

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

STATE OF MAINE,

Plaintiff

v.

Civil No. 00-122-B-C

UNITED STATES DEPARTMENT OF THE  
INTERIOR, UNITED STATES  
GEOLOGICAL SURVEY, UNITED STATES  
FISH AND WILDLIFE SERVICE, UNITED  
STATES DEPARTMENT OF COMMERCE,  
and NATIONAL MARINE FISHERIES  
SERVICE,

Defendants

GENE CARTER, District Judge

**MEMORANDUM OF DECISION AND ORDER**

This Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, enforcement action arises from Plaintiff State of Maine’s ongoing attempt to obtain from Defendants United States Department of the Interior (“DOI”), United States Geological Survey (“USGS”), United States Fish and Wildlife Service (“USFWS”), United States Department of Commerce (“DOC”), and National Marine Fisheries Service (“NMFS”) information regarding a proposal by Defendants USFWS and NMFS (collectively “the Services”) to list the Atlantic salmon populations in eight Maine rivers as a discrete population segment eligible for protection under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1543. Now before the Court is Defendant’s Partial Motion to Dismiss.

While consideration by Defendants USFWS and NMFS of the possibility of proposing a rule deeming Maine’s Atlantic salmon population as protected under the ESA dates back to as early as 1995, *see* Complaint ¶¶ 23-25 (Docket No. 1), Plaintiff’s efforts to obtain the information sought in the current suit allegedly began in response to the Services’ November 1999 announcement of their proposal to list the Atlantic salmon population in eight Maine rivers as endangered under the ESA. *See* Complaint ¶ 29. Seeking to respond meaningfully to the proposed rule and to conduct an independent evaluation of a study allegedly relied on by the Services in promulgating this rule, *see* Complaint ¶ 33,<sup>1</sup> Plaintiff served a FOIA request on Defendants USGS, USFWS, and DOC on December 21, 1999. *See id.*; December 21, 1999 FOIA Request (Attached to Complaint as Exhibit A).<sup>2</sup> In this request, Plaintiff listed, amongst other items, “both a paper copy and electronic format copy of the original genotypic data used by the authors in arriving at their conclusions” in the 1999 Study. *See* December 21, 1999 FOIA Request. Although Defendants served Plaintiff with various items of information in response to this request, Defendants did not provide Plaintiffs with a “Genotyper template file,” a file that Plaintiffs allege is encompassed within its request and necessary to access the raw genetic information used in the 1999 Study. *See* Complaint ¶¶ 42, 50.

After subsequent discussions with Defendants failed to yield the production of the Genotyper template file, Plaintiff filed a lawsuit in this Court on February, 24, 2000, seeking, in addition to other relief, an order enjoining Defendants from withholding the Genotyper template

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<sup>1</sup> The Court understands this study to be entitled “Microsatellite and mitochondrial DNA diversity in Atlantic salmon with emphasis on small coastal drainages of the Downeast and Midcoast of Maine.” (Hereinafter “the 1999 Study”).

<sup>2</sup> Because the FOIA request is expressly linked to Plaintiff’s Complaint, the Court will review it in consideration of Defendant’s Motion to Dismiss. *See Beddall v. State Street Bank and Trust Co.*, 137 F.3d 12, 17 (1<sup>st</sup> Cir. 1998) (“When . . . a complaint’s factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).”).

file. See *State of Maine v. United States Department of Interior, United States Geological Survey, United States Fish and Wildlife Service, Department of Commerce, and National Marine Fisheries Service*, Civil No. 00-30-B-C (Hereinafter “*State of Maine v. Department of Interior I*”). This lawsuit resulted in the production by Defendants DOI and USGS of a Genotyper template file on March 1, 2000, as well as a Consent Judgment in which Defendants agreed to extend the deadline for public comment on the Atlantic salmon listing proposal and Plaintiff agreed that unless it “filed a claim on or before April 14, 2000, . . . the federal defendants’ responses have included all records responsive to the State’s December 21, 1999 FOIA request and that the State has been given sufficient time to review those records and comment on the Services’ November 17 listing proposal.” See Amended Consent Judgment, *State of Maine v. Department of Interior I*, (Docket No. 8). Plaintiff filed no further claims prior to the April 14 deadline.

