

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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CIVIL NO. SA-16-cv-0972-XR

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiff *pro se* John Eakin respectfully moves this Court, pursuant to Fed. R. Civ. P. 56(c), for summary judgment in this Freedom of Information Act case. In support of this motion, the Court is respectfully referred to the accompanying memorandum of points and authorities, Plaintiffs' Declarations and Exhibits submitted in support of Summary Judgment, and Statement of Material Facts As to Which There Is No Genuine Dispute. A proposed order consistent with this motion is attached.

Respectfully submitted,

/s/ John Eakin
John Eakin, Plaintiff *pro se*
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record.

/s/ John Eakin
John Eakin, Plaintiff *pro se*

UNITED STATES DISTRICT COURT
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CIVIL NO. SA-16-cv-0972-XR

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

1. This action stems from the failure of Defendant U.S. Department of Defense to comply with the provisions of the Freedom of Information Act by their refusal to provide the requested documents within the statutory time limits.

2. Defendant has provided no claim of exemption from release under FOIA for the requested documents.

3. The documents in question are Individual Deceased Personnel Files of World War II U.S. Military personnel, (IDPF's). A subset of these files pertaining to unidentified remains of deceased military personnel are informally known as "X-Files" because they are identified by the letter X, a sequential number and the mortuary facility assigning the number. e.g., X-816 Manila #2.

4. Plaintiff's interest in the requested files stems from his efforts to identify the remains of a family member and associated military personnel who perished in a WWII POW camp and who were ultimately buried as Unknowns in the Manila American

Cemetery. The documents obtained in response to Plaintiff's first FOIA request, (This Court's case number SA-10-cv-00784-FB-NSN) allowed the remains of Plaintiff's family member and others to be identified and returned to their families for burial after Plaintiff petitioned this Court for a Writ of Mandamus. (This Court's case number SA-12-CA-1002-FB-HJB)

5. Plaintiff's success in identifying the remains of his family member has lead to dozens of other MIA families requesting his assistance and copies of the documents. Plaintiff maintains a website, www.BataanMissing.com, to assist other MIA families. Plaintiff makes these documents available to other families and researchers at no cost and release of the currently requested documents is in the public interest.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Disputed Issues.

Defendants' refusal to release documents requested by Plaintiff's Freedom of Information request.

B. Background

1. This FOIA request and litigation is a follow-on to a 2010 request submitted to Defendant Department of Defense by Plaintiff and previously litigated in this Court. SA-10-CA-784-FB-NSN. This first lawsuit requested the same class of documents as are at issue in the current case and resulted in the release of all such then existing documents that had been digitized. Plaintiff now requests similar documents that have since been digitized and/or declassified and are now available.

2. In response to Plaintiff's 2010 FOIA request, Defendants refused to admit the existence of digital copies and provided an unreasonable reproduction cost based on reproduction of hardcopy apparently designed to discourage Plaintiff's request. Plaintiff

filed suit contending that he should be considered to be a representative of the news media and release would be in the public interest.

3. Additionally, Defendants claimed that full disclosure of the requested documents (including next-of-kin information) would constitute a clearly unwarranted invasion of personal privacy (FOIA Exemption 6). Defendants later reconsidered that issue and released the documents. SA-10-CA-784-FB-NSN document 25-1 at 20-21.

4. Ultimately, this Court determined that Plaintiff did not qualify as a representative of the news media and fees should not be waived. Three weeks after entry of judgment, Defendants released the requested documents to the public in the digital format they previously denied the existence of.

5. The IDPF and X-Files currently at issue constitute an estimated 270,000 files. Of these, Plaintiff estimates there are approximately 1,100 additional X-Files that were not originally digitized. The balance of the files are IDPF's (last initial A - L) that were digitized as part of a \$9,500,000 contract administered by Defendant. All files are contained on three USB external hard drives of two terabyte capacity each and can be reproduced at minimal expense.

6. Defendant has not claimed any portion of the requested documents are exempt from release under FOIA.

7. In addition to the previously described IDPF's and X-files, plaintiff also requested contract documents pertaining to the digitization of the requested documents. Defendants have indicated that they have no objection to release of these documents with certain redactions. Plaintiff expects that the redactions, as verbally described to him by Defendant, will be acceptable, but reserves his right to object.

C. FOIA Request and Denials

1. On May 10, 2016, Plaintiff submitted a FOIA request to the Office of the Secretary of Defense/Joint Staff, (DoD FOIA request number 16-F-0955), a component of Defendant agency, seeking the following (IDPFs & X-files):

Electronic (digital) copies of all World War II era Individual Deceased Personnel Files (IDPF's) a/k/a 293 files and/or "X-files" which exist in any digital or electronic format. Included in this request are any indices, data dictionaries, databases or other documents necessary to properly access the requested IDPF documents.

