

1 DANIEL G. BOGDEN
2 United States Attorney

3 HOLLY A. VANCE
4 Assistant United States Attorney
5 100 West Liberty Street, Suite 600
6 Reno, NV 89501
7 Telephone: (775) 784-5438
8 Facsimile: (775) 784-5181

9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 JED MARGOLIN,)
12)
13 Plaintiff,)

14 v.)

15 CHARLES F. BOLDEN, Administrator,)
16 National Aeronautics and Space Administration,)
17 Defendant.)

) 3:09-CV-00421-LRH-VPC

**RESPONSE TO OPPOSITION
TO MOTION TO DISMISS (# 11)**

18 **I. ARGUMENT**

19 **A. This Court lacks jurisdiction to decide this Freedom of Information Act (“FOIA”)**
20 **action because the complaint names only an individual.**

21 The Freedom of Information Act (“FOIA”) authorizes the filing of FOIA lawsuits against
22 agencies – and agencies only. *See* 5 U.S.C. § 552(a)(4)(B) (“[T]he district court of the United
23 States * * * has jurisdiction to enjoin the *agency* from withholding agency records and to order
24 the production of any agency records improperly withheld from the complainant[.]”) (emphasis
25 added). Plaintiff’s arguments to the contrary (Opp. at 8-13) are unpersuasive in light of that
26 clear and unequivocal statutory mandate. Moreover, plaintiff’s reliance on *Baptist Health v.*
27
28

1 *Thompson*, 458 F.3d 768 (8th Cir. 2006) and *John Doe v. Mukasey*, 549 F.3d 861 (2nd Cir. 2008)
2 (Opp. at 16) is misplaced for two reasons: those cases did not involve FOIA requests and the
3 defendants in those actions did not move to dismiss or otherwise challenge the individually
4 named defendants as improper parties. In sum, because plaintiff's FOIA complaint names only
5 an individual, this Court is without jurisdiction to hear the case and dismissal is warranted.
6

7 **B. Court decisions likewise preclude the filing of FOIA actions against individually**
8 **named defendants.**

9 Court decisions – both published and unpublished – are consistent with the statutory
10 mandate promulgated in 5 U.S.C. § 552(a)(4)(B). Those decisions unanimously hold that
11 individual officers of federal agencies are not proper parties in FOIA actions. *See e.g.*,
12 *Thompson v. Walbran*, 990 F.2d 403, 405 (8th Cir. 1993) (holding that plaintiff failed to state a
13 claim under FOIA where he sued “the wrong party” – an individual); *Laughlin v. Commissioner*
14 *of I.R.S.*, 117 F.Supp.2d 997, 1000 (S.D.Ca. 2000) (“the plain language of the [FOIA] statute
15 creates a cause of action against federal agencies and not its individual employees”); *Salman v.*
16 *Secretary of Treasury*, 1997 WL 215508 (D.Nev.) (dismissing Secretary of Treasury from FOIA
17 lawsuit on the ground that he is not a “proper defendant”). Based on those authorities, Charles F.
18 Bolden is not a proper party in this FOIA action and the case against him should be dismissed.
19
20

21 **C. The Motion to Dismiss should not be construed as a Motion for Summary Judgment**
22 **because the motion raised only a legal issue – a jurisdictional challenge; the motion**
23 **did not include the submission of any evidence.**

24 Plaintiff cites this Court's September 14, 2009 Minute Order (document #10) to support
25 his argument that he “must” treat the Motion to Dismiss as a Motion for Summary Judgment.
26 (Opp. At 17). But the Minute Order allows a Motion to Dismiss to be treated as a Motion for
27 Summary judgment only if the defendant submits evidence in support thereof: “[I]f defendants
28

1 have submitted evidence in support of a motion to dismiss * * *, then the court may treat the
2 pending motion as a motion for summary judgment.” Here, defendant did not submit any
3 evidence with his motion but instead raised a jurisdictional challenge that precludes this Court
4 from hearing the case. Because the Motion to Dismiss raised only a legal question, this Court
5 can decide that issue – and that issue alone. This Court should refrain from treating the Motion
6 to Dismiss as a Motion for Summary Judgment and deciding factual issues where defendant did
7 not present any factual questions for the Court’s review.
8
9

10 **II. CONCLUSION**

11 For the foregoing reasons, the action against Charles F. Bolden should be dismissed.

12 Respectfully submitted,

13 DANIEL G. BOGDEN
14 United States Attorney

15
16 /s/ Holly A. Vance
17 HOLLY A. VANCE
18 Assistant United States Attorney
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

1
2 JED MARGOLIN,)
3) 3:09-CV-00421-LRH-VPC
4 Plaintiff,)
5 v.)
6 CHARLES F. BOLDEN, Administrator,)
7 National Aeronautics and Space Administration,)
8 Defendant.)

9
10 The undersigned hereby certifies that service of the foregoing **RESPONSE TO**
11 **OPPOSITION TO MOTION TO DISMISS (# 11)** has been made by electronic notification
12 through the Court's electronic filing system or, as appropriate, by sending a copy by first-class
13 mail to the following addressee(s) on October 7, 2009:

14
15 JED MARGOLIN
16 1981 Empire Road
17 VC Highlands, NV 89521-7430

18 /s/ Holly A. Vance
19 Holly A. Vance
20
21
22
23
24
25
26
27
28