Although Defendants informed Plaintiff upon their submission of the Genotyper template file that it had been altered from the format used in the 1999 Study, Defendants also represented that they had removed the alterations from the file submitted to Plaintiff and that they had restored the file to its March 1999 format. See *Complaint* ¶ 46.<sup>3</sup> From these representations, Plaintiff understood that the data included on the Genotyper template file was not altered in any matter other than the removal of the post-March 1999 modifications. See *id.* However, in the suit presently before the Court, Plaintiff alleges that on April 20, 2000, it received reliable information that Dr. Timothy King, a USGS scientist who worked on the 1999 Study and who was involved in responding to Plaintiff’s December 21 FOIA request, had intentionally altered the Genotyper

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<sup>3</sup> The Complaint does not make clear the significance of the March 1999 format of the file. However, the December 21, 1999 FOIA request refers to the 1999 Study as “the March 1999 Report.” See December 21, 1999 FOIA Request at 2. The Court, therefore, assumes that the format of the file in existence in March 1999 is significant to the parties because of its relation to the 1999 Study. The Court recognizes, however, that the file in existence in March 1999 did not necessarily serve as the basis for the conclusions in the 1999 Study, because alterations to the file may have taken place between the time of the data analysis forming the basis for the 1999 Study and March 1999, the date of the Study’s publication.

template file that Defendants had submitted to Plaintiff, and that these alterations extended beyond simple removal of the post-March 1999 modifications. *See Complaint* ¶¶ 33, 44, 48. Plaintiff also alleges that on April 20, 2000, Dr. King stated that because of Plaintiff's reliance on this altered Genotyper template file, Plaintiff's critique of the 1999 Study was flawed. *See Complaint* ¶ 49.

With regard to the Genotyper template file, Plaintiff now seeks, in Count I of the Complaint, a finding that Defendants DOI and USGS are in violation of the FOIA, an order requiring these Defendants to promptly produce an unaltered version of the Genotyper template file, and an order enjoining these Defendants from making a final determination on the rule until Plaintiff has had an opportunity to review the file in its unaltered format. Additionally, Count II alleges that Defendants DOC and NMFS have failed to respond to a FOIA request made by Plaintiff on January 18, 2000, and Count III alleges that Defendants DOI, FWS, and USGS have improperly withheld 307 files from their response to this request. With respect to these allegations, in Counts II and III of the Complaint, Plaintiff seeks a finding that Defendants are in violation of the FOIA and an order requiring the prompt production of these files.

## **DISCUSSION**

Before the Court is Defendant's Partial Motion to Dismiss ("Motion to Dismiss") (Docket No. 7). Defendants move to dismiss Count I of Plaintiff's Complaint on three grounds. First, Defendants argue that, under the doctrine of *res judicata*, the Amended Consent Judgment in *State of Maine v. Department of Interior I* precludes Plaintiff's present claim to enjoin the Defendants to produce the Genotyper template file. Defendants also argue that because the Genotyper template file no longer exists in its pre-March 1999 format and because Plaintiff's December 21, 1999 FOIA request did not encompass the Genotyper template file, the Court should dismiss this claim

for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Defendants finally move to dismiss Plaintiff's request to enjoin Defendants' issuance of a final rule for failure to state a claim upon which relief may be granted and lack of subject matter jurisdiction, maintaining that the FOIA does not authorize such relief. For the reasons discussed below, the Court will deny Defendants' motion in its entirety.

## I. *RES JUDICATA*

### A. Background

Directing the Court's attention to the previous FOIA claims filed by Plaintiff, Defendants argue that the doctrine of *res judicata* precludes Plaintiff's present claim pertaining to the Genotyper template file. Emphasizing the interests of finality, efficiency, and consistency served by the doctrine of *res judicata*, Defendants contend that because Plaintiff's previous claim resulted in a consent judgment and involved the same transaction and parties as the present claim, Plaintiff may not again engage in litigation to receive the Genotyper template file. In response, Plaintiff characterizes its present claim as a challenge to the alleged improper modification of the Genotyper template file and its previous claim as a challenge to Defendants' failure to produce the file. Because of this difference, Plaintiff maintains, the transactions underlying these two actions are not the same, and the doctrine of *res judicata* does not preclude the present litigation of its FOIA claim. Plaintiff also notes that it remained unaware of Dr. King's alleged improper alteration until one month after it signed the consent judgment and, therefore, that it could not have raised the present claim in the previous litigation.

In *State of Maine v. Department of the Interior I*, Plaintiff challenged Defendants' failure to produce a copy of the Genotyper template file, *see* Complaint ¶ 48, and sought relief in the form

of an injunction against Defendants' withholding of the file. This case was resolved in a consent judgment, the relevant terms of which are discussed above. *See supra* at 3.

