

**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

PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. On May 10, 2016, Plaintiff submitted a FOIA request to the Office of the Secretary of Defense/Joint Staff, (DoD FOIA request number 16-F-0955), a component of Defendant agency, 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.

2. On May 11, 2016, Plaintiff submitted a FOIA request to the ODCMO Directorate for Oversight and Compliance, (DoD FOIA request number 16-F-0958), a component of Defendant agency, 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).

3. Defendant notified Plaintiff by letter dated May 13, 2016, that his May 10, 2016 FOIA request (DoD FOIA request number 16-F-0955) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants' letter provided instructions for appeal of this decision. On May 16, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal.

4. Defendant notified Plaintiff by email dated May 23, 2016, that his May 11, 2016 FOIA request (DoD FOIA request number 16-F-0958) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants' letter provided instructions for appeal of this decision. On May 23, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal.

5. Defendant has constructively denied Plaintiff's appeal. *See* 5 U.S.C. § 552(a)(6)(C) (2000); *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 328 (D.D.C. 2002) ("The FOIA is considered a unique statute because it recognizes a constructive exhaustion doctrine for purposes of judicial review upon the expiration of certain relevant FOIA deadlines.").

6. Defendant has not claimed that any part of the requested IDPF files are exempt from disclosure under any specific provision of FOIA.

7. Plaintiff has received fifteen (15) redacted pages of the "contract documents" (request #2) from Defendant on January 20, 2017 and informed Plaintiff that additional contract documents will be provided at an unspecified future date.

8. In Plaintiff's 2010 FOIA action, (this Court's case number SA-10-cv-00784-FB-NSN), Plaintiff requested IDPF and X-files similar to those at issue currently. In 2012, Defendant announced that the requested IDPFs and X-files would be available to the public.

DPMO's (now DPAA) newsletter, *The Torch*, Spring 2012. ("*DPMO has initiated a scanning project to digitize all the X-Files to preserve the information, make the files more readily available, and to share the information within the accounting community....*")

9. In the 2010 action, Defendant determined that they see "[N]o reason to deny the release of home addresses of soldiers killed in World War II. Letter, Department of Defense, Freedom of Information Division, Ref: 10-L-1349, dated Feb 3, 2011. Exh 1, SA-10-CA-784-FB-NSN document 25-1 at 20-21.

10. In the 2010 action, Defendant determined that "[T]he names of the next of kin of soldiers killed in World War II, can now be released." Letter, Department of Defense, Freedom of Information Division, Ref: 10-L-1349, dated May 6, 2011. Exh 1, SA-10-CA-784-FB-NSN document 25-1 at 20-21.

11. The requested records are contained in three, two TB USB hard drives.

12. The requested records exist in two digital formats, .TIFF and .PDF which were created from the .TIFF files.

13. During the conversion of the requested records from hard copy to the requested digital format, Metadata was collected on each file. Contract Document pg 927XR_000010.

14. The contract for conversion of the requested records from hard copy to the requested digital format required the files to be processed to be machine readable. Contract Document pg 927XR_000010.

15. The contract for conversion of the requested records from hard copy to the requested digital format required the files to be processed to recognize specific forms in common use by DPAA.. Contract Document pg 927XR_000010.

16. Nothing in the requested IDPF files would require redaction if filed with this Court's ECM system. Fed.R.Civ Proc 5.2, local rule CV-10.