

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 No. SA-16-CV-0972-RCL

ADVISORY TO THE COURT

Plaintiff John Eakin, *pro se*, respectfully files this Advisory to the Court for the purpose of demonstrating Defendant’s non-compliance with the orders of this Court and the Freedom of Information statute. 5 U.S.C. § 552(a)

A - Defendant has failed to timely produce the A-L files as ordered.

On February 3, 2021, two days after this Court’s deadline to produce the A-L files, Defendant advised this Court that, “[T]he government believes it has now reviewed and produced to Plaintiff all currently available IDPFs for World War II service members with last names beginning with the letters A through L. Nevertheless, the government has also invited Plaintiff to identify any potential gaps or deficiencies in its production, and it remains committed to working with Plaintiff to address any issues that he or the government may identify.” (ECF No. 86 at 2)

In response, Plaintiff questioned the completeness of Defendant’s document production and informed Defendant that there appeared to be a very significant number of shortages in the number of records produced as ordered. Plaintiff’s observations were confirmed by additional document productions by Defendant that have since been delivered to Plaintiff. (*See status reports* ECF No. 88, 89

and 93) While these additional productions appear ongoing, now, more than three months since this Court ordered production, Defendant has not delivered all the A-L files Defendant was ordered to produce not later than February 1, 2021 nor has Plaintiff been advised of future delivery dates. Defendant has neither requested nor received this Court's permission to extend the date of full production of the subject files beyond February 1, 2021 and is apparently no longer expending any exceptional effort (*see* ECF 86 Ex. 2) in reviewing the missing files.

Just as Defendant was unable to provide this Court with an accurate accounting of the number files in question, the governments' apparent production of an incomplete sets of files casts doubt on their claim to have actually reviewed/redacted the subject files. Such large discrepancies in numbers of files should have been obvious to even a casual observer and belie any quality assurance effort in the production and control of these digital files. Such ineffectual control over the subject files has unduly burdened this Court and Plaintiff who have been unable to reconcile the multiple and constantly changing numbers presented to this Court by Defendant.

B - Defendant has falsely denied possession of the subject files.

More recently, Plaintiff submitted a FOIA request to Defendant encompassing the final tranche of the subject records. Defendant responded with what it described as a "final response" informing Plaintiff that it had determined that his FOIA request was under the cognizance of the National Personnel Records Center (NPRC). Defendant's response included a Memorandum of Agreement that inferred that Defendant no longer possessed the requested files. Defendant referred Plaintiff's FOIA request to NPRC for direct response and closed their file. (Ex. 1) Defendants' response was intentionally deceptive and has delayed this proceeding.

It should be noted that records accessioned into the NPRC are "published and offered for sale" and therefore generally not subject to production under the Freedom of Information Act. 5 U.S.C. § 552(a)(2)

In response, Plaintiff, exercising an abundance of caution and in an effort to maintain a clean and orderly record, moved this Court to allow him to withdraw his Motion for Leave to File a Second Amended Complaint. (ECF No. 91) which was subsequently granted (ECF No. 92). Upon expiration of Defendant's statutory time to respond to, and constructive denial of, Plaintiff's FOIA request, Plaintiff's Motion for Leave to File Second Amended Complaint was refiled. (ECF No. 94)

The National Personnel Records Center (NPRC) has now responded to Defendant's attempted referral of Plaintiff's FOIA request. (Ex. 2) NPRC states that Plaintiff's FOIA request was mistakenly referred to NARA and that **the requested records remain in the legal custody of Defendant**. NARA further explains that the Memorandum of Agreement relied upon by Defendant was not relevant to Plaintiff's FOIA request.

C – Defendant has intentionally delayed this litigation and unreasonably burdened this Court and Plaintiff.

Plaintiff submits the above information for the Court's consideration as examples of Defendant's attempts to delay release of documents that shed light on government operations and wrongdoing. Release of the subject documents would inform the public about "an agency's performance of its statutory duties" and would fall squarely within the definition of release in the public interest. *DOJ v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989)

The subject records are of intense public interest as they shed light on government operations and release is in the public interest. Information that serves the "basic purpose" of the FOIA to "open

agency action to the light of public scrutiny” constitutes a FOIA public interest in disclosure. (*see Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

Respectfully submitted,

/s/ John Eakin
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Certificate of Service

I hereby certify that on this the 21st day of May 2021, I electronically submitted the foregoing document for filing using the Court’s CM/ECF system. All counsel of record shall be served with a true and correct copy of the foregoing document by operation of the Court’s CM/ECF system.

/s/ John Eakin
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2 EXHIBITS