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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MICAH K. WELLMAN,

Plaintiff,

v.

DEPARTMENT OF JUSTICE, BUREAU OF
ALCOHOL, TOBACCO, FIREARMS AND
EXPLOSIVES,

Defendants.

Case No. 3:14-cv-000348-MMD-WGC

ORDER

I. SUMMARY

This case concerns pro se Plaintiff Micah K. Wellman’s Freedom of Information Act, 5 U.S.C. § 552, (“FOIA”) request seeking information from Defendant Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (“the Government”) about the Government’s internal affairs investigation regarding Plaintiff. Before the Court is the Government’s Motion for Summary Judgment (“the Government’s Motion”). (ECF No 60.) Also before the Court is Plaintiff’s Motion for Summary Judgment (“Plaintiff’s Motion”). (ECF No. 61.) With respect to the Government’s Motion, the Court has also reviewed Plaintiff’s response (ECF No. 63), and the Government’s reply (ECF No. 65). With respect to Plaintiff’s Motion, the Court has also reviewed the Government’s response (ECF No. 64), and Plaintiff’s reply (ECF No. 66). For the reasons explained below, the Government’s Motion is granted in part, and denied in part, and Plaintiff’s Motion is granted in part, and denied in part.

1 **II. BACKGROUND**

2 Plaintiff filed a FOIA request dated May 13, 2013, with the Government seeking
3 “documents regarding ATF Internal Affairs Division Investigation number 20120006
4 initiated by Jeffrey E. Vind on or about October 13, 2011 . . . into myself, [Plaintiff].” (ECF
5 No. 60-1 at 17.) The Government acknowledged receipt of Plaintiff’s request on June 13,
6 2013. (Id. at 20.) But the Government did not release any documents to Plaintiff for some
7 time. After some correspondence with the Government, Plaintiff filed suit to compel the
8 Government to respond to his FOIA request on July 3, 2014. (See ECF No. 1.) In his
9 Complaint, Plaintiff asserted violations of FOIA and the Administrative Procedure Act, 5
10 U.S.C. § 551 et seq. (“APA”). (See id. at 1-2.)

11 The parties then engaged in motion practice. The ultimate result of that motion
12 practice was that Plaintiff’s APA claim was dismissed, but the Court allowed his FOIA
13 claim to proceed. (See ECF No. 53.)

14 Meanwhile, prompted by this litigation, the Government released documents to
15 Plaintiff in response to his FOIA request in five batches between December 17, 2014,
16 and February 27, 2017.¹ (See ECF No. 60-1 at 21-88.) The Government represents that
17 the fifth release was also its final release, meaning that it has searched its records and
18 released all responsive documents to Plaintiff. (See ECF Nos. 60 at 5, 60-1 at 79.) The
19 Government also referred Plaintiff’s request and certain potentially responsive
20 documents to the Executive Office of the United States Attorney (“EOUSA”) as part of
21 the fourth release. (See ECF No. 60-1 at 56.) EOUSA reviewed these documents,
22 determined most of them were non-responsive, and withheld the remaining documents
23 from Plaintiff citing FOIA exemptions (B)(5) and (B)(7)(c). (See ECF No. 60-2 at 10.)
24 EOUSA informed Plaintiff of its decision in a letter dated September 12, 2016, in which
25 EOUSA also noted its decision as reflected in that letter represented the final action
26 EOUSA would take in response to Plaintiff’s request. (See id.)

27 _____
28 ¹The five batches of documents were specifically released on: October 17, 2014
(see ECF No. 60-1 at 22); April 7, 2015 (see id. at 31); October 16, 2015 (see id. at 42);
November 16, 2016 (see id. at 58); and February 27, 2017 (see id. at 79).

1 **III. LEGAL STANDARD**

2 The purpose of summary judgment is to avoid unnecessary trials when there is no
3 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
4 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,
5 the discovery and disclosure materials on file, and any affidavits “show there is no
6 genuine issue as to any material fact and that the movant is entitled to judgment as a
7 matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is “genuine”
8 if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for
9 the nonmoving party and a dispute is “material” if it could affect the outcome of the suit
10 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).
11 Where reasonable minds could differ on the material facts at issue, however, summary
12 judgment is not appropriate. See *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
13 1995). “The amount of evidence necessary to raise a genuine issue of material fact is
14 enough ‘to require a jury or judge to resolve the parties’ differing versions of the truth at
15 trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l*
16 *Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary
17 judgment motion, a court views all facts and draws all inferences in the light most
18 favorable to the nonmoving party. See *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*,
19 793 F.2d 1100, 1103 (9th Cir. 1986).

20 The moving party bears the burden of showing that there are no genuine issues
21 of material fact. See *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In
22 order to carry its burden of production, the moving party must either produce evidence
23 negating an essential element of the nonmoving party’s claim or defense or show that
24 the nonmoving party does not have enough evidence of an essential element to carry its
25 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
26 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements,
27 the burden shifts to the party resisting the motion to “set forth specific facts showing that
28 there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may

1 not rely on denials in the pleadings but must produce specific evidence, through
2 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*
3 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show
4 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285
5 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The mere existence of a
6 scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,
7 477 U.S. at 252.

8 Further, “when parties submit cross-motions for summary judgment, each motion
9 must be considered on its own merits.” *Fair Hous. Council of Riverside Cty., Inc. v.*
10 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (citations and internal quotation
11 marks omitted). “In fulfilling its duty to review each cross-motion separately, the court
12 must review the evidence submitted in support of each cross-motion.” *Id.* Courts must
13 also liberally construe documents filed by pro se litigants. See *Alvarez v. Hill*, 518 F.3d
14 1152, 1158 (9th Cir. 2008).

15 **IV. DISCUSSION**

16 **A. The Government’s Motion for Summary Judgment (ECF No. 60)**

17 The Government’s primary argument is that it has complied with its obligations
18 under FOIA and therefore this case should end. (See generally ECF No. 60.) With the
19 exception of documents partially redacted because they are “non-responsive”—
20 discussed in more detail *infra* Section IV.B.—the Court generally agrees. The
21 Government bears the burden to show its response to Plaintiff’s FOIA request complied
22 with the statute, and to demonstrate that any documents or portions of documents
23 withheld from disclosure were properly withheld from disclosure. See *Am. Immigration*
24 *Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir.
25 2016) (citation omitted) (“*Immigration Lawyers*”). “An agency can carry its burden by
26 submitting a Vaughn² index, along with affidavits from agency employees that describe
27 the justifications for nondisclosure with reasonably specific detail, demonstrate that the

28 ²Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

1 information withheld logically falls within the claimed exemption, and are not
2 controverted by either contrary evidence in the record nor by evidence of agency bad
3 faith.” *Id.* (internal citations and quotation marks omitted). “FOIA cases are very
4 frequently decided on summary judgment.” *Nevada v. U.S. Dep’t of Energy*, 517 F.
5 Supp. 2d 1245, 1256 (D. Nev. 2007) (granting summary judgment to defendants
6 because defendants properly asserted deliberative process privilege to entirely withhold
7 draft applications to store nuclear waste at Yucca Mountain).

8 The Court finds that the Government has generally carried its burden here,
9 subject to the exception discussed in more detail *infra* Section IV.B. The Court has
10 reviewed the affidavits and Vaughn indices attached to the Government’s Motion. (See
11 ECF Nos. 60-1 at 1-14; 60-2 at 1-8 (affidavits); 60-1 at 24-29, 33-40, 45-54, 60-78, 81-
12 88; 60-2 at 13-14 (Vaughn indices).) The Court finds that the affidavits submitted by the
13 Government describe the Government’s justifications for nondisclosure with reasonably
14 specific detail, logically demonstrate that the withheld information falls within the claimed
15 exemptions, and are not controverted by any evidence of the Government’s bad faith.
16 See *Zemansky v. U.S. E.P.A.*, 767 F.2d 569, 574 (9th Cir. 1985) (affirming grant of
17 summary judgment to agency where agency “submitted reasonably detailed, non-
18 conclusory affidavits depicting adequate searches for the documents requested”).

19 Further, Plaintiff does not offer any evidence or argument in his opposition to the
20 Government’s Motion with respect to the exemptions cited by the Government to
21 withhold certain documents, and the Government’s justification for citing those
22 exemptions. (See ECF No. 63.) Instead, Plaintiff devotes his response to arguing that
23 the government improperly redacted portions of certain documents released to him by
24 designating the reason for the redactions as ‘non-responsive’ in reliance on Immigration
25 Lawyers. (See *id.*) Plaintiff makes the same argument relying on Immigration Lawyers in
26 Plaintiff’s Motion, which the Court addresses below. However, because Plaintiff presents
27 no other evidence or argument in response to the substantive bulk of the Government’s
28 Motion, the Court agrees with the Government that summary judgment is appropriate

1 here. See *Bhan*, 929 F.2d at 1409 (stating that the nonmoving party “must produce
2 specific evidence, through affidavits or admissible discovery material, to show that the
3 dispute exists”).

