

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

DEFENDANT’S RESPONSE TO PLAINTIFF’S ADVISORY TO THE COURT

The United States Department of Defense (DoD), by and through its undersigned counsel, respectfully files this Response to Plaintiff’s Advisory to the Court. The Advisory does not seek any relief, but instead appears calculated to unfairly prejudice DoD by inaccurately characterizing DoD’s response to Plaintiff’s FOIA requests. This Response is intended to briefly provide DoD’s position as to the issues raised in the Advisory.

A. Production of A–L Files

Between October 1, 2017, and February 1, 2021, DoD produced 192,037 Individual Deceased Personnel Files (IDPFs) to Plaintiff. *See* ECF No. 86 at ¶ 5. DoD then invited Plaintiff to identify any potential gaps or deficiencies in its production; in response, Plaintiff claimed that the government had not produced all F, G, I, and J files. *Id.* at ¶ 6 & n.2. On March 23, 2021, answering an inquiry from the Court, the government confirmed that it was re-producing *every* F, G, I, and J file to Plaintiff, who agreed that a motion to compel would not be necessary. *See* ECF No. 94-4. As described in periodic status reports filed on the docket, DoD has since re-produced all but the G files—and those will be re-produced shortly. *See, e.g.,* ECF No. 93.

Plaintiff's Advisory suggests that these additional productions "confirmed" that the government had not met the Court's February 1 deadline to produce all A–L files. *See* ECF No. 96 at 2. That is not accurate. DoD does not deny that, despite its best efforts, there might be unintended gaps or deficiencies in its production. Indeed, as noted above, DoD proactively offered to work with Plaintiff to address those issues. But Plaintiff has not identified specific files he believes to be absent from the government's productions.¹ Accordingly, rather than spend time attempting to verify Plaintiff's claims of missing files, DoD has prioritized making replacement productions that contain *all* available files for service members with last names beginning with the letters F, G, I, and J, "including ... those previously produced to Plaintiff." *See* ECF No. 93 at ¶¶ 1–3. In other words, the replacement productions are not wholly comprised of previously unreleased files.

Plaintiff also chastises DoD for not requesting permission from the Court to extend the February 1 deadline. *See* ECF No. 96 at 2. But DoD has been transparent about its efforts to address the issues raised by Plaintiff. DoD alerted the Court to the alleged discrepancies with the F, G, I, and J files in its February 3 status report and elaborated on the specific steps it was taking to address Plaintiff's concerns in its March 25 status report. *See* ECF Nos. 86 and 88. Moreover, with each replacement production, DoD has filed an additional status report identifying the number of files released to Plaintiff. *See, e.g.*, ECF No. 89. Plaintiff never indicated that these productions were unsatisfactory; instead, he informed the Court that he did not intend to move to compel.

B. Response to Recent FOIA Request

On April 12, 2021, undersigned counsel informed Plaintiff that DoD had completed the digitization of the M–Z IDPFs. *See* ECF No. 94-4. The same day, Plaintiff submitted another FOIA

¹ DoD provided Plaintiff a spreadsheet identifying (by file name and date of production) every IDPF released to him in this litigation and invited him to identify with specificity the records that he believed were missing. *See* ECF No. 88 at ¶ 4. He declined.

request to capture “the balance of the requested files, not previously produced to [him].” ECF No. 94-3. On April 21, without waiting for a response from DoD, Plaintiff filed a motion for leave to file a second amended complaint. *See* ECF No. 90. On April 23, DoD referred Plaintiff’s FOIA request to the National Personnel Records Center (NPRC), part of the National Archives and Records Administration (NARA), pursuant to a Memorandum of Agreement (MOA) that was provided to Plaintiff. *See* ECF No. 91-1. Plaintiff withdrew his motion on April 27, *see* ECF No. 92, before refiling it on May 12, *see* ECF No. 94. After Plaintiff refiled his motion, NARA withdrew from the MOA, *see* ECF No. 96-2, and DoD reopened Plaintiff’s FOIA request “to ensure that [it] continues to process [the] request for a direct response,” Ex. 1.

Plaintiff now complains that DoD’s response was “intentionally deceptive” and that it “delayed this proceeding,” presumably by causing Plaintiff to withdraw and then refile his motion for leave to amend. *See* ECF No. 96 at 2. But DoD’s response, which included a copy of the MOA and was based on its interpretation of that agreement, was not “deceptive.” NARA simply disagreed with DoD’s interpretation and, for good measure, affirmatively withdrew from the MOA. Nor did DoD’s response cause any delay in these proceedings. Plaintiff’s April 21 motion for leave to amend, which alleged constructive exhaustion of his FOIA request, was premature and would have had to be refiled regardless of DoD’s response.² Notably, after Plaintiff refiled the

² Plaintiff’s motion was filed less than 20 business days from the date of his FOIA request, at a time when DoD had not yet responded to the request. As a result, the Court would not have been able to consider the proposed amendment. *See, e.g., Said v. Gonzales*, C06-986MJP, 2007 WL 2789344, at *6 (W.D. Wash. Sept. 24, 2007) (dismissing complaint for failure to exhaust administrative remedies where plaintiffs “filed their complaint ... before the time for the agencies to respond to their FOIA requests had even expired”); *Judicial Watch, Inc. v. FBI*, No. 01-1216 RBW, 2002 WL 34339771, at *3 (D.D.C. July 26, 2002) (dismissing complaint for failure to exhaust administrative remedies where plaintiff filed complaint twelve business days after submitting FOIA request).

motion, DoD did not raise any exhaustion defense, nor did it assert that DoD was not the appropriate party to respond to Plaintiff's FOIA request going forward. *See* ECF No. 95.

Dated: May 28, 2021

Respectfully submitted,

ASHLEY C. HOFF
United States Attorney

By: /s/ Thomas A. Parnham, Jr.
THOMAS A. PARNHAM, JR.
Assistant United States Attorney
New York Bar No. 4775706
903 San Jacinto Blvd, Suite 334
Austin, Texas 78701
(512) 916-5858 (tel)
(512) 916-5854 (fax)
thomas.parnham@usdoj.gov

*Attorneys for the United States
Department of Defense*

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 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