2. On May 11, 2016, Plaintiff submitted a FOIA request to the ODCMO Directorate for Oversight and Compliance, (DoD FOIA request number 16-F-0958), a component of Defendant agency, seeking the following (contract documents):

1. All contracts, contract amendments/modifications, and similar documents pertaining to contracts for digital scanning of U.S. Army Individual Deceased Personnel Files (IDPFs) previously stored at National Archives and Records Administration (NARA) and which were funded by the Defense Personnel Accounting Agency (f/k/a Defense POW/MIA Accounting Office).

2. All documents which identify users/agencies having electronic access to the above described digitally scanned Individual Deceased Personnel Files (IDPFs).

3. Defendant notified Plaintiff by letter dated May 13, 2016, that his May 10, 2016 FOIA request (DoD FOIA request number 16-F-0955) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants' letter provided instructions for appeal of this decision. On May 16, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal within the time allowed by law.

4. Defendant notified Plaintiff by email dated May 23, 2016, that his May 11, 2016 FOIA request (DoD FOIA request number 16-F-0958) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants'

letter provided instructions for appeal of this decision. On May 23, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal within the time allowed by law.

III. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is appropriate only when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue is one that, if resolved, establishes a claim or defense, affecting the action's outcome. *Anderson v. Liberty Lobby, Ind.*, 477 U.S. 242 (1986). Factual assertions in the moving party's affidavits or declarations may be accepted as true unless the opposing party submits his own affidavits or declarations or documentary evidence to the contrary. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992)

B. De Novo Review of the Agency Decision.

FOIA lawsuits are adjudicated according to standards and procedures that are quite atypical within the field of administrative law. First, the usual "substantial evidence" standard of review of agency action is replaced in the FOIA by a *de novo* review standard. *See* 5 U.S.C. § 552(a)(4)(B); *see also Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999) (observing that *de novo* standard of review comports with congressional intent); *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (explaining that review is "*de novo*"). Second, the burden of proof is on the defendant agency, which must justify its decision to withhold any information.

C. Administrative Remedies have been Constructively Exhausted.

The FOIA permits requesters to treat an agency's failure to comply with its specific time limits as full, or "constructive," exhaustion of administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C) (2000); *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines."). Thus, when an agency does not respond to a perfected request within the twenty-day (excepting Saturdays, Sundays, and legal public holidays) statutory time limit set forth in the Act, 5 U.S.C. § 552(a)(6)(A)(i) the requester is deemed to have exhausted his administrative remedies and can seek immediate judicial review, even though the requester has not filed an administrative appeal. *See, e.g., Pollack*, 49 F.3d at 118-19 ("Under FOIA's statutory scheme, when an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies unless the agency responds to the request before suit is filed."); *Campbell v. Unknown Power Superintendent of the Flathead Irrigation & Power Project*, No. 91-35104, 1992 WL 84315, at *1 (9th Cir. Apr. 22, 1992) (noting that exhaustion is deemed to have occurred if agency fails to respond to request within statutory time limit); *Gabel v. IRS*, No. 97-1653, 1998 U.S. Dist. LEXIS 12467, at *10 (N.D. Cal. June 25, 1998) (deciding that a plaintiff who did not receive a timely response "was entitled to file his complaint without further pursuing an administrative appeal or seeking further explanation"); cf. *Anderson v. USPS*, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (finding that "vague positive response" from agency received after statutory time limit allows plaintiff to claim "constructive" exhaustion), *aff'd*, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision).

III. CONCLUSION

Defendant has not claimed that the requested documents are exempt from disclosure under the FOIA and the Court should grant Plaintiff's motion for summary judgment and other relief as the court finds appropriate.

Respectfully submitted,

/s/ John Eakin

John Eakin, Plaintiff *pro se*

9865 Tower View, Helotes, TX 78023

210-695-2204 jeakin@airsafety.com

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PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. On May 10, 2016, Plaintiff submitted a FOIA request to the Office of the Secretary of Defense/Joint Staff, (DoD FOIA request number 16-F-0955), a component of Defendant agency, seeking the following:

Electronic (digital) copies of all World War II era Individual Deceased Personnel Files (IDPF's) a/k/a 293 files and/or "X-files" which exist in any digital or electronic format. Included in this request are any indices, data dictionaries, databases or other documents necessary to properly access the requested IDPF documents.

2. On May 11, 2016, Plaintiff submitted a FOIA request to the ODCMO Directorate for Oversight and Compliance, (DoD FOIA request number 16-F-0958), a component of Defendant agency, seeking the following:

1. All contracts, contract amendments/modifications, and similar documents pertaining to contracts for digital scanning of U.S. Army Individual Deceased Personnel Files (IDPFs) previously stored at National Archives and Records Administration (NARA) and which were funded by the Defense Personnel Accounting Agency (f/k/a Defense POW/MIA Accounting Office).

2. All documents which identify users/agencies having electronic access to the above described digitally scanned Individual Deceased Personnel Files (IDPFs).

3. Defendant notified Plaintiff by letter dated May 13, 2016, that his May 10, 2016 FOIA request (DoD FOIA request number 16-F-0955) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants' letter provided instructions for appeal of this decision. On May 16, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal.

4. Defendant notified Plaintiff by email dated May 23, 2016, that his May 11, 2016 FOIA request (DoD FOIA request number 16-F-0958) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants' letter provided instructions for appeal of this decision. On May 23, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal.

5. Defendant has constructively denied Plaintiff's appeal. *See* 5 U.S.C. § 552(a)(6)(C) (2000); *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.").

6. Defendant has not claimed that any part of the requested IDPF files are exempt from disclosure under any specific provision of FOIA.

7. Plaintiff has received fifteen (15) redacted pages of the "contract documents" (request #2) from Defendant on January 20, 2017 and informed Plaintiff that additional contract documents will be provided at an unspecified future date.

8. In Plaintiff's 2010 FOIA action, (this Court's case number SA-10-cv-00784-FB-NSN), Plaintiff requested IDPF and X-files similar to those at issue currently. In 2012, Defendant announced that the requested IDPFs and X-files would be available to the public. DPMO's (now DPAA) newsletter, *The Torch*, Spring 2012. ("*DPMO has*

initiated a scanning project to digitize all the X-Files to preserve the information, make the files more readily available, and to share the information within the accounting community....")

9. In the 2010 action, Defendant determined that they see "[N]o reason to deny the release of home addresses of soldiers killed in World War II. Letter, Department of Defense, Freedom of Information Divisioin, Ref: 10-L-1349, dated Feb 3, 2011. Exh 1, SA-10-CA-784-FB-NSN document 25-1 at 20-21.

10. In the 2010 action, Defendant determined that "[T]he names of the next of kin of soldiers killed in World War II, can now be released." Letter, Department of Defense, Freedom of Information Divisioin, Ref: 10-L-1349, dated May 6, 2011. Exh 1, SA-10-CA-784-FB-NSN document 25-1 at 20-21.

11. The requested records are contained in three, two TB USB hard drives.

12. The requested records exist in two digital formats, .TIFF and .PDF which were created from the .TIFF files.

13. Plaintiff requires only .PDF files.

14. During the conversion of the requested records from hard copy to the requested digital format, Metadata was collected on each file. Contract Document pg 927XR_000010.

15. During the conversion of the requested records from hard copy to the requested digital format, the files were processed to be machine readable. Contract Document pg 927XR_000010.

16. During the conversion of the requested records from hard copy to the requested digital format, the files were processed to recognize specific forms in common use by DPAA.. Contract Document pg 927XR_000010.

17. Nothing in the requested IDPF files would require redaction if filed with this Court's ECM system. Fed.R.Civ Proc 5.2, local rule CV-10.

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CIVIL NO. SA-16-cv-0972-XR

**DECLARATION OF JOHN EAKIN IN SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

I, John Eakin, declare as follows:

1. I am the Plaintiff in the above styled litigation.
2. In 2010 I filed a FOIA case in this Court styled Eakin v. U.S. Department of Defense, SA-10-cv-00784-FB-NSN. At issue in this case were documents of the same type and class as those requested in the current FOIA request.
3. In response to my 2010 FOIA request, Defendants refused to admit the existence of digital copies of the requested documents and provided an unreasonable reproduction cost based on reproduction from hard copy. This bogus estimate was apparently designed to discourage my request. I filed suit contending that I should be considered to be a representative of the news media and release would be in the public interest.
4. Additionally, Defendants claimed that full disclosure of the requested documents (including next-of-kin information) would constitute a clearly unwarranted invasion of personal privacy (FOIA Exemption 6). Defendants later reconsidered that

issue and released the documents. Exh 1, SA-10-CA-784-FB-NSN document 25-1 at 20-21.

5. Approximately three weeks after entry of judgment for the Defendants on the issue of a fee waiver, I received the requested Individual Deceased Personnel Files and X-Files on a portable USB hard drive. This release, and two subsequent document releases, constituted an estimated 30,000 unique digital files in .PDF format and over 600 MB of data.

