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

JOHN EAKIN, Plaintiff,	§	
	§	NO. SA-10-CA-0784-FB-NN
UNITED STATES DEPARTMENT OF DEFENSE; ROBERT M. GATES, Secretary of Defense, UNITED STATES DEPARTMENT OF THE ARMY, and JOHN McHUGH, Secretary of the Army Defendants.	§	

TO THE HONORABLE NANCY STEIN NOWAK, U.S. MAGISTRATE JUDGE:

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL OR FINAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

COME NOW, the United States Department of Defense; Robert M. Gates, Secretary of Defense; United States Department of the Army; and John McHugh, Secretary of the Army, by and through John E. Murphy, United States Attorney for the Western District of Texas, and files this Defendants' Response in Opposition to Plaintiff's Motion for Partial or Final Summary Judgment and Defendants' Cross-Motion for Summary Judgment.[1] This action arises under the Freedom of Information Act ("FOIA") and Administrative Procedures Act ("APA")[2].

[1] Individual officers are not proper parties to a FOIA action. *See Petrus v. Bowen*, 833 F.2d 581, 582-583 (5th Cir. 1987). Thus, Defendant Secretary Gates and Defendant Secretary McHugh must be dismissed from this action.

[2] Any relief sought by Plaintiff under the APA must be dismissed. There is no separate entitlement to relief under the APA that is not adequately provided for by the FOIA. *See Institute for Wildlife Protection v. United States Fish and Wildlife Service*, et al, 290 F. Supp. 2d 1226, 1229 (D. Or. 2003) (no provision of the APA other than FOIA provides for disclosure of documents or for the waiver of fees).

I. BACKGROUND

In a request dated, July 29, 2010, Plaintiff filed a Freedom of Information Act request with the DoD. *See* Exhibit A. The request sought all records relevant to the unidentified remains of American service members and DoD civilian employees (Individual Deceased Personnel Files ("IDPFs") and X-Files) who were held in Japanese POW camps in the Phillippines during World War II. *Id.* On August 11, 2010, the DoD denied Plaintiff's request for a fee reduction and expedited processing. *Id.* In a request dated August 16, 2010, Plaintiff requested reconsideration of the DoD's decision. *Id.* On August 26, 2010, the DoD informed Plaintiff that a response to his appeal would not occur within the statutory time requirement due to the heavy FOIA workload. *Id.* On November 24, 2010, the DoD provided documents to Plaintiff located by the Defense Prisoner of War/Missing Persons Office ("DPMO"), and informed Plaintiff that those documents constituted the entire set of responsive documents from DPMO. *Id.* The DoD withheld some information under FOIA exemption (b)(6), which applies to information, if released, would constitute a clearly unwarranted invasion of personal privacy. *Id.*

In a request dated September 20, 2011, Plaintiff filed a Freedom of Information Act request with the Department of the Army. *See* Exhibit B. Like the request to the DoD, the Army request sought all records relevant to the unidentified remains of American service members and DoD civilian employees who were held in Japanese POW camps in the Phillippines during World War II. *Id.* In correspondence dated October 20, 2010, Plaintiff followed up on his request with the Army. *Id.* On November 22, 2010, the Army denied Plaintiff's request for a fee waiver and request for expedited processing. *Id.* In an appeal dated November 23, 2010, Plaintiff submitted an appeal of the November 22, 2010 denial of fee waiver and expedited processing. *Id.* On February 17, 2011,

the Army denied Plaintiff's appeal. *Id.*

While the Plaintiff's claims were ongoing, Plaintiff filed a Complaint with this Court on September 28, 2010 against the DoD and the Secretary of Defense in his official capacity. On January 5, 2011, Plaintiff filed an Amended Complaint, adding the United States Department of Army and John McHugh in his official capacity. On March 28, 2011, Plaintiff filed a Motion for Summary Judgment.

