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

JOHN EAKIN Plaintiff,	§ § § § CASE NUMBER: SA-12-CA-1002-FB §
AMERICAN BATTLE MONUMENTS COMMISSION, MAX CLELAND, Secretary, American Battle Monuments Commission, U.S. DEPARTMENT OF DEFENSE, LEON E. PANETTA, Secretary of Defense, W. MONTAGUE WINFIELD, Deputy Assistant Secretary of Defense for POW/Missing Personnel Affairs, JOHNIE E. WEBB, Deputy to the Commander for External Relations and Legislative Affairs, Joint POW/MIA Accounting Command, Defendants	§ § § § § § § § § § § §

PLAINTIFF'S OPPOSED MOTION FOR DISCOVERY

On a motion made promptly, the Court may allow discovery in an action for judicial review of an administrative action, as permitted by Fed. R. Civ. P. 26(d)(1).

Counsel conferred on December 12, 2012 in a good faith attempt to resolve Defendants' objections. Counsel for Defendants avers that no discovery is permitted in an action for review of an administrative record.

Plaintiff respectfully disagrees and moves for consideration by this Court.

Respectfully submitted,

/s/ John Eakin
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MEMORANDUM OF POINTS AND AUTHORITIES SUBMITTED IN SUPPORT OF PLAINTIFF'S OPPOSED MOTION FOR DISCOVERY.

I Factual History

Plaintiff's family member, Pvt Arthur H. Kelder, survived the infamous Bataan Death March of April 1942 only to perish a few months later while a prisoner in the Cabanatuan POW camp. He and thirteen other fallen American heroes who died the same day were interred in the camp cemetery in communal grave number 717. The death was certified and burial documented by the American officers authorized to do so. These records were retrieved after liberation of the camp and have been admitted in multiple judicial and administrative proceedings and found credible.

After the war, the grave was opened and the remains of one man were immediately identified on the basis of information from the burial record and individually identified by an identification tag. The remains were all temporarily interred in Manila Cemetery #2 where the remains of three more men were identified on the basis of the burial record and military dental records. The remains of the remaining ten men were eventually transferred to above ground storage in an aircraft hangar at Nichols Field. Graves registration personnel attempted, unsuccessfully, to obtain civilian dental records of only one man in order to individually identify his remains. No further effort was ever made to obtain individually identifying information on Kelder or the remaining men.

Facing a congressionally mandated deadline to complete the Fort McKinley Military Cemetery, the still unidentified remains were interred there without military or religious ceremony before exhausting all possible avenues for identification. Records of the burials were then classified and restricted from public access. Family members were informed only that the remains were "non-recoverable."

By 2009, the records of Pvt Arthur H. Kelder had been automatically declassified and obtained by Plaintiff. Immediately recognizing that Kelder's remains were obviously one of no more than ten possibles, he contacted other family members who provided information of distinctive gold dental inlays which conclusively identified the unidentified remains designated as Manila #2 X-816 which were buried in grave A-12-195 in the cemetery now operated by Defendant ABMC.

Granted power of attorney by the primary next-of-kin, Plaintiff petitioned the U.S. Army Human Resources Command to recognize unknown X-816 as the remains of Arthur H. Kelder. That petition was subsequently forwarded to Defendant DPMO. Simultaneously, the JPAC Intelligence Directorate completed an investigation concerning all ten of the unknowns recovered from Cabanatuan Grave 717 and recommended disinterment for identification.

In addition to the evidence of the identity of unidentified remains X-816 submitted by Plaintiff, family reference samples (DNA) are available for all ten of the Grave 717 unknowns and would permit use of this modern identification technology if any party wishes to dispute the factual basis of the identification of X-816. Defendants have routinely employed DNA matching technology since at least 1998 when The Vietnam Unknown was disinterred from the Tomb of the Unknown in Arlington National Cemetery and identified as Lt. Michael J. Blassie.

II Introduction

This is an action for review of agency refusal to act to identify the remains of a member of Plaintiff's family missing since his death and burial in a WWII POW camp. Plaintiff has submitted overwhelming factual and expert opinion evidence that unidentified remains designated Manila #2 number X-816 are those of Pvt Arthur H. Kelder.

Plaintiff is further seeking injunctive action requiring that Defendants comply with their statutory obligations under 10 U.S.C. §§ 1501-1509 and that they be enjoined from future discrimination against the families of unknowns.

Counsel for Defendants has indicated that a dispositive motion will be filed in conjunction with filing the administrative record. Plaintiff will be severely disadvantaged if not allowed to conduct discovery in order to respond to Defendents' dispositive motion as well as to insure that the administrative record is complete.

Plaintiff has moved for discovery under Fed. R. Civ. P. 26 as permitted by Fed. R. Civ. P. 26(d)(1) and submits that there are several common exceptions to the record review rule 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).

Additionally, Plaintiff has raised issues beyond judicial review of an administrative action which are not exempt from discovery under Fed. R. Civ. P. 26(a)(1)(B)(i) and Plaintiff should be allowed to commence discovery without delay imposed by Defendant's need for additional time to answer Plaintiff's complaint.

II Additional information beyond the administrative record is necessary to understand the agency's decision making process.

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, e.g., Williams v. Roche*, No. 00-1288, 2002 U.S. Dist LEXIS 24030, at *8-9 (E.D. La. Dec. 12, 2002).

Defendants have stated that the administrative record includes records dating from 1942 which are in the possession of numerous components of the military. (Doc #7 at 2) The record is so extensive that Counsel for Defendants has requested an extension of time to file it with this court. In addition, review of the portions of the administrative record which were attached to Plaintiff's complaint (Doc #1) shows that in the pre-copy machine era it was common for documents to be filed in only one of several related personnel files, necessitating examination in this case that fourteen cases, including all records of interment, investigation, identification, and similar, must be reviewed to compile a single administrative record and consider it in context. Plaintiff deserves an opportunity to insure that such an extensive administrative record filed with this court is compete.

In addition, through discovery, Plaintiff will demonstrate that the administrative record is incomplete due to many of the same factors which caused thousands of remains to become unidentified. Many actions were simply not documented. The record was incomplete in 1946 and it will be incomplete in 2012 and discovery is necessary to attempt to reconstruct the record where possible.

Further, through discovery, Plaintiff will demonstrate that Defendants have employed discriminatory and often conflicting policies and practices in the past and that the current policy they rely on in the case of Pvt Kelder actually contradicts their actions.

Only through discovery can the Court insure that it has considered all of the relevant factors as without discovery the Defendants will determine what is relevant. The very definition of an arbitrary or capricious agency action is one that is not "based on a consideration of the relevant factors." *Overton Park,* 401 U.S. 402, 416. It will be impossible for the court to determine whether the agency took into consideration all relevant factors unless it looks outside

the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters. *ASARCO, INC., v. U. S. EPA,* 616 F.2d 1153, 1160; *see also Lands Council v. Powell,* 395 F.3d 1019, 1030 (9th Cir. 2005).

III Defendants have shown bad faith and improper behavior

Extra-record discovery is also justified in this case due to the bad faith and improper behavior demonstrated by the agency decision-makers. *Overton Park,* 401 U.S. 402, 420*; see also Nat'l Audubon Soc'y v. Hoffman*, 132 F. 3d 7, 14 (2nd Cir. 1997). Courts "have recognized bad faith where 'a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise unnecessary litigation to vindicate plain legal right.'" *Maritime Mgt., Inc. v. United States*, 242 F.3d 1326, 1335 (11th Cir. 2001) (*quoting Am. Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 220 (D.C. Cir. 1991)).

Defendants have exhibited multiple instances of bad faith in this litigation:

1. Plaintiff filed a related suit against Defendant DoD to obtain records under the Freedom of Information Act. Defendant DoD first provided an inflated estimated cost to reproduce the documents in an obvious attempt to discourage Plaintiff's request. The principal question then before the court was Plaintiff's request for a waiver of the reproduction fees. Two weeks after judgment was entered in favor of Defendants, Defendant DPMO announced on their website that they had completed digital scanning of one class of documents (X-files) and would complete scanning of the other class (IDPFs) within three years. In the sixteen months the FOIA suit was before this Court, the Defendants consistently and adamantly denied not only the existence of such documents, but that it was even feasible to digitize the requested documents.

Plaintiff subsequently obtained approximately two-thirds of the requested digital documents at no cost, but the balance of the scanned documents continue to be withheld despite multiple inquiries. Defendants knew of the existence of the digital document files, yet actively mislead this Court as to even the possibility that they could be digitized.

2. On December 16, 2010, the predecessor in office of Defendant Winfield issued a policy memorandum, subject: Policy Guidance on Prioritizing Remains Recovery and Identifications. This memorandum, euphemistically terming unknowns as remains already recovered and buried with honor in U.S. national cemeteries at home and abroad, ordered that action on these cases take a lower priority. This policy is in obvious conflict with the applicable statute.

> *The Secretary of Defense shall establish an activity to account for personnel who are missing or whose remains have not been recovered from the conflict in which they were lost. This activity shall be known as the Defense Prisoner of War/Missing Personnel Office.* ***The Secretary of Defense shall ensure that the activity is provided sufficient military and civilian personnel, and sufficient funding, to enable the activity to fully perform the complete range of missions of the activity.*** *The Secretary shall ensure that Department of Defense programming, planning, and budgeting procedures are structured so as to ensure compliance with the preceding sentence for each fiscal year. [emphasis added]*

10 U.S.C. § 1501(a)(6)(A)

3. In February of 2012, Plaintiff requested his case manager in the Army Casualty Office (more properly known as the Past Conflicts Repatriation Branch, U.S. Army Human Resources Command) to arrange a meeting during a scheduled family briefing with the "decision makers" who were in a position to review Plaintiff's petition for consideration of new evidence concerning the identification of the remains of his family member.

This meeting with Plaintiff and his wife was attended by Defendant Webb; Charles Henley, DPMO Director of External Affairs; Gregg Gardner; Chief, Past Conflicts Repatriation

Branch; and the respective case managers from each agency. 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. None of the other attendees challenged this claim by Defendant Webb.

This claim conflicts with multiple provisions of 10 U.S.C. §§ 1501-1509.

4. 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 and is not available to Plaintiff without discovery. There is no indication that these documents were transmitted to the Secretary of Defense or that they triggered action under 10 U.S.C. § 1509 as new information concerning an unaccounted for person.

5. 10 U.S.C. §§ 1501-1509 requires that new information concerning an unaccounted for person be provided to the Secretary of Defense and that the information be presented to a review board; a Missing Persons Counsel be appointed; and, the new information be shared with the primary next-of-kin.

> *(3) For purposes of this subsection, new information is information that is credible and that*
>
> *(A) is found or received after November 18, 1997, by a United States intelligence agency, by a Department of Defense agency, or by a person specified in section 1504(g) of this title; or*
>
> *(B) is identified after November 18, 1997, in records of the United States as information that could be relevant to the case of one or more unaccounted for persons covered by subsection (a).*

10 U.S.C. § 1509(e)(3)

In this case, credible new information has been collected by the JPAC Intelligence Directorate; has also been forwarded to Defendant DPMO from the U.S. Army Human

Resources Command; and, has also been identified in records of the United States by staff members of Defendants DPMO and JPAC. Yet, no status review has taken place; no Missing Persons Counsel has been appointed to represent Arthur H. Kelder; and, there has been no contact with the designated primary next-of-kin concerning new evidence or a status review.

Plaintiff submits further that Defendant's compilation of the administrative record in this litigation is sufficient in itself to trigger the status review requirements of 10 U.S.C. § 1509(e)(3) as it is intuitively obvious that the remains of Pvt Arthur H. Kelder can be identified simply with the new dental evidence included in his complaint (Doc. #1, Exh. 1 & 6). Further, the identities of all the men previously interred in Cabanatuan Grave 717 can now be identified by comparison with the Family Reference Samples (DNA) in Defendant's possession. Failure to now properly and timely account for these fallen American heroes is a further violation of 10 U.S.C. §§ 1501-1509 and constitutes arbitrary and capricious action by Defendants.

IV Agency action has been withheld and there is no final action to demarcate the limits of the record.

An action to compel an agency to fulfill a statutory obligation is not a challenge to a final agency decision, but rather an action arising under 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed." *Oregon Natural Res. Council Action v. United States Forest Service,* 59 F.Supp.2d 1085, 1095 (W.D. Wash. 1999). In such cases, review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record. *See Independence Mining Co., Inc. v. Babbitt,* 105 F.3d 502, 511 (9th Cir. 1997). *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

When "the government is being sued for inaction … [t]here is less reason to presume that the record assembled by the agency is presumptively complete." *CCL, Inc. v. United States*, 39

Fed. Cl. 780, 791 (1997); *see also Lands Council v. Forester of Region One of the U.S. Forest Serv.,* 395 F.3d 1019, 1030 (9th Cir. 2005). Moreover, "given that a 'rule of reason' ultimately governs the issue of unreasonable delay, some inquiry into … whether the reasons offered by the agency are the actual reasons for the delay must … be permitted." *Tummino v. Von Eschenbach,* 427 F. Supp. 2d 212, 231 (E.D.N.Y. 2006).

V Summary

Discovery is necessary to insure that meaningful judicial review is possible.

Unlike Plaintiff, Defendants will not be disadvantaged if Plaintiff is allowed to conduct discovery. In fact, Plaintiff's requests for production should significantly assist Defendant's compilation of the complete administrative record. And because Defendants are actively compiling the administrative record it should be less burdensome for them to provide related documents to Plaintiff concurrently rather than later in this litigation when Plaintiff's right to conduct discovery on other issues will be unquestioned.

The reason for Defendant's withholding of action is unknown and irrelevant, but the U.S. Government's actions beginning in 1942 and extending to the present offer great potential for embarrassment to the Government and all officials involved. With consideration to Defendant's past conduct, the interests of all parties are best served by allowing transparent conduct of discovery by Plaintiff concurrent with compilation of the administrative record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2012, 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
John Eakin, Plaintiff pro se

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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. Plaintiff is allowed to immediately begin discovery under Fed. R. Civ. P. 26 in the above captioned action.

Signed this the _____day of _____, 201_.

_____
HENRY J. BEMPORAD
MAGISTRATE JUDGE