

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

JOHN EAKIN,
Plaintiff,

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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’ REPLY TO PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANTS’ CROSS-MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS’
RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION TO STRIKE THE
DECLARATION OF DR. CYNTHIA A. CHAMBERS**

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’ Reply to Plaintiff’s Response in Opposition to Defendants’ Cross-Motion for Summary Judgment (“Defendants’ Cross-Motion”), and Response in Opposition to Plaintiff’s Motion to Strike the Declaration of Dr. Cynthia A. Chambers.

As stated in Defendants’ Cross-Motion, Defendants seek summary judgment because Plaintiff’s request is inadequate under the FOIA as it will inflict an undue or unreasonable burden on the agency that must respond to the request. In opposition to Defendants’ motion, Plaintiff makes various arguments based upon speculation. Plaintiff’s unfounded assertions and bald accusations throughout his response show a lack of knowledge of the functioning of the government in general,

and the specifics of the government's actions to resolve cases of missing service members.¹

Defendants stand by the Declaration and Supplemental Declaration, filed herewith as Exhibit D, of Dr. Cynthia A. Chambers, an expert who has the knowledge, education, training, and experience to testify on these matters.

While Plaintiff disputes that approximately 5,200,00 pages or 65,000 Individual Deceased Personnel Files ("IDPFs") relate to the Phillippines or that the files of the missing are mixed with the files of those recovered, *see* Plaintiff's Response ("Pltf's Rsp.") at 4, Plaintiff provides no competent summary judgment evidence to support his unsupported assertions that "false material statements" have been provided. Based upon the Army's November 22, 2010 initial denial letter, Plaintiff speculates that there may be up to 2,750 responsive files, and Plaintiff further claims to have identified 1,286 specific IDPFs.² Pltf's Rsp. at 5. Plaintiff can only speculate as to the number of responsive files, which is insufficient to defeat competent summary judgment evidence.

Plaintiff ignores that Dr. Chambers testified that approximately 5,200,000 pages or 65,000 IDPFs that relate to the Phillippines, which are in "pre-archival" state, are still not properly

¹ For the first time, Plaintiff claims that Defendant Army admitted that a previously unacknowledged program to scan responsive documents existed prior to Plaintiff's request and thus the original calculation of fees was an effort to discourage requesters. Pltf's Rsp. at 9. In addition, Plaintiff claims that a "substantial" number of IDPFs were scanned, and thus the estimated cost for duplication fees is lower and thus fees must be waived as an equitable solution. Pltf's Rsp. at 9-10. Defendants do not understand Plaintiff's allegation. If anything, given the volume of documents now ascertained according to Dr. Chambers' Declaration and Supplemental Declaration, the \$24,000 duplication fee is below the actual amount that should have been assessed. In addition, the amount also did not reflect the charges for review. Given that Plaintiff has not received a fee waiver or reduction, and has not agreed to pay the charges, Plaintiff's FOIA request will not be processed.

² Plaintiff seems to suggest that the May 16, 2011 submission of a purported list of 1,286 names of missing and unidentified service members to Defendants' counsel is a narrower request for documents, *see* Pltf's Rsp. at 5, Pltf's Rsp. at Exhibit A; however, Defendants are unsure whether Plaintiff's submission constitutes an amended request or periodic request while Plaintiff attempts to identify other service members.

catalogued and remain in six separate indices, and the files of those missing are mixed with those recovered. Defendants' Cross-Motion, Exhibit C at 5, ¶¶ 7. While Plaintiff claims that his request is limited to those service members held in Japanese POW camps in the Philippines during World War II, that does not change the organization and cataloguing of the IDPFs files relating to the Philippines. The overall World War II IDPFs are not separated by geographic area or by missing/recovered, and are filed in six separate accessions totaling 10,478 boxes. *See* Exhibit D, Supplemental Declaration of Dr. Cynthia A. Chambers at 1, ¶ 2.

