

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 Motion for Summary Judgment, or in the Alternative,  
Request for an *Open America* Stay**

The Department of Defense (“DoD”) files this motion for summary judgment, or in the alternative, request for an *Open America* Stay with regard to production of the M-Z Individual Deceased Personnel Files (IDPF’s) that were digitized at the time of Plaintiff’s December 18, 2019 FOIA request.<sup>1</sup> The DoD requests summary judgment, or in the alternative, a stay because Plaintiff’s request for all of the World War II IDPFs places an unreasonable burden upon the DoD as evidenced by the over three years it has spent working on the FOIA request for A-L IDPFs. At a minimum, a stay would permit the DoD to continue its process of review to identify and redact any sensitive medical, financial, and other Privacy Act material contained within these IDPFs.

**I. Background**

**A. A-L Individual Deceased Personnel Files**

On May 10, 2016, Plaintiff filed a FOIA request to the Office of the Secretary of

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<sup>1</sup> In its December 17, 2019 Opinion, this Court correctly held that it lacked subject-matter jurisdiction over Plaintiff’s Request for files created after his FOIA request. ECF 53. As of today’s date, the entirety of the M-Z IDPFs have not been digitized. As such, this *Open America* stay relates only to those IDPFs digitized at the time of Plaintiff’s December 17, 2019 FOIA request. As of December 2019, the contractor had digitized approximately 80,420 IDPFs. This marked the halfway point of the digitization effort for the IDPFs with the last name beginning with the letter “M” through the letter “Z.” Ex. 1, Declaration of Kevin West.

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.

Prior to Plaintiff's 2016 FOIA request, U.S. Army Contracting Command entered into a contract on behalf of the Defense Prisoner of War/Missing Personnel Office ("DPMO"), a predecessor organization of the Defense POW/MIA Accounting Agency ("DPAA"), with Lockheed Martin Integrated Systems, Inc. ("Lockheed") to scan the IDPFs later requested by Plaintiff. Ex. 1, Declaration of Kevin West. Lockheed digitized approximately 290,000 IDPFs, including the IDPFs for deceased U.S. military personnel whose last names begin with the letters A through L.

On September 30, 2016, Plaintiff filed this action against DoD seeking to compel a response to his FOIA request of May 10, 2016.<sup>2</sup> *Id.* Subsequently, the Plaintiff and the United States filed cross motions for summary judgment and the United States also requested an *Open America* Stay. In its Motion, DoD explained that it was not possible "to approximate the exact number of pages in each IDPF, as some contain only a few pages and others contain hundreds." ECF 22, p. 5. However, DoD used the number of IDPFs as a metric to estimate that "it would take the DoD over four years to complete Eakin's request." *Id.* On August 2, 2017, this Court denied

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<sup>2</sup> The complaint also concerned Plaintiff's May 11, 2016 FOIA request for, in pertinent part, the contracts related to the digital scanning of the IDPFs. On January 18, 2017 and February 9, 2017, the DoD produced to Plaintiff all documents it determined were responsive to the May 11, 2016 FOIA request.

the United States motion for summary judgment, but granted an *Open America* Stay with regard to the files digitized at the time of Plaintiff's May 10, 2016 request (the A-L files). ECF 29. The Court ordered production of the A-L files on a semi-annual basis. *Id.* Based on the United States' estimates in 2017, the Court opined that the DoD could produce all the files by February 1, 2021, which was three and a half years from entry of the order. ECF 29. Since 2017, the United States has continued to dedicate time and resources to responding to the FOIA request for A-L IDPFs, making semi-annual productions to Mr. Eakin. Due to the sheer volume of requested information, including the various number of pages in each IDPF, technical issues, employee turnover, a requirement to convert the documents into a searchable PDF format, and COVID-19, the United States is not on a production track that will meet the Court's February 2021 deadline. *See* ECF 69 and 70.

#### **B. M-Z Individual Deceased Personnel Files**

On September 27, 2017, the Department of Health and Human Services ("DHHS") entered into a contract on behalf of DPAA with Na Ali'i Consulting & Sales, LLC ("Na Ali'i"). Ex. 1, Declaration of Kevin West. The contract required Na Ali'i to "perform document management, data conversion, and indexing services for records known as Individual Deceased Personnel Files (IDPFs)." The contract required Na Ali'i to enable and use optical character recognition (OCR) software tools to locate and index and ensure the "digital copy constitutes a fair, accurate, and machine-readable version of each digitized content, to the extent possible." *Id.* This requires the conversion of images into machine-encoded text that allows the document to be edited and searched using compatible programs and software. This contract does not require Na Ali'i to produce searchable .pdfs, rather the scanned documents must be machine-readable. This means the documents can be converted to searchable .pdfs using compatible programs and

software.

The intent of the current contract is to complete the scanning of the IDPFs focusing on the files for deceased U.S. military personnel whose last names begin with the letter M through Z that remain to be digitized (approximately 165,000 files). Na Ali'i has not completed the digitization of the M-Z files. Na Ali'i estimates that it may be able to complete the digitization by April 2021, however, recent setbacks due to COVID-19 have delayed contract completion.

On December 18, 2019, Plaintiff submitted a FOIA request to the DoD seeking:

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 58 at 18. The DoD responded on December 20, 2019 stating that it would be not be able to respond within the 20-day statutory time period. At that time, Na Ali'i had completed the digitization of approximately 80,420 IDPFs, which marked the halfway point of the digitization effort for the IDPFs with the last name beginning with the letter "M" through the letter "Z".

Ex. 1, Declaration of Kevin West

On February 19, 2020, Plaintiff filed an Opposed Motion for Leave to File First Amended Complaint. ECF 58. Plaintiff sought to amend his Complaint to "include the balance of the IDPFs created since his original FOIA request." *Id.* Plaintiff conceded that the digitization of the M-Z files was "under way and is ongoing." *Id.*

On July 30, 2020, this Court granted Plaintiff's Motion for Leave to File First Amended Complaint. ECF 63. Plaintiff filed his First Amended Complaint on the same date requesting that this Court order Defendant to produce, by a date certain, all non-exempt records responsive to Plaintiff's FOIA request. ECF 64.

### C. Non-Exempt Responsive Records

The Army Human Resources Command Freedom of Information Act/Privacy Act (“AHRC FOIA/PA”) Office is assisting DPAA in reviewing the IDPFs to determine which documents are responsive and nonresponsive and if any information in the responsive documents is exempt from release under FOIA. Ex. 2, ¶ Affidavit of Monique Wey Gilbert. There is no easy way to do this review. The AHRC FOIA/PA Office does not have the current technological capability to create PII identifiers to scan the shared drive for PII. Instead, Action Officers conduct a manual review of individual files to screen them for PII. *Id.* at ¶ 13. This manual review takes roughly 30 seconds to 1 minute for each file, if there are no purges or redactions to be made. *Id.* at ¶ 14.

In prior rulings, this Court recognized that this review is necessary for the protection of the privacy interests of individuals whose private information, such as medical records, financial information or home addresses, is potentially contained in these files. ECF No. 28. In the DoD review, non-responsive information is removed and protected information is redacted or removed as required. While extremely sensitive information is rare, such information has been found. For example, to identify previously unidentified remains of servicemembers, the DoD has at times obtained DNA samples from living relatives of the servicemembers. At one point a report on some of this DNA information was found included in the IDPFs files requested by Plaintiff. *Id.* at ¶ 12. Further, in a recent review, a FOIA action officer found family travel orders with included financial information, home address, and other PII. *Id.*

### II. Plaintiff’s FOIA Requests for over 80,000 World War II Personnel Files Puts an Unreasonable Burden Upon the DoD

In response to Plaintiff’s initial Complaint, the DoD filed a Motion for Summary Judgment and in the alternative Motion for *Open America Stay*. As detailed above, DoD’s Motion for

Summary Judgment was denied. However, the government respectfully raises the arguments in support of summary judgment in the context of the request for the M-Z IDPFs. A motion for summary judgment is appropriate if the pleadings, depositions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994) (*en banc*).

The time, expense, and effort required to respond to Eakin's request is so great as to exceed FOIA's reasonableness requirements. Reasonableness standards permeate FOIA. Requesters must "reasonably describe" the records they seek. 5 U.S.C. § 552(a)(3)(A). Agencies must make "reasonable efforts" to search for such records. § 552(a)(3)(C). Agencies must only release "[a]ny reasonably segregable portion of a record," when there is material responsive, but included with exempt materials. § 552(b). An agency must take reasonable steps to respond to a request, but FOIA does not require a response where responding would unreasonably burden the agency. *See Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999); *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979).

Here, the time, money, and expense DoD expended over the past three and half years highlights the unreasonable nature of the request for the M-Z IDPFs. The DoD has already spent years reviewing the A-L IDPFs, finding they are intermixed with other service records, non-responsive materials, and personal information. The DoD's first productions to Plaintiff on the A-L IDPFs included over 2.5 million pages of documents. Plaintiff now requests approximately 80,420 additional IDPFs and has indicated he will continue to make FOIA requests until the digitization of all IDPFs is complete. These IDPFs must be manually reviewed to ensure Privacy Act protected information is not released to the public.

The time, money, expense, and effort required to respond to Plaintiff's requests for millions

of pages of documents is so great as to exceed FOIA's reasonableness requirements. The Court in *Lowry v. SSA* analyzed the reasonableness of a FOIA request. *Lowry v. SSA*, Case No. CV-00-1616, 2001 U.S. Dist. LEXIS 23474, at \*26 (D. Or. Aug. 29, 2001). Citing the Second Circuit, the *Lowry* court noted "we have no doubt that there is such a thing as a request that calls for an unreasonably burdensome search." *Id.* at \*26 (D. Or. Aug. 29, 2001) (citing *Ruotolo v. Department of Justice*, 53 F.2d 4, 9 (2nd Cir. 1995)). The *Lowry* court further analyzed the request in that case and noted that an unreasonable request would be one that included millions of pages of documents. *Id.* at \*25-26 (citing *Armstrong v. Bush*, 139 F.R.D. 547,553 (D.D.C. 1991)). This is especially the case here, where the materials are intermixed with non-responsive and protected information.

### III. *Open America Stay*

Under FOIA, in "exceptional circumstances," additional time may be allowed for an agency to process its records. "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." 5 U.S.C. § 552(a)(6)(c). DoD respectfully submits it can make that showing here as it needs additional time to complete the review of responsive records and is making reasonable strides in its review of pertinent material.

The seminal case on the matter is *Open America v. Watergate Special Pros. Force*, 547 F.2d 605 (D.C. Cir. 1976). Following that case, courts have generally evaluated four conditions that must be satisfied to warrant granting an *Open America* stay: "(1) when an agency is burdened with an unanticipated number of FOIA requests; and (2) when agency resources are inadequate to process the requests within the time limits set forth in the statute; and (3) when the agency shows that it is exercising due diligence in processing the requests; and (4) the agency shows reasonable

progress in reducing its backlog of requests.” *Elec. Frontier Found. v. Dep't of Justice*, 563 F. Supp.2d 188, 193 (D.C. Cir. 2008); *Summers v. Dep 't of Justice*, 925 F.2d 450, 452 n.2 (D.C. Cir. 1991) (noting first three factors). Courts have also considered additional factors in determining whether there are exceptional circumstances, including: the complexity of the request, newly imposed statutory or regulatory burdens on agencies, and other impediments that might prevent an agency from swiftly processing a request. *Bue v. FDA*, 762 F. Supp.2d 62, 66 (D.C. Dist. Ct. 2011) (citing *Gov't Accountability*, 568 F. Supp.2d at 59). Finally, agency affidavits and declarations in support of a stay under *Open America* are given "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Nat'l Sec. Archive v. S.E.C.*, 770 F. Supp.2d 6, 9 (D. D.C. 2011) (quoting *Elec. Frontier Found. v. Dep 't of Justice*, 517 F. Supp.2d at 117 (D. D.C. 2007)).

In the instant litigation, 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 also exist regarding the approximately 80,420 “M-Z” IDPFs digitized at the time of Plaintiff’s December 2019 FOIA request.

On October 8, 2020, Plaintiff filed an Opposed Motion to Lift *Open America* Stay with regard to the A-L files. ECF 71. The DoD has opposed that motion. ECF 72. That Motion is pending before this Court. Important to his motion, the ruling on that motion may affect the DoD’s ability to review the M-Z IDPFs.

Pending no additional employee turnover, technical issues, or other unforeseen circumstances, the DoD indicates it plans to dedicate four action officers, nearly half of its staff, to review the A-L files two hours per day, five days per week, excluding holidays, sick days and



vacation days, until the review of the A-L IDPFs is complete. There are approximately 54,009 A-L IDPFs left to review. If the four action officers can review these IDPFs 20 hours per week at four weeks per month, times 12 months, the AHRC FOIA/PA office estimates that it will take an additional 5 months to complete the review of the A-L files. The AHRC FOIA/PA cannot dedicate the same resources to simultaneously review the M-Z IDPFs, but will dedicate the same resources to review those files once the review of the A-L IDPFs is complete.

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

In August 2017, 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 documents Plaintiff seeks include millions of pages. In addition to Plaintiff's request, the AHRC-FOIA/PA office continues to receive 5,000 FOIA/PA requests per year that must be reviewed by nine Action Officers. Ex. 2, ¶ Affidavit of Monique Wey Gilbert. Reviewing FOIA requests is not the only mission of the AHRC-FOIA/PA office. The office also serves as the records custodian for Military Personnel files and the office is currently assisting with three other litigation projects with court mandated deadlines. *Id.* at ¶¶ 7-9.

**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 fluctuated due to personnel turnover. These limited resources are being used to process 5,000 requests annually and are also dedicated to other projects. *See Id.* at ¶ 7.

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

Regardless of the DoD's inability to review the A-L IDPFs at the pace it estimated in 2017, the DoD has exercised an *overall* diligence in handling the thousands of requests it receives each year and has diligently handled Plaintiff's request. *See Open America v. Watergate Special Prosecution Force*, 178 U.S. App. D.C. 308, 547 F.2d 605, 615 (1976). The United States has exercised good faith and due diligence which is fair overall in the particular agency. *Id.*

As of today, the DoD has made the following productions to Plaintiff:

<b>Date</b>	<b>Size (Approximate)</b>		<b>File Count</b>	<b>Folders</b>
10/1/2017	712	GB	49,938	945
10/1/2017	108	GB	9,182	750
12/1/2017	104	GB	9,489	758
5/17/2018	288	GB	18,259	495
11/26/2018	327	GB	3,883	348
5/30/2019	514	GB	28,835	699
12/1/2019	379	GB	15,978	150
5/18/2020	16	GB	1,225	11
	<b>2,448</b>	GB	<b>136,789</b>	<b>4,156</b>
	<b>2.34</b>	TB		

The DoD is preparing approximately 6,000 files to transmit to Plaintiff as part of its December 2020 semi-annual production. In addition, the DoD worked with Plaintiff to identify 1,674 files of previously classified files that had been digitized<sup>3</sup> and released to another requester.

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<sup>3</sup> These classified files were sent to the National Archives and Records Administration ("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

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. These files were not included as part of the DoD's original calculation of responsive documents.

As detailed above, DoD has always provided at least two productions per year to Mr. Eakin and it has been clear where DoD stood in the production. As a result, Mr. Eakin has filed motions with this Court since entry of the *Open America Stay*. The DoD responses, filed with this Court, have reported on the status of production:

- On February 7, 2018, the DoD noted that it had produced almost three million pages of documents to Plaintiff. ECF 36. This production included approximately 2.5 million pages of "all previously withheld non-exempt responsive documents," 350,000 pages pursuant to its first semi-annual production, and 272,822 pages of documents that could be released without further review. *Id.*
- On July 15, 2019, the DoD notified the Court that it had produced over 2 terabytes of data to Plaintiff. ECF 48. As of July 15, 2019, the DoD was just shy of the two year mark from the Court's August 2, 2017 order requiring production of these documents. At that point, the DoD had over 1 ½ years to complete review of the remaining 2.2 terabytes of data.
- On February 14, 2020, just one month before the vast majority of the country was required to shutdown due to the global COVID-19 pandemic, the parties filed a Joint Status Report. ECF 57. The DoD notified the court that it had identified 5,599 boxes of documents that contained the A-L IDPFs. *Id.* As of February 14, 2020, the DoD had reviewed and released 2,696 boxes of documents to Plaintiff. *Id.* The DoD also notified the Court in that Status Report that employee turnover was hindering the rate of review as was the conversion of the scanned IDPFs into a searchable PDF format. *Id.* With a year left until the Court's anticipated date of completion, the DoD was hopeful that it could complete, or at least substantially complete, review of the remaining files by the February 2021 deadline. Unfortunately, in March 2020 all AHRC-FOIA/PA personnel were required to work from home and the technological resources would only allow one FOIA officer to review the files.

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have been digitized and released.

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

In Plaintiff's Motion to Lift *Open America* Stay Plaintiff noted that according to his interpretation of the Department of Defense's annual FOIA report to Congress, the FOIA backlog for the Office of the Secretary of Defense/Joint Staff (OSD/JS) had increased each year. ECF 71. Although the Army is processing Plaintiff's request, it is possible that his request is being reported as an OSD/JS request. Regardless, the annual report must be read in its entirety for a clear picture regarding this question. The report demonstrates that the number of requests for OSD/JS has increased. For instance, the reports note that in 2018 OSD/JS received 1,854 requests "during fiscal year from current annual report" and in 2019 the number was 2,463. *See Report* at 52 and 43. Additionally, it is important to note that for all three years, the number of complex requests received by OSD far exceeds the number of simple requests received. The data not included in this report is the number of pages requested for each of these complex requests.

In short, each criteria detailed here as pertinent to entry of an *Open America* Stay weighs in favor of granting a stay in this case.

**Conclusion**

For the reasons cited herein, DoD respectfully requests that the Court GRANT the DoD's Motion for Summary Judgment, or in the Alternative, for an *Open America* Stay with regard to the M-Z IDPFs.

Dated: November 30, 2020

Respectfully submitted,

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**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 November 2020.

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