

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 REPLY TO HIS OPPOSED MOTIONS TO LIFT *OPEN AMERICA* STAY AND FOR BETTER DOCUMENT SEARCH

Plaintiff John Eakin *pro se* respectfully provides this reply to Defendant’s Response to his motions to lift the *Open America* stay and for an order requiring Defendant to conduct a better search for responsive documents.

Defendants Have Failed to Comply With the Terms of the *Open America* Stay

Defendants now explain their failure to timely complete their review of the requested files because some of the files are larger than others and their projection that it would take four years to complete the review was only an estimate. This is disingenuous in that Defendant’s representation to this court that they could produce 31,583 files every six months was based on Defendant’s *demonstrated ability* to review more than twice that number of files in only four months. (68,609 files were reviewed between August 2, 2017 and December 1, 2017. ECF 72 at 2) Therefore, Defendant’s estimate that they could produce all the subject files by February 1, 2021 (ECF 29) was quite conservative.

While some files are larger than others, some are smaller and the average number of pages in the files they reviewed is statistically likely to be consistent throughout the entirety of

such a large number of files and Defendants provide no evidence to the contrary.

“It has not been possible to approximate the exact number of pages in each IDPF, as some contain only a few pages and others contain hundreds. [Ex. 1, ¶ 6]. 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”

ECF 22 at 5

In a similar vein, Defendants’ personnel difficulties are regrettable, but hardly unique in most government agencies. In this case, AHRC told this court that they were assigning three employees to each work one hour per day on review of the requested files.

“In this case, AHRC has dedicated one hour of each workday of three FOIA Action Officers, in an office with only eight officers”

ECF 22 at 10

Defendants here neither claim, nor could claim, that these are the “exceptional circumstances” necessary to justify additional time to comply with the prior order of this court.¹

““exceptional circumstances exist” when 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 . . .

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 (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)

and when the agency can show that it “is exercising due diligence” in processing the requests.’

ECF 22 at 9

In fact, Defendant’s response states that the action agency, the Army Human Resources Command FOIA office, while not the agency to which Plaintiff’s request was directed to, has actually reduced their backlog of requests. ECF 72 at 5. This seems to contradict the claim that insufficient personnel were available.

Defendant’s response again bends the facts by citing the backlog of the Army rather than the Office of the Secretary of Defense/Joint Staff (OSD/JS). Plaintiff’s FOIA requests were directed to the OSD/JS which is the parent command having FOIA responsibility for the Defense POW/MIA Accounting Agency (DPAA). The Department of Defense, not the Department of the Army, is the defendant in this case. DPAA was responsible for digitization of the requested files and had custody and control of the requested records at the time of Plaintiff’s FOIA submission and continues to control release of the files. Plaintiff correctly cited the FOIA backlog of the OSD/JS because his FOIA requests were directed to that agency and they are responsible for compliance, regardless of the agency to which the action was assigned to. There has been no transfer of responsibility and Plaintiff’s FOIA requests continue to be reported in DoD’s annual reports under the OSD/JS heading.

Defendant’s claim that production was slowed by this court’s order to produce the documents in a searchable PDF format is, again, disingenuous, in that the scanning contract actually required their original contractor to produce the documents in searchable format. If further conversion was required it was a problem of Defendant’s own making.

Defendant Has Failed to Provide the Ordered Status Reports

The Government failed to submit ordered updated estimates of the amount of time it would 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 and recommended to this court and upon which the overall production schedule was based. (Final release date was to be February 1, 2021. ECF 29 at 17) Had Defendants complied in full with this court's order, their shortfall in production would have been apparent sooner and corrective measures or a request for additional time could have been timely made.

Better Search for Responsive Documents is Required

Defendant's reply confirmed that Plaintiff was correct in asserting the existence of additional responsive records not previously acknowledged by Defendant. While Plaintiff has gratefully received the records he specifically described, and which significantly detail agency misdeeds, there is good reason to believe additional responsive records exist and Defendants should be ordered to conduct a better search and report their findings and areas searched.

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. In fact, many of the records produced were previously produced to other requesters without the manual review Defendant now claims is necessary. This change in policy calls into question the need for such

review or if it is merely for the purpose of delay. Defendant should not be rewarded with additional time to produce the requested files.

Defendant's true motive here is revealed by their failure to recognize (ECF 72 at 6) the urgent need for release of these documents.

"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

Not only has Plaintiff provided testimony from a variety of users of these documents, but Defendant neglects to recognize that only because of Plaintiff's prior FOIA requests and related litigation have the remains of more than three hundred (300) missing American Servicemembers been recovered, something Defendant had been unable or unwilling to accomplish in more than seven decades. These were three hundred heroes who languished in graves as Unknowns because the U.S. Government wished to avoid disclosure of the government's malfeasance. That's more than three hundred (300) families who gave a son in defense of this country and who were denied even the minimal compensation of closure by learning the fate of their loved ones.

Defendant has failed to demonstrate an actual inability to comply with the terms they, themselves, originally proposed. Plaintiff should not be further penalized by additional delay.

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

The "public interest" and the public in general will be served if Plaintiff's Motion to Lift the *Open America* Stay is lifted. To promote judicial economy, Plaintiff would urge the court to

address production of not just the A-L files, but the functionally equivalent M-Z files addressed in Plaintiff's First Amended Complaint. Defendant has stated these files will be available by April 2021, only two months after the projected availability of the A-L files.

Respectfully submitted,

/s/ John Eakin

John Eakin, Plaintiff *pro se*
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com

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 2nd day of November, 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
San Antonio, Texas 78216

/s/ John Eakin

John Eakin, Plaintiff *pro se*
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com