

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN)
9865 Tower View Road)
Helotes, Texas 78023)

Plaintiff,)

v.)

NO. SA-10-CA-0784-FB-NN

UNITED STATES)
DEPARTMENT OF DEFENSE)
The Pentagon)
Washington, D.C. 20301-1155)

ROBERT M. GATES, in his official)
Capacity as Secretary of Defense)

UNITED STATES)
DEPARTMENT OF THE ARMY)
1400 Defense Pentagon)
Washington DC 20301-1400)

JOHN McHUGH, in his official)
Capacity as Secretary of the Army)

Defendants)
_____)

FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 et seq., for injunctive and other appropriate relief, and seeking the expedited processing and release of agency records improperly withheld from Plaintiff by Defendants Department of Defense (“DoD”) and Department of the Army (“Army”).

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to FOIA, 5 U.S.C. §§ 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

3. Plaintiff John Eakin is not affiliated with any organization or commercial entity having an interest in the requested documents. Plaintiff has previously obtained similar documents while researching the death of a family member, Pvt Arthur H. "Bud" Kelder, and other POW/MIA service members interred with Pvt Kelder. He maintains a non-profit website, *BataanMissing.com*, for the purpose of memorializing these men and sharing information with other family members and the public.

4. Defendant DoD is an agency within the meaning of 5 U.S.C. § 552(f). Defendant DoD has made an appearance in this action by filing an Answer to Plaintiff's Original Complaint. (Doc. #10). Service is made upon its counsel.

5. Defendant Army is an agency within the meaning of 5 U.S.C. § 552(f). Defendant Army may be served with process by service upon Chief, U.S. Army Litigation Division, 901 North Stuart St., Suite 400, Arlington, VA 22203-1837, 32 C.F.R. § 257.5.

6. Defendant Robert M. Gates, Secretary of Defense, is the Federal officer personally responsible for the actions of the Department of Defense within the meaning of 5 U.S.C. § 702. Defendant Robert M. Gates has made an appearance in this action by

filing an Answer to Plaintiff's Original Complaint. (Doc. #10). Service is made upon its counsel.

7. Defendant John McHugh, Secretary of the Army, is the Federal officer personally responsible for the actions of the Department of the Army within the meaning of 5 U.S.C. § 702. Defendant McHugh may be served with process in his official capacity directly or by service upon the Chief, U.S. Army Litigation Division, 901 North Stuart St., Suite 400, Arlington, VA 22203-1837 who "shall accept service of process for the . . . Secretary of the Army in his official capacity." 32 C.F.R. § 516.14.

Plaintiff's FOIA Request

8. By letters to DoD and Army dated July 29, 2010 and September 1, 2010, respectively, Plaintiff submitted a Freedom of Information Act ("FOIA") request for:

records relevant to unidentified American servicemembers and DoD civilian employees who were held in Japanese POW camps in the Philippines during WWII including:

Consolidated extracts of camp death rosters for Camps O'Donnell and Cabanatuan

Individual Deceased Personnel Files (IDPF's) for all American service members and American civilian employees of the US armed forces whose remains were not recovered or identified. (Alternatively, individual deceased personnel files for only those American personnel who are referenced in the below requested X-files.)

X-files pertaining to unidentified remains, including (but not limited to):

Camp Cabanatuan Cemetery
Camp O'Donnell Cemetery
Manila Cemetery #2
Manila Mausoleum
Manila ABMC Cemetery

Defendant DoD's Failure to Timely Comply with Plaintiff's Request

9. On August 11, 2010, Defendant DoD made a partial denial of Plaintiff's July 29, 2010 request to be considered as a member of the news media and receive

expedited processing and a general fee waiver. Defendant further stated that Plaintiff's request would be considered after approximately 1,700 earlier requests. No date on which a final determination could be expected was provided.

10. On August 16, 2010, Plaintiff appealed the partial denial and reiterated the need for timely determination of all issues.

11. On August 26, 2010, Defendant DoD informed Plaintiff that they were unable to complete his appeal within the statutory time requirement. No date on which a final determination could be expected was provided.

12. On November 24, 2010, Defendant DoD provided a final response to Plaintiff's request. Defendant provided ninety (90) pages of documents responsive to Plaintiff's request. These documents were largely illegible and information was withheld under FOIA exemption (b)(6) which applies to information, if released, would constitute a clearly unwarranted invasion of the personal privacy of individuals.

13. Defendant DoD has failed to act on Plaintiff's appeal within the time provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(ii).

