoever" as applied to federal employees who violate the U.S. Criminal Codes.

30. The U.S. Criminal Codes prohibit "whoever" from bribing a witness to testify. However, as noted in U.S. v. Singleton, a plea bargain by a U.S. Attorney does amount to bribing a witness.

31. In its decision, the court succinctly found that a federal employee who bribes a witness to testify is performing a "government function" that is rooted in common law, and is therefore not liable. However, the Court was quick to point out that a federal employee who bribes a witness to give false testimony is liable under the U.S. Criminal Codes because bribing for false testimony is not a "government function."

32. In the instant action where the making of false statements is alleged, lying is not a "government function," and therefore the liar ("whoever") is indeed subject to the U.S. Criminal Codes.

### **COMPLAINT OVERVIEW**

33. Counts 2, 4, 5, 12, 13, 14 and 16 of Docket 8 are repleaded in this Amended Complaint.

34. In order to tidy-up this amended complaint, the complaints have been renumbered and presented in a more logical order.

35. The instant action is primarily concerned with gross violations of the PRA and Privacy Act by Galaxy, OMB and USPTO related to USPTO Form PTO/SB/65 ("65").

These violations are addressed in Complaints 1-6 (old complaints 12 and 14).

36. In the prior complaint (Dkt 8), Brown alleged that private information was being released contrary to the PA. This is addressed in Complaint 7 (old complaint 13).

37. In the original complaint, FOIA complaints were also "tacked-on" for judicial economy. Brown thought he was doing the court a favor. In retrospect, that was a mistake. Anyway, those FOIA complaints from Dkt. 8 (old complaints 2, 4, 5 and 16) are also "tacked-on" to this Complaint as Complaints 8-11.

38. The court must still recognize that the main thrust of this lawsuit is for violations of the Paperwork Reduction Act and the Privacy Act as expressed in Complaints 1-7.

39. Since the plaintiff is proceeding *pro se*, the court's attention is directed to Exhibit 8 which is a sample of case law bearing on *pro se* considerations.

### COMPLAINT

**Complaint 1:** '65 has always lacked the required PA Statement required by "applicable law." (Old complaint 12).

40. Brown realleges and incorporates by reference the facts and allegations contained in Paragraphs 1-39, above.

41. Following are facts to support causes of action.

42. The PA, at 5 USC 552a(e)(3), mandates (without exception) that: "Each agency that maintains a *system of records* shall inform each individual whom it asks to supply information, on the form which it uses to *collect the information* or on a separate form that can be retained by the individual ("carry") [the required PA Statement]"

43. Form '65 is (1) part of a *system of records* and (2) is a form that does *collect information* ("form"). However, '65 has never carried the required PA Statement. See

Exhibits 9, 10 & 11.

44. Exhibit 12 shows how the required PA Statement is carried on an IRS form.

45. The Court must be vigilant that the defendants don't again attempt to deceive the court (as in Dkt 26 pg 19) by suggesting that the lack of the required PA Statement on '65 is somehow related to the actual release of personal information by the USPTO.

46. There is no connection between the two! The requirement that all forms that collect information carry the PA Statement is a simply, straight-forward, absolute **statutory** requirement! 5 USC 552a(e)(3).

47. Galaxy/USPTO invited comments in a Federal Register Notice on the proposed '65. Brown, along with 28 other individuals responded to that invitation with a number of comments. These included the fact, *inter alia*, that the proposed '65 lacked the required PA Statement.

48. Based on invited comments, Galaxy/USPTO and OMB did have notice of the objection in place. They did have the opportunity to correct the error. However, for some unknown reason, they still did not include the required PA Statement on '65.

49. The Paperwork Reduction Act ("PRA") became law on October 1, 1995.

50. The Privacy Act ("PA") came into being in 1974.

51. The Director of OMB [and his predecessors] ("Director") is responsible, under the PRA, for reviewing and approving all government forms. 44 USC 3504(c)(1).

52. "The authority of the Director under [the PRA] shall be exercised consistent with applicable law." 44 USC 3504(a)(2). (emphasis added).

53. During the time that the Director is considering the approval of a proposed form, he cannot be sued to "approve or not act" on the form. 44 USC 3507(d)(3). [From



surfing the internet, it appears that this provision was included to keep over-anxious agencies off of his back when they had submitted forms seeking dubious collections of information.] Obviously, there is no prohibition against judicial action once the form has been approved, if the approval did not abide by "applicable law," and a user was penalized by using the form that did not abide. This is the case, *inter alia*, in the instant action.

