UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF DEFENSE,

Defendant.

Case No. SA-16-cv-972-RCL

MEMORANDUM OPINION

In August 2017, this Court imposed a stay granting the Department of Defense (DOD) and related agencies additional time to produce documents responsive to Plaintiff John Eakin's Freedom of Information Act (FOIA) request. Mem. Op., ECF No. 29. The stay gave the government until February 1, 2021 to review and turn over relevant documents. *Id.* at 17. The Court based the length of that extension on the government's own estimate for when it would complete production. *Id.* at 15–16. The government, it turns out, has fallen behind the production rate it originally proposed. *See, e.g.*, Status Report, ECF 69. It now claims that it cannot meet the February 2021 deadline and seeks more time to process Eakin's request. Opp'n at 2–3, ECF No. 72. Eakin contends that the government has been dilatory, moves the Court to lift its stay, and separately requests another search for responsive documents. Mot., ECF No. 71. The government filed an opposition, Opp'n, ECF No. 72, and Eakin a reply. Reply, ECF No. 73. The Court also held a hearing on November 23, 2020 to discuss this matter with the parties. For the reasons explained below, the Court **DENIES** Eakin's motion to lift the stay, and it **DISMISSES WITHOUT PREJUDICE** his motion for another document search for apparent lack of subject-

matter jurisdiction. The Court also **DENIES** the government's request to extend the duration of the current stay.

I. BACKGROUND

This dispute arises from Plaintiff John Eakin's long-running attempt to secure the disclosure of government information related to the missing and unidentified remains of American military servicemembers. In May 2016, Eakin submitted a FOIA request that sought "[e]lectronic (digital) copies of all World War II era Individual Deceased Personnel Files (IDPFs)," and, specifically, "[IDPFs] for all American servicemembers or civilian employees whose remains were not recovered or identified." Mem. Op. at 1, ECF No. 62; Mem. Op. at 1, ECF No. 29.[1] Eakin uses that information to discover the foreign, unmarked graves of fallen servicemembers and to re-patriate their remains for re-burial by their families. Mot. at 6–7, ECF No. 71; Hearing Tr. at 2:22-25; 3:1-10. After the DOD informed Eakin that it could not meet the statutory deadline for the documents' production, and after it constructively denied his agency appeal, Eakin sued in this Court. Complaint, ECF No. 1.

At the time of Eakin's initial FOIA request, only IDPFs for servicemembers with the last names A–L existed in digital format. Mem. Op. at 8–9, ECF No. 53. (And only after Eakin's initial FOIA request did the government contract for the digitalization of the remaining M–Z set.) *Id.* Thus, as this Court explained, Eakin had exhausted his administrative remedies—and had thereby imbued this Court with subject-matter jurisdiction—only as to the A–L files.[2] *Id.* So as he returned

[1] Eakin also sought a distinct set of files—the "X-Files"—that pertain "to unidentified remains at specific POW camps and cemeteries in the Philippines." Mem. Op. at 1–2, ECF No. 29; *see also id.* at 2 n.1 ("'X-Files' refers to documents created by the American Graves Registration Service regarding unidentified remains, including the condition and location of the remains, personal effects found with remains, wreckage or hardware found near the remains, and details about the burial, re-burial, or recovery of the remains.").

[2] After Eakin filed another FOIA request specifically for the digitized M–Z files, for which the agency also said it could not meet the statutory deadline, this Court granted Eakin leave to amend his complaint to include the M–Z files. *See* Mem. Op. at 1–3, ECF No. 62. Whether to impose an *Open America* stay as to that set shall be the focus of a subsequent Memorandum Opinion.

to the agency to request the remaining M–Z set, Eakin asked this Court to compel disclosure of the A–L files.