4 **B. Plaintiff’s Motion for Summary Judgment (ECF No. 61)**

5 Plaintiff argues, relying on *Immigration Lawyers*, that the Government has
6 improperly withheld certain documents, either in full or in part, as “non-responsive,” and
7 also argues that the Government’s responses to his FOIA request are otherwise
8 inadequate because the Government improperly cited certain exemptions or has been
9 insufficiently specific about what FOIA exemptions apply to documents, or portions of
10 documents, that the Government has withheld. (See generally ECF No. 61.) The
11 Government generally argues in response that it has properly asserted and justified the
12 assertion of various FOIA exemptions, that *Immigration Lawyers* does not bind this
13 Court, and that the Court should not adopt the holdings of *Immigration Lawyers* as
14 relevant here. (See generally ECF No. 64.)

15 The Court finds *Immigration Lawyers* persuasive, and therefore agrees with
16 Plaintiff that the Government has improperly redacted portions of pages it released to
17 Plaintiff in response to his FOIA request by citing ‘non-responsive’ as the reason for
18 redaction. *Immigration Lawyers* is a District of Columbia Circuit Court of Appeals (“DC
19 Circuit”) opinion issued on July 29, 2016. It does not appear to have been cited by either
20 the Ninth Circuit Court of Appeals (“Ninth Circuit”), or any other district courts within the
21 Ninth Circuit. Thus, the Government is correct that the holdings of *Immigration Lawyers*
22 have not been adopted by the Ninth Circuit, and therefore *Immigration Lawyers* does not
23 bind this Court. (See ECF No. 64 at 5-6.) However, the Court has not located any
24 binding Ninth Circuit precedent contrary to the holding of *Immigration Lawyers* relevant
25 here—and the Government has not brought any to the Court’s attention. Plaintiff makes
26 clear that he cites *Immigration Lawyers* as persuasive, not binding, authority, and urges
27 the Court to consider it, especially because the D.C. Circuit is the circuit court that tends
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1 to handle the most FOIA appeals, and thus should be considered authoritative on the
2 topic. (See ECF No. 66 at 3-5.)

3 In *Immigration Lawyers*, the American Immigration Lawyers Association (“AILA”)
4 submitted a FOIA request to the Executive Office for Immigration Review (“EOIR”)
5 seeking disclosure of records related to complaints about the conduct of immigration
6 judges. See *Immigration Lawyers*, 830 F.3d at 669. EOIR released documents to AILA,
7 but, as relevant here, redacted portions of individual documents released to AILA and
8 provided the reason ‘non-responsive’ for doing so. See *id.* at 670. For example, “EOIR
9 noted that there were 64 pages of responsive records with non-responsive material
10 redacted. It gave examples of the reasons for those redactions. ‘The type of non-
11 responsive information’ redacted evidently includes ‘information about the need for an
12 immigration judge to clean his/her office, whether an immigration judge had returned to
13 the bench after a security issue, [and] the discussion of vacation plans[,] and personal
14 medical conditions of EOIR staff.’” *Id.* at 676-77. As a matter of first impression, the D.C.
15 Circuit held that this practice was improper because it was contrary to the governing
16 statute: FOIA. See *id.* at 667, 679.

17 In reaching this holding, the D.C. Circuit explained that FOIA “sets forth the broad
18 outlines of a process for agencies to follow when responding to FOIA requests: first,
19 identify responsive records; second, identify those responsive records or portions of
20 responsive records that are statutorily exempt from disclosure; and third, if necessary
21 and feasible, redact exempt information from the responsive records. The statute does
22 not provide for withholding responsive but non-exempt records or for redacting non-
23 exempt information within responsive records.” *Id.* at 677. The D.C. Circuit also cited the
24 “the Supreme Court’s instruction that FOIA’s exemptions are ‘explicitly made exclusive
25 and must be narrowly construed[.]’” as further support for its holding that it was improper
26 to redact as ‘non-responsive’ a portion of a document that the applicable agency had
27 already deemed responsive—the agency must cite one of FOIA’s statutory exemptions,
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1 or include all portions of a document it has already deemed responsive. *Id.* at 677-78
2 (citation omitted).

3 Here, Plaintiff argues the Government made the same type of redactions that the
4 D.C. Circuit found improper in *Immigration Lawyers*. (See ECF Nos. 61 at 6-8.) The
5 Government released documents to Plaintiff, but redacted portions of pages, sentences,
6 paragraphs, etc., as ‘non-responsive.’ This Court is persuaded by the D.C. Circuit’s
7 reasoning in *Immigration Lawyers*. This practice is improper because it is contrary to
8 FOIA. More specifically, the practice of redacting responsive documents on the basis
9 that certain portions are ‘non-responsive’ runs counter to FOIA, which only permits
10 partial document redaction if the applicable agency properly asserts one of the nine
11 statutory exemptions listed in 5 U.S.C. § 552(b). See *Immigration Lawyers*, 830 F.3d at
12 677. ‘Non-responsive’ is not one of those exemptions. See *id.* Thus, the Court adopts
13 the holding of *Immigration Lawyers* regarding partial redaction because certain contents
14 of documents are purportedly ‘non-responsive’ and applies it here.

15 Therefore, to the extent that the Government released certain pages to Plaintiff,
16 but redacted portions of those pages and cited ‘non-responsive’ as the reason for
17 redaction, that was improper. The Government must go back through the pages it
18 released to Plaintiff and remove the ‘non-responsive’ redactions. Then the Government
19 must release new versions of those same pages to Plaintiff with the improper redactions
20 removed. To the extent the Government argues that some of those improper redactions
21 should remain because one of FOIA’s statutory exemptions also applies to a particular
22 redaction, the Government may assert those exemptions, but must promptly provide
23 Plaintiff with an appropriately updated Vaughn index and properly cite the applicable
24 FOIA exemption on each particular redaction. Time is of the essence considering it took
25 the Government years to release documents to Plaintiff here—and Plaintiff had to sue
26 the Government to get any documents. The Court finds that sixty (60) days is reasonable
27 given the volume of documents at issue.

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1 Further, the Court is not persuaded by the Government's argument that the
2 holding of *Immigration Lawyers* regarding partial redaction citing 'non-responsive' should
3 only apply to the Government's final two releases of documents because they are the
4 only releases that post-date the *Immigration Lawyers* opinion issued on July 29, 2016.
5 (See ECF No. 65 at 4 n.1.) FOIA predates all of the Government's document releases to
6 Plaintiff in this case. Because the Court finds that the structure and text of FOIA itself—
7 as interpreted by the D.C. Circuit in *Immigration Lawyers*—renders the practice of partial
8 redaction while citing the reason 'non-responsive' improper, the Court finds that the
9 Government must reexamine all documents released to Plaintiff to comply with this
10 order.

11 That said, to the extent Plaintiff argues that certain of the FOIA exemptions cited
12 by the Government in withholding documents were improper or insufficiently explained,
13 the Court disagrees. As discussed *infra* in Section IV.A., the Government has provided
14 adequate support for the FOIA exemptions it relied on in withholding in whole or in part
15 various documents, and Plaintiff has not offered any citations to caselaw or evidence to
16 rebut the Government's initial showing. Thus, Plaintiff's Motion is denied except to the
17 extent it contends it was improper for the Government to redact portions of pages
18 released to Plaintiff and cite 'non-responsive' as the reason for those redactions.

19 **V. CONCLUSION**

20 The Court notes that the parties made several arguments and cited to several
21 cases not discussed above. The Court has reviewed these arguments and cases and
22 determines that they do not warrant discussion as they do not affect the outcome of
23 these motions.

24 It is therefore ordered that the Government's motion for summary judgment (ECF
25 No. 60) is granted in part and denied in part. The Government's motion for summary
26 judgment is granted in all respects except to the extent that the Government has
27 redacted portions of documents and provided the reason 'non-responsive' for that
28 redaction.

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It is further ordered that Plaintiff's motion for summary judgment (ECF No. 61) denied in part and granted in part. Plaintiff's motion for summary judgment is denied in all respects except to the extent that Plaintiff seeks the full text of responsive documents that were partially redacted as 'non-responsive.'

It is further ordered that the Government will reexamine its entire release of documents identified as responsive to Plaintiff's FOIA request, remove the redactions where the cited reason for the redaction was 'non-responsive' and release new versions of those documents—with the 'non-responsive' redactions removed—to Plaintiff within sixty (60) days of the entry of this order.

The Clerk is directed to enter judgment in accordance with this order and close this case.

DATED THIS 27th day of September 2018.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE