

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 SUR-REPLY TO PLAINTIFF’S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant files this sur-reply in order to respond to the new argument raised and the misstatement made in Plaintiff’s Reply to Defendant’s Response to Plaintiff’s Motion for Partial Summary Judgment (“Reply”).¹

In his Motion for Summary Judgment, Plaintiff specifically stated that “the single disputed issue remaining is Defendants’ [*sic*] 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.” Pl’s. Mot. Summ. J. 6, **ECF No. 46**. Plaintiff argued that Defendant cannot determine that these documents are non-responsive because “non-responsive to the request is not an exemption from release.” *Id.* at 10. In his Reply, however, Plaintiff presents a new argument that the documents must be turned over because “PII is not exempt from disclosure under FOIA.” Pl’s. Reply 2, **ECF No. 49**. Defendant asserts that Plaintiff is precluded from asserting a new

¹ Defendant does not concede any arguments made by Plaintiff not addressed in this sur-reply. Defendant simply limits this sur-reply to the argument improperly made for the first time by the Plaintiff in his reply brief and to correct the misstatement made in that brief.

argument in his Reply, but to the extent this Court seeks to analyze this new argument, Defendant provides this briefing to the Court.

I. Personally Identifiable Information is Exempt from Disclosure Under FOIA

Minimal redactions have been made to the documents provided to Plaintiff. These redactions include redactions to protect the privacy interests of living individuals. Any information concerning deceased servicemembers have not been redacted since those individuals no longer have a privacy interest in their information. The Vaughn Index presented to Plaintiff also indicates that if the Court determined that the documents listed are responsive, which they are not, then those documents would also need to be reviewed for PII and if PII is found in the documents it will need to be redacted prior to production.² In his Reply Plaintiff argues that PII is not exempt from disclosure under FOIA. Plaintiff does not, however, identify any specific document or documents where he believes PII was redacted inappropriately.

FOIA specifically exempts from disclosure “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). An agency may delete personal details within a document, provided the details to be deleted are reasonably severable and the overall privacy interests of the individual clearly outweigh the presumption of public disclosure. *Avondale Indus. v. NLRB*, **90 F.3d 955, 958** (5th Cir. 1996). “To determine whether disclosure of such files would constitute a clearly unwarranted invasion of personal privacy, Exemption 6 cases require a balancing of the individual’s right of privacy against the preservation of the basic purpose of FOIA, which is open agency action to the light of public scrutiny.” *Id.* at 960.

² Review of the documents for PII to determine if certain information should be redacted to protect the privacy interests of individuals would require significant time and expense.

Public interest is narrowly defined as “the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to the public understanding of the operations or activities of the government.” *Sherman v. U.S. Dep’t of the Army*, 244 F.3d 357, 361 (5th Cir. 2001) (citing *U.S. Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994)). Information about private citizens accumulated in various government files that reveal little or nothing about an agency’s own conduct do not implicate the public interest. *Id.* Here, arguably the public interest is served in obtaining information about World War II era servicemembers, not in obtaining home addresses of living relatives or their mitochondrial DNA sequence analysis.

II. Defendant Intends to Make Every Effort to Comply with the Court’s Order

In addition to this new argument on PII, Plaintiff makes a misstatement in his response that Defendant seeks to correct for the record. Plaintiff states “Defendant claims to be unable to identify and produce previously released material as ordered by the Court.” Pl’s. Reply 6, ECF No. 49. Defendant makes no such assertion in its Response. Defendant intends to make every effort to comply with the Court’s June 5, 2019 Order. Order, ECF No. 43.

CONCLUSION

DoD respectfully requests this Court deny Plaintiff’s Motion for Partial Summary Judgment.

DATED: July ___, 2019.

Respectfully submitted,

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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 ____th day of July, 2019, and was served by Federal Express as follows:

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/s/ Jacquelyn M. Christilles
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