Case No. 15-1023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLAKE BROWN, DEAN BIGGS, JACQUELINE DEHERRERA, RUTH ANN HEAD, MARLENE MASON, ROXANNE MCFALL, RICHARD MEDLOCK, and BERNADETTE SMITH,

Plaintiffs,

v.

THOMAS PEREZ, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR, an agency of the United States governing OFFICE OF WORKERS COMPENSATION PROGRAMS, an agency of the United States Department of Labor,

Defendants.

Appeal from the U.S. District Court, District of Colorado
Judge Raymond P. Moore, Case No. 13-cv-01722-RM-MJW.

Appeal brief on behalf of plaintiff/appellants.

Plaintiffs/Appellants request Oral argument.

Karen Larson
Plaintiffs' Counsel
3773 Cherry Creek N. Dr. Suite 575
Denver, CO 80209
Ph. (303) 831-4404

John S. Evangelisti
Plaintiffs' Counsel
1120 Lincoln St., St. 711
Denver, Colorado 80203
Ph. (303) 832-8226

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552(a)(4)(B). On 12/24/14, the District Court entered an Order granting the Defendant U.S. Dept. of Labor, Office of Workers Compensation Program's ("OWCP") motion for summary judgment and denying Plaintiffs' motion for summary judgment, thereby disposing of all parties' claims. On 1/20/15, Plaintiffs filed a timely notice of appeal. Fed. R. App. P. 4(a)(4)(A)(iv). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES FOR REVIEW

THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WHERE:

I. FOIA EXEMPTION 6 (PRIVACY) DOES NOT APPLY TO THE NAMES OF REFEREE PHYSICIANS THAT ARE ALREADY RELEASED TO THE PUBLIC.

AND, ANY PRIVACY INTEREST STEMMING FROM REFEREE PHYSICIANS' OWCP EVALUATIONS IS OUTWEIGHED BY THE PUBLIC'S INTEREST IN THE SELECTION OF IMPARTIAL REFEREE PHYSICIANS - VITAL TO THE INTEGRITY OF THE FECA PROGRAM.

II. EXEMPTION 4 (CONFIDENTIAL COMMERCIAL INFORMATION) DOES NOT APPLY TO THE NAMES OF REFEREE PHYSICIANS SINCE THE LIST FROM WHICH THEY ARE SELECTED IS OPEN TO THE PUBLIC.

AND, THE LICENSOR OF THE LIST ONLY OBJECTS TO ITS RELEASE BASED ON OWCP'S MISREPRESENTATION THAT PLAINTIFFS

REQUESTED ITS ENTIRE UNDERLYING DATABASE.

III. SCREEN SHOTS OF PULL DOWN MENUS ARE EXISTING ELECTRONIC RECORDS AND THUS DO NOT REQUIRE THAT OWCP "CREATE" RECORDS.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On 7/1/13, Plaintiffs filed their FOIA Complaint. App. 10-31. On 9/13/13, OWCP filed its Answer. App. 32-49. On 2/26/14, Plaintiffs and Defendant filed cross Motions for Summary Judgment. App. 50-78. On 12/23/14, the Court granted Defendant's and denied Plaintiffs' Motion for Summary Judgment. App. 163-176. On 12/24/14, the Court entered an Order of Judgment dismissing the case. App. 177-178. On 1/20/15, Plaintiffs filed a Notice of Appeal. App. 179-181.

PREAMBLE

Plaintiffs made FOIA requests for OWCP records concerning the selection of physicians that it hires to act as referees of medical disputes arising between injured federal employees treating physicians and OWCP second opinion physicians.

OWCP produced the records but redacted the names, addresses and zip codes of the referee physicians claiming FOIA exemptions 6 privacy and 4 confidential commercial information.

The Federal Employee Compensation Act ("FECA") requires that OWCP avoid even the appearance of impropriety in the selection of referee physicians because OWCP manages the conflicting interests of government agencies and federal employees.

OWCP regulations require that referee physicians be selected in a strict rotation from a roster of board certified physicians in zip codes adjacent to the injured employee's home zip code.

Plaintiffs cannot verify that OWCP selects referee physicians in a strict rotation without the physicians' names, addresses and zip codes. The evidence shows that OWCP does not select referee physicians as required in a strict rotation from a roster of physicians adjacent to employees' home zip codes.

Referee physicians' names are not private under exemption 6. They are released to the injured employee and the public in published appeal board decisions.

Referee physicians are not confidential commercial information under exemption 4. The referee physicians are selected from a list maintained by the America Board of Medical Specialties ("ABMS"). OWCP licenses the ABMS list from Elsevier Inc. ("Elsevier"). But, the same exact same list is posted on the ABMS public website

OWCP represented to the Court and Elsevier that plaintiffs requested Elsevier's complete database that underlies the physician list. This is not true. Plaintiffs did not request the underlying database. Elsevier objects only to the release of information that is not available to the public at the ABMS website. Plaintiffs did not request such information.

Plaintiffs also requested screen shots of pull down and help menus that show information concerning OWCP's selection of referee physicians. OWCP refused to print screen shots of these existing records claiming that this would require it to "create" records.

The selection of referee physicians is vital to the integrity of the federal workers compensation program because federal employees' rights are not protected by an adversary system and are solely dependent on the opinion of the referee physician to determine the nature and extent of their injury.

If the names and zip codes of referee physicians are not released OWCP can violate the selection safeguards, gutting the workers compensation program of its integrity.

INTRODUCTION

The trial court denied plaintiffs' FOIA action to compel disclosure of the names of referee physicians redacted from the OWCP records

produced in response to plaintiffs FOIA requests.

FECA provides workers' compensation benefits to civilian federal employees. FECA is administered by OWCP.

Conflicts of medical opinion that arise in workers compensation claims between employees' treating physicians and second opinion physicians hired by OWCP, are resolved by referee physicians selected by OWCP. The opinion of the referee physician is given special evidentiary weight and is thus binding on the injured employee. The referee physician's opinion will decide the nature and extent of injury, as well as the employee's right to wage loss compensation and/or medical benefits.

The FECA workers' compensation system is unique in that the injured worker is denied the protections of an adversary system to challenge the referee physician's opinion (e.g., discovery, cross examination, and weighting of medical evidence by a judge). OWCP represents the self-insured Government agencies and also determines federal employees' claims for on-the-job injuries.

To ensure the impartiality of referee physicians and avoid this conflict of interest, OWCP requires that referee physicians be randomly selected from the list of all board certified physicians found at the "ABMS" public website.

Plaintiffs made FOIA requests for records that document OWCP's random selection of referee physicians from the ABMS list.

OWCP produced the records but redacted the name, address and zip codes of the referee physicians.

OWCP claims that the names of the physicians are private under FOIA Exemption 6 (privacy). But, Exemption 6 does not apply where public interest in the integrity of OWCP's selection process outweighs the referee physicians' privacy interest (if any) in the fact that they conduct referee evaluations.

OWCP claims that the referee physicians' names are confidential commercial information under Exemption 4 since it leases the ABMS list from Elsevier. But, the ABMS list is not confidential because the entire physician list is available to the public at the "ABMS" website.

Elsevier objects to the release of its entire underlying database based on OWCP's misrepresentation that plaintiffs requested its entire database. But, this is not true - plaintiffs did not request the underlying database.

The names and zip codes of the referee physicians will show that OWCP is not complying with its regulations that require referee physicians be randomly and equitably selected from a list of all board certified physicians – which is vital to the integrity of the OWCP program.

The evidence shows that OWCP uses only a select few referee physicians. This misappropriates government funds to these select few physicians and leaves them financially beholden to OWCP.

UNDISPUTED FACTS

Plaintiffs' FOIA requests for OWCP records regarding the referee physician selection process.

Plaintiffs requested reports concerning referee physician evaluations kept by OWCP Dist. 12 for the state of Colorado from 2000 to 2011.[1] App. 263-275 (Brown), 195-198 (Biggs), 330-334 (DeHerrera), 349-351 (Head), 366-370 (Mason), 426-438 (McFall), 496-508 (Medlock), 561-563 (Smith). To wit: Appointment Log Reports ("Rpts."). App. 263 ¶¶5 & 7 (Brown), 195-196 ¶¶9 & 15 (Biggs), 330 ¶6 (DeHerrera), 366 ¶6 (Mason), 426 ¶ 6 (McFall), 496 ¶ 5 (Medlock); Physician Master Rpts. App. 264 ¶7 & 8 (Brown), 195-196 ¶¶10 & 11 (Biggs), 331¶8 (DeHerrera), 349 ¶¶ 6&7 (Head), 367 ¶8 (Mason), 427 ¶8 (McFall), 497 ¶¶7&8 (Medlock), 561 ¶¶6 & 8; and, Physician Usage Rpts. App. 264 ¶11 (Brown), 195-196 ¶14 (Biggs), 331¶ 11 (DeHerrera), 350 ¶ 10 (Head), 367 ¶11 (Mason), 427 ¶11 (McFall), 499 ¶11 (Medlock), 562 ¶10 (Smith).

Plaintiffs also requested screenshots of the pull down and help

[1] Dist. 12 covers 7 states: CO., N.M., N.D., S.D., MT., UT and WY.

menus in the referee selection software program that show the reports and data that can be generated by the system. App. 196 ¶15 (Biggs), 264 ¶12 (Brown), 331 ¶13 (DeHerrera), 350 ¶11 (Head), 367 ¶13 (Mason), 497 ¶12 (Medlock), 562 ¶11 (Smith).

OWCP responded to plaintiffs' FOIA requests but redacted the referee physicians' names.

OWCP produced: Physician Prompt Pay Rpts., App. 284-325 (Brown), 206-241 (Biggs), 345 (DeHerrera), 377-418 (Mason), 445-488 (McFall), 515-555 (Medlock), 570 (Smith); Physician Usage Rpts. App. 327-329 (Brown), 246-247 (Biggs), 344 (DeHerrera), 359-361 (Head), 423-425 (Mason), 493-495 (McFall), 576 (Smith); Physician History Rpts. App. 282 (Brown), 205 (Biggs), 341 (DeHerrera), 358 (Head), 419 (Mason), 489 (McFall), 556 (Medlock), 571 (Smith); and Physician Activity Rpts. App. 283 (Brown), 242-244 (Biggs), 342 (DeHerrera), 362-364 (Head), 420-421 (Mason), 490-491 (McFall), 572-574 (Smith).

OWCP claims FOIA Exemptions 6 Privacy and 4 Confidential Commercial Information.

OWCP redacted the referee physicians' names, addresses and zip codes from the reports. OWCP claims that the referee physicians' names and addresses are protected from disclosure by Exemption 6 (Privacy) and

Exemption 4 (Confidential Commercial Information).[2] 5 U.S.C. § 552(b)(4)&(6). App. 278 ¶¶5-6 (Brown), 202 ¶¶ 1-2 (Biggs), 337 ¶¶6-7 (DeHerrera), 354 ¶¶4 (Head), 373 ¶¶7-8 (Mason), 441 ¶¶6-7 (McFall), 511 ¶¶5-6 (Medlock), 566 ¶¶3-4 (Smith).

OWCP did not produce screen shots of the referee selection software showing pull down and help menus claiming that it is not required to "create" screen shots under FOIA. 5 U.S.C. § 552(b)(6). App. 278 ¶5 (Brown), 202 ¶1 (Biggs), 337 ¶6 (DeHerrera), 354 ¶4 (Head), 373 ¶ 7 (Mason), 441 ¶6 (McFall), 511 ¶ 3(Medlock), 566 ¶3 (Smith).

OWCP records are subject to FOIA but for narrow exemptions.

FOIA requires that a federal Agency disclose requested records unless they fall under a specific exemption. 5 U.S.C. § 552 (a)(3)(A) ("each agency, upon any request for records…shall make the records promptly available to any person.").

FOIA's "basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' ... focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Dept. of*

[2] OWCP claimed exemption 4 in its Answer.

Justice v. Reporters Comm., 489 U.S. 749, 773 (1989)(quoting *Dept. of Air Force v. Rose,* 425 U.S. 352, 360-361 (1976) (internal citations omitted).

There are nine "exclusive" and "narrowly construed" FOIA exemptions. 5 U.S.C. § 552 (b). *Milner v. Dept. of Navy*, 131 S. Ct. 1259, 1262 (2011).

An overview of FECA.

FECA is the exclusive remedy for federal civilian employees who suffer on-the-job injuries. *Johansen v. U.S.*, 343 U.S. 427, 439-41 (1952). It is non-adversarial in that OWCP protects the agencies interests.[3] FECA provides medical care; and, compensation for the disability or death of an employee resulting from a personal injury in the performance of duty. 5 U.S.C. §§ 8102 (a) & 8103(a).

FECA is administered by OWCP. OWCP makes decisions on employees' claims for workers compensation benefits. The DOL Employee Compensation Appeals Board ("ECAB") has exclusive jurisdiction to review OWCP decisions. 5 U.S.C. § 8149. ECAB decisions are final and conclusive for all purposes. They are not subject to judicial review by court or otherwise. 5 U.S.C. §8128(b). ECAB has long held

[3] Most FECA claimants are not represented by Counsel. **App. 881-882,** Aff'd. ¶. 8.

that OWCP's selection of referee physicians using all qualified specialists to "eliminate" any "possible appearance" of bias is "vital" to the "integrity" of the OWCP program.

Conflicts in medical opinions between treating physicians and OWCP second opinion physicians are resolved by referee physicians.

