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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,  
  
Defendant.

Case No. 3:14-cv-00348-MMD-WGC  
  
ORDER  
  
(Def.'s Motion to Dismiss – dkt. no. 11)

**I. SUMMARY**

Before the Court is a Motion to Dismiss filed by Defendant Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (“Motion”). (Dkt. no. 11.) The Court has reviewed Plaintiff Micah K. Wellman’s response, and Defendant’s reply. (Dkt. nos. 14, 15.) For the reasons stated below, the Motion is granted in part and denied in part.

**II. BACKGROUND**

Proceeding *pro se*, Micah K. Wellman seeks the production of agency records and emails concerning an Internal Affairs investigation that Defendant conducted. He alleges that on May 14, 2013, he filed a Freedom of Information Act (“FOIA”) request to obtain information regarding the investigation. He subsequently received an acknowledgment letter from Defendant’s Disclosure Division dated June 13, 2013, indicating that the request was assigned ATF FOIA number 13-1026 (“FOIA 13-1026”).

1 Defendant's letter did not, however, mention whether Defendant would need more than  
2 the normal 20-day processing period as provided by statute to comply with the request. 5  
3 U.S.C. § 552(a)(6)(A)-(B). Despite subsequent attempts to check on the status of his  
4 request, Plaintiff had not received any responsive records from Defendant regarding  
5 FOIA 13-1026 as of July 3, 2014, the date he filed the Complaint.

6 Plaintiff sued, alleging that the pertinent documents are being improperly withheld  
7 under FOIA and the Administrative Procedure Act ("APA"). Plaintiff asks this Court to  
8 order Defendant to provide access to the requested documents. (Dkt. no. 1 at 4.)  
9 Defendant now moves to dismiss the Complaint under Rule 12(b)(1) of the Federal  
10 Rules of Civil Procedure, arguing that Plaintiff lacks standing to bring his APA claim  
11 because FOIA provides an adequate remedy for Plaintiff.<sup>1</sup> (Dkt. no. 11.)

### 12 **III. LEGAL STANDARD**

13 Rule 12(b)(1) allows defendants to seek dismissal of a claim or action for a lack of  
14 subject matter jurisdiction. Dismissal under Rule 12(b)(1) "is appropriate if the complaint,  
15 considered in its entirety, on its face fails to allege facts sufficient to establish subject  
16 matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546  
17 F.3d 981, 984-85 (9th Cir. 2008). Although the defendant is the moving party in a motion  
18 to dismiss brought under Rule 12(b)(1), the plaintiff is the party invoking the Court's  
19 jurisdiction. As a result, the plaintiff bears the burden of proving that the case is properly  
20 in federal court. *In re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952, 957  
21 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189  
22 (1936)). Where, as here, a plaintiff proceeds *pro se*, courts must liberally construe the  
23 complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam).

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25 <sup>1</sup>Defendant initially sought dismissal under Rules 12(b)(2), (5), and (6). Defendant  
26 argued that this Court lacks personal jurisdiction over Defendant because Plaintiff failed  
27 to perfect service of process. (Dkt. no. 11 at 2.) However, Defendant now concedes that  
28 Plaintiff has perfected service of process on Defendant. (Dkt. no. 15 at 4; see dkt. no.  
13.) Defendant also alleged that Plaintiff "fail[ed] to state a claim upon which relief can  
be granted." Fed. R. Civ. P. 12(b)(6). However, Defendant did not discuss this allegation  
in the Motion or in its reply brief, and the Court will not address it here.

1 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v.*  
2 *Kroger*, 437 U.S. 365, 374 (1978). “A federal court is presumed to lack jurisdiction in a  
3 particular case unless the contrary affirmatively appears.” *Stock West, Inc. v.*  
4 *Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus,  
5 federal subject matter jurisdiction must exist at the time an action is commenced.  
6 *Mallard Auto. Grp., Ltd. v. United States*, 343 F. Supp. 2d 949, 952 (D. Nev. 2004).

#### 7 **IV. DISCUSSION**

8 The APA allows for suits to be filed by “[a] person suffering legal wrong because  
9 of agency action, or adversely affected or aggrieved by agency action within the  
10 meaning of a relevant statute.” 5 U.S.C. § 702. But “federal courts lack jurisdiction over  
11 APA challenges whenever Congress has provided another ‘adequate remedy.’” *Brem-Air*  
12 *Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998) (quoting 5 U.S.C. § 704).

13 Here, Plaintiff brings his complaint under FOIA and the APA. Plaintiff’s FOIA and  
14 APA claims both arise from the same factual basis: Plaintiff alleges that Defendant has  
15 failed to provide him with the requested documents in violation of FOIA. (Dkt. no. 1 at 1-  
16 2.) Plaintiff also seeks the same relief under both statutes: “to order the production of all  
17 agency records and emails concerning” FOIA 13-1026. (Dkt. no. 1 at 1-2.) Plaintiff,  
18 however, has not presented evidence suggesting that FOIA will fail to provide him with  
19 an adequate remedy. Absent such evidence, the Court lacks jurisdiction to hear  
20 Plaintiff’s APA claim.

21 Plaintiff argues that his APA claim should not be dismissed because it does not  
22 arise from a facial violation of the FOIA statute, but rather from Defendant’s failure to  
23 comply with 28 C.F.R. § 16.4 and 28 C.F.R. § 16.5. (Dkt. no. 14 at 7.) This argument,  
24 however, is misplaced because the Complaint contained no allegations based on 28  
25 C.F.R. § 16.4 and § 16.5; neither regulations were even cited in the Complaint. (See dkt.  
26 no. 1.) Instead, as alleged, the APA claim is premised upon the same facts and seeks  
27 the same relief as Plaintiff’s FOIA claim.

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1 The cases cited by Plaintiff are also unavailing to his opposition to the Motion. In  
2 *Snyder v. Central Intelligence Agency*, 230 F. Supp. 2d. 17, 24 (D.D.C. 2002), the  
3 plaintiff sought the production of documents under FOIA and APA. But unlike here, the  
4 plaintiff in *Snyder* asserted additional claims under the APA. *Id.* Plaintiff also cites  
5 *Oregon Natural Desert Association v. Locke*, 572 F.3d 610, 618 (9th Cir. 2009) for the  
6 proposition that “the Government argued that a challenge to agency regulations  
7 concerning processing of FOIA requests must be brought under the APA rather than the  
8 FOIA.” (Dkt. no. 14 at 7.) However, the Ninth Circuit issued no ruling on that subject, but  
9 instead held that “the APA prescribes standards for judicial review of an agency action  
10 only when jurisdiction is otherwise established.” *Id.* It is well established that courts lack  
11 jurisdiction over APA claims if a plaintiff enjoys an adequate remedy under a different  
12 statute. *See Brem-Air Disposal*, 156 F.3d at 1004; *Coos Cnty. Bd. of Cnty. Comm’rs v.*  
13 *Kemphorne*, 531 F.3d 792, 802 (9th Cir. 2008).

14 Plaintiff has failed to demonstrate that he cannot compel the production of the  
15 requested documents through his FOIA claim alone. Thus, Plaintiff has not established  
16 that this Court has jurisdiction to hear his APA claim.

17 Finally, although Plaintiff did not request leave to amend, the Court should “freely  
18 give leave to amend when justice so requires.” Fed. R. Civ. P. 15(a)(2). The policy of  
19 favoring amendments under Rule 15(a) “is applied even more liberally to pro se litigants”  
20 than to parties represented by counsel. *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th  
21 Cir.1987). In light of Plaintiff’s *pro se* status and the nascent stage of this case, the Court  
22 finds that leave to amend is appropriate. If Plaintiff chooses to file an amended complaint  
23 he is advised that an amended complaint supersedes the original complaint and, thus,  
24 the amended complaint must be complete in itself. *See Hal Roach Studios, Inc. v.*  
25 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (holding that “[t]he fact  
26 that a party was named in the original complaint is irrelevant; an amended pleading  
27 supersedes the original”); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.  
28 2012) (holding that for claims dismissed with prejudice, a plaintiff is not required to

1 reallege such claims in a subsequent amended complaint to preserve them for appeal).  
2 Plaintiff's amended complaint must contain all claims, defendants, and factual allegation  
3 that Plaintiff wishes to pursue in this lawsuit.

4 **V. CONCLUSION**

5 It is hereby ordered that Defendant's Motion to Dismiss (dkt. no. 11) is granted in  
6 part and denied in part. Defendant's Motion to Dismiss for failure to perfect service of  
7 process is denied as moot. Plaintiff's APA claim is dismissed with leave to amend.

8 It is further ordered that if Plaintiff chooses to amend the Complaint to address the  
9 jurisdictional problem with his APA claim, Plaintiff must file an amended complaint within  
10 fifteen (15) days of the date of this Order; otherwise, this action shall proceed on the  
11 remaining FOIA claim in the original complaint.

12 ENTERED THIS 13<sup>th</sup> day of August 2015.

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16 MIRANDA M. DU  
17 UNITED STATES DISTRICT JUDGE  
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