UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. SA-16-CV-0972
	§	
UNITED STATES DEPARTMENT OF DEFENSE,	§	
	§	
Defendant.	§	

DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, REQUEST FOR AN *OPEN AMERICA* STAY AND DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, John Eakin, filed a request with the Department of Defense (DoD) under the Freedom of Information Act (FOIA) for all World War II Individual Deceased Personnel Files (IDPFs) and/or X-Files, which exist in digital or electronic format. There are approximately 280,000 World War II era IDPFs located within files on three hard drives containing approximately 4.2 terabytes of data. There are other documents also within the approximately 4.2 terabytes of the data, including other FOIA requests and sensitive medical information. The DoD asks this Court to find Eakin's request unduly burdensome, or in the alternative, grant an *Open America* stay and permit the DoD to continue its process of review to find the IDPFs.

II. PROCEDURAL HISTORY

On May 10, 2016, Eakin filed a FOIA request to the Office of the Secretary of Defense/Joint Staff, (DoD FOIA request number 16-F-0955), a component of DoD, 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.

[Doc. at 1, p. 8]. On May 13, 2016, DoD notified Eakin that his May 10, 2016 FOIA request was received, but it would be unable to respond within the 20-day statutory time period. [Doc. at 1, p. 7]. On May 16, 2016, Eakin appealed DoD's decision. [Doc. at 1, p. 6].

On May 11, 2016, Eakin submitted a FOIA request to the Office of the Secretary of Defense/Joint Staff, (DoD FOIA request number 16-F-0958), a component of DoD, 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).

[Doc. at 1, p. 10]. On May 23, 2016, DoD notified Eakin that his May 11, 2016 FOIA request was received, but it would be unable to respond within the 20-day statutory time period. [Doc. at 1, p 12]. On May 23, 2016, Plaintiff appealed DoD's decision. [Doc. at 1, p. 14].

On September 30, 2016, Eakin filed this action against DoD seeking to compel a response to his FOIA requests of May 10, 2016 and May 11, 2016.[1] [Doc. at 1]. On November

[1] By way of productions on January 18, 2017 and February 9, 2017, the DoD produced all documents it determined to be responsive to Eakin's FOIA request of May 11, 2016. Undersigned counsel spoke with Eakin regarding the May 11, 2016 FOIA request and understands that all issues have been resolved as to that request.

1, 2016, DoD filed an answer denying certain allegations of the complaint and raising affirmative defenses. [Doc. at 8].

On January 24, 2017, Eakin filed a Motion for Summary Judgment. [Doc. at 16]. On January 31, 2017, DoD filed a Motion for an Extension of Time to Submit a Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment.[2] [Doc. at 17]. Summary judgment should be granted in favor of the DoD as Eakin's request is overly broad and unduly burdensome.

III. FACTUAL BACKGROUND

After receiving Eakin's FOIA request for all World War II Individual Deceased Personnel Files (IDPFs) and/or X-Files, in digital or electronic format, the DoD notified Eakin that it would be unable to respond within the 20-day statutory time period. [Doc. at 1, pp. 7-8]. At the time of Eakin's request, DoD was working on over 1,600 records requests. [Doc. at 1, p. 7]. Nonetheless, after receiving Eakin's request, the Defense POW/MIA Accounting Agency (DPAA) started coordinating an appropriate response. [Ex. 1, ¶ 5]. DPAA obtained the assistance of the Army Human Resources Command (AHRC) FOIA/ Privacy Act (PA) Office for purposes of processing the request. [Ex. 1, ¶¶ 1, 5]. There are approximately 280,000 World War II era IDPFs responsive to Eakin's request located within files on three hard drives containing approximately 4.2 terabytes of data. [Ex. 1, ¶¶ 5-6]. There are other documents also within the approximately 4.2 terabytes of the data, including other FOIA requests and some sensitive medical information. [Ex. 1, ¶ 8].

[2] DoD's extension of time motion is still pending, but it requested until June 1, 2017 to file a cross-motion for summary judgment and response. [Doc. at 17]. Accordingly, this motion and response are being filed by the government's requested deadline of June 1, 2017.

In order to find the IDPFs requested by Eakin, a number of steps have been taken by the DoD. On or about November 18, 2016, AHRC received three hard drives containing the approximately 280,000 IDPFs from the DPAA. [Ex. 1, ¶ 6]. Each individual IDPF can contain one or two pages, or as many as hundreds of pages. [Ex. 1, ¶ 6]. Because of the large amount of data, approximately 4.2 terabytes, on the hard drives, AHRC was required to run security scans and build a separate drive. [Ex. 1, ¶ 6]. That process took approximately six weeks. [Ex. 1, ¶ 6]. Another one and one-half weeks were required to download all of the files to a shared drive so FOIA Action Officers could work on the request. [Ex. 1, ¶ 6]. Another two weeks were required for the FOIA Action Officers to obtain the necessary security permissions. [Ex. 1, ¶ 6].

