ORAL ARGUMENT NOT REQUESTED

No. 15-1023

IN THE 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-Appellants,

v.

THOMAS PEREZ, SECRETARY OF LABOR; UNITED STATES DEPARTMENT OF LABOR, AN AGENCY OF THE UNITED STATES; OFFICE OF WORKERS' COMPENSATION PROGRAMS, AN AGENCY OF THE UNITED STATES DEPARTMENT OF LABOR,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
DISTRICT COURT NO. 13-01722
JUDGE RAYMOND P. MOORE

RESPONSE BRIEF FOR THE APPELLEES

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STATEMENT OF RELATED CASES

To the best of counsel's knowledge, there are no related cases within the meaning of 10th Cir. R. 28(C)(1).

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552, *et seq*. *See*

5 U.S.C. § 552(a)(4)(B). On December 23, 2014, the district court granted the defendants' motion for summary judgment, disposing of all claims as to all parties, and, the next day, entered judgment in favor of the defendants. Plaintiffs filed a timely notice of appeal on January 20, 2015. *See* Fed. R. App. P. 4(a)(4)(A)(iv). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether FOIA Exemption 4, which protects confidential commercial information from public disclosure, exempts the requested personal identifying information of physician referees. *See* 5 U.S.C. § 552(b)(4).

2. Whether FOIA Exemption 6, which protects personal privacy, exempts the requested personal identifying information of physician referees. *See* 5 U.S.C. § 552(b)(6).

3. Whether the agency is required under FOIA to create new records in response to plaintiffs' request for "screen shots" of pull-down menus that appear during the scheduling process for physician referees.

STATEMENT OF THE CASE

1. Introduction.

The Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101, *et seq*., provides workers' compensation benefits to civilian federal employees who incur an injury or illness in the performance of their duties. *See* 5 U.S.C. §8102(a) and § 8103(a). Under the program, the Office of Workers' Compensation Programs ("OWCP"), an agency of the Department of Labor, selects "referee" physicians to resolve medical conflicts between the injured employee's treating physician and second opinion physicians hired by OWCP. 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321. OWCP requires that referee physicians be randomly selected from a database of all board certified physicians using OWCP's computer selection program. Appendix ("App.") 169, 900 ¶ 20.

Plaintiffs are claimants who received or are receiving FECA benefits. Plaintiffs are of the view that referee physicians are not randomly selected, but that OWCP "cherry picks" a select few physicians which "raises the appearance of preselection and bias." Plaintiffs' Brief ("Pl. Br.") at 20. In pursuit of this theory, plaintiffs filed FOIA requests seeking records related to referee physicians. The

government produced responsive records but redacted the names, addresses and zip codes of the referee physicians pursuant to FOIA Exemption 4, which protects confidential commercial information, and Exemption 6, which protects personal privacy. Plaintiff then filed this action.

On cross-motions for summary judgment, the district court granted the government's motion. The court held that the requested data was protected from disclosure under both FOIA Exemptions 4 and 6. The court also agreed with the government that it was not required to produce requested "screen shots" of drop-down menus because, under FOIA, an agency is not required to create "new records." This appeal followed.

2. Statutory And Regulatory Framework.

FECA is a comprehensive statutory system designed to provide medical care and compensation for the disability or death of a federal employee resulting from a personal injury in the performance of duty. 5 U.S.C. §§ 8102 (a), 8103(a), 8133. *See* App. 897-98, ¶ 9. FECA is administered by OWCP, which makes decisions on employees' claims for workers' compensation benefits. *Id.* at 897, ¶ 8. The Department of

Labor's Employees' Compensation Appeals Board ("ECAB") has exclusive jurisdiction to review OWCP decisions. 5 U.S.C. § 8149. Final decisions of the Secretary of Labor or his designee (including decisions of the OWCP and ECAB) are not subject to judicial review. 5 U.S.C. § 8128(b).

This case focuses on the role of "referee" physicians in the compensation process. An individual applying for FECA benefits must show a qualifying medical condition supported by a physician's opinion. App. 898, ¶12. Where the medical opinion of the employee's treating physician conflicts with an OWCP-engaged second opinion, the conflict is resolved by a third physician, a referee physician. *Id.* FECA provides that

> (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, who shall make an examination * * *.

5 U.S.C. § 8123(a).

Referee physicians are randomly selected on a strict rotational basis from a database of all board certified physicians. App. 169, 690-91, 900, ¶ 20. Referee physicians are selected in the injured worker's

geographical area in alphabetical order as listed in the specialty physician roster. If a listed physician is unable or unwilling to participate as a referee physician, he is bypassed, and the next available physician is automatically selected by the agency's software. *Id*.

