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Sovereign-State-Parties
In their own Stead[1]

UNITED-STATES-DISTRICT-COURT

NORTHERN-DISTRICT OF CALIFORNIA

Robert-John:Foti as to Counts 1-46 Joe Neufeld as to counts 2,5-8, 10,11,14 Ken Augustine as to counts 5-7, 10,11,21,39,40,41-46 Plaintiffs[2], v. Officer McHugh and other unknown number of unnamed officers of the U.S. Marshall's Service and the Federal Protective Services U.S. Marshall's Service Federal Protective Services (John-Doe: 1-50) Respondents.	CASE-NO: C 04-2567 PJH Layman's Demand for Reconsideration Because of Errors of Fact and Law and of Fraud by the Court and Defendant's Date: To be announced Time: To be announced Courtroom 3, 17th Floor Trial by Jury Demanded **THREE JUDGE COURT CR 9(i)**[3]

[1] We are not attorneys. We should not be held to the same standard as an attorney and does request from this court an honest judgment. We trust any deficiencies and imperfections that may be contained herein will be liberally construed as the law favors form less than substance. This document is prepared without the assistance of counsel and is subject to whatever corrections are found necessary if and when the court so recommends.

Preliminary Statement

1. The Order Granting Motion to Dismiss First Amended Complaint is ridiculous, which is only exceeded by its absurdity.

2. We believe that the authority cited is sufficient to invoke a three-judge panel at this level. The prospect of becoming a country like Nazi Germany in which "Pappas please, Bitte?" was common everyday occurrences certainly demands it. So does the gravity of this case, call for a three-judge panel.

Better Statement of the Case than the false one the court proffers

3. One can imagine the scenario, "Pappas please, Bitte?" Jackbooted thugs, but wearing suits now, standing in the entrance to a courthouse (which used to be someplace everyone had the Right to Free Access (due process) so they were able to monitor and participate unencumbered the workings of the great judiciary of a great free country), conducting suspicionless searches for papers, not any papers, but specific government identification papers that no one is required to have. When someone tries to gain entrance who does not have these papers, papers no one are required to have, they are assaulted and removed forcefully (arrest without process/kidnapping), or made to suffer escort through the building, at the thugs whim and caprice (which is nothing short of involuntary servitude), denied the freedom of association with their fellow people in the courthouse (freedom of association), are obstructed and denied the ability to prosecute their cases (petition and redress), all because some Americans do not have government IDs they are not

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[2] The court said in Pike v. Dickson, 9 Cir. 323 F.2d. 856, at 857: "Chief Judge Sobeloff in United States v. Glass, 4 Cir., 317 F.2d 200, 202 said as follows: `Where the laymen's papers clearly show what he is driving at, it is usually in the interest of justice and may in the long run save time to temper the reading of the papers with a measure of tolerance.' This court has applied the same rule of construction of a layman's pleadings in Thomas v. Teets, 9 Cir. 205 F.2d 236,238. Note 1" Note 1: `Thomas' application being drawn by an inexperienced layman is to be construed to give its allegations effect, though inartfully drawn. Darr v. Burford, 339 U.S. 200, 203, 70 S.Ct. 587, 94 L.Ed. 761; Price v. Johnston, 334 U.S. 266, 292, 68 S.Ct. 1049, 92 L.Ed. 1356'" 370 F.2d. at 40 (1966)

[3] The constitutional claim could be adjudicated only by a three-judge court, but the statutory claim was within the jurisdiction of a single district judge. Hagans v Levine, 415 U.S. 528, 543 (1974) See also: Hohn v. United States 524 U.S. 236 (1998); Connolly v. Pension Benefit Guaranty Corporation 475 U.S. 211 (1986) Summary Dismissal claim court overruled; Walters v. National Association of Radiation Survivors 473 U.S. 305 (1985); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation 439 U.S. 463 (1979); Tully v. Griffin, Inc. 429 U.S. 68 (1976); Whalen v. Roe 423 U.S. 1313 (1975); Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade 412 U.S. 800 (1973); San Antonio Independent School District v. Rodriguez 411 U.S. 1 (1973); Shapiro v. Thompson 394 U.S. 618 (1969); Reynolds v. Sims 377 U.S. 533 (1964); Stratton v. St. Louis Southwestern Railway Co. 284 U.S. 530 (1932)

required to have. The thugs are demanding relinquishment by Americans of the Right to be free from unreasonable searches in order to enjoy a bevy of other clearly enumerated rights, and justify their acts because they take place at a security checkpoint? These thugs are told to believe that because they are conducting a security checkpoint the Fourth Amendment does not apply. The thugs act like a search for "papers" is merely, somehow, a legitimate request from the suspicionless and may be done because they are at a security checkpoint, despite the Fourth Amendment, despite *Brown v Texas*; 443 US 47, (1979), *Kolender v Lawson,* 461 U.S. 352 (1983), *Carey v Nevada Gaming Authority, et al,* 279 F.3d 873, *United States v Christian*, 356 F.3d 1103, 1106 (Jan. 2004), ("Nothing in our case law prohibits officers from asking for, or even demanding a suspect's identification.") and then despite *Hiibel v. Sixth Judicial Dist. Court of Nevada*, __ U.S. __, 124 S.Ct. 2451 where the supreme Court opined that asking for documents of identification by police is verboten, suspect or not, and despite the glaring fact that no one is required to have the "papers" defendants demand at their "well-established security practices," in the first instance. So, their "well-established security practices" violate clearly established law and are punishing otherwise legitimate and lawful people JUST FOR NOT HAVING WHAT IS NOT REQUIRED. OH! It's not a scenario from a third world country.

4. This is, in a nutshell, a more correct description of this case than is put forward in the Order Granting Motion to Dismiss First Amended Complaint by Judge Hamilton, who is clearly, by this ridiculous Order as will be shown herein, demonstrating discrimination against us non-lawyer Plaintiffs for the purpose of either wearing us out or causing us to expend unnecessary additional work and expense in appealing such an absurd Order. The Order omits issues that are contrary to the apparent preconceived outcome desired.

Of Course this Court has Subject Matter Jurisdiction

5. This Court could not get to the merits of stating a claim, as it has, if it did not have subject matter jurisdiction. Bell v. Hood, 327 U.S. 678 (1946)

6. If a fight occurs outside the federal building on the street, the city cops would respond and trial would take place in a state court. If a fight occurs inside the building, it would be handled by federal officers and be tried in federal court. The violations complained of in this case originated and took place in the federal building, except for the destination of the kidnapping.

7. A Bivens Action is against federal officer in their individual capacities. See, Scherer v U.S. 241 F. Supp 2nd 1270 (D. Kan. 2003), attached hereto and made a part hereof by this reference; Bell v. Hood, 327 U.S. 678 (1946); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 396 (1971); id. at 400-406 (Harlan, J., concurring) cited in Smith v. Robinson, 468 U.S. 992 (1984).

Of Certain issues, The Silence is Deafening

8. A central issue of this case is the sanctions put upon us for not having (contrary to the Judges lie that we refuse to produce such) Government issued IDs that are demanded in an unlawful search by defendants. Why are our demands for declaratory judgment on the issue itself of any requirement for compulsory government ID having to be had by everyone, being ignored, equally by this judge and defendant's counsel? Is it that the People are not to know that government issued identification documents are not required in order to live and carry on daily activities in this free country? And, that to resolve that question would mean that the officers' search for such is unreasonable?

9. The government is silent on the effectiveness of their search. See the effectiveness test in *Brown v Texas*; 443 US 47, (1979). These factual gaps should preclude dismissal.

10. The other issue blatantly ignored by this court and defendants is the search contrary to the Fourth Amendment the officers are conducting. The court made no finding those cases like Hiibel.[4] etc. gave no notice the federal officers behavior violated the constitution. The court failed to rule in relation to the cases that prevent police from searching suspicionless people or demanding documents, especially documents no one is required to have. If police can't stop me on the street to demand documents, shouldn't this court make some kind of finding that inside a building is different? Do we volunteer for this search by walking in the building to conduct our business? We highly doubt it. The court is silent on this. The

[4] Hiibel is a condemnation of government in this case. First, Hiibel is distinguishable on its facts because the request for ID at issue in Hiibel was grounded in reasonable suspicion. Hiibel, 124 S.Ct. at 2457 ("there is no question that the initial stop was grounded in reasonable suspicion"). Hiibel is thus irrelevant to suspicionless administrative searches. Second, the ID demand in Hiibel was based on a statute that was authoritatively construed to require only the disclosure of one's name. Id. In this case, the government has cited no statutory or regulatory authority that establishes a legislative or quasi-legislative basis for demanding official identity credentials.

government and the court is certainly silent on any reason to conduct this search other than to allude to some security procedure that hasn't been presented to the court and in reality, keeps us from the courts[5].

This Court was on Notice of the Fraud Defendants were perpetrating on the court and has now, apparently, joined it, in defrauding Plaintiffs by advancing misrepresentations of law and going outside the record to non-existing evidence.

11. The court was on notice of the fraud to deceive Plaintiffs and the court by defendants when in their original opposition to dismiss the complaint defendants purposefully misrepresented *United States v Christian*, 356 F.3d 1103, 1106 (Jan. 2004). This was brought to the courts attention by way of a request for sanctions that the court ignored. There is no doubt in our minds that if we had acted in like manner, we would be sanctioned. This court is discriminatory.

12. Now the court has joined in the fraud by citing federal code and regulations, (40 USC § 1315(c)(1), 41 CFR Part 102-74(C), (D), 28 USC § 556(a), (e)(1)(A), attached hereto and made a part hereof by this reference) as authority that defendants may rely on to believe their conduct in doing what they are doing, namely AN UNLAWFUL SEARCH, is allowed. While very interesting, none of the cited codes and regulations has anything to do with this case or defendant's behavior. A simple reading of them will determine that it is a fraud to use them.

a. No regulations are posted "in a conspicuous place on the property as required by 40 USC § 1315(c)(1), nor would the officers cite any regulations to us as their authority so I doubt they even knew of the regulation. Defendants and the court are looking outside the record at conjecture.

b. There has been no allegation of criminal intimidation as required by 28 USC § 556(e)(1)(A).

c. The cite of 41 CFR Part (C) of 41 CFR § 102.74-375(c) is fraudulent in that it omits (a) in that it only applies to other than normal working hours and if portions are used after normal working hours, the building must not

[5] Place also found that to detain luggage for 90 minutes was an unreasonable deprivation of the individual's "liberty interest in proceeding with his itinerary," which also is protected by the Fourth Amendment. United States v. Place, 462 U.S. 696 (1983), at 708-710.

be closed to the public. Subpart D controls what activities public areas are to be used for, none of which was alleged by defendants.

d. In affect the building or portions thereof may not be closed during normal working hours unless the procedure in 102.74-375(b) has been complied with. Defendants have not produced any evidence that (b) has been complied with nor alleged such.

e. It is clear in 41 CFR § 102-74.375(c) that if portions of the building are closed, the requirement for some type of ID, not necessarily government ID, pertains to only those closed portions, not at the main entrance to the building, as evident by use of the preposition "or" in the regulation.

f. Nothing in the regulation pertains to janitor's closets or judge's chambers or interior work areas.

g. Laws and regulations do not trump the fourth amendment prohibition on searches for identification documents as set out in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, __ U.S. __, 124 S.Ct. 2451 (2004)

h. Defendants have not alleged any practical reason for their search for something no one is required to have, which renders the search arbitrary and unreasonable (not with reason), in violation of the Fourth Amendment.

i. The code sections and regulations cited do not afford a belief that the officer's behavior is sanctioned in the face of clearly established law prohibiting it.

j. "Security measures" are talked about and relied on by the court to justify the unjustifiable in case. The government has not put into evidence anything on such "security measures" nor has the government justified any such "security measures." The court seems to want some sort of "Security measures" to exist but if they do, they are outside this record and can't be considered in this case, at this point. Because of this factual gap, the ruling is not valid as it rules on something that does not exist, in this record anyway.

13. We have seen no statute or regulation that grants authority for the federal police officer defendants' behavior, his or her search for documents, as conducted by these federal police officer defendants and the government has presented no such thing. The order to dismiss should

be reversed on this factual gap alone. Plus, their actions are unconstitutional which leaves them open for attack by Plaintiffs. Scherer v U.S. 241 F. Supp 2nd 1270, 1279 (D. Kan. 2003). The government is silent on any compelling public interest justifying violating the fourth Amendment with warrantless searches for "papers" (documents) at public building entrances.

Scherer v U.S. 241 F. Supp 2nd 1270 (D. Kan. 2003) is about § 1503 of Title 28, not § 1509 of Title 28.

14. The second paragraph of § 1509 clearly states: "No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime." § 1503 has no such caveat. *Scherer* is unavailing here. Section 1509 makes no exception for federal police officers.

Under no circumstances is there reason to believe Plaintiffs bring this suit under the Federal Tort Claims Act.

15. Defendants appear to claim that the Federal Tort Claims Act (FTCA) is the remedy Plaintiffs must be demanding, then set up a complete defense for that proposition, ignoring the fact that at no time is it mentioned in the complaint any reference to the FTCA[6]. Plaintiffs are not proceeding under the FTCA. The complaint cannot be dismissed under this theory advanced by the defendants. This is an old ploy, a trick to convolute, confuse and corrupt the issue and by now should be sanctionable. The courts have squarely addressed this ploy. Bell v. Hood, 327 U.S. 678 (1946)

16. The complaint, read in its entirety, state claims brought under the constitution and laws of the United States, save two, assault and battery and kidnapping which Plaintiffs believe are actionable in this court because they took place in the federal jurisdiction and/or under the theory of pendent jurisdiction as they relate to the acts of defendants in violation of the constitution and laws of the United States, and plaintiffs believe this is

[6] "A complaint may not be dismissed on motion if it states some sort of claim, baseless though it may eventually prove to be, and inartistically as the complaint may be drawn. Therefore, under our rules, the plaintiff's allegations that he is suing in 'criminal libel' should not be literally construed. [3] The complaint is hard to understand but this, with nothing more, should not bring about a dismissal of the complaint, particularly is this true where a defendant is not represented by counsel, and in view of rule 8{f} of the rules of civil procedure, 28 U.S.C., which requires that all pleadings shall be construed as to do substantial justice BURT VS. CITY OF NEW YORK, (2Cir. 1946) 156 F.2d 791.

clear in their complaint. Any and all reference to FTCA must be disregarded and are no grounds to dismiss because of it.

17. We ask that if these things are not clear in the complaint and because we are not attorneys and are not being assisted by counsel (not surprising we can find no attorney willing to take on this tyranny by defendants), we have ample opportunity to amend the complaint to make it perfectly clear.

18. Our request for administrative hearing has not been replied to yet so those claims could be brought after the six months allowed for response, so those claims denied with prejudice is error. They are ripe now. These issues Plaintiffs complain of do not ask for money damages, only that the agencies quit ordering their employees to do unconstitutional acts.

The statement in the Order that our free access of the courts is not impeded because we can still appear by paper is practically the most ludicrous statement we have ever heard from a Judge

19. What about the due process right to be HEARD? Can oral argument be conducted by paper? Can monitoring the court for behavior such as the unpublished Order be conducted by paper? Can a trial be conducted by paper? Courts are established to prevent those ancient rituals of rights by battle. To justify preventing access to courts simply because you do not have what you are not required to have is so far from acceptable, it borders on the insane. "Liberty must at all hazards be supported. We have a right to it, derived from our Maker. But if we had not, our fathers have earned and bought it for us, at the expense of their ease, their estates, their pleasure, and their blood." --John Adams

20. Criminal defendants will welcome the decision they may appear by paper.

Involuntary servitude plus the right to associate

21. I like the way the court states "involuntary servitude has been defined as meaning a condition of servitude in which the victim is forced to work for the defendant by the use or threat...of coercion through law or the legal process. Fortunately, that's not the only definition. The definition we rely on is "Lack of personal Freedom, as to act as one chooses." *The American Heritage Dictionary of the English Language,* 1992, page 1650. Escort like a criminal to and from a certain destination is degrading. There may be

other reasons to have to go into the public building, not just one. Maybe we like the cafeteria's food and wish to "associate" with the cook. We have lost our "Liberty of movement" under an escort.

22. We can't associate with our fellow man to observe trials?

23. We have certainly made claims under these and the other constitutional provisions. We have alleged losses of Liberty several times. The allegation of false arrest is *ipso facto* claims of the loss of liberty.

24. This court has the power to grant relief to us.

The sovereign immunity claim is frivolous as to constitutional violations committed by agencies and officers of the government because, if allowed, the government could, by sovereign immunity, dissolve the very "chains that bind them."[7] They could also violate any criminal statutes at will. The implication of these results is a prospect never intended and leads to absurd results.

25. Congress could just make sure it never waived sovereign immunity in its officers and agencies violation of constitutional provisions and, viola, the constitution is gone, as no one would have relief coming. The claim of sovereign immunity is poppycock. The court construes the doctrine of sovereign immunity in a manner that leads to an absurd result.

Officers are responsible to guard against Constitutional invasion

26. Whenever an officer conducts a search, he alone, is responsible to see that it is lawfully conducted.

> "It is incumbent on the officer[s] executing a search warrant to ensure the search is lawfully authorized and lawfully conducted." *Groh*, 124 S.Ct. at 1293. The *Groh* Court emphasized that unless there are exigent circumstances, officers are required to carefully ensure that constitutional requirements are met when searching a person's residence, and are not entitled to qualified immunity when they do not. *Id.* at 1294 n.9. The same care, if not more, must be taken when the officers are searching without a warrant,

[7] I think it was Thomas Jefferson who stated something to the effect of: Let the Constitution be the chains that bind government.

under an exception to the warrant requirement. *Groh v. Ramirez*, ___ U.S. ___, 124 S.Ct. 1284, 1291 (2004)

Not only that, those officers have a duty to restrain their own from constitutional violations.

27. Not one officer has restrained another in their gross treatment of us. They have joked about it, participated in it, or sat back and watch it happen. Their friendship with their fellow tyrants seem to be more important than their Oaths to support the Constitution they voluntarily took, but what is expected in a Police State?

> Each of the other officers either participated in harassing and intimidating Motley and her child during the search, or failed to intervene to stop the harassment. *See United States v. Koon*, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994) ("[A]n officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights."); *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) (holding that "a prison official can violate a prisoner's Eighth Amendment rights by failing to intervene" when another official acts unconstitutionally); *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988) ("A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers.").

The claim of defendants that are entitled to qualified immunity because there is no clearly established law prohibiting federal officials from requesting identification at a security checkpoint in a federal courthouse is not with merit and must fail.

28. The defendant's lawyer and now the judge are attempting to color the activity. Defendants want "papers" (documents) such as license, passport, or other government issued documents of identification. What the marshals are doing is a search for "papers," (documents) nothing less. They are not merely "requesting" a name. If they do not get the specific "papers" they are searching for, there are heavy penalties inflicted.

29. Defendants assert that there is no law prohibiting a search at a security checkpoint in a federal courthouse, specifically, but recent cases refute this defense. The issue is if there is notice that their conduct violates clearly established law. The only thing not clearly established is the imagination of government to come up with many different "novel" places to conduct their unlawful searches. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (noting that the Supreme Court has expressly rejected a requirement that the facts of previous cases be fundamentally or even materially similar). No. 02-56648--9th Circuit, Filed September 21, 2004

30. In this case, the government has failed to show that it is legally authorized to demand official ID from would-be court visitors, that such demands further any purpose, or that such demands are reasonable for any other constitutionally permissible administrative purpose. The government has also failed to show that the demanded "papers" are required to be possessed by anyone and the government is silent on the power of such personnel to impede the progress of, or detain, court visitors for failing to show such "papers". Accordingly, we argue that the demands for identity credentials at issue in this case do not "fit within the closely guarded category of constitutionally permissible suspicionless searches," Chandler, 520 U.S. 305 at 309, and violate the Fourth Amendment. Any law or rule that would force The People outside government employment, who are strictly private, to possess such "papers" would, in itself, be unconstitutional under any circumstances. Such "show your papers" demand ("internal passports" and/or "internal document checkpoints") is anathema to a free society.

31. The facts are not in dispute. The judges and attorney generals pass and observe the unlawful search on their way to their jobs everyday and have first hand knowledge. The defendants do demand from us "papers" as is clearly prohibited by the Fourth Amendment and when we can not produce any, subject us to punishment, arrest, involuntary servitude, and the host of other sanctions and indignities complained about in this case (notwithstanding the possibility we may not bring this matter before the court like lawyers).

We do not know why the papers are demanded

32. The Marshals merely look in the identification papers direction. They don't compare names to a terror list or anything else for that matter. There appears no reason for the ID requirement, so by definition, it is a search

not with reason, an unreasonable search.

33. The government has not justified demands for identity credentials. The physical processes of magnetometer and x-ray screening, are clearly connected to the detection of weapons and explosives. Requiring visitors to present identity credentials is not. Nothing is "looked at" when you or your carried items pass the magnetometer or x-ray machine. The process merely rules out the presence of weapons etc. Of course, if the judges and officers weren't making ludicrous rulings, like judge Hamilton, they would not have to be afraid[8]. The demand for ID is clearly superfluous. Nowhere has the government explained how the ID requirement furthers a legitimate government concern.

34. The defendants seem to allude to a domestic security concern after 911, but that claim rings hollow. Domestic Security cannot justify violations of the Forth Amendment.

> "The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." United States v United States District Court for the Eastern Dist. of Mich., 407 U.S. 297, 314 (1972)

35. This demand is based on all the evidence and documents in this case, including but not limited to Plaintiff's Opposition to Defendant's Motion to Dismiss First Amended Complaint, some of which is reproduced herein as we believe Judge Hamilton did not read it, and are incorporated herein by this reference.

36. The search and seizure violates clearly established law defendants knew or should have known.

37. The Order Granting Motion to Dismiss First Amended Complaint should be reconsidered and reversed before the appeals court sees how stupid it is. It is said that the only thing standing in the way of insurrection is the circuit courts. That, and crap like the Order of Judge Hamilton,

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[8] This country existed a long time before any security measures. There are no statistics presented here to justify security. There are no statistics entered in evidence that enumerate any judges being killed or injured.

speaks to the sorry state of our judiciary today. We urge the reversal of the Order before another court sees it.

Robert-John:Foti, Joe Neufeld and Ken Augustine are the Complainants in the above-entitled action and competent men able to state the following: We have read the foregoing and know the contents thereof. The same is true of our own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, we believe them to be true, and we will testify as to its veracity.
The foregoing is true and correct and not misleading under penalty of bearing false witness.

Dated this sixteenth day of February in the year of our Lord two thousand and ~~four~~ five and of the Independence of America the two hundred and twenty-ninth.

Respectively Presented

Robert-John: Foti 05/02/16

for Joesph Neufeld by

05/02/16

property to the extent necessary to protect the property and persons on the property.

(2) Powers.—While engaged in the performance of official duties, an officer or agent designated under this subsection may—

(A) enforce Federal laws and regulations for the protection of persons and property;

(B) carry firearms;

(C) make arrests without a warrant for any offense against the United States committed in the presence of the officer or agent or for any felony cognizable under the laws of the United States if the officer or agent has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

(D) serve warrants and subpoenas issued under the authority of the United States;

(E) conduct investigations, on and off the property in question, of offenses that may have been committed against property owned or occupied by the Federal Government or persons on the property; and

(F) carry out such other activities for the promotion of homeland security as the Secretary may prescribe.

(c) Regulations.—

(1) In general.—The Secretary, in consultation with the Administrator of General Services, may prescribe regulations necessary for the protection and administration of property owned or occupied by the Federal Government and persons on the property. The regulations may include reasonable penalties, within the limits prescribed in paragraph (2), for violations of the regulations. The regulations shall be posted and remain posted in a conspicuous place on the property.

(2) Penalties.—A person violating a regulation prescribed under this subsection shall be fined under title 18, United States Code, imprisoned for not more than 30 days, or both.

(d) Details.—

(1) Requests of agencies.—On the request of the head of a Federal agency having charge or control of property owned or occupied by the Federal Government, the Secretary may detail officers and agents designated under this section for the protection of the property and persons on the property.

(2) Applicability of regulations.—The Secretary may—

(A) extend to property referred to in paragraph (1) the applicability of regulations prescribed under this section and enforce the regulations as provided in this section; or

(B) utilize the authority and regulations of the requesting agency if agreed to in writing by the agencies.

(3) Facilities and services of other agencies.—When the Secretary determines it to be economical and in the public interest, the Secretary may utilize the facilities and services of Federal, State, and local law enforcement agencies, with the consent of the agencies.

(e) Authority outside Federal property.—For the protection of property owned or occupied by the Federal Government and persons on the property, the Secretary may enter into agreements with Federal agencies and with State and local governments to obtain authority for officers and agents designated under this section to enforce Federal laws and State and local laws concurrently with other Federal law enforcement officers and with State and local law enforcement officers.

(f) Secretary and Attorney General approval.—The powers granted to officers and agents designated under this section shall be exercised in accordance with guidelines approved by the Secretary and the Attorney General.

(g) Limitation on statutory construction.—Nothing in this section shall be construed to—

(1) preclude or limit the authority of any Federal law enforcement agency; or

(2) restrict the authority of the Administrator of General Services to promulgate regulations affecting property under the Administrator's custody and control.

(Pub.L. 107–217, § 1, Aug. 21, 2002, 116 Stat. 1140; Pub.L. 107–296, Title XVII, § 1706(b)(1), Nov. 25, 2002, 116 Stat. 2316.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2002 Acts.

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1315(a)	40:318(a).	June 1, 1948, ch. 359, § 1, 62 Stat. 281; Pub.L. 100–678, § 8(a), (b), Nov. 17, 1988, 102 Stat. 4052.
1315(b)	40:318(b).	
1315(c)	40:318b (words before semicolon).	June 1, 1948, ch. 359, § 3, 62 Stat. 281; Pub.L. 100–678, § 8(a), (c)(2), Nov. 17, 1988, 102 Stat. 4052, 4053.
1315(d)	40:318b (words after semicolon).	
1315(e)	40:318d.	June 1, 1948, ch. 359, § 5, as added Pub.L. 87–275, Sept. 22, 1961, 75 Stat. 574.
1315(f)	40:318a.	June 1, 1948, ch. 359, § 2, 62 Stat. 281; Pub.L. 100–678, § 8(a), (c)(1), Nov. 17, 1988, 102 Stat. 4052, 4053.
1315(g)	40:318c.	June 1, 1948, ch. 359, § 4, 62 Stat. 281; Pub.L. 104–201, Div. A, Title X, § 1067, Sept. 23, 1996, 110 Stat. 2654.

In this section, the word "duly" is omitted as unnecessary.

In subsection (e), the words "who have been" are omitted as unnecessary.

In subsection (g)(1), the words "fined under title 18" are substituted for "fined not more than $50" for consistency with chapter 227 of title 18.

In subsection (g)(2)(B), the words "similar offense" are substituted for "like or similar offense" to eliminate unnecessary words. The words "of the United States" are added for consistency in the revised title and with other titles of the United States Code.

House Report No. 107-479, see 2002 U.S. Code Cong. and Adm. News, p. 827.

House Report No. 107-609(Part I) and Statement by President, see 2002 U.S. Code Cong. and Adm. News, p. 1352.

References in Text

The Homeland Security Act, referred to in subsecs. (a) and (b)(1), is Pub.L. 107–296, Nov. 25, 2002, 116 Stat. 2135, which principally enacted chapter 1 of Title 6, 6 U.S.C.A. § 101 et seq. For complete classification, see Short Title note set out under this section and Tables.

Amendments

2002 Amendments. Pub.L. 107–296, § 1706(b)(1), rewrote this section, which formerly read:

"§ 1315. Special police

"(a) Appointment.—The Administrator of General Services, or an official of the General Services Administration authorized by the Administrator, may appoint uniformed guards of the Administration as special police without additional compensation for duty in connection with the policing of all buildings and areas owned or occupied by the Federal Government and under the charge and control of the Administrator.

"(b) Powers.—Special police appointed under this section have the same powers as sheriffs and constables on property referred to in subsection (a) to enforce laws enacted for the protection of individuals and property, prevent breaches of the peace, suppress affrays or unlawful assemblies, and enforce regulations prescribed by the Administrator or an official of the Administration authorized by the Administrator for property under their jurisdiction. However, the jurisdiction and policing powers of special police do not extend to the service of civil process.

"(c) Detail.—On the application of the head of a department or agency of the Government having property of the Government under its administration and control, the Administrator or an official of the Administration authorized by the Administrator may detail special police for the protection of the property and, if the Administrator considers it desirable, may extend to the property the applicability of regulations and enforce them as provided in this section.

"(d) Use of other law enforcement agencies.—When it is considered economical and in the public interest, the Administrator or an official of the Administration authorized by the Administrator may utilize the facilities and services of existing federal law enforcement agencies, and, with the consent of a state or local agency, the facilities and services of state or local law enforcement agencies.

from environmental tobacco smoke, and may restrict smoking in these areas in light of this evaluation.

§ 102–74.335 Who is responsible for monitoring and controlling areas designated for smoking and for ensuring that these areas are identified by proper signs?

Agency heads are responsible for monitoring and controlling areas designated for smoking and for ensuring that these areas are identified by proper signs. Suitable uniform signs reading "Designated Smoking Area" must be furnished and installed by the occupant agency.

§ 102–74.340 Who is responsible for signs on or near building entrances?

[illegible]al agency building's managers must furnish and install suitable, uniform signs reading "No Smoking Except in Designated Areas" on or near entrance doors of buildings subject to this section. It is not necessary to display a sign in every room of each building.

§ 102–74.345 Does the smoking policy in this part apply to the judicial branch?

This smoking policy applies to the judicial branch when it occupies space in buildings controlled by the executive branch. Furthermore, the Federal Chief Judge in a local jurisdiction may be deemed to be comparable to an agency head and may establish exceptions for Federal jurors and others as [illegible]ted in § 102–74.320(e).

§ 10[illegible].350 Are agencies required to meet their obligations under the Federal Service Labor-Management Relations Act where there is an exclusive representative for the employees prior to implementing this smoking policy?

Yes, where there is an exclusive representative for the employees, Federal agencies must meet their obligations under the Federal Service Labor-Management Relations Act (5 U.S.C. 7101 *et seq.*) prior to implementing this section. In all other cases, agencies may consult directly with employees.

ACCIDENT AND FIRE PREVENTION

§ 102–74.355 With what accident and fire prevention standards must Federal facilities comply?

To the maximum extent feasible, Federal agencies must manage facilities in accordance with the accident and fire prevention requirements identified in § 102–80.80 of this chapter.

§ 102–74.360 What are the specific accident and fire prevention responsibilities of occupant agencies?

Each occupant agency must:

(a) Participate in at least one fire drill per year;

(b) Maintain a neat and orderly facility to minimize the risk of accidental injuries and fires;

(c) Keep all exits, accesses to exits and accesses to emergency equipment clear at all times;

(d) Not bring hazardous, explosive or combustible materials into buildings unless authorized by appropriate agency officials and by GSA and unless protective arrangements determined necessary by GSA have been provided;

(e) Ensure that all draperies, curtains or other hanging materials are of noncombustible or flame-resistant fabric;

(f) Ensure that freestanding partitions and space dividers are limited combustible, and their fabric coverings are flame resistant;

(g) Cooperate with GSA to develop and maintain fire prevention programs that ensure the maximum safety of the occupants;

(h) Train employees to use protective equipment and educate employees to take appropriate fire safety precautions in their work;

(i) Ensure that facilities are kept in the safest condition practicable, and conduct periodic inspections in accordance with Executive Order 12196 and 29 CFR part 1960;

(j) Immediately report accidents involving personal injury or property damage, which result from building system or maintenance deficiencies, to the Federal agency building's manager; and

(k) Appoint a safety, health and fire protection liaison to represent the occupant agency with GSA.

Subpart C—Conduct on Federal Property

APPLICABILITY

§ 102–74.365 To whom does this subpart apply?

The rules in this subpart apply to all property under the authority of the General Services Administration and to all persons entering in or on such property. Each occupant agency shall be responsible for the observance of these rules and regulations. Federal agencies must post the notice in the Appendix to this part at each public entrance to each Federal facility.

INSPECTION

§ 102–74.370 What items are subject to inspection by Federal agencies?

Federal agencies may, at their discretion, inspect packages, briefcases and other containers in the immediate possession of visitors, employees or other persons arriving on, working at, visiting, or departing from Federal property. Federal agencies may conduct a full search of a person and the vehicle the person is driving or occupying upon his or her arrest.

ADMISSION TO PROPERTY

§ 102–74.375 What is the policy on admitting persons to Government property?

Federal agencies must:

(a) Close property to the public during other than normal working hours. In those instances where a Federal agency has approved the after-normal-working-hours use of buildings or portions thereof for activities authorized by subpart D of this part, Federal agencies must not close the property (or affected portions thereof) to the public.

(b) Close property to the public during working hours only when situations require this action to ensure the orderly conduct of Government business. The designated official under the Occupant Emergency Program may make such decision only after consultation with the buildings manager and the highest ranking representative of the law enforcement organization responsible for protection of the property or the area. The designated official is defined in § 102–71.20 of this chapter a[illegible] the highest ranking official of the pr[illegible]mary occupant agency, or the alte[illegible]nate highest ranking offical or de[illegible]ignee selected by mutual agreement b[illegible] other occupant agency officials.

(c) Ensure, when property or a po[illegible]tion thereof is closed to the publi[illegible] that admission to the property, or th[illegible] affected portion, is restricted to a[illegible]thorized persons who must registe[illegible] upon entry to the property and mus[illegible] when requested, display Government [illegible] other identifying credentials to Fe[illegible]eral police officers or other authorize[illegible] individuals when entering, leaving [illegible] while on the property. Failure to con[illegible]ply with any of the applicable prov[illegible]sions is a violation of these regul[illegible]tions.

PRESERVATION OF PROPERTY

§ 102–74.380 What is the policy co[illegible]cerning the preservation of pro[illegible]erty?

All persons entering in or on Feder[illegible] property are prohibited from:

(a) Improperly disposing of rubbis[illegible] on property;

(b) Willfully destroying or damagi[illegible] property;

(c) Stealing property;

(d) Creating any hazard on proper[illegible] to persons or things; or

(e) Throwing articles of any kin[illegible] from or at a building or the climbi[illegible] upon statues, fountains or any part [illegible] the building.

CONFORMITY WITH SIGNS AND DIRECTIONS

§ 102–74.385 What is the policy co[illegible]cerning conformity with offici[illegible] signs and directions?

Persons in and on property must [illegible] all times comply with official signs [illegible] a prohibitory, regulatory or directo[illegible] nature and with the lawful direction [illegible] Federal police officers and other a[illegible]thorized individuals.

DISTURBANCES

§ 102–74.390 What is the policy co[illegible]cerning disturbances?

All persons entering in or on Feder[illegible] property are prohibited from loiterin[illegible]

cept for official purposes.

Weapons

§ 102–74.440 What is the policy concerning weapons on Federal property?

Federal law prohibits the possession of firearms or other dangerous weapons in Federal facilities and Federal court facilities by all persons not specifically authorized by Title 18, United States Code, Section 930. Violators will be subject to fine and/or imprisonment for periods up to five (5) years.

Nondiscrimination

§ 102–74.445 What is the policy concerning discrimination on Federal property?

Federal agencies must not discriminate by segregation or otherwise against any person or persons because of race, creed, sex, color, or national origin in furnishing or by refusing to furnish to such person or persons the use of any facility of a public nature, including all services, privileges, accommodations, and activities provided on the property.

Penalties

§ 102–74.450 What are the penalties for violating any rule or regulation in this subpart?

A person found guilty of violating any rule or regulation in this subpart while on any property under the charge and control of the U.S. General Services Administration shall be fined under title 18 of the United States Code, imprisoned for not more than 30 days, or both.

Impact on Other Laws or Regulations

§ 102–74.455 What impact do the rules and regulations in this subpart have on other laws or regulations?

No rule or regulation in this subpart may be construed to nullify any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated (section 205(c), 63 Stat. 390; 40 U.S.C. 486(c)).

§ 102–74.460 What is the scope of this subpart?

This subpart establishes rules and regulations for the occasional use of public areas of public buildings for cultural, educational and recreational activities as provided by the Public Buildings Cooperative Use Act of 1976 (Pub. L. 94–541).

Application for Permit

§ 102–74.465 Is a person or organization that wishes to use a public area required to apply for a permit from a Federal agency?

Yes, any person or organization wishing to use a public area must file an application for a permit from the Federal agency buildings manager.

§ 102–74.470 What information must persons or organizations submit so that Federal agencies may consider their application for a permit?

Applicants must submit the following information:

(a) Their full names, mailing addresses and telephone numbers;

(b) The organization sponsoring the proposed activity;

(c) The individual(s) responsible for supervising the activity;

(d) Documentation showing that the applicant has authority to represent the sponsoring organization; and

(e) A description of the proposed activity, including the dates and times during which it is to be conducted and the number of persons to be involved.

§ 102–74.475 If an applicant proposes to use a public area to solicit funds, is the applicant required to make a certification?

Yes, if an applicant proposes to use a public area to solicit funds, the applicant must certify, in writing, that:

(a) The applicant is a representative of and will be soliciting funds for the sole benefit of a religion or religious group; or

(b) The applicant's organization has received an official ruling of tax-exempt status from the Internal Revenue Service, or has filed an application for such a ruling which is still pending.

Permits

§ 102–74.480 How many days does a Federal agency have to issue a permit following receipt of a completed application?

Federal agencies must issue permits within 10 working days following the receipt of the completed applications, unless the permit is disapproved in accordance with § 102–74.500.

§ 102–74.485 Is there any limitation on the length of time of a permit?

Yes, a permit may not be issued for a period of time in excess of 30 calendar days, unless specifically approved by the regional officer (as defined in § 102–71.20 of this chapter). After the expiration of a permit, Federal agencies may issue a new permit upon submission of a new application. In such a case, applicants may incorporate by reference all required information filed with the prior application.

§ 102–74.490 What if more than one permit is requested for the same area and time?

Federal agencies will issue permits on a first-come, first-served, basis when more than one permit is requested for the same area and times.

§ 102–74.495 If a permit involves demonstrations or activities that may lead to civil disturbances, what action must a Federal agency take before approving such a permit application?

Before approving a permit application, Federal agencies must coordinate with their law enforcement organization if a permit involves demonstrations or activities that may lead to civil disturbances.

