

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

John Eakin,)	
)	
Plaintiff,)	
)	
v.)	Civil Case No. 5:16-cv-00972-RCL
)	
)	
United States Department of Defense,)	
)	
Defendant.)	
)	

PLAINTIFF’S OPPOSED MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff John Eakin, *pro se*, respectfully submits his motion for partial summary judgment. The parties have conferred on multiple occasions and have cooperatively resolved several issues, however they have been unable to resolve the issues herein presented.

While Defendant has provided no detailed accounting of withheld files, email and status reports (ECF No. 139) filed with the court indicate that Defendant is unreasonably withholding as non-responsive a substantial number of records including those they consider to be charge-outs, file transfers or pertaining to Korean War casualties, *inter alia*.

I - Introduction

Attached as Exhibit 1 is the declaration of Plaintiff John Eakin. In this declaration, Plaintiff details the source of his knowledge of the creation of the records that are the subject of this litigation and how that defines the documents requested by Plaintiff. Primary among these documents was Defendant’s “Fiscal Year 2013 Budget Estimates” for the Defense Prisoner of War/Missing Personnel Office (DPMO) (a predecessor of DPAA) (Ex. 2) proposing their

“Individual Deceased Personnel Files (IDPFs) Project” that described as a single unit files from both WWII and later wars and conflicts. It goes on to detail the number of files pertaining to WWII and the Korean War as well as the total number of files. Plaintiff’s intention in drafting his FOIA request was to obtain all electronic files including, but not exclusive to, those digitized as part of Defendant’s IDPF Project as described in Exhibit 2. (*Eakin Decl*, Ex. 1 ¶ 4-12)

Plaintiff’s three FOIA requests are virtually identical except for arrangement of the text and, when read in their entirety, leave no doubt that Plaintiff’s request encompassed all IDPFs including all records digitized as part of Defendant’s scanning project.

Additionally, upon review of the records produced by Defendant, Plaintiff has found a number of the files to be empty and containing only a file transfer or “charge out” form. All of these transferred files went to various of Defendant’s agencies/offices and are responsive to Plaintiff’s FOIA request. (*Id.* ¶ 10-11)

II - History

Plaintiff has filed three FOIA requests which became the basis of this litigation. The first two requests were submitted prior to completion of Defendant’s scanning project and were necessary to confer interim subject-matter jurisdiction upon the Court. The third request was filed upon notice from Defendant that scanning of all files was complete. Amended complaints were filed upon Defendants’ constructive denial of each respective FOIA request.

On May 10, 2016 Plaintiff submitted his original 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.

The next day, May 11, 2016, Plaintiff submitted the following FOIA request:

1. All contracts, contract amendments/modifications, and similar documents pertaining to contracts for digital scanning of U.S. Army Individual Deceased Personnel Files (IDPFs) previously stored at National Archives and Records Administration (NARA) and which were funded by the Defense Personnel Accounting Agency (f/k/a Defense POW/MIA Accounting Office).

2. All documents which identify users/agencies having electronic access to the above described digitally scanned Individual Deceased Personnel Files (IDPFs).

The above two FOIA requests became the basis for Plaintiff's original complaint.

(Complaint ECF No. 1) On December 18, 2019 Plaintiff submitted a second FOIA request which became the basis for his First Amended Complaint: (ECF No. 64)

1. All contracts, contract amendments/modifications, and similar documents pertaining to contracts for digital scanning of U.S. Army Individual Deceased Personnel Files (IDPFs) previously stored at National Archives and Records Administration (NARA) and which were funded by the Defense Personnel Accounting Agency (f/k/a Defense POW/MIA Accounting Office) or other agency on behalf of the DPAA.

2. All documents which identify users/agencies having electronic access to the above described digitally scanned Individual Deceased Personnel Files (IDPFs).

3. 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.

On April 12, 2021, Plaintiff submitted a third FOIA request which became the basis for his Second Amended Complaint: (ECF No. 111)

1. All contracts, contract amendments/modifications, and similar documents pertaining to contracts for digital scanning of U.S. Army Individual Deceased Personnel Files (IDPFs) previously stored at National Archives and Records Administration (NARA) and which were funded by the Defense Personnel Accounting Agency (f/k/a Defense POW/MIA Accounting Office) or other agency on behalf of the DPAA.

2. All documents which identify users/agencies having electronic access to the above described digitally scanned Individual Deceased Personnel Files (IDPFs).

3. *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.*

This Court on August 2, 2017 (ECF No. 30), December 17, 2019 (ECF No. 54) and July 8, 2022 (ECF No. 120) ordered production of the records requested by Plaintiff. Defendant claimed that the records contained material exempt from FOIA disclosure under exemptions 6 and 7, privacy information, and several *Open America Stays* were granted to allow redaction of exempt material.

On October 8, 2020, Plaintiff moved the Court to lift the *Open America Stay* and for a better search. (ECF No. 71) On December 30, 2020, Plaintiff's motion was dismissed without prejudice for apparent lack of subject-matter jurisdiction. (ECF No. 78)

On January 17, 2018, Plaintiff filed his first motion to compel production of documents. (ECF No. 31, *Order* ECF No. 43). On September 28, 2022, Plaintiff filed a second motion to compel production of documents. (ECF No. 124, *Order* ECF No. 128)

III - Facts Not In Dispute

While Plaintiff is unable to audit the documents produced for completeness and must rely upon Defendant's representations, he believes the following facts to be true: (*Eakin Decl*, Ex.1 ¶¶ 13, 14)

a. Defendant has produced all of the Individual Deceased Personnel Files with last initials of A thru L. These files have been produced and include numerous files concerning casualties which occurred in Korea during both WWII and the Korean Conflict which grew out of WWII. In many cases there were multiple unique files on an individual that might appear to be duplicative, but were actually to correct deficiencies in the original scan or

add a supplemental entry. There were also numerous empty file folders and files containing only a charge-out or transfer request.

b. Defendant has produced all of the Individual Deceased Personnel Files with last initials of M thru Z except for:

- (1) Many, but not all, of the files pertaining to Korean Conflict deaths.
- (2) Many, but not all, of the charged-out or transferred files.

While Defendant has stated that M-Z IDPFs pertaining to locations in Korea or which contain only charge out forms are being withheld as non-responsive, (ECF No. 139) Plaintiff has found a number of these files to have actually been produced with the M-Z files. Therefore, Defendant's redaction process is flawed and likely to have withheld responsive as well as documents Defendant incorrectly deems to be non-responsive. (*Id.* ¶ 14)

IV - Disputed Issues

Plaintiff's intention in drafting his original FOIA request was to obtain all of the records described as Individual Deceased Personnel Records (IDPFs) or "293 files" including, but not exclusively, those that had been digitized either as part of the "Individual Deceased Personnel Project" described in Exhibit 2 or otherwise in the normal course of business. (*Id.* ¶ 4) The "Individual Deceased Personnel Project" described in Exhibit 2 specifically includes both WWII and Korean War files without date or other limitation and even details the estimated number of files in each. Plaintiff's FOIA request specifically includes and references the scanning project. Plaintiff's request contained no date or location restriction on the files to be produced and intentionally used the non-specific term "era."

Exhibit 2 describes the scanning project as, “The three-year project to scan all 442,000 IDPF files into an archival data library...” (Ex. 2 at 12-14) These files were stored and scanned as a single contiguous unit and Defendant has demonstrated that they cannot be reliably segregated by date, location or other factor. (*Eakin Decl*, Ex. 1 ¶ 13)

When addressing Plaintiff’s request to amend his complaint, this Court observed, “the Defense Department could save time and resources for both itself and the courts if it treated Mr. Eakin’s [May of 2016] FOIA request as a request for all of the digitized documents (*Originally cited* ECF No. 53 at 8-9) The Defense Department has undoubtedly been aware since Mr. Eakin made his initial FOIA request that he would eventually seek all of the digitized files.” (ECF No. 62 at 4)

A - Defendant is Withholding Responsive Records

While Defendant has represented that all documents responsive to Plaintiff’s FOIA requests have been produced (*Status Report* ECF No. 139 ¶ 15) Plaintiff finds numerous discrepancies in Defendant’s representation. (*Eakin Decl*, Ex. 1 ¶ 13) Defendant’s status report states that 252 unidentified documents were non-responsive (ECF No. 139) and implies that both Army Human Resources Command (AHRC) and the Defense POW/MIA Accounting Agency were each independently determining the responsiveness of each record, thereby circumventing the various controls Defendant had assured this court were in place.

Via email, ¹ Counsel for Defendant stated that those withheld files referenced in his status report to the court (*Id.*) consisted of charge-out sheets and Korean War files that had been provided by the Defense Prisoner of War Accounting Agency.

While Defendant admits withholding certain documents, no detailed accounting of these records or *Vaughn Index* has been provided. Based on Defendant's various communications, Plaintiff believes most of the missing or intentionally withheld records can be categorized as Korean War or are charge-out/file transfer records.

(1) - Korean War Files Are Responsive to Plaintiff's Request.

In drafting his FOIA request, Plaintiff requested **ALL** World War II **ERA** IDPFs or "293" files based on the information he obtained from Defendant's FY 2013 Budget Document (Ex. 2). [Emphasis added] Not only does the request specifically encompass ALL of the subject files, but the term "era" specifically indicates that the request is not limited to certain dates or locations. Even a narrow reading of the term "World War II era" would encompass Korean Conflict files as the Korean Conflict had its roots in World War II. ² (*Eakin Decl*, Ex. 1 ¶ 8, 16)

¹ Email dated July 21, 2023 from Thomas Parnham to John Eakin, subject *Eakin v. DoD No. SA-16-CV-972-RCL*

"My understanding is that DPAA provided AHRC the WWII files digitized pursuant to the contracts, and that those are what were reviewed for production to you. The government does not plan to produce the Korean War files or the charged out / transferred files, which we believe fall outside the scope of the FOIA requests. "

² The Korean War is often overshadowed by the immensity of World War II and the uncertainty of the Cold War. The conflict in Korea began before the end of World War II, amidst Allied negotiations to end the war with Japan. The Soviet Union, Japan, and China were longtime rivals for control of influence in Korea. After 35 years of Japanese colonial rule, the Soviet Union saw the liberation of Korea as an opportunity to extend their regional influence.

U.S. Naval History and Heritage Command website <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/korean-war/korea-operations/korea-origins.html> last viewed July 18, 2023

Defendant's acknowledgement that Plaintiff's FOIA request included all such records is shown by their inclusion with the A-L files that were produced. Defendant now wishes to change the rules midstream after previously producing documents they now claim to be non-responsive. (*Id.* ¶ 13)

(2) - Charge-Out and File Transfer Records are Responsive to Plaintiff's Request

Defendant has stated that files containing only a "charge-out" or file transfer request have been withheld as non-responsive. (*Status Report* ECF No. 139) Exemplars of these files are attached as Exhibits 3A, 3B and 3C. No corresponding complete file has been produced. (*Eakin Decl*, Ex. 1 ¶ 9-11)

Examination of the entirety of the files produced by Defendant finds that thousands of the files produced were empty and consisted only of a manila file folder or contained only one of several types of "charge-out" or transfer request forms. While many of these files do not identify the agency or office requesting the file, many were transferred to an element of the Defense POW/MIA Accounting Agency or a predecessor agency. While some of these "charged-out" files have a corresponding file that appears complete, most do not. (*Id.*)

The specificity of Plaintiff's FOIA request for "*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.*" should leave no doubt as to the records to be produced, the balance of Plaintiff's FOIA request citing Defendant's FY 2013 Budget Document (Ex. 2) ³

³ "*All contracts, contract amendments/modifications, and similar documents pertaining to contracts for digital scanning of U.S. Army Individual Deceased Personnel Files (IDPFs) previously stored at National Archives and Records Administration (NARA) and which were*

absolutely leaves no doubt that Plaintiff has requested, without date or location limits, the entire archive of digital files produced under a multi-million dollar contract funded by Defendant as well as any other deceased personnel file.

All records in Defendant's possession that have been digitized and which deal with individual deceased personnel are responsive to Plaintiff's FOIA request.

It should be noted that millions of official military personnel records were destroyed in a 1973 fire at the National Personnel Records Center and the IDPFs may be the only secondary record of an individual's service. Even these sparse records may be vital in proving a claim for veterans or burial benefits.

Further, Defendant has acknowledged that Plaintiff's FOIA request included all such charge-out and transfer records is shown by their inclusion in production of the A-L files. The fact that some of these files have been produced while others have been withheld indicates that Defendant's redaction process is faulty and it is likely that responsive records have been erroneously withheld. (*Id.* ¶ 13)

VI - Legal Standard

A - Summary Judgment

Summary judgment is proper when the evidence shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The main purpose of summary judgment is to dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

funded by the Defense Personnel Accounting Agency (f/k/a Defense POW/MIA Accounting Office) or other agency on behalf of the DPAA." (ECF Nos. 1, 64, 111)

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Id* at 323. If the moving party meets this burden, the non-moving party must come forward with specific facts that establish the existence of a genuine issue for trial. *ACE Am. Ins. Co. v. Freeport Welding & Fabricating, Inc.*, 699 F.3d 832, 839 (5th Cir. 2012). The function of summary judgment is to allow for parties to preempt litigation by demonstrating that "one or more of the essential elements of a claim or defense before the court is not in doubt and that, as a result, judgment should be entered on the basis of purely legal considerations." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). In deciding whether a fact issue exists, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving part, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 389 (1968)).

B - FOIA

"FOIA affords the public access to virtually any federal government record that FOIA itself does not specifically exempt from disclosure." *Jarvik v. CIA*, 741 F. Supp. 2d 106, 113 (D.D.C. 2010) (citing 5 U.S.C. §552; *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973)). Under FOIA, federal district courts have jurisdiction to order the release of improperly withheld or redacted information. 5 U.S.C. § 552(a)(4)(B). Under the statute, agencies must respond within 20 days of receiving a FOIA request. 5 U.S.C. § 552(a)(6)(A). This 20-day deadline may be extended by . . . up to 10 days under "unusual circumstances." 5 U.S.C. § 552(a)(6)(B)(i).

"Unusual circumstances" are defined to encompass only "the need to search for and collect the requested records" from separate locations; "the need to search for, collect, and appropriately examine a voluminous amount" of documents; and "the need for consultation" with other agencies. *Id.* § 552(a)(6)(B)(iii). In the event that more than 10 days are needed, the agency must notify the requester in writing and provide an opportunity to limit the scope of the request so that it may be processed within that time limit, or provide an opportunity to arrange for an alternative time frame to process the request (or modified request). *Id.* § 552(a)(6)(B)(ii). Critically, however, "[t]he statutory list of circumstances that permit an agency to extend the 20-working-day timeline to make a 'determination,' including collecting and examining numerous or distant documents, clearly contemplates that the agency must actually gather the responsive documents and determine which it will produce and which it will withhold." *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 711F.3d180, 188-89 (D.C. Cir. 2013). "The agency cannot make the requisite 'determination' by simply stating its future intent to produce some non- exempt documents." *Id.*

In the case of adverse determinations, FOIA provides the right to appeal to the head of the responding agency, and such agency shall make a determination within 20 days after receipt of the appeal. 5 U.S.C § 552(a)(6)(A)(i)-(ii). In the event an appeal is denied, FOIA provides for judicial review of the government's decisions to deny document production and allows district courts to order the production of agency records improperly withheld. 5 U.S.C. § 552(a)(4)(B). FOIA requires a plaintiff to exhaust his administrative remedies prior to filing a FOIA lawsuit. Generally, a plaintiff has exhausted his administrative remedies by filing an appeal, but a person shall be deemed to have exhausted his administrative remedies if the agency fails to comply with . . . the applicable time limit provisions. *Id.* § 552(a)(6)(C)(i).

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Defenders of Wildlife v. US. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (citing *Bigwood v. US. Agency for Int'l Dev.*, 484 F. Supp. 2d 68, 73 (D.D.C. 2007)). In considering a motion for summary judgment under FOIA, the court must conduct a de novo review of the record. 5 U.S.C. § 552(a)(4)(B). The defendant agency has the burden of justifying nondisclosure. *Id.*

VII - Release is in the Public Interest

The records that are the subject of this litigation show thousands of cases of mis-identification, incorrect identification and intentional non-identification of the remains of American military personnel. Also found in these records are thousands of examples of lost/misplaced remains and those negligently commingled. Certainly, it is in the public interest "to open agency action to the light of public scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). *See also Lesar v. Department of Justice*, 636 F.2d 472, 486 & n.80 (D.C. Cir. 1980).

Further, Defendant has foreclosed future public access to this complete digital archive of IDPFs and the advantages of digital copies by transferring the hardcopy original records to the National Archives where they are *individually* offered for sale and therefore exempt from FOIA. (5 U.S.C. § 552(a)(1)) Nor, has Defendant made these files available for public inspection in an electronic format. (5 U.S.C. § 552 (a)(2)) even though they are required to do so as they have become the subject of subsequent requests for substantially the same records (5 U.S.C. § 552 (a)(2)(D)(ii)(I) or because they have been requested 3 or more times. (5 U.S.C. § 552 (a)(2)(D)(ii)(II)) (*Eakin Decl*, Ex. 1 ¶ 15)

Relief Requested

Plaintiff moves for an order directing Defendant to:

- a. Complete production of all responsive documents not yet produced in their entirety and those being intentionally withheld.
- b. Provide a *Vaughn Index* of any records Defendant believes to be non-responsive or exempt from disclosure under FOIA.

Respectfully submitted,

/s/ John Eakin

John Eakin, Plaintiff *pro se*

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2023, 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*

INDEX OF EXHIBITS

Ex. 1 - Declaration of John Eakin

Ex. 2 – Extracted pages from “Fiscal Year 2013 Budget Estimates”

Ex. 3A - Exemplar File Transfer

Ex. 3B - Exemplar File Transfer

Ex. 3C - Exemplar charge out form

Ex. 4A – Extracted page from PATTON_ROBERT_E_-
_RA15424152_IDPF_COMPLETE_118432_WWII_UNK_85-txt.pdf

Ex. 4B – Extracted page from THOMAS_ROBERT_HERBERT_- _US-
45028833_IDPF_COMPLETE_452590_WWII_UNK_56-0903d5e182977c71.pdf

Proposed Order