54. The Director is responsible for insuring that '65 carries the required PA Statement, since the PA is "applicable law." It is the "applicable law" because it absolutely requires a particular statement on all forms that collect information.

55. The Director is also responsible to "oversee and coordinate compliance with [the PA]." 44 USC 3504(g)(2).

56. "The Director of OMB shall provide continuing assistance to and oversight of the implementation of [the PA] by agencies." 5 USC 552a(v)(2). (emphasis added).

57. So tying all of these facts together logically:

58. (1) since the Director is responsible for approving all forms,

59. (2) since the Director must exercise his authority consistent with applicable law,

60. (3) since applicable law requires a PA Statement on '65,

61. (4) since '65 does not (and has never) carry the required PA Statement,

62. the Director would be operating outside of his authority to approve and assign a control number to a form that does not have the required PA Statement.

63. Galaxy/USPTO violated the PRA and PA by perpetuating invalid '65s. They did not insure the inclusion of the required PA Statement.

64. Section 44 USC 3512 of the PRA states "... **no person shall be subject to any**

**penalty** for failing to comply with a collection of information that is subject to this chapter if the collection of information does not display a **valid** control number ... The protection provided by this section may be raised [as a private right of action] at any time during the agency administrative process or judicial action applicable thereto." (emphasis added).

65. The phrase "[private right of action]" has been substituted for the word "... otherwise" which is what Congress actually wrote. Their use of "otherwise" was to cover any action that could be raised.

66. Otherwise, they would not have used the word "otherwise." (Exhibit 13).

67. Brown was penalized (by losing his patent) after "failing to comply with a collection of information that lacked a valid control number."

68. A valid control number could not be assigned by the Director because he was operating outside of his authority by not being "consistent with applicable law." "Applicable law" required that '65 carry the required PA Statement.

69. The three causes of action for this complaint are complementary and are based on negligence. The three present an interesting challenge for the court to decide who was at fault for the illegal penalty imposed on Brown.

70. Was it Galaxy/USPTO for proposing '65s knowing that they lacked the required PA statement? Was it the Director for approving '65s knowing that they lacked the required PA statement? Was it USPTO alone for imposing a illegal penalty based on a form that they knew lacked the required PA statement? Or was it a comedy of errors and they were all at fault?

71. Relief is available somewhere among the three - or else Congress molded an

impotent 44 USC 3512 and the Paperwork Reduction Act is for naught.

72. The elements of negligence are (1) a duty, (2) a breach of that duty and (3) damage as a direct result of the breach.

73. The first cause of action is that Galaxy/USPTO had a statutory duty to obey the PRA and the PA. 44 USC 3506(a)(1)(B).

74. Galaxy/USPTO breached that duty

75. (1) by having perpetuated a number of flawed '65s over the years,

76. (2) by proposing '65s without the required PA Statement,

77. (3) by failing to respond to Federal Register comments (44 USC 3507(d)(2)) concerning the missing PA Statement.

78. Brown was damaged by Galaxy/USPTO's breaches by a penalty based on Brown's use of a flawed '65, which took away his patent rights (44 USC 3512).

79. Court ordered relief is obviously available by undoing the penalty.

80. Relief is also available under the APA, as previously noted in paragraphs 22-25.

81. The second cause of action is that statutorily the Director had

82. (1) a duty to obey "applicable law,"

83. (2) a duty to exercise his responsibility and authority consistent with "applicable law,"

84. (3) a duty to obey the PRA and the PA,

85. (4) a duty to oversee, coordinate and mandate compliance with the PRA and PA,

86. (5) a duty to insure the required PA statement on '65,

87. (6) a duty to approve '65 only when it complied with "applicable law,"

88. (7) a duty to assign a valid control number to '65 only when it complied with

"applicable law."

89. The Director breached his various statutory duties by approving and assigning a control number to '65 which lacked the required PA Statement.

90. Brown was damaged by the Director's breaches by a penalty (the loss of his patent rights) based on Brown's use of a flawed '65 (44 USC 3512).

91. Court ordered relief is obviously available by undoing the penalty.

92. Relief is also available under the APA, as previously noted in paragraphs 22-25.

93. The third cause of action is that USPTO had a statutory duty to **not** penalize Brown for his failure to comply with a form that did not conform to "applicable law."