In response, the government moved for an *Open America* stay. Cross-Mot., ECF No. 22. An *Open America* stay—a concept developed in the eponymous 1976 D.C. Circuit case and now provided for in the FOIA statute itself—allows courts to grant agencies "additional time" to process FOIA requests when they cannot do so by the ordinary statutory deadlines. *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976); 5 U.S.C. § 552(a)(6)(c)(i). The government argued that the size of Eakin's request, the need to locate, digitize, and convert the files to searchable PDFs, and the requirement that it manually review and redact the files for privacy concerns justified an extension. Cross-Mot. 5–11, ECF No. 22. This Court agreed. Mem. Op., ECF No. 29. In August 2017, relying on the government's estimate about the time needed to complete the project, the Court ordered semi-annual productions of the A–L files to Eakin. *Id.* at 16–17. The last of those productions was to occur on February 1, 2021. *Id.* at 17.

On September 28, 2020, however, the government filed a status report representing that it had produced less than half of the requested documents and that it could not possibly meet the February 2021 deadline. Status Report, ECF No. 69. The government explained that it had turned over about 2.44 terabytes of data to Eakin. *Id.* But it claimed that there remained 2.59 terabytes of material—218,466 IDPFs—in the A–L collection that it still needed to review and produce. *Id.* Based on those numbers, the government represented at the November 23 hearing that it was "not halfway through" the A–L set. Hearing Tr., 5:4-5. And the government, therefore, asserted that it would need another three years to complete its handover of just the A–L files, to say nothing of the M–Z set. *Id.* at 9:19-22.

On November 30, the government then moved this Court for another *Open America* stay for the M–Z set. Though the Court will address that issue in a subsequent Opinion, the government's November 30 filing makes several new assertions directly relevant to the A–L files. In particular, the chief FOIA officer in charge of handling Eakin's request now claims that "there are 54,009 A–L IDPFs"—down from the previous estimate of 218,466—left "to review." Gilbert Dec. at 4, ECF No. 76-2. And she now explains, "[m]y previous affidavit indicated there were 218,466 of the A–L IDPFs left to review, but this number included some of the M–Z IDPFs that have been transmitted to our office from DPAA." *Id.*

To say that that number wrongly included "*some*" of the M–Z IDPFs is, of course, quite the understatement. The government's previous estimate that 218,466 IDPFs remained for review—provided in the September 28 status report, reiterated in the government's October 30 opposition, and endorsed by government counsel at the November 23 hearing—apparently wrongly included over 164,000 IDPFs not actually contained in the A–L set. Indeed, despite the government's tripling down on its "218,466" figure, the true figure is apparently less than 25% of that amount. Given that revelation, "the AHRC FOIA/PA office [now] estimates that it will take an additional 5 months"—rather than an additional three years—"to complete the review of the A–L files." *Id.* at 4; *see also* Mot. at 9, ECF No. 76.

In the context of the impending February 1, 2021 deadline, a request for "an additional 5 months" is, essentially, a request for a three-month extension of the present *Open America* stay. (The government has about two months from the issuance of this Opinion to meet the original deadline.) And, of course, a three-month extension is a more modest request than the ridiculous three years government counsel suggested at the November 23 hearing. But a three-month extension has similarly little justification. The government could have met the original, February

1, 2021 deadline but for its own delays. As the Court explains below, extension of the A–L files' *Open America* stay is, therefore, patently unwarranted.

II. LEGAL STANDARD

The FOIA statute explains that in response to FOIA requests, the agency "shall determine within 20 days . . . whether to comply with such request." 5 U.S.C. § 552(a)(6)(A)(i). The statute later provides a "safety valve" so that, if "unusual circumstances" exist, the agency may extend its response time by "ten working days." *Citizens for Resp. & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 187 (D.C. Cir. 2013); 5 U.S.C. § 552(a)(6)(B)(i). The statute explains that "unusual circumstances" may exist when the agency must "appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request." § 552(a)(6)(B)(iii)(II). But the agency may not invoke the "unusual circumstances" provision to mask dilatory behavior. Rather, the extension applies only "to the extent reasonably necessary to the proper processing of the particular request[.]" *Id.* at (a)(6)(B)(iii).

The statute then sets forth a second safety valve for "*exceptional* circumstances." *Id.* at (a)(6)(C)(i) (emphasis added). Unlike the mere ten-day extension permitted by the "unusual circumstances" provision, the "exceptional circumstances" provision allows district courts to "retain jurisdiction" over a FOIA action after a complaint is filed, grant the agency "additional time to complete its review of the records," and "supervise the agency's ongoing progress." *Id.*; *Citizens for Res. & Ethics in Wash.*, 711 F.3d at 189. This provision—still often called the *Open America* provision—codifies into statute the stay procedure originally developed by the D.C. Circuit in its *Open America* decision. *See Elec. Frontier Foundation v. Dep't of Justice*, 517 F. Supp. 2d 111, 116–17 (D.D.C. 2007) (noting that Congress intended its 1996 amendments adding

these provisions to be "consistent with the holding in *Open America*.'"); *see also Open America*, 547 F.2d at 616.

Just as with the "unusual circumstances" provision, the agency cannot exploit the *Open America*/"exceptional circumstances" provision to indulge dilatory behavior. Rather, the district court must "ensur[e] that the agency continues to exercise due diligence in processing the request." *Citizens for Resp. & Ethics in Wash.*, 711 F.3d at 189. The FOIA statute itself does not define "exceptional circumstances." But it necessarily follows that as with the "unusual circumstances" provision, agency delay must be "reasonably necessary to the proper processing of the particular request" rather than simply dilatory. *See* § 552(a)(6)(B)(iii). And when an agency seeks an extension *not* "reasonably necessary" to process a FOIA request or otherwise fails to show diligence, the court may modify the terms of its *Open America* stay to reflect an appropriate timeline for disposition of the request. *See, e.g.*, *Piper v. Dep't of Justice*, 339 F. Supp. 2d 13, 16 (D.D.C. 2004) (noting reduction of an *Open America* stay period).

III. DISCUSSION

(1) The Government's Ever-Changing Estimates About the Volume of Data Involved Do Not Persuade the Court that a Stay Extension is Appropriate or Necessary

Despite having now dealt with Eakin's A–L request for over three years, the government, as mentioned, continues to waffle about basic information. It long represented (and, in some places, continues to represent) that the A–L IDPFs fill 4.2 terabytes. *See* Gilbert Dec. at 2, ECF No. 72–1. The Army's FOIA chief, Monique Gilbert, re-iterated that estimate as late as October 30, 2020. *Id.* In that same affidavit, however, Gilbert represented that her office had turned over 2.44 terabytes of data to Eakin, and that 2.59 terabytes in the A–L set still needed review. Gilbert Dec. at 3, ECF No. 72–1 ("The FOIA office estimates there are 218,466 of the A-L IDPFs left to review. Those files encompass approximately 2.59 TB of data."). The mathematically minded may

note that 2.44 terabytes plus 2.59 terabytes is 5.03 terabytes—a figure far exceeding the government's original 4.2-terabyte estimate. Indeed, that 830-gigabyte discrepancy would likely include several thousand IDPFs.[3] So Gilbert's own affidavit features internal contradictions that lack any coherent explanation. Yet that defect is not a new trend for the government. In its earlier, September 28, 2020 status report, the government also claimed that it had produced 2.44 terabytes, that 2.59 terabytes remained outstanding, and that the overall size of the A–L collection was an incongruous 4.2 terabytes. Status Report, ECF No. 69. And there too, the 4.2 terabyte vs. 5.03 terabyte discrepancy remained unaddressed.

The government's November 30 brief requesting an *Open America* stay as to the M–Z set contains further discrepancies about the size of the A–L productions. The chart it presents at page 10 now states that, thus far, it has disclosed *2.34* terabytes, rather than 2.44 terabytes, to Eakin. Mot. At 10, ECF No. 76. That hundred-gigabyte discrepancy also would likely represent a difference of several hundred IDPFs, given that a single IDPF averages a few dozen megabytes.[4] But since the government's numbers in that same chart add up to 2,448 gigabytes (i.e., 2.448 terabytes), the Court interprets the government's novel, 2.34-terabyte estimate as simply a typing error and the product of yet further carelessness.

At the November 23 hearing, the lawyer for the government introduced further confusion when she represented that "it is true that the government [is] not halfway through" the A–L production. Hearing Tr. at 5:4-5. That claim would make sense only if the A–L set was, indeed, 5.03 terabytes. For 2.44 terabytes produced would represent just 49% of 5.03 terabytes. But if the data set is really 4.2 terabytes, the 2.44 terabytes produced would represent about 58% completion.

[3] The first 49,938 IDPFs, for instance, comprised 712 GB. *See* Status Report at 1, ECF No. 69.
[4] As mentioned *supra* at note 3, the government's first production was 712 GB, or 712,000 MB. 712,000 MB divided by 49,938 IDPFs yields a rough average of 14.25 MB per IDPF.

And, of course, government counsel's representation was ultimately useless anyway, since it relied on the now-defunct view that 218,466 of the A–L IDPFs were outstanding, rather than the revised estimate of 54,009.

So how far is the government *actually* through the productions? Gilbert's new-and-improved November 30 affidavit offered no estimate of the size, in bytes, of the now-remaining 54,009 IPDFs. The reason for that omission remains unclear. But judging simply by the raw number of IDPFs that remain, the government has really completed about 72% of its original goal. That is, the 136,789 IDPFs so far produced, plus the 54,009 IDPFs outstanding, yields a total figure of 190,798 IDPFs. And those 136,789 IDPFs represent about 72% of the 190,798 IDPFs that supposedly comprise the overall A–L set.

What is the Court supposed to take from this numerical vacillation? The government's requested stay extension hinges on a showing that more time is "reasonably necessary" to complete Eakin's FOIA project. One would expect a showing of reasonable necessity to contain a clear and consistent articulation of the IDPFs outstanding versus the overall set of IDPFs. But the government has not met that burden. Its earlier, frantic claim that it needed several more *years* to finish production was apparently based on its unexplained, 300% over-estimate of the remaining A–L files. Since the true number of IDPFs outstanding is now said to be vastly smaller, the government has not shown that an extension is reasonably necessary.

(2) The Government Also Contradicts Itself About the Manpower It has Devoted—and Can Devote—to Eakin's Request

Not only do the government's estimates of the IDPFs outstanding appear to fluctuate on a whim, but so does its depiction of the manpower that it can devote to Eakin's project. The government's 2017 estimate that it would complete production by February 2021 hinged on its offer to commit three FOIA officers to spending an hour each a day, five days a week, on Eakin's

request. Cross-Mot. at 4, 8, 10, ECF No. 22. And, at least at first, three such officers *were* engaged in reviewing the IDPFs. *Id.*; *see also* Gilbert Dec. at 1, ECF No. 72-1. But until recently, the agency had just *one* FOIA officer on Eakin's project. Gilbert Dec. at 1, ECF No. 72-1. At the Court's November 23 hearing on this matter, the government falsely represented that this 66% reduction in manpower was because of COVID-19, rather than agency dereliction. Hearing Tr. at 5:22–24 ("[B]ecause of COVID, not knowing how long that—how long people were going to be out of the office, they only had one individual reviewing.").

But as the Court pointed out, the government's own affidavit submitted with its October 30 opposition to Eakin's motion contradicts that statement. *Id.* at 5:25–6:1-15. Gilbert there explained that of the three FOIA officers originally tasked with handling Eakin's project, "two of th[ose] dedicated Action Officers left the office in 2019." Gilbert Dec. at 1, ECF No. 72–1. Instead of re-routing remaining officers to Eakin's request, the Army apparently decided to hire new reviewers to overtake the departed employees' roles. *Id.* That hiring process alone takes three to five months, and it requires another two months' training before the new hires are competent to handle FOIA requests. *Id.* So, according to Gilbert, it was during 2019 that the number of officers on Eakin's project dwindled to one for several months. And, as Gilbert explains, the Army FOIA office did not begin remote work until March 2020. *Id.* at 3. So it was pre-COVID that the manpower devoted to Eakin's project fell to one-third of what the government originally said it would devote in 2017.

