

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

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

**DEFENDANT’S RESPONSE TO PLAINTIFF’S OPPOSED MOTION FOR
LEAVE TO FILE FIRST AMENDED COMPLAINT**

The Department of Defense (“DoD”) files this Response in Opposition to Plaintiff’s Opposed Motion for Leave to File First Amended Complaint. Pursuant to Fed. R. Civ. P. 16(b)(4) the Court should deny Plaintiff’s request to amend. Plaintiff’s request to amend is grossly untimely and unduly prejudicial to Defendant because it seeks to bootstrap an entirely new complaint onto a matter which was decided nearly three years ago. .

BACKGROUND

1. This FOIA case has been ongoing since September 30, 2016. It originally arose out of two FOIA requests filed by Plaintiff with the Office of the Secretary of Defense/Joint Staff on May 10 and May 11, 2016. In his May 10, 2016 request Plaintiff sought the following:

Electronic (digital) copies of all World War II era Individual Deceased Personnel Files (IDPF’s) a/k/a 293 files and/or “X-files” which exist in any digital or electronic format. Included in this request are any indices, data dictionaries, databases or other documents necessary to properly access the requested IDPF documents.

Pl. Complaint at p. 7, ECF No. 1. Plaintiff’s May 11, 2016 request was for certain contracts related

to the IDPFs that were the subject of his May 10, 2016 request. *Id.*

2. At the time of Plaintiff's May 10, 2016 FOIA request, 290,000 IDPFs existed in digital format. The digitized IDPFs included documents related to deceased U.S. military personnel whose last names began with the letters A through L. There were thousands of additional IDPFs that had not been digitized and existed in paper format. Because the files were from World War II, the integrity of the paper documents varied and required digitization before release. For various reasons, including that some of the IDPFs contained privacy information from living relatives, all IDPFs required review under FOIA prior to release.

3. Following the filing of Plaintiff's original complaint, Plaintiff and DoD filed cross-motions for summary judgment in this matter, and the DoD sought, in the alternative, an *Open America* stay. *See* Pl.'s Mot. Summ. J., ECF No. 16; Def.'s Mot. Summ. J., ECF No. 22. This court entered a memorandum and order disposing of both motions on August 2, 2017 and ordered Defendant to produce the digitized A-L IDPFs. Mem. Op., ECF. No. 29; Order, ECF No. 30. The court's order effectively concluded this litigation and it is now in a monitoring phase.

4. As a result of the court's ruling on August 2, 2017, the parties conferred on a rolling, semi-annual production schedule for the responsive documents—the A-L IDPFs that had been digitized at the time of Plaintiff's FOIA request. This agreed production schedule was based on information available to DoD at the time. Since the Court's order of August 2, 2017, the DoD has produced millions of pages of documents, over 2 terabytes of data, to Plaintiff.

5. After the court's August 2, 2017 ruling, the Department of Health and Human Services entered into a contract on behalf of the Defense Prisoner of War/Missing Personnel Office, a predecessor organization of the Defense POW/MIA Accounting Agency with Na Ali'i Consulting & Sales, LLC ("Na Ali'i"). The contract was for the digitization of the M-Z IDPFs.

The Na'Ali'i contract was separate from the contract that had led to the digitization of the A-L files. To date, Na'Ali'i has not completed the digitization of the M-Z IDPFs. Due to the current COVID-19 emergency, work on this contract has stopped and it impossible to know the completion date for the IDPFs.

AUTHORITY AND ARGUMENT

6. The “good cause” standard in Fed. R. Civ. P. 16(b)(4) governs amendment of pleadings after the scheduling order deadline covering amended pleadings has passed. *S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003). Only upon a movant's demonstration of good cause will the more liberal amendment requirements of Rule 15(a) apply to the district court's decision to grant or deny leave to amend. *Id.* Fed. R. Civ. P. 16(b)(4) applies here because the deadline for Plaintiff to file a motion seeking leave to amend pleadings was December 30, 2016 and Plaintiff has failed to demonstrate good cause for amendment of his complaint more than three years after the court’s deadline. Scheduling Order, ECF No. 15.

7. In *Borda v. Department of Justice*, the court denied a Plaintiff’s motion to amend based on undue delay and undue prejudice. *Borda v. United States DOJ*, 306 F. Supp. 3d 306, 312 (D.D.C. 2018). Plaintiff in *Borda* sought to amend his complaint to attack the sufficiency of the Department’s response to two FOIA requests separate from the FOIA request addressed in his initial Complaint. The court found that a “delay of several years between the filing of the initial action and the request to amend is generally undue and suggests prejudice to the defendant. *Id.* at 313. Additionally, the court acknowledged that there is considerable time and effort in briefing summary judgment on the issues presented in a FOIA case which weighs against granting leave to amend after that briefing has begun. *Id;* see also *James Madison Project v. DOJ*, 208 F. Supp. 3d

265, 279 (D.D.C. 2016). Courts in this circuit have likewise denied a request to amend at the point in litigation which would require the suit to begin anew with dispositive motions. *See Hostingxtreme Ventures, LLC v. Bespoke Grp., LLC*, Civil Action No. 3:14-CV-1471-M, 2017 U.S. Dist. LEXIS 191026, at *18 (N.D. Tex. 2017); *Valcho v. Dallas Cty. Hosp. Dist.*, 658 F. Supp. 2d 802, 815 (N.D. Tex. 2009) (noting that prejudice is frequently found when a party seeks leave to amend after the opposing party has filed a motion for summary judgment"); *Navarro v. Microsoft Corp.*, 214 F.R.D. 422, 424 (N.D. Tex. 2003) (finding prejudice even though the new causes of action in the proposed amended complaint were "virtually identical," because the defenses were not necessarily the same).

8. Here, permitting Plaintiff to amend his complaint nearly three years after this court already decided the ultimate issue in this case would certainly begin the suit anew. On August 2, 2017, this court ruled in favor of Plaintiff and ordered Defendant to produce documents responsive to Plaintiff's May 10 and May 11, 2016 FOIA requests. Following that ruling, Plaintiff and Defendant agreed on a schedule to produce the A-L IDPFs that had been digitized. Since that time Defendant has complied with the court's order and has produced over 2 terabytes of data.

9. Plaintiff now seeks to append an additional December 18, 2019 FOIA request to his original litigation. Although the language of the December 18, 2019 request mirrors the language in Plaintiff's May 10 and May 11, 2016 request, it is clear Plaintiff is seeking the M-Z set of files. Although some of the M-Z IDPFs have been digitized, that process is not complete. Permitting Plaintiff to amend his complaint and add future FOIA requests to this litigation would extend this litigation in perpetuity. If the court permits Plaintiff to amend and add more requests for documents, it begs the question of what future documents Plaintiff will be allowed to continue to add to this litigation, for instance, other documents related to World War II, IDPFs on conflicts

outside World War II, or other documents in possession of the DoD, ad infinitum.

10. If the court grants Plaintiff leave to amend his complaint, the DoD would be compelled to submit new motions for this court's consideration, given that circumstances have changed since the court's order in August 2017. Defendant should be able to present those new issues based on changing circumstances in litigation focused on Plaintiff's new request. For example, one issue that would be different would be manning at Defendant's FOIA office due to the changing nature of Defendant's operations. Another issue would be how events of the past month with the national health crisis for instance, have significantly altered the DoD's ability to conduct operations. Allowing Plaintiff to "jump the FOIA line" by bootstrapping this new request on to what is decided litigation, in a monitoring phase, is not the appropriate method of addressing his complaints. In summary, it appears Plaintiff wants to simply add newly requested files to the current production schedule which was calculated based on facts that existed at the time the schedule was set. Certainly enough factors have changed since then that Plaintiff should be precluded from making such a request without allowing Defendant to present those issues for the court's consideration.

CONCLUSION

For the reasons cited herein, Defendant respectfully requests that the Court deny Plaintiff's Motion for Leave to File First Amended Complaint.

DATED: March 27, 2020

Respectfully submitted,

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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 27th day of March, 2020, and that Plaintiff will receive a copy of same via the Court's CM/ECF system as follows:

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PRO SE

/s/ Jacquelyn M. Christilles
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