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## **APPENDIX A**

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

FILED  
MAY 28 2024  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DENNIS M. BUCKOVETZ, an individual,  
Plaintiff - Appellant,

and

LYNNE M. BIRD, an individual,  
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE NAVY,  
Defendant - Appellee.

No. 23-55284

D.C. No. 3:21-cv-00640-WQH-KSC  
U.S. District Court for Southern  
California, San Diego

### **MANDATE**

The judgment of this Court, entered April 05,  
2024, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT

## **APPENDIX B**

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

FILED  
APR 5 2024  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DENNIS M. BUCKOVETZ, an individual,  
Plaintiff - Appellant,

and

LYNNE M. BIRD, an individual,  
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE NAVY,  
Defendant - Appellee.

No. 23-55284  
D.C. No. 3:21-cv-00640-WQH-KSC

Appeal from the United States District Court  
for the Southern District of California  
William Q. Hayes, District Judge, Presiding

Argued and Submitted March 27, 2024  
Pasadena, California

## MEMORANDUM\*

Before: GRABER, IKUTA, and FORREST, Circuit Judges.

Plaintiff Dennis M. Buckovetz appeals from the judgment in favor of Defendant United States Department of the Navy (Navy) in the Freedom of Information Act (FOIA) action. We vacate the judgment and remand with the instruction that the district court dismiss the action as nonjusticiable. *See Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) ("It is a prerequisite of justiciability that judicial relief will prevent or redress the claimed injury, or that there is a significant likelihood of such redress."); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) ("When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." (cleaned up) (citations omitted)).

When all documents responsive to a FOIA request have been produced, a party's FOIA claim ceases to present a live case or controversy. Eventual production, "however belatedly, moots FOIA claims." *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (citation and internal quotation marks omitted). "That result obtains because once the defendant agency has fully complied with the FOIA's production

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

mandate, the plaintiff is no longer suffering or threatened with 'an actual injury traceable to the defendant' that is 'likely to be redressed by a favorable judicial decision.'" *Yonemoto v. Dept of Veterans Affs.*, 686 F.3d 681, 689 (9th Cir. 2012) (citation omitted), overruled in part on other grounds by *Animal Legal Def. Fund v. U.S. FDA*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc) (per curiam).

Plaintiff filed this action in district court years after the Navy produced the responsive documents. Despite Plaintiffs speculative contention that there may exist additional documents that were either destroyed or concealed, nothing in the record supports a reasonable inference that there were unproduced responsive documents at the time Plaintiff filed this action. Accordingly, the district court lacked jurisdiction at the time the case was filed. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (noting that courts have "an obligation to assure ... that [the plaintiff] had Article III standing at the outset of the litigation "); *see also id.* at 191 (" Standing admits of no ... exception; if a plaintiff lacks standing at the time the action commences, ... the complainant [is not entitled] to a federal judicial forum.").

The judgment of the district court is vacated, and the case is remanded with the instruction to dismiss the action as nonjusticiable.

**VACATED and REMANDED.**

## **APPENDIX C**

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

FILED  
FEB 27 2024  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DENNIS M. BUCKOVETZ, an individual,  
Plaintiff - Appellant,

and

LYNNE M. BIRD, an individual,  
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE NAVY,  
Defendant - Appellee.

No. 23-55284  
D.C. No. 3:21-cv-00640-WQH-KSC  
Southern District of California, San Diego

### **ORDER**

The parties are directed to file simultaneous letter briefs, within 14 days, not to exceed 5 pages, on the following question. Plaintiff Buckovetz alleges that Defendant violated FOIA by concealing or destroying

non-exempt records responsive to his 2015 FOIA request, ER 223 ¶¶ 66–69, but he received those records in 2019, ER 174–76, 233–35. Unlike Plaintiff Bird, who is no longer a party to this action, Plaintiff Buckovetz does not allege that responsive records have not been produced. Is the case moot? *See Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (stating that production of the documents sought, “however belatedly,” moots FOIA claims” (citation omitted)).

FOR THE COURT:

MOLLY C. DWYER  
CLERK OF COURT

## APPENDIX D

**United States District Court  
SOUTHERN DISTRICT OF CALIFORNIA**

Dennis M. Buckovetz  
Plaintiff,

v.

The Department of the Navy  
Defendant.

Civil Action No. 21-cv-00640-WQH-KSC

### **JUDGMENT IN A CIVIL CASE**

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS HEREBY ORDERED AND ADJUDGED:**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (ECF No. 30) is granted. The Clerk of the Court shall enter Judgment in favor of Defendant and against Plaintiff, and shall close the case.

Date: 3/9/23

**CLERK OF COURT  
JOHN MORRILL, Clerk of Court**  
By: s/ A. Sudan  
A. Sudan, Deputy

## **APPENDIX E**

### **UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS M. BUCKOVETZ, an individual,  
Plaintiff,

v.

THE DEPARTMENT OF THE NAVY,  
Defendant.

Case No.: 21-cv-640-WQH-KSC

### **ORDER**

HAYES, Judge:

The matters before the Court are Defendant Department of the Navy's Motion for Summary Judgment (ECF No. 30) and Plaintiff Dennis M. Buckovetz's renewed request for discovery (*see* ECF No. 38).

#### **I. PROCEDURAL BACKGROUND**

On April 13, 2021, Plaintiff initiated this action by filing a Complaint. (ECF No. 1.) The Complaint alleges that Plaintiff requested Defendant produce emails concerning an unlawful scheme by officers at the Marine Corps Recruit Depot in San Diego ("MCRD") to sell Marine Corps memorabilia, including

commemorative coins, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. *See id.* ¶ 14. The Complaint alleges that Defendant violated FOIA by “deliberately conceal[ing] or destroy[ing]” responsive emails “upon receipt of [the] FOIA request and before production.” *Id.* ¶ 2. The Complaint requests the following relief: (1) a declaration that Defendant violated FOIA; (2) an order requiring Defendant to produce responsive records; (3) an injunction against Defendant’s continued withholding of any responsive records; (4) written findings concerning whether agency personnel acted arbitrarily or capriciously; (5) an award of Plaintiff’s attorneys’ fees and litigation costs; and (6) other such relief as the Court deems just and proper, including sanctions.

On May 9, 2022, Defendant filed the Motion for Summary Judgment. (ECF No. 30.) Defendant requested summary judgment on the basis that affidavits submitted in support of the motion demonstrated that Defendant conducted a search reasonably calculated to uncover all documents responsive to Plaintiff’s FOIA request.

On May 31, 2022, Plaintiff filed a Motion for Discovery. (ECF No. 31.) Plaintiff requested discovery in lieu of summary judgment on the basis that the affidavits submitted by Defendant evidenced bad faith and did not adequately explain the search process.

