

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

JOHN EAKIN

Plaintiff,

AMERICAN BATTLE MONUMENTS
COMMISSION, et al

Defendants

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CASE NUMBER: SA-12-CA-1002-FB-HJB

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

Plaintiff, pro se, John Eakin opposes defendant's request that plaintiff's motion be stayed pending ruling on defendants' motion to dismiss, or, in the alternative [motion for summary judgment], be denied.

Plaintiff seeks only to complete the record rather than to supplement it as asserted by defendants (Def. Resp. at 4, ECF No. 22). While the agency enjoys a presumption of regularity when submitting a record to the court, once that presumption is rebutted the burden shifts to the agency to demonstrate to the reviewing court that the record on review is complete. The Supreme Court's formulation in *Overton Park* cautions against both under- and over-inclusiveness in the administrative record before a reviewing court: "[R]eview is to be based on the *full* administrative record that was before the Secretary *at the time* he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971) (emphasis added) (footnote omitted).

Defendants had an extended period of time to compile the administrative record and several weeks later supplemented the record without objection. Defendants submitted their certified administrative record (ECF No. 12) and supplemental certified administrative record (ECF No. 13) prior to submission of their incorrectly argued motion to dismiss (ECF No. 18) and should be compelled to complete the administrative record prior to consideration of their motion to dismiss.

Defendant's response (ECF No. 22) to plaintiff's motion to compel completion of the administrative record (ECF No. 15) appears to confirm that the complained of documents were deliberately withheld from this court. Defendants were on notice that the record was incomplete and have not produced any documents inadvertently and innocently overlooked nor have they asserted any privilege. Yet defendants now request that production of these critical documents be stayed pending this Court's consideration of their motion to dismiss.

Regardless of Plaintiff's standing to litigate the instant action, it is incumbent upon the Court to police the actions of litigants before the court and the court has authority to do so under 28 U.S.C. § 1331.

Defendants at this late date raise various and sundry reasons the withheld documents should not be provided to the court, that they are not necessary; that they would constitute supplementation rather than completion of the record; that they were not before the decisionmaker(s); that they are designated "Official Use Only"; or, they are duplicative of other materials in the record. Review of the attached documents will confirm that all such protestations are without merit.

Plaintiff respectfully submits that if, as Defendants assert, they were not required to submit a certified administrative record, their objections were waived when they presented,

twice, an incomplete *certified* administrative record which deliberately omitted material favorable to Plaintiff.

The fact that the withheld documents completely contradict other documents produced by defendants and provide factual support for Plaintiff's case makes the absence of these documents highly suspect and potentially in violation of Fed. R. Civ. P. 11. Defendants have filed an incomplete *certified* administrative record; an incomplete supplemental *certified* administrative record; and, now assert that incomplete *certified* records are permissible because they did it "to provide the Court with context and background". (Def. Resp. at 2, ECF No. 22)

Plaintiff's motion to compel completion of the administrative record identified in general terms multiple documents which were believed to have been omitted and specifically identified by title and date fourteen (14) documents which are known to have been withheld and are highly relevant. While Plaintiff believes defendants have waived any objection to the production of classified documents by their selective production of other such classified documents, Plaintiff, in an abundance of caution, has refrained from producing them to this Court without a specific order to do so.

However, one of the withheld documents carries no classification notice and describes in general terms the contents of the other withheld documents. That memorandum for the record is included here as attachment 1. (Plf. Ex. 21).

Any contention that these documents might be subject to any claim of privilege is disproven because this document makes clear that the withheld documents are a continuation of the work of a prior investigator. This prior investigator's report, (Rec. at 199 - Included as attachment 2 for convenience) (Kupsky Memo) although classified "For Official Use Only", was included in the Certified Administrative Record filed by Defendants.

Attachment 1 (Plf. Ex. 21), and the related withheld documents it addresses, provide explicit factual support for Plaintiff's claim that unidentified remains X816 are actually those of Private Arthur H. Kelder and that such might be easily confirmed by comparison with DNA samples now available to Defendants. It further sets out Defendant Webb's personal knowledge of this information.

Defendants also object that there is no evidence that the withheld documents are or were before the decisionmaker.¹ Plaintiff submits that in the absence of any other relevant documents, only the "Kupsky" memo (Rec. at 199), (which is superseded by the withheld documents) could have been the basis for the verbal decision rendered by Defendant Webb in February 2012 or for the conclusions reached in the Holland and McKeague memos (Supp. Rec. at 1 - 2) submitted to Defendant Winfield as a basis for his decision.

Judicial review of agency action under the APA must be based on the full administrative record that was before the agency at the time the decision was made. 5 U.S.C. § 706 (in reviewing agency action under the APA "the court shall review the whole record or those parts of it cited by a party"); *Overton Park*, 401 U.S. at 419-20, 91 S.Ct. 814; *Nat'l Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C.Cir.1975). It is therefore improper for a district court to review only a "partial and truncated [administrative] record." *Train*, 519 F.2d. at 291. "The 'whole' administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Stainback v. Sec of the Navy*, 520 F.Supp.2d 181, 185 (D.C. Cir. 2007)

¹ Statements by agency officials, agency documents and agency policy statements have disagreed as to the person actually having decision authority. Plaintiff will argue at the appropriate time that Defendants have previously rendered a decision and that they now seek to manufacture an additional or new controversy for which they are currently unreasonably withholding a decision which may constitute a constructive denial.

Plaintiff further submits as Attachment 3 (Plf. Ex. 22) the declaration of Chief Rick Stone, former Deputy Chief of the WWII Research and Investigation Branch of JPAC. Chief Stone's declaration authenticates attachment 1 (Plf. Ex. 21) and explains the circumstances of its preparation. Additionally, this declaration summarizes the contents of the additional withheld documents which confirm that remains X816 are those of Private Arthur H. Kelder and describes the persons with knowledge of the investigation and existence of the withheld documents.

As Chief Stone suggests, this is a simple case seeking to identify the remains of a person who gave his life in defense of our country and it is being made difficult for no apparent reason.

Also pending before this Court is Plaintiff's Opposed Motion for Discovery which details multiple demonstrations of bad faith by Defendants with regard to Plaintiff and Private Kelder. Plaintiff submits that these multiple examples of bad faith and concealment of documents cast doubt on Defendant's voracity and should be considered prior to consideration of any other pending motion.

Conclusion

For the above reasons, Plaintiff respectfully requests the Court grant his Motion to Compel Completion of the Record and reject Defendant's request to stay such action. Further, Plaintiff urges the favorable consideration of his Motion for Discovery in order to insure completion of the record and correctly ascertain what, if any, decisions have been rendered and what, if any, decisions have been withheld and the persons responsible.

Plaintiff further respectfully requests this Court inquire in to the circumstances of the withholding of these critical documents.

Respectfully submitted,

/s/ John Eakin

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th 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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/s/ John Eakin

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