94. USPTO breached this duty by taking away Brown's patent rights.

95. Brown was damaged by the loss of his patent rights.

96. Court ordered relief is obviously available by undoing the penalty.

97. Relief is also available under the APA, as previously noted in paragraphs 22-25.

#### **BACKGROUND TO COMPLAINTS 2 TO 6 (Old Complaint 14)**

98. Brown realleges and incorporates by reference the facts and allegations contained in Paragraphs 1-97 above.

99. Many of the facts and citations in Complaint 1 noted that the Director has the absolute responsibility to make sure that a form that collects information complies with the PRA and PA.

100. However, that authority (but not the responsibility) can be delegated. 44 USC 3503. The authority has been delegated to the OMB's Desk Officer, David Rostker.

101. For the remainder of this document, the word "Rostker" generally means David Rostker and his predecessors, exercising the authority delegated to them by the

Director(s).

102. During the summer of 2003, Rostker stated to Brown (see Exhibit 14): (1) "The [Approval Request for '65] that you were inquiring about [was] *improved* - [it was] not sent back."; (2) "I had some discussions with the PTO and they, from my opinion *as best I could tell* ... responded very well to your concerns."; (3) "I had some discussions with the PTO and they, ...**based upon the fact that this is in the middle of ongoing litigation**, *responded very well* to your concerns."; and (4) "I had some discussions with the PTO...." (emphasis added).

103. These statements were left on Brown's answering machine by Rostker.

104. The audio tape of Rostker's statements will be played at the trial.

105. Rostker's statements included such phrases as "*improved*," "*as best I could tell*," and "*responded very well*."

106. The PRA does not operate using shades of grey!

107. A form either complies or it doesn't - just like being pregnant!

108. If the form doesn't comply, it is not to be approved!

109. If the form doesn't comply, it is not to be assigned a control number!

110. If the form doesn't comply, it is not to be used for the collection of information!

111. If the form doesn't comply, an individual is not to be penalized by using it!

**Complaint 2:** Rostker failed to insure the required PA Statement on '65 by factoring in "ongoing litigation" [the instant action] contrary to applicable law.

112. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-111 above.

113. Following are facts to support causes of action.

114. The specific citations, facts and allegations of Compliant 1 concerning the simply, straight-forward, absolute **statutory** requirement that '65 carry the required PA Statement are realleged here.

115. The fact is that '65 has not had the required PA Statement since its inception. Rostker was aware of that. And even when given notice and the opportunity to correct the violation, he chose not to.

116. "Rostker" generally means David Rostker and his predecessors, exercising the authority delegated to them by the Director(s).

117. The causes of action based on Rostker's negligence are:

118. Rostker, with regards to the PA statement and statutorily, had

119. (1) a duty to obey "applicable law,"

120. (2) a duty to exercise his '65 authority in compliance with the PRA and the PA,

121. (3) a duty to oversee, coordinate and mandate '65s' compliance with the PRA and PA,

122. (4) a duty to insure that '65s had the required PA statement,

123. (5) a duty to approve '65s only when they complied with "applicable law,"

124. (6) a duty to assign a valid control number to '65s only when they complied with "applicable law,"

125. (7) a duty to not consider irrelevant factors, such as "ongoing litigation" [the instant action], during the approval process for '65.

126. Rostker breached his various duties

127. (1) by approving and assigning control numbers to flawed '65s,

128. (2) by conspiring with Galaxy/USPTO to sustain flawed '65s,

129. (3) by actually factoring the instant action into his decision to approve '65.

130. Brown was damaged by Rostker's breaches by a penalty based on Brown's use of a flawed '65. (44 USC 3512).

131. Court ordered relief is obviously available by undoing the penalty.

132. Relief is also available under the APA, as previously noted in paragraphs 22-25.

**Complaint 3:** Rostker failed to insure practical utility on '65 by factoring in "ongoing litigation" [the instant action] contrary to applicable law.

133. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-132 above.

134. Following are facts to support causes of action.

135. One way Congress insured that the PRA would reduce paperwork was to limit any collection of information to that which could actually be processed in a "timely and useful fashion." This is referred to as a form's having "practical utility."

136. The PRA mandates that all forms shall have practical utility. 44 USC 3506(c)(3)(A)

137. Practical utility is "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion" 44 USC 3502(11).

138. The USPTO published statements in the renewal approval requests for '65 (Exhibit 15) that

139. (1) prior to 1999, '65 was processed by a GS-15 in about two hours,

140. (2) since 1999, '65 has been processed by a GS-7 in about 30 minutes.

141. The USPTO requires extensive information to accompany '65. See Exhibit 16 for a sample of medical, financial and docket required information.

142. For Brown, the required information was for a complete showing of his financial condition by month for a 36-month period, "including all income (not just taxable), expenses, assets, credit and obligations." (Patent # 4,815,438).

