

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THOMAS A. O'DONNELL,
Plaintiff,

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF DEFENSE,
Defendants.

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:
: CIVIL ACTION
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: NO. 04-00101
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:

Memorandum and Order

YOHN, J.

January ____, 2006

Currently pending before the court is a motion to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), made by the defendants United States of America ("U.S.") and the U.S. Department of Defense ("DOD"). The defendants contend that the court lacks subject matter jurisdiction over the plaintiff's claims under the Federal Tort Claims Act ("FTCA") because the Federal Employees Compensation Act ("FECA") is his exclusive remedy and that the plaintiff's allegations of violations of the Privacy Act fail to state a claim upon which relief can be granted. For the reasons set forth below, the motion will be denied.

I. FACTUAL & PROCEDURAL BACKGROUND¹

Plaintiff Thomas A. O'Donnell ("O'Donnell"), is currently employed by the DOD, as an

¹The factual account accepts all allegations in the complaint as true. *See Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996).

auditor of defense contracts for the Defense Contract Audit Agency (“DCAA”), a component of the DOD that performs audit services for defense contracts, and is based in the Philadelphia office. O’Donnell is required to undergo periodic security background investigations due to the sensitive nature of his employment. Information gathered in these investigations is compiled and maintained in a confidential records system called Security Background Personnel Review (“SBPR”) files.

In September 1994, O’Donnell received treatment from a psychiatrist for a personal medical condition. In 1999, during a periodic security reinvestigation, O’Donnell told investigators from the Defense Security Services (“DSS”), a component of the DOD responsible for security clearance investigations, of his psychiatric treatment. On January 28, 2000 he signed a release authorizing the DSS to review his psychiatrist’s records.

DSS transferred O’Donnell’s entire SBPR file to Washington Headquarters Services (“WHS”), a component of the DOD responsible for adjudicating personnel security clearances, under a warning stating:

This file is the property of the Defense Security Service. Contents may be disclosed only to persons whose official duties require access hereto. Contents may not be disclosed to party(s) concerned without specific authorization from the Defense Security Service.

On July 26, 2001, O’Donnell received a memo from WHS requesting his agreement to undergo evaluation by an independent psychiatrist, and O’Donnell assented.

The complaint states that at some point DCAA headquarters in Washington received his SBPR file and DCAA then sent the file, which included his psychiatric records, to the Philadelphia branch office to schedule an independent psychiatric evaluation for O’Donnell. The

file was in an envelope containing the instruction “to be opened only by Barbara Reilly,” the regional director of the Philadelphia office. However, O’Donnell claims that his supervisor, Robert Melby (“Melby”) received, opened, and read his SBPR file. On January 10, 2002, O’Donnell learned from a co-worker that at least part of his SBPR file had been forwarded to the DCAA branch office in Philadelphia and was in Melby’s possession. This co-worker, who was in charge of arranging O’Donnell’s appointment with the psychiatrist, said that Melby had offered him O’Donnell’s file, but that the co-worker refused to take possession of or read the file.

The next day, Melby informed O’Donnell that he was in possession of the SBPR file and that he had read the contents. O’Donnell asked to see his file so he could view what Melby had read about him; Melby told O’Donnell that he was not entitled to see his own file and that he should speak with DCAA headquarters about how to gain access to his file.

Between January 11 and January 15, 2002, O’Donnell claims to have called the DCAA headquarter’s acting Security officer, Jennifer Lindenbaum (“Lindenbaum”), four times in reference to reviewing his own SBPR file. On January 15, 2002, Lindenbaum returned O’Donnell’s phone calls and allegedly told O’Donnell that she had read his file and was aware of his psychiatric records. She informed him that though there were no written procedures for the handling of such confidential files, his SBPR file had been sent to the Philadelphia office solely for the purpose of scheduling the psychiatric evaluation. After requesting again to view his SBPR file, Linbenbaum instructed O’Donnell to write a letter to the WHS to request authorization under the Privacy Act to review his file. O’Donnell sent out this written request the next day.

