

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. SA-16-cv-0972-RCL

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

1. On May 21, 2018, Plaintiff John Eakin received from Defendants a computer hard drive containing a semi-annual document release in accordance with this Court's August 2, 2017 Order. The documents provided to Plaintiff included two files titled as below:

- 12 Oct 2017 - 23 April 2018 Purged (Flickinger).pdf 1,854,271KB 7,293 pages
- Kilianski purged files.pdf 36,616KB 151 pages

Defendants' Disclosure of Redacted Documents

2. These files appear to contain the material redacted from the other documents produced to Plaintiff in accordance with the Court's order. These documents are either in the public domain or virtually identical to documents already in the public domain.

3. Plaintiffs' review of these "purged" files finds no material that could reasonably be considered exempt, privileged, or restricted from disclosure by statute. The purged pages are similar to the exemplar attached as Exhibit 4 to Plaintiffs' Motion to Compel (ECF Doc 31-4) and similar to the embedded FOIA requests contained in

other document releases to Plaintiff going back to at least 2012. These, now public, documents are those used by Defendant to justify a four year delay in release of the documents that are the subject of this litigation.

4. These newly released documents are virtually identical to documents described as "non-responsive" in the Vaughn Index previously provided by Defendants (ECF doc 31-5).

5. In the relatively recent case of *American Immigration Lawyers Association v. EOIR*, 830 F.3d at 669 (D.C. Cir. 2016) the agency processed thousands of pages of complaint files, but made redactions of information that the agency deemed to be non-responsive to the FOIA request. *Id.* at 672. Responding to a challenge to this practice, the D.C. Circuit ruled that the FOIA “sets forth the broad outlines of a process for agencies to follow when responding to FOIA requests: first, identify responsive records; second, identify those responsive records or portions of responsive records that are statutorily exempt from disclosure; and third, if necessary and feasible, redact exempt information from the responsive records.” *Id.* at 677. Significantly, the court ruled that **“[t]he statute does not provide for . . . redacting non-exempt information within responsive records.”** *Id.*

6. Relying on the Supreme Court’s ruling in *Milner v. Department of the Navy* that the FOIA’s exemptions are “‘exclusive’ and must be ‘narrowly construed,’” 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) & *FBI v. Abramson*, 456 U.S. 615, 630 (1982)), the D.C. Circuit ruled that “non-responsive redactions . . . find no home in FOIA’s scheme.” *AILA*, 830 F.3d at 677. “Rather,” the court declared, “once an agency identifies a record it deems responsive to a FOIA

request, the statute compels disclosure of the responsive record—i.e., as a unit—except insofar as the agency may redact information falling within a statutory exemption.” *Id.*

7. In arriving at this conclusion the court did not attempt to answer the important antecedent question of what a “record” is under the FOIA. *Id.* at 678. Indeed, it noted that the “practical significance of FOIA’s command to disclose a responsive record as a unit (after deletion of exempt information) depends on how one conceives of a ‘record.’” *Id.* In the case before it, the parties had not addressed this antecedent question and so the court simply took “as a given” the agency’s own understanding of what constitutes a “record.” *Id.* The court then held that “once an agency itself identifies a particular document or collection of material—such as a chain of emails—as a responsive ‘record,’ the only information the agency may redact from that record is that falling within one of the statutory exemptions.” *Id.* at 678-79.

Document Release is Being Deliberately Delayed

8. In addition to improperly withholding non-exempt embedded material as an excuse to avoid release of the documents requested by Plaintiff, this most recent document release contains evidence that Defendants are deliberately delaying release of documents this Court has ordered to be released. "Slow walking" as the practice is known within Defendant's agency.

9. The documents being released to Plaintiff are essentially in alphabetical order according to the last name of the subject deceased individual. This latest document delivery included files with the last initial through "Ce." At the time these documents were copied for release to Plaintiff, Defendant had actually reviewed (but did not release) files at least up to those pertaining to individuals with last initial "G."

10. Further evidence of Defendant's deliberate delay in releasing the requested files is shown by the latest change date in the files delivered to Plaintiff. The latest files released had been reviewed and were ready for release by March 16, 2018 - more than two months prior to the actual delivery to Plaintiff on May 21, 2018. It is apparent that Defendant has either not reviewed any records in the last two months, or has not released all of the documents they claim require review and have actually been reviewed and purged as they claim necessary.

Scanning Contract Documents Have Not Been Produced

11. Neither has Defendant produced the missing contract documents they previously represented as having been delivered to Plaintiff in spite of the obvious material omissions in the contract documents delivered to Plaintiff. Additionally, since the commencement of Plaintiff's FOIA request and subsequent litigation, Defendant has entered in to additional agreements to digitize additional files requested by Plaintiff. *See footnotes 3 and 5 to Defendant's Response* (ECF Doc 36 at 5,6) More than 90,000 additional files have been digitized to date, yet Defendants refuse to produce either the contract documents or the subsequently produced digital files.

Defendant Has a History of Concealing Documents

12. Defendant's false representation that the requested documents contain material exempt from release under FOIA; their representation that all contract documents had been released; and, their deliberate delay in complying with the Court's Order calls in to question the veracity of all representations made by Defendants in this and related litigation in this Court.

13. Not only is this Plaintiff's second FOIA lawsuit against this Defendant to obtain virtually the same documents, (*See Eakin v. DoD SA-10-cv-00784-FB-NSN*) but,

based on documents Defendants had attempted to conceal, he was also able to successfully sue the same Defendant (*See Eakin v. ABMC SA-12-CA-1002-FB-HJB*) when they were found to be concealing the remains of a deceased family member who perished while a prisoner of war. In each case, Defendant has misrepresented facts, unnecessarily delayed the legal process and deliberately denied Plaintiff access to documents and property that were rightly his. Currently, Plaintiff's family is a party to a fourth action in this Court (*See Patterson v. DPAA SA-17-cv-00467-XR*) against Defendant DoD in which they allege that Defendant continues to conceal the majority of the remains of this same deceased family member as well as the remains of other deceased American Servicemembers who gave their lives in defense of our Country. Defendants' conduct in concealing both records and the actual remains of American Heroes is reprehensible and dishonors all who serve the United States of America in any capacity.

Conclusion

14. Defendant's actions in this FOIA suit are part of their larger effort to avoid the return of the remains of missing American Servicemembers due to Defendants' many errors in the identification of remains. Plaintiff respectfully requests that, in addition to ordering the immediate release of all the requested documents including those to be produced under the subsequent scanning contract(s), the Court should also consider the issuance of findings appropriate for a referral to the Office of the Special Counsel under FOIA section 552(b)(4)(F) to discourage future FOIA violations and encourage judicial economy.

Respectfully submitted,

/s/ John Eakin

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