

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

UNITED STATES  
DEPARTMENT OF DEFENSE

Defendant

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

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

**PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO HIS OPPOSED  
MOTION FOR CLARIFICATION AND TO  
COMPEL PRODUCTION OF DOCUMENTS**

1. Plaintiff John Eakin *pro se* respectfully files his reply to Defendant's Response to Plaintiff's Motion for Clarification and to Compel Production of Documents. While in the process of falsely alleging that Plaintiff's motion contains "confusing and factually unsupported claims," Defendants response has confirmed their failure to comply with the FOIA, and also inaccurately described Plaintiff's motion.

2. Defendant's Response, at page 1, claims they have provided Plaintiff with "a set of X-files containing approximately 272,822 pages" which is true. They fail, however, to mention that the set of files provided were blatantly incomplete and years out of date. Later versions have been released to multiple requesters. The heart of the matter is that as Defendants admit in footnote 4, they have no idea what documents they have previously released under FOIA. 5 USC § 552(a)(2) requires that agencies make available in their electronic reading rooms copies of all records, regardless of form or format, that have been released to any person making a FOIA request; likely to become the subject of subsequent requests; or, that have been requested three or more times. All

of which certainly apply to the records Defendants now claim to be unable to determine if they have been previously released.

3. Defendants now ask this court to excuse their inability to comply with the court's order and reward their prior bad behavior. Had Defendants consistently complied with the electronic reading room requirements of FOIA, they would not only be able to determine what had been previously released, but this litigation would likely not have been necessary.

4. Defendants at page 3 of their response correctly present part of Plaintiff's FOIA request for contract documents as requesting "**ALL** contracts, contract amendments/modifications, and similar documents...." [emphasis added] Then, at footnote 3 Defendant states,

"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."

Therefore, Defendant has admitted that while Plaintiff had requested ALL contracts, there were at least three contracts, plus various amendments/modifications, yet in footnote 2 they state that they produced only a single contract to Plaintiff.

5. In addition, as described in Plaintiff's original motion, there are significant discrepancies between the single contract released to Plaintiff and Defendant's FY 2013 budget proposal (Exhibit 6, ECF 31-6 at 13)<sup>1</sup> which describes a three-year, \$9.5 million project to scan all 442,000 IDPFs, not just those 280,000 with initials A-L. If additional

---

<sup>1</sup> "The three-year project to scan all 442,000 IDPF files into an archival data library will provide "at will" access to sustain research and analysis to support the POW/MIA mission. .... The project estimate is \$9.5 million over the 3 years and the U.S. Army has agreed to fund \$600K per year...."

documents exist, Defendants should provide them. Otherwise, Defendants should explain the discrepancies.

6. In a similar vein, FOIA § 552(a)(4)(B) requires agencies to provide the records in any readily reproducible format requested by the person making the request. In this case, Plaintiff expected to receive the records in the format specified by the contract, that is in a searchable .pdf file format. Rather than simply providing a contract amendment, if such exists, that modifies the requirement that the scanned files be in a searchable format, Defendants instead falsely accuse Plaintiff of gathering evidence for a False Claims Act suit.

7. If the evidence supports a filing under 31 USC § 3730 (False Claims Act), Plaintiff will be happy to file such if Defendants are unable to properly investigate and will waive their right to oppose such under FCA § 3730(e)(4)(A).

8. And perhaps most significantly, Defendants have failed to defend their claim that the requested documents contain embedded exempt material except to claim that it is non-responsive to Plaintiff's request because they are FOIA requests submitted by third parties.

9. Defendants have completely failed to refute Plaintiff's assertion that none of the embedded material is exempt under any provision of the FOIA. Their only claim is that the embedded third-party FOIA requests are non-responsive to Plaintiff's request. However, their assertion fails because they neglect the obvious observation that each of these embedded FOIA requests were individually placed in these files by a multitude of different government employees who, over many years, considered that each of these embedded documents to be part and parcel of the IDPFs they were filed in. Defendants cannot now claim the third-party requests are not part of the file merely because it is now

inconvenient and gives them an excuse to delay release of the bulk of the files. By custom and practice over many years by many government employees the third-party FOIA requests are integral components of the requested IDPFs, responsive to Plaintiff's request and must be released without further delay.

10. To further delay release of these documents for a manual review of each file would be to further reward Defendant's bad behavior in not producing electronically searchable .pdf files as required by the provisions of the scanning contract.

### **Conclusion**

11. For all the reasons cited herein and in Plaintiff's motion, Plaintiff respectfully requests this Court grant Plaintiff's motion in full and order immediate release of all of the requested documents and encourage Defendants' future compliance with all provisions of the FOIA.

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 13th day of February, 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*

Mary F. Kruger  
Assistant United States Attorney  
601 N.W. Loop 410, Suite 600  
San Antonio, Texas 78216