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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT MOORE, *et al.*, *Plaintiffs,* **v.** **CENTRAL INTELLIGENCE AGENCY,** *Defendant.*	**Case No. 1:20-cv-1027-RCL**

MEMORANDUM ORDER

Before the Court in this Freedom of Information Act ("FOIA") case is Plaintiffs' Motion for Leave to Amend the Complaint, ECF No. 42. The defendant Central Intelligence Agency ("CIA") opposes that motion. ECF No. 44.

On July 28, 2022, the Court granted in part and denied in part each party's motion for summary judgment. *See Moore v. CIA*, No. 20-cv-1027-RCL, 2022 WL 2983419 (D.D.C. July 28, 2022); Order, ECF No. 41. Specifically, the Court ordered the CIA to supplement the record concerning the adequacy of its search and its *Glomar* response to plaintiffs' FOIA request 17, and to identify responsive documents to plaintiffs' FOIA request 1. Order at 1–2. The CIA represents that since the Court's summary judgment decision, it "has been preparing the final submissions that would dispose of the matter." Def.'s Opp'n at 8.

Approximately one month after that decision, and over two years after the filing of the complaint, plaintiffs moved to amend that complaint to (1) allege improper classification and withholdings of operational files under 50 U.S.C. § 3141, (2) narrow the FOIA request to information regarding Harry Moore, and (3) add Michael Driggs as a new plaintiff. Mot. for Leave to Amend at 1.

A plaintiff may amend a complaint as a matter of course 21 days after serving it or 21 days after service of a responsive pleading or motion under Federal Rule of Civil Procedure 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Thereafter, a plaintiff may amend a complaint "only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, the court may deny leave in cases involving "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 opposition party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). An amendment is futile if the amended complaint "would not survive a motion to dismiss." *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002).

The CIA argues that the Court should deny plaintiffs leave to amend for two reasons: (1) undue delay and (2) futility. Def.'s Opp'n at 5–10. The Court agrees with the CIA on both points.

Courts in this Circuit have found delays of as little as two years to be undue for purposes of amending a complaint. *See, e.g.*, *Atchinson v. District of Columbia*, 73 F.3d 418, 427 (D.C. Cir. 1996). A lengthy delay may be excused if supported by a good reason, but denial of leave to amend is appropriate where the plaintiff "offer[s] no explanation for its tardiness" or "had abundant opportunity over the course of [litigation] to raise the issue." *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C. Cir. 1987). In addition, "[c]onsideration of whether delay is undue [] should generally take into account the actions of other parties and the possibility of any resulting prejudice." *Atchinson*, 73 F.3d at 426. In the specific context of FOIA cases, courts in this District have recognized the significant time and resources required to prepare for summary judgment in such cases and the prejudice that results from putting all that effort to waste, and have accordingly denied motions for leave to amend when summary judgment briefing was underway

on grounds of undue delay. *See, e.g.*, *Borda v. Dep't of Just.*, 306 F. Supp. 3d 306, 313–14 (D.D.C. 2018); *James Madison Proj. v. Dep't of Just.*, 208 F. Supp. 3d 265, 279–80 (D.D.C. 2016).

Here, plaintiffs admit that their desire to amend their complaint was prompted at least in part by certain aspects of the Court's initial summary judgment decision that were adverse to them, specifically the portion concerning operational files. *See Moore*, 2022 WL 2983419, at *4; Mot. for Leave to Amend ¶¶ 2–3. In other words, plaintiffs seek to win back some points they lost in the previous round of summary judgment before the CIA can file a renewed motion for summary judgment and move toward final resolution of the case. That makes this context little different than those cases where a plaintiff seeks to amend during summary judgment briefing. The Court's decision on one round of summary judgment has narrowed and focused the issues in anticipation of a second round, for which the parties have spent time preparing already.

Furthermore, more than two years passed between the filing of the initial complaint and plaintiffs' motion for leave to amend. *Cf. Atchinson*, 73 F.3d at 427. Plaintiffs do not attempt to explain that delay with respect to adding Driggs as a plaintiff or narrowing the FOIA request. As to the new allegations of improper withholdings of operational files, plaintiffs explain for the first time in their reply brief (and without citation) that they did not know the CIA would be asserting a *Glomar* response related to such files until it filed its summary judgment motion, over a year after the complaint was filed. *See* Pls.' Reply at 3–4, ECF No. 45. But even if that is true, plaintiffs do not explain why they waited until after the Court's partially adverse decision on their summary judgment submissions to invoke the "exception" under 50 U.S.C. § 3142(f) that allows courts to order disclosure of files that the CIA has categorized as operational. *See Hall v. CIA*, No. 04-cv-814, 2022 WL 2528102, at *1 (D.D.C. July 7, 2022). Allowing an amendment at this stage would further delay disposition of this already three-year-old case and prejudice the CIA, which has

already expended great effort litigating the case along the lines addressed in the first summary judgment decision and begun preparing its submissions for the next round along those same lines, while at the same time allowing plaintiffs a second bite at the apple on an issue they at least could have addressed at the time the CIA filed its first summary judgment motion. *Cf. Hoffman v. United States*, 266 F. Supp. 2d 27, 34 (D.D.C. 2003) (internal quotation marks and citation omitted) ("A plaintiff, quite simply, cannot be permitted to circumvent the effects of summary judgment by amending the complaint every time a termination of the action threatens.").

The most important proposed amendment at issue—allegations of improper withholdings of operational files—would also be futile. As plaintiffs acknowledge, "when a complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complaint shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence." 50 U.S.C. § 3141(f)(3); *see* Mot for Leave to Amend ¶¶ 1–5. Plaintiffs attempt to satisfy that requirement with an affidavit from former CIA Agent Kevin Shipp. *See* Aff. of Kevin Shipp ("Shipp Aff."), ECF No. 42-2. Nowhere does Shipp claim to have "personal knowledge" of the files plaintiffs seek. 50 U.S.C. § 3141(f)(3); *see generally* Shipp Aff. And while the affidavit could conceivably be "otherwise admissible evidence," it in no way "support[s]" the new allegations of improper withholdings. 50 U.S.C. § 3141(f)(3). That is because Shipp simply argues that the records sought are so old that they can no longer be considered operational records, an opinion that he bases entirely on a section of an Executive Order that applies to records in the possession of the National Archives, not the CIA. *See* Shipp Aff. ¶¶ 6–11; E.O. 12356 § 3.3(a). The CIA notes that problem in its opposition, and plaintiffs do not address it in their reply. *See* Def.'s Opp'n at 8–10; Pls.' Reply at 2. Simply put, because Shipp's affidavit is entirely unhelpful in demonstrating that

operational files were wrongfully withheld, the portions of the amended complaint alleging such wrongful withholdings "would not survive a motion to dismiss." *Robinson*, 211 F. Supp. 2d at 114.

Accordingly, it is hereby **ORDERED** that Plaintiffs' Motion [42] for Leave to Amend the Complaint is **DENIED**. It is further **ORDERED** that the parties' Joint Motion [43] for Enlargement of Time to Submit a Proposed Summary Judgment Briefing Schedule is **GRANTED**, *nunc pro tunc*. The parties are **ORDERED** to file a proposed schedule within ten days of the issuance of this Memorandum Order, to include a timeline for filing new motions for summary judgment on the remaining issues, along with supporting affidavits and a revised *Vaughn* index.

IT IS SO ORDERED.

Date: March 30, 2023

Royce C. Lamberth
United States District Judge