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, LEON E. PANETTA[1], Secretary of Defense, UNITED STATES DEPARTMENT OF THE ARMY, JOHN McHUGH, Secretary of the Army **Defendants**	§	

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff pro se John Eakin respectfully objects to certain findings and recommendations contained in the Magistrate Judge's Report and Recommendation (Report and Recommendation) (Doc. No. 34) filed November 28, 2011.

INTRODUCTION

The Report and Recommendation demonstrated confusion concerning several issues fundamental to understanding the facts of this case.

1. The cost of duplication of paper (hardcopy) records is essentially the same whether the output is copied to second generation paper or scanned to a digital computer file. However, records which already exist in digital format (computer files) may be reproduced at virtually no additional cost.

2. There is no dispute that the *original paper copies* of the requested records are under the control of the US Army. However, digital copies have been found to exist

[1] Leon E. Panetta replaced Robert M. Gates as Secretary of Defense on July 1, 2011.

in multiple component agencies of the Department of Defense. When an agency receives a FOIA request for records in its possession, "it must take responsibility for processing the request" even if the documents originated elsewhere. *McGehee v. CIA,* 697 F.2d 1095, 1110 (D.C.Cir.)1983.

WITHHELD DOCUMENTS

The Report and Recommendation incorrectly concluded that the court need not decide whether the government withheld documents. At page 9 this conclusion was based on the finding that documents responsive to the third request fall outside the scope of this lawsuit and at page 23 cryptically concluded that Eakin asked for the records in electronic form and the estimate addressed the cost of paper copies.

Both conclusions fail to recognize that Defendants were obligated to provide a reasonably accurate estimate of costs to Plaintiff. Neither are Defendants permitted to inflate fees to discourage a request. By concealing the existence of digital copies of the requested records Defendants have substantially overstated the true cost of reproduction.

Defendant provided an estimated cost of approximately $24,000 to convert 165,000 original pages to digital files and also argued that Plaintiff's request was unreasonable and burdensome. Defendant's own witnesses and documents showed that various components of the Department of Defense were actively engaged in converting responsive documents to digital format, yet Defendant's cost estimates were based entirely on conversion of paper documents to digital files and no allowance was made for documents which already existed in digital format.

Subsequently, Plaintiff independently learned of a substantial number of responsive documents which had already been converted to digital files and could be

reproduced at virtually no cost as computer files. Whether overlooking these existing digital files was an honest mistake or an intentional attempt to discourage Plaintiff's request is immaterial, a FOIA requester has a right to a reasonably accurate estimate of the cost of providing the documents.

- Immediately prior to filing Defendant's answer to Plaintiff's first amended complaint, Defendants produced three redacted digital files responsive to Plaintiff's FOIA request and asserted that these files were the only responsive documents existent in digital format. These files were later supplemented with unredacted copies upon resolution of the privacy issue.
- During preparation of the joint scheduling recommendations, Counsel for Defendants represented that there were no relevant documents that would be provided by discovery and that discovery would be inappropriate.
- The declaration of Dr. Cynthia Chambers was filed in support of and concurrently with Defendant's Motion for Summary Judgment. This declaration contained testimony describing DoD's existing and ongoing program to digitize documents including those responsive to Plaintiff's FOIA request.
- On June 23, 2010, Defendant DoD issued a policy memorandum, Subject: Policy on Information Access, Transparency, and Sharing in Support of Personnel Accounting and Personnel Recovery. This policy directed agencies of the POW/MIA accounting community to, "[E]stablish a program to scan and digitize existing information on missing persons that is currently available only in hard copy. These files will be uploaded to digital files accessible to all members of the accounting community."
- Subsequent to the filing of the parties' respective Motions for Summary Judgment, Plaintiff filed three new FOIA requests unrelated to this litigation, but based in part on information obtained in the course of this litigation. These new FOIA requests were addressed to various agencies, all components of the US Department of Defense.
- In response to one of the new FOIA requests, Plaintiff received several thousand digital files from Army Human Resources Command, a substantial number of which were responsive to Plaintiff's original request (but had not been produced). Analysis of the digital files revealed that the files which would have been responsive to the original request had, in fact, existed prior to Plaintiff's original request and that there appeared to be an ongoing program to create additional digital files responsive to Plaintiff's original request.
- Additionally, the Joint Prisoners of War, Missing in Action Accounting Command (JPAC) responded that they had a number of documents, many of which may also be responsive to the original request. Plaintiff has not yet received these documents.

