

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' RESPONSE TO DEFENDANT'S MOTION FOR EXTENSION OF TIME TO SUBMIT CROSS-MOTION FOR SUMMARY JUDGMENT AND TO RESPOND TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

1. Plaintiff *pro se* John Eakin opposes Defendant's Motion for Extension of Time to Submit Cross-Motion for Summary Judgment and to Respond to Plaintiff's Motion for Summary Judgment.

2. Defendant has presented no reasonable justification for the requested 120 day stay other than the need for a new attorney to become familiar with the case and assorted vague requirements to review the requested material and ultimately determine if Plaintiff's request is unreasonably burdensome as a matter of law.

3. FOIA recognizes the need for promptly providing requested documents to requesters when such documents are not specifically exempt from disclosure. This is shown by several unique features of the FOI Act.

- An agency has thirty days from the date of service to answer a FOIA complaint, not the typical sixty days provided by Federal Rule of Civil Procedure 12(a)(2). 5 U.S.C. § 552(a)(4)(C) (2006 & Supp. IV 2010).
- FOIA Requests and appeals must be processed within 20 business days or they are considered to have been constructively denied. See 5 U.S.C. § 552(a)(6)(A)(i)
- Open America Stays serve as a safety valve under specified conditions when agencies are truly overwhelmed with FOIA requests, 5 U.S.C. § 552(a)(6)(C)(i)-

(iii) (2006 & Supp. IV 2010), *Open America v. Watergate Special Prosecution Force*. 547 F.2d 605 (D.C. Cir. 1976).

4. Defendants' motion to extend time appears actually to be a thinly disguised request for the *Open America* stay Defendant presented as an affirmative defense in its Answer, (ECF Document 8 at 4) however such a stay requires the agency to show that "exceptional circumstances exist" and that the agency is exercising due diligence in responding to the request. Defendant can not meet the standards for such a stay. 5 U.S.C. § 552(a)(6)(C)(i)-(iii) (2006 & Supp. IV 2010) Plaintiff would not oppose this extension of time had Defendant made a timely request when it first recognized the need for more time. Now, three months after Defendant jointly recommended a schedule and this Court adopted that recommendation and issued a scheduling order, it beggars belief that exceptional circumstances truly exist or that Defendant is exercising due diligence in responding to the request.

5. Similarly, the retirement of Defendant's Counsel was likely foreseeable and Defendants' assertion that an additional 120 days are required for a new Assistant United States Attorney to become familiar with the case is excessive in that this Court's Scheduling Order (ECF Document number 15) was entered on December 7, 2016 and requires submission of dispositive motions by February 1, 2017. Defendant's counsel did not retire until January 31, 2017, only one day prior to this Courts' deadline for submission of dispositive motions.

6. Defendant also fails to note that multiple government attorneys are involved in and fully briefed on this case.

7. Defendant, having now asserted Exemption 6 on the record, should simply argue such in their Cross-Motion for Summary Judgment and follow this Court's scheduling order rather than unnecessarily delay these proceedings while Defendant

prepares to argue that Plaintiff's request is burdensome as they have inferred they intend to do.

8. Based on these facts and conversations with opposing counsel, Plaintiff believes this eleventh hour Motion for Extension of Time is submitted for the purpose of delay and avoiding consideration of the content and context of the FOIA requests that Defendant now claims are privacy protected.

9. Defendant's motion at page 3 contains a factual misstatement. Defendant notes that, as stated in Plaintiff's Motion for Summary Judgment, Defendant previously conceded that the names and addresses of deceased WWII Servicemembers were not privacy restricted information. In actuality, this information, at first objected to by Defendants in EAKIN I and later conceded, is very similar to the name and address information contained in the embedded FOIA requests that Defendant now asserts should be considered privacy restricted and was submitted to show that Defendant has previously released nearly identical material.

10. Perhaps most importantly, Defendant also fails to note that many of the tens of thousands of files released to Plaintiff in 2012, 2013 and 2015 contained exactly the same type of embedded FOIA requests now objected to by Defendants. These embedded FOIA requests are contained both within the files currently at issue and those files previously released to Plaintiff and multiple other requesters without redaction of the embedded FOIA requests contained within them. For Defendant to now claim these FOIA requests contain privacy restricted information defies all logic. They weren't restricted when released to multiple requesters, but Defendant now claims they are restricted.

11. The burden is now properly on Defendant to show the privacy interest in

withholding the FOIA requests contained in the documents requested by Plaintiff. *See 5 U.S.C. § 552(a)(4)(B)* ; *Watkins v. U.S. Bureau of Customs*, 643 F.3d 1189, 1194 (9th Cir. 2011) ("FOIA's strong presumption in favor of disclosure means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents." (*quoting Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009))); *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (explaining that it is agency's burden "to justify the withholding of any requested documents"); *DOJ v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'"); *Reporters Comm.*, 489 U.S. at 755 (stating that "unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action'" (*citing 5 U.S.C. § 552(a)(4)(B)*)).

12. When this privacy issue is properly before the court, Plaintiff will show that Defendant has placed these documents in the public domain and now must demonstrate that these FOIA requests have caused, or are likely to cause, harm in order for Defendant to now properly claim a privacy right. Plaintiff will show that the FOIA requests contained within the requested documents do not constitute privacy information when considered in context. "A bare conclusory assessment that public disclosure of an employee's name would constitute an invasion of personal privacy is insufficient to support the existence of a privacy interest." *United America Financial v. Potter*, 531 F.Supp.2d 29 at 47. (DCDC 2008)

13. Defendant also deceptively misstates Plaintiff's statement that Defendant

has provided no claim of exemption from release of the requested documents.

Defendant's vague comment contained in their answer to Plaintiff's complaint (ECF Document No. 8) that some documents were exempt from disclosure under one of the enumerated FOIA exemptions was far short of an assertion of an exemption. Plaintiff is aware from verbal conversations with opposing counsel that in their opinion the requested material contains exemption 6 material, but Defendant until now has failed to so state on the record before this Court. Plaintiff is not required to, and will not be, drawn in to arguing vague claims not properly before this Court.

14. To put all these issues in proper context for the Court, Plaintiff attaches Exhibit One to this response. This exhibit is an exemplar FOIA request contained in the prior document releases and released to Plaintiff in 2012, 2013, and 2015 and now objected to by Defendant. This exhibit is typical of the FOIA Requests Defendant now objects to release of in conjunction with the requested documents. Nothing in this exhibit has required redaction to comply with this Court's filing rules, nor does it constitute privacy restricted information under FOIA.

15. Plaintiff respectfully asks the Court to deny Defendant's Motion to Extend time and grant Plaintiff's Motion for Summary Judgment. Alternatively, since Defendant has now asserted on the record its claim that certain FOIA requests are contained within the requested records and that embedded FOIA requests constitute privacy protected information and that Defendant must review these FOIA requests to determine if it will be burdensome to segregate the privacy protected information from the requested documents. Plaintiff therefore submits that the threshold issue at this point is to determine if the embedded FOIA requests actually constitute privacy restricted information and if such review of all of the requested files is necessary. Therefore, it

would seem dispositive if, after review and briefing, this Court would determine that the embedded FOIA requests are, or are not, privacy restricted and Plaintiff suggests such briefing and *in camera* review would be appropriate.

Respectfully submitted,

/s/ John Eakin

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CERTIFICATE OF SERVICE

I hereby certify that on the 3d day of February, 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*

