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26 **UNITED STATES DISTRICT COURT**  
 27 **SOUTHERN DISTRICT OF CALIFORNIA**

28 DENNIS M. BUCKOVETZ, an individual,  
 Plaintiff,  
 v.  
 THE DEPARTMENT OF THE NAVY,  
 Defendant.

Case No. 21cv640-WQH(KSC)  
 JOINT DISCOVERY PLAN

1 Defendant, the Department of the Navy (“Defendant”), by and through its  
2 counsel Randy S. Grossman, Acting U.S. Attorney, and Janet A. Cabral, Assistant U.S.  
3 Attorney, and Plaintiff Dennis M. Buckovetz (“Plaintiff”), by and through his counsel  
4 Travis J. Anderson and T. Sean Mann-O’Halloran, of Sheppard, Mullin, Richter &  
5 Hampton, LLP, submit this joint discovery plan.

6 **I. PROCEDURAL HISTORY**

7 Plaintiff and Lynne M. Bird (“Bird”) filed a Complaint on April 13, 2021,  
8 alleging a violation of the Freedom of Information Act, 5 U.S.C. § 552. The parties met  
9 and conferred to attempt to come to a resolution prior to the filing of a responsive  
10 pleading. As a result of those efforts, the parties filed a joint motion to dismiss the claim  
11 asserted by Bird. The Court dismissed Bird’s claim on August 5, 2011.<sup>1</sup>

12 On August 5, 2021, Defendant moved to dismiss Plaintiff’s claim for lack of  
13 jurisdiction. On October 7, 2021, the Court denied the motion to dismiss. On  
14 October 21, 2021, Defendant filed an Answer.

15 **II. DISCOVERY**

16 The parties dispute the availability of discovery in this FOIA case. Defendant  
17 contends that FOIA cases do not follow the usual procedural steps applicable to most  
18 civil cases. *Lane v. Dep’t of the Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (“While  
19 ordinarily the discovery process grants each party access to evidence, in FOIA and  
20 Privacy Act cases discovery is limited because the underlying case revolves around the  
21 propriety of revealing certain documents.”) Discovery is generally not available in a  
22 FOIA case. *See Schrecker v. Dep’t of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002)  
23 (explaining that “[d]iscovery in FOIA [cases] is rare and should be denied.”); *Judicial*  
24 *Watch, Inc. v. Dep’t of Justice*, 185 F. Supp. 2d 54, 65 (D.D.C. 2002) (“Discovery is  
25 not favored in lawsuits under the FOIA.”); *Wheeler v. C.I.A.*, 271 F. Supp. 2d 132, 139  
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27 <sup>1</sup> The parties’ Joint Dismissal Request, and the Court’s Order, both provide that the  
28 dismissal of Ms. Bird’s claim shall not operate as a waiver of her right to seek recovery  
of attorneys’ fees against the Navy, as permitted under FOIA.

1 (D.D.C. 2003) (“Discovery is generally unavailable in FOIA actions.”).

2 In certain FOIA cases, courts have allowed discovery only after the government  
3 has moved for summary judgment. *See, e.g., Lane*, 523 F.3d at 1134 (9th Cir. 2008)  
4 (courts routinely delay discovery in FOIA actions until after summary judgment).  
5 Defendant contends that in this case, where Plaintiff disputes the adequacy of the search  
6 conducted by the Navy, it is appropriate to delay any and all discovery until Defendant  
7 has filed its motion for summary judgment. *Lawyers’ Comm. for Civil Rights v. Dep’t*  
8 *of Treasury*, 54 F. Supp. 2d 1126 1136 (N.D. Cal. 2008) (denying discovery in FOIA  
9 case regarding record keeping procedures upon finding that declarations in support of  
10 summary judgment established that the agency conducted an adequate search).  
11 Consequently, Defendant contends that discovery should not be permitted in this FOIA  
12 case, and certainly not at this stage of the proceedings.

13 Plaintiff contends this case is not a typical FOIA case, and therefore the normal  
14 restrictions on discovery should not apply. Here, discovery will be necessary to  
15 understand whether or not the Navy violated FOIA by destroying and/or concealing  
16 responsive records in anticipation of or in response to Plaintiff’s FOIA request at issue  
17 in this litigation (the “Request”). As set forth in the Complaint, and as recognized by  
18 the Court’s Order denying Defendant’s Motion to Dismiss, issues of fact are present as  
19 to whether Major General James W. Bierman, or those acting at his behest, undertook  
20 efforts to suppress records responsive to Plaintiff’s Request. This would constitute a  
21 FOIA violation, notwithstanding that other employees of Defendant, such as Ms.  
22 Camacho, attempted to diligently comply with the FOIA request (as her efforts were  
23 stymied by the acts of others). As a result, this case is not merely about whether, at the  
24 time Defendant made its FOIA production, additional responsive records still existed.  
25 Rather, it is about whether such records were purged in anticipation of, or in response  
26 to, Plaintiff’s FOIA Request. Discovery will be necessary to answer these central  
27 questions, either before or after Defendant files its motion for summary judgment.

1           **III. CASE SCHEDULING PROPOSAL**

2           Although the parties do not agree on whether discovery is available in this FOIA  
3 case, without waiving any rights or defenses, neither party seeks discovery at this point  
4 of the proceedings, though Plaintiff intends to seek it following the filing of Defendant’s  
5 motion for summary judgment. Further, the parties agree it is appropriate to delay Rule  
6 26(a)(1)(A) disclosures at this point.

7           In prior FOIA litigation filed by Plaintiff, Defendant provided a declaration  
8 regarding its efforts to locate and produce records responsive to Plaintiff’s 2015 FOIA  
9 Request. *See* Case No. 18cv2736-MDD(KSC), Doc. No. 34-1. The parties have been  
10 meeting and conferring regarding the unanswered questions Plaintiff perceives with that  
11 prior declaration, the types of discovery Plaintiff seeks in this case, what witnesses may  
12 still be available to provide information about what steps others at Defendant took to  
13 impair the original search and otherwise suppress responsive documents in response to  
14 the Request, and the appropriate timing of any discovery. The parties mutually agree to  
15 continue these discussions.

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1 The parties seek an opportunity to continue working together for the next 45 days.  
2 Thereafter, the parties seek to hold a continued Rule 26(f) conference and meet and  
3 confer regarding discovery, or the scheduling of motion proceedings, in light of the  
4 parties' discussion. The parties request that, following discussions at the ENE, the Court  
5 schedule a follow up status conference to determine the most efficient course forward  
6 for this litigation.

7 DATED: November 30, 2021

Respectfully submitted,

8 RANDY S. GROSSMAN  
9 Acting United States Attorney

10 /s/ Janet A. Cabral

11 Janet A. Cabral  
12 Assistant United States Attorney  
13 Attorneys for Defendant  
Department of the Navy

14 DATED: November 30, 2021

/s/ Travis J. Anderson

15 Travis J. Anderson  
16 T. Sean Mann-O'Halloran  
17 SHEPPARD, MULLIN, RICHTER &  
18 HAMPTON LLP  
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