UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN, *Plaintiff*, v. UNITED STATES DEPARTMENT OF DEFENSE, *Defendant*.	§ § § § § § § § § §	No. SA-16-CV-972-RCL

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The Court should dismiss Plaintiff's FOIA lawsuit under Rule 12(b)(1) for lack of subject-matter jurisdiction. Plaintiff does not contend otherwise. His response (ECF No. 144) to DoD's motion to dismiss (ECF No. 142) makes no mention of the government's argument that a claim under 5 U.S.C. § 552(a)(6)(C) is moot and must be dismissed once the agency produces responsive records. *See Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993). Disputes about the adequacy of the agency's response are irrelevant and do not form a basis for the Court to retain jurisdiction. *See, e.g.*, *Matthews v. EOUSA*, No. 21-50829, 2022 WL 1055178, at *2 (5th Cir. 2022); *Calhoun v. FBI*, 546 F. App'x 487, 490 (5th Cir. 2013); *Voinche v. CIA*, 70 F.3d 1266, 1995 WL 696692, at *1 (5th Cir. 1995) (unpublished table decision).

If the Court declines to dismiss this matter under Rule 12(b)(1), it should nevertheless grant summary judgment to the government. The DoD conducted an adequate search of the appropriate system of records and withheld only those materials that were non-responsive or exempt from disclosure. *See* ECF No. 142 at 7–9; *see also* ECF No. 142-1, Holm Declaration; ECF No. 142-2, Price Declaration. The government reasonably interpreted Plaintiff's request for "all World War II era [IDPFs] … which exist in any digital or electronic format" as excluding

Korean War files and charge-out sheets. *See id.* at 9–14. Plaintiff agrees that there are no other issues in dispute. *See* ECF No. 141 at 4–5.

1. DoD's Additional Review and Supplemental Production of Previously Withheld Documents Is Evidence of Good Faith

Much of Plaintiff's opposition to the government's motion is directed at DoD's September 2023 supplemental production of previously withheld documents. Plaintiff asserts that the government "wishes to withhold 252 documents which [it] suddenly found [and] arbitrarily reclassified in [its] case management system…." *See* ECF No. 144 at 2; *see also id.* at 3 (accusing DoD of failing to "timely object[] to production of these 252 files" and of belatedly relying on "a bogus claim that they are non-responsive because they have arbitrarily reclassified them in their case management system"). He argues that DoD's decision to withhold 252 files "at this late hour" calls into question the government's "motives and/or the contents of these seemingly innocuous files." *Id.* at 6. Finally, he contends that DoD's "sudden discovery of additional responsive and non-responsive files after previously stating that they had complied with the Court's deadlines for production" confirms the need for a better search. *Id.* at 7.

Contrary to Plaintiff's arguments, DoD did not "suddenly" find or "untimely" identify the 252 withheld documents after completing its productions. Upon making its final production of M–Z files in July 2023, DoD informed Plaintiff and the Court that AHRC had "determined that 252 documents received from" DPAA were non-responsive and therefore would not be produced. *See* ECF No. 139 at ¶ 14. In other words, during a document-by-document review to redact exempt material, AHRC determined that a small number of files provided by DPAA (approximately 0.15%) had been misidentified as World War II IDPFs. It informed the Court about the withheld documents prior to the production deadline and then provided additional details about them to Plaintiff in correspondence aimed at narrowing the issues in dispute. *See*

ECF No. 141 at 7 ("Via email, Counsel for Defendants stated that [the] withheld files … consisted of charge-out sheets and Korean War files….") (footnote omitted).

The DoD did take a closer look at these 252 files to prepare an accounting in response to Plaintiff's motion for partial summary judgment. *See* ECF No. 142-3 (log identifying non-responsive files by name and reason for nonproduction). Upon further review, DoD decided that 20 of the 252 documents were releasable and provided copies to Plaintiff on September 28, 2023. *See* ECF No. 142-2, Price Decl. ¶ 13. The government's ongoing efforts to identify responsive documents, even as it was preparing its motion for summary judgment in this case, "does not prove that [its] original search was inadequate, but rather shows good faith on the part of the agency that it continues to search for responsive documents." *See Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 63 (D.D.C. 2003); *see also Khatchadourian v. DIA*, 597 F. Supp. 3d 96, 108 (D.D.C. 2022) (declining to find bad faith where agency conducted a supplemental review of withheld documents that led to release of 287 additional records).

Courts have "emphatically rejected" the argument that supplemental productions by the government are evidence of bad faith, because penalizing an agency for ongoing production efforts "would work mischief in the future by creating a disincentive for an agency to reappraise its position, and when appropriate, release documents previously withheld." *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986). DoD's second review of the non-releasable documents led to the production of 20 IDPFs in this case—"a proverbial 'drop in the bucket'" considering the "voluminous number of documents relevant to [Plaintiff's] FOIA request." *See Campaign For Responsible Transplantation v. FDA*, 219 F. Supp. 2d 106, 111 (D.D.C. 2002) (concluding that production of 55 documents following summary judgment filing was not evidence of bad faith). DoD did not produce these documents to flout the production deadline or "unreasonably delay

the conclusion of this litigation." *See* ECF No. 144 at 2. To the contrary, the government simply remains committed to "working in good faith to identify, review, and produce every [IDPF] to which Plaintiff is entitled…." ECF No. 102 at 1.

2. Korean War IDPFs and Charge-Out Files Are Not Responsive

Korean War IDPFs and charge-out files are not responsive to Plaintiff's FOIA requests. These files are fundamentally different from "World War II era" IDPFs that "exist in any digital or electronic format." The government must liberally construe Plaintiff's FOIA requests, but it need not produce files that were not requested. *See Khatchadourian v. Def. Intel. Agency*, 453 F. Supp. 3d 54, 68 (D.D.C. 2020); *see also Machado Amadis v. United States Dep't of State*, 971 F.3d 364, 370 (D.C. Cir. 2020) ("Agencies must read FOIA requests 'as drafted.'") (quoting *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984)).

Plaintiff resists this common-sense conclusion by repeating several arguments made in his motion for partial summary judgment. First, he argues that the Korean War files are responsive to his FOIA request because a DoD budget document describing its IDPF digitization process referenced both World War II and the Korean War.[1] *See* ECF No. 144 at 1. Second, he contends that "[a]ll World War II era records in [DoD's] possession that have been digitized and which deal with individual deceased personnel are responsive to Plaintiff's FOIA requests." *See id.* Finally, he claims that DoD "have acknowledged by prior productions" that charge-out sheets

[1] Plaintiff suggests that "approximately 35,520 of the files produced to date pertained to the Korean Conflict." *See* ECF No. 144 at 4–5. There is no support for such a claim. Plaintiff wrongly assumes that a budget estimate from a decade ago perfectly describes the files actually available for review by DoD in this case, and he ignores that the government reviewed and produced duplicates of certain IDPFs to ensure that all responsive files were released to him. *See* ECF No. 102 at 3 (describing government's efforts to re-produce all F, G, I, and J files in its possession, including those previously produced). Notably, Plaintiff identified only one Korean War file in his motion for partial summary judgment. *See* ECF No. 141-4.

were responsive, asserting that the government "previously produced at least 2,841 files containing a 'charge-out' sheet" and should therefore be required to produce all charge-out sheets.[2] *See id.* at 2, 5.

The DoD already addressed these arguments in its own dispositive motion and response to Plaintiff's motion for partial summary judgment. In short, the DoD budget document does not define the scope of Plaintiff's FOIA requests and is consistent with the government's interpretation in any event. *See* ECF No. 142 at 11. Plaintiff requested only digitized IDPFs, and a broad request for "all records" that "deal with individual deceased personnel" would be impossibly broad. *See id.* at 12–13. Finally, DoD's alleged overproduction of certain non-responsive A–L records prior to taking corrective measures in connection with its review of M–Z records is not a concession that non-responsive records need to be produced. *See id.* at 13–14.

Plaintiff's opposition also recycles an argument from his June 2019 motion for partial summary judgment. In that earlier motion, Plaintiff cited *American Immigration Lawyers Association (AILA) v. Executive Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016), for the proposition that DoD could not withhold "FOIA requests for the IDPFs made by other persons or organizations [as] non-responsive." *See* ECF No. 53 at 5. He argued that the "entire contents of the [IDPF] is responsive" and that DoD "would have digitized [non-IDPF materials] as part of their IDPF scanning project" unless the materials "were … integral parts of the IDPFs." *See* ECF No. 46 at 12. The Court rejected this argument, explaining:

> To say that thousands of IDPFs are analogous to one email chain stretches the bounds of rationality. Unlike in *AILA* where the agency "went down to the level of

[2] Plaintiff provides no factual support for his claim about the number of charge-out sheets previously produced by the government. In any event, producing an IDPF that "contains" a charge-out sheet is not the same as producing a charge-out sheet without a corresponding IDPF. If the government identified an IDPF that was previously "charged out," it produced that file to Plaintiff. *See* ECF No. 141 at 8; ECF No. 142 at 13 n.6.

> an individual sentence within a paragraph within an e-mail message" and redacted that individual sentence as non-responsive, [DoD] is not attempting to conduct a sentence-by-sentence review of each IDPF's responsiveness. The Court therefore finds [Plaintiff's] arguments regarding responsiveness to be uncompelling, and [DoD] may label individual files as non-responsive.

ECF No. 53 at 5–6 (citations omitted).

In his most recent motion for partial summary judgment, Plaintiff repeats and expands the argument that this Court has previously rejected. Plaintiff now claims that Korean War files and charge-out sheets are "part of the larger collection requested by Plaintiff," that this *collection* is a single responsive "record," and that DoD therefore must produce the entire corpus of scanned documents subject only to redactions pursuant to a statutory exemption. *See* ECF No. 144 at 5. Plaintiff's argument is breathtaking in its scope. But the logic of the Court's prior order still applies. A collection of thousands of potential IDPFs must be treated differently than a single email chain. Under the facts of this case, DoD was permitted to "label individual files as non-responsive" during its review rather than simply hand over the contents of the entire Case Management System. *See* ECF No. 53 at 6.

* * *

WHEREFORE, the government respectfully requests that the Court dismiss this action under Rule 12(b)(1) or, in the alternative, grant DoD summary judgment under Rule 56.

Dated: November 10, 2023

Respectfully submitted,

JAIME ESPARZA
United States Attorney

By: */s/ Thomas A. Parnham Jr.*
THOMAS A. PARNHAM JR.
Assistant United States Attorney
New York Bar No. 4775706
903 San Jacinto Blvd, Suite 334
Austin, Texas 78701
(512) 916-5858 (tel)
thomas.parnham@usdoj.gov

Attorneys for the United States Department of Defense