UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH,

Plaintiff,

v.

DEPARTMENT OF THE TREASURY, *et al.*,

Defendants.

Civil Action No. 17-cv-1796 (TSC)

MEMORANDUM OPINION

Plaintiff Grant F. Smith, appearing *pro se*, sued the United States Department of Treasury ("Treasury") and the United States Office of Personnel Management ("OPM") on September 1, 2017, seeking declaratory relief related to Freedom of Information Act ("FOIA") requests he filed with both agencies. After an initial production, Defendants moved for summary judgment, ECF No. 19. The court denied that motion, finding four deficiencies in Treasury's production, ECF No. 27. After reproducing certain records, Defendants moved once again for summary judgment, ECF No. 44. Smith responded by filing a "Declaration of Mistrial or Dismissal without Prejudice," ECF No. 45. For the reasons below and good cause shown, the court will **GRANT** Defendants' Renewed Motion for Summary Judgment and **DENY** Smith's "Motion for a Mistrial or Dismissal without Prejudice".

I. BACKGROUND

In April 2012, Smith submitted a FOIA request to Treasury seeking a list of "every Treasury Department employee." Compl. ¶ 8. In October 2012, Smith filed a similar request with OPM, seeking the name and title of all employees of the Treasury's Office of Terrorism and

Financial Intelligence ("TFI"). *Id.* ¶ 12. Both agencies provided Smith with redacted employee lists that he deemed unresponsive to his original request. *Id.* ¶¶ 10, 14. Smith then filed this action in 2017, seeking to compel adequate responses to his original FOIA requests.

Shortly thereafter, the parties agreed to a stay while Treasury—the agency deemed to possess any responsive records—produced responsive records. Joint Mot. for Stay at 1, ECF No. 13. Following that production, Defendants moved for summary judgment, ECF No. 19, and Smith cross moved for summary judgment, ECF No. 23. In 2020, the court granted in part and denied in part Defendants' Motion for Summary Judgment and denied Smith's cross motion for summary judgment. Mem. Op., ECF No. 27. In so doing, the court found four deficiencies in Treasury's FOIA production, specifically:

1. A failure to explain how exemptions 6 and 7(c) applied to phone numbers for Financial Crimes Enforcement Network ("FinCEN")[1] employees. *Id.* at 10;
2. A need for more information as to whether redacted TFI employee phone numbers were personal or office phone numbers. *Id.* at 11;
3. A failure to produce records in the electronic form and format requested by Smith. *Id.* at 14; and
4. A need for more explanation as to its efforts to produce all reasonable segregable material to Smith. *Id.* at 15.

Thereafter, through 2020 and early 2021, Defendants reproduced all lists in Microsoft Excel spreadsheets, as Smith had requested. Defs.' Renewed MSJ, Stmt. of Facts ¶ 6-10, ECF No. 44. That release included previously redacted office phone numbers associated with

[1] FinCEN is a bureau of the Treasury housed under the Office of Terrorism and Financial Intelligence

employees whose names were not redacted. *Id.* ¶ 10-11. Defendants have now again moved for summary judgment, contending that they have "addressed all of the issues raised by the Court in its Opinion and has fully responded to Plaintiff's FOIA request." Defs.' Renewed MSJ at 2. Smith did not respond to Defendants' motion for summary judgment, instead moving for a "Declaration of Mistrial or Dismissal without Prejudice". Defendants oppose this motion.

II. LEGAL STANDARD

A. Voluntary Dismissal

A plaintiff may voluntarily dismiss an action after a defendant has filed an answer or motion for summary judgment "on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). Dismissal at this stage is only granted if the plaintiff moved for voluntary dismissal in "good faith," and the defendant will not suffer "prejudice other than the prospect of a second lawsuit or some tactical disadvantage based on the dismissal." *Guttenberg v. Emergy*, 68 F. Supp. 3d 184, 187 (D.D.C. 2014) (citing *Conafay v. Wyeth Labs*., 793 F.2d 350, 353 (D.C. Cir. 1986).) Good faith is a question of fact, assessed against a plaintiff's reasons for seeking voluntary dismissal. *See Conafay*, 793 F.2d at 352 n.4.

B. Motion for Summary Judgment

Summary judgment is appropriate where the record shows there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). FOIA cases are "typically and appropriately decided on motions for summary judgment." *Georgacarokos v. F.B.I.*, 908 F. Supp. 2d 176, 180 (D.D.C. 2012) (internal citation omitted). The district court's review of the government's decision to withhold requested documents under FOIA's specific statutory exemptions is *de novo*. 5 U.S.C. § 552(a)(4)(B). The government agency bears the burden of showing that nondisclosed, requested information falls within a stated exemption. *Petroleum Info. Corp. v.*

U.S. Dep't of Interior, 976 F.2d 1429, 1433 (D.C. Cir. 1992) (citing *Id.*). If the adequacy of an agency's search efforts is implicated, the court may grant summary judgment based solely on the agency's supporting declarations. *See, e.g.*, *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011); *Students against Genocide v. Dep't of State*, 257 F.3d 828, 838 (D.C. Cir. 2001). If an agency affidavit describes its reasons for withholding information in sufficient detail and is not contradicted by contrary evidence in the record or evidence of the agency's bad faith, then summary judgment may be warranted on the basis of the affidavit alone. *ACLU*, 628 F.3d at 619. The agency's justification for invoking a FOIA exemption is sufficient if it appears "logical" or "plausible." *Id.* (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)) (internal quotation marks omitted).

III. ANALYSIS

A. Voluntary Dismissal

A motion for a mistrial requires first that there has been a trial. See Mistrial, Black's Law Dictionary (11th ed. 2019) ("A trial that the judge brings to an end . . . .") (emphasis added). The court will therefore construe Smith's motion as one for voluntary dismissal under Federal Rule of Civil Procedure 41(a).

To determine if a defendant would be prejudiced by a voluntary dismissal, courts weigh (1) the defendant's effort and expense in preparing a case; (2) whether there was excessive delay or lack of diligence on the plaintiff's part; (3) the adequacy of the plaintiff's explanation of the need for dismissal; and (4) the stage of the litigation at the time the motion is made, specifically if a motion for summary judgment is pending. *See In re Vitamins Antitrust Litigation*, 198 F.R.D. 296, 304 (D.D.C. 2000).

Each of the voluntary dismissal factors counsel against a grant of voluntary dismissal here. To start, Smith's "good faith" is questionable. He states plainly that his intent in moving

for dismissal is to "regroup and begin anew" in a "less compromised venue." Pl.'s Mot. for Dismissal at 1, ECF No. 45. Smith's allegations of bias were considered and rejected by this court in its Opinion denying Smith's motion for disqualification, ECF No. 29. Smith's attempt to reframe this argument into grounds for dismissal without prejudice raises the specter that his motion is brought in bad faith, particularly since Defendants assert that, "prior to proposing a briefing schedule, counsel for Defendants inquired as to whether there was a 'need for summary judgment' in light of Defendants' final responses." Defs.' Resp. at 2.

Dismissal without prejudice would also cause Defendants significant prejudice. This litigation has been ongoing for five years. While not all of Defendants' expenses would be completely wasted in new litigation, the court must consider the cost and expense associated with preparing for two separate motions for summary judgment. *See In re Vitamins Litigation*, 198 F.R.D. at 304-305. Certainly, the court could condition dismissal on reimbursement of these costs. *See* Fed. R. Civ. P. 41(a)(2); *Guttenberg*, 68 F. Supp. 3d. at 188 (discussing reimbursement as a condition). But financial cost is not the only consideration here; Defendants have spent months on both the first production and re-production: to force them to begin anew would be wasteful and thus prejudicial. *See In re Vitamins Litigation*, 198 F.R.D. at 304.

As to the second factor, Smith has shown unnecessary delay in bringing this motion. Smith previously indicated his dissatisfaction with this court's handling of this matter, and now appears to seek voluntary dismissal because of his frustration with this court. But Smith could have sought a different forum at any time in the past five years since he filed this action, rather than on the eve of a preclusive adverse judgment. *Cf. In re Vitamins Litigation*, 198 F.R.D. at 305 (citing *Pace v. S. Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969)) ("Most denials of

voluntary dismissals are justified by the fact that defendants had already filed motions for summary judgment or that the parties were on the eve of trial.").

Third, Smith's grounds for dismissal are unpersuasive. Filing this motion in response to Defendants' renewed motion for summary judgment appears to be an attempt to avoid a final, preclusive order that would bar him from further litigation. *See* Pl.'s Mot. for Mistrial or Voluntary Dismissal at 2 ("Plaintiff therefore requests that the present action . . . terminated without prejudice. Or, failing that, that it be dismissed without prejudice so that Plaintiff may regroup and begin anew to seek transparency and accountability through FOIA that Americans deserve, in a less compromised venue."). It is inappropriate to seek voluntary dismissal to avoid an adverse ruling. *Id.* (citing *Teck General P'ship v. Crown Cen. Petroleum Corp.*, 28 F. Supp. 2d 989 (E.D. Va. 1998)).

Fourth, this motion comes as the court considers Defendants' second summary judgment motion. It is proper for a court to deny voluntary dismissal when a motion for summary judgment is pending. *See, e.g.*, *Conafay*, 793 U.S. at 352 (citing *Pace v. Southern Express Co.*, 409 F. 2d 331 (7th Cir. 1969). All these factors militate against granting Smith's motion for voluntary dismissal without prejudice. Defendants have engaged in years of litigation, made multiple productions, and have now filed their second summary judgment motion. Smith cannot simply demand to restart the race when the parties are close to the finish line.

Defendants raised the possibility of granting Smith's motion for voluntary dismissal with prejudice, which would have preclusive effect. *See, e.g.*, *Burns v. Fincke*, 197 F.2d 165 (D.C. Cir. 1952). But to do so would be to only grant preclusive effect to this court's order on the first summary judgment motion, as well as on Smith's motion for disqualification. As the parties are aware, Defendants have produced records in response to the court's denial of their first motion

for summary judgment, and their renewed motion for summary judgment addressing that production is now ripe. Consequently, it would be inappropriate to grant Smith's motion with prejudice at this procedural juncture.

The significant resources expended by Defendants, Smith's delay in bringing this motion, and his reason for the motion all show that Smith's motion for a voluntary dismissal is not being brought in good faith and should be denied.

B. Motion for Summary Judgment

Smith did not respond to Defendants' motion for summary judgment or their Statement of Undisputed Material Facts. Thus, the court "must determine for itself that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law, and then 'should state on the record the reasons for granting or denying the motion." *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 509 (D.C. Cir. 2016) (citing Fed. R. Civ. P. 56(a)). There appears to be no genuine dispute of material fact. As noted, Smith did not respond to Defendants' Statement of Undisputed Facts and nothing in his motion disputes those facts. The court thus considers if Defendants are entitled to judgment as a matter of law.

To prevail in a FOIA suit, a plaintiff must demonstrate that an agency has (1) improperly (2) withheld (3) agency records." *Judicial Watch, Inc. v. Dep't of State*, 177 F. Supp. 3d 450, 454 (D.D.C. 2016). Because this is Defendants' second motion for summary judgment, the question is whether they have remedied the earlier deficiencies, and whether any new ones have emerged.

On the first issue, Defendants maintained their redactions of the office phone numbers of certain employees under Exemptions 6 and 7(C). Defs.' Renewed MSJ at 6-8. FOIA Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). "Similar files" is

construed broadly and covers "detailed Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S 595, 602 (1982) (quoting H.R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966)). This can include such information as telephone numbers. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989). Exemption 7(C) excludes law enforcement records from disclosure that "could be reasonably expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Like Exemption 6, it encompasses phone numbers. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007).

Once this "threshold inquiry is met," the court must balance the public interest in disclosure against the individuals' privacy interests. *See Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982). The requester bears the burden of showing that the public interest outweighs the private. *See Nat'l Archives & Records Admin v. Favish*, 541 U.S. 157, 172 (2004). By not responding to Defendants' motion, Smith has failed to meet his burden of demonstrating that any public interest in disclosure exists. Even if he had made some showing, Defendants have excised non-applicable employees and narrowed their redactions from their first disclosure. Dodson Decl. ¶ 14; Edwards Decl. ¶ 7. Based on this, the court finds that Defendants have met the standard required for exemptions 6 and 7(C) and have produced responsive records to Smith's requests.

On the second issue, the need for more information as to whether redacted TFI employee phone numbers were personal or office numbers, Defendants' reproduction no longer contains blanket redactions of office phone numbers for FinCEN employees or other non-exempt employees per Exemptions 6 and 7(c). In its earlier Opinion, the court affirmed the redaction of some employee names and information. Mem. Op. at 10. Defendants have altered their

production to redact the office phone numbers of only those redacted employee names. As a result, Defendants have produced office phone records for all employees whose privacy interests do not outweigh the public interest in disclosure. *See Shapiro v. Dep't of Just.*, 34 F. Supp. 89, 94 (D.D.C. 2014) (citing *Coleman v. Lappin*, 680 F. Supp. 2d 192, 196 (D.D.C. 2010) (considering the balance of the public and private interest factors).

As to the third issue—Defendants' failure to explain how exemptions 6 and 7(c) applied to phone numbers for FinCEN employees—Defendants have reproduced the originally produced data in the format Smith requested. In 2018, when the court considered Defendants' first motion for summary judgment, Treasury had produced responsive data in PDF form, though Smith had requested data in Microsoft Excel files. Pl.'s Cross MSJ at 57, ECF No. 21-1. Treasury has now produced the requested records in Excel, and therefore that issue has been resolved and there is no longer a case or controversy for the court to adjudicate on this point. *See Bayala v. Dep't of Homeland Sec.*, 827 F.3d 31, 34 (D.C. Cir. 2016).

Finally, as to the fourth issue, FOIA requires that agencies provide all reasonably segregable records; blanket exemptions are unacceptable. 5 U.S. C. § 552(b). The court finds that Defendants have now sufficiently explained their efforts to produce all reasonable segregable material. As Defendants describe through the Dodson Declaration, the process of converting the PDF files to Excel documents necessarily required Defendants to undertake a granular segregation process, because each cell in the spreadsheet had to be evaluated and redacted individually. Defs.' Renewed MSJ, Dodson Decl. ¶ 15; see also Ex. A (sample sheet). Consequently, the court finds that Defendants have met their statutory burden to reasonably disclose non-segregable records, and to "demonstrate that all reasonably segregable information has been released." *Cavezza v. U.S. Dep't of Justice*, 113 F. Supp. 3d 271, 2722 (D.D.C. 2015).

In sum, Defendants have shown that there is no genuine material dispute of fact as to whether they have improperly withheld agency records. Their motion for summary judgment will therefore be granted.

IV. CONCLUSION

For the foregoing reasons and for good cause shown, the court will **GRANT** Defendants' Motion for Summary Judgment, ECF No. 44, and **DENY** Plaintiff's Motion for a Mistrial or Voluntary Dismissal, ECF No. 45. A corresponding order will accompany this memorandum opinion. The case will be closed.

Date: March 8, 2022

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge