

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

FILED

2010 SEP 28 P 2:02

CLERK, US DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

BY JH  
DEPUTY

JOHN EAKIN  
9865 Tower View Road  
Helotes, Texas 78023

Plaintiff,

v.

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

And

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

Defendants

CASE NUMBER:

**SA10CA0784FB**

**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 defendant Department of Defense ("DoD").

**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) and 552

(a)(6)(E)(iii). 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 and 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).

**Plaintiff's FOIA Request**

5. By letter to DoD dated July 29, 2010, 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**

7. On August 11, 2010, defendant made a partial denial of Plaintiff's 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.

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

9. On August 26, 2010, defendant 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.

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

11. Defendant has not extended the time to respond under FOIA, 5 U.S.C. (6)(A).

12. Defendant has not requested that plaintiff modify or simplify his request under FOIA, 5 U.S.C. (6)(A).

13. Defendant 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).

14. Plaintiff has exhausted the applicable administrative remedies. 5 U.S.C. § 552(a)(6)(C).

**Factual Background**

15. 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 remains for which identification was obvious 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 illegally 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.

16. Defendant DoD currently has a program to actively seek contact with families of MIA servicemembers from the Korean War, Cold War, Viet Nam War and more recent conflicts for the purpose of obtaining [DNA] Family Reference Samples (FRS) to aid in identification of remains.

17. Defendant DoD encourages WWII MIA family members to contact the respective service casualty office, but does not actively seek contact with these families.

18. 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 their remains.

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

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

**Plaintiffs' Entitlement to the Requested Documents.**

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

22. Defendant DoD routinely provides copies of a limited number of Individual Deceased Personnel Files ("IDPF") and the related X-files ("X-files") and X-files to family members of MIA servicemembers.

23. Defendant DoD routinely grants in person access to all IDPF and X-files to family members and non-DoD researchers able to travel to the National Archives facility in College Park, MD.

24. 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.

25. More than 1,000 internet web sites provide information on how to request these files and in many instances provide complete copies of such files.

26. Under 32 C.F.R. § 286.4(f) discretionary releases to FOIA requesters constitute a waiver of any FOIA exemption that may otherwise apply.

27. The Deputy Assistant Secretary of Defense for POW/Missing Personnel on 23 June 2010 issued a policy memorandum establishing a program to scan and digitize existing information currently available only in hardcopy and directing better information sharing on missing servicemembers between independent researchers and analysts.

**Defendant DoD's Partial Denial and Processing Was Based on an  
Out Of Date Regulation**

28. Defendant cites DoD Regulation 5400.7-R, dated September 4, 1998 (most recently amended by change 1 dated April 11, 2006) as authority for denial of plaintiff's request and appeal.

29. DoD Regulation 5400.7-R, Paragraph C1.2. "provides policies and procedures for the DoD implementation of the Freedom of Information Act (5 U.S.C. 552, as amended)...."

30. DoD Regulation 5400.7-R has not been updated to comply with the most recent amendments to the Freedom of Information Act, 5 U.S.C. § 552. These amendments materially changed the FOIA standards for determination of who is a representative of the news media and are not reflected in DoD Regulation 5400.7-R.

**Plaintiffs' Entitlement to a Waiver or Limitation of Processing Fees**

31. 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; *BataanMissing.com*

32. Plaintiff further 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 in to a distinct work which will have obvious value to multiple news outlets as described at 5 U.S.C. § 552(a)(4)(A)(i).

33. 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).

34. 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 was 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).

35. Defendant DoD wrongfully denied plaintiff’s request using a DoD Regulation which is materially out of date and conflicts with the FOIA, 5 U.S.C. § 552.

36. Plaintiff’s request for a fee waiver and defendant’s denial is now moot as defendant is precluded from assessing search or duplication fees because defendant has failed to meet the statutory time limits in processing plaintiff’s request under 5 U.S.C. § 552(a)(4)(A)(viii).

**Plaintiffs' Entitlement to Expedited Processing**

37. Defendant DoD's failure 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 loved ones.

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

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

40. 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.

41. Due to defendant DoD's wrongful 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.

42. The wrongful withholding of these records denied requester and members of other families the opportunity to obtain due process which could have been petitioned for had these records been available to the public.

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



**CAUSES OF ACTION**

1. DoD's failure to disclose the requested documents is a violation of 5 U.S.C. § 552(a)(3), and the agency's own regulations promulgated thereunder.

2. Defendant's wrongful withholding of the requested documents violated plaintiff's due process rights in violation of the Fourth Amendment to the United States Constitution.

3. Defendant's denial of plaintiff's request and appeal, based on administrative procedures not in compliance with Federal Statutes, is a violation of APA, 5 U.S.C. §§ 701 - 708.

4. Defendants' failure to timely respond to plaintiff's requests for expedited processing constitutes agency action unlawfully withheld and unreasonably delayed, in violation of the APA. Defendants' failure to timely respond is arbitrary, capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law, all in violation of the APA.

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

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

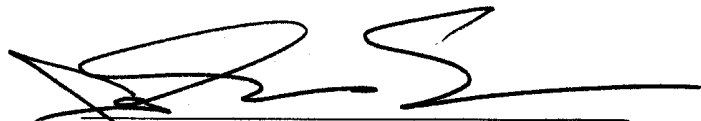
7. The failure of Defendants to grant Plaintiffs' request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A), and Defendant's corresponding regulations.

**Requested Relief**

WHEREFORE, plaintiff prays that this Court:

- A. Order defendant 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 plaintiffs 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,



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

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**

Eakin, John J.

(b) County of Residence of First Listed Plaintiff Bexar Co., Texas  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)  
John Eakin, pro se  
9865 Tower View, Helotes, Texas 78023  
210-695-2204

**DEFENDANTS**

US Department of Defense  
Gates, Robert M., Secretary of Defense

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

**SA10CA0784 FB**

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |                                         |                            |                            |                                                               |                            |                            |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
|                                         | <b>PTF</b>                 | <b>DEF</b>                 |                                                               | <b>PTF</b>                 | <b>DEF</b>                 |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation                                                | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	IMMIGRATION		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions		

**V. ORIGIN** (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

5 USC 552, 5 USC 701

Brief description of cause:

Freedom of Information

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

**DEMAND \$**

CHECK YES only if demanded in complaint:

**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

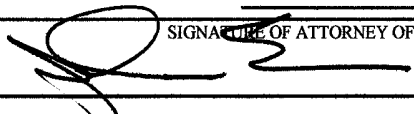
JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE

9-28-10

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**MJ-NSN**

Docket Copy

# FILING FEE RECEIPT COPY

DUPLICATE

Court Name: TEXAS WESTERN  
Division: 5  
Receipt Number: 500009100  
Cashier ID: dgarcia  
Transaction Date: 09/28/2010  
Payer Name: AIR DATA RESEARCH

CIVIL FILING FEE  
For: AIR DATA RESEARCH  
Amount: \$350.00

CHECK  
Check/Money Order Num: 3522  
Amt Tendered: \$350.00

Total Due: \$350.00  
Total Tendered: \$350.00  
Change Amt: \$0.00

SA-10-CA-0784. JOHN W. PEAKIN V. US  
DEPARTMENT OF DEFENSE ET AL.