

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL CASE NO. 5:16-cv-0972-RCL
	§	
UNITED STATES	§	
DEPARTMENT OF DEFENSE	§	
	§	
Defendant	§	
	§	

**PLAINTIFF’S OPPOSED MOTIONS TO LIFT *OPEN AMERICA* STAY AND FOR
BETTER DOCUMENT SEARCH**

Plaintiff *pro se* John Eakin moves this Court to lift the *Open America* stay in this case. Plaintiff further moves for an order requiring Defendant to conduct a better search for responsive documents.

Plaintiff and Counsel for Defendant conferred via email on October 6, 2020 and Counsel for Defendant opposes this motion.

BACKGROUND

This case is a follow-up to a 2010 FOIA case. *Eakin v. Department of Defense* 5:10-cv-00784-FB in which Plaintiff Eakin, *pro se*, requested copies of a subset of the files at issue in the instant case. This subset of Individual Deceased Personnel Files (IDPF) known as the X-files pertain to the unidentified remains of World War II American Servicemembers. In that litigation, Defendant falsely denied the existence of digital copies of the requested files and frivolously required prepayment of reproduction costs of \$24,000. While judgement was entered against Plaintiff on the issue of fee waiver or representative of the press, only three weeks after entry of judgment, Defendants announced the public availability of the more than 10,000 requested files in

digital format. The released files contained multiple embedded FOIA requests Defendants now contend are exempt from FOIA and must be redacted from the responsive records.

In FY 2013 Defendant proposed an estimated three year project to scan all 442,000 IDPF files into an archival data library at an estimated cost of \$9.5 million. After three years, this project was apparently terminated after scanning only approximately 280,000 IDPF's with last initials A through L.

Plaintiff filed suit on September 30, 2016. This court granted in part Plaintiff's motion for summary judgment and ordered release of the requested documents, but stayed production of exempt material to allow a forty-eight month period to redact exempt material embedded within the responsive documents. ECF 30

DEFENDANT NO LONGER QUALIFIES FOR AN *OPEN AMERICA* STAY

An *Open America* stay requires the agency to show that "exceptional circumstances exist" and that the agency is exercising due diligence in responding to the request. 5 U.S.C. § 552(a)(6)(C)(i)-(iii)

Exceptional circumstances are said to exist under the following conditions:

[W]hen an agency . . . is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests.

Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976).

Courts evaluate four conditions that must be satisfied to warrant granting an *Open America* stay: (1) the agency must be burdened with an unanticipated number of FOIA Requests; (2) the agency's resources are inadequate to process the requests within the time limits set forth in the statute; (3) the agency must show that it is exercising due diligence in processing the requests; and

(4) the agency must show reasonable progress in reducing its backlog of requests. *See Elec. Frontier Found. V. Dept. of Justice*, 563 F.Supp. 2d 188, 193 (D.C. Cir. 2008); *Summers v. Dept. of Justice*, 925 F.2d 450, 452 n.2 (D.C. Cir. 1991) (noting the first three factors); 5 U.S.C. § 552(a)(6)(C)(ii) (“[T]he term ‘exceptional circumstances’ does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.”) *See Order* ECF 29 at 8

Plaintiff, upon constructive denial of his FOIA request for the A-L files, filed this litigation on September 30, 2016, slightly more than 48 months ago. ECF 1 On August 2, 2017, slightly more than 38 months ago, this court granted Defendant’s motion for an *Open America* stay, but ordered a rolling semi-annual production schedule and regular status updates. *Memo Opinion* ECF 29, *Order* ECF 30 Production of all records was ordered to be completed no later than February 1, 2021 or 42 months from the date of the order. Review of the files had actually commenced six months prior to the date of the order thereby allowing 48 months to review all the records at the rate of 31,500 files per semi-annual period or 63,000 files per year that had been demonstrated by Defendant. ECF 22 at 5

On September 28, 2020, Defendants filed a status report, ECF 69, in response to the Court’s Order. ECF 66. Analysis of this status report shows, (disregarding the most recent production which was constrained by COVID restrictions) that the semi-annual rolling productions delivered a high of 58% of Defendant’s estimated number of files that could be reviewed and a low of 12%. Overall, less than 49% of the files have been produced 42 months since they began reviewing the files for release. Even disregarding the COVID delay, Defendants have failed to maintain the pace of review they originally demonstrated and which they informed the court they could deliver. ECF 22 at 5, ECF 69 at 1

During the most recent semi-annual production period between 12/1/2019 and 5/18/2020, Defendant reviewed only 1,255 records. Defendant's ability to ever review all the responsive records is questionable.

Defendant has failed to exercise due diligence in complying with the court's order to produce the files. Further, an *Open America* stay requires that the agency must show reasonable progress in reducing its backlog of requests. Review of the Department of Defense's annual FOIA report to congress shows that in each year since the filing of this action, the FOIA backlog for the Office of the Secretary of Defense/Joint Staff (OSD/JS) has actually increased each year.¹

The Electronic Freedom of Information Act Amendments of 1996 explicitly redefined the term "exceptional circumstances" to exclude any "delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests." *Electronic Freedom of Information Act Amendments of 1996*, Pub. L. No. 104-231, § 7(c), 110 Stat. 3048 (codified as amended at 5 U.S.C. § 552(a)(6)(C)(ii)) This definition of "exceptional circumstances" makes it difficult for agencies seeking a stay of proceedings to argue only the existence of a FOIA backlog as the basis for a stay. *See H.R. Rep. No. 104-795*, at 18-19 (1996); *see also Donham v. United States Dep't of Energy*, 192 F. Supp. 2d 877, 882 (S.D. Ill. 2002) (refusing to accept agency's argument that its backlog qualifies as "exceptional circumstances" because "then the 'exceptional circumstances' provision would render meaningless the twenty-day response requirement"); *Al-Fayed v. CIA*, No. 00-2092, slip op. at 5

¹ Department of Defense Freedom of Information Act (FOIA) Annual Reports for Fiscal Years 2017, 2018 and 2019 Note: Office of the Secretary of Defense / Joint Staff (OSD/JS) is the applicable DoD component agency.

https://open.defense.gov/Portals/23/Documents/DoDFY2019AnnualFOIA_Report.pdf

https://open.defense.gov/Portals/23/Documents/DoDFY2018AnnualFOIA_Report.pdf

https://open.defense.gov/Portals/23/Documents/DoDFY2017AnnualFOIA_Report.pdf

(last accessed 10/1/2020)

(D.D.C. Jan. 16, 2001) ("Rather than overturn *Open America*, the 1996 amendments merely explain that predictable agency workload and a backlog alone, will not justify a stay."), *aff'd* on other grounds, 254 F.3d 300 (D.C. Cir. 2001); *Eltayib v. United States Coast Guard*, No. 99-1033, slip op. at 3 (D.D.C. Nov. 11, 1999) (explaining intent of Electronic FOIA amendments' modification of FOIA's "exceptional circumstances" provision), *aff'd* on other grounds, 53 Fed. Appx. 127 (D.C. Cir. 2002) (*per curiam*)

The Government was required to submit updated estimates of the amount of time it will take to complete the review of the 4.2 terabytes of data along with each semi-annual production. ECF 29 at 17 To date, after eight (8) semi-annual productions, the only status update provided by Defendant has been the September 28, 2020 status report ordered by ECF 66.

The lack of semi-annual status updates concealed the fact that Defendant was noncompliant with the production schedule they had demonstrated to the court and upon which the overall production schedule was based. (Final release date was to be February 1, 2021. ECF 29 at 17)

CLAIM OF EXEMPT DOCUMENTS IS FOR THE PURPOSES OF DELAY AND AVOIDANCE OF PUBLIC SCRUTINY

Defendant's claim that the responsive files contain exempt material is intended only to delay production of the requested records. Without arguing whether the embedded material is actually exempt, something Plaintiff continues to dispute, it must be recognized that most of the material claimed to be exempt has been previously released to other requestors. Defendant argues they have no means of tracking what material has previously been released or which documents qualify for inclusion in Defendant's "reading room" under 5 U.S. Code § 552(a)(2)(D)(ii) (Records that have been requested three or more times.) ECF 37 at 1

Prior to Plaintiff's current request, many of these files, both IDPFs and X-files, were released to Plaintiff and others without redaction. Defendant's redaction process is so inconsistent

that FOIA requests of the type Defendant objects to the release of continue to be found in the produced files. One of the semi-annual productions to Plaintiff actually included files containing thousands of “purged” documents that had been redacted from the responsive records.

Perhaps more important than Defendant’s competence at redaction is the fact that all this “exempt” material was of a type submitted to the government with no expectation of privacy and the continued redaction process protects no one’s privacy interest. Redaction of the responsive documents only perpetuates this agency’s veil of secrecy and punishes family members of the missing servicemembers.

RELEASE OF THE DOCUMENTS IS IN THE PUBLIC INTEREST

Contrary to its public position, the U.S. Government has used access to the records of missing American Servicemembers to avoid embarrassing questions concerning not just the fate of the missing, but the competence of the government’s efforts to recover and identify them. Release of the requested documents is in accordance with the central purpose of FOIA—“to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny”—and the statute’s strong presumption towards the disclosure of responsive government documents *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The release of the “X-files” in 2012 resulted in the recovery of the remains of PVT Arthur H. “Bud” Kelder, a member of Plaintiff’s family, who had been buried as an Unknown in an overseas cemetery, and whose remains Defendant had refused to return to his family for burial. PVT Kelder was the first Unknown to be returned to his family for burial in modern times. It came only after protracted litigation, first to obtain the records, then to recover the remains from the grave of an Unknown in the Manila American Cemetery. Private Kelder’s case revealed not only that his remains and those of ten other Unknowns could have easily been identified, but showed further that

four Knowns had been correctly identified then shipped to the wrong families for burial. It also showed that the remains of the fourteen men originally in that common grave, and later in individual graves, to have been horribly commingled due to the negligent handling by the U.S. Army Graves Registration personnel. Private Kelder's remains, for example, have been found in five different caskets and the majority of his remains have not been identified due to the government's refusal to employ modern technology. The agency's desire for secrecy is understandable, but not justifiable.

In a recent hearing in the Western District of Texas, government counsel attributed more than 300 such recoveries of Unknowns to Plaintiff's work, all directly attributable to release of the X-files and all of which could have been recovered many years ago by the U.S. Government had they wished to do so.

In that case,² the government produced a file responsive in this case, and which Defendant now apparently wishes to conceal since it has not been produced here, the previously classified secret annex to the IDPF files of 1LT Ira Cheaney and 1LT Alexander Nininger, the recipient of the first Medal of Honor awarded in WWII. It documents the erroneous burial of 1LT Cheaney at the US Military Academy at West Point, NY and the belief that it may have actually been Nininger's remains that were buried as Cheaney. Apparently, much non-defense information was classified as defense secrets to avoid disclosure of agency wrongdoing. The government now seems to have difficulty producing these files to Plaintiff.

Attached as exhibits are declarations from a variety of users of this data, family members of the missing, independent researchers and organizations representing families of the missing. These declarations demonstrate the importance of these documents to the general public and the need for

² *Patterson, et al v. Defense POW/MIA Accounting Agency*, Western District of Texas, 5:17-cv-00467-XR.

immediate release.

However, for FOIA purposes, the use of the data by families and researchers is less important than its relationship to the basic purpose of the Freedom of Information Act[,] “to open agency action to the light of public scrutiny.” Information that informs the public about “an agency’s performance of its statutory duties falls squarely within that statutory purpose.” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); *see also O’Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (per curiam) (affirming that Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, do not overrule *Reporters Comm.* definition of “public interest”); cf. *NARA v. Favish*, 541 U.S. 157, 172 (2004) (reiterating the *Reporters Comm.* “public interest” standard, and characterizing it as “a structural necessity in a real democracy” that “should not be dismissed” – despite arguments by amici that *Reporters Comm.* had been “overruled” by Electronic FOIA amendments since 1996).

Information serves a FOIA public interest if it sheds light on agency action. *See Reporters Comm.*, 489 U.S. at 773; *Rose*, 425 U.S. at 372; *see also Bartko v. DOJ*, 898 F.3d 51, 76 (D.C. Cir. 2018) (“[T]he public interest in the material [appellant] seeks is substantial given the Fourth Circuit’s disclosure of a troubling pattern of prosecutorial missteps and the U.S. Attorney’s Office’s recognition that errors had been made and changes would be implemented”) (Exemption 7(C)), reh’g denied (July 31, 2018); *Henson v. HHS*, 892 F.3d 868, 878 (7th Cir. 2018) (upholding protection of “medical information about the manufacturer’s patients and the contact information for employees of the manufacturer and the agency,” stating that “the [FOIA] requires transparency from the government—not the manufacturer’s patients and employees”), reh’g denied (July 31, 2018); *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 746 F.3d 1082, 1092-96 (D.C. Cir. 2014) (holding categorical rule inappropriate as “[o]n the other side of the scale sits a weighty public

interest in shining a light on the FBI's investigation of major political corruption and the DOJ's ultimate decision not to prosecute a prominent member of the Congress for any involvement he may have had") ((Exemption 7(C)); *Nat'l Day Laborer Org. Network v. ICE*, 811 F. Supp. 2d 713, 748 (S.D.N.Y. 2011) ("[T]he public interest in disclosure outweighs the privacy interest as regards the names of agency heads or high-level subordinates . . . [as] [t]here is a substantial public interest in knowing whether the documents at issue reflect high-level agency policy, helping to inform the public as to 'what their government is up to.'") (*quoting Reporters Comm.*, 489 U.S. at 773) (Exemptions 6 & 7(C)); *Families for Freedom v. U.S. Customs & Border Prot.*, 797 F. Supp. 2d 375, 399 (S.D.N.Y. 2011) (finding disclosure of agency employee names would inform the public of "what their government is up to" by revealing "whether the expectations and requirements articulated in the memoranda reflect high-level agency policy") (Exemptions 6 and 7(C)); *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1041 (N.D. Cal. 2005) (finding public interest served by disclosure of individual agency employee names because their names show "who are making important government policy") (Exemptions 6 and 7(C)).

The requested records show that the government's official position, "It is DoD policy that ... [a]ccounting for personnel lost as a result of hostile acts is of the highest national priority." (DoD Directive 2310.07E, paragraph 4.1) is false. Disclosure of the requested records significantly pierces the government's veil of administrative secrecy and release of these documents is in the public interest.

BETTER SEARCH FOR RESPONSIVE DOCUMENTS REQUIRED

As explained above, Plaintiff became aware of the existence of an additional subset of the requested files while being deposed as an expert witness in an unrelated case involving the return of the remains of seven American Servicemembers missing since World War II. Plaintiff has since

become aware of at least several thousand additional files containing the previously classified annexes to the IDPFs that are the subject of this litigation.

These additional files are integral portions of the requested files and comprise at least boxes numbered 33 through 44 of a file series distinct from the main body of requested files (which also include boxes numbered 33 through 44, but containing different files). Further investigation by Plaintiff found that these files had been obtained by several FOIA requesters without undue delay or page by page review that Defendants now insist is imperative.

The existence of these additional files was brought to the attention of Defendants' Counsel and documentation was provided showing their location. The, somewhat cryptic, email response was:

“I verified the below information with DPAA. As stated in my initial e-mail, DPAA and predecessors did digitize some of the files, but not as part of the IDPF digitization effort. As such, DPAA likely has responsive documents, but they were not obtained as part of the government digitization of the whole collections of NARA accessions.

DPAA does have Box 34, 92-5S2D-1097, Box 42 92-58D-1097, and Box 43 92-58D-1097. DPAA does have additional documents, but the collection is not complete. DPAA is willing to provide the responsive documents they do have, but everything they have was not a planned, programmed complete digitization of the Department of Army/NARA records. The files will need to be reviewed by the Army FOIA office prior to release.”

9/29/20 email from Counsel for Defendant.

Since this confirms the existence of additional responsive files known to Defendants but not previously acknowledged to Plaintiff or this Court, Plaintiff moves for an order requiring Defendants to conduct a better search and produce all responsive documents in the file series referenced above or in related file series.

CONCLUSION

Defendant has failed to exercise due diligence in responding to this FOIA request and in compliance with this Court's order to produce records. Defendant has demonstrated an inability to timely review the responsive records even prior to the COVID restrictions. Defendant should not be rewarded with additional time to produce the requested files.

Defendant's efforts to conceal documents reflecting agency malfeasance should be noted and Plaintiff respectfully asks this Court to issue the attached order lifting the *Open America* stay and also ordering Defendant to conduct a better search for responsive documents.

Respectfully submitted,

/s/ John Eakin

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EXHIBITS

1. Nine Declarations
2. Proposed Order

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system on this the 8th day of October, 2020, and notification of such filing will be sent to the following:

Jacquelyn M. Christilles
Assistant United States Attorney
601 N.W. Loop 410, Suite 600
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/s/ John Eakin

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