

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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Civil Action No. SA-16-CV-0972-RCL

**PLAINTIFFS’ OPPOSED MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

Plaintiff John Eakin, *pro se*, files this Opposed Motion for Leave to File Second Amended Complaint which is attached as an exhibit to this motion pursuant to Local Rule CV-7(b). Defendant’s counsel has stated his opposition to this motion.

In a March 23, 2021 email, Defendant’s Counsel stated that in order to preserve the arguments raised in his response to Plaintiff’s Motion for Leave to File First Amended Complaint (ECF No. 61), he anticipated that he would oppose another motion for leave to amend the complaint.

Plaintiff previously moved for leave to file his first amended complaint (ECF 58) and was granted leave to do so. (*Mem O, Order* ECF No. 62,63). Since the filing of this first amended complaint (ECF No. 64), the final tranche of the subject documents have been digitized and have become ripe for release. As Plaintiff stated in his first motion to amend (ECF No. 58 at 4) and this Court affirmed (ECF No. 62 at 4), “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.”

On April 12, 2021, Plaintiff was advised by Counsel for the Government that the digitization project had just been completed. Plaintiff immediately filed a FOIA request for the balance of the subject files. Upon notice from Defendant that his request had been constructively denied, Plaintiff moved for leave to file a second amended complaint. (ECF No. 90)

Subsequent to Plaintiff's motion for leave to file a second amended complaint, Defendant provided notice that portions of his FOIA request had been transferred to the National Personnel Records Center for response. After consultation with Counsel for the Government, Plaintiff moved to withdraw his motion (ECF No. 91) pending Defendant's further processing of his request. Plaintiff's motion to withdraw the pending second amended complaint was granted. (ECF No. 92)

As of the date of this filing, Defendant has not acted to extend the statutory time to respond nor provided the requested records. Defendant has responded with what it described as a "final response" denying Plaintiff's request and forwarding Plaintiff's request to another agency without providing instructions for appeal of Defendant's determination. Defendant has constructively denied Plaintiff's request for the balance of the subject files.

I. Factual and Procedural Background

This is a Freedom of Information Act case that seeks to obtain records necessary to identify the remains of U.S. Military personnel missing from World War II and buried as Unknowns in overseas cemeteries. The requested documents are the key documents necessary for family members to begin the process of locating and requesting the return of their family members missing since World War II.

The subject records are of intense public interest as they shed light on government operations and release is in the public interest.

Plaintiff first filed suit in 2010, *Eakin v. United States Department of Defense et al*, SA-10-cv-00784-FB-NSN. Beginning in 2012, defendant began digitizing additional and overlapping portions of

this record collection and ultimately digitized the files with last name initials A thru L. In 2016, Plaintiff filed a second FOIA request which was the basis for Plaintiff's First Amended Complaint. This First Amended Complaint added additional files digitized subsequent to the original complaint. Plaintiff now seeks to amend his complaint to include the balance of the IDPF's created since his original and second FOIA requests.

The requested files are voluminous in number, constituting over 400,000 "Individual Deceased Personnel Files" (IDPF), but physically compact and may be stored on a single portable harddrive.

In this Court's Memorandum Opinion and Order (ECF No. 53, 54), it was determined that the Court lacked subject-matter jurisdiction over the second tranche of files because Plaintiff had failed to exhaust his administrative remedies. However, the Court further determined that judicial economy would be served if the prior FOIA request was treated as a request for all of the digitized documents. (ECF No. 53 at 8)

On December 18, 2019, Plaintiff submitted a FOIA request to Defendants seeking whatever of the "M-Z" files then existed. On December 20, 2019, Defendant Department of Defense responded to Plaintiff's FOIA request, having assigned it reference number 20-F-0416. Defendant's response stated that, "we will not be able to respond within the FOIA's 20-day statutory time period as there are unusual circumstances which impact our ability to quickly process your request." Therefore, Defendants constructively denied Plaintiff's FOIA request and all administrative remedies were exhausted.

On April 12, 2021, Defendant's counsel informed Plaintiff that digital scanning of all of the subject files was complete. Plaintiff immediately submitted a FOIA request to Defendants seeking the balance of the Individual Deceased Personnel Files. This FOIA request was assigned Request number 21-F-0833. On April 21, 2021, Plaintiff submitted a status request on Defendant's automated FOIA status system. Defendant's status report showed that the subject FOIA request was received on

04/13/2021 and the estimated delivery date was 09/01/2021 – approximately four and one-half months after receipt. Defendants therefore have constructively denied Plaintiff’s FOIA request and all administrative remedies have been exhausted. Defendants have not subsequently acted to extend the statutory time limit to respond nor acted to provide the requested records.

Plaintiff has been informed that all of the requested documents have been digitized and expects that this second amended complaint will be the final FOIA request necessary to obtain the subject Individual Deceased Personnel Files.

II. Argument and Authorities

A. Legal Standards for Amendment of Pleadings

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that “a party may amend its pleadings only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court strongly reaffirmed a prior iteration of Rule 15 (a)(2)’s mandate that a district court “should freely give leave when justice so requires.”

Over the years, the Fifth Circuit has elucidated and elaborated on *Foman*. In the Fifth Circuit, there is a “presumption in favor of allowing pleading amendments[.]” *Mayeaux v. Louisiana Health Service and Indem. Co.*, 376 F.3d 420, 426 (5th Cir. 2004). Although the district court is given broad discretion to grant or deny a motion for leave to amend, “the district court’s discretion does not permit denial of a motion to amend unless there is a substantial reason to do so.” *See Lefall v. Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir.1994), *citing Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933F.2d 314, 320 (5th Cir.1991). Among those “substantial reason[s]” is undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice

to the opposing party, or futility of the proposed amendment. *Foman*, 371 U.S. at 182; *see also In re Southmark Corp.*, 88 F.3d 311, 314-15 (5th Cir.1996). “The touchstone for denial of leave to amend under Rule 15(a) is prejudice.” *Dueling v. Devon Energy Corp.*, 623 Fed.Appx. 127, 130 (5th Cir. 2015) (citing *Lone Star Ladies Inv. Club v. Schlotzky's Inc.*, 238 F.3d 363, 368 (5th Cir.2001)).

The Fifth Circuit has consistently permitted leave to amended pleadings in keeping with the above precepts. In *Engstrom v. First Nat'l Bank*, 47 F.3d 1459, 1464 (5th Cir. 1995), the Court held that the district court did not abuse its discretion in allowing the plaintiff to amend his complaint, even though the defendant claimed the amendment was futile under the facts of the case. In *Bamm v. GAF Corp.*, 651 F.2d 389, 391 (5th Cir. 1981), the Fifth Circuit reversed the district court's denial of leave to amend a complaint because there was no showing of bad faith or dilatory motive on the part of the plaintiff or prejudice to the defendant. *Id.* at 391. In addition, the Court ruled that the district court abused its discretion because discovery was on-going and, while a trial date had been set, it was continued. *Id.* at 391-92. In *Dussouy*, 660 F.2d at 598, the Court allowed a plaintiff to amend his pleading after a dismissal and one week before trial. The Court relied on the fact that there was no prejudice involved, and that there is a bias in favor of granting leave to amend. *Id.*

B. The Court Should Grant this Motion for Leave to File Plaintiffs' Second Amended Complaint

1. This Motion Promotes Judicial Economy

This Court found (ECF No. 53 at 8) that, “the Defense Department could save time and resources for both itself and the courts if it treated Mr. Eakin’s prior FOIA request as a request for all of the digitized documents.”

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. Plaintiff's only alternative would be to file multiple new lawsuits each requiring service and the attendant delay in processing.

As noted above, Rule 15 states that a court should "freely" grant a motion for leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). The amendment Plaintiffs request here is in the interest of justice.

2. Amendment of the Complaint Should Not Delay This Case.

Once again, the potential grounds for denial of a motion include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, and undue prejudice to the opposing party." *Dussouy*, 660 F.2d at 598.

Defendant's motion for an *Open America* stay and a forty-eight month delay was granted on August 2, 2017 (ECF No. 30 at 2). Defendant's motion for an additional *Open America* stay for the M-Z files (ECF No. 76) is pending.

Defendant will not be prejudiced by the amendment, but a failure to permit the amendment may result in substantial prejudice to the Plaintiff. As noted above, "[t]he touchstone for denial of leave to amend under Rule 15(a) is prejudice." *Dueling*, 623 Fed.Appx. at 130. There would be no prejudice to the Defendant if the Court grants this motion.

At the same time, "[a] court may weigh in the movant's favor any prejudice that will arise from denial of leave to amend." *Dussouy*, 660 F.2d at 598 (citing *Foman*, 371 U.S. at 182; *Bamm v. GAF*, 651 F.2d 389, 391 (5th Cir. 1981)).

While Defendant has conceded that the requested files are not exempt from disclosure under FOIA, they have claimed that a small number of files contain embedded exempt data in the form of prior FOIA requests which were added later and now requiring that each file has to be manually reviewed and

redacted as necessary. Defendant has made a rolling document production at six month intervals as the file review was completed.

Defendant has been on notice since 2010 that the subject files are of intense public interest and multiple FOIA requests for these files have been submitted. In 2010 Defendant found that the requested files contained embedded FOIA requests similar to those at issue currently. At that time, Defendants stated that the files contained no exempt material and they were released to multiple requesters without redaction. However, since 2016 Defendant has claimed that these same files do contain exempt material and has insisted on reviewing and redacting them. Therefore, Defendant has been on notice for at least four years and perhaps as many as ten years that these files may contain embedded documents that they now claim are exempt from disclosure. During this time, Defendant has issued new contract(s) for digital scanning of the original documents, a process which requires page by page review of the documents. If Defendant has deliberately continued to include the embedded documents in the digital files being produced, they should not be rewarded by allowing them to further delay release.

III. Prayer

WHEREFORE, Plaintiff respectfully prays that this Court grant Plaintiffs' Motion for Leave to File Second Amended Complaint and direct the clerk of court to accept for filing Plaintiffs' Second Amended Complaint, attached hereto.

Respectfully submitted,

/s/ John Eakin

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Certificate of Service

I hereby certify that on this the 12th day of May 2021, I electronically submitted the foregoing document for filing using the Court's CM/ECF system. All counsel of record shall be served with a true and correct copy of the foregoing document by operation of the Court's CM/ECF system.

/s/ John Eakin

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EXHIBITS

1. Proposed Second Amended Complaint w/ 3 exhibits
2. Proposed Order