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' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY

Defendants American Battle Monuments Commission, et al., and the United States Department of Defense, *et al.* ("DoD") oppose plaintiff's Motion for Discovery. Defendants have moved to dismiss plaintiff's First Amended Complaint on jurisdictional grounds and for failure to state a claim, and have moved, in the alternative, for summary judgment. In the interest of judicial efficiency and effective use of government resources, the Court should address threshold jurisdictional and pleading issues before allowing discovery. In addition, discovery is inappropriate here because any part of this case that may survive defendants' motion to dismiss should be reviewed on the administrative record. Finally, as explained below, plaintiff has not identified any discovery that is relevant to any issue in the case. Defendants respectfully request that plaintiff's motion be stayed pending ruling on defendants' motion to dismiss, or, in the alternative, be denied.

I. Discovery Is Not Appropriate Until This Court Determines That It Has Subject Matter Jurisdiction and Plaintiff Has Stated a Claim Upon Which Relief Can Be Granted

Plaintiff's First Amended Complaint seeks relief under the Mandamus Act, substantive and procedural due process theories, and the Declaratory Judgment Act. Defendants have moved to dismiss because plaintiff lacks standing and because the Court lacks jurisdiction, among other reasons. Plaintiff lacks standing because there is no cause of action here; in the absence of any statutory or constitutional right, no one has standing to claim an injury from defendants' decision not to disinter unidentified remains. Secondarily, even assuming *arguendo* that such a right exists, any injury resulting from defendants' decision would be to the next-of-kin, which plaintiff is not.

With respect to plaintiff's mandamus claim, plaintiff has not met his burden to show that any statute or regulation places any relevant non-discretionary, ministerial duty on defendants, or vests any right in plaintiff, with respect to unidentified remains. Accordingly, his mandamus claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). With respect to plaintiff's due process claims, any review of defendants' specific acts with respect to plaintiff's request to disinter is precluded by the Missing Service Personnel Act (MSPA), 10 U.S.C. § 1508, as the Court previously held. Order Concerning Report and Recommendations of the Magistrate Judge and Further Orders of the Court (Doc. 34) ("Order") at 5-7, 13-14. That leaves only a facial due process challenge. However, plaintiff has failed to raise even a colorable constitutional claim because, among other reasons explained in defendants' Motion to Dismiss 1) he has identified no recognized property interest in unidentified remains or entitlement to have defendants disinter them; 2) he has identified no "fundamental right" protected by substantive due process and 3) defendants' actions have not deprived him of any interest or rights. Plaintiff has merely asked defendants to take an action that is in their discretion to take or not to take.

Absent any constitutional interest or individual statutory right, due process does not require the government to respond to plaintiff, much less act on his request. *Cf.*, *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 283 (1984) ("no constitutional right to force the government to listen to their views").

In light of these substantial threshold jurisdictional and pleading hurdles, any discovery is at best premature. "'Without jurisdiction the court cannot proceed at all in any cause,'" other than to "'announc[e] the fact and dismiss[]" the case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), *quoting Ex parte McCardle*, 74 U.S. 506, 514 (1869). "It is a recognized and appropriate procedure for a court to limit discovery proceedings at the outset to a determination of jurisdictional matters." *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988). *See also*, *e.g.*, *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987)(affirming district court's denial of discovery pending resolution of 12(b)(6) challenge to complaint, explaining that "[i]t is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery."); *Clemmons v. United States Dep't of Homeland Security*, No. 06-518, 2007 WL 2059796 at *1 (D.D.C. July 13, 2007) (granting protective order staying discovery until motion to dismiss on 12(b)(1) and 12(b)(6) grounds could be decided); *Greene v. Emersons*, Ltd., 86 F.R.D. 66, 73 (S.D.N.Y. 1980) (defendant has the right to challenge the legal sufficiency of the complaint's allegations against him before subjecting himself to discovery procedures).

Plaintiff has not contended that the discovery he seeks is relevant to defendants' pending motion challenging Plaintiff's standing and the subject matter jurisdiction of this Court. Those issues have been briefed and await this Court's ruling; there is no need for discovery.

II. This Case is for Review of an Agency Action and Review is Confined to the Record

Even assuming this case is not dismissed under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), the scope of the Court's review would still be limited to the record. *See* 5 U.S.C. § 706 (providing for review of legality, including constitutionality, of agency action; "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party"); *Islamic American Relief Assoc. v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007) (review of OFAC designation, including due process and other constitutional claims, was limited to the agency record); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164-66 (D.C. Cir. 2003) (upholding district court's dismissal of due process and other constitutional, statutory, and APA claims under summary judgment standard based on the administrative record).

Here, even if the Court were to find a discrete, nondiscretionary duty owed to plaintiff (sufficient to support jurisdiction and state a claim under the Mandamus Act), the issue of whether any defendant had failed to comply with such a duty would be determined by review of the record. Likewise, if the Court were to find some property interest or fundamental right at stake, then whether defendants' procedures were inadequate to protect that interest (for purposes of procedural due process), or whether their actions "shocked the conscious" (for purposes of substantive due process) would be determined by the record. Even if the record is insufficient, the remedy is remand, not discovery. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 142-3 (1973) (remedy for failure to explain agency action is to obtain additional explanation from agency, or remand for further consideration). Discovery is inappropriate in this situation.

III. Plaintiff Has Not Identified Any Relevant Issues for Discovery

Plaintiff's Motion for Discovery asserts five reasons why he believes discovery is appropriate in this case: 1) because, he alleges, the administrative record is not complete; 2) because an apparently leaked document allegedly has been used to "harass and intimidate

Plaintiff's witness;" 3) because defendants have allegedly "provided conflicting information to this Court;" 4) because defendants have allegedly "claimed that they have, and then claimed that they have not made a decision on Plaintiff's request;" and 5) because defendants allegedly "have illegally classified relevant documents as defense secrets." Mot. (Doc. 51) at 5-9. As explained below, however, none of these allegations is relevant to his case. Therefore, there is no reason for discovery on these allegations.

A. The Administrative Record

As defendants have previously explained, 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.

"The court assumes the agency properly designated the [a]dministrative [r]ecord absent clear evidence to the contrary." *Bar MK Ranches v. Yuetter,* 994 F.2d 735, 740 (10th Cir.1993). "Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision." *Ad Hoc Metals Coal. v. Whitman,* 227 F.Supp.2d 134, 143 (D.D.C. 2002). "[A]n agency generally may exclude material that reflects internal deliberations." *Fund for Animals v. Williams.* 391 F.Supp.2d 191, 197 (D.D.C. 2005). "Requiring the inclusion of deliberative materials in the administrative record

would pressure agencies to conduct internal discussions with judicial review in mind, rendering 'agency proceedings ... useless both to the agency and to the courts.' " *Tafas v. Dudas,* 530 F.Supp.2d 786, 794 (E.D.Va. 2008) (quoting *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n.* 789 F.2d 26, 44–45 (D.C. Cir. 1986)). *See also Nat'l Audobon Soc'y v. Dep't of Navy,* 422 F.3d 174, 199 (4th Cir. 2004) ("the evidence we look to ... does not include .. the alleged subjective intent of agency personnel divined through selective quotations from email trails.").

Plaintiff alleges that the administrative record is incomplete. He cites numerous documents that he alleges were "omitted," primarily consisting of "Investigative Reports" prepared by Rick Stone, a former fellow at JPAC. Plaintiff has not explained, however, how the documents that he cites in his motion are relevant to any issue in his complaint. At best, plaintiff claims that the documents he seeks would show that "Defendants had substituted superceded documents which supported their position instead of the current documents prepared by him (Rick Stone) which did not support their chosen position." Mot. (Doc. 51) at 5. This is not scurrilous behavior, as plaintiff seems to suggest, however. The existence of internal debate is exactly what one would expect within an agency. But it is the final agency action, and the justifications for it, that make up the administrative record, not the opinion of one employee. As defendants stated previously in their Opposition to Plaintiff's Motion to Compel, the documents referred to in Plaintiff's Motion are pre-decisional reports that were not approved by the preparer's department and therefore not relied on in the agency's (JPAC's) final recommendation.[1]

[1] As previously stated in our Opposition to Plaintiff's Motion to Compel, defendants will make the documents available for *in camera* review should the Court desire.

In any event, this Court has previously determined judicial review of defendants' decisions regarding disinterment to be precluded from review under the Missing Service Personnel Act (MSRP), 10 U.S.C. §§ 1501, et seq. Therefore, even assuming a final agency decision (which has not occurred), the completeness of the record for the agency's recommendation not to disinter is not at issue here.

B. Leaked Document

Plaintiff also alleges that a document labeled "Pre-Decisional" was leaked and sent via email to the current employer of Rick Stone, a former JPAC fellow who has submitted an affidavit in this case on behalf of plaintiff. Plaintiff seeks discovery "in order that Plaintiff may inquire as to the true source of this email." Mot. at 7.

Plaintiff does not explain how discovering the "true source of this email" is relevant to this case. Mr. Stone submitted an affidavit stating that he prepared reports recommending disinterment of X-816. As discussed above, even assuming that he did so, the recommendation of a single employee (or fellow) is not the agency position that would be subject to review, even were such review not precluded by statute. Mr. Stone's affidavit itself is not relevant to plaintiff's standing, to this Court's jurisdiction, or even assuming jurisdiction, to any material fact in this case. Determining the true source of an allegedly emailed leaked document regarding Mr. Stone is even less relevant.

C. Allegedly Conflicting Information

Plaintiff alleges that defendants have provided conflicting information to the Court, contending that defendants have argued that the MSPA does not apply to the case of PVT Kelder but it does govern this dispute. Mot. at 7. Plaintiff then seeks discovery to "determine which, if

any, policies are applicable in this case or if there are more, as yet undisclosed, policy directives."

Plaintiff misapprehends defendants' argument. It is not "conflicting" to state that the 2009 Amendments to the MSPA established defendants' accounting mission with respect to World War II missing including PVT Kelder, and therefore the MSPA governs this dispute, while also stating that certain provisions of the MSPA, that pertain only to those in missing status, do not apply to PVT Kelder. Plaintiff has not explained how any "undisclosed" policy directives could be relevant here. Defendants are unaware of any statutes, regulations or policies that create any relevant legal right in plaintiff.

D. Plaintiff's Claim the He has Received "Conflicting Information" Does Not Warrant Discovery

Plaintiff complains that he has received conflicting information regarding his disinterment request. Mot. at 8-9. The record speaks for itself with respect to defendants' contacts with plaintiff. *See* Defendants' Reply to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss (Doc. 54) at 18-19 and record citations therein. In any event, plaintiff does not indicate how the discovery he seeks is relevant to any claim. He seeks "discovery to determine if a decision has been made which would moot this lawsuit." Mot. at 9. Defendants aver that they will produce immediately any decision that would moot this lawsuit.

E. Defendants Have Not "Illegally Classified" Relevant Documents

Plaintiff's last request refers to a document that he claims has been "classified" "For Official Use Only." Plaintiff also apparently alleges that defendant has improperly classified this and other unidentified documents as "Defense Secrets." Mot. at 9. As a preliminary matter, "FOUO" is not a security classification, rather, it is a designation used to mark a document that may be exempt from disclosure under the Freedom of Information Act. Pursuant to applicable

Defense Department guidance, FOUO is a DoD dissemination control applied to unclassified information when disclosure to the public of that particular record, or portion thereof, would reasonably be expected to cause a foreseeable harm to an interest protected by one or more of Freedom of Information Act (FOIA) Exemptions (Department of Defense Manual 5200.01-V4, February 24, 2012, DoD Information Security Program: Controlled Unclassified Information).

In any event, plaintiff has not explained how the document he seeks is relevant to his complaint. Again, even assuming that it exists and says what plaintiff alleges, it simply represents a preliminary, deliberative intra-agency document, not a final agency position. And, in any event, the final agency action with respect to the disinterment decision is not reviewable. Order at 5-7, 13-14.

IV. Conclusion

For the reasons set forth above, defendants respectfully request that any discovery in this matter be stayed pending resolution of Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, or be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th 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:

Jefferson Moore
Counsel for John Eakin

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney