

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

JOHN EAKIN

Plaintiff,

v.

UNITED STATES
DEPARTMENT OF DEFENSE

Defendant

§
§
§
§
§
§
§
§
§
§
§

CIVIL NO. SA-16-cv-0972

**PLAINTIFF'S RESPONSE TO DEFENDANT'S CROSS MOTION FOR
SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT, MOTION TO STAY CASE
IN THE ALTERNATIVE**

Plaintiff *pro se* John Eakin provides this response to Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, Motion to Stay Case in the Alternative.

INTRODUCTION

This FOIA action requests recently digitized documents similar to those originally obtained by Plaintiff in response to 2010 litigation in this Court, Eakin v. United States Department of Defense et al SA-10-cv-00784-FB-NSN. In that action, the government concealed the existence of digital files and provided an exorbitant estimated cost of reproduction to discourage Plaintiff. Ultimately, judgment was entered against Plaintiff on the issues of fee waiver and representative of the news media. Approximately three weeks after entry of judgment, Defendant released to the public digital copies of the requested documents containing embedded documents similar to the the embedded

documents Defendant now claim contain personally identifying information and are exempt from release under FOIA. Supplemental document releases were provided to Plaintiff in 2013 and 2015 as additional documents were located and digitized. These subsequent releases also contained a substantial number of embedded documents with no redactions.

The released documents, World War II and Korean War Individual Deceased Personnel Files, were of intense public interest, especially to families of American Service members believed to be missing in action (MIA). Plaintiff filed a mandamus action, *Eakin v. American Battle Monuments Commission, et al* SA-12-CA-1002-FB-HJB, that forced Defendant to return the partial remains of Plaintiff's family member and those of thirteen associated missing servicemen. To date, only the partial remains of six of the fourteen MIA's have been identified due to the inadequate capacity and capability of the Armed Forces DNA Identification Laboratory (AFDIL). The successful identification of these servicemen has encouraged dozens of additional families to request the return of the remains of their missing loved ones. Recently, the families of seven families of missing servicemen, including a recipient of the Medal of Honor and two highly decorated senior officers, filed a mandamus action in this Court asking for the return of the remains of their loved ones and additional relief. *Patterson v. Defense POW/MIA Accounting Agency, et al* 5:17-cv-00467-XR

The initial document releases have exposed to public scrutiny the U.S. Government's inept efforts to account for its missing servicemen and resulted in substantial media coverage and embarrassment to the government.

The instant action simply requests the release of documents similar to those

originally released that have subsequently been located, declassified or digitized in order that additional families may receive closure in the deaths of their missing loved ones.

Defendant has made no objection to release of the documents requested by Plaintiff except for their claim that the requested documents contain embedded material that include personally identifiable information (PII).

Defendant, wishing to avoid further demands for remains and further embarrassment, has manufactured an excuse to delay release of the documents by claiming that documents embedded in the requested documents are exempt from release and segregation of the exempt material will be burdensome and/or so time consuming as to discourage Plaintiff's request.

Plaintiff would prefer to immediately receive the requested files including the embedded documents, but has no objection to removal of the embedded documents other than the substantial delay in release claimed by Defendant, a delay manufactured by Defendant's refusal to employ existing digital tools to quickly redact the embedded documents.

Due to the earlier litigation, Defendant was on notice that there was substantial public interest in future release of additional documents as they were digitized. However, when the government's nine million dollar digitization project began in 2013, Defendant claims that no effort was made to redact FOIA exempt or PII material even though their contract required the collection of meta data and other identifiers that could have quickly removed the embedded material.

**DEFENDANT MUST SHOW THAT THE EMBEDDED MATERIAL IS EXEMPT
FROM FOIA RELEASE**

In a FOIA case, the agency has the burden of justifying nondisclosure, *See* 5 U.S.C. § 552(a)(4)(B) (2000); *see, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989); *Wishart v. Comm'r*, No. 98-17248, 1999 WL 985142, at *1 (9th Cir. June 25, 1999); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) and it must sustain its burden by submitting detailed affidavits *See, e.g., O'Harvey v. Office of Workers' Compensation Programs*, No. 96-33015, 1997 WL 31589, at *1 (9th Cir. Jan. 21, 1997) (holding that when the district court relied on the agency's denial letter "[w]ithout an affidavit or oral testimony, [it] lacked a factual basis to make its decision"). that identify the documents at issue and explain why they fall under the claimed exemptions. *See Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998); *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987).

**DEFENDANT HAS FAILED TO CITE ANY FOIA EXEMPTION OR EXPLAIN
WHY THE EMBEDDED MATERIAL IS EXEMPT**

Defendant has submitted a single declaration describing the file review process. This declaration, while detailed, only mentions, "recently created materials, including recent FOIA requests, correspondence, and medical information, to include information on the DNA of related individuals, is being removed." Declaration of Wey Gilbert, ECF Doc No. 22-2 ¶ 8. No explanation of why they fall under any exemption from release under FOIA is made.

Neither Defendant nor Ms. Wey Gilbert have cited any specific exemption from release under FOIA, instead describing the embedded material as "Personally Identifiable

Information" or "PII", a term not found in the FOIA Statute.¹

Defendent's Cross-Motion for Summary Judgment has failed their burden of justifying nondisclosure in that they have provided only a vague description of the embeded material as "personally identifiable information" or "PII" and made no claim to a specific FOIA exemption.

