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 RESPONSE TO PLAINTIFF'S MOTION FOR CLARIFICATION AND TO COMPEL PRODUCTION OF DOCUMENTS

The Defendant, United States Department of Defense ("DoD'), hereby responds in opposition to Plaintiff's motion seeking clarification and requesting the production of documents [Doc. at 31], and in support thereof states as follows:

Introduction

Since the Court's order of August 2, 2017, the DoD has produced approximately 68,588 documents containing almost three million pages to Plaintiff John Eakin ("Eakin"). Specifically, on October 17, 2017, as ordered, the DoD provided Eakin with a 2.5 million page production of "all previously withheld non-exempt responsive documents." [Doc. 29, p. 17]. On December 1, 2017, as ordered, the DoD produced its first "semi-annual production" of responsive, non-exempt documents sending Eakin approximately 350,000 pages of material reviewed since the time of Court's August order. [Doc. 29, p. 17]. Further, in an attempt to provide whatever material could be released without further review, on January 4, 2018, DoD provided Eakin with a set of X-files containing approximately 272,822 pages. Finally, on January 12, 2018, DoD

provided Eakin with a sample *Vaughn* index for over 150 documents which were withheld as non-responsive, and would require at least some redaction if deemed responsive.

DoD is expending tremendous resources on the review of these documents and the logistics of this production. The suggestion that the DoD is purposely delaying this production is completely unfounded and belied by the efforts that have been made. Every attempt to explain to Eakin the scanning project that created the records he seeks, the type of records created and maintained by the DoD, and the way in which prior FOIA productions are documented fails. Eakin's motion now makes groundless accusations against the DoD and presents this Court with confusing and factually unsupported claims. DoD has complied with this Court's order and is working diligently to meet its future requirements.

Procedural Background

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, 2016, DoD filed an answer denying certain allegations of the complaint and raising affirmative defenses. [Doc. at 8]. Eakin and DoD filed cross-motions for summary judgment in this matter, and the government sought, in the alternative, an *Open America* stay. This Court entered a memorandum and order on those motions on August 2, 2017. [Doc. at 29 and 30].

Eakin now purports to file a motion to compel and seek clarification of the Court's August order. [Doc. at 31]. A motion to compel implies there is something not properly produced. Here, Eakin can make no such showing. Instead, Eakin's motion while titled a motion to compel seeks to modify the Court's August ruling and expand the scope of his original FOIA request.

[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. The second FOIA request is still relevant because Eakin cites to the materials produced in response to that FOIA in the instant motion. [See Doc. 31-2].

Legal Argument

Eakin is seeking to define this Court's prior order in such a fashion that he obtains what was either never a part of his original FOIA request—all prior FOIA requests for IDPFs or X-files—or not granted—production of all electronic IDPFs and X-files without review by the DoD for purposes of responsiveness and FOIA exempt material.

A. Legal Standard

A motion to compel under Rule 37 of the Federal Rules of Civil Procedure requires the party seeking discovery to prove that a discovery response is inadequate. *Barnes v. District of Columbia*, 289 F.R.D. 1, 6 (D.D.C.2012) (citing *Equal Rights Ctr. v. Post Props., Inc.*, 246 F.R.D. 29, 32 (D.D.C.2007)). In this case, Eakin does not even attempt to meet this standard. Eakin instead seeks "clarification" of the Court's order.

B. Eakin's Proposed "Clarification" is Inaccurate and Misleading

Eakin proposes to define the plain language of the Court's August order with two, new lengthy definitions.

Eakin first wants to define the term "responsive, non-exempt documents" as those documents digitized in bulk under the "scanning contract." This would confuse the plain language of the Court's order. The documents that are "responsive and non-exempt," can only logically be defined in reference to the original FOIA request which sought, "[e]lectronic (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." [Doc. at 1, p. 8]. Eakin has never requested production of only the "scanning contract" documents. DoD is reviewing any material that may be responsive to Eakin's original FOIA request and producing anything that is non-exempt. Further, very problematically, Eakin references the documents attached as Exhibit 2 to

his motion as the contract issued by DoD to digitize the WWII IDPFs. [Doc. 31-2].[2] These documents are not a contract between the DoD and an outside contractor, but instead only an internal support agreement between two parts of the DoD.[3]

Eakin also asks that the words "previously withheld, non-exempt, responsive documents" now be defined as those previously released to any FOIA requestor or those files subject to inclusion in an agency electronic reading room.[4] This definition should be rejected. The government understood the plan language of the Court's order to reference the non-exempt, responsive documents that it was withholding at the time the Court ruled on the case. As of August 2017, the DoD had yet to make any production because it sought summary judgment in its favor whereby no documents would be produced. In accordance with the Court's order, DoD has now produced all of the documents reviewed prior to the August order that are non-exempt and responsive.

C. Eakin Seeks a New Document Format and Misconstrues DoD's Contracts

Based on incomplete and inaccurate information, Eakin asks the Court to compel DoD to produce all documents in searchable .pdf format, produce additional scanning contract documents, and explain contract non-conformity.

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[2] In this litigation, the DoD produced a contract between Lockheed Martin, an outside contractor, and the DoD on February 9, 2017, which involved the scanning of WWII IDPFs. [Bates 972XR16-99]. It is attached, in part, hereto as Exhibit 1. This is the contract under which almost all of the electronic WWII IDPFs that exist were scanned.

[3] There is no single "scanning contract." DoD had a contract with Lockheed Martin which resulted in the scanning of WWII IDPFs with the last names A-L. Next, there was an interagency service agreement to do additional scanning. Finally, recently, DoD entered a contract with Na'Ali, but work has only recently started.

[4] Eakin's proposed definition assumes that the government has all the documents ever released due to FOIA requests saved and available for another immediate release. He has no evidence or support for his contentions. This is factually not the case. DoD maintains FOIA productions for a relatively short period. Further, the FOIA productions are not categorized in such a way that DoD could easily find only the FOIAs for electronic WWII IDPFs. The FOIAs for electronic WWII IDPFs are saved along with all other FOIA requests. The government is unable to determine how Exhibit 3 to Eakin's motion was created, who created it, and what it lists.

As an initial matter, Eakin appears to be attempting to turn this FOIA litigation into a venue for other claims, potentially to include an allegation of a False Claim Act violation. [Doc. 31, pp. 3-5, 8]. Such claims are not within the scope of court review in FOIA litigation. *Hrones v. C. I. A.*, 685 F.2d 13, 19 (1st Cir. 1982) ("[T]o the extent that the claims of appellant are based upon the 'highly questionable legality of the CIA's CHAOS operations,' he has chosen the wrong procedure for review . . . . Such an investigation is not within the scope of court review of the denial of an FOIA request."); *Amsinger v. I.R.S.*, Case No. 4:08-CV-1085, 2009 WL 911831, at *2 (E.D. Mo. Apr. 1, 2009)("[C]laims outside of the FOIA request are not justiciable in a FOIA proceeding.")(citing *Hornes*); and *Brown v. F.B.I.*, 744 F. Supp. 2d 120, 123 (D.D.C. 2010) ("Brown's initial complaint alleged claims only under the FOIA. His proposed amendment would add a claim beyond FOIA's scope.").

Next, as stated above, Eakin is factually incorrect about the scanning project. The WWII IDPFs with the last names A-L were scanned as part of a contract with Lockheed Martin whereby the Performance Work Statement required the documents to be saved in two formats, a high-resolution non-compressed archival version and a single Adobe Portable Document Format (.pdf). [Exhibit 1, 972XR 36-41]. There was no optical character recognition software requirement, although as Eakin has done, one can utilize certain programs to run such a process on the .pdf files.[5] Eakin's FOIA did not request searchable documents nor a certain file type. [Doc. at 1, p. 8]. DoD collected the documents for Eakin in .pdf, which is a typical and standard form of producing electronic records. Eakin is unable to cite any authority that suggests DoD is required under FOIA to produce more than what is available.

[5] Within the past year, DoD and Na'Ali entered a contract for scanning additional WWII IDPFs. That contract has different terms, but work has only just started. Eakin's reference to the number of files scanned appears to not account for the various arrangements for scanning and the amount actual completed.

Finally, Eakin raises the contract performance issues only in an attempt to re-litigate the issue decided in the summary judgment rulings—whether the DoD is able to turn over the 4.2 terabytes of potentially responsive material without any manual review. [See Doc. 31, p. 7]. As stated in the Court's memorandum, "While production of the entire contents of the hard drives would be relatively simple, this Court declines to order the production of potentially exempt information at this time. This Court will err on the side of protecting the privacy interests of individuals whose private information, such as medical records or home addresses, is potentially contained in those files. Further, an affidavit from the Chief of AHRC confirms that the agency is still reviewing the files for responsive and nonresponsive documents." [Doc. at 28, p.14].

DoD provided the affidavit of the Chief of the Army Human Resources Command (AHRC) FOIA/ Privacy Act (PA) Office, a person with a background and experience in this area, to support its contention that it does not have the technological capability to create identifiers to scan the share drive for personally identifiable information and manual file review is required. [Doc. 22-2]. This remains unrefuted. Eakin can provide no such qualified support of his position. The fact that he was able to find a single non-responsive document in the three million pages produced to date states nothing about how accurate his search would be if done to this document set. The records at issue are old, frequently they are hand-written, faded, and inconsistent in language and format. As a result, the accuracy of optical character recognition is questionable and persons in DoD with expertise are unable to determine a list of acceptable search terms. For example, until finding the document detailed, in part, in the *Vaughn* index as "Consultation Report on Contributor Material," DoD would not have searched for those words in the data set, despite that document containing sensitive medical information. [See Doc. 31-5, p. 12]. DoD does not want to expend its valuable resources on a manual review, but it has

obligations under FOIA and to those people who have provided personal and medical information to properly protect their information.

D. DoD Should Remove Non-Responsive, Exempt Material

Eakin's arguments as to the documents withheld from production are not specific to any single document, but appear to raise two issues: (1) related FOIA requests are responsive, and (2) the names of individuals who filed FOIAs would not cause an invasion of privacy.

As to the issue of responsiveness, Eakin has only requested the electronic WWII IDPFs and/or X-files, not other FOIA requests. The IDPFs are the personnel files created to document the death of a military member. The IDPFs sought by Eakin are being produced in full and there appears to be no issue with what has been provided in that respect. What is not a part of the personnel files is material created later, such as a FOIA request. A later request for a file does not in the DoD's view become a part of the IDPF.

As to the issue of what would be redacted if the FOIA requests were deemed responsive, Eakin only cites to cases discussing basic information, such as the name of a FOIA requestor. As detailed in DoD's sample *Vaughn* index, if the documents that are currently being withheld as non-responsive were deemed responsive, most, but not all of the documents currently being withheld would need to have redaction in part or whole. [See Doc. 31-5]. The FOIA requests can contain home addresses, dates of birth, driver's licenses, and other information that DoD would need to redact. The redaction of the personal identifiers would be a nominal amount of the information on the documents, but it would require more time and resources than the current removal process. Further, most importantly, DoD has on occasion identified personal medical information in the review of material which raises heighten concerns. An example of such material is the report from April 14, 2000, titled "Consultation Report on Contributor Material: A

report of mitochondrial DNA sequence analysis that involves unidentified skeletal remains from a WWII case and a comparison to six references representing six families presumed to be associated with the remains." [Doc. 31-5, p. 12]. Certainly, the DoD has significant concerns about revealing DNA sequence analysis of family members, even in a limited form as would be provided in such a report.

Conclusion

For the reasons cited herein, DoD respectfully requests this Court deny Plaintiff's Motion for Clarification and to Compel Production of Documents.

DATED: February 7, 2018

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 7th day of February 2018, and was served via U.S. Mail as follows:

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