On September 29, 2022, the Court issued an Order addressing both pending motions. (ECF No. 34.) In the Order, the Court first rejected the assertion that the limited participation of an individual named in the

FOIA request in responding to the request supported a finding of bad faith. However, the Court further held that the affidavits submitted by Defendant were not sufficiently detailed in their description of the search conducted by Defendant because they did not identify any of the “several reasons” for MCRD’s failure to produce certain responsive emails. *Id.* at 9. The Court determined that identification of these reasons was necessary in this case because evidence supporting Plaintiff’s allegations—that responsive emails were not produced because they were intentionally concealed or destroyed in response to Plaintiff’s FOIA request—would preclude summary judgment in favor of Defendant. Accordingly, the Court required Defendant to submit more detailed affidavits addressing this deficiency.<sup>1</sup> The Court further permitted each party to file supplemental briefing in response to any additional affidavits submitted by Defendant.

On November 15, 2022, Defendant filed a Supplemental Brief and two additional affidavits in accordance with the Court’s September 29, 2022, Order. (ECF No. 37.) On December 7, 2022, Plaintiff filed a Supplemental Response. Plaintiff’s Supplemental Response renews Plaintiff’s request for discovery in lieu of summary judgment. On February 10, 2023, the Court heard oral argument on the Motion for Summary Judgment.

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<sup>1</sup> The Court denied Plaintiff’s request for further discovery without prejudice.

## II. FACTS

On December 18, 2014, Plaintiff “was carbon-copied on an email chain between Major General James W. Bierman and others” regarding the sale of commemorative coins that “caused [Plaintiff] concern because [Plaintiff] understood that the sales ... diverted revenue from Marine Corps Community Services (‘MCCS’).” (Buckovetz Decl., ECF No. 31-2 ¶¶ 2-3.) On January 23, 2015, Plaintiff submitted FOIA Request DON-USMC-2015-002772 to MCRD, requesting:

all email messages dated on or after 1 May 2014 that have any of the following email addresses Mart.Tull@usmc.mil, J i m . G r u n y @ u s m c . m i l , M i c h a e l . L e e @ u s m c . m i l , J a m e s . B i e r m a n @ u s m c . m i l , Thomas.W.Spencer@sumc-mccs.org, and John.Ming@usmc.mil on the “From:”, “To:”, “Cc:”, or “Bcc:” lines AND contain the words “coin” or “coins” on the subject line or within the body of the message.

(Ex. 1 to Camacho Decl., ECF No. 30-1 at 10.) MCRD referred a portion of the FOIA request “pertaining to emails from [MCCS]” to Marine Corps Headquarters for processing because the MCCS email address of Thomas Spencer was “not maintained by MCRD.” (Camacho Decl., ECF No. 30-1 ¶ 4.)

Michael Lee, MCRD’s Chief of Staff and FOIA Initial Denial Authority, “instructed Cinthia Camacho,

the FOIA Specialist for MCRD, to make sure [Plaintiff] received everything [Plaintiff] was requesting.” (Lee Decl., ECF No. 30-2 ¶ 5.) On February 4, 2015, Captain Lisa Woo, the Deputy Staff Judge Advocate for MCRD, sent an email to the MCRD Information Technology (“IT”) department instructing the department to provide Camacho with the requested emails and “recommend[ing] that individuals who are named in the FOIA request [ ] not be involved in processing the FOIA request.” (Ex. 3 to Camacho Decl., ECF No. 30-1 at 15.) Camacho “worked with the Staff Judge Advocate and the IT department to search for responsive emails” in the MCRD email accounts of the individuals named in the FOIA request. (ECF No. 30-1 ¶ 5.) On February 20, 2015, Lee sent a letter to Plaintiff “acknowledging the receipt” of the FOIA request and notifying Plaintiff that a portion of the request had been referred to Marine Corps Headquarters. (ECF No. 30-2 ¶ 4.)

Camacho “received the responsive emails directly from the IT department” and “personally applied redactions based on FOIA’s exemptions.” (ECF No. 30-1 ¶ 6.) Camacho “did not remove or delete any emails from the production.” *Id.* Lee “reviewed the production and relied upon the work of [Camacho and Woo] in determining the appropriateness of the proposed redactions.” (ECF No. 30-2 ¶ 6.) Lee “did not remove any emails” or “at any point in time, intentionally delete any emails ... for the purpose of keeping those emails from being produced.” *Id.* ¶¶ 5-6. On March 5, 2015, Lee sent Plaintiff a letter responding to the FOIA request and providing 384 responsive emails, including several emails from

January of 2015 containing Bierman's email address and discussing the ongoing sale of coins. (See Exhibit A to McConnell Decl., ECF No. 37-2 at 3-14.). The production "did not contain" the email chain on which Plaintiff had been copied on December 18, 2014. (ECF No. 31-2 ¶ 5.)

Following the March 5, 2015 production, Plaintiff "raised concerns about whether all emails were searched and [] questioned the use of Exemption (b)(7)." (ECF No. 30-1 ¶ 8.) In response to these concerns, an MCRD IT employee conducted a further search of emails saved as .pst files and Camacho "corrected MCRD's use of the FOIA Exemption (b)(7)." *Id.* ¶ 9. Lee "was not involved in the processing and production of materials from this additional search." (ECF No. 30-2 ¶ 7.) On May 22, 2015, MCRD sent Plaintiff a second response to his FOIA request that did not contain the December 18, 2014, email chain on which Plaintiff had been copied.

On November 23, 2015, Marine Corps Headquarters responded to the portion of Plaintiff's FOIA request that had been referred from MCRD. In its production, Marine Corps Headquarters produced five additional responsive emails that included both Thomas Spencer's MCCS email address and MCRD email addresses named in the FOIA request, but that had not been produced by MCRD: the chain of four emails on which Plaintiff had been copied on December 18, 2014, and an additional email dated October 29,

2014, (collectively, the “five missing emails”).<sup>2</sup>

On September 3, 2018, Plaintiff “submitted another FOIA request that used the same language as Request DON-USMC-2015-002772.” (ECF No. 30-1 ¶ 11.) “MCRD administratively closed [Plaintiff’s] 2018 FOIA request as a duplicate of the 2015 request.” *Id.* ¶ 13. “The Marine Corps and MCRD have received several other FOIA requests that either duplicate or overlap with [Plaintiff’s] 2015 and 2018 FOIA requests.” *Id.* ¶ 16. In response to an October 19, 2018, FOIA request from an individual with the same mailing address as Plaintiff, “MCRD identified 106 pages of records in formats not previously produced to [Plaintiff].” *Id.* ¶ 17. On June 14, 2019, MCRD produced the 106 pages of records to Plaintiff. Plaintiff

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<sup>2</sup> The five emails discuss the sale of commemorative coins, the quantity sold, and plans to reorder coins to sell in the future. (See Ex. C to Complaint, ECF No. 1 at 27 (email from Jim Gruny “provid[ing] a status on where we stand on liquidating our coin and pin inventory” and describing sales to families of marines, Marine Corps Community Services, and the “museum foundation”); *Id.* at 26 (email from Bierman titled “Coins” that stated: “We sold all one hundred by 0815. I don’t want to ever run out... Ever... Again!!!” (ellipses in original)); *Id.* at 25 (email in response stating that the entire inventory of 183 company coins had been sold due to an underestimate as to “the level of interest,” and indicate an intent to reorder). Plaintiffs allege that the sale of commemorative coins is supposed to fund Marine Corps Community Services programs, but that Bierman and others diverted proceeds to fund the Marine Corps Birthday Ball and other events without authorization. (See generally Complaint, ECF No. 1.) In a declaration, Spencer states that the five missing emails related to these unauthorized activities. (See Ex. E to Buckovitz Decl., ECF No. 31-2 at 20.)

submitted additional FOIA requests on September 25, 2019, November 4, 2019, and November 11, 2019, that were closed as duplicative.

During the course of litigation, Camacho “learned that [Plaintiff] believed he received five email messages as part of Marine Corps Headquarters production that should have been, but were not, included in MCRD’s production.”<sup>3</sup> *Id.* ¶ 18. Camacho “spent many hours reviewing [MCRD’s] search efforts, reviewing [MCRD’s] productions, and conferring with IT staff at headquarters about why this would have occurred.” *Id.* IT staff performed additional “targeted searches focused solely on the days the ‘missing’ emails were sent.” *Id.* “IT staff at headquarters identified several reasons the emails might have been missing from MCRD’s search results, but [ ] were unable to definitively determine what the cause was in this instance” and found no additional responsive documents. *Id.*

The reasons identified by IT staff for why the MCRD’s initial search failed to find the five missing emails are as follows:

- a. The end user deleted the data.
- b. The end user moved the data to a local PST file.

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<sup>3</sup> MCRD later produced to Plaintiff the October 29, 2014, email in response to a separate FOIA request. (See ECF No. 31-2 ¶ 8.)

c. The data exists outside of the scope of the request, for example the data had been moved to a PST file and the request did not ask for those files to be acquired, or the data exists outside the timeframe requested.

d. The data is not able to be located because the request specifies an exact set of search terms. For example, if the request asks for a search of the subject line, but the term is within the body of a message.

(Rosenbaum Decl., ECF No. 37-1 ¶ 5.) “There is no way to determine, from a systems standpoint, which of the scenarios listed above” was the cause of MCRD’s failure to find the five missing emails produced by Marine Corps Headquarters. *Id.* ¶ 8. “During the period from 2014 to 2015,” MCRD email users “were required to routinely delete or archive email messages” because of “very limited email storage capacity.” *Id.* ¶ 6.

### **III. CONTENTIONS**

Defendant contends that the affidavits it has submitted demonstrate that it “performed searches reasonably calculated to recover all relevant documents” responsive to Plaintiff’s FOIA requests. (ECF No. 37 at 1.) Defendant contends that the affidavits demonstrate that there are several reasons why the five missing emails produced by Marine Corps Headquarters were not also produced by MCRD.

Defendants contend that the possibility that a user deleted the emails does not raise an inference of bad faith because it is “far more plausible” that users “deleted the ‘missing’ email messages from their mailbox in the ordinary course, prior to Plaintiff’s... FOIA request” than it is that they intentionally deleted emails in response to the FOIA request. *Id.* at 4-5. Defendants contend that “[t]he Court may also infer the absence of any intentional deletions... based upon the emails that *were* produced by MCRD.” *Id.* at 5. Defendant contends that there is no remedy the Court can grant because Plaintiff has received all responsive documents.

Plaintiff contends that “careful scrutiny demonstrates that deletion of the emails... is the **only** plausible reason why MCRD failed to produce” the five missing emails. (ECF No. 38 at 2.) Plaintiff contends that additional discovery is necessary to determine whether this deletion was intentional. Plaintiff contends that MCRD’s production of other emails does not demonstrate a lack of intent because the December 18, 2014, emails were uniquely inculpatory. Plaintiff requests additional discovery in the form of a deposition of James W. Bierman and the production of communications involving Bierman relating to the FOIA process and personnel.

#### IV. DISCUSSION

FOIA cases are usually decided at the summary judgment stage. *See Lane v. Dep’t of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008). To prevail on summary judgment in a FOIA case, “[t]he agency must:

‘demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.’” *Zemansky v. U.S. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (quoting *Weisberg v. U.S. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). To sustain its burden of “demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* (quoting *Weisberg*, 745 F.2d at 1485). The affidavits describing an agency’s search must be “relatively detailed in their description of the files searched and the search procedures.” *Zemansky*, 767 F.2d at 573; *see also Lion Raisons, Inc. v. U.S. Dep’t of Agric.*, 636 F. Supp. 2d 1081, 1104 (E.D. Cal. 2009) (“In a FOIA case, sufficient declarations describe ‘what records were searched, by whom, and through what process.’”) (quoting *Lawyers’ Comm. for Civ. Rts. v. U.S. Dep’t of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008)).

“While ordinarily the discovery process grants each party access to evidence, in FOIA ... cases discovery is limited because the underlying case revolves around the propriety of revealing certain documents.” *Lane*, 523 F.3d at 1134. Accordingly, when an agency’s affidavits are adequate, a district court may forgo discovery and grant summary judgment on the basis of the agency affidavits alone. *See id.*; *see also Carney v. U.S. Dep’t of Just.*, 19 F.3d 807, 812 (2d Cir. 1994). However, courts may permit discovery if an agency does not adequately explain its search process or if there is evidence that an agency submitted a declaration in bad faith. *See Withey v. Fed. Bureau of Investigations*, No. C18- 1635-JCC,

2020 WL 885974, at \*2 (W.D. Wash. Feb. 24, 2020); *Lion Raisins, Inc. v. U.S. Dep’t of Agric.*, No. 1:08-CV-00358-OWW-SMS, 2009 WL 160283, at \*2 (E.D. Cal. Jan. 21, 2009); *Van Strum v. U.S. E.P.A.*, 680 F. Supp. 349, 352 (D. Or. 1987).

As an initial matter, the evidence presented by the parties does not demonstrate any deficiency inherent in the searches coordinated by Camacho and described in detail in the affidavits submitted by Defendant. In the face of this evidence, MCRD’s failure to locate the five missing emails does not preclude a determination that Defendant’s search was adequate, particularly given that the emails were later produced to Plaintiff by Marine Corps Headquarters. *See Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 988 (9th Cir. 2009) (stating that “[a] search is not rendered inadequate based on ‘the failure to produce or identify a few isolated documents’); *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (“[T]he production of all nonexempt material, ‘however belatedly,’ moots FOIA claims.” (quoting *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982))).

However, the concealment or destruction of records in response to a FOIA request renders a subsequent search for such records inadequate, even if that search appears reasonable when considered in isolation. *See DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C. Cir. 2015) (“The general rule is that an agency may not avoid a FOIA request by intentionally ridding itself of a requested document”); *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1003-04 (D.C. Cir. 2009) (“[A] reasonable jury could find that Interior

intentionally destroyed the document—rendering the subsequent search ineffective—and there is therefore a genuine issue of material fact whether the search was adequate”); *cf. Kissinger v. Rep. Comm. for Freedom of the Press*, 445 U.S. 136, 155 n.9 (1980) (“There is no question that a ‘withholding’ must here be gauged by the time at which the request is made since there is no FOIA obligation to retain records prior to that request.”); *Lahr*, 569 F.3d at 988 n.24 (“The government, of course, must produce responsive documents *actually uncovered*.”). Plaintiff’s position is that the discrepancy in the productions of MCRD and Marine Corps Headquarters regarding the five missing emails evidences a broader scheme by MCRD employees to “erase[] or somehow conceal[]” documents in response to Plaintiff’s FOIA request, including unknown “additional responsive emails that were located only on the [MCRD] server.” (ECF No. 1 ¶ 48.)

The Declaration of Karl Rosenbaum identifies the following reasons why MCRD’s initial search failed to find the five missing emails:

- a. The end user deleted the data.
- b. The end user moved the data to a local PST file.
- c. The data exists outside of the scope of the request, for example the data had been moved to a PST file and the request did not ask for those files to be acquired, or the data exists outside the timeframe requested.

d. The data is not able to be located because the request specifies an exact set of search terms. For example, if the request asks for a search of the subject line, but the term is within the body of a message.

(Rosenbaum Decl., ECF No. 37-1 ¶ 5.) However, a search of PST files was later conducted, (see Camacho Decl., ECF No. 30-1 ¶ 9), and a review of the five missing emails demonstrates that those emails plainly fall within the scope of the request and the specified search terms. Accordingly, MCRD's failure to produce the five missing emails is most plausibly explained by the possibility that an end user deleted the data.

While the Rosenbaum Declaration supports Plaintiff's position that the five missing emails were deleted by users, it does not demonstrate that any deletion of emails occurred in response to Plaintiff's FOIA requests. The Rosenbaum Declaration is instead entirely consistent with the competing possibility that the five missing emails were deleted prior to the 2015 FOIA request, either to free up "very limited email storage capacity," (ECF No. 37-1 ¶ 6), or for other reasons. *See Kissinger*, 445 U.S. at 155 n.9 (1980) ("[T]here is no FOIA obligation to retain records prior to [a FOIA] request."). MCRD's production of 384 emails, including several emails from January of 2015 that were sent to or from Bierman's email address and discuss the sale of coins, further undermines Plaintiff's theory that individuals at MCRD deleted responsive emails to shield them from Plaintiff's FOIA request. (See Exhibit A to McConnell Decl., ECF No. 37-2 at 3-

14.) Plaintiff does not present any contrary evidence that the possible deletion of the five missing emails was motivated by an intent to evade an existing FOIA request, or that other unknown responsive emails existed and were deleted for the same reason.<sup>4</sup> In the absence of such evidence, Plaintiff is unable to rebut the affidavits submitted by Defendant, which expressly deny that any emails were “intentionally delete[d]... for the purpose of keeping those emails from being produced.” (Lee Decl., ECF No. 30-2 ¶¶ 5-6); *see Smart-Tek Servs., Inc. v. U.S. Internal Rev. Serv.*, 829 F. App’x 224, 225 (9th Cir. 2020) (“Agency affidavits ... cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.” (quoting *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991))).

Further discovery in this action is inappropriate because Defendant has adequately explained its search process and the affidavits presented by Defendant do not evidence bad faith. Plaintiff’s allegations that there

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<sup>4</sup> In a declaration, Thomas Spencer stated that he has a “belief” that there exist other email conversations concerning coins on which he was not included. (*See* Ex. E to Buckovitz Decl., ECF No. 31-2 at 20.) As an initial matter, Spencer’s statement fails to support Plaintiff’s position that unknown emails were not produced because Spencer’s belief is consistent with MCRD’s production of 384 other responsive emails. More fundamentally, Spencer’s belief is not cognizable evidence because Spencer offers no facts to support his belief or to otherwise demonstrate personal knowledge. *See Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) (stating that a “belief” is not cognizable evidence at summary judgment in the absence of proof that the declarant had personal knowledge of the matter).

exist unknown responsive emails that were intentionally deleted in response to his FOIA requests and have not been produced does not justify additional discovery because these allegations are not adequately supported by evidence in the record. *See Carney*, 19 F.3d at 813 (stating that allegations that additional concealed documents exist and were not produced are insufficient to justify discovery in the absence of factual support). The Court concludes that Defendant has “demonstrate[d] that it has conducted a search reasonably calculated to uncover all relevant documents.” *Zemansky*, 767 F.2d at 571 (quoting *Weisberg*, 745 F.2d at 1485). Summary judgment is granted in favor of Defendant.

## **V. CONCLUSION**

IT IS HEREBY ORDERED that Plaintiff’s renewed request for discovery (*see* ECF No. 38) is denied.

IT IS FURTHER ORDERED that Defendant’s Motion for Summary Judgment (ECF No. 30) is granted. The Clerk of the Court shall enter Judgment in favor of Defendant and against Plaintiff, and shall close the case.

Dated: March 8, 2023

/s/

Hon. William Q. Hayes  
United States District Judge

## **APPENDIX F**

**United States District Court  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS M. BUCKOVETZ, an individual,  
Plaintiff,

v.

THE DEPARTMENT OF THE NAVY,  
Defendant.

Case No.: 21-cv-640-WQH-KSC

### **ORDER**

HAYES, Judge:

The matters before the Court are the Motion for Summary Judgment filed by Defendant Department of the Navy (ECF No. 30) and Motion for Discovery filed by Plaintiff Dennis M. Buckovetz (ECF No. 31).

#### **I. PROCEDURAL BACKGROUND**

On April 13, 2021, Plaintiff initiated this action by filing a Complaint. (ECF No. 1). The Complaint alleges that Plaintiff requested that Defendant produce emails concerning an unlawful scheme by officers at the Marine Corps Recruit Depot in San Diego (“MCRD”) to sell Marine Corps memorabilia,

including commemorative coins, pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. (*See id.* ¶ 14). The Complaint alleges that Defendant violated FOIA by “deliberately conceal[ing] or destroy[ing]” responsive emails “upon receipt of [the] FOIA request and before production.” (*Id.* ¶ 2). The Complaint requests the following relief: (1) a declaration that Defendant violated FOIA; (2) an order requiring Defendant to produce responsive records; (3) an injunction against Defendant’s continued withholding of any responsive records; (4) written findings concerning whether agency personnel acted arbitrarily or capriciously; (5) an award of Plaintiff’s attorneys’ fees and litigation costs; and (6) other such relief as the Court deems just and proper, including sanctions.