Ms. Wey, Chief of the AHRC, assigned three FOIA Action Officers to work solely on Eakin's request for one hour each day of the workweek. [Ex. 1, ¶ 7]. The AHRC has only eight FOIA Action Officers. [Ex. 1, ¶ 3]. This is less than the office had earlier this year and currently Ms. Wey does not have authority to hire another FOIA Action Officer. [Ex. 1, ¶ 3]. The AHRC is responsible for processing approximately 6,000 record requests annually, and many of the requests the office must process are subject to statutory deadlines. [Ex. 1, ¶ 4].

Since the three FOIA Action Officers have had access to the shared drive, they have processed approximately 31,585 individual IDPFs and removed 9,253 documents. [Ex. 1, ¶ 8]. The IDPFs, created decades ago, are marked for release. [Ex. 1, ¶ 8]. However, recently created materials, including recent FOIA requests, correspondence, and medical information, to include information on the DNA of related individuals, is being removed. [Ex. 1, ¶ 8]. The practice of AHRC is to conduct a manual review of the files. [Ex. 1, ¶ 9]. The AHRC does not have the technological capability to create identifiers to scan the share drive for current Personally Identifiable Information (PII) that may have been included in the file or IDPF when DPAA

scanned the record and uploaded it to the hard drive that AHRC received. [Ex. 1, ¶ 9]. Ms. Wey believes that releasing files from the AHRC without a manual review would risk the possible disclosure of PII. [Ex. 1, ¶ 9].

It has not been possible to approximate the exact number of pages in each IDPF, as some contain only a few pages and others contain hundreds. [Ex. 1, ¶ 6]. Using the number of IDPFs as a metric, the review to date has processed 31,585 IDPFs, which means approximately 63,000 IDPFs could be processed by the AHRC in a year. Given that rate of review, it would take the DoD over four years to complete Eakin's request.

IV. ARGUMENT

Requesting all of the World War II IDPFs places an unreasonable burden upon the DoD. Attempts to agree upon a more reasonable modified request that would be limited to certain individuals or a narrow timeframe have been unsuccessful. This Court should grant summary judgment in favor of the DoD, or in the alternative, grant an *Open America* stay permitting the DoD to continue to work on Eakin's request.

A. Eakin's FOIA Request for 280,000 World War II Personnel Files Puts An Unreasonable Burden Upon DoD.

A motion for summary judgment is appropriate if the pleadings, depositions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Little v. Liquid Air Corp*., 37 F.3d 1069 (5th Cir. 1994) (*en banc*); *Godaire v. U.S. Dep't. of Justice*, Case No. 3:10CV1266, 2011 U.S. Dist. LEXIS 80892, at *5–6 (D. Conn. July 25, 2011).

The time, expense, and effort required to respond to Eakin's request is so great as to exceed FOIA's reasonableness requirements. Reasonableness standards permeate FOIA. Requesters must "reasonably describe" the records they seek. 5 U.S.C. § 552(a)(3)(A). Agencies

must make "reasonable efforts" to search for such records. § 552(a)(3)(C). Agencies must only release "[a]ny reasonably segregable portion of a record," when there is material responsive, but included with exempt materials. § 552(b). An agency must take reasonable steps to respond to a request, but FOIA does not require a response where responding would unreasonably burden the agency. *See Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999); *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979).

The reasonable-description provision, § 552(a)(3)(A), places on the requester the "responsibility to frame requests with sufficient particularly to ensure that searches are not unreasonably burdensome." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000) (*quoting Assassination Archives and Research Center, Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989)). "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Id*.

Here, the most problematic aspect of Eakin's request is not that the DoD is totally unable to find the materials requested; it knows this information is within approximately 4.2 terabytes of data, but it is the broad scope of the request. The request does not seek the files of certain individuals or pertain to a limited period. Instead, it seeks *all* World War II era IDPFs in digital format. The request seeks over 280,000 IDPFs, which is a currently unknown number of pages of production. [Ex. 1, ¶ 6-8]. Attempts to reach an agreement on a more limited, and therefore reasonable, request have been unsuccessful. A request for "millions of pages of documents" is too broad. *Lowry v. SSA*, Case No. CV-00-1616, 2001 U.S. Dist. LEXIS 23474, at *25 (D. Or. Aug. 29, 2001) (citing *Armstrong v. Bush*, 139 F.R.D. 547, 553 (D.D.C. 1991)). In *American Federation of Government Employees v. U.S. Department of Commerce*, 907 F.2d 203 (D.C. Cir. 1990), the D.C. Circuit held that it is unreasonable to request every personnel file an agency

possesses "in hopes of discovering information regarding [the agency's] promotion practices." *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 891–92 (D.C. Cir. 1995) (describing *American Fed'n*, 907 F.2d at 208–09). It was considered unreasonable to compel the Departments to "locate, review, redact, and arrange for inspection a vast quantity of material." *American Fed'n*, 907 F.2d at 209. *See also Ayuda, Inc. v. Federal Trade Comm'n*, 70 F. Supp. 3d 247, 275-76 (D.D.C. 2014) (citing numerous cases holding that federal agency is not required to comply with FOIA request which is so broad that it imposes an unreasonable burden on the agency).

Eakin's request for all World War II IDPFs is particularly problematic because those 280,000 IDPFs are located in approximately 4.2 terabytes of data that include other sensitive documents.[3] [Ex.1, ¶ 8]. Other FOIA requests are located in the data. Those requests contain the name, address, and contact information of private individuals who have sought information. More problematic, the FOIA Action Officers conducting the review have also found medical information, including information on family DNA samples. [Ex. 1, ¶ 8]. Certainly, any medical information of that nature would be highly sensitive and worthy of strict review and control. The release of extremely sensitive medical information of persons who have provided it for only for a very limited purpose poses a tremendous risk of harm. Eakin's request does not seek other FOIA requests, recent correspondence, or medical information on relatives. [Doc. at 1, pp. 7-13]. This material should not be produced – it is not responsive to Eakin's FOIA request.[4] The process of

[3] The results of the review to date, indicate a significant number of documents must be removed. In reviewing 31,585 IDPFs they found and removed 9,253 documents. [Ex. 1, ¶ 8].

[4] Even if Eakin's request was modified or viewed by this Court as also applying to the information beyond the personnel file created around World War II, it would not solve the issue of the DoD's review. While it is the government's contention that Eakin's FOIA request never sought any information other than the IDPF, if Eakin were to make a request for recent correspondence, FOIAs, or medical information, the government would argue that most of that material is protected from disclosure under FOIA's statutory exemptions. If an agency conducts a search and identifies responsive documents, it must

reviewing 4.2 terabytes of data, where it will take considerable time from three FOIA Action Officers, over a period of four years, to sort out such information is unreasonable. It is unreasonable to compel an agency to review millions of pages of documents that contain confidential information. In such circumstances, "segregation would be neither feasible, useful, nor desirable." *Journal of Commerce, Inc. v. U.S. Dep't of the Treasury*, Case No. 86-1075, 1988 U.S. Dist. LEXIS 17610, at *21 (D.D.C. Mar. 30, 1988). *Cf. Solar Sources v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (eight years to segregate exempt portions from non-exempt portions is unreasonable).

FOIA does not require agencies to undertake unreasonable measures to respond to a request. *See* 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C), and (b). This Court should therefore grant summary judgment to the DoD. *See American Federation*, 907 F.2d at 209 (affirming grant of summary judgment to agency where responding to request would impose unreasonable burden on agency).

B. Alternatively, This Court Should Grant an *Open America* Stay Where DoD is Processing Eakin's Request Diligently and in Good Faith.

Under the FOIA, in "exceptional circumstances," additional time may be allowed for an agency to process its records. "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." 5 U.S.C.

---

disclose them unless they fall within one of FOIA's statutory exemptions. *See FCC v. AT&T Inc*., 131 S. Ct. 1177, 1180 (2011). Even if a document is exempt, an agency still must disclose any non-exempt portions that are "reasonably segregable." 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 765–66 (1989). In other words, an agency can withhold nonexempt material when the requested records are so voluminous, or the required redactions so costly, that separating the exempt from the nonexempt portions would impose an "unusual burden" on the agency. *Wightman v. Bureau of ATF*, 755 F.2d 979, 983 (1st Cir. 1985).

§ 552(a)(6)(c). DoD needs additional time to complete the review of responsive records, and is making reasonable strides in its review of pertinent material.

In *Open America v. Watergate Special Pros. Force*, 547 F.2d 605 (D.C. Cir. 1976), the D.C. Circuit construed this section as follows:

> In summary, we interpret Section 552 (a)(6)(c)) to mean that "exceptional circumstances exist" when an agency . . . is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. In such situation, in the language of subsection (6)(c), "the court may retain jurisdiction and allow the agency additional time to complete its review of the records." Under the circumstances defined above the time limits prescribed by Congress in subsection (6)(A) become not mandatory but directory. The good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in, firstout basis, except those where exceptional need or urgency is shown, is compliance with the Act.

