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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 FREE SACRED TRINITY CHURCH, a
12 California nonprofit religious corporation;
13 and OPTIMUM HEALTH INSTITUTE –
14 SAN DIEGO, a California nonprofit
15 religious corporation,
16 Plaintiff,
17 v.
18 INTERNAL REVENUE SERVICE,
Defendant.

Case No.: 3:21-cv-1756-W (JLB)

**ORDER DENYING DEFENDANT’S
PARTIAL MOTION TO DISMISS
AND DENYING PLAINTIFFS’
REQUEST FOR EXPEDITED
PROCEEDINGS [DOC. 9]**

19 Pending before the Court is Defendant Internal Revenue Service’s (“IRS”) Partial
20 Motion to Dismiss Plaintiffs’ Complaint for failure to state a claim under Federal Rule of
21 Civil Procedure 12(b)(6). (*Mot.* [Doc. 9].) Defendant also opposes Plaintiffs’ request
22 for expedited proceedings under 28 U.S.C. Section 1657. (*Id.*) Plaintiffs Free Sacred
23 Trinity Church (“FSTC”) and Optimum Health Institute – San Diego (“OHI-SD”) oppose
24 the Motion. (*Opp’n* [Doc. 14].)

25 The Court decides the matter on the papers submitted and without oral argument.
26 Civ. L.R. 7.1(d.1). For the reasons that follow, the Court **DENIES** Defendant’s Partial
27 Motion to Dismiss and **DENIES** Plaintiffs’ request for expedited proceedings. [Doc. 9].
28

1 **I. BACKGROUND**

2 Plaintiff FSTC is a “nonprofit, religious corporation” that teaches “a distinct
3 religious creed based upon Judeo-Christian beliefs and holistic healing and nutrition
4 practices.” (*Compl.* [Doc. 1] ¶ 3.) Plaintiff OHI-SD is also a “nonprofit, religious
5 corporation” affiliated with and subject to the general supervision and control of FSTC.
6 (*Id.* ¶ 4.) On October 29, 2018, the IRS inquired into Plaintiffs’ tax-exempt status as a
7 church. (*Id.* ¶ 6.) It was concerned that FSTC was “being operated more than
8 insubstantially for commercial purposes,” which would disqualify FSTC as a tax-exempt
9 organization. (*Id.*, Ex. 1 at 1.) The IRS then audited Plaintiffs for the 2016 tax period.
10 (*Id.* ¶ 8.)

11 On March 4, 2019, Plaintiffs filed a Freedom of Information Act (“FOIA”) request
12 with the IRS under 5 U.S.C. Section 552, seeking documents regarding what led to the
13 IRS’ audit of Plaintiffs (“2019 FOIA Request”). (*Id.* ¶ 9.)¹ The IRS allegedly did not
14 comply with the FOIA request in time, causing Plaintiffs to file suit. (*Id.* ¶¶ 10-11.)
15 That lawsuit, which is also in this Court, is entitled Free Sacred Trinity Church, et al. v.
16 IRS, No. 3:19-cv-02358-W-JLB (S.D. Cal. 2019) (the “2019 FOIA Action”). In response
17

18
19 ¹ Specifically, Plaintiffs sought the following documents in their 2019 FOIA Request:

- 20 a. The IRS’s entire file (including, without limitation, its administrative file), that may or does
21 relate to the IRS Inquiries, including, without limitation:
- 22 i. All intra-IRS correspondence and referrals;
 - 23 ii. All inter-agency correspondence and referrals;
 - 24 iii. All inter-governmental entity (for example, state governmental entity) correspondence
25 and referrals; and
 - 26 iv. All whistleblower filings or public complaints howsoever documented and regardless of
27 whether on Form 211, Form 13909, or otherwise;
- 28 b. All other documents in the IRS’s possession that may or do relate to the IRS Inquiries, including
any documents showing how the IRS reached a decision, or contributed to the IRS’s decision, to raise
the IRS Inquiries; and
- c. All documents provided to, made available to, seen by, referred to, or otherwise provided for use
or used, in any manner by the applicable high-level Treasury official (as that phrase is used in 26 U.S.C.
§ 7611(a)(2)), in forming a reasonable belief on the basis of facts and circumstances recorded in writing
to justify the IRS examination of any, some, or all of Plaintiff FSTC, Plaintiff OHI-SD, and/or their
affiliate, OHI-A [Optimum Health Institute - Austin].

