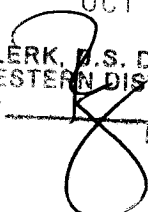


FILED

OCT 31 2011

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

**FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**JOHN EAKIN,
Plaintiff,**

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vs.

NO. SA-10-CA-784-FB-NSN

**UNITED STATES DEPARTMENT
OF DEFENSE, LEON E. PANETTA,
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 OPPOSED MOTION TO STRIKE DEFENDANT’S RESPONSE IN
OPPOSITION TO PLAINTIFF’S MOTION FOR PARTIAL OR FINAL
SUMMARY JUDGMENT AND DEFENDANT’S MOTION FOR SANCTIONS**

COME NOW, Plaintiff pro se, John Eakin, and files this Plaintiffs’ Reply to Defendants’ Response in Opposition to Plaintiff’s Opposed Motion to Strike Defendants’ Response in Opposition to Plaintiff’s Motion for Partial or final Summary Judgment and Defendants motion to Strike Plaintiff’s Rule 11 Motion for Sanctions. This action arises under the Freedom of Information Act (“FOIA”) and Administrative Procedures Act (“APA”).

I. DISCUSSION

A. Defendants Have Concealed the Existence of Digital Files

This issue arises due to Defendant’s willful concealment of digital copies of the requested files. Rather than acknowledge that a substantial portion of the requested files existed in digital format and could be easily reproduced at minimal cost, Defendants concealed the existence of these files. Defendants then presented Plaintiff with a wildly inflated estimated cost of digitizing all of the requested records with the obvious intent of

discouraging his FOIA request rather than properly calculating the estimated cost of only the records which had not yet been digitized.

The Defense Prisoner of War/Missing Persons Office (DPMO), Joint Prisoners of War, Missing in Action Accounting Command (JPAC), and the respective military departments are all components of the Department of Defense (DoD) and records possessed or controlled by any such component are considered agency records of Defendants. 5 U.S.C. § 552(f)

Early in this litigation, Defendant DoD presented Plaintiff with three small files containing burial roster information. Defendant represented that these “constitute the entire set of responsive documents within DPMO” and concealed the existence of digital files produced by the Defense Prisoner of War/Missing Persons Office (a component of the Office of the Secretary of Defense). Exhibit 1.

As Defendant’s claim that portions of these files were exempt from disclosure under FOIA exemption b(6) was resolved, Defendant DoD provided revised files to Plaintiff with certain redactions removed. At each revision, Defendant DoD again represented that there were no additional digital files responsive to Plaintiff’s 2010 FOIA request (the original request which is the subject of this litigation). It defies logic that certain digital files were released without charge while other existing digital files were withheld pending resolution of a waiver request as Defendants now claim.

Defendants continued to conceal these digital files even when Defendant’s own witnesses made reference to a program to digitize the subject files at DPMO. Def Exh C, Chambers Decl, at 9, 12, 15, 16, 25, 26.

Informed by Plaintiff that he had obtained a substantial volume of digital files from Army Human Resources Command and had also been informed that digital files also exist at JPAC, Defendants now claim that the “voluminous number and transitory state of the documents involved” are too complex for mere mortals to comprehend. Def Resp in Opp Plf Opp Mo to Strike Def Resp in Opp to Plf’s Mo for Part or Final Summary Judgment at 2.¹

What is apparent is that Defendants are intent on playing a shell game with these files rather than simply providing an accounting of the requested files and detailing the number of files which exist in digital format. Rather than provide facts, as they had agreed to provide informally to Plaintiff, Defendants now rely on obfuscation and confusion.

B. Plaintiff’s Motion For Sanctions Under Rule 11 is Withdrawn

Plaintiff acknowledges his procedural error in moving for sanctions under Rule 11 of the Federal Rules of Civil Procedure and asks that the motion be withdrawn. Plaintiff sincerely apologizes to the Court for this procedural error and will rely on the Court’s judgment to invoke sanctions when appropriate.

¹ DOS (Windows) data file headers include the date the file was created (scanned in this case) and the date last modified and may be viewed in most file directory programs such as Windows Explorer. Adobe Acrobat portable document format (.PDF) files also contain such date information in file properties. While these dates can be easily manipulated, Plaintiff accepted at face value the file dates of the files provided by Army HRC in response to his 2011 FOIA request. Considering that there is no logical reason in this case for Defendants to have falsely manipulated these dates to appear that the files were created earlier, Plaintiff believes good reason exists to accept that a substantial number of responsive documents existed in digital format prior to his original (2010) FOIA request.

