

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

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, *et al*

Defendants

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

PLAINTIFF’S OPPOSED MOTION TO COMMENCE DISCOVERY

Plaintiff moves this Court for an order allowing the commencement of discovery under Fed. R. Civ. P. 26 and Local Rule CV-7(d)(2).

Counsel conferred on November 27, 2013 in a good faith attempt to resolve Defendants’ objections to discovery. Counsel for Defendants contend that this proceeding is exempt from initial disclosures pursuant to Rule 26(a)(1)(B)(i) while Plaintiff respectfully disagrees and moves this Court for an order allowing the parties to conduct discovery pursuant to Fed. R. Civ. P. 26(a).

Plaintiff previously submitted his opposed Motion for Discovery (ECF No. 9) and his Objection to the Administrative Record and Opposed Motion to Compel Completion of Administrative Record (ECF No. 15). Both of these motions were denied on other grounds without addressing their merits. Plaintiff now incorporates these motions herein as if set out in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2014 , 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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**MEMORANDUM IN SUPPORT OF PLAINTIFF’S OPPOSED
MOTION TO COMMENCE DISCOVERY**

I. Factual History

Plaintiff, as primary-next-of-kin of Arthur H. Kelder, seeks to formally identify and properly bury the remains of his family member who died while a prisoner of the Imperial Japanese Army during WWII. These remains have been in the custody and control of Defendants since the end of WWII and no alternative process is available to allow Plaintiff to claim them. Plaintiff contends that Defendants negligently failed to identify the remains known as X816 Manila #2 (X816) and subsequently wrongfully concealed these remains from the legal custodians of the remains.

Plaintiff has presented evidence of the identity of unidentified remains X816 in the form of military records and written reports prepared by forensic identification experts. Plaintiff contends this evidence exceeds the standard necessary for disinterment for identification set forth in Defendant’s 1999 policy memo.

Defendants deny that unidentified remains X816 are those of Private Arthur H. Kelder; that they have an obligation to identify the remains; or, that they have violated Plaintiff's right to due process, *inter alia*.

II. Procedural History

Plaintiff's original complaint was filed October 18, 2012 and challenged an agency action or inaction under the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq. (ECF No. 1). Plaintiff subsequently sought to obtain discovery beyond the administrative record. (ECF No. 9). Defendants opposed the motion, arguing that discovery was not necessary in administrative review cases, and further contending that Plaintiff's motion was premature because Defendants had not yet filed the certified administrative record. Defendants suggested that, if necessary, Plaintiff could seek additional documents after the administrative record was filed. (ECF No. 10, at 1).

Defendants filed the administrative record on February 1, 2013 (ECF No. 12) and a supplemental administrative record on February 15, 2013. (ECF No. 13) Plaintiff filed another motion on February 15, 2013 (ECF No. 15) objecting to the Administrative Record and seeking to compel completion of the administrative record.

Because Plaintiff's subsequent motion appeared to the Court to be adequate to address any discovery issues in the case, Plaintiff's original Opposed Motion for Discovery (ECF No. 9) was denied as moot. (ECF No. 25) However, the merit of Plaintiff's Objection to the Administrative Record and seeking to compel completion of the administrative record (ECF No. 15) were not addressed because this Court found that Plaintiff lacked standing.

On August 5, 2013, this Court entered an order (ECF No. 34) which granted Defendants Motion to Dismiss and granted Plaintiff leave to file an amended complaint. (ECF No. 14-1) On

October 3, 2013, Plaintiff subsequently filed a First Amended Complaint alleging due process and Mandamus Act violations brought under the Declaratory judgment Act. (ECF No. 39)

On November 27, 2013, Counsel conferred as required by Fed. R. Civ. P. 16. The parties were unable to reach agreement on the conduct of discovery as Defendants contend that this proceeding is exempt from initial disclosures pursuant to Rule 26(a)(1)(B)(i). Plaintiff disagrees and notes the cited rule pertains to “an action for review on an administrative record;” and that the amended complaint no longer seeks judicial review of an administrative record.

