In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-36V
Filed: February 3, 2011

KEITH and BEVERLY LANGLAND, on behalf of their daughter, M.L.,	)	TO BE PUBLISHED
Petitioners,	)	
v.	)	Motion to Redact; § 300aa-12(d)(4)(B); Privacy; Medical information
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	
Respondent.	)	

Paul S. Dannenberg, Paul Dannenberg Esq., Huntington, VT, for Petitioners.
Melonie J. McCall, United States Department of Justice, Washington, D.C., for Respondent.

ORDER[1]

LORD, Chief Special Master.

I. INTRODUCTION AND OVERVIEW

Petitioners Keith and Beverly Langland sought compensation under the National Childhood Vaccine Injury Act ("Vaccine Act" or "Act") on behalf of their child, M.L., for injury allegedly suffered as a result of a Diphtheria-Tetanus-acellular Pertussis ("DTaP") vaccination administered in January 2004.[2] Special Master Abell issued a decision denying entitlement and Petitioners filed a timely motion seeking redaction of the decision pursuant to Vaccine Rule 18(b), essentially seeking anonymity for themselves and their child. Special Master Abell denied the request because it did not satisfy the requirements of § 12(d)(4)(B) of the Act, but he permitted Petitioners to file a supplemental request. While this request was pending, Special Master Abell retired and this case was assigned to me.

[1] As provided by Vaccine Rule 18(b), each party has 14 days within which to request the redaction "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." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of a timely objection, the entire document will be made publicly available.

[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.

Petitioners have requested redaction of all medical information, but in the alternative, they have proposed the redaction of Petitioners' names and other identifying information as a more efficient method of protecting the medical information from disclosure. For the reasons that follow, I grant in part and deny in part the request for redaction. I order redaction of the name of the minor child who was vaccinated, so that only the child's initials will appear in the decision and, in addition, I order redaction of the child's birth date. I deny further redaction.

The Vaccine Act requires special masters' decisions to be published. The Act also confers authority on special masters to order redaction of medical and other personal information meeting specified criteria. In this case, no information in the entitlement decision qualifies for redaction under the Congressionally-prescribed criteria in section 12(d)(4)(B) of the Vaccine Act.

Under the E-Government Act, which applies to the Office of Special Masters ("OSM"), a unit of the United States Court of Federal Claims ("CFC"), the courts have adopted rules governing redaction of private information. RCFC 5.2(a) permits redaction of certain identifying information, specifically, the name of a minor child, which may be redacted to initials, and an individual's birth date. See E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)-(c), 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)); RCFC 5.2(a). No further redaction of identifying information is required by the E-Government Act or the rules implementing it.

No statute, rule, or decision supports Petitioners' request for total anonymity. Petitioners' only argument in support of granting them anonymity is that such requests have been accorded by some special masters in the past. To the extent Petitioners suggest that affording petitioners anonymity was a uniform practice among the special masters Petitioners err, as Special Master Abell's decision in this and other cases demonstrates. Further, it is well established that special masters are not bound by the decisions of other special masters (or even by their own previous decisions). Petitioners therefore had no reasonable expectation that anonymity would be granted them.

II. PERTINENT PROCEDURAL AND FACTUAL BACKGROUND

A. Proceedings to Date

On October 21, 2010, Special Master Abell issued an entitlement decision dismissing Petitioners' petition. On November 4, 2010, Petitioners timely filed a motion to redact, requesting redaction of any mention of Petitioners' names or their family members' names. On November 8, 2010, Special Master Abell denied Petitioners' motion because Petitioners failed to show that the decision included "'medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.'" Order, Nov. 8, 2010 (quoting § 12(d)(4)(B)). Special Master Abell granted Petitioners leave to file a renewed motion by November 19, 2010, but specified that the motion should identify the content constituting the statutorily-defined information and that a "nonspecific demand without supporting proof or legal support will not suffice." Order, Nov. 8, 2010.[3] On November 19, 2010, Petitioners filed a

[3] This was in keeping with Special Master Abell's approach to redaction requests over the years. See, e.g., Finet v. Sec'y of Dep't of Health & Human Servs., No. 03-348V, 2009 WL 1374038 (Fed. Cl. Spec. Mstr. Apr. 24, 2009).

motion for an enlargement until November 26, 2010, to file a renewed motion for redaction. On November 19, 2010, Petitioners also filed a Motion for Review of the entitlement decision.[4]

On November 29, 2010, Petitioners filed an amended motion to redact the entitlement decision. Petitioners argued that it has been the Vaccine Program's "long and accepted" practice to redact a petitioner's or child's name. Petitioners asserted that redaction of all names, and any other potentially identifying information, is the "best, (by keeping the opinion largely intact), simplest, and most efficient" way to protect their private medical information. Mot. Redact, at 3. Petitioners requested that "all names of the petitioners or [M.L.] or any part thereof be deleted, as well as any other identifying information, such as case number, or name or location or medical facilities or providers." Mot. Redact, at 4. Alternatively, Petitioners requested redaction of any information that may have come from or been part of any medical file, including any reference to a medical condition, disease, or injury. Mot. Redact, at 4. Petitioners identified the page and line numbers of the information to which they objected.

B. Pertinent Statutes and Rules

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). They have no inherent authority to order redaction of private information. The Vaccine Act permits special masters to order limited redaction of medical information in specified circumstances not present in this case.

The E-Government Act, as implemented in Rule 5.2, applies by its terms to the entire federal judiciary and therefore also bears upon the scope of permissible redaction in proceedings under the Vaccine Act. RCFC 5.2(a) permits redaction of a minor child's name to initials as well as redaction of a birth date. Since RCFC 5.2(a) does not conflict with the Vaccine Act or Vaccine Rules, see Vaccine Rule 1(c), those redactions will be made in this instance.

The terms of the Vaccine Act, the E-Government Act, and the rules implementing them set the metes and bounds of special masters' authority to redact information from OSM decisions. None of these authorities permits the scope of redaction requested by Petitioners.

1. The Vaccine Act

In 1986, Congress passed the National Childhood Vaccine Injury Act, establishing a unique forum for compensation of persons injured by vaccines. The Vaccine Act was enacted both to ensure that the nation had a stable supply of safe, effective vaccines and to provide injured persons with compensation "quickly, easily, and with certainty and generosity." H.R. REP. NO. 99-908, at 1-2 (1986), reprinted in 1986 U.S.C.C.A.N. 6344. The Act was intended to further the public health by, inter alia, establishing a National Vaccine Program in the Department of Health & Human Services ("HHS"), implemented through a comprehensive plan to fund and coordinate vaccine research, licensing, and distribution, and by encouraging public

[4] The Motion for Review of the entitlement decision was assigned to Judge Wolski. On December 9, 2010, my chambers contacted Judge Wolski's chambers regarding the pending motion for redaction, and Judge Wolski indicated that he had no objection to my entertaining the motion for redaction at this time.

See generally, Cooter & Gell v. Hartmarx, Corp., 496 U.S. 384, 395 (1990) (noting that "[i]t is well established that a federal court may consider collateral issues after an action is no longer pending").

acceptance of immunization. § 1-3. 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 established the National Vaccine Injury Compensation Program ("NVICP"), 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.

Although the Secretary administers much of the Vaccine Program, Congress placed responsibility for deciding entitlement to compensation with the Judiciary. The Act established the OSM within the CFC, and OSM is the adjudicative body that hears vaccine injury claims in the first instance. §12. Each of the OSM's eight special masters is appointed for a term of four years by the judges of the CFC. § 12(c)(4). The judges also appoint a chief special master, who is responsible, inter alia, for administering the office of special masters and their staff, "providing for the efficient, expeditious, and effective handling of petitions." § 12(c)(6)(A). The special masters issue decisions including findings of fact and conclusions of law. § 12(d)(3)(A). A special master's decision may be appealed to the CFC, and further to the Court of Appeals for the Federal Circuit. § 12(e)-(f). The statute provides that the CFC reviews "any findings of fact and conclusions of law of the special master" under an "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. § 12(e)(2).

OSM is intended to provide a "less-adversarial, expeditious, and informal" forum for the resolution of vaccine injury petitions. § 12(d)(2). It was envisioned that the Vaccine Program would be faster than traditional tort litigation, that it would have lower transaction costs, and that it would give awards with relative certainty and generosity. H.R. REP. NO. 99-908, at 13. To help ensure the quick and efficient resolution of claims, aside from the petitioners and the Secretary, no other person can intervene or otherwise be made a party. H.R. REP. NO. 99-908, at 14; § 12(b)(1). In light of this restriction, Congress provided that any person could submit relevant, written information relating to the injury and its causation. H.R. REP. NO. 99-908, at 14; § 12(b)(2). To this end, the Act required the Secretary to publish in the Federal Register a notice of each new petition received. § 12(b)(2).

Section 12 of the Vaccine Act provides 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, more pertinently, "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy," § 12(d)(4)(B)(ii). Congress did not specify when the disclosure of such information would constitute a "clearly unwarranted" invasion of privacy.

2. Vaccine Rule 18(b)

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 a rule regarding requests for redaction of the decisions of special masters. Vaccine Rule 18(b) mirrors the statutory language:

Decision of the Special Master or Judge.

> 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 determination, at least in the first instance, to the discretion of the special master.

3. The E-Government Act

Congress reaffirmed the public's right to access to judicial records when it passed the E-Government Act of 2002, which instructed the judiciary to make its records electronically accessible to the public. The E-Government Act affirms that the public has an interest in obtaining access to court filings and decisions, but recognizes that some information is private, sensitive, and should not be publicly disclosed. E-Government Act, § 205(a)-(c). The E-Government Act was intended "[t]o take full advantage of the improved government performance that c[ould] be achieved through use of the Internet." E-Government Act § 2(a); see 44 U.S.C. § 3601 note.

Section 205 of the E-Government Act provides that all federal courts shall establish and maintain a website that provides public access to court rules, docket information, and the substance of all written opinions, amongst other information. E-Government Act § 205(a). The website shall provide to the public "[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format." Id. at § 205(1)(5).[5] It also requires that each court make publicly available online any electronically filed document, unless that document would not otherwise be available to the public, such as documents filed under seal. Id. at § 205(c). Section 205 requires the Supreme Court to promulgate rules to protect privacy and address security concerns relating to the filing of and public access to electronic documents. Id. at § 205(c)(3). To the extent practicable, the rules should provide for uniform treatment of privacy and security

[5] The E-Government Act requires disclosure of "written opinions," and the Judicial Conference has defined that term as "any document issued by a judge . . . that sets forth a reasoned explanation for a court's decision." See Access to Court Information Ever Expanding, THE THIRD BRANCH (Newsletter of the Federal Courts), July 2007, at 3, available at www.uscourts.gov/uscourts/news/ttb/archive/2007-07%20Jul.pdf (reporting the definition). The Judicial Conference further assigned to the issuing judge the responsibility for determining what constitutes a written opinion. Id.; see also Report of the Proceedings of the Judicial Conference of the United States 7 (Mar. 15, 2005), available at www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2005-03.pdf (approving the definition).

issues throughout the federal courts. Id. at § 205(c)(3). In response to this instruction, the federal courts adopted Model Federal Rule of Civil Procedure 5.2. FRCP 5.2 note.

4. Model Rule 5.2

In response to the E-Government Act and concerns raised by judges regarding electronic court filings, the U.S. Judicial Conference tasked a Committee with drafting new rules specifically to address privacy. The result was model Rule 5.2, which was adopted by the Judicial Conference following extensive deliberations, including periods of notice and comment. The rule ultimately was adopted as Federal Rule of Civil Procedure 5.2, which provides in part:

> **(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;
>
> (2) the year of the individual's birth;
>
> (3) the minor's initials; and
>
> (4) the last four digits of the financial-account number.

See Appendix A for full text of FRCP 5.2.

The Committee carved out certain types of civil cases from the general rule, however, because in those cases, it was deemed unworkable to apply the provisions set forth in Rule 5.2. Most pertinent to this discussion, the Committee, in subsection (c) of Rule 5.2, exempted Social Security cases. The Committee recommended limiting public electronic access in those cases to a skeletal docket and the written dispositions of the court.[6] The Committee did not address

[6] The Committee explained:

> [T]his recommendation treats Social Security cases differently from other civil case files. It would limit remote electronic access. It does contemplate, however, the existence of a skeletal electronic file in Social Security cases which would contain documents such as the complaint, answer and dispositive cross motions or petitions for review as applicable but **not** the administrative record . . . . Social Security cases warrant such treatment because they are of an inherently different nature from other cases. They are the continuation of an administrative proceeding, the files of which are confidential until the jurisdiction of the district court is invoked, by an individual to enforce his or her rights under a government program. Further, all Social Security disability claims, which are the majority of Social Security cases filed in district court, contain extremely detailed medical records and other personal information which an applicant must submit in an effort to establish disability. Such medical and personal information is critical to the court and is of little or no legitimate use to anyone not a party to the case. Thus, making such information available on the Internet would be of little public benefit and would present a substantial intrusion into the privacy of the claimant.

Judicial Conference Committee on Court Administration and Case Management, Report on Privacy and Public Access to Electronic Case Files, at Appendix A, 5 (June 26, 2001) (emphasis in original) [hereinafter "Judicial Conference Report on Privacy"].

redaction of any medical or other personal information contained in a court's written dispositions in Social Security cases.[7]

III. DISCUSSION

Petitioners have requested redaction of all medical information or in the alternative all identifying information. Petitioners' premise is that the vaccinee is entitled to redaction of all medical information on privacy grounds, and that since such redaction would render the decision incomprehensible, all identifying information should be redacted instead. As discussed below, the flaw in Petitioners' argument is their premise that all medical information must be redacted from the special master's decision. While medical information is indeed personal, Congress did not intend all medical information to be redacted routinely from OSM decisions. Since no basis exists for redacting all medical information, the alternative of redacting all identifying information also is unwarranted.[8]

A. Redaction of Medical Information in Vaccine Program Decisions

1. The Vaccine Act Limits the Authority to Redact Decisions.

The Vaccine Act permits redaction upon request of medical information which, if disclosed, would constitute a "clearly unwarranted invasion of privacy." § 12(d)(4)(B)(ii). Neither the statute nor the legislative history provides explicit guidance as to the content of the quoted phrase. [9]

---

[7] The CFC adopted Model Rule 5.2 with the exception of subsection (c). Subsection (c) was not included, apparently because the CFC does not hear Social Security disability or immigration cases. In place of that provision, RCFC 5.2(c) reads:

> (c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. [Not Used.]

[8] Petitioners have not argued that they have a constitutional right to redaction. See Vaccine Rule 8(f)(1) ("Any fact or argument not raised specifically in the record before the special master will be considered waived and cannot be raised by either party in proceedings on review of a special master's decision").

[9] The pertinent language also appears in exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), which lists "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" as an exception to the government's duty to disclose information to the public. Under FOIA, the phrase has been construed to require redaction of sensitive medical and personal information from files maintained by the government and required to be disclosed under FOIA. Dep't of State v. Washington Post, 456 U.S. 595 (1982); see 5 U.S.C. §§ 552(b)(4), 552(b)(6).

The altogether different context in which the terms appear in FOIA precludes applying the same construction under the Vaccine Act. 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). Petitioners' request for redaction, in contrast, emanates from the opposite pole: petitioners seek to hide from the public information that does not "just happen to be" in the entitlement decision but is the actual subject of it. Since the statutes are not in pari materia, FOIA and the cases construing it do not provide guidance as to the proper interpretation of "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

The best indication of Congress's intent is the language itself. 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))). Section 12(d)(4)(B)(ii) by its plain terms imposes a limitation on the right to redaction of medical information in a special master's decision. If all medical information could be kept secret upon request, the provision limiting the type of information that could be withheld from the public would be mere surplusage. 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"); Singer & Singer, Sutherland Statutory Construction, Vol. 2A § 46:3. So it is evident that something less than all medical information is subject to redaction. This leaves open the question of how much medical information may be redacted on privacy grounds.

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). The statutory scheme here evidences clear choices made by the legislative branch regarding the balance to be struck under the Vaccine Act between public and private interests.

-- First, Congress mandated that the Secretary of HHS publish a list of all vaccine claims in the Federal Register. § 12(b)(2). The express purpose of this provision was to disseminate information concerning vaccine injury claims, to foster public awareness and permit public comment. H.R. REP. NO. 99-908, at 14; § 12(b) (aside from the opportunity to submit written comment, the public is otherwise permitted no participation in vaccine cases brought before OSM).

-- Second, Congress protected information submitted by claimants in the course of adjudication. § 12(d)(4)(A). Thus, treatment records and similar documents containing personal medical information are closed to public view. The purpose of this provision patently is to protect personal medical and other information, the public disclosure of which was deemed by Congress to be unnecessary to carrying out the statutory purposes.

-- Third, Congress required publication of special masters' decisions. § 12(d)(4)(B). This is consistent with the traditional presumption affording public access to judicial actions and serves the Vaccine Act's express purpose in promoting public awareness of vaccine safety.

-- Fourth, Congress conferred authority on special masters to redact a narrow subset of personal information, including certain medical information, upon a specific showing satisfying the criteria for redaction set forth in subsections 12(d)(4)(B)(i) to (ii) of the Vaccine Act.

A special master is not authorized to alter the balance that Congress struck in the Vaccine Act between public and private interests; special masters' authority is limited to that granted by Congress. Patton, 25 F.3d at 1027. Under the plain provisions of the Vaccine Act, and consistent with the statutory scheme, a special master's discretion to order redaction is therefore very limited. It does not extend to anything other than redacting the information

---

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"). For the reasons discussed herein, it is plain that Congress did not intend to permit redaction of all sensitive medical information from Vaccine Program decisions.

described in section 12(d)(4)(B). No provision of the Vaccine Act or the rules promulgated under the Act permits a special master to redact additional information.

By definition, every Vaccine case involves a medical injury and medical information. When Congress provided that decisions under the Vaccine Act shall be disclosed, it clearly contemplated that medical information would be disclosed as well. The Vaccine Act's language grants special masters the authority to redact medical information only if the requesting party can show that disclosure would be an invasion of privacy, and that that invasion would be "clearly unwarranted." Read in the context of the statutory structure and purposes described above, this emphatic language shows that a party requesting redaction of medical information must satisfy a substantial burden to demonstrate a right to redaction.

2. At Common Law, Redaction of Medical Information is Limited to Extraordinary Circumstances.

While Congress did not state explicitly in section 12(d)(4)(B)(ii) what it intended by information which, if disclosed, would constitute a clearly unwarranted invasion of privacy, "Congress does not legislate in a vacuum." Ortega v. Holder, 592 F.3d 738, 743 (7th Cir. 2009). Among other sources of law, Congress legislates "against a backdrop that includes the decisional law of the Supreme Court." Hispanos Unidos v. Virgin Islands, 314 F.Supp.2d 501, 504 (D.V.I. 2004) (citing Sea-Land Serv., Inc. v. United States, 874 F.2d 169 (3d Cir. 1989)). Thus, the privacy interests typically recognized by federal courts provide guidance as to the meaning of the terms "clearly unwarranted invasion of privacy." The judiciary's tradition of public access to decisions, exemplified by its strict limitations on permitting filings under seal, supports construing the Vaccine Act to restrict redaction.

The common law establishes a strong presumption favoring public access to judicial records and proceedings. Nixon v. Warner Comm'cns, 435 U.S. 589, 598-99 (1978); see Baystate Techs., Inc. v. Bowers, 283 Fed.Appx. 808 (Fed. Cir. 2008) (unpublished table decision) (noting public right under First Circuit law).[10] "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).[11] The public has "ownership of the work of its public officials, including its judges." Reidell v. United States, 47 Fed. Cl. 209, 212 (2000). "Information that affects the disposition of litigation belongs in the public record unless a statute or privilege justifies nondisclosure." United States v. Foster, 564 F.3d 852, 853 (7th Cir. 2009). Other circuits also "have recognized a 'general right to inspect and copy public records and documents, including judicial records and documents.'" See, e.g., Kamakana v. Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting Nixon, 435 U.S. at 539).

Many judicial documents contain personal information and the courts recognize that in special instances -- such as cases involving trade secrets, names of spouses in domestic disputes, and undercover witnesses -- privacy considerations may outweigh the public's right to

[10] 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).

[11] 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).

access. In such cases, a party or parties often will file sensitive documents under seal, if permitted to do so by the presiding judicial officer. "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)). "But to order that proceedings be closed, a judge must make specific, on-the-record findings that 'closure is essential to preserve higher values than the public's right of access and is narrowly tailored to serve that interest.'" Crossman v. Astrue, 714 F.Supp.2d 284, 286 (D. Conn. 2009) (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)) (denying Social Security disability claimant's motion to file every document under seal); see generally, Sealed Plaintiff v. Sealed Defendant #1, 537 F.3d 185, 188-90 (2d Cir. 2008) (discussing factors to be balanced by court exercising its inherent authority to permit anonymous filing).

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, 447 F.3d at 1178-79 (citations omitted); accord, e.g., Virginia Dep't of State Police, 386 F.3d at 575. To overcome the presumption of public access "a litigant must do more than just identify a kind of information and demand secrecy." Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 546 (7th Cir. 2002). In general, compelling reasons sufficient to outweigh the public interest in disclosure exist when court files may become a vehicle for improper purposes, "such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." Kamakana, 447 F.3d at 1179. "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." Id. As the Seventh Circuit stated in Baxter, "[M]any 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, 297 F.3d at 547.

In sum, under the common law, public access to decisions is presumed, and the party seeking to seal a document faces a burden to show particularized harm outweighing the public interest in disclosure. This common law background informs the correct construction of the language in section 12(d)(4)(B)(ii), and militates against routine redaction of all sensitive medical information from special masters' decisions.

3. Petitioners Have Not Satisfied the Criteria for Redaction in Section 12(d)(4)(B).

Redaction of all medical information concerning petitioners who seek compensation under the Vaccine Program would render special masters' decisions meaningless. A result so inimical to the statutory structure and purposes cannot have been intended by Congress. Absent particularized grounds warranting non-disclosure in a particular case, the medical information relevant to a special master's decision whether to award compensation is exactly the type of information that should be disclosed.

No special facts warranting redaction of medical information have been adduced by Petitioners in this case, and upon careful review of the record, no such facts appear. Disclosure of medical information concerning the vaccinee's medical condition in this context is not "clearly unwarranted." On the contrary, disclosure is vital to understanding Special Master Abell's

decision to deny entitlement and the public has legitimate interests in knowing the reasons for that decision. None of the medical information included in the decision in any way gratifies private spite, promotes public scandal, or circulates libelous statements. See, e.g., Kamakana, 447 F.3d at 1179 (citing Nixon, 435 U.S. at 598). There is nothing shameful or scandalous about the vaccinee's injuries or Petitioners' claim for compensation under the Act.

Vaccine injuries are matters of overwhelming concern in the public health arena. As Congress recognized, the public needs to know whether, when, and in what circumstances vaccines are determined to cause injuries. Individual awards of compensation in the Vaccine Program can total tens of millions of dollars paid from a public trust fund. In addition, special masters routinely award substantial amounts to attorneys and experts who assist in the process of adjudication. This information is of legitimate interest not only to the general public but to other persons who may seek compensation for vaccine injuries, to the press, and to the health community.

That Petitioners would prefer not to have these matters made public is understood. Public disclosure of any information about an individual, including medical information, can result in embarrassment, discrimination, and unwanted communications from third parties. The Vaccine Act, however, confers no authority to order redaction beyond that specified in Section 12(d)(4)(B). Compelling as Petitioners' desire for anonymity may be, I cannot grant their request without exceeding the authority conferred by Congress.

One may readily conceive of medical information in a vaccine case that might be redacted by a special master, upon receiving a proper motion in accordance with Vaccine Rule 18(b), as meeting the "clearly unwarranted" criterion. Facts involving sexual misconduct or dysfunction, family medical history not pertinent to the vaccinee's claim, unrelated mental illness, or medical conditions inherently likely to bring opprobrium upon the sufferer, might well be redacted upon a proper motion.[12] Such redaction decisions can only be reached on a case-by-case basis. See, e.g., Virginia Dep't of State Police, 386 F.3d at 575 ("Ultimately, under the common law the decision whether to grant or restrict access to judicial records or documents is one 'best left to the sound discretion of the district court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.'" (quoting Nixon, 435 U.S. at 598-99)).

Petitioners have requested redaction of all medical information from Special Master Abell's reasoning for denying entitlement. Disclosure of the medical information will not cause a clearly unwarranted invasion of privacy. Because this is not the type of medical information that qualifies for redaction, the alternative method of redaction suggested by Petitioners, namely, concealment of all identifying information necessarily must be rejected as well.[13]

[12] One would hope and expect that the need for redaction would be rare, because most OSM decisions are written without unnecessary disclosure of the petitioner's medical information.

[13] As indicated above, the Vaccine Act does not provide for redaction of identifying information. Such redaction is disfavored at common law, except under extraordinary circumstances. Reasonable jurists can disagree concerning the circumstances under which redaction of identifying information is justified. For a recent example of bitter disagreement on this question, see Doe v. Kamehameha Schools, 625 F.3d 1182 (9th Cir. 2010). Suffice it to say that no circumstances appear in this case that approach the appalling situation giving rise to the request for redaction in Kamehameha.

B. Redaction of Identifying Information Under the E-Government Act

The E-Government Act and implementing rules adopted by the federal courts permit redaction of certain identifying information.[14] This part of the decision discusses the application of the E-Government Act and implementing rules to the question of what identifying information may be redacted from Special Master Abell's entitlement decision, in accordance with Petitioners' request.

The E-Government Act responded to the development of electronic media that were not in common usage in 1986, when the Vaccine Act was adopted. Since OSM is part of the federal judiciary, Congress presumably intended that it would be subject to the E-Government Act, barring actual conflict between the two laws. "We must assume that Congress is cognizant of other statutory provisions and expects its new enactments to work in harmony with existing provisions." Ortega, 592 F.3d at 743.

As implemented by the federal courts, including the CFC, the E-Government Act generally permits redaction of particular information, as pertinent here, the name of a minor child and an individual's birth date. See RCFC 5.2(a).[15] While not conferring complete anonymity on the vaccinee in this case, Rule 5.2(a) provides significant protection from discovery by casual electronic searching. This is the extent of the protection recommended by the Judicial Conference, permitted by the Court of Federal Claims, and consistent with the practice of other courts.

It is significant that the result achieved here for Vaccine Program petitioners is consistent with the privacy protection afforded Social Security disability claimants. Under Model Rule 5.2(c), as recommended by the Judicial Committee and adopted by most courts, Social Security disability claims receive special treatment in the district courts. The administrative file in such proceedings is available only at the courthouse, not electronically, while a skeleton docket created by the court is published on line. The reviewing court's decision, however, is disseminated electronically. See FRCP 5.2(c).

Of even greater significance for the Vaccine Program is that no court permits redaction upon request of its entire docket to protect the identity of claimants. Yet, this would be the effect of the remedy proposed by Petitioners in this case.

[14] The Vaccine Act contains more specific provisions governing redaction of special masters' decisions, it therefore would be possible to conclude that the E-Government Act has no application in this context. Since the two enactments can be harmonized, however, application of both is appropriate. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (stating that redundancies across statutes are not unusual, and absent repugnancy between two laws, effect should be given to both laws); Singer & Singer, Sutherland Statutory Construction, Vol. 2B, § 51:2.

[15] Vaccine Rule 1(c) states that "the RCFC apply only to the extent they are consistent with the Vaccine Rules." What constitutes consistency between the Vaccine Rules and the CFC Rules has not been elucidated by the courts. It could be argued that certain provisions of RCFC 5.2 conflict with Vaccine Rule18, and therefore are inapplicable pursuant to Vaccine Rule 1(c). I perceive no actual inconsistency in this case between application of RCFC 5.2(a), however, which concerns redaction of identifying information, and application of Vaccine Rule 18(b), which covers redaction of medical information.

The standards governing redaction of published decisions under Rule 5.2(c) is not spelled out under the federal rules. It is clear, however, that Social Security claimants are not entitled to anonymity, notwithstanding that in disability claims, including disability of a minor child, claimants' personal medical information is extensively discussed in judicial decisions.[16] Rule 5.2(c) affords no protection for medical information or any identifying information other than the redaction permitted in Rule 5.2(a), as pertinent here, a minor child's name and birth date. Since vaccine injury claimants commonly participate in both programs, uniformity of redaction practices is especially desirable. See E-Government Act § 205(c)(3)(A)(ii); Judicial Conference Report on Privacy, at Appendix A, 5 ("There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file").

Consistent with the rules and practices adopted by the courts under the E-Government Act and Rule 5.2, only the minor child's name [substituting initials] and birth date will be redacted from Special Master Abell's decision in this case.

C. Petitioners' Request for Anonymity Is Not Supported by Past Practice.

Petitioners argue that they are entitled to anonymity because some special masters in the recent past have redacted claimants' identity in their decisions. The quick answer is that one special master is not bound by the decisions of another. Hanlon v. Sec'y of Dep't of Health & Human Servs., 40 Fed. Cl. 625, 630 (1998), aff'd on other grounds, 191 F.3d 1344 (Fed. Cir. 1999); accord, e.g., Snyder v. Sec'y of Dep't of Health & Human Servs., 88 Fed. Cl. 706, 719 n.23 (2009); Guillory v. Sec'y of Dep't of Health & Human Servs., 59 Fed. Cl. 121, 124 (2003), aff'd on other grounds, 103 Fed. Appx. 712 (Fed. Cir. 2004). This principle applies with equal force to redaction as to other special masters' decisions.

Petitioners' implication that a uniform practice was adopted by special masters regarding requests for anonymity is belied by this very case. In fact, Special Master Abell's practice was to refuse redaction unless a petitioner satisfied the criteria of § 12(d)(4)(B). See, e.g., Finet, 2009 WL 1374038. After Petitioners in this case filed a request that did not comply with § 12(d)(4)(B), Special Master Abell clearly instructed Petitioners that redaction would be granted only if Petitioners could satisfy the criteria specified in § 12(d)(4)(B) of the Vaccine Act, and he permitted them leave to refile. On refiling, Petitioners provided no support for redaction of medical information in accordance with the statutory requirements.[17]

---

[16] For just a few examples see: Giles ex rel. Giles v. Astrue, 483 F.3d 483 (7th Cir. 2007) (discussing minor's developmental delays and speech and language disorders); Gomes ex rel. Reiner v. Astrue, 633 F.Supp.2d 171 (S.D.N.Y. 2009) (discussing minor's ADHD, speech and language delays). Lopez v. Astrue, 2009 WL 1543494 (W.D. Wash. Mar. 29, 2009) (discussing minor's four severe mental impairments); Sanchez ex rel. Sanchez v. Barnhart, 467 F.3d 1081 (7th Cir. 2006) (discussing minor's asthma and psychiatric diagnoses). Routine publication of claimants' medical information in Social Security disability decisions reinforces the conclusion that publication of medical information in the context of Vaccine Program decisions cannot constitute a "clearly unwarranted invasion of privacy." See discussion, supra, at section III.A.3.

[17] Petitioners have been given notice and a full and fair opportunity to be heard, and therefore cannot claim they have been deprived of any due process. See Goldberg v. Kelly, 397 U.S. 254 (1970); see also Vaccine Rule 8(f)(1) (waiver).

As discussed above, the legal authorities do not support a general practice of redacting all identifying information from a special master's decision, whether under the Vaccine Act or the E-Government Act. That this practice may have been employed in the past by some special masters does not justify its perpetuation, if the practice is unsupported by pertinent legal requirements. See generally Swift Co. v. Wickham, 382 U.S. 111, 116 (1965) (stating that unless a practice is "inexorably commanded by statute," it should not be continued "in the name of stare decisis once it is proved to be unworkable in practice"). Petitioners have identified no legal authority that entitles them to the relief they seek. Pertinent law, as discussed above, precludes granting their request.

IV. CONCLUSION

I grant Petitioners' request in part, by replacing the name of their minor child with initials and redacting the child's birth date. Further redaction is denied.

IT IS SO ORDERED.

Dee Lord
Chief Special Master

APPENDIX A

FRCP 5.2

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed; and

(5) a filing covered by RCFC 5.2(d).

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases.
Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The Court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal.

A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List.
A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of RCFC 5.2(a) s to the person's own information by filing it without redaction and not under seal.