

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN ECHOLS,

No. C 12-1581 CW

Plaintiff,

ORDER GRANTING  
FEDERAL

v.

DEFENDANTS' MOTION  
TO DISMISS (Docket  
No. 36) AND  
CONTINUING CASE  
MANAGEMENT  
CONFERENCE

MORPHO DETECTION, INC.; UNITED  
STATES DEPARTMENT OF HOMELAND  
SECURITY; TRANSPORTATION SECURITY  
AGENCY; and JANET NAPOLITANO, in  
her official capacity as  
Secretary of Homeland Security,

Defendants.

United States District Court  
For the Northern District of California

\_\_\_\_\_ /

Defendants United States Department of Homeland Security (DHS), Transportation Security Agency (TSA) and Secretary of Homeland Security Janet Napolitano (collectively, Federal Defendants) move to dismiss three of the claims asserted against them by Plaintiff Stephen Echols. Plaintiff opposes their motion and, in his opposition brief, requests leave to bring additional claims against them. The Court takes Federal Defendants' motion under submission on the papers and GRANTS it. The Court also grants Plaintiff leave to file a motion for leave to amend his complaint to assert new claims against Federal Defendants.

BACKGROUND

The following facts are taken from Plaintiff's first amended complaint (1AC).

In September 2004, Plaintiff began working for Invision Technologies. 1AC ¶ 8. That company became or was acquired by Defendant Morpho Detection, Inc. in or about 2009. Id. Morpho

1 Detection has contracts with DHS and TSA to provide airport  
2 security. Id. at ¶ 9. Plaintiff was employed as a field service  
3 technician at the Los Angeles International Airport. Id. at ¶ 8.

4 Prior to March 9, 2010, Plaintiff passed all government  
5 airport and company background checks that he underwent. Id.

6 In or around January 2010, TSA required all of Morpho  
7 Detection's engineers, including Plaintiff, to undergo an "eQuip  
8 background investigation." Id. at ¶ 10.

9 Plaintiff received a letter from TSA dated March 9, 2010,  
10 stating that he was "ineligible to work on any TSA contract based  
11 on the following issues identified during" the background  
12 investigation:

13 CRIMINAL CONDUCT

- 14 • GRAND THEFT, \$/LABOR/PROP \$400+, 1/1/2007, Gardena  
15 Police Department, CA.
- 16 • BURGLARY OF IDENT/ 1 COUNT OF THREATEN CRIME WITH  
17 INTENT TO TERRORIZE/ 1 COUNT STALKING, 2/9/1999,  
18 Superior Court Los Angeles, CA. Sentence: CONVICTED,  
19 probation/jail 240 days/36 months.
- 20 • MAIMING/ASSAULT & BATTERY, 11/25/1990, Hampton Police  
21 Department, VA. Sentence: 6 months suspend, 6 months  
22 for 5 years.

21 HONESTY

- 22 • You failed to list most recent charge, GRAND THEFT,  
23 \$/LABOR/PROP \$400+, on your SF85P.

24 1AC ¶ 11, Ex. 2 (all errors in original).<sup>1</sup>

25  
26 \_\_\_\_\_  
27 <sup>1</sup> In the copy of the letter attached to the 1AC, the words  
28 "EXPUNGED & DISMISSED" are written next to the second item under  
the heading "Criminal Conduct." 1AC ¶ 11, Ex. 2.

1 Plaintiff alleges that he was not the person who committed  
2 the crimes identified in the first or second items under "Criminal  
3 Conduct" or the item under "Honesty" and that he "was the victim  
4 of identity theft." Id. at ¶ 13. He also alleges that the third  
5 item under "Criminal Conduct" was "inaccurate in that the  
6 plaintiff recalls the case was dismissed." Id.

7 In March 2010, Plaintiff received a telephone call from his  
8 manager, David Fox, who told him that he was being placed on  
9 suspension with pay. Id. at ¶ 15. Plaintiff was terminated on  
10 March 31, 2010. Id. at ¶ 16.

11 After he received the letter from the TSA, Plaintiff  
12 communicated "with TSA and Morpho explaining the identity theft  
13 issue and the alleged conviction in 1990." Id. at ¶ 15. Despite  
14 his repeated requests, TSA failed to provide Plaintiff with a copy  
15 of his background report. Id.