A false estimate of the cost to reproduce the requested records is a violation of FOIA 5 U.S.C. § 552(a)(4)(A) and Defendant's own regulations.

> Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.
> 32 CFR 286.28(e) and 32 CFR § 518.19(e)

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).

Further, as the Magistrate Judge observed concerning Defendant's claim that Plaintiff's FOIA request was unreasonable, an "agency must stand on whatever reasons for denial it gave in the administrative proceeding." 5 U.S.C. §552 (a)(4)(vii) That includes a right to a reasonably accurate estimate of the cost of duplication of the requested documents. Clearly, that has not happened here as Plaintiff has independently established that digital copies of at least one-third of one class of requested documents already exist in digital format and may be reproduced at virtually no additional cost.

So, while the Report and Recommendation recognized that judicial review was limited to the record before the agency, it failed to recognize and incorporate the parallel requirement that the government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case, i.e., the actual cost of duplication.

"Our review 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)(vii); *MESS*, 835 F.2d at 1284. True, requesters bear the initial burden of satisfying the statutory and regulatory standards for a fee waiver, *MESS*, 835 F.2d 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." [Emphasis added]
Friends of the coast Fork v. US Dept of the Interior, 110 F.3d 53

REPRESENTATIVE OF THE NEWS MEDIA

Plaintiff objects to findings of the Report and Recommendation which conclude that:

- Plaintiff's efforts are directed toward professional scholarship in the area of aviation accident investigation and advertising Eakin's services as an aviation mishap investigator, not toward gathering information of potential interest to a segment of the public.
- Plaintiff's efforts do not constitute gathering information of potential interest to a segment of the public, using editorial skills to turn raw materials into a distinct work, and distributing that work to an audience.
- That it is questionable whether the sought-after information constitutes "news".

These findings are incorrect, irrelevant or simply have no basis in law. 5 U.S.C. § 552(a)(4)(A)(ii) defines the term a 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.

This clause further states that:

- Alternative media shall be considered to be a news-media entity.
- The government may also consider the past publication record of the requester in making such a determination [as to representative of the news media status].

Plaintiff has demonstrated that he meets the definition of a representative of the news media standard by his:

- Investigative reporting on the subject of aviation mishap investigation.
- Publication in multiple newspapers of the disposition of the service members interred in Grave 717.
- Publication for over nine years of a weekly aviation safety e-newsletter.
- Web publication of the stories of the search for the families of the men interred in Grave 717.

Further, the Report and Recommendation completely ignores the individual news stories previously published through Plaintiff's efforts in regional news media and the future distribution described by Plaintiff which are virtually identical to the "document sets" described in *National Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989) and, as therein, more than qualify Plaintiff as a representative of the news media.

The history of the Freedom of Information Act is one of Federal agencies working to avoid compliance with the FOIA and periodic attempts by the congress to force compliance by a kicking and screaming bureaucracy. Senator Leahy, who was a sponsor of the 1986 amendments, said, "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." 132 Cong.Rec. S14298

As a result of continued agency non-compliance, the Open Government Act of 2007 was enacted. The legislative history summarizes section 3. Protection of fee status for news media as:

> "This section amends 5 U.S.C. 552(a)(4)(A)(ii) to make clear that independent journalists are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media entity. In determining whether to grant a fee waiver, an agency shall consider the prior publication history of the requestor. If the requestor has no prior publication history and no current affiliation with a news organization, the agency shall review the requestor's plans for disseminating the requested material and whether those plans include distributing the material to a reasonably broad audience."