To the extent that Plaintiff's request is limited to those service members held in Japanese POW camps in the Philippines in World War II, Dr. Chambers now provides information addressing that request. In the Supplemental Declaration, Dr. Chambers testified that the number of IDPFs for civilian and military deceased is approximately 9,123. Exhibit D at 1, ¶ 1. In addition, as Dr. Chambers testified, the National Archives and Records Administration does not plan to digitize these files, while the DPMO digitizes and scans IDPFs in response to individual research requests. *Id.* at 5, Exhibit C at 6, ¶ 8(b), Exhibit C at 8, ¶ 9, Exhibit C at 13, ¶ 25. Importantly, Dr. Chambers addresses, in her Supplemental Declaration, the burden Plaintiff's request for IDPFs would create for the office, notwithstanding the 79 boxes of X-Files addressed in her Declaration that would require approximately 3 years to complete. Exhibit C at 10, ¶ 16. Particularly, Dr. Chambers stated that the effort to refine and verify the data sets is extensive. Exhibit D at 2, ¶ 3. Indeed, given the workload of the office, "a historian dedicated to this effort would require approximately three years to pull, assess, and incorporate data from the IDPFs in question." *Id.* Dr. Chambers further testified that Plaintiff's request, without additional substantial resources, would detract from DPMO's worldwide mission of recovering missing World War II missing service members. Exhibit D at 2,

¶ 4. The FOIA requires the processing of documents that requires a manual page-by-page, line-by-line review in order to redact any materials that may be protected by the FOIA, particularly difficult when dealing with old, fragile documents. Essentially, Plaintiff's request requires DPMO to stop working on its current mission as mandated by Congress, focus on Plaintiff's request and review, organize, scan and process X-Files and IDPFs (which are not to be scanned except for individual research cases), which will take years, and for the whole process to be paid for by taxpayers. 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). Plaintiff's request presents such an unreasonable burden on the agency, and is not proper under the FOIA. Thus, Defendants' Motion for Summary Judgment should be granted.

Plaintiff also challenges Dr. Chambers' testimony because the Army's November 22, 2010 denial letter stated that 165,000 records relate to IDPFs and X-Files. Pltf's Rsp. at 4-6. The numbers provided in the November 22, 2010 are not the most complete or recent information available. As demonstrated by the Declaration of Erin Chidester, the Information Release Specialist for the Army at Fort Knox, KY, the records estimate for Plaintiff's request was based upon the documents at the Joint POW/MIA Accounting Command ("JPAC") in Hawaii and failed to take into account documents at other locations. The testimony provided by Dr. Chambers took into account all of the documents, and is the most complete and recent information available. *See Exhibit E, Declaration of Erin Chidester*.

In addition, Plaintiff claims that Defendants should not be allowed to claim that Plaintiff's

request is burdensome and unreasonable because the claim and declaration of Dr. Chambers are not part of the administrative record. Pltf's Rsp. at 3. Relatedly, Plaintiff also claims that the Defendants admitted that the Court may only review the administrative record regarding the unduly burdensome and unreasonable argument. Pltf's Reply at 3. In support of Plaintiff's argument, Plaintiff cites only one case. *Id.* Plaintiff quotes a Ninth Circuit case³ to support his argument. As an initial matter, the language quoted by Plaintiff is wholly inaccurate and does not follow the language from that case; the *IMC* decision does not quote or address a government denial letter. Further, the case is irrelevant. The *IMC* case does not relate to this action because it did not pertain to a FOIA matter; the case involved the Mandamus and Venue Act of 1962, the Administrative Procedure Act, and a plaintiff's demand for the Secretary of the Interior to process his applications for mineral patents.

Further, while it is true that the Court's review of the fee waiver and fee reduction requests are limited to the administrative record, *see* Defendants' Cross-Motion at 14, 18, that limitation does not apply to Defendants' argument that Plaintiff's request is unduly burdensome and unreasonable. The court's limitation to the review of the administrative record for fee waivers and reductions is spelled out in the United States Code (5 U.S.C. § 552(a)(4)(A)(vii)); there is no such limitation preventing a party from raising summary judgment evidence during district court litigation on various other matters, such as FOIA exemptions or claims that the request is unduly burdensome and unreasonable. An agency is not precluded from filing an affidavit or declaration with the Court to assist the trier of fact in determining whether summary judgment has been met. *See ICB v. United*

³ *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 511-12 (9th Cir. 1997) ("*IMC* case") (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n. 31 (1980)).

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”). Similarly, the D.C. Circuit held that there is no requirement for an agency to administratively invoke a FOIA exemption to rely on it in federal court. See *Hodes v. U.S. Dep't of Housing & Urban Devel.*, 532 F. Supp. 2d 108, 114 n. 2 (D.D.C. 2008) (holding that an agency can invoke an FOIA exemption that was not previously referenced in the administrative claim); *Sciba v. Bd. of Governor of Fed. Reserve Sys.*, No. 04-1011, 2005 WL 758260, at *1 n. 3 (D.D.C., Mar. 30, 2005) (“an agency only waives FOIA Exemptions by failing to claim them in the original proceedings before the district court”).

Moreover, Defendants filed a declaration from Dr. Chambers that explains in detail the volume of documents that pertain to Plaintiff's FOIA requests. Dr. Chambers does not work in the DoD or Army FOIA offices and accordingly did not provide a detailed declaration during the processing of Plaintiff's FOIA requests. Dr. Chambers works on the ground and provides the most accurate lay and expert testimony regarding this subject. A declaration or an affidavit can be appended to a Motion for Summary Judgment to assist the trier of fact understand the facts and issues, and summary judgment is proper when “the pleadings, the discovery [if any] and disclosure of materials on file, and any *affidavits* show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). (emphasis added). To meet its burden, the agency may submit affidavits or declarations that explain both in reasonable detail and in a non-conclusory fashion the scope and method of the agency's search. *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982). In the absence of contrary evidence, such affidavits or declarations are sufficient to demonstrate an agency's compliance with the FOIA. *Id.* For this

reason, Dr. Chambers's Declaration and Supplemental Declaration are highly relevant, timely, and provide detailed information to assist the trier of fact.⁴

In conclusion, Defendants' Cross-Motion for Summary Judgment is dispositive for the case and should be granted because Plaintiff's FOIA request is unduly burdensome, and thus Defendants are entitled to summary judgment as a matter of law and Plaintiff's case should be dismissed.

Respectfully submitted,

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UNITED STATES ATTORNEY

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⁴ Defendants also oppose Plaintiff's Motion to Strike the Declaration of Dr. Cynthia Chambers. Plaintiff's motion raises the same issues raised in his response in opposition to Defendants' Cross Motion, namely because Dr. Chambers allegedly falsely stated that Plaintiff requested 65,000 files, and that the Declaration was allegedly outside the administrative record. As explained *supra*, Dr. Chambers' declaration does not need to be part of the administrative record, and Plaintiff has provided no competent evidence that Dr. Chambers provided material false statements, and, in any event, her Supplemental Declaration combined with her Declaration respond to Plaintiff's request for documents that relate to those in POW camps in the Philippines.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed via the Court's CM/ECF system and served by certified mail, return receipt requested on this 24th day of May, 2011 addressed as follows:

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

CMRRR 7179 1000 1642 5537 3519

/s/ Dimitri N. Rocha
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Assistant United States Attorney

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JOHN EAKIN,
Plaintiff,

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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' Cross-Motion for Summary Judgment. The Court having reviewed said Motion and any response thereto, finds that Defendants' Cross-Motion for Summary Judgment should be, and hereby is, **GRANTED**, and Plaintiff's Motion to Strike the Declaration of Dr. Cynthia A. Chambers should be, and hereby is, **DENIED**.

Signed this the _____ day of _____, 2011.

NANCY STEIN NOWAK
UNITED STATES MAGISTRATE JUDGE