16 Plaintiff filed this case on March 29, 2012, originally  
17 asserting claims against Morpho Detection only. Docket No. 1. On  
18 October 12, 2012, the Court granted the parties' stipulation to  
19 allow Plaintiff to file his 1AC. Docket Nos. 23, 25.

20 In his 1AC, Plaintiff asserts four claims against Federal  
21 Defendants: (1) willful violation of the Fair Credit Reporting Act  
22 (FCRA), 15 U.S.C. §§ 1681-1681x; (2) negligent violation of the  
23 FRCA; (3) violation of the Freedom of Information Act (FOIA), 5  
24 U.S.C. § 552; and (4) declaratory relief that Plaintiff is  
25 eligible to be employed by the federal government or organizations  
26 that require passage of the eEquip background check. As relief for  
27 his FCRA claims, among other things, Plaintiff seeks "damages  
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1 exceeding \$300,000.00 which is the approximate equivalent of four  
2 (4) years of salary with the related benefits." 1AC ¶¶ 23, 25.

3 Federal Defendants move to dismiss the FCRA claims and  
4 declaratory relief claim. In the instant motion, they do not seek  
5 to dismiss the FOIA claim.

6 LEGAL STANDARDS

7 I. Federal Rule of Civil Procedure 12(b)(1)

8 Subject matter jurisdiction is a threshold issue which goes  
9 to the power of the court to hear the case. Federal subject  
10 matter jurisdiction must exist at the time the action is  
11 commenced. Morongo Band of Mission Indians v. Cal. State Bd. of  
12 Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A federal  
13 court is presumed to lack subject matter jurisdiction until the  
14 contrary affirmatively appears. Stock W., Inc. v. Confederated  
15 Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

16 Dismissal is appropriate under Rule 12(b)(1) when the  
17 district court lacks subject matter jurisdiction over the claim.  
18 Fed. R. Civ. P. 12(b)(1). Once subject matter jurisdiction has  
19 been challenged, the plaintiff has the burden of establishing its  
20 existence. Rattlesnake Coal. v. United States Env'tl. Prot.  
21 Agency, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007).

22 "A Rule 12(b)(1) jurisdictional attack may be facial or  
23 factual." Safe Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)  
24 (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). "In a  
25 facial attack, the challenger asserts that the allegations  
26 contained in a complaint are insufficient on their face to invoke  
27 federal jurisdiction." Id.

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1           When a facial attack is made, the court's inquiry is confined  
2 to the allegations in the complaint. Savage v. Glendale Union  
3 High Sch. Dist. No. 205, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003)  
4 (citation omitted). Review is similar to that of a motion made  
5 under Rule 12(b)(6) and the allegations made in the complaint are  
6 taken as true and construed in the light most favorable to the  
7 plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir.  
8 1989).

9           Because Federal Defendants do not submit any evidence beyond  
10 the complaint with their motion and instead contend that the  
11 allegations set forth in Plaintiff's 1AC, even if true, are  
12 insufficient on their face to invoke federal jurisdiction, they  
13 raise a facial attack on jurisdiction.

14 II. Federal Rule of Civil Procedure 12(b)(6)

15           A complaint must contain a "short and plain statement of the  
16 claim showing that the pleader is entitled to relief." Fed. R.  
17 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
18 state a claim, dismissal is appropriate only when the complaint  
19 does not give the defendant fair notice of a legally cognizable  
20 claim and the grounds on which it rests. Bell Atl. Corp. v.  
21 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
22 complaint is sufficient to state a claim, the court will take all  
23 material allegations as true and construe them in the light most  
24 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
25 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
26 to legal conclusions; "threadbare recitals of the elements of a  
27 cause of action, supported by mere conclusory statements," are not  
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1 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
2 (citing Twombly, 550 U.S. at 555).

3 A statute of limitations defense may be raised by a motion to  
4 dismiss if the running of the relevant statute of limitations is  
5 apparent on the face of the complaint. Ledesma v. Jack Stewart  
6 Produce, Inc., 816 F.2d 482, 484 n.1 (9th Cir. 1987). When a  
7 motion to dismiss is based on the running of a statute of  
8 limitations, the motion can be granted "only if the assertions of  
9 the complaint, read with the required liberality, would not permit  
10 the plaintiff to prove that the statute was tolled." Jablon v.  
11 Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (citation  
12 omitted).