Disapproval of Applications or Cancellation of Permits

§ 102–74.500 Can Federal agencies disapprove permit applications or cancel issued permits?

Yes, Federal agencies may disapprove any permit application or cancel an issued permit if:

(a) The applicant has failed to furnish all information required under § 102–74.470 and § 102–74.475, or has falsified such information;

(b) The proposed use is a commercial activity as defined in § 102–71.20 of this chapter;

(c) The proposed use interferes with access to the public area, disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or damages any property;

(d) The proposed use is intended to influence or impede any pending judicial proceeding;

(e) The proposed use is obscene within the meaning of obscenity as defined in 18 U.S.C. 1461–65; or

(f) The proposed use violates the prohibition against political solicitation in 18 U.S.C. 607.

§ 102–74.505 What action must Federal agencies take after disapproving an application or canceling an issued permit?

Upon disapproving an application or canceling a permit, Federal agencies must promptly:

(a) Notify the applicant or permittee of the reasons for the action; and

(b) Inform the applicant or permittee of his/her appeal rights under § 102–74.510.

Appeals

§ 102–74.510 How may the disapproval of a permit application or cancellation of an issued permit be appealed?

A person or organization may appeal the disapproval of an application or cancellation of an issued permit by notifying the regional officer (as defined in § 102–71.20 of this chapter), in writing, of the intent to appeal within 10 calendar days of the notification of disapproval or cancellation.

§ 102–74.515 Will the affected person or organization and the Federal agency buildings manager have an opportunity to state their positions on the issues?

Yes, during the appeal process, the affected person or organization and the Federal agency buildings manager will

§ 564. Powers as sheriff

United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.

(Added Pub.L. 100–690, Title VII, § 7608(a)(1), Nov. 18, 1988, 102 Stat. 4513.)

EDITORIAL NOTES

Prior Provisions. A prior section 564, added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 619, which related to bonds of United States marshals, was repealed by Pub.L. 92–310, Title II, § 206(a)(1), June 6, 1972, 86 Stat. 203.

§ 565. Expenses of the Service

The Director is authorized to use funds appropriated for the Service to make payments for expenses incurred pursuant to personal services contracts and cooperative agreements, authorized by the Attorney General, for security guards and for the service of summons on complaints, subpoenas, and notices in lieu of services by United States marshals and deputy marshals.

(Added Pub.L. 100–690, Title VII, § 7608(a)(1), Nov. 18, 1988, 102 Stat. 4513.)

EDITORIAL NOTES

Prior Provisions. A prior section 565, added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 620, which related to filling vacancies, was repealed by Pub.L. 100–690, Title VII, § 7608(a)(1), Nov. 18, 1988, 102 Stat. 4512. See section 562 of this title.

§ 566. Powers and duties

(a) It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade.

(b) The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in that district, and of the Court of International Trade holding sessions in that district, and may, in the discretion of the respective courts, be required to attend any session of court.

(c) Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties.

(d) Each United States marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States committed in his or her presence, or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

(e)(1) The United States Marshals Service is authorized to—

(A) provide for the personal protection of Federal jurists, court officers, witnesses, and other threatened persons in the interests of justice where criminal intimidation impedes on the functioning of the judicial process or any other official proceeding; and

(B) investigate such fugitive matters, both within and outside the United States, as directed by the Attorney General.

(2) Nothing in paragraph (1)(B) shall be construed to interfere with or supersede the authority of other Federal agencies or bureaus.

(f) In accordance with procedures established by the Director, and except for public money deposited under section 2041 of this title, each United States marshal shall deposit public moneys that the marshal collects into the Treasury, subject to disbursement by the marshal. At the end of each accounting period, the earned part of public moneys accruing to the United States shall be deposited in the Treasury to the credit of the appropriate receipt accounts.

(g) Prior to resignation, retirement, or removal from office—

(1) a United States marshal shall deliver to the marshal's successor all prisoners in his custody and all unserved process; and

(2) a deputy marshal shall deliver to the marshal all process in the custody of the deputy marshal.

(h) The United States marshals shall pay such office expenses of United States Attorneys as may be directed by the Attorney General.

(Added Pub.L. 100–690, Title VII, § 7608(a)(1), Nov. 18, 1988, 102 Stat. 4514.)

EDITORIAL NOTES

Prior Provisions. A prior section 566, added Pub.L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 620, and amended Pub.L. 92–310, Title II, § 206(b), June 6, 1972, 86 Stat. 203, provided that upon death of a marshal his deputy or deputies perform his duties until a successor is appointed and qualifies, and was repealed by Pub.L. 100–690, Title VII, § 7608(a)(1), Nov. 18, 1988, 102 Stat. 4512.

EDITORIAL NOTES

References in Text. The Antitrust Civil Process Act, referred to in text, is classified generally to section 1311 et seq. of Title 15, U.S.C.A., Commerce and Trade.

§ 1506. Theft or alteration of record or process; false bail

Whoever feloniously steals, takes away, alters, falsifies, or otherwise avoids any record, writ, process, or other proceeding, in any court of the United States, whereby any judgment is reversed, made void, or does not take effect; or

Whoever acknowledges, or procures to be acknowledged in any such court, any recognizance, bail, or judgment, in the name of any other person not privy or consenting to the same—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

REVISION NOTES

Based on title 18, U.S.C., 1940 ed., § 233 (Mar. 4, 1909, ch. 321, § 127, 35 Stat. 1111).

The term of imprisonment was reduced from 7 to 5 years, to conform the punishment with like ones for similar offenses. (See section 1503 of this title.)

Minor changes were made in phraseology.

§ 1507. Picketing or parading

Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

(Added Sept. 23, 1950, c. 1024, Title I, § 31(a), 64 Stat. 1018.)

§ 1508. Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting

Whoever knowingly and willfully, by any means or device whatsoever—

(a) records, or attempts to record, the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating or voting; or

(b) listens to or observes, or attempts to listen to or observe, the proceedings of any grand or petit jury of which he is not a member in any court of the United States while such jury is deliberating or voting—

shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Nothing in paragraph (a) of this section shall be construed to prohibit the taking of notes by a grand or petit juror in any court of the United States in connection with and solely for the purpose of assisting him in the performance of his duties as such juror.

(Added Aug. 2, 1956, c. 879, § 1, 70 Stat. 935.)

§ 1509. Obstruction of court orders

Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime.

(Added Pub.L. 86-449, Title I, § 101, May 6, 1960, 74 Stat. 86.)

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b)(1) Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than 5 years, or both.

(2) Whoever, being an officer of a financial institution, directly or indirectly notifies—

(A) a customer of that financial institution whose records are sought by a grand jury subpoena; or

(B) any other person named in that subpoena;

about the existence or contents of that subpoena or information that has been furnished to the grand

Chemicals Industry, Ltd., and Chisso Corporation are hereby dismissed from this case.

Thomas E. SCHERER, Plaintiff,

v.

UNITED STATES of America, et al., Defendants.

Case No. 02-2075-JWL.

United States District Court, D. Kansas.

Jan. 9, 2003.

Unsuccessful law school applicant brought action against United States Department of Education and its employees for allegedly violating Freedom of Information Act (FOIA), obstructing justice, violating ethical rules of conduct, and failing to enforce civil rights legislation against state university. On Department's motion to dismiss, the District Court, Lungstrum, J., held that: (1) applicant failed to establish that he had constructively exhausted his administrative remedies; (2) applicant failed to properly serve officials in their personal capacities; (3) United States did not waive its sovereign immunity under ethical standards governing conduct of Department of Education and its employees; and (4) applicant did not have private right of action under Title VI or ADA.

Motion granted.

1. Federal Civil Procedure ⇐657.5(1)

When plaintiff is proceeding pro se, court construes his or her pleadings liberally and holds pleadings to less stringent standard than formal pleadings drafted by lawyers.

2. Records ⇐63

Requestor failed to establish that he had constructively exhausted his administrative remedies under Freedom of Information Act (FOIA) against United States Department of Education, and thus requestor could not seek judicial review, absent indication that requestor did not actually receive requested documents before filing suit. 5 U.S.C.A. § 552(a)(6)(C).

3. Action ⇐3

Freedom of Information Act (FOIA) does not provide private right of action for monetary damages. 5 U.S.C.A. § 552.

4. United States ⇐125(6)

Court is bound to construe narrowly any waiver of sovereign immunity, and must not extend scope of sovereign's consent beyond what Congress clearly expressed.

5. Records ⇐63

Freedom of Information Act (FOIA) does not create right of action against individual employees of agency. 5 U.S.C.A. § 552.

6. United States ⇐125(17, 18)

Besides barring actions for money damages, sovereign immunity applies with equal force to actions for injunctive or declaratory relief.

7. United States ⇐125(9)

United States did not waive its immunity under federal obstruction of justice statute, and thus sovereign immunity barred requestor's suit against Department of Education officials for obstructing justice due to their failure to produce Freedom of Information Act (FOIA) documents, absent allegation that officials acted ultra vires. 5 U.S.C.A. § 552; 18 U.S.C.A. § 1503.

8. United States ⇐125(17)

United States has not waived its immunity generally with respect to declaratory judgment actions.

9. United States ⇐125(24)

Doctrine of sovereign immunity does not apply to federal officials in their individual capacities.

10. Federal Civil Procedure ⇐2394

Without personal service in accordance with applicable law, district court is without jurisdiction to render personal judgment against defendant. Fed.Rules Civ.Proc.Rule 4(e), 28 U.S.C.A.

11. Federal Civil Procedure ⇐425
Process ⇐82

Service of process by means of certified mail at federal employees' work address was insufficient to establish jurisdiction over employees in their individual capacities, even if service would have been sufficient if employees were sued in their official capacities, where state law permitted service by certified mail only if it was addressed to individual's usual place of abode, and federal rule required personal service. Fed.Rules Civ.Proc. Rule 4(d)(1), (e), 28 U.S.C.A.; K.S.A. 60-304(a).

12. Action ⇐5

Federal obstruction of justice statute does not provide private right of action. 18 U.S.C.A. § 1503.

13. United States ⇐125(28.1)

United States did not waive its sovereign immunity under ethical standards governing conduct of Department of Education and its employees, including Ethics in Government Act, Office of Government Ethic's regulations, Department of Education regulations supplementing Ethics in Government Act, and criminal conflict-of-interest statute. 5 U.S.C.App. 4; 18 U.S.C.A. § 208; 5 C.F.R. §§ 2634 et seq., 6301.

14. United States ⇐41

Ethics in Government Act and regulations promulgated thereunder did not create private right of action. 5 U.S.C.App. 4 § 504; 5 C.F.R. §§ 2635.106(c), 6301.101.

15. United States ⇐127(1)

Federal criminal conflict of interest statute did not create independent private right of action. 18 U.S.C.A. § 208.

16. United States ⇐41

Executive order providing for certain standards of conduct for executive branch employees did not create private right of action.

17. United States ⇐127(1)

Unsuccessful law school applicant did not have private right of action under Title VI or ADA against Department of Education for allegedly failing to adequately investigate his discrimination complaint against state university and to enforce civil rights statutes. Civil Rights Act of 1964, § 601 et seq., as amended, 42 U.S.C.A. § 2000d et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

18. United States ⇐127(1)

Unsuccessful law school applicant did not have private right of action under Administrative Procedure Act (APA) against Department of Education for allegedly failing to adequately investigate his discrimination complaint against state university and to enforce civil rights statutes; rather, applicant's remedy was to bring action directly against university. 5 U.S.C.A. § 702.

Thomas E. Scherer, Topeka, KS, Pro se.

Emily B. Metzger, Office of United States Attorney, Wichita, KS, Katharine S. Bunn, Office of the General Counsel, Columbia, MO, for Defendants.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

Thomas E. Scherer, proceeding *pro se*, brings this action seeking monetary, injunctive and declaratory relief[1] against the Department of Education, Secretary Paige, and various employees of the agency[2] (collectively the "Department") for allegedly violating the Freedom of Information Act ("FOIA"), obstructing justice, violating ethical rules of conduct, and failing to enforce civil rights legislation against the University of Missouri.

The Department filed a motion to dismiss Mr. Scherer's claims pursuant to Federal Rules of Civil Procedure 12(b)(1), (b)(2) and (b)(6) (Doc. 38) and the matter is before the court on that motion. The Department contends that the court should dismiss Mr. Scherer's FOIA claims because (1) he failed to exhaust his administrative remedies; (2) he pursues an exclusive remedy, punitive damages, that is not available under the act; and (3) he named individual officers when FOIA permits suit against only the agency. As to Mr. Scherer's non-FOIA claims[3], the Department contends that the court should dismiss these claims because (1) the doctrine of sovereign immunity deprives the court of subject matter jurisdiction over the claims; (2) the court lacks personal jurisdiction over the employees in their individual capacities; and (3) Mr. Scherer has no private right of action under the statutes, regulations and executive orders that form the basis of his non-FOIA claims. The court grants the Department's motion and dismisses Mr. Scherer's complaint in its entirety. Specifically, Mr. Scherer's FOIA claims must be dismissed because he failed to actually exhaust his administrative remedies and he pursues a remedy that is not available under the Act. As to his non-FOIA claims, the relevant statutes do not provide him with an express or implied right of action.[4]

BACKGROUND

In January of 2001, Mr. Scherer applied and was denied admission to the University of Missouri–Kansas City School of Law. On January 19, 2001, Mr. Scherer filed an administrative complaint with the Department of Education, alleging that he was wrongfully denied admission.[5] Mr. Scherer also filed a complaint against the Curators of the University of Missouri in the Western District of Missouri.[6]

I. The Freedom of Information Act Request

On November 16, 2001, Mr. Scherer requested, under FOIA, certain documents that he intended to use in his suit before the Western District of Missouri. Two days later, the Department's FOIA officer, defendant Maria Teresa Cueva, contacted Mr. Scherer to request additional information regarding his document requests. On December 5, 2001, Mr. Scherer contacted Ms. Cueva concerning the status of his request. On January 7, 2002, the Department produced a copy of the grant application Mr. Scherer requested under FOIA, but failed to produce the "assurances" he sought in the same request. Thus, Mr. Scherer, that very day, made his second FOIA request for "assurances." On February 21, 2002, Ms. Cueva offered to produce, via fax, the "assurances" that Mr. Scherer had requested.[7] One day later, Mr. Scherer filed the present action. To remedy this violation, Mr. Scherer seeks an award of punitive damages.

II. Non-FOIA Claims

In addition to the FOIA claim, Mr. Scherer contends that the Department obstructed justice by failing to produce the FOIA documents. Mr. Scherer alleges that he needed these documents as evidentiary exhibits in his federal action in the Western District of Missouri and that the Department intentionally refused to produce the documents to obstruct him in that proceeding. To remedy this violation, Mr. Scherer seeks a judgment declaring that the Department of Education obstructed justice by failing to produce the requested documents in a timely fashion.[8]

Apart from the claims related to the document requests, Mr. Scherer contends that the Department of Education, Office for Civil Rights ("OCR") for Region VII, cannot perform its functions because defendant Angela Bennett serves as both the director of OCR and as a member of the Board of Curators for the University of Missouri. Because the University of Missouri receives federal funds, conditioned upon compliance with federal civil rights statutes, Mr. Scherer alleges that Ms.

1. Specifically, in his prayer for relief, Mr. Scherer requests an award of punitive damages for the alleged FOIA violation, an order requiring the Department to conduct an investigation of the alleged ethical violations, a judgment declaring that the Department obstructed justice by failing to produce the FOIA documents, an order requiring the Department of Justice, Region VII Civil Rights Division to enforce all civil rights statutes against the University of Missouri, an order revoking all federal funding to the Curators of the University of Missouri, and a taxation of costs.

2. Mr. Scherer has named the Department of Education, Secretary Paige in his official capacity, and several officers of the agency in their individual capacities. For clarity and simplicity, the court refers to the defendants collectively as the "Department," but differentiates among the specific defendants when necessary to clarify issues of personal jurisdiction and sovereign immunity.

3. The non-FOIA claims refer to Mr. Scherer's attempt to state a claim for obstruction of justice, violations of various ethics provisions, and the Department's failure to enforce civil rights legislation.

4. As explained within this order, Mr. Scherer's claims are also subject to dismissal against certain defendants under Federal Rules of Civil Procedure 12(b)(1), (2), and (6).

5. After failing to provide a consent form, the Department threatened to close Mr. Scherer's complaint. Mr. Scherer thereafter submitted his consent form and the Department assigned a new case number to his administrative complaint on July 25, 2001.

6. Plaintiff alleges that he originally filed his suit against the Curators of the University of Missouri in the District of Kansas, but the court transferred the case to the Western District of Missouri.

7. Mr. Scherer fails to clarify whether Ms. Cueva actually produced the assurances or whether she simply expressed an interest in producing them by fax. For example, Mr. Scherer alleges that Ms. Cueva failed to timely produce those documents under the FOIA or produce those documents at all. On the other hand, Mr. Scherer states that "[r]egardless of production, the FOIA violation does not disappear." (Emphasis added).

8. Mr. Scherer alleges that he filed a motion to compel the Curators of the University of Missouri to produce the grants and assurances in his action before the Western District of Missouri, but the court denied Mr. Scherer's motion on January 8, 2002. This allegation severely undermines his argument that any party obstructed justice by failing to produce the documents. Even so, because the motion to compel sought production from the Curators, while his FOIA request sought production from the Department, the court will analyze the obstruction of justice claim as applied to the Department.

Bennett's dual status as a board member and civil rights director creates a conflict of interest.[9]

To remedy this alleged violation of federal ethical guidelines, Mr. Scherer requests an injunction requiring the Department of Education to conduct an internal investigation into Ms. Bennett's dual employment status.

Finally, Mr. Scherer contends that the Department has failed to investigate adequately his administrative complaint, has failed to initiate an investigation of Ms. Bennett despite his request for such action, and has generally failed to enforce the civil rights laws against the University of Missouri. Mr. Scherer does not identify explicitly any statutory or legal authority that converts these allegations into a cognizable right of action. The court, however, could construe Mr. Scherer's allegations as an attempt to state a statutory or implied right of action under Title VI, Section 504 of the Rehabilitation Act, or the Americans with Disabilities Act.[10] To remedy this alleged violation, Mr. Scherer requests an injunction requiring the Department investigate increased federal funding to the University of Missouri and enforce the Civil Rights Act, the Rehabilitation Act, the Americans with Disabilities Act, and all Presidential Executive Orders against that institution. Additionally, Mr. Scherer requests that the court revoke all federal funding to the Curators of the University of Missouri "until such time as they can establish affirmative evidence that they comply with their voluntary assurances as a condition of receipt of federal funds."

ANALYSIS

I. Standard

[1] When, as here, a plaintiff is proceeding *pro se*, the court construes his or her pleadings liberally and holds the pleadings to a less stringent standard than formal pleadings drafted by lawyers. *McBride v. Deer*, 240 F.3d 1287, 1290 (10th Cir.2001); accord *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir.1998) (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). In other words, "[n]ot every fact must be described in specific detail, ... and the plaintiff whose factual allegations are close to stating a claim but are missing some important element that may not have occurred to him should be allowed to amend his complaint." *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir.1996) (quoting *Hall*, 935 F.2d at 1110). The liberal construction of the plaintiff's complaint, however, "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based," and "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Id.* (quoting *Hall*, 935 F.2d at 1110).

9. Mr. Scherer contends that Ms. Bennett has violated an executive order regarding ethics issued by President John F. Kennedy, but fails to specify the precise order. In his response to the motion to dismiss, Mr. Scherer analyzes the alleged violation under Executive Order 12674. As such, the court considers whether Mr. Scherer states a claim under this order as well as other ethical statutes and regulations applicable to the Department's employees.

10. The OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act; and Title II of the Americans with Disabilities Act, as they apply to institutions of higher education and similarly situated state institutions that receive federal funds. As such, the Department has noted and Mr. Scherer has not disputed that his allegations pertaining to the Department's failure to enforce civil rights statutes are necessarily limited to these civil rights statutes.

The court will dismiss a cause of action for failure to state a claim only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his [or her] claims which would entitle him [or her] to relief," *Poole v. County of Otero*, 271 F.3d 955, 957 (10th Cir.2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir.2001). The issue in resolving a motion such as this is "not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997, 152 L.Ed.2d 1 (2002) (quotation omitted).

II. Analysis

Because the department's jurisdictional and substantive challenges do not uniformly apply to all of the defendants or to all of Mr. Scherer's claims, the court will simply evaluate all four potential claims separately to resolve the applicable jurisdictional and substantive issues.

A. The Freedom of Information Act Claim

As noted above, Mr. Scherer asserts that the Department violated FOIA in failing to produce the assurances. The Department contends that these claims must be dismissed because Mr. Scherer failed to exhaust his administrative remedies as required under the Act. Additionally, the Department contends that the court must dismiss Mr. Scherer's request for punitive damages because the Act does not permit him to recover monetary damages. Finally, the Department argues that the FOIA claims must be dismissed as to the individual defendants because the Act permits suit only against the non-compliant department or agency.

1. Exhaustion of Administrative Remedies

The Department asserts that the court lacks subject matter jurisdiction over Mr. Scherer's FOIA claims because he did not allege that he exhausted his administrative remedies as required under the Act. "The purpose of the exhaustion rule is to permit agencies to exercise discretion and apply their expertise, to allow the complete development of the record before judicial review, to prevent parties from circumventing the procedures established by Congress, and to avoid unnecessary judicial decisions by giving the agency an opportunity to correct errors." *Urban by Urban v. Jefferson County Sch. Dist. R–1*, 89 F.3d 720, 724 (10th Cir.1996).

Under FOIA, the Department is required to determine whether it will comply with a document request within 20 days,[11] notify the requesting party of his or her right to an administrative appeal, resolve any administrative appeal within 20 days, and notify the party of his or her right to judicial review if the appeal is denied. 5 U.S.C. § 552(a)(6)(A)(i) and (ii).[12] This

11. Department of Education regulations actually require the agency to determine whether records will be released or withheld "within 10 working days from date of receipt in the office having custody of the records." 5 C.F.R. § 5.5(d).

12. Specifically, this section provides:
Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—(I) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of

provision "clearly requires a party to exhaust all administrative remedies before seeking redress in the federal courts." *Taylor v. Appleton*, 30 F.3d 1365, 1367–68 (11th Cir.1994) (citing *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1238 (5th Cir.1979); *Hedley v. United States*, 594 F.2d 1043, 1044 (5th Cir.1979) (per curiam); *Spannaus v. United States Dep't of Justice*, 824 F.2d 52, 58 (D.C.Cir.1987); *In re Steele*, 799 F.2d 461, 465 (9th Cir.1986); *Brumley v. United States Dep't of Labor*, 767 F.2d 444, 445 (8th Cir.1985) (per curiam); *Stebbins v. Nationwide Mut. Ins. Co.*, 757 F.2d 364, 366 (D.C.Cir.1985); *Cazalas v. United States Dep't of Justice*, 660 F.2d 612 (5th Cir.1981)). Thus, Mr. Scherer is generally required to pursue the Department's administrative remedies set forth at 34 C.F.R. §§ 5.80 and 5.82 (permitting appeal to the Secretary of the Department of Education) to satisfy the actual exhaustion requirements of the Act. His failure to do so typically deprives the court of subject matter jurisdiction over the FOIA claim. *Barvick v. Cisneros*, 941 F.Supp. 1015, 1018 (D.Kan.1996) (citing *Trenerry v. I.R.S.*, 78 F.3d 598, 1996 WL 88459, at *1 (10th Cir.1996); *Lanter v. Dep't of Justice*, 19 F.3d 33, 1994 WL 75876, at *1 (10th Cir.1994); *Voinche v. F.B.I.*, 999 F.2d 962, 963 (5th Cir.1993)).

In addition to actual exhaustion, FOIA deems a request to be "constructively exhausted" if the agency fails to respond within the time period contemplated in § 552(a)(6)(A)(i) and (ii). 5 U.S.C. § 552(a)(6)(C)(i) (providing that a requesting party "shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph"); *see also Taylor*, 30 F.3d at 1368 (noting that when the agency has not responded within these statutory time limits, the requester may bring suit). The constructive exhaustion provision, however, is not without limit and the agency can cure its failure to respond within the statutory period by producing the requested documents before the requestor files suit in district court. The D.C. Circuit has explained:

> 5 U.S.C. § 552(a)(6)(C) permits a requester to file a lawsuit when [twenty] days have passed without a reply from the agency indicating that it is responding to his request, but that this option lasts only up to the point that an agency actually responds. Once the agency has responded to the request, the petitioner may no longer exercise his option to go to court immediately. Rather, the requester can seek judicial review only after he has unsuccessfully appealed to the head of the agency as to any denial and thereby exhausted his administrative remedies. Thus, if the agency responds to a FOIA request before the requester files suit, the ten-day constructive exhaustion provision in 5 U.S.C. § 552(a)(6)(C) no longer applies; actual exhaustion of administrative remedies is required.

Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61 (D.C.Cir.1990) (citations omitted).

any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection. 5 U.S.C. § 552(a)(6)(A)(i) and (ii).

[2] Mr. Scherer has not alleged that he appealed his FOIA request to the Secretary as contemplated by the Department's regulations.[13] As such, the Department correctly notes that he has not actually exhausted his administrative remedies. The question not addressed by the parties, however, is whether Mr. Scherer constructively exhausted his administrative remedies under FOIA. Mr. Scherer's allegations fail to clearly satisfy the constructive exhaustion requirement under FOIA. Mr. Scherer states that he requested these documents on November 18, 2001. On January 7, 2002, the Department produced the grant he requested, but failed to include the "assurances" he sought in the same request. As such, Mr. Scherer renewed his FOIA request for assurances on January 7, 2002. The complaint, however, fails to clarify whether Mr. Scherer actually received the assurances before filing suit. For example, Mr. Scherer alleges that "Ms. Cueva failed to timely produce those documents under the FOIA or produce those documents at all." On the other hand Mr. Scherer, alleges that on February 21, 2001, the department "wanted to . . . fax the assurances that were not provided", but "*[r]egardless of production*, the FOIA violation does not disappear." (Emphasis added). In short, the court can not determine from Mr. Scherer's complaint whether or not the Department produced the requested assurances prior to the date he filed this action and, therefore, the court cannot apply the constructive exhaustion doctrine to Mr. Scherer's FOIA claim.[14] As such, the Department's motion to dismiss this claim under Rule 12(b)(1) is granted.

2. Punitive Damages under FOIA

[3] The Department contends that even if the court had jurisdiction over the FOIA claims, Mr. Scherer fails to state a claim because Congress did not include monetary damages as part of FOIA's remedial scheme. The Department correctly notes that FOIA does not provide a private right of action for monetary damages. *Daniels v. St. Louis VA Regional Office*, 561 F.Supp. 250, 251 (E.D.Mo.1983); *Dremond v. FBI*, 532 F.Supp. 232, 233 (S.D.N.Y.1981), aff'd, 707 F.2d 75 (2d Cir.

13. In his response to the motion to dismiss, Mr. Scherer contends that he exhausted his administrative remedies based upon his numerous efforts to obtain the documents from Ms. Cueva, Adriene Payne and Tony Swetnam. Mr. Scherer also alleges in his complaint that he took the following actions to exhaust his administrative remedies: filing a "pending congressional complaint with Senator Pat Roberts", contacting "Governor Bob Holden requesting he review his appointment of a federal regulator to the Board of Curators", and requesting "staff of Senator Kit Bond to investigate" his complaint. Mr. Scherer believes that "for all practical purposes, he has exhausted administrative remedy [sic] in this case." While no one disputes Mr. Scherer's diligence in attempting to obtain the documents from governmental officials, his methods do not comport with the remedial process contemplated under FOIA and Department regulations.

14. Where "factual allegations are close to stating a claim but are missing some important element that may not have occurred to him", the court will often permit the plaintiff leave to amend his complaint. *Hondrages*, 83 F.3d at 1202. However, because Mr. Scherer has also failed to state a claim under FOIA, as discussed fully in the next section, granting him leave to amend would be futile. In addition, Mr. Scherer alleges that he requested defendant Adriene Payne and defendant Tony Swetnam produce a copy of his administrative complaint and all documents related to the Department's investigation of that complaint. Mr. Scherer and the Department have not characterized this inquiry as a formal request under FOIA. While the court might have requested additional briefing on this issue under different circumstances, such a request would be futile here, where Mr. Scherer has failed to state a claim for relief.

1983), cert. denied, 465 U.S. 1004, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984); *Gasparutti v. United States*, 22 F.Supp.2d 1114 (C.D.Cal.1998); *Soghomonian v. United States*, 82 F.Supp.2d 1134, 1147 n. 9 (E.D.Cal.1999); *Thompson v. Walbran*, 990 F.2d 403, 405 (8th Cir.1993). Instead, the remedy under FOIA is limited to "enjoin[ing] the agency from withholding agency records and to order[ing] the production of any agency records improperly withheld from the complainant." *Coolman v. I.R.S.*, 1999 WL 676819, at *7 (W.D.Mo. 1999) (quoting 5 U.S.C. § 552(a)(4)(B)).

[4] Because Mr. Scherer is not entitled to punitive damages, the court grants the Department's motion to dismiss his FOIA claim under Rule 12(b)(6).[15] *Thompson v. Walbran*, 990 F.2d 403, 405 (8th Cir.1993) (granting motion to dismiss, without deciding whether plaintiff was actually entitled to documents, where plaintiff requested money damages and costs, but failed to request production of the documents).

3. FOIA Claim Against Department Officials

[5] Finally, the Department argues that Mr. Scherer's FOIA claim against agency officials must be dismissed. Indeed, FOIA authorizes suit against federal agencies, but does not create a right of action against individual employees of the agency. *Thompson*, 990 F.2d at 405; *Sherwood Van Lines v. United States Dep't of Navy*, 782 F.Supp. 240, 241 (D.D.C.1990); *Weiss v. Sawyer*, 28 F.Supp.2d 1221, 1228 (W.D.Okla.1997). In light of this authority, had Mr. Scherer exhausted his administrative remedies and pursued an available remedy, his FOIA claims against Secretary Paige, Maria Cueva, Tony Swetnam, and Adrian Payne would be dismissed under Rule 12(b)(6).

In summary, the court grants the Department's motion to dismiss Mr. Scherer's claim under Rule 12(b)(1) for failure to exhaust his administrative remedies. The court grants the Department's motion to dismiss the FOIA claims as to all defendants under Rule 12(b)(6) because Mr. Scherer pursues a remedy that is not available under the Act. The court further grants the Department's motion to dismiss the claims as to the relevant individual defendants because FOIA does not provide a right of action against the Department's employees.

B. Obstruction of Justice

In addition to the FOIA claim, Mr. Scherer contends that the Department's failure to produce the documents constitutes an obstruction of justice. The Department contends and Mr. Scherer has not refuted that he is attempting to state a claim under the federal obstruction of justice statute, 18 U.S.C. § 1503. The

15. The Department contends that sovereign immunity bars Mr. Scherer's non-FOIA claims, but does not suggest that the doctrine applies to the FOIA claims. While the court agrees that the United States has waived its sovereign immunity under FOIA as to injunctive relief, attorney fees and costs, Congress did not include monetary damages as part of FOIA's remedial scheme. The court is bound to construe narrowly any waiver of sovereign immunity and must not extend the scope of the sovereign's consent beyond what Congress clearly expressed within FOIA. *Bradley v. United States ex rel. Veterans Admin.*, 951 F.2d 268, 270 (10th Cir.1991) (quoting *United States v. Kubrick*, 444 U.S. 111, 118, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979)) (explaining that court should not extend waiver beyond that which Congress intended)). As such, the United States has not consented to suit for punitive damages under FOIA and the court lacks jurisdiction over Mr. Scherer's request for such relief against the Department of Education, Secretary Paige, and the employees in their official capacities. Accordingly, Mr. Scherer's FOIA claims against these defendants could also be dismissed under Rule 12(b)(1).

Department argues that the doctrine of sovereign immunity bars this claim against the Department of Education, Secretary Paige and the department employees in their official capacity.[16] The Department further contends that to the extent Mr. Scherer pursues this claim against the Department employees in their individual capacities, the court lacks personal jurisdiction over those individual defendants. Finally, the Department alleges that the federal obstruction of justice statute fails to provide Mr. Scherer with a private right of action.

1. Sovereign Immunity

[6] Before turning to the merits of plaintiff's obstruction of justice claim, the court must first address the issue of immunity. *Frazier v. Simmons*, 254 F.3d 1247, 1252 (10th Cir.2001) (discussing immunity under the Eleventh Amendment, as opposed to federal sovereign immunity, but the rationale for prioritizing immunity issues remains the same under either doctrine). "[T]he defense of sovereign immunity is jurisdictional in nature." *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir.2002) (citing *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)), and "generally shields the United States, its agencies, and officers acting in their official capacity from suit." *Id.* (citing *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994)). Besides barring actions for money damages, sovereign immunity applies with equal force to actions for injunctive or declaratory relief. *United States v. Murdock Mach. and Eng'g Co. of Utah*, 81 F.3d 922, 929 (10th Cir.1996); *see also Cabeza De Vaca Land & Cattle Co., L.L.C. v. Babbitt*, 58 F.Supp.2d 1226, 1230 (D.Colo.1999). Thus, Mr. Scherer "generally cannot pursue a suit against the Federal Government absent a congressional waiver of immunity." *Id.* (citing *Block v. North Dakota*, 461 U.S. 273, 280, 103 S.Ct. 1811, 75 L.Ed.2d 840(1983)). The courts, however, recognize a narrow exception to the doctrine of sovereign immunity. "A court may regard a government officer's conduct as so 'illegal' as to permit a suit for specific relief against the officer as an individual if (1) the conduct is not within the officer's statutory powers or (2) those powers, or their exercise in the particular case, are unconstitutional." *Wyoming*, 279 F.3d at 1225 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949)).

The Department argues that the court lacks jurisdiction over Mr. Scherer's claim because it constitutes a suit against the sovereign. A judgment operates against the sovereign " 'if [it] would expend itself on the public treasury or domain, or interfere with the public administration,' or 'if the effect of the judgment would be to restrain the government from acting, or to compel it to act.' " *Puerto Rico Public Housing Admin. v. U.S. Dep't of Housing & Urban Dev.*, 59 F.Supp.2d 310, 321 (D.Puerto Rico 1999)(citing *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963)). In this action, Mr. Scherer has alleged that the Department of Education, Secretary Paige and various Department officials [17] obstructed justice.

16. Mr. Scherer named six officers of the Department of Education and other unnamed parties, all in their individual capacities. Given Mr. Scherer's pro se status and because the court ultimately finds that it lacks personal jurisdiction over the individual defendants in their individual capacity, the court feels compelled to construe Mr. Scherer's complaint liberally by assuming that he intended to name these individuals in both their individual and official capacities.

17. As explained in greater detail below, the doctrine of sovereign immunity does not apply to defendants named in their individual

To remedy this alleged violation, Mr. Scherer seeks a judgment declaring that the Department obstructed justice by failing to produce the FOIA documents. As such, Mr. Scherer seeks a judgment against the United States and the doctrine of sovereign immunity bars this claim, unless it is subject to waiver or one of the limited exceptions to the doctrine.

[7, 8] The United States has not waived its immunity under the federal obstruction of justice statute. While sovereign immunity does not apply when the sovereign consents to suit, such waivers are to be read narrowly, *James v. United States*, 970 F.2d 750, 753 (10th Cir.1992) (citations omitted), and the party bringing suit bears the burden of proving that sovereign immunity has been waived. *Id.* (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 188, 56 S.Ct. 780, 80 L.Ed. 1135 (1936)). Mr. Scherer has failed to allege any waiver of sovereign immunity and the court's review of 18 U.S.C. § 1503 reveals that it contains none. Moreover, the United States has not waived its immunity generally with respect to declaratory judgment actions. *Wyoming*, 279 F.3d at 1225 (noting that general jurisdictional statutes such as 28 U.S.C. § 1331 or the declaratory judgment statute, 28 U.S.C. § 2201 do not waive the government's sovereign immunity).

Additionally, Mr. Scherer's allegations do not place his claims outside the doctrine of sovereign immunity. As stated above, even when the United States has not consented to suit, there are limited exceptions to the doctrine of sovereign immunity. "[T]he Supreme Court in Larson recognized an exception to the sovereign immunity doctrine in a suit for specific relief against the United States where a government official acted ultra vires or beyond those powers Congress extended." *Wyoming*, 279 F.3d at 1229 (citing *Larson*, 337 U.S. at 689, 69 S.Ct. 1457). The Larson Court, however, emphasized "that application of the ultra vires exception to the sovereign immunity doctrine rested upon 'the officer's lack of delegated power,' or . . . lack of statutory authority." *Id.* (quoting *Larson*, 337 U.S. at 690, 69 S.Ct. 1457). Based upon the Supreme Court's guidance, the Tenth Circuit has recognized that a plaintiff may not pierce the shield of sovereign immunity by merely alleging that officers acted wrongfully or erroneously:

> Therefore, an official's erroneous exercise of delegated power is insufficient to invoke the exception. Official action is not ultra vires or invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so. Moreover, the mere allegation that an officer acted wrongfully does not establish that the officer, in committing the alleged wrong, was not exercising the powers delegated to him by the sovereign. If the officer is exercising such powers, the suit is in fact against the sovereign and may not proceed unless the sovereign has consented. Thus, the question of whether a government official acted ultra vires is quite different from the question of whether that same official acted erroneously or incorrectly as a matter of law.

Id. at 1229–30. While Mr. Scherer's complaint is replete with allegations of wrongful conduct, he does not suggest that any of the defendants acted ultra vires. In fact, Mr. Scherer's claim is based upon the manner in which the officials responded to the FOIA request. Congress has delegated to the Department and its officials the authority to respond to FOIA requests and these defendants were exercising this authority when they constructed their response to Mr. Scherer's request. As such, the limited exception to the doctrine of sovereign immunity does not apply to Mr. Scherer's obstruction of justice claim. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548–49 (10th Cir. 2001) (noting that actions taken by agency were within its delegated authority and therefore not ultra vires, despite the plaintiff's assertion that the agency wrongfully reached its administrative decision).

Because the United States has not waived its immunity under the federal obstruction of justice claim and Mr. Scherer has failed to allege that the Department acted ultra vires, the doctrine of sovereign immunity bars his obstruction of justice claim against the Department of Education, Secretary Paige, and the agency employees in their official capacity.[18] As such, the court grants the Department's motion to dismiss this claim under Rule 12(b)(1).

2. Personal Jurisdiction over Defendants in their Individual Capacity

[9, 10] Mr. Scherer named the employees of the Department of Education in their individual capacities. The doctrine of sovereign immunity does not apply to federal officials in this capacity. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Larson*, 337 U.S. at 689, 69 S.Ct. 1457; *Nurse v. United States*, 226 F.3d 996, 1004 (9th Cir.2000). However, "when a plaintiff proceeds against an agent of the government in his or her individual capacity, the plaintiff must effect personal service on that agent in compliance with Rule 4(d)(1)." *Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436, 1438 (10th Cir.1994) (citing *Micklus v. Carlson*, 632 F.2d 227, 240 (3d Cir.1980); *Love v. Hayden*, 757 F.Supp. 1209, 1211 (D.Kan.1991); 4A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1107 at 163 (1987)).[19] Without personal service in accordance with Rule 4(e), the district court is without jurisdiction to render a personal judgment against a defendant. *Royal Lace Paper Works v. Pest–Guard Prod., Inc.*, 240 F.2d 814, 816 (5th Cir.1957).

[11] Rule 4(e) permits Mr. Scherer to serve the individual defendants either pur-

capacity, but the court is construing Mr. Scherer's complaint liberally by assuming he intended to sue the individuals in their official and individual capacity.

18. In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the court held that a party has a right of action for damages for constitutional violations caused by a federal official acting under color of his authority. As such, sovereign immunity would not apply to these individual defendants to the extent Mr. Scherer alleges a constitutional violation under the *Bivens* doctrine. Mr. Scherer has not pursued this theory nor made allegations that fall within the scope of the doctrine. Moreover, as the Department noted, if Mr. Scherer wanted to pursue a *Bivens* claim, he must do more than make conclusory allegations of a constitutional violation. The closest Mr. Scherer comes to stating such a violation in his complaint is when he alleges that "[t]he Department of Education and its various staff members and officers have failed to enforce the civil rights laws at the University of Missouri. In the process they have violated Mr. Scherer's and others civil rights." Such conclusory allegations are insufficient to state a constitutional claim under *Bivens*. *Blinder, Robinson & Co., v. SEC*, 748 F.2d 1415, 1419 (10th Cir.1984) cert. denied 471 U.S. 1125, 105 S.Ct. 2655, 86 L.Ed.2d 272 (1985). While Mr. Scherer contends that the Department violated his due process rights by failing to produce the requested documents, those allegations were made in his response to the motion to dismiss and are not present in his complaint.

19. Prior to 1993, the rule for service upon an individual was contained at Rule 4(d)(1). In 1993, the rule was amended and service upon an individual is now governed by Rule 4(e)(1) and (2). While paragraph (2) retained the text of the former subdivision (d)(1), paragraph (e)(1) authorized service in any judicial district in conformity with state law.

suant to the law of the state in which the district court is located, Fed R. Civ. P. 4(e)(1), or by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode. Fed.R.Civ.P. 4(e)(2). Here, Mr. Scherer served the Department employees by certified mail at their work address. This method fails to satisfy Rule 4(e)(1) because Kansas law requires that "[s]ervice by certified mail shall be addressed to an individual at the individual's dwelling house or usual place of abode." K.S.A. § 60-304(a). For the same reason, this method also fails to satisfy Rule 4(e)(2). While Mr. Scherer's method was proper for serving federal employees in their official capacities, it does not satisfy the requirements for service upon them in their individual capacities. As such, the court must dismiss Mr. Scherer's obstruction of justice claim, and for that matter all other claims against the Department officials in their individual capacities, under Rule 12(b)(2). *Bartels v. Hecker*, 46 F.3d 1150, 1995 WL 24911, at *2 (10th Cir.1995) (finding district court properly dismissed defendant in his individual capacity, despite the fact that he was properly before the court in his official capacity, because Rule 4(d)(1) of the Federal Rules of Civil Procedure expressly requires personal service when a defendant is named individually).

3. Private Right of Action under the Federal Obstruction of Justice Statute

[12] In addition to its jurisdictional challenges, the Department contends that Mr. Scherer fails to state a claim under the federal obstruction of justice statute because it does not provide a private right of action. The Department is correct. Federal courts have consistently denied a private civil right of action under 18 U.S.C. § 1503, the criminal statute against jury tampering, witness intimidation, and obstruction of justice. *OMI Holdings, Inc. v. Howell*, 864 F.Supp. 1046, 1048 (D.Kan. 1994) (citing *Hanna v. Home Ins. Co.*, 281 F.2d 298, 303 (5th Cir.1960) cert. denied, 365 U.S. 833, 81 S.Ct. 751, 5 L.Ed.2d 747; *Odell v. Humble Oil & Refining Co.*, 201 F.2d 128, 127 (10th Cir.) cert. denied, 345 U.S. 941, 73 S.Ct. 833, 97 L.Ed. 1367 (1953); *Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp. 795, 807 (D.Utah 1988); *Harberson v. Hilton Hotels*, 616 F.Supp. 864, 866 (D.Colo.1985); *Burch v. Snider*, 461 F.Supp. 598, 602 (D.Md.1978); *Mainelli v. Providence Journal Co.*, 207 F.Supp. 453, 456 (D.R.I.) aff'd in part and vacated in part on other grounds, 312 F.2d 3 (1st Cir.1962)); *see also Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1482 (9th Cir.1997); *James v. McCoy*, 56 F.Supp.2d 919, 936 (S.D.Ohio 1998).

Therefore, even if the court had subject matter jurisdiction over Mr. Scherer's obstruction claim and personal jurisdiction over the defendants in their individual capacity, Mr. Scherer has no private right of action under the statute and the claim must be dismissed under Rule 12(b)(6).

C. Federal Ethical Standards of Conduct

Apart from the claims based upon the document requests, Mr. Scherer contends that Angela Bennett violated federal standards of conduct and Presidential Executive Orders by serving both as a board member of the Curators of the University of Missouri and the Director of the OCR for Region VII. The Department contends that to the extent Mr. Scherer pursues this claim against the Department employees in their individual capacity, the court lacks personal jurisdiction over those individual defendants. The Department further argues that the doctrine of sovereign immunity bars this claim against the Department of Education, Secretary Paige and the department employees in their official capacity. Finally, the Department alleges that these ethics provisions fail to provide Mr. Scherer with a private right of action.

1. Personal Jurisdiction

As noted in the previous section, Mr. Scherer failed to personally serve the individual defendants. To the extent that he seeks to sue Ms. Bennett in her individual capacity for violating applicable ethical guidelines, his claim must be dismissed for lack of personal jurisdiction.

2. Sovereign Immunity

To remedy these alleged ethical violations, Mr. Scherer requests an injunction requiring the Region VII office of OCR to conduct an investigation into the five fold increase in federal funds to the Curators of the University of Missouri and an injunction requiring the Department of Education to conduct an internal investigation into the alleged ethical violations. To this extent, Mr. Scherer seeks an order against the United States and the doctrine of sovereign immunity bars the claim, absent waiver or an applicable exception.

[13] The United States has not waived its sovereign immunity under any of the ethical standards that govern the conduct of the Department of Education and its employees. Mr. Scherer alleges that defendant Angela Bennett violated an unspecified Presidential Executive Order. In his response to the motion to dismiss, Mr. Scherer specifies that the conduct violates Executive Order 12674. This order prohibits employees from holding financial interests that conflict with the conscientious performance of duty, but it contains no express waiver of sovereign immunity. Additionally, the United States has not waived its immunity under any of the other ethical guidelines regulating the Department's conduct. The Department contends and Mr. Scherer does not dispute that its conduct is regulated by: (1) the Ethics in Government, codified at 5 U.S.C.App. 4; (2) the Office of Government Ethic's regulations, promulgated at 5 C.F.R. § 2634, et al.; (3) Department of Education regulations supplementing the Ethics in Government act, promulgated at 5 C.F.R. § 6801; and (4) the criminal conflict-of-interest standard, codified at 18 U.S.C. § 208. None of these statutes or regulations explicitly waive the immunity of the sovereign.

It is less certain, however, whether Mr. Scherer's allegations place Ms. Bennett's conduct outside the protections of sovereign immunity. Based upon Mr. Scherer's allegations, Ms. Bennett's delegated authority is limited by the applicable ethical provisions. Mr. Scherer implicitly argues that by violating these ethical provisions, Ms. Bennett has necessarily acted ultra vires. The court need not reach the issue, however, because none of the applicable ethical guidelines provide Mr. Scherer with a private right of action.

3. Private Right of Action under Ethical Guidelines

The Department argues that even if Ms. Bennett violated the applicable ethics guidelines they do not provide him with an express or implied right of action. After reviewing the applicable guidelines, the court agrees that Mr. Scherer has no private right of action under these standards of conduct.

To decide whether a private right of action is available under a statute, the court must decide "whether Congress, expressly or by implication, intended to create a private cause of action." *Sommerfield v. Denver*, 100 F.3d 744, 747 (10th Cir. 1996). The Tenth Circuit has cautioned

that the court "must exercise great care in finding an implied right of action." *Davis-Warren Auctioneers, J.V. v. F.D.I.C.*, 215 F.3d 1159, 1162 (10th Cir.2000) (citing *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 291, 113 S.Ct. 2085, 124 L.Ed.2d 194 (1993)). "A plaintiff asserting an implied right of action under a federal statute bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute." *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521–22 (5th Cir.2002). "In other words, he [or she] must overcome the familiar presumption that Congress did not intend to create a private right of action." *Id.* at 522.

As noted above, the ethical provisions relevant to this action include: (1) the Ethics in Government Act, codified at 5 U.S.C.App. 4; (2) the Office of Government Ethic's regulations, promulgated at 5 C.F.R. § 2634, et al.; (3) Department of Education regulations supplementing the Ethics in Government act, promulgated at 5 C.F.R. § 6301; (4) the criminal conflict-of-interest standard, codified at 18 U.S.C. § 208, and (5) Executive Order 12674.[20] The court reviews each of these provisions to determine whether Mr. Scherer is entitled to bring a civil action thereunder.

a. Ethics in Government Act of 1978

[14] The Ethics in Government provisions, codified at 5 U.S.C.App. 4, governs the conduct of Department employees. The Act, however, does not provide an express or implied private right of action. Only the Attorney General has an express right of action under the Act. The relevant enforcement provision provides as follows:

> (a) Civil action.—The Attorney General may bring a civil action in any appropriate United States district court against any individual who violates any provision of section 501 or 502. The court in which such action is brought may assess against such individual a civil penalty of not more than $10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater.

5 U.S.C.App. 4 § 504. Moreover, there is no evidence that Congress intended to create a private right of action under the Act. In fact, this "title is *subject to the rules and regulations of ... the Office of Government Ethics* and administered by designated agency ethics officials with respect to officers and employees of the executive branch." 5 U.S.C.App. 4 § 503(2) (emphasis added). As discussed below, the Office of Government Ethic's implementing regulations preclude a private right of action under those provisions. As such, Mr. Scherer has failed to state a claim under the Act and any claim thereunder must be dismissed under Rule 12(b)(6).

b. Office of Government Ethics Regulations

The Office of Government Ethics has promulgated regulations that implement the Ethics in Government Act at 5 C.F.R. § 2634 *et seq* (the "Standards of Ethical Conduct for Employees of the Executive Branch"). The Office of Government Ethics has made clear that these regulations create no private right of action against federal employees. Section § 2635.106 provides that "[a] violation of this part or of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person." 5 C.F.R. § 2635.106(c). As such, the implementing regulations do not provide Mr. Scherer with a private right of action and any claim under these regulations must be dismissed under Rule 12(b)(6).

c. Supplemental Standards of Ethical Conduct

The Supplemental Standards of Ethical Conduct for Employees of the Department of Education "apply to employees of the Department of Education and supplement the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 CFR part 2635." 5 C.F.R. § 6301.101. These regulations contain no express private right of action. Moreover, the Standards of Ethical Conduct for Employees of the Executive Branch provide that neither those regulations nor the provisions "*of supplemental agency regulations* ... create any right or benefit, substantive or procedural, enforceable at law ..." 5 C.F.R. § 2635.106(c) (emphasis added).

