

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 03-632V**

Filed: January 10, 2011

ROBERT KRAKOW and LORI *
KRAKOW, parents of A.K., *
a minor, *

Petitioners, *

v. *
 *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

ORDER ON MOTION TO REDACT¹

Vowell, Special Master:

On November 24, 2010, petitioners Robert and Lori Krakow timely filed Petitioners' Motion to Redact Decision Pursuant to Vaccine Rule 18(b) ["Motion to Redact"], seeking redaction of my November 12, 2010 Order on Motion for Reconsideration ["November 12, 2010 Order"]. I grant in part and deny in part petitioners' Motion to Redact.

In the November 12, 2010 Order, I reconsidered my October 13, 2010 Decision dismissing petitioners' Vaccine Act² petition for their failure to comply with court orders

¹ Because this unpublished order contains a reasoned explanation for the action in this case, I intend to post it on the United States Court of Federal Claims' website, in accordance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)). The parties have 14 days to object to the posting of this order in its current form.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

and to prosecute their claim. Based on § 205 of the E-Government Act,³ which requires federal courts to make publicly available opinions which contain a “reasoned explanation” for their actions,⁴ I indicated my intent to publish the November 12, 2010 Order.⁵

In their Motion to Redact, petitioners object to the public disclosure of their names, the name of their minor child, and any references to their minor child’s condition. They specifically request redaction of footnote 8 in its entirety, asserting that it would lead to a disclosure of their identity; redaction of portions of footnote 9 that would lead to a disclosure of their identity; and redaction of several references to their minor child’s diagnosis.⁶

On December 10, 2010, respondent filed a response to the Motion to Redact [“Response to Motion”].⁷ In essence, respondent argues that petitioners improperly base their motion to redact on Vaccine Rule 18(b), but agrees that information submitted by a party is protected by § 300aa-12(d)(4)(A), unless permission to disclose is granted in writing. Respondent draws a distinction between “decisions” and “orders”

³ 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)).

⁴ 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).

⁵ Section 205(a)(5) of the E-Government Act requires public disclosure of even “unpublished” opinions via the court’s website.

⁶ Petitioners also object to “the disclosure of the names [sic] of any medical expert who may have been mentioned as a person from whom [they] are seeking a medical opinion.” Motion to Redact at 4. Petitioners’ Exhibit 59, submitted with the Motion to Redact, is a proposed redacted version of the November 12, 2010 Order “that bears highlighting in yellow of those portions of the document to which petitioners object.” Motion to Redact at 2. In the exhibit, petitioners did not redact the name of any medical expert. The November 12, 2010 Order does discuss the filed report of a medical expert and names that expert. Petitioners have noted their intent to retain additional experts, and because petitioners’ description suggests an expert who has not yet submitted a medical opinion, I cannot conclude that they intended to seek redaction of the expert named in the order.

⁷ Respondent requested and received leave to file this motion out of time.

in the application of § 300aa-12(d)(4)(B),⁸ which requires decisions of special masters to be publicly disclosed.⁹ Respondent narrowly construes “decisions” to include only an ultimate determination on whether compensation will be awarded and the amount of such compensation. Response to Motion at 1.

Because neither party addressed the public disclosure requirements of the E-Government Act, I ordered supplemental briefing in an order issued on December 13, 2010. Respondent responded [“Res.’s Res. to Dec. 13, 2010 Order”] on December 23, 2010; petitioners responded on December 30, 2010 [“Pet.’s Res. to Dec. 13, 2010 Order”], primarily deferring to respondent’s interpretation that the provisions of the Vaccine Act control in this instance.¹⁰ Respondent acknowledges that § 205(a)(5) of the E-Government Act requires courts to make “all written opinions” available in a text-searchable format. Res.’s Res. to Dec. 13, 2010 Order at n.1. Respondent interprets “opinions” in the E-Government Act as the equivalent of the term “decision” as it is used in the Vaccine Act. Based on the exception found in § 205(c)(2) for “documents filed under seal,” respondent maintains her position that any information submitted by a party is exempt from disclosure in any ruling that does not constitute a “decision” within the narrow scope of that term as used in § 300aa-12(d)(3)(A).

After careful consideration of the arguments and relevant law, I will redact the name of the minor child and references to his medical condition. I will not redact the names of the petitioners. In reaching this conclusion, I need not decide which specific Vaccine Act provision governs disclosure in this instance, as even under the more restrictive § 300aa-12(d)(4)(A), I would reach this result. I also need not decide whether the E-Government Act mandates disclosure of the original November 12, 2010 Order, because in publicly disclosing a revised version with the contemplated redactions, I am granting all of petitioners’ colorable objections.

⁸ Vaccine Rule 18(b)’s provisions for redaction are based on § 300aa-12(d)(4)(B).

⁹ There are two narrow exceptions to the requirement that decisions be disclosed. The party who submitted information on a petition may object to disclosure of such 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.” § 300aa-12(d)(4)(B).

¹⁰ Petitioners also cite privacy provisions codified at 5 U.S.C. § 552(a) as a basis for their motion. See Pet.’s Res. to Dec. 13, 2010 Order at 2. After reviewing that section, I conclude that the provisions in 44 U.S.C. § 3501 note, codifying § 205 of the E-Government Act, apply more directly to this issue. Title 5 of the U.S. Code governs actions by government agencies, whereas § 205 of the E-Government Act specifically governs disclosure of opinions by federal courts and the privacy protections afforded in that process.

The names of the petitioners are not “information” as that term is used in § 300aa-12(d)(4)(A). The Vaccine Act requires that “[w]ithin 30 days after the Secretary [of Health and Human Services] receives service of any petition filed under section 300aa-11 of this title the Secretary shall publish notice of such petition in the Federal Register.” § 300aa-12(b)(2). Notice of this case was published in the Federal Register on August 5, 2003. See National Vaccine Injury Compensation Program; List of Petitions Received, 68 Fed. Reg. 46202, 46210 (Aug. 5, 2003).¹¹ Neither party addressed how this provision affects their arguments under § 300aa-12(d)(4)(A). The notice lists petitioners’ names, the vaccinee’s name, and the case number, and it discloses that they have filed a petition for compensation under the Vaccine Act.¹² Disclosure of petitioners’ names cannot be a violation of § 300aa-12(d)(4)(A) because the Act requires disclosure of their names. Petitioners’ motion to redact their names is **DENIED**.

I do agree with the parties that § 300aa-12(d)(4)(A) prohibits some forms of disclosure of information submitted in a Vaccine Act case. But while the parties raise several issues in the intersection of the E-Government Act’s mandate for public disclosure and the Vaccine Act’s prohibition on some disclosure, their simplistic approach collapses several steps of analysis. Although they present interpretations of the language in both statutes, they cite no support from case law or the legal literature for those interpretations.¹³

¹¹ I note that the Federal Register is also published online. This same notice is available at www.federalregister.gov/articles/2003/08/05/03-19798/national-vaccine-injury-compensation-program-list-of-petitions-received#h-6.

¹² Petitioners’ names, the name of the vaccinee, the case number, and the fact that they have a pending Vaccine Act case alleging vaccines caused the vaccinee’s condition, were also disclosed in filings that petitioners made in the Omnibus Autism Proceeding [“OAP”] Docket while petitioners’ case was a designated test case. That Docket is publicly available at www.uscfc.uscourts.gov/node/2718. Petitioners filed a motion to withdraw their case as a test case on April 11, 2008, and therein requested withdrawal of “any case-specific material” from the public OAP Docket. The court granted that motion, and removed the case-specific expert report from the Docket. Petitioners’ names and the case number, however, are still publicly available on that docket, based on their filing the request to withdraw in both the case docket, which is not publicly available, and the OAP Docket, which is. For this reason, petitioners’ objection to the disclosure of footnote 8 of the November 12, 2010 Order is moot. The contents of that footnote, other than their new causation theory, are currently publicly available. Their new causation theory will be redacted to the extent it discloses the vaccinee’s medical condition.

