

United States District Court  
Western District of Texas  
San Antonio Division

John Eakin,  
Plaintiff,

v.

United States Department of Defense,  
Defendant.

No. SA-16-CV-00972-RCL

**Defendant’s Response to Plaintiff’s Opposed Motions to Lift *Open America* Stay and for Better Document Search**

The Department of Defense (“DoD”) files this Response to Plaintiff’s Opposed Motions to Lift *Open America* Stay and for Better Document Search. The conditions requiring an *Open America* stay for production of the A-L Individual Deceased Personnel Files (IDPF’s) continue to exist and Plaintiff’s motion should be denied.

**I. Background**

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

ECF 1 at 8. 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 the 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), 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 that 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 January 18, 2017 and February 9, 2017, the Army Human Resources Command (AHRC)-Freedom of Information Act (FOIA)/Privacy Act (PA), the DoD component office responsible for reviewing the documents, produced all documents responsive to Plaintiff's May 11, 2016 request.

Plaintiff and the United States filed cross motions for summary judgment and the United States' also requested an *Open America* stay. On August 2, 2017, this Court ordered the United States to produce non-exempt responsive documents and an accompanying Vaughn index within 90 days of the Order. ECF 30. In compliance with the Court's Order, the United States produced approximately 59,120 IDPFs on October 1, 2017. The United States produced another 9,489 IDPs two months later on December 1, 2017. This Court also granted the United States' *Open America* stay and ordered production on a semi-annual basis. *Id.* Based on the United States' estimates in 2017, it believed it could accomplish production of all of the files by February 1, 2021. ECF 29. Unfortunately, due to the sheer volume of requested information, employee turnover, a

requirement to convert the documents into a searchable PDF format, and COVID-19, the United States will be unable to meet that deadline. *See* ECF 69 and 70.

## **II. *Open America* Stay**

In August 2017, this Court determined that an *Open America* stay was appropriate concerning release of the A-L IDPFs to Plaintiff. This Court evaluated the four conditions that must be satisfied for an *Open America* stay and determined that all four existed. ECF 29. These four conditions still exist.

### **A. The Agency must be burdened with an unanticipated number of FOIA requests**

This Court found that given the sheer volume of Plaintiff's request, and the large number of other requests the AHRC- FOIA/ PA Office must process, the first condition for an *Open America* stay was met. ECF 29. The AHRC-FOIA/PA office continues to receive between 5,000 – 6,000 FOIA/PA requests per year. Ex. 1, Affidavit of Monique Wey Gilbert. In addition, the office is currently assisting with two other litigation projects. *Id.*

### **B. The Agency's resources are inadequate to process the requests within the time limits set forth in the statute**

The second condition for granting an *Open America* stay is also satisfied. In fact, since this Court granted the stay in 2017, the AHRC-FOIA/PA office resources have decreased due to personnel turnover. These limited resources are being used to process 5,000 – 6,000 requests annually and are also dedicated to two other large litigation projects.

### **C. The Agency must show that it is exercising due diligence in processing the requests**

In an effort to demonstrate lack of due diligence, Plaintiff claims that "Defendants (*sic*) have failed to maintain the pace of review they originally demonstrated and which they informed the court they could deliver." ECF 71. Although the United States has not been able to review

the documents at the pace it *estimated* in 2017, Plaintiff's assertions do not demonstrate that the United States has failed to exercise an *overall* diligence in handling the thousands of requests it receives each year or a lack of diligence in handling Plaintiff's request. *See Open America v. Watergate Special Prosecution Force*, 178 U.S. App. D.C. 308, 547 F.2d 605, 615 (1976). To the contrary, producing 138,463 files and dedicating three personnel five (5) hours per week to reviewing this voluminous amount of documents requested by Plaintiff certainly suggests the United States is working diligently to process Plaintiff's request.

In 2017, the United States *estimated* that it would take four years to complete review of the documents requested by Plaintiff. The United States made it clear in its estimate that "it has not been possible to approximate the number of pages in each IDPF, as some contain only a few pages and other contain hundreds. Using the number of IDPFs as a *metric*, the review to date has processed 31,585 IDPFs, which means approximately 63,000 IDPFs could be processed by the AHRC in a year." (emphasis added). ECF 22. As such, the United States was giving the Court its best estimate based on the data at hand. Unfortunately, the United States estimate was not accurate and other intervening factors affected its anticipated rate of review.

Although the United States has not been able to meet the estimated time for completion of this project, it has diligently provided Plaintiff with production on a semi-annual basis. In fact, to date the United States has provided over 2 terabytes of data to Plaintiff. *See* ECF 69. The United States did provide a much smaller production for the December 1, 2019 to May 18, 2020 production. As noted in the United States' status report, two factors accounted for this smaller production 1) the requirement to convert the files into a searchable PDF format and 2) COVID-19. *Id.* The United States is working diligently to expand its ability to review documents responsive to Plaintiff's request. Plaintiff has failed to show that the United States has exercised

good faith and due diligence which is fair overall in the particular agency. *Id.*

In his Motion, Plaintiff once again asserts that the “claim of exempt documents is for the purposes of delay and avoidance of public scrutiny.” This Court has already addressed this argument. In its Opinion on Plaintiff’s Motion for Partial Summary Judgment this Court noted:

Although the presence of PII does not automatically warrant redaction, it does signal to the agency that careful review of the information is necessary, as PII does often require redaction. If there is certain information about living persons that the Defense Department improperly redacted, Mr. Eakin has failed to identify any specific documents that he thinks contain such improper redactions. Without some semblance of specificity about what documents contain improper redactions, the Court would be blindly ordering the Defense Department to turn over information that could compromise the privacy interests of living individuals.

ECF 53. Plaintiff’s argument that the United States is improperly redacting document again fails to identify any specific document containing improper redactions.

**D. The Agency must show reasonable progress in reducing the backlog of requests**

Plaintiff claims that the fourth condition for an *Open America* stay is not met because the FOIA backlog for the Office of the Secretary of Defense/Joint Staff (OSD/JS) has increased each year. ECF 71. OSD/JS is one of only 33 component’s listed in the reports cited by Plaintiff and is not the component handling the review of Plaintiff’s request. Plaintiff fails to note for this Court that the backlog for the Army in 2017 and 2019 decreased. In 2018 the backlog increased, but so did the number of requests. The Army received over 1,000 more requests in 2018 than in 2017 and 2019. The chart below reflects the numbers for the Army<sup>1</sup>:

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<sup>1</sup> 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/DoDFY2019AnnualFOIA_Report.pdf)  
[https://open.defense.gov/Portals/23/Documents/DoDFY2018AnnualFOIA\\_Report.pdf](https://open.defense.gov/Portals/23/Documents/DoDFY2018AnnualFOIA_Report.pdf)  
[https://open.defense.gov/Portals/23/Documents/DoDFY2017AnnualFOIA\\_Report.pdf](https://open.defense.gov/Portals/23/Documents/DoDFY2017AnnualFOIA_Report.pdf)

Year	Number of Requests Pending as of Start of Fiscal Year	Number of Requests Received in Fiscal Year	Number of Requests Processed in Fiscal Year	Number of Requests Pending as of End of Fiscal Year
FY 2019	2757	25680	25907	2530
FY 2018	2434	26812	26414	2831
FY 2017	2602	25666	25811	2457

### III. Release is in the Public Interest

The United States is diligently working to release the subject records to Plaintiff. As reflected above, the delay in production is not to “avoid embarrassing questions,” but rather is directly related to the volume of Plaintiff’s request and the available resources. Although Plaintiff compels this Court for an immediate release of these documents, he fails to demonstrate the urgent need for these documents that would either 1) require the United States to bypass a review, potentially releasing information protected by the Privacy Act or 2) justify putting Plaintiff’s request ahead of all other requests received by the agency. As the Court noted in *Open America*:

[i]f *any* request for information can be the subject of a court order to the agency to place the request in a priority position, without any showing in court of urgency or exceptional need, then these court-ordered cases will take their places along with those court-ordered cases in which genuine urgency and need have been shown. The result will be that not only similar, prior, non-urgent requests will be displaced; even those requests with an urgent need will be unable to get to the head of the line, because of the crowd of miscellaneous requests already placed there by court order without any showing of urgency or need whatsoever. We believe that Congress intended to guarantee access to Government agency documents on an equal and fair basis. We believe also that Congress wished to reserve the role of the courts for two occasions, (1) when the agency was not showing due diligence in processing plaintiff’s individual request or was lax overall in meeting its obligations under the Act with all available resources, and (2) when plaintiff can show a genuine need and reason for urgency in gaining access to Government records ahead of prior applicants for information. The role of the courts in achieving both of these objectives would be totally

jeopardized by the interpretation of the statute urged by plaintiffs here.

*Open America v. Watergate Special Prosecution Force*, 178 U.S. App. D.C. 308, 547 F.2d 605, 615-16 (1976).

Plaintiff has failed to demonstrate the urgent need for these documents. Plaintiff claims that he requires immediate release of these documents to assist the families of the missing. The affidavits he attaches to his request demonstrates the opposite. The affidavits demonstrate that the family members of the missing and other organizations have made FOIA requests for this information; requests that are specific to the family member. As such, Plaintiff has failed to demonstrate why his request is urgent and why his request should be placed at the head of the line.

#### **IV. Better Document Search**

Plaintiff is correct in noting that there is an additional subset of IDPFs that exist at the National Archives and Records Administration (NARA). From the late 1930s to the early 1950s, the Army classified “annexes” of IDPFs for a variety of reasons. These classified files were sent to NARA as a separate accession from those IDPFs that were part of the digitization project. As such, these files have never been digitized as part of an entire digitization project. NARA declassified the files at some point. This group of files contain some files from WWII, but also contain files from Korea and files unrelated to any conflict. Specific files have been pulled from NARA pursuant to FOIA requests from other individuals. As such, some of these “annex” IDPFs have been digitized and released.

Recently, the AHRC-FOIA/PA identified approximately 1,674 files of previously classified files that had been digitized and released to another requester. These files were saved on the AHRC-FOIA/PA system under the requester’s name, rather than being identified as IDPFs. On October 26, 2020, the United States produced 18.36 GB of data, approximately 1,674 files and

12 boxes of previously classified IDPFs to Plaintiff. DPAA and AHRC-FOIA/PA are doing an additional scrub of their systems to determine if any of these “annex” files have been digitized. If any additional files are identified that are responsive to Plaintiff’s request, they will be reviewed and released to Plaintiff.

Dated: October 30, 2020

Respectfully submitted,

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**Attorneys for Defendant**

#### **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 30<sup>th</sup> day of October 2020.

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*PRO SE*

/s/ Jacquelyn M. Christilles  
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