

MGD

WO

1
2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Jose Adalberto Zaldivar, Sr.,
10 Plaintiff,

No. CV 14-01493-PHX-DGC (DMF)

v.

ORDER

12 United States Department of Veterans
13 Affairs, et al.,
14 Defendants.

15
16
17 Plaintiff Jose Adalberto Zaldivar, Sr., who is currently confined in Arizona State
18 Prison Complex-Eyman, brought this pro se civil rights case pursuant to 42 U.S.C.
19 §§ 1981, 1982, 1983, 1985, and 1986, as well as *Bivens v. Six Unknown Named Agents of*
20 *Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Freedom of Information Act
21 (FOIA). (Doc. 1.) Pending before the Court are: (1) Defendant Veterans Affairs Office
22 of Inspector General's (OIG) Motion to Dismiss (Doc. 20), and (2) Defendant Veterans
23 Affairs Regional Office—Phoenix (VARO) and Office of General Counsel's (OGC)
24 Partial Motion to Dismiss (Doc. 21). Plaintiff opposes both Motions (Docs. 24, 27).¹

25 The Court will grant the Motions.

26

27
28 ¹ The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d
952, 962 (9th Cir. 1998) (en banc), regarding the requirements of responding to both
motions. (Doc. 22.)

1 **I. Background**

2 On July 1, 2014, Plaintiff filed a three-count Complaint, naming as Defendants the
3 OIG, the VARO, and Pima County. Plaintiff alleged in Count One that he submitted
4 FOIA requests to the VARO in 2002, 2005, and 2007 for copies of statements and letters
5 in his veteran compensation file that had been filed against him by his former wife,
6 Rebecca Zaldivar. The VARO responded with documents that had certain personal
7 information redacted. In December 2007, Plaintiff filed a FOIA appeal regarding the
8 denial of certain documents he had requested earlier that year. The VARO responded
9 that it had given Plaintiff the documents he requested and the only information redacted
10 was Rebecca Zaldivar’s personal information, the release of which would constitute an
11 “unwarranted invasion of personal privacy[.]” (Doc. 1 at 6.)² On February 14, 2008,
12 Plaintiff appealed this decision to the OGC, claiming that the VARO’s denial of this
13 information hampered his “right to a fair trial” and that disclosing the redacted
14 information would not invade his former wife’s privacy. (*Id.*) The OGC responded on
15 August 4, 2010 that it was denying Plaintiff’s appeal after determining that releasing his
16 former wife’s personal information would constitute an invasion of privacy and that a
17 document Plaintiff sought—a claim submitted by his former wife dated October 1,
18 2001—was never received by the VA and was not in Plaintiff’s file.

19 Plaintiff submitted a fourth FOIA request to VARO on April 26, 2012, requesting
20 various documents, including an application for apportionment to support Plaintiff’s
21 dependent spouse, notes related to that application, a VA letter dated April 3, 2012,
22 stating that Plaintiff’s former wife was entitled to benefits, and a list of names and contact
23 information “of benefits payable claimed by surviving spouses, dependent spouses and
24 children entitled to dependency and i[n]dem[n]ity compensation.” (Doc. 1 at 8.) Plaintiff
25 did not receive a response to this request and he filed an appeal with the VARO. On

26
27
28 ² The citation refers to the document and page number generated by the Court’s
Case Management/Electronic Case Filing system.

1 June 21, 2012, Plaintiff received a copy of his entire claim folder except for his service
2 treatment records, which VARO said had already been provided to him.

3 On May 15, 2013, Plaintiff filed a complaint with the OIG pursuant to 38 C.F.R.
4 § 42, the Program Fraud Civil Remedies Act of 1986 (PFCRA), alleging that his former
5 wife made false statements to the VARO. On May 20, 2013, Plaintiff submitted
6 additional exhibits in support of his May 15, 2013 complaint to the OIG. The OIG
7 notified Plaintiff on June 27, 2013 that it was responding to his May 20, 2013 complaint
8 and that it had determined “that it does not warrant formal investigation by the OIG.”
9 (Doc. 1 at 11.) Plaintiff filed a “Notice of disagreement” on July 18, 2013, which he said
10 also served as a “motion for reconsideration on the matters of the initial complaint.” (*Id.*)
11 Plaintiff wrote that if there was “no right to the motion for reconsideration, then to
12 consider this as a notice of appeal to be forwarded to the Secretary of Veterans Affairs.”
13 (*Id.*) Plaintiff also requested that OIG provide “any ‘handbook’ describing their appeal
14 process and/or administrative appeals to higher-level agency officials before seeking help
15 from the courts for relief.” (*Id.* at 11-12.) Plaintiff did not receive a response to his
16 request as of the date of his Complaint. (*Id.* at 12.)

17 In Count Two, Plaintiff alleged that on May 20, 2013, he submitted a FOIA
18 request to VARO for copies of various communications between Rebecca Zaldivar and
19 the VA. Plaintiff did not receive a response and so filed an appeal on July 15, 2013.

20 In Count Three, Plaintiff alleged that on June 4, 2013, he filed a FOIA request to
21 VARO for documents requested or submitted by Rebecca Zaldivar “previously not
22 supplied without having to make future request[s].” (Doc. 1 at 19.) Plaintiff did not
23 receive a response and he filed a FOIA appeal on July 15, 2013.

24 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff
25 stated a claim under FOIA and directed the OIG, the VARO, and the OGC to answer the
26 FOIA claims in Counts One and Two of the Complaint. The Court dismissed the
27 remaining claims and Defendants. (Doc. 9.)

28

1 The OIG seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1),
2 arguing that the Court lacks subject matter jurisdiction over it. (Doc. 20 at 2.) The
3 VARO and OGC filed a partial Motion to Dismiss pursuant to Federal Rule of Civil
4 Procedure 12(b)(6), arguing that three of Plaintiff’s five claims against them are barred
5 by the statute of limitations.³ (Doc. 21 at 2-3.)

6 **II. OIG’s Motion to Dismiss**

7 **A. Federal Rule of Civil Procedure 12(b)(1)**

8 A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be a
9 facial or a factual challenge to the existence of federal jurisdiction. *White v. Lee*, 227
10 F.3d 1214, 1242 (9th Cir. 2000). A facial challenge alleges that the pleadings are
11 insufficient to support subject matter jurisdiction. *Safe Air for Everyone v. Meyer*, 373
12 F.3d 1035, 1039 (9th Cir. 2004). In resolving a facial challenge, the district court must
13 accept the allegations of the complaint as true. *Doe v. Holy See*, 557 F.3d 1066, 1073
14 (9th Cir. 2009) (citing *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)). A factual
15 challenge alleges that there is no actual existence of jurisdiction. *Safe Air for Everyone*,
16 373 F.3d at 1039. When a party makes a factual challenge, the court is not required to
17 presume the truth of the allegations and may consider other properly presented evidence
18 in the record for the purpose of determining the existence of subject matter jurisdiction.
19 *Id.* The party asserting subject matter jurisdiction has the burden to prove such
20 jurisdiction, regardless of whether it is the movant. *See In re Dynamic Random Access*
21 *Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008).

22 **B. Facial Challenge to OIG’s Investigation Decision**

23 **1. Parties’ Arguments**

24 OIG asserts that it is making a facial challenge to Plaintiff’s claim regarding the
25 OIG’s decision not to launch a formal investigation of his complaint. Thus, the Court
26 must accept as true Plaintiff’s Complaint allegations. *Holy See*, 557 F.3d at 1073.

27
28 ³ In their Motion, the VARO and OGC also moved to strike portions of Plaintiff’s
Complaint, which the Court denied without prejudice. (Doc. 22.)

1 OIG argues that this Court lacks jurisdiction over Plaintiff’s failure-to-investigate
2 claim because there has been no waiver of sovereign immunity. OIG further argues that
3 under the Inspector General Act of 1978, 5 U.S.C. app. §§ 1, et seq., the agency is
4 afforded “absolute discretion in how investigations are conducted,” thus precluding any
5 claim by Plaintiff under the Administrative Procedure Act (APA). (Doc. 20 at 3.) OIG
6 cites to the VA’s Standards for Implementing the PFCRA to argue that the regulation
7 “vests complete discretion in the VA-OIG to make an initial determination of whether the
8 VA-OIG believes ‘that an action under the [PFCRA] may be warranted’ before any
9 obligation to refer a matter to the VA-OGC arises.” (Doc. 29 at 2, citing 38 C.F.R.
10 § 42.4(c).) OIG also argues that Plaintiff lacks constitutional standing to challenge the
11 OIG’s decisions under the PFCRA because he is a third party, notwithstanding his claim
12 that he is a victim of his former wife’s alleged misconduct.

13 Plaintiff responds that “sovereign immunity does not grant one a discretion on
14 whether [] or not to investigate any claim.” (Doc. 24 at 3.) Plaintiff asserts that he “is
15 not asking that the sovereign immunity enjoyed by the VA-OIG be waived, or that the
16 PFCRA act as a waiver, thereof.” (*Id.* at 5.) Plaintiff contends that as a veteran and the
17 “principle party” he is owed a duty to investigate” because he has “been held accountable
18 and garnishment implemented for past overpayments provided to a fiduciary (Plaintiff’s
19 former spouse).” (*Id.* at 3.) Plaintiff argues that OIG “should be held accountable for its
20 failure to act and aiding or abetting false, fictitious or fraudulent claims.”⁴ (*Id.* at 7.)

21 2. Discussion

22 a. APA

23 The APA “sets forth the full extent of judicial authority to review executive
24 agency action for procedural correctness.” *FCC v. Fox Television Stations, Inc.*, 556 U.S.

25
26 ⁴ In his Response, Plaintiff again attempts to assert a claim under *Bivens*, stating
27 that he is suing Defendants in their individual capacity. (Doc. 24 at 4.) Plaintiff, though,
28 has only named federal agencies in his suit, and a **Error! Main Document Only.** *Bivens*
action will not lie against the United States or its agencies. See *FDIC v. Meyer*, 510 U.S.
471, 486 (1994).

1 502, 513, 514 (2009). Generally, a plaintiff must be seeking non-monetary relief for
2 legal wrongs resulting from a final action undertaken by an agency or by an agency
3 officer or employee. *Id.* (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi*
4 *Indians v. Patchak*, __ U.S. __, 132 S. Ct. 2199, 2207 (2012)). “[T]he APA does not
5 apply if the ‘agency action is committed to agency discretion by law’ or if ‘statutes
6 preclude judicial review.’” *City of Oakland v. Lynch*, 798 F.3d 1159, 1165 (9th Cir.
7 2015) (quoting 5 U.S.C. § 701(a)(1), (2)). The Supreme Court has held that “an agency’s
8 decision not to prosecute or enforce, whether through civil or criminal process, is a
9 decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*,
10 470 U.S. 821, 831-32 (1985) (noting that “when an agency refuses to act it generally does
11 not exercise its coercive power over an individual’s liberty or property rights, and thus
12 does not infringe upon areas that courts often are called upon to protect”). While the
13 exception for actions “committed to agency discretion” is narrow, it includes “agency
14 refusals to institute investigative or enforcement proceedings, unless Congress has
15 indicated otherwise.” *Id.* at 838.

16 Here, the OIG made the decision not to investigate Plaintiff’s complaint regarding
17 his former wife. This decision falls squarely within OIG’s discretion to refuse to institute
18 investigative or enforcement proceedings and is not reviewable under the APA. *See*
19 *Heckler*, 470 U.S. at 831-32. Accordingly, the Court lacks subject matter jurisdiction
20 over Plaintiff’s claim against OIG regarding its decision not to investigate his complaint.

21 **b. PFCRA**

22 The PFCRA “was enacted in 1986 to allow administrative agencies to pursue
23 remedies for false or fraudulent claims for benefits or payments.” *Roberts v. Shinseki*,
24 647 F.3d 1334, 1349 (Fed. Cir. 2011) (noting that the VA’s implementing regulations
25 provide that “allegations of liability under PFCRA are referred to the VA OIG, who
26 conducts an investigation and reports to the VA General Counsel”). The PCFRA “was
27 not enacted for citizens to utilize as a cause of action against an administrative agency
28” *Ellis v. Dep’t of Veterans’ Affairs*, No. CV-05-257-RHW, 2006 WL 224041, at *1

1 (E.D. Wash. Jan. 27, 2006) (citing 31 U.S.C. § 3102 and *Orfanos v. Dep't of Health &*
2 *Human Servs.*, 896 F. Supp. 23, 24-25 (D.D.C. 1995)). Plaintiff cannot rely on the
3 PFCRA to require OIG to conduct an investigation or to grant subject matter jurisdiction
4 over Plaintiff's claim in this Court.⁵

5 **C. Factual Challenge Regarding Handbook**

6 OIG asserts that it is making a factual challenge to Plaintiff's claim regarding the
7 appeals handbook, which means the Court can review evidence beyond the complaint
8 without converting Defendants' Motion to one for summary judgment. *Safe Air for*
9 *Everyone*, 373 F.3d at 1039. When a defendant mounts a factual attack on subject matter
10 jurisdiction, "the plaintiff must support [his] jurisdictional allegations with 'competent
11 proof.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Hertz Corp. v.*
12 *Friend*, 559 U.S. 77, 99-97 (2010)). Such an attack uses the same evidentiary standard as
13 used at summary judgment. *Id.* (citations omitted). While the Plaintiff generally bears
14 the burden of proving subject matter jurisdiction by a preponderance of evidence, "if the
15 existence of jurisdiction turns on disputed factual issues, the district court may resolve
16 those factual disputes itself." *Id.* at 1121-22 (citations omitted).

17 Federal jurisdiction under FOIA "is dependent upon a showing that an agency has
18 (1) 'improperly'; (2) 'withheld'; (3) 'agency records.'" *Kissinger v. Reporters Comm. for*
19 *Freedom of the Press*, 445 U.S. 135, 150 (1980) (quoting 5 U.S.C. § 552(a)(4)(B)).
20 "Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies
21 to force an agency to comply with the FOIA's disclosure requirements." *United States*
22 *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989).

23 **1. Parties' Arguments**

24 OIG argues that Plaintiff's FOIA claim regarding an appeals handbook should be
25 dismissed for lack of subject matter jurisdiction because an appeals handbook does not
26 exist. For support, Defendant has provided the Declaration of Jason Woodward, who is

27
28 ⁵ Because the Court lacks jurisdiction over Plaintiff's PFCRA claim, the Court
need not reach Defendants' argument regarding standing.

1 OIG’s Deputy Assistant Inspector General for Management and Administration, which
2 operates OIG’s Hotline Division. (Doc. 20-1 at 1 ¶¶ 1-3.) According to Woodward,
3 “there is no right to appeal from a decision of the VA-OIG Hotline Division to decline to
4 launch a formal investigation of a complaint.” (*Id.* at 2 ¶ 6.) Woodward attached a copy
5 of the letter OIG Hotline Division sent to Plaintiff in response to his May 15, 2013
6 complaint. (*Id.* ¶ 7; Doc. 20-1 at 10.) The letter is from a Senior Analyst, “Dee,” at the
7 OIG Hotline who said that OIG had not selected Plaintiff’s complaint “for formal review
8 as an OIG case.” (Doc. 20-1 at 10.) The letter informed Plaintiff that “[t]here is no
9 appeal process on the disposition of a Hotline complaint. This is our final response on
10 this issue.”⁶ (*Id.*)

11 Woodward asserts that because there is no right to appeal OIG’s decision
12 regarding a Hotline complaint, “there is no handbook outlining the procedures to follow
13 if an individual wishes to appeal from such a decision.” (Doc. 20-1 at 2 ¶ 8.) If there
14 were such a handbook, Woodward states that he would be aware of it. (*Id.*) Woodward
15 also provided a copy of the VA’s “OIG Hotline Frequently Asked Questions” from its
16 website, which states that “[t]here are no appeal rights from a decision by the Hotline
17 Division as to the actions taken on a particular complaint.” (Doc. 20-1 at 8.)

18 Plaintiff responds that this Court “has jurisdiction because Plaintiff has the right to
19 information on [OIG’s] policies, procedures and appeals towards the exhaustion of
20 remedies.” (Doc. 24 at 10.) Plaintiff cites to FOIA’s requirements that each agency
21 prepare and make publicly available “reference materials or a guide for requesting
22 records or information from the agency,” including “a handbook for obtaining various
23 types and categories of public information from the agency pursuant to chapter 35 of
24 Title 44, and under this section.” (Doc. 24 at 10, citing 5 U.S.C. § 552(g).)

25 Plaintiff takes issue with Woodward’s Declaration, arguing that Woodward does
26 not have personal knowledge of the facts set forth in his Declaration. (Doc. 24 at 12.)

27
28 ⁶ Woodward notes that the letter from OIG is incorrectly dated April 24, 2013,
when it was actually mailed to Plaintiff on or about May 24, 2013. (Doc. 20-1 at 2 ¶ 7.)

1 Plaintiff asks the Court to compare the letter from Senior Analyst “Dee” attached to
2 Woodward’s Declaration, which responded to Plaintiff’s May 15, 2013 complaint, and a
3 different letter he received dated June 27, 2013 from Senior Analyst “DORA,”
4 responding to Plaintiff’s May 20, 2013 additional evidence. (Doc. 25 at 22.) The letter
5 from “DORA” states: “Our staff has reviewed your complaint and determined that it
6 does not warrant formal investigation by the OIG. Our review did not result in the
7 creation of an investigation report. This is our final response on this issue.” (*Id.*)
8 Plaintiff asserts that this letter does not say that he lacks appeal rights.

9 **2. Discussion**

10 The Court lacks jurisdiction over Plaintiff’s FOIA claim pertaining to his request
11 to OIG for an appeals handbook. Agency possession of the requested documents is ‘an
12 indispensable prerequisite to liability in a suit under FOIA.’” *Kissinger*, 445 U.S. at 155.
13 OIG has provided evidence in the form of a sworn declaration that no such handbook
14 exists, and has provided evidence that there is no appeal of an OIG decision not to
15 investigate. Plaintiff has not offered any evidence to the contrary.

16 When an agency does not possess a record or document, it cannot be claimed that
17 the document was improperly withheld. Therefore, this Court lacks jurisdiction over
18 Plaintiff’s claim regarding the handbook and this claim against OIG will be dismissed.

19 **III. VARO and OGC’s Motion to Dismiss**

20 VARO and OGC seek to dismiss claims related to three of Plaintiff’s five FOIA
21 requests on the basis that those claims are time-barred under 28 U.S.C. § 2401(a).
22 (Doc. 21 at 2.) They seek dismissal of Plaintiff’s FOIA requests made on October 20,
23 2002, April 13, 2005, and July 10, 2007.

24 **A. Legal Standard**

25 The statute-of-limitations defense may be raised in a motion to dismiss “only
26 when the running of the statute is apparent from the face of the complaint.” *U.S. ex rel.*
27 *Air Control Techs., Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2013)
28 (quoting *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th

1 Cir. 2010)). “A motion to dismiss based on the running of the statute of limitations
2 period may be granted only if the assertions of the complaint, read with the required
3 liberality, would not permit the plaintiff to prove that the statute was tolled.” *Supermail*
4 *Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07 (9th Cir. 1995) (internal citations and
5 quotation marks omitted). In order to dismiss a claim as untimely on a Rule 12(b)(6)
6 motion, it must “appear[] beyond doubt that the plaintiff can prove no set of facts that
7 would establish the timeliness of the claim.” *Id.* at 1207. Thus, “[i]f, from the
8 allegations of the complaint as well as any judicially noticeable materials, an asserted
9 defense raises disputed issues of fact, dismissal under Rule 12(b)(6) is improper.”
10 *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (citation
11 omitted).

12 Generally, the Court may not consider any material outside the pleadings in ruling
13 on a Rule 12(b)(6) motion. *United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th
14 Cir. 2011). But the incorporation-by-reference doctrine allows material that is attached to
15 the complaint to be considered, as well as unattached evidence on which the complaint
16 relies if: “(1) the complaint refers to the document; (2) the document is central to
17 plaintiff’s claim; and (3) no party questions the authenticity of the document.” *Id.* at 999.

18 If a specific statute is silent regarding the time period for filing an action, then the
19 Court looks to 28 U.S.C. § 2401(a), which provides that “every civil action commenced
20 against the United States shall be barred unless the complaint is filed within six years
21 after the right of action first accrues.” *Nesovic v. U.S.*, 71 F.3d 776, 778 (9th Cir. 1995).
22 Because FOIA does not include its own statute of limitations, the six-year limitations
23 period under § 2401(a) applies. *Howard v. Pritzker*, 775 F.3d 430, 437 (D.C. Cir. 2015).

24 “A cause of action against an administrative agency ‘first accrues,’ within the
25 meaning of § 2401(a), as soon as (but not before) the person challenging the agency
26 action can institute and maintain a suit in court.” *Spannaus v. U.S. Dep’t of Justice*, 824
27 F.2d 52, 56 (D.C. Cir. 1987). Generally, a FOIA claimant must exhaust administrative
28 remedies before filing a lawsuit. *Id.*; *see also In re Steele*, 799 F.2d 461, 465-66 (9th Cir.

1 1986) (“Exhaustion of a part[y]’s administrative remedies is required under the FOIA
2 before that party can seek judicial review.”).

3 Under FOIA, administrative remedies are exhausted “if the agency fails to comply
4 with the applicable time limit provisions of this paragraph.” 5 U.S.C. § 552(a)(6)(C)(i).
5 The paragraph requires the agency to “determine within 20 days (excepting Saturdays,
6 Sundays, and legal public holidays) after the receipt of any such request whether to
7 comply with such request” and to notify the requester of the decision and the right to
8 appeal to the head of the agency any “adverse determination.” *Id.* § 552(a)(6)(A)(i). The
9 statute also requires an agency to make a determination with respect to any appeal within
10 20 business days and, if the denial of a request for records is upheld, then the agency
11 must notify the requester of the provisions for judicial review. *Id.* § 552(a)(6)(A)(ii).
12 Thus, a FOIA claim accrues either (1) when an agency fails to meet the 20-day deadline
13 after receiving a FOIA request or an appeal from a denial of a FOIA request, or (2) when
14 an agency makes a timely response to an appeal from a timely adverse determination of
15 an initial FOIA request. *Spannaus*, 824 F.2d at 58-59. The agency may extend the time
16 of its determination by an additional 10 days if it provides notice to the requestor in
17 writing. 5 U.S.C. § 552(a)(6)(B). “If an agency fails to respond to a request within the
18 time provided, ‘constructive’ exhaustion of administrative remedies has occurred and the
19 requestor may seek judicial review.” *Bush v. Dep’t of Justice*, No. C 08-3842 JF(RS),
20 2008 WL 5245046, at *3 (N.D. Cal. Dec. 16, 2008) (citing *Spannaus*, 824 F.2d at 58).
21 “Once constructive exhaustion occurs, any available administrative appeal—i.e., actual
22 exhaustion—becomes permissive in the sense in which the term is used here; the
23 requester may pursue it, but his failure to do so does not bar a lawsuit.” *Spannaus*, 824
24 F.2d at 58.

25 **B. Plaintiff’s FOIA Requests**

26 **1. October 20, 2002 FOIA Request**

27 Plaintiff made his first FOIA request to VARO on October 20, 2002, requesting
28 copies of statements and letters in his VA compensation file from Rebecca Zaldivar.

1 (Doc. 1 at 4.) On November 16, 2002, VARO provided “copies of the documents to and
2 from Plaintiff’s wife,” some “with personal identifiers or information redacted, others
3 provided without their enclosures.” (*Id.*) Plaintiff does not state that he appealed this
4 response. VARO and OGC argue that Plaintiff’s cause of action as to this FOIA request
5 accrued, at the latest, on or about November 16, 2002, when Plaintiff was provided
6 documents in response to his request. (Doc. 21 at 4.)

7 **2. April 13, 2005 FOIA Request**

8 Plaintiff made his second FOIA request to VARO on April 13, 2005, requesting
9 copies of “supporting documents” and a copy of a VA letter dated January 6, 2004 to
10 Plaintiff. (Doc. 1 at 4.) Plaintiff also sent a “Notice of Disagreement” to VARO
11 regarding a VARO decision dated March 16, 2005 “and exercised the right to a personal
12 hearing to present evidence and arguments on important points in plaintiff’s claim.” (*Id.*)
13 On April 22, 2005, VARO provided four “additional copies of documents submitted by
14 Rebecca Zaldivar since November 2002,” with addresses and personal information
15 redacted, and a copy of a letter dated January 6, 2005. (*Id.* at 4-5.) Plaintiff does not
16 state that he appealed this response, and he does not explain what he means by a “Notice
17 of Disagreement” or what the March 16, 2005 decision entailed. VARO and OGC argue
18 that the cause of action as to this second FOIA request accrued on or about April 22,
19 2005, when VARO provided the documents in response to Plaintiff’s request. (Doc. 21
20 at 4.)

21 **3. July 10, 2007 FOIA Request**

22 Plaintiff made his third FOIA request to VARO on July 10, 2007, requesting
23 “specific documents mentioned in documents from the previous two request releases.”
24 (Doc. 1 at 5.) VARO responded on July 18, 2007 with a request for additional time to
25 obtain the records. (*Id.*) On September 25, 2007, VARO provided 17 sets of documents
26 containing duplicates from the 2002 and 2005 releases, as well as other documents not
27 previously disclosed, and VARO withheld “other documents.” (*Id.*) On or about
28 December 20, 2007, Plaintiff filed an appeal over VARO’s denial of “certain requested

1 records.” (*Id.*) VARO responded on December 28, 2007, “denying the request” and
2 noting that it had provided the information Plaintiff had requested and that the only
3 information redacted was Rebecca Zaldivar’s personal information, which was exempt
4 from disclosure under 5 U.S.C. § 552(b)(6). (*Id.* at 6.) On February 14, 2008, Plaintiff
5 filed an appeal to OGC. OGC acknowledged receipt of the appeal on March 4, 2008, and
6 assigned case #13527 to it. On December 10, 2008, Plaintiff “inquired into the status of
7 the FOIA appeal.” (*Id.* at 7.) OGC responded to the FOIA appeal on August 4, 2010,
8 apparently denying the appeal and upholding the exemptions claimed. (*Id.*)

9 VARO and OGC argue that the cause of action on this FOIA claim accrued on or
10 about April 1, 2008, 20 business days after OGC acknowledged receipt of the appeal on
11 March 4, 2008. (Doc. 21 at 4.)

12 C. Discussion

13 Plaintiff argues that the statute of limitations does not preclude his claims because
14 the alleged FOIA violations “should be considered to be a ‘continuing wrong’ and a
15 ‘continuing violation.’” (Doc. 27 at 3, citing cases from the Sixth, Tenth, and Seventh
16 Circuits.) Plaintiff contends that “[a]s long as Defendants continue to deprive Plaintiff
17 access to records, . . . further injury cannot be avoided or the wrong corrected.” (*Id.*)
18 Plaintiff argues that “the misrepresentation and concealment of documents released or
19 provided to others to use in court proceedings to Plaintiff[’s] detriment violates FOIA and
20 deprive[s] Plaintiff of his constitution[al] rights.” (*Id.* at 3-4.)

21 Defendants respond that Plaintiff’s application of the “continuing violation”
22 doctrine, which is an equitable exception to the timely filing requirement, does not apply
23 here because a “potential plaintiff in a FOIA action would immediately suspect that he
24 has a claim upon the agency’s timely response to the FOIA request, or upon the passage
25 of 20 days after making the request or appeal when no response has been forthcoming.”
26 (Doc. 31 at 3-4.) Defendants argue that this is “a finite deadline, which is easily
27 ascertainable in either circumstance” and so there is no cause to extend the six-year
28 limitations period to bring a FOIA action in these three instances. (*Id.* at 4.)

1 The continuing violation doctrine does not apply to Plaintiff's first three FOIA
2 requests. The cases Plaintiff relies on are not FOIA cases and do not support application
3 of the doctrine here. The first case cited by Plaintiff, *Hensley v. City of Columbus*, 557
4 F.3d 693, 697 (6th Cir. 2009), involved federal takings and due process claims. The
5 court held that the continuing violations doctrine did not extend the limitations period
6 where the damage was complete at a fixed point in time. The second case, *Tiberi v.*
7 *Cigna Corporation*, 89 F.3d 1423 (10th Cir. 1996), involved New Mexico contract and
8 tort law and noted that the continuing violation doctrine could not be applied where the
9 plaintiff's injury "is definite and discoverable, and nothing prevented the plaintiff from
10 coming forward to seek redress." *Id.* at 1431 (internal citation and quotations omitted).
11 The two Seventh Circuit cases cited by Plaintiff involved an Eighth Amendment medical
12 care claim under 42 U.S.C. § 1983 (*Heard v. Sheahen*, 253 F.3d 316 (7th Cir. 2001)) and
13 a copyright infringement claim (*Taylor v. Meirick*, 712 F.2d 1112, 1118-19 (7th Cir.
14 1983)). Neither case supports application of the doctrine to Plaintiff's three FOIA
15 requests made between 2002 and 2007 because Plaintiff would know by the expiration of
16 the applicable response date whether he had the documents he sought or not.

17 In response to Plaintiff's first FOIA request, VARO provided documents on
18 November 16, 2002. Plaintiff does not say he ever appealed that response. Therefore,
19 the FOIA claim accrued on November 16, 2002, and Plaintiff was obligated to file a
20 lawsuit on that claim by November 16, 2008.

21 In response to Plaintiff's second FOIA request, VARO provided documents on
22 April 22, 2005. Plaintiff does not say that he appealed this response. Therefore, the
23 FOIA claim accrued on April 22, 2005, and Plaintiff was obligated to file a lawsuit by
24 April 22, 2011.

25 Plaintiff filed his third FOIA request on July 10, 2007. After requesting additional
26 time, VARO provided documents on September 25, 2007. Plaintiff filed an appeal over
27 the denial of certain records around December 20, 2007, and VARO denied the appeal on
28 December 28, 2007. Plaintiff filed an appeal to the OGC on February 14, 2008, and

1 OGC acknowledged receipt of Plaintiff's appeal on March 4, 2008, assigning it case
2 #13527. There is no indication in Plaintiff's Complaint that anything more happened
3 until Plaintiff made an inquiry on December 10, 2008 about the status of his appeal.
4 Therefore, Plaintiff constructively exhausted this claim 20 business days after March 4,
5 2008, or April 1, 2008, *see Spannaus*, 824 F.2d at 58, and Plaintiff was required to file
6 suit on this claim by April 1, 2014. Plaintiff did not file this lawsuit until July 1, 2014.

7 The Court accordingly will dismiss Plaintiff's claims regarding the FOIA requests
8 he submitted on October 20, 2002, April 13, 2005 and July 10, 2007, as barred by the
9 statute of limitations.

10 **IT IS ORDERED:**

11 (1) The reference to the Magistrate Judge is withdrawn as to Defendant OIG's
12 Motion to Dismiss (Doc. 20) and Defendants VARO and OGC's Partial Motion to
13 Dismiss (Doc. 21).

14 (2) Defendant OIG's Motion to Dismiss (Doc. 20) is **granted** and OIG is
15 dismissed from this action.

16 (3) Defendants VARO and OGC's Partial Motion to Dismiss (Doc. 21) is
17 **granted**. Plaintiff's claims regarding the FOIA requests he submitted on October 20,
18 2002, April 13, 2005 and July 10, 2007 are dismissed.

19 (4) The remaining claims in this action are against VARO and OGC relating to
20 Plaintiff's April 26, 2012 FOIA request in Count One and Plaintiff's May 20, 2013 FOIA
21 request in Count Two.

22 Dated this 27th day of October, 2015.

23
24
25 

26 _____
27 David G. Campbell
28 United States District Judge