

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
2 OPPOSITION TO MOTION TO DISMISS.

3
4 Nonetheless, Margolin wishes to clarify things by changing:

5
6 CHARLES F. BOLDEN, Administrator, National Aeronautics and Space Administration,
7 Defendant.

8
9 to

10
11 CHARLES F. BOLDEN, in his official capacity as Administrator, National Aeronautics
12 and Space Administration, and NATIONAL AERONAUTICS AND SPACE
13 ADMINISTRATION, Defendants.
14

15 In the event this amendment triggers Federal Rules of Civil Procedure Rule 15(c), Margolin
16 offers the following discussion.

17
18 The Federal Rules of Civil Procedure Rule 15(c) RELATION BACK OF AMENDMENTS

19
20 states:

21
22
23 Rule 15(c):

24
25 (c) RELATION BACK OF AMENDMENTS.

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27 (1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date
28 of the original pleading when:

29
30 (A) the law that provides the applicable statute of limitations allows relation back;

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32 (B) the amendment asserts a claim or defense that arose out of the conduct, transaction,
33 or occurrence set out — or attempted to be set out — in the original pleading; or

34
35 (C) the amendment changes the party or the naming of the party against whom a claim
36 is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule
37 4(m) for serving the summons and complaint, the party to be brought in by amendment:
38

1 (i) received such notice of the action that it will not be prejudiced in defending on
2 the merits; and
3

4 (ii) knew or should have known that the action would have been brought against it,
5 but for a mistake concerning the proper party's identity.
6

7 (2) *Notice to the United States.* When the United States or a United States officer or agency
8 is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and
9 (ii) are satisfied if, during the stated period, process was delivered or mailed to the United
10 States attorney or the United States attorney's designee, to the Attorney General of the
11 United States, or to the officer or agency.
12
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14

15 Rule 15(c)(1)(A)
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17 Does the amendment relate back to the date of the original pleading when the law that provides
18 the applicable statute of limitations allows relation back?
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20 Yes. 5 U.S.C. § 552 (a)(4)(B) does not impose a statute of limitations on filing a complaint.

21 (B) On complaint, the district court of the United States in the district in which the
22 complainant resides, or has his principal place of business, or in which the agency records
23 are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from
24 withholding agency records and to order the production of any agency records improperly
25 withheld from the complainant. In such a case the court shall determine the matter de novo,
26 and may examine the contents of such agency records in camera to determine whether such
27 records or any part thereof shall be withheld under any of the exemptions set forth in
28 subsection (b) of this section, and the burden is on the agency to sustain its action. In
29 addition to any other matters to which a court accords substantial weight, a court shall
30 accord substantial weight to an affidavit of an agency concerning the agency's
31 determination as to technical feasibility under paragraph (2)(C) and subsection (b) and
32 reproducibility under paragraph (3)(B).

33 The Department of Justice Web site discusses the Statute of Limitations for Freedom of
34 Information Act actions from *Spannaus v. United States Department of Justice*, 824 F.2d 52
35 (D.C. Cir. 1987) http://www.usdoj.gov/oip/foia_updates/Vol_VIII_2/viii2page4.htm

36 In a decision of first impression, the D.C. Circuit Court of Appeals has ruled that 28 U.S.C.
37 § 2401(a), the six-year general statute of limitations governing "every civil action" against
38 the United States, applies to bar a FOIA suit filed more than six years after its underlying

1 administrative process was "constructively" exhausted. Writing for the court, Circuit Judge
2 Steven F. Williams observed that "the words 'every civil action' mean what they say" and
3 that because § 2401(a) is a "jurisdictional condition attached to the government's waiver of
4 sovereign immunity," it must be "strictly construed." Judge Williams noted that a "right of
5 action first accrues" under § 2401(a) as soon as "the person challenging the agency action
6 can institute and maintain a suit in court" and that the statute of limitations thus commenced
7 to run in this case in October 1977 when the FBI failed to comply with the plaintiff's FOIA
8 request within ten working days. Accord 5 U.S.C. § 552(a)(6)(C). He flatly rejected the
9 plaintiff's argument that the statute of limitations should commence to run only when all
10 administrative appeals have been completed (almost two years later, in this case), observing
11 that such a construction ignores "the clear language of a statute of limitations that conditions
12 a waiver of sovereign immunity."

13 (Emphasis added)

14 Margolin filed the FOIA Request on July 1, 2008 (Plaintiff's Complaint at Appendix A17). He
15 was asked by NASA's Mr. Jan McNutt for a 90 day extension (Plaintiff's Complaint at
16 Appendix A19) which Margolin gave him (Plaintiff's Complaint at Appendix A21). Regardless
17 of how the days are calculated (business days or calendar days) Margolin is well within the six
18 year Statute of Limitations.

19

20 Rule 15(c)(1)(B)

21 Does the amendment relate back to the date of the original pleading when the amendment asserts
22 a claim or defense that arose out of the conduct, transaction, or occurrence set out — or
23 attempted to be set out — in the original pleading;

24

25 Yes, Margolin continues to assert the claim under 5 U.S.C. 552.

26

27 Rule 15(c)(1)(C)(i) and Rule 15(c)(1)(C)(ii)

28 The requirements under this section are satisfied by Rule 15(c)(2)

1 Rule 15(c)(2)

2 (2) *Notice to the United States.* When the United States or a United States officer or agency
3 is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and
4 (ii) are satisfied if, during the stated period, process was delivered or mailed to the United
5 States attorney or the United States attorney's designee, to the Attorney General of the
6 United States, or to the officer or agency.
7

8 Process was delivered to the U.S. Attorney in August 3, 2009. Process was mailed to the
9 Attorney General of the United States by USPS Registered mail on August 3, 2009 and delivered
10 by USPS on August 6, 2009. See Pacer Document 4.

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12 Second Reason for Amending the Complaint

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

19

20 NASA denied Margolin's Appeal and produced no additional documents, only more reasons to
21 withhold them. Margolin would like to amend his Complaint to include NASA's Denial of his
22 Appeal. The Federal Rules of Civil Procedure Rule 15(d) states:

23 (d) SUPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on
24 just terms, permit a party to serve a supplemental pleading setting out any transaction,
25 occurrence, or event that happened after the date of the pleading to be supplemented. The
26 court may permit supplementation even though the original pleading is defective in stating a

1 claim or defense. The court may order that the opposing party plead to the supplemental
2 pleading within a specified time.
3

4 Third Reason for Amending the Complaint

5 Margolin wishes to correct various informalities in the original Complaint. Under the Federal
6 Rules For Civil Procedure Rule 15(a)(1)(A) Margolin is permitted to amend his complaint before
7 being served with a responsive pleading. Margolin believes that means Defendants' Answer to
8 the Complaint which Defendants have yet to file. If Margolin is mistaken he asks the Court's
9 leave to amend his Complaint under Rule 15(a)(2).
10

11 Conclusion

12 Margolin moves for leave to amend his Complaint and as per local Rule LR 15-1 AMENDED
13 PLEADINGS Margolin is including his proposed amended Complaint and Appendix.
14
15

16 Respectfully submitted,
17

18 /Jed Margolin/

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25 Dated: September 24, 2009
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing MOTION FOR LEAVE TO FILE AMENDED COMPLAINT has been made by electronic notification through the Court's electronic filing system on September 24, 2009.

/Jed Margolin/

Jed Margolin