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. See Stonehill v. IRS, No. 06-0599, 2008 WL 101712 (D.D.C. Jan. 10,

¹ The most likely source of this term is Department of Defense Regulation 5400.11-R, dated May 14, 2007, titled Department of Defense Privacy Program. Under the definations section, this regulation states:

DL1.14. Personal Information. Information about an individual that identifies, links, relates, or is unique to, or describes him or her, e.g., a social security number; age; military rank; civilian grade; marital status; race; salary; home/office phone numbers; other demographic, biometric, personnel, medical, and financial information, etc. Such information is also known as personally identifiable information(i.e., information which can be used to distinguish or trace an individual's identity, such as their name, social security number, date and place of birth, mother's maiden name, biometric records, including any other personal information which is linked or linkable to a specified individual).

However, the forward to this regulation states:

This Regulation does not apply to:

- Requests for information made under the Freedom of Information Act (DoD Directive 5400.7) (Reference (c)). They are processed in accordance with DoD 5400.7-R (Reference (d)).

The referenced DoD Manual 5400.07, dated January 25, 2017, titled DoD Freedom of Information Act (FOIA) Program contains only a single reference to "Personally Identifiable Information at Page 15:

1. Documents requested by a person that would be exempt from release to any other requester pursuant to Exemptions 6 or 7(C) because they contain personally identifiable information about the requester. This commonly occurs when a requester makes a first party request for their own information; however, it could arise in other situations.

2008), at *10 (holding that agency affidavit stating that disclosure of an employee's name "could cause harassment and/or undue embarrassment or could result in undue public attention" was too conclusory to support withholding under Exemptions 6 and 7(C)). "[I]f the government's bare assertion that a protected privacy interest is involved . . . is sufficient, then the FOIA privacy exemptions could effectively swallow the general rule favoring disclosure." *Id.* Furthermore, the "**privacy interest at stake may vary depending on the context in which it is asserted.**" [emphasis added] and thus an agency must at least explain the ground for concluding that there, is some factual basis for concerns about "harassment, intimidation, or physical harm." See *Judicial Watch v. FDA*, 449 F.3d at 153 (holding that names of FDA employees and others who worked on the approval of a controversial abortion drug were properly withheld under Exemption 6 where the agency provided affidavits describing threats and instances of abortion-related violence). Because the Moore declaration does not provide a factual basis for the conclusion that harassment or intimidation would result from disclosure of the names, the Court cannot uphold the assertion of Exemption 6 or 7(C). *United America Financial, Inc v. Potter*, 531 F. Supp. 2d 29 (2008 D.D.C)

PLAINTIFF'S REQUEST IS NOT BURDENSOME

Contrary to Defendant's assertion, Plaintiff's request is not burdensome when conducted reasonably. Plaintiff's request was carefully crafted to include an entire set of digital files so it is a simple matter to copy all files to a portable USB drive provided by Plaintiff. Selecting only specific records to copy or reviewing every record for imaginary exempt material as suggested by Defendant would be extremely cumbersome and time consuming.

Defendant's claim that redacting the requested files is burdensome is not supported by evidence indicating a *need* for any review or redaction.

The fact that a FOIA request is very broad or "burdensome" in its magnitude does not, in and of itself, entitle an agency to deny that request on the basis that it does not "reasonably describe" the records sought. *See Ruotolo v. Dep't of Justice*, 53 F.3d 4, 10 (2d Cir. 1995) (finding that request that required 803 files to be searched was not "unreasonably burdensome"); *Pub. Citizen v. FDA*, No. 94-0018, slip op. at 2 (D.D.C. Feb. 9, 1996); *see also FOIA Update*, Vol. IV, No. 3, at 5 ("The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A).").

The key factor is the ability of an agency's staff to reasonably ascertain exactly which records are being requested and then locate them. *See Yeager v. DEA*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding request encompassing over 1,000,000 computerized records to be valid because "[t]he linchpin inquiry is whether the agency is able to determine 'precisely what records [are] being requested'" (quoting legislative history)).

The courts have held only that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records. *See Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (agreeing that search which would require review of twenty-three years of unindexed files would be unreasonably burdensome, but disagreeing that search through chronologically indexed agency files for dated memorandum would be burdensome); Van Strum v. EPA, No. 91-35404, 1992 WL

197660, at *1 (9th Cir. Aug. 17, 1992) (accepting agency justification in denying or seeking clarification of overly broad requests which would place inordinate search burden on agency resources)

Agencies nonetheless may make discretionary disclosures of exempt information, but should do so only upon "full and deliberate consideration of the . . . interests that could be implicated by disclosure of the information.

AN OPEN AMERICA STAY IS NOT APPLICABLE BY STATUTE

As set out in Plaintiff's Opposed Motion to Strike Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, Motion to Stay Case in the Alternative, the FOIA statute does not permit an Open America stay without showing that exceptional circumstances exist and that the agency is exercising due diligence in responding to the request. 5 U.S.C. § 552(a)(6)(C)(i)-(iii) Plaintiff incorporates the arguments of that motion as if set out in full in this response.

CONCLUSION

The inescapable conclusion is that Defendant has manufactured a false claim that certain materials are exempt from release. Defendant has previously released a huge volume of similar records to this Plaintiff on multiple occasions. Further, the prior litigation and thousands of requests for individual records of this type have certainly put Defendant on notice of the intense public interest in further releases of these files as they were digitized, yet Defendant made no effort to redact or tag what they now claim is exempt material when it was reviewed for digitization/scanning. And even at this late stage in the process, Defendant's refusal to digitally search the requested documents for exempt material belies Defendant's true motive.

Plaintiff respectfully requests that the Court strike or deny Defendants' Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, Motion to Stay Case in the Alternative; grant Plaintiff's Motion for Summary Judgment, and; order immediate release of the requested records.

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 7th day of June, 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*