

1 RANDY S. GROSSMAN  
Acting United States Attorney  
2 Janet A. Cabral  
Assistant U.S. Attorney  
3 California Bar No. 168900  
Office of the U.S. Attorney  
4 880 Front Street, Room 6293  
San Diego, CA 92101  
5 Tel: (619) 546-8715  
Fax: (619) 546-7751  
6 Email: Janet.Cabral@usdoj.gov  
7 Attorneys for the Department  
Of the Navy  
8  
9

10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**

13 DENNIS M. BUCKOVETZ, an  
individual,  
14  
Plaintiff,  
15  
v.  
16 THE DEPARTMENT OF THE NAVY,  
17  
Defendant.  
18

Case No.: 21cv640-WQH(KSC)

DEFENDANT’S MOTION TO DISMISS  
FOR LACK OF JURISDICTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT

Hearing Date: September 14, 2021

**NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT**

21 The Department of the Navy has searched for and produced to Plaintiff Dennis  
22 Buckovetz hundreds of emails in response to his 2015 and identical 2018 Freedom of  
23 Information Act (FOIA) Requests.<sup>1</sup> Nonetheless, based upon five emails produced by the  
24 Navy in November of 2015, Mr. Buckovetz speculates that there were additional emails  
25

26  
27 <sup>1</sup> These are two of the more than 60 FOIA requests submitted by Plaintiff Buckovetz.  
28 See article “Knight FOI Fund provides ‘meaningful vote of support’ to California man  
seeking Marine emails,” available at <https://www.nfoic.org/blogs/knight-foi-fund-provides-meaningful-vote-of-support-to-california-man-seeking-marine-records/>.

1 which were intentionally deleted or destroyed by or at the direction of the former  
2 Commanding General of the Marine Corps Recruit Depot (“MCRD”), San Diego. Mr.  
3 Buckovetz speculates that these phantom emails implicate the General in a scheme to sell  
4 Marine Corps memorabilia without official oversight, and that the emails were concealed  
5 or destroyed by or at the direction of the General. As a result, Mr. Buckovetz alleges that  
6 because of the deliberate actions of the General “and those working underneath or in  
7 conjunction with him,” the Navy “concealed or destroyed non-exempt records responsive  
8 to Buckovetz’s FOIA Requests.” Mr. Buckovetz seeks “a declaration that the prior search  
9 for the requested emails done by Defendant The Department of the Navy (“Defendant”)  
10 was inadequate because Defendant, through Gen. Bierman, deliberately concealed or  
11 destroyed emails.” [Complaint, ¶¶ 2, 67.]

12 The Court lacks jurisdiction over the claims asserted by Mr. Buckovetz. FOIA  
13 authorizes this Court to (a) enjoin the agency from withholding agency records, and  
14 (b) order the production of any agency records improperly withheld from the complainant.  
15 5 U.S.C. § 552(a)(4)(B). But according to Mr. Buckovetz’s Complaint, the emails he seeks  
16 no longer exist. Mr. Buckovetz’s claims are based wholly upon his speculation regarding  
17 phantom emails which, according to the Complaint, have been deleted or otherwise  
18 destroyed. Mr. Buckovetz’s allegations, speculating about the destruction of additional  
19 emails, do not form the basis for any relief which this Court can grant under the auspices  
20 of FOIA. Therefore, the Court should dismiss the Complaint<sup>2</sup> for lack of jurisdiction.

## 21 I. BACKGROUND

22 On January 23, 2015, Mr. Buckovetz submitted a FOIA request to the Marine Corps  
23 Recruit Depot, Western Recruiting Region, San Diego (“MCRD”) seeking the following:

24 [A]ll email messages dated on or after 1 May 2014 that have any of  
25 the following email addresses Mark.Tull@usmc.mil,  
26 Jim.Gruny@usmc.mil, Michael.Lee@usmc.mil, James.Bierman@  
27 usmc.mil, Thomas.W.Spencer@usmc-mccs.org, and

28 <sup>2</sup> Plaintiff Lynne Bird has dismissed her claim in this case. [See Joint Motion to Dismiss and Order Thereon, Doc. Nos. 9 and 11.]

1 John.Ming@usmc.mil on the “From:”, “To:”, “Cc:” or “Bcc:” lines  
2 AND contain the word “coin” or “coins” on the subject line or within  
3 the body of the message.

4 [Complaint, ¶ 26, and Exhibit B thereto.] This FOIA request, numbered DON-USMC-  
5 2015-002772 (hereinafter “2015 Request”) was referred in part to the Marine Corps  
6 Community Services (“MCCS”) Headquarters in Quantico, VA. The partial referral was  
7 necessary because some of the identified email addresses were for individuals with MCCS,  
8 which uses different email servers and domains than MCRD. The MCRD uses “.mil” as an  
9 email domain whereas MCCS uses “.org.” [Complaint, ¶ 27.]

10 On March 5, 2015, MCRD produced to Mr. Buckovetz 319 pages of records  
11 containing 384 individual emails. [Complaint, ¶ 28.] On November 23, 2015, MCCS  
12 Headquarters in Quantico responded to the referral of Mr. Buckovetz’s 2015 Request and  
13 produced five additional emails that had not appeared in MCRD’s March 5, 2015,  
14 production (the “Five Emails”). [Complaint, ¶ 43, and Exhibit C thereto.]

15 On September 3, 2018, Mr. Buckovetz submitted FOIA Request DON-USMC-  
16 2018-011145 (hereinafter “2018 Request”) to Marine Corps Recruit Depot Western  
17 Recruiting Region San Diego using language identical to that contained in DON-USMC-  
18 2015-002772. [Complaint, ¶ 50, and Exhibit D thereto.] Mr. Buckovetz submitted the  
19 2018 Request to allow him to compare the production with those previously provided in  
20 response to his 2015 Request. [Complaint, ¶ 51.] Specifically, Mr. Buckovetz believed that  
21 the response from MCRD regarding the 2015 Request should have contained the five  
22 additional emails which he received from MCCS in response to the 2015 Request.  
23 [Complaint, ¶ 44.] On September 17, 2018, MCRD administratively closed the 2018 FOIA  
24 request as duplicative of the 2015 Request. [Complaint, ¶ 52.]

25 Mr. Buckovetz administratively appealed the denial of the 2018 Request, and on  
26 December 5, 2018, filed suit alleging a violation of the FOIA based upon the Defendant’s  
27 application of its internal policy regarding duplicative requests, Case No. 18cv2736-WQH-  
28 MDD(KSC). [Complaint, ¶¶ 53 and 63, and Exhibit F thereto.] Mr. Buckovetz in that case

1 also challenged the adequacy of Defendant's search for records in response to his 2015 and  
2 2018 FOIA Requests, pointing out that MCRD did not produce the five emails he received  
3 from the MCCR response to his 2015 Request. Mr. Buckovetz, however, voluntarily  
4 dismissed his claim regarding the adequacy of these prior searches without prejudice upon  
5 agreement of the parties. [Complaint, ¶¶ 63-64, and Exhibits G and H thereto.]  
6 Nonetheless, during the scope of subsequent motion proceedings, Plaintiff continued to  
7 raise issues regarding the adequacy of the Navy's search for responsive emails. As a result,  
8 Defendant filed along with its motion to dismiss for lack of jurisdiction a declaration setting  
9 forth the full scope of its search of all locations likely to contain responsive documents.  
10 [See Case No. 18cv2736-MDD(KSC), Doc. No. 34-1.] The Court subsequently dismissed  
11 Mr. Buckovetz's claim relating to the application of Defendant's duplicative request  
12 policy, concluding that Plaintiff had not shown he had been harmed by the application of  
13 the policy pertaining to duplicative requests.<sup>3</sup> [Complaint, ¶ 65; see also Case No.  
14 18cv2736-WQH-MDD(KSC), Doc. No. 38 (Order of Magistrate Judge Dembin, filed May  
15 7, 2020, granting Defendant's motion to dismiss for lack of jurisdiction).]

16 Mr. Buckovetz, in his current complaint, does not specifically identify any particular  
17 document or email which has been withheld from production by Defendant. He does not  
18 identify any location where Defendant could or should have looked which was likely to  
19 contain additional responsive documents. To the contrary, Mr. Buckovetz speculates there  
20 *may have been* additional responsive emails, which he also speculates were destroyed.  
21 [Complaint, ¶¶ 1-2.]

22  
23  
24 <sup>3</sup> On October 18, 2018, Mr. Buckovetz's spouse, Lynne Bird, submitted a separate  
25 FOIA Request to MCRD, DON-USMC-2019-000608, seeking the same emails Mr.  
26 Buckovetz had requested in his 2015 and 2018 Requests. [Complaint, ¶ 54.] Ms. Bird  
27 received all of the same emails previously produced by the Department of the Navy from  
28 the MCRD email server responsive to the 2015 Request. In responding to Ms. Bird's FOIA  
Request, the Navy also located certain additional email documents, and produced those to  
Ms. Bird. Although Mr. Buckovetz's 2015 Request, at that point, was closed, Defendant  
also produced the additional records to Mr. Buckovetz pursuant to his duplicative 2018  
Request. Therefore, Magistrate Judge Dembin concluded that Mr. Buckovetz had not  
shown he was harmed by the application of the Defendant's policy against processing  
duplicative requests.

## 1 II. LEGAL STANDARD

2 FOIA is a statutory scheme under which individuals may request access to federal  
3 agency documents. *See* 5 U.S.C. § 552. The statute sets forth the procedures for requesting  
4 documents, and carves out nine categories of documents that are exempt from disclosure.  
5 *See* 5 U.S.C. § 552(b). A FOIA requestor who exhausts administrative appeals and is  
6 unsatisfied with the agency’s response may file litigation in federal court. *Id.* at  
7 § 552(a)(4)(B). In a FOIA case, as in others, a motion to dismiss under Rule 12(b)(1)  
8 challenges the Court’s subject matter jurisdiction. A lack of jurisdiction is presumed unless  
9 the party asserting jurisdiction establishes that it exists. *See Kokkonen v. Guardian Life*  
10 *Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, the plaintiff bears the burden of proof on  
11 a Rule 12(b)(1) motion to dismiss for lack of jurisdiction. *Sopcak v. Northern Mountain*  
12 *Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995).

13 When a plaintiff makes a FOIA claim, “federal jurisdiction is dependent upon a  
14 showing that an agency has (1) ‘improperly’; (2) ‘withheld’; (3) ‘agency records.’”  
15 *Kissinger v. Reporters Comm. For Freedom of the Press*, 445 U.S. 136, 150 (1980).  
16 “Judicial authority to devise remedies and enjoin agencies can only be invoked . . . if the  
17 agency has contravened all three components of this obligation.” *Id.*

## 18 III. ARGUMENT

19 Mr. Buckovetz’s claim under FOIA should be dismissed for lack of jurisdiction  
20 because he does not allege any documents within the Defendant’s possession or custody  
21 are being withheld from production. Instead, Mr. Buckovetz speculates that because there  
22 were five emails located on the MCCS.org server, which were not produced by the Navy  
23 from the MCRD.mil server, there *could have been* additional emails that once existed on  
24 the MCRD.mil server which he further speculates were destroyed or concealed by or at the  
25 direction of the MCRD Commanding General so they could not be produced in response  
26 to his 2015 FOIA Request. These speculative claims are not ones over which this Court  
27 has jurisdiction under FOIA.

28 The Supreme Court made clear in the seminal case of *Kissinger v. Reports Comm.*

1 *for Freedom of the Press*, 445 U.S. 136 (1980), that FOIA jurisdiction is triggered by the  
2 agency having actual possession of the requested documents, and that federal courts have  
3 no authority to order the production of records not in the possession of the agency. At issue  
4 in *Kissinger* was the authority of the federal courts, under FOIA, to order production of  
5 documents which were no longer in the possession of the State Department. Throughout  
6 his Government service as Secretary of State and Assistant to the President for National  
7 Security Affairs, Henry Kissinger had prepared summaries and transcripts from electronic  
8 or stenographic recordings of his telephone conversations. Those telephone notes were  
9 stored in his office at the State Department. *Id.* at 140. While still Secretary of State,  
10 Kissinger arranged to move the notes from his office in the State Department to the New  
11 York estate of Nelson Rockefeller. Thereafter, Kissinger first decided what he deemed to  
12 be his private papers, which did not include the telephone notes, to the United States, in  
13 care of the Library of Congress. Kissinger later donated a second collection of papers to  
14 the Library of Congress, including the telephone notes. *Id.* at 141-42.

15 Three separate FOIA requests formed the basis of the litigation which made its way  
16 to the Supreme Court. The first FOIA Request was filed prior to Kissinger's removal of  
17 the telephone notes from the premises of the State Department. *Id.* at 143. The second and  
18 third Requests were filed after Kissinger announced his gift of his telephone notes and their  
19 placement in the Library of Congress. The State Department denied each of the FOIA  
20 requests on the basis that the telephone notes were not agency records subject to FOIA  
21 disclosure. As to the second and third requests, the State Department also denied the  
22 requests because the deposit of the notes with the Library of Congress meant those notes  
23 were not in the Department's custody and control. *Id.* at 143-44. There was some dispute  
24 between the State Department and Kissinger regarding whether the removal of the records  
25 violated the Federal Records and Records Disposal Acts, and the State Department  
26 requested Kissinger return the records to the State Department. Kissinger ultimately  
27 declined to respond to requests from the Department to provide documents to them. *Id.* at  
28 144.

1 Plaintiffs, the FOIA Requesters, filed suit against the Department of State, Secretary  
2 of State, Library of Congress, and Kissinger in an attempt to force disclosure of the records  
3 under FOIA. *Id.* at 144-45. The district court recognized that FOIA did not directly provide  
4 relief because the records were in the custody of the Library of Congress, not an “agency”  
5 for purposes of FOIA. Nonetheless, the district court invoked its equitable powers and  
6 ordered “the return of wrongfully removed agency documents where a statutory retrieval  
7 action appears unlikely.” *Id.* at 145. The district court entered an order requiring the Library  
8 to return documents to the Department of State, and requiring the Department of State to  
9 provide responsive materials to the Plaintiffs. *Id.* The Court of appeals affirmed. *Id.* at 145-  
10 46.

11 The Supreme Court reversed, finding that the district court did not possess authority  
12 to order the Library of Congress to return documents to the Department of State because  
13 even if the telephone notes were agency records, and were wrongfully removed by  
14 Kissinger, FOIA did not confer jurisdiction on the federal courts to impose the remedy. *Id.*  
15 at 146-47. The Court first addressed Plaintiffs’ claims under the Records Act, clarifying  
16 that federal courts lack jurisdiction to adjudicate a claim by a private party that the Act has  
17 been violated. *Id.* at 149-50. The Court further clarified that FOIA does not permit private  
18 actions to recover records wrongfully removed from Government custody. *Id.* at 150. The  
19 Court looked closely at the meaning of the word “withhold” as used in FOIA, concluding  
20 that agency “possession or control is a prerequisite to FOIA disclosure duties.” *Id.* at 152.  
21 The Court noted that FOIA “does not obligate agencies to create or retain documents; it  
22 only obligates them to provide access to those which it in fact has created and retained.”  
23 *Id.* “It is therefore clear that Congress never intended when it enacted the FOIA, to displace  
24 the statutory scheme embodied in the Federal Records Act and the Federal Records  
25 Disposal Act, providing for administrative remedies to safeguard against wrongful removal  
26 of agency records as well as to retrieve wrongfully removed records.” *Id.* at 154.

27 Defendant wholly denies the truth of Mr. Buckovetz’s allegations regarding actions  
28 purportedly taken by or at the direction of the former Commanding General of the MCRD.

1 Nonetheless, even taking as true Mr. Buckovetz’s speculative allegation that there existed  
2 additional emails which were intentionally deleted or concealed by the General so they  
3 could not be produced by the Navy, the Complaint fails to allege that Defendant has  
4 withheld documents within its “possession or control” from production in response to his  
5 FOIA Request. Mr. Buckovetz’s claims in this case are based upon pure speculation. Mr.  
6 Buckovetz has in his possession the declaration prepared by the Defendant in Case No.  
7 18cv2736-MDD(KSC) regarding the search undertaken to respond to his prior allegation  
8 relating to the sufficiency of the agency’s search in response to his 2015 and 2018 FOIA  
9 Requests. Nonetheless, the Complaint in this case makes no effort to describe how the  
10 Navy’s search for responsive records has been inadequate.

11 Instead, Mr. Buckovetz alleges that the prior search was inadequate *because of his*  
12 speculation regarding the existence of phantom emails which were allegedly destroyed by  
13 or at the direction of an individual. Mr. Buckovetz alleges the Defendant violated FOIA by  
14 withholding documents which are, by his own allegations, not in the possession or control  
15 of the Defendant. Because FOIA only authorizes this court to (a) enjoin the agency from  
16 withholding agency records, and (b) order the production of any agency records improperly  
17 withheld from the complainant, the Court lacks jurisdiction to grant the relief sought by  
18 Mr. Buckovetz by way of his current Complaint. The Court should dismiss Mr.  
19 Buckovetz’s claim for lack of jurisdiction.

20 **CONCLUSION**

21 For the reasons set forth above, Defendant respectfully moves the Court to dismiss  
22 Plaintiff’s complaint for lack of jurisdiction.

24 DATED: August 5, 2021

Respectfully submitted,

RANDY S. GROSSMAN  
Acting United States Attorney

27 s/ Janet A. Cabral  
28 Janet A. Cabral  
Assistant U.S. Attorney  
Attorneys for Defendant