

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’ OPPOSED MOTION TO  
COMPEL PRODUCTION OF DOCUMENTS AND FOR BETTER SEARCH**

Plaintiff John Eakin, *pro se*, respectfully files this Opposed Motion to Compel Production of Documents and for Better Search. Plaintiff and counsel for Defendant have conferred extensively via email regarding the relief requested in this motion and been unable to resolve the issues herein presented. Plaintiff therefore submits this motion to the Court for consideration and determination.

**I. Factual and Procedural Background**

This is a Freedom of Information Act case that seeks to obtain records necessary to identify the remains of U.S. Military personnel missing from World War II and buried as Unknowns in overseas cemeteries. To date, Defendants attribute more than 300 such recoveries to Plaintiff’s efforts.<sup>1</sup>

Plaintiff first filed suit in 2010, *Eakin v. United States Department of Defense et al*, SA-10-cv-00784-FB-NSN, and obtained the files that had been digitized to that point. Beginning in 2012, defendant began digitizing additional and overlapping portions of this record collection and ultimately digitized the files with last name initials A thru L. Files with last name initials M thru Z were

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<sup>1</sup> Statement by AUSA Thorp in court on July 22, 2019

subsequently digitized. In 2020 and 2022, Plaintiff filed amended complaints. (ECF 64 and 111, respectively) These amended complaints essentially only expanded the subject-matter jurisdiction of this court as additional responsive records were digitized.

The original and amended complaints all requested production *inter alia* the following records:

*“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.”*

**A. Defendant has demonstrated confusion as to the subject document collection.**

Throughout the course of this litigation, Defendant has demonstrated a lack of familiarity with the subject records. They have been unable to quantify the number of files, describe the file naming conventions used, or even find documents in their possession until prompted. This Court’s Order of December 3, 2020 (ECF 78) extensively details the government’s misleading statements (*Id* at 3), dilatory behavior (*Id* at 6), “waffle[ing] about basic information” (*Id* at 6), and general confusion as to the size and contents of the subject document collection. (*Id* at 7) Defendants’ lack of cooperation has repeatedly delayed this litigation and unnecessarily burdened this Court and Plaintiff.

**B. Prior Motion to Compel Production of Documents**

On March 9, 2021, Plaintiff advised this court (ECF 87) that his analysis of the files produced to date indicated that the production was incomplete and in violation of this Court’s August 2, 2017 Order (ECF 29) that all A-L files be produced by February 2, 2021.

On March 26, 2021 and April 6, 2021, Defendant filed status reports asserting that additional files had been produced to Plaintiff and efforts to continue production were ongoing. (ECF 88, 89)

On May 21, 2021 advised this court that his analysis (ECF 96) of the produced documents indicated that all responsive documents had not yet been produced.

On September 8, 2021, Plaintiff filed his opposed motion to compel production of documents. (ECF 99) Defendant subsequently produced many tens of thousands of documents they had previously asserted did not exist. Plaintiff's motion to compel production of documents was subsequently withdrawn as moot upon Defendants' production of the contested records. (Mo. ECF 106, Order ECF 107) Defendants' ultimate production of documents not originally produced validated the accuracy of Plaintiff's analysis of the completeness of production.

## **II. Motion to Compel Production of Documents**

Defendant has now changed the production process by arbitrarily and, without notice or consultation, withholding certain of the M-Z files.

In response to this court's July 8, 2022 order (Memo Opinion ECF 120, Order ECF 121), Defendant began making monthly production of the remaining M-Z files. However, beginning with the first delivery of these M-Z files, Defendant has begun arbitrarily and erroneously withholding certain files of types previously produced.

As in Plaintiff's March 9, 2021 Advisory (ECF 87), analysis of the first two monthly deliveries of M-Z files revealed discrepancies when compared against known numbers of casualties by last initial. However, while Defendant conceded the discrepancies in the A-L files and subsequently produced records in excess of the number of WWII deaths, Defendant now informs Plaintiff that they are not producing files they suddenly consider to be non-responsive. These "non-responsive" records include duplicate files and those from conflicts other than World War II that were included with the A-L files previously produced.<sup>2</sup>

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<sup>2</sup> Aug 18, 2022 email from AUSA Parnham to Plaintiff

*We did not agree that the number of files should at least equal the number in the NARA database. As I explained in my email to you of March 4, 2021:*

*Although it makes sense that the number of files produced for some letters will exceed the number of WWII deaths, that will not be the case for all letters. Your FOIA request was for WWII IDPFs, not Korean War (or Vietnam War) IDPFs, so to the extent you received non-WWII files it was due to an overproduction on the government's part. In addition, the number of*

Defendant's unilateral determination that certain types of files previously produced are now non-responsive again demonstrates Defendant's lack of knowledge and confusion concerning the requested records. Defendant seems unaware that many individuals have multiple unique files. Defendant seems unaware that files that actually are duplicative would be overwritten during the file transfer process if the file names are the same. On the other hand, files not identically named are unique by definition. Further, the first two monthly productions of M-Z files have contained multiple examples of Korean War era files that Defendant now claims to be withholding. Obviously, Defendants' "quality control measures to screen for Korean War IDPFs" are defective in that they are not withholding files they claim to be withholding and just as likely to be erroneously withholding responsive files. In response, Defendant asks Plaintiff to identify specific files that he believes have been erroneously withheld, an absurd request.

Defendant's decision, after six years of production, to now withhold files of types previously produced to Plaintiff are an unwarranted and impermissible change that makes it impossible for Plaintiff or this Court to determine the completeness of the ordered production. Further, the fact that Defendant inconsistently produces files of a type they claim to be withholding brings into question the accuracy of their "quality control measures."

Plaintiff moves the Court to order production of all records of types previously produced for the A-L files and cease their unwarranted and deliberately confusing editing of the material to be produced.

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*files might not perfectly match up with the number of deaths because some individuals have more than one IDPF and some do not have an IDPF (e.g., due to duplicates, replacement files, declassified files, missing or destroyed files). Similarly, as I explained in my email to you of March 9, 2021:  
The NARA Death Index number is not the "minimum" number of WWII IDPFs that should exist. You should not expect a direct correlation between IDPFs and number of WWII deaths. Some files may have been lost, destroyed, etc.  
It is not our intention to produce Korean War files, and Army HRC reports that it has quality control measures to screen for Korean War IDPFs in the M-Z dataset. If you can identify the specific Korean War files you found in your review of the most recent production, we would be happy to take a look at the issue.*

Alternatively, Plaintiff would move for a Vaughn Index of all M-Z files that have been withheld. Such a Vaughn Index should include the reason for withholding, exact file name and, for files claimed to be duplicative of other files, the exact file names and file sizes of all such duplicative files.

### **III. Motion for Better Search**

On October 8, 2020, Plaintiff moved this court to order a better search. (ECF 71) This motion was subsequently dismissed without prejudice for lack of subject-matter jurisdiction. (Memo Opinion ECF 78, Order ECF 79) With the filing of Plaintiff's Second Amended Complaint, (ECF 111) this Court now has subject-matter jurisdiction over the disputed files.

After closely examining the files produced to date, Plaintiff has observed that many thousands of the files contained in both the A-L files and the partial M-Z files produced to date, were empty and contained only a file transfer request or a "charge out" form. Elsewhere in the produced files are indications that at least one of the agencies to whom these files were transferred was also in the habit of electronically scanning or digitizing the files and these files are responsive to Plaintiff's multiple FOIA requests and should now be produced.

Plaintiff requests the Court to order Defendant to conduct a better search to determine the location of the transferred or "charged out" files and if these files have ever been digitized and should be produced to Plaintiff.

Respectfully submitted,

/s/ John Eakin  
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**Certificate of Service**

I hereby certify that on this the 28<sup>th</sup> day of September 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* \_\_\_\_\_

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