14. Defendant DoD has improperly withheld information under FOIA exemption (b)(6).

15. Defendant DoD has not extended the time to respond under FOIA, 5 U.S.C. § 552(a)(6)(B).

16. Defendant DoD has not requested that Plaintiff modify or simplify his request under FOIA, 5 U.S.C. § 552(a)(6).

17. Defendant DoD has constructively denied any remaining issues by failing to comply within the time provided by 5 U.S.C. §§ 552(a)(6)(A)(i) & (ii) and by failing

to provide a date on which a determination is expected to be dispatched as required by 5 U.S.C. § 552(a)(6)(B)(i).

18. Plaintiff has exhausted the applicable administrative remedies as described at 5 U.S.C. § 552(a)(6)(C).

Defendant Army's Failure to Timely Comply with Plaintiff's Request

19 On October 20, 2010 Plaintiff appealed Defendant Army's constructive denial of his September 10, 2010 FOIA request.

20. On November 22, 2010 Defendant Army partially denied Plaintiff's FOIA request on the issues of a fee waiver and expedited processing.

21. On November 24, 2010, Plaintiff again appealed Defendant Army's denial.

22. Defendant Army has failed to act on Plaintiff's appeal within the time provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(ii).

23. Defendant Army has not extended the time to respond under FOIA, 5 U.S.C. (a)(6)(B).

24. Defendant Army has not requested that Plaintiff modify or simplify his request under FOIA, 5 U.S.C. 5 U.S.C. § 552(a)(6)(B).

25. Defendant Army has constructively denied any remaining issues by failing to comply within the time provided by 5 U.S.C. §§ 552(a)(6)(A)(i) & (ii) and by failing to provide a date on which a determination is expected to be dispatched as required by 5 U.S.C. § 552(a)(6)(B)(i).

26. Plaintiff has exhausted the applicable administrative remedies as described at 5 U.S.C. § 552(a)(6)(C).

Factual Background

27. The requested documents pertain to American Military servicemembers, including a member of Plaintiff's family, who perished during the infamous Bataan Death March of April/May 1942 or during their subsequent internment by the Imperial Japanese Government. After the war the camp cemeteries were disinterred by Army Graves Registration units and some remains were returned to their families. Although the identities of the remaining occupants of these graves were known by the US Government, efforts to conclusively identify the remains were, by the Army's own admission, incompetent and ineffective. Rather than diligently pursue the identification of the remains, the US Government instead wrongfully classified the requested documents as national defense information and further administratively restricted it from public disclosure. The families of these servicemembers were told that their remains were non-recoverable although they actually were buried as "unknowns" in the Manila American Cemetery despite substantial evidence of their identities.

28. On September 7, 2010, the Defense Prisoner of War/Missing Personnel Office (DPMO) produced a historical research memorandum concerning some of the remains recovered from Cabanatuan POW Camp Cemetery. This memorandum stated that, "Information available in the files of currently resolved individuals from the Cabanatuan Cemetery indicates that the evidentiary basis for their resolution was less than secure." The memorandum further describes the disappearance from the remains of teeth containing gold during a period of time while the remains were in the custody and care of the U.S. Army.

29. Defendants encourage WWII MIA family members to contact the respective service casualty office, but do not actively seek contact with these families.

30. The Joint POW/MIA Accounting Command (JPAC), a DoD component, states on their website,

"[I]f you are an eligible [DNA] donor for a WWII casualty, we welcome your donation as it could play a role in a future identification."

"Anyone can help by selecting a casualty (perhaps from your home town, home state or a man that served in the same unit as you), and researching their family history to determine if there are living relatives who might be FRS donors. This might involve internet searches, amateur genealogy or good old fashioned detective work in county records, newspapers, yearbooks, church records, etc. If you have information about a possible FRS donor then please contact JPAC or the Service Casualty Officers so they can arrange for sample collection as appropriate."

31. The requested documents are the most basic documents necessary to begin to identify and account for the subject missing servicemembers. In many cases the requested records reveal the final resting places of deceased American Servicemembers whose families were told that their remains were "non-recoverable." The requested files pertain to up to 3,744 missing American Servicemembers. The fact that these documents are not readily available in digital format or legible transcriptions is an indication that, sixty-eight (68) years after their deaths, the US Government, despite public statements to the contrary, is not effectively engaged in the recovery or accounting of these missing American heroes.

32. Plaintiff seeks the requested information in order to inform the public, especially the families of these missing servicemembers, of the operations and activities of the Government, specifically the ultimate fate of these servicemembers and the US Government's concealment of, and failure to secure and protect, their remains and to facilitate the identification of these American heroes.