II. DR. CYNTHIA A. CHAMBERS' DECLARATION

In support of Defendants' Motion for Summary Judgment and Response in Opposition to Plaintiff's Motion for Summary Judgment, Defendants provide a declaration of Dr. Cynthia A. Chambers, Deputy Director of Research and Analysis, World War II Division for the Defense Prisoner of War/Missing Personnel Office ("DPMO"), a Department of Defense Field Activity. Exhibit C, Declaration of Dr. Chambers. In the declaration, Dr. Chambers explains what an Individual Deceased Personnel File ("IDPF") is, and that there are approximately 405,000 IDPFs for service members deaths in World War II. Exhibit C at 3-4, ¶¶ 4-5. The Adjunct General of the Army has authority over IDPFs. Exhibit C at 5, ¶ 7. In addition, Dr. Chambers explains that there are about 9,000 X-Files created for sets of remains that were not identified. Exhibit C at 4, ¶ 6. The X-File collection for WWII consists of 125 archival storage boxes. Exhibit C at 8, ¶ 10. This collection belongs to the Secretary of the Army and is temporarily stored at the Washington National Records Center in Suitland, Maryland. *Id.* Of the 125 boxes, 19 are signed out to JPAC in Hawaii, 79 signed out to DPMO, 23 are currently located in the Washington National Records Center, 1 is in transit from JPAC to Washington National Records Center, and 3 remaining boxes are at an

unknown location. *Id.* The number of individual files in each box ranges from 5 to 120 with the average being 80. *Id.*

The National Archives and Records Administration ("NARA") houses IDPFs for all services for WWII in 10,478 boxes with about 3,000 pages per box at the Washington National Records Center in Suitland, Maryland. Exhibit C at 4, ¶ 7. These records are "pre-archival" in that they are still in the purview of the agency to which they belong. *Id.* Copies of files can be requested at $0.75 per page. At this time, the NARA does not plan to digitize these files. Exhibit C at 5, ¶ 7. Using the 80 page per IDPF average, the total IDPF collection would be approximately 5,200,000 pages for the Phillippines in WWII. *Id.* While the files are stored alphabetically by last name of the casualty, the material has not yet been properly catalogued and remain in six separate indices. *Id.* The X-Files are boxed separately, and both sets of files are critical to any research or accounting effort. *Id.*

Dr. Chambers provides detailed information about access to IDPFs. Exhibit C at 5-7, ¶ 8. In addition, Dr. Chambers describes DPMO WWII efforts to digitize documents beginning in 2010. Exhibit C at 8, ¶ 9. DPMO Research and Analysis Directorate has one employee devoted totally to the scanning project, and each member of the Directorate's WW II Division is expected to spend at least 2 hours per week scanning X-Files. Exhibit C at 10, ¶ 15. After a file is scanned and converted to PDF, a supervisory analyst conducts a page-by-page quality control review. *Id.*

The preponderance of the X-File material is over 59 years old, with much of the paper brittle or has sustained some form of damage. Exhibit C at 9, ¶ 11. A significant portion consists of carbon copies on onion skin/flimsies. *Id.* Many files are held together by one or more two-hole fasteners and placed in one or more manila folder; the pages are often attached to each other by one or more

staples. *Id.* If staples need to be removed, a special archivist-approved staple remover must be used. Exhibit C at 10, ¶ 14. Due to the condition of the X-Files, the auto-feed feature on the scanner cannot be used; DPMO analysts/historians must use a flat bed scanner working one page at a time. Exhibit C at 9, ¶ 13. Scanning one file can take 5 minutes to more than one day. Exhibit C at 10, ¶ 15. Folded documents must be handled "gingerly" because folds create weak-points where paper often fails. Exhibit C at 10, ¶ 14.

To date, 23 of 125 X-File collection has been scanned, including 5 boxes from the Philippines. Exhibit C at 10, ¶ 16. Barring unforseen circumstances, the 79 boxes DPMO has on hand will be completed in approximately 3 years. *Id.* The physical scanning is only the first step. *Id.* Each file must be indexed by a trained analyst who can find key data elements that are essential for making correlations, which must be entered into a database that can be searched by state-of-the-art geospatial and link analytic tools. Exhibit C at 10-11, ¶ 16.

Dr. Chambers then describes the different components of the Accounting Community, which play a role in policy, research, recovery, identification, and the return of missing service members and civilians to their country. Exhibit C at 11-13, ¶¶ 17-28. After Congress passed a law in October 2009, the DoD was, for the first time, required to proactively account for WWII missing personnel. Exhibit C at 12, ¶ 23. In addition, Congress established a goal of accounting for 200 missing personnel beginning in FY 2015. *Id.* In January 2010, DPMO expanded the WWII Division Directorate by proactively researching and investigating loss incidents. *Id.* In addition, all DPMO researchers are required to make a color scan of no less than 300 pixels per inch/dots per inch resolution of any IDPF used to conduct research. Exhibit C at 13, ¶ 25. The nascent scanning effort is one file at a time. *Id.* Since November 2010, DPMO has scanned 2/100ths of one percent of the

total number of IDPFs. *Id.*

Regarding the X-Files, phase one has been ongoing for 1 year and consists of preparing the files for scanning by removing staples and fasteners; nothing can be done by automatic feed due to the age and conditions of the files. Exhibit C at 13, ¶ 26. Once all of the files are scanned, the initial phase will be complete, and this phase will be finished in approximately 3 years. *Id.* Phase two involves assigning metadata, key words, and indices to each of the recovered remains to a geographic area or incident. Exhibit C at 13, ¶ 27. Phase three involves conducting in-depth research analyzing X-File information with all known losses (both recovered and missing) in the geographic area or incident. Exhibit C at 13, ¶ 28.

