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 TO PLAINTIFF'S MOTION TO COMPEL AND MOTION FOR A PROTECTIVE ORDER

Defendants American Battle Monuments Commission, *et al.*, oppose Plaintiff's Motion to Compel, filed July 20, 2014. Plaintiff's Motion fails to comply with Fed. R. Civ. P. 37(a)(1), 26(f)(2) and (3), and this Court's Order of July 17, 2014. Rule 37(a)(1) and this Court's Order require plaintiff to confer in good faith prior to filing a motion to compel. Both the Rule and this Court's Order required plaintiff to file a certification to that effect, which he has failed to do. The Court should deny the motion and enter a protective order. Fed. R. Civ. P. 37(a)(5)(B).

Rule 26(f)(2) specifies that parties "must consider the nature and basis of their claims" in conferring on discovery, while Rule 26(f)(3) further specifies that the parties must attempt to agree on the "subjects on which discovery may be needed" and whether discovery should be "limited to or focused on particular issues."

Plaintiff steadfastly refused to allow his counsel to engage in these required discussions and now has refused to do so himself. Further, plaintiff's continued insistence on discovery that is irrelevant to this case appears to be a bad faith attempt to circumvent the District Court's

summary judgment against him in previous litigation under the Freedom of Information Act. The Court in that action rejected plaintiff's request for a fee waiver and expedited processing for most of the same documents plaintiff seeks here. See Eakin v. United States Department of Defense, et al., SA 10-CV-0784 FB (NN). Plaintiff's Motion to Compel should be denied and a protective order entered.[1]

I. Background

In requesting discovery from this Court, plaintiff relied primarily on his assertion that defendants had withheld relevant documents from the Administrative Record that allegedly supported his request to disinter (e.g., reports of the JPAC fellow, Rick Stone), as well as other limited reasons. Plaintiff's Motion for Discovery (ECF 51) at 5-9. Following this Court's Order allowing plaintiff limited discovery, however, plaintiff was not so discriminating, filing two Requests for Production (totaling **120** separate requests), 2 sets of Requests for Admission, and a Set of Interrogatories. Some of these were filed May 5, 2014, and others on May 13, 2014.

Plaintiff's 120 requests demanded documents of all sorts for every missing person since Pearl Harbor (e.g., 29, 37, 40-42, 44-46, 59-61, 75, 77, 84, 94, 111); various personnel records for defendants' employees; documents alleging "misconduct by any person assigned to JPAC or DPMO" (63, see also 62); documents "which discussed or mentioned misconduct by any person employed by Defendants in any capacity," (#65, see also 72, 73); and a host of other irrelevant and ill-defined material.

On June 3, 2014, pursuant to Fed. R. 29(b), counsel agreed to an extension of time to respond. No deadline was set. Counsel agreed to meet on June 17, 2014, to confer on a number

[1] As discussed below, counsel did have the required "meet and confer" as to one Request: plaintiff's request to produce the remains of the ten unknowns associated with Grave 717. This request is absurd on its face; however, we address it briefly below.

of matters, including limitations on the document requests and interrogatories, timing for production, and the applicability of any of the requests to defendant American Battle Monuments Commission (ABMC). [ABMC is a small agency with a part-time general counsel, and has nothing to do with this case]. See Exhibit 1 (email from Susan Strawn to Jefferson Moore dated June 3, 2014, and response).

As noted, plaintiff's requests covered every conflict since World War II, and at least 10 components of government (many of which have changed over time). To prepare for the June 17 meeting defendants spent many hours seeking to determine the existence and location of responsive documents. The undersigned spent multiple hours discussing the requests with agency counsel and staff from six different components and agencies, culminating in about a day and a half's worth of conference calls with defendants in advance of the June 17 meeting.

Mr. Moore, however, did not show up to the meeting. Several hours after the meeting was scheduled to occur, Mr. Moore telephoned to advise defendants' counsel that he had been meeting with plaintiff and that plaintiff had not authorized him to negotiate with respect to the discovery requests. Mr. Moore advised that he would be seeking to withdraw as counsel.

