

**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 Case No. 5:16-16-cv-0972-RCL

**OPPOSED MOTION TO
COMPEL PRODUCTION OF DOCUMENTS**

1. Comes now, Plaintiff John Eakin *pro se* who moves the Court for an order compelling production of certain documents not yet produced in response to this Court’s Order of August 2, 2017. (*Mem. Op. ECF No. 29 at 17, Order ECF No. 30*)

2. Plaintiff and Counsel for Defendant have conferred extensively in the six months since the February 1, 2021 date specified for complete and total production of the A-L files. (*Id.*) Most recently, the parties conferred via email on September 2, 2021.

I. HISTORY OF PRODUCTION OF DOCUMENTS

3. On February 3, 2021, Defendants advised the Court that, “the 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.” (*Status Report, ECF No. 86*)

4. On February 9, 2021, Plaintiff advised Defendants' counsel that he had observed certain anomalies in the number of files produced to date. A subsequent Advisory to the Court (*ECF No. 87*) was filed March 9, 2021 when no response had been received from Defendant after 30 days.

5. The discrepancies were noted after Plaintiff had organized the files produced to date by last initial and compared the number of files to the number of WWII deaths reported in the NARA WWII death index database. While it is accepted that no direct comparison can be made due to file duplications, missing files and inclusion of Korean War files, Plaintiff observed multiple very substantial discrepancies between the number of deceased personnel files (IDPF's) produced and the number of reported deaths.

6. The Government subsequently made a series of supplemental productions of certain of the files, thereby confirming Plaintiff's observation that the original productions had been incomplete. (*Status Report, ECF No. 93*)

7. While Defendant has repeatedly invited Plaintiff to identify specific files he believes have not been produced, this invitation is unreasonable in that Plaintiff has no means of determining what files are in Defendant's possession and therefore what files have not been produced. Plaintiff has made a good faith attempt to assist Defendant in determining what files may not have been produced.

8. As noted by this Court, Defendant has been unable or unwilling to provide the most basic information concerning the subject files. (*Mem. Op. ECF No. 78*) Defendant's dilly-dallying has significantly burdened both this Court and Plaintiff and caused unnecessary delay. (*Id. at 11*)

9. While Plaintiff is unable to confirm Defendants' repeated assertions that all relevant files have been produced in response to this court's order (*ECF No. 79*), at this point Plaintiff believes that only the G, H and L files have not been produced in their entirety. Defendant has produced only 4,090 "E" files while the NARA database reports there were 7,191 deaths; 10,030 "H" files for 28,026 deaths; and, 10,857 "L" files for 17,258 deaths.

10. Additionally, Plaintiff submits that should documents exist which detail the numbers of files or the existing file names they should have been produced in response to Plaintiff's FOIA request.

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.** *[emphasis added]*

First Amended Complaint, (ECF No. 64 at 2)

It beggars belief that a government project such as the subject scanning project, estimated to exceed twenty million dollars (\$20,000,000) in cost, would not have produced documents detailing the volume of files and the individual file names. Should such documents exist, the Court's inquiries, as well as Plaintiff's requests, show that they are necessary to properly access the requested IDPF documents and therefore should have been produced to Plaintiff.

11. Defendant's most recent status report (*ECF No. 98*) notes that "The parties have not yet reached agreement on whether, when, or to what extent [the G,H and L files] will be re-produced."

12. Defendant's intentionally dilatory behavior is further illustrated by their misleading response to Plaintiff's FOIA request for the M-Z files as set out in Plaintiff's

Advisory (ECF No. 96) falsely inferring that the requested files were no longer in Defendant's possession. (Def. Response, ECF No. 97)

II. RELIEF REQUESTED

13. This Court has observed that the government has shown a lack of diligence in processing this FOIA request (*Mem. Op. ECF No. 78 at 13*) and Defendant now refuses to fully comply with this Court's Order of August 2, 2017. (*Mem. Op. ECF No. 29 at 17, Order ECF No. 30*) Plaintiff now respectfully requests the following relief:

a. An order requiring the immediate production of all documents not yet produced as required by this Court's Order of August 2, 2017 (*Id.*) or certification that such responsive documents do not exist.

b. An order requiring the immediate production of all existing documents necessary to audit the adequacy and completeness of Defendant's production of Individual Deceased Personnel Files or documents otherwise included in Plaintiff's FOIA requests or certification that such responsive documents do not exist.

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 on the 8th day of September, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties of record.

/s/ John Eakin

John Eakin, Plaintiff *pro se*