

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION CENTER	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:09cv2084 (RMU)
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
	)	
Defendant.	)	

**MOTION FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE RESPOND TO  
COMPLAINT, AND NOTICE IN OPPOSITION TO ENTRY OF DEFAULT**

Defendant United States Department of Homeland Security (“DHS”), through undersigned counsel, respectfully moves the Court to allow Defendant an additional ten (10) days to answer or otherwise respond to Plaintiff’s Complaint, and to direct the Clerk to refrain from entering a default in this matter.

Plaintiff has requested that the Clerk enter a default due to the fact that Defendant has not yet filed a responsive pleading, and has filed affidavits and certified mail receipts in support of its request. Until the instant proceedings related to Plaintiff’s request for entry of default, both undersigned counsel and Defendant were unaware that the United States Attorney’s Office for the District of Columbia had been served with the Complaint - indeed, as of this filing, the U.S. Attorney’s Office has no record of service - and accordingly did not believe that a response to the Complaint was yet due. *See* Fed. R. Civ. P. 12(a)(2) (federal government’s answer is due 60 days after service on the United States attorney), *as modified by* 5 U.S.C. § 552(a)(4)(C) (shortening a defendant’s response period in Freedom of Information Act lawsuits to 30 days

“unless the court otherwise directs for good cause shown”).

Accordingly, Defendant respectfully requests that the Court direct the Clerk to refrain from entering a default in this matter, and instead grant Defendant an additional ten (10) days to answer or otherwise respond to the Complaint, making Defendant’s response due on Friday, January 22, 2010. Default is a highly disfavored practice. See *Biton v. Palestinian Interim Self Gov’t Auth.*, 233 F. Supp. 2d 31, 33 (D.D.C. 2002) (“resolving litigation by default is disfavored because of ‘the strong policies favoring the resolution of genuine disputes on their merits. . . .’” (quoting *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980))); see also 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2681 (3d ed. 1998) (“Under modern procedure, defaults are not favored by the law and any doubts usually will be resolved in favor of the defaulting party.”). The law particularly disfavors defaults, and default judgments, against the federal government. “A default judgment may be entered against the United States, its officers, or its agencies *only* if the claimant establishes a claim or right to relief by evidence that satisfies the court.” Fed. R. Civ. P. 55(d) (emphasis added). Accordingly, “[a]s a practical matter . . . when the government’s default is due to a failure to plead or otherwise defend, the court typically either will refuse to enter a default or, if a default is entered, it will be set aside.” Wright et al., § 2702.

Here, entry of a default would be particularly inappropriate given that upon learning that according to Plaintiff’s representations, the United States attorney had been served, undersigned counsel immediately entered an appearance in this case [Doc. No. 8], indicating Defendant’s willingness to defend this case on the merits. See Wright, et al., § 2682 (“But if [a] defendant appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default. This approach is in line with the general policy that whenever there is

doubt whether a default should be entered, the court ought to allow the case to be tried on the merits.”). Moreover, in this Freedom of Information Act lawsuit, the relief Plaintiff seeks is the provision of certain documents. Defendant is currently endeavoring to respond to Plaintiff’s document request, and indeed has already provided one set of documents. *See* Electronic Privacy Information Center, UPDATE - EPIC Posts TSA Documents on Body Scanners, *available at* <http://epic.org/2010/01/update---epic-posts-tsa-docume.html> (posted Jan. 11. 2010).

Under these circumstances, the interests of the parties would be protected if the Court, rather than allowing the case to move to a default posture, granted Defendant leave to file an answer or other responsive pleading by next Friday, January 22, 2010. Defendant accordingly requests that the Court grant this relief, and that it direct the Clerk to refrain from entering a default.

Pursuant to Local Civ. R. 7(m), undersigned counsel has conferred with counsel for Plaintiff, who has indicated that Plaintiff opposes the relief requested.

Date: January 12, 2010

Respectfully submitted,

TONY WEST  
Assistant Attorney General

CHANNING D. PHILLIPS  
Acting United States Attorney for the  
District of Columbia

ELIZABETH J. SHAPIRO  
Deputy Branch Director

/s/ Jesse Z. Grauman  
JESSE Z. GRAUMAN (Va. Bar No. 76782)  
U.S. Department of Justice  
Civil Division, Federal Programs Branch

Mailing Address:  
Post Office Box 883  
Washington, D.C. 20044

Courier Address:  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001

Telephone: (202) 514-2849  
Fax: (202) 616-8460  
Email: [jesse.z.grauman@usdoj.gov](mailto:jesse.z.grauman@usdoj.gov)

Attorneys for Defendants

## CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2010, I electronically filed this Motion for Extension of Time to Answer or Otherwise Respond to Complaint, and Notice in Opposition to Entry of Default through the Court's CM/ECF system, which will send notification of such filing to the following individuals:

John Arthur Verdi  
Electronic Privacy Information Center  
1718 Connecticut Avenue, NW  
Washington, DC 20009  
(202) 483-1140  
Email: verdi@epic.org

Marc Rotenberg  
Electronic Privacy Information Center  
1718 Connecticut Avenue, NW, Suite 200  
Washington, DC 20009  
(202) 483-1140  
Email: rotenberg@epic.org

/s/ Jesse Z. Grauman  
Jesse Z. Grauman  
Trial Attorney