

United States District Court  
Western District of Texas  
San Antonio Division

John Eakin,  
Plaintiff,

v.

United States Department of Defense,  
Defendant.

No. SA-16-CV-00972-RCL

**Joint Proposed Scheduling Recommendations**

On August 13, 2020, this Court ordered the parties to confer and provide a joint report with a proposed schedule for further proceedings herein. The parties conferred on October 7, 2020 and submit the following recommendations to this Court:

**I. Proposed Production Schedule – A-L Individual Deceased Personnel Files**

The parties are unable to agree on a proposed schedule for production of the remaining A-L Individual Deceased Personnel Files (IDPFs).

**A. United States Department of Defense Position**

On September 28, 2020, the United States Department of Defense (DoD) filed a Status Report with the Court regarding the release of the remaining A-L IDPFs. ECF No. 69. As noted in that report, due to several unforeseen circumstances, the DoD will be unable to meet its original estimated delivery date for these files of February 1, 2021. *See* ECF No. 29. The original estimate was based on the “Government’s estimates and progress thus far” and did not account for employee turnover, delay due to conversion of the files into a searchable format, and the global COVID-19 pandemic. *See* ECF No. 29 and 57. Although the DoD has turned over approximately 2.44 TB of data consisting of 136,789 files, the DoD’s pace of review has not proceeded as quickly as the DoD had hoped when it gave the Court its original production estimate in 2017.

The DoD is working diligently to develop solutions to alleviate the current rate of review caused by COVID-19. The FOIA office recently installed five (5) virtual drives that can accommodate 1.5 TB of data each. The virtual drives will allow more than one reviewer to access the files.

On June 5, 2019, the Court ordered the DoD to produce documents as searchable PDFs going forward.<sup>1</sup> ECF No. 42. DPAA worked to convert the remaining A-L files that had not already been produced to Mr. Eakin into a searchable format using an Optical Character Recognition (OCR) program.<sup>2</sup> In order to get the files to the FOIA office for review in a timely manner, DPAA converted the files in two separate batches. On February 11, 2020, DPAA transmitted approximately 67,000 IDPFs to the FOIA office for review. The FOIA office is working to upload those files to the virtual drives. The files must be separated into 1.5 TB batches. The FOIA office is working to separate the files and estimates it will take 2-3 weeks to upload the files from the external hard drive to the virtual drives.

Once the files are uploaded to the virtual drives, the FOIA office intends to assign four (4) reviewers to review the files for one hour each day for five (5) days per week. Due to the workload associated with other FOIA requests, the FOIA office cannot dedicate additional personnel or time

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<sup>1</sup> It is Mr. Eakin's position that the contract required the files be produced in a searchable .pdf format. The DoD's position is that the contract for the digitization of the A-L files does not contain any language concerning producing the files in a searchable .pdf format. The M-Z digitization contract states "[t]he Contractor shall ensure that the digital copy constitutes a fair, accurate, and machine-readable version of each digitized content, to the extent possible." It is the DoD's position that this does not mean that the contractor will produce a searchable .pdf for each document. Instead the contractor will produce a scanned copy that is of a sufficient quality to be as searchable as the applied technology can support. The Optical Character Recognition program DPAA is using to transfer the files to the FOIA office creates an embedded searchable text layer in the .pdf itself, thus making it a searchable .pdf as required by the Court Order.

<sup>2</sup> Files beginning with the letters A-D and some files beginning with the letter E had already been produced to Mr. Eakin prior to the Court's June 5, 2019 Order. Therefore, files produced in the searchable .pdf format will generally include files starting with the letter E-L.

to this project. Previously, three (3) reviewers were assigned to this project for one hour each day for five days per week, when the FOIA office had sufficient personnel. The FOIA office estimates that each reviewer can review 400 IDPFs per week. If the FOIA office is able to accomplish the upload to the virtual drives and the reviewers can access the files remotely, the FOIA office estimates it can finalize review of the first batch of OCRd files in approximately 37 weeks.

DPAA sent a second batch of OCRd files to the FOIA office in September 2020 consisting of 144,510 IDPFs. At the same rate of review, it would take the FOIA office approximately 91 weeks to review these files. As such, the FOIA office will likely need an additional 2.5 years to review the remaining A-L IDPFs. Therefore, the DoD would request an additional 2.5 years to complete review of the remaining A-L IDPFs and provide those files on a semi-annual production schedule.

The rates of review are only the DoD's best estimates and depend on employee retention, government funding, and other factors. As the Court has witnessed, unexpected delays can occur for a variety of reasons, including a global pandemic.

## **B. Plaintiff's Position**

Mr. Eakin does not concur with the DoD's estimate and requests the files be produced without review. Mr. Eakin's position is that review and production of records from the very beginning was far less than the government's demonstrated forecast even before they encountered delays. As mentioned above, Mr. Eakin's position is that producing the files in a searchable .pdf format was a requirement of the scanning contract and is now a problem of Defendant's own making. Mr. Eakin will note for the Court that within 3 months of filing this litigation, Plaintiff supplied the FOIA office with two sets of three external hard drives each in order to facilitate their review and delivery of the responsive records.

## II. Proposed Briefing Schedule

Mr. Eakin intends to file a Motion to Lift the Open America Stay and for a Better Search no later than October 9, 2020. It is Mr. Eakin's position that this case no longer meets the criteria for an Open America Stay. If Mr. Eakin files his Motion no later than October 9, 2020, Defendant will file its response to this Motion by October 30, 2020. Any reply in support of Plaintiff's motion will be filed by Plaintiff by November 6, 2020.

The DoD intends to file a Motion for Summary Judgment or, in the alternative, request for Open America Stay regarding Plaintiff's First Amended Complaint.<sup>3</sup> See ECF No. 64. The parties have agreed that Defendant shall file this Motion by November 30, 2020. Plaintiff will file his response by December 18, 2020. Any reply in support of Defendant's motion will be filed by Defendant no later than January 8, 2021.

Dated: October 8, 2020

Respectfully submitted,

**John F. Bash**  
United States Attorney

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<sup>3</sup> Mr. Eakin's First Amended Complaint requests IDPFs that have been digitized since his initial FOIA request in May 2016. The digitization process of the remaining IDPFs is ongoing. DPAA anticipates all IDPFs will be scanned by the end of April 2021. However, the digitization process could be delayed by unforeseen circumstances such as COVID-19.

/s/ John J. Eakin

**John J. Eakin**

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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 8<sup>th</sup> day of October 2020.

/s/ Jacquelyn M. Christilles

**Jacquelyn M. Christilles**

Assistant United States Attorney