Dr. Chambers also provided information about how DPMO previously assisted Plaintiff following a meeting with him at a "Family Member Update." Exhibit C at 14-15, ¶¶ 29-33.

Finally, Dr. Chambers provided information about how Plaintiff's request for approximately 65,000 IDPFs associated with the Philippines would take the next decade to scan paper files, which would detract from DPMO's worldwide mission of recovering WWII missing. Exhibit C at 16, ¶ 34. DPMO would also be unable to fulfill 10 U.S.C. §1509 because DPMO would be applying all of its resources to Plaintiff's case – assets that could be used to continue researching and recovering. Exhibit C at 16, ¶ 35. The use of Washington National Records Center staff in pulling and re-filing records related to Plaintiff would impede and likely forestall the possibility of JPAC to develop cases for field investigation. Exhibit C at 17, ¶¶ 36, 37. In addition, JPAC must increase the number of WWII missions to meet the Congressional mandate of 200 per year by 2015 – impossible if Plaintiff's request were granted. *Id.* Because the Service Casualty Offices use IDPFs, those offices would also be hindered by Plaintiff's request if it were granted. Exhibit C at 17-18, ¶ 38.

III. ARGUMENT

A. Defendants' Motion For Summary Judgment Should Be Granted Because Plaintiff's FOIA Is Unreasonable

i. Plaintiff's FOIA Request Is Inadequate And Will Inflict An Unreasonable Burden

Defendants seek summary judgment Federal Rule of Civil Procedure 56(c) requires the entry of summary judgment where the materials presented "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A request is inadequate under the FOIA if it will inflict an undue or unreasonable burden on the agency that must respond to the request. Plaintiff's FOIA request for all IDPFs and X-Files for all American service members and civilian employees whose remains were not recovered or identified who were held in Japanese POW camps in the Philippines, during WWII, imposes such an undue burden on DPMO, as it would require the DPMO to process over 5,200,000 documents under FOIA's statutory scheme. Exhibit C at 5, ¶ 7. Although the sheer magnitude of a FOIA request is not a traditional reason for granting relief from the strictures of the FOIA, a request of this scale is not a traditional request. *See ICB v. United States Dep't of Defense*, 723 F. Supp. 2d 54, 59-60, n.6 (D.D.C. 2010) (agency need not honor a FOIA request that requires it to conduct an unduly burdensome search, and the agency may rely upon an agency affidavit for explanation as to why a search would be "unduly burdensome").

A request under the FOIA must "reasonably describe" the records sought. See 5 U.S.C. § 552(a)(3). This requirement has often been analyzed in the proverbial "needle in a haystack" scenario – that is, where the agency would have to conduct an unreasonably onerous search of a large volume of records in order to identify and locate the responsive documents. *See, e.g., Dale*

v. IRS, 238 F. Supp.2d 99, 104-105 (D.D.C. 2002) (finding that a FOIA request for any and all documents that refer or relate in any way to the requester was subject to dismissal because the "request amounted to an all-encompassing fishing expedition of files at IRS offices across the country," and did not permit an IRS employee to locate the records with a reasonable amount of effort); *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (finding that a FOIA request that required a search of every FBI office would not reasonably describe the records sought).

What is evident from this jurisprudence is that the reasonable description requirement is measured by the effort that must be expended by the agency to satisfy the FOIA request. *See Dale*, 238 F. Supp. 2d at 104 ("A description 'would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with *a reasonable amount of effort*." (internal quotation marks omitted) (emphasis added); Marks, 578 F.2d at 263 (same). Thus, the courts have recognized that the question of whether or not a request "reasonably describes" records demands an underlying inquiry into the relative context of the agency's systems of records and the records themselves. For example, in *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), the D.C. Circuit stated that "[i]t is well established that an agency is not required to reorganize its files in response to a plaintiff's request in the form in which it was made, and that if an agency has not previously segregated the requested class of records production may be required only where the agency can identify that material with reasonable effort." 607 F.2d at 353 (internal quotations and citations omitted). The court then dismissed the FOIA request because the agency's affidavit "plainly show[ed] that the *effort required* to locate the hypothesized 'back-up' documents would be unreasonable" in that case. *Id.* at 353-54 (emphasis added).

Even in situations where the FOIA request actually does describe documents with "sufficient precision to enable the agency to identify them" the agency still need not comply with a request that is "so broad as to impose an unreasonable burden upon the agency . . . ." *Am. Fed'n of Gov't Employees, Local 2782 v. United States Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (emphasis added); *see Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp.2d 19, 26-28 (D.D.C. 2000) (noting that "[a] description of the requested documents is adequate if it enables a professional agency employee familiar with the subject area to locate the record with a reasonable amount of effort. *Further*, a request can be inadequate if it imposes an unreasonable burden") (internal citation omitted) (emphasis added); *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 891-92 (D.C. Cir. 1995) (finding that a search through 23 years of unindexed files for records pertaining to H. Ross Perot imposed an unreasonable burden on the agency); *Irons v. Schuyler*, 465 F.2d 608, 613 (D.C. Cir. 1972) (holding that although the request for "all unpublished manuscript decisions of the Patent Office" did "describe in general a type of record. . . the contours of the records thus described are so broad *in the context of the Patent Office files* as not to come within a reasonable interpretation of 'identifiable records' as this statutory language is used in paragraph (a)(3)."") (emphasis added). Thus, the amount of effort that must be expended by the agency is evaluated because the "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." *Assassination Archives and Research Center, Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), *aff'd in part*, 1990 WL 123924 (D.C. Cir. 1990) (per curiam).

ii. An Overbroad Request Can Require the Expenditure of an Unreasonable Amount of Effort by the Agency

Courts have not explicitly confined the reasonableness inquiry to the "needle in a haystack" context. Indeed, several courts have suggested that there are other scenarios which challenge the reasonable limits of a FOIA request. For example, courts have noted that broad requests or broad interpretations of requests would be improper under the FOIA. *See, e.g.*, *Hunt v. Commodity Futures Trading Comm'n*, 484 F. Supp. 47, 51 (D.D.C. 1979) (rejecting the requesters' broader interpretation of their FOIA request as including information concerning the requesters *and* any other large commodity trader, where the request was only for information that "concerned" the requester, because such a broad interpretation would "expand their original FOIA request to include virtually every piece of paper in Commission files nationwide"); *Gaunce v. Burnett*, 849 F.2d 1475 (9th Cir. 1988) (unpublished) (finding that a request for "every scrap of paper wherever located in the agency which related to [the requester's] activity in the world of aviation" was "unreasonably vague" and that such "broad, sweeping requests" were not permissible under the FOIA. 1988 WL 63760, at *1 (internal quotation marks omitted).

So, too, in *American Federation of Government Employees*, the D.C. Circuit held that a "broad" request for "every chronological office file and correspondent file, internal and external, for every branch office, staff office [etc.]" imposed an "unreasonable burden upon the agency" because the request would require the agency not only to locate the records, but also to "*review, redact, and arrange for inspection a vast quantity of material*." 907 F.2d at 209 (emphasis added). Thus, in considering the burden that a FOIA request would impose upon an agency, the court in *American Federation of Government Employees* considered more than the work involved in merely searching for the records, but also considered the burden that the breadth of

the request would impose for the review and processing of the materials. Later, in *Nation Magazine*, the D.C. Circuit reasoned that, "[t]o be sure, there are some limits on what an agency must do to satisfy its FOIA obligations. For example, a request to inspect 'every chronological file, internal and external, for every branch office, staff office [etc.]' of the Census Bureau . . . was held to be unreasonable." Id. at 891 (citing *Am. Fed'n of Gov't Employees, Local 2782*, 907 F.2d at 208-209). In addition, overbreadth in the context of a FOIA request has also been analogized to the discovery context, where overbroad requests are objectionable. *See Com. of Mass. v. HHS*, 727 F.Supp 35, 36 & n.2 (D. Mass 1989) (noting that "[a] request for all documents 'relating to' a subject is usually subject to criticism as over-broad . . . . Such a request thus unfairly places the onus of non-production on the recipient of the request and not where it belongs– upon the person who drafted such a sloppy request. Just as such requests are objectionable under [FRCP] 26(b)(1), so ought they be objectionable under the [Freedom of Information] Act.").

Moreover, a request for the entire "haystack," at some point, must be unreasonable under the FOIA if the prevailing "needle in a haystack" case law is to be given any effect. *Irons v. Schuyler* provides an apt example. There, the D.C. Circuit held that a request for "all unpublished manuscript decisions of the Patent Office" was so broad in the context of the Patent Office files as not to come within a reasonable interpretation of "identifiable records" because it would have required the agency to search through the "more than 3,500,000 files of patents, approximately 100,000 files of patent interferences . . . approximately 180,000 pending patent applications, and well over a million of abandoned patent applications" as any of these might have contained unpublished manuscript decisions. 465 F.2d at 611. The court therefore dismissed the request because it would have imposed an unreasonable burden on the agency.

Irons and subsequent jurisprudence cannot be read so narrowly as to apply only in situations where the *search* for documents – as opposed to the processing of documents – is unduly burdensome. Otherwise, a FOIA requester can always circumvent a dismissal by simply asking for the entire haystack.

In *Irons*, rather than asking for only the "unpublished manuscript decisions" of the Patent Office, the requester could have asked for all files of the Patent Office. Such a request would not pose a specific problem of identification or search, but surely, such a request would be unreasonable under the FOIA. *Cf. Hunt*, 484 F. Supp. at 51 (rejecting the requesters' broader interpretation of their FOIA request which would have included "virtually every piece of paper in Commission files nationwide"); *Mason v. Callaway*, 554 F.2d 129, 131 (4th Cir. 1977) ("[Requests for] all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs, . . . including, but not limited to, the files of [various government offices] . . . typifies the lack of specificity that Congress sought to preclude in the requirement of 5 U.S.C. § 552(a)(3) that records sought be reasonably described.").

iii. Plaintiff's FOIA Request For All IDPFs and X-Files Imposes an Unreasonable Burden And Therefore Plaintiff Has Failed To Make A Proper Request Under The FOIA

In the present case, Plaintiff's request for all IDPFs and X-Files for all American service members and civilian employees who were held in Japanese camps whose remains were not recovered or identified would impose an unreasonable burden by requiring the processing of IDPFs with over 5,200,000 pages plus X-Files under FOIA's statutory scheme.

Requests that are more specific and manageable in scope concerning the IDPFs or X-Files have been, or are, in the process of being released. Indeed, Plaintiff previously filed a reasonable

FOIA request with specificity, which resulted in the release of 14 IDPFs, including Plaintiff's cousin's IDPF, and related X-Files. *See* Eakin Summary Judgment Declaration at 4, ¶10. Plaintiff received these documents. *Id.* When a reasonable request is made, a reasonable response is provided. By comparison, however, Plaintiff's current FOIA request is unreasonably broad. Plaintiff's request would require DPMO to process millions of pages under the FOIA's statutory schemes and conduct a manual page-by-page, line-by-line review in order to redact any materials that may be protected by the FOIA. Dr. Chambers testified that Plaintiff's request for approximately 65,000 IDPFs associated with the Philippines would take the next *decade* to scan paper files, which would detract from DPMO's worldwide mission of recovering WWII missing. Exhibit C at 16, ¶ 34. After the documents are scanned, the documents would still have to reviewed for FOIA processing. Regarding X-Files, the 79 boxes in DPMO's possession that related toWWII would be completed in approximately 3 years, barring unforseen circumstances. Exhibit C at 10, ¶ 16. The case is not one of unwillingness to disclose the information, but a refusal to make all 5 million+ documents, many with unique concerns given the age and condition of the documents, in response to a FOIA request.

Such a review of documents is unreasonable under the FOIA's statutory scheme, which allows the agency an initial 20 days to respond to FOIA requests. Further, without limits to the reasonable breadth of a FOIA request, agencies and the courts faced with voluminous requests will always be forced into an extended court-monitored administrative process. Other FOIA requesters who seek records from these agencies will suffer undue delay or have their requests pushed further down the queue by those with the resources to file a FOIA suit and obtain a court ordered resolution of their request. A request that presents such an unreasonable burden on an agency is not proper under the FOIA and therefore Defendants' Motion for Summary Judgment

should be granted. *Cf. Judicial Watch, Inc.*, 108 F. Supp.2d at 26-28 (finding that a request seeking "all records pertaining to contacts" between two individuals and any entities related to China was "unreasonably broad" and "burdensome," and therefore the request itself was deemed "inadequate" and no FOIA search was necessary). Indeed, Plaintiff's request for approximately 65,000 IDPFs associated with the Philippines would take the next decade to scan paper files, which would detract from DPMO's worldwide mission of recovering WWII missing. Exhibit C at 16, ¶ 34. Thus, summary judgment for Defendant is proper as a matter of law.[3]

B. Plaintiff's Motion For Summary Judgment Should Be Denied Because He Is Not Entitled To A Fee Reduction or Fee Waiver

i. The Department Of The Army Did Not Abuse Its Discretion When It Determined That Plaintiff Is Not Due A Fee Limitation As A "Representative Of The News Media"

The court's review is limited to the administrative record. *See Judicial Watch, Inc. v. United States Department of Justice*, 122 F. Supp.2d 5, 12 (D.D.C. 2000). There is some disagreement whether fee reductions are reviewed *de novo* or under an arbitrary and capricious standard, Defendant Army asserts that the standard should be whether its decisions was arbitrary

[3] Defendants also seek summary judgment on Plaintiff's request for expedited processing. FOIA. Under the FOIA, a requester must show a compelling need or other circumstances determined by the agency. 5 U.S.C. § 552(a)(6)(E)(i)(I)-(II). A "compelling need" means "that a failure to obtain requested records on an expedited basis . . . could reasonably be expected to pose an imminent threat to the life or physical safety of an individual" or "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(I)-(II). DoD regulation 5400.7-R also provides for expedited processing for an imminent loss of substantial due process rights or humanitarian need. Plaintiff has not shown how the request would show a compelling need under the statute or regulation, particularly given the reasons discussed supra regarding Plaintiff's request for a fee waiver and how the information would not inform the public concerning government activity.

Plaintiff's Amended Complaint also claimed that the alleged wrongful withholding violated his Fifth Amendment due process rights. Am. Cmpl. at 14. Plaintiff did not provide any legal basis for his claim, and there is none. No fundamental right has been violated.

and capricious based upon the legislative history demonstrates that reductions of fees issues will be reviewed under the arbitrary and capricious standard. *Id.* In any event, even under a *de novo* standard, Plaintiff has not shown that he is a "representative of the news media."

FOIA provides for the charging of fees "applicable to the processing of requests." 5 U.S.C. § 552(a)(4)(A)(I) (2006), amended by OPEN Government Act fo 2007, Pub. L. No. 110-175, 121 Stat. 2524 ("OPEN Act"). Congress charged the Office of Management and Budget ("OMB") with the responsibility of providing a "uniform schedule of fees" for agencies to follow when promulgating their FOIA fee regulations. 5 U.S.C. § 552(a)(4)(A)(i). FOIA requesters must ordinarily pay reasonable charges associated with processing their requests, including search, review, and duplication charges. 5 U.S.C. § 552(a)(4)(A).

The identity of a FOIA requester is relevant when determining applicable fees to be assessed. The FOIA provides for three categories of requesters: commercial use requesters; educational institutions, noncommercial scientific institutions, and representatives of the news media; and finally, all requesters who do not fall within either of the preceding two categories. 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III), amended by OPEN Act. A request by a "representative of the news media" is only subject to duplication fees. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The OPEN Act defined the term "representative of the news media" to be "a 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 distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4). This definition is consistent with the OMB Fee Guidelines and the District of Columbia Circuit Court's opinion in *National Security Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) ("[a representative of the news media is, in essence, a 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."). Additionally, Congress incorporated the OMB Fee Guidelines' definition of "news" as "information that is about current events or that would be of current interest to the public." 5 U.S.C. § 552(a)(4). Further, Congress provided that freelance journalists are considered representatives of the news media if they "can demonstrate a solid basis for expecting publication through [a news media] entity, whether or not the journalist is actually employed by the entity." *Id.*

Here, the Department of the Army correctly determined that Plaintiff is not due a fee limitation as a "representative of the news media" for failure to meet the second and third elements of the definition. First, Plaintiff's request would not turn raw materials into a distinct work. Plaintiff stated that his intended use is to "create a database of MIA/POW's whose remains were determined to be nonrecoverable," use the information to generate publicity to locate family members, and inform family members of the option of providing a Family Reference Sample ("FRS") to an appropriate military casualty office. Plaintiff's FOIA Request to the Army at 3; *see also Judicial Watch, Inc. v. U.S. Dep't of Justice*, 2000 WL 33724693, at *3-4 (D.D.C. Aug. 17, 2000).

The Army correctly acknowledged that although Plaintiff would have to sort and categorize the released records to create a database into a searchable format, merely taking the information and reorganizing it into a new format (apparently into a database similar to a typical EXCEL document) does not entail creating a distinct work from the raw information. Making information available to the public does not transform a requester into a representative of the news media. *See Judicial Watch v. United States Dep't of Justice*, 122 F. Supp. 2d 13, 20-21 (D.D.C. 2000). In *National Security Archive*, in which the court found that the requester was a representative of the news media, the plaintiff not only gathered and made the information

available, it culled items of particular interest and "expressed a firm intention . . . to publish . . . document sets" in which it supplemented the chosen documents with "detailed cross-referenced indices, other finding aids, and a sophisticated computerized retrieval system. *Id.* (quoting *National Security Archive*, 880 F.2d at 1386).

Of import, Plaintiff does not present evidence that he was employed by a news organization such as a television station or newspaper or magazine publisher. While Plaintiff is active with issues unrelated to his FOIA request, such as aviation safety and being a community organizer protesting the construction of a Wal-Mart, Plaintiff provided no evidence that published anything related to his FOIA request. While Plaintiff established www.bataanmissing.com,[4] "publishing a newsletter does not automatically make an entity as a news organization and that maintaining a website it not by itself sufficient to qualify a FOIA requester as a representative of the news media." *Brown v. United States Patent and Tradmark Office, et al.*, 445 F. Supp. 2d, 1347, 1357 (M.D. Fla. 2006) (citing *Electronic Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003), *aff'd* 2007 WL 446601 (11th Cir. Feb. 13, 2007). Indeed, virtually every entity in local-area businesses, law firms, trade associations, etc., as well as most individuals, has a website but are not entitled to news media status for fee determinations. *Id.* Finally, Plaintiff's true purpose for his FOIA request is to connect POW/MIA's with their relatives.

Plaintiff also has not shown that he is a "freelance" journalist. Similar to the plaintiff in *Brown*, Plaintiff notes that he has been featured in media articles. Yet as a representative of the news media, the requester must demonstrate a "firm intention" or "solid basis for expecting

[4] Plaintiff has not established evidence from the website presented with the administrative claim, other than what was found in his actual claim. *See Ctr. for Pub. Integrity v. U.S. Dep't of Health and Human Servs.*, 2007 WL 2248071, *5 n.3 (D.D.C. Aug. 3, 2007).

publication through a [news media] entity" to disseminate publicly the requested information, and Plaintiff has not shown such a firm intention here. *See Brown*, 445 F. Supp. 2d at 1357. Indeed, "[b]eing profiled in newspaper articles does not make Plaintiff a representative of the news media as defined by regulation or create a material factual dispute regarding this issue." *Id.* In conclusion, Defendant Army correctly determined that Plaintiff is not a "representative of a news media," and thus not provided a fee limitation.

ii. The Department Of The Army Correctly Ddetermined That Plaintiff Did Not Establish A Fee Waiver Because The Documents Do Not Contribute Significantly To The Understanding Of The Government.

FOIA provides for *de novo* review of fee-waiver decisions, provided that the review is "limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii). The party requesting documents under the FOIA bears the burden of establishing that the requirements are satisfied. *See Larson v. CIA*, 843 F.2d 1481, 1483 (D.C. Cir. 1988).

To qualify for a fee waiver, a requester must satisfy a two-prong statutory test. The requester must show that "disclosure of the information is [1] in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and [2] is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In compliance with its statutory duty, the DoD promulgated regulations. Particularly, the DoD in Regulation 5400.7-R stated that the six relevant factors are:

1. The subject matter of the requested records;
2. The informative value of the information to be disclosed;
3. The contribution to public understanding likely to result from disclosure;
4. The significance of the contribution to public understanding;
5. The existence and magnitude of a commercial interest in disclosure; and
6. Whether the "primary" interest disclosure is in the public interest or the requester's commercial interest.

Requests for public interest waivers must be "reasonbl[y] specific[]" and are judged on a

case-by-case basis. *See Larson*, 843 F.2d at 1483. Here, Plaintiff's FOIA request stated that the documents would contribute significantly to the public understanding of government operations by providing an avenue to contact family members of affected POW/MIA's, presumably if the Army waives the fees and freely provides the documents in response to the FOIA request. Plaintiff is incorrect. Merely claiming that the release of documents and potential contact of family members would contribute significantly to the public understanding of government operations is without reasonable specificity and is conclusory and unsupported by any facts. *See, e.g., Judicial Watch v. U.S. Dep't of Justice*, 122 F. Supp.2d 13, 17-19 (D.D.C. 2000); *Judicial Watch v. United State Dep't of Justice*, 122 F. Supp.2d 5, 9, 10-11 (D.D.C. 2000) (citing *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir. 1987) (finding conclusory statements insufficient to support a fee waiver); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 2000 WL 33724693, at *5-6 (D.D.C. Aug. 17, 2000).

