

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-2751 V

Filed: September 22, 2011

To Be Published

WYLDN H. PEARSON, *

Petitioner, *

v. *

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Denial of Motion to Redact
Decision Awarding Damages

ORDER¹

Pursuant to Vaccine Rule 18(b), petitioner moved to redact his name and case number from the Decision Awarding Damages issued August 23, 2011. Respondent filed her response to petitioner's motion on September 13, 2011, objecting to any redaction of the decision. Petitioner sent his reply on September 22, 2011.

Because the redaction of petitioner's name and case number to prevent disclosure of award of compensation does not meet the criteria for redaction under the Vaccine Act, petitioner's request is **DENIED**.

I. Procedural Background

On November 26, 2003, petitioner Wyldn H. Pearson filed a petition under the National Childhood Vaccine Injury Act ("Vaccine Act" or "Act"), 42 U.S.C. §§ 300aa-1-33 (2006). On August 16, 2011, the undersigned filed a decision awarding compensation to petitioner based

¹ Vaccine Rule 18(b) states that all decisions and substantive orders of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision or substantive order is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

upon Respondent's Proffer on Award of Compensation, filed on August 11, 2011. Due to an error in respondent's calculation of damages in its proffer, the decision issued August 11 was struck from the record. A new Decision Awarding Damages based on respondent's revised Proffer, which included the correct calculation of damages, was issued on August 23, 2011.

Under Vaccine Rule 18(b), a party has 14 days after a special master's decision is filed to request redaction of certain information in the decision before it is released to the public. Petitioner timely filed his motion on August 31, 2011, requesting that his name and case number be redacted from the Decision Awarding Damages issued August 23, 2011. *See* Pet'r's Mot. for Order Excluding Confidential Information ("Pet'r's Mot.") at 2. Petitioner argues that the disclosure of his unique name combined with the award of compensation constitutes confidential financial information, the release of which is an unwarranted invasion of privacy. *Id.* Additionally, petitioner requests that the case number be redacted, contending that one can discover his identity through the case number in the damages decision by looking at the Ruling on Entitlement issued November 6, 2008, which includes both his name and case number. *Id.*

Respondent filed a response to petitioner's motion on September 13, 2011, objecting to the redaction of petitioner's name and case number. *See* Resp't's Reply to Pet'r's Mot. to Redact Decision on Damages and Proffer ("Resp.") at 1, 6. Respondent argues that petitioner fails to state how the disclosure of the information for which he requests redaction would amount to a "clearly unwarranted invasion privacy," as required by the Vaccine Act and Vaccine Rule 18(b).² *Id.* Additionally, respondent contends that Congress intended for an adult petitioner's name to be disclosed, limiting the option of redaction to medical facts which would constitute a clearly unwarranted invasion of privacy and privileged or confidential financial information. *Id.* at 5.

On September 22, 2011, petitioner sent³ his reply. Petitioner stressed his privacy interest and that disclosure of his award in connection with his name would be a clearly unwarranted

² Respondent also argues that petitioner has standing only to object to the disclosure of information which petitioner provided to the Court. Resp't's Reply to Pet'r's Mot. to Redact Decision on Damages and Proffer ("Resp.") at 2, 6. Accordingly, petitioner cannot request redaction of information in the proffer, which was filed by respondent. *See id.* Respondent's argument, however, does not take into account that the undersigned attached and incorporated the proffer into the damages decision she issued on August 23, 2011. The proffer is effectively part of the decision when it is filed by the court as an attachment to the decision, and the decision refers to and incorporates its terms. Because Vaccine Rule 18(b) pertains to a "decision" of a special master, petitioner may request redaction of these pages as well.

³ On September 16, 2011, the undersigned's law clerk spoke with petitioner's counsel about whether petitioner planned on filing a reply to respondent's response. On September 21, 2011, petitioner's counsel communicated that petitioner planned on filing a reply that day. Because judgment on the damages decision was going to enter in the case on September 23, 2011, the undersigned's order ruling on the motion had to be filed by September 22, 2011. Accordingly, the undersigned's law clerk asked petitioner's counsel to either fax or e-mail the reply, in addition to formally filing a paper copy with the court (the case is not electronic), so the undersigned could consider it before ruling on the motion. The undersigned received the motion, along with respondent, via e-mail on September 22, 2011.

invasion of privacy. Pet’r’s Reply at 2–3 (“The issue is whether the disclosure of petitioner’s name in the Decision Awarding Damages . . . constitutes a clearly unwarranted invasion of privacy”). Petitioner again contended that there is no public purpose in disclosing his name in connection with his award. *Id.*

II. Relevant Legal Standards

The Vaccine Act, Vaccine Rule⁴ 18(b), and the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002), as implemented by the Rules of the Court of Federal Claims (“RCFC”), dictate the limited circumstances in which a special master may order redaction of a decision.

A. The Vaccine Act and Vaccine Rule 18(b)

The Vaccine Act contains two privacy provisions: § 12(d)(4)(A) and § 12(d)(4)(B).⁵ Section 12(d)(4)(A) provides that “[e]xcept as provided in subparagraph (B), information submitted to a special master . . . 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.” Decisions⁶ of special masters, however, are governed by § 12(d)(4)(B), which states:

- (B) A decision of a special master or the court in a proceeding shall be disclosed, except that if the decision is to include information—
 - (i) which is trade secret or commercial or financial information which is privileged and confidential, or
 - (ii) which are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy,and if the person who submitted such information objects to the inclusion of such information in the decision, the decision shall be disclosed without such information.

Thus, the statute contemplates two distinct situations concerning disclosure of petitioner’s information. While the special master conducts proceedings on a petition, any

⁴ Pursuant to authority granted in 42 U.S.C. § 300aa-12(d)(2) (2006), the Court of Federal Claims, based on the recommendation of the special masters, promulgated the Vaccine Rules to govern petitions brought under the Act.

⁵ For an extensive and well-researched discussion of the amendments and legislative history of these provisions of the Act, see Special Master Lord’s recently published decision denying redaction of financial and medical information in a damages decision, *Castagna v. Sec’y of HHS*, No. 99-411V, 2011 WL 4348135, at *4–8 (Fed. Cl. Spec. Mstr. Aug. 25, 2011).

⁶ Section 300aa-12(d)(3)(A) specifies the information that must be included in a decision of a special master: whether compensation is to be provided, the amount of compensation, findings of fact, and conclusions of law. 42 U.S.C. § 300aa-12(d)(3)(A).

information submitted to the special master may not be disclosed unless the party who submitted the information consents. § 300aa-12(d)(4)(A). When the special master reaches a decision in a proceeding, however, such a decision “shall be disclosed.” § 300aa-12(d)(4)(B) (emphasis added). If the decision includes privileged and confidential financial information or medical information, the disclosure of which would constitute a clearly unwarranted invasion of privacy, and the party who submitted such information objects, only then may the special master redact the decision. *Id.*

Vaccine Rule 18(b) largely tracks the statutory language. The rule provides:

- (b) 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 trade secret or commercial or financial in substance and is privileged or confidential; or
 - (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.
- An objecting party must provide the court with a proposed redacted version of the decision. In the absence of an objection, the entire decision will be made public.

Vaccine Rule 18(b). Similar to the statute, the rule only permits redaction of a narrow class of information: privileged or confidential financial information or medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.

B. E-Government Act of 2002

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

To implement this requirement, the Court of Federal Claims added⁷ RCFC 5.2. The rule provides that an electronic or paper filing may be redacted if it contains an individual’s social security number, taxpayer-identification number, birth date, account number, or the name of a minor. RCFC 5.2(a).

⁷ For a full account of the federal courts’ implementation of § 205 of the E-Government Act, see Special Master Lord’s discussion in *Langland v. Sec’y of HHS*, No. 07–36V, 2011 WL 802695, at *4–5 (Fed. Cl. Spec. Mstr. Feb. 3, 2011).

III. Analysis

Petitioner requests redaction of his name and case number to avoid public disclosure of petitioner's award in connection with his name. Pet'r's Mot. at 1–2. He argues that his name is unique and can be easily found when searching the Internet. *Id* at 2. When combined with the award of compensation, he insists that this information “constitutes financial information that is confidential, the disclosure of which does not serve a public interest and would be an unwarranted invasion of privacy.” *Id*.

When petitioner argues that disclosure of his name in connection of his award is an unwarranted invasion of privacy, he transposes the descriptive language of two separate sections in the statute. Each section, however, should be read independently. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (stating that a court must give effect to every clause and word of a statute). The “clearly unwarranted invasion of privacy” language qualifies what type of medical information may be redacted. § 300aa-12(d)(4)(B)(ii). “Privilege and confidential” describes what type of trade secret or commercial or financial information may be redacted. § 300aa-12(d)(4)(B)(i). Thus, to prevent disclosure of the award,⁸ petitioner must show that the award is financial information that is both⁹ privileged and confidential.

The statutory term “financial information” may be reasonably construed to include an award of compensation. *See Castagna v. Sec’y of HHS*, No. 99-411V, 2011 WL 4348135, at *12 (Fed. Cl. Spec. Mstr. Aug. 25, 2011). To meet the criteria for redaction under the statute, however, financial information must be privileged and confidential. 42 U.S.C. § 300aa-12(d)(4)(B)(i). Petitioner does not explain why this information is confidential and never claims that this information is privileged, which means that petitioner has not fulfilled the requirement of the Vaccine Act that a party seeking redaction of financial information show that the information is both privileged and confidential.

Furthermore, even under the incorrect standard petitioner argues, that disclosure of the award does not serve a public interest and is a clearly unwarranted invasion of privacy, *see*

⁸ In his reply, petitioner insists that his request concerns only redaction of his name and case number, not redaction of the award. *See* Pet'r's Reply at 1, 3. Yet, petitioner does not want to keep his name private; he wants to prevent the public from knowing the amount he was awarded in the decision by removing his name and case number from the decision. This is evident from the repeated assertions that disclosing not just his award, but his award in connection with his name would be a clearly unwarranted invasion of privacy. *See* Pet'r's Mot. at 2, 3; Pet'r's Reply at 1, 3. Accordingly, the discussion focuses on the showing required to prevent disclosure of an award in a decision.

⁹ Although Vaccine Rule 18(b) largely tracks the statutory language, there are some variations. Namely, Vaccine Rule 18(b) allows for redaction of financial information that is “privileged or confidential.” Section 300aa-12(d)(4)(B)(i) of the Vaccine Act allows for redaction of financial information that is “privileged and confidential.” The Vaccine Act, as an act of Congress, takes precedence over a Vaccine Rule. Thus, petitioner must meet the more restrictive standard of the statute and show that financial information is both privileged and confidential.

Pet’r’s Mot. at 2; Pet’r’s Reply at 2, petitioner does not explain why this is the case. As Special Master Lord reasoned in *Castagna*, the amount awarded as compensation for damages was not meant to be kept private. *Id.* at *12. The public generally has a right to access judicial decisions, which are a matter of public record. *See id.* at *8–9 (discussing the common law right of access to judicial records). Congress recognized this public interest in the Vaccine Act specifically and required disclosure of a special master’s decision, which by statute includes the amount of compensation awarded. 42 U.S.C. § 300aa-12(d)(3)(A). Congress later reaffirmed this general principle in the E-Government Act by requiring all federal courts to make written opinions available online, subject to protections for privacy and security as determined by each court. § 205(a)(5). When the Court of Federal Claims implemented the E-Government Act and enacted its privacy protections for filings, it did not provide for redaction of the amount of compensation a party was awarded. *See* RCFC 5.2. (allowing for redaction of a social security number, taxpayer-identification number, financial account number, birth date, or name of a minor).