III. The Administrative Record Filed by Defendants is not Complete

Through discovery, Plaintiff will demonstrate that the administrative record filed by Defendants is incomplete. Plaintiff’s Motion to Compel Completion of Administrative Record (ECF No. 15) and Plaintiff’s reply to that motion (ECF No. 23) contain sworn testimony from Chief Rick Stone, a former JPAC employee, that in submission of the administrative record, Defendants had substituted superseded documents which supported their position instead of the current documents prepared by him which did not support their chosen position. These and similar documents are critical to prosecution of Plaintiff’s factual case and further document Defendant’s bad faith in submissions to this Court.

Examples of omitted documents:

- Investigative Report, JPAC Incident 425, X-812 dated 6 March 2012
- Investigative Report, JPAC Incident 425, X-814 dated 7 March 2012
- Investigative Report, JPAC Incident 425, X-815 dated 7 March 2012
- Investigative Report, JPAC Incident 425, X-816 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-818 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-820 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-821 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-822 dated 8 March 2012
- Investigative Report, JPAC Incident 425, X-823 dated 9 March 2012
- Investigative Report, JPAC Incident 425, X-812 dated 9 March 2012
- Memorandum for Record, JPAC Incident 425, dated 25 April 2012
- Request for Family Reference Samples, JPAC Incident 425, dated 9 March 2012

- Email Chain regarding JPAC Incident 425 between JPAC External Relations Section (Johnie Webb, Rae Phillips, etc), J2 Historians, and Lab Management in April 2011
- Email Chain regarding JPAC Incident 425 between JPAC External Relations Section (Johnie Webb, Rae Phillips, etc), J2 Historians, J2 Management, and Lab Management in February 2012

Plaintiff moves for discovery in order to obtain documents which Defendants have withheld from the administrative record.

**IV. Leaked JPAC Documents Have Been Used to
Harrass and Intimidate Plaintiff's Witness**

Attachment 1 to this motion is an email which forwarded Attachment 2 to the current employer of Rick Stone, a witness for the Plaintiff. Rick Stone is currently the Police Chief for the City of Hutto, Texas. The email had no text in the body and the subject was "You might like to see this". The email chain shows that the email originated with Marcus Svedicus, a person unknown to Plaintiff. The email was first addressed to Debbie Holland, the Mayor of the City of Hutto, Texas. Mayor Holland forwarded the email to David R. Mitchell, City Manager of the City of Hutto, Texas. Mr. Mitchell forwarded the email to Rick Stone, Interim Chief of Police for the City of Hutto, Texas. Chief Stone then forwarded the email and attachment to Plaintiff John Eakin.

Attached to the email from Marcus Svedicus to Mayor Holland was Attachment 2 to this motion, a memorandum addressed to Brad Byrnes, Esq, JPAC Legal Counsel. This memorandum was from Paul M. Cole, an employee of Defendant JPAC. The subject of the memorandum was, 'Review of "Plaintiff's Exhibit #21, Declaration of Chief Rick Stone, 12 March 2013" Case 5:12-cv-01002-FB-HJB Document 23-3 Filed 03/13/13'

Attachment 2 appears to be a highly unflattering and untruthful review by Defendant JPAC employee Mr. Cole of a declaration submitted by Chief Rick Stone in support of Plaintiff's

Motion to Compel Completion of Administrative Record (ECF No. 15) and Plaintiff's reply to this motion (ECF No. 23)

The anonymous submission of this memorandum to the current employer of this witness could only have been intended to harass and intimidate this witness. Considering that the memorandum is labeled as a draft and includes a red label stating, "PRE-DECISIONAL – NOT FOR PUBLIC RELEASE" it seems most likely that this email chain somehow originated with Defendant JPAC.

This harassment of Plaintiff's witness is further grounds for the Court to grant Plaintiff's motion for discovery in order that Plaintiff may inquire as to the true source of this email.

V. Defendants Have Provided Conflicting Information to This Court

Defendants have crafted a variety of policy memoranda, directives and regulations in addition to the legislatively enacted MSPA. Various of these publications have not been made available to the public. In addition, Defendants have selectively argued their position based on the policy most convenient to them on that day.