> (a) An employee shall submit to examination by a…physician designated …by the Secretary of Labor,…If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, named a referee physician, who shall make an examination.
> ….
> (d) If an employee refuses to submit to or obstructs an examination, his right to compensation…is suspended until the refusal or obstruction stops…

5 U.S.C. § 8123(a).

"Second opinion examinations are generally conducted by a physician selected by a medical referral group that has contracted with the OWCP to provide second opinion medical referrals….a strict rotation of physicians is not required for this type of examination." FECA Procedural Manual ("PM") 2-0810-9. FECA PM 3-0500-3b. App. 693-694.

The opinion of a referee physician is assigned the weight of the medical evidence.

> [R]egulations provide for the appointment of a referee physician to examine the claimant and resolve a conflict of medical opinion in a case. … Because this method of resolving conflicts is provided in the FECA, the probative value of the referee specialist's report is great and will normally constitute the

> weight of the medical evidence of record.

FECA PM 3.500.4 (7/11)**.**

> The Employees' Compensation Appeals Board has placed great importance on the appearance as well as the fact of impartiality, and only if the selection procedures which were designed to achieve this result are carefully followed may the selected physician carry the special weight accorded to an "impartial specialist."

FECA PM 3.500.4(b)(2) (7/11).

Referees are to be selected on a rotational basis from a list of all physicians.

To eliminate any inference of impartiality or bias, OWCP requires that referee physicians be randomly selected on a strict rotational basis from a database of all board certified physicians. This random selection is to be accomplished by selecting referee physicians in the injured worker's geographical area in alphabetical order as listed in the specialty physician roster and then repeating the process when the list is exhausted. FECA PM 3-500.4(b)(1)(3/94). App. 695- 696.

There is no way to independently verify that OWCP properly selected a referee physician in a strict rotation without the redacted referee physicians' zip codes.

The Physician Directory System ("PDS") was used in the past to select referees.

The PDS is an OWCP software program that it designed to schedule

referee examinations and ensure consistent rotation among referee physicians in a fair and unbiased manner. FECA Bulletin 00-01 (11/5/99). App. 679-691. FECA PM 3-0500-7 (3/94, 10/95). App. 702.

The Medical Management Application ("MMA") is now used to select referee physicians.

In 2005 the PDS was replaced by the MMA which provides that:

> The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting physicians (in the designated specialty in the appropriate geographic area) in alphabetical order as listed in the roster and repeating the process until the list is exhausted.

FECA PM 3.500.4(b)(6)(7/11).

The ABMS lists all board certified physicians at its public website.

Referee physicians are selected from the list of physicians certified by "ABMS" specialty boards. The ABMS website provides a directory with the name, address, zip code and specialty of all Board-Certified physicians in the United States. At abms.org and certificationmatters.org The ABMS promotes public dissemination of information on board certified physicians to encourage persons seeking physicians to choose board certified physicians. App. 838-843, 882 ¶5.

The ABMS licenses the directory to Elsevier who licenses it to OWCP.

ABMS licenses the right to sell its directory to Elsevier Inc.

("Elsevier"). Elsevier in turn licenses the ABMS database to OWCP. App. 857-864. OWCP then uses its own software to select a referee physician from the ABMS directory.

Elsevier licenses an XML version of the database to OWCP for $24,950.00 per annum. App. 857. Elsevier sells the database to the public for $895.00. abmsdirectory.com/abms/statis/product_info.htm

OWCP misrepresented to Elsevier that plaintiffs requested its entire database.

On 12/12/2012, OWCP notified Elsevier of several FOIA requests by non-parties (i.e. not plaintiffs) for a master copy or list of all physicians in the ABMS database that was provided by Elsevier. **App. 912-916.** The complete database contains some information that is not available to the public.

However, plaintiffs never requested a master copy of the complete database. To the contrary, plaintiffs only requested the names of the referee physicians listed in the OWCP records released to plaintiffs. The names of these referee physicians were already made public to the injured employee and available in the public domain at the ABMS website.

Elsevier then objected to the release of its entire database.

On 1/10/13, Elsevier wrote OWCP that it objected to the release of its entire database, i.e. "the physician data that you receive from us." App.

917-918.

SUMMARY OF ARGUMENT

The trial court affirmed OWCP's redaction of the names of the referee physicians under both exemptions 6 and 4.

However, referee physicians do not have an exemption 6 privacy interest in the fact that they contract with OWCP to perform referee evaluations - especially where their names are released to the employee and published in ECAB decisions.

Moreover, the referee physicians' privacy interest, if any, is outweighed by the public interest in OWCP complying with its statutory duty to select impartial referee physicians using all qualified specialists to "eliminate" any "possible appearance" of bias which is "vital" to the "integrity" of the OWCP program. *B.S, and OPM*, ECAB No. 08-2103 (8/21/09).

Only disclosure of the redacted names will allow the public to verify that referee physicians are selected, as required, from a list of all physicians in zip codes in or adjacent to the injured employee's home zip code.

The names of the referee physicians are neither commercial nor confidential information under exemption 4 since they are released to the

employee, published in ECAB decisions and offered to the public at the ABMS website.

OWCP's claim of confidential commercial information is based on vendor Elsevier's hearsay response to a request from OWCP asking if it objects to the release of its entire database. But plaintiffs never requested Elsevier's entire database. OWCP's claim that Elsevier will not provide the ABMS list in the future if OWCP releases the entire database is frivolous as the entire database was never requested.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Judicial review of withholding under FOIA is *de novo*, with the burden of proof on the defendant agency to show that the materials sought have not been improperly withheld. FOIA 5 U.S.C. § 552(a)(4)(B). *Utah v. U.S. Dept. of Interior*, 256 F.3d 967 (10th Cir. 2001). When the Defendant fails to make this showing, plaintiffs need not present further argument and will still prevail. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 861 (D.C. Cir. 1980).

ARGUMENT

I. FOIA EXEMPTION 6 (PRIVACY) DOES NOT APPLY TO THE NAMES OF REFEREE PHYSICIANS THAT ARE RELEASED TO THE PUBLIC.

AND, ANY PRIVACY INTEREST STEMMING FROM REFEREE PHYSICIANS OWCP EVALUATIONS IS OUTWEIGHED BY THE PUBLIC'S INTEREST IN THE SELECTION OF IMPARTIAL REFEREE PHYSICIANS - VITAL TO THE INTEGRITY OF THE FECA PROGRAM.

Judge Moore found that the referee physicians name, address and zip code would reveal their activities. And, that referee physicians have a privacy interest in "personal and business information" that is not outweighed by any public interest in understanding the government's activities in selecting referee physicians. Add. 10. App. 172, 174-175.

A. Physicians do not have a privacy interest in the fact that they contract with OWCP to perform referee evaluations because that fact is released to the public.

Referee physicians simply do not have a privacy interest in the fact that they conduct evaluations for OWCP. They know their opinions will be made public in the legal proceeding. They contract with OWCP to act as expert witnesses to resolve conflicts between the medical opinions of federal employees treating physicians and the Government's second opinion physicians.[4] This is not a secret government contract. OWCP

[4] OWCP second opinions are like Defense Medical Exams, e.g. from 12/03 to 3/12/11, OWCP selected Orthopedic Dr. Douthit to conduct 305 second opinion evaluations. App. 855 ¶1.

pays for their report and is free to use it without restriction. The report is provided to OWCP without any request or expectation of confidentiality. The names of the referee physicians are openly set forth in ECAB's published decisions.[5]

Moreover, OWCP releases the referee physician's opinion to: the injured federal employee, treating physicians, the agency, OWCP Vocational Counselors, second opinion physicians[6] and subsequent referee physicians[7].

The injured employee is free to disclose the referee physician's name and address to anyone. There is no doctor/patient relationship between the referee physician and the injured federal employee. OWCP even discloses the referee physician's charges to the injured employee.

OWCP will only release referee physicians names on a piecemeal basis. OWCP will disclose to any injured employee the number of times that the referee physician that examines him ever acted as a referee.[8] But OWCP will not release to any one person the number of times that all the referee physicians acted as referees. Compare: the release to Mr. Biggs

[5] e.g., a Westlaw search shows 30 ECAB Decisions citing Dr. Sabin.
[6] e.g., *C.K.* 2012 WL 3878632 (ECAB 2012).
[7] e.g., *D.M.* 2013 WL 3282766 (ECAB 2013).
[8] OWCP will also release dates and partial claim numbers.

with Referee Dinnerberg's information not redacted, to the release to Mr. Brown with Referee Sabin information not redacted. Add. 15-18. App. 246-247, 327-328.

In the past, OWCP agreed with plaintiffs that exemption 6 did not apply and "determined that none of the information contained in the above record will be redacted pursuant to FOIA Exemption 6." App. 912-916, OWCP Technical Asst. Chief Tritz' 12/12/12 letter to Elsevier.

B. Referee physicians' names are not subject to exemption 6 since they are not "similar' to private personal records.

The names of referee physicians in the OWCP records are not "similar' to personnel files and medical records because they contain no personal information. *Greenpeace U.S.A. Inc. v. EPA,* 735 F. Supp. 13, 14(D.D.C. 1990) (finding no personal information in the name of an EPA employee that attended a meeting sponsored by a regulated company in violation of regulations). The referee physicians' names are not personal merely because they discloses they work for the government. The names of the referee physicians are like the names of government employees which are not "similar" to personal files. *See generally Aguirre v SEC,* 551 F. Supp. 2d 33, 54 (D.D.C. 2008).

C. The referee physicians' privacy interest (if any) is outweighed by the public's interest in OWCP's performance of its statutory duty to select referee physicians in a fair and impartial manner - vital to the integrity of the OWCP program.

The burden is on the government to prove the invasion of privacy is clearly unwarranted. *Avondale Indus., Inc. v. NLRB,* 90 F.3d 955, 960 (5th Cir. 1996).

Disclosure of the redacted names will shed light on OWCP's performance of its statutory duty to select neutral unbiased referee physicians. The public has a strong interest in information that would expose bias in the selection of referees. On information and belief, the names of the referee physicians will show that OWCP does not select referee physicians as required randomly from a list of all possible physicians; but rather cherry picks a select few physicians to act as referees. This raises the appearance of preselection and bias. Referee physicians that are specially selected are conflicted and become financially beholden to OWCP for more lucrative referrals.

1. The balancing test: public interest vs. a clearly unwarranted invasion of privacy.

The substantive test for Exemption 6 is whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).

> Exemption 6's requirement that disclosure be "clearly unwarranted" instructs us to "tilt the balance (of disclosure interests against privacy interests) in favor of disclosure. [citations omitted] As the Supreme Court stressed in *Rose*, 425 U.S. at 378 n.16…, Congress's choice of the "clearly unwarranted" standard was a "considered and significant determination," made despite repeated objections by government witnesses to the heavy burden it creates. Thus, under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.

Washington Post Co. v. Dep't of Health and Human Services, 690 F. 2d 252, 261 (D.C. Cir. 1982) *rev'd on other grounds*, 795 F.2d 205 (D.C. Cir 1986), *remand*, 865 F.2d 320 (D.C. Cir 1989); *Dept. of Air Force v. Rose,* 425 U.S. 352 (1976); *Getman v. NLRB,* 450 F. 2d 670, 674 (D.C. Cir. 1971), *stay denied,* 404 U.S. 1204 (1971).

This test 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.' " *Dep't of Air Force v. Rose,* 425 U.S. 352, 372 (1976); *Dep't of State v. Ray,* 502 U.S. 164 (1991). The dispositive question in conducting this balancing is whether the severity of the invasion of personal privacy resulting from disclosure would outweigh the public interest in publication. *Washington Post Co. v. HHS,* 690 F. 2d 252, 261-62 (1982), *rev'd on other grounds*, 795 F.2d 205 (D.C. Cir 1986), *remand,* 865 F.2d 320 (D.C. Cir 1989). "[T]he only

relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the *operations or activities of the government*." *U.S. DOD v. Fed. Labor Relations Auth.,* 510 U.S. 487, 495 (1994) (emphasis in original).

The fact that a particular physician performs a disproportionate share of the exams may embarrass OWCP but does not make it exempt. Disclosure is not a clearly unwarranted invasion of personal privacy simply because it would invite a negative reaction or cause embarrassment in the sense that a position is thought by others to be wrong or inadequate. *Schell v. Health & Human Servs.* 843 F. 2d 933, 939 (6th Cir. 1988) (disclosing ALJ memo critical of an internal recommendation).

2. Business relationships enjoy only a slight privacy interest.

Exemption 6 was developed to protect intimate details of personal and family life, not business relationships. It does not shield matters of clear public concern such as the names of those entering into contracts with the federal government. *Sims v. CIA*, 642 F. 2d 562, 575 (D.C. Cir.1980) (identities of CIA contract researchers), *rev'd on other grounds, CIA v Sims*, 471 US 159 (4/16/85) (identities classified).

The disclosure of information about an individual's business or

professional activities does not impinge significantly on cognizable interests in personal privacy. In *Washington Post Co. v. Dep't of Health and Human Servs.* 690 F. 2d 252 (D.C. Cir. 1982), *rev'd on other grounds*, 795 F.2d 205 (D.C. Cir 1986), *remand to determine exemption 4 fact conflict*, 865 F.2d 320 (D.C. Cir 1989), the Agency was ordered to disclose information that it required from its consultants to monitor them for conflicts of interest - nonfederal employment and organizations in which they had a financial interest. Unlike here, the information was collected with a limited pledge of confidentiality. The Court found that the "relatively slight privacy interest" in employment and financial information was outweighed by the public interest in information that could, as in this case, show conflicts of interest. At 265. The Court emphasized that Congress was aware that on "innumerable times" under prior law; agencies withheld information, as in this case, to cover up embarrassing mistakes or irregularities. "The purpose of FOIA is to permit the public to decide for itself whether government action is proper." At 264.

