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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA
6

7 JOHN WORTHINGTON,

8 Plaintiff,

9 v.

10 LEON E PANETTA, et al.,

11 Defendants.

CASE NO. C11-5916 BHS

ORDER DENYING
DEFENDANTS' MOTION TO
DISMISS AND PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT

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13 This matter comes before the Court on Defendants Jerry Kosierowski, Timothy J.
14 Lowenberg, and Leon E. Panetta's ("Federal Defendants") motion to dismiss (Dkt. 19)
15 and Plaintiff John Worthington's ("Worthington") motion for partial summary judgment
16 (Dkt. 20). The Court has considered the pleadings filed in support of and in opposition to
17 the motion and the remainder of the file and hereby denies the motions for the reasons
18 stated herein.

19 **I. PROCEDURAL HISTORY**

20 Borrowing from the Federal Defendants' metaphor, this is chapter three in the
21 ongoing saga whether Worthington may obtain flight records of his government's planes
22 flying over his property. Like any good novel, the first chapter introduced the reader to

1 the characters and the plot. The second chapter is on appeal, and the undersigned will
2 refrain from commentary because the final draft may be written by another author. In the
3 third chapter, Worthington alleges that his claims are exhausted and ripe for judicial
4 review.

5 **A. Chapter One**

6 In the beginning, the federal government argued that the matter was not ripe for
7 review. Specifically, the federal government argued that Worthington could simply ask
8 for the documents via a *Touhy* request¹. Because Worthington could obtain his desired
9 result via an alternative means, the federal government asserted that judicial review was
10 premature. The Court agreed and dismissed Worthington’s complaint stating that, at that
11 time, there was “not yet a case in controversy as between Worthington and Federal
12 Defendants.” *Worthington v. Gates*, 2011 WL 1459559, *2 (W.D. Wash. 2011).

13 **B. Chapter Two**

14 On appeal.

15 **C. Chapter Three**

16 On November 8, 2011, Worthington filed a complaint against the Federal
17 Defendants, Christine Gregoire, and Robert M. McKenna. Dkt. 1 (“Complaint”).
18 Worthington asserts three causes of action, two of which request judicial review of
19 agency actions and the other being a declaratory judgment and injunction. *Id.* In his first
20 cause of action, Worthington alleges that Secretary Panetta, through the National Guard

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22 ¹ *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

1 Board (“NGB”), has unlawfully asserted control over the documents in question.
2 Complaint ¶¶ 4.1–4.8.

3 On March 22, 2012, the Federal Defendants filed a motion to dismiss
4 Worthington’s first cause of action. Dkt. 19. On April 9, 2012, Worthington responded
5 and filed a cross-motion for partial summary judgment on the first cause of action. Dkt.
6 20. On April 13, 2012, the Federal Defendants replied to their motion. Dkt. 21. On
7 April 30, 2012, the Federal Defendants responded to Worthington’s motion. Dkt. 22.
8 On May 4, 2012, Worthington replied. Dkt. 23.

9 II. FACTUAL BACKGROUND

10 The Washington National Guard (“WNG”) is the federally recognized militia of
11 the State of Washington, and a part of the Washington Military Department (“WAMIL”),
12 which is an agency of the State of Washington. The WNG engages in counter-drug
13 activities pursuant to 32 U.S.C. § 112. These counter-drug activities are conducted in
14 service of the State of Washington under Title 32 U.S.C. and occur while WNG units and
15 personnel have not been activated into federal service under Title 10 U.S.C. Complaint,
16 ¶¶ 3.1-3.4; Dkt. 8, ¶¶ 3.1-3.4. Defendants Lowenberg and Kosierowski are the WNG
17 Adjutant General and the WNG counter-drug coordinator, respectively. Complaint, ¶¶
18 2.5-2.6; Dkt. 10, ¶¶ 2.5-2.6.

19 From December 14, 2007, to May 31, 2008, Worthington requested various
20 records relating to WNG counter-drug activities pursuant to the Washington Public
21 Records Act, Chap. 42.56 RCW (“PRA”). In response to Worthington’s requests for
22 records under the PRA, Defendants asserted that records relating to WNG counter-drug

1 activities were “federal records” and that such records could only be obtained pursuant to
2 the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). Complaint, ¶¶ 3.5-3.6;
3 Answer (Federal) (Dkt. 10), ¶¶ 3.5-3.6.1

4 On April 18, 2011, Worthington made a formal *Touhy* request to the NGB for the
5 WNG records at issue. This request resulted in an exchange of seven (7) letters in which
6 Worthington and the NGB argued about whether Worthington had made a proper *Touhy*
7 request and whether the NGB needed more information in order to act on Worthington’s
8 request. Complaint, ¶¶ 3.22-28; Answer (Federal), ¶¶ 3.22-28.3. The NGB ultimately
9 determined that Worthington had failed to comply with its *Touhy* regulations and
10 informed Worthington that the NGB considered the request to be withdrawn. Dkt. 11
11 (letter dated October 25, 2012) at 4.

12 III. DISCUSSION

13 A. Motion to Dismiss

14 Although the Federal Defendants move to dismiss Worthington’s first cause of
15 action under Fed. R. Civ. P. 12(h)(3), the proper standard is under Fed. R. Civ. P.
16 12(b)(1). *Wood v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012) (Rule 12(h)(3)
17 merely prolongs the deadline for filing a motion under Fed. R. Civ. P. 12(b)(1)). Under
18 Rule 12(b)(1), a party may assert a facial attack or a factual attack for lack of jurisdiction.
19 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted).

20 In a facial attack, the challenger asserts that the allegations contained
21 in a complaint are insufficient on their face to invoke federal jurisdiction.
22 By contrast, in a factual attack, the challenger disputes the truth of the
allegations that, by themselves, would otherwise invoke federal
jurisdiction.

1 | *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

2 | In this case, the Federal Defendants appear to launch a facial attack. Worthington
3 | brings his first cause of action “for relief from unlawful agency action pursuant to 5 USC
4 | § 702.” Complaint, ¶ 4.1. Worthington alleges that “the defendant Secretary of Defense,
5 | through the NGB, has asserted federal control over the Washington National Guard
6 | records requested by Worthington under the PRA.” *Id.*, ¶ 4.2. The Federal Defendants
7 | move to dismiss this cause of action based on the premise that Worthington has failed to
8 | allege a final agency action that this Court may review. Dkt. 19 at 11. Specifically, they
9 | contend that Worthington “is unable to point to any affirmative and discrete action by
10 | federal defendants whereby it either ‘asserted control’ or ‘prevented’ the Washington
11 | Military Department from doing anything.” *Id.* at 13. Thus, they contend that
12 | Worthington’s allegations are insufficient on their face to invoke jurisdiction.

13 | In resolving a facial attack, the Court must accept the factual allegations of the
14 | complaint as true and draw all reasonable inferences in plaintiff’s favor. *Doe v. Holy See*,
15 | 557 F.3d 1066, 1073 (9th Cir. 2009). Accepting Worthington’s allegation as true, the
16 | Court must accept the allegation that Secretary Panetta asserted federal control over the
17 | relevant documents. Therefore, the issue is whether such an act constitutes a final agency
18 | action.

19 | “Only final agency decisions are subject to review under the APA.” *See Ohio*
20 | *Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998).

21 | For an agency action to be final, the action must (1) “mark the
22 | consummation of the agency’s decision making process,” and (2) “be one

1 by which rights or obligations have been determined, or from which legal
2 consequences will flow.”

3 *Oregon Natural Desert Ass’n v. U.S. Forrest Service*, 465 F.3d 977, 982 (9th Cir. 2006)
4 (citing 5 U.S.C. § 704). Under the APA, “[t]he core question is whether the agency has
5 completed its decision making process, and whether the result of that process is one that
6 will directly affect the parties.” *Id.*

7 In this case, the Federal Defendants argue that (1) Worthington has failed to
8 identify a final agency action and (2) Worthington is attempting a “programmatic attack.”
9 First, Worthington has alleged an act that marks the consummation of the agency’s
10 decision making process and one from which legal consequences flow. Secretary
11 Panetta’s alleged action does not appear to be tentative or interlocutory in nature.
12 *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). For example, it has not been alleged that
13 once the counter-drug activities are completed, the records will be not be under federal
14 control. To the contrary, Worthington has alleged that, because of the Secretary’s
15 actions, the only way Worthington may obtain the documents is through a *Touhy* request
16 to the NGB. The decision appears to be final. Moreover, this final decision results in the
17 determination that Worthington’s legal rights are to be considered under the NGB’s
18 *Touhy* regulations. Therefore, the Court denies the Federal Defendants’ motion on this
19 issue.

20 Second, the Federal Defendants argue that Worthington is attempting to challenge
21 the entire relationship between the NGB and the Washington National Guard. Dkt. 19 at
22 15–16. In *Lujan v. National Wildlife Fed’n*, 497 U.S. 871 (1990), the Supreme Court

1 held that “respondent cannot seek wholesale improvement of [the agency’s] program by
2 court decree, rather than in the offices of the [federal agency] or the halls of Congress,
3 where programmatic improvements are normally made.” *Id.* at 891. Worthington,
4 however, has not alleged that the entire relationship is unlawful. Worthington challenges,
5 at most, two concrete and discrete acts:

6 The Secretary of Defense, through the NGB, has acted unlawfully
7 and in excess of its statutory and constitutional authority in asserting
8 federal control over the Washington National Guard records requested by
9 Worthington under the PRA and/or by preventing the Washington Military
10 Department from producing the Washington National Guard records
11 requested by Worthington under the PRA.

12 Complaint, ¶ 4.8. This is not a “programmatic challenge.” Therefore, the Court denies
13 the Federal Defendants’ motion to dismiss Worthington’s first cause of action.

14 **B. Summary Judgment**

15 **1. Standard**

16 Summary judgment is proper only if the pleadings, the discovery and disclosure
17 materials on file, and any affidavits show that there is no genuine issue as to any material
18 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
19 “[W]here the moving party has the burden—the plaintiff on a claim for relief or the
20 defendant on an affirmative defense—his showing must be sufficient for the court to hold
21 that no reasonable trier of fact could find other than for the moving party.” *Calderone v.*
22 *United States*, 799 F.2d 254, 259 (6th Cir. 1986); *Southern California Gas Co. v. City of*
Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003) (moving party with burden of persuasion at
trial “must establish ‘beyond controversy every essential element of its’ claim.”).

