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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.*

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

## 6 **II. ALLEGATIONS**

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

11 Major General James W. Bierman, the Commanding General of MCRD, as well as  
12 several other officers, engaged in an unlawful scheme to sell Marine Corps memorabilia,  
13 including commemorative coins, using government personnel and resources and without  
14 official oversight. (*Id.* ¶ 14). Gen. Bierman directed the funds received from the sales to  
15 be used to finance the annual Marine Corps Birthday Ball. (*Id.* ¶ 17).

16 On January 23, 2015, Plaintiff submitted a FOIA Request, Request DON-ESMC-  
17 2015-002772, to the MCRD, stating the following:

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

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

28 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

1 Quantico responded to the referral of Plaintiff’s 2015 Request and produced five additional  
2 emails that had not appeared in MCRD’s March 5, 2015 production. (ECF No. 1, Ex. C).  
3 The additional emails produced by the MCCS included an email thread with the subject  
4 line “Coins” in which Gen. Bierman stated “We sold all one hundred by 0815. I don’t want  
5 to ever run out...Ever...Again!!!!” (*Id.*). A second email also discussed the inventory and  
6 sale of coins. (*Id.*). “These facts indicate that Gen. Bierman, upon learning of Buckovetz’s  
7 2015 FOIA Request, deliberately led Defendant to withhold the Five Emails from MCRD’s  
8 2015 production.” (ECF No. 1 ¶ 47).

9 On September 3, 2018, Plaintiff submitted a second FOIA Request, DON-USMC-  
10 2018-011145, seeking the same documents as the earlier Request in 2015. (ECF No. 1,  
11 Ex. D). On September 17, 2018, MCRD closed the Request, stating that it was duplicative  
12 of the earlier Request. (ECF No. 1 ¶ 52). Plaintiff has exhausted his administrative  
13 remedies as to both Requests. (ECF No. 1 ¶¶ 49, 53).

### 14 **III. LEGAL STANDARD**

15 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to move  
16 for dismissal on grounds that the court lacks jurisdiction over the subject matter. Fed. R.  
17 Civ. P. 12(b)(1). The burden is on the plaintiff to establish that the court has subject matter  
18 jurisdiction over the action. *Assoc. of Med. Colls. v. United States*, 217 F.3d 770, 778–779  
19 (9th Cir. 2000).

20 “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the  
21 challenger asserts that the allegations contained in a complaint are insufficient on their face  
22 to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the  
23 truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.”  
24 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

### 25 **IV. DISCUSSION**

26 Defendant asserts a facial challenge to the Court’s subject matter jurisdiction. (ECF  
27 No. 14 at 2). Defendant contends that it cannot “withhold” the alleged agency records that  
28 Plaintiff seeks, because it does not currently possess them. (ECF No. 12 at 4). Defendant

1 contends that Plaintiff lacks any remedy under FOIA because there are no records to  
2 produce. (ECF No. 14 at 3-4). Plaintiff contends that the agency has “withheld” the alleged  
3 records because it possessed the records and has failed to provide them in response to  
4 Defendant’s FOIA requests. (ECF No. 13 at 5, 9).

5 FOIA grants jurisdiction to United States district courts to “enjoin [an] agency from  
6 withholding agency records” in response to a FOIA request “and to order the production  
7 of any agency records improperly withheld from the complainant.” 5 U.S.C. §  
8 552(a)(4)(B). In addition, courts may “assess against the United States reasonable attorney  
9 fees and other litigation costs reasonably incurred” and “issue[] a written finding that the  
10 circumstances surrounding the withholding raise questions whether agency personnel acted  
11 arbitrarily or capriciously.” *Id.* § 552(a)(4)(E)-(F). Thus, under FOIA, a district court has  
12 subject matter jurisdiction if there is “a showing that an agency has (1) improperly; (2)  
13 withheld; (3) agency records.” *Kissinger v. Rep. Comm. for Freedom of the Press*, 445  
14 U.S. 136, 150 (1980).

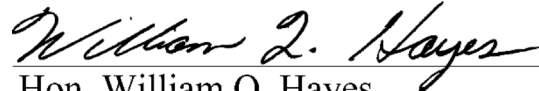
15 The Complaint alleges that Plaintiff’s FOIA Requests sought emails sent between  
16 Defendant’s employees concerning commemorative coins. (*Id.* ¶ 26). The Complaint  
17 further alleges facts to support the allegation that Defendant “concealed or destroyed” these  
18 records without a proper legal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

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

1 **V. CONCLUSION**

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

4 Dated: October 7, 2021



Hon. William Q. Hayes

United States District Court

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**U.S. District Court**

**Southern District of California**

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**Filer:**

**Document Number:** [16](#)

**Docket Text:**

**ORDER: The Motion to Dismiss filed by Defendant The Department of the Navy (ECF No. [12]) is denied. Signed by District Judge William Q. Hayes on 10/7/2021. (ag)**

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