As such, Mr. Scherer has no right of action under the Department's supplemental standards and any claim based upon these standards must be dismissed under Rule 12(b)(6).

d. Criminal Conflict of interest statute 18 U.S.C. § 208

[15] The criminal conflict of interest standard also governs Ms. Bennett's conduct. The only right of action under this provision, however, is reserved for the Attorney General. Subsection (b) and (c) of the statute entitles the Attorney General to bring a civil penalty or injunctive action. 18 U.S.C. § 208(b). While the imposition of a civil penalty "does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person," it does not create an independent private right of action. *Ray v. Proxmire*, 581 F.2d 998, 1001 (D.C.Cir.), cert. denied, 439 U.S. 933, 99 S.Ct. 326, 58 L.Ed.2d 329 (1978) (upholding 12(b)(6) dismissal of claim brought under 18 U.S.C. § 201 because "bare criminal statute" provides no private cause of action). The courts have also refused to recognize an implied right of action under the statute. *Judicial Watch, Inc. v. Clinton*, 880 F.Supp. 1, 5 (D.D.C.1995) (dismissing claim under 12(b)(6) because statute provided no private right of action); *Saratoga Sav. and Loan Ass'n v. Fed. Home Loan Bank of San Francisco*, 724 F.Supp. 688, 690 (N.D.Cal.1989) (no private right of action). The court agrees with the reasoning of these courts and joins them in concluding that the federal conflict of interest statute provides no express or implied private right of action. As such, Mr. Scherer's claims under this statute must be dismissed under Rule 12(b)(6).

e. Executive Order 12674

[16] Executive Order 12674 provides for certain standards of conduct for executive branch employees. The Order does not expressly create a right of action. Mr. Scherer has offered no evidence suggesting that the President intended to create an implied right of action and the court has found no such evidence in its independent review of the order. As such, Mr. Scherer has failed to overcome the relatively heavy presumption that the government did not intend to create a private right of action and, therefore, has failed to state a claim under the executive order.

D. Failure to Enforce Civil Rights Legislation

Finally, Mr. Scherer alleges that the Department has failed to investigate ade-

20. It is worth noting that Mr. Scherer did not allege violations of these specific provisions. Instead, he generally alleges that Ms. Bennett has violated unspecified ethics provisions and Executive Orders. The court and the Department have taken the initiative of construing his complaint broadly to analyze whether his allegations state a claim under these provisions.

quately his administrative complaint. Mr. Scherer also makes a conclusory allegation that the Department has failed to enforce applicable civil rights legislation against the University of Missouri. To cure these alleged deficiencies, Mr. Scherer seeks an injunction requiring the Department to enforce all federal civil rights statutes and to revoke funding to the Curators of the University of Missouri until they can produce affirmative evidence demonstrating compliance with these acts. In its motion to dismiss, the Department contends that to the extent Mr. Scherer pursues this claim against the Department employees in their individual capacity, the court lacks personal jurisdiction over those individual defendants. The Department further argues that the doctrine of sovereign immunity bars this claim against the Department of Education, Secretary Paige and the department employees in their official capacity. Finally, the Department believes that Mr. Scherer has no private right of action against the funding agency.

1. Personal Jurisdiction

As noted in the previous section, Mr. Scherer failed to personally serve the individual defendants and the court lacks personal jurisdiction over these parties.

2. Sovereign Immunity

To adequately address the sovereignty issue, the court must determine whether the federal civil rights statutes or the Administrative Procedure Act ("APA") creates an express or implied right of action against the federal funding agency.[21] As such, the court must turn to whether Mr. Scherer has a statutory or implied right of action directly against the Department.

3. Private Right of Action against the Federal Funding Agency

[17] As previously discussed, the Department of Education is responsible for enforcing Title VI, Section 504 of the Rehabilitation Act and the ADA against educational institutions that receive federal funding. Liberally interpreting Mr. Scherer's complaint, he alleges that the Department has failed to adequately investigate his discrimination complaint and enforce these civil rights statutes. While Mr. Scherer, assuming he has standing, has an implied right of action against recipients of federal funds who violate these civil rights statutes, he does not have a private right of action against the funding agency, the Department in this case. To reach this conclusion, the court must examine whether Mr. Scherer has a statutory basis for judicial review of the agency conduct or a right of action under the APA.

a. Right of Action under the Statutes

The focal point of the court's analysis is on Title VI because the remedial schemes of both Section 504 and the ADA are tied to the remedies available under Title VI.[22]

21. For example, if Mr. Scherer has a right to compel the Department to initiate further investigations or enforce the applicable civil rights legislation under the APA, section 702 waives sovereign immunity as to injunctive relief against administrative agencies. *Wyoming*, 279 F.3d at 1236 (noting that "Section 702 generally waives the sovereign immunity of the United States, its agencies, and officials in agency review actions seeking specific relief").

22. Section 504 was modeled upon Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 1126 n. 2, 94 L.Ed.2d 307 (1987). Courts often construe section 504 with reference to Titles VI and IX. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir.1999). In fact, in 1978 Congress amended section 505 of the Act to specify that the enforcement scheme of Title VI governs § 504. 29 U.S.C. § 794a(a)(2). Similarly, the ADA specifically incorporates the remedies, procedures, and rights available under § 504 of the Rehabilitation Act. 42 U.S.C. § 12133, and the courts construe the ADA with reference to § 504. *Patton v. TIC United Corp.*, 77 F.3d 1235, 1245 (10th Cir. 1996)

Title VI prohibits federal exclusion from participation in, denial of benefits of, and discrimination under any federally-assisted program on account of race or national origin. Justice Ginsburg aptly described the administrative enforcement component of Title VI:

> The statute directs each federal agency that disburses federal funds to "effectuate" the antidiscrimination mandate. If compliance cannot be secured by voluntary means, Title VI instructs the agency to initiate a process leading to the termination of or refusal to grant or to continue [federal monetary] assistance. *http://www.westlaw.com/Find/Default.wl?rs=1.0&vr=2.0&DB=1000546&DocName=42USCAS2000D-1&FindType=L* Under a complaint procedure devised by the Department, individuals may file administrative complaints identifying allegedly noncomplying aid recipients. If the agency (OCR, now placed in the Department of Education) investigates and determines the complaint to be meritorious, the agency is then directed to undertake various compliance efforts, potentially culminating in the ultimate sanction of fund termination. *Document1zzF.V F0011*

Women's Equity Action League v. Cavazos, 906 F.2d 742, 745 (D.C.Cir.1990) (internal citations omitted). In addition to administrative enforcement of the civil rights statutes, the Supreme Court has held that victims of discriminatory practices have an implied right of action against the discriminating recipients of federal funds. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

The *Cannon* Court, however, suggested that no such right exists against the funding agency. After reviewing Title VI's legislative history the court explained that Congress' final version of the Act reflected "a compromise aimed at protecting individual rights without subjecting the Government to suits." *Id.* at 715, 99 S.Ct. 1946. The court concluded that a private right of action against the funding agency would be "far more disruptive" of the agency's efforts to ensure compliance than a "private suit against the recipient of the federal aid could ever be." *Id.* at 706 n. 41, 99 S.Ct. 1946. These comments suggest that Mr. Scherer has no implied right of action against the funding agency. Indeed, since *Cannon*, federal courts have generally held that plaintiffs do not have a right of action against the funding agency to compel them to enforce the civil rights statutes. *Document1zzF.V F0088 Women's Equity Action League*, 906 F.2d at 749 (citing *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1252 n. 27 (3d Cir.1979); *Cousins v. United States Dep't of Transp.*, 880 F.2d 603, 607 (1st Cir.1989); *Marlow v. United States Dep't of Ed.*, 820 F.2d 581, 583 (2d Cir. 1987), cert. denied, 484 U.S. 1044, 108 S.Ct. 780, 98 L.Ed.2d 866 (1988); *Salvador v. Bennett*, 800 F.2d 97, 99 (7th Cir.1986); *see also Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191 (4th Cir.1999)(finding no express right of action under Title VI and refusing to recognize an implied right under the Act).[23]

23. Some courts have permitted actions directly against the funding agency, but only in "narrow circumstances involving allegations that the agency has consciously and expressly abdicated its enforcement duties, that the

The court believes that the Tenth Circuit would embrace the reasoning of these courts and likewise deny Mr. Scherer a right of action against the Department, based upon its unpublished opinion in *Renteria v. Donahue*, 92 F.3d 1197, 1996 WL 446905 (10th Cir.1996), cert. denied 522 U.S. 897, 118 S.Ct. 241, 139 L.Ed.2d 171 (1997). In *Renteria*, the plaintiff brought a pro se action against officials of the Region VII Office for Civil Rights, United States Department of Education, after OCR closed her administrative complaint in which she alleged that Wichita State University had discriminated against her while she was a student in various classes. *Id.* at *1, 92 F.3d 1197. After reviewing the district court's opinion dismissing the action, the Tenth Circuit agreed that Ms. Renteria had no private right of action directly against the agency under Title VI. *Id.* at *2, 92 F.3d 1197. Mr. Scherer is similarly situated to Ms. Renteria in that he seeks a remedy for the Department's alleged failure to adequately investigate his complaint and enforce applicable civil rights statutes. As such, the court is convinced that he, just as Ms. Renteria, has no private right of action against the Department under Title VI.

b. Implied Right of Action under the Administrative Procedure Act

Absent a right of action under the civil rights statutes, the question is whether the APA provides a right of action requiring agencies to enforce the applicable civil rights statutes.

Section 702 of the APA generally authorizes suits against government agencies for relief other than money damages. 5 U.S.C. § 702. A suit under Section 702 however, is available only when "there is no other adequate remedy in a court...." 5 *U.S.C.* 704. Federal courts have held that victims of discrimination have an adequate remedy to redress discrimination in the form of an implied right of action directly against the discriminating institution and that this remedy forecloses any right of action against the funding agency under the APA. *http://www.westlaw.com/Find/Default.wl?rs=1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1990098945&ReferencePosition=748* *Washington Legal Foundation v. Alexander*, 984 F.2d 483, 486 (D.C.Cir.1993); *Women's Equity Action League*, 906 F.2d at 751; *Jersey Heights Neighborhood Ass'n*, 174 F.3d at 191–92 (4th Cir.1999).

[18] Again, the court believes that the Tenth Circuit would adopt the same position based upon its unpublished opinion in *Renteria*. Therein, the court affirmed the district court's finding that the plaintiff had no right of action, under the APA, against the Department of Education, 92 F.3d 1197, 1996 WL 446905, at *2. Likewise, Mr. Scherer has no right of action under the APA to force the Department to investigate further his administrative complaint or enforce Title VI, Section 504 of the Rehabilitation Act, or the ADA against the University of Missouri. Instead, Mr. Scherer's remedy lies with an action directly against the discriminatory recipient of federal funds.[24] As such, the court denies Mr. Scherer's claims founded upon an express or implied right of action under the civil rights statutes or the APA under Rule 12(b)(6).

IT IS THEREFORE ORDERED BY THE COURT THAT defendant's motion to dismiss (Doc. 38) is granted and Mr. Scherer's complaint is dismissed in its entirety. Specifically, the court grants the motion as to Mr. Scherer's FOIA claims under Rule 12(b)(1) for failing to exhaust his administrative remedies and under Rule 12(b)(6) because his requested remedy is not available under the statute. The court further dismisses his FOIA claims against the individual defendants under Rule 12(b)(6) because FOIA provides a right of action against the agency, not its officers. The court grants the motion as to Mr. Scherer's non-FOIA claims under Rule 12(b)(6) in their entirety because none of the relevant statutes, regulations or executive orders provides him with a private right of action. Moreover, the court grants the Department's motion to dismiss the obstruction of justice claim against all federal agencies and employees in their official capacity under Rule 12(b)(1) because the doctrine of sovereign immunity bars such claims. Finally, the court dismisses all claims against the individual defendants in their individual capacity under Rule 12(b)(2) because Mr. Scherer failed to serve them in conformity with Rule 4(e) and the court lacks personal jurisdiction over the defendants in that capacity.

agency is using improper procedures for approving funded programs, that it acquiesced or actively participated in discriminatory practices, or that it has wrongly refused to pursue further action when efforts to achieve voluntary compliance have failed." *Marlow*, 820 F.2d at 583 (internal citations omitted). It is unclear, however, whether these narrow exceptions are still applicable in light of the Supreme Court's guidance in *Cannon*. Nevertheless, the court need not decide that issue because Mr. Scherer's complaint contains only one conclusory allegation that "[t]he Department of Education and its various staff members and officers have failed to enforce the civil rights laws at the University of Missouri." As a result, Mr. Scherer concludes that "they have violated [his] and others civil rights." Even assuming that the narrow line of cases permitting direct actions against the funding agency remain valid in the post-*Cannon* era, Mr. Scherer's conclusory allegations are insufficient to place his complaint within the scope of those decisions.

24. In fact, Mr. Scherer has utilized this remedy by suing the allegedly discriminating institution in the United States District Court for the Western District of Missouri.

Barbara J. KELLY-KOFFI, Plaintiff,

v.

WESLEY MEDICAL CENTER, Defendant.

No. 01–1276–JTM.

United States District Court, D. Kansas.

Jan. 13, 2003.

Nurse brought § 1981 action against medical center alleging race discrimination. On medical center's motion for summary judgment, the District Court, Marten, J., held that: (1) nurse was not qualified for her position, and (2) nurse's serial errors in documenting the dispensation of narcotic medications were legitimate, non-race based reasons for medical center's decision to terminate her employment.

Motion granted.

1. Civil Rights ⇐144

Terminated nurse who had numerous discrepancies in her documentation of narcotic medications was not qualified for her position, as required for her prima facie case of race discrimination under § 1981; nurse's pattern of errors was not satisfactory to medical center, and her errors