

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

MOTION FOR OPEN AMERICA STAY

The United States Department of Defense (DoD), by and through its undersigned counsel, respectfully moves this Court for an *Open America* stay to allow it time to adequately review and produce the M–Z Individual Deceased Personnel Files (IDPFs) covered by Plaintiff’s Freedom of Information Act (FOIA) requests.¹ As described below, and in consideration of the Court’s observations at the recent in-person status conference in this case, DoD proposes to review all 164,260 remaining M–Z IDPFs within the next eighteen (18) months.

BACKGROUND

This litigation arises out of Plaintiff’s FOIA requests for all digital or electronic World War II (WWII) IDPFs. At the time Plaintiff submitted his initial FOIA requests in May 2016, a DoD contractor had already digitized approximately 290,000 IDPFs for WWII personnel whose last names began with the letters A through L. *See* ECF No. 53 at 2 (citing ECF No. 48 at 3). DoD could not produce these files to Plaintiff without undertaking a manual review to prevent possible disclosure of personally identifiable information. *See* ECF No. 22 at 4–5. The Army Human

¹ This motion supersedes DoD’s Motion for Summary Judgment or, in the Alternative, Request for an *Open America* Stay (ECF No. 76), which was filed in response to Plaintiff’s First Amended Complaint (ECF No. 64). With the Court’s leave, Plaintiff has since filed a Second Amended Complaint (ECF No. 111). As a result, DoD respectfully requests that ECF No. 76 be withdrawn and/or denied as moot.

Resources Command (AHRC) allocated one hour of each workday from three of its eight FOIA officers to that project. *See id.* at 10. On August 2, 2017, the Court granted DoD's request for an *Open America* stay and directed it to produce responsive records on a semi-annual basis through February 1, 2021. *See* ECF No. 29 at 17; ECF No. 30 at 2.

Following the Court's *Open America* order, the government contracted with a new vendor to complete the digitization of IDPFs for WWII personnel with last names beginning with M–Z. *See* ECF No. 76-1 at ¶¶ 4–7. On December 18, 2019, Plaintiff submitted an additional FOIA request for the M–Z files that had been digitized by that date. *See* ECF No. 58-1 at 18–19. The Court granted Plaintiff's motion to amend his complaint to incorporate allegations regarding these new files. *See* ECF No. 63. In response, DoD sought another *Open America* stay for the additional 80,420 M–Z files covered by the new request. *See* ECF No. 76 at 7–12. The government proposed dedicating two hours of each workday from four of its eight FOIA officers to review of both the A–L and M–Z files. *See id.* at 8–9. The government also sought an extension of the February 2021 deadline to finish producing the A–L files. *See* ECF No. 72 at 2–3.

In December 2020, the Court denied the government's request to extend the *Open America* stay to produce the A–L files. *See* ECF No. 79. The Court found that DoD was not able to provide consistent estimates of the volume of data involved, made contradictory representations about the manpower devoted to Plaintiff's requests, failed to follow a first-in, first-out policy, and ignored the requirement to submit updated estimates of the time needed to complete the production. *See* ECF No. 78 at 6–13. To meet the February 1 deadline, AHRC temporarily reassigned 44 military and civilian personnel to the FOIA/PA Office and authorized over 675 hours of overtime pay and nearly 150 hours of compensation time for employees. *See* ECF No. 86 at ¶ 8. The government produced more than 47,000 IDPFs before the deadline, resulting in a total production of more than 192,000 files between October 2017 and February 2021. *See id.* at ¶ 5.

Over the next year, the government coordinated with Plaintiff to identify and produce any A–L IDPFs that may not have been included in the prior productions.² Specifically, between March 2021 and February 2022, DoD re-reviewed and re-produced more than 43,000 “F,” “G,” “I” and “J” IDPFs, *see* ECF No. 98; located, reviewed, and produced approximately 23,000 missing “E,” “H,” and “L” IDPFs, *see* ECF No. 105; and re-scanned, re-reviewed, and re-produced 418 IDPFs whose PDF files could not be opened, *see* ECF No. 108. AHRC authorized 410 additional hours of overtime to complete these supplementary reviews. *See* Ex. 1, Gilbert Decl. ¶ 9.

The government also brought the Court’s concerns and Plaintiff’s allegations of missing documents to the attention of Major General Thomas R. Drew, the Commander of AHRC. *See* ECF No. 102-2. MG Drew ordered a complete review of AHRC’s role in the production of the A–L files and directed his staff to adopt several corrective measures before reviewing and producing the M–Z files. *See id.* ¶¶ 5–13. Colonel Daniel Gilbert, AHRC’s Deputy Chief of Staff, now leads a dedicated taskforce providing support to AHRC’s FOIA Office in connection with Plaintiff’s requests. *See* Gilbert Decl. ¶ 8. This taskforce includes a field-grade officer who specializes in database management to manage the data associated with the requests and a legal advisor assigned by the Judge Advocate General of the Army to work exclusively on this matter. *Id.* These process improvements and additional personnel allowed AHRC to complete the supplementary reviews described above with a 100% file accuracy rate. *Id.* at ¶ 9.

On April 12, 2021, DoD informed Plaintiff and this Court that it had completed the digitization of the remaining M–Z files. *See* ECF No. 94-4. Later that day, Plaintiff submitted another FOIA request for “the balance of the requested files” that were “not previously produced.”

² As the government explained at the recent status conference, AHRC lacked sufficient records to track and audit their work on the A–L files. In addition, the Defense POW/MIA Accounting Agency (DPAA) has not yet identified all WWII IDPFs due to the existence of multiple versions of IDPFs associated with a single case loss, misfiled IDPFs, missing IDPFs, IDPFs comingled across conflicts and mixed with non-conflict deaths, and the poor condition of records from the 1940s. *See* ECF No. 102-3 at ¶ 8. Accordingly, it is possible that some of the IDPFs produced between March 2021 and February 2022 had not even been digitized at the time of Plaintiff’s FOIA requests for the A–L files.

ECF No. 94-2. The Court once again granted Plaintiff's motion for leave to amend his complaint and directed the parties to meet, confer, and file a joint report with a proposed production schedule for the M–Z IDPFs. *See* ECF No. 112. The parties were unable to reach agreement on a proposed schedule. *See* ECF No. 114.

LEGAL STANDARD

“If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to [a FOIA request], the court may retain jurisdiction and allow the agency time to complete its review of the records.” 5 U.S.C. § 552(a)(6)(C)(i). In *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), the D.C. Circuit explained that “exceptional circumstances exist when an agency ... is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it is exercising due diligence in processing the requests.” *Id.* at 616 (internal quotation marks omitted).

“Courts evaluate four conditions that must be satisfied to warrant granting an *Open America* stay: (1) the agency must be burdened with an unanticipated number of FOIA requests; (2) the agency's resources are inadequate to process the requests within the time limits set forth in the statute; (3) the agency must show that it is exercising due diligence in processing the requests; and (4) the agency must show reasonable progress in reducing its backlog of requests.” ECF No. 29 at 8 (citing *Elec. Frontier Found v. DOJ*, 563 F. Supp. 2d 188, 193 (D.C. Cir. 2008); *Summers v. DOJ*, 925 F.2d 450, 452 n.2 (D.C. Cir. 1991)). “Agency affidavits and declarations in support of an *Open America* Stay are evaluated under ‘a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.’” *Id.* at 9 (quoting *Nat'l Sec. Archive v. SEC*, 770 F. Supp. 2d 6, 9 (D.D.C. 2011)).

ARGUMENT

I. THE COURT SHOULD GRANT AN *OPEN AMERICA* STAY.

The circumstances that led the Court to grant an *Open America* stay to give the DoD time to review and produce the A–L IDPFs continue to justify a stay for DoD’s review and production of the M–Z files. The Court has noted on several occasions that it would not be appropriate to order the government to produce the IDPFs without first reviewing them. *See, e.g.*, ECF No. 29 at 14 (“This Court will err on the side of protecting the privacy interests of individuals whose private information ... is potentially contained in those files.”); ECF No. 78 at 14 (declining to “abandon[] ... the review process altogether” by ordering the immediate disclosure of files containing potentially exempt information). And the scope of Plaintiff’s FOIA requests makes it impossible to review and produce the voluminous responsive records within the deadline set forth in the statute (or Plaintiff’s proposed 30-day deadline). Accordingly, the Court should once again “retain jurisdiction and allow [DoD] additional time to complete its review of the records.” *See* 5 U.S.C. § 552(a)(6)(C)(i).

A. The agency is burdened with an unanticipated number of FOIA requests.

The Court previously explained that DoD satisfied the first requirement to obtain an *Open America* stay due to “the sheer volume of plaintiff’s requests” and the “large number of other requests” AHRC’s FOIA Office must process. *See* ECF No. 29 at 15. Although AHRC has already reviewed some of the requested documents, approximately 160,000 IDPFs remain to be reviewed. *See* Gilbert Decl. ¶ 10. And in addition to Plaintiff’s requests, AHRC continues to receive between 5,000 to 6,000 FOIA/PA requests each year. *Id.* at ¶ 4. In the first six months of this fiscal year, AHRC has already received 2,164 FOIA requests. *Id.* It therefore remains the case that the agency is burdened with an unanticipated volume of requests.

B. The agency’s resources are inadequate to process the requests within the time limits set forth in the statute.

In granting the government’s request for an *Open America* stay with respect to the A–L files, the Court noted that even if “DoD were to redirect all eight FOIA Action Officers to work

only on [Plaintiff's] request full-time, it would still take the office nearly ten weeks to process this request (to the detriment of all other FOIA requests)." See ECF No. 29 at 15. Although AHRC's FOIA/PA Office now has ten analysts, it would still take them more than eight weeks to process Plaintiff's request for the M–Z files. Specifically, experience has shown that the average analyst can review between 33 to 50 IDPFs per hour. See Gilbert Decl. ¶ 12. Reviewing 164,260 files would therefore require between and 3,285 and 4,978 man-hours to complete. Even if AHRC assigned all ten analysts to review the files for eight hours a day, five days a week, it would take approximately eight to twelve weeks to get through them all. And the FOIA office would have to ignore all the other requests, some of which are voluminous and each of which has its own statutory and/or regulatory release deadline. *Id.* at ¶¶ 4–5. In short, the agency's resources remain inadequate to process the requests within the time limits set forth in the statute.

C. The agency is exercising due diligence in processing the requests.

At the time of its original request for an *Open America* stay in June 2017, DoD had already processed more than 30,000 IDPFs, which the Court noted was "evidence in itself of good faith in the review of these documents." See ECF No. 29 at 16. Even though the Court in December 2020 found that DoD's diligence had waned over the course of the four-year review, since completing the production of A–L files the government has (a) elevated this matter to the Commanding General of AHRC, who ordered that several corrective actions be taken in advance of the M–Z file review, see ECF No. 102-2 at ¶¶ 5–13; (b) devoted additional resources to this project, including by authorizing significant amounts of overtime, see Gilbert Decl. ¶ 9; (c) committed dedicated database management and legal personnel to assist in the review and production of IDPFs in this matter, see *id.* ¶ 8; and (d) conducted supplementary reviews leading to the production of more than 66,000 additional records with a 100% file accuracy rate, see *id.* ¶ 9. Thus, even if DoD's efforts prior to December 2020 were insufficient to justify an extension of the prior *Open America* stay, its actions since then provide strong evidence that it is exercising due diligence in processing Plaintiff's FOIA requests.

D. The agency has made reasonable progress in reducing its backlog of requests.

Finally, in concluding that DoD had satisfied the fourth requirement to obtain an *Open America* stay, the Court previously noted that ordering AHRC's FOIA officers to "increase the rate of review of plaintiff's requests would necessarily have an adverse effect on many of the office's 6,000 other FOIA requests." *See* ECF No. 29 at 16. The same is true of Plaintiff's most recent request for the M–Z files: The more time AHRC dedicates to the review of these files, the greater the likelihood of a substantial backlog in responding to the other requests. The Court also noted that "[w]hile four years is a significant period of time, plaintiff's FOIA request has an equally significant number of responsive documents." *Id.* As described in greater detail below, DoD is proposing a more aggressive 18-month production schedule for the M–Z files due to a smaller volume of responsive files, additional staffing provided by AHRC, and the implementation of several process improvements described in the declarations of MG Drew and COL Gilbert.

II. DOD'S PROPOSED PRODUCTION SCHEDULE IS REASONABLE.

DoD recognizes that it failed to meet the Court's expectations in its processing of the A–L files under the prior *Open America* stay. As noted above, the government elevated the Court's concerns to the Commanding General of AHRC and has adopted several corrective measures in advance of its review and production of the M–Z files. The government believes that these measures will lead to a better, more consistent, and more timely review going forward. Moreover, the government is also cognizant of the Court's observations at the recent status conference about the appropriate level of staffing on this case and the possible need to modify the usual "first in, first out" approach to FOIA responses anticipated by the *Open America* line of cases.³ For that reason, DoD has agreed to devote even more resources to this case and to produce the M–Z IDPFs more quickly than it had proposed just two weeks ago.

³ The government understood the Court to suggest that, given the age of this litigation, DoD consider prioritizing its review of the M–Z IDPFs over its responses to other FOIA requests received by AHRC in the interim. *See also* ECF No. 53 at 8–9 (suggesting that DoD treat Plaintiff's original requests as "a request for all the digitized documents").

AHRC has received 164,260 M–Z IDPFs from DPAA for review and production to Plaintiff. *See* Gilbert Decl. ¶ 10. As of the date of this filing, AHRC has completed review of 5,854 files. *Id.* The government previously proposed having four of AHRC’s FOIA analysts devote two hours per day to review of the IDPFs. *See* ECF No. 76 at 8–9. But in the wake of the recent status conference before this Court, AHRC has agreed to instead commit two hours per day from five to six of its ten FOIA analysts to this project. *See* Gilbert Decl. ¶ 11. As a result of this increased staffing, AHRC now estimates that it will take approximately sixteen-and-a-half (16½) months to review and produce all responsive IDPFs. *Id.* at ¶ 12. To provide adequate cushion against possible unforeseen events, DoD proposes a final production deadline of **October 8, 2023** (eighteen months from the date of this filing) with interim productions on **October 8, 2022** (six months from the date of this filing) and **April 8, 2023** (twelve months from the date of this filing).

In addition, the government agrees with the Court’s suggestion at the recent status conference that DoD should provide detailed status reports with each production that include metrics on its ongoing review of the files. Specifically, DoD proposes that each status report identify (a) the number of files produced; (b) the total volume (in GB) of files produced; and (c) the number of files remaining to be produced. The government will also specifically indicate whether it remains on track to complete the review on the schedule ordered by the Court and what additional resources, if any, it intends to devote to this project to ensure that all M–Z IDPFs are produced by that date.

CONCLUSION

WHEREFORE, DoD respectfully requests that this Court grant it an *Open America* stay on the terms set forth above. A proposed order accompanies this motion.

Dated: April 8, 2022

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that I conferred in good faith with Plaintiff in a good-faith attempt to resolve this matter by agreement. As set forth in the parties' joint status report previously filed with the Court, the parties were not able to agree on a production schedule.

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

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2022, 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.