The disclosure of the names and home addresses of employees invade privacy to only a "very minimal degree". *Getman v. NLRB,* 450 F. 2d 670, 675 (D.C. Cir. 1971), *stay denied,* 404 U.S. 1204 (1971). There, in balancing individual privacy against the public interest the court affirmed

the release of the names and addresses of employees eligible to vote in representation elections for use in voting research was not an unwarranted invasion of privacy. At 672. *Cf U.S. DOJ v. Reporters Committee,* 489 U.S. 749, 772 (1989)(disclosure of criminal rap sheet unwarranted, proposed use irrelevant).

> [W]hether disclosure of a list of names is a "'significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.' " *National Assn. of Retired Federal Employees v. Horner,…* 879 F.2d 873, 877 (1989), cert. denied, 494 U.S. 1078…(1990)

Dept. of State v. Ray, 502 U.S. 164, 176 n.12 (1991). *Accord Physicians Committee for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1, 6 (D.C,C. 2000)(ordering release of financial disclosure forms because of the public interest in learning whether a committee member was financially beholden to a person interested in the amendment of dietary guidelines). Here, disclosure will reveal if referee physicians are beholden to OWCP in exchange for their being selected for contracts.

The degree of intrusion is limited by the slight informational content of the requested material. *Kurzon v. Dept. of Health & Human Services,* 649 F.2d 65, 69 (1st Cir. 1981) (ordering release of names and addresses of unsuccessful applicants for research grants was, as here, not purely private or stigmatizing). *Cf. Forest Guardians v. U.S. FEMA,* 410 F. 3d 1214,

1218 (10th Cir. 2005) (minimal privacy interest in home addresses sufficient where nonexistent public interest in information) citing *U.S. DOD v. Fed. Labor Relations Authority,* 510 U.S. 487 (1994)(negligible public interest in federal employees home address).

3. The public interest in the selection process that is vital to OWCP program integrity.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 152 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242, (1978).

> The proper inquiry is whether the information "sheds light" on government activities, *Ray,* 502 U.S. at 177–78…and whether it would "appreciably further" public understanding of the government's actions, *Dep't of Def. v. Fed. Labor Relations Auth.,* 510 U.S. at 497… A public interest exists where the public "can more easily determine" whether an agency is in compliance with a statutory mandate, *Multi Ag,* 515 F.3d at 1232, even if "the data will not be perfect" with respect to the value of the information that might be derived from that requested. *Am. Civil Liberties Union v. Dep't of Justice,* 655 F.3d 1, 14 (D.C.Cir. 2011).

Jurewicz v. U.S. Dep't of Agric., 741 F.3d 1326, 1333-34 (D.C. Cir. 2014)

OWCP agrees that the referee selection system is designed to safeguard against any possible appearance of bias that is vital to the integrity of the FECA program by using a strict rotation system to eliminate

any inference of partiality. PMSJ. App. 60 ¶45. Def. Resp. App. 83 ¶ 45. The referee selection process is the foundation of the FECA system. The selection of referee physicians must be fair, transparent and verifiable. ECAB has long held that the selection process must be scrupulously followed and avoid even the appearance of impropriety:

> the Office has developed specific procedures for the selection of the impartial medical specialist designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced…. impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exits between a particular physician and the Office….The service of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty… in the appropriate geographical area and repeating the process when the list is exhausted.
>
> The PDS was originally developed to ensure that referee medical specialists would be chosen in a fair and unbiased manner and this goal remains as vital as ever to the integrity of the federal employees' compensation program. The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist.

B.S, and OPM, ECAB Dkt. No. 08-2103 (8/21/09).

4. The redacted zip codes are needed to verify that OWCP selects the referee physician from a physician roster in zip codes adjacent to the employee's home zip code.

The names and zip codes of the referee physicians are needed for the public to determine if OWCP is selecting physicians in zip codes adjacent to injured employees' home zip codes, in strict rotation from a roster of all board certified physicians in that geographic area. The public can only verify OWCP's operation of an equitable rotational referee selection system by matching the referee physicians' names, zip codes and specialty against employees partial claim number, date of exam and zip code. Without the referee physicians names and zip codes, there is no way to independently verify the accuracy of OWCP's assertions of neutrality; it is impossible to show that other available physicians are bypassed in favor of a few select physicians without analyzing the number of exams by each physician compared to the total number of exams in the geographic area.

Only in this way can the public safeguard against corruption and ensure the integrity of the selection process and the neutrality of referee physicians.

5. Hearsay objection to OWCP claim that it selects referee physicians in a strict rotation from a roster of all physicians close to employees home zip codes.

Plaintiffs object to OWCP's contention that its MMA software actually selects referee physicians in a strict rotation citing FRE 802, Hearsay and FRE 901(9), Lack of Authentication. *U.S. v. Espinal-Almeida*, 699 F. 3d 588, 610 (1st Cir. 2012). Def. MSJ. App. 111-112 ¶¶1-11. Pls. reply. App. 131-132 ¶¶1-11. Def. Resp. Pls. MSJ. App. 86-87 ¶¶1-11. Pls. reply. App. 100 ¶¶1-11.

OWCP's claim that its software selects referee physicians in a strict rotation is based on a hearsay statement by Deputy Director Tritz, to wit: "The statements contained in this declaration are based upon information provided to me in my official capacity by persons who I deem reliable and well informed, and upon a review of the official FECA case files maintained by the OWCP and pertaining to plaintiffs…". App. 886 ¶2.

OWCP offers no admissible evidence to show that it follows the selection process. Plaintiffs provide strong contrary evidence. No OWCP employee with software expertise made any affirmation with respect to the technical functionality of the selection software program.

6. OWCP does not select physicians closest to employees' home as required.

The PDS is supposed to search for a referee in or close to claimant's zip code.

The PDS is supposed to search for a referee physician in the injured employee's zip code. FECA Bulletin No. 00-01, 2a(1) (11/5/99). App. 682. "If no physicians are available within that zip code, the application prompts the medical scheduler to select a radius of 10, 20, 30, 40, 50 or 75 miles from the originally entered zip code." App. 705.

But, OWCP fails to select referee physicians adjacent to an employee's home zip code.

OWCP selected Dr. Sabin in Lakewood, Colo. to conduct referee medical evaluations of injured federal employees that lived 45 to 240 miles away from his Lakewood, Colorado office. In doing so OWCP inexplicably skipped over 55 to 94 orthopedic physicians closer to federal employee's home zip code.[9]

[9] OWCP selected Dr. Sabin, Lakewood, Colo. as referee for an employee that lived 240 miles away in Grand Junction, Colo. bypassing 94 orthopedic physicians closer to her home. App. 739-751, 883 ¶¶3-4; for an employee that lived in Montrose, Colo. App. 793, 881-882 ¶1; for an employee that lived in 133 miles away in Silt, Colo. (bypassing 55 closer orthopedic physicians). App. 732-738, 881 ¶2, 883 ¶¶3-4; for an employee that lived 119 miles away in Pueblo, Colo. App. 718-721, 883 ¶4; and for an employee that lived in 45 miles away in Jamestown, Colo. (bypassing 55 closer orthopedic physicians). App. 722-731, 881 ¶3, 883 ¶3.

The MMA is supposed to search for a referee in an employee's zip code cluster.

The MMA is supposed to search the list of physicians in the chosen specialty using the first three numbers of claimant's zip code. The MMA is supposed to first search in alphabetical order all the physicians in that zip code cluster that were never scheduled for a referee appointment. If all of these physicians are bypassed, the MMA is then supposed to search the list of all physicians that were previously scheduled referee appointments - with the physician that last conducted an evaluation placed at the bottom of the list and the physician that first conducted an evaluation placed at the top of the list. FECA PM 3-0500-5e(1).

But, OWCP fails to select referee physicians adjacent to employees' home zip code.

If the referee physicians were selected in rotation based on the first three numbers of a zip code cluster then each orthopedic physician in that zip code cluster should have about the same number of referee evaluations. But the evidence is to the contrary. The Physician Activity Report for referee evaluations by orthopedic physicians shows that there are 5 referee physicians in the zip code cluster starting with 802**. Of these 5 referee physicians: Dr. Sabin did 108 referee evaluations, Dr. Dinnenberg did 9 referee evaluations, Dr. Oster did 2 referee evaluations,

Dr. Heyman did 2 referee evaluations, and Dr. Britton did 1 referee evaluation. App. 850-852. This disparity is not possible if the software selected referee physicians in strict rotation from a roster in the 802** zip code cluster.

7. OWCP cannot be selecting referee physicians in a strict rotation from a roster of all physicians because 3 doctors did 39% of Dist. 12 referee exams in the last 5 years.

From 1/1/2005 to 9/7/10, Dist. 12 conducted 588 referee evaluations. App. 577 ¶3.

From 10/1/2005 – 7/4/10, Orthopedist Dr. Sabin conducted 112 of the Dist. 12 referee evaluations - about 19%. App. 597.

From 1/1/2005 – 9/22/10, Orthopedist Dr. Sukin conducted 79 of the Dist. 12 referee evaluations – about 11%. App. 609.

From 2005 – 2010, Psychiatrist Dr. Moe conducted at least 63 of the Dist. 12 referee evaluations - about 9%. App. 596 ¶2.

8. OWCP cannot be selecting referee physician in a strict rotation from a roster of all physician because 12 physicians performed all 209 orthopedic referee evaluations for Dist. 12 in Colorado.

The ABMS website lists 574 orthopedic physicians in Colorado. App. 752-792.

From 2000 – 2011: a total of only 12 orthopedic physicians conducted all of the 209 total orthopedic referee evaluations in Colorado: 108 were by

Dr. Sabin, 40 were by Dr. Arnold, 28 were by Dr. Douthit, and 9 were by Dr. Dinnenberg. The remaining 8 physicians conducted 4 or fewer referee evaluations. App. 850-852**,** un-redacted Physician Activity Rpt. (Biggs).[10]

The redacted reports from 2000 – 2011, are misleading in that they make it appear that 18 orthopedic physicians conducted the 209 total orthopedic referee evaluations in Colorado. This is because several doctors are listed more than once - Dr. Sabin shows up as 4 different doctors with 4 different provider ID numbers; Dr. Arnold shows up as 3 different doctors with two different addresses. App. 246-247, Biggs redacted Physician Usage rpt. App. 328-329, Brown Physician Usage rpt.

9. OWCP cannot be selecting referee physicians in a strict rotation from a roster of all physicians because Dr. Sabin conducted 20% of orthopedic referee evaluations in Colorado.

From 5/24/00 – 5/24/05, Dr. Sabin conducted 61 [App. 603 last ¶] of the 306 Dist. 12 orthopedic referee evaluations in Colorado from 1/1/01 – 2/28/11 – about 20%. App. 619-660.[11]

10. The select few referee physicians earn a disproportionate amount of the 1.5 million dollars spent on referee exams, raising an appearance of impropriety.

The select few referee physicians receive hundreds of thousands of

[10] Colorado zip codes range from 80001 to 81658. App. 248-262.
[11] From 2005 – 2008, Dr. Sabin also conducted 69 referee evaluations for the Kansas City Office. App. 605.

dollars in fees from OWCP. From 1/4/05 – 9/23/10, Dist. 12 paid $1,450,544.72 for referee exams. App. 593. Orthopedist Dr. Sabin billed $8,175.00 for an evaluation on 8/19/10. App. 607. Assuming this is an average charge, Dr. Sabin received $940,125.00 for his 115 referee exams in 5 yrs. Psychiatrist Dr. Moe billed $10,900.00 for an evaluation on 2/19/10. App. 614. Assuming this is an average charge, Dr. Moe received $686,700.00 for his 63 referee exams in 5 yrs.[12]

11. It appears that OWCP purged all but a select few orthopedic physicians from its database.

The above statistics show that OWCP purged all but a select few orthopedic physicians from its database. This eliminates the safeguards for federal employees provided by the requirement that referee physicians be selected from a database of all physicians. OWCP can then funnel government funds to the select few physicians. This leaves these physicians beholden to OWCP for more referrals, deprives other physicians of an opportunity to provide this service and claimants of a fairly selected referee. The names of these select physicians will shed light on why they

[12] OWCP provides contradictory reports about the number of its referee evaluations. OWCP reports that it conducted: 99 referee evaluations in 2005. App. 590. *But see* 60 in 2005. App. 593. 94 referee evaluations in 2006. App. 580. *But see* 83 in 2006. App. 593. 92 referee evaluations in 2007. App. 580. *But see* 85 in 2007. App. 593. 133 referee evaluations in 2008. App. 580. *But see* 91 in 2008. App. 593 and 86 referee evaluations in 2009. App. 580. *But see* 68 in 2009. App. 593.

were chosen (bias); and bring media and congressional attention to these cozy relationships. And, hopefully lead to holding OWCP accountable.

OWCP relies on hearsay to establish its claims so that OWCP officials can assert plausible deniability of knowledge of misfeasance in administering the program. **App. 886** ¶2.

II. EXEMPTION 4 (CONFIDENTIAL COMMERCIAL INFORMATION) DOES NOT APPLY TO THE NAMES OF REFEREE PHYSICIANS SINCE THE LIST FROM WHICH THEY ARE SELECTED IS OPEN TO THE PUBLIC.

AND, THE LICENSOR OF THE LIST ONLY OBJECTS TO ITS RELEASE BASED ON OWCP'S MISREPRESENTATION THAT PLAINTIFFS REQUESTED ITS ENTIRE UNDERLYING DATABASE.

FOIA "does not apply to matters that are… commercial…information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). *Utah v. U.S. Dept. of Interior*, 256 F.3d 967, 969 (10th Cir. 2001) citing *Nat'l. Parks and Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C.Cir.1974)("*Nat'l. Parks I*") and *Critical Mass Energy Project v. Nuclear Regulatory Comm.,* 975 F.2d 871, 879 (D.C.Cir.1992)(*en banc*) ("*Critical Mass II")*.

Judge Moore held that the names of referee physicians are confidential commercial information under *Nat'l. Parks* because companies would be less likely to license commercial data "if their confidential data could be accessed by anyone simply by making a FOIA request."

Therefore, the government's ability to obtain necessary information in the future would be impaired. Add. 10. App. 172.

Judge Moore held that the names of referee physicians are also confidential commercial information under *Critical Mass II* because "Elsevier considers the information in its database to be such that it would not be customarily released to the public by Elsevier." Add. 10-11. App. 171-172.[13]

A. PUBLIC INFORMATION IS NOT CONFIDENTIAL INFORMATION

"[A] plaintiff asserting that information has been previously disclosed bears the initial burden of pointing to specific information in the public domain that duplicates that being withheld." *Public Citizen v. Dept. of State,* 11 F.3d 198, 201 (D.C. Cir. 1993).

Information that has been publicly disseminated or is available from other sources falls outside of exemption 4. *Niagara Mohawk Power Corp. v. DOE,* 169 F. 3d 16, 19 (D.C. Cir. 1999). "'To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality - a *sine qua non* of Exemption 4." *CNA*

[13] Judge Moore also held that the names of the referee physician were "commercial in nature." Add. 8. App. 170. He found that the "public nature of the names" being at the ABMS website does not mean they are not confidential where taken in context the documents "reveal a physician's activities, referrals, clients, etc." App. 172-173. However, this finding goes to the privacy exemption not to the commercial information exemption.

Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) citing *Worthington Compressors v. Costle,* 662 F.2d 45 (D.C. Cir 1981) (records describing an air compressor). "[I]f the information is freely or cheaply available from other sources ..., it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm to the submitter…." *Worthington* at 51. *Accord Anderson v. Dept. HHS,* 907 F.2d 936, 952 (10th Cir. 1990).

Plaintiffs do not request any information that is not available to the public at the ABMS website. The release of names and addresses of board certified physicians does not violate any confidential commercial interest as the ABMS publishes its' complete database with the names and addresses of all board-certified physicians on its free public website. http://www.abms.org In fact, the ABMS promotes the public's use of Board Certified physicians at its website. Moreover, the ABMS's public database, like the OWCP database, is searchable by zip code. Plaintiffs' counsel searched the ABMS database with the same list of ABMS physicians used by OWCP, in order to show that OWCP bypassed numerous physicians closer to claimants' homes in selecting referee physicians. *Supra* 29.

In addition, the name and address of the referee physician selected from the ABMS database are released to the public by OWCP. *Supra* 17-

19. OWCP does not contend that these public releases are confidential or a violation of its license. Exemption 4 is waived where the information sought to be withheld is disclosed to the public. *Herrick v. Garvey,* 298 F. 3d 1184 (10th Cir. 2002) (finding that a request for plans for an antique airplane released by the prior owner are public but for fact that the release was later revoked, citing *Niagara* at 1193). *Herrick* is cited by, *Watkins v. U.S. Bureau of Customs & Border Prot.,* 643 F.3d 1189 (9th Cir. 2011). *Watkins* found that a "no-strings-attached disclosure" of seizure notices to an owner who (like a federal employee) can freely disseminate them to attorneys, business affiliates, competitors, the media, etc., voids any claim to confidentiality. *Watkins,* 1197. "[W]hen an agency freely discloses to a third party confidential information covered by a FOIA exemption without limiting the third-party's ability to further disseminate the information then the agency waives the ability to claim an exemption to a FOIA request for the disclosed information." *Watkins,* 1198.

Judge Moore found that, "[t]he data at issue is part of a database provided by Elsevier". Add. 9. App. 171. To the contrary, the released records are from OWCP's MMA software database. This is not Elsevier data. This is OWCP data. After the referee physician was selected from the Elsevier database his name was released to the public in accord with

the license agreement - no strings attached. OWCP then saved the names of the referee physicians in its own separate MMA database from which it produced the redacted records at issue in this case.

Information that can't affect the supplier's fortune is not commercial.

Information is commercial in nature, only if the "commercial fortunes" of the supplier "could be materially affected by the disclosure of the information." *Public Citizen Health Research Group v. FDA,* 704 F. 2d 1280 (D.C. Cir 1983)("not every bit of information submitted to the government by a commercial entity qualifies for protection under Exemption 4.") At 1290.

B. OWCP'S EXEMPTION 4 CLAIM IS BASED ON INADMISSIBLE EVIDENCE

Judge Moore did not address plaintiffs' hearsay objections to Director Tritz' affidavit, her letter to Elsevier and Elsevier's response.[14]

1. An unsworn letter is offered to prove objection to release of physician names.

OWCP bases its exemption 4 claim on Elsevier's 1/19/13 response [App. 917-918] to OWCP's 12/12/12 request, asking if it objects to the

[14] *See* Chief Triz' aff'd.: "The statements contained in this declaration are based upon information provided to me in my official capacity by persons who I deem reliable and well informed, and upon a review of the official FECA case files maintained by the OWCP and pertaining to plaintiffs,…". App. 886 ¶2.

release of its entire database. App. 912-916. First, the response is irrelevant since plaintiffs did not request the database. Second, plaintiffs objected to the unsworn letter as hearsay. Citing, *Echo Acceptance Corp. v. Household Retail Services, Inc.* 267 F. 3d 1068, 1090 (10th Cir. 2001). Def. MSJ. App. 118 ¶16. Pls. Reply. App. 133 ¶16. "[L]etters were properly excluded as hearsay—out-of-court statements of declarants offered for the truth of the matter asserted". *Eller v. Trans Union, LLC*, 739 F.3d 467, 476 (10th Cir. 2013), *cert. denied,* 134 S. Ct. 2158, 188 L. Ed. 2d 1126 (2014). "The evidence…is hearsay. It is an out-of-court written statement by a judge now offered to prove the truth of the matter asserted—in this case… *See* Fed. R. Evid. 801(c). It is therefore inadmissible…." *Herrick v. Garvey*, 298 F.3d 1184, 1191 (10th Cir. 2002).

2. OWCP asked Elsevier if it objects to requests contained in an attachment that was not offered into evidence.

OWCP claims that Elsevier objects to third party FOIA requests that are made in a CD-ROM that was attached to its letter to Elsevier. Since the attachment is not offered into evidence we can only speculate as to the basis of Elsevier's objection.

Director Tritz wrote Elsevier that there were "several requests" under FOIA for "a master copy of all physicians… or a master list of ABMS physicians practicing in specified regions….I have enclosed a copy on CD-

ROM for your review." App. 912-916. Plaintiffs objected to the admission of OWCP's 12/12/12 letter to Elsevier as it does not include a referenced attached CD-ROM. Citing, FRE 106 (remainder of related writing).[15] Def. MSJ. App. 118 ¶15. Pls. Reply. App. 133 ¶15.

3. OWCP makes the bald assertion that the attachment it sent to Elsevier was Elsevier's own database.

It appears that the word "copy" refers to the FOIA requests. So, on 3/6/14, plaintiffs requested that OWCP produce the CD ROM with the FOIA requests attached to its 12/12/12 letter to Elsevier. OWCP declined. App. 853. OWCP contends, without support by affirmation, that: "The context of that letter makes clear what was omitted from Defendants' submission of that letter: the data from the Elsevier database." Def. Reply in support of MSJ. App. 153 ¶15.

If the full database was attached as OWCP claims, the letter was clearly designed so that Elsevier would object to giving away for free the product that it sells to the public for $895.00 and licenses to OWCP for $24,950.00 a year.

[15] It appears that OWCP contacted Elsevier off the record and solicited a response after Elsevier failed to respond to the 12/12/12 request; as Elsevier's response states, "[w]e are now in receipt of your letter of 2/12/12…that …was never received." Defendant fails to explain how Elsevier became aware of the letter that it never received. Moreover, Elsevier responded to Yvonne Lynah rather than the author of the letter, then Chief Technical Asst. Tritz.

C. SUMMARY JUDGMENT IS IMPROPER AS OWCP'S CREDIBILITY IS AT ISSUE

1. OWCP misrepresents to Court that it sent plaintiffs FOIA requests to Elsevier.

Elsevier, the licensor of the ABMS database, objected to the release of its entire database. App. 917-918. However, plaintiffs never asked for release of the entire database.

OWCP claims that Elsevier's objection was, "In response to a letter from OWCP regarding Plaintiff's FOIA requests…." Def. MSJ. App. 122. Deputy Director Tritz states in her affidavit that, "OWCP notified Elsevier that plaintiff's had submitted a FOIA request seeking information contained in the DATABASE." App. 899 ¶34. This is a false statement. The notice to Elsevier is dated 12/12/12. Plaintiffs' FOIA requests were served between 2010 and 2011. *Supra* 7-8**.** OWCP's FOIA responses were served on plaintiffs in 2011. *Supra* 8**.**[16]

Judge Moore found that Elsevier objected "if OWCP disclosed the information sought in the FOIA requests." Add. 10. App. 172. This is incorrect. OWCP never asked Elsevier if it objected to the information sought in plaintiffs FOIA requests – the names of referee physicians in the

[16] OWCP Counsel admitted at oral argument that these were not plaintiffs FOIA requests but rather a different request for a master copy. T. 37-38.

OWCP records that were already released to the public in accord with its license with Elsevier.

If the third party FOIA requests were attached to the letter to Elsevier, then OWCP withheld them so that it could misrepresent to the Court that it sent plaintiffs FOIA requests to Elsevier.

2. The misrepresentation makes it appear that Elsevier objected to plaintiffs' FOIA requests when OWCP knows that plaintiffs' requests were never sent to Elsevier.

OWCP tailored its misrepresentation to fit the facts of *O'Harvey v. Compensation Program Workers,* No. 98-35106, 1999 WL 626633 (9th Cir. 8/16/99)(unpub.). There, *O'Harvey* requested the full Marquis directory (a precursor of Elsevier). The trial court granted summary judgment in favor of the agency after a hearing that was not attended by the *pro se* plaintiff. The agency in effect took default judgment. *O'Harvey* did not assert any public interest in the disclosure. Unlike O'Harvey, Plaintiffs only request the names and addresses of the few physicians who actually did referee evaluations that are kept by OWCP in its own records. Judge Moore cites *O'Harvey* to support his holding of confidential data. Add. 10. App. 172.

3. By not sending plaintiffs requests to Elsevier, OWCP avoided its obligation to copy plaintiffs on any notice to Elsevier.

Executive Order 12600 § 9 requires that the Government provide a copy to the requester (i.e. plaintiffs) of its FOIA notice to the submitter.

App. 865-880. OWCP apparently avoided this requirement by never notifying Elsevier of plaintiffs' narrow FOIA requests. App. 882 ¶7.

4. Even though OWCP is required to provide notice to Elsevier of plaintiffs FOIA action; Elsevier never appeared in this suit to raise an objection.

When a FOIA requester brings suit seeking to compel disclosure of confidential commercial information the agency shall promptly notify the business submitter. 29 CFR 70.26 (h). If the Agency gave notice to Elsevier as required; then Elsevier decided that its interests were not important enough to protect by intervening in this suit.

5. OWCP set up its case by encouraging and coaching Elsevier on how to object.

President Obama's Executive Order directs Agencies to presume the release of information and take affirmative steps to make information public. Fed. Reg. V. 74 Issue 15 (1/26/09).

Nevertheless, OWCP's letter to Elsevier encouraged and coached it to object by giving it a list of six legal elements of FOIA Exemption 4 that are not found in the regulations. OWCP counseled Elsevier that it was "extremely important" to address at a "minimum" the six points of law concerning FOIA Exemption 4. App. 912-916. OWCP thereby took sides and advanced its parochial interests over the interest of the public.

OWCP's letter to Elsevier goes far beyond the requirements of

Executive Order 12600 which states only that the Government may provide notice of a FOIA request to the submitter of information; and provide the submitter an opportunity to object to the release of the information and state all grounds upon which disclosure is opposed. App. 812-816.

Defendant's letter to Elsevier goes far beyond the requirements of the OWCP regulations that provide guidance for carrying out Executive Order 12600. 20 CFR 70.26 provides merely that OWCP give notice to anyone that submits information designated as confidential if a FOIA request for that information is made and provide an opportunity to submit a detailed statement of the grounds and basis for contending the information is confidential under Exemption 4. App. 865-880.

Note bene 26 CFR 70.26 (g)(2) provides an exception to the notice requirement where, as in this case, "The information has been lawfully published or has been officially made available to the public."

D. OWCP DID NOT MEET CONFIDENTIAL COMMERCIAL INFORMATION TESTS

The Government "ultimately [has] the onus of proving that the [documents] are exempt from disclosure." *Nat'l Ass'n of Gov't Employees v. Campbell,* 593 F.2d 1023 1027 (D.C.C. 1978)

If the referee physicians name and zip code were not provided free to the public, the Court would apply either: the *Nat'l Parks I* impairment or

competitive harm test; or the *Critical Mass II* customary release test to determine whether they are exempt. *Nat'l. Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974)(*Nat'l Parks I*), *Critical Mass Energy Project v. Nuclear Regulatory Comm.,* 975 F.2d 871, 879 (D.C.Cir.1992)(*en banc*)("*Critical Mass II*").

