UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER: February 19, 2015

CBCA 2727, 2951, 3445, 3461, 3539, 3558, 3884, 4006

KEPA SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

William L. Bruckner and Nicholas A. Arcamone of Bruckner Law Firm, APC, San Diego, CA, and Linda L. Shapiro, Timothy F. Noelker, and Scott F. Lane of Thompson Coburn LLP, St. Louis, MO, counsel for Appellant.

Cecily Chambliss, Stacey North-Willis, and Charlma J. Quarles, Office of General Counsel, Department of Veterans Affairs, Washington, DC, and Helen S. Henningsen, Office of General Counsel, Department of Veterans Affairs, Milwaukee, WI, counsel for Respondent.

LESTER, Board Judge.

ORDER

Pending before the Board is the motion to compel discovery responses from the Department of Veterans Affairs (VA or agency) that appellant, Kepa Services, Inc. (Kepa), filed on November 26, 2014. Following receipt of Kepa's motion to compel, the Board conducted telephonic status conferences with the parties on December 8, 16, and 22, 2014,

to discuss the motion and the agency's efforts to respond to Kepa's discovery. After considering Kepa's motion, the information that the parties shared during the telephonic status conferences, and the additional submissions from the parties (the most recent of which was filed on February 11, 2015), the Board grants Kepa's motion in part. Nevertheless, because of the burdensome nature of Kepa's requested discovery, the Board significantly alters the aggressive discovery and hearing schedule that the Board had previously entered at Kepa's request, and it grants, in part, the agency's requests to enlarge the time for it to respond to Kepa's discovery and to submit its expert report(s).[1]

Background

This litigation involves eight appeals, all of which are now consolidated, of twenty-four separate claims arising out of a contract with the VA, Contract No. VA101CFM-C-0093 (Contract 0093), which involves work associated with gravesite expansion and cemetery development at the Abraham Lincoln National Cemetery in Elwood, Illinois.

Kepa filed the first of its appeals, which the Board docketed as CBCA 2727, on February 1, 2012. In that case, Kepa appealed the contracting officer's "deemed denial" of two separate claims under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). The judge assigned to the case at that time initially stayed the case pending receipt of a contracting officer's final decisions on the two claims, but he lifted that stay by order dated May 22, 2012, after the contracting officer issued final decisions on the two claims and indicated that "[p]roceedings in accordance with Board rules shall commence immediately." Kepa did not initiate any discovery at that time.

Kepa filed another appeal arising out of claims associated with contract 0093 (CBCA 2951) on August 28, 2012. The parties informed the Board during a conference call on March 26, 2013, that Kepa anticipated filing in the near future several additional appeals that would be related to CBCA 2727 and 2951. In accordance with that conference call and the request of the parties, the Board judge then assigned to these cases stayed all proceedings pending further direction of the Board.

The last of Kepa's eight appeals under Contract 0093 (CBCA 4006) was not filed until July 28, 2014. Nevertheless, on January 17, 2014, six months before that last appeal was filed, the Board, at the request of the parties, issued an order lifting the stay of proceedings in the then-pending cases. Although the parties indicated in a January 14, 2014, status

[1] This order does not address Kepa's motion for a protective order, filed February 12, 2015. The Board will request briefing on that motion by separate order.

conference with the then-assigned judge that they intended to start discovery, they did not start it at that time.

In July 2014, these cases were reassigned to the undersigned. Following a telephonic status conference with the parties on July 24, 2014, the Board issued an order, dated July 31, 2014, formally consolidating all eight appeals associated with Contract 0093 and requesting that the parties submit a joint proposed schedule for further proceedings in the cases, including proposed deadlines for expert witness identification, a proposed schedule for discovery, and a proposed schedule for submission of dispositive motions. The Board also ordered the parties, as part of their joint proposed schedule, to identify the "scope of the discovery that the parties currently anticipate (including the number of anticipated depositions that each side expects to take, as well as the extent to which either party anticipates the need for document discovery beyond what is already contained in the Rule 4 files)." Order at 2 (July 31, 2014). The order provided that, if the parties could not agree on a proposed schedule, they could submit separate proposals.

Kepa responded with an individual proposal containing what it described as "a slightly accelerated schedule," which it stated "reflects its need to more quickly resolve the matters before the Board." It proposed that all written discovery requests be served by September 15, 2014, with all responses due by October 10, 2014; that expert witness reports be exchanged by November 1, 2014; that all discovery completed by December 19, 2014; and that a hearing on the merits begin on April 27, 2015. By order dated September 10, 2014, the Board, following another status conference with the parties during which the Board judge indicated his preference for sequential rather than simultaneous expert reports, adopted a slightly altered version of Kepa's proposal, ordering that all voluntary discovery would conclude by January 30, 2015; that Kepa would provide its expert report(s) to the VA by October 15, 2014; that the VA would respond with any expert report(s) by December 8, 2014; and that a hearing would be conducted beginning June 22, 2015. Although the Board viewed the schedule as fairly aggressive given the number of claims at issue in the cases, the Board was not made aware of any extensive discovery needs that would preclude an expedited schedule. Because of an issue with the submission of an appeal file in the most recently filed appeal, the Board conducted another telephonic status conference with the parties on October 20, 2014, after which the Board amended the expert witness deadlines (by order dated October 22, 2014) to require production of Kepa's expert report(s) by November 21, 2014, and the VA's responsive report(s) by January12, 2015, and amended the discovery deadline to reflect a closing date of February 27, 2015.

During the parties' October 20, 2014, status conference, neither party mentioned that Kepa had recently served a total of 557 interrogatories, many with accompanying document production requests, on the VA, comprised as follows:

(1) On October 10, 2014, Kepa had served twenty-five separate sets of discovery requests upon the VA, each titled "First Set of Interrogatories and Requests for Production," containing a total of 492 interrogatories. The majority of these 492 interrogatories also contained document production requests, requiring production of all documents related to the interrogatory response. Kepa explains in its pending motion to compel that it served one set of interrogatories and document production requests for each of the twenty-four claims at issue in these consolidated appeals, as well as one set of discovery requests aimed at matters common to all of the claims in these cases (to which Kepa refers as its "All Claims" discovery requests). *See* Appellant's Motion to Compel at 2. In accordance with CBCA Rule 14 (48 CFR 6101.14 (2014)), the VA's responses to all 492 interrogatories and document production requests would be due on November 10, 2014.

(2) On October 17, 2014, Kepa had served upon the VA two sets of what it titled its "Second Set of Interrogatories and Requests for Production." These two sets of discovery requests were targeted at two of the appeals in these cases, CBCA 3539 and 3558. In these new requests, Kepa added sixty-five interrogatories covering, according to Kepa, seventeen discrete claims that are at issue in CBCA 3539 and 3558. Again, many of these interrogatories included document production requests. Pursuant to CBCA Rule 14, the VA's responses to these second sets of discovery requests were due on November 17, 2014.

Counsel for the VA sent an e-mail message to counsel for Kepa on October 24, 2014, requesting a telephonic conference to discuss the discovery requests, and counsel for the parties, as well as counsel for one of Kepa's subcontractors, Poettker Construction Company (Poettker), participated in that conference on October 28, 2014. During that call, the parties agreed that the VA would respond to three sets of the "First Set of Interrogatories and Requests for Production" – the "All Claims" set, plus the sets dealing with the "Late Delivery of Site Claim" (CBCA 2727) and the "Pay Application Claim" (CBCA 3461) – by November 6, 2014. They also agreed that the VA would respond to those requests dealing with seven claims at issue in CBCA 3539 by November 13, 2014, and to all of the remaining requests by November 21, 2014.

On November 5, 2014, the VA provided written responses to the two sets of discovery requests: the "All Claims" discovery set and the "Late Delivery of Site Claim" set applicable to CBCA 2727. Nevertheless, it objected to some of the requests, including those that requested specific information about particular Government employees as well as production of those employees' personal employment files (to include performance evaluations and "descriptions as to any reprimands, disciplinary measures, performance problems or misconduct"). Citing the Privacy Act of 1974, 5 U.S.C. § 552a (2012), the VA declined to

provide that information or to produce the requested personal employment files. Counsel for the VA represented in the e-mail message forwarding these two sets of discovery responses that the responses to the "Pay Application Claim" (CBCA 3461) "is forthcoming."

By letter dated November 11, 2014, counsel for Kepa sent a "meet and confer" letter to the VA, objecting to what it described as the VA's "incomplete and inadequate responses" to the "All Claims" and "Late Delivery of Site Claim" interrogatories and document production requests. It also noted that the VA had waived its right to object to any of the requests because, under CBCA Rule 13(f)(2), any objections had to have been lodged within fifteen calendar days of the VA's receipt of the discovery requests. Counsel for Kepa also complained that, despite the parties' prior agreement that the VA would respond to the "Pay Application Claim" (CBCA 3461) by November 6, 2014, no responses had been received.

On November 14, 2014, counsel for Kepa sent an e-mail message to counsel for the VA, again complaining about the lack of response to the "Pay Application Claim" discovery requests and also complaining that the VA had not responded to the requests relating to CBCA 3539 by November 13, 2014, as the parties had previously agreed. Counsel for Kepa requested a meeting to be held no later than November 19, 2014.

By e-mail message dated November 20, 2014, counsel for the VA informed counsel for Kepa that, after talking with necessary parties on the remaining interrogatories, "it looks like VA will be able to respond to all interrogatories and request for production of documents between December 1-5." Counsel indicated that it was the VA's intention to submit the responses on a rolling basis as they were completed. Counsel subsequently indicated that she was going to speak with her client to try to develop a more concrete schedule for responses.

On November 26, 2014, Kepa filed a motion to compel responses to all of its interrogatories and document production requests. Kepa has asserted in its motion to compel that these interrogatories and document production requests are necessary "to meet basic discovery needs" and that the total number of interrogatories equates to approximately twenty-three requests per claim. Appellant's Motion to Compel at 1. It further asserted that "this is not an unreasonable number of requests for a set of eight appeals involving 24 claims." *Id.* at 9. It argued that "the VA has no reason to be surprised by this discovery" because "[m]any of these issues have been pending before the VA – either as requests for information, proposals, claims or contract appeals – for over three years." *Id.* Kepa represented that "[i]t was made clear to [Kepa] during contract performance that the VA's client has no respect for deadlines" and that Kepa has "borne the cost of the VA's inaction for too long." *Id.*

By letter to the Board dated December 3, 2014, the VA requested an extension of time to respond to 506 of the interrogatories and document production requests, to and including February 16, 2015, and it requested a discovery conference with the Board. The VA asserted that, although it had attempted to work out a reasonable schedule with Kepa, the appellant had refused to consider any plan that did not result in complete and final responses to all discovery requests by November 21, 2014. The VA further asserted that, based upon its further review of the volume and scope of the requests, a complete response to all of the requests within the time frames contemplated by the Board's rules was impossible.