¹³ Certainly there may not be further support for some of the parties’ arguments. Some of the issues they raise, however, are not novel. See, e.g., *Warfle v. Sec’y, HHS*, 92 Fed. Cl. 361, 363-64 (2010) (distinguishing the statutory import of “orders” and “decisions” in the context of appellate review); *Weiss v. Sec’y, HHS*, 59 Fed. Cl. 624 (2004); *Currie v. Sec’y, HHS*, No. 02-838V, 2003 WL 23218074 (Fed. Cl. Spec. Mstr. Nov. 26, 2003) (both discussing the meaning of “decision” as it is used in the Vaccine Act);

Although not well-framed by the parties' filings, several issues involving statutory interpretation are raised by the Motion to Redact. Respondent's argument appears to be that "decision" has only one meaning throughout the Vaccine Act: a ruling on the merits of a petition,¹⁴ and that "opinion" can only be a decision under § 300aa-12(d)(3)(A). Thus no order, no matter how substantive, nor any fact ruling, can be posted on the court's website. Any filing, even a purely legal argument made by a party, could not be referenced without express written consent. This result would preclude any compliance with the E-Government Act, other than public disclosure of a decision on compensation, and would ignore the fact that this court has posted both decisions and substantive orders for many years.¹⁵

The Vaccine Act does not define "information submitted ... in a proceeding on a petition" in § 300aa-12(d)(4)(A) or elsewhere. This is the only provision within the Vaccine Act that addresses accessibility of anyone, other than the parties and the special master or the court, to the content of filings. It has the effect of making "information" undisclosable, without the need for a court order sealing it. To conclude that legal analysis constitutes "information submitted ... in a proceeding on a petition" would be nonsensical.¹⁶

In this case, I need not decide whether a substantive ruling constitutes a "decision" within the meaning of § 300aa-12(d)(4)(B) or what constitutes "information" under § 300aa-12(d)(4)(A).¹⁷ As noted above, the name of the vaccinee in this case

see also Shaw v. Sec'y, HHS, 609 F.3d 1372 (Fed. Cir. 2010) (discussing appellate review of decisions under § 300aa-12(e)).

¹⁴ Taken to its extreme, respondent's strict interpretation would preclude public disclosure without consent of a decision on entitlement alone, including one denying entitlement to compensation, absent a concurrent award of compensation. See § 300aa-12(d)(3)(A) ("A special master...shall issue a decision on [a] petition with respect to whether compensation is to be provided under the Program and the amount of such compensation.").

¹⁵ The court's website includes matters dating back to 2002 in the section for unpublished "Opinions/Decisions" (see www.uscfc.uscourts.gov/opinions_decisions_vaccine/UnPublished) and 1997 for published "Opinions/Decisions" (see www.uscfc.uscourts.gov/opinions_decisions_vaccine/Published).

¹⁶ Indeed, § 300aa-11(d), titled "Additional Information," refers to medical records pertaining to the merits of a petition that may be filed in addition to the records required by § 300aa-11(c)(2). Even when the statute refers to "information" outside the context of medical records, it still refers to evidence, not argument or analysis. See § 300aa-12(d)(4)(B) (describing trade secret, commercial, and financial information).

¹⁷ I note that petitioners themselves referred to my November 12, 2010 Order as a "decision" in their Motion to Redact.

has already been publicly disclosed in the Federal Register, suggesting that redaction of his name in the Order will not accomplish petitioners' privacy goals. Because he is a minor child, however, I **GRANT** redaction of his name and will substitute the initials "A.K." in the November 12, 2010 Order and the instant order. I note, without deciding whether it actually applies to Vaccine Act cases, that Rule 5.2 of the Rules of the United States Court of Federal Claims provides such protection for filings made by the parties. This rule was created to comply with § 205 of the E-Government Act. See Federal Rules of Civil Procedure, Rule 5.2 (noting the adoption of an identical rule to comply with § 205 of the E-Government Act).

I also **GRANT** redaction of the medical references identified by petitioners in their Motion to Redact at page 3. I will assume without deciding that these references are protected from disclosure by the Vaccine Act, not because the filings provide sufficient legal support, but because if these references are disclosed now, petitioners will face an almost insurmountable burden in seeking to prevent their future disclosure in another written opinion.¹⁸ The medical references are not material to the analysis set forth in the November 12, 2010 Order, and redaction of those references will not hinder the disclosure of a "reasoned explanation" for my conclusion. Should either of the parties seek to prevent disclosure of certain information contained in future opinions in this case, I will expect them to provide a showing sufficient under § 300aa-12(d)(4).

The November 12, 2010 Order, revised in accordance with my findings herein, shall issue separately and will be distributed immediately for publication.

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master

¹⁸ An opinion on petitioners' entitlement to compensation must be subject to the heightened standards set forth in § 300aa-12(d)(4)(B).