

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

**RESPONSE IN OPPOSITION TO PLAINTIFF’S OPPOSED  
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

The United States Department of Defense (DoD), by and through its undersigned counsel, respectfully files this Response in Opposition to Plaintiff’s Opposed Motion for Leave to File Second Amended Complaint. It remains the government’s position that Plaintiff’s repeated requests to amend the complaint years after initiating this lawsuit are untimely and unduly prejudicial. The Court has not found those arguments to be persuasive in the past. Nevertheless, to preserve its objections, the government respectfully asks the Court both to reconsider its order granting Plaintiff’s first motion for leave to amend the complaint and to deny Plaintiff’s second motion for leave to further amend the complaint.

**BACKGROUND**

Plaintiff filed his original complaint on September 30, 2016, after DoD informed him that it could not process his request for all digitized World War II era Individual Deceased Personnel Files (IDPFs) within the 20-day period provided for by the Freedom of Information Act (FOIA). *See* ECF No. 1. At the time of Plaintiff’s request, DoD and its contractors had digitized IDPFs for deceased U.S. military personnel whose last names began with the letters A through L. *See* ECF

No. 48 at 3. It was not until September 2017 that the government contracted with another vendor to digitize the IDPFs relating to deceased U.S. military personnel whose last names began with the letters M through Z. *See id.* at 4–5. Accordingly, the Court determined that Plaintiff had failed to exhaust his administrative remedies as to the M–Z files. *See* ECF No. 53 at 8–9.

On August 2, 2017, the Court ordered DoD to produce the digitized A–L files on a semi-annual basis until a final release date of February 1, 2021. *See* ECF No. 29 at 17; ECF No. 30. But in December 2019, before DoD had finalized its production of A–L files or even completed the digitization of the M–Z files, Plaintiff submitted another FOIA request for “whatever of the ‘M–Z’ files then existed,” seeking leave to amend his complaint in this action to “include the balance of the IDPFs created since his original FOIA request.” ECF No. 58 at 2. Over the government’s objection, the Court granted Plaintiff’s motion and directed the Clerk to docket the First Amended Complaint. *See* ECF No. 63.

As directed by the Court, DoD completed its release of the A–L files on February 1, 2021. *See* ECF No. 86.<sup>1</sup> Not long thereafter, on April 12, 2021, DoD informed Plaintiff and this Court that it had completed the digitization of the M–Z files. *See* ECF No. 94-4. The same day, Plaintiff filed another FOIA request to capture “the balance of the requested files, not previously produced to [him].” ECF No. 94-3.

### **ARGUMENT**

As the Court previously noted, a plaintiff who seeks to amend his complaint after the deadline set forth in a scheduling order must satisfy Rule 16(b)(4)’s “good cause” standard. *See* ECF No. 62 at 4; *see also S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d

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<sup>1</sup> At Plaintiff’s request, and based on his assertion that he could not reconcile the government’s numbers with his own records, DoD has re-produced all F, I, and J files, and is in the process of re-producing all G files. *See* ECF Nos. 88, 93.

533, 536 (5th Cir. 2003). The scheduling order in this case provides that “[t]he deadline for Plaintiff(s) to file a motion seeking leave to amend pleadings ... is December 30, 2016.” ECF No. 15 at 1. Because that deadline expired more than four years ago, the burden is on Plaintiff to show that amendment is justified based on “1) the explanation for the failure to move timely for leave to amend; 2) the importance of the amendment; 3) potential prejudice in allowing the amendment; and 4) the availability of a continuance to cure such prejudice.” *Hawthorne Land Co. v. Occidental Chem. Corp.*, 431 F.3d 221, 227 (5th Cir. 2005).

In granting Plaintiff’s prior untimely motion for leave to amend, the Court noted that Plaintiff “could not have requested any M–Z files that were not digitized at the time of his initial request[.]” ECF No. 62 at 5. The Court reasoned that allowing amendment would “not force the [DoD] to relitigate issues that the Court already resolved at the summary judgment stage” because DoD would “simply have to go through summary judgment on the M–Z files in a separate lawsuit” anyway. *Id.* The Court explained that “ordinarily [it] would be extremely hesitant to grant a motion to amend three years after the amendment deadline,” but that this case is “unique” because denying amendment would leave Plaintiff free to “bring new lawsuits periodically as more of the M–Z files become digitized.” *Id.* at 6. Doing so would waste “the time and resources of both the litigants and the Court ... by handling the M–Z files in a series of separate lawsuits.” *Id.*

DoD respectfully asks the Court to reconsider.<sup>2</sup> Denying leave to amend would not have led to piecemeal litigation as portions of the M–Z files were digitized. Instead, Plaintiff might have

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<sup>2</sup> The Court is free not only to reconsider its reasoning and deny Plaintiff’s current motion, but also to reconsider its prior ruling granting Plaintiff’s first motion for leave to amend. *See Saqui v. Pride Cent. Am., LLC*, 595 F.3d 206, 210 (5th Cir. 2010) (“[W]hen a district court rules on an interlocutory order, it is ‘free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.’”) (citation omitted).

waited until digitization of the M–Z files was complete and then filed a new lawsuit that dealt solely with the entirety of that tranche of separate documents (following the submission of a follow-up FOIA request). That would have spared DoD substantial prejudice in preparing and filing a second answer (ECF No. 65) and second motion for summary judgment (ECF No. 76) while still processing Plaintiff’s original request, only to face yet another proposed amendment after it released all responsive files. Courts have recognized that such duplicative briefing is prejudicial to the government in FOIA cases. *See Borda v. DOJ*, 306 F. Supp. 3d 306, 312 (D.D.C. 2018); *James Madison Project v. DOJ*, 208 F. Supp. 3d 265, 280 (D.D.C. 2016).

The Court may be inclined to dismiss the government’s arguments, reasoning that piecemeal litigation is now inevitable because DoD will have to file a third answer and a third summary judgment brief in any event. But as the government previously noted, there is nothing to stop Plaintiff—freed from even the nominal burdens of a filing fee and service of process, and able to jump to the head of the long line of FOIA requests already pending within DoD—from further amending his complaint with future FOIA requests, thereby extending this litigation in perpetuity.

This case began with a FOIA request for the then-existing digitized A–L files nearly five years ago. The end to the litigation over *that* request is finally in sight, and the parties should be given the opportunity to present any issues based on changing circumstances in separate litigation specifically focused on Plaintiff’s new request(s).

### **CONCLUSION**

For the reasons set forth above, DoD respectfully requests that the Court both reconsider its prior ruling granting Plaintiff’s Motion for Leave to File First Amended Complaint and deny Plaintiff’s Motion for Leave to File Second Amended Complaint.

Dated: May 19, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2021, 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.  
Assistant United States Attorney