In accordance with the June 3 agreement, defendants responded to plaintiff's First and Second Requests for Admissions on June 20, 2014. On June 23, 2014, the Assistant Secretary of the Army approved the disinterment of the remains at issue in the case, mooting this case. Plaintiff, however, did not agree to voluntarily dismiss, and instead continued to request discovery.

In the meantime, Mr. Moore and defendants' counsel continued to discuss the need for a meet and confer; plaintiff, however, would not agree to any limitation. Counsel for the parties finally met on July 7. The results of that meeting were summarized in relevant part in an email:

1. We agreed that the meeting served as a "meet and confer" only as to Plaintiff's Second Request for Production Nos 1 and 5. No agreements, including deadlines, have been agreed to for the remainder. You agreed to continue to work with plaintiff to limit and focus these requests.

2. As to Request No. 1, defendants do not agree to produce the remains from the ten unknowns in discovery. As you know, defendants have agreed to disinter the ten sets of remains and attempt identification. You advised that you would be filing a motion to compel on this Request. I advised that defendants would be filing a motion to dismiss as moot.

3. As to Request No. 5, defendants agreed to search for responsive documents. Defendants will attempt to advise by Friday, July 11 as to the existence, amount and location of any responsive documents, and agree to a production schedule.

See Exhibit 2 (Email from Susan Strawn to Jefferson Moore dated July 9, 2014 and response).

On July 8, 2014, defendants filed their Suggestion of Mootness and Motion to Stay Discovery Pending Decision on Mootness or Other Resolution (ECF 64). Also on July 8, plaintiff filed a motion for leave to file motions to vacate the appointment of his pro bono counsel, Mr. Moore, and to compel. (ECF 65). Notably, Plaintiff's motion to vacate was based on the grounds that Mr. Moore "refused multiple requests from Plaintiff that he require Defendant's response to discovery requests." Plaintiff's Motion to Vacate Appointment of Pro Bono Counsel (ECF 67) at 2.

After a status hearing, this Court overruled defendants' objections and granted plaintiff's motion to vacate as well as his request for leave to file a motion to compel. The Court, however, informed plaintiff of the requirement that the parties "meet and confer" and further required, in its Order, a certification to that effect. ECF 71, paragraph 2. The Court further informed plaintiff that the Court considered plaintiff's case to be limited to PVT Kelder and not all the families of every US casualty.

Following the status conference, counsel for defendants advised plaintiff that plaintiff should limit his discovery requests to documents relevant to PVT Kelder. Counsel invited

plaintiff to identify documents or requests that he believed to relevant prior to any discussion. See Exhibit to Plaintiff's Motion to Compel (ECF 72-1) (July 16, 2014 Letter from Susan Strawn to John Eakin).

Plaintiff did not respond to the letter but filed his motion to compel on July 20 (ECF 72). No certification was attached to plaintiff's motion, nor was one requested from defendants. Moreover, plaintiff's motion contains numerous misstatements of fact, including that defendants have exceeded any deadline for responding and that defendants have not given "Plaintiff an opportunity to modify or clarify his requests." Motion to Compel (ECF 72) at 2, 6.

II. The Motion to Compel Should be Denied

A. Requests for Documents

Plaintiff filed his motion in direct contravention of this Court's Order requiring a certification, as well as in violation of Fed. R. Civ. P. 37(a)(1). Moreover, with one exception, plaintiff cannot make such a certification because, pursuant to Rule 26, he has not made a good faith effort to consider the "nature and basis" of his claims or any attempt to narrow his requests to any issue in this case. Moreover, plaintiff refused to allow his attorney to do so. Accordingly, the Motion should be denied.

B. Request for the Remains

Although plaintiff violated this Court's Order requiring a certification, counsel did confer on plaintiff's request to produce the remains and defendants do object. The remains are unidentified, and plaintiff has no claim to them unless and until they are identified as being those of PVT Kelder. The Department of Defense has custody of remains of servicemen and women until they are identified and disposed of in accordance with the wishes of the person authorized to direct disposition or the primary next-of-kin.

Moreover, the remains themselves are not "evidence" in this case, or relevant within the means of Rule 26(b). Plaintiff's due process claim is not a claim to "property" but a claim to "due process." The "property" itself is irrelevant. As a preliminary matter, the "due process" right claimed in the First Amended Complaint concerned the defendants' alleged refusal to entertain plaintiff's request to disinter remains, not a "right" to particular identification procedures, to observe processes, to conduct independent testing, or to have the Court "oversee" the process. These claimed "entitlements" or hypothetical future due process violations are not before the Court.

Second, the Fifth Amendment is not a bar to the taking of property. Even assuming that plaintiff had standing to claim unidentified remains; and even assuming that human remains are "property" within the meaning of the due process clause (and there has never been a case so holding, to defendants' knowledge); and even assuming that defendants are depriving plaintiff of property (as opposed to engaging in a voluntary, discretionary program to assist plaintiff); and even assuming a preemptive challenge to defendant's identification procedures didn't raise its own ripeness and standing issues, the issue for this Court would be whether defendants' identification procedures meet the requirements of due process. Plaintiff is not entitled to his own process, he is (hypothetically assuming standing, a property right, and a deprivation) entitled to *due* process.

The remains themselves are not relevant to this inquiry. Accordingly, plaintiff's Motion to Compel should be denied.

III. Defendants are Entitled to a Protective Order

A. Good Cause Exist for a Protective Order

Fed. R. Civ. P. 37(a)(5)(B) provides that if a motion to compel is denied the Court may enter any protective order authorized under Rule 26(c). Fed. R. Civ. P. 26(c)(1) provides the

court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, among other things "(A) forbidding the disclosure or discovery."

Plaintiff is seeking to compel defendants to undertake the undue burden, expense and annoyance of attempting to respond to 120 separate requests. As discussed above, defendants' counsel required over 12 hours of conference calls simply to go through plaintiff's requests with defendants and (unsuccessfully) attempt to discern what was being requested and what might be available. Agency counsel spent considerably more time with their components and/or agency on the task. Responding to all of these requests with individual objections (even with a large amount of cut and paste – to which plaintiff would no doubt object) would require many days and would likely run well over 120 pages.

As noted above, plaintiff has repeatedly refused to narrow his discovery to relevant documents, instead requesting documents of all sorts for every missing person since Pearl Harbor (e.g., 29, 37, 40-42, 44-46, 59-61, 75, 77, 84, 94, 111); as well as various personnel records for defendants' employees; documents alleging "misconduct by any person assigned to JPAC or DPMO" (63, see also 62); documents "which discussed or mentioned misconduct by any person employed by Defendants in any capacity," (#65, see also 72, 73); and a host of other material.

Plaintiff refused to cooperate with his counsel to focus these requests, and ignored both this Court's order to meet and confer, and its admonition to limit his case to PVT Kelder. Given plaintiff's track record, it is highly unlikely that government counsel will be able to negotiate any

reasonable discovery limit with plaintiff in any reasonable amount of time.[2] Accordingly, good cause supports the entry of a protective order.

Finally, not only has plaintiff failed to confer in good faith to limit the scope of his requests, but his Request for Production appear to be a bad faith attempt to end-run the Court's previous decision in his case brought under the Freedom of Information Act. See Eakin v. United States Department of Defense, et al., SA 10-CV-0784 FB (NN). In that case, Eakin sued the DoD and the Department of the Army under FOIA seeking production of most of the same documents he seeks in this action. The Army agreed to produce many of the documents but denied his request for a fee waiver and expedited processing, and Eakin sued.

In upholding the Army's determination and granting the government's motion for summary judgment, the Magistrate Judge wrote: "Eakin seeks the documents at no cost and prioritized over other FOIA requests. Eakin wants the government to scan responsive, fragile, paper documents and to produce the resulting electronic files. The government did not deny Eakin's requests. Instead, the government denied the requests for production per Eakin's terms." Report and Recommendation (ECF 34) at 8-9 (attached as Exhibit 3, exhibits omitted).

The Magistrate Judge found that Eakin's requests were not in the public interest and that Eakin was not a representative of the news media as he claimed, and therefore he was not entitled to a fee waiver. Id. at 9-14. The Magistrate also rejected Eakin's claim to expedited processing based on a claimed due process violation, holding that Eakin had no standing to raise due process rights of others, and that he himself had not been denied due process because the Army had produced the documents. Id. at 19. Accordingly, the Magistrate recommended

[2] In addition, since Mr. Eakin is now *pro se*, government practice would require another staff member to attend any meetings or phone calls as a witness, effectively doubling the resources required.

granting defendants' motion for summary judgment. The District Court agreed and dismissed the case. Order Accepting Report and Recommendation of the United States Magistrate Judge (ECF 45) at 2.

Reviewing plaintiff's actions in this case against his prior lawsuit strongly suggests that plaintiff's refusal to limit his discovery requests is not in good faith. Rather, he is using this case to seek documents that he could not obtain "at no cost and prioritized" in his FOIA action. Accordingly, good cause exists for a protective order to prevent this abuse.

B. Discovery Should Be Denied

As this Court stated at the July 16, 2014, status conference, this case is solely about PVT Kelder, and not, as plaintiff would have it, all families of unaccounted for servicemen and women. Therefore, discovery is properly limited to documents related to PVT Kelder. However, the vast majority of documents related to PVT Kelder, and plaintiff's request to disinter X-816, have already been produced to plaintiff in the Administrative Record. The documents that were withheld from the record (and that plaintiff used to support his initial request for discovery, e.g., the reports produced by Rick Stone) are no longer relevant (to the extent they ever were). Since the final agency decision is to disinter the remains at issue, the existence, non-existence or contents of deliberative, intra-agency views cannot be of any relevance. At this point, there is no reason to allow discovery and require defendants to formally assert privilege.

Indeed, as defendants pointed out in their Suggestion of Mootness, their Motion to Dismiss and *passim*, there is no reason for continued discovery in this case, because there is no case or controversy. Plaintiff gets this precisely backwards: he argues that the case is not moot because he has not received discovery. To state the obvious, a desire for discovery (to avoid

paying FOIA fees) does not create an Article III case or controversy. Likewise, a plaintiff cannot compel in discovery what he has no legal right to receive in the underlying case (i.e., remains).

To summarize, there is no factual issue in this matter to warrant discovery, and no legal issue sufficient to raise a case or controversy:

1) Plaintiff's declaratory judgment actions cannot stand alone, as there is no waiver of sovereign immunity.

2) Plaintiff's mandamus action presented a purely legal issue (the existence of a duty to disinter to identify), and one that is now plainly moot as defendants are complying with the alleged "duty" to identify remains.

3) Plaintiff's due process claim faces a rather momentous, purely legal, hurdle: to show his, or any, constitutional property interest in unidentified remains. Whether defendants' conduct caused a "deprivation" within the meaning of the due process clause is also a legal issue. Even assuming the Court found for plaintiff on those issues, however, there is no factual issue regarding the due process provided. It is a matter of record, from which the Court could determine whether the process met constitutional standards. In any event, this issue is moot, as defendants have agreed to plaintiff's request for disinterment and identification that was the basis of his due process claim.

There being no factual issue in this matter, defendants' motion for a protective order against plaintiff's outstanding discovery and any further discovery should be granted.

IV. Conclusion

Plaintiff has abused the discovery process by filing burdensome and irrelevant requests, refusing to meet and confer as required by the Federal Rules and this Court's Order, and filing a motion to compel in violation of Rule 37 and this Court's Order. Moreover, his motion to

compel production of remains should be denied on the merits. Just as there is no due process right to compel the government to produce documents "per Eakin's terms," there is no due process right to produce remains for testing per Eakin's terms. Cf. Exhibit 3 (Report and Recommendations) at 8-9.

Defendants respectfully request that Plaintiff's Motion to Compel be denied, a Protective Order entered, and that the Magistrate Judge further recommend that the case be dismissed as 1) for lack of jurisdiction, 2) for failure to state a claim, and/or 3) that summary judgment be entered. A proposed Order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 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:

John Eakin, Plaintiff *pro se*

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney