

1 JOSEPH P. RUSSONIELLO (CSBN 44332)
United States Attorney
2 JOANN M. SWANSON (CSBN 88143)
Chief, Civil Division
3 MELANIE L. PROCTOR (CSBN 228971)
Assistant United States Attorney

4 450 Golden Gate Avenue, Box 36055
5 San Francisco, California 94102-3495
6 Telephone: (415) 436-6730
7 FAX: (415) 436-7169
Melanie.Proctor@usdoj.gov

Attorneys for Defendant

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 AMERICAN SMALL BUSINESS)	No. C 09-1098 EMC
12 LEAGUE,)	
13)	
14)	
15)	
16)	
17)	
18)	
19)	
20)	
21)	
22)	
23)	
24)	
25)	
26)	
27)	
28)	

I. NOTICE OF MOTION

PLEASE TAKE NOTICE that on Wednesday, June 3, 2009, at 10:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Edward M. Chen, Courtroom C, 450 Golden Gate Avenue, San Francisco, California, the United States Small Business Administration (“Defendant”), will move the Court to dismiss this action with prejudice for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1). In the alternative, Defendant moves for an order granting summary judgment in its favor.

The Motion is based on this notice, the memorandum of points and authorities, the declarations of Daniel M. Vellucci and Kim Y. Forte, the submitted Vaughn Index, and the pleadings on file with the Court.

///

1 **II. RELIEF SOUGHT**

2 Defendant seeks an order dismissing this action with prejudice for lack of subject matter
3 jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Plaintiff has failed
4 to exhaust administrative remedies. Alternatively, Defendant moves for summary judgment in its
5 favor because Defendant’s search was reasonably calculated to produce responsive records.

6 **III. ISSUES PRESENTED**

7 1. Whether the Complaint should be dismissed for lack of subject matter jurisdiction
8 because Plaintiff failed to exhaust administrative remedies available under the Freedom of
9 Information Act (“FOIA”).

10 2. Whether summary judgment should be granted in Defendant’s favor because
11 Defendant’s search was reasonably calculated to produce responsive records.

12 **IV. STATEMENT OF FACTS**

13 On July 3, 2008, Plaintiff American Small Business League (“Plaintiff”) requested a copy
14 of the “telephone records for Mr. Michael Stamler, Director of the Small Business Administration
15 Press Office during the years 2006 and 2007 in electronic form.” Complaint, p. 2 ¶ 5; *id.*, Exh. A.
16 Defendant’s telephone records consist of a monthly billing statement from Verizon, Defendant’s
17 local telephone service provider, and CDs (“Sprint discs”) delivered monthly to Defendant by Sprint,
18 Defendant’s long distance telephone provider. Declaration of Daniel M. Velucci (“Velucci Decl.”),
19 pp. 1-2 ¶¶ 3, 4. Because Defendant’s contract with Verizon was a flat rate, the local telephone
20 billing records contain no information regarding individual telephone calls placed or received by
21 Defendant. *Id.* The Sprint discs contain databases of Defendant’s outgoing long distance telephone
22 calls. *Id.*, p. 2 ¶ 5; Declaration of Kim Y. Forte (“Forte Decl.”), p. 1 ¶¶ 3, 4.

23 In response to Plaintiff’s request, at the direction of Mr. Velucci, Defendant’s personnel
24 searched each of the Sprint discs for December 2005 through December 2007.¹ *Id.*, p. 2 ¶ 7. The
25 searches were performed by entering Mr. Stamler’s telephone number as a search term in the
26 database contained on each of the Sprint discs. *Id.* The database then returned records of calls from

27
28 ¹Plaintiff incorrectly alleges Defendant’s response included the entirety of 2005. Complaint,
p. 2 ¶ 6.

1 Mr. Stamler's telephone, with the exception for the data on the January 2007 disc, which was
2 corrupted. Id. Defendant then compiled those records on an Excel spreadsheet, which was
3 transmitted on a floppy diskette enclosed with a letter to Plaintiff. Id.; Complaint, p. 2 ¶ 6. Pursuant
4 to Exemption 6 of the Freedom of Information Act, Defendant withheld six telephone calls made
5 by Mr. Stamler; those records did not appear on the spreadsheet transmitted to Plaintiff.² Velucci
6 Decl., p. 2 ¶ 8.

7 By letter dated November 6, 2008, Plaintiff informed Defendant that the Excel spreadsheet
8 on the floppy diskette was corrupted. Id., p. 2 ¶ 9. Plaintiff requested Defendant to send the
9 responsive records on CD. Id., Exh. 2. On November 17, 2008, Defendant transmitted the same
10 Excel spreadsheet file on a CD. Id., p. 3 ¶ 10; id., Exh. 3. Subsequent to Defendant's responses,
11 Sprint provided Defendant with an uncorrupted set of telephone records for January 2007. Id., p.
12 3 ¶ 13.