13 When granting a motion to dismiss, the court is generally  
14 required to grant the plaintiff leave to amend, even if no request  
15 to amend the pleading was made, unless amendment would be futile.  
16 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
17 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
18 amendment would be futile, the court examines whether the  
19 complaint could be amended to cure the defect requiring dismissal  
20 "without contradicting any of the allegations of [the] original  
21 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
22 Cir. 1990).

23 Although the court is generally confined to consideration of  
24 the allegations in the pleadings, when the complaint is  
25 accompanied by attached documents, such documents are deemed part  
26 of the complaint and may be considered in evaluating the merits of  
27 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d  
28 1265, 1267 (9th Cir. 1987).

DISCUSSION

Federal Defendants move to dismiss Plaintiff's FCRA and declaratory relief claims on several bases. First, they contend that FCRA does not waive sovereign immunity for damages claims against the government. Second, they argue that the claims are non-justiciable and that judicial review of a security clearance determination is not available. Third, they maintain that Plaintiff has not stated a claim for relief under the FCRA. Further, they argue that the FCRA claims are barred by the statute of limitations. Finally, they contend that Plaintiff has not identified any tenable basis for his declaratory relief claim.

I. Sovereign Immunity

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). "The doctrine of sovereign immunity applies to federal agencies and to federal employees acting within their official capacities." Hodge v. Dalton, 107 F.3d 705, 707 (9th Cir. 1997) (quoting South Delta Water Agency v. Dep't of Interior, 767 F.2d 531, 536 (9th Cir. 1985)). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied . . ." Lane v. Pena, 518 U.S. 187, 192 (1996) (citations omitted). "Any ambiguities in the statutory language are to be construed in favor of immunity, . . . so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires, . . ." Fed. Aviation Agency v. Cooper, 132 S. Ct. 1441, 1448 (2012) (internal citations omitted). "Ambiguity exists if there is a

1 plausible interpretation of the statute that would not authorize  
2 money damages against the Government." Id.

3 Plaintiff contends that the FCRA contains an express waiver  
4 of sovereign immunity. He points out that the FCRA defines  
5 "person" to mean "any individual, partnership, corporation, trust,  
6 estate, cooperative, association, government or governmental  
7 subdivision or agency, or other entity," 15 U.S.C. § 1681a  
8 (emphasis added), and that it states, "Any person who willfully  
9 fails to comply with any requirement imposed under this title with  
10 respect to any consumer is liable to that consumer . . ." 15  
11 U.S.C. § 1681n (emphasis added). See also 15 U.S.C. § 1681o  
12 (similar provision imposing liability on "any person" who  
13 negligently fails to comply with the FCRA's requirements).  
14 Plaintiff does not maintain that any statute other than the FCRA  
15 is the source of a waiver of sovereign immunity for the damages  
16 claims that he has asserted here.

17 Although neither the Ninth Circuit nor the Supreme Court has  
18 addressed the issue, most courts that have done so have held that  
19 the FCRA does not contain an unequivocal waiver of sovereign  
20 immunity in its text. See Taylor v. United States, 2011 WL  
21 1843286, at \*5 (D. Ariz.) (holding that the plaintiff had not  
22 shown an unequivocal waiver of sovereign immunity under the FCRA);  
23 Gillert v. United States Dep't of Educ., 2010 WL 3582945, at \*3-4  
24 (W.D. Ark.) (same); Ralph v. U.S. Air Force MGIB, 2007 WL 3232593,  
25 at \*3 (D. Colo.) (same); Kenney v. Barnhart, 2006 WL 2092607, at  
26 \*9 (C.D. Cal.) (same); but see Talley v. U.S. Dep't of Agric.,  
27 2007 WL 2028537, at \*2 (N.D. Ill.) (finding waiver of sovereign  
28 immunity in the FCRA), aff'd on other grounds, 595 F.3d 754 (7th

1 Cir. 2010) (finding waiver of sovereign immunity in the Tucker  
2 Act), vacated, 2010 U.S. App. LEXIS 12927, judgment affirmed by  
3 equally divided court on reh'g en banc, 2010 WL 5887796 (7th Cir.  
4 2010).

5 Although he has quoted the statutory text, Plaintiff has not  
6 shown that these provisions contain an unequivocal waiver of  
7 sovereign immunity. He has also failed to address the numerous  
8 decisions in which other courts have held that they do not.  
9 Further, the Court notes that most other federal statutes that  
10 have unequivocally waived sovereign immunity have done so in much  
11 clearer terms than the statutory provisions at issue here. For  
12 example, the Federal Tort Claims Act authorizes "claims against  
13 the United States, for money damages . . . for injury or loss of  
14 property or personal injury or death caused by the negligent or  
15 wrongful act or omission of any employee of the Government while  
16 acting within the scope of his office or employment . . ." 28  
17 U.S.C. § 1346(b)(1); see also 42 U.S.C. § 2000e-5(k) ("In any  
18 action or proceeding under this subchapter . . . the United States  
19 shall be liable for costs the same as a private person."); 26  
20 U.S.C. § 7433(a) ("If, in connection with any collection of  
21 Federal tax with respect to a taxpayer, any officer or employee of  
22 the Internal Revenue Service . . . disregards any provision of  
23 this title . . . such taxpayer may bring a civil action for  
24 damages against the United States."). In fact, a separate  
25 provision of the FCRA itself contains an express waiver of  
26 sovereign immunity for certain violations that is stated in  
27 unequivocal terms. See 15 U.S.C. § 1681u(i) ("Any agency or  
28 department of the United States obtaining or disclosing any

1 consumer reports, records, or information contained therein in  
2 violation of this section is liable to the consumer . . .”).

3 Like the plaintiff in Al-Malik v. United States Department of  
4 Education, 2011 U.S. Dist. LEXIS 96753 (N.D. Cal.), Plaintiff has  
5 not shown that sovereign immunity has been waived and thus that  
6 this Court has subject-matter jurisdiction over his FCRA claims  
7 against Federal Defendants.

8 Accordingly, the Court GRANTS Federal Defendants’ motion to  
9 dismiss the FCRA claims for lack of subject matter jurisdiction.

10 II. Failure to State a Claim for Relief under the FCRA

11 Even if sovereign immunity were waived for Plaintiff’s FCRA  
12 claims against Federal Defendants, he has failed to state a claim  
13 for relief against them under that statute. In his first and  
14 second causes of action, Plaintiff alleges simply that Federal  
15 Defendants willfully and negligently “failed to comply with the  
16 requirements of the Fair Credit Reporting Act, 15 U.S.C. 1681 et  
17 seq.” 1AC ¶¶ 23, 25. In his opposition brief, Plaintiff contends  
18 that the FCRA creates liability for “consumer reporting agencies”  
19 and “users of information” and that he has alleged that Federal  
20 Defendants are “users of information” under FCRA and that they  
21 “did not follow procedures to ensure maximum possible accuracy in  
22 the background report 15 U.S.C. § 1681i, did not properly handle  
23 his dispute 15 U.S.C. § 1681c and e, nor maintain strict

1 procedures to ensure the information was complete and up to date  
2 15 U.S.C. § 1681k." Opp. at 10 (all errors in original).<sup>2</sup>

3 However, these code sections impose obligations on "consumer  
4 reporting agencies" and not on "users of information." See 15  
5 U.S.C. § 1681k(a) ("A consumer reporting agency which furnishes a  
6 consumer report for employment purposes . . . shall . . . maintain  
7 strict procedures designed to insure that whenever public record  
8 information which is likely to have an adverse effect on a  
9 consumer's ability to obtain employment is reported it is complete  
10 and up to date.") (emphasis added); 15 U.S.C. § 1681e (b)

11 ("Whenever a consumer reporting agency prepares a consumer report  
12 it shall follow reasonable procedures to assure maximum possible  
13 accuracy of the information concerning the individual about whom  
14 the report relates.") (emphasis added); 15 U.S.C. § 1681i(a)(1)(A)  
15 ("if the completeness or accuracy of any item of information  
16 contained in a consumer's file at a consumer reporting agency is  
17 disputed by the consumer and the consumer notifies the agency  
18 directly, or indirectly through a reseller, of such dispute, the  
19 agency shall, free of charge, conduct a reasonable reinvestigation  
20 to determine whether the disputed information is  
21 inaccurate . . .") (emphasis added); 15 U.S.C. § 1681c(f) ("If a  
22 consumer reporting agency is notified pursuant to section  
23 623(a)(3) that information regarding a consumer who was furnished  
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25 <sup>2</sup> Plaintiff appears to have confused some of these citations.  
26 For example, the code provision that requires "reasonable  
27 procedures to assure maximum possible accuracy of the information"  
28 in consumer reports is contained in 15 U.S.C. § 1681e(b), not 15  
U.S.C. § 1681i, which instead addresses procedures in cases of  
disputed accuracy. The Court addresses each provision that  
Plaintiff has cited and that it appears that he intended to cite.

