

**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 Case No. 5:16-16-cv-0972-RCL

**OPPOSED MOTION FOR CLARIFICATION AND TO  
COMPEL PRODUCTION OF DOCUMENTS**

1. Comes now, Plaintiff John Eakin *pro se* who moves the Court for clarification of certain requirements of the Court's Order dated August 2, 2017 and, if the Court finds it appropriate, an order compelling production of certain documents.

2. Plaintiff and Counsel for Defendant have conferred extensively in the five months since issuance of the Court's Order. Both parties have worked diligently and in good faith to resolve disagreement over release of certain files. Large volumes of files have been released and semi-annual releases begun. However, the parties disagree on certain points and request further direction of the Court. Defendant opposes this motion.

3. Further, as the Court properly recognized in its August 2, 2017 Order, Plaintiff was unable at that time to properly object to Defendants' claims that certain files were exempt from release. ECF doc 29 at 14, 16 Defendant has now released a sizeable volume of files and a Vaughn Index to Plaintiff and he is now able to adequately object to Defendants' claim that certain documents are exempt from release. In addition,

Defendant has released to Plaintiff files not conforming to the scanning contract requirements in format and volume.

**I. Request for clarification**

4. The Court's Order of August 2, 2017 ECF Doc 30 referenced two types of documents and provided a schedule for the release of each. The parties have been unable to agree as to the exact definition of each class of document nor the review and release schedule for each class. Plaintiff suggests each document class be defined as follows:

a. "Responsive, non-exempt documents" should be defined as those requested documents digitized in bulk under the "scanning contract."<sup>1</sup> (Exhibit 2) The Court's Order appears to recognize that these files require review before release in that the Order directs repetitive releases as the files are cleared for release.

b. "Previously withheld, non-exempt, responsive documents" are those previously released to any FOIA requester or those files subject to inclusion in an agency electronic reading room under FOIA section (a)(2). These are files digitized by Defendant in the normal course of business when requested by either a government or FOIA requester and are distinct from those produced under the "scanning contract."

(1) Plaintiff believes the Court's Order recognizes that these files can be released without further review in that it specifies that they are to be released within ninety (90) days of the Order and does not provide for subsequent releases.

(2) Attached as Exhibit 3 is a list of approximately 1200 digitized IDPFs released to other FOIA requesters subsequent to the last such release to

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<sup>1</sup> "Scanning Project" refers to the three-year, \$9.5 million dollar contract issued by Defendant to digitize the WWII era Individual Deceased Personnel Files. A copy of this contract was requested as part of this litigation and was provided by Defendant. See Exhibit 2 and Exhibit 6 at page 13.

Plaintiff in 2015. This list is representative of multiple such prior document releases to multiple other FOIA requesters that Defendant now claims must be reviewed again and exempt material redacted before they can be released to Plaintiff.

5. The above suggested document classifications are Plaintiff's understanding of the Court's Order and Defendant disagrees. Further guidance of the Court is respectfully requested.

**II. The Format and Volume of Files does not Conform to the Scanning Contract Requirements provided to Plaintiff by Defendant.**

6. .pdf files may be created in two formats, searchable or non-searchable image files. Searchable .pdf files are those that may be searched for text in most .pdf reader software as well as software designed specifically for searching large volumes of .pdf files.

7. The scanning contract provided to Plaintiff by Defendant (Exhibit 2) specifies that the files digitized under this contract shall be processed by optical character recognition software to insure that they are searchable .pdf files.<sup>2</sup> Searchable .pdf files have significantly greater utility to Plaintiff and other users.<sup>3</sup>

8. Perhaps most significantly for the purpose of this litigation, documents conforming to the scanning contract specifications could be quickly and economically

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<sup>2</sup> "I. Optical Character Recognition (OCR). Scanned items shall be run through optical character recognition software to ensure they are machine readable to the maximum extent possible." *Exhibit 2 at ¶ I, pg 11 (scanning contract)*.

<sup>3</sup> 5 U.S.C. § 552(a)(4)(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

reviewed by Defendants and exempt material could be more readily redacted than by manually reviewing approximately 442,000 individual files.

9. To demonstrate the utility and importance of searchable .pdf files, Plaintiff selected the first approximately 1,200 files produced by Defendant and ran them through optical character recognition software to convert them to searchable .pdf files. He then ran a global search of these files for the keyword "FOIA" that would be found in a document Defendant claims to be exempt from release. The search found the document attached as Exhibit 4, an exemplar of the type of document the Defendant objects to the release of. Presumably, this document was overlooked during the manual document review insisted upon by Defendants. This demonstrates that electronic review is at least as thorough as manual review of these files, if not more so.

10. Plaintiff suggests that Defendant's refusal to electronically search these files and insistence on manual review of them may be for the purpose of delay rather than to effectively review and redact exempt material.

11. Further, Exhibit 6, an agency budget document, describes the scanning project contracted for by Exhibit 2. Exhibit 6 and similar documents describe the number of files to be digitized as approximately 442,000 files and estimates the cost of digitization at \$9.5 million over the three year life of the project. Exhibit 2, the contract documents produced to Plaintiff by Defendant, appears to cover a much shorter period of time and does not describe the number of files to be digitized, however, Defendant has represented that only approximately 280,000 files have been digitized under this contract. Defendant has not explained this major discrepancy in the volume of files to be digitized nor the contract non-conformity of the non-searchable files produced to Plaintiff. Either

additional digital files exist or there are additional contract documents providing for a narrower scope of work and different file format.