6. These files were used to support a Petition for Writ of Mandamus filed in this Court. SA-12-CA-1002-FB-HJB. This litigation was successful in that it resulted in the exhumation of ten graves in the Manila American Cemetery where my family member and associated deceased American Servicemembers were buried as Unknowns. Four of these ten American heroes have now been identified and returned to their families for burial and work is ongoing to also identify the other Unknowns.

7. My efforts to recover the remains of my family member were covered extensively in the press and was featured on the CBS Evening News, National Public Radio and many other print and electronic news media. I received so many inquiries that I used a website, BataanMissing.com, to share information with other families of missing American Servicemembers. These inquiries continue to this day. In many instances, we have been able to determine that many of the missing are actually buried as Unknowns and these families have begun the process of demanding the return of the remains of their family members for burial as they might direct.

8. The additional files requested in this current action are intended to provide information to families of other missing servicemembers in order that they might receive the closure my family received upon the identification of my Cousin, Pvt. Arthur H.

"Bud" Kelder.

9. Burial of a family's dead is a basic human right and obligation and release of the requested documents is in the public interest.

10. The attached Exhibits are incorporated in support of this declaration

I hereby certify under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of January, 2017.

/s/ John Eakin

John Eakin, Plaintiff *pro se*

9865 Tower View, Helotes, TX 78023

210-695-2204 jeakin@airsafety.com

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WESTERN DISTRICT OF TEXAS
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EXHIBIT ONE

Exh 1, SA-10-CA-784-FB-NSN document 25-1 at 20-21.



**DEPARTMENT OF DEFENSE
FREEDOM OF INFORMATION DIVISION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

03 FEB 2011

Ref: 10-L-1349

John Eakin
9865 Tower View Road
Helotes, TX 78023

Dear Mr. Eakin:

This is an amended final response to your Freedom of Information Act (FOIA) request received on July 29, 2010, to the Department of Defense (DoD). The Office of Freedom of Information, which is responsible for FOIA requests for the Office of the Secretary of Defense (OSD), received and processed your request. The amended enclosed documents are responsive to your request pertaining to the consolidated extracts of death camp rosters for Camps O'Donnell and Cabanatuan.

After a further review of the documents we concluded that additional information can be released. Our office sees no reason to deny the release of home addresses of soldiers killed in World War II. Additional information is being withheld under FOIA exemption (b)(6), which applies to information, if released, would constitute a clearly unwarranted invasion of the personal privacy of individuals.

Because the withheld information is a matter of litigation (*Eakin v. DoD*, 10-cv-00784, WDTX), your appeal rights are considered moot for this request. Please be advised, the mootness of your appellate rights still applies only to your request received by OFOI, and not to your separate request to the Army.

Sincerely,

Will Kammer
Chief, Freedom of Information Division

Enclosures
As Stated



**DEPARTMENT OF DEFENSE
FREEDOM OF INFORMATION DIVISION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

MAY 09 2011

Ref: 10-L-1349

Mr. John Eakin
9865 Tower View Road
Helotes, TX 78023

Dear Mr. Eakin:

On February 3, 2011, this office provided you with documents subject to the current litigation, *Eakin v. DoD*, 10-cv-00784, WDTX. Subsequent to this release, you asked for another review of the consolidated extracts of death camp rosters for Camps O'Donnell and Cabanatuan.

After a further review of the documents, it was determined that additional information, specifically the names of the next of kin of soldiers killed in World War II, can now be released. The enclosed documents contain the newly released information. Additional information in the enclosed documents is still being withheld under Exemption 6 of the Freedom of Information Act (FOIA), which applies to information, if released, would constitute a clearly unwarranted invasion of the personal privacy of individuals.

Because the withheld information is a matter of litigation (*Eakin v. DoD*, 10-cv-00784, WDTX), your appeal rights are considered moot for this request. Please be advised, the mootness of your appellate rights still applies only to your FOIA request received by the Office of Freedom of Information, and not to your separate FOIA request to the Army.

Sincerely,

A handwritten signature in cursive script that reads "Will Kammer".

Will Kammer
Chief, Freedom of Information Division

Enclosures:
As Stated

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

JOHN EAKIN

Plaintiff,

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CIVIL NO. SA-16-cv-0972-XR

ORDER

On this day, came on for consideration Plaintiff's Motion for Summary Judgment.
The Court having reviewed said Motion, finds that the Motion should be, and hereby is,
GRANTED.

Signed this the _____ day of _____, 2017

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE