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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

THOMAS MICHAEL BENHOFF,  
Booking #13769047,  
  
Plaintiff,  
  
vs.  
  
UNITED STATES DEPARTMENT OF  
JUSTICE, et al.,  
  
Defendants.

Case No.: 3:16-cv-01095-GPC-JLB

**ORDER:**

**1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
PURSUANT TO 28 U.S.C. § 1915(a)  
[ECF No. 2]**

**AND**

**2) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE PURSUANT TO  
28 U.S.C. § 1915(d) AND  
Fed. R. Civ. P. 4(c)(3)**

THOMAS MICHAEL BENHOFF (“Plaintiff”), currently detained at the San Diego County Jail (“SDCJ”), awaiting trial in *People v. Benhoff*, San Diego Superior Court Case No. SCD324140, and proceeding pro se, has filed a “Complaint under the Administrative Procedures Act to Compel Disclosure of FOIA Materials” pursuant to 5 U.S.C. §§ 552 and 701, et seq., see ECF No. 1 at 1-2, together with a Motion to Proceed In Forma Pauperis (“IFP”) (ECF No. 2).

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1 Plaintiff seeks “injunctive and/or mandamus relief” compelling the U.S. Department  
2 of Justice, Laura E. Duffy, the United States Attorney for the Southern District of  
3 California, and Kyle W. Hoffman, an Assistant United States Attorney for the Southern  
4 District of California (“Defendants”) “to provide all available, non-exempt materials and  
5 information responsive to” nine Freedom of Information Act (“FOIA”) requests  
6 Defendants “have improperly refused to produce to him,” in response to a subpoena, which  
7 he claims are “directly exculpatory” and “would enable [him] to prove his factual  
8 innocence in his pending state criminal proceeding.” *See* ECF No. 1 at 1, 4, 5 & Ex. A at  
9 7-9.<sup>1</sup>

#### 10 **I. Plaintiff’s Motion to Proceed IFP**

11 All parties instituting any civil action, suit or proceeding in a district court of the  
12 United States, except an application for writ of habeas corpus, must pay a filing fee of  
13 \$400.<sup>2</sup> *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
14 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
15 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
16 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
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19 <sup>1</sup> Federal agencies have regulations implementing policies for disclosing information in  
20 response to a subpoena. *See Mak v. FBI*, 252 F.3d 1089, 1092 (9th Cir. 2001). The  
21 regulations, known as *Touhy* regulations, are codified at 28 C.F.R. §§ 16.21–16.29, and  
22 were adopted following the Supreme Court’s decision in *Touhy v. Ragen*, 340 U.S. 462  
23 (1951). *Touhy* held, in general, that federal officials could not be held in contempt for  
24 failing to disclose information demanded. *Id.* at 469; *see also Kwan Fai Mak v. FBI*, 252  
25 F.3d 1089, 1093 (9th Cir. 2001). Plaintiff’s exhibits reveal he seeks to challenge  
Defendants’ refusal to produce documents ostensibly held by the FBI’s Computer Crimes  
Unit, based on his purported failure to meet conditions set by 28 C.F.R. §§ 16.21-16.27.  
(ECF No. 1, Ex. A at 11-12; Ex. B at 19-23.)

26 <sup>2</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
27 fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court  
28 Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014). The additional \$50 administrative fee does  
not apply to persons granted leave to proceed IFP. *Id.*

1 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
2 *Bruce v. Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d  
3 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.  
4 *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

5 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
6 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the  
7 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
8 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
9 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
10 monthly deposits in the account for the past six months, or (b) the average monthly balance  
11 in the account for the past six months, whichever is greater, unless the prisoner has no  
12 assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody  
13 of the prisoner then collects subsequent payments, assessed at 20% of the preceding  
14 month’s income, in any month in which his account exceeds \$10, and forwards those  
15 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,  
16 136 S. Ct. at 629.

17 In support of his IFP motion, Plaintiff has submitted a copy of SDCJ trust account  
18 activity for the three-month period between January 1, 2016, and March 23, 2016 (ECF  
19 No. 2 at 6). While 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2 technically require  
20 Plaintiff to submit *six* months of accounting, Plaintiff’s account statements show he had an  
21 available balance of only \$1.89 in his account at the time of filing, and he swears, under  
22 penalty of perjury, that SDCJ officials informed him they could only provide him with  
23 three months of accounting. *Id.* at 2.

24 Based on these submissions, the Court finds Plaintiff’s motion sufficient to show he  
25 is “unable to pay” any initial partial filing fee pursuant to 28 U.S.C. § 1915(a)(a) and (b)(1)  
26 at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be  
27 prohibited from bringing a civil action or appealing a civil action or criminal judgment for  
28 the reason that the prisoner has no assets and no means by which to pay the initial partial

1 filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.  
2 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based  
3 solely on a “failure to pay . . . due to the lack of funds available to him when payment is  
4 ordered.”).

5 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2),  
6 declines to “exact” any initial filing fee because his SDCJ certificate shows he “has no  
7 means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Watch Commander of the SDCJ,  
8 or his designee, to collect the entire \$350 balance of the filing fees required by 28 U.S.C.  
9 § 1914 and to forward them to the Clerk of the Court pursuant to the installment payment  
10 provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

## 11 **II. Initial Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A**

12 Notwithstanding Plaintiff’s IFP status or the payment of any filing fees, the PLRA  
13 also requires the Court to review complaints filed by all persons proceeding IFP and by  
14 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,  
15 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
16 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
17 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
18 statutes, the Court must sua sponte dismiss any complaint, or any portion of a complaint,  
19 which is frivolous, malicious, fails to state a claim, or seeks damages from defendants who  
20 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203 F.3d 1122,  
21 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004  
22 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

23 All complaints must contain “a short and plain statement of the claim showing that  
24 the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations are not  
25 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
26 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing  
27 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining whether a  
28 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the

1 reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere  
2 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; *see also*  
3 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

4 “When there are well-pleaded factual allegations, a court should assume their  
5 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
6 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
7 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
8 allegations of material fact and must construe those facts in the light most favorable to the  
9 plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
10 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6).”).

11 However, while the court “ha[s] an obligation where the petitioner is pro se,  
12 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
13 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
14 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not  
15 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of*  
16 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

17 As currently pleaded, the Court finds Plaintiff’s Complaint contains claims sufficient  
18 to survive the “low threshold” for proceeding past the sua sponte screening required by 28  
19 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir.  
20 2012).<sup>3</sup> Accordingly, the Court will direct the U.S. Marshal to effect service upon  
21 Defendants on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall  
22 issue and serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3)  
23 (“[T]he court may order that service be made by a United States marshal or deputy marshal  
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26 <sup>3</sup> Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative  
27 of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [any individual  
28 defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.  
Cal. 2007).

1 . . . if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915.”).

2 **III. Conclusion and Orders**

3 Good cause appearing, the Court:

4 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
5 (ECF No. 2);

6 2. **DIRECTS** the Watch Commander of the SDCJ, or his designee, to collect  
7 from Plaintiff’s inmate trust account the \$350 filing fee owed in this case by garnishing  
8 monthly payments from his account in an amount equal to twenty percent (20%) of the  
9 preceding month’s income and forwarding those payments to the Clerk of the Court each  
10 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**  
11 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
12 **ASSIGNED TO THIS ACTION;**

13 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on the Watch  
14 Commander, San Diego Central Jail, 1173 Front Street, San Diego, California 92101;

15 4. **DIRECTS** the Clerk to issue a summons as to Plaintiff’s Complaint (ECF No.  
16 1) upon Defendants and forward it to Plaintiff along with a blank U.S. Marshal Form 285  
17 for each Defendant.<sup>4</sup> In addition, the Clerk will provide Plaintiff with a certified copy of  
18 this Order, a certified copy of his Complaint and the summons so that he may serve the  
19 Defendants. Upon receipt of this “IFP Package,” Plaintiff must complete the Form 285s as  
20 completely and accurately as possible, and return them to the United States Marshal  
21 according to the instructions the Clerk provides in the letter accompanying his IFP package;

22 5. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons  
23 upon Defendants as directed by Plaintiff on the USM Form 285s provided to him. All costs  
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26 <sup>4</sup> Plaintiff is cautioned that because he has named an agency and officers or employees of  
27 the United States as Defendants, he must comply with the service requirements set out in  
28 FED. R. CIV. P. 4(i). *See e.g., Tracy v. United States*, 243 F.R.D. 662, 665-66 (D. Nev. 2007).

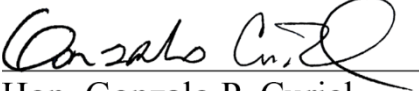
1 of that service will be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED. R.  
2 CIV. P. 4(c)(3);

3       6.     **ORDERS** Defendants to reply to Plaintiff’s Complaint within the time  
4 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42  
5 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to “waive the right  
6 to reply to any action brought by a prisoner confined in any jail, prison, or other correctional  
7 facility under section 1983,” once the Court has conducted its sua sponte screening  
8 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary  
9 determination based on the face on the pleading alone that Plaintiff has a “reasonable  
10 opportunity to prevail on the merits,” the defendant is required to respond); and

11       7.     **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to  
12 serve upon Defendants, or, if appearance has been entered by counsel, upon Defendants’  
13 counsel, a copy of every further pleading, motion, or other document submitted for the  
14 Court’s consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must include with every  
15 original document he seeks to file with the Clerk of the Court, a certificate stating the  
16 manner in which a true and correct copy of that document has been was served on  
17 Defendants or their counsel, and the date of that service. *See* S.D. CAL. CIVLR 5.2. Any  
18 document received by the Court which has not been properly filed with the Clerk or which  
19 fails to include a Certificate of Service upon Defendants may be disregarded.

20           **IT IS SO ORDERED.**

21 Dated: June 14, 2016

  
22 Hon. Gonzalo P. Curiel  
23 United States District Judge  
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