

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

PLAINTIFFS’ RESPONSE TO DEFENDANT’S MOTION FOR OPEN AMERICA STAY

Plaintiff John Eakin, *pro se*, respectfully files this response to Defendant’s Opposed Motion For *Open America* Stay. Since the March 25, 2022 status conference, the parties have conferred via email and been unable to agree on a production schedule for the M-Z files.

While Plaintiff fully respects this Court’s discretion in setting a production schedule, Plaintiff argues that Defendant does not qualify for an *Open America* stay under the FOIA statute nor this Court’s prior findings.

This Court’s prior Memorandum Opinions (ECF No. 29 and 78) explicitly set out the standards for granting an *Open America* stay. Plaintiff asserts that Defendant has failed to demonstrate that “exceptional circumstances” exist nor has Defendant made any progress in reducing its backlog of pending requests; this FOIA request is not being processed on a first-in; first-out basis; nor, has Defendant met the additional required conditions necessary for this court to grant an *Open America* stay.

I. An Open America Stay is not warranted under the FOIA Statute.

A. Defendant has failed to demonstrate that “exceptional circumstances” exist.

Just as with the “unusual circumstances” provision of the statute, the agency cannot exploit the *Open America* “exceptional circumstances” provision to indulge dilatory behavior. *5 U.S.C. § 552(a)(6)(C)(ii)* For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests. *Id.* After nearly six years since Plaintiff first requested the M-Z files, Plaintiff’s FOIA request is the very definition of a predictable agency workload.

B. Defendant has failed to follow a First-in; First-out policy in processing Plaintiff’s request.

Just as this Court found in 2020, (ECF No. 78 at 10) “The Government Apparently Does Not Follow a First-In, First-Out Policy, Despite Representing that It does.” (ECF 78 at 10) Defendant appears to have failed to even begin to process this request until Plaintiff’s Second Amended Complaint (ECF No. 111) was recently filed in this Court - six years after the original request was submitted. This Court previously found that, “Ironically, the agency here has used its *Open America* stay for precisely the opposite purpose: to cover up its dilly-dallying on Eakin’s project as it processes later-filed FOIA requests.” (ECF 78 at 11) Just as in 2020, Defendant now asserts that it will do better if granted another *Open America* stay and will devote additional, but unspecified, resources to processing this request. (ECF No. 117 at 7, ECF No. 117-1)

II. Four Conditions Must Be Satisfied to Warrant an Open America Stay.

Courts evaluate four conditions that must all be satisfied to warrant granting an Open America stay: *See Elec. Frontier Found. V. Det. Of Justice*, 563 F. Supp. 2d 188, 193 (D.C. Cir. 2008); *Summers v. Dept. of Justice*, 925 F. 2d 450, 452 n.2 (D.C. Cir. 1991; 5 U.S.C. § 552(a)(6)(C)(ii); *Memo. Op. ECF 29 at 8*

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

Plaintiff's FOIA request for Copies of WWII era Individual Deceased Personnel Files was submitted to Defendant on May 10, 2016. To date, only approximately half of these files (those with last initials A-L) have been produced. At some time in the intervening six years, Defendants might have anticipated production of the balance of the request (encompassing the M-Z files). Plaintiff's request at this point is, and has been, a very predictable agency workload.

B. The agency's resources are inadequate to process the requests within the time limits set forth in the statute

Defendant has failed to show that the agency's resources are inadequate to process the requests within the time limits set forth in the statute. Rather, Defendant's motion (ECF No. 117) and attached exhibit (ECF No. 117-1) show that they are willing to devote some, unstated and arbitrary, resources to the project only when pressed by this Court. As this court observed (ECF No. 78 at 10), "contrary to representations in its briefs and at the November 23 hearing, the agency apparently can octuple the manpower devoted to certain projects when it sees fit."

Plaintiff would also note that while Defendant consistently insists that file review can not be accelerated by the use of computer search programs, they work well for Plaintiff and he is able to find thousands of pages that have been, or should have been, redacted, within the documents produced to date.

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

Throughout this litigation, Defendant has consistently demonstrated a shocking lack of diligence in processing the requests. Files have been redacted improperly and/or inconsistently; redacted files have been accidentally produced to Plaintiff; Defendants don't even have an understanding of how many files they are dealing with. After informing the court that they had complied with the February 1, 2021 deadline to produce the A-L files, they actually needed an additional ten months to do so.

Defendant's response has been repeated, and usually unfulfilled, promises to do better in the future. Defendant has devoted no effort to properly re-reviewing the files improperly redacted or retrieving the files not properly redacted. Defendant appears more concerned with delay than protection of exempt material.

As this Court observed, (ECF No. 78 at 11) "the agency here has used its *Open America* stay for precisely the opposite purpose: to cover up its dilly-dallying on Eakin's project" When Defendant's actions in this litigation are looked at as a whole, the inescapable conclusion is that Defendant's difficulties have been due to their own desire to delay rather than with the size and scope of Plaintiff's request.

D. The agency must show reasonable progress in reducing its backlog of requests.

Neither the defendant agency (DoD), its subcomponent to which Plaintiff's request was submitted (OSD/JS), nor the agency contracted to respond to the requests (Army) have reduced their backlog of requests during the period in which the request was pending.

The following data collected from Defendant's annual reports to the Attorney General ¹ shows that neither the Department of Defense; the Office of the Secretary of Defense/Joint Staff; nor, the Army have reduced their backlog of FOIA requests.

Number of Requests Pending at End of Fiscal Year (backlog of requests)

<u>Year</u>	<u>DoD</u>		<u>OSD/JS</u>	<u>Army</u>
2016	13,681	3% increase	1,925	2,662
2017	14,905	11% increase	2,444	2,457
2018	16,903	19% increase	2,380	2,831
2019	18,665	10% increase	2,636	2,530
2020	22,412	22% increase	3,059	3,113
2021	24,385	9% increase	3,210	4,080

III. Balancing a Privacy Interest in Nondisclosure Against a Public Interest in Release

Attached as Exhibit 1 are three pages extracted from the IDPF of a member of Plaintiff's family, Private Arthur H. "Bud" Kelder, who died in a Japanese POW camp and was buried as one of 3,744 Unknowns in the Manila American Cemetery. This is an exemplar case representing more than 2,600 similar cases involving American Servicemen who perished in the Cabanatuan POW camp.

Page 1 of this exhibit is one of several letters from Private Kelder's Father to the Department of the Army requesting information on recovery of his son's remains. Page 2 is the Army's response informing Mr. Kelder that his son's remains are non-recoverable but assuring him that the Army fully appreciates his desires and will do everything in its power to fulfill them at the earliest possible date.

Apparently, Army was unable to read and comprehend their own file as the very next page, Page 3 of this exhibit, contains a note that "X-812, 814 thru 816, 818, 820 thru 824, Manila

¹ Department of Defense Annual FOIA Report to the Attorney General
<https://open.defense.gov/Transparency/FOIA/DoD-Annual-Reports-to-AG/>
 Last viewed April 12, 2022

#2, P.I. is associated with the subject decedent.” These ten “X numbers” represent the ten sets of unidentified remains recovered from the POW camp cemetery which were buried on November 19, 1942 when Private Kelder died. Private Kelder’s remains were found to be commingled with these associated remains. The government neglected or was unable to share this information with the families of Private Kelder or the thirteen other associated families.

The Individual Deceased Personnel Files on these ten individuals were obtained through Plaintiff’s first FOIA suit in this district. *Eakin v. United States Department of Defense et al SA-10-cv-00784-FB-NSN*. These IDPFs were the basis for Plaintiff’s subsequent petition for a Writ of Mandamus, *Eakin v. American Battle Monuments Commission, et al SA-12-CA-1002-FB-HJB*, and resulted in the disinterment and identification of the fourteen men – ten Unknowns and four (erroneously identified) Knowns – associated with Private Kelder.

These fourteen men were the first World War II Unknowns to be identified in modern times. Their recoveries, finally, after more than seventy years of waiting for the Army to do their job, brought closure to the families who, like Private Kelder’s family, had been denied their right to bury their family members according to their respective beliefs.

Since the recovery of Private Kelder’s remains, the Department of Defense has been shamed into disinterring and identifying more than three hundred similar cases, each of which recovery rested upon the availability of the IDPFs which are the subject of this lawsuit. Each of these cases resulted in the identification of additional remains that had been either not identified or identified incorrectly in violation of military regulations and congressional direction that recovery of missing American Servicemembers was among the highest national priorities.

As a result of the *Kelder* case and similar events which were highly embarrassing to Defendant, investigations were conducted into Defendant's MIA recovery mission by multiple government agencies.²

The *Kelder* case and subsequent investigations are similar to the cases of thousands of other World War II era MIA's, the resolution of which depend on the easy availability of the files that are the subject of this litigation. Placing these files in the public domain is in the public interest.

The Court of Appeals for the District of Columbia Circuit has opined that disclosure of information may be "necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991) (protecting individuals' identities in absence of such a showing); see also *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904-05 (D.C. Cir. 1996) ("[T]he public interest is insubstantial unless the requester puts forward compelling evidence that the agency denying the FOIA request is engaged in illegal activity and shows that the information sought is necessary in order to confirm or refute that evidence") (Exemption 7(C)), amended (Feb. 20, 1996); cf. *Dobronski v. FCC*, 17 F.3d 275, 278-80 (9th Cir. 1994) (ordering release of employee's sick leave slips despite fact that requester's allegations of abuse of leave time were wholly based upon unsubstantiated tips). At the same time, however, the Supreme Court has held

² Last viewed April 13, 2022

- Assessment of the Department of Defense Prisoner of War/Missing in Action Accounting Community <https://www.dodig.mil/reports.html/Article/1119070/assessment-of-the-department-of-defense-prisoner-of-war-missing-in-action-account/>
- DOD's POW/MIA Mission: Top-Level Leadership Attention Needed to Resolve Longstanding Challenges in Accounting for Missing Persons from Past Conflicts <https://www.gao.gov/products/gao-13-619>
- Senate Cmte. Reviews Defense Dept.'s Missing Personnel Offices Video at <http://www.c-spanvideo.org/event/222506>
- Wikipedia summary of 2013 evaluation, reports, and investigations into JPAC https://en.wikipedia.org/wiki/Joint_POW/MIA_Accounting_Command

that mere allegations of wrongdoing do not constitute a FOIA public interest and cannot outweigh an individual's privacy interest in avoiding unwarranted association with such allegations. *NARA v. Favish*, 541 U.S. 157, 175 (2004); *see, e.g., Bloomgarden v. DOJ*, 874 F.3d 757, 761 (D.C. Cir. 2017) (*finding substantial privacy interest in termination letter concerning Assistant United States Attorney and noting "[t]he aspect of the letter that concerns [the court] the most is that it contains mere allegations; it was never tested, nor was it ever formally adopted by the deputy-attorney general's office"*); *Kuzma v. DOJ*, 692 F. App'x 30, 35 (2d Cir. 2017) (*protecting identities of individuals involved in murder investigation and noting plaintiff does not provide evidence that information would reveal fault in handling of investigation*) (*Exemptions 6 and 7(C)*); *Watters v. DOJ*, 576 F. App'x 718, 724 (10th Cir. 2014) (*finding fault with plaintiff's asserted public interest of obtaining exculpatory information to prove his innocence because he provided no evidence of government wrongdoing*) (*Exemptions 6 & 7(C)*); *Sussman v. USMS*, 494 F.3d 1106, 1115 (D.C. Cir. 2007) (*finding that USMS properly protected the privacy of various individuals stressing that "[w]hile we find [plaintiff] did in fact allege misconduct, his bare and undeveloped allegations would not warrant a belief by a reasonable person that impropriety might have occurred"*) (*Exemption 7(C)*); *McCutchen v. HHS*, 30 F.3d 183, 187-89 (D.C. Cir. 1994) (*protecting identities of scientists found not to have engaged in alleged scientific misconduct*) (*Exemption 7(C)*); *Hunt v. FBI*, 972 F.2d 286, 288-90 (9th Cir. 1992) (*protecting investigation of named FBI agent cleared of charges of misconduct*) (*Exemption 7(C)*); *Dunkelberger v. DOJ*, 906 F.2d 779, 782 (D.C. Cir. 1990) (*same*) (*Exemption 7(C)*); *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987) (*protecting identities of attorneys subject to disciplinary proceedings, which were later dismissed*); *Bonilla v. DOJ*, 798 F. Supp. 2d 1325, 1332 (S.D. Fla. 2011) (*holding that speculative allegations of*

*impropriety, found meritless in requester's criminal action, fail to satisfy Favish standard); Aguirre v. SEC, 551 F. Supp. 2d 33, 56 (D.D.C. 2008) ("A 'bare suspicion' of agency misconduct is insufficient; the FOIA requester 'must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred'" (quoting Favish, 541 U.S. at 174)); McQueen v. United States, 264 F. Supp. 2d 502, 533-34 (S.D. Tex. 2003) (deciding that public interest would not be served by "disclosure of information regarding unsubstantiated allegations" made against three government employees) (Exemptions 6 and 7(C)), *aff'd*, 100 F. App'x 964 (5th Cir. 2004) (*per curiam*).*

IV. Summary

Defendant has failed to qualify for an *Open America* stay. When confronted with examples of their lack of diligence, they have responded with hollow promises that they have failed to deliver upon.

Production of the subject files is in the public interest in that they show considerable government wrongdoing and delivery to Plaintiff should be accelerated. Plaintiff's assertion that the subject files are critical to the identification of thousands of missing American servicemembers was validated by the ultimate identification of Kelder and the thirteen associated men due to litigation in this district. *Eakin v. American Battle Monuments Commission, et al.*

The great irony in Defendant's insistence in redacting the identity of prior requestors of these files is that is often the very person that Defendant requires MIA family members to identify and contact in order to provide family reference samples (DNA) before the MIA's family can request disinterment and identification of their missing family member.³

³ Directive-type Memorandum (DTM) 16-003, "Policy Guidance for the Disinterment of Unidentified Human Remains," May 5, 2016, Incorporating Change 2, June 15, 2017
<http://bataanmissing.com/pattersonVdpaa/007-13.pdf>
 Last viewed April 14, 2022

Respectfully submitted,

/s/ John Eakin

JOHN EAKIN, pro se
9865 Tower View, Helotes, Texas 78023
jeakin@airsafety.com 210-695-2204

Certificate of Service

I hereby certify that on this the 15th day of April 2022, 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

JOHN Eakin, pro se
9865 Tower View, Helotes, Texas 78023
jeakin@airsafety.com 210-695-2204