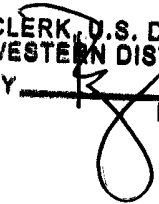


FILED

MAY 31 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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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 REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO STRIKE
THE DECLARATION OF DR. CYNTHIA A. CHAMBERS**

COME NOW, Plaintiff pro se John Eakin and respectfully files this Reply to Defendants' Response in Opposition to Plaintiff's Motion to Strike the Declaration of Dr. Cynthia A. Chambers.

Defendants have now filed the Supplemental Declaration of Dr. Cynthia A. Chambers in which she admits having incorrectly interpreted Plaintiff's request for documents in her original Declaration. While there is no evidence the original declaration was submitted in bad faith and Plaintiff makes no allegation of such, it constitutes a material false statement and the Court should strike her Declaration from the record pursuant to Fed. R. Civ. P. 12(f) and grant summary judgment to Plaintiff under Fed. R. Civ. P. 56.

Further, the Supplemental Declaration of Dr. Chambers displays a continued lack of understanding of what documents have been requested and the negligible burden Plaintiff's request will place on her agency and should also be struck from the record.

The following is submitted in support of Plaintiff's claim that Dr. Chambers Supplemental Declaration is also defective and that any claim of negative impact on the mission of Dr. Chambers agency is false:

I. Plaintiff's Request is Not Burdensome.

Plaintiff's original FOIA requests to Defendants were for digital copies of the requested records.¹ Plf's FOIA requests – Plts's Mo Sum Judgment Exh A1 at 7 and B1 at 7

The DoD denial letter objected to release only on the basis of FOIA Exception 6 (privacy). (This objection has since been reconsidered and mooted by Defendant.) Plts's Mo Sum Judgment Exh A5, A6 and Def's Rsp. to Plfs Mo Sum Judgment at 20

The Army denial letter estimated that there were 165,000 pages of responsive documents and the charge for duplication would be approximately \$24,000 and suggested Plaintiff apply for a waiver of fees. The Army denial letter also informed Plaintiff that, "Search fees related to your request would be waived since responsive documents are already available within the organization and require no additional search." Army denial letter. Plts's Mo Sum Judgment Exh B3.

The denial letters provided to Plaintiff by Defendants pointedly failed to acknowledge the existence of any digital records and provided Plaintiff with the estimated costs of scanning responsive documents from paper originals, a hugely inflated

¹ A vital point in this FOIA request and ensuing litigation is that the requests were for scanned documents and in this regard the terms digital, digitized, or electronic are used interchangeably. This distinction is crucial because, while the conversion process is essentially identical for creating paper (hardcopy) or digital records, subsequent or additional copies of digital records can be created for little more than the cost of the medium (such as CD-ROM or DVD) or the bandwidth used to transmit them. 5 USC § 552(a)(4)(A)(ii) limits duplication fees to reasonable standard charges.

amount compared to the cost of duplicating electronic files. Plts's Mo Sum Judgment Exh A4, A5 A6, B3, B5.

When no response was received on Plaintiff's administrative request for waiver of fees to convert the requested documents to digital format, Plaintiff requested judicial review of Defendants actions in invoking Exception 6 and waiver of fees.

Upon commencement of this litigation DoD promptly provided three digital files to Plaintiff and represented that they constituted all of the responsive files in their custody. Plts's Mo Sum Judgment Exh A5 and A6

Defendants then provided testimony that a substantial number of additional responsive records already existed in digital form and that planned digitization of at least the X-files had begun in FY 2010 and would be completed in three years or less. Scanning of IDPFs was performed as required as part of an ongoing program. (These existing files have not been provided to Plaintiff.) Chambers Decl at ¶¶ 8-10, 12, 13, 15, 16, 25-27, 32 and Chidester Decl at ¶ 3. Digitization of these records was formally adopted as DoD policy on 23 June 2010. Plts's Mo Sum Judgment Exh I

Plaintiff does not contest the reasonable charges for duplication of digital data and Defendants have stated no objection to the production of the responsive X-files or IDPFs. Plf's Mo to Strike Chambers Decl at 2 and Plf's Rsp. to Def's cross-mo for summary Judgment at 2

The Declaration of Dr. Chambers raised a new issue, that Plaintiff's request was burdensome and would require the wholesale duplication or review of 5,200,000 pages of documents because Defendant could not identify exactly which American servicemen had died in Japanese POW camps and whose remains were not recovered. Plaintiff was,

and still is, incredulous that the US Department of Defense Prisoner of War / Missing Personnel Office does not have such information readily to hand. Defendants ask us to believe that the US Government spends more than \$100 million dollars each year looking for the remains of men they don't know the names of.

Plaintiff then moved to strike the declaration of Dr. Chambers on the grounds that it introduced a new issue not part of the administrative record and that it contained material false statements. Plaintiff disputed Defendants claim that he was requesting 65,000 IDPF's (1,950,000 pages). Plaintiff then provided a list of 1,286 files which he believed to be all of the responsive IDPFs, and stipulated that the total number of responsive records would not exceed 2,700 if his research of the X-files identified additional names as suggested by Army's denial letter. Plts's Rsp. in Opposition to Def's Cross-Mo Sum Judgment at 6 and Exh A.

Defendants next provided a supplemental declaration by Dr. Chambers which included an admission that she had incorrectly interpreted Plaintiff's request – a material false statement. Chambers Supp Decl at 1

Defendants then provided a declaration by Erin Chidester that Defendant's record search was defective. Chidester Decl at 3

This is likely the first time in the history of the FOIA that the Government has argued that its document search was inadequate.

The sole remaining issue concerns the waiver of fees for digitization of less than 2,700 IDPF's. (The maximum number which Plaintiff has stipulated, less the unknown number of IDPF's already digitized in the normal course of Defendant's business.) No further research or review of these files is required of Defendants since Plaintiff will

identify any additional responsive IDPF's by name (up to the stipulated maximum of 2,700) which may be revealed by review of the Xfiles. Plts's Rsp. in Opposition to Def's Cross-Mo Sum Judgment at 6 and Exh A.

Defendants argue that they should be allowed to move the goalposts on Plaintiff by presenting new and previously unstated objections to the release of the requested documents and that while the digitization of 165,000 pages was reasonable at the time of their original denial of Plaintiff's request, digitization of substantially less than 81,000 pages is now burdensome and would shut down their entire operation for the next three years.

II. Dr. Chambers Raises an Issue Not Part of the Record.

Additionally, the (now admittedly incorrect) Declaration and Supplemental Declaration of Dr. Chambers is the basis for the introduction of the new claim that Plaintiff's request is burdensome, a new issue not a part of the administrative record and therefore precluded from the Court's *de novo* review under 5 U.S.C. § 552(a)(4)(A)(viii) which limits the Court's review of the matter to the record before the agency. As stated in *Friends of the Coast Fork v. U.S. Dept of the Interior*, 110 F.3d 53, 55:

“[R]eview is limited to the record before the agency, and this applies just as much to the reasons the agency offered for denial as it does to the evidence the agency offered, 5 U.S.C. § 552(a)(4)(A)(viii); *MESS*, 835 F.2d at 1284. True, requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver, [Id at 1284-85], but 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, we 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. Ed2d 1010 (1980)). Taken together, these principles lead us to the following conclusion: on judicial review, the agency must stand on whatever reasons for denial it gave in the administrative proceeding. If

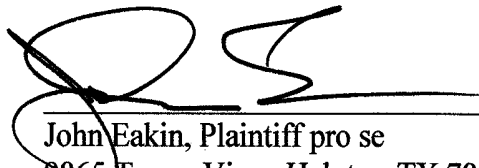
those reasons are inadequate, and if the requesters meet their burden, then a full fee waiver is in order.”

The record supports Plaintiff’s entitlement to a fee waiver under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 and summary judgment should be granted in his favor in the absence of any valid objection by Defendants and as a form of sanction under Fed. R. Civ. P. 56.

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: 5-30-11



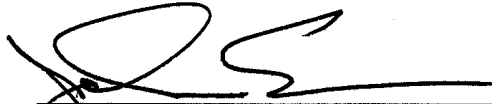
John Eakin, Plaintiff pro se
9865 Tower View, Helotes, TX 78023
210-695-2204 jeakin@airsafety.com

CERTIFICATE OF SERVICE

I, John Eakin, Plaintiff pro se, do hereby certify that on the 30th 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: 5-30-11



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FOR THE WESTERN DISTRICT OF TEXAS
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**JOHN EAKIN,
Plaintiff,**

vs.

**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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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**