In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-411V

Filed: August 25, 2011

CHERYL CASTAGNA,	)	
	)	
Petitioner,	)	PUBLISHED
	)	
v.	)	Redaction; section 12(d)(4)(B);
	)	Statutory interpretation;
SECRETARY OF	)	Legislative history
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

ORDER[1]

I. INTRODUCTION AND SUMMARY

On May 18, 2011, I entered a decision awarding damages ("damages decision") to Petitioner Cheryl Castagna pursuant to the National Childhood Vaccine Injury Act ("Vaccine Act" or "Act").[2] In the decision, I notified the parties that I intended to post the decision to the Court of Federal Claims's website in accordance with 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)).

On June 2, 2011, Petitioner filed a Motion to Redact the damages decision. Petitioner requested redaction of "all portions of the Decision and Proffer that include[d] information from [sic] 'financial information and is privileged or confidential' and information from 'medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.'" Petr's Mot. Redact at 1. Petitioner expressed

[1] Because this order contains a reasoned explanation for the action in this case, I intend to post it on the United States Court of Federal Claims' website, in accordance with 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)). In accordance with Vaccine Rule 18(b), Petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from the published order.

[2] The National Vaccine Injury Compensation Program comprises 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-1 et seq. (2006). Hereinafter, individual section references will be to 42 U.S.C. § 300aa of the Vaccine Act.

a preference that the information in the decision remain private, but she identified no specific facts to demonstrate that redaction was appropriate.

The issue is whether, given the inherently sensitive nature of the information contained in Vaccine Act cases, a petitioner has a right to have all medical, financial, and identifying information categorically redacted from a special master's decision without any particularized showing of need for redaction. Consistent with § 12(d)(4)(B) of the Vaccine Act, Vaccine Rule 18(b), the E-Government Act, and the common law, I find that petitioner has not presented facts warranting redaction of the decision awarding damages. See Langland v. Sec'y of Dep't of Health & Human Servs., No. 07-36V, 2011 WL 802695 (Fed. Cl. Spec. Mstr. Feb. 3, 2011).[3]

The text, structure, and context of the Vaccine Act show that Congress was cognizant of privacy concerns in vaccine injury cases. Congress chose to protect privacy by eliminating the public's common law right to inspect the case file. See § 12(d)(4)(A). Simultaneously, however, Congress recognized the important policy concerns reflected in the common law presumption of the public's right to access to judicial decisions. Accordingly, Congress mandated disclosure of a special master's decision, including any findings of fact and conclusions of law, and provided for redaction of a decision only in limited circumstances to be determined by the special master. See §§ 12(d)(3)(A), 12(d)(4)(B). A special master's decision, therefore, is presumptively public.

The intent of Congress in this respect is clear, not only from the provisions of the Act, but from the legislative history. Congress placed the Office of Special Masters in the Judicial Branch, originally creating jurisdiction to decide vaccine claims in the district courts and eventually placing the jurisdiction within the Court of Federal Claims. The privacy provisions contained in the Vaccine Act must therefore be construed in light of the traditional common law right of access to judicial decisions. I find no evidence in the legislative history of intent to create a private court by hiding information about the identities of petitioners, the nature of their claims, or the awards made under the Vaccine Program. I find no basis on which to withhold information concerning actions taken by special masters, who are public officials, in resolving claims and disposing of public funds. Without persuasive justification, I cannot accede to Petitioner's demand for secrecy, however sympathetic I may be to the desire of individuals to withhold from public scrutiny matters of personal concern.

Petitioner cited to an unrelated section of the Act that provides for non-disclosure of identifying information maintained by the Department of Health & Human Services ("HHS"). § 25(c)(1). That provision applies to the information the Secretary collects

[3] My decision in the instant case also is consistent with OSM's policy on redaction, which can be found on the Court of Federal Claims's website. See http://www.uscfc.uscourts.gov/new-redaction-procedures; http://www.uscfc.uscourts.gov/new-vaccine-rules-now-effect (last visited: Aug. 18, 2011).

from health care providers and plainly does not pertain to redaction of a special master's decision. Under the Act as written, a special master may, upon a timely and appropriate showing, redact only two limited classes of information: commercial or financial information that is privileged and confidential, and medical information whose disclosure would constitute a "clearly unwarranted invasion of privacy." § 12(d)(4)(B). Petitioner has not established that the damages decision contains any information that warrants redaction under the Vaccine Act. Therefore, Petitioner's Motion to Redact is denied.

II. BACKGROUND AND PROCEEDINGS TO DATE

On June 28, 1999, Petitioner filed a petition seeking compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006). On November 13, 2009, Respondent decided not to expend further resources contesting entitlement in this matter. I issued a ruling on entitlement on December 8, 2009, and the parties worked together to reach an agreement on the appropriate amount of damages. On May 18, 2011, the parties filed a joint Proffer, which contained the agreed upon amounts of compensation. That same day, I issued the damages decision, which awarded Petitioner compensation in the amounts contained in the Proffer. Because the parties had agreed on all the relevant issues, the decision summarily adopted the parties' positions and only briefly recited the case's key facts. The damages decision was two pages long.[4]

Pursuant to Vaccine Rule 18, Petitioner had 14 days to request redaction of the damages decision. On June 2, 2011, Petitioner filed a Motion to Redact.[5] I requested the Secretary's views on the Motion and, on July 13, 2011, the Secretary filed a response. Petitioner, after requesting and being granted two enlargements, filed a reply on August 10, 2011.

In her Motion, Petitioner requested complete redaction of three types of information: medical information, including the injury alleged and the vaccine received; all monetary amounts awarded in compensation; and her name, to be redacted to her initials.[6] Petitioner asserted that disclosure of the medical information constituted "information from 'medical files or similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.'" Petr's Mot. Redact at 2 (quoting § 12(d)(4)(B)). Petitioner asserted that the damages amounts are "very confidential in nature and very important to the Petitioner to be redacted, as this is not information that she wants available to anyone who can search for it on the internet." Petr's Mot. Redact

[4] The four-page Proffer was filed as an Appendix to the damages decision.

[5] This motion was filed one day late "due to server problems." Petr's Mot. Redact at 1 n.1.

[6] A copy of Petitioner's proposed redacted decision is attached as an addendum to this Order.

at 4. Petitioner asked that her name be redacted to her initials "to further protect her privacy." Id.

In her Motion, Petitioner argued that her request should be evaluated in light of the recent district court decision in Long v. United States Department of Justice, No. 06-CV-1086, 2011 WL 1135925, -- F. Supp.2d -- (N.D.N.Y. Mar. 25, 2011). The plaintiffs in Long had filed a request for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2006), seeking information related to vaccine cases from a case tracking database maintained by the Department of Justice ("DOJ"). The plaintiffs were appealing the DOJ's withholding of information about vaccine type and vaccination date from its response. The district court held that the government properly withheld the information because § 12(d)(4)(A) of the Vaccine Act was an exemption statute for purposes of Exemption 3 of FOIA, § 552(b)(3). The Long court also held in the alternative that disclosure of the information would constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6 of FOIA, §552(b)(6), because the information was medical information and could be linked to individual petitioners.

Petitioner argued that if information was exempt from disclosure under FOIA because it could be linked to the identity of a petitioner, then identifying information should be redacted from a special master's decision upon request. Petitioner also asserted that the balancing test for evaluating disclosure under Exemption 6 of FOIA was applicable to evaluating disclosure under § 12(d)(4)(B)(ii) of the Vaccine Act because the provisions use similar language.

In her response, the Secretary asserted that, while Congress provided privacy protection to all information contained in the case file under § 12(d)(4)(A), Congress did not extend the same protection to the facts contained in a special master's decision, which is governed by § 12(d)(4)(B). The Secretary maintained that redaction is governed by § 12(d)(4)(B) and Vaccine Rule 18(b), and that Petitioner made no showing that the information to be redacted qualified for redaction under the applicable standards. The Secretary noted that Petitioner did not "articulate[] how the disclosure of the information for which she requests redaction would constitute a clearly unwarranted invasion of privacy" nor did Petitioner "even assert[] that [any invasion of privacy] would be 'clearly unwarranted.'" Respt's Resp. at 2. Additionally, the Secretary asserted that Long was not applicable to the Motion to Redact because the decision in Long involved a third party request for information and was based on § 12(d)(4)(A), not 12(d)(4)(B), which pertains to redaction of special masters' decisions.

In Petitioner's reply, Petitioner asserted that the Court of Federal Claims's decision in W.C. v. Secretary of Department of Health & Human Services, No. 07-456V, 2011 WL 3439131 (Fed. Cl. July 22, 2011), established that information in cases brought under the Vaccine Act should be treated the same as information requested through a FOIA request. Petitioner further asserted that there is no practical difference between disclosure of information through FOIA and disclosure in a special master's decision because the information is public either way. Therefore, requests for redaction

under the Vaccine Act should be governed by the FOIA decisions approving the non-disclosure of medical and identifying information, including the decision in Long. Additionally, Petitioner argued for the first time that financial records are closely guarded and disclosure of both the award amounts and Petitioner's name could expose Petitioner to "predators seeking to obtain those amounts." Petr's Reply at 4.

III. ANALYSIS

Special masters derive their powers from the Vaccine Act. Patton v. Sec'y of Dep't of Health & Human Servs., 25 F.3d 1021, 1027 (Fed. Cir. 1994). A special master's authority to order redaction of a decision, therefore, is limited to that set forth in the Vaccine Act. The text and structure of the Vaccine Act establish the balance between the public interest in disclosure and the individual interest in privacy to be reached in Vaccine Act cases. Accordingly, a special master may order redaction of a decision only in limited, specified circumstances. See Langland, 2011 WL 802695, at *6. In Part A, below, I discuss the proper construction of the Vaccine Act's privacy provisions. In Part B, I discuss FOIA's applicability to Vaccine Act cases.

A. The Vaccine Act Permits Redaction in Limited Circumstances Not Present in this Case.

1. Construction of the Vaccine Act's Privacy Provisions

In interpreting the text of the Vaccine Act, I begin by "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006). The Federal Circuit has held that, when construing a statute, the "analysis must begin with the plain language of the statute." Cloer v. Sec'y of Dep't of Health & Human Servs., No. 2009-5052, -- F.3d --, 2011 WL 3374302, *7 (Fed. Cir. Aug. 5, 2011) (en banc); see Weddel v. Sec'y of Dep't of Health & Human Servs., 23 F.3d 388, 391 (Fed. Cir. 1994) ("'There is, of course, no more persuasive evidence of intent than the words by which the legislature undertook to give expression to its wishes.'" (quoting United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940))). The structure of the statute and context in which a term appears also guide interpretation of the words used. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004); see also Cloer, 2011 WL 3374302, at *12-*13 (construing Vaccine Act's statute of limitations in context of "the text of the Vaccine Act and considering its overall structure"). The text and statutory scheme here evidences Congress's clear choices regarding the balance between public and private interests under the Vaccine Act.

2. The Text, Structure, and History of the Vaccine Act

a. Pertinent Statutory Provisions

The only Vaccine Act provisions explicitly concerning redaction of special masters' decisions are found in § 12(d)(4)(A) and § 12(d)(4)(B). The relevant portions of each provision are:

§ 12(d)(4)(A):

> 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.

§ 12(d)(4)(B):

> A decision of a special master . . . shall be disclosed, except if [it] 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.

Petitioner's argument rests on a portion of the Vaccine Act that does not pertain to proceedings before the special masters. See Petr's Reply at 3 (citing to W.C., 2011 WL 3439131, at *21). That provision, § 25 of the Act, concerns various vaccine-related public health measures administered by the Department of Health & Human Services. Section 25 states:

> Recording and reporting of information
> . . .
>
> (b) Reporting.
>
> (1) Each health care provider and vaccine manufacturer shall report to the Secretary . . . the occurrence of any event set forth in the Vaccine Injury Table . . . and . . . such other matters as the Secretary may by regulation require.
> . . .
>
> (c) Release of information.

> (1) Information which is in the possession of the [Government] under this section and which may identify an individual shall not be made available under section 552 of title 5 [FOIA], or otherwise, to any person . . . .

b. The Statutory Structure

The Act does not provide explicit guidance as to the meaning of the criteria governing redaction in § 12(d)(4)(B)(i) ("commercial or financial information which is privileged and confidential") or § 12(d)(4)(B)(ii) ("medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy"). I look to the statutory structure and history for guidance. See Cloer, 2011 WL 3374302, at *3, *13.

Congress passed the Vaccine Act in 1986. The Act consisted of two main parts that created two separate programs. Part 1 of the Act established the National Vaccine Program ("NVP") in HHS, which was intended to further the public health by implementing a comprehensive plan to fund and coordinate vaccine research, licensing, and distribution, and by encouraging public acceptance of immunization. § 1-3. The NVP coordinates vaccine research, development, and distribution with other federal agencies and with non-governmental entities as well. §§ 2(1), 2(8). The Act also was intended to advance the public health through the collection and dissemination of information about vaccines, including adverse events potentially related to vaccine administration, and through promoting the development of safer vaccines. § 25-28. The Act requires HHS to collect and record information about any adverse reactions to vaccines, and to make that information publicly available. § 25.

Part 2 of the Act established the National Vaccine Injury Compensation Program ("NVICP" or "Vaccine Program"), under which individuals injured by vaccines would be awarded compensation. Compensation is awarded from the Vaccine Injury Compensation Trust Fund, which is administered by HHS. §§ 15(f)(4)(A) and (i)(2); see 26 U.S.C. § 9510 (2006). The Trust Fund is funded by a surtax placed on every dose of vaccine sold in the United States. 26 U.S.C. §§ 4131, 9510(b).

Although the Secretary administers much of the Vaccine Program, including the provisions of Part 1 of the Act, Congress placed responsibility for deciding entitlement to compensation within the Judiciary. The Act, as amended, established the Office of Special Masters ("OSM") within the United States Court of Federal Claims ("CFC"), and OSM is the adjudicative body that hears vaccine injury claims in the first instance. § 12.[7] OSM provides a "less-adversarial, expeditious, and informal" forum for the resolution of vaccine injury petitions. § 12(d)(2).

[7] When the OSM was created, the CFC was called the Claims Court. In 1992, Congress passed legislation changing the Claims Court to the CFC. See Federal Courts Administration Act of 1992, Pub. L. 102-571, 106 Stat. 4506 (1992). Because the distinction between the Claims Court and CFC is not relevant to this decision, I will refer to both courts as the CFC.

c. Amendments and Legislative History

In the early 1980s, public alarm over vaccine injuries and increasing tort suits against vaccine manufacturers destabilized the vaccine market. See Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1072-73 (2011). In 1985 and 1986, committees in both the House and the Senate drafted vaccine legislation, but Congress ultimately adopted the House bill.[8] According to the 1986 House Report, the Vaccine Act was enacted to ensure that the nation had a stable supply of safe and effective vaccines, to encourage continued widespread use and public acceptance of vaccines, and to provide injured persons with compensation "quickly, easily, and with certainty and generosity." H.R. REP. NO. 99-908, at 3-5 (1986), reprinted in 1986 U.S.C.C.A.N. 6344. The system was intended both to be more fair than tort litigation and to lessen the number of lawsuits against vaccine manufacturers. Id. at 12-13. Congress anticipated that, under the Vaccine Program, many persons unable to satisfy the standards of proof of liability in state courts would be compensated for their injuries. Id. at 13.

The original Vaccine Act established the Vaccine Program, and it provided that claims were to be brought in the district courts and assigned to special masters. § 12(a) (Supp. V 1988). The original Act was unfunded, and the Program was not implemented until Congress passed a funding provision. In 1987, Congress simultaneously passed the funding provision and amended parts of the Act. Following the 1987 amendments, the Act was implemented, and the Vaccine Program went into effect on October 1, 1988. See Pub. L. 100-203, § 4302, 101 Stat. 1330, 221 (Dec. 22, 1987).

The legislative history of the 1987 amendments described the original Vaccine Act as establishing an "administrative proceeding" in the United States district courts, which was the type of activity that had "hitherto been done in an executive branch agency or before an Article III court." H.R. REP. NO. 100-495, 771 (1987) (Conf. Rep.), reprinted in 1987 U.S.C.C.A.N. 2313, 1245. A number of concerns had been raised about the original Act, including that the election provision (§ 21) violated the "case or controversy" requirement of Article III and that having judges adjudicate vaccine claims

[8] The 1985 Senate bill contained an injury compensation program, but the 1986 Senate bill dropped it. See National Childhood Vaccine Improvement Act of 1986, S. 827, 99th Cong. (1986); S. REP. NO. 99-483 (report to S. 827). The Vaccine Act, which was enacted in 1986, came out of the House bill (H.R. 5546). Although some of the provisions in the House bill were identical to provisions in the Senate bill, the Senate bill did not contain a vaccine injury compensation program. See S. REP. NO. 99-483, at 5. Thus, the NVICP provisions came entirely from the House Bill. See generally Lainie Rutkow et al., Balancing Consumer and Industry Interests in Public Health: The National Vaccine Injury Compensation Program and Its Influence During the Last Two Decades, 111 Penn St. L. Rev. 681, 695-703 (2007). This is significant because the legislative history relied upon by Petitioner is from the Senate bill (S. 827), which did not contain an injury compensation program, and in any event, was not passed. See Petr's Reply at 3; W.C., 2011 WL 3439131, at *17.

was an inefficient use of judicial resources.[9] One solution would have been for Congress to move vaccine cases to an Executive Branch agency. Congress chose instead to keep the cases in the Judiciary, and to solve the potential problems by moving jurisdiction to the CFC, an Article I court. H.R. REP. NO. 100-495, at 771-72; see Pub. L. 100-203. The conference report noted that the CFC's jurisdiction was nationwide, that the CFC followed the Federal Rules of Evidence, and that the CFC handled a wide variety of cases. H.R. REP. NO. 100-495, at 771-72.[10]

Congress again amended the Act in 1989, establishing the OSM within the CFC. Pub. L. 101-239, 101 Stat. 2106; see H.R. REP. NO. 101-386, at 515 (1989) (Conf. Rep.), reprinted in 1989 U.S.C.C.A.N. 3018, 3115. The conference report explained that the proceedings in the CFC had become too formal, with the parties retaining traditional litigation positions. The conference report stated that special masters should use the powers given to them to keep proceedings flexible, simple, and non-adversarial. H.R. REP. NO. 101-386, at 513.

The structure and text of the 1989 amendments reinforce OSM's role in ensuring that the Vaccine Program remains flexible and non-adversarial. The OSM was created as a discrete unit of the CFC. § 12(c). OSM was to recommend rules to the CFC to govern vaccine cases, providing flexible standards for the admissibility of evidence and allowing special masters to "replace the usual rules of discovery in civil actions in the [CFC]." § 12(d)(2). The amendments clarified the special masters' broad powers to direct discovery and compel the filing of medical records and other information. § 12(d)(3)(B).

In the original Act, a special master was to recommend a decision to a district judge, and the judge could adopt the decision or review it de novo. After the amendments, the special masters were to make final decisions, which would be appealable to the CFC judges and reviewed under a deferential standard. §§ 12(d)(3)(A), 12(e). The 1989 amendments added § 12(d)(3)(A), which provided that a special master must issue a decision with respect to whether compensation is to be provided and the amount of such compensation, and the decision must include findings of fact and conclusions of law.

The 1989 amendments also added to the Act's privacy provisions. At the end of the paragraph listing the special masters' discovery powers, Congress originally had

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[9] These concerns were raised by the U.S. Judicial Conference, the American Bar Association, and other groups. H.R. REP. NO. 100-495, at 771.

[10] The conference report noted that the CFC heard cases in several substantive areas, including federal tax refund suits, government contract claims, patent and copyright infringement suits, military and civilian pay cases, Indian claims, and Constitutional takings claims. H.R. REP. NO. 100-495, at 772. The report further noted that the court originally was established as an administrative agency to settle claims against the United States. Id. Therefore, having the court hear vaccine cases was well within the CFC's purview. Id.

provided that "Information submitted to a special master . . . 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. There may be no discovery in a proceeding on a petition other than the discovery required under this paragraph." § 12(c)(2) (Supp. V 1988). The 1989 amendments separated the privacy and discovery provisions, and moved the privacy provisions to § 12(d)(4). Section 12(d)(4)(A) provided that "Except as provided in subparagraph (B), information submitted to a special master . . . 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." § 12(d)(4)(A). Section 12(d)(4)(B) was new to the Act, and it provided that "[a] decision of a special master . . . in a proceeding shall be disclosed," subject to limited exceptions for certain types of information: "trade secret or commercial or financial information which is privileged and confidential," § 12(d)(4)(B)(i), and, "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy," § 12(d)(4)(B)(ii).

As discussed above, the 1989 amendments maintained a provision requiring the Secretary to collect from health care providers information on vaccine adverse events, which the Secretary has done via the Vaccine Adverse Event Reporting System ("VAERS"). A 1986 Senate report, which addressed a bill that was not enacted but contained a provision similar to § 25, explained that collecting information on adverse reactions would widen the knowledge about such reactions and help reduce adverse reactions by informing the public about them. S. REP. NO. 99-483, at 18. The report also stated, however, that the names of individuals who suffered such reactions did not need to be made public. Id.[11]

3. Other Relevant Sources

a. Vaccine Rules 16(b) and 18(b)

In interpreting a statute, I also must consider any other "precedents or authorities that inform the analysis." Dolan, 546 U.S. at 486. Pursuant to the express delegation in the Vaccine Act, see § 12(d)(2), the CFC, upon OSM's recommendation, has promulgated rules governing practice before OSM, including rules regarding redaction of the decisions of special masters. The rules reflect OSM's policy regarding redaction and privacy. See note 3, supra.

Vaccine Rule 18(b) mirrors the statutory language:

Decision of the Special Master or Judge.

[11] The individuals whose events are reported in VAERS are not necessarily the same as those who file claims for vaccine compensation, and there is no cross-reference for the two cohorts.

> 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 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.
>
> Any 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). The rule, like the statute, provides no specific guidance concerning the type of disclosure of "medical files or similar files . . . which would constitute a clearly unwarranted invasion of privacy." The result appears to be to commit this factual determination, at least in the first instance, to the discretion of the special master.

In 2011, the Vaccine Rules were amended to reflect the practice of other federal courts in implementing the E-Government Act, including that of the CFC under Rule 5.2(a). See Langland, 2011 WL 802695, at * 10. Rule 16 now provides that "If a petition is filed on behalf of a minor, the caption may include only the minor's initials." Vaccine Rule 16(b).

b. Common Law Right of Access to Judicial Records

The Vaccine Act conferred jurisdiction to adjudicate vaccine injury claims on the Judiciary, not on an executive agency. Proceedings in the Judiciary are subject to a common law presumption favoring public access to judicial records and proceedings. Nixon v. Warner Comm'cns, 435 U.S. 589, 598-99 (1978); see In re Violation of Rule 28(D), 635 F.3d 1352, 1356 (Fed. Cir. 2011).[12] "This common law right enables the public to review court records, and public access to court records is essential to the preservation of our system of self-government." Miller-Holzwarch, Inc. v. United States, 44 Fed. Cl. 153, 154 (1999).[13] When Congress enacted the Vaccine Act, it presumptively was aware of the common law right of access to judicial proceedings. Traynor v. Turnage, 485 U.S. 535, 546 (1988) (stating "It is always appropriate to

[12] The courts also recognize that the press and public have a First Amendment interest in the content of judicial opinions. Virginia Dep't of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004); see Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 15 (1986).

[13] Consistent with the common law right, "Congress has mandated that 'all decisions of the Court of Federal Claims shall be preserved and open to inspection.'" Miller-Holzwarch, 44 Fed. Cl. at 154 (quoting 28 U.S.C. § 174).

assume that our elected representatives, like other citizens, know the law" (quotations omitted)).

Many judicial documents contain personal information, however, and the courts recognize that in special instances privacy considerations may outweigh the public's right to access. Nixon, 435 U.S. at 598. In such cases, a party or parties often will file sensitive documents under seal, if permitted to do so by the presiding judicial officer. See In re Violation of Rule 28(D), 635 F.3d at 1357-58. "Discretion is afforded the trial court to determine whether the circumstances warrant overcoming the common law right of public access to judicial records; however, 'that discretion is circumscribed by the presumption that the public shall have access to those records absent a compelling justification for sealing.'" Miller-Holzwarth, 44 Fed. Cl. at 154 (quoting Pratt & Whitney Canada, Inc. v. United States, 14 Cl. Ct. 268 (1988)).

A party seeking to seal a court document bears the burden of articulating compelling reasons that "outweigh the general history of access and the public policies favoring disclosure, such as the 'public interest in understanding the judicial process.'" Kamakana v. Honolulu, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations omitted); accord, e.g., Virginia Dep't of State Police, 386 F.3d at 575. "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." Kamakana, 447 F.3d at 1179. "Many litigants would like to keep confidential the salary they made, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed." Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 547 (7th Cir. 2002).

In sum, under the common law, public access to court documents and decisions is presumed, and the party seeking to seal a document bears a burden to show particularized harm outweighing the public interest in disclosure.

4. Proper Construction of the Vaccine Act's Privacy Provisions in Light of the Statutory Structure and History

Sections 12(d)(4)(A) and (B) set forth the privacy protections for petitioners in Vaccine cases. 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.

The history of the Vaccine Act informs the construction of these provisions. Jurisdiction of vaccine cases originally was with the district courts, and the public has a common law right to access district court records. Before implementation, Congress amended the Vaccine Act in response to concerns that Article III courts were not best suited to adjudicate vaccine cases, but Congress kept jurisdiction within the Judiciary.

As the statutory language and legislative history show, Congress was aware that by giving jurisdiction to the Judiciary, judicial rules, such as the Federal Rules of Evidence and Federal Rules of Procedure, would apply absent instructions to the contrary. Section 12(d)(4)(A)'s original purpose was to close the case file, which otherwise would be presumed to be public.[14]

The new § 12(d)(4)(B) clarified that, while the case file was closed, the special master's decision was public. Further evidence of Congressional intent appears in another provision added by the 1989 amendments, which specified that a special master's decision must state whether compensation is to be awarded, contain the amount of any compensation, and include findings of fact and conclusions of law. § 12(d)(3)(A). A special master's findings of fact and conclusions of law necessarily will encompass key medical facts in a case, including the vaccine at issue, the injury alleged, and the injured person's medical condition.

By act of Congress, in sum, decisions of special masters presumptively are public documents, and a petitioner requesting redaction of a decision must make an affirmative, factual showing that redaction is proper. Congress placed jurisdiction with the Judiciary, and it must be presumed that Congress was aware of the common law presumption of access to judicial proceedings. Traynor, 485 U.S. at 546; see Ortega v. Holder, 592 F.3d 738, 743 (7th Cir. 2010) (Congress does not legislate in a vacuum). Congress chose to protect a petitioner's privacy by overriding the presumption of access with respect to the filings and case file. Congress did not create an absolute privilege against disclosure, however, because it also provided that decisions shall be disclosed. By providing a general rule requiring disclosure, Congress preserved the public's traditional right to access judicial decisions. Taken together, these provisions provide strong guidance as to the proper balance to be struck between disclosure and privacy in a special master's decision.

In contrast, § 25(c)(1), on which Petitioner relies, see Petr's Reply at 3 (citing W.C., 2011 WL 3439131, at *17-*18), applies to a different data set entirely, and offers no meaningful guidance on the question before me. Section 25 requires the Secretary to collect data on adverse reactions from health care providers, and to make those data public.[15] The purpose of collecting these data is to obtain aggregate statistics on

[14] Further evidence that § 12(d)(4)(A) overturned the presumption of access to the case file is found in the history of the provision. Originally, § 12(d)(4)(A) was one sentence in the paragraph setting forth the special master's broad discovery powers. Section 12(d)(4)(A)'s genesis in the discovery provisions indicates that its purpose was to ensure cooperation with the special master in discovery matters by keeping the case file closed to public access and prohibiting third parties from gaining access to it.

[15] The collection of records under § 25 is purely an executive agency action. As records kept by an agency, those records ordinarily would be publicly accessible through a FOIA request. See § 552(a)(3). Congress foreclosed the public's right to the information by explicitly prohibiting disclosure through FOIA. § 25(c)(1).

possible reactions. See S. REP. NO. 99-483, at 18. The public's interest in this information is in knowing the frequency of adverse reactions, not the identity of individuals who may have experienced adverse reactions. Thus, in the context of § 25, Congress chose explicitly to prohibit disclosure of identifying information -- § 25(c)(1) explicitly exempts from disclosure any information "which may identify an individual." This provision of the Act on its face governs the Secretary's collection of information, not OSM's adjudication of vaccine compensation claims. The very different provisions of § 12(d)(4)(B) cannot be ignored, under accepted tenets of statutory construction and consistent with the evident purpose of those provisions.

5. Application of the Vaccine Act's Privacy Provisions

Petitioner has requested redaction of her name, of all monetary amounts awarded as compensation, and of all medical information (including the vaccine and injury). Petitioner has not alleged that disclosure of this information will result in a particular harm or invasion of privacy; Petitioner has voiced only a preference for privacy. As explained below, I find that a general preference for privacy does not satisfy the criteria for redaction of a special master's decision.

a. Redaction of Identifying Information

The language of the Act cannot reasonably be construed as creating a private court in which all petitions could be filed and disposed of by anonymous petitioners. Since Congress did not explicitly provide for routine redaction of identifying information, such privacy protection should be available only in the special circumstances set forth in the Vaccine Act.[16]

Further, Congress in the same legislation provided for redaction of identifying information in one context, under § 25(c) of the Vaccine Act, but not under the provisions pertaining to special masters' decisions, except in accordance with limited, statutory criteria. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion". Russello v. United States, 464 U.S. 16, 23 (1983); see Cloer, 2011 WL 3374302, at *12 n.7 (rejecting reading an implied discovery rule into the Vaccine Act's statute of limitations and noting that "Congress knows how to legislate an explicit discovery rule"). I must give effect to the deliberate choice of the legislators not to permit withholding of identifying information from special masters' decisions except when warranted by the statutory criteria in section 12(d)(4)(B).

In this case, Petitioner has requested redaction of all identifying information, essentially requesting anonymity. Petitioner has not alleged the existence of any

[16] Like the rest of the Judiciary, OSM and the CFC, consistent with the E-Government Act, permit routine redaction of the name of a minor. Vaccine Rule 16(b).

special circumstances that could justify her request. Petitioner is an adult, and her case presents no facts that would make redaction of all identifying information appropriate. Therefore, because the Vaccine Act does not give petitioners a categorical right to anonymity, Petitioner's request to redact all identifying information must be denied. See Langland, 2011 WL 802695, at *11.

The result reached under this interpretation of the Act is consistent with the practice in the rest of the Judiciary. Other federal courts do not routinely redact the party's name from a decision upon request. For example, in Social Security Disability appeals, which also focus on sensitive medical and personal information, the claimants' names ordinarily are not redacted from court decisions. See Langland, 2011 WL 802695, at *10 n.16 (discussing cases). Other courts routinely disclose the identity of parties and will consider redaction of a party's name only when special facts or circumstances are present. See Sealed Plaintiff v. Sealed Defendant #1, 537 F.3d 185, 188-90 (2d Cir. 2008) (stating "identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." (quoting Doe v. Blue Cross & Blue Shield United, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.))).

b. Redaction of Financial Information

Financial information may be redacted from a special master's decision with an appropriate showing of need. The Vaccine Act provides for redaction of information that is "trade secret or commercial or financial information which is privileged and confidential." § 12(d)(4)(B)(i). Vaccine Rule 18(b)(1), which uses slightly different language, describes this information as information "that is a trade secret or commercial or financial in substance and is privileged or confidential." The amount of an award of damages is not business information that could be considered trade secret or commercial, as those terms are understood in the law. For the purposes of this decision, I assume that the term "financial information" may be broadly construed so that the amounts awarded in damages would constitute a type of financial information that might be protected from disclosure under appropriate circumstances.[17] Financial information may be redacted only if it is privileged or confidential.[18]

The statute does not define "privileged" or "confidential." I start with "'the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" Russello, 464 U.S. at 21 (quoting Richards v. United States, 369 U.S. 1, 9 (1960)). Black's Law Dictionary defines the term "privileged" as an adjective that

[17] The damages decision includes the Proffer as an appendix. The Proffer breaks out the damage award into lost future earnings, pain and suffering, and past unreimbursable expenses, and it specifies the form of the payment.

[18] I need not decide whether information must be both privileged and confidential (as provided in the statute) or whether it is sufficient for information to be either privileged or confidential (as provide in the rule); Petitioner has not shown the damage award is either.

means "1. Not subject to the usual rules or liabilities; esp[ecially], not subject to disclosure during the course of a lawsuit . . . . 2. Enjoying or subject to a privilege." Black's Law Dictionary (9th ed. 2009). The term "confidential" is an adjective that means "meant to be kept secret." Black's Law Dictionary (9th ed. 2009). The American Heritage Dictionary defines the two terms in substantially the same way.[19]

An amount awarded as damages in a vaccine-injury claim is not protected by a privilege. Judgments and the amounts awarded in damages routinely are disclosed in other judicial decisions, including in tort suits, Social Security Disability appeals, and bankruptcy proceedings. See Daniel J. Solove, Access and Aggregation: Public Records, Privacy and the Constitution, 86 Minn L. Rev. 1137, 1146-48 (June 2002). Nor is an amount awarded in damages meant to be kept secret. Section 12(d)(3)(A) requires a special master's decision to state whether compensation is to be awarded and the amount of such compensation. § 12(d)(3)(A). Because the Act requires disclosure of the amount of compensation, the amount of compensation cannot be confidential.

While the Vaccine Act does not precisely define when financial information would be privileged or confidential, wholesale redaction of any financial information contained in a decision cannot have been intended by the language in § 12(d)(4)(B)(i). Redaction is appropriate when disclosure would cause a person to suffer some particularized harm or when disclosure would make a third party less likely to participate in a case.[20] Certain financial information might qualify for redaction, such as a family's income or its debts, depending on the facts in a particular case. To be sure, however, § 12(d)(4)(B)(i), which imposes a limitation on the type of financial information that can be redacted, does not permit a petitioner to hide from the public the amount of an award he received for a vaccine injury in a proceeding under the Vaccine Act.

In this case, the financial information in the damages decision was the amount of compensation to be awarded. Petitioner argued that the amount of compensation should be redacted because it is "very confidential" and she does not want it disclosed to the public. She also argued that public knowledge of the award could attract predators seeking to obtain the award. While Petitioner's concerns are understandable, they are not a cognizable basis for redaction. While many persons may prefer to keep information revealed during litigation private, judicial proceedings are a public forum and

[19] "Confidential" is defined as "done or communicated in confidence; secret," and "confidence" is defined as "trust or faith in a person or thing." American Heritage Dictionary 386 (4th ed. 2006). "Privileged" is defined as "enjoying a privilege," and "privilege" is defined as "a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste." Id. at 1396.

[20] Application of § 12(d)(4)(B) is not on its face limited to the parties. A witness who testified or a third party who submitted information requested during discovery could object to the inclusion of information he submitted to the court, based on the specified criteria for redaction.

judicial decisions are a matter of public record. The Vaccine Act requires my decision to contain the amount of compensation awarded, and Petitioner has not shown that the award amount is either privileged or confidential. Therefore, Petitioner's request to redact all financial information is denied.

c. Redaction of Medical Information

i. Standard for Redaction of Medical Information

Congress permitted redaction of "medical files and similar files" only if disclosure of the information would constitute a "clearly unwarranted invasion of privacy." § 12(d)(4)(B)(ii). Consistent with the treatment of medical information by the courts in other contexts, I interpret this language as establishing a balancing test that requires a special master to weigh the individual's interest in privacy against the public's interest in disclosure as provided by the Vaccine Act. See Langland, 2011 WL 802695, at *8-*9; see also Nixon, 435 U.S. at 602-03 (common law requires balancing of public and private interests); In re Violation of Rule 28(D), 635 F.3d at 1356-58 (restricting public access under either common law or Rule 26(c)(1) requires balancing of public and private interests). I recognize, however, that by providing a general rule requiring disclosure, and an exception only when an invasion of privacy is "clearly unwarranted," Congress created a presumption of disclosure.

To balance the interests, a special master must determine the scope of an individual's privacy interest in the information contained in the decision. A special master must then balance the individual's privacy interest against the public interest in disclosure as set forth in the Vaccine Act. Langland, 2011 WL 802695, at *6. Because the propriety of redaction is a fact-bound determination, redaction generally is committed to the discretion of the judicial officer and is determined on a case-by-case basis. See Sealed Plaintiffs, 537 F.3d at 190 (stating that the factor-driven balancing test required the trial court to "exercise its discretion in the course of weighing competing interests"); In re Violation of Rule 28(D), 635 F.3d at 1358 (judge may exercise discretion to restrict public access to a filing under FRCP 26(c)(1) if requesting party can show good cause).

Without question, an individual has an interest in keeping sensitive medical information private. Further, the individual has an interest in keeping potentially embarrassing information private. A special master may require a petitioner to file psychiatric records, disability records, and any evidence showing the presence of a preexisting injury. Although the records may contain sensitive information, however, this information often is the subject of the litigation. In cases where sensitive information is the subject of the dispute, that information routinely is disclosed in decisions, to enable the reader to follow and understand the decision maker's rationale. See Giles ex rel. Giles v. Astrue, 483 F.3d 483 (7th Cir. 2007) (Social Security Disability case discussing developmental delays and speech and language disorders); Langland, 2011 WL 802695, at *10 n.16 (citing cases); see generally Solove, supra, 86 Minn L.

Rev. 1137, at 1145-50 (discussing personal information that can be contained in court records). There has been no showing in this instance that any particular medical information would be disclosed that might needlessly expose Petitioner to embarrassment, harassment, or other cognizable harm.

The public, meanwhile, has a strong interest in disclosure of pertinent medical information contained in special masters' decisions. The Vaccine Act's purpose is to encourage the continued widespread use of vaccinations and to provide compensation to those who may be injured by vaccines. The public has an interest in knowing which vaccines may cause injuries and what injuries those vaccines may cause. The public also has an interest in keeping decisions open to public view so any individual can assess whether he thinks vaccines are safe or whether he thinks the cases show that vaccines are unsafe. Further, the Vaccine Program is administered by the Secretary, and the public has an interest in seeing how the Secretary treats vaccine injury claims. The public pays the surtax that funds awards of compensation to claimants as well as their attorneys' fees and costs, and has an interest in monitoring the disposition of those funds.

As with all judicial proceedings, the public has a general interest in keeping government operations open to public inspection. Full disclosure of decisions allows the public to monitor judicial officers and to ensure that special masters administer the law fairly and in keeping with the Congressional intent. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concurring). The public also has an interest in the development of a coherent body of case law, so that all claimants can have notice of the standards for judging a case. Disclosure of decisions enables the public to request legislative action if the law or its application seems unjust; such a possibility is particularly relevant to the Vaccine Program because both vaccines and the Vaccine Program are topics of public debate.

The determination of whether disclosure would constitute a "clearly unwarranted" invasion of privacy must be made in light of the Act's requirement for disclosure of any findings of fact and conclusions of law and the ultimate determination in case. Because the statute requires disclosure of the critical components of a decision, which necessarily include information about a vaccinee's medical condition, a petitioner must show that her interest consists of something more than a preference for privacy. A petitioner must show that disclosure of medical information would cause a particular prejudice, and that the prejudice outweighs the public's substantial interests in disclosure. Redaction of medical information that forms the basis of a decision would render the decision virtually incomprehensible and useless to the public, and such redaction should not be a routine practice. See In re Violation of Rule 28(D), 635 F.3d at 1360 (excessive confidentiality markings deprive public of benefit of decisions and hampers a court's consideration and opinion writing).

ii. Redaction Is Inappropriate in this Case.

Petitioner has voiced only a preference for privacy, without presenting facts that would justify redaction. A general preference for privacy is not a sufficient basis for redaction, and particularly not in this case, which is a routine decision on a proffer -- the damages decision adopts the parties' Proffer and does not contain a detailed examination of Petitioner's injury, medical condition, or clinical course. The damages decision contains only two types of medical information: the injuries alleged and the vaccine received. This is exactly the type of medical information Congress required to be disclosed.

The public's interest in disclosure far outweighs Petitioner's privacy interest in this limited amount of medical information. Compensation was granted, and the public has a significant interest in knowing which vaccine was found to be legally responsible for the injury and under what circumstances. The Secretary chose in this case not to continue contesting vaccine causation, and she agreed to the amount of compensation to be awarded. The public generally, and especially any individual who has received the vaccine at issue, has a legitimate interest in knowing how this case was handled and resolved. Disclosure of these matters promotes the purpose of creating and maintaining an informed population in this vital area of public health, an overriding concern expressed in the statute and legislative history. Even when the medical information is linked to the amount of compensation awarded and Petitioner's name, disclosure cannot constitute an invasion of privacy that is clearly unwarranted because the Act requires disclosure of all this information. Accordingly, Petitioner's request for redaction of all medical information must be denied.

B. Cases Interpreting FOIA Do Not Determine the Proper Construction of the Vaccine Act.

Despite the clear guidance provided the Vaccine Act, Petitioner has alleged that cases interpreting FOIA should determine whether redaction should occur in Vaccine Act decisions. Because Exemption 6 of FOIA uses language similar to § 12(d)(4)(B)(ii) of the Vaccine Act, Petitioner asserted that the judicial application of the balancing test for evaluating disclosure under Exemption 6 should be applied to requests for redaction. Petitioner argued that identifying information should be redacted from a special master's decision upon request because identifying information often is exempt from disclosure under Exemption 6. Petitioner argued further that, because the district court in Long found that certain information in a government database was protected from disclosure through FOIA, based in part on § 12(d)(4)(A), the same information should be protected from public disclosure in a special master's decision.

Although the language in § 12(d)(4)(B) is similar to some of the language in § 552(b) of FOIA, that similarity does not establish that Congress intended to adopt the substantive rules of FOIA. Gross v. FBL Financial Servs., Inc., 129 S. Ct. 2343, 2349 (2009) (stating that "When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" (quoting Federal Express Corp. v. Holowecki, 552 U.S. 389, 393

(2008))); cf. Northcross v. Bd. of Ed. of Memphis City Schools, 412 U.S. 427, 428 (1973) (per curiam) (interpreting part of desegregation statute in pari passu with the Civil Rights Act of 1964 because they used the same language and had a common purpose). An examination of FOIA's text and purpose shows that FOIA and the Vaccine Act relate to different entities and different persons and that they share no common purpose. Therefore, one cannot apply the same standards under both statutes without reaching the wrong results.

1. The Freedom of Information Act

FOIA was enacted "to facilitate public access to Government documents." United States Department of State v. Ray, 502 U.S. 164, 173 (1991) ("Ray"). FOIA requires each federal agency to publish its rules of procedure, to disclose many details about its operational functions, and to open upon request its records to citizens for public inspection. § 552(a)(1)-(3). Under FOIA, individuals have a right to petition an agency to release information and records. FOIA establishes a "strong presumption in favor of disclosure" of documents held by an agency and "places the burden on the agency to justify the withholding of any requested documents." Ray, 502 U.S. at 173. If the government withholds information from disclosure, an individual can bring suit in a district court. § 552(a)(4)(B). FOIA provides that district courts review de novo an agency's decision to withhold. § 552(a)(4)(B); see Dep't of the Air Force v. Rose, 425 U.S. 352, 379 (1976) ("Rose").

FOIA requires each agency to make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . . ." § 552(a)(2)(A). An agency "may delete identifying details" from an opinion to the extent required to prevent "a clearly unwarranted invasion of personal privacy." § 552(a)(2). Instead of withholding a document that contains sensitive or exempted information, the document instead should be disclosed in redacted form; "the policy of informing the public about the operation of its Government can be adequately served in some cases without unnecessarily compromising individual interests in privacy." Ray, 502 U.S. at 174.

FOIA exempts nine categories of information from its broad disclosure requirements. Relevant here are Exemptions 3, 4, and 6. 5 U.S.C. § 552(b) reads:

> This section does not apply to matters that are –
> . . .
> (3) specifically exempted from disclosure by statute . . .;
> . . .
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
> . . .
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; . . . .

Exemption 3 allows for legislative override of FOIA's presumption of disclosure. Thus, if a statute explicitly exempts information from disclosure, that information cannot be disclosed. Exemption 4 applies to two types of information: 1) trade secrets and 2) information that is commercial or financial, and is submitted by a person, and is privileged or confidential. § 552(b)(4). Exemption 4 has two purposes. One is to encourage persons to cooperate with the government and voluntarily provide it with information when not required to do so by law. Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 877-78 (D.C. Cir. 1992) (en banc). The other is to protect the private interests of persons or entities who must "submit financial or commercial data to government agencies from the competitive disadvantages which would result from publication." Critical Mass, 975 F.2d at 877 (quoting National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 768 (D.C. Cir. 1974)).

Exemption 6 protects individuals from disclosure of personal information about them that the government may have. Exemption 6 has been interpreted by the Supreme Court as requiring "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" Rose, 425 U.S. at 372. "Exemption 6 does not protect against disclosure every incidental invasion of privacy, but only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." Id. at 382. The Court of Appeals for the District of Columbia has held that, when determining whether non-disclosure is proper under Exemption 6, a court should first determine whether disclosure would constitute an invasion of privacy and how severe an invasion. Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974). Next, the court should consider the public's interest in disclosure and whether other sources of information might suffice. Id. Then, the court should balance these factors. Id. at 78.

2. Cases Applying FOIA Do Not Govern Application of Section 12(d)(4)(B) To Special Masters' Decisions.

As Petitioner has argued, Exemption 6 of FOIA contains language that is similar to § 12(d)(4)(B)(ii). To the extent § 12(d)(4)(B)(ii) and Exemption 6 are similar, the cases interpreting Exemption 6 of FOIA reinforce my conclusion that redaction of medical information is appropriate only when an individual can show an interest in privacy that outweighs the public interest in disclosure. The Vaccine Act, like FOIA, creates a presumption of public disclosure subject to limited exceptions. Section 12(d)(4)(B)(ii) requires balancing of the individual interest in privacy against the statutory purpose of the Vaccine Act. Exemption 6 requires "a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" Rose, 425 U.S. at 372.

Although both FOIA and the Vaccine Act establish balancing tests for evaluating privacy interests, the balance of interests under Exemption 6 does not provide guidance

as to the proper balance to be struck in a redaction case under the Vaccine Act, because there are key dissimilarities between the statutes. First, the Vaccine Act and FOIA have different purposes and establish different legal schemes. FOIA's central purpose is to guarantee "that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed." Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989) (emphasis in original). FOIA creates a procedure for the public to gain access to government records that otherwise may not be disclosed, and is a mechanism for shedding light on the government's actions. When documents held by the government contain personal information, FOIA permits redaction of the personal information so the public can receive the benefit of knowing about government operations without incidentally compromising individual privacy.

Redaction of a special master's decision, in contrast, emanates from the opposite pole: a person is seeking to hide from the public information that does not "just happen to be" in the decision but is the actual subject of it. The Vaccine Act creates a judicial cause of action for individuals seeking compensation under a tort model, and it provides for public disclosure of a judicial officer's decision. The Vaccine Act's purpose is to stabilize the vaccine market, provide compensation to persons who may be injured by vaccines, and encourage public acceptance of immunization. The two statutes relate to different entities and persons, and they were designed to achieve different purposes. FOIA's standards therefore cannot be applied mechanically to the Vaccine Act.

The Vaccine Act's substantive provisions guide the judicial officer charged with balancing the competing interests in vaccine cases. Congress provided that a special master's decision must state whether compensation is to be awarded, contain the amount of any compensation, and include findings of fact and conclusions of law. § 12(d)(3)(A). A special master's findings of fact and conclusions of law necessarily will encompass key medical facts in a case, including the vaccine at issue, the injury alleged, and the injured person's medical condition. It would negate the statutory provisions and purpose to allow the critical components of a decision to be redacted upon request without a showing of special circumstance. If Congress had intended in § 12(d)(4)(B) either to adopt FOIA's redaction rules or provide anonymity to a petitioner, Congress would have either referenced FOIA specifically or provided explicitly for non-disclosure of identifying information, as it did in § 25. Instead, Congress provided that a decision shall be disclosed except if disclosure of medical information would constitute a clearly unwarranted invasion of privacy. Thus, when medical information forms the factual predicate of a decision, disclosure of that medical information is warranted by the Act, absent extraordinary circumstances. [21]

[21] Petitioner's reading would render nugatory the provisions of §12(d)(4)(B), in contravention of well-established principles of statutory construction. See Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 472 (1997) (noting the general doctrine that "legislative enactments should not be construed to render their provisions mere surplusage"); Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction, Vol. 2A § 46:3 (7th ed. 2007).

Since the statutes are not in pari materia, Exemption 6 of FOIA and the cases applying it do not dictate the proper interpretation of the term "clearly unwarranted" in the Vaccine Act. Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction, Vol. 2B § 51:3 (7th ed. 2007) ("Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object"). The fundamental and pervasive distinctions between FOIA and the Vaccine Act mandate application of this basic tenet of statutory construction in the circumstances presented here.

3. Petitioner's Arguments Are Unpersuasive.

Petitioner relied on FOIA's standard for withholding information. For the reasons stated above, that reliance is misplaced.[22] Petitioner also relied heavily on the district court decision in Long which, most importantly, was not decided under the Vaccine Act, but solely under FOIA. In Long, the plaintiff sought information contained in a Department of Justice database, not in a special master's decision. The court concluded that the DOJ properly withheld the information under Exemption 3, because §12(d)(4)(A) prohibits the disclosure of such information, and § 12(d)(4)(A) was an exemption statute under Exemption 3. Long, 2011 WL 1135925, at *10.

Petitioner maintained that, because the DOJ and the Secretary took the position in Long that the Vaccine Act prohibited disclosure through FOIA of vaccine type and administration date, the Secretary must agree that redaction of similar medical information from a special master's decision is appropriate. This argument fails for reasons discussed above. In addition, Petitioner did not distinguish between § 12(d)(4)(A) and § 12(d)(4)(B). By its express terms, § 12(d)(4)(A) does not apply to special masters' decisions. Accordingly, contrary to Petitioner's assertion, it is perfectly consistent for the Secretary to assert that § 12(d)(4)(A) categorically excludes

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This is no academic quibble. Petitioner's argument, if adopted, would eliminate the scheme Congress created to disclose information that is necessary to the proper functioning of OSM and the Vaccine Program. Congress evidently decided that similar information was not essential to the core functions of executive agencies, and therefore might be withheld under FOIA. The legislative scheme governing disclosure of information under the Vaccine Act may not be tossed aside simply because, in some instances, similar information might be withheld under a different statute. See discussion infra.

[22] A recent decision of the CFC found it appropriate to balance a petitioner's interest in privacy "against the public purpose of the Vaccine Act, in a manner analogous to the balancing of private and public interests under FOIA." W.C., 2011 WL 3439131, at *21. The court found that redaction of the petitioner's name was appropriate because the petitioner, who frequently testified for the government in cases involving criminal and administrative violations, had an individual interest in preventing the medical information in the decision from being used to discredit his professional testimony. Id. at *5, *21. No such showing of particularized harm has been adduced in this case.

information from disclosure through FOIA, while simultaneously asserting that the § 12(d)(4)(B) requires disclosure of the same information in a special master's decision.

Petitioner also relied on the Long court's discussion of Exemption 6. The court found that, even if Exemption 3 did not apply, the information requested would be exempt from disclosure under Exemption 6. Long, 2011 WL 1135925, at *10. The court balanced the individual privacy interest in the medical information against the purpose of the FOIA request. Id. at *11. The court found that the individual had a substantial privacy interest in the medical information held by the government. Id. at *12. The court did not, however, find a countervailing public interest in disclosure of the information. Id. According to the court, not only would the requested information not shed any light on the conduct of DOJ or HHS in performing their statutory duties, but the plaintiffs already had access to the information they requested through alternative sources, including "the publicly disclosed decisions by Court of Federal Claims special masters." Id. Therefore, "[h]aving balanced the privacy interests of the individuals to whom this information belongs against the non-existent public interest, the Court f[ound] disclosure clearly unwarranted." Id. The Long decision thus was predicated on the practice of disclosure that Petitioner has challenged. Long, in fact, explicitly endorsed the proposition that similar information may be withheld under FOIA and disclosed in a special master's decision.

For these reasons, Petitioner's reliance on the Long decision is unpersuasive. Although Exemption 6 and § 12(d)(4)(B)(ii) of the Vaccine Act both establish balancing tests, the interests to be balanced, and the weight to be afforded them, are different under each statute. The Long court considered whether the government could properly withhold information, not whether it could properly publish it. In so doing, the court was balancing the interests that pertain to the provisions, policies and purposes of FOIA, not the Vaccine Act.

IV. CONCLUSION

Petitioner has not established that redaction is appropriate under § 12(d)(4)(B) of the Vaccine Act. Therefore, Petitioner's Motion to Redact is **DENIED**.

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-411V
Filed: May 18, 2011

CHERYL A. CASTAGNA,	)	
	)	
Petitioner,	)	NOT TO BE PUBLISHED
	)	
v.	)	Damages; proffer;
	)	[redacted]
SECRETARY OF	)	[redacted];
HEALTH AND HUMAN SERVICES,	)	[redacted]
	)	
Respondent.	)	
	)	

Clifford J. Shoemaker, Shoemaker and Associates, Vienna, VA, for Petitioner.
Alexis B. Babcock, U.S. Dep't of Justice, Washington, D.C. for Respondent.

DECISION AWARDING DAMAGES[1]

On June 28, 1999, Petitioner Cheryl Castagna filed a petition seeking compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006). Petitioner alleged that she suffered from [redacted] and Probable [redacted]" which were caused in fact by the [redacted] vaccinations she received on February 26, 1998, and April 7, 1998. Amended Pet. at 1. On November 13, 2009, Respondent decided not to expend further resources on contesting entitlement in this matter, and I issued a ruling on entitlement on December 8, 2009.

On May 18, 2011, Respondent filed a joint Proffer setting forth all items of compensation to which the parties proffered should be awarded to Petitioner. Based upon the record as a whole, the undersigned finds the proffer reasonable and that Petitioner is entitled to an award as stated in the Proffer. Pursuant to the Proffer, attached as Appendix A, the court awards Petitioner:

[1] The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with 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 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 trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire ruling will be available to the public. Id.

1. **A lump sum payment of [redacted], representing life care expenses for Year One [redacted], lost earnings [redacted], pain and suffering [redacted], and past unreimbursable expenses [redacted] in the form of a check payable to petitioner, Cheryl Castagna;**

2. **An amount sufficient to purchase the annuity contract described in section II. B. of the Proffer attached as Appendix A.**

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.

IT IS SO ORDERED.

s/ Dee Lord
Dee Lord
Special Master

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

CHERYL A. CASTAGNA, Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	No. 99-411V Special Master Lord

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The respondent engaged life care planner Linda Curtis, RN, MS, CCM, CNLCP, to provide an estimation of Cheryl A. Castagna's future vaccine-injury related needs. For the purposes of this proffer, the term "vaccine-injury related" is as described in the special master's Ruling on Entitlement issued December 8, 2009. All items of compensation identified in the life care plan, filed on December 6, 2010, as Respondent's Exhibit G, are supported by the evidence, and are illustrated by the chart entitled Appendix A: Items of Compensation for Cheryl A. Castagna, attached hereto as Tab A.[1] Respondent proffers that Cheryl A. Castagna should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

[1] The chart at Tab A illustrates the annual benefits provided by the life care plan. The annual benefit years run from the date of judgment up to the first anniversary of the date of judgment, and every year thereafter up to the anniversary of the date of judgment.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, Cheryl A. Castagna has suffered a past loss of earnings and will not be gainfully employed in the future. Therefore, respondent proffers that Cheryl A. Castagna should be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Respondent proffers that the appropriate award for Cheryl A. Castagna's lost earnings is [redacted]. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Cheryl A. Castagna should be awarded [redacted] in actual and projected pain and suffering. This amount reflects that the award for projected pain and suffering has been reduced to net present value. See 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents Cheryl A. Castagna's expenditure of past unreimbursable expenses related to her vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of [redacted]. Petitioner agrees.

E. Medicaid Lien

Petitioner represents that there are no outstanding Medicaid liens against her.

II. Form of the Award

The parties recommend that the compensation provided to Cheryl A. Castagna should be made through a combination of lump sum payments and future annuity payments as described

below, and request that the special master's decision and the Court's judgment award the following:

A. A lump sum payment of [redacted] representing compensation for life care expenses expected to be incurred during the first year after judgment [redacted], lost earnings [redacted], pain and suffering [redacted], and past unreimbursable expenses [redacted], in the form of a check payable to petitioner, Cheryl A. Castagna.

B. An amount sufficient to purchase an annuity contract,[2] subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company[3] from which the annuity will be purchased.[4] Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioner, Cheryl A. Castagna, only so long as Cheryl A. Castagna is alive at the time a particular payment

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[2] In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

[3] The Life Insurance Company must have a minimum of $250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;

b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;

c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;

d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

[4] Petitioner authorizes the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a five percent (5%) growth rate should be applied to all medical life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent (4%) compounded annually from the date of judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioner agrees.

2. Life-contingent annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as she, Cheryl A. Castagna, is alive at the time that a particular payment is due. Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Cheryl A. Castagna's death.

3. Guardianship

Petitioner is a competent adult. Evidence of guardianship is not required in this case.

III. Summary of Recommended Payments Following Judgment

A. Lump Sum paid to petitioner, Cheryl A. Castagna: [redacted]

B. An amount sufficient to purchase the annuity contract described above in section II. B.