On February 15, 2002, the WHS informed O’Donnell that he needed to provide proof of

identity as a prerequisite for approval to access his file. On March 19, 2002, O'Donnell was informed that he could access the small portion of the file generated by the WHS, but that he would have to submit a separate request to DSS to view the majority of his file, which had been generated by DSS. On April 6, 2002, O'Donnell finally received the major portion of his file from DSS, which included his actual psychiatric records and the doctor's handwritten notes.

O'Donnell claims that he only authorized the release of his psychiatric records to DSS and that he was stunned to discover that Melby and Lindenbaum had access to his actual psychiatric records. He alleges that he only signed the release because DSS informed him that it might be unable to determine his suitability for access to classified defense information without the release. O'Donnell's understanding was that his psychiatric records were strictly confidential and would not be disclosed outside of DSS and that they would be returned to the psychiatrist after DSS review. He claims that the transfer of his confidential file from WHS to DCAA headquarters, and then to the DCAA branch office was unnecessary to schedule an independent psychiatric evaluation. He also claims that his psychiatric evaluation was in fact scheduled by someone who never read or took possession of the SBPR file.

On April 15, 2002 O'Donnell wrote a letter to Judy Smith, the Privacy Act Officer for the Mid-Atlantic Region, in an attempt to pursue an administrative remedy for the violation of his privacy. On May 29, 2002, O'Donnell received a response, which he found unsatisfactory. On June 27, 2002, O'Donnell wrote a letter of "appeal" to Jody Trenary, Assistant Director, Resources for DCAA. O'Donnell received a response from Trenary on July 31, 2002, which stated that there had been no unauthorized disclosure of personal information because Lindenbaum and Melby had a need for the information and that no disclosure accounting was required. O'Donnell claims that Trenary's letter expressly concluded the administrative remedies

process.

On January 6, 2004, O'Donnell filed a personal injury claim with the U.S. Army Tort Claim Division alleging invasion of privacy, intrusion upon seclusion, and a violation of the Constitutional right to privacy. The plaintiff next filed a complaint in this court on January 9, 2004, alleging that there is no valid reason for his SBPR file to have been disclosed to the DCAA, Lindenbaum, or Melby and that his privacy rights were willfully and intentionally violated. The complaint contains eleven separate counts: Counts I-V charge the defendants with various violations of the Federal Privacy Act, 5 U.S.C. § 552a; Count VI alleges violations of the United States and Pennsylvania Constitutions; Count VII claims violations of the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2679 and Pennsylvania's Mental Health Procedures Act, 50 P.S. § 7101, et seq.; Counts VIII and IX allege further violations of the Federal Privacy Act, 5 U.S.C. § 552a; Count X asserts further violations of the Federal Tort Claims Act, 28 U.S.C. §§1346 and 2679; and Count IX asserts additional violations of the United States Constitution.

On March 12, 2004, the defendants filed a motion to dismiss arguing, *inter alia*, that the plaintiff had failed to exhaust his remedies under the Federal Tort Claims Act ("FTCA") and the Federal Employees Compensation Act ("FECA"), Lindenbaum and Melby were not proper parties to the lawsuit, and that the United States had not waived sovereign immunity as to the Constitutional claims. The plaintiff did not respond to the motion and on March 31, 2004, this court entered an order dismissing the complaint. However, on April 7, 2004, the plaintiff filed a motion for reconsideration, seeking to have the court reconsider the March 31, 2004 order

dismissing the case.² On April 8, 2004 the court granted the plaintiff's uncontested motion, vacated the March 31, 2004 order, and dismissed all claims against Lindenbaum and Melby by agreement of counsel. The plaintiff filed a brief opposing the motion to dismiss on April 19, 2004.

On April 21, 2004, the court issued an order placing the case in civil suspense, pending the completion of the administrative claim with the U.S. Army Tort claim division. On September 10, 2004, the U.S. Army Tort Claim Division denied O'Donnell's claim. On July 8, 2005, plaintiff's counsel advised the court of the denial and the case was brought out of civil suspension on July 13, 2005.

On August 11, 2005, after a status conference, I dismissed the defendants' previous motion to dismiss without prejudice to the right of the defendants to file a new motion to dismiss based on the changed circumstances. On September 9, 2005, the defendants filed a second motion to dismiss. The same day the parties stipulated to amend the caption to dismiss all of the defendants except the United States of America and the DOD, and the parties WHS, DSS and the DCAA were terminated from the action.³ On October 11, 2005, the plaintiff filed a brief in

²The plaintiff's attorney claimed he was inadvertently late in filing a response and that dismissal of the plaintiff's claim would result in manifest injustice. The government concurred in this motion, upon the plaintiff's agreement to dismiss Lindenbaum and Melby from the complaint. See Motion for Reconsideration, ¶¶ 3-6, 13.

³The defendants claim that "the changed circumstances are that the only claims now remaining in this case are those brought by plaintiff under the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., and the Federal Privacy Act, 5 U.S.C. § 552a." Def. Br. 6. However, because the March 31, 2004 order dismissing the case was vacated, the Plaintiff's claims were reinstated in full, with the exception of the dismissal of all claims against Lindenbaum and Melby. After WHS, DSS, and DCAA were terminated as parties, Counts IV-VI and VIII, which were brought exclusively against DSS, and Count IX, which was brought exclusively against WHS, were dismissed. Therefore, the plaintiff's remaining viable claims at this point include Counts I-

opposition to the defendants' motion to dismiss.

II. SUBJECT MATTER JURISDICTION

I have jurisdiction to hear claims alleging violations of the Federal Privacy Act, 5 U.S.C. § 552a, under the court's federal question jurisdiction, 28 U.S.C. § 1331. Additionally, jurisdiction is proper under 28 U.S.C. § 1346(b) when the United States is a defendant to a claim.

III. STANDARD OF REVIEW

When a defendant challenges subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of persuasion. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991). However, the plaintiff's burden is light. *Dugan v. Coastal Industries, Inc.*, 96 F. Supp. 2d 481, 482-83 (E.D. Pa. 2000). "A district court can grant a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the legal insufficiency of a claim. But dismissal is proper only when the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" *Kehr Packages*, 926 F.2d at 1408-1409 (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). Where the defendants' motion is not merely a facial challenge to the district court's jurisdiction, the court is not limited to the face of the pleadings in determining whether it has subject matter jurisdiction; it "may review any evidence to resolve factual disputes concerning the existence of jurisdiction."⁴

III, alleging violations of the Privacy Act, Counts VII and X, alleging claims under the FTCA, and Count XI, alleging violations of the plaintiff's privacy rights under the United States Constitution. Defendants' belief that plaintiff has dropped his federal constitutional claim is not supported by the record.

⁴A motion under Rule 12(b)(1) may take the form of either a factual or a facial challenge to subject matter jurisdiction. See *Singer v. Commissioner*, No. 99-2783, 2000 U.S. Dist. LEXIS 57 at *3-4 (E.D. Pa. Jan. 7, 2000) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). Where there is a factual challenge to subject matter jurisdiction, the

Gotha v. U.S., 115 F.3d 176, 179 (3d Cir. 1997).

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts must accept as true all well-pled allegations in the complaint, and any reasonable inferences that may be drawn therefrom, to determine whether “under any reasonable reading of the pleadings, the plaintiff may be entitled to relief.” *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). Although courts must construe the complaint in the light most favorable to the plaintiff, they need not “accept as true unsupported conclusions and unwarranted inferences.” *Schuylkill Energy Res. v. Pa. Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997).

Courts will grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) if a plaintiff can prove no set of facts to support the allegations that would entitle her to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

IV. DISCUSSION

A. Claims Brought Pursuant to the FTCA (Counts VII, X)

In Counts VII and X the plaintiff asserts violations of the FTCA, 28 U.S.C. §§ 1346 and 2679, claiming the United States is responsible for: (1) disclosing his psychiatric records to WHS

court's consideration is not limited to allegations in the plaintiff's complaint; the court may also consider evidence outside the pleadings. *Mortensen*, 549 F.2d at 891-92. Therefore, this court may consider the affidavit and accompanying letter of Edward G. Duncan, the Deputy Director for Federal Employee's Compensation, attached as Exhibit A to the Brief in Support of Defendants' Motion to Dismiss.

without his express written authorization to do so, in violation of Pennsylvania’s Mental Health Procedures Act, 50 P.S. §§ 7111 and 7113 (Count VII), and (2) the tort of intrusion upon seclusion as a result of the reading of his confidential SBPR file by Melby and Lindenbaum (Count X). See Compl. ¶¶ 85-89, 99-107. The plaintiff claims to have suffered “embarrassment, humiliation, emotional distress, and an invasion of his privacy” because of the defendants’ conduct. *Id.*

The government argues that the court lacks subject matter jurisdiction over the plaintiff’s claims, because the FECA, 5 U.S.C. §§8101-8152, provides an exclusive comprehensive remedy to a federal employee for work related injuries. Def. Br. 7-9. Therefore the plaintiff is barred from pursuing claims under the FTCA because his exclusive remedies, if any, are under the FECA. *Id.* In response, the plaintiff argues that the claims of mental and emotional injury he asserts under the FTCA are not covered under the FECA and that he is not claiming he was disabled in any way which would cause FECA to apply. Pl. Br. 5-7.

The FECA provides that “[t]he United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.” 5 U.S.C. § 8102(a). A federal court lacks subject matter jurisdiction to entertain claims that are covered by the FECA. 5 U.S.C. § 8128(b); *see also Heilman v. United States*, 731 F.2d 1104, 1110 (3d Cir. 1984); *DiPippa v. United States*, 687 F.2d 14, 17 (3d Cir. 1982). Only the Secretary of Labor or his designee may determine the scope of FECA coverage. 5 U.S.C. § 8128(b). “In deference to such authority, this court has held that where a ‘substantial question’ of FECA coverage exists, federal district courts will not entertain claims under the FTCA.” *Di Pippa* 687 F.2d at 16. A “substantial question” exists unless the

court is certain that the Secretary of Labor would find no coverage under the FECA. *Horton v. United States*, 144 Fed. Appx. 931, 932 (3d Cir. 2005).

The court concludes that there is a substantial question of FECA coverage in this case. The parties dispute whether the emotional harms allegedly suffered by plaintiff are “injuries” that fall within the coverage of the FECA. While some courts have held that emotional distress injuries are not covered by FECA, other courts have declared that FECA encompasses emotional distress claims. *Compare Lucente v. Bolger*, No. 84-4176, 1985 U.S. Dist. LEXIS 19248, at *2 (E.D. Pa. 1985) (“incidents involving federal employees that give rise to psychological harm such as mental anguish and humiliation have been found by the Secretary to be covered by FECA”), *Tippets v. United States*, 308 F.3d 1091, 1094 (10th Cir. 2002) (finding that claims of intentional infliction of emotional distress and invasion of privacy presented a “substantial question of coverage” under FECA), *McDaniel v. United States*, 970 F.2d 194, 198 (6th Cir. 1992) (“we agree [with the Secretary of Labor] that FECA covers McDaniel's claims” for negligent and intentional infliction of emotional distress), *Castro v. United States*, 757 F.Supp. 1149, 1151 (W.D. Wash. 1991) (because FECA covers emotional injuries, claim for intentional infliction of emotional distress under FTCA is barred), *with Lawrence v. United States*, 631 F.Supp. 631 (E.D.Pa. 1982) (“FECA does not provide coverage for mental suffering, humiliation, embarrassment or loss of employment. . . .”), *Sheehan v. United States*, 896 F.2d 1168, 1174 (9th Cir. 1990), amended , reh'g denied , en banc , 917 F.2d 424 (9th Cir. 1990) (finding that FECA compensates only for physical harm and the plaintiff’s alleged injury, emotional distress, is divorced from a claim of physical harm and therefore does not fall within the scope of FECA coverage), *De Ford v. Secretary of Labor*, 700 F.2d 281, 290 (6th Cir. 1983) (viewing intentional

discrimination as not causing an injury subject to FECA coverage).

The Employee Compensation Board (“ECAB”) has held explicitly that the FECA covers emotional injuries under certain circumstances. *See In the Matter re Lillian Cutler*, 28 ECAB 125 (1976), *In the Matter re Kathleen D. Walker*, 42 ECAB 603 (1991), *In the Matter re Gregory J. Meisenburg*, 44 ECAB 527, 529 (1993). Where a disability⁵ results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the FECA. *In the Matter re Lillian Cutler*, 28 ECAB 125 (1976). The Deputy Director for Federal Employees’ Compensation, Edward G. Duncan, in an advisory opinion specifically addressing the question of FECA coverage for O’Donnell’s claims, concluded that “there is a significant possibility that the plaintiff may be covered under FECA,” for the claims raised in this action. Def. Br. Exh. A, 3. O’Donnell’s injuries arose from the handling of his security file as part of the reinvestigation of his security clearance, which is a requirement imposed by his employment as a defense contract auditor for the DOD. Under these circumstances, I can not say with certainty that the Secretary of Labor would find that the plaintiff’s claims are not covered by the FECA; therefore, a

⁵Citing *Griffin v. United States*, 703 F.2d 321 (8th Cir 1983) and *Mason v. District of Columbia*, 395 A.2d 399 (D.C. 1978), the plaintiff argues that the FECA does not apply when the injury claimed does not disable the employee from performing his work. However, these cases do not support her argument. In *Griffin*, the there was no question that the plaintiff suffered a disabling back injury and the court specifically found that there was a substantial question of FECA coverage. 703 F.2d at 322. Though the court in *Mason* did find that the plaintiff’s emotional injury was not disabling, therefore FECA did not cover the claim, the incident giving rise to the suit was not as clearly within the scope of employment as O’Donnell’s injury. The plaintiff in *Mason* had walked across the street from her place of employment to mail a letter when she got into an argument with a police officer and was arrested without cause. *Mason*, 395 A.2d at 401. *Mason*’s claims of assault, battery, false arrest and imprisonment, were not as clearly within the scope of employment as O’Donnell’s claims involving his personal security file.

substantial question of FECA coverage exists.

Accordingly, the defendants' motion to dismiss is denied. I will place these claims in civil suspense until the Secretary of Labor determines whether the FECA covers plaintiff's tort claim for emotional injuries. *Di Pippa v. United States*, 687 F.2d 14, 20 (3d Cir. 1982) (holding that the appropriate remedy when there is a substantial question of FECA coverage is to stay proceedings in the action until the Secretary resolves the question of coverage, and not to dismiss the claim). The plaintiff should therefore pursue this claim under FECA, 5 U.S.C. § 8101, *et seq.*⁶ If the Secretary of Labor concludes that plaintiff's claim falls within the purview of FECA, then FECA is plaintiff's exclusive remedy. However, if the Secretary concludes that plaintiff's injury is not governed by FECA, I will then address the merits of plaintiff's emotional distress and intrusion upon seclusion claims.

B. Claims Brought Pursuant to the Privacy Act (I-III)

In Counts I-III, the plaintiff claims that the defendants violated various provisions of the Privacy Act, 5 U.S.C. §552a and numerous DOD regulations, including: (1) willful and intentional disclosure of O'Donnell's SBPR file in violation of 5 U.S.C. §§552a (b) and (e)(10) (Count I); (2) DOD's three month delay in providing the plaintiff with access to his security file in violation of 5 U.S.C. §§552a(d) and (e)(10) (Count II); and (3) failure to implement adequate

⁶Though FECA has a three year statute of limitations, there is an exception where an immediate superior had actual knowledge of the injury within 30 days. 5 U.S.C. § 8122(a). The complaint states that Melby, O'Donnell's superior, was aware of the plaintiff's concerns surrounding access to his SBPR file from the conversation that took place on January 11, 2002. Compl. ¶¶18-19, 22-23. In his advisory opinion, Deputy Director Duncan, states "it would appear that this communication would be sufficient to constitute actual knowledge of the immediate superior under 5 U.S.C. § 8122(a)(1), and a claim for benefits under the FECA based on the allegations of the complaint would therefore be timely filed." Def. Br. Exh. A, 7.

procedures to safeguard the confidentiality of security background files of employees, in violation of 5 U.S.C. §552a(e)(10) (Count III). Compl. ¶¶ 61-63, 65-68, 70-73.

The Privacy Act provides that an individual may bring a civil action against an agency, when the agency “fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.” 5 U.S.C. § 552a (g)(1)(D). To state a claim under 5 U.S.C. § 552a (g)(1)(D) for a violation of the Act's central prohibition against disclosure, 5 U.S.C. § 552a (b), “a plaintiff must advance evidence to support a jury's finding of four necessary elements: (1) the information is covered by the Act as a record contained in a system of records; (2) the agency ‘disclosed’ the information; (3) the disclosure had an adverse effect on the plaintiff . . .; and (4) the disclosure was ‘willful or intentional.’” *Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992).

The defendants claim that the plaintiff has failed to allege facts in support of elements (2) and (4). They argue that the plaintiff fails to state a claim because the information “disclosed” falls within an exception to 5 U.S.C. § 552a (b) which allows disclosures under certain circumstances. They contend that the alleged actions fall within either the exception which allows disclosures when agency employees have a “need to know”, 5 U.S.C. § 552a(b)(1), or the “routine use” exception to the Privacy Act, 5 U.S.C. § 552a(b)(3).⁷ Def. Br. 9-13. **The defendants also argue that the plaintiff has failed to state a claim because the actions in question were not “intentional or willful.”** Def. Br. 13-14. **The plaintiff argues in opposition that Melby**

⁷The defendants appear to argue that the “need to know” and “routine use” exceptions, 5 U.S.C. § 552a (b)(1) and (3), would absolve the defendants from any violation of the Privacy Act. However, though the plaintiff brings various claims under the Privacy Act, only Count I alleges disclosure violations of 5 U.S.C. § 552a (b), to which the “need to know” and “routine use” exceptions would apply.

and Lindenbaum had no need for his SBPR file to perform their duties. Pl. Br. 8-15. O'Donnell claims that the "routine use" exception only applies to inter-agency disclosures, not intra-agency disclosures, and that this information was not necessary for a "routine use." Pl. Br. 15-17. The plaintiff also argues that the complaint does allege intentional and willful conduct. Pl. Br. 18. I conclude that the defendants' motion to dismiss will be denied.

1. The "Need to Know" Exception to Disclosure - 5 U.S.C. § 552a (b)(1)

5 U.S.C. §552a (b)(1), known as the "need to know" exception, allows for disclosure "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." The defendants claim that both Lindenbaum and Melby needed to know the information contained in the plaintiff's personnel file to evaluate whether O'Donnell should have continuing access to classified documents. Def. Br. 9-11.

However, the allegations in the complaint, which are controlling at this juncture of the litigation, are to the contrary. The plaintiff clearly alleges in his complaint that "no one has ever articulated any reasons why Lindenbaum or Melby needed to read Mr. O'Donnell's file. No valid reasons exist." Compl. ¶¶ 42, 45, 53. The plaintiff claims that DCAA (in the person of Lindenbaum and Melby) received his SBPR file for the sole purpose of scheduling his independent psychiatric evaluation. Compl. ¶ 39. He then goes on to state that "[n]either possession nor reading of the confidential files was necessary for this purpose." *Id.* Though the defendants may at some later point in the litigation provide evidence to show that the need to know exception applies, courts must accept as true all well-pled allegations in the complaint when ruling on a motion to dismiss. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). Therefore, the plaintiff has sufficiently alleged in the complaint that the exception found in 5 U.S.C. § 552a

(b)(1) does not apply so that the claim survives a motion to dismiss.

2. The “Routine Use” Exception to Disclosure - 5 U.S.C. § 552a (b)(3)

5 U.S.C. § 552a (b)(3), known as the “routine use” exception to the prohibition on disclosure under the Privacy Act, allows disclosure “for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section.” The Privacy Act defines the term “routine use” to mean “with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.”⁸ 5 U.S.C. § 552a (a)(7). “Agencies that maintain a system of records are required to publish in the Federal Register a notice of ‘each routine use of the records contained in the system, including the categories of users and the purpose of each use.’” *Pippinger v. Rubin*, 129 F.3d 519, 532 (10th Cir. 1997) (citing 5 U.S.C. § 552a (e)(4)(D)). The DOD has set up “common blanket routine uses for all DoD-maintained systems of records” and “unless a system notice specifically excludes a system from a given blanket routine use, all blanket routine uses apply.” 32 C.F.R. § 310.41 (e)(5). A list of DOD blanket routine uses provides:

C. Routine Use--Disclosure of Requested Information

A record from a system of records maintained by a Component may be disclosed to a federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

⁸Though the plaintiff argues “routine use” should be defined as it is in 32 C.F.R. § 310.4 to mean “the disclosure of a record *outside of the Department of Defense*,” this court believes that the term “routine use” is sufficiently defined by the Privacy Act. *See* Pl. Br. 16. The “routine use” exception specifically states that disclosure is allowed “for a routine use as defined in subsection (a)(7) of this section.” 5 U.S.C. § 552a (b)(3).

32 C.F.R. Part 310, Appendix C (emphasis added).

There is insufficient information at this time to decide whether Melby's and Lindenbaum's review of O'Donnell's SBPR file falls within the routine use exception. However, the plaintiff does not allege that the DCAA received the SBPR file in response to a request. The complaint repeatedly contends that Lindenbaum and Melby's review of his psychiatric records was not necessary for determining the retention of his security clearance. Compl. ¶¶ 40, 42, 45, 53. Because it is unclear from the face of the plaintiff's complaint that the routine use exception applies, the motion to dismiss will be denied.

3. Intentional or Willful Disclosure - 5 U.S.C. § 552a (g)(4)

Though the Privacy Act permits a civil action under U.S.C. § 552a (g)(1)(D) against an agency for its unprotected disclosures which have an adverse effect, a plaintiff may recover damages only when the agency "acted in a manner which was intentional or willful." 5 U.S.C. § 552a (g)(4), see *Britt v. Naval Investigative Service*, 886 F.2d 544, 551 (3d Cir. 1989). The intentional or willful standard is viewed as "somewhat greater than gross negligence." *Britt*, 886 F.2d at 551. This standard requires a plaintiff to show that an agency "committed the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act." *Id.* (citing *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984).

The plaintiff pleads sufficient facts to state a claim that the DOD willfully or intentionally violated his rights under the Privacy Act. On a motion to dismiss, the court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993). The complaint states that O'Donnell's SBPR file was covered by a warning stating that its "contents may not be

disclosed to party(s) concerned without specific authorization from the Defense Security Service.” Compl. ¶ 38. The complaint alleges that Melby and Lindenbaum read his SBPR file despite the warnings present on the material. Compl. ¶ 58. Additionally, Melby allegedly read the plaintiff’s file despite the fact it arrived with the instruction “To be opened only by Barbara Reilly.” Compl. ¶ 45. O’Donnell also claims that it was unnecessary for Melby and Lindenbaum to read his psychiatric record, when the only task put before the DCAA was to schedule the plaintiff’s independent psychiatrist evaluation. Compl. ¶ 40, 42, 45-6. The conduct alleged in this case, if true, could meet (g)(4)’s intentional or willful standard. Accordingly, the plaintiff has sufficiently alleged the elements of a claim under 5 U.S.C. § 552a (g)(1)(D) and the motion to dismiss will be denied.

IV. CONCLUSION

The defendants' motion to dismiss will be denied. A substantial question exists as to whether O’Donnell’s FTCA claims are covered by FECA, such that FECA is his exclusive remedy. These claims will be placed in civil suspense until the Secretary of Labor determines whether FECA covers plaintiff’s tort claim for emotional injuries. Therefore the defendant’s motion to dismiss Counts VII and X will be denied.

The defendants’ motion to dismiss the plaintiff’s claims under the Privacy Act for failure to state a claim will also be denied. It is unclear from the face of the complaint that the “routine use” exception or the “need to know” exception apply. O’Donnell has alleged sufficient facts to show that the defendant’s conduct was intentional or willful. Therefore the defendant’s motion to dismiss Counts I-III will be denied. An appropriate order follows.

whether plaintiff's FTCA claims are preempted by FECA.

(3) Defendants' motion to dismiss plaintiff's claims under the Privacy Act, 5 U.S.C. § 552a in Counts I-III is DENIED.

(4) A status conference by telephone with reference to the trial scheduled for March 6, 2006 is scheduled for January 31, 2006 at 12 p.m.

William H. Yohn, Jr., J.