UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN, Plaintiff, v. AMERICAN BATTLE MONUMENTS COMMISSION, et al. Defendants.	§ § § § § § § § § § §	Civ. A. No. SA:12-cv-1002-FB-HJB

DEFENDANTS' OPPOSITION TO PLAINTIFF'S OBJECTION TO THE ADMINISTRATIVE RECORD AND OPPOSED MOTION TO COMPEL COMPLETION OF ADMINISTRATIVE RECORD

Defendants American Battle Monuments Commission, et al., and the United States Department of Defense, *et al.* ("DoD"),[1] by and through Robert Pitman, United States Attorney for the Western District of Texas, oppose plaintiff's Motion to Compel Completion of the Administrative Record, filed February 15, 2013. For the reasons set forth below, defendants respectfully request that plaintiff's motion be stayed pending ruling on defendants' motion to dismiss, or, in the alternative, be denied.

I. Background

Plaintiff's Complaint is an action filed under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, alleging, *inter alia*, that the defendants violated the provisions of the Missing Service Personnel Act, 10 U.S.C. §§ 1501-1513. Plaintiff contends that the Act requires defendants to convene a board of inquiry and appoint a missing person's counsel to consider

[1] Pursuant to Fed. R. Civ. P. 25(d), defendants note the substitution of Chuck Hagel, Secretary of Defense, for defendant Leon E. Panetta.

information that he has provided related to the case of a relative, Pvt Arthur H. Kelder, who perished as a POW in World War II and is thought to be buried as an "unknown" in Manila American Cemetery, Philippines. Plaintiff also seeks a declaration from this Court that certain unidentified remains are those of Pvt Kelder.

As explained in the defendants' motion to dismiss, filed February 15, 2013, there is no case or controversy before this Court, and the Court lacks jurisdiction. Plaintiff lacks standing under the Missing Service Personnel Act or any other possible theory, as he is not an immediate family member or next-of-kin of Pvt Kelder. Even if he were, he has no rights vis an "unknown," who by definition has no identifiable next-of-kin. Moreover, the relief he seeks is not available under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, or other statute. In sum, the decision as to whether and when to disinter an "unknown" to attempt further identification is committed to the discretion of the Department of Defense, which, through the Department of the Army, has sole custody of "unknowns" until they are identified and returned to the primary next-of-kin.

Accordingly, an administrative record is not necessary to decide defendants' motion to dismiss, as the Court lacks jurisdiction to review the agency's actions in this matter. In order to provide the Court with context and background, however, defendants filed an administrative record consisting of the matters related to the plaintiff and his contacts with defendants. These records were gathered from numerous DoD components, including the Joint POW/MIA Accounting Command in Hawaii, and other DoD and Army offices in Virginia. These records make clear that defendants have given considerable attention to plaintiff's request to disinter certain remains, and that his request is still pending final decision. See, e.g., Supp. Rec. at 1-2. As plaintiff does not challenge a rule-making, adjudicatory action or other final agency action,

however, there is no clearly defined administrative record. Ergo, even were this Court to find some review appropriate, there is no final record to review in this matter.

II. Plaintiff's Motion Should be Stayed or, in the Alternative, Denied

A. Plaintiff's Motion Should be Stayed Pending a Decision on this Court's Jurisdiction

For the reasons described above, defendants respectfully suggest that, for purposes of judicial efficiency as well as jurisdictional concerns, plaintiff's motion be stayed pending resolution of defendants' motion to dismiss. A ruling for defendants on that motion will moot plaintiff's motion here. As plaintiff manifestly lacks standing, and DoD's actions are not reviewable under the APA, it is a waste of judicial resources for the Court to wade into the composition of the record, including possible determinations of privilege,[2] prior to determining its jurisdiction. See Kane County Utah v. Salazar, 562 F.3d 1077, 1086 (10th Cir. 2009) (proper to summarily dismiss APA-based complaint under Rule 12(b)(6) "without obtaining or reviewing the administrative record"). Moreover, if jurisdiction is lacking on the merits, so, too, is jurisdiction to examine the record. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."). Finally, any review under the APA, including review of the composition of the record, is subject to the rule of prejudicial error. 5 U.S.C. §

[2] Defendants bring the Court's attention to the issue of deliberative process privilege, but notes that the agency has not yet formally invoked such privilege because plaintiff has not sought to compel production of any particular document, nor have defendants sought a protective order against their production. In the event the Court declines to stay this motion pending resolution of its jurisdiction, defendants respectfully reserve the right to invoke privilege with respect to any individual document that plaintiff seeks.

