

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

E-Filed: January 11, 2012

_____)	
NATHAN HOUSE,)	
)	
)	No. 99-406V
Petitioner,)	
)	TO BE PUBLISHED
v.)	
)	Motion to Redact;
SECRETARY OF THE DEPARTMENT)	42 U.S.C. § 300aa-12(d)(4)(B);
OF HEALTH AND HUMAN SERVICES,)	Privacy; Medical Information
)	
Respondent.)	
_____)	

Clifford Shoemaker, Vienna, VA, for petitioner.

Lisa Watts, Washington, DC, for respondent.

ORDER DENYING PETITIONER’S MOTION TO REDACT¹

Campbell-Smith, Chief Special Master

On June 28, 1999, petitioner, Nathan House, filed a petition seeking compensation under the National Vaccine Injury Compensation Program² (the Vaccine Program or the

¹ Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this decision on the United States Court of Federal Claims’ website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. § 300aa-10 through § 300aa-34 (2006) (Vaccine Act or

Act). Petitioner claims that as a result of the hepatitis B vaccine series³ he received, he “experienced flu-like symptoms, joint pain, diarrhea and fever.” Petition (Pet.) at 1, ¶ 3. Petitioner asserts that his symptoms worsened after each vaccination and led to his development of Crohn’s disease. Id. at 1-2, ¶3.

On February 28, 2011, the undersigned issued a decision denying compensation in this matter, which was reissued on March 3, 2011, to include footnote 12, identifying Federal Circuit precedent addressing the meaning of term “substantial factor,” as used in the undersigned’s discussion of causation under the Vaccine Act.⁴

On March 14, 2011, petitioner filed a Motion to Redact Entitlement Decision (Motion to Redact) pursuant to Vaccine Rule 18(b). In his Motion, petitioner requested that:

his medical information and any information that could be construed as his medical information be redacted from the decision due to the personal nature of the medical information that is included in the decision that is an invasion of the Petitioner’s privacy.

Id. Petitioner’s counsel appended a proposed redacted decision to his filed motion. The proposed redacted decision removed all references to petitioner’s alleged vaccine-related injury, including all of his symptoms and diagnostic tests, as well as the medical specialty of respondent’s expert witness. Petitioner’s counsel did not submit any argument with the proposed redaction.

On March 30, 2011, petitioner’s counsel filed a Motion for Review of the undersigned’s entitlement decision denying compensation.⁵

the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

³ The dates of vaccination were September 9, 1993, October 22, 1993, and February 24, 1994.

⁴ On August 29, 2011, Judge George Miller reversed the undersigned’s decision denying compensation and remanded the claim for further proceedings. On November 14, 2011, the parties informed the undersigned that they had reached a tentative agreement in this case and requested the issuance of a 15-week order to allow for the filing of a stipulation.

⁵ Because the motion for review of the entitlement decision had been assigned to Judge Miller, the undersigned’s chambers inquired of Judge Miller’s chambers regarding

On April 6, 2011, the undersigned conducted a status conference with the parties to discuss petitioner's Motion to Redact.⁶ See Order filed April 8, 2011. During the status conference, respondent's counsel requested that petitioner articulate the basis for his redaction request. Respondent desired to file a meaningful response to the redaction motion, but could not address the motion in its conclusory form. See id.

In an effort to explain petitioner's position, petitioner's counsel referenced a decision issued by another court. Counsel believed the position taken by respondent in the other court demonstrated an inconsistency in respondent's position regarding what constitutes personal information. Id.

The undersigned ordered petitioner to file an amended redaction motion by April 22, 2011, to include as an attachment the decision that petitioner's counsel had referenced. Respondent was afforded until May 13, 2011 to file a response. Id.

On April 22, 2011, petitioner filed an Amended Motion to Redact Entitlement Decision (Amended Redaction Motion). Appended to the Amended Redaction Motion was a copy of a Memorandum Decision and Order issued in Long/Burnham v. Department of Justice, 778 F. Supp. 2d 222 (N.D.N.Y. 2011). The decision in Long/Burnham addresses plaintiff's request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for internal case management system data maintained for all Vaccine Program cases. The district court in Long/Burnham held that a non-party could not obtain the requested information under FOIA because section 12(d)(4)(A) of the Vaccine Act expressly prohibits disclosure of information submitted by a party in a vaccine proceeding absent consent from the submitting party.⁷

I. APPLICABLE LEGAL STANDARDS

Petitioner's amended motion for redaction of the undersigned's decision denying Program compensation must be considered in light of the applicable legal standards.

the pending motion for redaction. Judge Miller indicated that he had no objection to the undersigned entertaining the motion for redaction.

⁶ The order states that the status conference was conducted on April 8, 2011. However, the status conference was conducted on April 6, 2011.

⁷ The district court noted, however, that even if the requested information was not protected under Section 12(d)(4)(A), it would not be discoverable under FOIA because the information requested contained personal medical information. Long/Burnham, 778 F. Supp. 2d at 234-236.

The circumstances in which a special master may order redaction of a decision are addressed by section 12(d)(4)(B) of the Vaccine Act, Vaccine Rule 18(b),⁸ and the E-Government Act of 2002, Pub. L. No. 107–347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)), as implemented by the Rules of the Court of Federal Claims (“RCFC”).

1. The Vaccine Act

Section 12(d)(4) addresses the limitations on disclosures under the Vaccine Act. Section 12(d)(4)(A) of the Act prohibits disclosure to a non-party of information submitted during a vaccine proceeding to either a special master or the court, unless the person who submitted the information gives express written consent.⁹ The limitations on disclosure are different if the disclosure is contemplated in the context of a decision to be issued by either a special master or the court.¹⁰ Such limitations are set forth in section 12(d)(4)(B).

Section 12(d)(4)(B) of the Act provides that a decision issued in a vaccine proceeding, by either a special master or the court, must be disclosed unless that decision includes either: (i) trade secret or commercial or financial information that is privileged and confidential or (ii) medical files and similar files that, if disclosed, would constitute a clearly unwarranted invasion of privacy.¹¹ If the decision to be issued contains either of

⁸ As authorized under section 12(d)(2) of the Vaccine Act and on the recommendation of the special masters, the Court of Federal Claims has promulgated the Vaccine Rules that govern petitions filed under the Act.

⁹ Section 12(d)(4)(A) provides:

Except as provided in subparagraph (B), information submitted to a special master or the court in a proceeding on a petition may not be disclosed to a person who is not a party to the proceeding without the express written consent of the person who submitted the information.

42 U.S.C. § 300aa-12(d)(4)(A).

¹⁰ As set forth in section 12(d)(3)(A) of the Vaccine Act, a special master shall issue a decision in a vaccine proceeding that determines whether the petition merits compensation under the Program, and if so, the amount of such compensation. Such decision shall include findings of fact and conclusions of law. 42 U.S.C. § 300aa-12(d)(3)(A)(i).

¹¹ Section 12(d)(4)(B) provides:

the enumerated types of information and the person who submitted such information objects to the inclusion of the information in the decision, the Vaccine Act directs that “the decision shall be disclosed without such information.” 42 U.S.C. § 300aa-12(d)(3)(D)(4)(B).

The chief distinction between the two subsections addressing the limitations on disclosures appears to lie in whether the anticipated disclosure occurs in the context of an issued decision. In a circumstance involving the issuance of a vaccine decision, disclosure is favored unless proper grounds for a redaction can be established.

A detailed review and careful analysis of the legislative history and statutory amendments that have informed the purpose of section 12(d)(4) of the Act may be found in Castagna v. Secretary of Health and Human Services, No. 99–411V, 2011 WL 4348135, at *4-8 (Fed. Cl. Spec. Mstr. Aug. 25, 2011) (a damages decision in which a request to redact financial and medical information is denied). In that case, Special Master Lord found that:

Section 12(d)(4)(A) governs the proceedings before the special master, providing complete privacy protection: information submitted to a special master may not be disclosed to a third party. On the other hand, § 12(d)(4)(B), which governs a special master's decision, provides only limited privacy protection: a decision must be disclosed, but certain qualifying information may be redacted in some circumstances.

2011 WL 4348135, at *9. Because the undersigned agrees with, and adopts here, the reasoning outlined in Castagna, the undersigned too concludes that section 12(d)(4)(B) of the Vaccine Act affords “only limited privacy protection.” Id. To that end, a decision on

A decision of a special master or the court in a proceeding shall be disclosed, except that if the decision is to include information –

(i) which is trade secret or commercial or financial information which is privileged and confidential, or

(ii) which are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy,

and if the person who submitted such information objects to the inclusion of such information in the decision, the decision shall be disclosed without such information.

42 U.S.C. § 300aa-12(d)(4)(B).

a vaccine claim and the information that is germane to that decision must be disclosed unless certain information contained in the decision qualifies for redaction.

2. Vaccine Rule 18(b)

The language of Vaccine Rule 18(b), which governs the disclosure of vaccine decisions, parallels the statutory language. It provides that:

A decision of the special master or judge will be held for 14 days to afford each party an opportunity to object to the public disclosure of any information furnished by that party:

(1) that is trade secret or commercial or financial in substance and is privileged or confidential; or

(2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.

An objecting party must provide the court with a proposed redacted version of the decision. In the absence of an objection, the entire decision will be made public.

Vaccine Rule 18(b). This Vaccine Rule, similar to the statute, favors the disclosure of information in a decision unless the information falls into the specifically defined categories of information meriting redaction, when timely requested.

3. E-Government Act of 2002

Section 205 of the E-Government Act requires that all federal courts, including the Court of Federal Claims, establish and maintain a website that provides public access to “docket information for each case” and “[a]ccess to the substance of all written opinions issued by the court.” E-Government Act § 205(a). The statute also provides that documents filed electronically shall be publicly available online, unless the documents are not otherwise available to the public, such as documents filed under seal. § 205(c)(1)-(2). To protect privacy and security concerns, the statute directed the Supreme Court to prescribe rules regarding the electronic filing of documents that would provide for the redaction of certain categories of information. § 205(c)(3).

Rule 5.2 of the Federal Rules of Civil Procedure (FRCP) is the promulgated rule implementing privacy protection for filings made with the court. This rule became effective on December 1, 2007. FRCP 5.2.

Subsequently, on November 3, 2008, the Court of Federal Claims adopted a corresponding rule, also designated as Rule 5.2. Rules of the United States Court of

Federal Claims (RCFC) 5.2. This rule provides that an electronic or paper filing may be redacted if it contains an individual's social security number, taxpayer-identification number, birth date, financial account number, or the name of a minor. *Id.* at 5.2(a). Consistent with the implementation of § 205 of the E-Government Act by the Court of Federal Claims through RCFC 5.2, the Vaccine Rules were amended in July 2011 to permit the use of a minor's initials in the caption of a filed vaccine claim.¹² Vaccine Rule 16(b).

Petitioner's request for redaction is considered in light of the applicable legal standards.

II. ANALYSIS

Here, petitioner requests "all portions" of "the Ruling on Entitlement of the Special Master entered on February 28, 2011 and the reissued Ruling on Entitlement [dated] March 3, 20[1]1"¹³ that include "information from 'medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy,' be redacted." Amended Redaction Motion at 1. Appended to petitioner's amended redaction request is a decision containing petitioner's proposed redactions. Also appended to the redaction request is a copy of a decision and order issued by Chief Judge Norman Mordue of the United States District Court of the Northern District of New York in the matter of Long/Burnham v. Department of Justice, 778 F. Supp. 2d 222 (N.D.N.Y. 2011).

In the Long/Burnham case, the district court denied, on cross-summary judgment motions, plaintiff's FOIA request for certain information contained in the computerized case information system maintained by the litigating components of the Civil Division of the Department of Justice. The chief judge of the district court reasoned that the sought information – pertaining to the type of vaccine administered and the date of vaccine administration – was exempt from disclosure under FOIA exemptions 3 and 6, which respectively prohibit the disclosure of records "specifically exempted from disclosure by

¹² In Langland v. Secretary of Health and Human Services, No. 07–36V, 2011 WL 802695, at *4-5 (Fed. Cl. Spec. Mstr. Feb. 3, 2011), Special Master Lord carefully considered a request to redact the names of petitioners and their minor child, on whose behalf the vaccine claim had been filed. There, she provided an extensive discussion of the implementation of § 205 of the E-Government Act by the federal courts.

¹³ The date of the reissued Ruling on Entitlement appears in the Amended Redaction Motion as 2001, rather than 2011. Because the undersigned did not reissue the Ruling on Entitlement until March of 2011, the undersigned corrects that typographical error sua sponte.

statute” and the disclosure of “personnel and medical files and similar files . . . which would constitute a clearly unwarranted invasion of privacy.” See 5 U.S.C. § 552(b)(3), (6).¹⁴

Petitioner asserts in his Amended Redaction Motion that the question of what constitutes information from “medical files or similar files[,] the disclosure of which would constitute a clearly unwarranted invasion of privacy” under the Vaccine Act has been answered already in the cited (and supplied) Long/Burnham decision addressing a FOIA request. Amended Redaction Motion at 2. In support of his position, petitioner points to a declaration prepared in the Long/Burnham case by the Associate General Counsel for Public Health from the Department of Health and Human Services’ Office of General Counsel, in which the Associate General Counsel, Mr. David Benor, stated that public disclosure, pursuant to a FOIA request, of information pertaining to vaccine type and administration would contravene section 12(d)(4)(A) of the Vaccine Act. Id.

Petitioner contends that because the district court concluded in Long/Burnham that the public disclosure, pursuant to a FOIA request, of vaccine type and administration date would constitute a “clearly unwarranted invasion of personal privacy,” such reasoning should be imported and applied in this context to prevent the disclosure of the type of vaccine petitioner received and date of vaccine administration – among other details

¹⁴ In accordance with exemption 3 under FOIA, a federal agency need not make available for copying and public inspection any records that are:

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute –

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3).

Moreover, in accordance with exemption 6 under FOIA, a federal agency need not make available for copying and public inspection any records that are “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).

about petitioner’s vaccine claim – in the issued rulings denying Program compensation. See id. at 3-4.

In her response to petitioner’s Amended Redaction Motion (Respondent’s Response), the Secretary of the Department of Health and Human Services argues that petitioner’s reliance on the Long/Burnham decision is misplaced because the considerations informing disclosures within the context of a FOIA request are distinguishable from the considerations that inform the disclosure of information contained in a special master’s decision on a vaccine claim. Respondent’s Response at 3. The Secretary argues that the use of the compulsory phrase “shall be disclose[d]” in section 12(d)(4)(B) of the Vaccine Act requires disclosure of information contained in a decision issued in a vaccine proceeding unless that information is shown to meet certain criteria. Id. at 4.

The Secretary asserts that decisions issued in vaccine proceedings “must contain limited medical information concerning the underlying claim” that supports “why the special master either found in favor [of], or against, entitlement.” Id. The Secretary urges that the use of the qualifying term “unwarranted” in the phrase “‘clearly unwarranted’ invasion of privacy” reflects Congress’s acknowledgment that a vaccinee’s medical information will be disclosed in a decision on the issue of entitlement. Id. The Secretary adds that if a special master does not address the underlying factual record in an issued decision, he or she risks having the decision set aside by the reviewing court as “arbitrary, capricious, or otherwise not in accordance with the law.” Id. (quoting 42 U.S.C. § 300aa-12(e)(2)(B)).

The Secretary contends that here petitioner seeks to redact the information that is quintessential to the determination of whether the vaccine in question caused his injury, without articulating what “clearly unwarranted invasion of privacy . . . would follow from the disclosure of the information he seeks to redact.” Id. at 6. Absent any argument from petitioner – other than an effort to import an interpretation of Vaccine Act terms from the FOIA context – the Secretary urges the undersigned to deny petitioner’s request. Id. at 6-7.

In petitioner’s reply memorandum, petitioner reasserts the legal argument that the phrase “clearly unwarranted invasion of privacy,” as used in the Vaccine Act provision governing the disclosure of vaccine decisions, should be interpreted in the same manner as the terms have been interpreted in the FOIA context. Petitioner makes no fact-based argument in his particular case for redaction. Rather, petitioner makes a burden of proof argument, urging that the burden rests not with petitioner to provide a compelling reason for the redaction of medical record references from a decision but lies instead with respondent to show “what public interest is so compelling as to justify invading the privacy of a petitioner’s medical records.” Petitioner’s Reply to Respondent’s Response to Amended Motion to Redact Entitlement Decision (Petitioner’s Reply) at 2.

Petitioner’s arguments do not persuade the undersigned. Petitioner’s reliance on the Long/Burnham decision is misplaced. The outcome in that case is not dispositive of the question presented here. The Long/Burnham decision specifically addressed a request for the disclosure of vaccine claim information under FOIA and considered whether certain information provided in Vaccine Program proceedings was exempt from disclosure under FOIA. The distinction in purpose between the statutory schemes of the Vaccine Act and FOIA has been addressed comprehensively and persuasively in the earlier cited Castagna case, and while special masters “are neither bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand,” the undersigned agrees with and adopts the reasoning of Special Master Lord in Castagna. Hanlon v. Sec’y of Health and Human Servs., 40 Fed. Cl. 625, 630 (1998). In Castagna, Special Master Lord concluded that “[a] special master’s decision . . . is presumptively public[,]” and in the absence of “a timely and appropriate showing,” a redaction request must be denied. 2011 WL 4348135, at *1-2 (emphasis added).

Here, petitioner offers no reason why publication of his administered vaccines, his ensuing symptoms, and his alleged vaccine injury would constitute a “clearly unwarranted invasion of privacy.” Instead, petitioner urges that the disclosure of such medical information in a decision—the very information that supported petitioner’s claim for compensation and informed the undersigned’s decision that petitioner was not entitled to a damages award—necessarily constitutes a clearly unwarranted invasion of privacy unless respondent can demonstrate a compelling public interest for disclosing information obtained from petitioner’s medical records.¹⁵

¹⁵ Petitioner’s argument in this case seems to rely, without overt mention, on the reasoning outlined in the Court of Federal Claims’ decision, W.C. v. Secretary of Health and Human Services, 100 Fed. Cl. 440 (2011). In that case, the court first determined that the privacy provisions of FOIA should be construed “in concert” with the privacy provisions of the Vaccine Act because the terms of the privacy provisions mirror each other and, then, the court balanced petitioner’s interest in keeping either his name or his medical condition private due to his particular line of work against the public interest in the vaccine type that petitioner received and his alleged adverse reaction. Id. The court concluded that redaction of the petitioner’s name was proper but declined to redact the medical information contained in the decision. Id.

This case can be distinguished from that case. The petitioner in W.C. argued that his credibility as a court witness, an important aspect of his career, would be jeopardized by the disclosure of his medical condition in a vaccine decision and on that ground, he sought the redaction of information pertaining to his medical condition as a “clearly unwarranted invasion of privacy.” On review, the court fashioned a different remedy than that requested by petitioner. But, most importantly, for purposes of evaluating the

Petitioner attempts to flout the requirement – expressed in both the Vaccine Act’s privacy provisions and Vaccine Rule 18(b) – that a decision “shall be disclosed” unless certain information to be included in the decision is shown to qualify for redaction. As the party requesting redaction, petitioner bears the burden of making the appropriate showing, not respondent. However, petitioner has offered no argument that is specific to the facts of his case in support of his proposed redactions. That a fact-specific argument is appropriate when requesting redaction might be inferred from the Vaccine Act’s requirement that a special master include findings of fact and conclusions of law in a decision on whether a petition should be compensated under the Vaccine Program. See 42 U.S.C. § 300aa-12(d)(3)(A)(i). This statutory requirement concerning the content of a vaccine decision contemplates, as respondent noted in her briefing, that certain medical information pertinent to the evaluation of petitioner’s claim will be contained in an issued decision. Disclosure of that information also is contemplated unless the information is shown to qualify for redaction.

The public disclosure of the factual underpinnings that support rulings and awards on vaccine petitions serves to educate the public about whether petitioners who receive certain vaccines and have certain injuries are being compensated and if so, the amount of the compensation. The availability of the Vaccine Program and the decisions of the special masters evaluating vaccine petitions are intended to be public. See 42 U.S.C. §§ 300aa-10(c), 12(d)(4)(B). Because petitioner has not demonstrated that the disclosure of information about the vaccines he received and the nature of his injury would intrude unjustifiably upon his privacy interests, his redaction request, as amended, is **DENIED**.

III. CONCLUSION

As authorized under the Vaccine Act, petitioner may expect a confidential review of any medical records and other personal information submitted during the course of proceedings on a vaccine claim. 42 U.S.C. § 300aa-12(d)(4)(A). As further authorized by the Vaccine Act, petitioner may expect disclosure in a vaccine decision of those facts deemed pertinent to the merits of the claim for Program compensation, unless certain facts qualify for redaction. 42 U.S.C. § 300aa-12(d)(4)(B). Here, petitioner invokes provisions of FOIA, and another court’s interpretation of the FOIA provisions, to prevent the disclosure of medical information relevant to his vaccine claim in a decision finding no entitlement to Program compensation. But, petitioner makes no argument addressing

case here, petitioner in W.C. pointed to his particular factual circumstances to show that the full disclosure of his vaccine decision would constitute an unjustified invasion of his privacy. In contrast, petitioner here makes absolutely no attempt to show, by reference to his own particular circumstances, how the disclosure of the decision on his claim that he suffered a particular injury as a result of receiving certain vaccines would effect a “clearly unwarranted” intrusion on his privacy.

how the disclosure of such information would "constitute a clearly unwarranted invasion of privacy" as contemplated by the Vaccine Act, the statutory scheme under which petitioner has filed his claim. Id. For the reasons detailed above, petitioner has failed to make an appropriate showing that the information he seeks to redact qualifies for such treatment. Accordingly, petitioner's Amended Redaction Motion is **DENIED**. Pursuant to Vaccine Rule 18(b), the entire decision will be made available to the public.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Chief Special Master