143. Most users of '65 incorporate medical, financial or office procedures information into their '65 submissions.

144. The job requirements for the GS-15 and GS-7 lack credential requirements to process such information.

145. Requiring information for '65 that cannot be processed by the GS-15 or the GS-7 based on credentials and average time violates the PRA. That makes '65 invalid.

146. The fact is that '65 has not had practical utility since its inception. Rostker was aware of that. And even when given notice and the opportunity to correct the violation, he chose not to.

147. "Rostker" generally means David Rostker and his predecessors, exercising the authority delegated to them by the Director(s).

148. The causes of action for Rostker's negligence are:

149. Rostker, with regards to practical utility and statutorily, had

150. (1) a duty to obey "applicable law,"

151. (2) a duty to exercise his '65 authority in compliance with the PRA,

152. (3) a duty to oversee, coordinate and mandate '65s' compliance with the PRA,

153. (4) a duty to insure that '65s had practical utility,

154. (5) a duty to approve '65s only when they complied with "applicable law,"

155. (6) a duty to assign a valid control number to '65s only when they complied with "applicable law,"



156. (7) a duty to not consider irrelevant factors, such as "ongoing litigation" [the instant action], during the approval process for '65.
157. Rostker breached his various duties
158. (1) by approving and assigning control numbers to flawed '65s,
159. (2) by conspiring with Galaxy/USPTO to sustain flawed '65s,
160. (3) by actually factoring the instant action into his decision to approve '65.
161. Rostker, with regards to practical utility, had
162. (1) a duty to exercise his '65 authority in compliance with the PRA,
163. (2) a duty to approve '65 only when it complied with the law,
164. (3) a duty to assign a valid control number to '65 only when it complied with the law,
165. (4) a duty to oversee and coordinate compliance of '65 with the practical utility aspects of the PRA,
166. (5) a duty to not consider irrelevant factors [such as the instant action].
167. Rostker breached his various duties
168. (1) by actually factoring the instant action into his decision to approve '65,
169. (2) by conspiring with Galaxy/USPTO to sustain the flawed '65,
170. (3) by approving and assigning a control number to '65.
171. Brown was damaged by Rostker's breaches by a penalty based on Brown's use of a flawed '65 (44 USC 3512).
172. Court ordered relief is obviously available by undoing the penalty.
173. Relief is also available under the APA, as previously noted in paragraphs 22-25.

**Complaint 4:** Rostker failed to insure an accurate time burden on '65 by factoring in the

"ongoing litigation" [the instant action] contrary to applicable law.

174. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-173 above.

175. Following are facts to support causes of action.

176. One way Congress insured that the PRA would reduce paperwork was to require that forms which collect information must have on them an accurate *time burden* to "gather, prepare and submit" the form.

177. From 1996 to 2003, '65's *time burden* was "1 hour." (Exhibits 9 & 10).

178. Indeed, Brown did devote about an hour to "gather, prepare and submit" his '65.

179. However, USPTO denied his '65 petition and Brown was required to provide "additional information" that would have taken hundreds of hours to "gather, prepare and submit." The USPTO's requirement was for a complete showing of Brown's financial condition **by month** for a 36-month period, "including all income (not just taxable), expenses, assets, credit and obligations."

180. Another inventor was required to "fully and completely discuss every dollar the business spent during 1997, 1998, and 1999." (Patent # 5,336,186).

181. Both of these are fairly typical requirements for "additional information." (Exhibit 16).

182. The PRA explicitly states the methods to calculate the *time burden*:  
44 USC 3504(c)(5), 44 USC 3506(c)(1)(A)(iv) and 44 USC 3506(c)(1)(B)(iii)(III).

183. And Galaxy/USPTO procedures do exist for the calculation of the time burden. They are known as "*Patent And Trademark Office Burden Estimation Techniques - Appendix C*".

184. Brown requested the back-up documentation for the 1-hour *time burden* calculation used prior to 2003. There was none!

185. Since 2003, the time burden to "gather, prepare and submit" a '65 is "8 hours."

186. Brown also requested the back-up documentation for the 8-hour *time burden* calculation. He received only one-sentence from a single Galaxy/USPTO email (Exhibit 2). All it stated was: "It has been suggested that the average time to complete [a '65] is 8 hours."

187. Brown alleges that (1) PRA methodology was not used to calculate the 1-hour or 8-hour *time burdens*

188. The fact is that '65 has not had an accurate time burden estimate since its inception. Rostker was aware of that. And even when given notice and the opportunity to correct the violation, he chose not to.

189. "Rostker" generally means David Rostker and his predecessors, exercising the authority delegated to them by the Director(s).

190. The causes of action for Rostker's negligence are:

191. Rostker, with regards to an accurate time burden and statutorily, had

192. (1) a duty to obey "applicable law,"

193. (2) a duty to exercise his '65 authority in compliance with the PRA,

194. (3) a duty to oversee, coordinate and mandate '65s' compliance with the PRA,

195. (4) a duty to insure that '65s had an accurate time burden,

196. (5) a duty to approve '65s only when they complied with "applicable law,"

197. (6) a duty to assign a valid control number to '65s only when they complied with "applicable law,"

198. (7) a duty to not consider irrelevant factors, such as "ongoing litigation" [the instant action], during the approval process for '65.

199. Rostker breached his various duties

200. (1) by approving and assigning control numbers to flawed '65s,

201. (2) by conspiring with Galaxy/USPTO to sustain flawed '65s,

202. (3) by actually factoring the instant action into his decision to approve '65.

203. Brown was harmed by an illegal penalty, based on his use of flawed '65.

204. Court ordered relief is obviously available by undoing the penalty.

205. Relief is also available under the APA, as previously noted in paragraphs 22-25.

**Complaint 5:** Rostker failed to insure a valid showing statement on '65 by factoring in "ongoing litigation" [the instant action] contrary to applicable law.

206. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-205 above.

207. Following are facts to support causes of action.

208. One way Congress insured that the PRA would reduce paperwork was to require that forms which collect information must have a "showing statement" that is "written using plain, coherent, and unambiguous terminology and is understandable to those who are to respond." ("valid showing statement"). 44 USC 3506(c)(3)(D).

209. IRS forms contain excellent examples of valid showing statements.

210. Form '65 has just a two-sentence showing statement (Exhibits 9, 10 & 11).

211. Between 1995 and 2000, about 840 '65 petitions were filed.

212. Of those, about 768 were denied for insufficient information.

213. That means that over 91% of the individuals who used '65 were required to

supply additional showing information.

214. A failure rate of over 91% evidences the lack of a valid showing statement that "is understandable to those who are to respond."

215. The lack of a valid showing statement violates the PRA and invalidates '65.

216. The fact is that '65 has not had a valid showing statement since its inception.

Rostker was aware of that. And even when given notice and the opportunity to correct the violation, he chose not to.

217. "Rostker" generally means David Rostker and his predecessors, exercising the authority delegated to them by the Director(s).

218. The causes of action for Rostker's negligence are:

219. Rostker, with regards to a valid showing statement and statutorily, had

220. (1) a duty to obey "applicable law,"

221. (2) a duty to exercise his '65 authority in compliance with the PRA,

222. (3) a duty to oversee, coordinate and mandate '65s' compliance with the PRA,

223. (4) a duty to insure that '65s had a valid showing statement,

224. (5) a duty to approve '65s only when they complied with "applicable law,"

225. (6) a duty to assign a valid control number to '65s only when they complied with "applicable law,"

226. (7) a duty to not consider irrelevant factors, such as "ongoing litigation" [the instant action], during the approval process for '65.

227. Rostker breached his various duties

228. (1) by approving and assigning control numbers to flawed '65s,

229. (2) by conspiring with Galaxy/USPTO to sustain flawed '65s,

230. (3) by actually factoring the instant action into his decision to approve '65.

231. Court ordered relief is obviously available by undoing the penalty.

232. Relief is also available under the APA, as previously noted in paragraphs 22-25.

**Complaint 6:** Rostker failed to insure approval of additional required information as a "collection of information" by factoring in "ongoing litigation" [the instant action] contrary to applicable law.

233. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-232 above.

234. Following are facts to support causes of action.

235. One way Congress insured that the PRA would reduce paperwork was to specify that anytime the same question is asked of ten or more individuals, it is a "collection of information."

236. See Exhibit 17 for a sample of where the same "additional information" was required of ten or more people (including Brown), thereby making it a "collection of information."

237. Rostker must approve any "collection of information."

238. Galaxy/USPTO has never gotten approval from Rostker for this additional "collection of information."

239. The failure to get approval for this additional "collection of information" violates the PRA and invalidates '65.

240. The fact is that the identical requirements for "additional information" has never been approved for '65 since its inception. Rostker was aware of that. And even when given notice and the opportunity to correct the violation, he chose not to.

241. "Rostker" generally means David Rostker and his predecessors, exercising the authority delegated to them by the Director(s).
242. The causes of action for Rostker's negligence are:
243. Rostker, with regards to the approval of the "collection of information" and statutorily, had
244. (1) a duty to obey "applicable law,"
245. (2) a duty to exercise his '65 authority in compliance with the PRA,
246. (3) a duty to oversee, coordinate and mandate '65s' compliance with the PRA,
247. (4) a duty to insure that required "additional information" for '65s had approval as a "collection of information,
248. (5) a duty to approve '65s only when they complied with "applicable law,"
249. (6) a duty to assign a valid control number to '65s only when they complied with "applicable law,"
250. (7) a duty to not consider irrelevant factors, such as "ongoing litigation" [the instant action], during the approval process for '65.
251. Rostker breached his various duties
252. (1) by approving and assigning control numbers to flawed '65s,
253. (2) by conspiring with Galaxy/USPTO to sustain flawed '65s,
254. (3) by actually factoring the instant action into his decision to approve '65.
255. Brown was harmed by an illegal penalty, based on his use of flawed '65.
256. Court ordered relief is obviously available by undoing the penalty.
257. Relief is also available under the APA, as previously noted in paragraphs 22-25.
- Complaint 7: Retention and release of private records (Old Complaint 13).**

258. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-257 above.

259. Galaxy is included as a defendant for this count because they are paid to "handle [USPTO] systems support, including ... data and records management...."

260. Plaintiff alleges that Galaxy had a responsibility to provide support by bringing the "data and records management" aspects of the USPTO's release of private information to the attention of USPTO.

261. In Cruz v. Beto 405 U.S. 319, 322 (1972), the court held that the allegations of a *pro se* complaint "must" be taken as true for purposes of a motion to dismiss.

262. Since Brown is proceeding *pro se*, Galaxy cannot be dismissed from this count.

263. USPTO/Galaxy routinely retain and release very personal information including Income Tax Returns with Social Security Numbers, Payroll and other documents with Social Security Numbers and associated names, Bank statements (with account numbers), Check books, Medical and hospital records, Hospital and doctors' bills, Doctor's examination notes and narratives, documents concerning Psychiatric and Mental problems, Personal narratives of misfortune (including job termination and suicide attempts), Death certificates, etc.

264. I pray the court will take the time to carefully review the forty-four documents at Exhibit 18. [How would you like similar information about you and your family made public?.]

265. USPTO/Galaxy also routinely retained and released, during the week of November 8-15, 2002, Brown's statement (Exhibit 9) concerning his personal financial situation, which is milder than those in Exhibit 18 - but still...



266. USPTO imposed "additional information requirements" on Brown that were over-and-above that which initially accompanied his '65.

267. These were that Brown was required to provide a complete showing of his financial condition **by month** for a 36-month period, "including all income (not just taxable), expenses, assets, credit, and obligations."

268. "Returns and return information shall be confidential, and except as authorized by this title ...." 26 USC 6103(a).

269. The USPTO is not included among those who are authorized to release returns or return information under 26 USC 6103.

270. "If any officer or employee of the U.S. knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the U.S. in a district court of the U.S." 26 USC 7431(a)(1).

271. Identity Theft is the fastest-growing white collar crime.

272. Had Brown supplied the additional information that was "required," it too would have been made public in violation of the Internal Revenue Code. And it would have put Brown in jeopardy of Identity Theft, just as it has hundreds of other inventors.

273. By not supplying the additional information that was "required," Brown lost his patent.

274. These personal records are in a system which allows retrieval by name and therefor are subject to the provisions of the PA.

275. USPTO/Galaxy have a scanning project to put all this personal information on the Internet.

276. The PA forbids USPTO/Galaxy's
277. (a) retention of records that do not "insure fairness,"
278. (b) retention of records that are not "timely or relevant,"
279. (c) releasing of individual's records that could cause "harm, embarrassment, inconvenience, or unfairness,"
280. (d) retention of records that consist of "illegally collected" data,
281. The causes of action for USPTO/Galaxy's negligence are:
282. USPTO/Galaxy, with respect to private information, had
283. (1) a duty to not release Brown's income tax returns and return information,
284. (2) a duty to maintain Brown's records in such a manner as to:
285. (a) "insure fairness,"
286. (b) be "timely or relevant,"
287. (c) not cause him "harm, embarrassment, inconvenience, or unfairness."
288. (3) a duty to not maintain Brown's information that was "illegally collected."
289. USPTO/Galaxy breached their duties
290. (1) by releasing, during the week of November 8-15, 2002, Brown's personal financial situation,
291. (2) by requiring "additional information" in the form of income tax returns and return information with the "intention to distribute," in violation of the Internal Revenue Code.
292. Brown was harmed by being put between a rock and a hard-place by having to choose between (1) submitting the "required additional information" of his income tax returns and return information and having it made public, or (2) not submitting the

"required additional information" and losing his patent. [Brown chose (2) and lost his patent.]

293. Relief is available under 26 USC 7431(c).

294. Although this is a civil action, it is pertinent for the Court, in connection with possible punitive damages, to take notice of: "If any person is criminally charged by indictment or information with inspection or disclosure of a taxpayer's return or return ... the Secretary shall notify such taxpayer as soon as practicable of such inspection or disclosure." 26 USC 7431(e).

295. Reviewing Exhibit 18, it is obvious that the USPTO does release income tax returns and return information. That is a violation of the Internal Revenue Code. For judicial economy and justice, even though this is not a criminal action, perhaps the court could rule that the USPTO is to notify all of the inventors whose returns and return information and/or personal financial information has been made public.

296. An added touch would be to require the notice to mention this lawsuit (or [www.PatentOfficeLawsuit.com](http://www.PatentOfficeLawsuit.com)) as the cause for the notification.

### **COMPLAINTS 8-11**

297. The court must recognize that the main thrust of this lawsuit is for violations of the Paperwork Reductions Act and the Privacy Act as laid out in Complaints 1-7.

298. However, in the original complaint (Dkt 1), FOIA related complaints were also "tacked-on" for judicial economy. Brown thought he was doing the court a favor. In retrospect, that was a mistake. But anyway, those FOIA complaints from Dkt. 8 (old complaints 2, 4, 5 and 16) are also "tacked-on" to this Amended Complaint as complaints 8-11.

**Complaint 8: No FOIA response after three years (Old Complaint 4)**

299. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-298 above.

300. On November 27, 2000 Brown appealed Item 7 of USPTO FOIA response 00-200.

301. USPTO is to respond within 20 days to a FOIA appeal. USPTO has yet to provide a formal response. Brown has reminded USPTO over 20 times that they have not yet formally responded.

302. Had the response actually been created, federal record retention regulations require USPTO to have a copy of what was sent. USPTO has been unable to locate a copy of what they purport to have sent to Brown.

303. The cause of action based on USPTO's negligence is that USPTO had a statutory duty to respond to a FOIA appeal within 20 days.

304. USPTO breached their duty by failing to respond to Brown's FOIA appeal [despite the passage of over three years and over twenty reminders].

305. Brown was harmed by not knowing how to proceed since he never received a response.

306. Relief is available under the FOIA and APA.

**Complaint 9: Out-of-date citations - (Old Complaint 5).**

307. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-306 above.

308. Brown maintains a popular website dealing, *inter alia*, with the instant action.

309. Brown has requested a fee waiver for several FOIA requests by noting that his

website provides a means for disseminating the information. Most were denied by citing out-of-date case law which required a "professional or personal contact with any major newspaper company. (Exhibit 19)"

310. There is more recent case law that finds that the Internet gives the requestor "the ability to publicize the disclosed information." See Exhibit 20.

311. Even the USPTO in a Federal Register notice (Exhibit 21) acknowledged that "the Internet provides a valuable means of disseminating information...."

312. Brown alleges that USPTO intentionally ignored the more recent case law.

313. The USPTO's out-of-date citations are a violation of U.S. Criminal Code 18 USC §§ 1001, 1008 (Exhibit 7). (U.S. v. Singleton).

314. No private right of action exists when federal employees violate the Criminal Codes.

315. However, in that case, the APA (Exhibit 5 and paragraphs 22-25) takes over with:

316. "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 USC 702.

317. "Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 USC 703.

318. The cause of action based on USPTO's negligence is:

319. USPTO has:

- (1) a duty to grant appropriate FOIA fee waivers,
- (2) a duty to not quote out-of-date citations,

320. USPTO breached its various duties by intentionally quoting out-of-date case law to deny a deserved fee waiver.

321. Brown was harmed by being denied a deserved fee waiver.

322. Relief is available under FOIA and APA.

**Complaint 10: Withholding of FOIA documents - (Old Complaint 2).**

323. This count has already been sustained by the court's Order.

324. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-322 above.

325. Brown's FOIA Request 03-247 asked for "all documents concerning disciplinary and similar actions based on violations against [Brown]...".

326. USPTO denied the request citing FOIA Exemptions 6 and 7-C.

327. Brown appealed, citing an abundance of case law [reproduced here as Exhibit 22].

It was copied from the Attorney General's website.