13 On January 13, 2009, Plaintiff appealed Defendant's response to its request for records. Id.,
14 p. 3 ¶ 12; id., Exh. 3. On February 10, 2009, Lisa Babcock, the Chief of the FOIA/Privacy Act
15 Office for Defendant, remanded the matter so that Defendant could respond with the records for
16 January 2007. Id., Exh. 5. Ms. Babcock informed Plaintiff that Defendant would conduct an initial
17 FOIA review of the its telephone records and respond directly with its disclosure information. Id.
18 She further informed Plaintiff that because of the error in the January 2007 Sprint disc, and the need
19 for Defendant to re-conduct the initial search of the records, her office would not conduct an
20 appellate review of the records at that time. Id.

21 In response to the remand, Defendant searched the disc of uncorrupted SBA telephone
22 records for January 2007 for all records of telephone calls from the telephone of Michael Stamler
23 during that month. Id., p. 3 ¶ 13. This search was performed by entering Mr. Stamler's telephone
24 number as a search term in the database contained on the disc. Id. In response to the search, the
25 database returned records of calls from Mr. Stamler's telephone. Id. On February 12, 2009,
26 Defendant transmitted to Plaintiff the responsive records for January 2007. Id.; Complaint, Exh. D.

27
28 ²Although Plaintiff does not challenge the withholding of these six calls, Defendant has
submitted a Vaughn Index of these calls concurrently with this Motion.

1 Defendant informed Plaintiff that Plaintiff had the right to appeal its decision to the Chief of the
2 FOIA/Privacy Act Office. Complaint, Exh. D. However, rather than appealing, one month later,
3 Plaintiff filed this action in district court. Elec. Dkt. No. 1.

4 V. ANALYSIS

5 A. LEGAL STANDARDS APPLICABLE TO THIS MOTION

6 1. Rule 12(b)(1)

7 A motion to dismiss under Rule 12(b)(1) tests the subject matter jurisdiction of the court. See
8 e.g., Savage v. Glendale Union High School, 343 F.3d 1036, 1039-40 (9th Cir. 2003), cert. denied,
9 541 U.S. 1009 (2004). A motion will be granted if the complaint, when considered in its entirety,
10 on its face fails to allege facts sufficient to establish subject matter jurisdiction. Id. at 1039 n.2.
11 “When a defendant moves to dismiss a complaint for lack of subject matter jurisdiction pursuant to
12 Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of proving that the court has jurisdiction to
13 decide the claim.” R.K., ex rel. T.K. v. Hayward United School Dist., No. C 06-7836 JSW, 2007
14 WL 2778702, at *4 (N.D. Cal. Sept. 21, 2007), citing Thornhill Publ’n Co. v. General Tel. & Elecs.
15 Corp., 594 F.2d 730, 733 (9th Cir. 1979).

16 2. Motions for Summary Judgment

17 On a motion for summary judgment, the moving party bears the initial burden of
18 demonstrating that “there is an absence of evidence to support the nonmoving party’s case.” Celotex
19 Corp. v. Catrett, 477 U.S. 317, 325 (1986); see also Fed. R. Civ. P. 56. A defendant may prevail by
20 disproving an essential element of the plaintiff’s claim, but can also carry its burden simply by
21 pointing out that the plaintiff’s evidence is insufficient to establish an essential element of her claim.
22 Celotex, 477 U.S. at 323-324. The burden then shifts to the opposing party to prove a material issue
23 of fact exists preventing summary judgment. Id. at 324.

24 Once the moving party has met its burden of proof, the nonmoving party must produce
25 evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in
26 light of the evidentiary burden the law places on that party. See Triton Energy Corp. v. Square D
27 Co., 68 F.3d 1216, 1221 (9th Cir.1995). The nonmoving party cannot simply rest on its allegations
28 without any significant probative evidence tending to support the complaint. Nissan Fire & Marine

1 Ins. Co., 210 F.3d at 1107. Instead, the nonmoving party, through affidavits or other admissible
2 evidence, “must set forth specific facts showing that there is a genuine issue for trial.”
3 Fed. R. Civ. P. 56(e).

4 The Supreme Court has held that

5 the plain language of Rule 56(c) mandates the entry of summary judgment . . .
6 against a party who fails to make a showing sufficient to establish the existence of
7 an element essential to the party's case, and on which that party will bear the burden
8 of proof at trial. In such a situation, there can be “no genuine issue as to any material
9 fact,” since a complete failure of proof concerning an essential element of the
10 nonmoving party's case necessarily renders all other facts immaterial.

11 Celotex Corp., 477 U.S. at 322-23.

12 B. PLAINTIFF HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

13 The Freedom of Information Act, 5 U.S.C. § 552 et seq., requires that administrative
14 remedies be exhausted before suit may be brought in federal court. 5 U.S.C. § 552(a); United States
15 v. United States District Court, C.D. Cal., 717 F.2d 478, 480 (9th Cir. 1983). The Small Business
16 Administration has issued regulations providing for such appeals. 13 C.F.R. § 102.8(a). Plaintiff
17 appears to have construed Defendant’s February 12, 2009 letter and attachment as a decision on its
18 appeal. Complaint, p. 3 ¶ 8. However, Ms. Babcock’s response to Plaintiff made clear that no
19 appellate review would be conducted until Plaintiff had received a response that included the
20 January 2007 records. Complaint, Exh. D. As such, it was incumbent upon Plaintiff to file an
21 appeal upon receipt of the February 12, 2009 response. Instead, on March 12, 2009, Plaintiff filed
22 this action in district court. Elec. Dkt. No. 1. Because Plaintiff has failed to exhaust its
23 administrative remedies, the Court lacks subject matter jurisdiction. 5 U.S.C. § 552(a); United
24 States, 717 F.3d at 480.

25 C. DEFENDANT’S SEARCH WAS IN GOOD FAITH AND REASONABLY
26 CALCULATED TO PRODUCE THE REQUESTED INFORMATION.

27 Plaintiff alleges that Defendant wrongfully withheld requested documents “by failing to
28 undertake a search reasonable [sic] calculated to uncover all relevant documents.” Complaint, p.
3 ¶ 10. FOIA requires that the agency conduct a reasonable search for responsive documents using
4 methods which can reasonably be expected to produce the information requested. 5 U.S.C.

1 § 552(a)(3)(C). In demonstrating the reasonableness of the search, Defendant “may rely upon
2 reasonably detailed, nonconclusory affidavits submitted in good faith.” Zemansky v. EPA, 767 F.2d
3 569, 571 (9th Cir. 1985). This declaration may be from an agency official with “responsibility for
4 coordinating the agency's decisions on FOIA requests where that official has personal knowledge
5 of the procedures used in handling the FOIA request at issue and is familiar with the documents in
6 question.” Berman v. CIA, 378 F. Supp. 2d 1209, 1216 n.7 (E.D. Cal. 2005). “Mere speculation
7 that as yet uncovered documents may exist does not undermine the finding that the agency
8 conducted a reasonable search for them.” SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1201
9 (D.C. Cir. 1991).

10 Here, Defendant provides the declaration of Daniel M. Velucci, the Director of the Office
11 of Planning & Technology Assets Management of Defendant. Velucci Decl., p. 1 ¶ 1. Mr.
12 Velucci’s responsibilities include, inter alia, responding to certain requests for records, pursuant to
13 FOIA, including this request for telephone records. Id., p. 1 ¶ 2. In that capacity, Mr. Velucci
14 supervised the search of the Sprint discs for records responsive to Plaintiff’s request. Id., p. 2 ¶ 7.

15 Mr. Velucci explains that at his direction, agency personnel searched each of the Sprint discs
16 for December 2005 through December 2007 for records of telephone calls placed from Mr.
17 Stamler’s telephone. Id., p. 2 ¶ 7. The searches were performed by entering Mr. Stamler’s
18 telephone number as a search term in the database contained on each of the Sprint discs. Id. The
19 database then returned records of calls from Mr. Stamler’s telephone. Id. Defendant’s staff, under
20 his supervision, then compiled those records on an Excel spreadsheet, which was transmitted to
21 Plaintiff. Id., pp. 2-3 ¶¶ 7, 10. Defendant repeated these steps in response to the February 10, 2009
22 remand. Id., p. 3 ¶ 13.

23 The declarations of Mr. Velucci and Ms. Forte demonstrate that Defendant conducted a
24 search reasonably calculated to find responsive records. Plaintiff’s assertion that more records must
25 exist is mere speculation that is insufficient to rebut the evidence that a reasonable search was
26 conducted. Accuracy in Media, Inc. v. Nat’l Park Service, 194 F.3d 120, 124 (D.C. Cir. 1999);
27 SafeCard, 926 F.2d at 1201. Accordingly, summary judgment should be granted in Defendant’s
28 favor. See, e.g., Jackson v. Department of Labor, 2008 WL 5339925, *5 (E.D. Cal. Feb. 25, 2008)

1 (finding that polling of attendees at informal meeting as to whether they kept any notes, agency
2 conducted a reasonable search for responsive documents); Silney v. Federal Bureau of Prisons, 2005
3 WL 839540, *3 (D.D.C. April 11, 2005) (finding that where plaintiff sought tapes of telephone
4 conversations made by him while he was incarcerated at FCI Ray Brook, and the BOP searched the
5 telephone records at that institution, “[i]t was reasonable for BOP to believe that a search of that
6 system of records would yield the information requested.”).

7 **VI. CONCLUSION**

8 For the foregoing reasons, Defendant respectfully requests the Court to dismiss the
9 Complaint for lack of subject matter jurisdiction. In the alternative, Defendant respectfully requests
10 the Court to grant summary judgment in its favor.

11 Dated: April 16, 2009

Respectfully submitted,

12 JOSEPH P. RUSSONIELLO
13 United States Attorney

14 /s/
15 MELANIE L. PROCTOR
Assistant United States Attorney
Attorneys for Defendant