1. Elsevier only makes a conclusory objection to the release of its database.

Elsevier makes a conclusory objection only to the release of the portions of the database that are not available to the public at the ABMS website.[17]

Conclusory or vague statements or a sweeping recitation of the statutory standard are not "probative evidence". *Billington v. U.S. Dep't of Justice*, 233 F.3d 581, 584 (D.C. Cir. 2000). The Court need not accept

[17] Elsevier's 9/30/06 license states that the database is compiled by "extensive gathering and coordination of information, selection of information considered by Elsevier to be relevant and useful and arrange the selected information." App. 904-911 ¶11-6. The database is used for many purposes: to analyze physician credentials, for specialist certification, to investigate qualifications or credentials for employment screening or for maintenance of accreditation by JCAHO, NCQA, URAC, state or federal agencies or other accreditation processes. App. 905 ¶1.1. The Elsevier website abmsdirectory.com has a "DEMO" that shows information it contains on 800,000 board certified physicians. The Elsevier directory provides a physician profile that shows, among other things: Board Certifications, the year originally certified, participation in meeting certification maintenance requirements, date of last quarterly update for the website, and links to specific Boards with more information. It allows you to search multiple certifications or sub certifications. It allows comparison of specialists side by side. It allows you to cross reference physician profiles and specialists certified in multiple areas. App. 805-837.

Elsevier's conclusory statements of impairment or competitive harm where, as here, "a declaration of fact is capable of exact proof but is unsupported by any reliable evidence and instead consists of bald "declaration[s] of empirical fact"—not "predictive judgment [s]." *Canadian Commercial Corp. v. Dep't of Air Force*, 442 F. Supp. 2d 15, 30-31 (D.D.C. 2006),*aff'd.,* 514 F.3d 37 (D.C. Cir. 2008).

2. Plaintiffs' response to Elsevier's objection to the release of its entire database.

On 1/10/13 Elsevier objected to the request to "disclose the physician data that you receive from us". Here is each objection followed by plaintiffs' response:

1. The "entire database" is confidential commercial information disclosure of which would cause irreparable financial harm. This is a conclusion. Moreover, the entire database is not requested.

2. Disclosure would be of value to competitors who do not have access to *portions* of the database obtained from the ABMS under contract or collected directly at great expense.[18] But, plaintiffs do not request any portion of information that is not made available to the public by ABMS. Therefore, competitors, if any, could not gain a competitive advantage by

[18] This contention is hearsay and without foundation as the contract with ABMS is not produced.

the already publicly released names.

3. Access to the raw database for matching to other data sources may not be published and "could jeopardize the personal information of physicians"; competitors would be exempt from the cost to compile and maintain the data. But, plaintiffs' do not request the "raw database" or personal non-public information. Importantly, Elsevier does not have any competitors.

4. The database is kept in a secure data center. But, plaintiffs do not request the database.

5. The license prohibits distribution of parts of the database. Violation of the license would cause irreparable harm. But, plaintiffs do not request any parts of the database that are confidential or that were not already previously released in accord with the license agreement. The license provides the "permitted" use of printing the discrete searches for referee physicians. App. 859 ¶2:8, 861 ¶11:5. The claim of irreparable harm is conclusory and not supported by any evidence.

6. If the information is disclosed, Elsevier would likely terminate the license and might seek injunctive relief. App. 917-918. But, Elsevier cannot terminate the license or obtain an injunction because the information is already public and released to the public by OWCP in accord with the license agreement. What Elsevier might do is irrelevant.

C. NEITHER OF *NAT'L. PARKS* TWO PRONG TESTS ARE MET

Under *Nat'l. Parks & Conservation Ass'n v. Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974)(*Nat'l Parks I)* information is confidential if it is likely: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Utah v. U.S. Dept. of Interior*, 256 F.3d 967, 969 (10th Cir. 2001).

1. Identification of referee physicians will not impair OWCP's ability to obtain the names of board certified physicians in the future.

OWCP's claim of impairment is based upon a false premise - namely that plaintiffs requested Elsevier's complete database. They did not.

Judge Moore based his finding that the release of the referee physicians names would "impair the government's ability to obtain necessary information in the future" on Chief Tritz' hearsay declaration. Add. 10. App. 172. To the contrary, self-serving conclusory affidavits from the submitter or the agency that information will be withheld in the future cannot prove a risk of impairment. *Niagara Mohawk Power Corp. v. DOE*, 169 F. 3d 16, 18 (D.C. Cir. 1999).

Neither OWCP nor Elsevier provide any admissible evidence that Elsevier could terminate its license if OWCP discloses what was actually requested under FOIA - the small list of referee physicians. Moreover, the

release of the referee physicians' names to the public was clearly a permitted use of its license by OWCP. If not, OWCP could not schedule any referee examination with information obtained from the ABMS database.

Although OWCP was required to notify Elsevier of this suit, Elsevier did not take advantage of the opportunity to pursue an objection directly in this action.

OWCP misrepresented to the Court that Elsevier objected to the release of the information requested in plaintiffs FOIA requests. To the contrary, OWCP asked Elsevier if it objected to the release of its entire database. Now having been caught in a lie, OWCP speculates that Elsevier would nevertheless object to the release of the referee physicians names and zip codes that OWCP releases every time it notices a referee evaluation.

It is highly unlikely that Elsevier would even consider terminating its $24,950.00 annual license over the release of a miniscule number of physicians' names.

"It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it." *Ackerly v. Ley,* 420 F. 2d 1336, 1339-40 n.3 (D.C. Cir. 1969)

(undertakings of that nature cannot, in and of themselves, override the Act.).

Importantly, OWCP made no showing that it cannot get the information from another source or that Elsevier is the only source of the ABMS list. OWCP can obtain the information directly from the ABMS. OWCP can obtain the information from the contractors that provide second opinion physicians. *Supra* 11.

2. No harm to competitive position is shown where no competition exists.

Judge Moore held that "safeguarding the submitter from competitive disadvantage" applied. Add. 10. App. 172. This finding fails because OWCP did not identify a single competitor of Elsevier.

The government must show: (1) actual competition and (2) a likelihood of substantial competitive injury if the information were released. *GC Micro Corp v. Def. Logistics Agency,* 33 F. 3d 1109, 1112-1113 (9th Cir. 1994). OWCP has done neither. "[I]f there is no evidence that establishes that both the actual competition and substantial competitive injury elements are met, then exemption 4 does not apply to the disputed information." *People for the Ethical Treatment of Animals v. USDA*, 2005 WL 1241141, at 8-10 (D.D.C. 2005); *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976) ("Nat'l Parks II").

The government must show actual, not speculative or conclusory proof of the likelihood of competitive injury. *Hercules, Inc. v. Marsh,* 839 F. 2d 1027, 1030 (4th Cir, 1988) (holding that where, as here, *Hercules'* contract was not awarded competitively the chance of injury by release of the directory was remote). The submitter "must prove that it actually faces competition and that 'substantial competitive injury would likely result from disclosure.'" *Anderson v. Dep't of Health & Human Servs.,* 907 F.2d 936, 947 (10th Cir. 1990) citing *National Parks and Conservation Ass'n v. Kleppe,* 547 F.2d 673, 679 (D.C.Cir.1976) (*Nat'l. Parks II)*. OWCP's claim of competition and competitive injury must be supported by a "detailed factual justification [of] the extent to which disclosure…will cause substantial harm to the competitive position of the person from whom the information is obtained, with specific factual or evidentiary material to support the conclusion reached", not generalized or conclusory affidavits or information. *Pub. Citizen Health Research Group v. FDA,* 704 F. 2d 1280, 1291 (D.C. Cir. 1983); *Critical Mass Energy Project v. Nuclear Regulatory Comm.,* 830 F.2d 278, 283 (D.C. Cir. 1987)(*Critical Mass I)*.

A "minor impairment" cannot overcome the disclosure mandate.

Clearly, the names of referee physicians cannot be extrapolated to recreate a competitive directory. In determining whether disclosure would

likely cause substantial competitive harm, the critical question is whether a logical pattern exists that would permit extrapolation of confidential information by a competitor. *Boeing Co. v. United States Dep't of the Air Force,* 616 F. Supp. 2d 40, 45 (D.D.C. 2009). A "minor impairment" cannot overcome the disclosure mandate of FOIA. *Critical Mass Energy Project v. Nuclear Regulatory Comm.,* 830 F.2d 278, 283 (D.C. Cir. 1987)(*Critical Mass I)*.

OWCP's contention that the release of the referee physician names would impair Elsevier's competitive positon is not rational. The number of referee physicians is miniscule compared to the 800,000 ABMS board certified specialists. App. 805-837. The license agreement lists 48 medical specialties, few of which are used by OWCP. App. 904-911. The number or referee physicians is miniscule compared to the 19843 physicians in Colorado. App. 856. From 1/1/05 - 9/7/10, Dist. 12 conducted 558 referee evaluations. App. 5771 ¶3.

In *Hercules, Inc. v. Marsh*, 659 F. Supp. 849, 854 (W.D. Va. 1987) *aff'd,* 839 F.2d 1027 (4th Cir. 1988), *Hercules*, a government contractor, provided the Army with employees' names, phone numbers, key personnel, organizational structure and proprietary information for an ammunitions plant telephone directory. *Hercules* claimed that release of the directory in

response to a FOIA request would impair the government's ability to obtain information in the future and cause competitive harm. The court found the information supplied by *Hercules* was not a significant impairment. In addition, *Hercules* only showed conclusory evidence of competitive harm where (as in the instant case) it had a longstanding relationship with the government.

E. THE *CRITICAL MASS II* CUSTOMARY RELEASE TEST IS MET

In *Utah v. U.S. Dept. of Interior*, 256 F.3d 967, 969 (10th Cir. 2001)(terms of nuclear fuel storage leases), the Tenth Circuit referred to *Critical Mass II* but did not expressly adopt it. Instead, it applied the *Nat'l. Parks* standard to cases where the information is compelled. *Id. at 969.*[19]

Information must be disclosed if identical information is available in

[19] No other Circuit adopted the *Critical Mass II* test. The *Nat'l. Parks* test, prong one, impairment, settles the question whether information is voluntary and therefore difficult to obtain or compelled and therefore guaranteed in the future; hence, *Critical Mass* is superfluous. *Comdisco v. General Services Admin. 864 F. Supp. 510 (E.D. Va. 1994).* Giving conclusive status to that which the submitter subjectively characterizes as confidential would cause the definition of "confidential" to become overly broad, and thus undermine the central purpose of FOIA. *N.Y. Public Interest Research Group v. U.S. E.P.A.* 249 F. Supp. 327 (S.D. N.Y. 2003). In *International Brotherhood of Electrical Workers Local 68 v. Denver Metropolitan Major League Baseball Stadium Dist. 880 P. 2d 160 (Colo. App. 1994), the Colorado Court of Appeals* declined to apply the *Critical Mass* standards to the Colorado Open Records Act, citing Justice Ginsberg's dissent in Critical Mass as follows: "Apparently, this new standard for protection of information voluntarily submitted to the government is a subjective test under which 'it will do for an agency official to agree with the submitter's ascription of confidential status to the information.'" *Critical Mass* 975 F.2d at 885 (Ginsberg, J, dissenting).

the public domain. "[I]f identical information is truly public, then enforcement of an exemption cannot fulfill its purposes." *Niagara Mohawk Power Corp. v. DOE,* 169 F.3d 16, 19 (D.C. Cir. 1999).

The ABMS directory is sold to the public by Elsevier. You can buy a copy for $895.00.

In *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.,* 244 F.3d 144, 151-52 (D.C. Cir. 2001) (remand to determine if objectors evidence was adequate to defeat customary disclosure claim), plaintiff requested information that was voluntarily submitted by manufacturers on the characteristics of airbags. The court citing its holding in *Niagara Mohawk,* held that information must be disclosed if identical information is in the public domain. The court noted that the "identical information" basis for disclosure is distinct from the "customary disclosure" standard. The court found that selling airbags did not constitute evidence of customary disclosure of the physical characteristics of every vehicle over many years, where the difference in detail produced a difference in information. Nevertheless, the court noted that "the information need not have been identical to constitute customary disclosure." At 153. The court remanded to determine whether some of the requested information was customarily disclosed. At 151-52

III. SCREEN SHOTS OF PULL DOWN MENUS ARE EXISTING ELECTRONIC RECORDS AND THUS DO NOT REQUIRE OWCP TO "CREATE" RECORDS.

Because the agency is in the unique position of "[p]ossessing both the burden of proof and all the evidence", it must provide the Court and the challenging party "a measure of access without compromising its original withholdings." *Judicial Watch, Inc. v. F.D.A.*, 449 F.3d 141, 146 (D.C. Cir. 2006).

1. OWCP claims that screen shots are not "records" under FOIA.

Plaintiffs requested screen shots of all pull down and help menus based shown on screen shots of the MMA records previously produced by OWCP.[20] *See* e.g. App. 375-376. OWCP responded that it was "not

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[20] Print outs of all MMA menu screens (use Claimant's claim number to access the MMA). Please do this for all the possible screens in the MMA system for all the pull down screens, e.g.:

The Schedule Appointment screen at the top shows file, action, view, and help buttons.

Please click on each and print the resultant screens. If those screens have further pull down menu buttons click on these and print those screens; continue until all MMA screens are printed.

The Schedule Appointment screen shows View Mode, Pending Appts, Cancelled Appts, Appt. Log, Missed Appts., Sanctions, File Review Log, Resume/Cancel SP, Browse Doctor, Find Doctor, Schedule Appt., Bypass Doctor, File Review, Cancel, and Update Doctor buttons.

The bottom of the Schedule Appointment screen shows a Start Menu, Inbox, iFECS Application, Workload Org., Imaging, 2 windows, Schedule ap, 2 Microsoft, Correspondence, 4 Microsoft, and Virtualy Ther… buttons.

Please click on all of these buttons and print the resulting screens. If those screens

required to create sample reports or screens." Thus, OWCP claims that screen shots are not "records" as that term is used in FOIA. OWCP does not here claim any of FOIA's narrow exemptions.

Judge Moore held that OWCP was not required to create screen shots and was only obligated to produce records "created or retained" as part of the scheduling process. Add. 12. App. 174. However, plaintiffs' requests for screen shots do not refer to the scheduling process. Plaintiffs requests for screen shots of the pull down and help menus are independent of their requests for records regarding the selection of referee physicians.

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have further pull down menus, click and print those screens until all the options are exhausted.

The Schedule Appointment screen has a pull down screen for Case Number, Subject, Apt. Type, Doctor Specialty, Claimant Zip Code, Doctor Subspecialty; and a button for ICDS.

Please click on all of those buttons and print the resulting screens. If those screens have further pull down menus, click and show those screens until all the options are exhausted.

On the Bypass Doctor screen there is a pull down menu for Select Bypass Reasons...

Please click on all of those and print the resulting screens. If those screens have further pull down menus, click and show those screens until all the options are exhausted.

On the MM Locate Doctor - Select Zip code screen there is a pull down filter for zip code and select a mileage; there is also a Load button.

Please click on all of those and print the resulting screens. If those screens have further pull down menus, click and show those screens until all the options are exhausted.

Judge Moore cited *Kissinger v. Reporters Comm. for Freedom of the Press***,** 445 U.S. 136, 152 (1980) which held that, "The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." At 151-152. Here the *Kissinger* requirements are satisfied. OWCP "created and retained" the screen shots since electronically stored information is a "record" under FOIA. Plaintiffs request screen shots of actual software screens. Plaintiffs did not request sample reports.

2. Information that perpetuates knowledge is a "record" under FOIA.

> The Act does not define the terms "records." However, it has been held that under such circumstances, reliance may be placed on a dictionary meaning of the word "record" defined as that which is written or transcribed to perpetuate knowledge or events.

DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978) citing *Nichols v. U.S.*, 325 F.Supp. 130 (D.C.Kan.1971), *aff'd*, 460 F.2d 671 (10th Cir. 1972), *cert. denied*, 409 U.S. 966 (1972).

3. Computer stored information is a "record" under FOIA.

Computer stored information are records under FOIA. *Yeager v. DEA*, 678 F.2d 315, 321 (D.C.Cir. 1982):

> Agencies that store information in computerized retrieval systems have more flexibility in voluntarily releasing information and should be "encourage(d) ... to process requests for computerized information even if doing so involves performing

> services which the agencies are not required to provide ....” S. Rep. No. 854, 93d Cong., 2d Sess. 12 (1974); Source Book at 164 (emphasis added). As noted by the district court, “(a)s agencies begin keeping more of their records in computerized form, the need to contour the provisions of FOIA to the computer will become increasingly necessary and more dramatic.”

At 326-27.

4. Software that is designed to manipulate agency information is a “record”.

A computer software program is an agency record where the MMA unlike “generic word processing or prefabricated software” it is “uniquely suited to its underlying database” such that “the software’s design and ability to manipulate the data reflect the” the agency study. “These programs preserve information and ‘perpetuate knowledge’”, responsive to plaintiffs’ FOIA requests because of their relationship to the agency study. *Cleary, Gottlieb, Sten & Hamilton v. HHS,* 844 F. Supp. 770, 781 – 82 (D.D.C. 1993).

5. Electronic staff manuals are FOIA “records”

Pull down menus are akin to manuals that contain instructions to staff concerning knowledge of the stored OWCP records. 29 CFR 70.4 (2) & (3) provide for the release of statements of policy and interpretation adopted by the agency and administrative staff manuals and instructions to staff that affect a member of the public. *Accord* 5 U.S.C. §552(a)(3)(A).

The pull down screens show the information that the MMA (Medical Management Application) organizes and accesses on a daily basis. Without the screen shots designed to manipulate the OWCP medical management data, the public is deprived of access to OWCP records of information and knowledge on referee selection and other related OWCP operations and activities.

OWCP's claim that it is not required to "create" screen shots of pull down menus that it accesses on a daily basis is disingenuous. OWCP could make the same argument with respect to the referee physician reports produced by OWCP. Plaintiffs requested reports for specific zip codes, time periods and specialties. OWCP created these reports by opening specific pull down screens and entering the parameters of plaintiffs FOIA requests into its software system - referee physicians, zip codes, time periods, and specialty. Yet, OWCP does not claim that this process required it to create records.

6. OWCP's pull down menus replaced its software operational manual

Screen shots of pull down menus are the keys to kingdom of OWCP knowledge of its operations and activities. OWCP never published a

program bulletin for the MMA.[21] Plaintiffs were only able to make FOIA requests for specific reports because OWCP published a program bulletin for the PDS that described some of the reports that the system could generate, to wit: "appointment log", "physician master" and "physician usage" reports. App. 661-678, 702-703**,** FECA Bulletin 01-11 (6/4/02)**.** When OWCP renamed the software program "MMA" it changed the names of the reports. OWCP therefore produced reports that were not listed in the old PDS program bulletin – "activity", "physician prompt pay" and "physician usage" reports. Without an operational manual the public cannot access OWCP knowledge of records concerning its operations and activities.

OWCP hides the pull down menus that show the functions of the system to prevent the public *f*rom making informed requests for information. It appears that the training, operation and maintenance of the MMA is done verbally to avoid disclosing the selection process to the public. OWCP has no notebooks or manuals that provide the functions of

[21] OWCP did not announce that the MMA replaced the PDS until July 2011. DMSJ. App. 113 fns. 2 & 3. OWCP admits that plaintiffs requested screen shots from the MMA. PMSJ, App. 54 ¶8, Def. resp. App. 80 ¶8 At oral argument, the government stated that the PDS no longer existed but that it considered the closest analog the MMA. T. 50. And, that all of the records produced in this case were from the MMA as the PDS no longer exists. T. 55.

the PDS. App. 707-715. OWCP has no reviews, studies, or evaluations of the PDS. App. 347.

"The legislative history is replete with references to Congress' desire to loosen the agency's grip on the data underlying governmental decision making." *Chrysler Corp. v. Brown*, 441 U.S. 281, 290 fn 10 (1979).

CONCLUSION

The case provides an opportunity for the public to safeguard the integrity of the entire federal workers' compensation program. This is important because DOL FECA decisions are not subject to judicial review.

Given OWCP's conflict between the interests of federal agencies vs. that of federal employees it is best to verify rather than trust.

Plaintiffs request that this Court reverse the District Court's grant of OWCP's motion for summary judgment.

Plaintiffs request that this Court remand the case to the District Court with instructions to grant plaintiffs' motion for summary judgment.

ORAL ARGUMENT

Oral Argument is requested to address the FECA statutory scheme, OWCP's administration of FECA, OWCP's conflict of interest, why referee selection is vital to program integrity, how the selection process should

work, OWCP credibility, the inadmissibility of evidence for OWCP's exemption claims, and the lack of foundation for the Elsevier objection.

April 20, 2015

Respectfully submitted,

Attorney for Plaintiffs

/s/ Karen Larson
Karen Larson
Attorney for Plaintiffs
3773 Cherry Creek North Drive
Suite 575
Denver, CO 80209
(303) 831-4404
(303) 261-8109 fax
Email: karenlarson@qwestoffice.net

/s/ John S. Evangelisti
John S. Evangelisti
Attorney for Plaintiffs
1120 Lincoln St., St. 711
Denver, Colorado 80203
(303) 832-8226
(303) 830-8843 fax
john@johnevangelisti.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 13-cv-01722-RM-MJW

BLAKE BROWN,
DEAN BIGGS,
JACQUELINE DEHERRERA,
RUTH ANN HEAD,
MARLENE MASON,
ROXANNE MCFALL,
RICHARD MEDLOCK, and,
BERNADETTE SMITH.

Plaintiffs,

v.

THOMAS E. PEREZ, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR, an agency of the United States, and
OFFICE OF WORKERS COMPENSATION, an agency of the United States Department of Labor,

Defendants.

ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the parties' cross motions for summary judgment (ECF Nos. 51 & 52). Plaintiffs Blake Brown, Dean Biggs, Jacqueline Deherrera, Ruth Ann Head, Marlene Mason, Roxanne McFall, Richard Medlock and Bernadette Smith ("Plaintiffs") seek an order finding that Defendants violated the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by improperly responding to their FOIA requests. Defendants United States Department of Labor, the Office of Workers Compensation, and Thomas E. Perez, the Secretary of Labor ("Defendants") seek an order finding that they responded appropriately to the FOIA requests. A hearing was conducted on this matter on September 9, 2014. Upon

consideration of the arguments at the hearing, the *Vaughn* index, papers filed with the Court and the applicable law, Plaintiffs' motion is denied and Defendants' motion is granted.

I. FACTUAL BACKGROUND

Plaintiffs brought this action under FOIA as part of an effort to demonstrate that the Office of Workers Compensation Programs "engaged in fraud, waste and abuse by selecting referee physicians in violation of federal employees' . . . right to have referee physician[s] randomly and equitably selected from a list of all board certified physicians." (ECF No. 41 at 2.) In order to prove that, Plaintiffs sought various documents related to the referee physician selection process in District 12[1], among them records listing the physicians accepting referrals, the chronological file of referral letters, print outs of selection software screens, and other related documents. (*See, e.g.*, ECF No. 42-6, FOIA Request Example.) In response, Defendants produced some of the requested reports, redacted and produced others, and denied other requests claiming either a FOIA exemption, or that the documents did not exist, or some other defect with the FOIA request, as detailed further below. Plaintiffs contested the withholding of some of these categories of documents that were not produced, and this suit resulted.

A. Plaintiffs' FOIA Requests

Under the Federal Employees Compensation Act ("FECA"), the Office of Workers Compensation Programs ("OWCP") selects referee physicians to resolve medical conflicts that arise between treating physicians and second opinion physicians hired by OWCP. (ECF No. 72, Proposed Findings of Fact by Plaintiffs, at 1.) FECA provides workers' compensation benefits to civilian federal employees who sustain injury or illness in the performance of duty. (ECF No.

[1] The Office of Workers Compensation Program administers the Division of Federal Employees Compensation, the subject of the instant suit, which has various district offices covering groups of states. The instant suit concerns District 12, which covers the following states: Colorado, Wyoming, New Mexico, North Dakota, South Dakota, Montana, and Utah. *See Contacting Your Federal Employees' Compensation District Office*, United States Department of Labor, http://www.dol.gov/owcp/contacts/fecacont.htm (last visited December 19, 2014).

52-1 at 3-4.) Plaintiffs are claimants who received or are receiving FECA benefits. (*Id.* at 4.) An individual qualifying for FECA benefits must show a qualifying medical condition supported by a physician's opinion. (*Id.*) Where a conflict exists between two physicians' medical opinions, FECA requires the appointment of a third referee physician to resolve the conflict. (*Id.* at 5.)

OWCP requires that referee physicians be randomly selected from a database of all board certified physicians using OWCP's selection program. (ECF No. 72 at 2.) That selection program was called the Physician Directory System (the "PDS") until it was replaced by the Medical Management Application ("MMA"). (*Id.*)

The PDS contained a list of American Board of Medical Specialists ("ABMS") who were chosen as physician referees on a rotational basis. (ECF Nos. 52 at 2; 72 at 2.) The opinions of the referee physicians are final and binding. (*Id.* at 2.) The company that provided the underlying database containing the ABMS list for the PDS was Elsevier, Inc. ("Elsevier"). (ECF No. 52 at 2.) The PDS and the MMA were designed to "provide an automatic and strict rotational scheduling feature for selecting referee physicians," as Defendants put it, or to "support the random and neutral scheduling of referee examinations," as Plaintiffs put it. (ECF Nos. 52 at 2, 72 at 2.) If the physician selected by the software is not available or unwilling to conduct the examination, that physician is "bypassed" and another physician is selected by the software. (*See* ECF Nos. 52 at 3; 72 at 2.)

Plaintiffs made FOIA requests for documents starting in 2001 regarding OWCP's referee physician selection process. (ECF No. 72 at 3.) Plaintiffs requested information for referee examinations "in accord with FECA Bulletin 01-11 (6/4/02), which describes some of the reports that can be generated by the PDS (now MMA) computer program." (*Id.*) All in all, Plaintiffs

submitted over twenty FOIA requests from September 2009 through May 2011. (ECF No. 52-1 at 3.) Also, specifically at issue in the cross motions, Plaintiffs requested physician bypass reports and pull-down screens from the PDS and MMA computer systems. (ECF No. 72 at 3.)

B. Released and Withheld Information

According to Plaintiffs, "OWCP for the most part produced the requested reports but redacted the names of the referee physicians claiming FOIA Exemption 6 (privacy)." (*Id.* at 3.) OWCP did not produce bypass reports or screenshots of pull-down menus. (*Id.*) OWCP also did not produce documents or information contained in the PDS; "OWCP has repeatedly advised plaintiffs that it is unable to obtain information from the PDS because it no longer exists." (ECF No. 52-1 at 5.)

