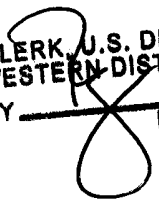


FILED

MAR 28 2011

**FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

**JOHN EAKIN,
Plaintiff,**

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vs.

NO. SA-10-CA-784-FB-NSN

**UNITED STATES DEPARTMENT
OF DEFENSE, ROBERT M. GATES,
Secretary of Defense, UNITED STATES
DEPARTMENT OF THE ARMY,
JOHN McHUGH, Secretary of the Army
Defendants**

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff pro se John Eakin respectfully moves this Court, pursuant to Fed. R. Civ. P. 56 (c), for summary judgment in this Freedom of Information Act case. In support of this motion, the Court is respectfully referred to the accompanying memorandum of points and authorities, Plaintiffs' Declarations and Exhibits submitted in support of Summary Judgment, and Statement of Material Facts As To Which There Is No Genuine Dispute. A proposed order consistent with this motion is attached.

Respectfully submitted



Dated: 23 MARCH 2011

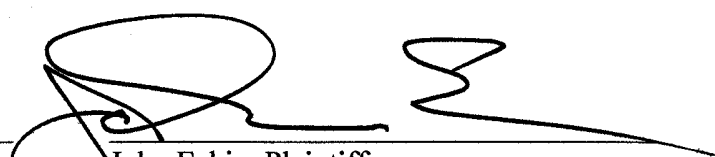
John Eakin, Plaintiff pro se
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com

CERTIFICATE OF SERVICE

I, John Eakin, Plaintiff pro se, do hereby certify that on the 23rd day of MARCH, 2011, a true and correct copy of the foregoing pleading was forwarded to Defendants by First Class Mail at the following address:

Dimitri N. Rocha
Assistant United States Attorney
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216-5597

Dated: 23 MARCH



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

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

**JOHN EAKIN,
Plaintiff,**

vs.

**UNITED STATES DEPARTMENT
OF DEFENSE, ROBERT M. GATES,
Secretary of Defense, UNITED STATES
DEPARTMENT OF THE ARMY,
JOHN McHUGH, Secretary of the Army
Defendants**

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NO. SA-10-CA-784-FB-NSN

ORDER

On this day, came on for consideration Plaintiff's Motion for Summary Judgment.

The Court having reviewed said Motion finds that it should be, and hereby is,

GRANTED.

Signed this the _____ day of _____, 2011.

**NANCY STEIN NOWAK
UNITED STATES MAGISTRATE JUDGE**

2. Defendant Army's incorrect calculation of fees and other deficiencies in denial of Plaintiff's request.

3. Defendant DoD's claim that full disclosure of the requested documents (next-of-kin information) would constitute a clearly unwarranted invasion of personal privacy (FOIA Exemption 6).

B. Background

At the conclusion of World War II hostilities, the remains of many deceased American Servicemembers and accompanying American civilians could not be positively identified and were buried as unknowns. While the identity of many of these unknowns were believed known either as individuals or as one of a small number of individuals, Army Graves Registration units failed to complete the identifications of several thousand of the remains recovered in the Pacific theatre. Ultimately, civilian consultants to the U.S. Government concluded that Army personnel had badly mismanaged these efforts and identification activities were beyond repair. Exhibit (Ex.) D ¶¶ 3,4 (DPMO Memorandum, dated September 7, 2010, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery) At that point all further identification efforts were suspended. Records of these misguided efforts were classified as defense secrets and further administratively restricted from public view as shown by the declassification statements and coversheets contained in the subject Individual Deceased Personnel Files (IDPF's) and Unidentified Remains Files (X-files). Ex. G1 (Exemplar IDPF), Ex. G2 (Exemplar X-File)

Documents provided by Defendants indicate that in addition to substantial failures in the identification of remains, remains were incorrectly identified and returned to the

wrong families for burial and that gold dentalwork was stolen from the remains while in the care and custody of the US Army. Ex. D at 7, 8 (DPMO Memorandum, dated September 7, 2010, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery)

In 2010 Plaintiff obtained records, now declassified due to age, pertaining to a family member and thirteen others associated with his burial all of whom had perished in a Japanese POW camp. Using public records and with the assistance of regional news media, Plaintiff was able to locate family members from whom DNA reference samples could be obtained to identify all of these unidentified American servicemembers. Eakin Decl. at ¶ 10; Ex. F1 (Janesville (WI) Gazette, May 30, 2010), Ex. F2 (Port Clinton (OH) News Herald, July 29, 2010), Ex. F3 (San Antonio (TX) Express-News, November 11, 2010)

Defendants' web pages encourage the public to assist in the identification of the remains of unidentified American Servicemembers by locating appropriate family members from whom DNA reference samples can be obtained. Ex. J1 (Defense Prisoner of War/Missing Personnel Office web page titled: Basic Research Information for Family Members of Unaccounted-for Americans), Ex. J2 (Joint POW/MIA Accounting Command (JPAC) web page titled: Search for Casualties) Plaintiff has now requested additional records from the U.S. Government so that similar efforts can be made to locate family members of other unidentified American servicemembers from the World War II Pacific Theatre. Plaintiff intends to extract relevant information from the requested records from which relational databases can be created and the data edited. From these databases it will be possible to extract geographic and other types of targeted lists of

families which will be supplied to appropriate regional and national news media in hopes of locating family members of deceased American Servicemembers. Additionally, this data will be provided digitally via Plaintiff's websites and those of news media and veterans organizations. *Id.*

C. Description of the Requester

Requester, John Eakin, is self-employed as an aviation accident analyst. His primary clients are aviation industry manufacturers, underwriters and attorneys for whom he provides custom analysis of aviation mishap information from proprietary databases of mishap data. This work requires a high level of ability in the creation and programming of relational databases. Regarded as an expert in the history of various types of aviation mishaps, he is frequently interviewed or quoted as a source by print, electronic and internet news media outlets. He has been quoted by such as the Wall Street Journal, USA Today, ABC News, CNN, BBC, CBC and many other media outlets. He also disseminates news and editorial opinion via his website, AirSafety.com, and two blogs, AirSafety.info/wp and BataanMissing.com. These sites are available to the public via direct web access, email subscriptions, and RSS feeds. In the most recent eight months for which statistics are available these sites have experienced more than 125,000 hits (pageviews, feeds and spiders) for an annualized rate of more than 187,000 hits. Eakin Decl. at ¶ 2

Additionally, Mr. Eakin is well known in his community as a founder of a non-profit group of citizens formed to oppose the construction of a retail supercenter in his small community. Within this group, Mr. Eakin was the primary media contact and

regularly drafted and distributed press releases and media advisories. He was frequently interviewed by print and electronic media outlets. Eakin Decl. at ¶ 4

D. FOIA Request and Denials.

1. Initial FOIA request to DoD and Army.

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 servicemembers 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

Additionally, these FOIA requests provided Defendants with information concerning:

- Requestor’s background and experience as a representative of the news media.
- Requester’s intention to extract relevant information into database format which would be provided to appropriate news media and also made available on the internet.
- The public interest in the requested documents and why the public interest would be served by release.
- The requested documents have no commercial use and requester has no commercial intent.
- Requester’s past research of Cabanatuan Grave 717 and how the information resulted in newspaper and internet news stories which resulted in location of family members able to supply DNA reference samples.
- Examples of why this information qualified as a news story.

- Requester's request for a fee waiver and to be treated as a representative of the news media.
- A request for expedited processing because the requested information was needed by a person primarily engaged in disseminating information to the public and because the requested information was likely to contribute significantly to public understanding of the operations or activities of the government by showing that the US Government was no longer unlawfully withholding the requested documents.

Ex. A1 (FOIA request to US Department of Defense, dated Jul 29, 2010), Ex. B1 (FOIA request to US Army Human Resources Command, dated Sep 10, 2010)

2. Defendant DoD's Initial Denial, Appeals and Responses.

a. 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. Ex. A2 (FOIA response from US Department of Defense, dated Aug 11, 2010)

b. On August 16, 2010, Plaintiff appealed the partial denial and reiterated the need for timely determination of all issues. Ex. A3 (FOIA appeal to US Department of Defense, dated Aug 16, 2010)

c. 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. Ex. A4 (FOIA response from US Department of Defense, dated Aug 26, 2010)

d. On November 24, 2010, Defendant DoD provided a final response to Requester's FOIA request and provided 90 pages of the requested documents.

Defendant DoD asserted that those pages constituted all responsive documents in their possession. Selected portions of those documents concerning family members of the

deceased servicemembers were redacted under FOIA Exemption 6. Ex. A5 (FOIA response from US Department of Defense, dated Nov 24, 2010)

e. On February 3, 2011, Defendant DoD provided an amended final response. This amended response released home addresses of the subject servicemembers. Information concerning next-of-kin remained redacted under FOIA exemption 6. Ex. A6 (FOIA response from US Department of Defense, dated Feb 3, 2011)

f. Defendant DoD admits Plaintiff has exhausted the applicable administrative remedies as described at 5 U.S.C. § 552(a)(6)(C). Def. Answer ¶ 18

3. Defendant Army's Initial Denial, Appeals and Responses.

a. On October 20, 2010 Plaintiff appealed Defendant Army's constructive denial of his September 10, 2010 FOIA request. Ex. B2 (FOIA appeal to US Army Human Resources Command, dated Oct 20, 2010)

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

Defendant Army stated that they are the custodian of the requested IDPF's and X-files which they estimated to total 165,000 pages and copying fees would total \$24,000 at \$0.15 per page.

Defendant Army further stated that the core purpose of the FOIA is to allow individuals access to information that demonstrates how the government operates and that requesters must show how disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Defendant further stated, "Unfortunately, the information ...

requested is not a manual, regulation, or other form of procedural guidance that would clearly demonstrate how the government operates.”

In denying Plaintiff’s request, Defendant Army further stated, “The IDPFs and X- files are stored by the government and serve to clarify the events which transpired pertaining to individuals. Accordingly, the public understanding of operations or activities would not be enhanced by disclosing IDPFs relating to individual soldiers.” They further stated, “Another consideration when making a fee waiver determination is whether or not the information is of interest to a wide segment of the American public and a requester’s capacity to further disclose the information in a manner which will be informative to the American public at large.” Ex. B3 (FOIA response from US Army Human Resources Command, dated Nov 22, 2010)

c. On November 24, 2010, Plaintiff appealed Defendant Army’s partial denial. Ex. B4 (FOIA appeal to US Army Human Resources Command, dated Nov 24, 2010)

d. On February 17, 2011, Defendant Army responded to Plaintiff’s appeal. Ex. B5 (FOIA response from US Department of the Army, dated Feb 17, 2011)

f. Defendant Army admits Plaintiff has exhausted the applicable administrative remedies as described at 5 U.S.C. § 552(a)(6)(C). Def. Answer ¶ 26

4. Plaintiff’s Request for Judicial Review

a. On September 28, 2010, Plaintiff filed his original complaint requesting judicial review of Defendant DoD’s denial.

b. On December 29, 2010, Plaintiff filed his amended complaint adding Defendant Army and clarifying the original complaint.

III. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is appropriate only when the record shows that there is not genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56 (c). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue is one that, if resolved, establishes a claim or defense, affecting the action's outcome. *Anderson v. Liberty Lobby, Ind.*, 477 U.S. 242 (1986). Factual assertions in the moving party's affidavits or declarations may be accepted as true unless the opposing party submits his own affidavits or declarations or documentary evidence to the contrary. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992).

B. De Novo Review of the Agency Decision.

FOIA fee waiver decisions are reviewed *de novo*, with review limited to the record before the agency at the time of decision. See 5 U.S.C. § 552(a)(4)(A)(vii); *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644, 648 (D.C.Cir. 1987).

The legislative history of the FOIA fee waiver provision indicates that it "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (statement of Sen. Leahy)). Thus, the Court can reach its own factual and legal conclusions from the agency record before it.

Judicial review of fee waiver denials is limited to the record before the agency at the time of the denial, and the government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case. On judicial

review, the court cannot consider new reasons offered by the agency not raised in the denial letter. The agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order. *Friends of the Coast Fork*, 110 F.3d 54, 55 (9th Cir. 1997).

C. FOIA Requirements for a Fee Waiver

Under FOIA, a requester must meet a two-prong statutory test for waiver of fees for the costs of producing documents. These two tests are: (1) disclosure of the information is in the public interest, and (2) is not primarily in the requester's commercial interest. *See* 5 U.S.C. § 552(a)(4)(A)(iii).¹

In addition to the above two-prong test, the Department of Justice promulgated regulations prescribing six factors that the requester must meet for the fee waiver. 28 C.F.R. §§ 16.11 (a)-(d) (2007); *Federal Cure (FedCURE) v. Lappin*, 602 F.Supp.2d 197 (2009)(D.C.Cir.). Defendant Army adopted virtually identical language at 32 CFR § 518.19, with only editorial changes from the regulations promulgated by the Department of Justice and reviewed in *FedCURE*. The first four factors fall under the public-interest prong and the last two under the commercial-free prong. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285-86 (9th Cir. 1987); *Stewart v. U.S. Dep't of the Interior*, 554 F.3d 1236, 1242 (10th Cir. 2009).

1. Public Interest Prong Factors:

¹ The statute reads:

[d]ocuments shall be furnished without charge ... if disclosure of the information is in the public interest because it 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.

a. **Subject of the request.** The requested materials must concern “operations of activities of the government,” which have a connection that is direct and clear, not remote or attenuated.

b. **Informative value of the information to be disclosed.** The information must be “likely to contribute” to an understanding of government operations or activities. The disclosed material must be meaningfully informative about these operations or activities.

c. **A contribution to the public’s understanding of the subject is likely to result from disclosure.**

i. Disclosure of the material will contribute to public understanding of the subject.

ii. Disclosure will contribute to a “reasonably broad” audience interested in the subject, not just the requester’s individual understanding.

iii. There is a consideration of the requester’s expertise in the subject and intention to effectively disseminate the information to the public.

iv. There is a presumption that a representative of the news media satisfies the above consideration.

d. **The significance of the contribution to the public understanding.** The disclosure will likely contribute “significantly” to the public understanding of the government operation or activities. Moreover, the disclosure will enhance the public’s understanding compared to the understanding prior to the disclosure.

The Agency cannot make a subjective determination of whether the information is sufficiently important to be made public. *Ettlinger v. FBI*, 596 F.Supp. 867, 877

(D.Mass. 1984)

2. **Absence of Commercial Interest Prong:**

If the requester satisfies the public interest prong, he or she must show that the sought-after information is not primarily in his or her commercial interest. *See* 5 U.S.C. § 552(a)(4)(A)(iii). This test consists of two conditions. First, the agency must ascertain

if the disclosure would serve any commercial interest of the requester. Second, the agency must weigh any commercial interest against the public interest in disclosing the information. The agency must grant the fee waiver if the public interest outweighs the requester's commercial interest in the information. *Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)

Commercial use is defined at 32 C.F.R. § 518.19(e)(2)(i) as:

The term "commercial use" request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, Activities must determine the use to which a requester will put the documents requested. Moreover, where an Activity has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Activities should seek additional clarification before assigning the request to a specific category.

Fees shall be limited to only reasonable standard charges for document duplication ... when the request is made by a representative of the news media. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). The FOIA define these entities. *Id.* at § 552(a)(4)(A)(ii).²

² **[T]he term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.** In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of newsmedia entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. **Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of**

Further, an agency is precluded from assessing duplication fees upon a representative of the news media if the agency fails to comply with any time limit. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

Fee waiver issues also are reviewed under the *de novo* standard of review, but the scope of review is specifically limited by statute to the record before the agency. *See* 5 U.S.C. § 552(a)(4)(A)(vii); *Judicial Watch, Inc. v. Rosotti*, 326 F.3d 1309, 1311 (D.C. Cir. 2003).

D. FOIA Requirements for Exemption 6

The standards and procedures that apply to FOIA lawsuits are atypical within the field of administrative law. First, the usual "substantial evidence" standard of review of agency action is replaced in the FOIA by a *de novo* review standard. Second, the burden of proof is on the defendant agency, which must justify its decision to withhold any information. *See* 5 U.S.C. § 552(a)(4)(B); *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991).

newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the **Government may also consider the past publication record of the requester in making such a determination.** [emphasis added]

III. ARGUMENT

A. The Record Establishes that Plaintiff Meets the Public Interest Requirement Under the FOIA Statute and Regulations and Qualifies for a Fee Waiver.

Plaintiff meets all the criteria for a fee waiver. Plaintiff satisfies the public interest prong because the requested documents relate to government operations and Plaintiff's submissions to Defendants show how disclosure will significantly contribute to the public's understanding of the government's activities to identify deceased American servicemembers.

The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). Any decision which checks against corruption or serves to hold the governors accountable to the governed must be construed as being in the public interest.

Defendants have admitted that obtaining contact information for the families of deceased WWII Servicemembers is a stated policy objective of the US Government. Def. Answer ¶ 42; Ex. J1 (Defense Prisoner of War/Missing Personnel Office web page titled: Basic Research Information for Family Members of Unaccounted-for Americans), Ex. J2 (Joint POW/MIA Accounting Command (JPAC) web page titled: Search for Casualties)

It is reasonable to presume that furnishing journalists with information will primarily benefit the general public; any other view would entail a more or less unresolvable inquiry into the value of journalists' private goals. *National Treasury Employees Union v. Griffin*, ("NTEU") 811 F.2d 644 (D.C. Cir. 1987).

1. Plaintiff's Fee Waiver Application and Appeals Addressed the Overall Public Interest Requirement with Sufficient Specificity.

- a. Subject of the request.** The requested materials must concern "operations of activities of the government," which have a connection that is direct and clear, not remote or attenuated.

The requested documents were created by US Army personnel and pertain to deceased US Army personnel. They were classified as national defense information and access was restricted from public view. Ex. G1 (Exemplar IDPF), Ex. G2 (Exemplar X-File) (noting declassification statements and coversheets) They have always been under the control of US Government personnel. There is a direct and clear connection showing that the requested documents concern "operations of activities of the government" and meet this test.

- b. Informative value of the information to be disclosed.** The information must be "likely to contribute" to an understanding of government operations or activities. The disclosed material must be meaningfully informative about these operations or activities.

The requested documents detail efforts to recover the remains of deceased American servicemembers and determine their identities. Included in the documents are correspondence between the US Military Services and family members informing them of the status of efforts to recover the remains of their family member. Other documents in these files show that these communications with family members were often less than completely truthful and in some cases outright fabrications. Both individually and as a group, these documents go far beyond being meaningfully informative about these operations or activities as they directly impact current efforts by the US Government to locate family members of deceased American servicemembers for the purpose of

obtaining DNA reference samples to aid in their identification. Ex. G1 (Exemplar IDPF),
Ex. G2 (Exemplar X-File)

c. A contribution to the public's understanding of the subject is likely to result from disclosure.

- i. Disclosure of the material will contribute to public understanding of the subject.
- ii. Disclosure will contribute to a "reasonably broad" audience interested in the subject, not just the requester's individual understanding.
- iii. There is a consideration of the requester's expertise in the subject and intention to effectively disseminate the information to the public.
- iv. There is a presumption that a representative of the news media satisfies the above consideration.

As discussed above, the disclosure of the requested records will contribute to public understanding of the recovery of currently unidentified remains of American servicemembers. The disclosed information will be synthesized and packaged with original background information in a format designed to encourage publication in all areas in which family members might be expected to be currently residing. Beyond contacting the members of the estimated 2,500 to 3,500 families which these records directly pertain to, this is a general interest story likely to be picked up by national news organizations and wire services and widely disseminated.

Requester has demonstrated his ability to present newsworthy articles to media organizations in such a manner that they are published and receive the widest regional, national, and often, international distribution. Ex. F1 (Janesville (WI) Gazette, May 30, 2010), Ex. F2 (Port Clinton (OH) News Herald, July 29, 2010), Ex. F3 (San Antonio (TX) Express-News, November 11, 2010)

d. The significance of the contribution to the public understanding. The disclosure will likely contribute "significantly" to

the public understanding of the government operation or activities. Moreover, the disclosure will enhance the public's understanding compared to the understanding prior to the disclosure.

Plaintiff's prior efforts have resulted in the disclosure to multiple family members of the final resting place of deceased American servicemembers who had been told by the US Military that no remains had been recovered. Disclosure of the requested records is expected to ultimately reveal the location and identity of an estimated additional 2,500 to 3,500 additional remains. Additionally, the attendant national publicity will greatly enhance the public's understanding of the US Government's efforts to account for missing American servicemembers from all conflicts.

2. Requested Documents Have No Commercial Value and Plaintiff Has No Commercial Interest Related to the Requested Documents.

The absence of commercial interest prong is met by the fact that the requested documents have no commercial value and Requester's statement that he has no commercial interest or intent concerning the requested documents. The requested documents would not further Requester's commercial, trade or profit interest. Defendant Army is silent on this issue, having failed to establish in the record any objection on this point. Further, Defendant Army's own regulations establish a duty to seek additional clarification where the use of the requested records is not clear. 32 C.F.R. 518.19(e)(2)(i). Defendant Army has made no inquiry concerning any potential commercial interest in the requested documents. Eakin Decl. at ¶¶ 19-20

3. Plaintiff Established that He Is a Representative of the News Media

National Security Archive v. Dep't of Defense, 880 F.2d 1381 (D.C. Cir. 1989), supports finding that Plaintiff qualifies as a representative of the news media. In that

case, the court found that the National Security Archive's intention to publish "document sets" was a deciding factor. Plaintiff's stated intent to publish tailored lists of unidentified American servicemembers and family members is similar to National Security Archive's "document sets."

The Court in *National Security Archive* further notes from the FOIA legislative history, "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected.... In fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a 'representative of the news media.'" *Id.* at 1386.

Subsequent to the 1989 decision in *National Security Archive*, the FOIA was amended by the OPEN Government Act of 2007 which further defined the term 'representative of the news media' as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." The amendment specifies that the "Government may also consider the past publication record of the requester in making such a determination." *See* 5 U.S.C. § 552(a)(4)(A)(ii); Ex. F1 (Janesville (WI) Gazette, May 30, 2010), Ex. F2 (Port Clinton (OH) News Herald, July 29, 2010), Ex. F3 (San Antonio (TX) Express-News, November 11, 2010)

Clearly, Plaintiff's request for representative of the news media status must be granted in the absence of Defendant Army's lack of objection in the record on this issue and considering Plaintiff's prior and intended future dissemination of similar information to that requested.

C. Defendant Has Incorrectly Calculated the Cost Quoted to Plaintiff

FOIA requesters must ordinarily pay reasonable charges associated with processing their requests. See 5 U.S.C. § 552(a)(4)(A). In *National Treasury Employees Union v. Griffin*, (“NTEU”) 811 F.2d 644 (D.C. Cir. 1987), the D.C. Circuit wrote that it would be “highly improper” for an agency to inflate the fees requested “with a view in effectively denying access.” *Id* at 650. The D.C. Circuit further stated that “the 1974 amendments to FOIA adding the language on fee waivers and reasonable standard charges were clearly aimed at preventing agencies from using high fees to discourage requests.” *Id*; S. Rep. No. 93-864, at 11-12 (1974).

Defendant Army’s calculation of estimated duplication costs to fulfill this request are clearly erroneous and serve simply to discourage requesters in violation of its own regulations.

Fee assessment. Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

32 CFR § 518.19(e)

Defendant Army, the admitted custodian of the requested records, already has some records in digital form as shown by the documents previously provided to Plaintiff and by Defendant DoD’s own research memorandum. Ex. H (FOIA transmittal from US Army Human Resources Command of IDPF’s and X-files), Ex. D at footnote 1 (DPMO Memorandum, dated September 7, 2010, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery) Yet, Defendant Army disregards these already digitized records in an attempt to place the entire burden on, or to discourage, Plaintiff by providing an estimated cost of \$24,000 for scanning 165,000 pages at \$0.15 per page

when the actual cost to copy digital files to CD/DVD should be less than \$100.00. Ex. B3 (FOIA response from US Army Human Resources Command, dated Nov 22, 2010)

Additionally, Defendant Army has been directed by the Office of the Secretary of Defense to digitally scan all information on missing persons (which includes the requested records) for government use and at government expense. This directive includes the statement, “Resource shortfalls should be coordinated with DPMO to ensure OSD-level advocacy for valid funding requirements. Ex. I (DPMO Memorandum, dated June 23, 2010, Subj: Policy on Information Access, Transparency, and Sharing in Support of Personnel Accounting and Personnel Recovery); Def. Answer ¶ 39

At best, Defendant Army appears to be attempting to place the cost of their digital modernization program on Plaintiff. At worst, Defendant Army may be attempting to discourage Plaintiff’s request under FOIA by inflating estimated fees. *See* 5 U.S.C. § 552(a)(4)(A)(ii); *Hall v. CIA*, No. 04-0814, 2006 WL 197462, at 3 & n.4 (D.D.C. Jan. 25, 2006); S. Rep. No. 93-1200, 93rd Cong., 2nd Sess., October 1, 1974 at 8.

D. Exemption 6 – Privacy Considerations

All information pertaining to next-of-kin of the deceased American Servicemembers was redacted from the ninety pages previously provided to Plaintiff by Defendant DoD. To warrant protection under Exemption 6, information must first meet the threshold requirement that it must fall within the category of “personnel and medical files and similar files.” *See* 5 U.S.C. § 552(b)(6). Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue “would constitute a clearly unwarranted invasion of personal privacy.” *Id.* This requires a balancing of the public’s

right to disclosure against the individual's right to privacy. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

1. There is no Privacy Interest to Protect and Defendants Failed to Determine Life Status.

First it must be ascertained whether a protectible privacy interest exists that would be threatened by disclosure. *Multi Ag Media LLC v. USDA*, 515 F.3d at 1229. If no privacy interest is found, further analysis is unnecessary and the information at issue must be disclosed.

On the other hand, if a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure. *Associated Press v. DOD*, 554 F.3d 274, 291. If there is a public interest in disclosure that outweighs the privacy interest, the information should be disclosed; if the opposite is found to be the case, the information should be withheld. *DOD v. FLRA*, 510 U.S. 487, 497 (1994).

When analyzing the privacy interest in nondisclosure under the FOIA, courts have found that the privacy interest of an individual may be diminished if that individual is deceased. *Davis v. DOJ*, 460 F.3d 92, 97-98 (D.C. Cir. 2007). Indeed, the "fact of death, ... while not requiring the release of information, is a relevant factor to be taken into account in the balancing decision whether to release information. *Schrecker v. Dep't of Justice*, 254 F.3d 162, 166-167 (D.C.Cir.2001) (*Schrecker I*). Consequently, "without confirmation that the Government took certain basic steps to ascertain whether an individual was dead or alive, we are unable to say whether the Government reasonably balanced the interests in personal privacy against the public interest in release of the

information at issue." The government's obligation in this regard is to "ma[k]e a reasonable effort to ascertain life status." *Schrecker v. Dep't of Justice*, 349 F.3d at 662 (*Schrecker II*)

The D.C. Circuit has held that an agency must take certain "basic steps," which can vary depending on the specific circumstances of a particular case, to investigate whether disclosure would violate a living person's privacy interests. *Johnson v. EOUSA*, 310 F.3d 771, 775-76 (D.C. Cir. 2002). An agency must take these basic steps to determine life status before invoking a privacy interest under Exemption 6. *Schrecker I*, 254 F.3d 162, at 167; *Schoenman*, 576 F. Supp. 2d at 9-10, 13-14.

In the instant case, Defendant DoD has admitted that they failed to properly determine the individual's life status prior to invoking FOIA exemption (b)(6) on portions of documents previously provided. Def. Answer ¶ 40

That Court has also upheld the use of the FBI's "100-year rule," in making its privacy protection determinations whereby the FBI assumes that an individual is alive unless his or her birthdate is more than 100 years ago. *Schrecker II*, 349 F.3d at 662-65.

In the instant case, the subjects of the records are deceased by definition (Individual Deceased Personnel Files) and it is the redaction of next-of-kin information, which is in question. The minimum age of the parents named as next-of-kin can be accurately estimated from the known minimum age of eighteen of the servicemembers when assigned to the Philippines in 1941 therefore their year of birth was 1923 or earlier. The next-of-kin in these Individual Deceased Personnel Files would have had to be aged twelve or younger at the time of the deceased servicemember's birth to be aged less than

100 in 2011. That these parents would today be less than 100 years of age is biologically unlikely.

2. Disclosure is in the Public Interest

If it has been determined that a substantial privacy interest is threatened by a requested disclosure, the second step in the balancing process comes into play; this stage of the analysis requires an assessment of the public interest in disclosure.

In certain circumstances, an individual may have an interest in having his or her personal information disclosed rather than withheld. In *Lepelletier v. FDIC*, 164 F.3d 37, 48-49 (D.C. Cir. 1999), the D.C. Circuit remanded the case back to the district court to determine whether some of the names of individual depositors with unclaimed funds at banks for which the FDIC was then the receiver should be released to a professional money finder. Introducing a new element into the balancing test for this particular type of information, the D.C. Circuit held that the standard test "is inapposite here, i.e., where the individuals whom the government seeks to protect have a clear interest in the release of the requested information." *Id.* at 48; *McAllister v. Resolution Trust Corp.*, 201 F.3d 570 (5th Cir. 2000).

Plaintiff suggests that survivors of these next-of-kin have a substantial interest in the release of information pertaining to the death and current grave location of a member of their family. The importance of fully accounting for these missing Service members is recognized by the US Government's policy and efforts to obtain contact information for the families of deceased WWII Servicemembers. Def. Answer ¶ 42

3. Defendants Selectively Withhold Information

On April 15, 2010, Defendant Army, in response to a prior FOIA request, forwarded to Plaintiff a CD-ROM disk containing the Individual Deceased Personnel Files (IDPF's) of eight deceased American Servicemembers and the X-files associated with these men. No information was redacted from these files which are encompassed by the broader FOIA request which is the subject of this litigation. These files contain substantially the same type of next-of-kin name and address information which Defendant DoD has redacted from the ninety pages previously provided in response to the FOIA request which is the subject of this litigation. Ex. G1 (Exemplar IDPF)

Additionally, Defendants admit they routinely provide unredacted copies of Individual Deceased Personnel Files and the related X-files to family members of MIA servicemembers. Def. Answer ¶ 36

However, Plaintiff's current request which includes the previously provided documents, and which coincidentally is highly embarrassing to Defendants, is now withheld under FOIA Exemption 6 as an "unwarranted invasion of personal privacy."

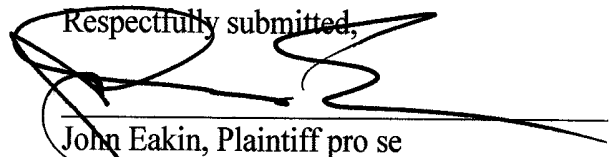
Selective disclosure exhibited by the government is offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate. *North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978)

CONCLUSION

For the reasons set forth above, the Court should grant Plaintiff's motion for summary judgment and other relief as the court finds appropriate.

Dated: 23 MARCH 2011

Respectfully submitted,



John Eakin, Plaintiff pro se
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- Requester's intention to extract relevant information into database format which would be provided to appropriate news media and also made available on the internet.
- The public interest in the requested documents and why the public interest would be served by release.
- That the requested documents have no commercial value and requester has no commercial intent.
- Requester's past research of Cabanatuan Grave 717 and how the information resulted in newspaper and internet news stories which resulted in location of family members able to supply DNA reference samples.
- Examples of why this information qualified as a news story.
- Requester's request for a fee waiver and to be treated as a representative of the news media.
- A request for expedited processing because the requested information was needed by a person primarily engaged in disseminating information to the public and because the requested information was likely to contribute significantly to public understanding of the operations or activities of the government by showing that the US Government was no longer unlawfully withholding the requested documents.

Ex. A1 (FOIA request to US Department of Defense, dated Jul 29, 2010), Ex. B1 (FOIA request to US Army Human Resources Command, dated Sep 10, 2010)

2. On October 20, 2010 Plaintiff appealed Defendant Army's constructive denial of his September 10, 2010 FOIA request. Ex. B2 (FOIA appeal to US Army Human Resources Command, dated Oct 20, 2010)

3. On November 22, 2010 Defendant Army partially denied Plaintiff's FOIA request on the issues of a fee waiver and expedited processing. Ex. B2 (FOIA appeal to US Army Human Resources Command, dated Oct 20, 2010); Def. Answer ¶¶ #64, #20 & #42

4. On November 24, 2010, Requester appealed Defendant Army's denial. Ex. B4 (FOIA appeal to US Army Human Resources Command, dated Nov 24, 2010)

5. On November 24, 2010, Defendant DoD provided a final response to Requester's FOIA request. Ex. A5 (FOIA response from US Department of Defense, dated Nov 24, 2010)
6. Defendants have admitted that Plaintiff has exhausted all administrative remedies prior to filing this lawsuit. Def. Answer ¶¶ 18, 26
7. Defendant Army has not requested additional information from Plaintiff for the purpose of verifying Plaintiff's request for a waiver of fees or to be considered a representative of the news media. Def. Answer ¶ 63
8. Obtaining contact information for the families of deceased WWII Servicemembers is a stated policy objective of the US Government. Def. Answer ¶ 42
9. The Department of Defense encourages the public to assist in the identification of missing American Servicemembers by locating family members from which DNA reference samples can be obtained. Ex. J1 (Defense Prisoner of War/Missing Personnel Office web page titled: Basic Research Information for Family Members of Unaccounted-for Americans), Ex. J2 (Joint POW/MIA Accounting Command (JPAC) web page titled: Search for Casualties)
10. Defendant DoD provided ninety (90) pages of requested documents and redacted next-of-kin information under FOIA exemption 6. Ex. A5 (FOIA response from US Department of Defense, dated Nov 24, 2010), Ex. A6 (FOIA response from US Department of Defense, dated Feb 3, 2011)
11. Defendant DoD did not attempt to determine the individual's life status prior to invoking FOIA exemption (b)(6). Def. Answer ¶ 40

12. Defendant Army provided Plaintiff with an estimated cost of duplicating the requested documents based on the cost of copying hardcopies and did not consider the substantially lower cost of duplicating electronic files. Ex. B3 (FOIA response from US Army Human Resources Command, dated Nov 22, 2010)
13. Some of the requested documents exist in digital format. Ex. H (FOIA transmittal from US Army Human Resources Command of IDPF's and X-files), Ex. D at footnote 1 (DPMO Memorandum, dated September 7, 2010, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery)
14. Defendant DoD has directed Defendant Army to digitally scan the requested documents at government expense for purposes not connected with this litigation. Def. Answer ¶ 39
15. Defendant DoD has prepared a research memorandum which details how efforts to identify remains of deceased American Servicemembers were mismanaged, gold dentalwork was stolen from the remains, and erroneous identifications are suspected. Ex. D ¶¶ 7, 8 (DPMO Memorandum, dated September 7, 2010, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery)
16. Plaintiff has previously disseminated information concerning the identification of MIA's to the news media. Ex. F1 (Janesville (WI) Gazette, May 30, 2010), Ex. F2 (Port Clinton (OH) News Herald, July 29, 2010), Ex. F3 (San Antonio (TX) Express-News, November 11, 2010)
17. Exemplar IDPF's and X-files are typical of the requested documents and contain next-of-kin information similar to that which was redacted by Defendant DoD. Ex. G1 (Exemplar IDPF), Ex. G2 (Exemplar X-File)

18. Defendant Army regularly provides IDPF's and X-files to both family members and non-family members and does not redact next-of-kin information. Ex. H (FOIA transmittal from US Army Human Resources Command of IDPF's)

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

JOHN EAKIN,
Plaintiff,

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vs.

NO. SA-10-CA-784-FB-NSN

UNITED STATES DEPARTMENT
OF DEFENSE, ROBERT M. GATES,
Secretary of Defense, UNITED STATES
DEPARTMENT OF THE ARMY,
JOHN McHUGH, Secretary of the Army
Defendants

**DECLARATION OF JOHN EAKIN IN SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

I, John Eakin, declare as follows:

1. I am the Plaintiff in litigation styled John Eakin v. US Department of Defense.

Description of Declarant and His Information Dissemination Activities

2. I have been self-employed as an aviation accident analyst for more than twenty years. Prior to that I worked as a pilot, flight instructor and aircraft mechanic. My clients are aviation industry manufacturers, underwriters and attorneys for whom I provide custom analysis of aviation mishap history information using proprietary databases of mishap data. This work requires a high degree of proficiency in creation and programming of relational databases. My work is frequently accepted in various courts and I am regarded as an expert in the history of various types of aviation mishaps. I am often interviewed or quoted as a source by print, electronic and internet news media outlets. I have been quoted by such as the Wall Street Journal, USA Today, ABC News,

CNN, BBC, CBC and many other media outlets. I have no idea how many times I have been interviewed by the press, but it numbers in the hundreds, perhaps thousands.

3. I have published a weekly newsletter for more than nine years. The target audience is aviation safety professionals, investigators and litigators. Originally, this newsletter was distributed via email only to my professional associates who requested a subscription. As the distribution list grew to over two-thousand subscribers, it became unwieldy to administer and I converted it to a blog format which is now available online, via RSS syndication and email. In 2010 I created an additional blog site, BataanMissing.com to disseminate information concerning my search for the family members of those buried in Cabanatuan Grave 717. In the most recent eight months for which statistics are available these sites have experienced more than 125,000 hits (pageviews, feeds and spiders) for an annualized rate of more than 187,000 hits.

4. I am also well known in my community as a founder of a non-profit group of citizens formed to oppose the construction of a Wal-Mart Supercenter in our community. Within this group, I was the primary media contact and regularly drafted and distributed press releases and media advisories. I was frequently interviewed by local print and electronic media outlets. When members of our group were ultimately elected and filled all local city council and mayoral seats, I continued to act as the volunteer media coordinator for the city as well as the individual office holders. During this period a huge mulch fire on the city outskirts created an emergency situation as declared by city officials. City officials had requested emergency assistance and were rebuffed by both Bexar County and the State of Texas. I was primarily responsible for organizing community demonstrations and alerting the media such that a declaration of emergency

was declared by the Governor of the State of Texas. The mulch fire became a viral news story and was widely reported nationally and internationally by both the traditional and digital news media.

5. I believe that my activities have resulted in much wider dissemination of the various messages I have championed than if I were a conventional journalist employed by a single media outlet.

6. I have read the FOIA definition of “representative of the news media” contained at 5 U.S.C. § 552(a)(4)(A)(ii) and studied the legislative history of the FOIA and believe my experience and activities far exceed the minimum requirements of the FOIA to be considered a representative of the news media.

Prior MIA/POW Activities

7. One of my hobbies is researching my family’s history. In the fall of 2010 I became interested in the life of my cousin, Arthur H. “Bud” Kelder, who died in a Japanese prison camp during World War II. I first contacted a Casualty Assistance Officer at the Army Casualty Office who ultimately delivered to me a copy of Pvt Kelder’s Individual Deceased Personnel File (IDPF) and other information concerning his November 1942 death and burial in the Philippine Islands. I learned that even though there were records of his disinterment from the Cabanatuan Camp #1 Cemetery after the war, Army Graves Registration units had failed to identify and return his remains to his parents. Ex. G1 (Exemplar IDPF), Ex. G2 (Exemplar X-File)

8. Contained in the IDPF were correspondence between the US Army and my Uncle Herman Kelder concerning his wish for the return of Bud Kelder’s remains for burial at home. I later found other US Government records which documented the disinterment of

Bud's remains contrary to the information supplied to my Uncle by the US Army. Ex. E (Correspondence between Mr. Herman Kelder and the US Army Quartermaster General (7 letters total). Report of Interment, dated 7 Feb 46, Unknown X-821 (KELDER, Arthur H.))

9. I served nine years in the US Army, including more than six years overseas in Germany and Viet Nam. Overseas military service causes a person to truly appreciate life in the United States, perhaps more than others will ever know. On many occasions I heard my fellow military personnel express a strong desire that they not be buried overseas. I strongly share that belief and feel that every American Hero deserves better than to have his bones wrapped in a tarp; hauled to the cemetery in the back of a truck; then interred without religious or military ceremony. Ex. G2 at 3, 4 (X-File X-821 associated with Arthur H. Kelder)

10. I first obtained the IDPF's on the fourteen persons, including my cousin, who were interred in Cabanatuan Camp #1 Cemetery grave 717. I also obtained the "X-files" pertaining to each of the ten sets of remains from that grave which remained unidentified. These records were obtained through a FOIA request to the Army Human Resources Command and no part of these records were redacted even though only one of these persons was a member of my family. These records were all provided in digital format on a DVD disk. Ex. H (FOIA transmittal from US Army Human Resources Command of IDPF's (Collins, Hirschi, Kovach, Lobdell, Overbey, Ruark, Simmons, and Wood) and X-files number 812, 814, 815, 816, 818, 820, 821, 822, 824, dated April 15, 2010)

11. From these records I determined that the Army had not even attempted to obtain the dental records on the ten men interred in grave 717 who ultimately were not

identified. This was especially ironic in the case of Bud Kelder because his older brother was a dentist and he had done extensive and distinctive work on Bud's teeth, and the address of his dental office was listed on the record of disinterment as Bud's home of record. Minimal investigation by the US Army would have found the records necessary to identify the remains of Pvt Kelder.

12. I determined from family records that Bud had distinctive gold dental inlays. From the X-files of the unidentified remains of grave 717 I determined that only one set of remains had gold inlays. I forwarded this information to the Army Casualty Office along with contact information for other family members who were qualified to provide DNA reference samples.

13. Through this process, I had become aware that a great number of American Servicemembers who had died in POW camps had not been identified simply because of the ineptness, incompetence and corruption of the US Government and that the records of this mismanagement had been classified as a defense secret to keep the knowledge from the American public. In addition to what I had observed, I obtained Department of Defense documents which verified that gold dental work was stolen from the remains while they were in the custody of and under the protection of the US Army. And further, the DoD documents verified that the identifications which were made were highly suspect and that even a casual observer could see that the dental records which were the basis for the identifications did not match the remains. Ex. D ¶¶ 7, 8 (DPMO Memorandum, dated September 7, 2010, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery)

Efforts to Locate MIA Family Members

14. After providing information to the Army Casualty Office from which my cousin's remains could be conclusively identified, I decided to locate family members for each of the other nine servicemembers originally interred with my cousin. I began by researching genealogical records available on Ancestry.com. In a few weeks of part-time work I was able to locate family members of all but three of the families. At that time I decided to contact the newspapers in the towns where I believed descendants of two of the families to currently reside.

15. In both cases I found the editors more than happy to assist me. They assigned reporters to the story who were able to provide additional local information in addition to information that I provided. Within hours of publication the appropriate family members contacted the newspapers which referred them to me. I was able to inform them of the circumstances of the burial of their family member and direct them to the appropriate service casualty office.

16. The stories ran on the front pages of the newspapers, as did subsequent followup stories. One newspaper later published an editorial strongly supporting our efforts. These stories were so successful that additional families beyond those we had targeted contacted us to inquire about their family members whose remains had not been returned by the US Government. Ex. F1 (Janesville (WI) Gazette, May 30, 2010), Ex. F2 (Port Clinton (OH) News Herald, July 29, 2010), Ex. F3 (San Antonio (TX) Express-News, November 11, 2010)

Intended Use of the Requested Documents

17. I intend to use the requested documents to create a database of missing personnel and their last known next-of-kin. From this database I will be able to extract regional

lists of the families from which a DNA reference sample is needed. These tailored lists, background information and a description of the objective will be distributed to various regional media outlets where it is most likely that these family members will be found. Additionally, there are a number of veterans groups and active military associations which have expressed an interest in disseminating this information to their membership and the described database application will have the capability of providing data relevant to their needs as well. The contact information will be made available to the respective Service Casualty Offices to facilitate their stated goal of obtaining DNA reference samples. Ex. J1 (Defense Prisoner of War/Missing Personnel Office web page titled: Basic Research Information for Family Members of Unaccounted-for Americans), Ex. J2 (Joint POW/MIA Accounting Command (JPAC) web page titled: Search for Casualties)

18. A senior producer for a national TV news department whom I am acquainted with has expressed a strong interest in disseminating the story nationally if I am able to obtain the requested documents.

No Commercial Motive

19. The US Military makes a commitment to every servicemember that they will not be left on the battlefield. However, after sixty-nine years of mismanagment, and inaction I am not optimistic that the US Government wishes to reopen this shameful episode and I feel obligated to do what I can to assist in the identification of these unknowns. I know that if the roles were reversed, these men would do the same for me. Therefore, I am committed to obtaining the records necessary to locate family members from whom DNA reference samples can be obtained.

20. I have no commercial motive in making this request for documents. These documents will not further any commercial, trade or profit interest. I have not received any reimbursement, nor will I accept any future reimbursement beyond that awarded by this court if I prevail in this litigation.

Some Records Already Exist in Digital Format

21. At least some of the requested records already exist in digital format.

a. On April 15, 2010 the US Army Human Resources Command forwarded a number of IDPF's and X-files to me on a DVD. None of these files were believed to pertain to a member of my family. These files contained the next-of-kin names and addresses of those servicemembers and are typical of the other documents I seek. No information was redacted from these files even though they were not my family members. Ex. H (FOIA transmittal from US Army Human Resources Command of IDPF's and X-Files)

b. The September 7, 2010, DPMO research memorandum, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery, contains a footnote reference to files existing in digital format. Ex. D at 3,4 (DPMO Memorandum, dated September 7, 2010, Subj: Historical research concerning Grave 717, Cabanatuan Camp #3 Cemetery)

c. Since June 2010, Department of Defense policy has been that "all organizations in the POW/MIA accounting and personnel recovery community will establish a program to scan and digitize existing information on missing persons that is currently available only in hard copy." Ex. I (DPMO Memorandum, dated June 23,

2010, Subj: Policy on Information Access, Transparency, and Sharing in Support of Personnel Accounting and Personnel Recovery); Def. Answer ¶ 39

22. The attached Exhibits are incorporated in support of this declaration.

I hereby certify under penalty of perjury that the foregoing is true and correct.

Executed this 23rd day of MARCH, 2011



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