Id. at 616. The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) clarified the standard for obtaining a stay. *See Gov't Accountability Project v. U.S. Dep't of Health and Human Servs*., 568 F. Supp.2d 55, 58 (D.D.C. 2008). In order to obtain a stay, "due diligence" in processing requests is always necessary. *See Gov't Accountability*, 568 F. Supp.2d at 63. Following *Open America* and the 1996 amendments, courts' interpretation of the requirements "has evolved into four conditions that must be satisfied to warrant granting an Open America Stay: (1) when an agency is burdened with an unanticipated number of FOIA requests; and (2) when agency resources are inadequate to process the requests within the time limits set forth in the statute; and (3) when the agency shows that it is exercising due diligence in processing the requests; and (4) the agency shows reasonable progress in reducing its backlog of requests."

Elec. Frontier Found. v. Dep't of Justice, 563 F. Supp.2d 188, 193 (D.C. Cir. 2008); *Summers v. Dep't of Justice*, 925 F.2d 450, 452 n.2 (D.C. Cir. 1991) (noting first three factors). Courts have also considered additional factors in determining whether there are exceptional circumstances, including: the complexity of the request, newly imposed statutory or regulatory burdens on agencies, and other impediments that might prevent an agency from swiftly processing a request. *Buc v. FDA*, 762 F. Supp.2d 62, 66 (D.C. Dist. Ct. 2011) (*citing Gov't Accountability*, 568 F. Supp.2d at 59). Finally, agency affidavits and declarations in support of a stay under O*pen America* are given "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Nat'l Sec. Archive v. S.E.C.*, 770 F. Supp.2d 6, 9 (D. D.C. 2011) (*quoting Elec. Frontier Found. v. Dep't of Justice*, 517 F. Supp.2d at 117 (D. D.C. 2007)).

In this case, AHRC has dedicated one hour of each workday of three FOIA Action Officers, in an office with only eight officers that must process 6,000 requests a year, to working on Eakin's request. [Ex. 1]. That is a significant allocation of resources in a budget-constrained environment. DoD is proceeding diligently and in good faith as evidenced by the review of 31,585 IDPFs to date. [Ex. 1, ¶ 8]. It has not been possible to approximate the exact number of pages in each IDPF, as some contain only a few pages and others contain hundreds. [Ex. 1, ¶ 6]. However using the number of IDPFs as a metric, approximately 63,000 IDPFs could be reviewed a year. Thus, if this Court does not find Eakin's request to be an undue burden, the DoD requests an *Open America* stay to continue to current rate of processing. DoD would be willing to provide a semi-annual production to Eakin.

DoD anticipates that Eakin will argue that the DoD should undertake an expedited, search-based review of the 4.2 terabytes of data at issue to decrease the period of responsive

review.[5] Once again, this would misconstrues the nature of the review as one that is removing only PII instead of finding the requested material, but further it unreasonably requires a change in the technology systems used by the DoD. [See Ex.1, ¶ 9]. Additionally, in the view of Ms. Wey, who oversees the eight individuals tasked with these types of reviews, releasing files without manual review would risk the disclosure of PII. Although there is a very limited number of truly sensitive documents, the DoD is working diligently to ensure it properly conducts the important and complete review that is warranted in this case. An *Open America* stay is justified and necessary in this case.

V. CONCLUSION

For the reasons cited herein, DoD respectfully requests that the Court DENY Plaintiff's Motion for Summary Judgment and GRANT its Motion for Summary Judgment.

DATED: June 1, 2017

Respectfully submitted,

RICHARD L. DURBIN, JR.,
United States Attorney

By: /s/ *MARY F. KRUGER*

MARY F. KRUGER
Assistant United States Attorney
Georgia Bar No. 6282540
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Tel: (210) 384-7100
Fax: (210) 384-7312
E-mail: Mary.Kruger@usdoj.gov

ATTORNEYS FOR DEFEENDANT

AGENCY COUNSEL:
Mark Herrington
U.S. Department of Defense Office
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301-1600

[5] Ms. Wey, Chief of the AHRC, states that her office does not have the capability to create identifiers to scan the share drive for PII.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system on this 1st day of June, 2017, and was served via U.S. Mail as follows:

John J. Eakin
9865 Tower View
Helotes, Texas 78023
jeakin@airsafety.com
PRO SE

/s/ *MARY F. KRUGER*
MARY F. KRUGER
Assistant United States Attorney