

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NO. 13-15197

**W. SCOTT HARKONEN,
Plaintiff-Appellant.**

v.

**UNITED STATES DEPARTMENT OF JUSTICE and
UNITED STATES OFFICE OF MANAGEMENT AND BUDGET
Defendants-Appellees.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NO. 4:12-CV-00629 (WILKENS, J.)**

**EXCERPTS OF RECORD
VOLUME 1**

<p>COLEEN KLASMEIER KATHLEEN M. MUELLER SIDLEY AUSTIN LLP 1501 K STREET, N.W. WASHINGTON, DC 20005 TEL.: (202) 736-8000 FAX: (202) 736-8711</p>	<p>MARK E. HADDAD COUNSEL OF RECORD SIDLEY AUSTIN LLP 555 WEST FIFTH STREET, SUITE 4000 LOS ANGELES, CA 90013 TEL.: (213) 896-6000 FAX: (213) 896-6600</p>
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Attorneys for Plaintiff-Appellant Dr. W. Scott Harkonen

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

W. SCOTT HARKONEN, M.D.,

No. C 12-629 CW

Plaintiff,

ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS (Docket
No. 8) AND DENYING
PLAINTIFF'S MOTION
FOR SUMMARY
JUDGMENT (Docket
No. 21)

v.

UNITED STATES DEPARTMENT OF
JUSTICE; and UNITED STATES OFFICE
OF MANAGEMENT AND BUDGET,

Defendants.

_____ /

This case arises out of Defendant United States Department of Justice (DOJ)'s denial of Plaintiff W. Scott Harkonen's multiple requests for correction of a press release that DOJ disseminated announcing Plaintiff's criminal conviction for wire fraud. Plaintiff seeks review of these denials and brings facial and as-applied challenges to the information quality guidelines promulgated by DOJ and co-Defendant United States Office of Management and Budget (OMB). Defendants move to dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes and cross-moves for summary judgment. Having considered the papers filed by the parties and their arguments at the hearing, the Court GRANTS Defendants' motion to dismiss and DENIES Plaintiff's motion for summary judgment.

BACKGROUND

I. Statutory and Administrative Framework

A. The Information Quality Act (IQA)

The IQA, which was enacted in 2000, provides in full:

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(a) In general. The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) Content of guidelines. The guidelines under subsection (a) shall--

(1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and

(2) require that each Federal agency to which the guidelines apply--

(A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);

(B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and

(C) report periodically to the Director--

(i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and

(ii) how such complaints were handled by the agency.

44 U.S.C. § 3516, note.

Title 44 U.S.C. § 3504(d)(1), in turn, provides, "With respect to information dissemination, the Director [of the OMB] shall develop and oversee the implementation of policies,

1 principles, standards, and guidelines to . . . apply to Federal
2 agency dissemination of public information, regardless of the form
3 or format in which such information is disseminated."

4 B. OMB Guidelines

5 On June 28, 2001, the OMB issued proposed guidelines
6 implementing the IQA and requesting public comment. 66 Fed. Reg.
7 34489.

8 On September 28, 2001, the OMB issued final guidelines
9 implementing the IQA. 66 Fed. Reg. 49718. At that time, the OMB
10 requested additional comments on a provision not relevant to the
11 case at hand and, after receiving further comments, issued updated
12 final guidelines on February 22, 2002. See 67 Fed. Reg. 8452
13 (hereinafter, the OMB guidelines).

14 The OMB guidelines require agencies to "adopt a basic
15 standard of quality (including objectivity, utility, and
16 integrity) as a performance goal," including "specific standards
17 of quality that are appropriate for the various categories of
18 information they disseminate." 67 Fed. Reg. 8458-59. "Quality is
19 to be ensured and established at levels appropriate to the nature
20 and timeliness of the information to be disseminated." Id. at
21 8458. "'Objectivity' includes whether disseminated information is
22 being presented in an accurate, clear, complete, and unbiased
23 manner." Id. at 8460. The guidelines also require agencies to
24 "develop a process to review the quality . . . of information
25 before it is disseminated," and "administrative mechanisms
26 allowing affected persons to seek and obtain, where appropriate,
27 timely correction of information maintained and disseminated by
28 the agency that does not comply with OMB or agency guidelines."

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1 Id. at 8459. Finally, agencies are required to prepare reports
2 providing the agency's information quality guidelines and
3 information regarding the number and nature of the complaints
4 received by the agency and how they were resolved. Id.

5 By their terms, the OMB guidelines apply to "information"
6 that is "disseminated by Federal agencies." Id. at 8458. The
7 guidelines define information to mean "any communication or
8 representation of knowledge such as facts or data, in any medium
9 or form," including "information that an agency disseminates from
10 a web page," but not "opinions, where the agency's presentation
11 makes it clear that what is being offered is someone's opinion
12 rather than fact or the agency's views." Id. at 8460. The
13 guidelines define dissemination as "agency initiated or sponsored
14 distribution of information to the public," but states that this
15 definition "does not include distribution limited to
16 correspondence with individuals or persons, press releases,
17 archival records, public filings, subpoenas or adjudicative
18 processes." Id.

19 The guidelines direct that the administrative correction
20 process "shall be flexible" and "appropriate to the nature and
21 timeliness of the disseminated information." Id. at 8459. The
22 OMB commentary provided when the guidelines were published states
23 that it "does not envision administrative mechanisms that would
24 burden agencies with frivolous claims," and that "[a]gencies, in
25 making their determination of whether or not to correct
26 information, may reject claims made in bad faith or without
27 justification, and are required to undertake only the degree of
28 correction that they conclude is appropriate for the nature and

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1 timeliness of the information involved." Id. at 8458. It notes
2 that "an objective process will ensure that the office that
3 originally disseminates the information does not have
4 responsibility for both the initial response and resolution of a
5 disagreement." Id.

6 C. DOJ Guidelines

7 On May 14, 2002, DOJ published notice in the Federal Register
8 that its draft guidelines had been posted to its public web site
9 and requested public comments. 67 Fed. Reg. 34475. On October 4,
10 2002, DOJ published notice in the Federal Register that its final
11 guidelines were available on its public website. 67 Fed. Reg.
12 6266. The final guidelines are currently available at
13 <http://www.justice.gov/iqpr/iqpr.html>. See also Pl.'s Ex. E
14 (hereinafter, the DOJ guidelines).

15 The introduction to the DOJ guidelines notes that the DOJ
16 produces "a variety of information which is provided to the
17 public," including "Departmental briefs in major cases,
18 regulations, business review letters, memoranda, press releases,
19 opinions, research, statistical and special reports, newsletters,
20 and general publications," although "[n]ot all of this information
21 falls within these guidelines." DOJ guidelines. The DOJ
22 guidelines focus on three areas: (1) the basic standard of
23 quality, including objectivity, utility and integrity; (2) the
24 process for reviewing the quality of information; and (3) the
25 process for citizen complaint. Id. As to objectivity, the
26 guidelines state that "DOJ components will ensure disseminated
27 information, as a matter of substance and presentation, is
28 accurate, reliable, and unbiased." Id. As to objectivity, the

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1 guidelines provide that "DOJ components will ensure disseminated
2 information, as a matter of substance and presentation, is
3 accurate, reliable, and unbiased." Id.

4 The guidelines provide that "DOJ will correct information
5 that does not meet its guidelines or those of OMB based on the
6 significance and impact of the correction." Id. They further
7 state, "Except for those categories of information that are
8 specifically exempt from coverage . . . , these guidelines apply to
9 all information disseminated by DOJ," including "information that
10 an agency disseminates from a web page." Id. The stated
11 exceptions include "information disseminated in the following
12 contexts: . . . press releases, fact sheets, press conferences or
13 similar communications (in any medium) that announce, support or
14 give public notice of information in DOJ." Id.

15 As required by the IQA and OMB guidelines, the DOJ guidelines
16 set forth procedures for submitting requests for correction of DOJ
17 information. Under the guidelines, "DOJ will normally respond to
18 requests for correction of information within 60 calendar days of
19 receipt." Id. The guidelines provide that "DOJ is not required
20 to change, or in any way alter, the content or status of
21 information simply based on the receipt of a request for
22 correction," and that "[a]ny corrective action will be determined
23 by the nature and timeliness of the information involved and such
24 factors as the significance of the error on the use of the
25 information and the magnitude of the error." Id. Further, under
26 the guidelines, DOJ "need not respond substantively to frivolous
27 or repetitive requests for correction," or "to requests that
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1 concern information not covered by the guidelines or from a person
2 whom the information does not affect." Id.

3 "If the requestor disagrees with DOJ's denial of the request
4 or with the corrective action the Department intends to take, the
5 requestor may file a request for reconsideration with the
6 disseminating DOJ component" within forty-five days of DOJ's
7 decision on the original request for correction. Id. DOJ "should
8 generally provide that the official conducting the second level
9 review is not the same official that responded to the initial
10 request." Id. "DOJ will respond to all requests for
11 reconsideration within 45 calendar days of receipt." Id.

12 The DOJ guidelines also specify, "These guidelines are not a
13 regulation. They are not legally enforceable and do not create
14 any legal rights or impose any legally binding requirements or
15 obligations on the agency or the public. Nothing in these
16 guidelines affects any otherwise available judicial review of
17 agency action." Id.

18 II. The Underlying Criminal Case

19 In March 2008, Plaintiff was indicted for wire fraud in
20 violation of 18 U.S.C. § 1343 and felony misbranding of a drug in
21 violation of 21 U.S.C. §§ 331(k), 333(a)(2) and 352(a). Docket
22 No. 1, United States v. Harkonen, Case No. 08-CR-164 (N.D. Cal.)
23 (Patel, J.).¹

24

25

26 ¹ The Court takes judicial notice of the allegations made in
27 the indictment but not the truth of these allegations. The Court
28 provides these allegations as context to understand the factual
background presented by the parties, particularly by Plaintiff,
but notes that these allegations were not relevant to the
determination of the instant motions.

1 In relevant part, the indictment made the following
2 allegations: Plaintiff was the Chief Executive Officer of
3 InterMune, Inc. from February 1998 through at least June 30, 2003
4 and was a member of its Board of Directors from February 1998
5 through September 2003. InterMune developed, marketed and sold
6 drugs, including a drug sold under the brand name Actimmune.
7 Actimmune was approved by the FDA to treat two rare disorders that
8 primarily affect children, chronic granulomatous disease and
9 severe, malignant osteopetrosis. It was not approved by the FDA
10 to treat idiopathic pulmonary fibrosis (IPF), a fatal lung disease
11 that mainly affects middle-aged people.

12 In October 2000, InterMune began a Phase III clinical trial,
13 named the GIPF-001 trial, to determine whether treating IPF
14 patients with Actimmune was effective.

15 In August 2002, data from that clinical trial failed to show
16 that Actimmune was effective in treating IPF. Plaintiff discussed
17 the results of the trial with his staff at InterMune and directed
18 them to conduct additional analyses on subgroups of patients.
19 This after-the-fact analysis suggested a survival trend for
20 patients whose IPF was described by InterMune as "mild to
21 moderate."

22 On August 27, 2002, Plaintiff and some InterMune employees
23 spoke with the FDA about the results of the GIPF-001 Phase III
24 trial and additional subgroup analyses of patient deaths. The FDA
25 medical reviewer staff advised Plaintiff that the trial data were
26 not sufficient to gain FDA approval for Actimmune to treat IPF and
27 that further clinical testing would be required to determine
28 whether Actimmune could delay death for IPF patients.

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1 On August 28, 2002, InterMune issued a nationwide press
2 release publicly announcing the results of the GIPF-001 Phase III
3 clinical trial. Plaintiff wrote the headline and subheading and
4 controlled the content of the entire press release. Plaintiff
5 caused the press release to be posted on InterMune's website and
6 to be sent to a wire service for release to news outlets
7 nationwide. The headline stated, "InterMune Announces Phase III
8 Data Demonstrating Survival Benefit of Actimmune in IPF," with the
9 subheading "Reduces Mortality by 70% in Patients With Mild to
10 Moderate Disease."

11 This press release, which is attached to Plaintiff's
12 complaint in the instant case and was offered by him as evidence
13 in support of his motion for summary judgment, also stated:

14 InterMune, Inc. (Nasdaq: ITMN) announced today that
15 preliminary data from its Phase III clinical trial of
16 Actimmune® (Interferon gamma-1b) injection for the
17 treatment of idiopathic pulmonary fibrosis (IPF), a
18 debilitating and usually fatal disease for which there
19 are no effective treatment options, demonstrate a
20 significant survival benefit in patients with mild to
21 moderate disease randomly assigned to Actimmune versus
22 control treatment (p = 0.004). . . .

23 Importantly, Actimmune also demonstrated a strong
24 positive trend in increased survival in the overall
25 patient population, and a statistically significant
26 survival benefit in patients with mild to moderate IPF.
27 . . .

28 Haddad Decl. ¶ 3, Compl., Ex. 2.

The wire fraud count alleged that the press release
"contained materially false and misleading information regarding
Actimmune and falsely portrayed the results of a GIPF-001 Phase
III trial as establishing that Actimmune reduces mortality in
patients with IPF."

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1 At a pretrial conference in the criminal case, the prosecutor
2 acknowledged that the allegations in the indictment were not that
3 the data in the study were "transposed or changed in any way," but
4 rather challenged the interpretation and presentation of the data.
5 See Haddad Decl. ¶ 4, Compl., Ex. 3G, 28.

6 During closing arguments, when discussing the press release,
7 the prosecutor stated, "I don't need to spend any time on the
8 numbers in there. We all know the numbers are correct." Id. at
9 3698:20-21.

10 On September 29, 2009, the jury convicted Plaintiff of wire
11 fraud and acquitted him of felony misbranding. Docket No. 240,
12 United States v. Harkonen, No. 08-CR-164.

13 On November 17, 2010, at the first sentencing hearing, the
14 prosecutor stated, "The Government has always agreed that there
15 was no falsification of data here, so that fact is not in dispute,
16 and there's no need to have anyone testify on that. With respect
17 to whether there was a falsification of the conclusions that could
18 be drawn from the data, that was what the trial was all about.
19 That was the central issue in the trial . . ." Haddad Decl. ¶ 8,
20 Compl., Ex. 7; see also Docket No. 301, 9:1-8, United States v.
21 Harkonen, No. 08-CR-164.

22 Similar statements were made at the second sentencing hearing
23 on April 13, 2011. The court stated that "there's no dispute, is
24 there, that the data that's actually referred to in the press
25 release is accurately reflected? Is that correct?" Haddad Decl.
26 ¶ 9, Compl., Ex. 8; Docket No. 373, 12:1-3, United States v.
27 Harkonen, No. 08-CR-164. The prosecutor responded, "No dispute.
28 The government says the conclusions were inaccurate" and "were

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1 false." Id. at 12:4-8. The court replied, "It's the
2 interpretation thereof, et cetera. Is that correct? Okay." Id.
3 at 12:9-10.

4 At the April 13, 2011 hearing, Judge Patel declined to impose
5 a sentence enhancement based on proof that an actual loss had been
6 suffered by victims, stating:

7 The Court finds . . . that whichever burden of proof the
8 Court would use, that it is unable to determine with a
9 sufficient degree of accuracy that . . . there is a loss
10 as a result of the conduct reflected in the wire fraud
11 count . . . there just isn't enough evidence in the
12 record under either burden of proof to satisfy the Court
13 that there is a loss as a result of the press release.

14 Id. at 116:14-25.

15 Plaintiff's appeal from the criminal conviction and the
16 government's cross-appeal of his sentence are currently pending
17 before the Ninth Circuit. See United States v. Harkonen, Case
18 Nos. 11-10209 & 11-10242 (9th Cir.).

19 III. The DOJ Press Release and Requests for Correction

20 On September 29, 2009, the same day that the jury returned
21 the verdict in the criminal trial, the United States Attorney's
22 Office in this district issued a press release announcing the
23 verdict. Haddad Decl. ¶ 2, Compl., Ex. 1. At issue in this case
24 are the following two paragraphs of the press release, and
25 particularly the underlined sections:

26 "Mr. Harkonen lied to the public about the results of a
27 clinical trial and offered false hope to people stricken
28 with a deadly disease. Manipulating scientific research
and falsifying test results damages the foundation of
the clinical trial process and undermines public trust
in our system for drug approval," said FBI Special Agent
in Charge Stephanie Douglas.

Douglas J. Carver, Special Agent in Charge of the U.S.
Department of Veterans Affairs, Office of Inspector
General, Western Field Office, stated "today's verdict,

1 which resulted from a complex and labor-intensive
2 investigation and trial, demonstrates our commitment to
3 work with our law enforcement partners to aggressively
4 pursue all individuals that would jeopardize the
5 integrity and safety of the VA's health care system.
6 The actions of this defendant served to divert precious
7 financial resources from the VA's critical mission of
8 providing healthcare to this nation's military veterans.
9 . . ."

10 Id. at 2 (emphasis added).

11 On February 11, 2010, Plaintiff submitted his first request
12 for correction of the press release to the United States
13 Attorney's Office, under the DOJ guidelines. Haddad Decl. ¶ 4,
14 Compl., Ex. 3. Plaintiff requested that the government correct
15 its description of the charges against him, and stated, "The
16 Government's assertion in the DOJ press release that Dr. Harkonen
17 'falsif[ied] test results' thus misrepresents what the Government
18 sought to prove in the case and misleads the public as to what the
19 jury actually found, and as to why Dr. Harkonen was convicted."

20 Id. at 1-3.

21 On March 15, 2010, H. Marshall Jarrett, Director of the DOJ's
22 Executive Office for United States Attorneys sent Plaintiff a
23 letter denying his request on two bases. Haddad Decl. ¶ 5,
24 Compl., Ex. 4. First, he stated that, because the complained-of
25 statement was disseminated in a press release, it was not covered
26 by the OMB or DOJ guidelines, which expressly exclude press
27 releases from their coverage. Id. at 1. Second, he asserted,
28 "Even if the guidelines applied, no retraction is necessary
because the statement at issue is correct." Id. He explained,

While we agree that Mr. Harkonen did not change the
data, he nevertheless used it to support his false and
misleading conclusions. Because data alone is
meaningless without analysis and conclusions, Mr.
Harkonen's false statements regarding the data's meaning

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1 were part and parcel of the results. Thus, it was
accurate to say that he falsified the results.

2 Id. at 2.

3 On April 20, 2010, Plaintiff submitted a request for
4 reconsideration. Haddad Decl. ¶ 6, Compl., Ex. 5. In the
5 request, he argued that the DOJ guidelines did apply to the press
6 release, because it was posted on a web page and because it did
7 not "announce, support or give public notice of information in
8 DOJ," but rather "announced the verdict of a criminal trial in
9 federal court." Id. at 2-3. He further contended that, when an
10 agency's "guidelines address an issue that is treated only more
11 generally in the OMB guidelines, the agency's own, more specific
12 guidelines control," and thus that the OMB guidelines could not be
13 used to limit coverage under the DOJ guidelines. Id. at 3. He
14 also argued that the press release did fall within the OMB
15 guidelines, in part because a 2003 U.S. Attorneys' Manual stated,
16 "The use of a press release . . . is the usual method to release
17 public information to the media by Department of Justice
18 components and investigative agencies." Id. at 3-4. Finally, he
19 maintained that the DOJ's defense of the merits of the statement
20 was "nonsensical" and "ignores the well-recognized distinction
21 between scientific data and scientific analysis." Id. at 4-5
22 (emphasis in original).

23 On July 2, 2010, Jarrett responded, rejecting Plaintiff's
24 request for reconsideration. Haddad Decl. ¶ 7, Compl., Ex. 6. He
25 stated that "a press release that announces a successful
26 prosecution is clearly public information in the Department of
27 Justice," and thus that the press release falls within the
28 exception. Id. at 1. He also stated that the "guidelines make no

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1 distinction between a press release that is posted on the Internet
2 and one that is issued any other way (e.g., fax or mail)," and
3 that "the very fact that the information is contained in a press
4 release . . . exempts it from the guidelines." Id. He did not
5 address directly Plaintiff's argument on the merits of the
6 statement, but noted, "Because the guidelines do not apply to
7 press releases, the Department was not required to respond
8 substantively to your initial request for a retraction." Id.

9 On June 8, 2011, Plaintiff submitted to the United States
10 Attorney's Office his second request for correction of the press
11 release. Haddad Decl. ¶ 10, Compl., Ex. 9. In this request, he
12 argued that the statement in the press release that his actions
13 "served to divert precious financial resources from the VA's
14 critical mission of providing healthcare to this nation's military
15 veterans" was inaccurate and violated the DOJ and OMB guidelines,
16 because the government had been unable to prove during the
17 sentencing phase of his criminal case that the Actimmune press
18 release had caused a loss to any victim, including to the VA. Id.
19 at 1-3. He also repeated many of his earlier arguments regarding
20 the applicability of the DOJ and OMB guidelines to press releases.

21 On August 4, 2011, Jarrett rejected Plaintiff's second
22 request for two reasons. Haddad Decl. ¶ 11, Compl., Ex. 10. He
23 again stated that the press release was not covered by either the
24 OMB or DOJ guidelines. Id. at 1-2. He also asserted, "Even if
25 the guidelines applied, no retraction is necessary because the
26 statement accurately described the government's position." Id. at
27 2. He explained,

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1 As you know, the government has consistently maintained
2 that Dr. Harkonen's false and misleading press release
3 fraudulently caused patients to seek and doctors to
4 prescribe Actimmune as a treatment for idiopathic
5 pulmonary fibrosis, thereby leading to increased sales
6 of Actimmune. Although the district court found that
7 the government did not meet its burden of proving actual
8 loss for purposes of Dr. Harkonen's sentencing, this
9 does not mean the press release did not have any effect
10 on Actimmune's sales. The district court simply held
11 that it was not possible to determine with the degree of
12 certainty necessary for Dr. Harkonen's sentencing, the
13 role the press release played in the increased sales of
14 Actimmune that followed after the press release over
15 eight years ago.

16 Moreover, the statement that Dr. Harkonen's actions
17 "served to divert precious financial resources from the
18 VA's critical mission of providing health care to this
19 nation's military veterans" can reasonably be
20 interpreted to mean that Dr. Harkonen's wrongdoing
21 necessitated an investigation into the matter by the
22 Veterans Administration. As the investigation into this
23 matter was comprehensive, it was accurate to say that it
24 diverted precious financial resources from the VA's
25 primary mission.

26 Id. at 2.

27 On August 22, 2011, Plaintiff submitted a request for
28 reconsideration of the August 4 decision. Haddad Decl. ¶ 11,
29 Compl., Ex. 10. Plaintiff asked that his request be reviewed by
30 someone other than Jarrett. Plaintiff argued again that the press
31 release was covered by the OMB and DOJ guidelines, that this
32 statement did not concern "information in DOJ" and that the
33 government was unable to provide any evidence in support of the
34 assertion that the VA had lost money that would have been devoted
35 to health care for veterans. Id. at 1-5. He further contended
36 that the argument that the VA investigation used financial
37 resources that could otherwise have been devoted to the VA's
38 central mission of health care for veterans was incorrect. Id. at
39 6. He argued that "a reasonable reader would assume that the VA
40 chose to allocate funds that already were designated for the

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1 investigation of potential health care fraud to the investigation
2 of this case" because the VA's Office of Inspector General "is
3 'independent" from the VA and is considered 'a separate Federal
4 agency with annual budgetary submission requirements.'" Id.
5 (quoting VA 2010 Organizational Briefing Book 42).

6 On October 7, 2011, Jarrett sent a response, stating that the
7 second request for reconsideration would "not be accommodated."
8 Haddad Decl. ¶ 13, Compl., Ex. 12, 1. He explained,

9 As we have previously explained, the Guidelines do not
10 apply to press releases. Moreover, because the
11 Guidelines do not apply to press releases, the
12 Department was not required to respond substantively to
13 your June 8, 2011 request for a retraction and,
14 similarly, is not required to respond substantively to
15 your most recent request for reconsideration. The
16 Guidelines provide that "[t]he Department need not
17 respond substantively . . . to repetitive requests for
18 correction . . . [nor to] requests that concern
19 information not covered by the guidelines.

20 Id.

21 On February 8, 2012, Plaintiff initiated the instant case
22 against DOJ and the OMB under the IQA and the Administrative
23 Procedure Act (APA), 5 U.S.C. § 701, et seq. Docket No. 1. In
24 the first count, asserted against DOJ only, Plaintiff asserts that
25 DOJ's denial of his first and second requests for correction was
26 arbitrary and capricious, an abuse of discretion and contrary to
27 law. In the second count, also asserted against DOJ only,
28 Plaintiff asserts that the exclusion of press releases from the
DOJ guidelines is arbitrary and capricious, an abuse of
discretion, and contrary to law. In the third count, asserted
against the OMB only, Plaintiff asserts that the exclusion of
press releases from the OMB guidelines is arbitrary and
capricious, an abuse of discretion, and contrary to law.

1 On April 9, 2012, the government filed this motion to
2 dismiss. Docket No. 8.

3 On July 2, 2012, Plaintiff filed his cross-motion for summary
4 judgment and opposition to the government's motion to dismiss.
5 Docket No. 21.

6 DISCUSSION

7 I. Defendants' Motion to Dismiss

8 Defendants argue that Plaintiff's complaint should be
9 dismissed because there is no private right of action under the
10 IQA and his claims are not subject to judicial review under the
11 APA. Plaintiff responds that he has not asserted a private right
12 of action under the IQA and seeks review under the APA only. He
13 contends that the APA does provide for judicial review of the
14 DOJ's denial of his requests for correction.

15 A. Legal Standard

16 A complaint must contain a "short and plain statement of the
17 claim showing that the pleader is entitled to relief." Fed. R.
18 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
19 state a claim, dismissal is appropriate only when the complaint
20 does not give the defendant fair notice of a legally cognizable
21 claim and the grounds on which it rests. Bell Atl. Corp. v.
22 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
23 complaint is sufficient to state a claim, the court will take all
24 material allegations as true and construe them in the light most
25 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
26 896, 898 (9th Cir. 1986). However, this principle is inapplicable
27 to legal conclusions; "threadbare recitals of the elements of a
28 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 When granting a motion to dismiss, the court is generally
4 required to grant the plaintiff leave to amend, even if no request
5 to amend the pleading was made, unless amendment would be futile.
6 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
7 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
8 amendment would be futile, the court examines whether the
9 complaint could be amended to cure the defect requiring dismissal
10 "without contradicting any of the allegations of [the] original
11 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
12 Cir. 1990).

13 Although the court is generally confined to consideration of
14 the allegations in the pleadings, when the complaint is
15 accompanied by attached documents, such documents are deemed part
16 of the complaint and may be considered in evaluating the merits of
17 a Rule 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d
18 1265, 1267 (9th Cir. 1987).

19 B. Final Agency Action

20 The APA provides judicial review for "final agency action for
21 which there is no other adequate remedy in a court." 5 U.S.C.
22 § 704. "[T]wo conditions must be satisfied for agency action to
23 be 'final': First, the action must mark the 'consummation' of the
24 agency's decisionmaking process, . . . And second, the action
25 must be one by which 'rights or obligations have been determined,'
26 or from which 'legal consequences will flow.'" Bennett v. Spear,
27 520 U.S. 154, 177-78 (1997) (internal citations omitted). "As the
28 Supreme Court has stated, '[t]he core question is whether the

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1 agency has completed its decisionmaking process, and whether the
2 result of that process is one that will directly affect the
3 parties.'" Indus. Customers of Nw. Utilities v. Bonneville Power
4 Admin., 408 F.3d 638, 646 (9th Cir. 2005) (quoting Franklin v.
5 Massachusetts, 505 U.S. 788, 797 (1992)). Defendants do not
6 dispute that the first requirement is met. Instead, their dispute
7 centers on the second requirement.

8 Defendants argue that the IQA does not create any right to
9 correct information and thus that there was no right affected by,
10 and no legal consequence to, the denial of Plaintiff's requests
11 for correction. Plaintiff responds that the text of the statute
12 confers legal rights on persons who are affected by an agency's
13 dissemination of incorrect information and that the denial of his
14 requests for correction interferes with these rights.

15 "The general rule is that administrative orders are not final
16 and reviewable 'unless and until they impose an obligation, deny a
17 right, or fix some legal relationship as a consummation of the
18 administrative process.'" Ukiah Valley Med. Ctr. v. FTC, 911 F.2d
19 261, 264 (9th Cir. 1990) (quoting Chicago & S. Air Lines, Inc. v.
20 Waterman S.S. Corp., 333 U.S. 103, 113 (1948)). "When an action
21 is not a 'definitive' statement of the" agency's "position and
22 does not have a 'direct and immediate . . . effect on the day-to-
23 day business' of the subject party, it is not 'final.'" Id.
24 (quoting FTC v. Standard Oil Co., 449 U.S. 232, 239 (1980)).
25 "Other relevant factors include whether the order has the status
26 of law or comparable legal force, and whether immediate compliance
27 with its terms is expected." Id.

28

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1 Courts that have reviewed the IQA have uniformly found that
2 it "does not create any legal right to information or its
3 correctness." Salt Inst. v. Leavitt, 440 F.3d 156, 159 (4th Cir.
4 2006); see also Habitat for Horses v. Salazar, 2011 WL 4343306, at
5 *7 (S.D.N.Y.); Single Stick, Inc. v. Johanns, 601 F. Supp. 2d 307,
6 317 (D.D.C. 2009), rev'd in part on other grounds sub nom. Prime
7 Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010); Wood ex
8 rel. U.S. v. Applied Research Associates, Inc., 2008 WL 2566728,
9 at *6 (S.D.N.Y.); Haas v. Gutierrez, 2008 U.S. Dist. LEXIS 48762,
10 at *25 (S.D.N.Y.); Ams. for Safe Access v. U.S. Dept. of Health &
11 Human Services, 2007 WL 2141289, at *4 (N.D. Cal.), aff'd on other
12 grounds, 399 F. App'x 314 (9th Cir. 2010). Several district
13 courts have held that, as a result, the agencies' actions did not
14 determine the plaintiff's rights or cause any legal consequence,
15 and thus that there was no final agency action. Single Stick, 601
16 F. Supp. 2d at 317 ("Because the IQA does not vest any party with
17 a right to information or to correction of information, . . . the
18 USDA's actions under the IQA did not determine Single Stick's
19 rights or cause any legal consequence."); Salt Inst. v. Thompson,
20 345 F. Supp. 2d 589, 602 (E.D. Va. 2004) ("Agency dissemination of
21 advisory information that has no legal impact has consistently
22 been found inadequate to constitute final agency action and thus
23 is unreviewable by federal courts under the APA."), aff'd on
24 alternate grounds sub nom., Salt Inst. v. Leavitt, 440 F.3d 156
25 (4th Cir. 2006); see also Ams. for Safe Access, 2007 WL 2141289,
26 at *4 (rejecting plaintiff's argument that "the legal consequence
27 of HHS's final decision denying ASA's [p]etition and appeal is
28 that ASA has been deprived of its right under the IQA to seek and

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1 obtain the timely correction of incorrect information" because
2 plaintiff "failed to plead that the IQA grants any legal right to
3 the correction of information").²

4 Plaintiff offers no cases in which a court has held to the
5 contrary. Instead, Plaintiff seeks to diminish the importance of
6 the district court cases by pointing out that, on appeal, the
7 appellate courts did not directly address this issue and affirmed
8 the decisions on other grounds. For example, in Americans for
9 Safe Access, the district court granted the plaintiff leave to
10 amend to "proceed on a theory that defendants unlawfully withheld
11 or delayed agency action by not giving a substantive response to
12 plaintiff's petition." 2007 WL 2141289, at *5. After the
13 plaintiff amended its complaint and the defendants moved again for
14 dismissal, the district court dismissed the case, finding that the
15 IQA and OMB guidelines did not create a duty for agencies to
16 perform actions that are legally required. Ams. for Safe Access
17 v. U.S. Dept. of Health & Human Services, 2007 WL 4168511, at *1-4
18 (N.D. Cal.). On appeal, the Ninth Circuit affirmed the district
19 court's dismissal of the action on the basis that the agency had
20 made only an "interlocutory decision" on the IQA petition at issue
21 and deferred its final decision; thus, there had been no

22 _____
23 ² On December 2, 2011, the House of Representatives passed
24 H.R. 3010, which would, among other things, amend 5 U.S.C. § 704
25 of the APA to specify, "Denial by an agency of a correction
26 request or, where administrative appeal is provided for, denial of
27 an appeal, under an administrative mechanism described in
28 subsection (b)(2)(B) of the Information Quality Act, or the
failure of an agency within 90 days to grant or deny such request
or appeal, shall be final action for purposes of this section."
On December 5, 2011, the Senate referred the bill to the Committee
on Homeland Security and Governmental Affairs; since then, no
further action has been taken. 2011 H.R. 3010.

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1 "consummation of the agency's decision making process," as
2 required by the first Bennett criterion. Ams. for Safe Access v.
3 Dept. of Health & Human Services, 399 F. App'x 314, 315-16 (9th
4 Cir. 2010) (internal quotation marks omitted). The court did not
5 reach the second Bennett criterion and thus did not address
6 whether the action was one by which rights or obligations were
7 determined or from which legal consequences flowed. In Prime
8 Time, the D.C. Circuit upheld the OMB's decision to exclude
9 documents prepared and distributed in the context of adjudicative
10 proceedings as a reasonable interpretation of the IQA, worthy of
11 deference. 599 F.3d at 685-86. In neither decision did the
12 appellate court directly question the district court's holding
13 that the agency action did not determine the plaintiff's rights or
14 cause any legal consequence.

15 Plaintiff suggests that, because the D.C. Circuit reached the
16 merits of the IQA claim in Prime Time--the only case to do so--a
17 contrary finding was implicit, because the court had to find first
18 that it had jurisdiction under the APA to review the merits of the
19 IQA claim before it could proceed to do so. However, "the appeals
20 court specifically concluded the underlying agency action--USDA's
21 determination of manufacturer's assessments under the Fair and
22 Equitable Tobacco Reform Act ('FETRA')--was an adjudicatory
23 proceeding subject to judicial review directly under FETRA" and
24 thus there was no need to, and the appellate court did not,
25 consider whether judicial review was also available under the APA.
26 Family Farm Alliance v. Salazar, 749 F. Supp. 2d 1083, 1096-1100
27 (E.D. Cal. 2010); see Prime Time, 599 F.3d at 686 ("USDA's
28 determination of Prime Time's assessments for three quarters of FY

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1 2005 was an adjudication, attendant to which Prime Time had rights
2 to an administrative appeal and judicial review" under 7 U.S.C.
3 § 518d(i), (j)). Thus, Prime Time does not support that, by
4 reaching the substantive question, the court found there was a
5 right to review under the APA.

6 Plaintiff also tries to distinguish Salt Institute because
7 the plaintiffs in that case sought the release of information, not
8 correction of it, and the appellate court held that the plaintiffs
9 lacked standing, instead of addressing the APA requirements.
10 Pl.'s Cross-Mot. for Summ. J. and Opp. to Defs.' Mot. to Dismiss
11 (Pl.'s Cross-Mot.), 15. However, the appellate decision is not so
12 limited; in it, the court discussed the IQA in detail and broadly
13 stated that "this statute creates no legal rights in any third
14 parties" and "does not create any legal right to information or
15 its correctness." Salt Inst. v. Leavitt, 440 F.3d at 158-59.

16 Further, this result is concordant with the IQA. The IQA
17 does not, as Plaintiff contends, state that the guidelines
18 "'shall' give 'affected persons' such as Dr. Harkonen an
19 opportunity 'to seek and obtain correction of information
20 maintaining and disseminated by the agency . . .'" Pl.'s Cross-
21 Mot. at 13. Instead, the IQA requires that the OMB draft
22 guidelines about information quality within a certain time frame
23 and sets forth particular requirements about the content of those
24 guidelines, including that the guidelines address the
25 establishment of administrative mechanisms for requests for
26 correction. It does not provide that individuals have a right to
27 correct information. Thus, the denial of Plaintiff's request for
28 correction did not deny him a legal right.

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1 Plaintiff also contends that DOJ's denials of his requests
2 for correction "have the 'legal consequence' that [he] did not
3 obtain the press release corrections that he sought under the DOJ
4 Guidelines." Pl.'s Cross-Mot. at 13. Although this may have the
5 practical consequence that Plaintiff has not obtained what he
6 wanted, it does not have any legal consequence for him. For
7 example, DOJ's denial has no direct or immediate effect on his
8 day-to-day activities, nor is he required to take any action
9 because of it.

10 Plaintiff cites several cases that he states establish, "When
11 a statute gives a person the right to request an agency to take an
12 action, the agency's decision not to take the requested action is
13 'final agency action,' regardless of whether the agency had
14 discretion to deny the request." Id. at 14. However, the statute
15 here does not give Plaintiff the right to request that DOJ correct
16 information nor the right to obtain a correction; instead, it
17 requires the OMB to promulgate guidelines by which agencies must
18 create procedures for such requests.

19 Further, the cases that Plaintiff cites on this point are
20 inapposite. Plaintiff states that he cites Fox TV Stations, Inc.
21 v. FCC, 280 F.3d 1027, 1037 (D.C. Cir. 2002), for the "general
22 proposition" that "'an agency's denial of a petition to initiate a
23 rulemaking for the repeal or modification of a rule is a final
24 agency action subject to judicial review.'" Pl.'s Reply, 7.
25 However, the present case does not deal with Defendants' refusal
26 to embark on formal rulemaking; instead, Plaintiff seeks to
27 address DOJ's refusal to change a press release. In Intercity
28 Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984), the

1 Interstate Commerce Commission refused to institute a declaratory
2 order proceeding, which the D.C. Circuit found had legal
3 consequence because it "had the potential of infringing upon
4 petitioners' statutory right to a reasoned agency disposition of
5 its request," as provided under a separate section of the APA, 5
6 U.S.C. § 554(e), which is inapplicable here. Here, there is no
7 separate legal right that Defendants' refusal has infringed, as
8 discussed above. Finally, the cases that Plaintiff offers
9 regarding the statute under which members of the Armed Forces can
10 seek correction of their records are inapplicable. In his cross-
11 motion, Plaintiff cites Barber v. Widnall, 78 F.3d 1419 (9th Cir.
12 1996), but this decision does not address final agency action or
13 whether an action is reviewable under the APA. In his reply,
14 Plaintiff cites Clinton v. Goldsmith, 526 U.S. 529 (1999); in
15 Clinton, the Court collects cases to support the proposition that
16 a servicemember can challenge an agency's decision to drop him
17 from the rolls, or otherwise dismiss him, as final agency action.
18 Id. at 539. Plaintiff argues that these are "clearly parallel" to
19 the case at hand but fails to explain why. "When a servicemember
20 is dropped from the rolls, he forfeits his military pay." Id. at
21 532 n.1. This, unlike the denial in the case at hand, affects
22 legal rights.

23 Accordingly, the Court holds that there has been no final
24 agency action in the case at hand.

25 C. Committed to Agency Discretion by Law

26 Under 5 U.S.C. § 701(a)(2), judicial review is foreclosed
27 when the challenged "agency action is committed to agency
28 discretion by law." One instance in which agency action is exempt

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1 from judicial review under this provision is when "'a court would
2 have no meaningful standard against which to judge the agency's
3 exercise of discretion' and there thus 'is no law to apply.'" Newman v. Apfel, 223 F.3d 937, 943 (9th Cir. 2000) (quoting
4 Heckler v. Chaney, 470 U.S. 821, 830 (1985)). The Supreme Court
5 has emphasized that this "is a very narrow exception" and
6 "applicable in those rare instances where statutes are drawn in
7 such broad terms that in a given case there is no law to apply."
8 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402,
9 410 (1971) (internal quotation marks and citations omitted),
10 overruled on other grounds, Califano v. Sanders, 430 U.S. 99, 105
11 (1977).

12
13 Defendants contend that both agencies' decisions to exclude
14 press releases from their IQA guidelines and DOJ's decision not to
15 issue a correction were committed to their discretion by law.

16 "In determining whether judicial review is precluded on
17 § 701(a)(2) grounds," the Ninth Circuit considers "'the language
18 of the statute and whether the general purposes of the statute
19 would be endangered by judicial review.'" Pinnacle Armor, Inc. v.
20 United States, 648 F.3d 708, 719 (9th Cir. 2011) (quoting Cnty. of
21 Esmeralda v. Dep't of Energy, 925 F.2d 1216, 1218 (9th Cir.
22 1991)). "Therefore, 'the mere fact that a statute contains
23 discretionary language does not make agency action unreviewable.'" Id. (quoting Beno v. Shalala, 30 F.3d 1057, 1066 (9th Cir. 1994)).
24 In addition to the relevant statute, courts also look to
25 "regulations, established agency policies, or judicial decisions"
26 for a meaningful standard against which to review the agency's
27 exercise of discretion. Id. (citing Mendez-Gutierrez v. Ashcroft,

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1 340 F.3d 865, 868 (9th Cir. 2003)); see also Padula v. Webster,
2 822 F.2d 97, 100 (9th Cir. 1987) ("Judicially manageable standards
3 may be found in formal and informal policy statements and
4 regulations as well as in statutes, but if a court examines all
5 these possible sources and concludes that there is, in fact, no
6 law to apply, judicial review will be precluded.") (internal
7 quotation marks and citations omitted).

8 Several courts have considered whether the judicial review of
9 various agency decisions under the IQA is prohibited on
10 § 701(a)(2) grounds. In In re Operation of the Missouri River
11 System Litigation, 363 F. Supp. 2d 1145, 1174 (D. Minn. 2004), the
12 plaintiffs challenged the defendants' failure to comply with their
13 request for "information and science" regarding proposed flow
14 plans for the Missouri River. The court found that there was no
15 meaningful standard against which to evaluate the agency's
16 decision to deny the information quality request. It reached this
17 conclusion because, "[a]lthough the IQA directs the [OMB] to issue
18 guidelines that provide policy and procedural guidance to Federal
19 agencies for ensuring and maximizing the quality, objectivity,
20 utility, and integrity of information disseminated by the agency,
21 the plain language of the legislation fails to define these
22 terms," and "the history of the legislation fails to provide any
23 indication as to the scope of these terms." Id. at 1174-75.

24 In Salt Institute, the plaintiffs challenged the National
25 Heart, Lung and Blood Institute (NHLBI)'s denial of their request
26 for disclosure of all data and methods connected with a clinical
27 trial. The district court held that judicial review of the
28 NHLBI's decisions was not available under the APA "because the IQA

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1 and OMB guidelines at issue insulate the agency's determinations
2 of when correction of information contained in informal agency
3 statements is warranted." 345 F. Supp. 2d at 602-03. In so
4 holding, it stated,

5 Neither the IQA nor the OMB Guidelines provide
6 judicially manageable standards that would allow
7 meaningful judicial review to determine whether an
8 agency properly exercised its discretion in deciding a
9 request to correct a prior communication. In fact, the
10 guidelines provide that "agencies, in making their
11 determination of whether or not to correct information,
12 may reject claims made in bad faith or without
13 justification, and are required to undertake only the
14 degree of correction that they conclude is appropriate
15 for the nature and timeliness of the information
16 involved." 67 Fed. Reg. at 8458. Courts have
17 determined that regulations containing similar language
18 granted sufficient discretion to agencies to preclude
19 judicial review under the APA.

20 Id.

21 In Family Farm Alliance, a court of the Eastern District of
22 California considered whether the IQA and its implementing
23 guidelines committed to agency discretion the agency actions that
24 the plaintiff challenged, which were the timing of the Fish and
25 Wildlife Service (FWS)'s responses to requests for correction and
26 appeals and the makeup of peer review panels. Before going on to
27 address the agency's regulations in relation to each of these, the
28 court noted that "the IQA itself contains absolutely no
substantive standards, let alone any standards relevant to the
claims brought in this case" Id. at 1092. The court then
also concluded that the OMB and FWS guidelines did preserve the
agency's discretion regarding these matters. Id. at 1093-1100.

Here, in his second and third claims, Plaintiff challenges
the decisions of the OMB and DOJ to exempt from their guidelines
information disseminated in a press release. The IQA mandates

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1 that the OMB "issue guidelines . . . that provide policy and
2 procedural guidance to Federal agencies for ensuring and
3 maximizing the quality, objectivity, utility, and integrity of
4 information . . . disseminated by Federal agencies." 44 U.S.C.
5 § 3516, note. It further requires that the OMB's guidelines
6 provide that the agencies also shall "issue guidelines ensuring
7 and maximizing the quality, objectivity, utility, and integrity of
8 information . . . disseminated by the agency." Id. However, as
9 the District of Minnesota held in Missouri River, the plain
10 language of the IQA does not define these terms, and its history
11 does not provide any indication as to their scope. The IQA's
12 terms in fact direct the OMB itself to establish policy to guide
13 the agencies.

14 Plaintiff argues that the direction that the OMB's
15 regulations provide guidance to agencies to maximize the quality,
16 objectivity, utility, and integrity of information disseminated is
17 a sufficiently meaningful standard by which to review the contents
18 of the regulations of the OMB and DOJ. He points to cases in
19 which the Ninth Circuit has found that regulations and statutes
20 are sufficiently meaningful for review and argues that the
21 standards in the IQA have more content than the ones addressed in
22 those cases.

23 However, Plaintiff is incorrect; the statute and regulations
24 examined in those cases provide significantly more meaningful
25 standards for review than the IQA does. In Socop-Gonzalez v. INS,
26 208 F.3d 838 (9th Cir. 2000), the Ninth Circuit found that the
27 Board of Immigration Appeal (BIA)'s regulations, which provided
28 that it could reopen proceedings sua sponte "in exceptional

1 situations," provided a meaningful standard for review of agency
2 actions where the "exceptional situations" standard is used
3 throughout federal immigration law and courts routinely decide
4 challenges to the BIA's exercise of discretion under that
5 standard. Id. at 844-45. In Beno, the Ninth Circuit found that
6 the statute allowing the Secretary of Health and Human Services to
7 waive certain federal laws related to California's Medicaid plain
8 provided "a meaningful standard by which to judge the Secretary's
9 waiver," where it allowed "waivers only for the period and extent
10 necessary to implement experimental projects which are 'likely to
11 assist in promoting the objectives' of the AFDC program,"
12 objectives that were set out with specificity elsewhere in federal
13 law. 30 F.3d at 1067. In Keating v. Federal Aviation Admin., 610
14 F.2d 611 (9th Cir. 1980), the Ninth Circuit considered a statute
15 that provided that the Federal Aviation Administration (FAA)
16 administrator "may grant exemptions" to pilots excusing compliance
17 with certain regulations "if he finds that such action would be in
18 the public interest." Id. at 612. The court held "that the
19 'public interest' standard provides law to be applied by the
20 administrator sufficient to permit judicial review." Id.

21 Here, as noted, the IQA requires the OMB to issue guidelines
22 that "provide policy and procedural guidance" on "ensuring and
23 maximizing the quality, objectivity, utility, and integrity of
24 information" disseminated by agencies. 44 U.S.C. § 3516, note.
25 However, it provides no standard by which the content of the
26 guidelines is to be measured. Accordingly, the Court holds, like
27 the court in Missouri River, that the IQA provides no substantive
28 standards by which to evaluate whether the OMB and DOJ regulations

1 could exclude press releases from the covered dissemination of
2 information.

3 Further, the IQA and agency guidelines do not create a
4 meaningful standard by which to review DOJ's denial of Plaintiff's
5 requests for correction. The IQA is silent on the standards by
6 which an affected person's request for correction should be
7 judged. The OMB guidelines provide that agencies "are required to
8 undertake only the degree of correction that they conclude is
9 appropriate for the nature and timeliness of the information
10 involved," which is akin to saying that the decision is committed
11 to the agency's discretion. The DOJ guidelines also reserve to
12 the agency wide discretion in how to respond to a request for
13 correction and repeats language similar to the OMB guidelines. It
14 also provides that DOJ "is not required to change, or in any way
15 alter, the content or status of information simply based on the
16 receipt of a request for correction." Accordingly, like the
17 district court in Salt Institute, this Court holds that the IQA
18 and agency guidelines grant sufficient discretion to the DOJ to
19 preclude judicial review under the APA.

20 Thus, because there was no final agency action and the denial
21 was committed to agency discretion by law, the Court GRANTS
22 Defendants' motion to dismiss in its entirety.³ Because amendment
23 would be futile, the Court does not grant Plaintiff leave to
24 amend.

25 _____
26 ³ Because the Court grants Defendants' motion in full on
27 other grounds, it does not reach their implied preclusion
28 argument, in which they contend that the IQA's statutory scheme
demonstrates that Congress intended to preclude judicial review
through its creation of an alternative review procedure.

1 II. Plaintiff's Motion for Summary Judgment

2 Because the Court grants Defendants' motion to dismiss,
3 Plaintiff's cross-motion for summary judgment is moot. However,
4 because the parties have briefed the issues extensively, the
5 Court briefly remarks on several arguments made by the parties
6 and notes that, had it reached the merits of Plaintiff's motion,
7 it would have denied it.

8 A. Legal Standard

9 Summary judgment is properly granted when no genuine and
10 disputed issues of material fact remain, and when, viewing the
11 evidence most favorably to the non-moving party, the movant is
12 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
13 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
14 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
15 1987).

16 The moving party bears the burden of showing that there is no
17 material factual dispute. Therefore, the court must regard as
18 true the opposing party's evidence, if supported by affidavits or
19 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
20 815 F.2d at 1289. The court must draw all reasonable inferences
21 in favor of the party against whom summary judgment is sought.
22 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
23 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
24 F.2d 1551, 1558 (9th Cir. 1991).

25 B. Statute of Limitations

26 Defendants contend that Plaintiff's motion for summary
27 judgment on his second and third claims, facial challenges to the
28 lawfulness of the OMB and DOJ guidelines, must be denied because

1 they are time-barred. This argument was not raised in their
2 motion to dismiss.

3 The Ninth Circuit has held that, if a "person wishes to bring
4 a policy-based facial challenge" to a government decision, the
5 challenge "must be brought within six years of the decision."
6 Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th
7 Cir. 1991) (holding that the general six-year statute of
8 limitations for civil actions brought against the United States,
9 28 U.S.C. § 2401(a), applies to actions for judicial review
10 brought under the APA). "If, however, a challenger contests the
11 substance of an agency decision as exceeding constitutional or
12 statutory authority, the challenger may do so later than six years
13 following the decision by filing a complaint for review of the
14 adverse application of the decision to the particular challenger."
15 Id.

16 The OMB and DOJ guidelines were both issued in 2002, more
17 than nine years before Plaintiff initiated this suit. Plaintiff
18 conceded at oral argument that his second and third claims are
19 time-barred. The parties agree that Plaintiff's first claim,
20 which presents an as-applied challenge based on the denial of his
21 requests for correction, is timely because the denials took place
22 in 2010 and 2011, less than six years before he initiated this
23 action.

24 C. Accuracy of the Press Release

25 Plaintiff claims that DOJ "abandoned" its reliance on the
26 accuracy of the press release when Jarrett denied his requests for
27 reconsideration. The Court finds it did not. In the responses to
28 the requests for reconsideration, Jarrett did not explicitly

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1 repudiate the position that the challenged statements in the press
2 release were accurate. Instead, he explained that the requests
3 for reconsideration had not persuaded him to change the
4 determination that the information was not covered by the
5 guidelines and the guidelines did not require any substantive
6 response to such requests, even though he had provided one. That
7 he did not repeat the reasons that he determined that the press
8 release was accurate did not mean that DOJ abandoned the
9 reasoning.

10 Under the APA, DOJ's denial of the petitions for correction
11 "may be set aside only if it is 'arbitrary, capricious, an abuse
12 of discretion, or otherwise not in accordance with law.'" Save
13 the Peaks Coal. v. United States Forest Serv., 669 F.3d 1025, 1035
14 (2012) (quoting Se. Alaska Conservation Council v. Fed. Highway
15 Admin., 649 F.3d 1050, 1056 (9th Cir. 2011)). "Review under the
16 arbitrary and capricious standard is narrow, and we do not
17 substitute our judgment for the agency's judgment." Id.
18 (citations omitted).

19 In the first request for correction, Plaintiff attacked what
20 he believed to be a suggestion in the press release that he
21 "falsif[ied] test results," arguing that the government had always
22 conceded that he had not falsified the data from the study. In
23 DOJ's response to the request for correction, it explained that,
24 although it agreed that he did not change the data, the press
25 release did not say that he falsified the data, but rather the
26 results. It explained that Plaintiff's false statements about the
27 data's meaning and the conclusions to be drawn from the data "were
28 part and parcel of the results," and thus it was accurate to say

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1 that he falsified the results. Thus, even if the agency
2 guidelines had encompassed press releases, Plaintiff has not
3 established that DOJ's conclusion that this statement was accurate
4 and did not warrant correction was arbitrary, capricious, an abuse
5 of discretion, or otherwise not in accordance with law.

6 In the second request for correction, Plaintiff challenged
7 the statement that his conduct "served to divert precious
8 financial resources from the VA's critical mission of providing
9 healthcare to this nation's military veterans." DOJ denied this
10 request, noting that this "accurately described the government's
11 position." Haddad Decl. ¶ 11, Compl., Ex. 10, 2. Although the
12 court subsequently found, more than a year and a half after the
13 challenged press release was issued, that the prosecution had not
14 introduced evidence sufficient to meet its burden to prove for
15 sentencing enhancement purposes that an actual loss had occurred,
16 this does not mean that no financial resources were diverted.
17 Plaintiff points to no authority that requires the government to
18 establish the truth of anything that it puts into a press release
19 at the same standard at which it must prove sentencing
20 enhancements in court. Accordingly, even if the agency guidelines
21 encompassed press releases, Plaintiff has not established that the
22 denial of his second request for correction was an abuse of
23 discretion, arbitrary, capricious or contrary to the law.

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CONCLUSION

For the reasons set forth above, the Court GRANTS Defendants' motion to dismiss (Docket No. 8) and DENIES as moot Plaintiff's motion for summary judgment (Docket No. 21).

The Clerk shall enter judgment and close the file. Defendants shall recover their costs from Plaintiff.

IT IS SO ORDERED.

Dated: 12/3/201



CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 31, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: May 31, 2013

s/ Mark E. Haddad
Mark E. Haddad (CABN 205945)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, California 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600