1 to that suit, the IRS agreed to release all non-exempt, responsive records to Plaintiffs’
2 2019 FOIA request, with status reports every 60 days. (*Compl.* ¶ 12.)

3 According to Plaintiffs, after the 2019 FOIA Action began, the IRS reported
4 Plaintiff’s counsel, Paul J. Dostart, to the U.S. Treasury Inspector General for Tax
5 Administration (“TIGTA”). (*Opp’n* at 2.) TIGTA allegedly investigated Mr. Dostart but
6 informed the IRS that it would not “prosecute” him. (*Id.*) Consequently, on March 12,
7 2021, Plaintiffs filed a new FOIA request with the IRS, seeking additional records related
8 to the IRS’s audit (the “2021 FOIA Request”). (*Compl.* ¶ 15.) Specifically, the 2021
9 FOIA Request “expanded the 2019 FOIA Request to include all documents prepared or
10 dated from March 4, 2019 to and including the date on which the IRS provides its last
11 batch of documents to Plaintiffs regarding the request,” and included three new
12 categories of requested documents:

- 13 d. All other documents in the IRS’s possession that may or do relate to or show
14 how the IRS reached a decision, or contributed to the IRS’s decision, to
15 issue the two initial reports of examination issued to me under cover of letter
16 dated January 21, 2021;
- 17 e. All documents that relate to the Treasury Inspector General for Tax
18 Administration (“TIGTA”) inquiry or investigation of Paul J. Dostart, and/or
19 which relate to the interview of Paul J. Dostart by TIGTA agents on May 14,
20 2020, and which were created on or after January 1, 2020, and extend up
21 until the present; and
- 22 f. If you determine that there exist documents which are described in this
23 FOIA request but which you decide to not disclose, a description of such
24 document(s), the reasons for your non-disclosure decision, and any
25 documents relied upon or that may be relied upon to make that decision.

26 (*Id.*)

27 The IRS forwarded the subsection (e) portion of Plaintiffs’ 2021 FOIA Request to
28 TIGTA, and TIGTA produced approximately 250 pages of documents in response. (*Id.* ¶

1 16.) Plaintiffs, however, allege that these are the only documents they received and they
2 “do not believe that this production includes all documents responsive to the request.”

3 (*Id.*)

4 Defendant IRS moves to dismiss the subsection (e) portion of Plaintiffs’ 2021
5 FOIA Request for failure to state a claim, arguing that it “does not have access to TIGTA
6 records and once the transfer is made to TIGTA, the responsibility for that portion of the
7 FOIA request falls on TIGTA.” The IRS relies on a declaration from Fatima Merriam—a
8 Senior Disclosure Specialist in the IRS’s Office of Privacy, Governmental Liaison and
9 Disclosure—in support for this contention. (*Mot.* at 6; *Fatima Merriam Decl.* [Doc. 9].)
10 Plaintiffs counter that the IRS cannot satisfy its FOIA obligation by simply transferring
11 the 2021 FOIA Request to another agency. It must also search for its own records
12 responsive to the Request. (*Opp’n* at 5).

13 In addition, Defendant IRS opposes Plaintiffs’ request for expedited proceedings
14 for failing to establish “good cause” under 28 U.S.C. Section 1657. (*Mot.* at 6-7.)

15 16 **II. LEGAL STANDARD**

17 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
18 sufficiency of the complaint. Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484
19 (9th Cir. 1995). A complaint may be dismissed as a matter of law either for lack of a
20 cognizable legal theory or for insufficient facts under a cognizable theory. Balisteri v.
21 Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the motion, a
22 court must “accept all material allegations of fact as true and construe the complaint in a
23 light most favorable to the non-moving party.” Vasquez v. L.A. Cnty., 487 F.3d 1246,
24 1249 (9th Cir. 2007).

25 A complaint must contain “a short and plain statement of the claim showing that
26 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has
27 interpreted this rule to mean that “[f]actual allegations must be enough to raise a right to
28 relief above the speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555

1 (2007). The allegations in the complaint must “contain sufficient factual matter, accepted
2 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556
3 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). Well-pled allegations in the
4 complaint are assumed true, but a court is not required to accept legal conclusions
5 couched as facts, unwarranted deductions, or unreasonable inferences. See Papasan v.
6 Allain, 478 U.S. 265, 286 (1986); Sprewell v. Golden State Warriors, 266 F.3d 979, 988
7 (9th Cir. 2001).

8 9 **III. DISCUSSION**

10 **A. Must the IRS Search for Records Responsive to the Subsection (e)** 11 **Portion of Plaintiffs’ 2021 FOIA Request?**

12 FOIA was enacted “to promote honest and open government” and “to ensure
13 public access to information created by the government” Wood v. F.B.I., 432 F.3d
14 78, 82 (2nd Cir. 2005) (citations omitted). Bolstering this policy of transparency, FOIA’s
15 statutory exemptions are construed narrowly, with all doubts resolved in favor of
16 disclosure. See id. at 82-83. FOIA obligates the government to produce documents
17 within its “possession or control.” Kissinger v. Reporters Comm. for Freedom of the
18 Press, 445 U.S. 136, 150–51 (1980). But a federal statute concerning FOIA and the IRS,
19 26 C.F.R. Section 601.702(c)(3)(i), provides:

20 Where the request is for a record which is determined to be in the possession
21 or under the control of a constituent unit of the Department of the Treasury
22 other than the IRS, the request for such record shall immediately be
23 transferred to the appropriate constituent unit and the requester notified to
24 that effect. Such referral shall not be deemed a denial of access within the
25 meaning of these regulations.

26 Defendant IRS contends that it and TIGTA are separate agencies for the purposes
27 of FOIA and that it does not have access to TIGTA records. (*Mot.* at 3.) The IRS relies
28 on the Declaration of Fatima Merriam for support of this contention. (*Id.*) Plaintiffs

1 counter that the Court may not consider the Merriam Declaration because it is extrinsic
2 evidence not identified or relied upon in the Complaint. (*Opp'n* at 3.)

3 Generally, courts may not consider material outside the complaint when ruling on a
4 motion to dismiss. Schneider v. Cal. Dept. of Corrections, 151 F.3d 1194, 1197 n.1 (9th
5 Cir. 1998) (“The focus of any Rule 12(b)(6) dismissal ... is the complaint.”). Courts,
6 however, may “consider documents that were not physically attached to the complaint
7 where the documents’ authenticity is not contested, and the plaintiff’s complaint
8 necessarily relies on them.” Sams v. Yahoo! Inc., 713 F.3d 1175, 1179 (9th Cir. 2013)
9 (citation omitted).

10 Plaintiffs’ Complaint does not include the Merriam Declaration, it does not
11 necessarily rely on it, and the authenticity and facts in the Declaration are in dispute.
12 Therefore, the Court cannot consider the Merriam Declaration without converting
13 Defendant’s Motion to Dismiss into a motion for summary judgment. See Fed. R. Civ.
14 Proc. 12(d); see also Arellano v. Santos, 2020 WL 1275650, at *3 (S.D. Cal. Mar. 16,
15 2020).

16 Even if the Court could consider the Merriam Declaration without converting
17 Defendant’s Motion into a motion for summary judgment, the IRS still fails to show how
18 it met its obligation under FOIA, at least at this stage of the litigation. The subsection (e)
19 portion of Plaintiffs’ 2021 FOIA Request seeks records relating to TIGTA’s inquiry of
20 Plaintiffs’ counsel, Paul Dostart. (*Compl.* ¶ 15.) Contrary to Defendant’s argument, not
21 all records responsive to this request lie under the exclusive control of TIGTA. (*Mot.* at
22 5-6.) For example, as Plaintiffs suggest, the IRS might have “notes or written
23 communications between IRS agents in connection with their request that TIGTA
24 conduct an investigation” of Mr. Dostart. (*Opp'n* at 6.)

25 Moreover, to comply with FOIA, the IRS must actually search for documents to
26 know whether they exist in their possession. See Middle East Forum v. U.S. Dept. of
27 Treasury, 317 F.Supp.3d 257, 266 (D.D.C. 2018) (“[T]he IRS cannot aver that no
28 responsive non-exempt records exist without looking for them.”). If the IRS claims it

1 does not possess or control a requested document, the IRS must show that it conducted a
2 search “reasonably calculated to uncover all relevant documents.” Urban v. United
3 States, 72 F.3d 94, 95 (8th Cir. 1995) (quotation and citation omitted). Therefore,
4 because Defendant failed to conduct a reasonable search for records, its Partial Motion to
5 Dismiss the subsection (e) portion of Plaintiffs’ 2021 FOIA Request is **DENIED**.

6
7 **B. Have Plaintiffs Shown Good Cause for Expedited Proceedings?**

8 Parties are entitled to expedited proceedings if they can show good cause. 28 U.S.C.
9 § 1657(a). They can establish good cause by showing that “a right under the Constitution
10 of the United States or a Federal Statute (including rights under section 552 of title 5) would
11 be maintained in a factual context that indicates that a request for expedited consideration
12 has merit.” 28 U.S.C. § 1657(a). District courts have discretion to determine the need for
13 expedited proceedings on a case-by-case basis. Freedom Commc’ns. Inc. v. F.D.I.C., 157
14 F.R.D. 485, 486–87 (C.D. Cal. 1994) (“The [Federal Civil Priorities Act] grants a court
15 wide discretion to organize its docket.”). While the “good cause” provision of Section
16 1657 should be “liberally construed by the courts for expedited consideration under the
17 Freedom of Information Act,” litigants must “persuasively assert that there is a special
18 public or private interest in expeditious treatment of their case.” Id. (citation omitted).
19 Special consideration is given for actions asserting federal rights, for example, in “habeas
20 corpus actions, recalcitrant witness actions, and actions for preliminary or temporary
21 injunctive relief.” Id.

22 Plaintiffs argue that good cause exists for expedited proceedings because the records
23 sought in their FOIA Requests “are needed to investigate government action in
24 commencing the audit of [Plaintiffs], and that the IRS has been painfully slow to produce
25 them.” (*Opp’n* at 6.) Indeed, while Defendant IRS’ Partial Motion to Dismiss was under
26 submission with the Court, the IRS concluded its audit of Plaintiffs and revoked their tax-
27 exempt status as a church. (*See Order Granting in Part Plaintiffs’ Ex Parte App. to*
28 *Supplement Opp’n* [Doc. 19] at 2.) Plaintiffs allegedly intend to appeal the IRS’

1 unfavorable audit determination in U.S. Tax Court. (*Opp'n* at 7.) And according to
2 Plaintiffs, in order to begin litigating in tax court, they “will quickly need the records they
3 requested in the earlier related FOIA case.” (*Id.*)

4 In other words, Plaintiffs seek expedited proceedings to quickly obtain civil
5 discovery so they can appeal the IRS’ audit in tax court. However, “FOIA is not designed
6 ‘as a substitute for civil discovery.’” Shannahan v. I.R.S., 672 F.3d 1142, 1151 (9th Cir.
7 2012) (citing Baldrige v. Shapiro, 455 U.S. 345, 360 n.14 (1982) (“The primary purpose
8 of the FOIA was not to benefit private litigants or to serve as a substitute for civil
9 discovery.”). Moreover, Plaintiffs fail to explain why they “need” these documents to
10 begin litigating in tax court in the first place. Assuming the requested documents are
11 relevant to the IRS’ audit and ultimate determination of Plaintiffs’ tax-exempt status,
12 Plaintiffs can likely obtain these documents in tax court through discovery. Therefore,
13 having failed to establish good cause, Plaintiffs’ request for expedited proceedings is

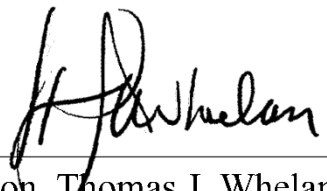
14 **DENIED WITHOUT PREJUDICE.**

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16 **IV. CONCLUSION & ORDER**

17 For the foregoing reasons, the Court **DENIES** Defendant’s Partial Motion to
18 Dismiss and **DENIES** Plaintiff’s Request for Expedited Proceedings **WITHOUT**
19 **PREJUDICE.** [Doc. 9].

20 **IT IS SO ORDERED.**

21 Dated: March 30, 2022

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23 
24 Hon. Thomas J. Whelan
25 United States District Judge
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