On May 9, 2022, Defendant filed the Motion for Summary Judgment. (ECF No. 30). On May 31, 2022, Plaintiff filed the Motion for Discovery. (ECF No. 31). On June 14, 2022, Defendant filed a Response in opposition to the Motion for Discovery. (ECF No. 32). On June 21, 2022, Plaintiff filed a Reply. (ECF No. 33).

## II. FACTS

On December 18, 2014, Plaintiff “was carbon-copied on an email chain between Major General James W. Bierman and others” regarding the sale of commemorative coins that “caused [Plaintiff] concern because [Plaintiff] understood that the sales ... diverted revenue from Marine Corps Community Services (“MCCS”).” (ECF No. 31-2 ¶¶ 2-3). On January 23, 2015, Plaintiff submitted FOIA Request DON-

USMC-2015-002772 to MCRD, requesting:

all email messages dated on or after 1 May 2014 that have any of the following email addresses Mart.Tull@usmc.mil, J i m . G r u n y @ u s m c . m i l , M i c h a e l . L e e @ u s m c . m i l , J a m e s . B i e r m a n @ u s m c . m i l , Thomas.W.Spencer@sumc-mccs.org, and John.Ming@usmc.mil on the “From:”, “To:”, “Cc:”, or “Bcc:” lines AND contain the words “coin” or “coins” on the subject line or within the body of the message.

(Ex. 1 to Camacho Decl., ECF No. 30-1 at 10). MCRD referred a portion of the FOIA request “pertaining to emails from [MCCS]” to Marine Corps Headquarters for processing because MCCS “emails are not maintained by MCRD.” (ECF No. 30-1 ¶ 4).

Michael Lee, MCRD’s Chief of Staff and FOIA Initial Denial Authority, “instructed Cinthia Camacho, the FOIA Specialist for MCRD, to make sure [Plaintiff] received everything [Plaintiff] was requesting.” (ECF No. 30-2 ¶ 5). On February 4, 2015, Captain Lisa Woo, the Deputy Staff Judge Advocate for MCRD, sent an email to the MCRD Information Technology (“IT”) department instructing the department to provide Camacho with the requested emails and “recommend[ing] that individuals who are named in the FOIA request [ ] not be involved in processing the FOIA request.” (Ex. 3 to Camacho Decl., ECF No. 30-1 at 15). Camacho “worked with the Staff Judge Advocate and the IT department to search for

responsive emails” in the MCRD email accounts of the individuals named in the FOIA request. (ECF No. 30-1 ¶ 5). On February 20, 2015, Lee sent a letter to Plaintiff “acknowledging the receipt” of the FOIA request and notifying Plaintiff that a portion of the request had been referred to Marine Corps Headquarters. (ECF No. 30-2 ¶ 4).

Camacho “received the responsive emails directly from the IT department” and “personally applied redactions based on FOIA’s exemptions.” (ECF No. 30-1 ¶ 6). Camacho “did not remove or delete any emails from the production.” (*Id.*). Lee “reviewed the production and relied upon the work of [Camacho and Woo] in determining the appropriateness of the proposed redactions.” (ECF No. 30-2 ¶ 6). Lee “did not remove any emails” or “at any point in time, intentionally delete any emails … for the purpose of keeping those emails from being produced.” (*Id.* ¶¶ 5-6). On March 5, 2015, Lee sent Plaintiff a letter responding to the FOIA request and providing 384 responsive emails. The production “did not contain” the email chain on which Plaintiff had been copied on December 18, 2014. (ECF No. 31-2 ¶ 5).

Following the March 5, 2015 production, Plaintiff “raised concerns about whether all emails were searched and [ ] questioned the use of Exemption (b)(7).” (ECF No. 30-1 ¶ 8). In response to these concerns, an MCRD IT employee conducted a further search of emails saved as .pst files and Camacho “corrected MCRD’s use of the FOIA Exemption (b)(7).” (*Id.* ¶ 9). Lee “was not involved in the processing and production of materials from this additional search.”

(ECF No. 30-2 ¶ 7). On May 22, 2015, MCRD sent Plaintiff a second response to his FOIA request that did not contain the December 18, 2014, email chain on which Plaintiff had been copied.

On November 23, 2015, Marine Corps Headquarters responded to the portion of Plaintiff's FOIA request that had been referred from MCRD. Marine Corps Headquarters produced responsive emails, including the email chain on which Plaintiff had been copied on December 18, 2014. The five emails in the email chain included multiple MCRD email addresses named in Plaintiff's FOIA request.

On September 3, 2018, Plaintiff "submitted another FOIA request that used the same language as Request DON-USMC-2015-002772." (ECF No. 30-1 ¶ 11). "MCRD administratively closed [Plaintiff's] 2018 FOIA request as a duplicate of the 2015 request." (*Id.* ¶ 13). "The Marine Corps and MCRD have received several other FOIA requests that either duplicate or overlap with [Plaintiff's] 2015 and 2018 FOIA requests." (*Id.* ¶ 16). In response to an October 19, 2018, FOIA request from an individual with the same mailing address as Plaintiff, "MCRD identified 106 pages of records in formats not previously produced to [Plaintiff]." (*Id.* ¶ 17). On June 14, 2019, MCRD produced the 106 pages of records to Plaintiff. Plaintiff submitted additional FOIA requests on September 25, 2019, November 4, 2019, and November 11, 2019, that were closed as duplicative.

During the course of litigation, Camacho "learned that [Plaintiff] believed he received five email

messages as part of Marine Corps Headquarters production that should have been, but were not, included in MCRD’s production.” (ECF No. 30-1 ¶ 18). Camacho “spent many hours reviewing [MCRD’s] search efforts, reviewing [MCRD’s] productions, and conferring with IT staff at headquarters about why this would have occurred.” (*Id.*). IT staff performed additional “targeted searches focused solely on the days the ‘missing’ emails were sent.” (*Id.*). “IT staff at headquarters identified several reasons the emails might have been missing from MCRD’s search results, but [ ] were unable to definitively determine what the cause was in this instance” and found no additional responsive documents. (*Id.*).