706. Because plaintiff lacks standing, and the Court otherwise lacks jurisdiction, plaintiff cannot show any prejudicial error from any alleged omissions in the record.[3]

B. Plaintiff Has Not Met His Burden to Prove by a Strong Showing That the Administrative Record Is Incomplete

An agency's designation of the administrative record is generally afforded a presumption of regularity. Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993). Supplementation of the record is an exceptional request. Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Eng'rs, 441 F.Supp.2d 1, 6 (D.D.C. 2006). "[T]the mere fact that certain information is not in the record does not alone suggest that the record is incomplete." Amfac Resorts, LLC v. U.S. Dept. of the Interior, 143 F.Supp.2d 7, 13 (D.D.C. 2001). "Thus, a party must make a significant showing—variously described as a "strong", "substantial", or "prima facie" showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record." Id. at 12.

"For a court to supplement the record, the moving party must rebut the presumption of administrative regularity and show that the documents to be included were before the agency decisionmaker." Pac. Shores Subdiv. at 6. It is not enough to merely assert that the documents are relevant or were not adequately considered. Defendants are not required to "include every potentially relevant document within its agency". Id., *citing* Fund for Animals v. Williams, 245 F.Supp.2d 49, 57 n. 7 (D.D.C. 2001). Moreover, it is not enough that some documents were before some part of the DoD. Id. (Not enough for plaintiff to "state that the documents were before the entire Corps, but rather it must instead prove that the documents were before the Corps' decisionmaker(s)"); Ivy Sports Medicine, LLC v. Sebelius, Slip Copy, 2012 WL 5248176

[3] None of the documents that plaintiff seeks to add to the record relate to his standing or the Court's jurisdiction under the APA.

(D.D.C. 2012) ("A party moving to supplement the administrative record 'must do more than imply that the documents at issue were in the [agency's] possession'; they 'must prove that the documents were before the actual decisionmakers involved in the determination.'") (*quoting* Sara Lee Corp. v. Am. Bakers Ass'n, 252 F.R.D. 31, 34 (D.D.C.2008).

In his Motion to Compel Completion of the Administrative Record, plaintiff contends that a number of documents are "missing" from the record produced by defendants. Plaintiff has not, however, met his burden to show that these documents 1) exist,[4] or 2) are properly part of any record before the decisionmaker. As a general matter, any such claim is impossible with respect to a disinterment decision; there has been no decision, and therefore no record before the decisionmaker exists.

Most of the documents that plaintiff seeks are internal documents (draft reports, emails, and memorandum to the file) of the Joint POW/MIA Accounting Command (JPAC). These documents, however, will not be before the decisionmaker because JPAC is not the decisionmaker in this case. See Supp. Rec. 1-2. In addition, these and others are internal draft and deliberative documents that do not represent the final, considered, views even of JPAC, much less the decisionmaker. See Fund for Animals, 245 F. Supp. 2d at 55 (explaining that "an agency generally may exclude material that reflects internal deliberations"); Amfac Resorts, 143 F. Supp. 2d at 13 ("deliberative intra-agency memoranda and other such records are ordinarily privileged, and need not be included in the record"); cf. May v. Department of Air Force, 777 F.2d 1012 (5th Cir. 1985) (record covered by FOIA Exemption 5 loses its exempt status only if the record is incorporated into a final opinion); Coastal States Gas Corp. v. Dep't of Energy, 617

[4] As described below, many of the documents that plaintiff speculates exist based on alleged "discrepancies" do not exist or are not known to exist. Accordingly, they will not be before the decisionmaker, in any event.

F.2d 854, 866 (D.C.Cir.1980) (FOIA "exemption covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.").

The policy behind excluding such materials from the record is well-settled. As one court explained:

> The three specific policy objectives underlying this privilege are: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationale that were not in fact ultimately the grounds for an agency's action. *Russell v. Dep't of Air Force*, 682 F.2d 1045, 1048 (D.C.Cir.1982); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980); *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C.Cir.1978) (en banc). In essence, the privilege protects the 'decision making processes of government agencies and focus[es] on documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.' *Sears*, 421 U.S. at 150, 95 S.Ct. 1504 (internal quotations omitted)."

Judicial Watch v. Dep't of Army, 466 F.Supp.2d 112, 120 (D.D.C.2006).

In Russell, the court applied these concerns to an analogous situation in the FOIA context. In declining to order production of drafts of an official Air Force history, the court expressed concern that release of such drafts and internal deliberations would make impossible the "creative debate and candid consideration of the alternatives within the Air Force and other government agencies it consults." Russell, 682 F.2d at 1049 (internal quotation omitted). It further explained: "the draft represents one Air Force historian's view of the 'facts' . . . Only after the manuscript completed the [] review process did it reflect the official Air Force view." Id. at 1049-50. The court emphasized that FOIA exemption for such documents "acts in this

case to prevent the public from misconstruing the views of an individual Air Force officer to be the views of the Air Force." Id. at 1050.

Those same concerns apply here in at least two respects. First, defendants strive to work with families of the missing and give consideration to requests and information received from them. The premature and out-of-context release of documents reflecting internal deliberations would chill consideration of those requests. Second, some of the materials that plaintiff seeks are internal reports that reflect the views of the writer and were not approved or adopted by the agency. Some are designated "Official Use Only." Releasing these documents, that are not properly part of any final decision, risks putting documents in the public domain out-of-context, and without the benefit of the agency's consideration and explanation based on its scientific expertise. In particular, because DoD's analysis and decisions with respect to the missing impact many families, such a result threatens to create the kind of public confusion that the deliberative process privilege, and the requirement of final agency action, seek to avoid. Cf. Russell, at 1050.

Plaintiff has not met his burden to make a "strong showing" that the record is incomplete in this case. Moreover, nothing he has identified relates to his standing, or to the Court's jurisdiction. Accordingly, in the event the Court does not stay this motion pending resolution of our motion to dismiss, his motion should be denied.

C. The Records Identified by Plaintiff Do Not Exist, or Are Not Properly Part of the Record

If, and only if, the Court does not stay plaintiff's motion, or deny it in outright because he has not met his burden, the Court should deny plaintiff's motion with respect to individual documents, as described below.[5] As set forth below, some of the documents plaintiff seeks do not exist, and others are not properly part of the record as they are not before the decisionmaker,

[5] Should the Court desire, defendants will make the documents available for *in camera* review.

or they reflect pre-decisional and deliberative documents, or for other reasons. Explanations are in italics.

1) At page 6 of his motion, plaintiff complains that the Cabanatuan burial record is not included in the record. *As explained in the record (at 12, fn 5), the Death Report was buried when the POW camp was evacuated and is too fragile to copy. A transcription of the relevant page is included in the record, however. See Rec. at 283.*

2) Also at page 6, plaintiff notes "examples of document discrepancies" as follows:

a) Evidence considered by original identification boards in the World War II era.

This evidence does not survive in agency records.

b) Case files for case numbers referred to in certain IDPFs.

These files do not exist in agency records.

c) Staff comments/concurrence related to the "Prioritization Memo."

As explained in defendants' motion to dismiss, this memo is not subject to notice and comment procedures. We have located one internal document, a memorandum dated November 15, 2010 from Brig. Gen. Walter B. Golden, Jr. This and any other staff comments related to its promulgation would be almost certainly subject to deliberative process privilege.

d) Plaintiff's petition for consideration of new evidence and agency's response to it.

As explained in the Declaration of Cynthia Chambers, Exhibit A to Defendant's Motion to Dismiss) at par. 41, DPMO has no record of receiving this petition.

e) Evidence of staff comments or recommendations by the intelligence (J2) or the Central Identification Laboratory.

This request is vague and, other than those documents discussed below, we are not aware of additional documents.

3) At page 7, plaintiff lists a number of documents that he contends are examples of "omitted documents." These include a number of reports prepared by a former Fellow at JPAC, a memorandum for the record prepared by the same person, and several "email chains." *These documents are properly excluded from the record as materials that were/are not before any relevant decisionmaker. The reports were not approved by the writer's department. Moreover, to the extent they contain factual matter, the reports are duplicative of other materials in the record. To the extent they contain analysis and recommendations, they are deliberative, and were not adopted by the agency.*

III. Conclusion

For the reasons set forth above, plaintiff's motion to compel completion of the administrative record should be stayed pending determination of the Court's jurisdiction over this matter. In the alternative, the motion should be dismissed because there has been no final decision, and therefore plaintiff has not met (and cannot meet) his burden to show that materials considered by the "decisionmaker" have been omitted from the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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