II. CONCLUSION

Plaintiff has presented evidence that a substantial number of the requested files exist in digital format and may be reproduced at minimal cost. This evidence is supported by statements of Defendants' own witnesses. Further, Defendant's response on this issue admits that the estimated costs provided to Plaintiff were in error. Def Resp in Opp Plf Opp Mo to Strike Def Resp in Opp to Plf's Mo for Part or Final Summary Judgment at page 4.

Defendant's claim that the requested documents were not furnished because the "Army made a legal determination that Plaintiff was not entitled to a fee waiver or fee reduction, regardless of the estimate." is laughable and presents a "Catch 22" situation in that Plaintiff could neither effectively request, nor could Defendants evaluate, a fee waiver in the absence of a reasonably accurate estimate of the fees. Id at 4. If there is no fee there can be no waiver and Defendants have now provided an estimate they concede is not accurate.

Plaintiff has shown that many of the requested files existed in digital form at the time of the original FOIA request; many have been digitized since; and, Defendants have an existing program to digitize the balance of the files at government expense. Plf Exh I, Plf's Mo Summary Judgment.

Defendants have presented no other grounds to exempt the requested files from release under the Freedom of Information Act.

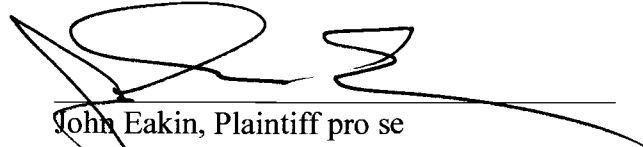
Defendants have obstructed the operation of the Freedom of Information Act and have shown a flagrant disregard for judicial economy. Plaintiff's Motion to Strike

Defendants' Motion for Partial or Final Summary Judgment should be granted and full and final summary judgment should be granted in favor of Plaintiff.

Alternatively, Defendants should be ordered to provide a full accounting of the requested files including disclosure of the number of such files which exist in digital format and the number of those digital files which existed prior to the commencement of this litigation. Such accounting should include all relevant files in the possession of, or controlled by, any component of the U.S. Department of Defense.

Respectfully submitted,

Dated: 10-29-11


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 29th day of Oct, 2011, a true and correct copy of the foregoing 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: 10-29-11


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

EXHIBIT 1

Letter, U.S. Department of Defense to John Eakin, dated 24 Nov 2010.
Final response to FOIA request



**DEPARTMENT OF DEFENSE
FREEDOM OF INFORMATION DIVISION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

Ref: 10-L-1349

John Eakin
9865 Tower View Road
Helotes, TX 78023

24 NOV 2010

Dear Mr. Eakin:

This is the final response to your Freedom of Information Act (FOIA) request received on July 29, 2010, to the Department of Defense (DoD). The Office of Freedom of Information, which is responsible for FOIA requests for the Office of the Secretary of Defense (OSD), received and processed your request. The enclosed documents are responsive to your request pertaining to the consolidated extracts of death camp rosters for Camps O'Donnell and Cabanatuan.

The information being withheld under FOIA exemption (b)(6), which applies to information, if released, would constitute a clearly unwarranted invasion of the personal privacy of individuals.

The enclosed documents were located by the Defense Prisoner of War/Missing Persons Office, a component of the OSD, and constitute the entire set of responsive documents within DPMO. Individual Deceased Personnel Files and X-files are under the purview of the U.S. Army Human Resources Command. We have been advised by that command that they have received a nearly identical request from you and have sent you correspondence regarding your request. Because you have requested the documents directly from the controlling component, we consider those files to fall outside of your request to us, and outside of this litigation.

Because the withheld information is a matter of litigation (*Eakin v. DoD*, 10-cv-00784, EDTX), your appeal rights are considered moot for this request. Please be advised, the mootness of your appellate rights applies only to your request received by OFOI, and not to your separate request to the Army.

Sincerely,

A handwritten signature in cursive script that reads "Will Kammer".

Will Kammer
Chief, Freedom of Information Division

Enclosures
As Stated