UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL NO. SA-16-cv-0972-RCL
	§	
UNITED STATES	§	
DEPARTMENT OF DEFENSE	§	
	§	
Defendant	§	
	§	

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff *pro se* John Eakin respectfully provides this reply to Defendant's Response to Plaintiff's Motion for Partial Summary Judgment.

I. Defendent Denies That Subject Documents Were to be in Searchable Format

Defendant's response (ECF 48 at 2) states that Plaintiff's May 11, 2016 FOIA request included:

> 1. All contracts, contract amendments/modifications, and similar documents pertaining to contracts for digital scanning or U.S. Army Individual Deceased Personnel Files ....

And that on January 18, 2017 and February 9, 2017, the DoD produced all documents it determined to be responsive to Plaintiff's request of May 11, 2016. (*Id* at FN 1). Defendents now claim that their production of January 18, 2017 was not really contract documents, "but instead only an internal support agreement," (ECF 48, FN 2) therefore, Defendant asserts that there wasn't really a requirement to provide the requested files in a searchable format. (*Id* at 3)

Plaintiff relied upon Defendant's representation in their transmittal letter of January 18, 2017 (ECF 31-2) that they were producing what they then termed "Contract documents." The attached "contract documents" (*Id* at 11) or "internal support agreement" (ECF 48, FN2) both state:

> "I. Optical Character Recognition (OCR). Scanned items shall be run through optical character recognition software to ensure they are machine readable to the maximum extent possible. Recognizing that OCR is an imperfect technology and the condition of the paper files determines OCR quality, the OCR data shall be editable to correct any discrepancies found after scanning."

The OCR process converts "image" .pdf files to "searchable" .pdf files and is the type of document Defendant apparently contracted to receive. Whether "contract documents" or "internal support agreement," it cannot be disputed that Defendant intended to obtain searchable .pdf files. Defendant's reply also callls in to question their representation that they have produced the requested "contract documents."

While the government is correct in describing the Individual Deceased Personnel Files as being poor copies that do not produce perfect OCR results, they do produce text acceptable for research purposes. More importantly, the embedded material they seek to redact is of more recent vintage, generally typed and converts to machine readable text very well.

II. "PII" is Not Exempt From Disclosure Under FOIA

The same January 18, 2017 letter transmitting the "contract" documents to Plaintiff (ECF 31-2), also confirms that the government is attempting to redact material not exempt from disclosure under the FOIA. Rather than screening out material exempt under FOIA, they are withholding "PII" or Personally Identifiable Information. PII is variously defined throughout the Federal Government and, while it may overlap, it does

not strictly conform to FOIA exemptions. The U.S. Army's online defination is:

> **Personally Identifiable Information** (**PII**) is any information about an individual which can be used to distinguish or trace an individual's identity such as name, Social Security Number (SSN), date and place of birth, mother's maiden name, and biometric records. [1]

"A 'bare conclusory assessment' that public disclosure of an employee's name would constitute an invasion of personal privacy is insufficient to support the existence of a privacy interest. *See* Stonehill v. IRS, No. 06-0599, 2008 WL 101712 (D.D.C. Jan. 10, 2008), at *10 (holding that agency affidavit stating that disclosure of an employee's name 'could cause harassment and/or undue embarrassment or could result in undue public attention' was too conclusory to support withholding under Exemptions 6 and 7(C)). '[I]f the government's bare assertion that a protected privacy interest in involved . . . is sufficient, then the FOIA privacy exemptions could effectively swallow the general rule favoring disclosure.' *Id*. Furthermore, the **'privacy interest at stake may vary depending on the context in which it is asserted.'** [emphisis added] and thus an agency must at least explain the ground for concluding that there, is some factual basis for concerns about 'harassment, intimidation, or physical harm.' See *Judicial Watch v. FDA*, 449 F.3d at 153 (holding that names of FDA employees and others who worked on the approval of a controversial abortion drug were properly withheld under Exemption 6 where the agency provided affidavits describing threats and instances of abortion-related violence). Because the Moore declaration does not provide a factual basis for the conclusion that harassment or intimidation would result from disclosure of the names, the Court cannot uphold the assertion of Exemption 6 or 7(C)." *United America Financial, Inc v. Potter*, 531 F. Supp. 2d 29 (2008 D.D.C)

In this case, defendants have provided Plaintiff with approximately 6,354 pages of redacted material in addition to the Vaughn Index ordered produced by this court. While documents similar to the "correspondence, request for service, FOIA request, draft response, Form 11, and a report of mitochondrial DNA sequence analysis" described by defendants (ECF 48 at 5), defendants have failed to provide a factual basis for their conclusion that such documents are exempt from disclosure.

III. Digitization of IDPF's is a Single On-going Project.

As this Court has observed, (ECF 29 at 9) Plaintiff exhausted all administrative remedies prior to filing this litigation. As described in Defendants' Response (ECF 48 at 3-5) and Fiscal Year 2013 Budget Estimates (ECF 31-6 at 12), the government set out in 2012 to digitize all of approximately 405,000 WWII Individual Deceased Personnel Files. After approximately four years, the program was suspended for budgetary and technical reasons. Plaintiff then iniated the current litigation expecting to obtain the then completed digital files as well as those yet to be produced when/if the program was restarted.

Defendant's original scanning program clearly intended to digitize the entire collection of IDPF's and Plaintiff's request was intended to obtain the entire collection as it was digitized. To seperate the files, as proposed by the government, in to two distinct collections according to the contract under which they were scanned, and require a second FOIA request, would significantly burden and waste the resources of both the Courts and Plaintiff. Judicial economy would not be served by requiring a second FOIA request, and a probable second round of litigation, involving essentially the same records

[1] https://www.rmda.army.mil/privacy/PII/PII.html last viewed July 16, 2019.

at issue here.

IV. "Non-Responsive" is not an Exemption from Disclosure Under FOIA

In the 2016 case of *American Immigration Lawyers Association v. EOIR*, 830 F.3d at 669 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.

The court explained that the FOIA itself contains no definition of the term "record," and that "agencies . . . in effect define a 'record' when they undertake the process of identifying records that are responsive to a request." *Id*. at 678. The court also pointed out that there were a "range of possible ways in which an agency might conceive of a 'record'" and noted that the Department of Justice had issued guidance on the topic of processing documents that concern multiple, unrelated topics that agencies could use "when determining whether it is appropriate to divide such a document into discrete 'records.'" *Id*.

V. Conclusion

Nearly two years have elapsed since this Court's Order of August 2, 2017 (ECF 30) and, contrary to Defendant's assertion that they have delivered files through initial E, (ECF 48 at 10) the government has produced to Plaintiff only files with last initials of A, B and some of the C's. Defendant has redacted non-exempt documents and is far behind the forty-eight month production schedule they represented to the court as reasonable. (ECF 22 at 5) Further, Defendant claims to be unable to identify and produce previously released material as ordered by this Court. (ECF 29 at 17)

The requested files are admittedly volumous, but are essentially homogeneous and significant portions have previously been released without review or redaction. By insisting on review of these documents, Defendant has manufactured unnecessary work to delay production and now complains that it is burdensome. (ECF 22 at 3)

Even the tiny portion of the subject files that have been released have been of tremendous value to many families of missing WWII era servicemembers who seek closure in their deaths. Continued withholding of these records unnecessarily prolongs the grieving of these families; dishonors the fallen; and is a stain on the good name of the United States of America. Immediate release of all Individual Deceased Personnel Files is in the public interest.

Respectfully submitted,

/s/ John Eakin
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 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.

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