

1 events.⁴ Ghaffari spent at least 500 hours complying with Dang's requests.⁵ His health and
2 company suffered as a result.⁶

3 This suit followed. Ghaffari alleges Dang and the IRS bombarded him with requests for
4 unnecessary information to harass and intimidate him.⁷ He asserts three causes of action:
5 (1) violation of the Privacy Act,⁸ (2) violation of his First and Fifth Amendment rights under
6 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*⁹ and (3) wrongful inspection
7 and disclosure.

8 II.

9 This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The parties further
10 consented to the jurisdiction of the undersigned magistrate judge under 28 U.S.C. § 636(c) and
11 Fed. R. Civ. P. 72(a).

12 Under Fed. R. Civ. P. 12(b)(1), a case must be dismissed when, considered in its entirety
13 and on its face, the complaint fails to establish subject matter jurisdiction.¹⁰ The plaintiff bears the
14 burden of establishing subject matter jurisdiction.¹¹

15 Under Fed. R. Civ. P. 12(b)(6), "dismissal can be based on the lack of a cognizable legal
16 theory or the absence of sufficient facts alleged under a cognizable legal theory."¹² If a plaintiff

17 ⁴ See *id.* at ¶ 2.4.

18 ⁵ See *id.* at ¶ 8.15.

19 ⁶ See *id.* at ¶ 5.5.

20 ⁷ See *id.* at ¶ 2.4.

21 ⁸ Specifically, Ghaffari alleges Defendants retained his tax return information for unlawful
22 purposes, failed to specify the authority that authorized solicitation of his information, failed to
23 notify him of the purpose for which the information was solicited, failed to notify him of how his
24 information would be used, failed to notify him of the consequences of not providing information
and maintained records of his First Amendment activity without authorization. See *id.* at ¶¶ 8.5-12;
see also 5 U.S.C. § 552a(e)(1), (3)(A)-(D), (7).

25 ⁹ 403 U.S. 388 (1971).

26 ¹⁰ See *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

27 ¹¹ *In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir. 2013).

28 ¹² *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

1 fails to proffer “enough facts to state a claim to relief that is plausible on its face,” the complaint
2 may be dismissed for failure to state a claim upon which relief may be granted.¹³ A claim is
3 facially plausible “when the pleaded factual content allows the court to draw the reasonable
4 inference that the defendant is liable for the misconduct alleged.”¹⁴

5 At this stage of the case, the court must accept all material allegations in the complaint as
6 true and construe them in the light most favorable to the non-moving party.¹⁵ The court’s review is
7 limited to the face of the complaint, materials incorporated into the complaint by reference, and
8 matters of which the court may take judicial notice.¹⁶ However, the court need not accept as true
9 allegations that are conclusory, unwarranted deductions of fact, or unreasonable inferences.¹⁷

10 III.

11 As a preliminary matter, Ghaffari’s complaint must be dismissed in its entirety for
12 insufficient service. In an action against a federal agency or employee, a plaintiff also must serve
13 the United States by serving the Attorney General and the United States Attorney for the district in
14 which the action is brought.¹⁸ This Ghaffari failed to do. As a result, his complaint must be
15 dismissed pursuant to Fed. R. Civ. P. 12(b)(5). But Ghaffari’s claims suffer from flaws greater
16 than insufficient service alone.

17 *First*, Ghaffari’s Privacy Act claims fail as a matter of law. Section 522a(g)(1) of the
18 Privacy Act provides civil remedies for federal agencies’ failure to comply with Privacy Act

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22 ¹³ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

23 ¹⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

24 ¹⁵ *See Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

25 ¹⁶ *See id.*

26 ¹⁷ *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Twombly*,
27 550 U.S. at 561 (2007) (“a wholly conclusory statement of [a] claim” will not survive a motion to
dismiss).

28 ¹⁸ *See Fed. R. Civ. P. 4(i)(1)-(3).*

1 provisions.¹⁹ Congress, however, limited Section 552a(g)'s scope with regards to tax-related
2 activity by specifying that "[t]he provision of subsection[] (g) of section 552a . . . shall not be
3 applied, directly or indirectly, to the determination of the existence or possible existence of liability
4 (or the amount thereof) of any person for any tax."²⁰ Here, Ghaffari's Privacy Act claims
5 challenge the IRS's investigation of his claimed expenses, which indisputably relates to
6 determination of his tax liability.²¹

7 Ghaffari's Privacy Act claim against Dang similarly fails. Section 522a(g)(1) only allows
8 plaintiffs to bring civil actions "against the agency." This right of action does not extend to
9 individual federal employees like Dang.²²

10 **Second**, Ghaffari's *Bivens* claims fail as a matter of law. A *Bivens* claim can only be made
11 against government agents in those agents' individual capacities.²³ Of particular relevance here,
12 government agencies are not subject to suit under *Bivens*.²⁴

13 Even as to Dang, Ghaffari's *Bivens* claim does not pass muster. Ghaffari argues that he has
14 "no statutory remedy" for Defendants' violation of his First Amendment rights.²⁵ The
15 Ninth Circuit, however, recognizes a comprehensive remedial scheme created by Congress to

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17 ¹⁹ See 5 U.S.C. § 552a(g)(1) ("Whenever any agency . . . fails to comply with any other provision
18 of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on
19 an individual, the individual may bring a civil action against the agency").

20 ²⁰ 26 U.S.C. § 7852e.