On December 8, 2014, the Board conducted a telephonic status conference with counsel for the VA, for Kepa, and for Kepa's subcontractor, Poettker. Following that conference call, the Board ordered the VA to develop a proposed plan for responding to Kepa's interrogatories and document production requests on a time-staggered or rolling basis, identifying realistic deadlines for responding to each set of the written discovery requests, and to confer with counsel for Kepa about that plan. In addition, the Board indicated that, notwithstanding Kepa's objections to the timeliness of their identification under CBCA Rule 13(f), the VA should be prepared at a subsequent status conference to discuss any concerns about overbreadth of the written discovery requests.

The VA provided the Board with a proposed interrogatory response schedule on December 15, 2014. It indicated its intent to make documents available to counsel for Kepa for review on site at the Abraham Lincoln National Cemetery beginning January 20, 2015 (a date that, as reflected in Kepa's most recent letter to the Board, the parties have apparently agreed to change to February 19, 2015), but suggested that the VA should be allowed to respond to one set of written interrogatories each week, through and including June 19, 2015.

Between January 5 and February 11, 2015, each party submitted several additional letters to the Board, with Kepa identifying additional objections to the VA's discovery responses and the VA requesting an enlargement of its expert witness report due date.

Discussion

I. The Time Limit for Responding to Kepa's 557 Interrogatories

Like its predecessor boards, this Board "endorses and encourages liberal, voluntary discovery between the parties and, ordinarily, where it appears the [information and] documents sought are relevant to the matters in dispute or reasonably calculated to lead to the discovery of admissible evidence, the discovery motion will be granted, unless its allowance would be prejudicial, oppressive, embarrassing, or annoying to the parties affected thereby." *Essex Electro Engineers, Inc.*, DOT CAB 1025, 79-2 BCA ¶ 14,158, at 69,710;

see Southwest Marine, Inc., DOT CAB 1497, et al., 86-2 BCA ¶ 18,773, at 94,548 ("In an effort to discourage surprise and achieve the just and inexpensive determination of appeals without unnecessary delay, this Board endorses and encourages liberal, voluntary discovery between the parties."). In that regard, we interpret CBCA Rules 13, 14, and 15, which address our discovery procedures, "to be as broad in [breadth] as the discovery procedures cognizable under the Federal Rules of Civil Procedure." *Essex Electro*, 79-2 BCA at 69,910.

Written interrogatories, a discovery tool permitted in cases before the Board through CBCA Rule 14(a), can be, when properly utilized, "an effective way to obtain simple facts, to narrow the issues by securing admissions from the other party, and to obtain information needed in order to make use of the other discovery procedures." 8B Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice & Procedure* § 2163, at 8 (3d ed. 2010). Essentially, their purpose is "to enable a party to prepare for trial, to . . . help determine what evidence will be needed at the trial, and to reduce the possibility of surprise at trial." *Id.* § 2162, at 5; *see Tranco Industries, Inc.*, AGBCA 77-151, 78-2 BCA ¶ 13,498, at 66,065 (the most "compelling purpose" of interrogatories "is to narrow the issues at the trial and thereby eliminate unnecessary introduction of evidence and testimony at the trial"). Accordingly, as Kepa has done here, "a party may propound interrogatories calling for the disclosure of the opposing party's specific position as to the facts underlying his claim, notwithstanding that such facts, divorced from their application to the legal principles governing the case, may already be known or accessible to the propounding party." *Tranco Industries*, 78-2 BCA at 66,065 (quoting *United States v. Beatrice Foods Co.*, 52 F.R.D. 14, 19 (D. Minn. 1971)).

Nevertheless, "these rules have boundaries and limitations." *Tranco Industries*, 78-2 BCA at 66,065. "[T]he device [of written interrogatories] can be costly and may be used as a means of harassment." Committee Notes, Proposed Amendments to the Federal Rules of Civil Procedure and Forms, 146 F.R.D. 535, 675 (Apr. 15, 1992). That is because, although "[t]here is no significant expense for the party sending the interrogatories except for the time spent in preparing the questions," *Restatement (Second) of Contracts* § 2163, at 7 (3d ed. 2010), the responding party, who "generally must make efforts to obtain desired information," *id.*, may have to expend substantial time, effort, and cost to develop responses through investigation, document search and review, and fact witness interviews. In part because of the possibility of abuse, *see* 146 F.R.D. at 675, Federal courts have imposed a presumptive limit of twenty-five interrogatories (including all discrete subparts) in any case, subject to the court's right to order or the parties' right to stipulate to a different number. *See* Fed. R. Civ. P. 33(a)(1). The aim in requiring court permission to exceed this numerical limit "is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device." 146 F.R.D. at 676.

