

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

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff John Eakin *pro se* respectfully moves this Court, pursuant to Fed. R. Civ. P. 56(c), for partial summary judgment in this Freedom of Information Act case. In support of this motion, the Court is respectfully referred to the accompanying memorandum of points and authorities, Plaintiffs' Declaration and Exhibits submitted in support of Summary Judgment, and Statement of Material Facts As to Which There Is No Genuine Dispute.

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 17th day of June, 2019, 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

Jacquelyn Michelle Christilles
Assistant United States Attorney
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

**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

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

Thousands of American families have yet to obtain answers to their questions concerning the ultimate fate of their loved ones who did not return from World War II. They have been denied this basic information due to the intransigence of the U.S. Government and its reluctance to admit that the identification of WWII remains was fatally flawed and these thousands of Unknown Soldiers could and can be identified and returned to their families for burial as prescribed by the beliefs of each family.

In the Order of August 2, (ECF Doc 30) 2017, this Court *sua sponte* ordered Defendants to produce a limited Vaughn Index. Prior to receipt of this Vaughn Index, Plaintiff was unable to properly object to Defendants' claims that certain files were exempt from release. *Id* at 14, 16 Defendant has now released a sizeable volume of files and a Vaughn Index to Plaintiff and he is now able to demonstrate that Defendant has erroneously claimed that certain documents are exempt from release.

Additionally, the Court's order of June 5, 2019 (ECF 43) has directed that the requested files are to be produced as searchable .pdf files (as opposed to non-searchable image .pdf files) as required by the scanning contract issued by Defendants. If the requested files truly require redaction, they could be easily and quickly searched without manual review of each and every file. Objection to efficiently searching these files would appear to either be an excuse to delay release or to conceal the fact that the scanned files did not conform to contract specifications.

Plaintiff notes the courts' concern about the volume of files requested and points out that these are electronic files that can be reproduced at virtually no cost and a minimal amount of time. Copying 4.2 terabytes of files requires little more human interaction or cost than copying a few hundred pages of hardcopy. Plaintiff would further note that Defendant has made this request burdensome for all parties by their unreasonable demand to review and redact every file without showing the existence of any information actually exempt under recognized FOIA exemptions and requiring redaction.

II. HISTORY OF THIS LITIGATION

Plaintiff's quest for these files has a long history. In 2010, Plaintiff brought a FOIA action (*Eakin v. United States Department of Defense*, SA-10-cv-00784-FB-NSN) to obtain the "X-files," a subset of the Individual Deceased Personnel Files pertaining to unidentified remains that are the subject of this litigation. These are a portion of the previously released files that contain embedded FOIA requests that Defendant now objects to releasing.

Receipt of the "X-files" made it possible for Plaintiff to petition for a Writ of Mandamus in 2012 (*Eakin v. American Battle Monuments Commission*, SA-12-CA-1002-FB-HJB) to recover the remains of a family member missing since WWII who had been buried as an Unknown Soldier. This was the first Unknown recovered in modern times and the first of

approximately two-hundred other WWII Unknowns subsequently returned to their families for burial.

In 2017, the families of seven missing American Servicemembers, including Plaintiff's family, brought another suit in the Western District of Texas (Patterson, et al v. Defense POW/MIA Accounting Agency, 5:17-cv-00467-XR) requesting the return of remains unreasonably withheld from them and seeking an order providing due process to all families of missing servicemembers in recovering the remains of their loved ones. This case is set for trial in October 2019 if the remaining issues are not resolved by the pending motions for summary judgment.

Without the Individual Deceased Personnel Files that are the subject of this litigation, families of the missing will be severely handicapped in exercising their due process rights in recovering their missing family members.

III. INTRODUCTION

At issue in this suit are approximately 480,000 files known as Individual Deceased Personnel files (IDPF or 293 files) of World War II American Servicemembers that have been, or are expected to be, digitally scanned as computer files. The previously released "X-Files" that pertain to unidentified remains are a subset of these IDPF files.

While there is no question as to the releasability of these files, Defendant claims that a small number of files contain FOIA requests for the basic file and that these embedded documents are exempt from release under FOIA exemption six or are non-responsive to Plaintiffs request.

Embedded FOIA requests, virtually identical to those at issue in this case, were released in response to Plaintiffs 2010 request for the X-files. Additionally, these same files, including

the embedded FOIA requests, were released to an unknown number of other FOIA requesters. At the time of their release, there was no claim or consideration that they were exempt from disclosure because of the embedded material. The appearance is that Defendants have now seized on this manufactured issue to delay disclosure of the requested files.

This Court's Order of August 2, 2017 (ECF doc 30) directed that defendant shall produce all previously withheld, non-exempt, responsive documents already marked for release. The Order of June 5, 2019 (ECF doc 43) directed defendant to produce any documents ready for release, whether they were processed for this case, for another FOIA requester, or for inclusion in the Defense Department's reading room.

In the twenty-two months since the Order of August 2, 2017 (ECF doc 30), Defendant has provided bulk production of redacted files in October and December of 2017, January, June and November of 2018. These deliveries have contained the requested files for all personnel having a last initial of A and B and some files with a last initial of C. At this rate, the final delivery will not occur until at least 2024 at the earliest, far longer than Defendants' estimate of 2021.

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. Disputed Issue

The single disputed issue remaining is Defendants' refusal to release documents requested by Plaintiff's Freedom of Information request due to the inclusion in a small number of these files of a request for the basic document. Defendants assert that these embedded requests are either non-responsive to Plaintiff's request or are exempt from release under FOIA. Plaintiff challenges their assertion.

B. Background

Defendant U.S. Government has a history of unreasonably restricting access to the requested files. In response to Plaintiff's 2010 FOIA request for a subset of these files, Defendants falsely refused to admit the existence of digital copies and provided an unreasonable reproduction cost based on reproduction of hardcopy. These files contained embedded FOIA requests virtually identical to those Defendant now objects to releasing.

In the instant case, Defendant has not claimed any portion of the requested documents are exempt from release under FOIA, rather, that the requested files contain embedded material that is either non-responsive to Plaintiff's request or exempt from release and each file must be manually reviewed and, if necessary, redacted.

C. FOIA Request and Denials

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 (IDPFs & X-files):

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.

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 (contract documents):

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).

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 within the time allowed by law.

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 within the time allowed by law.

V. LEGAL STANDARDS

a. Summary Judgment Standard

Summary judgment is appropriate only when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P.56(c). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue is one that, if resolved, establishes a claim or defense, affecting the action's outcome. *Anderson v. Liberty Lobby, Ind.*, 477 U.S. 242 (1986). Factual assertions in the moving party's affidavits or declarations may be accepted as true unless the opposing party submits his own affidavits or declarations or documentary evidence to the contrary. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992)

b. De Novo Review of the Agency Decision.

FOIA lawsuits are adjudicated according to standards and procedures that are quite atypical within the field of administrative law. First, the usual "substantial evidence" standard of review of agency action is replaced in the FOIA by a *de novo* review standard. *See* 5 U.S.C. § 552(a)(4)(B); *see also Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999) (observing that *de novo* standard of review comports with congressional intent); *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (explaining that review is "*de novo*"). Second, the burden of proof is on the defendant agency, which must justify its decision to withhold any information.

c. Administrative Remedies have been Constructively Exhausted.

The FOIA permits requesters to treat an agency's failure to comply with its specific time limits as full, or "constructive," exhaustion of administrative remedies. *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."). Thus, when an agency does not respond to a perfected request within the twenty-day (excepting Saturdays, Sundays, and legal public holidays) statutory time limit set forth in the Act, 5 U.S.C. § 552(a)(6)(A)(i) the requester is deemed to have exhausted his administrative remedies and can seek immediate judicial review, even though the requester has not filed an administrative appeal. *See, e.g., Pollack*, 49 F.3d at 118-19 ("Under FOIA's statutory scheme, when an agency fails to comply in a timely fashion with a proper FOIA request, it may not insist on the exhaustion of administrative remedies unless the agency responds to the request before suit is filed."); *Campbell v. Unknown Power Superintendent of the Flathead Irrigation & Power Project*, No. 91-35104, 1992 WL 84315, at *1 (9th Cir. Apr. 22, 1992) (noting that exhaustion is

deemed to have occurred if agency fails to respond to request within statutory time limit); *Gabel v. IRS*, No. 97-1653, 1998 U.S. Dist. LEXIS 12467, at *10 (N.D. Cal. June 25, 1998) (deciding that a plaintiff who did not receive a timely response "was entitled to file his complaint without further pursuing an administrative appeal or seeking further explanation"); cf. *Anderson v. USPS*, 7 F. Supp. 2d 583, 586 (E.D. Pa. 1998) (finding that "vague positive response" from agency received after statutory time limit allows plaintiff to claim "constructive" exhaustion), *aff'd*, 187 F.3d 625 (3d Cir. 1999) (unpublished table decision).

VI. EMBEDDED FOIA REQUESTS ARE NOT EXEMPT FROM RELEASE

In response to the Court's Order of August 2, 2017, Defendants produced the Vaughn Index attached as Exhibit Two. This Vaughn Index contains approximately 150 entries describing randomly selected files redacted by Defendants. Two columns describe the claimed exemption from release under FOIA.

The first column is labeled, "Responsive to Current FOIA Request?" All but one of the entries contain the response, "No, removed as non-responsive." The single remaining entry is blank.

The second column is labeled, "If Deemed Responsive, Redaction In Part or Whole of Document Would be Required by FOIA Exemption/Agency Nondisclosure Justification." Twelve entries indicate "none." The remaining entries indicate, "5 U.S.C. § 552(b)(6) for personal information of requester."

a. "Non-Responsive to the request" is not an exemption from release

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.*

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.*

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.

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.

b. Embedded FOIA requests are not exempt under FOIA exemption 6.

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)

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).

....

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

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.

VII. ADDITIONAL RECORDS SUBJECT TO THIS REQUEST

At the time of Plaintiff's FOIA request, only the files for deceased persons having the last initial of A through L had been digitized. As described in Defendant's Response to Plaintiff's Motion for Clarification and to Compel Production of Documents (ECF Doc 36), subsequent to filing this litigation, Defendants have continued to digitally scan the balance of the files, initials M through Z. In the interest of judicial economy, Plaintiff respectfully requests the Court order release of these additionally scanned files under the same conditions as those which were originally contemplated when this suit was brought.

VIII. RELIEF REQUESTED

Plaintiff respectfully requests the following relief:

- a. An order prohibiting Defendant from redaction of non-exempt embedded documents.
- b. An order directing Defendant to complete any further review of the requested files within thirty (30) days.
- c. An order directing Defendant to timely produce all existing digitized WWII era Individual Deceased Personnel Files.
- d. An order directing Defendant to produce at approximate six month intervals all subsequently digitized WWII era Individual Deceased Personnel Files until all such files have been produced to Plaintiff.