1 to the agency is disputed by the consumer, the agency shall  
2 indicate that fact in each consumer report that includes the  
3 disputed information.”) (emphasis added); 15 U.S.C. § 1681c-2(a)  
4 (“a consumer reporting agency shall block the reporting of any  
5 information in the file of a consumer that the consumer identifies  
6 as information that resulted from an alleged identity theft”).

7 Plaintiff has not alleged or argued that any Federal  
8 Defendant is a consumer reporting agency as defined in the FCRA.  
9 Nor could he. See Ollestad v. Kelley, 573 F.2d 1109, 1111 (9th  
10 Cir. 1978) (stating that “the Federal Trade Commission, the agency  
11 charged with administering the FCRA, has concluded that federal  
12 agencies are not consumer reporting agencies within the meaning of  
13 the act” and that this “reasoned conclusion is entitled to our  
14 deference”).

15 Accordingly, the Court GRANTS Federal Defendants’ motion to  
16 dismiss the FCRA claims for failure to state a claim. Even if  
17 Plaintiff had shown that subject matter jurisdiction existed over  
18 these claims, dismissal under Rule 12(b)(6) would be with  
19 prejudice because Plaintiff could not remedy through amendment  
20 this deficiency so as to state a claim under any section of the  
21 FCRA that he has identified. Because the Court grants the motion  
22 to dismiss for lack of subject matter jurisdiction and failure to  
23 state a claim, the Court does not reach Federal Defendants’  
24 alternative argument, that the FCRA claims are barred because the  
25 two year statute of limitations had run before Plaintiff filed his  
26 complaint.

27

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1 III. Justiciability

2 Federal Defendants also argue that Plaintiff's claims are  
3 non-justiciable because judicial review of a security clearance  
4 determination is not available and here Plaintiff seeks a finding  
5 that his security clearance was improperly denied.

6 In response, Plaintiff argues that he is bringing claims that  
7 he was denied the right to earn a living in his chosen profession  
8 without notice or hearing, apparently suggesting he is asserting a  
9 procedural challenge, not a substantive challenge, to the  
10 decision. However, as discussed above, Plaintiff did not state in  
11 the 1AC what conduct he is alleging was a violation of the FCRA.  
12 The 1AC appears to present both procedural and substantive  
13 challenges to Federal Defendants' denial of his background  
14 clearance. See 1AC, 8 (requesting a "judicial determination  
15 finding him eligible to be employed by the Federal government or  
16 organizations that require passage of the security clearance known  
17 as an eEquip background check"); 1AC ¶ 20 (alleging that Federal  
18 Defendants "failed and refused to reinvestigate to confirm or  
19 disclaim the accuracy of the information" in the background  
20 investigation in violation of the law). In addition, in his  
21 opposition, rather than basing his arguments on a violation of the  
22 procedures set forth in FCRA, Plaintiff appears to be arguing that  
23 his constitutional due process rights have been violated. Opp. at  
24 4 (citing FCRA and addressing revocation of the security clearance  
25 without notice or hearing and depriving him of a constitutionally-  
26 protected liberty interest).

27 To the extent that Plaintiff seeks a judicial determination  
28 that he should be granted a security clearance and deemed eligible

1 for employment in positions requiring such a clearance, those  
2 claims are non-justiciable under the principles set forth in a  
3 line of Supreme Court and Ninth Circuit cases. This includes the  
4 sole basis for his declaratory relief claim that is apparent in  
5 his 1AC.