Unlike the Federal Rules of Civil Procedure, CBCA Rule 14(a), through which the Board permits the use of interrogatories, does not impose any express limit on the permissible number of interrogatories that a party can serve, but that does not mean that the Board is powerless to deal with abuses of the interrogatory process. Under CBCA Rule 13(f)(1), "the Board, on motion or on its own initiative, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" in the discovery process. *Cf. Peter Kiewit Sons' Co.*, IBCA 3535-95, et al., 00-2 BCA ¶ 31,019, at 153,195 ("the Board may limit the scope of discovery to protect a party from undue burden or expense"); *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA 22645, 78-2 BCA ¶ 13,350, at 65,261 (the Board has discretionary authority to issue "protective order to narrow the range of discovery," when appropriate). Such actions could include limiting the number of permissible interrogatories, limiting the scope of interrogatories, or providing additional time for response.

Here, the VA has not asked us to limit the number or general scope of Kepa's interrogatories. Based upon our review of Kepa's 557 interrogatories, there appears to be nothing particularly unusual about most of the individual requests, as they generally focus, with some exceptions, upon such information as the names and addresses of pertinent fact witnesses, the VA's position on particular fact issues, and the bases for the VA's positions. Further, there are twenty-four claims at issue in these cases, and although they each arise under the same contract and may have to be evaluated against each other to preclude any duplicate recoveries, each appears to involve specific facts that apply only to that claim. Kepa is entitled to adequate discovery on each of its claims.

The VA's concern here is with the timing, not the scope, of the voluminous interrogatories and accompanying document production requests. The agency complains about the very limited time that the VA was given to respond to them, particularly where Kepa could have started its discovery much earlier than it did. We have to agree with the VA that, in light of the expedited manner in which Kepa had asked for these consolidated cases to proceed, Kepa's decision then to serve 557 interrogatories in a one-week period, with accompanying document production requests, on the VA when the VA was about to receive Kepa's expert witness report – to which the VA was to respond in an expedited time frame – and during which time the VA would have to take and complete any discovery that its own expert might need was unduly burdensome. Kepa had months – in fact, more than two years – to take most of the discovery that it was seeking. Even though the Board (at the parties' request) issued a stay of proceedings at various times in these cases to permit Kepa to get all of its claims before the Board, there is no reason that, had the Board known of Kepa's intention to take extensive discovery on each individual claim in these cases, it would not have permitted Kepa to commence some discovery on a seriatim claim-by-claim basis during those stays. Further, there were extensive periods – from May 2012 through March 2013,

and again from January 2014 to the present – when there was no stay of proceedings. Yet, Kepa delayed beginning any discovery until October 2014, after it had an expedited schedule in place, before delivering its massive set of interrogatories upon the VA, with a demand of quick compliance. A disinterested third party might cynically view the timing of Kepa's delivery of 557 interrogatories – served only after Kepa obtained agreement on an expedited discovery and hearing schedule – as intended to harass the VA and to preclude the VA from having time adequately to develop any defenses to Kepa's claims. We need not, and do not, impugn Kepa's motives, however – most of the requested discovery, despite its volume, is well within the bounds of typical discovery, and Kepa most likely just did not focus on its discovery needs until late in the process. Ill motives are not necessary to grant the VA relief. It is enough simply that the timing of the delivery of Kepa's extensive written discovery had the effect of adversely impacting the VA's ability to respond in a timely manner while simultaneously having to develop its own case.

We recognize that some of the problems with discovery here clearly are the fault of the VA. Counsel for the VA seemingly agreed to various deadlines for responding to Kepa's written discovery that were, on their face, clearly unrealistic. Had the VA brought to the Board's attention the scope and size of Kepa's discovery requests soon after they were served, the Board could more quickly have recognized the inconsistency between the numerosity and scope of those requests, on the one hand, and the aggressive and expedited schedule that Kepa requested for these cases, on the other. Further, the VA not only agreed to unrealistic deadlines, but failed to make timely enlargement requests to the Board when it was unable to meet those deadlines, instead just letting the deadlines pass. Pursuant to CBCA Rule 3(b), any time that a party anticipates that it will not be able to meet a deadline imposed by the Board's rules or by an order issued in a case, it must request an enlargement of time from the Board unless the Board's rules permit a particular enlargement by agreement of the parties. To be timely, the enlargement request must be filed *before* the current due date for which the enlargement is being sought. In fact, an enlargement request should be filed as soon as practicable after a party knows that it will not be able to meet an ordered deadline. Although CBCA Rule 3(b) permits the Board to grant an enlargement of time "even though the request was filed after the time for taking the required action expired," the requesting party generally "must show good cause for its inability to make the request before that time expired." Here, the VA's failures to meet deadlines to which it had agreed, followed by temporary silence, is almost inexplicable. We can only speculate that the VA felt overwhelmed by the massive number of requests and, while trying to be responsive, did not appreciate the complexity of the necessary responses.

Normally, we might not be particularly forgiving of a party that agreed to specific deadlines and then seemingly ignored them. Here, though, we are convinced that the agency is attempting in good faith to comply with its obligations, even if its efforts are imperfect.

Nevertheless, the amount of time that the agency is seeking – until June 2015 – for completing its responses is far too long. Although Kepa's requests are lengthy, the VA has been responding to them on a rolling basis since November 2014, and it has identified no reason that, while continuing that rolling process, it cannot complete all written discovery responses by the end of the next month. We grant Kepa's motion to compel to the extent that we order the VA to complete its responses to all of the written discovery that Kepa served on October 10 and 17, 2014, no later than March 27, 2015.

II. Kepa's Specific Objections to the VA's Responses

A. Kepa's Request for Employee Personnel Files

In addition to seeking complete responses to its interrogatories and document production requests, Kepa also objects to some of the responses that the agency has already provided to the "All Claims" interrogatory set. In several of its interrogatories (including Interrogatory Nos. 14 to 19), Kepa has requested copies of several agency employees' personal employment files, including, but not limited to, "all performance evaluations" for each employee and "descriptions as to any reprimands, disciplinary measures, performance problems or misconduct." The agency has objected to these requests, citing to the Privacy Act, which provides that "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be" in accordance with one or more of twelve listed statutory exceptions.[2] 5 U.S.C. § 552a(b).

The Privacy Act "safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records." *Bartel v.*

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[2] Kepa asserts that the VA waived its right to object to these requests because, pursuant to CBCA Rule 13(f)(2), "any objection to a discovery request must be filed within 15 calendar days after receipt." Subsections (1) and (2) of Rule 13(f) permit the Board to modify that deadline where circumstances warrant. Here, given the volume of Kepa's discovery requests, it would be unreasonable to expect the VA to identify every objection that it might have to each of Kepa's 557 requests within fifteen days of receipt. In these circumstances, and considering the Privacy Act implications of the requested material, we exercise our discretion to find that the VA has not waived its objections. Consistent with the Federal Rules of Civil Procedure, we will find the VA's objections to Kepa's discovery requests timely in these cases if the objections are identified in the VA's responses to the written requests.

Federal Aviation Administration, 725 F.2d 1403, 1407 (D.C. Cir. 1984). Although violation of the Privacy Act is a potentially serious matter, given that the Act includes criminal penalties for improper disclosures of protected information, 5 U.S.C. § 552a(i)(1), the statute does not create an evidentiary privilege precluding disclosure in litigation. *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987). Further, one of the statutory exceptions to the Privacy Act's restrictions relates to disclosures of information that constitute a "routine use as defined in subsection (a)(7)" of the Act. 5 U.S.C. § 552a(b)(3). Numerous agencies have defined presentation of relevant material to administrative tribunals, which would include this Board, during the conduct of civil litigation as a "routine use" of information that falls within this exception, sometimes even expressly mentioning the agency's ability to produce such information to opposing counsel in response to civil discovery before such tribunals (so long as the agency determines that the information is relevant). *See*, *e.g.*, 80 Fed. Reg. 4637, 4638 (Jan. 28, 2015) (Department of the Treasury); 80 Fed. Reg. 239, 239-40 (Jan. 5, 2015) (Department of Homeland Security); 79 Fed. Reg. 78,839, 78,840 (Dec. 31, 2014) (Bureau of Consumer Financial Protection); 79 Fed. Reg. 70,181, 70,183 (Nov. 25, 2014) (Federal Housing Finance Agency); 79 Fed. Reg. 61,599, 61,600 (Oct. 14, 2014) (Department of Commerce). *See generally MacGregor Triangle Co.*, AGBCA 82-111-1, 83-1 BCA ¶ 16,498, at 81,993 (based on Department of Agriculture regulation, "[i]t is beyond question that matters before this Board would be included as a routine use"); *Pippinger v. Rubin*, 129 F.3d 519, 532 (10th Cir. 1997) (discussing "routine use" of Privacy Act material in administrative proceedings). The VA itself permits such production, defining a "routine use" as a disclosure of information "in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records." 78 Fed. Reg. 76,897, 76,898-99 (Dec. 19, 2013). As a result, the Privacy Act is not necessarily a bar to production in discovery before the Board.

Nevertheless, before the "routine use" exception will apply, the material has to be relevant to the matters pending before the Board. Further, "although the Privacy Act, 5 U.S.C. § 552a, [does] not create a qualified discovery privilege, the fact that a document [is] subject to the Act [is] not 'irrelevant to the manner in which discovery should proceed,'" *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1216 (D.C. Cir. 2004) (quoting *Laxalt*, 809 F.2d at 889); *see Marozsan v. Veterans Administration*, No. S84-500, 1991 WL 441905, at *3 (N.D. Ind. June 24, 1991) ("[c]overage of the Privacy Act . . . is not irrelevant to the determination of discoverability under the Federal Rules of Civil Procedure"). With regard to a request for production of an agency's employee performance evaluations, one of our predecessor boards opined that it "taxe[s] one's imagination to comprehend how those reports could be 'reasonably calculated to lead to the discovery of admissible evidence' under Fed. R. Civ. P. 26(b)(1)" in a contract dispute. *Federal Data Corp.*, DOT BCA 2389, 91-3

BCA ¶ 24,063, at 120,465 n.7. Even though Kepa asserts that this information is necessary for it to prove "a pattern of persistent VA interference, negligent administration, harassment of personnel, and obstructive project oversight," *see* Letter to the Board at 2 (Jan. 5, 2015), it has not explained how a broad and wholesale review of VA employee personnel files will assist in that effort, and the production requests are not narrowly tailored to target such information. Instead, this type of broad request for employee personnel files appears more like a fishing expedition for information to embarrass or harass the employees at issue. We agree with the explanation of one of our predecessor boards in denying a request for production of such files:

> [W]e fail to see even remotely how disclosure of such performance ratings would be either germane or material to the issues in dispute or would lead to the discovery of material evidence. For if it is intended to show by such information that any of the employees in question may have been lacking in the requisite competence to properly execute their assigned inspection or other duties, it would be sufficient merely to show that their decisions were erroneous and exacted more of appellant than was contractually required of it. This can be done by simply comparing the requirements of the contract against the decisions that were made. Accordingly, while the Government is obliged to comply with appellant's request relative to the job descriptions, duties and authority of the identified persons, good cause has not been shown as would warrant its compliance with the request to furnish the performance evaluations and ratings of such employees; in fact, we find no warrant in the law to permit such request.

Essex Electro, 79-2 BCA at 69,710. We will not require the VA to produce such information.

That being said, the VA has mistakenly applied the Privacy Act to one aspect of Kepa's requests. The VA has asserted in response to Kepa's interrogatories that the names and last known duty stations of certain employees' supervisors are subject to the Privacy Act. Congress did not intend the Privacy Act to prohibit the disclosure to the public of information such as "names, titles, salaries, and duty stations of most Federal employees." H.R. Rep. No. 93-1416, at 13 (Oct. 2, 1974), *quoted in Greentree v. United States Customs Service*, 674 F.2d 74, 82 (D.C. Cir. 1982); *see National Western Life Insurance Co. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) ("It cannot be seriously contended that postal employees have an expectation of privacy with respect to their names and duty stations."). Although it seems that a list of particular employees' supervisors is of limited relevance and value in the circumstances here, we cannot say that it is so far outside the realm of permissible discovery that the VA should not have to produce those names and last-known VA duty station

addresses. We grant Kepa's motion to compel production of those names and last-known duty station addresses.

B. Additional Objections to the VA's Responses

In Interrogatory Nos. 1 and 2 of its "All Claims" set of interrogatories, Kepa asked the VA to identify "all current or former Government personnel," as well as "all current or former Cemetery personnel," who were "involved in any way with the Contract." In its interrogatory instructions, Kepa defined the word "identify" as including "the name and address of his or her employer at the time referred to in your answer and at the present time," as well as each individual's current residential address. The VA has listed numerous individuals in response to these two interrogatories, with their job titles for the project, descriptions of their responsibility, and, for those that are currently employed with the VA, a current VA business address.[3] Kepa complains that the VA has not identified the current employers, employer addresses, or residential addresses for former VA employees, which it needs to know "for purposes of planning discovery and other discovery." It is clear that such information is covered by the Privacy Act. *See United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 493-502 (1994) (discussing Privacy Act coverage of employee home addresses and telephone numbers).[4] It is unclear, however, whether disclosure of such information for former employees on the VA's list would constitute a "routine use" under the Privacy Act exceptions. At least one court has indicated that it does not, at least where there are "adequate alternative means to communicate with [such] employees." *Federal Labor Relations Authority v. Department of the Navy, Naval Communications Unit*, 941 F.2d 49, 60 (1st Cir. 1991). As previously discussed, even

[3] Kepa complains that it is unclear whether the individuals for whom the VA has provided business addresses are current VA employees. Although we agree that the written interrogatory responses themselves are a bit unclear, the VA has represented to the Board that, unless the response identifies a listed individual as a "former" employee, the individual is a current VA employee, and the address is the individual's VA business address. To ensure the completeness of the VA's responses, if any of the individuals identified in response to Interrogatory Nos. 1 and 2 are former employees but are not currently designated in the responses as "former," the VA shall amend its responses to correct those omissions, and it should identify each former employee's last-known business address before leaving the VA.

[4] In addition to asking for former employee residential information, Kepa has asked for current VA employee residential information. Because it already has current VA employees' business contact information, disclosure of Privacy Act-protected home addresses and telephone numbers is unnecessary.

though there is no specific evidentiary privilege for materials subject to the Privacy Act, we must be cognizant of the Act's purposes when ordering discovery. *Sealed Case*, 381 F.3d at 1216. Without more thorough briefing on this issue, we will not at this stage of litigation require the VA to produce, on a wholesale basis, current contact information – through either identification of current employers or through disclosure of residential information – for former VA employees. If Kepa, after reviewing the VA's discovery production, decides that contact with particular former employees is necessary to its case, Kepa should contact the VA to evaluate potential alternative means for communicating with the individual(s) before seeking further relief from the Board.

Kepa complains that, in response to Interrogatory Nos. 5, 8, 9, and 10 of the "All Claims" set, it is not clear what documents the VA intends to produce during Kepa's review on-site at the Abraham Lincoln National Cemetery in Illinois beginning February 19. *See* Letter to the Board at 2 (Jan. 5, 2015). In its response, consistent with representations made during a December 2014 status conference, the VA indicated that it has already produced logs and reports responsive to the interrogatories electronically and that it intends to ship hard copy materials to the project site in Illinois so that Kepa can review both Central Office files and project site files together in one location. Under CBCA Rule 13(f)(3), a party is required to represent that it has tried in good faith, prior to seeking the Board's resolution of a discovery dispute, to resolve the matter informally with the other party. Where the parties actually discussed this very issue with the Board in December 2014 and the agency made representations addressing appellant's concerns, there seems to be no basis for appellant subsequently to request some type of Board resolution of an apparent non-issue.

Conversely, Kepa complains that, although the VA has agreed to produce handwritten notebooks and logs of VA Central Office employees at the Illinois project site, it "remains unclear" whether the VA will be producing similar documents from VA personnel outside the VA Central Office. Letter to the Board at 2 (Feb. 11, 2015). Again, Kepa did not represent that, consistent with the requirements of CBCA Rule 13(f)(3), there is a live dispute between the parties on these issues, and it appears from the e-mail messages attached to Kepa's letter that this issue is one still being discussed by the parties. We will not intervene in those discussions prior to an actual dispute. Although Kepa asserts that it needs to know what will be produced at the project site when its counsel travels to review documents on February 19, it seems fairly simple, to the extent that there are responsive documents that the VA does not actually produce during counsel's visit, for the VA directly to provide counsel with copies of those documents after the site visit. The fact that Kepa's counsel is about to travel does not somehow change the requirements of Rule 13(f)(3).

Kepa also asserts that the VA is refusing to produce any pre-award documents in response to Interrogatory No. 5 "because they might contain proprietary or source selection

sensitive information." Letter to the Board at 2 (Feb. 11, 2015) (emphasis in original). Kepa does not explain what type of pre-award information it is seeking. To the extent that it wants copies of all other bidders' proposals for this procurement, Kepa has not identified why such information would be relevant to its contract performance claims, and, even if there is no specific applicable evidentiary privilege, "the Government has a legitimate interest in limiting disclosure of proprietary information between bidders." *Metric Systems Corp. v. United States*, 13 Cl. Ct. 504, 506 (1987) (citing *CACI Field Services, Inc. v. United States*, 12 Cl. Ct. 440, 442-45 (1987)). If Kepa is seeking internal VA documents, some of that material might be subject to a claim of deliberative process privilege, were the VA to elect to take the steps necessary to invoke that privilege. *See generally Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (discussing the deliberative process privilege). To the extent that there is proprietary or sensitive information that is responsive to Kepa's requests that is not privileged, the VA might produce the information subject to a protective order limiting the manner in which such information is distributed and used. *See Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 611, 614 (2004) (creating protective order applicable to use of proprietary information). Without knowledge of the type or scope of information that Kepa is seeking, we have no basis for ruling on Kepa's objection to non-production. To the extent that Kepa wishes to pursue this issue, it will need to file a more detailed motion explaining the requested documents' relevance and the reasons that the VA's stated objections are inappropriate.

Kepa also states that, in response to Interrogatory Nos. 14 through 19 of the "All Claims" interrogatories, the VA had agreed to provide employment history for the identified individuals for a ten-year period prior to the start of the contract. Kepa complains that, for four individuals, the identified employment history does not go back ten years. The VA responded that it provided individuals' ten-year VA project history, which is what the VA thought the parties had agreed, but that some of the individuals have not been with the VA for ten years. The information that the VA has provided about each individual is fairly extensive, and the agency has no obligation to attempt to obtain information from its employees about their employment histories prior to their work with the Federal Government. *See Payer, Hewitt & Co. v. Bellanca Corp.*, 26 F.R.D. 219, 222 (D. Del. 1960) (in responding to interrogatories, corporation had no obligation to obtain information from corporate officer regarding officer's personal business transactions about which corporation had no knowledge). Given the previously discussed Privacy Act considerations that would apply to pre-Federal service employment histories that the VA may possess, we believe that what the VA has provided is sufficient, particularly in light of the lack of identified relevance of those histories to the contract disputes at issue in these cases.

III. The VA's Expert Witness Report Deadline, and the Discovery Schedule

Kepa has asked us to require the VA to produce its expert witness report(s) immediately. Pursuant to the Board's order dated October 22, 2014, Kepa disclosed its expert report to the VA on November 21, 2014, and the VA's responsive expert reports, if any, were due by January 12, 2015. Before the due date for its expert reports, the VA requested an enlargement of time for submitting its reports. In supplemental filings, the VA expanded upon its initial enlargement request, indicating that the Office of Inspector General, which is conducting an audit of Kepa's claims at counsel's request, needed two to three months to complete its work, and further indicating that the VA intends to provide an additional expert report from an outside consultant, which also needs approximately three months to complete its work. Kepa opposes any enlargement of the VA's time, asserting that it would be "patently unfair that [Kepa was] required to submit [its] expert report at such an early stage in discovery if the VA is not going to be held to the same standard." Letter to the Board at 3 (Jan. 5, 2015). It complains that one of the main reasons that the VA needs an enlargement for its expert reports is because the VA delayed in beginning the process of obtaining experts.

It is obvious from the filings in these cases and from the Board's past conferences with the parties that the VA unnecessarily delayed putting its experts in place, and there would be some unfairness in rewarding the VA's delay through an extensive time enlargement. Nevertheless, the expedited schedule that the Board put in place largely at Kepa's insistence is clearly not going to work. The Board did not anticipate service of a large volume of interrogatories and document production requests when it agreed to enter an aggressive schedule, and the agency's need for adequate time not only to respond to all of that written discovery, but to prepare its own case, cannot fairly fit within the existing schedule. Further, the existence of a scheduled hearing date means that the parties, and the Board, must now fit numerous activities – not only the outstanding written discovery, but depositions, pre-hearing motions, and pre-hearing briefing – into a compacted time frame. In fact, as far as the Board is aware, the parties have not yet discussed depositions of fact and expert witnesses, which presumably will not occur until the pending written discovery responses and document production are complete or near completion. Accordingly, the Board, on its own motion, hereby **VACATES** the pre-hearing schedule and hearing date contained in its September 10 and October 22, 2014, orders.[5] The Board will set a new hearing date, as well as new deadlines for the submission of pre-hearing filings, after the completion of discovery.