In any event, the discovery and speculative contact of individuals is, de facto, "conduct" that does not relate to the understanding of government operations. Plaintiff's FOIA request also claimed that the government's alleged unnecessary and unlawful withholding of the requested documents, presumably if a FOIA fee is assessed, contributes significantly to the public understanding of government operations. Once again, Plaintiff's claim is a vague and conclusory assertion that is not reasonably specific as to how the refusal to provide the requested documents without a fee assessment significantly contributes to the public understanding of government operations. *See American Federation of Gov't Employees v. United States Dep't of Commerce*, 632 F. Supp. 1272, 1278 (D.D.C 1986) (Plaintiff's perfunctory assertions were too "ephemeral" to satisfy the "reasonable specificity" standard), *aff'd on other grounds*, 907 F.2d 203 (D.C. Cir.

1990). As the Army stated, the release of documents relates to specific unidentified individuals, not an understanding of government operations.

Plaintiff's argument also attempts to make an agency's *non-release* of documents a factor in favor of a fee waiver, essentially creating an absurd result of making an agency's refusal to provide documents per a FOIA request a basis for waiving the fee under FOIA. Moreover, Plaintiff's request for a fee waiver is premised on a Catch-22 situation for the Army. On one hand, Plaintiff claims that the release of information would significantly contribute to the public understanding of government operations, while the non-release would also contribute to the public understanding. Finally, an objective review of Plaintiff's FOIA request shows the document request is truly about facilitating a connection between MIA/POW's and living relatives. As the Army pointed out, the requested documents relate to specific, unidentified individuals (from over sixty years ago) that do not shed light on government operations. While Plaintiff's intent is obviously a laudable goal, that goal is unrelated to a significant contribution to the public understanding of government operations.

iii. Plaintiff's Argument That Next-Of-Kin Information Should Not Fall Under Exemption 6 Is Now Moot.

Plaintiff's summary judgment motion claims that next-of-kin information should not fall under FOIA Exemption 6 (privacy exemption). Plaintiff's MSJ at 20-23. Since Plaintiff's motion, Defendant DoD has released the documents and did not withhold the next-of-kin information. *See* Exhibit A at 20. Thus, there is no case or controversy regarding this issue, and it is a moot point.

IV. CONCLUSION

In sum, Defendants' Motion for Summary Judgment is dispositive for the case and should be granted because Plaintiff's FOIA request was unduly burdensome, and thus Plaintiff's case should be dismissed regardless of the fee waiver/reduction issues. In any event, Plaintiff's Motion for Summary Judgment should be denied as he failed to demonstrate that he was entitled to a fee reduction or fee waiver, and Plaintiff's only other point is now moot.

Respectfully submitted,

JOHN E. MURPHY
UNITED STATES ATTORNEY

By: */s/ Dimitri N. Rocha*
DIMITRI N. ROCHA
Assistant United States Attorney
Florida State Bar No. 693332
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Telephone: (210) 384-7396
Facsimile: (210) 384-7358
E-mail: Dimitri.Rocha@usdoj.gov
ATTORNEYS FOR DEFENDANTS

Of Counsel:
Mark Herrington
Office of General Counsel
Department of Defense
1155 Defense Pentagon
Washington, DC 20301

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by certified mail, return receipt requested on this 6th day of May, 2011 addressed as follows:

John Eakin, *Pro Se*
9865 Tower View Road
Helotes, Texas 78023

CMRRR 71791000164202119795

/s/ Dimitri N. Rocha
DIMITRI N. ROCHA
Assistant United States Attorney

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

JOHN EAKIN, Plaintiff,	§ § § § §	NO. SA-10-CA-0784-FB-NN
UNITED STATES DEPARTMENT OF DEFENSE; ROBERT M. GATES, Secretary of Defense, Defendants.	§ § § §	

ORDER

On this day, came on for consideration Defendants' Motion for Summary Judgment and Plaintiff's Motion for Partial or Final Summary Judgment. The Court having reviewed said Motions finds that Defendants' Motion for Summary Judgment should be, and hereby is, **GRANTED**, and Plaintiff's Motion for Partial or Final Summary Judgment should be, and hereby is, **DENIED.**

Signed this the _____ day of _____, 2011.

_____
NANCY STEIN NOWAK
UNITED STATES MAGISTRATE JUDGE