In response to Plaintiffs' FOIA requests, OWCP conducted a search of the MMA database. (ECF No. 52-1 at 6.) OWCP then released to Plaintiffs responsive information and documents as a result of that search, including "[b]ypass [s]tatistics report with counts of physician bypass for date range from Start 2000 to End 2001." (ECF No. 52-1 at 11.) OWCP produced other information in redacted form, deleting the names and identifiers of non-plaintiff claimants and physicians. (*Id.* at 10-11.) "In the instances when OWCP made a partial release of information, the description and rationale for withholding the information is included in . . . the [*Vaughn*][2] Index." (*Id.* at 7.)

The *Vaughn* index submitted by Defendants discloses the title of the attached *Vaughn* Exhibit, the subject matter of the document (such as: "Information withheld consists of: physicians' names, physicians' ID numbers"); the exemption asserted (such as: "Witheld in Part: Exemption 4 – commercial information obtained from a person that is confidential"); and the

[2] A *Vaughn* index is an agency's compilation listing each withheld document and explaining the asserted basis for its nondisclosure. *Anderson v. Dep't. of Health & Human Serv.*, 907 F.2d 936, 940, n.3 (10th Cir. 1990); *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

applicable Plaintiffs. Defendants also attach a supporting declaration by an OWCP official, Julia Tritz (ECF No. 52-1 at 1-19), detailing Plaintiffs' requests and Defendants' responses, and attaching further supporting documentation.

II. ANALYSIS

There are many factual disputes between Plaintiffs and Defendants and the briefing and supporting documentation is voluminous, but the actual issues that must be decided are relatively narrow and concise in this case—first, whether physician and client names, phone numbers, addresses and other identifiers were rightfully withheld under FOIA; second, whether OWCP was required to create print-outs of computer screenshots of drop-down menus and produce them under FOIA.[3]

A. FOIA

"FOIA is designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Anderson v. Dept. of Health & Human Serv.*, 907 F.2d 936, 941 (10th Cir. 1990) (citation and internal quotation marks omitted). Accordingly, FOIA is to be broadly construed in favor of disclosure and its exemptions are to be narrowly construed. *Id.*

The agency must demonstrate that it made a good faith effort to conduct a search for the FOIA records requested, using methods which are reasonably calculated to uncover all relevant documents. *Schwarz v. FBI,* No. 98-4036, 1998 WL 667643, at *1 (10th Cir. Sept. 17, 1998); *Information Network for Resp. Mining ("INFORM") v. Bureau of Land Mgmt.*, 611 F.Supp.2d

[3] Defendants' Motion for Summary Judgment assumes that Plaintiffs were contesting the withholding of claimant names and identifiers, but as they note in their responsive briefing, "Plaintiffs did not argue that claimant's names and identifiers must be released...Plaintiffs are apparently satisfied by OWCP's decision to provide the last four digits of claim numbers." (ECF No. 57 at 9-10.) Plaintiffs did not address that statement either affirmatively or negatively in their reply brief in response to that filing. Plaintiffs listed other FOIA requests in their Motion for Summary Judgment which Defendants contend are beyond the scope of this litigation, and they similarly do not respond to this charge. (*See id.* at 19.) Defendants are correct that Plaintiffs responsive briefing "takes issue with only two aspects of OWCP's FOIA responses: (1) the redaction of doctors' names and other information; and (2) OWCP declining to create printouts of certain computer screens." (ECF No. 63 at 4.) A *Vaughn* Index has been produced which substantiates Defendants' position on the nonproduction of all other documents.

1178, 1184 (D.Colo. 2009) ("*INFORM v. BLM*"). "To show reasonableness at the summary judgment phase, an agency must set forth sufficient information in its affidavits for a court to determine if the search was adequate." *Schwarz v. FBI, supra* at *1 (citation and quotation marks omitted). "The affidavits must be reasonably detailed, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Id.* at *1 (citation and quotation marks omitted). The reasonableness of the agency's search depends on the facts of each case. *INFORM v. BLM, supra* at 1184.

A search is not unreasonable simply because it failed to produce all relevant material. "The fundamental question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was *adequate*." *Schwarz v. FBI, supra* at *2 (citation and quotation marks omitted; italics in original). *See also* James T. O'Reilly, *Federal Information Disclosure*, § 7.8 ("Records search disagreements – Reasonableness") (2013).

In order to withhold responsive information uncovered, the government agency must prove the requested information falls within one, or more, of the nine specific exemptions from disclosure. *Hull v. I.R.S.*, 656 F.3d 1174, 1177 (10th Cir. 2011); 5 U.S.C. § 552(a)(4)(B) & (b). "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). The Court may enjoin the agency from withholding records or order the production of any documents improperly withheld. 5 U.S.C. § 552(a)(4)(B).

Where, as here, the parties file cross-motions for summary judgment, the Court is "entitled to assume that no evidence needs to be considered other than that filed by the parties,

but summary judgment is nevertheless inappropriate if disputes remain as to material facts." *James Barlow Family Ltd. P'ship v. David M. Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997.) The Court reviews the government's refusal to release requested information *de novo*. *Hull v. I.R.S., supra* at 1177; 5 U.S.C. § 552(a)(4)(B). The Court has a variety of options it may utilize to determine whether a sufficient factual basis exists for evaluating the correctness of the agency's action, including ordering the production of the withheld information, or some sample thereof, for an *in camera* review; reviewing detailed affidavits/ declarations; or reviewing a *Vaughn* index. *See Hull v. I.R.S., supra* at 1177-1178; *Anderson v. Dep't. of Health & Human Serv., supra* at 942. "If the government agency's *Vaughn* index and affidavits are reasonably clear, specific, and detailed, the court normally affords agency determinations substantial weight." *Public Emp. for Envir. Resp. (PEER), Rocky Mtn. Chapter v. U.S. EPA*, 978 F.Supp. 955, 960 (D.Colo. 1997). If the information provided is insufficient, the Court may issue further orders to ensure it has an adequate foundation for its review. *Anderson v. Dep't. of Health & Human Serv., supra* at 942.

B. Information Withheld Under Exemption 4

Defendants contend that some of the information withheld is covered by Exemption 4 of FOIA; namely, the physician names, addresses, phone numbers and identification numbers. (ECF No. 52 at 9.) Exemption 4 is asserted with respect to the referenced data as contained in Physician Activity Reports, Physician Usage Reports, Physician Prompt Pay Lay Reports, and certain IT reports as disclosed by the *Vaughn* index.

Exemption 4[4] exempts from disclosure trade secrets and commercial or financial information that is privileged or confidential. If not a trade secret, for Exemption 4 to apply the

[4] Plaintiffs argue that OWCP is no longer permitted to assert Exemption 4 because they failed to refer to it in letters to Plaintiffs prior to litigation. The Court is persuaded by a review of the case law that Defendants did not waive

information must be "(a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." *Anderson v. Dept. of Health and Human Services et al.*, 907 F.2d 936 (10th Cir. 1990) (quoting *National Parks and Conservation Ass'n v. Mortion*, 498 F.2d 765, 766 (D.C. Cir. 1974) (hereinafter *National Parks*)). Plaintiffs argue that the information withheld under Exemption 4 is not commercial in nature, was not obtained from a person, and is not confidential, and thus that it does not meet any of the three requirements for Exemption 4.

Plaintiffs argue that since the redacted names were generated by OWCP software, "compiled by the government," rather than obtained from a person, this information cannot fall within Exemption 4. (ECF No. 53 at 11.) Defendants respond by noting that though OWCP accesses the data using its own software, the data that Plaintiffs seek actually comes from a private business entity, thus meeting the Exemption 4 requirement that the information be "obtained from a person." (ECF No. 63 at 6.) *See, e.g., Pub. Citizen v. United States Dep't of Health & Human Servs.*, 975 F. Supp. 2d 81, 98 (D.D.C. 2013) ("[T]he statute makes clear that a 'person includes an individual, partnership, corporation, association, or public or private organization other than an agency.'") (quoting 5 U.S.C. § 551(2)). The Court agrees with Defendants both on that point and also that the information sought in this context is clearly commercial in nature.

Turning now to the confidentiality requirement, there are two different tests for whether information is "confidential." According to the Tenth Circuit, the "first step . . . is determining whether the information submitted to the government agency was given voluntarily or involuntarily." *Utah v. U.S. Dep't of Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (citing *Critical*

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any FOIA exemptions by not raising them prior to this litigation. *E.g., Cuban v. S.E.C.*, 744 F. Supp. 2d 60, 90 (D.D.C. 2010) on reconsideration in part, 795 F. Supp. 2d 43 (D.D.C. 2011) (quoting *Young v. CIA*, 972 F.2d 536, 538 (4th Cir. 1992) ("[A]n agency does not waive FOIA exemptions by not raising them during the administrative process.").

Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 878-879 (D.C.Cir.1992) (en banc) (hereinafter *Critical Mass*)). If voluntary, the *Critical Mass* test applies and the information is protected from disclosure if "it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass* at 879. On the other hand, if the submission was involuntary, the *National Parks* test applies, and the information is protected from disclosure by FOIA if disclosure will either "(1) ... impair the government's ability to obtain necessary information in the future or (2) ... cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks* at 770.

Both parties appear to agree that *National Parks* is the correct test, but the Court finds it less than clear whether *National Parks* should apply versus *Critical Mass*. The data at issue is part of a database provided by Elsevier under a commercial license agreement with the government. Defendants note that the information sought "was provided to OWCP pursuant to a licensing agreement, so it was required to be provided," without addressing that Elsevier was not required to undertake that agreement in the first place. (ECF No. 52 at 13.) No matter which test is applied, however, the Court finds that Defendants prevail.

Under *Critical Mass*, the Court concludes that the information sought by Plaintiffs, specifically, the names and identifiers for physicians in various contexts, would not customarily be released to the public by a private company, Elsevier. The value of a commercial database is inconsistent with the free and ready disclosure of its contents—even if restricted to District 12. And information from Elsevier in the form of a communication to OWCP, despite Plaintiffs' criticism,[5] shows that Elsevier considers the information in its database to be such that it would

[5] Plaintiffs suggest that the government encouraged Elsevier to object. (*See* ECF No. 53 at 5 ("Defendant encouraged an objection and prompted Elsevier on how to couch its objection . . . .").)

not be customarily released to the public by Elsevier. (*See* ECF No. 52-1, Elsevier Letter, at 48-49) (stating that if OWCP disclosed the information sought in the FOIA requests, "we would be unable to continue providing information and updates to DOL [Department of Labor], would likely terminate the existing License, and may seek injunctive relief . . . .").

Under *National Parks*, the Court concludes that disclosure would impair the government's ability to obtain necessary information in the future. It requires little deductive reasoning to reach the conclusion that companies in the business of licensing commercial data to the government would be less likely to do so if their confidential data could be accessed by anyone simply by making a FOIA request. Indeed, with respect to the PDS, the predecessor of the current MMA, the Ninth Circuit has previously found Exemption 4 to apply. *See O'Harvey v. Comp. Programs Workers*, 188 F.3d 514 (9th Cir. 1999) (unpublished opinion). Based on this, as well as the Declaration of Julia Tritz, the Court finds that Exemption 4 applies. And as to the alternative Exemption 4 basis – safeguarding the submitter from competitive disadvantage – the Court finds that this rationale too applies based on the Declaration and the Elsevier letter to OWCP, discussed above. Under either test, the information sought is confidential.

On a separate note, Plaintiffs generally argue that since the information it seeks is available to the public at the ABMS website, it is not confidential. (ECF No. 53 at 10.) Defendants respond that although physician names and identifying information is obviously known to the public, "context matters" because "the information requested would show that the doctors performed referee examinations on specific individuals on specific dates." (ECF No. 63 at 6.) On this point, the Court agrees with Defendants that context matters. The public nature of the names, addresses and phone numbers of physicians does not mean that the information is not confidential when it is given in the context of documents that reveal a physician's activities,

referrals, clients, etc. The Court finds that the information is confidential, and that Exemption 4 applies.

C. Information Withheld Under Exemption 6

Defendants redacted certain information from a variety of documents from medical and claim files. The information withheld pertained either to the physicians performing examinations or to the claimants with respect to whom examinations were made. The withheld material includes such matters as physician EIN numbers, patient names or identifiers and other physician identifiers including names and addresses.[6]

The *Vaughn* index, along with other supporting evidence, substantiates the OWCP's withholding of documents claimed under Exemption 6. Under this exemption, the agency need not disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). "Similar files" "has a broad, rather than a narrow, meaning and encompasses all information that applies to a particular individual." *Forest Guardians v. U.S. F.E.M.A.*, 410 F.3d 1214, 1217 (10th Cir. 2005) (internal quotation marks omitted). Here, the limited information segregated and withheld through redaction contains personal names and identifiers within "similar files." (ECF No. 52-1 at 21-24.)

In evaluating whether Exemption 6 should apply, courts balance the privacy interest of the persons whose information would be released against the public interest the requestors demonstrate. *See, e.g., Sheet Metal Workers Intern. Ass'n Local No. 9 v. U.S. Air Force*, 63 F.3d 994, 997 (10th Cir. 1995). The Supreme Court has narrowly defined "public interest" to mean "the extent to which disclosure would serve the 'core purpose of the FOIA,' which is

[6] Defendants also redacted case numbers from records produced, but has agreed to reproduce the same, redacting only the first five of the nine digit case numbers.

'contribut[ing] significantly to the public understanding of the operations or activities of the government.'" *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 114 S.Ct. 1006, 1012 (1994) (quoting *Dept. of Justice v. Reporters Comm.*, 109 S.Ct. 1468, 1482-83 (1989)) (alteration in original).

Plaintiffs argue that they are entitled to the redacted data as the data will shed light on "whether a particular physician performs a disproportionate share of the exams" without impinging "significantly on cognizable interests in personal privacy" for the physicians. (ECF No. 51 at 19.)

Defendants argue that the required link or nexus between the requested public records and the asserted public interest is wanting here "because Plaintiffs allegedly already have conclusive evidence of OWCP impropriety, and they offer no explanation how the requested records would advance their understanding of that issue." (ECF No. 57 at 16.) Defendants also point out that the information requested would not show what Plaintiffs claim it would. If, for example, all they receive is information about which physicians ultimately perform the referee examinations, that would not shed light on whether the OWCP selection process is operating as it should, since both selected physicians and the claimants themselves may have previously challenged or declined a selection resulting in the "selected" physician not performing the examination. (*Id.*)

In the Court's view, the bottom line with regard to Exemption 6 is that the physicians and private individuals appearing in case files have a clear privacy interest in their personal and business information. That interest, as made clear by a review of the applicable case law, includes "the individual's control of information concerning his or her person" and includes names and addresses. *See, e.g.*, *Forest Guardians*, 410 F.3d at 1218 (citing *United States Dep't*

of Defense v. FLRA, 510 U.S. 487, 500 (1994)). This privacy interest is not outweighed by any public interest that has been articulated by Plaintiffs, and the Court will not require disclosure of the redacted identifiers.

D. Creation of Screenshot Printouts

Plaintiffs seek printouts of screenshots showing pull down menus, which they say are "needed to show the functions that the referee physician software system the PDS can perform." (ECF No. 51 at 19.) Defendants argue that the printouts of screenshots of dropdown menus "do not exist, and FOIA does not require an agency to create records to subsequently disclose." (ECF No. 63 at 10.) In response to this argument, Plaintiffs cite no case law to contravene the notion that FOIA simply does not require Defendants to create screenshots and printouts where none previously existed, but merely argue that "[c]learly, it's not that OWCP can't print the pull down menus; it's that OWCP will not print the pull down menus." (ECF No. 53 at 20.)[7] They then cite Defendants language that "screen shots are not created or maintained as part of the scheduling process," and simply respond that "plaintiffs' request for pull down menus does not concern the scheduling process." (*Id.*) They cite nothing and this Court has found nothing that would call into question Defendants interpretation of the controlling case law which, as set forth below, supports Defendants' argument that they were not required to create and print screenshots.

The Court agrees with Defendants that FOIA "does not oblige agencies to create or retain records; it only obliges them to provide access to those which it in fact has created or retained." *Kissinger v. Reports Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980). Defendants

[7] In terms of the print outs, OWCP's FOIA response was that no responsive records existed because "OWCP stopped using the PDS in 2005 . . . [and] in PDS's replacement, the MMA, the referee selection process can only be done for an actual claimant and screenshots are not printed or otherwise created or maintained as part of the scheduling process." (ECF No. 73 at 6-7.)

will not be required to create and then produce printouts of computer screenshots as requested by Plaintiffs.

III. CONCLUSION

Based on the foregoing, it is hereby ORDERED as follows:

1. Defendants' Motion is GRANTED;

2. Plaintiffs' Motion is DENIED;

3. Given the instant Order, all other pending motions (such as the Objection to Magistrate Judge's Order Pending Discovery, ECF No. 15) are hereby DENIED AS MOOT;

4. With the issuance of the instant Order, all issues before the Court are now resolved and the Clerk of the Court is directed to close this case.

DATED this 23rd day of December, 2014.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge

U.S Department of Labor
iFECS Report: ME 007 - Physician Usage Report

Sort: Physician Name
sab

Doctor Name / Doctor ID	Zip	Spec/SubSpec	DOL	Last Referee Dt / Referees	Last 2op Dt / 2ops	Last Bypass Dt / Bypasses	Last Admin Sched Dt / Admin Schedulings	Sus	Sus From Dt / Sus To Dt
[redacted]	802105852	21/NA	N	12/05/2008 1	0	09/11/2008 35	0	N	
	801105002	21/NA	Y	04/11/2011 28	03/14/2011 5	05/19/2011 33	0	N	
	80031	21/NA	Y	05/19/2011 5	07/28/2011 1	08/11/2011 45	0	N	
	80907	21/NA	Y	08/11/2011 8	08/14/2008 2	03/28/2011 72	0	N	
	809077532	21/NA	N	0	02/05/2008 1	0	0	N	
	80910	21/NA	Y	11/07/2007 1	0	09/10/2007 33	0	Y	1
	80210	21/NA	Y	11/27/2007 1	0	07/14/2011 81	0	N	
	80228	21/NA	Y	04/15/2011 62	03/12/2009 7	03/10/2011 19	0	N	
	80230	21/NA	Y	02/23/2011 2	0	07/26/2011 25	0	N	
	80113	21/NA	Y	05/26/2009 4	0	05/19/2011 82	0	N	
	80210	21/NA	Y	11/06/2007 2	0	07/14/2011 81	0	N	
	80033	21/NA	N	10/09/2008 2	0	08/18/2010 22	0	N	
	80228	21/NA	Y	03/31/2011 6	0	03/10/2011 7	0	N	

08/31/2011 04:19:20 PM **Specialty:** 21 **Subspecialty:** All

Appt Type: All **Zip Range:** 80001-81658 **Date Range:** 08/01/2000 thru 08/31/2010

Add. 15

U.S Department of Labor
iFECS Report: ME 007 - Physician Usage Report

Sort: Physician Name
sab

Doctor Name / Doctor ID	Zip	Spec/SubSpec	DOL	Last Referee Dt / Referees	Last 2op Dt / 2ops	Last Bypass Dt / Bypasses	Last Admin Sched Dt / Admin Schedulings	Sus	Sus From Dt / Sus To Dt
[redacted]	80228	21/NA	Y	03/09/2011 8	08/04/2011 1	03/10/2011 7	0	N	
	80224	21/NA	Y	09/15/2011 16	06/16/2011 2	03/26/2011 7	0	N	
	80907	21/NA	Y	07/13/2011 9	05/13/2010 2	03/28/2011 13	0	N	
	80228	21/NA	Y	05/11/2011 8	0	03/10/2011 5	0	N	
DINENBERG S 6455305	80214	21/NA	N	08/30/2010 9	0	08/18/2010 2	0	N	

Physicians selected: 18

08/31/2011 04:19:20 PM **Specialty:** 21 **Subspecialty:** All

Appt Type: All **Zip Range:** 80001-81658 **Date Range:** 08/01/2000 thru 08/31/2010

U.S Department of Labor
IFECS Report: ME 007 - Physician Usage Report

exempt 6

Doctor Name / Doctor ID	Zip	Spec/SubSpec	DOL	Last Referee Dt / Referees	Last 2op Dt / 2ops	Last Bypass Dt / Bypasses	Last Admin Sched Dt / Admin Schedulings	Sus	Sus From Dt / Sus To Dt
[redacted]	802105852	21/NA	N	12/05/2008 1	0	09/11/2008 35	0	N	
[redacted]	80210	21/NA	Y	11/27/2007 1	0	07/14/2011 81	0	N	
SABIN JEFFR 1569526	80228	21/NA	Y	04/15/2011 82	03/12/2009 7	03/10/2011 19	0	N	
[redacted]	80230	21/NA	Y	02/23/2011 2	0	07/26/2011 25	0	N	
[redacted]	80210	21/NA	Y	11/08/2007 2	0	07/14/2011 81	0	N	
SABIN JEFFR 6455219	80228	21/NA	Y	03/31/2011 8	0	03/10/2011 7	0	N	
SABIN JEFFR 6455239	80228	21/NA	Y	03/09/2011 8	08/04/2011 1	03/10/2011 7	0	N	
[redacted]	80224	21/NA	Y	03/18/2011 14	08/16/2011 2	03/28/2011 7	0	N	
SABIN JEFFR 6455244	80228	21/NA	Y	05/11/2011 8	0	03/10/2011 5	0	N	
[redacted]	80214	21/NA	N	08/30/2010 9	0	08/18/2010 2	0	N	

Physicians selected: 10

U.S Department of Labor
IFECS Report: ME 007 - Physician Usage Report

Doctor Name / Doctor ID	Zip	Spec/SubSpec	DOL	Last Referee Dt / Referees	Last 2op Dt / 2ops	Last Bypass Dt / Bypasses	Last Admin Sched Dt / Admin Schedulings	Sus	Sus From Dt / Sus To Dt
[redacted]	802105852	21/NA	N	12/05/2008 1	0	09/11/2008 35	0	N	
[redacted]	801105002	21/NA	Y	04/11/2011 28	03/14/2011 5	05/19/2011 33	0	N	
[redacted]	80031	21/NA	Y	05/19/2011 5	07/28/2011 1	07/28/2011 44	0	N	
[redacted]	80807	21/NA	Y	08/11/2011 8	09/14/2008 2	03/28/2011 72	0	N	
[redacted]	80910	21/NA	Y	11/07/2007 1	0	09/10/2007 33	0	Y	1
[redacted]	80210	21/NA	Y	11/27/2007 1	0	07/14/2011 81	0	N	
SABIN JEFFR 1569526	80228	21/NA	Y	04/15/2011 82	03/12/2009 7	03/10/2011 19	0	N	
[redacted]	80230	21/NA	Y	02/23/2011 2	0	07/26/2011 25	0	N	
[redacted]	80113	21/NA	Y	05/26/2009 4	0	06/19/2011 82	0	N	
[redacted]	80210	21/NA	Y	11/06/2007 2	0	07/14/2011 81	0	N	
[redacted]	80033	21/NA	N	10/09/2008 2	0	06/18/2010 22	0	N	
SABIN JEFFR 6455219	80228	21/NA	Y	03/31/2011 6	0	03/10/2011 7	0	N	
SABIN JEFFR 6455239	80228	21/NA	Y	03/09/2011 8	08/04/2011 1	03/10/2011 7	0	N	

Exempt

Add. 18

07/28/2011 10:52:57 AM Specialty: 21 Subspecialty: All
Appt Type: Referee Zip Range: 80001-81658 Date Range: 06/28/2001 thru 07/28/2011

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April 2015, I electronically filed the foregoing Appeal Brief with the Clerk of the Court using ECF system which will send notification of such filing to the following email address:

Timothy B. Jafek
Assistant U.S. Attorney
United States Attorney's Office
1225 17th Street, Suite 700
Denver, CO 80202
Timothy.jafek@usdoj.gov

Office of the United States Attorney
Attn: Robert Mark Russel
Karl L. Schock
1225 Seventeenth St., Ste. 700
Denver, CO 80202
USACO.ECFAppellate@usdoj.gov
Robert.Russel@usdoj.gov
karl.schock@usdoj.gov

Steve Frank
950 Pennsylvania Ave., NW
Rm. 7245
Washington, DC 20530
Steven.frank@usdoj.gov

/s/ Jodi Waldron

Case No. 15-1023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BLAKE BROWN, DEAN BIGGS, JACQUELINE DEHERRERA, RUTH ANN HEAD, MARLENE MASON, ROXANNE MCFALL, RICHARD MEDLOCK, and BERNADETTE SMITH,

Plaintiffs,

v.

THOMAS PEREZ, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR, an agency of the United States governing OFFICE OF WORKERS COMPENSATION PROGRAMS, an agency of the United States Department of Labor,

Defendants.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contained 13,409 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microscoft Word in 14 point Arial.

/s/ Jodi M. Waldron
Jodi M. Waldron

Case No. 15-1023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Plaintiffs,

v.

THOMAS PEREZ, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR, an agency of the United States governing OFFICE OF WORKERS COMPENSATION PROGRAMS, an agency of the United States Department of Labor,

Defendants.

CERTIFICATE OF COMPLIANCE

The required privacy redactions have been made, a hard copy submitted to the court is an exact copy of the version submitted electronically and the electronic submission was scanned for viruses with the most recent version of Microsoft Security Essential Virus and Spyware Definitions up to date and is free of viruses.

/s/ Jodi M. Waldron
Jodi M. Waldron

Case No. 15-1023

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Defendants.

ERRATA SHEET TO APPELLANTS' OPENING BRIEF

Pursuant To 10th Cir. R. 28.2(C)(1), plaintiffs state that there are no prior or related appeals.

Date: April 21, 2015

Respectfully submitted,

/s/ Karen Larson
Karen Larson
3773 Cherry Creek N. Dr. Suite 575
Denver, CO 80209
Ph. (303) 831-4404
fax (303) 261-8109
Email: karenlarson@qwestoffice.net

/s/ John S. Evangelisti
John S. Evangelisti
1120 Lincoln St., St. 711
Denver, Colorado 80203
Ph. (303) 832-8226
fax (303) 830-8843
Email: john@johnevangelisti.com

CERTIFICATE OF ELECTRONIC SUBMISSION

I hereby certify that all required privacy redactions have been made and that and this electronic submission was scanned for viruses with the most recent version of Microsoft Security Essential Virus and Spyware, Definitions up to date and is free of viruses.

/s/ Jodi M. Waldron

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April 2015, I electronically filed the foregoing Errata Sheet to Appellants' Opening Brief with the Clerk of the Court using ECF system which will send notification of such filing to the following email address:

Timothy B. Jafek
Assistant U.S. Attorney
United States Attorney's Office
1225 17th Street, Suite 700
Denver, CO 80202
Timothy.jafek@usdoj.gov

Office of the United States Attorney
Attn: Robert Mark Russel
Karl L. Schock
1225 Seventeenth St., Ste. 700
Denver, CO 80202
USACO.ECFAppellate@usdoj.gov
Robert.Russel@usdoj.gov
karl.schock@usdoj.gov

Steve Frank
950 Pennsylvania Ave., NW
Rm. 7245
Washington, DC 20530
Steven.frank@usdoj.gov

/s/ Jodi Waldron