6 In Department of Navy v. Egan, 484 U.S. 518 (1988), the  
7 Supreme Court held that employment decisions based on the  
8 executive branch's security clearance decisions are not reviewable  
9 by the Merit Systems Protection Board (MPSB). In that decision,  
10 the Court held that "the grant of security clearance to a  
11 particular employee, a sensitive and inherently discretionary  
12 judgment call, is committed by law to the appropriate agency of  
13 the Executive Branch." Id. at 527. "[T]he President[, ] as head  
14 of the Executive Branch and as Commander in Chief," has "authority  
15 to classify and control access to information bearing on national  
16 security and to determine whether an individual is sufficiently  
17 trustworthy to occupy a position in the Executive Branch that will  
18 give that person access to such information . . ." Id. The  
19 decision to grant or deny a security clearance requires the type  
20 of "[p]redictive judgment" that "must be made by those with the  
21 necessary expertise in protecting classified information." Id. at  
22 529. Thus, "[f]or reasons too obvious to call for enlarged  
23 discussion, the protection of classified information must be  
24 committed to the broad discretion of the agency responsible, and  
25 this must include broad discretion to determine who may have  
26 access to it." Id. (internal formatting, quotation marks and  
27 citations omitted). Accordingly, the Court concluded that the  
28

1 MPSB, as an "outside nonexpert body," could not "review the  
2 substance of such a judgment . . ." Id.

3 Then, in Webster v. Doe, 486 U.S. 592 (1988), the Supreme  
4 Court confirmed that federal courts do not have jurisdiction to  
5 review the merits of decisions regarding security clearances. It  
6 held that the CIA director's decision to terminate a CIA employee  
7 for a security reason was committed to the discretion of the  
8 director by law, thereby precluding judicial review under the  
9 Administrative Procedures Act (APA). Id. at 601. It found,  
10 however, that the same considerations did not deprive the courts  
11 of jurisdiction to review constitutional claims and remanded for  
12 further proceedings. Id. at 603-04. The Court did not decide  
13 whether the plaintiff had in fact presented colorable  
14 constitutional claims. Id. at 604 n.8. There, the plaintiff  
15 alleged that the CIA unconstitutionally discriminated against  
16 homosexuals in making security clearance determinations. Id. at  
17 601-02.

18 Later, in Dorfmont v. Brown, 913 F.2d 1399 (9th Cir. 1990),  
19 the Ninth Circuit extended Egan to bar judicial review of the  
20 merits of a decision regarding a security clearance. In that  
21 case, the plaintiff sued the Department of Defense "seeking an  
22 injunction against the revocation of her security clearance,"  
23 arguing that the decision violated her constitutional "rights to  
24 procedural and substantive due process." Id. at 1400. The court  
25 stated that, although Egan's holding was limited to the MPSB,  
26 "[t]he logic of that decision precludes judicial review as well."  
27 Id. at 1401. "When it comes to security matters, a federal court  
28 is 'an outside nonexpert body.' We have no more business

1 reviewing the merits of a decision to grant or revoke a security  
2 clearance than does the MPSB." Id. (quoting Egan, 484 U.S. at  
3 529). The court stated, "Although Dorfmont fashions her claims as  
4 due process challenges," her arguments--save two--were in fact  
5 "attacks on the merits of the decision to lift her security  
6 clearance." Id. The court held that "the district court has no  
7 authority to review" those challenges to the merits of the  
8 security clearance decision. Id. at 1402. As to the two due  
9 process challenges, the Dorfmont court held that, although they  
10 were justiciable, "a claim for denial of due process stemming from  
11 revocation of a security clearance is not a colorable  
12 constitutional claim." Id. at 1404.

13 Under these cases, to the extent that Plaintiff seeks a  
14 determination that he should be deemed to have passed the  
15 background clearance, his FCRA and declaratory relief claims are  
16 barred. This Court does not have the jurisdiction to review the  
17 merits of Federal Defendants' decision regarding Plaintiff's  
18 background investigation.

19 Instead of defending his claims that challenge the outcome of  
20 the background investigation, Plaintiff argues instead that he has  
21 asserted justiciable claims that challenge the procedures accorded  
22 to him. In support, Plaintiff cites cases that address claims for  
23 violation of the due process clause in the context of background  
24 investigations and security clearances. See Greene v. McElroy,  
25 360 U.S. 474 (1959); Kartseva v. Dep't of State, 37 F.3d 1524  
26 (D.C. Cir. 1994); Baillargeon v. Drug Enforcement Adm., 638 F.  
27 Supp. 2d 235 (D. R.I. 2009). Plaintiff, however, has not asserted  
28 any such constitutional claims in his 1AC.

1           Accordingly, because Plaintiff's declaratory relief and FCRA  
2 claims seek a determination that he should be granted the security  
3 clearance, the Court finds that they are not justiciable and  
4 dismisses them without leave to amend. Because Plaintiff has not  
5 plead a claim for violation of his procedural due process rights  
6 in the background investigation, the Court declines to address  
7 whether any such hypothetical claims would be justiciable.

8 IV. Declaratory Relief Claim

9           Federal Defendants contend that Plaintiff has not identified  
10 any proper jurisdictional basis for his declaratory relief claim.

11           The Declaratory Judgment Act (DJA) provides that "any court  
12 of the United States, upon the filing of an appropriate pleading,  
13 may declare the rights and other legal relations of any interested  
14 party seeking such declaration, whether or not further relief is  
15 or could be sought." 28 U.S.C. § 2201(a). The "DJA expanded the  
16 scope of the federal courts' remedial powers" but it did not  
17 create or modify the courts' jurisdiction, "which must properly  
18 exist independent of the DJA." Countrywide Home Loans, Inc. v.  
19 Mortg. Guar. Ins. Corp., 642 F.3d 849, 853 (9th Cir. 2011). "In  
20 other words, federal courts have discretion under the DJA only as  
21 to whether to award declaratory relief pursuant to the  
22 jurisdiction that they must properly derive from the underlying  
23 controversy between the litigants." Id.

24           In his response, Plaintiff asserts that the APA provides a  
25 valid basis for declaratory relief. Plaintiff, however, has not  
26 cited the APA in his 1AC or asserted any claim for relief under  
27 the APA in his current pleading. Instead, in his opposition  
28 brief, Plaintiff seeks leave to amend to add an APA claim and a

1 constitutional claim. Because Plaintiff does not appear to  
2 dispute that he has provided no proper jurisdictional basis for  
3 his declaratory relief claim as plead in his 1AC, the Court grants  
4 Federal Defendants' motion to dismiss this claim.

5 V. Plaintiff's Request for Leave to Amend to Assert New Claims

6 In his opposition, Plaintiff requests leave to amend to  
7 assert new claims under the APA, the due process clause of the  
8 Fifth Amendment or both, which are not plead in his 1AC.

9 Plaintiff has improperly presented this request in an  
10 opposition brief and has not moved for permission to add new  
11 claims, as required by the Federal Rules of Civil Procedure and  
12 the Civil Local Rules of this Court. See Federal Rule of Civil  
13 Procedure 7(b)(1) ("A request for a court order must be made by  
14 motion."); Civil Local Rules 7-1 and 7-2. Plaintiff also does not  
15 address whether leave to amend should be granted pursuant to  
16 Federal Rule of Civil Procedure 15(a) or the five factors that  
17 courts consider when assessing the propriety of a motion for leave  
18 to amend: undue delay, bad faith, futility of amendment, prejudice  
19 to the opposing party and whether the plaintiff has previously  
20 amended the complaint. Ahlmeyer v. Nev. Sys. of Higher Educ., 555  
21 F.3d 1051, 1055 n.3 (9th Cir. 2009). Finally, Plaintiff does not  
22 provide his proposed pleading as required by Civil Local Rule 10-1  
23 and it is not clear what his proposed claims would be.

24 Accordingly, the Court denies Plaintiff's improper request  
25 for leave to assert new claims, without prejudice to Plaintiff  
26 renewing his request in a properly filed motion within two weeks  
27 of the date of this Order, as set forth below.

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CONCLUSION

For the reasons set forth above, the Court GRANTS Federal Defendants' motion to dismiss (Docket No. 36). Plaintiff's claims for violation of the FCRA against Federal Defendants and his declaratory relief claim are DISMISSED without leave to amend.

Within two weeks of the date of this Order, Plaintiff may file a motion for leave to amend his complaint to add new claims against Federal Defendants under the APA or the due process clause, including a declaratory relief claim based on these provisions. With any such motion, Plaintiff shall attach his proposed amended complaint and shall address why leave to amend should be granted. If Plaintiff files a motion for leave to amend, Federal Defendants shall file a response within two weeks thereafter, Plaintiff shall file a reply within one week thereafter and the Court will resolve the motion for leave to amend on the papers.

The case management conference currently set for Thursday, March 7, 2013, at 2:00 p.m. is CONTINUED to Wednesday, April 24, 2013, at 2:00 p.m.

IT IS SO ORDERED.

Dated: February 27, 2013

  
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CLAUDIA WILKEN  
United States District Judge