

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. SA-16-CV-0972-RCL
	§	
UNITED STATES DEPARTMENT	§	
OF DEFENSE,	§	
	§	
Defendant.	§	

**DEFENDANT’S RESPONSE TO PLAINTIFF’S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Defendant, United States Department of Defense (“DoD”), hereby responds in opposition to Plaintiff’s Partial Motion for Summary Judgment, and would show as follows:

I. INTRODUCTION

Plaintiff’s Motion for Partial Summary Judgment should be denied because the DoD has not inappropriately withheld any documents from Plaintiff. This Court should also deny Plaintiff’s request to order production of documents created after Plaintiff’s May 2016 Freedom of Information Act (“FOIA”) request because Plaintiff has not exhausted his administrative remedies which is a prerequisite for judicial review.

II. BACKGROUND

On May 10, 2016, Plaintiff filed a FOIA request with 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.

Complaint 8, ECF No. 1. On May 13, 2016, DoD notified Plaintiff that his May 10, 2016 FOIA request was received, but it would be unable to respond within the 20-day statutory time period.

Id. at 7. On May 16, 2016, Plaintiff appealed DoD's decision. *Id.* at 6.

On May 11, 2016, Plaintiff 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).

Id. at 10. On May 23, 2016, DoD notified Plaintiff that his May 11, 2016 FOIA request was received, but it would be unable to respond within the 20-day statutory time period. *Id.* at 12. On May 23, 2016, Plaintiff appealed DoD's decision. *Id.* at 14.

On September 30, 2016, Plaintiff filed this action against DoD seeking to compel a response to his FOIA requests of May 10, 2016 and May 11, 2016. *Id.* On November 1, 2016, DoD filed an answer denying certain allegations of the complaint and raising affirmative defenses. Def.'s Answer, ECF No. 8. Plaintiff and DoD filed cross-motions for summary judgment in this matter, and the Government sought, in the alternative, an *Open America* stay. *See* Pl.'s Mot.

Summ. J., ECF No. 16; Def.'s Mot. Summ. J., ECF No. 22. This Court entered a memorandum and order on those motions on August 2, 2017.¹ Mem. Op., ECF. No. 29; Order, ECF No. 30.

Prior to Plaintiff's 2016 FOIA requests, U.S. Army Contracting Command entered into a contract on behalf of the Defense Prisoner of War/Missing Personnel Office ("DPMO"), a predecessor organization of the Defense POW/MIA Accounting Agency ("DPAA"), with Lockheed Martin Integrated Systems, Inc. ("Lockheed") to scan Individual Deceased Personnel Files ("IDPFs"). Ex. 1 to Def.'s Resp. Pl.'s Mot. Compel, ECF No. 36-1. The contract, entered into on August 27, 2012, required Lockheed to produce digital files in "two formats, a high resolution non-compressed archival version and a single Adobe Portable Format (.pdf)."² The contract did not require the documents be scanned using optical character recognition ("OCR") software. Lockheed digitized approximately 290,000 IDPFs, including the IDPFs for deceased U.S. military personnel whose last names begin with the letters A through L. Exhibit 1, Declaration of Christopher M. McDermott.

Although certain documents were in electronic format at the time of Plaintiff's 2016 request, the Army Human Resources Command Freedom of Information Act/Privacy Act ("AHRC FOIA/PA") Office needed to review the documents to determine which documents were responsive and nonresponsive and if any information in the responsive documents was exempt from release under FOIA. Ex. 2 to Def.'s Mot. Summ. J. (Declaration of Gilbert) 2, ECF No. 22-2. The Court has recognized that this review is necessary for the protection of the privacy interests

¹ By way of production 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.

² In Plaintiff's Motion for Clarification and to Compel Production of Documents, Plaintiff referenced and attached documents he represented was the contract issued by DoD to digitize the WWII IDPFs. Ex. 2 Pl.'s Mot. Clarification and Compel, ECF No. 31-2. 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. The contract relevant to the IDPFs in electronic format at the time of Plaintiff's FOIA request was the Lockheed contract.

of individuals whose private information, such as medical records or home addresses, is potentially contained in those files. Order 14, ECF No. 28. To date the DoD has released IDPFs to Plaintiff relating to personnel with last names starting with A-E.

Since the Court's order of August 2, 2017, the DoD has produced millions of pages of documents, over 2 terabytes of data to Plaintiff. 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." *See* Mem. Op. 17, ECF No. 29. 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 the Court's August order. 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. Exhibit 2, Letter to John Eakin with Enclosed Vaughn Index.

On September 27, 2017³, the Department of Health and Human Services ("DHHS") entered into a contract on behalf of DPAA with Na Ali'i Consulting & Sales, LLC ("Na Ali'i"). The contract required Na Ali'i to "perform document management, data conversion, and indexing services for records known as Individual Deceased Personnel Files (IDPFs)." The contract further required Na Ali'i to enable and use OCR software tools to locate, index, and ensure the "digital copy constitutes a fair, accurate, and machine-readable version of each digitized content, to the extent possible." The intent of the current contract is to complete the scanning of the IDPFs focusing on the files for deceased U.S. military personnel whose last names begin with the letter

³ This case was commenced on September 30, 2016, nearly one year prior to the contract with Na Ali'i to digitize the remaining IDPFs.

M through Z that remain to be digitized (approximately 165,000 files). Exhibit 1, Declaration of Christopher McDermott.

III. LAW AND ANALYSIS

A. FOIA Requests are not Responsive to Plaintiff's Request

The twelve page Vaughn Index provided to Plaintiff on January 12, 2018 identified the documents that were not produced to Plaintiff. Pl.'s Mot. Partial Summ. J. 1, ECF No. 46. The document descriptions in this index included: correspondence, request for service, FOIA request, draft response, Form 11, and a report of mitochondrial DNA sequence analysis. Exhibit 2, Letter to John Eakin with Enclosed Vaughn Index. In his Partial Motion for Summary Judgment, Plaintiff only disputes the withholding of FOIA requests for the IDPFs. *See Id.* at 6. Plaintiff's Motion does not specifically address any of the documents listed in the Vaughn index.

FOIA requires the Government to make certain records available to any person when the records are reasonably described by the request and are not exempt from disclosure under one of the applicable exemptions. *See* 5 U.S.C. § 552(a)(3)(A). In responding to a FOIA request, the agency must "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3)(D).

On May 10, 2016, Plaintiff requested:

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.

As such, FOIA requests from other individuals are not responsive to Plaintiff's 2016 FOIA request for IDPFs.

Plaintiff relies on *American Immigration Lawyers Association v. EOIR*, for the proposition that FOIA requests from other individuals may not be withheld as non-responsive. *American Immigration Lawyers Association v. EOIR*, 830 F.3d 669 (D.C. Cir. 2016). Plaintiff asserts that the FOIA requests are responsive because the agency has identified them as records responsive to his request. See Pl.’s Mot. Summ. J. 11, ECF No. 46. This is not accurate. Instead, as required by FOIA, the agency “review[ed], manually or by automated means, agency records for the purpose of locating those records which [were] responsive” to Plaintiff’s request and determined that the FOIA requests were not responsive. Unlike the facts here, in *American* the agency “went down to the level of an individual sentence within a paragraph within an e-mail message” and redacted that individual sentence as non-responsive. *American Immigration Lawyers Association*, 830 F.3d at 679. In *American*, the agency identified a record as responsive—the e-mail message—and then redacted portions of that record as non-responsive. Here, the AFHRC FOIA/PA Office reviewed a system of records to determine which records were responsive to Plaintiff’s request and which records in that system of records were non-responsive.

The same court that decided *American* recognized that an agency may determine that certain documents within a collection of documents are non-responsive. In *Citizens for Responsibility & Ethics in Wash. V. United States DOJ*, the D.C. District Court, with regard to non-responsive documents, stated “such documents are simply not subject to the statute’s disclosure requirements, and agencies may decline to release such material without invoking a statutory exemption...[t]hat is, while most FOIA cases deal with documents that are located and then withheld under a particular exemption, non-responsive records need no such justification.” *Citizens for Responsibility & Ethics in Wash. V. United States DOJ*, 48 F.Supp. 3d 40, 52 (D.C. Cir. 2014). In that case, one such non-responsive document was “an email exchange discussing the FOIA request itself.” *Id.*

Even if this Court found that the prior FOIA requests were responsive, which they are not, this Court has recognized that those requests would still need to be reviewed by the AHRC PA/FOIA office to determine if they contain information exempt from release under FOIA. Many of these documents would likely contain personally identifiable information (“PII”) exempt from release under 5 U.S.C. § 552(b)(6).

Plaintiff claims that “embedded FOIA requests” were released in response to Plaintiff’s 2010 request for the X-files, presumably indicating such potential mistaken release now sets some sort of precedent. Even assuming FOIA requests were previously released, Plaintiff’s argument fails. Instances of prior inadvertent releases of PII, for instance, certainly do not mean that same PII is now somehow subject to release. Mistakes that may have been made in any prior release do not change the proper analysis in future instances.

B. The FOIA Office Must Review Responsive Documents Before Producing Those Documents to Plaintiff

This Court has recognized that the FOIA review is necessary. Without any basis, Plaintiff asserts that “if the requested files truly require redaction, they could be easily and quickly searched without manual review of each and every file.” Pl.’s Mot. Summ. J. 4, ECF No. 46. Although this Court ordered the Government going forward to produce documents as searchable PDFs, the AHRC FOIA/PA office will still need to review documents manually. *See* Order, ECF No. 43. In order to create a “searchable PDF,” images must be converted into machine-encoded text. Exhibit 1, Declaration of Christopher McDermott. This conversion of images is done using optical character recognition (“OCR”) software. *Id.* A number of factors contribute to decreased accuracy during the OCR conversion process, including image quality, font type and size, and whether the image is handwritten or typed. *Id.* IDPFs are routinely comprised of older documents that are of poor quality, on problematic source media/paper types, blurred copied fonts, handwritten, or

contain images that are unrecognizable during the OCR process. *Id.* For these reasons, IDPFs that have been processed with OCR will still need to be manually reviewed.⁴

C. This Court Lacks Jurisdiction to Order Defendant to Release Additional Documents

“To qualify as an agency record, the agency must: 1) create or obtain the requested materials; and 2) be in control of the requested material at the time the FOIA request is made.” *McQueen v. United States*, 179 F.R.D. 522, 525 (S.D. Tex. May 1998) (citing *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 144, 106 L.Ed. 2d 112, 109 S. Ct. 2841 (1989)).

Plaintiff made his request for “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” on May 10, 2016. At the time of Plaintiff’s request, the M-Z IDPFs had not been scanned into digital or electronic format—the requested documents were not under the control of the agency. The contract for the scanning of those documents was not awarded until September 27, 2017. As such, Plaintiff’s FOIA request and this suit pre-date the digitalization contract for records M-Z.

Defendant is unaware of any additional FOIA requests or appeals by Plaintiff for the IDPFs that now exist in digital or electronic format. As such, Plaintiff has not exhausted his administrative remedies. According to 5 U.S.C. § 552(a)(6), a person exhausts his or her administrative remedies if the agency fails to comply with certain applicable time limits after the request is made. The Fifth Circuit has held that FOIA should be read to require proof of exhaustion of administrative remedies prior to seeking judicial review. *Hedley v. United States*, 594 F.2d

⁴ The images of documents attached to Exhibit 1 demonstrate that certain OCRd IDPFs do not result in searchable text.

1043, 1044 (5th Cir. 1979). Therefore, Plaintiff's request for the M-Z IDPFs would not properly be before this Court.

IV. CONCLUSION

For the reasons cited herein, DoD respectfully requests this Court deny Plaintiff's Motion for Partial Summary Judgment.

DATED: July 15, 2019.

Respectfully submitted,

JOHN F. BASH
UNITED STATES ATTORNEY

By: *s/ Jacquelyn M. Christilles*
JACQUELYN M. CHRISTILLES
Assistant United States Attorney
Texas State Bar No. 24075431
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Tel: (210) 384-7100
Fax: (210) 384-7312
E-mail: Jacquelyn.christilles@usdoj.gov

MARY F. KRUGER
Assistant United States Attorney
Georgia Bar No. 6282540
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Telephone: (210) 384-7360
Facsimile: (210) 384-7322
E-mail: mary.kruger@usdoj.gov

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system on this 12th day of July, 2019, and was served by Federal Express as follows:

John J. Eakin
9865 Tower View Road
Helotes, Texas 78023
jeakin@airsafety.com
PRO SE

/s/ Jacquelyn M. Christilles
JACQUELYN M. CHRISTILLES
Assistant United States Attorney