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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS MICHAEL BENHOFF,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF JUSTICE; LAURA E. DUFFY,
UNITED STATES ATTORNEY;
KYLE W. HOFFMAN, ASSISTANT
UNITED STATES ATTORNEY,

Defendants.

CASE NO. 16CV1095-GPC(JLB)

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

[Dkt. No. 10.]

Before the Court is Defendants' motion to dismiss for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Plaintiff filed an opposition and Defendants replied. (Dkt. Nos. 12, 13.) On November 8, 2016, Plaintiff filed a request to file a sur-reply. (Dkt. No. 16.) The motions are submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). The Court GRANTS Plaintiff's request to file a sur-reply. Based on the reasoning below, the Court GRANTS in part and DENIES in part Defendants' motion to dismiss for lack of jurisdiction.

Background

Plaintiff Thomas Michael Benhoff ("Plaintiff"), proceeding *pro se*, is currently in custody in the San Diego County Jail facing a charge, *inter alia*, of alleged possession of six images of "child pornography" in violation of California Penal Code

1 section 311.11 in San Diego Superior Court in the case of People v. Benhoff,
2 SCN324140. (Dkt. No. 1, Compl. ¶ 1.) Defendant United States Department of Justice
3 is a federal governmental agency in possession of the documents sought by Plaintiff.
4 (Id. ¶ 2.) Defendant Laura Duffy is the United States Attorney for the Southern District
5 of California, who has the ultimate authority for the denial of Plaintiff’s FOIA request.
6 (Id. ¶ 3.) Kyle Hoffman is the Assistant United States Attorney (“AUSA”) who
7 communicated directly with Plaintiff and denied the FOIA request. (Id. ¶ 4.)

8 Around November 17, 2015, Plaintiff served a subpoena duces tecum issued
9 from the Superior Court of San Diego County on the Federal Bureau of Investigation
10 (“FBI”) seeking materials under the Freedom of Information Act (“FOIA”). (Id. ¶ 6.)
11 Around November 30, 2015, AUSA Hoffman responded that Plaintiff’s subpoena
12 duces tecum from the state court would not be complied with due to sovereign
13 immunity of federal agencies in state court. (Id. ¶ 7; id., Att. A at 11¹.) The letter then
14 summarized the “Touhy²” procedures for Plaintiff to undertake to obtain the requested
15 materials. (Id.) Around January 14, 2016, Plaintiff submitted to Hoffman a FOIA
16 request supported by pertinent documents. (Id. ¶ 8; id., Ex. A at 7.) Plaintiff claims
17 his FOIA request does not seek information that are exempt from disclosure and seeks
18 only six images that are charged against Plaintiff in the pending state criminal
19 prosecution, and no records are sought that would interfere with enforcement
20 proceedings or disclose investigative techniques. (Id. ¶¶ 11, 12.) In a letter dated
21 February 4, 2016, Hoffman denied Plaintiff’s FOIA request. (Id. ¶ 14; id., Ex. B at 19.)

22 According to Plaintiff, the subject FOIA materials are directly exculpatory and
23 would allow him to prove his factual innocence in the state criminal proceedings and
24 Defendants have improperly refused to produce the documents requested. (Id. at 1; id.
25 ¶ 18.) Plaintiff alleges causes of action under the Freedom of Information Act
26 (“FOIA”) and the Administrative Procedures Act (“APA”) to compel the disclosure of

27 ¹Page numbers are based on the CM/ECF pagination.
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²Touhy v. Ragen, 340 U.S. 462 (1951).

1 non-exempt documents which Plaintiff sought and Defendants have refused to produce.
2 Specifically, Plaintiff seeks “injunctive and/or mandamus relief” compelling
3 Defendants “to provide all available, non-exempt materials and information responsive
4 to” nine Freedom of Information Act (“FOIA”) requests attached in Exhibit A. (Id. at
5 5.)

6 **Discussion**

7 Defendants move to dismiss the FOIA cause of action for failure to exhaust
8 administrative remedies and move to dismiss the U.S. Attorney and the Assistant U.S.
9 Attorney as defendants, under the remaining cause of action under the Administrative
10 Procedures Act.³ (Dkt. No. 10.) Plaintiff opposes.

11 **A. Legal Standard under Federal Rule of Civil Procedure 12(b)(1)**

12 Federal Rule of Civil Procedure (“Rule”) 12(b)(1) provides for dismissal of a
13 complaint for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Rule
14 12(b)(1) jurisdictional attacks can be either facial or factual. White v. Lee, 227 F.3d
15 1214, 1242 (9th Cir. 2000).

16 Here, Defendants are mounting a factual attack on subject matter jurisdiction as
17 they provide evidence to challenge subject matter jurisdiction. In a factual attack, the
18 challenger provides evidence that an alleged fact in the complaint is false, thereby
19 resulting in a lack of subject matter jurisdiction. Safe Air for Everyone v. Meyer, 373
20 F.3d 1035, 1039 (9th Cir. 2004). Upon a factual attack, the allegations in the complaint
21 are not presumed to be true, White, 227 F.3d at 1242, and “the district court is not
22 restricted to the face of the pleadings, but may review any evidence, such as affidavits
23 and testimony, to resolve factual disputes concerning the existence of jurisdiction.”
24 McCarthy v. United States, 850 F.2d 558, 560 (9th Cir.1988). “Once the moving party
25 has converted the motion to dismiss into a factual motion by presenting affidavits or
26 other evidence properly brought before the court, the party opposing the motion must
27 furnish affidavits or other evidence necessary to satisfy its burden of establishing

28 ³Defendants do not move to dismiss the APA cause of action.

1 subject matter jurisdiction.” Savage v. Glendale Union High Sch., 343 F.3d 1036,
2 1039 n. 2 (9th Cir. 2003). The district court may review evidence beyond the
3 complaint without converting the motion to dismiss into a motion for summary
4 judgment. See id. However, “[a] court may not resolve genuinely disputed facts where
5 ‘the question of jurisdiction is dependent on the resolution of factual issues going to
6 the merits.’” Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987) (citations
7 omitted.)

8 **B. Freedom of Information Act (“FOIA”)**

9 FOIA requires every agency “upon any request for records which . . . reasonably
10 describes such records” to make such records “promptly available to any person.” 5
11 U.S.C. § 552(a)(3). There are nine categories of documents exempted from disclosure
12 under FOIA. 5 U.S.C. § 552(b). “If an agency improperly withholds any documents,
13 the district court has jurisdiction to order their production.” U.S. Dept. of Justice v.
14 Reporters Comm. for Freedom of Press, 489 U.S. 749, 756 (1989).

15 “Exhaustion of a parties’ administrative remedies is required under the FOIA
16 before that party can seek judicial review.” In re Steele, 799 F.2d 461, 465 (9th Cir.
17 1986) (citations omitted). “FOIA should be read to require that a party must present
18 proof of exhaustion of administrative remedies prior to seeking judicial review.”
19 Hedley v. United States, 594 F.2d 1043, 1044 (5th Cir. 1979). “The complainant must
20 request specific information in accordance with published administrative procedures,
21 see 5 U.S.C. § 552(a)(1), (2) & (3), and have the request improperly refused before that
22 party can bring a court action under the FOIA. See 5 U.S.C. § 552(a)(4)(B)⁴.” In re
23 Steele, 799 F.2d at 466. If a plaintiff has not complied with the exhaustion procedures,
24 district courts lack jurisdiction over the claim under the exhaustion doctrine and will
25 dismiss the claim for lack of subject matter jurisdiction. Id. In Steele, the Ninth Circuit
26 held that the claimants failed to exhaust the FOIA claim because neither of them made

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28 ⁴ “On complaint, the district court . . . has jurisdiction to enjoin the agency from
withholding agency records and to order the production of any agency records
improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

1 a request from the agency's office pursuant to FOIA. Id. The court also determined
2 that the district judge improperly construed the claimants' informal discovery as a
3 request for information under FOIA. Id.