Further, government counsel at the November 23 hearing and in earlier briefs presented those personnel issues as virtually intractable obstacles to the timely handling of Eakin's FOIA request. The Court heard about the DOD's "limited resources" and the "other FOIA requests" its personnel were busy processing. Hearing Tr. at 7:19-21. And it was told that the agency's "inadequate" staffing and "personnel turnover" would bar compliance with the original February

2021 deadline. Opp'n at 3, ECF No. 72. Just a month ago, these budgetary and human resources problems were said to abound.

Yet it now seems the agency has enjoyed a miraculous recovery. In its November 30 filing, the government tells the Court that the FOIA office can put *four* reviewers on Eakin's request for *two* hours each day, five days a week. Gilbert Dec. at 4, ECF No. 76-2. Whereas the agency was previously devoting just five hours per week to Eakin's project (one reviewer reviewing for one hour for five days a week), it now proposes to devote *forty* hours per week (four reviewers each reviewing for two hours a day, five days a week) to the same task. So contrary to representations in its briefs and at the November 23 hearing, the agency apparently can octuple the manpower devoted to certain projects when it sees fit. Clearly, then, the agency can re-arrange which officers handle which projects, and it can direct its officers to spend more time on certain projects. But that has always been true, and the agency could have done so with Eakin's much sooner. And had the agency truly been diligently handling Eakin's request, it would have made those personnel rearrangements without this Court's intervention.

(3) The Government Apparently Does Not Follow a First-In, First-Out Policy, Despite Representing that It Does

The government's representation that it follows a "first-in, first out" policy as to the order in which it handles FOIA requests also defies basic facts in this case. Gilbert Dec. at 1, ECF No. 72-1; *see also* Gilbert Dec. at 1, ECF No. 76-2. As the D.C. Circuit explained in *Open America* itself, agencies generally follow a "first-in, first-out" policy when processing FOIA requests. *Open America*, 547 F.2d 614 (labeling first-in, first-out processing "fair, orderly, and the most efficient procedure."). That is, agencies dispose of FOIA requests in chronological order, answering requests in the order in which they were filed. *Id.* The *Open America* majority viewed first-in, first out review as the fairest way to handle such requests. *Id.* For if a FOIA requester could immediately

jump to the head of the line upon the expiration of the statutory deadline for his request—and thereby compel the agency to begin reviewing his request immediately—it would displace all earlier-filed requests. *Id.* at 614–15. Thus, granting an *Open America* stay is supposed to allow the agency to keep handling requests on a first-in, first-out basis. *Id.* By granting the agency more time to handle later-filed requests, the agency can continue to address earlier requests in the order in which it received them, without having to give arbitrary priority to later requests. *Id.*

Ironically, the agency here has used its *Open America* stay for precisely the opposite purpose: to cover up its dilly-dallying on Eakin's project as it processes later-filed FOIA requests. At the November 23 hearing, the Court directly asked government counsel whether the agency was neglecting Eakin's project by "dealing with other FOIA requests that are made subsequent to [Eakin's]." Hearing Tr. at 7:22-24. Government counsel responded that she "would have to check with the office." *Id.* at 7:25–8:1. When the Court pointed out that the time to do that should have been "in response to this motion" and before the hearing, *id.* at 8:2-3, government counsel then contradicted herself and stated, "I did check with the FOIA office and they indicated that they were working . . . several other FOIA requests." *Id.* at 8:8-12. That answer was, of course, non-responsive, since it did not explain whether the requests the agency is handling ahead of Eakin's request were filed *subsequent* to it.

Yet the gift that keeps on giving—the government's November 30 brief about the M–Z set—now makes clear that the FOIA office has, indeed, prioritized later-filed requests over Eakin's. As it states, "[i]n addition to Plaintiff's request, the [FOIA office] continues to receive 5,000 FOIA/PA requests per year that must be reviewed by nine action officers." Mot. at 9, ECF No. 76. As explained above, Eakin filed his FOIA request in May 2016, and this Court imposed the present stay in August 2017. So these 5,000 new requests that came in "per year"—that is, in

2018, 2019, and 2020—and that "must be reviewed" by the agency before Eakin's request is completed—obviously are requests submitted *after* Eakin's was. So despite the government's repeated claim that "[a]ll FOIA requests are handled on a first-in, first out basis," that statement is false. Gilbert Dec. at 1, ECF No. 72-1; Gilbert Dec. at 1, ECF No. 76-2. The agency really is following a first-in, out-after-several-thousand-other-requests policy. That tactic is an abuse of *Open America*'s stay procedure, the point of which is to preserve first-in, first-out review.

(4) The Government Ignored This Court's Directive To Submit Updated Estimates Of the Time Needed to Complete Review, thus Concealing Its Delay

In its August 2017 Opinion granting the *Open America* stay, the Court explained that "[t]he Government will be required to submit updated estimates of the amount of time it will take to complete the review of the 4.2 terabytes of data along with each semi-annual production." Mem. Op. at 17, ECF No. 29. Yet as Eakin points out, the government never provided those updated estimates, thus concealing its delay in processing his request. Reply at 4, ECF No. 73. The government conceded at the November 23 hearing that it had wrongfully failed to submit those updated reports about the time needed to complete Eakin's project. Hearing Tr. at 7:9-11 ("Your Honor, it is true that we are not at the point that we thought it would be and we should have produced additional status reports[.]"). And as the Court pointed out, that failure has created the present uncertainty about where the government stands in processing Eakin's request. *Id.* at 4:19-24; 5:1-3.

Yet after its candor at the November 23 hearing, the government now tries to double back and portray its wrongful failure to submit updated estimates as, essentially, harmless error. Mot. at 11, ECF No. 76. Its November 30 brief asserts that since the amount of data disclosed in each production was known to Eakin, Eakin should have been able to extrapolate how much longer the

remaining productions would take. *Id.* Thus, says the government, "it has been clear where DoD stood in the production." *Id.*

That argument is inane. The *government* does not even know where the government stands in the productions, which is why its briefs and Gilbert's affidavits constantly contradict themselves. The Court was told that the A–L set was 4.2 terabytes, and then it was told it was 5.03 terabytes. And now the overall size of that set is not even known, since Gilbert's new, November 30 affidavit does not even mention the byte size of the revised, 54,009-IDPF set. The Court was also told that "there are 218,466 of the A–L IDPFs to review," and it is now told that, really, "there are 54,0009 A–L IDPFs left to review," since the former estimate wrongfully included "some of" (!) the M–Z set. *Compare* Gilbert Dec. at 3, ECF No. 72-1, *with* Gilbert Dec. at 4, ECF No. 76-2. In addition to these shifting figures, Eakin and this Court knew nothing of the FOIA office's personnel gyrations until a few months ago. So even had the government furnished accurate estimates of the *size* of the data set, Eakin still could not have made valid inferences about the *rate* at which the government would review the data.

The government had the perfect opportunity to show that it was working diligently on Eakin's request with updated, semi-annual estimates, but it neglected to submit them. That failure itself shows a lack of diligence. But more importantly, it shows that the agency should not be rewarded with yet further time to process Eakin's request. The agency has used its time thus far to keep Eakin and this Court in the dark about the size of the A–L files and the time needed to process them. The Court will not further lengthen the FOIA office's leash.

(5) Because of Privacy Concerns, the Court Will Not Order Immediate Release of the Unreviewed A–L IDPFs

Given these governmental failures, Eakin seeks to swing the pendulum all the way in the opposite direction with immediate disclosure of the unreviewed A–L IDPFs. Mot., ECF No. 71.

