

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. SA-16-CV-0972-XR
	§	
UNITED STATES DEPARTMENT	§	
OF DEFENSE,	§	
	§	
Defendant.	§	

**DEFENDANT’S MOTION FOR EXTENSION OF TIME TO SUBMIT CROSS-MOTION
FOR SUMMARY JUDGMENT AND TO RESPOND TO
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE XAVIER RODRIGUEZ, U.S. DISTRICT JUDGE:

NOW COMES the Defendant, United States Department of Defense (DoD), by and through the United States Attorney for the Western District of Texas, and respectfully submits this Motion for Extension of Time. Defendant would show the Court the following:

1. On January 31, 2017, Defendant’s current counsel, Assistant United States Attorney Robert Shaw-Meadow, is retiring from the Department of Justice after 21 years of federal service.
2. Plaintiff John Eakin, *pro se*, filed his Motion for Summary Judgment January 24, 2017 (ECF No. 16). Absent an extension of time, Defendant’s Response to Plaintiff’s Motion for Summary Judgment will be due February 7, 2017.
3. Pursuant to the Court’s December 8, 2016 Scheduling Order (ECF No. 15), Defendant’s Motion for Summary Judgment is due February 1, 2017.

4. This is a lawsuit brought under the Freedom of Information Act (FOIA). It is Mr. Eakin's third recent lawsuit against the Department of Defense. This latest FOIA suit involves two separate requests – one for contract documents, which should be resolved amicably¹ -- and the other for over 280,000 World War II era Individual Deceased Personnel Files (IDPFs), which is considerably more complex and contains personally identifying information (PII) of other FOIA requestors, subject to the Privacy Act and exempted from disclosure under FOIA. As Plaintiff is well aware, at the time DoD responded to his FOIA request and stated that it could not process it within 20-days, DoD was working on over 1,600 records requests which had been received before Mr. Eakin's. *See* Exhibit 1B to Plaintiff's Complaint (ECF No. 1) (Page 7 of 14).

5. Plaintiff's repeated statement that "Defendant has provided no claim of exemption from release under FOIA for the requested documents" (ECF No. 16, Memorandum of Points and Authorities, pp. 2, 4) is inaccurate. In its November 1, 2016 Answer (ECF No. 8), Defendant affirmatively alleged that some documents requested were exempt from disclosure under one of the enumerated FOIA exemptions. In the parties' subsequent December 1 informal scheduling meeting, Defendant's counsel made clear that the IDPF's could not be released before they were manually screened to ensure that Personally Identifiable Information ("PII") was not released. In recent emails attempting to negotiate an extension of time, Defendant consistently has taken the position that the PII of other FOIA requestors contained within some of the responsive IDPF files

¹ To his credit, Mr. Eakin acknowledges that Defendant has released 15 pages of responsive contract documents on January 20, 2017 (*see* ECF No. 16, Page 10 of 19), and that "Plaintiff expects that the redactions, as verbally described to him by Defendant, will be acceptable, but reserves his right to object." Plaintiff's Memorandum of Points and Authorities, ¶ 7 (ECF No. 16, Page 4 of 19). After further review and redaction by a different DoD component, Defendant will release, with redactions, the additional responsive contract documents to Plaintiff.

could not be produced without redaction because of the privacy interests of these third parties. (Exhibit 1 attached).²

6. In addition to locating, redacting, and partially producing responsive contract documents, Defendant has begun the arduous process of manually reviewing the 280,000 IDPF's to ensure that no current PII is released.³ To date, 475 files have been reviewed, and 41 of these files (8.6%) contain **current** PII (names, addresses, phone numbers, and email addresses of other FOIA requestors). See Declaration of Monique Wey Gilbert at ¶ 4 (Exhibit 2 attached).

7. Regrettably, undersigned counsel underestimated the complexity and time required to complete dispositive motions in this case.

² It would seem that Plaintiff believes that since DoD eventually released documents containing old PII without redaction in *Eakin I*, it has disavowed any claim of exemption from release of current PII in this case. This is not so. The information eventually released without redaction in *Eakin I* pertained to “the release of home addresses [**circa 1941-1945**] of soldiers killed in World War II,” and to the release of “names of the next of kin [**circa 1941-1945**] of soldiers killed in World War II.” See Plaintiff’s Statement of Material Facts at ¶¶ 9-10 (ECF No. 16, Page 11 of 19), and Plaintiff’s Exhibit 1 to Motion for Summary Judgment (ECF No. 16, Pages 17-18). DoD initially opposed the release of historic PII in *Eakin I*, but the DoD Office of General Counsel then made the policy decision that after more than sixty years had passed, information regarding deceased soldiers and their families could be released. In this case, to the contrary, DoD is asserting FOIA Exemption 6 pertaining to **current** PII of third-party FOIA requestors, not PII which is more than 60 years old and no longer subject to protection. Plaintiff is comparing apples and oranges, and DoD is not taking a contrary position in this case. In any event, in this litigation DoD is not bound by any **allegedly** contrary position taken in *Eakin I*.