- Under Secretary of Defense Walter B. Slocum memorandum, Dated May 13, 1999, subject: Disinterment Policy for the Purpose of Identification (Supp Admin Record page 0003-0004)
- Defense Prisoner of War / Missing Persons Office memorandum, dated December 16, 2010, subject: Policy Guidance on Prioritizing Remains Recovery and identifications, (Supp Admin Record page 5)

Further, in the same motion to dismiss, Defendants have argued that the Missing Service Personnel Act (MSPA) 10 U.S.C. 1501 *et seq* does not apply to the case of Private Kelder because he "is not in a missing status." (Mot. Dismiss ECF No. 47 at 11) Then, just two pages later they argue the MSPA *does* govern this dispute. (*Id.* at 13)

Only through discovery can Plaintiff determine which, if any, policies are applicable in this case or if there are more, as yet undisclosed, policy directives.

VI. Defendants have claimed that they have, and then claimed that they have not made a decision on Plaintiff's request

In February of 2012, Plaintiff requested a meeting with the “decision makers” of Defendants JPAC and DPMO as well as the Chief of the Army Casualty Office. In this meeting, Defendant Webb adamantly and repeatedly asserted that he was the only person who could order further investigation or action concerning the identification of unknown remains X-816 as those of Pvt Arthur H. Kelder and that he had determined that no further action would be taken to identify the remains of Private Kelder. (Eakin Decl. ECF 15-2 ¶ 8)

Contrary to Defendant Webb's assertion that he is the decision authority, DPMO and JPAC continue to apply a policy set forth in a May 13, 1999, memorandum, entitled “Disinterment Policy for the Purpose of Identification.” (Supp. AR 003-004) (Mot. Dismiss ECF No. 47 at 12) This policy designates the Central Identification Laboratory (CIL) (Now a component part of Defendant JPAC) as the decision authority on requests for the disinterment of remains for identification and designates the Deputy Assistant Secretary of Defense (DASD) as the appellate authority.

On January 28 and 30, 2013, just two days before this Court's deadline to file the administrative record and nearly one year after Defendant Webb had verbally denied Plaintiff's request, the CIL Scientific Director and JPAC Commanding General, rather than issuing a decision as required by this policy, forwarded the Kelder file to the Deputy Assistant Secretary of Defense (DASD) (Supp. AR 001-002) for a decision. Defendants now argue (Mot. Dismiss ECF No. 47 at 4, n2) that no final decision has been made on whether to pursue the disinterment that plaintiff seeks. Elsewhere, Defendants state that they “*have* considered plaintiff's evidence, and they *have* determined that there is an insufficient likelihood of identification to support disinterment.” (*Id* at 32)

In light of these conflicting statements, Plaintiff must conduct discovery to determine if a decision has been made which would moot this lawsuit.

VII. Defendants Have Illegally Classified Relevant Documents as Defense Secrets

Defendant JPAC's Directorate of Intelligence investigated the cases which originated with Cabanatuan Grave 717, and designated it as JPAC incident 425. This report by a U.S. intelligence agency recommended that all the involved remains be disinterred for identification. This document has been classified For Official Use Only and is not available to Plaintiff without discovery.

VIII. Summary

In opposing Plaintiff's Motion to Obtain Discovery Beyond the Administrative Record, (ECF No. 9) Defendants suggested that, if necessary, Plaintiff could seek additional documents after the administrative record was filed. (ECF No. 10, at 1). Subsequently, Plaintiff's motion for discovery was denied as moot because Plaintiff's later motion appeared adequate to address any discovery issues. (Order ECF No. 25)

Defendants have been on notice for more than one year that the administrative record they filed was incomplete, yet they have made no effort to supplement the previously filed administrative record or comply with the disclosure requirements of Fed. R. Civ. Proc 26(a).

Fed. R. Civ. Proc. 26 specifically exempts certain type of litigation for which discovery is inappropriate and this is not one of the listed types. Plaintiff has shown adequate grounds for discovery and respectfully asks the Court to immediately grant his motion without further delay.

Respectfully submitted,

/S/

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Certificate of Service

I hereby certify that 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/

Jefferson Moore

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ORDER

On this day, came on for consideration Plaintiff’s Opposed Motion for Discovery. The Court having reviewed said Motion, finds that the Motion should be, and hereby is, **GRANTED**.

Accordingly, it is **ORDERED**, Plaintiff is allowed to immediately begin discovery under Fed. R. Civ. P. 26 in the above captioned action.

Signed this the _____ day of _____, 2014.

HENRY J. BEMPORAD
MAGISTRATE JUDGE