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

John Eakin,	)	
	)	
Plaintiff,	)	
	)	
	)	**Civil Case No. 5:16-cv-0972-RCL**
v.	)	
	)	
	)	
United States Department of Defense,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S REPLY TO HIS OPPOSED MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR A BETTER DOCUMENT SEARCH AND HIS RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Plaintiff now respectfully files this Reply to His Opposed Motions for Partial Summary Judgment and for a Better Document Search and his Response to Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment.

Defendant's budget document (ECF No. 141-2) describes the scanning project referenced in Plaintiff's FOIA requests as requiring, "[T]he release, transport, handling, scanning, and return of approximately 405,000 WWII and 37,000 Korean War IDPFs …." in a "three-year project to scan all 442,000 IDPF files into an archival data library…." (*Plf. Exh. No. 2 at 12-14*, *Id*.) These files were stored and scanned as a single contiguous unit of World War II era files and Defendant has demonstrated that they cannot be reliably segregated by date, location or other factor.

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

Further, Defendant has acknowledged by prior productions that Plaintiff's FOIA request included all such charge-out and transfer records. The fact that some of these files have been produced while others have now been withheld indicates that Defendant's redaction process is faulty and it is likely that additional responsive records have been erroneously withheld.

A. Defendant's Objection to Production is Untimely.

Now, three months after informing the Court that production was complete and the Court's deadline had been complied with, Defendant wishes to withhold 252 documents which Defendant has suddenly found, arbitrarily reclassified in their case management system and now asserts that they are non-responsive. Defendant's objection at this late hour is untimely and has no apparent purpose except to unreasonably delay the conclusion of this litigation.

Plaintiff's FOIA requests for World War II era IDPFs were filed in 2016 (*Complaint* ECF No. 1), 2019 (*First Amended Complaint* ECF No. 64) and most recently on April 12, 2021 (*Second Amended Complaint* ECF No. 111).

This Court on August 2, 2017 (ECF No. 30), December 17, 2019 (ECF No. 54) and July 8, 2022 (ECF No. 120, 121) ordered production of the records requested by Plaintiff. Said productions to be completed by July 8, 2023. Throughout the ensuing production Defendant has produced tens of thousands of virtually identical documents without objection by Defendant.

Now, more than seven years since Plaintiff's first request was filed and after the Court's deadline, Defendant untimely has produced twenty additional files and objects to production of four (4) complete IDPFs and 248 IDPFs consisting of only a file folder and charge-out sheet, all of which are virtually identical to files they have previously produced.

During the course of this litigation Defendant has previously objected to production of ONLY those files which they considered to be exempt from production under FOIA exceptions 6 and 7 (privacy).

This type of unfounded, untimely and dilatory behavior by Defendant was previously noted in this Court's Order of December 3, 2020 (ECF No. 78) when it observed that "[T]he district court must 'ensur[e] that the agency continues to exercise due diligence in processing the request.' *Citizens for Resp. & Ethics in Wash*, 711 F.3d at 189."

Defendant has obviously located these files, has them on-hand, and has had more than sufficient opportunity to redact any material exempt under FOIA exceptions 6 or 7 and has made no claim that release would cause harm to any party. Instead of timely objecting to production of these 252 files, Defendant now relies on a bogus claim that they are non-responsive because they have arbitrarily reclassified them in their case management system.

This Court has generously accommodated Defendant's extensive requests for additional time to review and redact the requested records (ECF No. 121) and Defendant has claimed to have produced all records (ECF No. 139 ¶ 15). Defendant has, now three months after stating that they had complied with the Court's deadline of July 8, 2023, and that production was compete, Defendant has produced an additional 20 complete IDPFs and simultaneously makes a bogus claim of exemption for approximately 252 files claimed to be non-responsive. (*Id*. ¶ 14)

B. Defendant's Objection to Production is bogus, confused, and contradictory

Defendant now argues (ECF No. 142 at 8) that they have searched their Case Management System and because that system classifies files by conflict, rather than *Era* as specified in Plaintiff's FOIA request, those files pertaining to the Korean Conflict are now non-

responsive. Defendant's arbitrary reclassification after receipt of Plaintiff's request is disingenuous and those files are relevant and responsive to Plaintiff's request.

While Defendant correctly acknowledges that agencies have a duty to construe a FOIA request liberally (ECF No. 142 at 9), they neglect to acknowledge that they previously determined that virtually identical records were responsive. How were these records responsive then and non-responsive, now.

Defendant argues (ECF No. 142 at 9) that they "Reasonably Interpreted Plaintiff's FOIA Requests as Seeking Only World War II IDPF's." But they previously produced thousands of records they now consider non-responsive so it appears that their interpretation of Plaintiff's FOIA request changed mid-stream.

Defendant's claims to have consistently considered Korean Conflict files and charge-out records as non-responsive are blatantly false. ("*DoD reasonably Interpreted Plaintiff's FOIA Requests as Seeking Only World War II IDPFs*." (*Id*.) "*DoD reasonably construed Plaintiff's request …. As excluding Korean War files."* (*Id.* at 10) "*The government has always interpreted Korean War files as outside the scope of Plaintiff's request."* (*Id.* at 11)) Defendant has previously produced tens of thousands of IDPFs generated from deaths during the Korean Conflict and files containing only charge-out forms.

Just as described in this Court's December 3, 2020 Order, (ECF No. 78) Defendant's accounting of the number of subject files is again defective, confused and contradictory.

Defendant states (ECF No. 142 at 3) that 422,459 IDPFs have been produced or 96% of the 442,000 files stated in their original estimates. (*Fiscal Year 2013 Budget Estimates* (Ex 2) ECF No. 141-2) If one assumes, as appears true, that the Korean Conflict files are evenly distributed throughout the collection, then approximately 35,520 of the files produced to date

pertained to the Korean Conflict. Defendant now claims that only the four withheld files pertained to the Korean Conflict.

Similarly, Defendant has previously produced at least 2,841 files containing a "charge-out" sheet and is now withholding 248 as non-responsive. Again, how were these files responsive then, but non-responsive, now.

In July 2016, the D.C. Circuit decided *American Immigration Lawyers Association v. Executive Office for Immigration Review* (*Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, No. 15-5201, 2016 WL 4056405, at *1 (D.C. Cir. July 29, 2016)) and held there is "no statutory basis for redacting ostensibly non-responsive information from a record deemed responsive. . . . [O]nce the government concludes that a particular record is responsive to a disclosure request, the sole basis on which it may withhold particular information within that record is if the information falls within one of the statutory exemptions[.]" (*Id*. at 7)

The court found "the dispositive point is that, once an agency itself identifies a particular document or ***collection of material***—such as a chain of emails—as a responsive 'record,' the only information the agency may redact from that record is that falling within one of the statutory exemptions." (*Id*.) (emphasis added)

In this case, by withholding specific files while producing virtually identical records Defendant has tacitly confirmed that the withheld records are part of the larger collection requested by Plaintiff. Defendant is attempting to invoke a tenth exemption to the nine very specific exemptions provided for in the Freedom of Information Act.

Defendant's bogus claim of exemption from FOIA as non-responsive seems to be yet another example of their inability to properly manage the collection of records which are the

basis of this litigation as this Court documented in its December 3, 2020 Order. (ECF No. 78 at 4)

Defendant previously stated that there were 405,000 WWII IDPFs and 37,000 Korean Conflict IDPFs, a total of 442,000 IDPFs in one contagious collection, stored as a single unit, and to be scanned and digitized as a unit. (ECF No. 141-2). Defendant's ridiculous and untimely claim that these last 252 files – less than 0.00053260% of those produced - are exempt from production as non-responsive seems to ask the Court to hear its words and ignore its prior actions. Defendant would have one believe that there are only four IDPFs from the Korean Conflict when thousands of such have previously been produced to Plaintiff.

Either Defendant doesn't know how many World War II and Korean Conflict files exist or they are unable to properly segregate them into the categories they now claim to be non-responsive – facts that support Plaintiff's request for a better search.

Defendant's assertion that file folders containing only a charge-out form are not IDPFs (ECF No. 142 at 12) defies all logic in that they were filed and stored as IDPFs (ECF No. 141-2), scanned and digitized as IDPFs, (*Id.*) and are identical to thousands of files previously produced to Plaintiff in response to his request for IDPFs.

C. Defendant's Frivolous Objections to Production of a Small Number of Records Similar to Those Previously Produced Have Created a Public Interest in the Contents of These Records.

Defendant's actions in withholding these 252 out of 422,459 files at this late hour now calls into question Defendant's motives and/or the contents of these seemingly innocuous files.

As the Supreme Court has put it, the basic purpose of the Freedom of Information Act is"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). Defendant's untimely and thinly supported claim that the subject files are exempt from production as non-responsive now presents the question of what could be contained in such seemingly innocuous records as to require a last-minute, unsupportable, objection to production?

The courts have found the public interest in disclosure to be strong when requested information would inform the public about proven violations of public trust. *See, e.g., Columbia Packing Co., Inc. v. Department of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977) (federal employees found guilty of accepting bribes); *Congressional News Syndicate v. Department of Justice,* 438 F. Supp, 538, 544 (D.D.C. 1977) (misconduct by White House staffers). As one court has observed, there is an "obvious public interest in a full and thorough airing of . . . serious abuses that did in fact occur, in the hope that such abuses will not occur in the future." *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 418 (D.D.C. 1976).

In addition to the obvious public interest involved in production of these final 252 records, the apparently unfounded objections surrounding the withholding of these records raise questions as to whether agency personnel acted arbitrarily or capriciously with respect to the withholding, after receipt of Plaintiff's FOIA request, then reclassifying the files in their case management system to support their claim of non-responsiveness.

D. Defendants Late Production Confirms the Need for a Better Search

Judicial economy demands the prompt conclusion of this litigation with, if appropriate, the court's opinion as to the circumstances surrounding this withholding. Defendant's sudden discovery of additional responsive and non-responsive files after previously stating that they had complied with the Court's deadline for production demonstrates Defendant's continued inability to properly account for these records and supports Plaintiff's request for a better search.

Respectfully submitted,

/s/ John Eakin
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 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*