

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN EAKIN,

*Plaintiff,*

v.

UNITED STATES DEPARTMENT  
OF DEFENSE,

*Defendant.*

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No. SA-16-CV-972-RCL

**ADVISORY TO THE COURT**

The United States Department of Defense (DoD), by and through its undersigned counsel, respectfully submits the following Advisory regarding this matter:

1. On August 2, 2017, this Court ordered the DoD to produce responsive A-L Individual Deceased Personnel Files (IDPFs) to Plaintiff on a semi-annual basis, with the final production due by February 1, 2021. *See* ECF No. 29, Mem. Op. at 17; ECF No. 30, Order at 2.
2. On September 28, 2020, the DoD reported to the Court that the Army Human Resources Command (AHRC) Freedom of Information Act (FOIA) / Privacy Act (PA) Office estimated that there were 218,466 A-L IDPFs left to review. ECF No. 69, Status Report ¶ 7. Based on that estimate, the DoD asserted that the AHRC FOIA/PA Office would “likely need an additional 2.5 years to review the remaining A-L IDPFs.” ECF No. 70, Joint Proposed Scheduling Recommendations at 3.
3. In response, Plaintiff requested that the Court lift the *Open America* stay entered with respect to the A-L IDPFs. *See* ECF No. 71, Mot. to Lift Stay. In opposition to Plaintiff’s motion, the government reiterated its argument that it would not be able to meet the February 21, 2021 deadline set by the Court, *see* ECF No. 72, Opp’n at 2–3, and, at the November 23, 2020 hearing on the motion, requested additional time to complete that production.

4. On November 30, 2020, the DoD filed a motion for summary judgment or, in the alternative, an *Open America* stay with respect to the M-Z IDPFs. In that motion, and contrary to its previous representation to the Court, the DoD stated that the AHRC FOIA/PA Office estimated that only 54,009 A-L IDPFs were yet to be reviewed. ECF No. 76-2, Gilbert Decl. ¶ 17.

5. On December 3, 2020, the Court denied Plaintiff's motion to lift the *Open America* stay as to the A-L IDPFs. *See* ECF No. 78, Mem. Op.; ECF No. 79, Order. However, the Court also concluded that the government's request for additional time to complete the A-L IDPFs was "patently unwarranted," in large part due to the government's inconsistent estimates of the number of IDPFs to be reviewed. ECF No. 78, Mem. Op. at 5, 6–8.

6. Following the Court's December 3, 2020 Order, the government has reviewed its estimates of the number of outstanding A-L IDPFs. The government now believes that the estimates previously provided to the Court, including in support of its recent motion for summary judgment, may not be accurate. The DoD therefore requests that the Court not consider such estimates when assessing the government's pending motion for summary judgment or, in the alternative, an *Open America* stay as to the M-Z IDPFs.

7. The government is devoting substantial resources to complying with the deadline established by the Court's August 2, 2017 and December 3, 2020 Orders. The DoD does not seek any relief at this time, and files this Advisory solely to identify potentially inaccurate information previously provided to the Court. As soon as possible after February 1, 2021, the government intends to provide an update to the Court and Plaintiff regarding the total number of IDPFs actually reviewed and produced.

Dated: December 30, 2020

Respectfully submitted,

GREGG N. SOFER  
United States Attorney

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2020, I caused the foregoing to be electronically filed via the Court's CM/ECF system, which will send notification to Plaintiff.

/s/ Thomas A. Parnham, Jr.  
THOMAS A. PARNHAM, JR.