



date except for good cause. The deadline to file motions (including dispositive motions and Daubert motions) is February 1, 2017. This deadline is also applicable to the filing of any summary judgment motion under Fed. R. Civ. P. 56 and any defense of qualified immunity."

On January 31, 2017, Defendant filed its Opposed Motion for Extension of Time to Submit Cross-Motion for Summary Judgment and to Respond to Plaintiff's Motion for Summary Judgment." (ECF Doc No. 17) In this motion, Defendant requested a 120-day extension of time, until June 1, 2017, to respond to Plaintiff's Motion for Summary Judgment and to file its own Cross-Motion for Summary Judgment. This extension of time was for the purpose of allowing a new Assistant U.S. Attorney to become familiar with the case and for Defendant to complete various reviews of the requested materials.

On February 13, 2017, Plaintiff filed his Response to Defendant's Motion for Extension of Time to Submit Cross-Motion for Summary Judgment and to Respond to Plaintiff's Motion for Summary Judgment. (ECF Doc No. 18) Plaintiff challenged Defendant's request for an extension of time as excessive because:

- a. The retirement of Defendant's counsel was foreseeable at the time Defendant agreed to the scheduling recommendations;
- b. Defendants' motion to extend time appeared actually to be a thinly disguised request for the *Open America* stay Defendant presented as an affirmative defense in its Answer, (ECF Doc 8 at 4) however such a stay requires the agency to show that "exceptional circumstances exist" and that the agency is exercising due diligence in responding to the request. 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2006 & Supp. IV 2010);
- c. Plaintiff also noted that Defendant had previously released to

Plaintiff a large volume of nearly identical material containing virtually the same embedded material without redaction and Plaintiff contends the embedded material is not exempt from disclosure under FOIA, and;

d. Plaintiff further stated his belief that this late Motion for Extension of Time was submitted for the purpose of delay and avoiding consideration of the content and context of the FOIA requests that Defendant suddenly claimed were privacy protected.

On February 9, 2017, Defendant filed their Reply in Support of its Motion for Extension of Time to Submit Cross-Motion for Summary Judgment and to Respond to Plaintiff's Motion for Summary Judgment. (ECF Doc 20)

On March 13, 2017, this case was transferred to the docket of the Honorable Judge Royce C. Lambert. (ECF Doc 21) The Order directed that, "All orders shall remain in effect unless and until altered by the receiving judge."

To date, the Court has not granted Defendant's Motion for Extension of Time nor modified the scheduling order. Defendants did not seek leave to file their motion out of time. They have, therefore, waived their opportunity to submit pretrial motions.

**DEFENDANT HAS NOT SHOWN GOOD CAUSE FOR LATE FILING**

Defendant has now, without explicit permission of the Court, had the four month delay they contended was necessary, yet their cross-motion for summary judgment and response to Plaintiff's motion for summary judgment contains no new information and is based on facts that were known four months ago. Defendant has failed to show good cause for a delay and their request for such should not be retroactively granted.

**DEFENDANT DOES NOT QUALIFY FOR A STAY**

Defendant's attempt to extend time is actually a thinly disguised attempt to obtain an open ended *Open America* stay without compliance with the FOIA statute.

Defendant presented an *Open America* stay as an affirmative defense in its Answer, (ECF Doc 8 at 4), however such a stay requires the agency to show that "exceptional circumstances exist" and that the agency is exercising due diligence in responding to the request. 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2006 & Supp. IV 2010) Defendant could not show such at that time, nor at the present time. Defendant then moved for a stay in order to properly review the requested records. Now, without leave of the Court to file late, Defendant, alternatively, asks for an *Open America* stay.

When a requester who has constructively exhausted administrative remedies due to an agency's failure to comply with the FOIA's time deadlines files a suit in court, the court may retain jurisdiction over the case -- ordinarily through issuance of a stay of proceedings -- while allowing the agency additional time to complete its processing of the request. The FOIA itself explicitly permits such a stay if it can be shown that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request." *Id.* This provision of the FOIA provides an important "safety valve" for agencies that have been, and continue to be, overwhelmed by increasing numbers of FOIA requests.

The leading case construing this FOIA provision is *Open America v. Watergate Special Prosecution Force*. 547 F.2d 605 (D.C. Cir. 1976) In *Open America*, the Court of Appeals for the District of Columbia Circuit held that "exceptional circumstances" may exist when an agency can show that it "is deluged with a volume of requests for

information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)." *Id.* at 616

The Electronic Freedom of Information Act Amendments of 1996 explicitly redefined the term "exceptional circumstances" to exclude any "delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." *Electronic Freedom of Information Act Amendments of 1996*, Pub. L. No. 104-231, § 7(c), 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552(a)(6)(C)(ii)) This definition of "exceptional circumstances" makes it difficult for agencies seeking a stay of proceedings to argue only the existence of a FOIA backlog as the basis for a stay. *See H.R. Rep. No. 104-795*, at 18-19 (1996); *see also Donham v. United States Dep't of Energy*, 192 F. Supp. 2d 877, 882 (S.D. Ill. 2002) (refusing to accept agency's argument that its backlog qualifies as "exceptional circumstances" because "then the 'exceptional circumstances' provision would render meaningless the twenty-day response requirement"); *Al-Fayed v. CIA*, No. 00-2092, slip op. at 5 (D.D.C. Jan. 16, 2001) ("Rather than overturn *Open America*, the 1996 amendments merely explain that predictable agency workload and a backlog alone, will not justify a stay."), *aff'd* on other grounds, 254 F.3d 300 (D.C. Cir. 2001); *Eltayib v. United States Coast Guard*, No. 99-1033, slip op. at 3 (D.D.C. Nov. 11, 1999) (explaining intent of Electronic FOIA amendments' modification of FOIA's "exceptional circumstances" provision), *aff'd* on other grounds, 53 Fed. Appx. 127 (D.C. Cir. 2002) (per curiam)

At the same time, in enacting the Electronic FOIA amendments, Congress specifically contemplated that other factors may be relevant to a court's determination as to whether "exceptional circumstances" exist: An agency's efforts to reduce its pending request backlog; the size and complexity of other requests being processed by the agency; the amount of classified material involved; and the number of requests for records by courts or administrative tribunals that are also pending. *See H.R. Rep. No. 104-795*, at 24-25, 1996 *U.S.C.C.A.N.* 3448, 3468 (1996) (specifying factors that may be considered in determining whether "exceptional circumstances" exist).

### **CONCLUSION**

For the foregoing reasons, this Court should issue the attached order striking Defendant's Cross-Motion for Summary Judgment and response to Plaintiff's Motion for Summary Judgment, Motion to Stay Case in the Alternative.

Respectfully submitted,

/s/ John Eakin

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of June, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record.

/s/ John Eakin

John Eakin, Plaintiff *pro se*

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL NO. SA-16-cv-0972-XR
	§	
UNITED STATES	§	
DEPARTMENT OF DEFENSE	§	
	§	
Defendant	§	
	§	

**ORDER**

On this day, came on for consideration Plaintiff's Opposed Motion to Strike Defendant's Cross-Motion for Summary Judgment and response to Plaintiff's Motion for Summary Judgment, Motion to Stay Case in the Alternative.

The Court having reviewed said Motion, finds that the Motion should be, and hereby is, GRANTED. Defendant's Cross-Motion for Summary Judgment and response to Plaintiff's Motion for Summary Judgment, Motion to Stay Case in the Alternative is STRICKEN.

Signed this the \_\_\_\_\_ day of \_\_\_\_\_, 2017

\_\_\_\_\_  
DISTRICT JUDGE