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

8 JOHN WORTHINGTON,

9 Plaintiff,

10 v.

11 LEON E. PANETTA, et al.,

12 Defendants.

CASE NO. C11-5916 BHS

ORDER DISMISSING ACTION
FOR LACK OF JURISDICTION

13 This matter comes before the Court on the Court's order requesting briefing re:
14 standing (Dkt. 54) and the parties' supplemental briefs (Dkts. 55, 57, & 59). The Court
15 has considered the parties' pleadings and the remainder of the record and hereby
16 dismisses the action for lack of jurisdiction.

17 **I. PROCEDURAL HISTORY**

18 On November 8, 2011, Plaintiff John Worthington ("Worthington") filed a
19 complaint against Defendants Jerry Kosierowski, Timothy J. Lowenberg, and Leon E.
20 Panetta ("Federal Defendants"), Christine Gregoire, and Robert M. McKenna. Dkt. 1
21 ("Complaint"). Worthington asserts three causes of action, two of which request judicial
22 review of agency actions and the other being a declaratory judgment and injunction. *Id.*

1 In his first cause of action, Worthington alleges that Secretary Panetta, through the
2 National Guard Board (“NGB”), has unlawfully asserted control over the Government
3 flight records of flying over Worthington’s property. Complaint ¶¶ 4.1–4.8.

4 On March 22, 2012, Federal Defendants moved to dismiss Worthington’s first
5 cause of action for lack of subject matter jurisdiction. Dkt. 19. On July 19, 2012, the
6 Court denied the motion concluding that there was a final agency action to review and
7 that Worthington was not asserting a programmatic challenge. Dkt. 24.

8 On October 3, 2013, Worthington filed a motion for summary judgment. Dkt. 38.
9 On November 12, 2013, Defendants replied and filed a cross-motion for summary
10 judgment. Dkt. 47. On November 15, 2013, Worthington replied. Dkt. 52. On
11 December 6, 2013, Defendants replied. Dkt. 53.

12 On January 23, 2014, the Court requested additional briefing on the issue of
13 standing because the parties disputed whether Worthington had received all of the records
14 that he has requested from the Defendants. Dkt. 54. On January 31, 2014, Worthington
15 submitted a supplemental brief. Dkt. 55. On February 7, 2014, Defendants submitted a
16 supplemental response. Dkt. 57. On February 12, 2014, Worthington submitted a
17 supplemental reply. Dkt. 59.

18 **II. FACTUAL BACKGROUND**

19 The Washington National Guard (“WNG”) is the federally recognized militia of
20 the state of Washington, and a part of the Washington Military Department (“WAMIL”),
21 which is an agency of the state of Washington. The WNG engages in counter-drug
22 activities pursuant to 32 U.S.C. § 112. These counter-drug activities are conducted in

1 service of the state of Washington under Title 32 U.S.C. and occur while WNG units and
2 personnel have not been activated into federal service under Title 10 U.S.C. Complaint,
3 ¶¶ 3.1-3.4; Dkt. 8, ¶¶ 3.1-3.4. Defendants Lowenberg and Kosierowski are the WNG
4 Adjutant General and the WNG counter-drug coordinator, respectively. Complaint, ¶¶
5 2.5-2.6; Dkt. 10, ¶¶ 2.5-2.6.

6 From December 14, 2007, to May 31, 2008, Worthington requested various
7 records relating to WNG counter-drug activities pursuant to the Washington Public
8 Records Act, Chap. 42.56 RCW (“PRA”). In response to Worthington’s requests for
9 records under the PRA, Defendants asserted that records relating to WNG counter-drug
10 activities were “federal records” and that such records could only be obtained pursuant to
11 the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). Complaint, ¶¶ 3.5-3.6;
12 Answer (Federal) (Dkt. 10), ¶¶ 3.5-3.6.1

13 **III. DISCUSSION**

14 As a threshold matter, the Court must address two procedural arguments made by
15 Worthington. First, Worthington argues that there “is no court rule that allows the
16 defendants to make new factual allegations without allowing the plaintiff to respond
17” Dkt. 59 at 2. The Court agrees and will consider (1) the supplemental declaration
18 of Todd Millard (Dkt. 58 (“Millard Dec.”)) and (2) Worthington’s response (Dkt. 59).

