

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION)
CENTER,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
JUSTICE,)
)
Defendant.)

Case No. 15-cv-1955 (TSC)

MOTION FOR EXTENSION OF TIME TO
RESPOND TO MOTION FOR DEFAULT JUDGMENT AND
TO RESCHEDULE STATUS CONFERENCE

Defendant, by and through undersigned counsel, moves pursuant to Federal Rule of Civil Procedure 6(b)(1) for an enlargement of time of two weeks, to, and including, February 8, 2016, to respond to the pending motion for default judgment. Defendant also moves that the Court reschedule the status conference scheduled for February 1, 2016 to a date and time following the requested extension date. As grounds for this motion, Defendant states as follows.

1. This action under the Freedom of Information Act was brought by the Electronic Privacy Information Center (“EPIC”) and filed on or about November 4, 2015. On January 6, 2016, Plaintiff filed a motion for default judgment and, by order dated January 8, 2016, the Court ordered Defendant to respond to that motion on or before January 25, 2016, which corresponds to the period under Local Rule 7(b) to respond to a motion.

2. According to the docket, the United States Attorney’s Office received the Complaint on November 16, 2015, making Defendant’s deadline to answer December 16, 2015.

Based on a review of the matter undertaken to date, it appears that undersigned counsel's office did, in fact, receive the Complaint on the date indicated on the docket, but, due to an apparent administrative oversight, the Complaint failed to go through the applicable assignment process. Specifically, although the case name appears on a written list of materials received at the front desk, it was not entered into the database that logs newly served cases, and also appears not to have been routed to a supervisor for assignment to an AUSA. Despite searching, the Civil Division has been unable to locate the service copy of the Complaint.

3. As a result, the government failed to appear and respond to the Complaint within the applicable 30-day period under FOIA. The failure to appear in a timely fashion was not intentional. *See generally Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 61 (D.D.C. 2013) ("A default judgment is appropriate when a defendant is a totally unresponsive party and its default [is] plainly willful, reflected by its failure to respond to the summons and complaint, the entry of default, or the motion for default judgment."), *aff'd*, 782 F.3d 9 (D.C. Cir. 2015); *Payne v. Barnhart*, 725 F. Supp. 2d 113, 115 (D.D.C. 2010) ("[f]ederal law favors the disposition of cases on the merits, and, as a result, 'a default judgment is a drastic sanction that should be employed only in an extreme situation'"); *see also* Fed. R. Civ. P. 55(d) (courts shall not enter a default judgment against the United States or any agency thereof unless claimant establishes a right to relief upon evidence satisfactory to the court). Undersigned counsel's office handles a high volume of cases and regrets this administrative oversight.¹

¹ Defendant also observes that EPIC litigates with the government over FOIA matters before this Court frequently and, when the deadline to respond to the Complaint passed, could have contacted the United States Attorney's Office to confirm that it received the Complaint and inquire as to the status. If, as EPIC maintains, it seeks prompt resolution of this matter, that would have been a more efficient way to proceed instead of moving for a default. The declaration

4. Upon learning of this matter on January 7, 2016, undersigned counsel immediately entered an appearance and promptly contacted the applicable component within the Department of Justice to bring the lawsuit to its attention and identify the appropriate contact to confer over the matter.

5. The FOIA request at issue seeks release of a single document described in the Complaint as the ‘EU-US Umbrella Agreement on the data protection.’ (Compl. ¶ 2, 22; *see also* ECF No. 14 at ECF Page 7 of 8). EPIC issued a similar request to the Department of Homeland Security and the Department of State (*id.* ¶ 21) but has named as the Defendant in this matter only the Department of Justice.

6. Defendant has identified a document that it believes to be responsive to this request and is currently evaluating the document under FOIA and expects to make a determination as to whether or not it will be released shortly (and, if not, the basis for any withholdings). That process, however, involves consultation within the applicable Department of Justice offices, as well as with the Department of State and the Department of Homeland Security. Accordingly, that process may not be completed before the January 25, 2016 filing deadline. That process, moreover, will be further complicated by the anticipated weather event that is expected to impact this area beginning on Friday, January 22, 2016.

7. Since the Defendant expects to make a determination regarding the document shortly, Defendant requests that the Court extend Defendant’s deadline to respond to the motion

accompanying the motion for default filed in this matter does not indicate that any attempt was made to contact the United States Attorney’s office. (ECF No. 14-1) Indeed, the same attorney who signed that declaration (Mr. Tran) is counsel of record in a pending FOIA matter brought by EPIC against the United States Coast Guard and the Department of Homeland Security in which the United States Attorney’s Office appeared on behalf of the defendants. *See, e.g., EPIC v. United States Coast Guard, et al.*, Case No. 15-1527 (RDM).

for default by two weeks, to and including, February 8, 2016. By that time, Defendant expects to have made a determination with respect to the document at issue and that determination likely will inform whether further litigation is necessary, including with respect to the pending motion for default judgment. For the same reason, Defendant requests that the Court reschedule the status conference currently scheduled for February 1, 2016, to a date and time following the proposed extended response period.

8. Pursuant to Rule 7(m) of the Rules of the United States District Court for the District of Columbia, the undersigned counsel has conferred with counsel for Plaintiff regarding the requested extension and counsel for Plaintiff has stated that Plaintiff opposes the requested extension.

9. A proposed order is attached.

Respectfully submitted,

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