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MAY 17 2011

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

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

JOHN EAKIN,
 Plaintiff,

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**

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**PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff pro se John Eakin respectfully files this opposition to the cross-motion for summary judgment of 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, and moves for summary judgment in his favor on all contested issues.

The record supports Plaintiff's entitlement to a fee waiver under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

A proposed order consistent with this motion is attached.

I. 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. Plaintiff filed a motion for summary judgment on March 28, 2011. Defendants answered and filed a cross-motion for summary judgment on May 6, 2011.

Plaintiff has moved 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.

II. Disputed Issues

1. Defendants originally asserted that next-of-kin information should be withheld 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' Cross-motion for Summary Judgment, at 20. (Hereafter, Defendants' Response)) Defendants and Plaintiff agree this issue is now moot.

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). Defendant now states that a significant number of X-files had been digitized prior to Plaintiff's original request and the balance should be completed within a reasonable time. *Id* at 4 & 6. Therefore, Plaintiff believes the only remaining fee waiver to pertain to less than 2,750 Individual Deceased Personnel Files.

The duplication cost of digitized files is minimal and not contested by Plaintiff. Therefore, the remaining issue is relatively narrow concerning only the duplication or scanning costs of no more than 2,750 Individual Deceased Personnel Files from paper originals, many of which have already been scanned in the routine course of business.

III. Argument

A. Defendant Raises a New Issue Not in the Administrative Record

Defendants now raise a new issue not complained of in their denial letter. They variously complain that they would have to review 65,000 files to determine which files are responsive to Plaintiff's request. Alternately, in the same declaration they complain that Plaintiff has requested all 65,000 files pertaining to the Philippines. Neither assertion is true.

Defendant should not be allowed to 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 at 14). The Declaration of Dr. Chambers is dated May 6, 2011, well after the close of the administrative record and it raises an issue, that Plaintiff's request is burdensome and unreasonable, 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 and Plaintiff has filed a Motion to Strike this 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 (9th 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)).

B. Defendant Has Provided False Material Statements

Dr. Chambers Declaration presents an exaggerated 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.” Implying that each of 65,000 files would have to be reviewed to determine responsiveness. Then, in paragraph 34 she presents an alternate scenario when 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.” The claim that Plaintiff has requested all 65,000 IDPF’s is repeated in Defendants’ Response at 6, 12, 13 and 14. Neither assertion is true.

Plaintiff’s actual request was for IDPF’s pertaining to unidentified American servicemembers who were held in Japanese POW camps in the Philippines during WWII.¹

¹ Plaintiff’s 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

While it beggars belief that the Defense Prisoner of War/Missing Personnel Office does not have a detailed listing, and is also unaware of other sources, of the names of deceased American servicemembers whose remains were not identified. Plaintiff has researched publicly available data from the National Archives and Records Administration, camp burial rosters and the American Battle Monuments Commission to obtain the names of such missing and unidentified personnel. Plaintiff estimates that based on the information provided in Defendants November 22, 2010 denial letter, there may be up to 2,750 responsive files, but to date Plaintiff has only identified 1,286 specific IDPFs. This is approximately two percent of the number of files Dr. Chambers claims Plaintiff has requested or which she claims would be required to be reviewed.

A principal point of Dr. Chambers' Declaration, that there are 65,000 IDPF files consisting of 5,200,000 responsive pages, (Chambers Declaration ¶ 4) contradicts Defendants' denial letter which stated that there were 165,000 responsive pages of both IDPFs and X-files which they were at that time prepared to provide to Plaintiff upon payment of fees. (Exhibit B)

Plaintiff submits that a person of Dr. Chambers' experience should reasonably be expected to know of the existence of various sources of the information necessary to select the files responsive to Plaintiff's request. To suggest that all IDPFs must be reviewed or that Plaintiff has requested all IDPFs pertaining to the Philippines strains credibility, and is a material misstatement.

Defendants denial letter and cross-motion for summary judgment present wildly differing information concerning the number of documents with no explanation for the discrepancy.

Plaintiff has provided the list of 1,286 names for whom IDPFs are requested to Defendants' Counsel and will stipulate that there are no more than 2,750 responsive IDPFs. (Exhibit A)

To allow Defendants to arbitrarily introduce new and contradictory facts and complaints at this late date in this litigation presents Plaintiff with moving targets and is fundamentally unfair.

C. Plaintiff's FOIA Request is Reasonable

Defendant now raises a new issue not part of the administrative record that Plaintiff's FOIA request is unreasonable, burdensome, and will require the expenditure of an unreasonable amount of effort by the Agency.

Dr. Chambers' May 6, 2011 Declaration states that there are 5,200,000 pages of IDPFs and asserts that duplication of these IDPFs for Plaintiff would be burdensome and would require an unreasonable amount of effort.

Defendants' November 22, 2010 denial letter states that there are 165,000 pages of responsive documents, both IDPFs and X-files, and conveys that they are prepared to duplicate them for plaintiff upon receipt of payment.

Plaintiff submits that if duplication of 165,000 pages was reasonable and not burdensome six months ago, then Plaintiff's estimate of 1,286 IDPF's consisting of approximately 39,000 pages should be reasonable, now. And based upon Dr. Chambers' description of the importance of IDPFs to the accounting mission, (Chambers Decl ¶ 4, 25 & 37), the existence of these digitized files will actually advance the work of her office.

Defendants state that when a reasonable request is made, a reasonable response is provided. (Defendants' Response at 13) On November 22, 2010 Defendant Army informed Plaintiff that duplication of 165,000 pages was reasonable. (Exhibit B) Consequently, the much smaller number of 39,000 pages should be reasonable.

D. Plaintiff Qualifies for a Waiver of All Fees

Defendants response attempts to distance themselves from the garbled and confused contents of the November 22, 2010 denial letter from Army Human Resources Command.² However, "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 (9th Cir. 1997).

² [Extract from denial letter concerning fee waivers]

When considering requests for fee waivers, the core purpose of the FOIA must be considered. The core purpose of the FOIA is to allow individuals access to information that demonstrates how the government operates; therefore, in order to receive a fee waiver requesters must first show how 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." Unfortunately, the information you have requested is not a manual, regulation, or other form of procedural guidance that would clearly demonstrate how the government operates. 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.

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. You have indicated that some veterans organizations would find the information interesting or useful; however, the information is not thought to be of interest to the public majority. You have also stated that the records are needed in order to preserve historical records available pertaining to this time period. Please be advised, that the Federal government through the Department of the Army and the National Archives is the official custodian of historical/archived records from World War II. They are made available to the public upon request in accordance with the FOIA.

(Exhibit B - Denial letter from U.S. Army Human Resources Command, dated November 22, 2010)

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 effort, or lack of effort, 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). So clearly, 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.

Plaintiff has 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 to appropriate media outlets is similar to National Security Archive's "document sets." These lists will be tailored by region, military unit or other criteria to make them relevant to a particular publishers' readership. Additionally, the entire list will be made available on Plaintiff's existing website which will be linked to from other sites containing related information.

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." 5 U.S.C. § 552(a)(4)(A)(ii)

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 history of dissemination of similar information to the news media.

Defendants' predisposition to denial of requests for fee waivers is evidenced by their lack of further inquiry in to Plaintiff's request. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1282, 1287.

E. Other Fee Waiver Considerations

Defendant Army's admission that a previously unacknowledged program to scan responsive records existed prior to Plaintiff's original request is evidence that Defendant's original calculation of fees was an effort to discourage requesters, a violation of its' own regulations and 32 CFR § 518.19(e).

Further, Defendants continue to ignore the substantial number of IDPF's which were scanned for family members and other Department of Defense agencies and made reference to by Dr. Chambers at ¶ 8a, 8b, 8c, 8d, 9 & 12. The actual, and much lower, cost of duplication of these digital IDPF files, like that of the already scanned X-files has still not been acknowledged by Defendants and a corrected estimate of duplication fees provided. Therefore, a waiver of all of these fees is the only equitable solution.

FOIA requesters must ordinarily pay reasonable charges associated with processing their requests. 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).

Plaintiff exceeds all requirements of Defendants' denial letter and the FOIA statute to qualify for a waiver of all fees both in the public interest and as a representative of the news media. To not grant Plaintiff's motion for summary judgment would be to reward Defendant's violation of its own regulations.

E. Conclusion

Plaintiff, and all citizens, have a right to request documents from the government. Implicit in this is the government's obligation to act in good faith. To provide true, correct and timely responses and deal fairly. Instead;

1. Defendants denied the existence of digitized files and provided Plaintiff with an exaggerated estimate of costs designed to discourage the request.

2. Defendants failed to comply with the statutory time limits of the FOIA.

3. Defendants invoked FOIA Exemption 6 (privacy) without sufficient reason. While it is true that they have since conceded that the exemption was not applicable, they did not do so until Plaintiff filed suit. Their unsubstantiated actions unreasonably burdened the Court and delayed this litigation.

4. Defendants introduced new objections to compliance with Plaintiff's request even though the objection was not contained in the administrative record as required by statute.

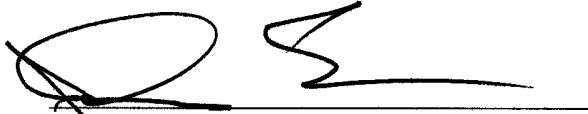
5. Defendants introduced false and contradictory material statements concerning the number of pages requested which strain credibility and deliberately misconstrued Plaintiff's request for documents.

6. Defendants provided instructions for obtaining a fee waiver then, after Plaintiff complied with their instructions, now argue that it was inadequate.

Plaintiff requests that the Court grant his Motion for Summary Judgment and order Defendants to timely produce all responsive documents from all components of the Department of Defense including all military departments and joint commands. That all fees for digitization of paper files be waived and also issue a finding that release of the documents is in the public interest and that Plaintiff has qualified as a representative of the news media.

Respectfully submitted,

Dated: 16 MAY 2011



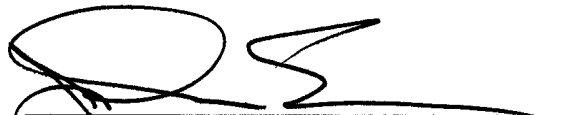
John Eakin, Plaintiff pro se
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com

CERTIFICATE OF SERVICE

I, John Eakin, Plaintiff pro se, do hereby certify that on the 16th 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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Secretary of Defense, UNITED STATES
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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 and Defendants' Motion for Summary Judgment. The Court having reviewed said Motions finds that it should be, and hereby is, **GRANTED**, and Defendant's Motion for Summary Judgment should be, and hereby is, **DENIED**. Additionally, the Court finds that Plaintiff qualifies for a waiver of all fees and expedited processing as a representative of the news media.

Signed this the _____ day of _____, 2011.

**NANCY STEIN NOWAK
UNITED STATES MAGISTRATE JUDGE**