

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JEFFREY ROSENBLATT,)
)
 Plaintiff)
)
 v.)
)
 UNITED STATES DEPARTMENT)
 OF INTERIOR, BUREAU OF)
 INDIAN AFFAIRS,)
)
 Defendant)

Civil No. 98-45-P-H

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

This is the second of two actions pending in this court in which the plaintiff invokes the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in an effort to acquire certain documents he believes to be in the possession of the Bureau of Indian Affairs (“Bureau”). The Bureau seeks dismissal of the instant action under Fed. R. Civ. P. 12(b)(6) for failure to state a valid claim.

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in his favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

The plaintiff alleges here that on January 27, 1998 he sent the Bureau’s Freedom of Information Unit a certified letter requesting “all records” in the Bureau’s custody concerning certain contracts between the Passamaquoddy Indian Tribe (“Tribe”) and other parties identified by the

plaintiff as Tamir Sapir, Snake River Financing Ltd., Soiltech US, Soiltech Canada, Soiltech Environmental Systems, Inc., Zar Realty Corporation, Zar Realty Management Corporation, Joy Lud Distributors, Joy Lud Distributors International, Joy Lud Distributors, Inc. and any other entity bearing the name “Joy Lud.” Complaint (Docket No. 1) at ¶ 3 and Exh. A thereto. The complaint further alleges that the Bureau received his letter and that more than ten days elapsed without any response to his request. *Id.* at ¶¶ 4-5.

In support of its dismissal motion, the Bureau offers the declaration of Thomas Hartman, its acting FOIA coordinator. *See* Declaration of Thomas Hartman (Docket No. 3). According to Hartman, the Department of the Interior (of which the Bureau is a unit) “has concluded that it has no records responsive to this request.” *Id.* at ¶ 4. Hartman further stated in his declaration that a letter to this effect was “in the final review process,” that the letter the Bureau planned to send to the plaintiff is “highly unlikely” to “vary significantly” from the draft, and that the Bureau would be sending the letter in “the immediate future.” *Id.* at ¶ 5.

Without recourse to authority, the Bureau contends that the court should simply credit Hartman’s assertion that there are no records responsive to the FOIA request and therefore dismiss the action. Dismissal is inappropriate on the present record.

The Federal Rules of Civil Procedure permit the court to consider matters outside the pleadings when a defendant seeks dismissal for failure to state a valid claim, but if the court so opts “the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Fed. R. Civ. P. 12(b). Dismissal at this juncture would deny the plaintiff such an opportunity on a key issue: whether the search conducted by the Bureau was reasonable, and

therefore adequate, to discharge its FOIA obligations. *See Church of Scientology Int'l v. United States Dept. of Justice*, 30 F.3d 224, 230 (1st Cir. 1994) (“crucial issue” is “whether the agency’s search was ‘reasonably calculated to discover the requested documents’”) (quoting *Maynard v. Central Intelligence Agency*, 986 F.2d 547, 559 (1st Cir. 1993)). An agency may establish the adequacy of its search at the summary judgment stage by relying on affidavits, “provided they are relatively detailed and nonconclusory, and are submitted by responsible agency officials in good faith.” *Maynard*, 986 F.2d at 559. Assuming *arguendo* that the Hartman declaration achieves the requisite level of specificity, the plaintiff is still entitled to an opportunity to demonstrate lack of good faith on the part of the Bureau. *See id.* at 560 (affidavit describing search “accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.”) (citation and internal quotation marks omitted).¹

I therefore recommend that the Bureau’s motion to dismiss the action be **DENIED**.

¹ Although I therefore consider it premature to evaluate any showing the plaintiff may be in a position to make at the present juncture on the issue of good faith, I note that the plaintiff draws the court’s attention to the summary judgment proceedings in the separate FOIA litigation pending in this court between these parties. As noted there, certain contracts entered into by the Tribe require the Bureau’s approval and, as a result of the approval process, the Bureau is in possession of an agreement between the Tribe and Snake River Financing, Ltd. (“Snake River”). Recommended Decision on Cross-Motions for Summary Judgment, Civil Docket No. 97-312-P-H, at 3 n.1, 7. Given that the contract between the Tribe and Snake River is also part of the FOIA request at issue in the instant proceeding, it is puzzling that the Bureau’s acting FOIA coordinator contends here under penalty of perjury that the Department of the Interior is in possession of no documents that are responsive to the plaintiff’s request.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of April, 1998.

*David M. Cohen
United States Magistrate Judge*