19 Second, Worthington argues that the Federal Defendants “never alleged standing
20 in their *Answer*, and they never challenged Worthington’s standing in a proper motion.”
21 Dkt. 59 at 2. This is irrelevant because standing confers jurisdiction and the Court may
22 *sua sponte* address its jurisdiction at *any time*. Fed. R. Civ. P. 12(h)(3). Once the Court

1 was aware that the remaining issue was *how* Worthington received requested documents
2 and not *whether* Worthington received requested documents, the Court requested
3 additional briefing on the issue of jurisdiction. The Court now turns to Worthington’s
4 standing.

5 To satisfy Article III standing requirements, a plaintiff must show that: (1)
6 plaintiff has suffered “injury in fact” that is (a) concrete and particularized; and (b) actual
7 or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the
8 challenged action of the defendant; and (3) it is likely, as opposed to merely speculative,
9 that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v.*
10 *Laidlaw Env’tl. Servs.*, 528 U.S. 167, 180–181(2000) (citing *Lujan v. Defenders of*
11 *Wildlife*, 504 U.S. 555, 560–61). Plaintiff bears the burden of proof to establish standing.
12 *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104 (1998).

13 In this case, Worthington has failed to show that he has suffered an injury that can
14 be redressed by a favorable decision from this Court. First, Worthington argues that he
15 was injured when the Federal Defendants asserted federal control of WNG records and
16 that the injury is ongoing because he “still has not obtained all of [the records he
17 requested].” Dkt. 55 at 10. Worthington supports this argument with hypothetical factual
18 allegations and actual factual allegations. For example, he alleges that “he has no way of
19 knowing whether the [defendant’s] response . . . is complete” Dkt. 55 at 3. This is a
20 hypothetical injury because Worthington fails to identify any specific document that has
21 been withheld from him and that the Court may order to be produced. Such an allegation
22 does not confer standing.

1 On the other hand, Worthington asserts that he requested three types of documents
2 that have not been provided to him.

3 Specifically, Worthington has not received the situational reports and after
4 action (AAR) reports that he requested on or about April 25, 2008, and he
5 has not received the memoranda of understanding (MOUs) that he
6 requested on or about May 31, 2008.

7 Dkt. 55 at 5–6. Contrary to this assertion, Mr. Millard declares that Federal Defendants
8 have either supplied every document requested from them pursuant to Worthington’s
9 FOIA requests or such documents do not exist. Millard Dec., ¶¶ 4–8. Worthington
10 responds that these assertions are “false, intentionally misleading, and not supported by
11 the record.” Dkt. 59 at 5. Yet, Worthington fails to identify a single document that these
12 Federal Defendants possess and have failed to produce causing Worthington any injury in
13 fact. *See* Dkt. 59 at 2–10. Therefore, the Court concludes that Worthington has failed to
14 meet his burden on this requirement of standing.

15 With regard to the issue of a redressability, no decision from this Court will solve
16 Worthington’s problems under the PRA. Worthington explains:

17 (i) Worthington’s rights under the PRA are not automatically vindicated by
18 merely obtaining the same records from another source, (ii) Worthington
19 needs this Court to reverse the federal defendants’ illegal actions so that he
20 may pursue his state court case, and (iii) Worthington seeks to vindicate his
21 right to have his future access to Title 32 WNG records determined under
22 the PRA and in state courts.

23 Dkt. 59 at 11. Worthington’s rights under the PRA should be determined by the state
24 courts, including whether there was inappropriate federal interference with those rights.

25 On one hand, if a state court orders production of federal documents, then the federal
26 government may seek protection in an Article III court. On the other hand, if a state

1 court is faced with a request for production of federal documents under the PRA, the state
2 court can interpret and rule upon both federal and state law. In either of these cases, there
3 would be a concrete injury and actual controversy that could be redressed. Now,
4 however, it is purely speculative that any decision by this Court would redress
5 Worthington's alleged injuries under the PRA. Therefore, the Court concludes that
6 Worthington lacks standing to pursue this action.

7 **IV. ORDER**

8 Therefore, it is hereby **ORDERED** that this action is **DISMISSED** for lack of
9 jurisdiction.

10 Dated this 12th day of June, 2014.

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BENJAMIN H. SETTLE
13 United States District Judge