

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 REPLY TO DEFENDANT’S RESPONSE TO PLAINTIFF’S OPPOSED
MOTION TO COMMENCE DISCOVERY**

I. Discovery is appropriate at this time and should begin without further delay.

Defendant’s jurisdictional arguments were originally presented in their first Motion to Dismiss (ECF Doc No. 14-1) which was submitted on February 15, 2013 and addressed by this Court on August 5, 2013 (ECF Doc No. 34).

Plaintiff has a right to possess the remains of his family member for burial and Defendants have an obvious obligation to identify and return such remains. The immediate commencement of discovery will contribute to the speedy and efficient disposition of this action.

Plaintiff has previously filed a motion for discovery beyond the administrative record (ECF Doc. #9) Defendants at that time suggested that, if necessary, Plaintiff could seek additional documents after the administrative record was filed. (ECF Doc. # 10, at 1). This Court ruled that because a subsequent motion appeared adequate to address any discovery issues in the case, Plaintiff’s motion for discovery was moot.

After Defendants had filed their administrative record, Plaintiff moved to compel completion of the administrative record and provided witness testimony that identified specific material documents that had been withheld from the administrative record and for which superseded documents were substituted. (ECF Doc. # 15). That motion was dismissed when this Court found that Plaintiff lacked standing and granted leave for Plaintiff to file an amended complaint.

These prior motions were incorporated in to the current motion for discovery and Plaintiff once again respectfully moves this Court for leave to conduct discovery as permitted under Fed. R. Civ. P. 26.

II. This is not an action under the Administrative Procedures Act, is not exempt from discovery nor is consideration confined to the administrative record.

Defendants' averment that this is an action for judicial review of an administrative decision under the Administrative Procedures Act (APA) and exempt from discovery is incorrect. Defendant's original objection to proceeding under the APA was upheld by this court and was subsequently omitted from Plaintiff's First Amended Complaint which was crafted to conform to the Court's findings. No action currently plead is exempt from discovery under Fed. R. Civ. P. 26(a)(1)(B).

Even if a case is normally limited to the administrative record, there are exceptions and the "decision whether to allow such extra record investigation rests within the sound discretion of the district court." *Stewart v. Potts*, 126 F. Supp. 2d 428, 435 (S.D. Tex. 2000).

As Plaintiff stated in his first motion for discovery (Docket No 9), a common exception to the record review rule is when extra-record information is required for effective judicial review. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Thus,

discovery is permissible when the administrative record is incomplete, when the agency relied on information outside the administrative record or when extra-record information is necessary to understand the agency's decision-making process. See *Williams v. Roche*, No. 00-1288, 2002 U.S. Dist LEXIS 24030, at *8-9 (E.D. La. Dec. 12, 2002).

III. Plaintiff has identified multiple issues for which discovery is necessary

Defendant's argument that Plaintiff has not identified any relevant issues for discovery is also incorrect. Although Fed. R. Civ. P. 26 contains no requirement that a party identify areas for discovery, Plaintiff has previously identified multiple issues for discovery over the course of this litigation and in his Motion for Discovery.

In addition to specific documents that Plaintiff has identified as having been withheld from the filed administrative record, Defendants, as set out below, have provided conflicting policy documents and conflicting statements as to the status of their decision to disinter the remains. Without discovery Plaintiff will be unable to clarify the relevant policies and the actual status of the government's decision.

Plaintiff has since become aware of additional government investigators who have prepared official reports that were withheld from the administrative record and that these reports further support Plaintiff's assertion that unidentified remains X816 are those of Pvt Arthur H. "Bud" Kelder and should be returned to the family for burial.

IV. The attempted badgering of a witness for Plaintiff by the use of "leaked" government documents is a legitimate avenue to pursue in the conduct of discovery.

Contrary to Defendants' averment, an attempt to badger a witness is a legitimate avenue for discovery. The Plaintiff needs to find out who are the persons that have leaked the documents against Rick Stone to answer the question of whether these persons are witnesses for

the Defendants. This would touch upon the credibility and bias to the Defendants' witnesses that directly relate to this cause.

V. Defendants have provided Plaintiff and this Court with conflicting documents and statements.

At various times, Defendants have asserted that they have decided not to comply with Plaintiff's request to identify remains X816 as those of his family member, then, often in the same document, asserted that no decision has been made.

“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.”

Defendant's Response to Motion for Discovery. (ECF Doc No. 55 at 2)

“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.”

Defendant's Response to Motion for Discovery (ECF Doc No. 55 at 5)

Similarly, Defendants have provided two conflicting policy memos. The “Slocombe Memo” (Supp AR Doc No. 2) states:

“A decision to disinter must be based on sufficient circumstantial and anatomical evidence which when combined with current forensic science techniques would lead to a high probability of positive identification.”

The “Prioritization Memo” (Supp AR Doc No. 3) essentially proscribes disinterments for identification when it states:

“Identifying the remains of unknowns already recovered and buried with honor in U.S. national cemeteries at home and abroad must take a lower priority.”

In light of these, and other conflicts and departures from written policies by Defendants, Plaintiff must be permitted to investigate and determine which, if any, of Defendants' policies and directives are actually valid and the actual status of his request for return of the remains of

Pvt Arthur H. “Bud” Kelder as well as to obtain documents and tangible things relevant to this lawsuit.

VI. Defendants have restricted Plaintiff’s access to many documents

Plaintiff accepts Defendants assertion that the notation “For Official Use Only” is not a classification as a defense secret. However, Plaintiff has been unable to obtain some documents because of this restriction.¹ Further, Plaintiff notes that most of the documents on deceased military personnel and unidentified remains carry a declassification notice and at various times Defendants have claimed them to be exempt from release under the Freedom of Information Act.² Should this Court allow the parties to proceed with discovery it will insure that Plaintiff has access to all necessary documents without undue delay.

VII. Conclusion

Attachment One is a feature story recently published by Stars & Stripes, a newspaper distributed to U.S. Military personnel around the world and Attachment Two is a web story posted by a Chicago TV station. These attachments illustrate the level of public interest in the story of Unknowns in general and “Bud” Kelder in particular.

Undue delay in resolution of this issue can be expected to negatively impact the morale and retention of current servicemembers as well as the public perception of the U.S. Government. Additionally, as the media has disseminated this story to the American public, Plaintiff has been contacted for information by an increasing number of the families of the more than 8,700 WWII Unknowns. Additional legal challenges can be expected to be filed as additional administrative requests for the return of remains ripen and enter the legal arena.

¹ Specific documents are identified in Plaintiff’s Motion for Discovery (ECF Doc No. 51 at 5)

² Eakin v U.S. Department of Defense, et al, SA-10-CA-0784-FB-NN

Plaintiff submits that neither judicial economy nor the public interest are well served by additional delay in the resolution of what should be the simple issue of the burial of a fallen Soldier.

Defendants have delayed this litigation with objections previously ruled upon by this Court and by a four-month extension of time in order to locate a relative handful of documents. Plaintiff's family has endured a nearly seventy (70) year delay in obtaining the return of the remains of a family member who gave his life in service to our country, a basic legal and moral right and an obligation of the family. Plaintiff asks this Court to not allow further unnecessary delay and to order that discovery begin immediately.

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st 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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