33. Plaintiff intends to distribute lists of these missing servicemembers and family members to regional and national news outlets in order to locate family members from whom family reference samples (FRS) can be obtained.

34. Plaintiff has no commercial motive in seeking the requested records.

Plaintiffs' Entitlement to the Requested Documents.

35. The requested documents are in the public domain and the unredacted information is routinely provided to non-DoD personnel both in response to Freedom of Information requests and in the routine course of business.

36. Defendants routinely provide unredacted copies of Individual Deceased Personnel Files ("IDPF") and the related X-files ("X-files") to family members of MIA servicemembers.

37. Defendants routinely grant in person access to all IDPF and X-files to family members and non-DoD researchers able to travel to the appropriate National Archives facility.

38. Defendant DoD's website recommends Individual Deceased Personnel Files and X-files as basic research sources and provides detailed instructions for obtaining copies or in-person access.

39. The Deputy Assistant Secretary of Defense for POW/Missing Personnel on 23 June 2010 issued a policy memorandum establishing a program to establish a personnel file for individuals missing from past conflicts and to scan and digitize existing information currently available only in hardcopy. Under this policy the requested documents have been or will be digitized at US Government expense and duplication for Plaintiff will incur minimal additional expense.

40. Defendant DoD failed to properly determine the individual's life status prior to invoking FOIA exemption (b)(6) on portions of documents previously provided.

41. The persons named in the requested documents are either known to be deceased or are more than 100 years of age and can be assumed to be deceased for the purpose of FOIA exemption (b)(6).

42. Defendant Army has stated that it is the official custodian of the requested documents and the records "are made available to the public upon request in accordance with the FOIA."

Plaintiffs' Entitlement to a Waiver or Limitation of Processing Fees

41. The requested records concern the operations or activities of the Government.

42. Obtaining contact information for the families of deceased WWII Servicemembers is a stated policy objective of the US Government.

43. Disclosure of the recovery and return to their families of the remains of more than 2,500 deceased American Servicemembers would significantly contribute to public understanding of the operations or activities of the Government.

44. Disclosure that the Government incorrectly identified the remains of some American Servicemembers and returned their remains to the wrong families would significantly contribute to public understanding of the operations or activities of the Government.

45. Disclosure that precious metal dental work was stolen from the remains of deceased American Servicemembers while such remains were in the custody and control

of the US Government would significantly contribute to public understanding of the operations or activities of the Government.

46. Disclosure that the US Government does or does not strive to account for all missing WWII American Servicemembers more than sixty years after their deaths would significantly contribute to public understanding of the operations or activities of the Government.

47. The requested documents detail WWII Army Graves Registration procedures and Identification Board proceedings and explain how some remains were identified, some were not identified, and some were incorrectly identified.

48. Defendants are unaware of, and have had no reason to inquire as to, any commercial motive on the part of Plaintiff in submitting the subject request.

49. Defendants are unaware of, and have had no reason to inquire as to, any intention of Plaintiff to use the requested for any other purpose than to locate family members of missing American Servicemembers.

50. Plaintiff is responsible for multiple front page newspaper stories and a website related to the missing American servicemembers of Bataan and qualifies as a "representative of the news media" under the detailed criteria contained in FOIA, 5 U.S.C. (a)(4)(A). *See e.g., Frank Schultz, Known but to God, Could One of the Janesville 99 Finally Come Home?* Janesville (WI) Gazette, May 30; 2010; James Proffitt, *WWII soldier still waiting to come home*, Port Clinton (OH) News Herald, May 31; 2010; James Proffitt, *Remains connected to local family*, Port Clinton (OH) News Herald, July 29, 2010; Scott Huddleston, *Man Tries to Bring WWII GI's Remains Home*, San Antonio Express-News, November 11, 2010; *BataanMissing.com*.

51. Plaintiff is responsible for placement of several hundred news media articles and interviews on the subjects of aviation safety and community affairs of Helotes, Texas. These news stories have been reported by major print and electronic news media in the US and overseas and further disseminated by various wire services and the internet.

52. Plaintiff is entitled to a waiver of document reproduction fees because he qualifies as a “representative of the news media” and the records are not sought for commercial use. 32 C.F.R. § 286.28(e)(7); *see also* 5 U.S.C. § 552(a)(4)(A)(ii)(II) & (III).

53. Plaintiff is a representative of the news media for the purposes of FOIA because he gathers information of potential interest to a segment of the public, uses his editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. He publishes newsletters, briefings and other material that is disseminated to the public either under his name or through other media outlets. These materials are widely available to everyone, including tax-exempt organizations, not-for-profit groups, and individuals.

54. Plaintiff qualifies as a “representative of the news media” by virtue of his stated intent to use his editorial skills to transform the raw information contained in the requested files into a distinct work which will have obvious value to multiple news outlets as described at 5 U.S.C. § 552(a)(4)(A)(i).

55. As a “representative of the news media,” Plaintiff is entitled to a waiver or limitation of processing and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 32 C.F.R. § 286.28(d).

56. If Plaintiff is determined to be a “representative of the news media” for the purposes of FOIA, Defendants would be precluded from assessing search or duplication fees because Defendants have failed to meet the statutory time limits in processing Plaintiff’s request under 5 U.S.C. § 552(a)(4)(A)(viii).

57. Because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester” Plaintiff is entitled to a waiver or limitation of processing and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 32 C.F.R. § 286.28(d).

58. More than 14,000 Americans have demonstrated their interest in the recovery of missing American Servicemembers by traveling to monthly family briefings sponsored by the Defense POW/Missing Personnel Office (DPMO).

59. More than 74,000 American families have a family member classified as missing from WWII.

60. Defendant Army denied Plaintiff’s fee waiver request in part because “the information is not thought to be of interest to the public majority.”

61. Defendant Army’s denial of Plaintiff’s request incorrectly determined that information concerning the proper identification and burial of American servicemen would not be of interest to a wide segment of the American public.

Defendants Have Improperly Denied Plaintiff’s Request

62. Defendant DoD wrongfully denied Plaintiff’s request based on Regulations which are materially out of date and in conflict with provisions of the FOIA, 5 U.S.C. § 552.

63. Defendant Army denied portions of Plaintiff's request without requesting additional information concerning the proper fee category in accordance with FOIA, 5 U.S.C. § 552(a)(6)(A and 32 CFR § 286.28(d)

64. Defendant Army denied Plaintiff's fee waiver request because it was not a "manual, regulation, or other form of procedural guidance that would clearly demonstrate how the government operates."

65. Defendant Army incorrectly calculated duplication costs of the requested documents by failing to acknowledge an existing Department of Defense program to scan and digitize the requested documents at government expense.

Plaintiffs' Entitlement to Expedited Processing

66. Defendant's failures to properly identify the remains of the subject servicemembers and withholding of relevant documents deprived Plaintiff and other WWII MIA families of due process in seeking the disposition of the remains of their deceased family members.

67. The viability of various types of DNA contained in human remains deteriorates with time.

68. The family members from which family reference samples can be obtained become progressively more difficult to locate over time.

69. The various types of DNA are generally passed only through a continuous maternal or paternal line. These continuous exclusively male or female lines become unavailable over time.

70. Due to Defendant's concealment of the requested records for more than sixty years, family members of the subject servicemembers who are most concerned and most qualified to provide appropriate family reference samples are elderly or deceased.

71. Plaintiff certifies that there is a compelling need for expedited processing as required by FOIA, 5 U.S.C. § 552(a)(6)(E)(vi).

CAUSES OF ACTION

72. Defendants failure to disclose the requested documents is a violation of FOIA, 5 U.S.C. § 552, and the agencies own regulations.

73. Defendants failure to disclose documents responsive to Plaintiff's request constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Defendants' failure in this matter is arbitrary, capricious, an abuse of discretion, not in accordance with the law and without observance of procedure required by law, all in violation of the APA.

74. Defendants' wrongful withholding of the requested documents violated Plaintiff's due process rights in violation of the Fifth Amendment to the United States Constitution.

75. Defendants' failure to timely respond to Plaintiff's requests for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E).

76. The failure of Defendants to grant Plaintiff's request for a limitation of fees violates FOIA, 5 U.S.C. § 552(a)(4)(A), and Defendant's corresponding regulations.


77. The failure of Defendants to grant Plaintiff's request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A), and Defendant's corresponding regulations.

Requested Relief

WHEREFORE, Plaintiff prays that this Court:

- A. Order Defendants to immediately disclose the requested records in their entireties and make electronic copies available to Plaintiff;
- B. Provide for expeditious processing in this action;
- C. Enjoin Defendants from charging Plaintiff fees for the processing or duplication of his request.
- D. Award Plaintiff his costs incurred in this action; and
- E. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



Dated: December 29, 2010

John Eakin, Plaintiff pro se
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com