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[5] Specifically, the Board **VACATES** paragraphs 3(C), 3(D), and 3(E) of its October 22, 2014, order and **VACATES** its September 10, 2014, order in its entirety.

Further, the Board believes it appropriate to establish new deadlines for expert witness reports and for the close of discovery, unrelated to the specific enlargement request that the VA seeks. As previously discussed, one of the main purposes of interrogatories is to narrow issues for trial and to "eliminate unnecessary introduction of evidence and testimony at trial." *Tranco Industries*, 78-2 BCA at 66,065. Assuming that Kepa's written discovery is in line with that purpose, as it must be, Kepa will likely want its expert witness to consider the breadth of evidentiary material that Kepa has received and will be receiving in forming his opinions, particularly since the expert witness report that Kepa submitted to the Board on November 21, 2014, is a schedule and delay analysis that appears highly dependent upon factual information relating to events that occurred during performance of the contract. To provide Kepa's expert with that opportunity in the circumstances here, we will allow Kepa to submit an updated or supplemental expert report after it has received the VA's written discovery responses and had an opportunity to take whatever depositions it desires, as well as to submit any additional expert reports that it determines appropriate. Because the VA has has had the benefit of reviewing Kepa's existing expert report since late November 2014, and because any updated or supplemental report presumably will have strong similarities to the original report, the VA should be able to submit its own reports a short time thereafter.

Although Kepa complains about the unfairness of requiring it to submit an expert report early in the discovery process when the VA will not have to do that, Kepa's early report deadline was scheduled at Kepa's request, not on the Board's initiative, because Kepa wanted an expedited schedule. Yet, despite its desire for acceleration, Kepa delayed serving its extensive written discovery until October 2014, even though it could have started its discovery on a staggered claim-by-claim basis as early as May 2012. It is, in part, the volume of discovery requested all at one time that has caused the process back-up that we are now experiencing. In any event, "[t]he purpose of admitting the testimony of an expert witness is, of course, to assist the [tribunal] in understanding the evidence or to determine a fact in issue." *Moe v. Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 929 (10th Cir. 1984). The Board will not be assisted by requiring the VA to submit a hastily assembled expert report now, followed by a supplement from Kepa's expert after discovery is complete that changes some opinions and adds others, followed by further supplements from the experts as more information becomes available. The purpose of these proceedings is to obtain a thorough airing of the facts associated with Kepa's delay claims, rather than to use procedural tactics to inhibit what evidence is evaluated and presented. With a new schedule that allows the parties to complete discovery and prepare thoughtful and responsive expert analyses, the Board will be in a better position to understand the facts as they occurred during the progress of this project and to reach a reasoned decision.

Based on the foregoing, the Board amends the deadlines contained in paragraph 3(A) of its order dated October 22, 2014, as follows: (1) no later than **Tuesday, April 28, 2015**,

appellant may file a supplement to its existing expert report, or may replace its expert report in its entirety, and it can file additional expert reports if, during discovery, it determines that it wishes to rely upon additional expert testimony; and (2) to the extent that it intends to use the testimony of experts, the VA will disclose to Kepa the identity of any such expert, along with a written report (prepared and signed by the expert) containing the information identified in Federal Rule of Civil Procedure 26(a)(2)(B), no later than **Friday, May 29, 2015**. In addition, the Board amends paragraph 3(B) of its October 22, 2014, order to reflect that voluntary fact and expert discovery in these cases will conclude by **Friday, June 26, 2015**.

Decision

For the foregoing reasons, the Board **GRANTS IN PART** Kepa's motion to compel, **GRANTS IN PART** the VA's motion for an enlargement of time, and otherwise **AMENDS** the schedule in this case as follows:

(1) The VA shall supplement its existing responses to Interrogatory Nos. 14 through 19 of the "All Claims" set of interrogatories to disclose supervisors' names and last-known duty station addresses, and shall supplement its existing responses to Interrogatory Nos. 1 and 2 of its "All Claims" interrogatories (if necessary) to designate any former employees as "former," no later than **Friday, March 27, 2015**.

(2) The VA shall complete its responses to Kepa's 557 interrogatories no later than **Friday, March 27, 2015**. In responding to those interrogatories, the VA shall not be required to produce any employee personnel files, performance evaluations, or descriptions of employee reprimands, disciplinary measures, performance problems, or misconduct.

(3) The Board **AMENDS** paragraphs 3(A) and 3(B) of its October 22, 2014, order to reflect that Kepa's supplemental or updated expert report(s) are due no later than **Monday, April 27, 2015**; the VA's expert report(s) are due no later than **Friday, May 29, 2015**; and voluntary discovery in these cases will conclude no later than **Friday, June 26, 2015**.

(4) The Board **VACATES** its September 10, 2014, order in its entirety and **VACATES** paragraphs 3(C), 3(D), and 3(E) of its October 22, 2014, order. The Board will set a new hearing date, as well as new deadlines

for the submission of pre-hearing filings, after the completion of discovery.

Kepa's motion to compel and the VA's motion for an enlargement are otherwise **DENIED**.

HAROLD D. LESTER, JR.
Board Judge