

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANK LEE DEARWESTER,  
  
Plaintiff,  
  
v.  
  
UNITED STATES OF AMERICA, et al.,  
  
Defendants.

No. 2:19-cv-0124 KJM CKD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a claim for injunctive relief under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. On August 26, 2020, the court recommended that this action be dismissed for plaintiff’s failure to file an opposition to defendants’ motion to revoke plaintiff’s in forma pauperis status. On September 4, 2020, plaintiff filed a document the court construes as plaintiff’s opposition. Accordingly, the court’s August 26, 2020 findings and recommendations will be vacated and the court will address defendants’ motion.

Title 28 U.S.C. § 1915(g) reads as follows:

In no event shall a prisoner bring a civil action . . . [in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

1 On May 28, 2015, in Dearwester v. CDCR, 1:15-cv-0694 MJS, the court found that  
2 plaintiff has “struck out” under 28 U.S.C. § 1915(g). Judgement was final in that case well before  
3 this case was filed and plaintiff does not challenge the finding that he has “struck out.” As noted  
4 above, plaintiff brought this action seeking documents under FOIA. The claims do not concern  
5 physical injury.

6 Accordingly, IT IS HEREBY ORDERED that the court’s August 26, 2020 findings and  
7 recommendations are vacated.

8 IT IS HEREBY RECOMMENDED that:

- 9 1. Defendants’ motion to revoke plaintiff’s in forma pauperis status (ECF No. 21) be  
10 granted;  
11 2. Plaintiff’s in forma pauperis status be revoked; and  
12 3. Plaintiff be ordered to pay the \$402 filing fee for this action.

13 These findings and recommendations are submitted to the United States District Judge  
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
15 after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. Such a document should be captioned  
17 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
18 objections shall be served and filed within fourteen days after service of the objections. The  
19 parties are advised that failure to file objections within the specified time may waive the right to  
20 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 Dated: December 18, 2020

22   
23 \_\_\_\_\_  
24 CAROLYN K. DELANEY  
25 UNITED STATES MAGISTRATE JUDGE

26 1  
27 dear0124.3ks