Petitioner emphasizes in his motion and reply that there is no public interest in revealing his name and the civil number in his case. That is incorrect. Not only does the Vaccine Act require disclosure except for two limitations, one of which is financial information that is privileged and confidential, but also the purpose of disclosure of rulings and awards is to educate an interested public in whether petitioners who receive certain vaccines and have certain injuries are being compensated and the amount of the compensation. The undersigned’s ruling on entitlement in petitioner’s favor was published.¹⁰ *See Pearson v. Sec’y of HHS*, No. 03-2751, 2008 WL 5093378 (Fed. Cl. Spec. Mstr. Nov. 6, 2008) (middle-aged man receives second hepatitis B vaccine at the time he has an upper respiratory infection; gets transverse myelitis 26 days later; respondent moves for ruling on the record). Either a vaccinee or a vaccine attorney interested in reading this case or looking to evaluate a prospective case would be interested in discovering how much petitioner was awarded. There is no way to connect the ruling on entitlement to the damages decision unless either petitioner’s name or the civil number is present on the damages decision. Since petitioner has stated that both his name and the civil number need to be redacted or someone curious could use either to discover petitioner’s identity, there is no reason to redact just one. There is a substantial public interest in disclosing petitioner’s award, which predominates over petitioner’s wish to keep his award secret.

To support the proposition that there is no public interest in the disclosure of a petitioner’s name, petitioner cites a recent case in the Court of Federal Claims, *W.C. v. Sec’y of HHS*, No. 07-456V, 2011 WL 3439131 (Fed. Cl. July 22, 2011). *See* Pet’r’s Mot. at 2; Pet’r’s Reply at 2–3. In that case, the court concluded that the privacy provisions of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, should be construed “in concert” with the privacy provisions of the Vaccine Act because the provisions mirror each other. *W.C.*, 2011 WL 3439131, at *21. Accordingly, the court balanced petitioner’s privacy interests against the public purpose of the Vaccine Act, as is done in FOIA cases. *Id.* The court considered the petitioner’s

¹⁰ As in all decisions of the special masters, a footnote was included in the ruling on entitlement, informing petitioner that he had 14 days to move to redact the decision. *See Pearson v. Sec’y of HHS*, No. 03-2751, 2008 WL 5093378, at *1 n.1 (Fed. Cl. Spec. Mstr. Nov. 6, 2008). Petitioner did not move to redact this decision.

interest in keeping his name or medical condition private because of his line of work. *Id.* It then weighed petitioner's interest against the public interest. *Id.* The court concluded that there is a notable interest in petitioner's vaccination, subsequent medical history, and adverse reaction, but there is not a similar interest in the disclosure of his identity. *Id.* Therefore, the court found that redaction of the petitioner's name was proper, but it retained the medical information in the decision. *Id.*

The case at hand can be distinguished from *W.C.* The petitioner in *W.C.* argued that disclosure of his medical condition would be a clearly unwarranted invasion of privacy because knowledge of his medical condition might affect his credibility and efficacy as a witness in court and would undermine his career, which the court found persuasive. *Id.* at *5, 21. Such a circumstance is not present in this case. All petitioner wants here is to keep people at large unaware of the amount of his damages award, should they perform an internet search of his name. *See* Pet'r's Mot. at 2; Pet'r's Reply at 2. Petitioner basically requests anonymity without giving a justification. *See Castagna*, 2011 WL 4348135, at *10 ("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."). Petitioner's preference to keep his damages award private is not a sufficient reason to satisfy the criteria and justify redaction in this case. *See id.* at *11.

For all the reason stated above, petitioner's request to redact his name and case number from the decision is **DENIED**.

IT IS SO ORDERED.

Dated: _____

Laura D. Millman
Special Master