4 Defendants argue that because Plaintiff never submitted a FOIA request to the
5 FBI, his claim fails for lack of administrative exhaustion. The FBI's
6 Record/Information Dissemination Section ("RIDS") processes FOIA requests and a
7 search of Document Processing System, which processes, tracks and responds to FOIA
8 requests received by the FBI reveals no FOIA requests by "Thomas Michael Benhoff."
9 (Dkt. No. 10-3, Hardy Decl. ¶¶ 3, 4.) The FBI's public website provides detailed
10 instructions on how to submit a FOIA request which includes mailing the request to
11 RIDS to an address in Virginia, faxing to a specific fax number, emailing to a specific
12 email address or electronically submitting a request via the eFOIA portal. (Id. ¶ 7.)
13 FOIA requests are different and distinct from Touhy⁵ requests and both are governed
14 by two separate standards, regulations and procedures. (Id. ¶ 6.)

15 In response, Plaintiff first argues that his requests for information were FOIA
16 requests because the subject line of his January 14, 2016 letter states, "Request for
17 Information . . ." and FOIA does not require that he specifically include the words
18 "FOIA request"; therefore, he contends his January 14, 2016 letter was a FOIA request.

19 As noted by Defendants in their reply, the January 14, 2106 subject line, in full,
20 states "Request for Information Pursuant to 28 C.F.R. 16.21 - 16.27." (Dkt. No. 1, Ex.
21 A at 7.) Contrary to Plaintiff's argument, he specifically sought information under the
22 Touhy regulations. Moreover, Plaintiff's alleged FOIA request on January 14, 2016
23 was a response to Defendant Hoffman's letter of November 30, 2015 concerning

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25 ⁵Federal agencies, including the Department of Justice, have regulations
26 implementing policies for disclosing information to state courts after receiving a
27 "demand", which ordinarily takes the form of a subpoena. Mak v. FBI, 252 F.3d 1089,
28 1092 (9th Cir. 2001). These regulations, known as the Touhy regulations, are codified
at 28 C.F.R. §§ 16.21-16.27 and provide procedures to respond to demands for
"production or disclosure" of information for state and federal court proceedings. Id.
(citing 28 U.S.C. § 16.21(a).)

1 Plaintiff's earlier subpoena for FBI records, and not a FOIA request. (Dkt. No. 10-3,
2 Hardy Decl. ¶ 5.) Thus, Plaintiff's argument that his January 14, 2016 letter to
3 Hoffman was a FOIA request is without merit.

4 Second, Plaintiff argues his requests for information should be construed as
5 FOIA requests because he submitted a request for information to the DOJ which is an
6 agency to which FOIA information can be sought. Therefore, a FOIA request to the
7 DOJ was a FOIA request to the FBI. However, as stated in a declaration by the Section
8 Chief of RIDS at the FBI, FOIA requests seeking records from the FBI must
9 specifically comply with the procedural requirements outlined on its website which
10 Plaintiff failed to comply with. (Dkt. No. 10-3, Hardy Decl. ¶¶ 7, 8.) Moreover,
11 Plaintiff's letter of January 14, 2016 specifically seeks document pursuant to the Touhy
12 regulations. Plaintiff's argument is not persuasive.

13 Lastly, even if Plaintiff did not comply with exhausting administrative remedies
14 for his FOIA claim, he argues that he should be exempted from the requirement to
15 exhaust because he faces irreparable injury of a false state court conviction and cites
16 to Laing v. Ashcroft, 370 F.3d 994 (9th Cir. 2004).⁶ However, Laing is inapposite as
17 it concerned the Illegal Immigration Reform and Immigrant Responsibility Act of 1996
18 dealing with different issues and concerns than those involved in a FOIA request.
19 Plaintiff has not provided any legal support that the exhaustion requirement may be
20 waived under FOIA.⁷

21 Because Plaintiff has not demonstrated he exhausted administrative remedies,
22 the Court lacks subject matter jurisdiction over his FOIA claim, and the Court
23 GRANTS Defendants' motion to dismiss the FOIA cause of action. Although Plaintiff
24 argues that even if his letter of January 14, 2016 was not a FOIA request, it was a

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26 ⁶Laing held that the district court erred by waiving the exhaustion requirement
concerning the untimeliness of the petition for review. 370 F.3d at 1001.

27 ⁷The Court notes there is a "constructive exhaustion" provision under FOIA. See
28 5 U.S.C. § 552(a)(6)(C) (if the government fails to timely respond to a plaintiff's FOIA
request, a plaintiff is "deemed to have exhausted his administrative remedies"). In this
case, Plaintiff has not even made a FOIA request.

1 Touhy request. The Court notes that Defendants have not moved to dismiss the APA
2 claim regarding the Touhy request and that claim remains.

3 **B. Dismissal of Individual Defendants U.S. Attorney and Assistant U.S.
4 Attorney**

5 Defendants argue that, under the APA, Laura Duffy, the U.S. Attorney, and Kyle
6 Hoffman, Assistant U.S. Attorney, as individuals, should be dismissed. In response,
7 Plaintiff argues that Defendants have not provided any authority that the individual
8 defendants should be dismissed at this stage as 5 U.S.C. § 703 authorizes suits against
9 “any appropriate officer.”

10 An APA action is the appropriate means for reviewing a federal agency’s final
11 decision based on Touhy regulations. Akal Sec., Inc. v. U.S. Immigration and Customs
12 Enforcement, No. 09cv2277-W(NLS), 2010 WL 2731649 at *4 (S.D. Cal. July 9,
13 2010). The APA provides that “the action for judicial review may be brought against
14 the United States, the agency by its official title, or the appropriate officer.” 5 U.S.C.
15 § 703. The Touhy regulations provide that in a case where the United States is not a
16 party, Department employees may not produce any materials subpoenaed without
17 “prior approval of proper Department official.” Smith v. Cromer, 159 F.3d 875, 878
18 (4th Cir. 1998) (quoting 28 C.F.R. §16.22(a).) If a demand is made to a department
19 employee, the employee must notify the U.S. Attorney for the district where the issuing
20 authority is located.” Id. § 16.22(b). Furthermore, the Touhy regulations provide that
21 as a starting point, the U.S. Attorney as the responsible official must, after any
22 necessary consultation with the originating component⁸, “authorize . . . the production
23 of material from Department files without further authorization from Department
24 officials whenever possible” 28 C.F.R. § 16.24(c). The U.S. Attorney has the
25 authority to grant or deny a request for the production of documents. Moreover, U.S.

27 ⁸The “‘originating component’ is the bureau, division, office or agency of the
28 DOJ in which the person whose deposition is sought is employed.” Cavanaugh v.
Wainstein, Civil Action No. 05-123 (GK), 2007 WL 1601723, at *12 n. 13 (D.D.C.
June 4, 2007) (citing 28 C.F.R. § 16.24(a)).

1 Attorneys have been named as defendants in APA cases. See IMO Miller v.
2 Mehrtretter, 478 F. Supp. 2d 415, 418 (E.D.N.Y. 2007) (Acting U.S. Attorney named
3 as a defendant in APA cause of action); Cavanaugh v. Wainstein, Civil Action No. 05-
4 123 (GK), 2007 WL 1601723, at *1 (D.D.C. June 4, 2007) (U.S. Attorney as named
5 defendant where Acting Chief of the Civil Division denied the demand for deposition
6 in an APA claim). Thus, the Court concludes the U.S. Attorney is an appropriate
7 officer under the APA; however, Plaintiff has not provided any legal authority, and the
8 Court has not found any legal authority that an AUSA is an appropriate officer and can
9 be named as a defendant.

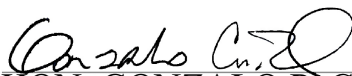
10 In sum, the Court concludes that Laura Duffy, the U.S. Attorney, is an
11 “appropriate officer” under the APA and is properly named as a Defendant; however,
12 AUSA Hoffman is not an “appropriate officer” under the APA. Accordingly, the Court
13 GRANTS Defendants’ motion to dismiss the Assistant U.S. Attorney and DENIES
14 Defendants’ motion to dismiss the U.S. Attorney as a named defendant.

15 Conclusion

16 Based on the above, the Court GRANTS Defendants’ motion to dismiss the
17 FOIA cause of action and GRANTS Defendants’ motion to dismiss the Assistant U.S.
18 Attorney and DENIES Defendants’ motion to dismiss the U.S. Attorney.

19 IT IS SO ORDERED.

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21 DATED: November 29, 2016

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23 HON. GONZALO P. CURIEL
24 United States District Judge
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