

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN

Plaintiff,

v.

UNITED STATES
DEPARTMENT OF DEFENSE

Defendant

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Civil Action No0. SA-16-CV-0972-RCL

SECOND AMENDED COMPLAINT

Plaintiff John Eakin brings this action against Defendant U.S. Department of Defense to compel compliance with the Freedom of Information Act, 5 U.S.C. §552 (“FOIA”).

As grounds therefore, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff John Eakin engages in non-commercial research concerning the disposition of missing in action military personnel and shares such research with families of the missing. Plaintiff seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law.

4. Defendant U.S. Department of Defense is an agency of the United States Government and is headquartered at 1400 Defense Pentagon, Washington, DC 20301. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

RELATED LITIGATION

5. On September 28, 2010, Plaintiff filed a related FOIA complaint in this court, Eakin v. U.S. Department of Defense, SA-10-CA-O748-FB (NSN), seeking records under the Freedom of Information Act. Certain of the same records are involved in this complaint.

6. On October 18, 2012, Plaintiff filed a related complaint in this court, Eakin vs. American Battle Monuments Commission, SA-12-CA-1002-FB (HJB) seeking the return of the remains of a family member missing since World War II and erroneously buried as an Unknown.

7. On September 30, 2016, Plaintiff filed his original complaint in this case, Eakin vs. United States Department of Defense, SA-16-cv-00972-RCL, seeking the production of Individual Deceased Personnel Files under the Freedom of Information Act.

8. On July 31, 2020, Plaintiff filed a first amended complaint in case number SA-16-cv-00972-RCL.

STATEMENT OF FACTS

9. On May 10, 2016, Plaintiff submitted a FOIA request to the Office of the Secretary of Defense/Joint Staff, (DoD FOIA request number 16-F-0955), a component of Defendant agency, 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.

10. On May 11, 2016, Plaintiff submitted a FOIA request to the ODCMO Directorate for Oversight and Compliance, (DoD FOIA request number 16-F-0958), a component of Defendant agency, 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).

11. Defendant notified Plaintiff by letter dated May 13, 2016, that his May 10, 2016 FOIA request (DoD FOIA request number 16-F-0955) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants' letter provided instructions for appeal of this decision. On May 16, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal within the time allowed by law which constitutes constructive denial.

12. Defendant notified Plaintiff by email dated May 23, 2016, that his May 11, 2016 FOIA request (DoD FOIA request number 16-F-0958) had been received, but they would be unable to respond within the 20-day statutory time period. Defendants' letter provided instructions for appeal of this decision. On May 23, 2016, Plaintiff appealed Defendants' decision. Defendant has not responded to Plaintiff's appeal within the time allowed by law which constitutes constructive denial.

13. On December 18, 2019, Plaintiff filed a FOIA request with the U.S. Department of Defense requesting copies of the following documents not provided under FOIA requests submitted on May 10 and 11, 2016 and subsequently litigated in the Western District of Texas,

civil case no. 5:16-16-cv-0972-RCL (DoD FOIA request numbers 16-F-0955 and 16-F-0958):

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/ka Defense POW/MIA Accounting Office) or other agency on behalf of the DPAA.

2. All documents which identify users/agencies having electronic access to the above described digitally scanned Individual Deceased Personnel Files (IDPFs).

3. Electronic (digital) copies of all World War II era Individual Deceased Personnel Files (IDPF's) a/ka 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.

14. On December 20, 2019, the Department of Defense responded and assigned reference number 20-F-0416 to Plaintiff's request. This response stated, "we will not be able to respond within the FOIA's 20-day statutory time period as there are unusual circumstances which impact our ability to quickly process your request."

15. The Department of Defense constructively denied Plaintiff's request and Plaintiff exhausted his administrative remedies.

16. On April 12, 2021, immediately upon receipt of information from Counsel for the Government that the digitization project was complete, Plaintiff filed a FOIA request with the U.S. Department of Defense requesting copies of the following documents not previously produced under FOIA requests number 16-F-0955, May 10, 2016; 16-F-0958, May 11, 2016; and 20-F-0416, Dec 18, 2019: (Ex. 1)

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/ka Defense POW/MIA Accounting Office) or other agency on behalf of the DPAA.

2. All documents that identify users/agencies having electronic access to the above described digitally scanned Individual Deceased Personnel Files (IDPFs).
3. 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.

17. On April 21, 2021, the Department of Defense indicated that Plaintiff's request was received on April 13, 2021, assigned reference number 21-F-0833 and the expected delivery date was 09/01/2021. (*Id*) On April 23, 2021, Defendant provided a final response to Plaintiff stating that his FOIA request number 21-F-0833 had been referred to the National Personnel Records Center (NPRC) and that Plaintiff's FOIA request was closed. (Ex. 2)

18. Plaintiff has made multiple requests for the requested documents via email, web form, request to counsel for the government (Ex. 3) and/or filings with this Court. As of the date of this amended Complaint, Defendant has failed to: (i) produce all of the requested records or demonstrate that the requested records are lawfully exempt from production; (ii) notify Plaintiff of the scope of any responsive records Defendant intends to produce or withhold and the reasons for any withholdings; or (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination.

19. The Department of Defense has constructively denied Plaintiff's request and Plaintiff has exhausted his administrative remedies.

COUNT I
(Violation of FOIA, 5 U.S.C. § 552)

20. Plaintiff realleges paragraphs 1 through 15 as if fully stated herein.
21. Defendant is violating FOIA by failing to search for and produce all records responsive to Plaintiff's request or demonstrate that the requested records are lawfully exempt from production.

22. Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with FOIA.

23. To trigger FOIA's administrative exhaustion requirement, Defendant was required to determine whether to comply with Plaintiff's request within twenty (20) working days of receiving the request. At a minimum, Defendant was required to: (i) gather and review the requested documents; (ii) determine and communicate to Plaintiff the scope of any responsive records Defendant intended to produce or withhold and the reasons for any withholdings; and (iii) inform Plaintiff that it may appeal any adequately specific, adverse determination. *See, e.g., Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 188-89 (D.C. Cir. 2013).

24. Because Defendant failed to determine whether to comply with Plaintiff's request within the time period required by FOIA, Plaintiff is deemed to have exhausted his administrative appeal remedies. 5 U.S.C. § 552(a)(6)(C)(i).

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to search for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably calculated to uncover all records responsive to the request; (2) order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a Vaughn index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ John Eakin

John Eakin, Plaintiff *pro se*

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