Report 110-59 of the 110th Congress, 1st Session, Calendar No. 127

Plaintiff's history documents his ability to gather information and transform it into a distinct work and to distribute that work to the public. The documents which are the subject of this litigation will expand the coverage which began with telling the stories of the men buried in Grave 717.

The standard applied in the Report and Recommendation make it doubtful that even an employee of a major media outlet would qualify for a waiver as a representative of the news media.

And in a similar vein, the Report and Recommendation comments that Plaintiff's dissemination of aviation mishap information was irrelevant because, "those efforts do not constitute gathering information of potential interest to a segment of the public, using editorial skills to turn raw materials into a distinct work, and distributing that work to an audience" not only misconstrues Plaintiff's work in that field, but displays total disregard for how that experience might be employed to compile, analyze and disseminate the requested information. The Report and Recommendation fails to consider the past publication record of the requester in making a determination that requester is a representative of the news media. 5 USC § 552(a)(4)(ii).

PUBLIC INTEREST FEE WAIVER

Plaintiff objects to findings of the Report and Recommendation which conclude that he has not demonstrated compliance with three of the four factors that show disclosure of the documents serves the public interest. Those factors are:

1. **Subject of the request.** The requested materials must concern "operations or activities of the government," which have a connection that is direct and clear, not remote or attenuated.

2. **Informative value of the information to be disclosed**. The information must be "likely to contribute" to an understanding of government operations or activities. The disclosed material must be meaningfully informative about these operations or activities.

3. **A contribution to the public's understanding of the subject is likely to result from disclosure.**

   a. Disclosure of the material will contribute to public understanding of the subject.

   b. Disclosure will contribute to a "reasonably broad" audience interested in the subject, not just the requester's individual understanding.

   c. There is a consideration of the requester's expertise in the subject and intention to effectively disseminate the information to the public.

   d. There is a presumption that a representative of the news media satisfies the above consideration.

The conclusion of the Report and Recommendation that Plaintiff's fee waiver request fails on factors one and two because the requested documents pertain to individuals is not intelligible. The requested documents were created by US Army personnel and pertain to deceased US Army personnel. They were classified as national defense information and access was restricted from the public by the US Government. They have always been under the control of US Government personnel. There is a direct and clear connection showing that the requested documents concern "operations or activities of the government" and meet this test. The fact that they apply to individuals is not relevant to the issue.

The requested documents collectively detail efforts to recover the remains of deceased American servicemembers and determine their identities. Included in the documents are correspondence between the US Military Services and family members informing them of the status of efforts to recover the remains of their family member. Other documents in these files show that these communications with family members were often less than truthful and in some cases outright fabrications. Both individually and as a group, these documents go far beyond being meaningfully informative about these operations or activities as they directly impact current efforts by the US Government to locate family members of deceased American servicemembers for the purpose of obtaining DNA reference samples to aid in their identification.

The Report and Recommendation considers Plaintiff to have failed on factor number three essentially because the requested records are more than sixty years old and would be of interest to only a small segment of the public which will continue to decrease in size with time. The Report and Recommendation fails to recognize that the requested records were classified as defense secrets and withheld from public knowledge for many years. To allow this finding to stand on these grounds only rewards agency misconduct and encourages wrongful classification of documents which are potentially embarrassing to an agency.

The disclosure of the requested records will contribute to public understanding of the recovery of currently unidentified remains of American servicemembers. The disclosed information will be synthesized and packaged with original background information ("document sets") in a format designed to encourage publication in all localities in which family members might be expected to be currently residing.

That Plaintiff has no commercial interest in the documents is undisputed.

CONCLUSION

To rule for the Defendants is to reward the government's misconduct in withholding responsive documents and inflating fee estimates in violation of statute and Defendant's own regulations. Plaintiff has demonstrated the ability to compile and disseminate information in the public interest and effectively act as a representative of the news media.

Respectfully submitted,

Dated: December 8, 2011

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CERTIFICATE OF SERVICE

I, John Eakin, Plaintiff pro se, do hereby certify that on the 8th day of December, 2011, a true and correct copy of the foregoing pleading was forwarded to Defendants by First Class Mail at the following address:

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Dated: December 8, 2011

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