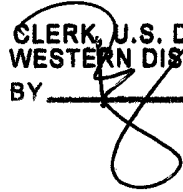


**FILED**

MAY 17 2011

**IN THE UNITED STATES DISTRICT COURT  
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 TO STRIKE  
THE DECLARATION OF DR. CYNTHIA A. CHAMBERS**

Plaintiff pro se John Eakin respectfully moves this Court, pursuant to Fed. R. Civ. P. 12(f), to strike from the record the Declaration of Dr. Cynthia A. Chambers on grounds that it presents material false statements intended to support an erroneous and insufficient defense. Further, the Declaration of Dr. Chambers should be precluded from consideration because it is not part of the administrative record.

A proposed order consistent with this motion is attached.

**Introduction**

This is a Freedom of Information Act proceeding in which the Plaintiff seeks disclosure of certain records pertaining to American military personnel missing from WWII and unidentified remains believed to be theirs. Plaintiff filed a motion for summary judgment on March 28, 2011. Defendants answered and filed a cross-motion on May 6, 2011.<sup>1</sup>

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<sup>1</sup> Plaintiff's reply and answer to Defendant's cross-motion will be filed separately as scheduled on or before May 17, 2011.

Defendant relies on the Declaration of Dr. Cynthia A. Chambers. Plaintiff hereby moves to strike that Declaration.

Plaintiff asserts that Dr. Chambers has falsely stated that Plaintiff has requested the production of 65,000 files and that such production would unduly burden the mission of her agency. Further, that such claim is outside the administrative record and cannot be considered.

Two issues were in contention at the time Plaintiff filed his Motion for Summary Judgment:

1. That next-of-kin information should not fall under FOIA Exemption 6 (privacy). Defendants have conceded this point and have provided un-redacted documents to Plaintiff. (Defendants' Response in Opposition to Plaintiff's Motion for Partial or Final Summary Judgment and Defendants' Crossmotion for Summary Judgment, at 20.)

2. Plaintiff's request for waiver of duplication and review charges for Individual Deceased Personnel Files (IDPFs) and files pertaining to unidentified remains (X-files). Since Defendant's response states that a significant number of X-files have already been digitized and the balance should be completed within a reasonable time, Plaintiff believes the only remaining fee waiver to pertain to approximately 1,286 Individual Deceased Personnel Files. *Id* at 5

The duplication costs of digitized files is minimal and not contested by Plaintiff. Therefore, the remaining issue is relatively narrow concerning only the duplication costs of Individual Deceased Personnel Files from paper originals.

### Material False Statements

Dr. Chambers Declaration presents a distorted and misleading account at paragraph 7 when she states, "Approximately 5,200,000 pages or 65,000 IDPFs [Individual Deceased Personnel Files] relate to the Philippines." And that, "The files of the missing are mixed with the files of those recovered." Then, in paragraph 34 she states that, "Mr. Eakin's request for approximately 65,000 IDPFs associated with the Philippines would take DPMO the next decade to scan paper files."

Plaintiff's actual request<sup>2</sup> was for IDPF's pertaining to unidentified American servicemembers who were held in Japanese POW camps in the Philippines during WWII.

While it beggars belief that the Defense Prisoner of War/Missing Personnel Office does not have a detailed listing of such deceased American servicemembers whose remains were not identified, publicly available data from the National Archives and Records Administration and the American Battle Monuments Commission provides the

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<sup>2</sup> Plaintiff's actual request reads:

"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

names of only 1,286 such missing and unidentified personnel. Less than two percent of the wildly exaggerated figure provided by Dr. Chambers.

Further, while Dr. Chambers Declaration describes an unwieldy process requiring the manual review of an enormous archive of files, the truth is that a listing of the 1,286 requested files has been provided to Defendants.

Plaintiff submits that this much smaller number is hardly burdensome and, contrary to Dr. Chamber's assertion, the existence of digital copies of these vitally important files will actually advance the work of her office.

**The Declaration of Dr. Chambers is Not Part of the Administrative Record**

Defendant cannot introduce this Declaration because it is not part of the administrative record.

As Defendant acknowledges, the Court's *de novo* review is limited to the administrative record. (Defendants' Response in Opposition to Plaintiff's Motion for Partial or Final Summary Judgment and Defendants' Crossmotion for Summary Judgment, at 14). The Chambers Declaration is dated May 6, 2011, well after the close of the administrative record before the Defendants and it raises an issue, that Plaintiff's request is burdensome, a complaint not stated in the denial letters provided to Plaintiff by Defendants.

The administrative record consists of the correspondence between the Requester and Defendants concerning the FOIA request, the fee waiver application, the appeal and the reconsideration. Therefore, this Court should disregard the Chambers Declaration.

"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.”

*Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 511-12 (9<sup>th</sup> Cir. 1997) (citing *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31, 100 S.Ct. 2844, 2858 n. 31, 65 L.Ed.2d 1010 (1980)).

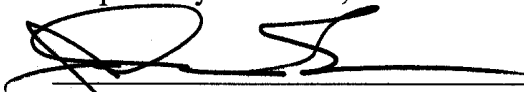
“On judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If those reasons are inadequate, and if the requesters meet their burden, than a full fee waiver is in order.” *Friends of the Coast Fork v. U.S. Dept Interior*, 110 F.3d 53 (9<sup>th</sup> Cir. 1997).

The sole remaining issue in this litigation is Plaintiff’s request for a waiver of fees. Dr. Chambers’ Declaration is silent on this issue and is therefore irrelevant.

Therefore, Plaintiff requests this Court to strike the Declaration of Dr. Chambers.

Respectfully submitted,

Dated: 16 MAY 2011

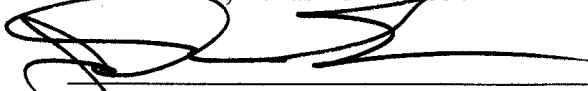
  
\_\_\_\_\_  
John Eakin, Plaintiff pro se  
9865 Tower View, Helotes, TX 78023  
210-695-2204 jeakin@airsafety.com

**CERTIFICATE OF SERVICE**

I, John Eakin, Plaintiff pro se, do hereby certify that on the 16<sup>th</sup> day of MAY, 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: 16 MAY 2011

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

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**UNITED STATES DEPARTMENT  
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**NO. SA-10-CA-784-FB-NSN**

**ORDER**

On this day, came on for consideration Plaintiff's Motion to Strike the Declaration of Dr. Cynthia A. Chambers. 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**