That, too, the Court will not mandate. The Court has already explained that some of the IDPFs may implicate the privacy interests of living individuals. Indeed, as it said when imposing the *Open America* stay, "[t]his Court will err on the side of protecting the privacy interests of individuals whose private information, such as medical records or home addresses, is potentially contained in those files." Mem. Op. at 14, ECF No. 29. Just as it did then, the Court now "declines to order the production of potentially exempt information." *Id.* Eakin's frustration with the government's conduct is understandable. But the answer to those concerns is rigorous monitoring and enforcement of the review and production timeline—not abandonment of the review process altogether.

(6) Eakin's Separate Motion for a "Better Document Search" is Dismissed Without Prejudice for Apparent Lack of Subject-Matter Jurisdiction

Separate from his request that this Court lift its *Open America* stay, Eakin also asks that the Court order what he terms a "better document search." Mot. at 1, 9–10, ECF No. 71. Eakin alleges—and the government concedes—the existence of "several thousand additional files containing the previously classified annexes to the IDPFs that are the subject of this litigation." *Id.* at 10; Opp'n at 7–8, ECF No. 72. These files apparently were, at some point, digitized and disclosed to other FOIA requesters but then mislabeled and only recently re-discovered. Opp'n at 7, ECF No. 72. After Eakin moved this Court for an order that the FOIA Office produce those records to him, however, the FOIA Office voluntarily did so. *Id.* at 8. And Eakin acknowledges that he has "received the records he specifically described" from that additional collection. Reply at 4, ECF No. 73.

Though that part of Eakin's request is, therefore, moot, he also moves for a "better search for responsive documents." *Id.* He argues that since there were some responsive documents not initially identified by the agency, there may be others, and that the agency should search for said

records and report its findings to him. *Id.* Problematically, though, it is not clear to this Court that Eakin has exhausted his administrative remedies for this request. If the files outside the known A–L collection were digitized before Eakin's initial FOIA request on May 10, 2016, then the Court may indeed have subject-matter jurisdiction over their production. Mem. Op. at 8–9, ECF No. 53; *see also United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). But if they were digitized only after that request, then they are not within the scope of the A–L request. Mem. Op. at 8–9, ECF No. 53.[5] And if the additional files Eakin seeks were digitized *after* the A–L set was, it is unclear why Eakin can use litigation about the A–L files as a vehicle to litigate issues about later-digitized documents.

Conversely, these documents indeed may have been digitized before his May 10, 2016 FOIA request, and so may fall within the initial request's scope. The problem is that Eakin has introduced no facts about when these additional documents were digitized. The Court might have subject-matter jurisdiction, or it might not. But "might" is not good enough when it comes to subject-matter jurisdiction. Federal courts must presume its absence, and they cannot exercise jurisdiction until the party seeking its exercise introduces facts that persuade the Court of its existence. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); 13 Charles Alan Wright, *et al.*, Federal Practice and Procedure § 3522 (3d ed. 2008) ("[T]here is a presumption that a federal court lacks subject-matter jurisdiction, and the party seeking to invoke federal jurisdiction must affirmatively allege the facts supporting it."). Because Eakin has not alleged those jurisdictional facts, the Court must presume jurisdiction is lacking. And, it follows,

[5] This was, in fact, the exact reason why Eakin had to amend his complaint to add the M–Z files. Those IDPFs were not digitized at the time of Eakin's initial FOIA request. So, because Eakin's request covered only those IDPFs digitized at the time of the request's filing, Eakin had to return to the agency to file a new FOIA request and exhaust his administrative remedies for the later-digitized M-Z set. Mem. Op. at 8–9, ECF No. 53.

the Court must decline to entertain Eakin's request for an additional search for, and possible production of, files outside the canonical A–L set at this time.

IV. CONCLUSION

For those reasons, the Court **DENIES** Eakin's motion to lift the stay, and it **DISMISSES WITHOUT PREJUDICE** his request for a "better document search" for apparent lack of subject-matter jurisdiction. The Court also **DENIES** the government's request for an extension of the *Open America* stay, and it **ORDERS** the government to complete production of the A–L IDPFs by February 1, 2021. A separate Order consistent with this Memorandum Opinion shall issue this date.

SIGNED this 3rd day of December, 2020.

Royce C. Lamberth
United States District Judge