21 ²¹ See *England v. Comm'r*, 798 F.2d 350, 351-52 (9th Cir. 1986) (holding that a district court
22 lacked jurisdiction over a § 522a(g) claim concerning records related to determining tax liability);
23 *O'Connor v. United States*, 669 F. Supp. 317, 323 (D. Nev. 1987), *aff'd*, 935 F.2d 275 (9th Cir.
24 1991) ("Therefore, § 26 U.S.C. § 7852(e) applies and prevents this Court's assertion of jurisdiction
25 over plaintiffs' Privacy Act Claims against the IRS.").

26 ²² See also *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1448 (9th Cir. 1985) (citations omitted) ("The
27 civil remedy provisions of the [Privacy Act] do not apply against private individuals").

28 ²³ See *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173
(9th Cir. 2007) ("[A] *Bivens* action can be maintained against a defendant in his or her individual
capacity only, and not in his or her official capacity." (quoting *Daly-Murphy v. Winston*, 837 F.2d
348, 355 (9th Cir. 1987))).

²⁴ See *FDIC v. Meyer*, 510 U.S. 471, 484-85 (1994).

²⁵ Docket No. 22 at ¶ 9.2.

1 resolve tax disputes.²⁶ Accordingly, the Ninth Circuit has held that *Bivens* relief is not available
2 for challenges to IRS officials' actions.²⁷ Here, Ghaffari's allegations against Dang all relate to her
3 investigation of his tax returns, which involved tax assessment and collection.

4 Dang also is entitled to qualified immunity against Ghaffari's *Bivens* claim. Government
5 officers acting in their official capacities are entitled to qualified immunity unless they violate
6 "clearly established statutory or constitutional rights."²⁸ Ghaffari asserts that Dang and the IRS
7 "impos[ed] unreasonable burdens upon the exercise of [his] First Amendment rights"²⁹ and
8 invaded "constitutionally protected . . . privacy."³⁰ But notwithstanding these conclusory
9 statements, Ghaffari fails to allege any conduct that constitutes a clear First or Fifth Amendment
10 violation.

11 **Third**, Ghaffari's wrongful inspection and disclosure claims fail as a matter of law. While
12 Ghaffari raises his wrongful inspection and disclosure claims under 26 U.S.C. § 7431(a)(1),³¹ that
13 statute only provides a right of action "against the United States." Ghaffari does not name the
14 United States as a party.³²

15 Even amending his complaint to assert a cause of action against the United States would not
16 save Ghaffari's claims. He alleges Defendants wrongfully inspected the information that Dang

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18 ²⁶ See *Adams v. Johnson*, 355 F.3d 1179, 1185 (9th Cir. 2004) ("There are few statutory schemes
19 more complex, comprehensive, or subject to greater congressional scrutiny than the Internal
20 Revenue Code").

21 ²⁷ See *id.* at 1186 ("[W]e hold that *Bivens* relief is unavailable for plaintiffs' suit against IRS
22 auditors and officials.").

23 ²⁸ See *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988) (quoting *Harlow v. Fitzgerald*, 457 U.S.
24 800, 818 (1982)) (internal quotation marks omitted).

25 ²⁹ Docket No. 22 at ¶ 9.6.

26 ³⁰ See *id.* at ¶ 2.4.

27 ³¹ See 26 U.S.C. § 7431(1)(a) ("If any officer or employee of the United States knowingly, or by
28 reason of negligence, inspects or discloses any return or return information with respect to a
taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for
damages against the United States").

³² See also *Mid-S. Music Corp. v. Kolak*, 756 F.2d 23, 25 (6th Cir. 1984) ([U]nder
26 U.S.C. § 7431(a)(1) the only proper defendant to such a suit is the United States").

1 requested because the inspection was not undertaken for tax administration purposes.³³ But
2 Ghaffari fails to allege any facts to support this conclusion. The requested bank records, contact
3 information for individuals with whom Ghaffari had business engagements and information about
4 related events are all relevant to verifying claimed business expenses.

5 To the extent Ghaffari alleges Defendants unlawfully disclosed his tax return information,³⁴
6 his claim still fails. Ghaffari never identifies what information was disclosed, to whom, or under
7 what circumstances. Such incomplete allegations are insufficient to render his wrongful disclosure
8 claim plausible.³⁵

9 **IV.**

10 Defendants' motion to dismiss is GRANTED. Dismissal without leave to amend is only
11 appropriate if it is clear that the complaint could not be saved by amendment such as after a
12 plaintiff's "repeated failure to cure deficiencies by amendments previously allowed."³⁶ Because
13 Ghaffari has not previously amended his complaint and the court cannot yet say that amendment
14 would be futile, leave to amend also is GRANTED. Any amended pleadings shall be filed no later
15 than July 1, 2015.

16 **SO ORDERED.**

17 Dated: June 10, 2015

18 
19 PAUL S. GREWAL
20 United States Magistrate Judge

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23 ³³ See Docket No. 22 at ¶ 10.5.

24 ³⁴ See *id.* at ¶¶ 10.7-9.

25 ³⁵ Other courts have similarly required more specific allegations when evaluating motions to
26 dismiss § 7431 wrongful disclosure claims. See, e.g., *Schroeder v. United States*, Case No. 3:12-
27 cv-00152, 2013 WL 3832445, at *2-3 (D. Nev. July 23, 2013).

28 ³⁶ *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).