328. It shows that the public's need-to-know" about the criminal behavior of civil servants far outweighs any privacy rights they may have.

329. The appeal was denied with a conclusory and unsupported single sentence.

330. Brown alleges that the withholding was arbitrary, capricious, intentional, without merit and a violation of the FOIA and the U.S. Criminal Codes (Exhibit 7).

331. The cause of action based on USPTO's negligence is:

332. USPTO had:

333. (1) a duty to produce the documents based on the FOIA,

334. (2) a duty to produce the documents based on case law.

335. USPTO breached that duty by not supplying the documents.

336. Brown was harmed by being denied the requested documents.

337. Relief is available under the FOIA.

338. Relief is also available under the APA, as previously noted in paragraphs 22-25.

**Complaint 11: Lying by Commerce employees Fields or Kil - (Old Complaint 16).**

339. Brown realleges and incorporates by reference the citations, facts and allegations contained in Paragraphs 1-338 above.

340. The Attorney General has advised for FOIA/Privacy Act requests:

341. (1) "agencies are expected to honor a requester's obvious intent,"

342. (2) a "broader interpretation [of FOIA requests] is more appropriate,"

343. (3) questions to agencies are to be considered as FOIA requests.

344. Compelling case law and Directives of the Attorney General underscore the "Dual retrieval" principle of the Privacy Act.

345. Brown made a request for documents related to the I.G.'s investigations of wrongdoing at USPTO.

346. The request was processed by Gordon Fields.

347. Fields denied the request.

348. Under the "dual retrieval" principle of the Privacy Act, the documents should have been provided.

349. Fields said there were no such documents. See Exhibit 23 @6.

350. However, later correspondence from Sophia Kil (Exhibit 24) indicated that the documents did exist. Huh?

351. Either Fields or Kil lied, in violation of the U.S. Criminal Codes.

352. Brown alleges that Fields' and/or Kil's behavior was arbitrary, capricious,

intentional, without merit and a violation of the FOIA and the U.S. Criminal Codes.

353. The cause of action based on Commerce's negligence is:

354. Commerce had:

355. (1) a duty to produce the documents based on the FOIA,

356. (2) a duty to produce the documents based on case law.

357. Commerce breached that duty by not supplying the documents.

358. Brown was harmed by being denied the requested documents.

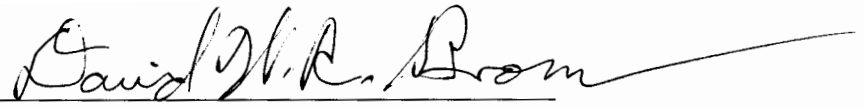
359. Relief is available under the FOIA.

360. Relief is also available under the APA, as previously noted in paragraphs 22-25.



**RELIEF**

- A. WHEREFORE, Plaintiff requests the Court, based on Complaints 1-6 to find USPTO Form PTO/SB/65 to have been invalid for the collection of information from its inception.
- B. WHEREFORE, Plaintiff requests the Court, based on Complaints 1-6 to undo all penalties that were based on the use of the flawed USPTO Form PTO/SB/65 from its inception.
- C. WHEREFORE, Plaintiff requests the Court, based on Complaint 7, to order USPTO to cease and desist in the retention and/or release of Plaintiff's (and others' as the Court sees fit) records which violate the privacy rights of the individual.
- D. WHEREFORE, Plaintiff requests the Court to order USPTO to release the documents noted in Complaints 8-10.
- E. WHEREFORE, Plaintiff requests the Court to order Commerce to release the documents noted in Complaint 11.
- F. WHEREFORE, Plaintiff requests the Court, based on the pervasive wrongdoing of the defendants, to award Plaintiff a monetary judgement of not less than \$1,000,000 plus a punitive award of not less than \$3,000,000 or the maximum allowed by law.
- G. WHEREFORE, Plaintiff requests that, with regard to the U.S. Patent and Trademark Office's scanning project [to make all patent related documents available on the Internet], (1) the Court order an immediate stop to the image scanning project, (2) the Court order the destruction of all image files created thus far, (3) the Court order that if the rescanning project is to begin anew, that before imaging, each page is to be reviewed for privacy considerations, in which case the information is to be redacted.

A handwritten signature in black ink that reads "David W. R. Brown". The signature is written in a cursive style and extends across the width of the page.

David W. R. Brown, *pro se*

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Sun City Center FL 33573-5219

Phone: (813) 634-6048

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Plaintiff's Amended Complaint with exhibits has been furnished, by U.S. Mail, this 1st day of October, 2004, to the following:

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