

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. SA-16-CV-0972-RCL
	§	
UNITED STATES	§	
DEPARTMENT OF DEFENSE	§	
	§	
Defendant	§	
	§	

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

Plaintiff John Eakin, *pro se*, respectfully files this Reply to his Opposed Motion to Compel Production of Documents and for Better Search.

I. Additional Background

In addition to the procedural background presented in Defendant’s response, it should be noted that a similar situation existed with the A-L files. Plaintiff’s analysis of the A-L documents then being produced suggested that the production was incomplete. When notified of the apparent shortage, Defendant denied that any documents had been withheld. However, after this Court’s February 2, 2021 deadline for production of all of the A-L Plaintiff filed a motion to compel production. Defendant then suddenly “found” and produced more than eighty-five thousand (85,000) additional records that had not been produced by the deadline. (*see Plaintiff’s motion ECF 124 at 2*)

II. Plaintiff’s Motion is not Premature

While Defendant complains that Plaintiff’s motion is premature, they fail to note that this Court has ordered that production of the M-Z files be completed by July 8, 2023. (ECF 121) Rather, Defendant has represented that their monthly document productions constitute all records for specified

initials and production of these records that Defendant admits are being withheld will not be forthcoming. Addressing this issue at this time is entirely appropriate and may avoid another unnecessary delay in compliance with this Court's deadline for production similar to that of the A-L files which extended their delivery by nearly one year.

III. Defendant has Provided Evidence that Responsive Documents are Being Withheld

Defendant's complaint that this motion lacks evidentiary support and that Plaintiff should identify the withheld records is absurd in that Plaintiff has no way to know what records are being concealed. However, in this case not only does Plaintiff's analysis of the records produced show obvious anomalies and discrepancies in the number of records produced, but Defendant admits that records they consider to be "non-responsive" are being withheld.

Plaintiff's original and amended complaints all requested production of *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."* [emphasis added]

Plaintiff did not request just unique files or that duplicate files not be produced. Neither did Plaintiff specify only files specifically pertaining to WWII, but rather to all such files produced in that era. Defendant has a large archive of records known generally as the World War II era Individual Deceased Personnel Files that were all produced under various scanning contracts as well as files produced individually as needed. This archive, as shown by Defendant's production of A-L files, includes files Defendant now considers non-responsive because they are duplicative or pertain to conflicts other than WWII. Many such files may appear to be duplicative, but were required to correct a prior scanning problem. While the contents of some files may appear to be duplicative only a pixel by

pixel comparison can so determine. In other cases, multiple files may pertain to a single individual, but all such files have distinct file names and therefore are not duplicative of any other record.

Defendant should not be allowed at this late date to change their definition of what is responsive to Plaintiff's request and should be ordered to produce all responsive records in their possession and defined by their production of the A-L documents.

FOIA "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated." *American Immigration Lawyers Association v. EOIR*, 830 F.3d 667 (D.C. Cir. 2016). Agencies may only withhold portions of those records if they fall within one of the nine statutory exemptions. They are not authorized to withhold any other information.

Relying on the Supreme Court's ruling in *Milner v. Department of the Navy* that the FOIA's exemptions are "'exclusive' and must be 'narrowly construed,'" 562 U.S. 562, 565 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973) & *FBI v. Abramson*, 456 U.S. 615, 630 (1982)), the D.C. Circuit ruled that "non-responsive redactions . . . find no home in FOIA's scheme." *AILA*, 830 F.3d at 677. "Rather," the court declared, "once an agency identifies a record it deems responsive to a FOIA request, the statute compels disclosure of the responsive record—i.e., as a unit—except insofar as the agency may redact information falling within a statutory exemption." *Id.*

Not only has Defendant improperly withheld non-exempt records based on their erroneous determination of what records are non-responsive, but there are indications in the produced records that even their effort to withhold non-exempt records is being done defectively. Plaintiff's analysis has found that Defendant has produced numerous records of types Defendant now claims to be withholding from the M-Z files. One may conclude from this that Defendant's new and improved review of the M-Z files is defective and it is likely to be withholding even files Defendant considers to be responsive. This appears to be another example of Defendant's inability to properly manage their files as previously noted in this Court's Memorandum Opinion of December 3, 2020. (ECF 78)

IV. Defendant's Document Management is Ineffective and Mandates a Better Search

As shown by the A-L files, Defendant's management of the requested records has been ineffective and mismanaged. Defendant has repeatedly shown its lack of knowledge concerning the number or location of responsive records. Plaintiff has repeatedly attempted to share such information with Defendant and each time was rebuffed until this Court was made aware of such discrepancies.

Plaintiff's review of the records produced to date shows that many file folders contain only a form showing that the file contents were transferred to another office of the same agency. Many of these transfers were to Defendant's Honolulu, HI office which was known to digitize their records (which would make them responsive to Plaintiff's request). Digital copies of these charged out records have not been produced and Plaintiff requests that Defendant perform a better search of all agencies/offices known to have charged out IDPFs and produce any digital IDPF copies found.

Plaintiff requests the Court to order Defendant to produce all improperly withheld records and 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
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 10th day of October, 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