## **B. Discussion**

The doctrine of *res judicata* “precludes . . . parties from relitigating claims that were raised or could have been raised” in a previous action that resulted in a final judgment on the merits. *Porn v. Nat’l Grange Insurance Co.*, 93 F.3d 31, 34 (1<sup>st</sup> Cir. 1996). *See also Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981). Under this doctrine, the relitigation of a subsequent claim is precluded if three elements are established: the resolution of the earlier suit in a final judgment on the merits; “sufficient identity between the parties in the two suits”; and “sufficient identity between the causes of action asserted in the earlier and later suits.” *Porn*, 93 F.3d at 34. This doctrine promotes the interests of judicial economy, finality, and fairness. *See Dall v. Goulet*, 871 F. Supp. 518, 523 (D. Me. 1994) (citing *Kradoska v. Kipp*, 397 A.2d 562, 565 (Me. 1979)); *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981).

The first two elements of *res judicata* have been established. Although *Maine v. Department of Interior I* was resolved in a consent judgment rather than a litigated judgment, consent judgments have the same preclusive effect as litigated judgments for the purposes of *res judicata*. *See Gilday v. Dubois*, 124 F.3d 277, 283 (1<sup>st</sup> Cir. 1997) (“[P]arties to a consent decree are bound by traditional preclusion principles and may not litigate claims necessarily resolved by the decree.”), *cert. denied*, 524 U.S. 918, 118 S. Ct. 2302 (1998); *Langton v. Hogan*, 71 F.3d 930, 935 (1<sup>st</sup> Cir. 1995); *Medomak Canning v. Bayside Enterprises, Inc.*, 922 F.2d 895, 900 (1<sup>st</sup> Cir. 1991). Hence, the consent order establishes the element of a final judgment on the merits.

Additionally, the parties involved in the present case are identical to the parties involved in *Maine v. Department of Interior I*.

At issue, however, is whether the third element of *res judicata*, identity between the causes of action, has been established in this case. The First Circuit Court of Appeals has embraced the Restatement's transactional approach to determining the sufficiency of identity between the causes of action in a previously litigated case and a case at bar. *See Manego v. Orleans Board of Trade*, 773 F.2d 1, 5 (1<sup>st</sup> Cir. 1985), *cert. denied*, 475 U.S. 1084, 106 S. Ct. 1466 (1986). This approach precludes subsequent litigation to enforce rights or obtain remedies “with respect to all or any part of the transaction or series of connected transactions out of which the [previous] action arose.” *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)). In determining whether subsequent litigation involves claims, facts, or issues that fall within the same transaction as the previous litigation, a court takes a pragmatic approach, “giving weight to such factors as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” *Marengo*, 773 F.2d at 5 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)). *See also Porn*, 93 F.3d at 34 (noting suggestive rather than dispositive status of factors).

The Court finds that the claim raised by Plaintiff in the present case does not fall within the same transaction as the claim raised in *Maine v. Department of Interior I*. Although both claims have been filed under the same FOIA provision and both actions involve Plaintiff's attempt to obtain a copy of the Genotyper template file, Plaintiff's current claim is distinct from its previous claim in time, space, origin, and motivation. These two claims allege “separate and distinct wrongs resting on different factual bases.” *Landrigen v. City of Warwick*, 628 F.2d 736, 741 (1<sup>st</sup>

Cir. 1980). In contrast to the factual basis of its previous claim against Defendants, the withholding of the Genotyper template file, Plaintiff bases its current claim on the allegations that Defendants improperly altered the file before releasing it to Plaintiff. The refusal to issue the Genotyper template file that served as the impetus for *Maine v. Department of Interior I* occurred prior to February 2, 2000, while the present action results from alterations which allegedly occurred between February 2, 2000 and March 1, 2000. Moreover, as Plaintiff did not learn of the factual basis for the present claim until one month after it entered into the consent decree in *Maine v. Department of Interior I*, see Complaint ¶¶ 48-49, and Defendants represented to Plaintiff that the file's only alterations consisted of removing the post-March 1999 modifications, see Complaint ¶ 46, the treatment of the two claims as one factual unit would not conform to the parties' expectations.<sup>4</sup> Finally, Given Plaintiff's lack of knowledge about Dr. King's alleged improper alteration of the Genotyper template file, Plaintiff could not have raised its current claim in the previous case, and should not be barred from doing so under the transactional approach to *res judicata*.

## **II. PLAINTIFFS' REQUEST FOR THE GENOTYPER TEMPLATE FILE AND THE EXISTENCE OF THE FILE**

### **A. Background**

Defendants also move to dismiss Count I of the Complaint on the grounds that Plaintiff, in using the term "data" in its FOIA request, did not request the Genotyper template file and that, even if Plaintiff did request this file, the file no longer exists in its pre-March 1999 format. Defendants contend that because FOIA constitutes a waiver of sovereign immunity, Plaintiff's failure to satisfy

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<sup>4</sup> At this point in the litigation, it appears that Defendants entered into the consent agreement without knowledge of Dr. King's alleged additional modifications to the Genotyper template file and, therefore, were not in a position to expect the resolution of Plaintiff's present claim concerning these alleged alterations. For this same reason, the Court notes that Plaintiff did not have a duty to engage in discovery regarding the alleged improper alteration of the Genotyper template file.

these elements of a FOIA claim prevents the Court from having subject matter jurisdiction of the claim and requires its dismissal. Defendants attempt to introduce materials outside the pleadings in support of their argument in the form of affidavits, maintaining that because their motion raises the question of federal subject matter jurisdiction, the Court has both the authority and the obligation to weigh these facts.

In response to these arguments, Plaintiff contends that its December 21, 1999 FOIA request did call for production of the Genotyper template file because the file is needed to interpret data and the request contained language broad enough to encompass both the data and the tools necessary to its interpretation. Plaintiff further argues that Defendants had actual knowledge of Plaintiff's request for this file as a result of a telephone conference call that took place on February 16, 2000. *See* Complaint ¶ 44. With regard to Defendants' assertion that the file no longer exists in its pre-March 1999 format, Plaintiff responds that, although its format has been altered, the file does exist and that Defendants have an obligation to produce the file in the form in which it existed when Plaintiff's FOIA request was received.<sup>5</sup> Plaintiff also disputes Defendants' characterization of its motion as a 12(b)(1) motion, arguing that their challenge addresses the merits of Plaintiff's claim rather than the subject matter jurisdiction of the Court; therefore, Plaintiff argues, the Court should confine its factual analysis to the contents of the pleadings or convert the motion into one for summary judgment and allow Plaintiff an opportunity to present its own factual materials. Plaintiff additionally asserts that, regardless of the Court's characterization of Defendants' motion or its consideration of Defendants' additional factual submissions, the Court must treat all well-pleaded facts as true and indulge all reasonable inferences in favor of Plaintiff.

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<sup>5</sup> The Court understands Plaintiff's prayer for relief to request a version of the Genotyper template file as it existed when Defendants received the December 21, 1999 FOIA request, regardless of whether this version contains post-March 1999 modifications.

Under this standard, Plaintiff maintains, it has satisfied its burden of moving forward in this lawsuit.

**B. Characterization of Defendants' Claims as Rule 12(b)(1) or 12(b)(6) Motions**

As a threshold matter, the Court will determine whether Defendants' arguments regarding Plaintiff's request for the Genotyper template file and the availability of the file should be considered under Rule 12(b)(1) or Rule 12(b)(6). *See* FED. R. CIV. P. 12(b)(1), (6). Defendants' papers leave somewhat unclear the characterization of their arguments. In their Motion to Dismiss, Defendants appear to be moving jointly under both Rules 12(b)(1) and 12(b)(6) in asserting these arguments. *See* Motion to Dismiss at 13 (Docket No. 5) ("As a result, Plaintiff has not stated a claim that Defendants violated the FOIA by failing to provide the file, and the Court lacks federal question subject matter jurisdiction."). However, in their Reply, Defendants characterize both of these arguments as falling within the scope of Rule 12(b)(1), maintaining that both a reasonable request for a record and the existence of the record constitute elements of the FOIA's waiver of sovereign immunity and that the Court, therefore, lacks subject matter jurisdiction unless these elements are satisfied. *See* Reply at 6 n.2 (Docket No. 12). As will be discussed in the subsequent two subsections of this Opinion, the characterization of Defendants' motion as a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim upon which relief may be granted has implications for the allocation of the burden of proof and the evidence that the Court may consider in evaluating whether to grant Defendants' motion.

Two provisions of the FOIA resolve the dispute over the characterization of Defendants' arguments. The first provision, 5 U.S.C. § 552(a)(3)(A), requires that "[e]xcept with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance

with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” The second provision, 5

U.S.C. § 552(a)(4)(B), provides:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

While the second of these provisions explicitly serves to confer subject matter jurisdiction on a district court in a FOIA action, *see United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142, 109 S. Ct. 2841, 2846 (1989), the first of these two provisions concerns the merits of a FOIA claim. Therefore, to determine whether to apply the 12(b)(1) or 12(b)(6) standard of review, the Court must decide under which of these two FOIA provisions Defendants’ arguments fall. For the reasons discussed below, the Court finds that Defendants’ argument regarding the nonexistence of the Genotyper template file in its pre-March 1999 format falls under § 552(a)(4)(B) and addresses the Court’s subject matter jurisdiction over this claim, while the argument concerning the scope of Plaintiff’s FOIA request falls under § 552(a)(3)(A) and addresses the merits of the claim.

Because Rule 12(b)(1) motions take precedence over Rule 12(b)(6) motions, *see Northeast Erectors Ass’n of BTEA v. Secretary of Labor, Occupational Safety, and Health Admin.*, 62 F.3d 37, 39 (1<sup>st</sup> Cir. 1995), the Court will first consider whether it has subject matter jurisdiction over this FOIA claim pursuant to § 552(a)(4)(B).

**C. The Court’s Subject Matter Jurisdiction over Plaintiff’s Claim for the Genotyper Template File**

Under 5 U.S.C. § 552(a)(4)(B), a district court has subject matter jurisdiction if it finds that three elements have been established: that the information sought falls within the category of

agency records; that the agency has withheld these records; and that the agency's withholding of the records was improper. *See id.* (citing *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. at 150, 100 S. Ct. at 968). Records are considered agency records within the meaning of the FOIA if two requirements are met. "First, an agency must 'either create or obtain' the requested materials 'as a prerequisite to its becoming an agency record within the meaning of the FOIA.'" *Tax Analysts*, 492 U.S. at 144, 109 S. Ct. at 2848 (citing *Kissinger*, 445 U.S. 136, 182, 100 S. Ct. at 960, 985 (1980)). "Second, the agency must be in control of the requested materials at the time the FOIA request is made." *Tax Analysts*, 492 U.S. at 145, 109 S. Ct. at 2848. The Supreme Court has interpreted the term "withhold" to imply its "usual meaning." *See id.* at 150, 109 S. Ct. at 2851; *Kissinger*, 445 U.S. at 151, 100 S. Ct. at 969 (determining that "refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb 'withhold'"). If an agency record does not fall within any of the exemptions enumerated in the FOIA, *see* 5 U.S.C. § 552(b), the withholding is deemed improper. *See Tax Analysts*, 492 U.S. at 151, 109 S. Ct. at 2851 ("It follows from the exclusive nature of the § 552(b) exemption scheme that agency records which do not fall within one of the exemptions are 'improperly' withheld."). Consistent with the FOIA's goal of broad disclosure of governmental activities, these exemptions are narrowly construed. *See id.*

Because Defendants' argument that the Genotyper template file no longer exists in its pre-March 1999 format raises a question as to whether Defendants had control of the record at the time that Plaintiff made its FOIA request, hence whether the file is an "agency record" within the meaning of the FOIA. Specifically, if the agency was not in control of the requested records at the time that Plaintiff made the FOIA request, the Defendants did not withhold an agency record, and the Court lacks subject matter jurisdiction to award relief under the FOIA. *See Tax Analysts*, 492

U.S. at 145-50, 109 S. Ct. at 2848-51. The Court will, therefore, evaluate this argument according to the Rule 12(b)(1) for lack of subject matter jurisdiction.

In general, a plaintiff bears the burden of establishing subject matter jurisdiction under Rule 12(b)(1). *See Gibbs v. Buck*, 307 U.S. 66, 72, 59 S. Ct. 725, 729 (1939) (“The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants.”); *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 215 F.3d 195, 200 (1<sup>st</sup> Cir. 2000) (“The party invoking federal court jurisdiction bears the burden of proving its existence.”); *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1<sup>st</sup> Cir. 1996). In determining whether a plaintiff has met its burden of establishing federal subject matter jurisdiction, a court must “treat[] all well-pleaded facts as true and indulg[e] all reasonable inferences in favor of a plaintiff.” *Id.* *See also Pejepsot Industrial Park, Inc.*, 215 F.3d at 197; *Murphy v. United States*, 45 F.3d 520, 522 (1<sup>st</sup> Cir. 1995), *cert. denied*, 515 U.S. 1144, 115 S. Ct. 2581 (1995). However, in addition to the allegations in a plaintiff’s complaint, a court may also consider additional evidence that the parties have submitted, and may require the parties to submit such evidence. *See Gibbs*, 307 U.S. at 72, 59 S. Ct. at 729 (“If there were any doubt of the good faith of the allegations, the court might have called for their justification by evidence.”); *Aversa*, 99 F.3d at 1209-10. A court does not need to convert a 12(b)(1) motion into a motion for summary judgment in order to consider such materials and is also free to “test the truthfulness of the plaintiff’s allegations” and to resolve factual disputes. *Dynamic Image Technologies*, 221 F.3d 34, 37-38 (1<sup>st</sup> Cir. 2000). *See also Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 915 (6<sup>th</sup> Cir. 1986). The FOIA, however, somewhat complicates the framework for evaluating subject matter jurisdiction by placing the burden of disproving subject matter jurisdiction on the defendant agency. *See Tax Analysts*, 492 U.S. at 142, 109 S. Ct. at 2847 n.3 (“The burden is on the agency to demonstrate, not the requester to disprove,

that the materials sought are not ‘agency records’ or have not been ‘improperly’ ‘withheld.’”) (citing S. Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 8 (1965)). Therefore, in evaluating whether to dismiss Plaintiff’s claim for the Genotyper template file for lack of subject matter jurisdiction under the FOIA, the Court will determine whether Defendants have provided the Court with evidence which undermines Plaintiff’s assertion of subject matter jurisdiction under the FOIA.

Plaintiff’s Complaint adequately alleges federal subject matter jurisdiction under the FOIA. In the Complaint, Plaintiff alleges that Defendants “advised Maine that the Genotyper Template file exists and that it is in the possession of USGS,” Complaint ¶ 44, and that Defendants will not provide Plaintiffs with an unaltered version of this file. Complaint ¶ 62. These allegations fulfill the subject matter jurisdiction requirements of 5 U.S.C. § 552(a)(4)(B) because they allege that the Defendants had control and possession of the file and withheld it from Plaintiff. Defendants do not invoke a FOIA exemption to challenge the impropriety of withholding this file, *see* 5 U.S.C. § 552(b), asserting only the file’s nonexistence to defeat subject matter jurisdiction. However, the form and content of Defendants’ assertions fail to defeat Plaintiff’s claim that the Genotyper template file constitutes an agency record within the meaning of the FOIA. First, while Defendants have submitted two affidavits, the affiants do not attest to personal knowledge of the nonexistence of the file, but instead refer to conversations with USGS staff. *See* Holley Declaration, Attachment I, ¶ 22, 23 (stating that on February 22, 2000, “USGS staff also reported that the template used for [the 1999 Study] was prepared in 1997 but had been revised from the 1997 format in order to accommodate newer data.”); Stone Declaration, Attachment K, ¶ 3 (stating that on February 18, 2000, “[m]y staff and I made inquiries about the State’s request and were told that the ‘genotyper template file’ relied on in the March 1999 report authored by Dr. Tim King did not exist.”). Defendants have failed to submit affidavits from the USGS staff members who can

personally attest to the nonexistence of the file. Affidavits based on hearsay will not suffice to defeat Plaintiff's claim of subject matter jurisdiction under the FOIA.

Second, even if these affidavits were based on personal knowledge, their content does not address the existence of the file at the time of Plaintiff's FOIA request. FOIA's definition of an agency record is based on the timing of the FOIA request. *See, e.g., Tax Analysts*, 492 U.S. at 145, 104 S. Ct. at 2848 (framing control question in terms of "at the time the FOIA request is made"); *Cleary, Gottlieb, Steen & Hamilton v. Department of Health and Human Services*, 844 F. Supp. 770, 778 (D.D.C. 1993) (holding that electronic database as it existed at time of a FOIA request is responsive to the request).<sup>6</sup> The affidavits that Defendants have submitted do not establish that the Genotyper template file did not exist at the time of Plaintiff's December 21 FOIA request. Instead, these affidavits assert only that the file did not exist in its pre-March 1999 format in February 2000—two months after Plaintiff's FOIA request.<sup>7</sup> Such allegations do not address whether this format of the file existed in December 1999, the date of Plaintiff's original FOIA request.<sup>8</sup> Nor do they allege that no format of the file existed on this date. Hence, the Court holds that Defendants have failed to disprove Plaintiff's assertion of subject matter jurisdiction by asserting the post-March 1999 modifications to the Genotyper template file.<sup>9</sup>

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<sup>6</sup> The Court notes that Plaintiff's request for "an unaltered copy of the Genotyper template file" in its prayer for relief, *see* Complaint at 13, leaves unclear which format of the Genotyper template file Plaintiff seeks. However, given Plaintiff's assertion that "an agency that receives a FOIA request for a computer file that has been modified must produce it in the form it existed when the request was received," Opposition to Defendant's Motion to Dismiss at 11 (Docket No. 7), its concession that "[t]he agency is certainly under no obligation to recreate the file to some earlier version," *id.* at 11-12, and its contracted scientist's sworn statement that "I advised the State of Maine that I could use the Genotyper template file either as it existed in March, 1999 or as it exists now," Kornfield Affidavit at ¶ 11, the Court understands that Plaintiff seeks the Genotyper template file in the form in which it existed at the time of its December 21, 1999 FOIA request.

<sup>7</sup> *See* Holley Declaration and Stone Declaration, cited *supra* at 15.

<sup>8</sup> Although Defendants' Motion to Dismiss asserts that "[b]y the time that Plaintiff made its December 21, 1999 FOIA request, Defendants possessed only a Genotyper template file that was a descendant of the file that had been used to analyze the data Plaintiff asked for," *see* Motion to Dismiss at 15, Defendants have failed to produce any affidavits that support this assertion.

<sup>9</sup> The Court notes that because of this holding, it need not decide whether Defendant waived the nonexistence argument under FOIA by purporting to provide a requester with the record and whether Defendant could waive a claim which goes to a federal

**D. Whether Plaintiff Has Stated a Claim for Relief under the FOIA**

In contrast to Defendants' assertion regarding the nonexistence of the Genotyper template file, Defendants' argument concerning whether Plaintiff's FOIA request called for the production of the Genotyper template file falls within the rubric of 5 U.S.C. § 552(a)(3)(A) because it addresses whether Plaintiff "reasonably describe[d]" the file in its December 21 FOIA request. As discussed in subsection B, this argument addresses whether Plaintiff has stated a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). In determining a Rule 12(b)(6) motion, a court must "take the allegations in the complaint as true and grant all reasonable inferences in favor of the plaintiff." *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987, 988 (1<sup>st</sup> Cir. 1992).

Applying this standard, the Court determines that Plaintiff's Complaint does state a claim upon which relief may be granted. Plaintiff alleges that "Maine's FOIA request called for production of the Genotyper template file." Complaint ¶ 43. Indeed, the December 21 FOIA request sought "both a paper copy and electronic format copy of the original genotypic data used by the authors [of the 1999 Study] in arriving at their conclusions." *See* December 21, 1999 FOIA Request. Construing all reasonable inferences in favor of the Plaintiff, the Court finds that Plaintiffs have adequately alleged that the December 21, 1999 FOIA request did encompass the Genotyper template file. Because of the procedural posture of the case, the Court will not consider the affidavit that Defendants have submitted to address the scope of Plaintiff's request. Additionally, the Court does not find that the cases that Defendants cite regarding an agency's duty to interpret and investigate in response to a FOIA request support a different result at this point in the proceedings.

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court's subject matter jurisdiction under FOIA.

### **III. JURISDICTION TO ENJOIN AGENCY RULEMAKING UNDER FOIA**

#### **A. Background**

Defendants finally argue that the Court does not have jurisdiction to enjoin agency rulemaking in a FOIA action and, therefore, should dismiss the portion of Count I seeking such injunctive relief. Defendants base this argument on the doctrine of sovereign immunity, contending that, as a sovereign, the United States is immune from suit unless it consents to suit. Because the FOIA constitutes a limited waiver of sovereign immunity and does not authorize the injunction of agency rulemaking, Defendants argue, the Court lacks jurisdiction to award such relief.

Defendants also contend that even if the Court does have jurisdiction to award such relief, Plaintiff has failed to demonstrate the irreparable harm required for an injunction. Plaintiff does not dispute that the FOIA does not authorize relief in the form of enjoining agency rulemaking, but sets forth three arguments in response to Defendants' position. First, Plaintiff argues that this issue is not yet "ripe" for consideration because Plaintiff has not yet moved for injunctive relief. Second, Plaintiff maintains that the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, constitutes the waiver of sovereign immunity necessary to allow the Court to enjoin Defendants' rulemaking. Finally, Plaintiff argues that courts have the inherent equitable authority to enjoin agency rulemaking in certain circumstances in FOIA cases.

#### **B. Discussion**

Because Plaintiff has not yet moved for injunctive relief, the Court need not decide whether to issue such relief. Therefore, the Court will not address the arguments raised by Defendants regarding whether Plaintiff has satisfied the criteria for the issuance of an injunction. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 70 (D. Me. 1993) (setting forth necessary elements for issuance of injunction). At this point in the proceedings, the

Court need only decide whether it would have jurisdiction to entertain a claim for injunctive relief in the form of enjoining the issuance of a final rule, should Plaintiff choose to seek such relief.

While the extent of a court's power to enjoin agency proceedings in a FOIA action remains subject to dispute, controlling authority makes clear that the FOIA does not negate a district court's jurisdiction to issue such relief in an appropriate case. *See Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19-20 (concluding that "the . . . principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases" because "there is little to suggest . . . that Congress sought to limit the inherent powers of an equity court"); *Columbia Packing Company v. United States Department of Agriculture*, 563 F.2d 495, 500 (1<sup>st</sup> Cir. 1977) (holding that "the court below was not without power to issue collateral injunctive relief if circumstances warranted"). *See also Lewis v. Reagan*, 660 F.2d 124, 128 (5<sup>th</sup> Cir. 1981) (noting that "most courts addressing the question have held that district courts do have the power to enjoin agency proceedings pending resolution of FOIA claims," and concluding that "[w]e too now hold that a district court has jurisdiction to enjoin agency action for a violation of a FOIA claim"); *Sears, Roebuck and Co. v. National Labor Relations Board*, 473 F.2d 91, 93 (D.C. Cir. 1972). The Court notes that the two cases relied on by Defendants in support of its argument, *Stabasefski v. United States*, 919 F. Supp. 1570 (M.D. Ga. 1996) and *Gale v. United States*, 786 F. Supp. 697 (N.D. Ill. 1990), are neither controlling precedent nor factually persuasive. *Stabasefski* addresses the issue of whether a district court can order relief in the form of restitution of improperly required, prepaid copying fees. *See Stabasefski*, 919 F. Supp. at 1574. Although the district court in *Gale* did address the issue of a court's ability to enjoin agency proceedings in a FOIA action, the court did not address whether it retained inherent equitable authority to issue such relief, and its determination that the plaintiff had failed to exhaust his administrative remedies with regards to

his request for information rendered the injunctive relief sought primary rather than collateral. *See Gale*, 786 F. Supp. at 699.

For these reasons, the Court denies Defendants' motion to dismiss Plaintiff's claim to enjoin the issuance of a final rule.<sup>10</sup> However, the Court emphasizes that, given the precedent discussed *supra*, Plaintiff will need to make a strong showing of irreparable injury should it choose to move for such relief. *See, e.g., Columbia Packing Company*, 563 F.2d at 501 (explaining that "it must ordinarily be demonstrated, at least, that without access during the proceeding to the information sought, the litigant faces a probability of very serious, specific injury which cannot be averted by any of the administrative remedies available in the course of the proceeding"); *Lewis*, 660 F.2d at 128 ("It is well established that courts should interrupt the orderly flow of administrative proceedings only under extraordinary circumstances."); *Sears, Roebuck and Co.*, 473 F.2d at 93.

Plaintiff has also suggested that the Court allow Plaintiff the opportunity to conduct limited discovery regarding the alleged improper alteration of the Genotyper template file, and order the Defendants to notify Plaintiff fourteen days before the issuance of a final rule so that Plaintiff can move for injunctive relief if its discovery leads it to believe that such relief is necessary. The discovery aspect of this proposal has already been resolved, as Magistrate Judge Kravchuk's August 2, 2000 Order (Docket No. 9) provides for a discovery conference within five days of the resolution of the Motion to Dismiss. The Court declines to enter an order requiring Defendants to give Plaintiff fourteen days notice prior to the issuance of a final rule.

## CONCLUSION

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<sup>10</sup> Because of the Court's determination that it has inherent equitable authority to issue such injunctive relief, it does not reach the question of whether the APA also authorizes this form of relief.

The doctrine of *res judicata* does not bar the litigation of Plaintiff's claim for an unaltered version of the Genotyper template file, the Plaintiffs have adequately alleged subject matter jurisdiction and stated a claim for relief under FOIA regarding the production of this file, and the Court will have jurisdiction to enjoin the issuance of a final rule upon a sufficient

showing of injury by Plaintiffs. The Defendants' Motion to Dismiss will be denied.

Accordingly, the Court **ORDERS** that the Defendants' Motion to Dismiss be, and it is hereby, **DENIED**.

GENE CARTER  
District Judge

Dated at Portland, Maine this 6<sup>th</sup> day of November, 2000.

MAINE, STATE OF  
plaintiff

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COMMERCE, US DEPT  
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