³ Defendant is in the process of compiling a good faith estimate of how many hours it would take to process Plaintiff’s request for the release of these approximately 280,000 IDPF’s. Depending on the results of this analysis, Defendant reserves the right to move for summary judgment on the grounds that Plaintiff’s request is unreasonably burdensome. See, e.g., *Ayuda, Inc. v. Federal Trade Comm’n*, 70 F. Supp. 3d 247, 275-76 (D.D.C. 2014) (citing numerous cases holding that federal agency is not required to comply with FOIA request which is so broad that it imposes an unreasonable burden on the agency).

8. Defendant is requesting a **120-day** extension of time,⁴ until June 1, 2017, to respond to Plaintiff's Motion for Summary Judgment and to file its own Cross-Motion for Summary Judgment for the following reasons:

a. A new Assistant United States Attorney will need to be assigned as lead counsel and will need time to review the complicated governing facts and law, assemble factual information, prepare a Response to Plaintiff's Motion for Summary Judgment, and prepare Defendant's Cross-Motion for Summary Judgment;

b. DoD will need to complete its review, redaction, and production of responsive contract documents, and confirm that Plaintiff has no objection to the redactions made;

c. The Army Human Resources Command (AHRC) IT contact will need to complete his research to see if Mr. Eakin's claim that PII can be automatically screened out by available software programs is correct (*see* attached Defendant's Exhibit 1, email string, and Defendant's Exhibit 2, Wey Gilbert Declaration at ¶ 5);⁵

⁴ Plaintiff is only willing to agree to a 14-day extension of time. *See* Exhibit 1. Defendant's Answer in this case was timely filed November 1, 2016. If the Court approves Defendant's requested extension, all dispositive motions in this case would be filed within **seven months** of Defendant's first appearance in this case. Compared to other civil cases in the San Antonio Division, Defendant submits that this is a reasonable scheduling timeline. The Court may also take judicial notice of the time it took to finally resolve Mr. Eakin's first two lawsuits against DoD: No. SA-10-CA-784-FB (approximately sixteen months between Complaint and Judgment) (*Eakin I*); No. SA-12-cv-1002-FB (approximately three years between Complaint and final ruling in case) (*Eakin II*).

⁵ Mr. Eakin's claim does not appear to be correct, but Defendant has agreed to further investigate the point. *See Ayuda*, 70 F. Supp. 3d at 272 (“[N]o automated process exists for capturing all similar information [by the FTC] because consumers may transcribe the sensitive numbers in varying and unpredictable patterns, and other free-form personal identifying information, such as names and addresses, simply never lends itself to a predictable format that might allow automated redacting.”).

d. The AHRC FOIA/Privacy Act Office will need to research and estimate the amount of time which would be required to manually review the approximately 280,000 World War II era IDPFs;

e. Assuming that Plaintiff's request is **not** unreasonably burdensome as a matter of law, DoD will be required to process and release the 280,000 IDPF files once the PII is identified and removed.

Certificate of Conference

9. I certify that I conferred with Mr. John Eakin, Plaintiff *pro se*, via email, and Plaintiff opposes any extension of time of more than 14 days, as reflected in Exhibit 1. This Motion is therefore submitted to the Court for resolution.

WHEREFORE, Defendant respectfully requests that the Court GRANT this Motion, and extend the deadlines for Defendant to respond to Plaintiff's Motion for Summary Judgment, and to file its own Cross-Motion for Summary Judgment by 120 days, until June 1, 2017.

DATED: January 31, 2017

Respectfully submitted,

RICHARD L. DURBIN, JR.,
United States Attorney

AGENCY COUNSEL:
Mark Herrington
U.S. Department of Defense Office
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301-1600

By: /s/ Robert Shaw-Meadow
ROBERT SHAW-MEADOW
Assistant United States Attorney
Texas Bar No. 18162475
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Telephone: (210) 384-7355
Facsimile: (210) 384-7312
E-mail: Rob.Shaw-Meadow@usdoj.gov

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system on this 31st day of January, 2017, and was served via Certified Mail, No. 7004 2890 0001 6442 as follows:

John J. Eakin
9865 Tower View
Helotes, Texas 78023
jeakin@airsafety.com
PRO SE

/s/ Robert Shaw-Meadow
ROBERT SHAW-MEADOW
Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,

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ORDER

The matter before the Court is Defendant’s Motion for Extension of Time (docket entry no. 17). The Motion is opposed by Plaintiff.

After considering the parties’ positions and the status of the case, the Court is of the opinion that the Motion should be GRANTED. Docket no. 17 is GRANTED.

IT IS THEREFORE ORDERED that Defendant’s deadlines -- to respond to Plaintiff’s Motion for Summary Judgment, and to submit its own Cross-Motion for Summary Judgment -- are HEREBY EXTENDED through June 1, 2017.

SIGNED this _____ day of February, 2017.

HON. XAVIER RODRIGUEZ
UNITED STATES. DISTRICT JUDGE