**III. Defendant's Claim That Certain Documents are Exempt from Release is Bogus**

12. Attached as Exhibit 5 is the Vaughn Index produced by Defendant. Defendant has redacted these documents as either non-responsive to Plaintiff's request and/or exempt from release under FOIA exemption (b)(6).

13. Plaintiff objects to these redactions for non-responsiveness on the basis that the entire contents of the Individual Deceased Personnel File is responsive to Plaintiff's request. Obviously, a substantial number of government employees over many years also agreed that these documents should be included in the respective files or they would not have filed them there. Further, if they were not integral parts of the IDPF's, Defendant would not have digitized them as part of their IDPF scanning project.

14. Plaintiff further objects to Defendant's redaction of FOIA and similar information requests as exempt from release. The subject files are by definition personnel files of deceased military personnel having no right to privacy because they are deceased. The embedded documents Defendant claims to be exempt are of the nature of neither personnel nor medical files except that they are attached to the personnel file of a deceased Servicemember. "[T]he privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased." *Schrecker II*, 349 F.3d at 661. Indeed, the "fact of death, ... while not requiring the release of information, is a relevant factor to be taken into account in the balancing decision whether to release information." *Id.* (quoting *Schrecker I*, 254 F.3d at 166)

15. The embedded documents were submitted by third parties with no expectation of privacy. "FOIA requesters . . . have no general expectation that their names will be kept private." *Agee v. CIA*, 1 GDS ¶ 80,213 at 80,532 (D.D.C. 1980). In fact, in most cases the release of the name of a FOIA requester would not cause even the minimal invasion of privacy required to trigger the balancing tests of Exemptions 6 and 7(c). *See Stauss v. IRS*, 516 F.Supp. 1218, 1223 (D.D.C. 1981): *cf. National Western Life Insurance Co. v. United States*, 512 F. Supp. 454, 460-61 (N.D. Tex. 1980): *compare Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 (3d Cir. 1974). It would take an extraordinary rare and compelling situation for the mere identification of a person or entity as a FOIA requester of particular records to rise to the level of implicating a privacy interest (or, less likely, a commercial interest) protectible under the FOIA.

Exemption 6 protects disclosure under the FOIA of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 thus has two prongs, and requires an agency to prove both the nature of the files and that the files' disclosure "would constitute a clearly unwarranted invasion of personal privacy." *Dep't of State v. Washington Post.*, 456 U.S. 595, 599-603, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982)). The first criterion does not require that the information be contained in a specifically designated "personnel" file. *Id.* at 601. It is met if the information "appl[ies] to a particular individual" and is "personal" in nature. *New York Times Co. v. NASA*, 852 F.2d 602, 606 (D.C. Cir 1988). The second step of an Exemption 6 analysis is to strike a "balance between the protection of an individual's right to privacy and the preservation of the public's right to government information." *Washington Post.*, 456 U.S. at 599. The "public interest" in the analysis is limited to the "core purpose" for which Congress enacted the FOIA, i.e., to "shed ... light on an agency's performance of its statutory duties." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 109 S. Ct. 1468, 103 L. \Ed.2d 774 (1989).

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There must be some personal information that relates to a particular individual for exemption 6 protection to be warranted. Typical personal information protected under exemption 6 includes "place of birth, date of birth, date of marriage, employment history, and comparable data." *Nat'l*

*Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989). In examining an exemption 6 withholding, the court must balance the privacy interest at stake against the public's interest in disclosure. *Fund for Constitutional Gov't v. National Archives and Records Serv.*, 656 F.2d 856, 862 (D.C. Cir. 1981). "Under exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 202).

*Hall v. CIA, D.C. Cir (2017) 1:04-cv-00814-RCL at 11*

16. Further, even though a substantial number of these same embedded documents were released to Plaintiff and other FOIA requesters more than five years ago, Defendant can show no harm nor adverse effect due to the release of this claimed to be exempt material. Conversely, the public interest in release of these documents containing information as to the ultimate fate of American Servicemembers who for all intents and purposes have fallen from the face of the earth is extremely high.

#### **IV. RELIEF REQUESTED**

17. Plaintiff respectfully requests the following relief:
- a. A supplemental Order more precisely defining the terms "Responsive, non-exempt documents" and "Previously withheld, non-exempt, responsive documents" as used in the Court's Order of August 2, 2017 and specifying if additional review and redaction is permitted of each class of document.
  - b. An order compelling Defendant to produce all documents to Plaintiff in searchable .pdf format.
  - c. An order compelling Defendant to use electronic means to locate and redact any exempt documents and that all review be completed within sixty (60) days.

d. An order compelling Defendant to produce additional scanning contract documents suspending the requirement to run the files through optical character recognition software if such documents exist or otherwise explain such contract non-conformity.

e. An order compelling Defendant to produce additional scanning contract documents providing for digitization of less than approximately 442,000 files or less than all WWII Individual Deceased Personnel Files if such documents exist or otherwise explain such contract non-conformity.

f. An order prohibiting Defendant from redaction of non-exempt embedded documents and to provide a Vaughn Index of all documents not produced to Plaintiff after review.

Respectfully submitted,

/s/ John Eakin

John Eakin, Plaintiff *pro se*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of January, 2018, 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*

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