

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,

Plaintiff,

vs.

UNITED STATES DEPARTMENT
OF DEFENSE,

Defendant.

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Civil Action No. SA-16-CV-0972

**DEFENDANT’S REPLY IN SUPPORT OF ITS CROSS-MOTION
FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,
REQUEST FOR AN OPEN AMERICA STAY**

The Department of Defense (DoD) files this Reply in support of its Cross-Motion For Summary Judgment or, in the alternative, Request for an Open America Stay, and maintains that this Court should grant summary judgment in its favor as a FOIA request for approximately 280,000 World War II era Individual Deceased Personnel Files (IDPFs) is unduly burdensome.

I. INTRODUCTION

Eakin’s response incorrectly asserts that the DoD makes no objection to release of the documents other than the removable of personally identifiable information (PII) and argues that the DoD is making a “false claim” that materials are exempt from release.¹ [Doc. at 24, pp. 3, 8]. This is incorrect. DoD’s motion for summary judgment argues that searching through 4.2 terabytes of data to find all of the scanned World War II era personnel files requested is an unreasonable burden. The other materials in the data are non-responsive to the FOIA request.

¹ Eakin has no response to DoD’s objection to Eakin’s statement of material facts not in dispute. Eakin makes numerous factual statements without support or citation; some statements mischaracterize the facts of this case. Inadmissible statements should not be considered when ruling upon a motion for summary judgment.

DoD, in the alternative, moves for an *Open America* stay, to continue doing all that is required to meet Eakin's extraordinary request. It is incredulous that Eakin claims the DoD is not willing to produce this material or is trying to delay its production, when it is spending a tremendous amount of time and money working on his request every day.

There is only one pertinent FOIA request before this Court, and it concerns a request for approximately 280,000 World War II era personnel files. A single file can be only a few pages or hundreds of pages. DoD is proceeding diligently and in good faith as evidenced by the review of 31,585 IDPFs to date. [Doc. at 22-2, ¶ 8].

II. UNDUELY BURDENSOME

Eakin incorrectly argues that the standard applicable in this case is whether the request is burdensome when conducted reasonably, *as defined by him*, and his sense of how DoD's data should maintained and searched. [Doc. at 24, pp. 6-9]. The FOIA does not impose requirements regarding how the 280,000 World War II era IDPFs at issue here should have been scanned or maintained, and does not require DoD to buy certain software or agree with a requestor's ideas of how a search should be conducted. *See* 5 U.S.C. § 552.

The IDPFs sought by Eakin are stored in 4.2 terabytes of data, along with non-responsive documents to include some information on family DNA.² [Doc. at 22-2, ¶¶ 6 and 8]. Eakin fails to explain how it is reasonable to force the DoD to look through that volume of data to locate and find 280,000 personnel files. Eakin has not limited his request to a narrow date range, a set of individuals, or a specific event. Eakin has no experience conducting FOIA searches on behalf of the government or reviewing records. The DoD is responsible for ensuring that the

² Only the IDPFs, created many years ago, are responsive to this request, but if the request were for all documents in the data, it is likely many of the removed documents would need to be fully or partially redacted. Eakin appears to mistakenly argue that PII is the only reason for the government's review of the 4.2 terabytes of data.

correct records are produced, and that non-responsive and sensitive materials are not inadvertently released. The DoD has submitted a sworn affidavit from the Chief of the Army Human Resources Command, Ms. Wey, who has over ten years of experience doing FOIA work for the government. [Doc. 22-2, ¶¶ 1-2]. Wey explains that the DoD does not have the ability to do searches through scans, explains the policy of manual review, and opines that the release of any files from her office without manual review would risk the possible disclosure of PII. [Doc. 22-2, ¶ 9]. There is no admissible evidence before this Court to refute those statements.

The FOIA requires an agency to 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). As argued in DoD's motion for summary judgment, that includes situations such as here where the responsive material is imbedded in non-responsive material and it is unduly burdensome for the agency to produce the requested material. Eakin has simply failed to refute the DoD's primary argument, and it is on this grounds that the Court should grant summary judgment in favor of the DoD.

III. OPEN AMERICA STAY

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. § 552(a)(6)(c). Eakin claims the government has not shown exceptional circumstances, but he ignores entirely the government's detailed affidavit on the progress of this review and the

resources DoD has allocated specifically to his request. In short, despite his request being given special and significant resources, Eakin still demands more.

Since the three FOIA Action Officers have had access to the shared drive holding this data, they have processed approximately 31,585 individual IDPFs and removed 9,253 documents. [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, but nonetheless the DoD has made considerable progress since Eakin made his request and this case was filed. [See Ex. 1, ¶ 6]. As argued in the DoD's motion for summary judgement, it is Eakin's request, the nature of files involved, the size of the files, the review required, and the resources available that show this is a situation with exceptional circumstances.

IV. 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 14, 2017

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

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 14th day of June, 2017, and was served via U.S. Mail as follows:

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