

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL CASE NO. 5:16-cv-0972-RCL
	§	
UNITED STATES	§	
DEPARTMENT OF DEFENSE	§	
	§	
Defendant	§	
_____	§	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION FOR SUMMARY  
JUDGMENT, OR IN THE ALTERNATIVE, REQUEST FOR AN  
OPEN AMERICA STAY**

Plaintiff *pro se* John Eakin respectfully submits this response in opposition to Defendant’s Motion for Summary Judgment, or in the alternative, Request for an *Open America* Stay.

The M-Z files that are the subject of this second motion for summary judgment are virtually identical to the A-L files that were the subject of Defendant’s first motion for summary judgment and motion for an *Open America* stay. Defendant has provided no new evidence that would support a different resolution.

**A. Defendants’ motions for Summary Judgment, or alternatively an *Open America* stay were previously decided.**

In early 2017, the parties filed a motion (ECF 16) and cross-motion (ECF 22) for summary judgment addressing the A-L files. Defendant alternatively moved for an *Open America* stay. This Court denied Defendant’s motion for summary judgment and granted (ECF 30) Plaintiff’s motion and ordered the subject records to be produced. The same order granted Defendant’s alternate motion for an *Open America* stay until February 1, 2021 to allow redaction

of privacy information from the records to be released.

In response to Plaintiff's Motion for Partial Summary Judgment (ECF 46) this Court found that it lacked subject-matter jurisdiction over files created subsequent to Plaintiff's original FOIA request, the M-Z files. Mem. Op., ECF 53, Order ECF 54

Plaintiff then filed a second FOIA request and subsequent motion to amend his complaint (to include the M-Z files). ECF 58 In ruling on Plaintiff's motion to amend, this court agreed with Plaintiff's contention that "The additional files are virtually identical to those that are the subject of this case. The additional files contain no new or unique features not found in the current files and it is anticipated that no new issues will be presented to the Court." Mem. Op., ECF 62 at 4 Plaintiff was granted leave to file his First Amended Complaint. Order ECF 63, First Amd. Comp. ECF 64

Most recently, Defendant has filed a motion for summary judgment addressing the M-Z files and alternatively moving for an *Open America* stay to permit review of the M-Z files. The most recent motions have raised no new issues.

**B. Defendant's Motion for Summary Judgment should be denied.**

This Court previously found that, "through broad, the request is not unreasonably burdensome to the DoD" and denied Defendant's prior motion for summary judgment pertaining to the A-L files. ECF 20 at 13. No new evidence or justification has been provided to support summary judgment concerning the M-Z files.

**C. Defendant's Motion for an *Open America* Stay should be denied.**

While Plaintiff recognizes the need for redaction of exempt material, he suggests that an *Open America* Stay is no longer appropriate as Defendant has failed to meet the requirements for such.

A stay is appropriate, “[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.” 5 U.S.C. § 552(a)(6) C) Defendant has failed to exercise due diligence in resolving either the request at issue here or to resolve their backlog of other requests. This Court has observed that, “[t]he 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....” ECF 78 at 12 “The Government Ignored This Court’s Directive To Submit Updated Estimates Of the Time Needed to Complete Review, thus Concealing Its Delay” *Id.* “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.” *Id.* at 13

Defendant’s lack of diligence in processing Plaintiff’s FOIA requests is demonstrated by the fact that while scanning of the M-Z files has been ongoing for more than one year and they have had an opportunity to simultaneously review the files for release, they have yet to begin any review despite being on notice that those M-Z files would also be requested.<sup>1</sup>

While Plaintiff appreciates that Defendant has recently directed additional resources to review of the A-L files, Plaintiff has been significantly delayed and disadvantaged by Defendant’s delays and non-compliance with this Court’s orders. Throughout this litigation, Defendant agency has done little to help itself or even to comply with the orders of this Court.

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<sup>1</sup> Plaintiff confirms and reiterates the Court’s observation that, “The Defense Department has undoubtedly been aware since Mr. Eakin made his initial FOIA request that he would eventually seek all of the digitized Files.” ECF 62 at 4 Defendant has projected that digitization of the balance of the M-Z will be complete by April 2021 (ECF 76 at 4) and Plaintiff intends to submit an additional FOIA request at that time. Defendant is aware of such future additional FOIA requests until the digitization of all IDPFs is complete. ECF 76 at 6

Defendant's difficulties in reviewing the files are self-inflicted. As the Court has made clear numerous times throughout this litigation, "the Defense Department could save time and resources for both itself and the courts if it treated Mr. Eakin's [May of 2016] FOIA request as a request for all of the digitized documents." ECF No. 53 at 8-9 quoted at Mem. Op., ECF 62 at 4

While Plaintiff opposes an *Open America* stay of the M-Z files on the grounds that Defendant has been less than diligent in processing the A-L files and an *Open America* stay is not appropriate under the FOIA statute. However, Plaintiff recognizes the need for review of the requested files and will not oppose any reasonable accommodation which this Court determines to be equitable. To avoid a repeat of Defendant's prior non-compliance, regular status reports providing details of the number of files reviewed and number of files yet to be reviewed would be appropriate. Additionally, judicial economy would be furthered if Defendant were to stipulate that Plaintiff's second FOIA request encompassed the entirety of the M-Z files, thereby avoiding the need for both this Court and Defendant to process yet a third FOIA request and the probable filing of a second amended complaint and answer.

### **CONCLUSION**

While Plaintiff does not assert an exceptional need for the records and ask that his request go to the head of the line. Plaintiff does submit that his original request was submitted more than four years ago, unreasonably delayed by Defendant, and the files are to be used for humanitarian purposes in providing comfort to family members who have been denied closure in the loss of family members whose remains have been concealed by the government's misconduct. This use of these records is consistent with Defendant's policy that "[a]ccounting for personnel lost as a result of hostile acts is of the highest national priority." (DoD Directive 2310.07E, paragraph 4.1)

Respectfully submitted,

/s/ John 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 the 11<sup>th</sup> day of December, 2020, and notification of such filing will be sent to the following:

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/s/ John Eakin

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