### **III. CONTENTIONS**

Defendant contends that summary judgment is appropriate because “Defendant conducted thorough searches in response to [Plaintiff’s] 2015 and 2018 FOIA requests … reasonably calculated to uncover all relevant records.” (ECF No. 30 at 9). Defendant contends that Plaintiff actually received the five emails in the December 18, 2014, email chain that were missing from the MCRD production through the referral of Plaintiff’s FOIA request to Marine Corps Headquarters. Defendant contends that the existence of any further responsive emails that have not been produced is “speculation,” not supported by evidence in the record. (ECF No. 32 at 7). Defendant contends that the allegations that responsive records were concealed or destroyed and MCRD’s “inability to locate a responsive record” do not preclude summary judgment. (ECF No. 30 at 11).

Plaintiff contends that “[d]iscovery is needed to understand the full extent of [ ] Lee’s involvement in MCRD’s response” to the FOIA request. (ECF No. 31 at 8). Plaintiff contends that “there remain questions of material fact as to whether or not someone at MCRD deleted emails … thereby rendering Camacho’s search ‘ineffective.’” (*Id.* at 9). Plaintiff contends that the declarations submitted in support of the Motion for Summary Judgment are “vague” in their discussion of the missing emails and justify discovery. (*Id.* at 8-9).

#### **IV. DISCUSSION**

FOIA cases are usually decided at the summary judgment stage. *See Lane v. Dep’t of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008). To prevail on summary judgment in a FOIA case, “[t]he agency must: ‘demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.’” *Zemansky v. U.S. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (quoting *Weisberg v. U.S. Dep’t of Just.*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). To sustain its burden of “demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith.” *Id.* (quoting *Weisberg*, 745 F.2d at 1485).

“While ordinarily the discovery process grants each party access to evidence, in FOIA … cases discovery is limited because the underlying case revolves around the propriety of revealing certain documents.” *Lane*, 523 F.3d at 1134. Accordingly, the general rule in FOIA cases is that discovery is unavailable—when the agency’s affidavits are

adequate, a district court may forgo discovery and grant summary judgment on the basis of the agency affidavits alone. *See id.*; *see also Carney v. U.S. Dep’t of Just.*, 19 F.3d 807, 812 (2d Cir. 1994). However, courts may permit discovery if an agency does not adequately explain its search process or if there is evidence that an agency submitted a declaration in bad faith. *See Withey v. Fed. Bureau of Investigations*, No. C18-1635-JCC, 2020 WL 885974, at \*2 (W.D. Wash. Feb. 24, 2020); *Lion Raisins, Inc. v. U.S. Dep’t of Agric.*, No. 1:08-CV-00358-OWW-SMS, 2009 WL 160283, at \*2 (E.D. Cal. Jan. 21, 2009); *Van Strum v. U.S. E.P.A.*, 680 F. Supp. 349, 352 (D. Or. 1987).

Plaintiff asserts that Lee’s participation in responding to the 2015 FOIA request, despite Lee being named in the request itself, demonstrates bad faith and justifies discovery. Camacho states that Captain Lisa Woo, the Deputy Staff Judge Advocate for MCRD, recommended “that individuals who are named in the FOIA request [ ] not be involved in processing the FOIA request.” (Ex. 3 to Camacho Decl., ECF No. 30-1 at 15). Lee states that he “reviewed the production” in response to the 2015 FOIA request, and “relied upon the work of [Camacho and Woo] in determining the appropriateness of the proposed redactions,” in his role as the FOIA Initial Denial Authority. (ECF No. 30-2 ¶¶ 3, 6). Lee states that he “did not remove any emails” or “at any point in time, intentionally delete any emails … for the purpose of keeping those emails from being produced.” (*Id.* ¶¶ 5-6). Lee’s participation in responding to the 2015 FOIA request does not overcome a presumption of good faith or require further inquiry because the declarations

establish that Lee did not take an active role in the search for records. Further, Lee “was not involved in the processing and production of materials” from additional searches conducted in response to Plaintiff’s concerns. (ECF No. 30-2 ¶ 7). Lee’s limited participation in the initial response to the 2015 FOIA request does not require discovery or preclude summary judgment.

Plaintiff asserts in the alternative that the declarations of Camacho and Lee are too “vague” in their discussion of the emails that were missing from the MCRD production to justify a grant of summary judgment. (ECF No. 31 at 8). Camacho states that she worked with the MCRD IT department to search for emails containing the terms and email addresses specified in the 2015 FOIA request. Camacho states that she reviewed the responsive records, “personally applied redactions,” and “did not remove or delete any emails from the production.” (ECF No. 30-1 ¶ 6). MCRD provided Plaintiff with 384 responsive emails. Camacho states that after Plaintiff “raised concerns about whether all emails were searched,” the MCRD IT department conducted a further search of emails saved as .pst files. (ECF No. 30-1 ¶ 8). Camacho states that additional records were later produced to Plaintiff that were discovered in response to subsequent FOIA requests.

Camacho states that a portion of the FOIA request “pertaining to emails from [MCCS]” accounts was further referred to Marine Corps Headquarters for processing because MCCS “emails are not maintained by MCRD.” (ECF No. 30-1 ¶ 4). Marine Corps

Headquarters produced an additional email chain containing five emails that included multiple MCRD email addresses named in Plaintiff's FOIA request. Camacho states that in response to Plaintiff's assertion that the emails produced by Marine Corps Headquarters should have also been included in the MCRD production, Camacho "spent many hours reviewing [MCRD's] search efforts, reviewing [MCRD's] productions, and conferring with IT staff at headquarters about why" the five emails were missing from MCRD's production. (*Id.* ¶ 18). Camacho states that IT staff performed additional "targeted searches focused solely on the days the 'missing' emails were sent." (*Id.*). Camacho states that "IT staff at headquarters identified several reasons the emails might have been missing from MCRD's search results, but [ ] were unable to definitively determine what the cause was in this instance" and found no additional responsive documents. (*Id.*). Camacho and Lee each state that they did not personally remove or delete any responsive emails.

The affidavits describing an agency's search must be "relatively detailed in their description of the files searched and the search procedures." *Zemansky*, 767 F.2d at 573; *see also Lion Raisons, Inc. v. U.S. Dep't of Agric.*, 636 F. Supp. 2d 1081, 1104 (E.D. Cal. 2009) ("In a FOIA case, sufficient declarations describe 'what records were searched, by whom, and through what process.'") (quoting *Lawyers' Comm. for Civ. Rts. v. U.S. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008)). A search is not rendered inadequate based on "the failure to produce or identify a few isolated documents," *Lahr v. Nat'l Transp. Safety*

*Bd.*, 569 F.3d 964, 988 (9th Cir. 2009), and “the production of all nonexempt material, ‘however belatedly,’ moots FOIA claims,” *Papa v. U.S.*, 281 F.3d 1004, 1013 (9th Cir. 2002) (quoting *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982)). However, an agency’s “search” for records it previously concealed or destroyed in response to a FOIA request is not “reasonably calculated to uncover all relevant documents.” *See DiBacco v. U.S. Army*, 795 F.3d 178, 192 (D.C. Cir. 2015) (“The general rule is that an agency may not avoid a FOIA request by intentionally ridding itself of a requested document”); *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1003-04 (D.C. Cir. 2009) (“a reasonable jury could find that Interior intentionally destroyed the document— rendering the subsequent search ineffective—and there is therefore a genuine issue of material fact whether the search was adequate”); *cf. Kissinger v. Rep. Comm. for Freedom of the Press*, 445 U.S. 136, 155 n.9 (1980) (“There is no question that a ‘withholding’ must here be gauged by the time at which the request is made since there is no FOIA obligation to retain records prior to that request.”); *Lahr*, 569 F.3d at 988 n.24 (“The government, of course, must produce responsive documents *actually uncovered*.”).

Allegations that records existed and were destroyed in response to a FOIA request must be supported by evidence in order to preclude summary judgment in favor of the agency. *See Smart-Tek Servs., Inc. v. U.S. Internal Revenue Serv.*, 829 F. App’x 224, 225 (9th Cir. 2020) (“Agency affidavits … cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.”)

(quoting *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Plaintiff asserts that the searches described by Camacho are “inadequate” because Defendant “deliberately concealed or destroyed” responsive emails “upon receipt of a FOIA request and before production.” (ECF No. 1 ¶ 2). Plaintiff relies upon Camacho’s failure to find the five allegedly inculpatory emails produced by Marine Corps Headquarters but not by MCRD to demonstrate that other, unknown emails existed and were concealed or destroyed. The Camacho declaration states that “IT staff at headquarters identified several reasons the emails might have been missing from MCRD’s search results,” (ECF No. 30-1 ¶ 18), but does not identify any reason the emails might have been missing. The Court concludes that the Camacho and Lee declarations are not sufficiently detailed to carry Defendant’s burden of demonstrating an adequate search because the declarations do not identify any reason for the five known missing emails.

Plaintiff requests that the Court permit discovery to address any insufficiencies in the declarations submitted by Defendant. However, the Court concludes that requiring Defendant to submit a more detailed affidavit is sufficient to gather additional relevant information at this time. *See, e.g., Lions Raisins*, 636 F. Supp. 2d at 1107 (“When, as here, the adequacy of the search remains in doubt on summary judgment, courts have ... required the government agency to supply supplemental declarations, to gather additional relevant information.”); *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (“Although Oglesby argues

that discovery is needed to answer his questions regarding the adequacy of Army's search, a relatively detailed affidavit addressing the issue could suffice."); *Wolf v. C.I.A.*, 569 F. Supp. 2d 1, 10 (D.D.C. 2008) ("Where an agency's declarations are deficient, courts generally will request that an agency supplement its supporting declarations rather than order discovery.") (quotation omitted).

## V. CONCLUSION

IT IS HEREBY ORDERED that Defendant Department of the Navy shall supply the Court with one or more supplemental declarations no later than thirty (30) days from the date of this Order. Defendant may file a supplemental brief not to exceed ten pages in conjunction with the filing of the supplemental declaration(s).

IT IS FURTHER ORDERED that Plaintiff Dennis M. Buckovetz's Motion for Discovery (ECF No. 31) is denied without prejudice. Plaintiff may file a brief not to exceed ten pages in response to the supplemental declaration(s) submitted by Defendant no later than forty-five (45) days from the date of this Order.

Dated: September 29, 2022

/s/

Hon. William Q. Hayes  
United States District Judge

## **APPENDIX G**

**United States District Court  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS M. BUCKOVETZ, an individual,  
Plaintiff,

v.

THE DEPARTMENT OF THE NAVY,  
Defendant.

Case No.: 21-cv-640-WQH-KSC

### **ORDER**

HAYES, Judge:

The matter before the Court is the Motion to Dismiss for Lack of Jurisdiction filed by Defendant The Department of the Navy (ECF No. 12).

#### **I. PROCEDURAL BACKGROUND**

On April 13, 2021, Plaintiff Dennis M. Buckovetz initiated this action against Defendant The Department of the Navy by filing the Complaint. (ECF No. 1). The Complaint alleges that Defendant violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by concealing or destroying non-exempt records in response to a FOIA Request made by Plaintiff. *Id.* The

Complaint requests the following relief: (1) a declaration that Defendant violated FOIA; (2) an Order requiring Defendant to produce responsive records; (3) an injunction against Defendant's continued withholding of any responsive records; (4) written findings concerning whether agency personnel acted arbitrarily or capriciously; (5) an award of Plaintiff's attorneys' fees and litigation costs; and (6) other such relief as the Court deems just and proper, including sanctions. *Id.*

On August 5, 2021, Defendant filed a Motion to Dismiss for Lack of Jurisdiction. (ECF No. 12). On August 31, 2021, Plaintiff filed a Response in opposition to the Motion. (ECF No. 13). On September 7, 2021, Defendant filed a Reply. (ECF No. 14). On September 9, 2021, Plaintiff filed a Notice of Errata correcting the wording of a sentence in his Response. (ECF No. 15).

## II. ALLEGATIONS

Plaintiff is a retired Marine Corps Lieutenant Colonel domiciled in San Diego County, California, who served as the Administrative Director of the Marine Corps Community Services (MCCS) at the Marine Corps Recruit Depot (MCRD) located in San Diego. (ECF No. 1 ¶ 5). Defendant is a United States agency. (*Id.* ¶ 7).

Major General James W. Bierman, the Commanding General of MCRD, as well as several other officers, engaged in an unlawful scheme to sell Marine Corps memorabilia, including commemorative

coins, using government personnel and resources and without official oversight. (*Id.* ¶ 14). Gen. Bierman directed the funds received from the sales to be used to finance the annual Marine Corps Birthday Ball. (*Id.* ¶ 17).

On January 23, 2015, Plaintiff submitted a FOIA Request, Request DON-ESMC- 2015-002772, to the MCRD, stating the following:

I request all email messages dated on or after 1 May 2014 that have any of the following email addresses  
Mark.Tull@usmc.mil,  
Jim.Gruny@usmc.mil,  
Michael.Lee@usmc.mil,  
James.Bierman@usmc.mil,  
Thomas.W.Spencer@usmc-mccs.org, and  
John.Ming@usmc.mil on the “From:”,  
“To:”, “Cc:”, or “Bcc:” lines AND contain  
the words “coin” or “coins” on the subject  
line or within the body of the message.

(ECF No. 1, Ex. B). This FOIA Request was also referred in part to the Marine Corps Community Services (MCCS) Headquarters in Quantico, VA, because one of the identified email addresses was for an individual in MCCS, which uses different email servers than MCRD. (ECF No. 1 ¶ 27).

On March 5, 2015, MCRD produced to Plaintiff 319 pages of records containing 384 individual emails. (*Id.* ¶ 28). On November 23, 2015, MCCS Headquarters in Quantico responded to the referral of

Plaintiff's 2015 Request and produced five additional emails that had not appeared in MCRD's March 5, 2015 production. (ECF No. 1, Ex. C). The additional emails produced by the MCCS included an email thread with the subject line "Coins" in which Gen. Bierman stated "We sold all one hundred by 0815. I don't want to ever run out...Ever...Again!!!!" (*Id.*). A second email also discussed the inventory and sale of coins. (*Id.*). "These facts indicate that Gen. Bierman, upon learning of Buckovetz's 2015 FOIA Request, deliberately led Defendant to withhold the Five Emails from MCRD's 2015 production." (ECF No. 1 ¶ 47).

On September 3, 2018, Plaintiff submitted a second FOIA Request, DON-USMC-2018-011145, seeking the same documents as the earlier Request in 2015. (ECF No. 1, Ex. D). On September 17, 2018, MCRD closed the Request, stating that it was duplicative of the earlier Request. (ECF No. 1 ¶ 52). Plaintiff has exhausted his administrative remedies as to both Requests. (ECF No. 1 ¶¶ 49, 53).

### **III. LEGAL STANDARD**

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has subject matter jurisdiction over the action. *Assoc. of Med. Clls. v. United States*, 217 F.3d 770, 778–779 (9th Cir. 2000).

"A Rule 12(b)(1) jurisdictional attack may be

facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

#### **IV. DISCUSSION**

Defendant asserts a facial challenge to the Court’s subject matter jurisdiction. (ECF No. 14 at 2). Defendant contends that it cannot “withhold” the alleged agency records that Plaintiff seeks, because it does not currently possess them. (ECF No. 12 at 4). Defendant contends that Plaintiff lacks any remedy under FOIA because there are no records to produce. (ECF No. 14 at 3-4). Plaintiff contends that the agency has “withheld” the alleged records because it possessed the records and has failed to provide them in response to Defendant’s FOIA requests. (ECF No. 13 at 5, 9).

FOIA grants jurisdiction to United States district courts to “enjoin [an] agency from withholding agency records” in response to a FOIA request “and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). In addition, courts may “assess against the United States reasonable attorney fees and other litigation costs reasonably incurred” and “issue[] a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously.” *Id.* §

552(a)(4)(E)-(F). Thus, under FOIA, a district court has subject matter jurisdiction if there is “a showing that an agency has (1) improperly; (2) withheld; (3) agency records.” *Kissinger v. Rep. Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980).

The Complaint alleges that Plaintiff’s FOIA Requests sought emails sent between Defendant’s employees concerning commemorative coins. (*Id.* ¶ 26). The Complaint further alleges facts to support the allegation that Defendant “concealed or destroyed” these records without a proper legal basis after Plaintiff’s FOIA request was made. The requirements that the withholding be “improper” and of “agency records” are satisfied.

The Complaint alleges that the agency records sought by Plaintiff were “concealed or destroyed” in response to Plaintiff’s FOIA request to MCRD. (ECF No. 1 ¶ 67). The Complaint alleges that Defendant’s withholding is evidenced by the fact that MCCS produced five additional emails that were not produced by MCRD. (*Id.* ¶ 47). The Complaint alleges that production has been inadequate and seeks to enjoin Defendant’s continued withholding of records. (*Id.* at 15). In a facial challenge, the Court must accept these factual allegations—including the allegation that the records were concealed—as true. The complaint adequately alleges facts to support the withholding requirement. The Court has subject matter jurisdiction over Plaintiff’s claims.

## **V. CONCLUSION**

IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant The Department of the Navy (ECF No. 12) is denied.

Dated: October 7, 2021

/s/

Hon. William Q. Hayes  
United States District Judge

## **APPENDIX H**

**United States District Court  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS M. BUCKOVETZ, an individual,  
Plaintiff,

v.

THE DEPARTMENT OF THE NAVY,  
Defendant.

Case No.: 21-cv-640-WQH-KSC

### **ORDER**

HAYES, Judge:

WHEREAS in the Complaint filed in the above-captioned action, Plaintiff Lynne M. Bird ("Bird") asserted a claim for violation of the Freedom of Information Action, 5 U.S.C. § 552 ("FOIA") against Defendant the Department of the Navy (the "Navy") based on the Navy's failure to unredact the name of Major General James W. Bierman from records responsive to Bird's FOIA request DON-USMC-2019-000608 (the "Request").

WHEREAS the Navy has produced records responsive to the Request unredacting Gen. Bierman's name.

WHEREAS Bird has not administratively appealed any aspect of the Navy's response to the Request other than the redaction of Gen. Bierman's name.

THEREFORE IT IS HEREBY STIPULATED by and between the parties hereto that Bird's claim for violation of FOIA be dismissed from the above-referenced action without prejudice, and that Bird be dismissed from the above-referenced action without prejudice. The parties hereto further agree that Bird's dismissal shall not operate as a waiver of her right to seek recovery of her attorneys' fees incurred in this Action from the Navy as permitted under FOIA.

Dated: August 5, 2021

/s/

Hon. William Q. Hayes  
United States District Judge

## **APPENDIX I**

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### **UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA**

DENNIS M. BUCKOVETZ,  
Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE NAVY,  
Defendant.

Case No.: 18-cv-02736-MDD

### **JOINT MOTION FOR PARTIAL DISMISSAL**

The parties to this action jointly request an order dismissing without prejudice Plaintiff's claim

challenging the adequacy of the Navy's search for records in response to Plaintiff's FOIA requests. Plaintiff has informed counsel for Defendant that he seeks to limit the scope of this case to his legal challenge to the Navy's duplicate FOIA request policy, and that he wishes to dismiss, without prejudice, his challenge to the adequacy of the Navy's search for records. The Navy does not object to this request, and therefore in order to clarify the issues prior to summary judgment briefing, the parties jointly move to dismiss, without prejudice, Plaintiff's challenge to the adequacy of the Navy's records searches. Following the partial dismissal, the only potentially applicable requests for relief are those set forth in paragraphs 14, 15, 18, and 20 of Plaintiff's First Amended Complaint. Each party shall bear its own costs and fees associated with the dismissed claims.

Defendant will submit a proposed order granting this joint motion.

DATED: January 17, 2020

Respectfully submitted,

ROBERT S. BREWER, JR.  
United States Attorney

s/ Katherine L. Parker  
Katherine L. Parker  
Assistant U.S. Attorney  
Attorneys for Defendant

s/ Dennis Buckovetz  
Plaintiff (with permission)

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual of the United States District Court for the Southern District of California, I hereby certify that the content of this document is acceptable to Dennis Buckovetz, and that I have obtained his authorization to affix his electronic signature to this document.

/s/ Katherine L. Parker  
Katherine L. Parker  
Assistant U.S. Attorney