3. Statement of Facts.

A. Background.

The American Board of Medical Specialists ("ABMS") lists all board certified physicians in a directory at its public website. *See* abms.org and certificationmatters.org. The ABMS licenses its directory to Elsevier, Inc., which provides additional information and then, in turn, licenses its database to OWCP for $24,950.00 per annum. The Elsevier database is not publically available for free. Under its Licensing Agreement with Elsevier, the Department of Labor agreed not to "publish, distribute, or re-license the DATABASE or portions thereof to any third party." OWCP then uses its own software to select a referee physician from the database on a rotational basis. App. 169, 900, ¶ 12, 909, ¶ 33, 916, ¶2.8.

The Physician Directory System ("PDS") was the software system used in the past to select referees. App. 899, ¶¶ 13-17. The PDS was an OWCP software program designed to schedule referee examinations and ensure consistent rotation among referee physicians. *Id.* In 2005, the PDS system was replaced by a similar software program, the Medical Management Application ("MMA") to select referee physicians. *Id.* The current operation of the MMA is described fully in the Federal (FECA) Procedure Manual ("FECA Manual"). This chapter is publicly available on the OWCP website at https://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/FECA-PT3/. *See also* App. 900, ¶¶ 20-21.

Once the MMA system became operational, OWCP no longer maintained, accessed, or operated the PDS system. App. 899, ¶ 17. Some of plaintiffs' FOIA requests sought records previously contained in the PDS system. The agency searched for such records, to the extent they still existed, in the MMA system that replaced the PDS software. *Id.* at 170, 889, ¶¶16-18.

The FECA program manual contains detailed instructions regarding the selection of physician referees. It explains that, when a

scheduler schedules an examination, he inputs the first three digits of the patient's zip code, and those physicians who have not had an appointment are shown first in alphabetical order. Only if all those physicians are bypassed (because they are busy, do not handle FECA claimants, have lost their license, etc.), are the names of those physicians who have previously handled FECA examinations presented to the scheduler. If all physicians within the patient's zip code cluster are bypassed, the scheduler is presented with physicians in 25 mile increments until the 200 mile limit is reached. App. 695-700, 900, ¶¶ 20-21.

B. FOIA Requests.

Plaintiffs filed FOIA requests regarding OWCP's referee physicians in Colorado for the years 2000 to 2011. App. 195-98, 263-75, 330-34, 349-51, 366-70, 426-38, 496-508, 561-63. Plaintiffs sought Appointment Log Reports, Physician Master Reports, and Physician Usage Reports, records which show the names of physicians accepting referrals, along with their addresses and zip codes. *Id.* Plaintiffs also requested screenshots of the pull down menus in the referee selection software program. *Id.* at 168.

On December 12, 2012, OWCP wrote Elsevier informing it that the agency had received several FOIA requests regarding data provided by Elsevier to OWCP. App. 922. The agency informed Elsevier that "part of this material may be protected from mandatory disclosure by virtue of Exemption 4 of the FOIA." *Id.* The agency stated that it was writing Elsevier pursuant to Executive Order 12600 "to give you an opportunity to express your views on the possible disclosure of this record." *Id.*[1]

On January 10, 2013, Elsevier responded to OWCP's letter objecting to "any disclosure of the physician data requested." App. 927. Elsevier stated that "[i]f the information is disclosed by DOL, we would be unable to continue providing information and updates to DOL, would likely terminate the existing License, and may seek injunctive relief * * *." *Id.* at 928.

[1] Executive Order 12600 requires agencies "to notify submitters of records containing confidential commercial information" when those records are requested under FOIA. The purpose is to afford the submitter an opportunity "to object to the disclosure" and "to state all grounds upon which disclosure is opposed." Exec. Order 12600, 3 C.F.R. 235 (1987 Comp.). *See* App. 924.

The government produced records responsive to plaintiffs' FOIA requests, but redacted the personal identifying information of referee physicians (names, addresses, zip codes), invoking FOIA Exemptions 4 (protecting confidential commercial information) and 6 (protecting personal privacy). App. 170-71. In support of its withholdings, the government submitted a *Vaughn* Index (*see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)), and several supporting declarations, including the declaration of Julia Tritz, Deputy Director for Operations and Claims Management, Division of Federal Employees' Compensation, Department of Labor, detailing plaintiffs' requests and the government's responses. *See* Tritz Declaration, App. 895-913 (for description of FOIA requests and government's responses).

C. District Court Decision.

After having exhausted their administrative remedies, on July 1, 2013, plaintiffs filed this FOIA action. App. 16-35. The parties filed cross-motions for summary judgment. On December 23, 2014, the district court granted the government's motion for summary judgment and, the next day, entered final judgment in favor of the government. *Id.* at 167-80, 181-82.

The district court upheld the government's redactions under both FOIA Exemptions 4 and 6. The court held that the government had carried its burden to satisfy all three requirements of Exemption 4. App. 173-76. First, the court found that the redacted data was "clearly commercial in nature." *Id.* at 174. Second, the court held that the data was "obtained from a person," because, even though it was "compiled by the government," the data originated from a private business entity, which the courts have made clear meets the definition of a "person" under FOIA. *Id.* Third, the court held the withheld information was "confidential" under either the *Critical Mass* test set forth in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 878-79 (D.C. Cir. 1992) (*en banc*) or the *National Parks* test set forth in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). App. 174-76. The court concluded that "[n]o matter which test is applied * * * the Court finds that Defendants prevail." *Id.* at 175.

The court also held that the redacted data was independently exempt from disclosure under FOIA Exemption 6 since disclosure "would constitute a clearly unwarranted invasion of personal privacy."

See 5 U.S.C. § 552(b)(6). App. 177-79. Finally, the court held that the government was not required to produce "screen shots" of drop-down menus from its computer software program because these records are not permanent records of the agency and, under FOIA, an agency is not required to "create new records." *Id.* at 179-80. The court, therefore, granted the government's motion for summary judgment and entered judgment in favor of the government. *Id.* at 180-82. This appeal followed.

STANDARD OF REVIEW

In FOIA cases, the standard of review in this Court of a grant of summary judgment is *de novo*. *Jordan v. Dep't of Justice*, 668 F.3d 1188, 1193 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 2400 (2012).

SUMMARY OF ARGUMENT

Plaintiffs seek records regarding the referee physician selection process utilized by the Department of Labor in adjudicating FECA claims. The government produced responsive records, but, as is quite common in FOIA processing, redacted certain personal identifying information under FOIA Exemptions 4 (protecting confidential commercial information) and 6 (protecting personal privacy). The

district court upheld the government's redactions in a well-reasoned opinion supported by settled case law. Its judgment should be affirmed.

1. The district court correctly held that responsive records satisfy the three requirements for withholding under Exemption 4. They are "commercial information," "obtained from a person," and "confidential." 5 U.S.C. § 552(b)(4). Plaintiffs only challenge the "confidentiality" prong of this test, chiefly asserting that the records they seek are not "confidential" because they are publicly available on the ABMS website. Of course, plaintiffs fail to answer the critical question: if the exact same records they seek under FOIA are publicly available for free, why are they expending needless time and resources to obtain them under FOIA? The answer, of course, as explained in detail below, is that the precise data plaintiffs seek is not publicly available and their "public domain" argument with regard to confidentiality must be rejected.

The district court also correctly held that the requested data is protected from disclosure under Exemption 4 under either or both of the standard Exemption 4 tests. Properly applying the test under *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court correctly held that disclosure of the requested data would both

"impair the government's ability to obtain necessary information in the future" and "cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770. Also applying the test in *Critical Mass Energy Project v. NRC,* 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), the court correctly held that the requested data "is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Id.* at 879.

Plaintiffs' various arguments that neither Exemption 4 test was satisfied here, based largely on evidentiary objections to the government's declaration and its exhibits, are meritless.

2. Alternatively, the district court also correctly held that the requested personal identifying information is independently protected from disclosure under FOIA Exemption 6 on privacy grounds. The court carefully weighed the privacy interests at stake against the purported public interest in disclosure and held that privacy prevails. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

The courts, including the Supreme Court and this Court, consistently have found a substantial privacy interest in an individual's

name and address contained in government files. This is now settled law. *See, e.g., Dep't of Defense v. FLRA,* 510 U.S. 487, 500 (1994) (privacy interest in home addresses); *Forest Guardians v. U.S. Federal Emergency Management Agency*, 410 F.3d 1214, 1218 (10th Cir. 2005) (same). Moreover, privacy interests are even more substantial when the personal identifying information is coupled with financial information, as here. *See Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999). *See also Consumers' Checkbook, Ctr. for the Study of Servs. v. U.S. Dept. of Health & Human Services*, 554 F.3d 1046 (D.C. Cir. 2009) (Exemption 6 covers financial information of physicians who perform Medicare services), *cert. denied,* 559 U.S. 1067 (2010).

Plaintiffs attempt to resurrect a "cramped notion" of personal privacy which has been rejected by the Supreme Court. *See Reporters Comm.*, 489 U.S. at 763. Relying on outmoded case law, plaintiffs seek to limit Exemption 6 coverage to "intimate details of personal family life, not business relationships." Pl. Br. at 22. The courts, however, repeatedly have rejected such a narrow reading of the exemption. *See Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982).

Against this substantial privacy interest, the district court properly weighed the purported public interest in disclosure and found it wanting because it would not "shed light on an agency's performance of its statutory duties." *See Reporters Comm.*, 489 U.S. at 762. Plaintiffs' purported public interest here, a desire to determine whether the agency is scheduling physician referee appointments on a random rotational basis, does not rise to the level of a "significant" public interest. This is especially the case following the Supreme Court's decision in *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004), which held that a requester who bases his public interest argument on allegations of government misconduct - - as plaintiffs do here - - must make a "meaningful evidentiary showing" before the potential misconduct can serve as a public interest "counterweight" to the privacy interest. *See id.* at 172-74. Plaintiffs' allegations, based on mere speculation, fail to meet the heightened *Favish* test.

Finally, the district court correctly granted the government's motion for summary judgment with regard to plaintiffs' request for "print outs of all MMA menu screens" for "all the possible screens in the MMA system." Relying on the government's declaration explaining that

such pull-down menus only appear temporarily during the process of scheduling an actual appointment for a real claimant and are not preserved, the court followed settled law that FOIA does not obligate agencies to create "new records." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980).

ARGUMENT

The Freedom of Information Act, 5 U.S.C. §§ 552, *et seq*., generally provides that any person has a right of access to federal agency records, except to the extent such records are protected from disclosure by a congressional exemption. "Congress recognized * * * that public disclosure is not always in the public interest" and carved out nine exemptions from disclosure in 5 U.S.C. § 552(b). *CIA v. Sims*, 471 U.S. 159, 166-67 (1985).

The exemptions pertinent to the present appeal are FOIA Exemption 4 which protects confidential commercial information and Exemption 6 which protects personal privacy. *See* 5 U.S.C. §§ 552(b)(4) and (6). The district court correctly held that both exemptions apply here independently to protect data redacted by the government from the requested records.

I. THE REDACTED DATA IS PROTECTED FROM DISCLOSURE UNDER FOIA EXEMPTION 4.

A. The District Court Correctly Held That The Requested Records Satisfy Both The *National Parks* And *Critical Mass* Tests For Exemption 4 Protection.

1. Exemption 4 protects "trade secrets and commercial information or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). *See generally Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *Anderson v. Dep't of Health & Human Services*, 907 F.2d 936 (10th Cir. 1990). The exemption encourages submitters to voluntarily furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable. *See Critical Mass Energy Project v. NRC,* 975 F.2d 871, 878 (D.C. Cir. 1992) (*en banc*). It also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from public disclosure. *See Nat'l Parks*, 498 F.3d at 768; *Utah v. Dep't of Interior*, 256 F.3d 967, 969 (10th Cir. 2001).

2. The district court correctly held that the withheld records here satisfy Exemption 4's requisites. App. 173-76. The first requirement is that the information sought to be withheld must be "commercial" in nature. *See* 5 U.S.C. § 552(b)(4). Courts define commercial information quite broadly and regard information as "commercial" if it relates to business or trade and the submitter has a "commercial interest" in the data. *See Pub. Citizens Health Research Group v. FCA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Wash. Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982). *See also Am. Airlines v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) ("surely [it] means [anything] pertaining or relating to or dealing with commerce").

In this case, the government obtains the data at issue from a private company, Elsevier, that licenses the information for a fee. App. 909, ¶33. OWCP accesses Elsevier's database through a Licensing Agreement for which it pays Elsevier an annual fee. *Id.* at 914-22. Under the Licensing Agreement, the Department of Labor may not "publish, distribute, or re-license the DATABASE or portions thereof to any third party." *Id.* at 916, §2.8. Accordingly, it is manifest that Elsevier has a "commercial interest" in the requested data and the

district court correctly held it "is clearly commercial in nature." *Id.* at 174. In their opening brief on appeal, plaintiffs do not challenge the district court's finding that the requested data constituted "commercial information" within the meaning of Exemption 4. Plaintiffs, therefore, have waived any such argument. *See, e.g.*, *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief").

3. The district court also held that the second requisite for Exemption 4 protection was satisfied here because the data was "obtained from a person." App. 174. The court held that although the government 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.'" *Id.* *See, e.g., Pub. Citizen v. Dep't of Health & Human Servs.,* 975 F. Supp. 2d 81, 98 (D.D.C. 2013) ("the 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)). Here again, plaintiffs do not challenge this

finding of the district court and, therefore, have waived any argument to the contrary on appeal. *See Bronson*, 500 F.3d at 1104.

4. The third requirement to Exemption 4 protection is that the requested data must constitute "confidential" information within the meaning of the exemption. This is the only prong of the Exemption 4 test that plaintiffs challenge on appeal. However, the district court's thorough opinion finding that this requirement is satisfied withstands plaintiffs' challenge. App. 174-76.

With regard to this prong of the Exemption 4 test, this Court has held that the "first step * * * is determining whether the information submitted to the government agency was given voluntarily or involuntarily." *Utah v. Dep't of Interior*, 256 F.3d at 969. 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*, 975 F.2d at 879. If the submission was involuntary, the *National Parks* test applies, and the information is protected 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*, 498 F. 2d at 770 (emphasis added).

The district court stated that "[b]oth parties appear to agree that the *National Parks* test is the correct test," but the court itself found that question "less than clear." App. 175. The court, therefore, applied both tests, and determined that "[n]o matter which test is applied, * * * the Court finds that Defendants prevail." *Id.* [2]

The court applied the *National Parks* test for information involuntarily submitted and concluded that "disclosure would impair the government's ability to obtain necessary information in the future." App. 176. The court stated that "[i]t 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

[2] The court noted that, on the one hand, the data at issue was provided by Elsevier to OWCP pursuant to a licensing agreement, so that, in that sense, it was "required" to be provided. On the other hand, the court observed that Elsevier was not required to undertake that agreement in the first place. App. 175. The government is of the view that, once Elsevier entered into the licensing agreement, it was required to provide the data under the agreement, and, therefore, the proper test is the *National Parks* test. However, as the district court correctly held, the records at issue here satisfy both tests. *Id.* at 175-76.

confidential data could be accessed by anyone simply by making a FOIA request." *Id.*

For much the same reasons, the court also held that the second, independent prong of *National Parks, i.e.,* that disclosure would "cause substantial harm to the competitive position of the person from whom the information was obtained" (*see National Parks*, 498 F.2d at 770), was satisfied here. App. 176.

The court's conclusion that both prongs of the *National Parks* test was satisfied here was well-supported. The court relied upon the government's detailed declaration in support of its conclusion that Exemption 4 applied here. *See* App. 176. The government's declaration explained that, under the Licensing Agreement between the Department of Labor and Elsevier, the Department of Labor agreed not to "publish, distribute, or re-license the DATABASE or portions thereof to any third party." *Id.* at 909, § 33, 916, § 2.8. The court also relied on a January 10, 2013 letter from Elsevier objecting to release of the requested data. App. 176, 927 (Elsevier letter 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"). In addition, the court noted that the court of appeals in *O'Harvey v. Comp. Programs Workers*, 188 F.3d 514 (9th Cir. 1999), had applied Exemption 4 to the agency's PDS software program, the predecessor of the current MMA program at issue here. App. 176.

Alternatively, the district court found that the *Critical Mass* test for information voluntarily submitted was also satisfied. App. 175. The court concluded that "the information sought by Plaintiffs, specifically, the names and identities for physicians in various contexts, would not customarily be released to the public by a private company." *Id.* at 175-76. The court explained that "the value of a commercial database is inconsistent with the free and ready disclosure of its contents." *Id.* at 175. Here again, the court relied on the letter from Elsevier to OWCP indicating that the data at issue customarily would not be released to the public by Elsevier. *Id.* at 176, 927.

In sum, the district court correctly held that, under either the *National Parks* test or the *Critical Mass* test, the data at issue was

confidential and, therefore, protected from public disclosure under FOIA Exemption 4. The court's thorough opinion should be affirmed.

B. Plaintiffs' Exemption 4 Arguments Lack Merit.

1. Plaintiffs raise several objections to the district court's Exemption 4 holding on appeal. None has merit. Plaintiffs' chief argument is that the confidentiality prong of the Exemption 4 test has not been met because "plaintiffs do not request any information that is not available to the public at the ABMS website." Pl. Br. at 36. Plaintiffs insist that the "same exact list" it seeks "is posted on the ABMS public website." *Id.* at 3. As discussed further *infra*, plaintiffs are incorrect and their public information argument should be rejected.

Plaintiffs cite *Niagara Mohawk Power Corp. v. DOE*, 169 F.3d 16, 19 (D.C. Cir. 1999) in support of their public information argument. Pl. Br. at 35. However, as the court of appeals reasonably posited in that case: "if the information is publicly available, one wonders, why [plaintiff] is burning up counsel fees to obtain it under FOIA?" *Id.* Plaintiffs here fail to answer that critical question.[3]

[3] Plaintiffs also cite *Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002) in support of their public information argument. Pl. Br. at 37.

Continued on next page.

The reason that plaintiffs have failed to address that question is manifest: it is because plaintiffs recognize that the data they seek from OWCP is different from random data publicly available on the ABMS website. If not, as the D.C. Circuit queried in *Niagara*, why are plaintiffs expending time and resources seeking to obtain data under FOIA they could otherwise freely obtain from a public website? Why would Elsevier be able to charge fees to the public and the government for licensing their data if such data were otherwise freely available on a public website?

"For the public domain doctrine to apply, the *specific information* sought must have already been disclosed and *preserved* in a permanent public record." *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (emphasis added). As plaintiffs concede, they bear the "'burden of pointing to specific information in the public domain that duplicates that being withheld.'" Pl. Br. at 35 (*quoting Pub. Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993)). Plaintiffs have failed to do so. The "specific information"

However, in that case—unlike the instant action—the submitter of the records at issue had granted the government permission to share them with third parties. 298 F.3d at 1194.

plaintiffs seek is not disclosed in the ABMS website since if it were, plaintiffs obviously would not be seeking the exact same information through FOIA. Second, that information is not "preserved in a permanent public record," as the data plaintiffs seek for previous years is not preserved on the ABMS website; only current data is available there.

Plaintiffs' argument that the data they seek is freely available on the ABMS website is undermined by the ABMS website itself which demonstrates on its face that both the content and timeframe of the ABMS site differ from the Elsevier database. The content available plainly differs. Indeed, the district court expressly found this to be the case, noting that "the information requested [from OWCP] would show that the doctors performed referee examinations on specific individuals on specific dates." Add. 176. The public ABMS website does not contain this information, which is apparently the data plaintiffs seek. Plaintiff do not seek just a random selection of certified physicians - - which is what is contained on the ABMS site. Rather, they seek personal identifying information about certified physicians <u>who serve as referee physicians</u> for OWCP. It is because the information they seek is

not available on the ABMS public website that plaintiffs seek to obtain that data through FOIA.

Plaintiffs appear to concede as much, stating in their opening brief that they "only request the names and addresses of the few physicians who actually did referee evaluations that are kept by OWCP in their own records." Pl. Br. at 42. This specific information is not otherwise publicly available at the ABMS site. Thus, plaintiffs have failed to satisfy the settled test for the public domain doctrine, having failed to demonstrate that "the specific information sought" had "already been disclosed." *Students Against Genocide,* 257 F.3d at 836.

The Elsevier data differs considerably from the data available on the ABMS site. That is why Elsevier is able to charge a licensing fee for the use of its data. If the data were precisely the same, plaintiffs could freely obtain the requested data there. But they cannot do so. They, therefore, seek the information for free under FOIA.

In its response letter to OWCP, Elsevier made clear that the public and its competitors "do not have access to the portions of the database that we obtain directly from the [AMBS] under contractual license, or to the portions that we collect directly, at great investment

and effort." App. 927. Elsevier also stated that its "competitive position would be destroyed if competitors are able to access information from our database at no expense, and without any of the security and publication restrictions and obligations that we must implement and maintain." *Id.* Elsevier also made clear that "[s]mall, specific portions of the information in our database are only disclosed to the public * * * through discrete searches that generate necessary information about one, single physician at a time * * *." *Id.* Perhaps plaintiffs seek to avoid using the considerable resources that would be required to conduct searches one physician at a time on the ABMS site by obtaining Elsevier's data through a FOIA request to the government without paying Elsevier's licensing fees.

The considerable differences between the ABMS website and the Elsevier records utilized by OWCP are apparent on the face of the public web site. The ABMS site contains a tool called "Certification Matters," where one can search for current doctors' certifications by zip code and specialty. *See* http://www.certificationmatters.org/default.aspx. The public ABMS "Certification Matters" tool does not appear to release street mailing

addresses – city/state and zip code are the extent of its geographic precision. To the extent that plaintiffs are seeking street addresses or other information that doesn't appear in the ABMS tool, that information plainly is not publicly available. In addition, on the ABMS website, a doctor may decline to provide certain information, such as a zip code, and those fields are designated "private" in an ABMS search. The FAQs to the "Certification Matters" ABMS online tool prominently states that "[p]hysicians may voluntarily elect to not provide any information."[4]

When searching for Orthopedic Surgeons in Lakewood, Colorado, Dr. Jeffrey Sabin (a name released to plaintiffs) was accessible through the ABMS "Certification Matters" tool. But his name did not appear through a search of Orthopedic Surgeons in the zip code 80228, indicated on the Physicians Usage Report released to plaintiffs as Dr.

[4] The Elsevier database contains a great deal of information that the public ABMS "Certification Matters" tool does not. It lists information regarding the physician's original date of certification, educational history, training, academic and hospital appointments, type of medical practice, and full contact information including mailing addresses and phone/fax numbers. Indeed, plaintiffs concede that the Elsevier database is far more extensive than the ABMS data. *See* Pl. Br. at 45, n.17.

Sabin's zip code, even though Dr. Sabin's online presence states quite clearly that he practices in 80228. (http://orthodoc.aaos.org/drjeffreyjsabin/). This indicates that Dr. Sabin did not authorize ABMS to routinely release his zip code publicly.

Likewise, a search for orthopedic surgeon "Dinenberg, S" (a name released to plaintiffs), also practicing in Lakewood as an orthopedic surgeon, doesn't return any matching hits at all. This indicates that Dr. Dinenberg did not authorize any information to be released publicly about himself through the ABMS tool, even though his information was available to DOL through the license from Elsevier.

Equally important, the timeframe between the ABMS and Elsevier databases differs significantly. Here, plaintiffs "requested records concerning referee physician evaluations kept by OWCP Dist. 12 for the state of Colorado from 2000 to 2011." Thus, plaintiffs' request encompasses historical information, not current information. The ABMS "Certification Matters" tool is not searchable for historical information—there is no way to search for anything other than current information. To the extent the list has changed through time, the current information in the public domain does not match the

information obtained by DOL from Elsevier and requested by plaintiffs. In short, the specific data requested by plaintiffs is not publicly available. Plaintiffs' attempt to undermine the district court's confidentiality finding by utilizing the public domain argument must be rejected.

2. Plaintiffs raise several other arguments regarding Exemption 4, none of which has merit. Plaintiffs first contend that neither the *National Parks* nor the *Critical Mass* test has been satisfied here. Plaintiffs are incorrect.

The parties are in agreement that the *National Parks* test for records required to be submitted is the appropriate test here and the bulk of plaintiffs' argument is that this test is not satisfied here. As discussed above, under *National Parks*, information is confidential if its disclosure is likely to *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." *See National Parks,* 498 F.2d at 770; *Utah v. Dep't of Interior*, 256 F.3d at 969. These are two independent prongs, only one of which need be satisfied in order for the confidentiality

requirement of Exemption 4 to apply. As discussed above, the district court correctly found that both prongs of *National Parks* are satisfied here. *See* 176-79.

In support of its position that release of the requested data would "impair" its ability to obtain the information in the future, the government submitted a letter from Elsevier expressly stating that if the data were released, "we would be unable to continue providing information and updates to [the Department of Labor], would likely terminate the existing License, and may seek injunctive relief." App. 928. Plaintiffs do not dispute Elsevier's letter with countervailing evidence; they simply do not believe it. Plaintiffs state that "it is highly unlikely that Elsevier would even consider terminating its $24,950.00 annual license over the release of a miniscule number of physician's names." Pl. Br. at 49. Plaintiffs may not credit Elsevier's evaluation of the threat to its business from public release of the disputed data, but the government and the court certainly are entitled to do so, and they quite properly did.

Plaintiffs also insist that they do not seek Elsevier's "entire database," but only parts thereof, and if only Elsevier had understood

that, they would not have objected to such a limited release. Pl. Br. at 49. The record belies plaintiffs' speculation. As noted above, under the Licensing Agreement with Elsevier, the Department of Labor agreed not to "publish, distribute, or re-license the DATABASE or portions thereof to any third party." *See* App. 916, ¶ 2.8 (emphasis added). In its January 10, 2013 letter, Elsevier did state that its entire database is "confidential," but also quoted that part of the licensing agreement prohibiting the government from disclosing any "parts thereof." *Id.* at 928. Elsevier also pointed out that "[d]isclosure of this information would be of extraordinary value to competitors who do not have access to the portions of the database that we obtain directly from [AMBS] under contractual license, or to the portions that we collect directly, at great investment and expense." *Id.* at 927. Plaintiffs' speculation that Elsevier only objected to the release of its entire database and would have no problem with release of only portions of the confidential database lacks any support in the record.

Plaintiffs object to the introduction of the Tritz declaration (App. 895) and the exchange of letters between OWCP and Elsevier (*id.* at 922-28) on hearsay grounds. *See* Pl. Br. at 38. The courts, however,

have made clear that declarations such as that submitted by Tritz, an agency official in charge of processing FOIA requests, satisfy the "personal knowledge" requirement of Rule 56(c). *See, e.g., Carney v. Dep't of Justice*, 19 F.3d 807, 813 (2d Cir. 1994) ("[e]ach of the declarations was prepared by the individual who had supervised the processing of Carney's FOIA requests"); *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993) (admitting affidavit of "a supervisor in the FOIA section of the FBI's records division"); *Jernigan v. Dep't of the Air Force,* 163 F.3d 606, *2, n.4 (Table) (9th Cir. 1998) ("[a]ffidavits and declarations are appropriately considered by a district court for summary judgment purposes in FOIA cases").

Plaintiffs also object to OWCP's December 12, 2012 letter to Elsevier (App. 922) because OWCP "encouraged and coached [Elsevier] to object by giving it a list of six legal elements of FOIA Exemption 4 that are not found in the regulations." Pl. Br. at 43 (citing 20 C.F.R. § 70.26).[5] However, the cited regulation does not confine the

[5] In its December 12 letter, the government inquired of Elsevier:

1. What specific information that has been requested do you consider to be a trade secret or confidential commercial information?

Continued on next page.

government's notice requirement to any particular language and the questions posed by the government were perfectly reasonable and precisely the kind of questions the government needed responses to in order to determine whether the requested material was protected from disclosure under Exemption 4. Indeed, they are also the very questions the district court and this Court must weigh in evaluating the government's Exemption 4 claim.

In addition, plaintiffs challenge the admission of Elsevier's January 10, 2013 letter (App. 927-28) in which Elsevier objected to the potential release of portions of its database as inadmissible hearsay. Pl. Br. at 30 (*citing Echo Acceptance Corp. v. Household Retail Services,*

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2. How would disclosure of this information * * * be valuable to your competitors? Indicate the nature or the harm to your competitive position that would likely result from disclosures of this information.

3. To what extent is this information known to the public or your competitors in products, articles, services, patents, copyrights or other means? If it is known, why would release of the information nevertheless be competitively harmful?

4. What steps have you taken to protect the confidentiality of the information?

5. Did you submit the information to the Department of Labor with the understanding that it would be held in confidence after the agreement was signed?

6. If the information is disclosed by the Department, how would this affect your decision to submit information of this nature to the Department in the future? App. 922-23.

Inc., 267 F.3d 1068 (10th Cir. 2001)). However, *Echo Acceptance* makes clear that "an out-of-court statement may be admitted over a hearsay objection if the statement is offered not for the truth of the matter asserted in the statement but merely to show that a party had knowledge of a material fact or issue." *See* 267 F.3d at 1090. In the instant action, the Elsevier letter was offered merely to demonstrate that Elsevier objected to the release of the requested data and that the government was on notice of its objection, not to establish the truth of anything contained in the letter. Plaintiffs' hearsay objection lacks merit.

Finally, with regard to the *National Parks* test, plaintiffs object to the court's finding of "competitive harm" to Elsevier if the requested data is released, contending that Elsevier has no competition. Pl. Br. at 47, 50. This is incorrect. Elsevier is one of many companies that obtain physician information from ABMS (http://www.abms.org/media/1366/abmsdisplayagentlist_10_29_14.pdf), and also competes with other companies in selling that information to subscribers (http://www.medadvantage.com/electronic.aspx). There is

actual competition, and actual risk to Elsevier's business interests, should confidential information be released.

Plaintiffs present a limited challenge to the district court's finding that the *Critical Mass* test for confidentiality also applies here. *See Critical Mass*, 975 F.2d at 879 (information must be "of a kind that would customarily not be released to the public by the person from whom it was obtained"). *See also* Pl. Br. at 53-54. Plaintiffs merely repeat their contention that the records they seek are publicly available and are licensed for a fee. We have rebutted plaintiffs' public domain argument at length above. And the fact that Elsevier charges a licensing fee for access to its database demonstrates that it is not "customarily" or freely released to the public.

In sum, the district court's carefully reasoned opinion holding that the requested records are protected from disclosure under FOIA Exemption 4 withstands plaintiffs' challenges and should be affirmed.

II. PERSONAL IDENTIFYING INFORMATION IS PROTECTED FROM DISCLOSURE BY FOIA EXEMPTION 6.

The district court independently held that physician referees' names and addresses were also protected from public disclosure by FOIA Exemption 6. App. 177-79. Exemption 6 protects information

about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To make this determination, a court engages in a balancing test weighing the individual's right to privacy against the public interest in disclosure. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). *See also Sheet Metal Workers Int'l Ass'n Local No. 9 v. Dep't of Air Force,* 63 F.3d 994, 997 (10th Cir. 1995).

A. The Privacy Interests At Stake In This Case Are Significant.

1. The Supreme Court has emphasized that the "privacy interests" protected by Exemption 6 cover a broad range of interests that "encompass[es] the individual's control of information concerning his or her person." *Reporters Committee*, 489 U.S. at 763-764 & n.16; *accord, e.g., Department of Defense v. FLRA,* 510 U.S. 487, 500 (1994). The Supreme Court repeatedly has stressed that the "concept of personal privacy [under FOIA] is not some limited or 'cramped notion' of that idea." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 165 (2004) (quoting *Reporters Committee*, 489 U.S. at 763).

The Supreme Court historically has been particularly protective of personal privacy in the FOIA context. Over the past quarter century, the Supreme Court consistently has protected privacy interests such as those at stake in this case. Indeed, in six out of the last six such cases to reach the Court, privacy prevailed. *See Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982); *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); *Dep't of State v. Ray*, 502 U.S. 164 (1991); *Dep't of Defense v. FLRA*, 510 U.S. 487 (1994); *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997); *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).

The threshold for finding a cognizable privacy interest under Exemption 6 is relatively low. A "non-trivial privacy interest" is sufficient to justify the withholding of information under Exemption 6, unless the public interest in disclosure is sufficient to outweigh it. *See Dep't of Defense v. FLRA*, 510 U.S. at 501. *See also Multi AG Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1229-29 (D.C. Cir. 2008) (threshold for privacy is "anything greater than a *de minimis* privacy interest"). As discussed further *infra*, the threshold test is more than

satisfied here under settled law and the purported public interest is not sufficient to overcome the privacy interests at stake.

Redacting personal identifying information, such as the government did here, is routine practice in FOIA processing. In *Dep't of State v. Ray*, the Supreme Court observed that "[t]he redaction procedure is * * * *expressly authorized by FOIA. Congress thus recognized that the policy of informing the public about the operation of its Government can be adequately served in some cases without unnecessarily compromising individual interests in privacy." 502 U.S. at 174. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 380 (1976) (requiring disclosure of summaries of Air Force Academy disciplinary proceedings "with personal references or other identifying information deleted"). This is precisely what the government has done in this case -- released responsive records while redacting personal identifying information in the interest of personal privacy.

2. The district court correctly held that the records withheld here meet the threshold test of Exemption 6 in that they constitute "personal and medical files and similar files." App. 177. *See* 5 U.S.C. 552(b)(6). The court noted that this Court has stated that "similar files" has "'a

broad, rather than a narrow, meaning and encompasses all information that applies to a particular individual.'" App. 177 (quoting *Forest Guardians v. FEMA*, 410 F.3d 1214, 1217 (10th Cir. 2005)). *See United States Department of State v. Washington Post Co.*, 456 U.S. 595 (1982) (same). In this action, the district court held that the "limited information segregated and withheld through redaction contains personal names and identifiers within 'similar files.'" App. 177.[6]

The district court also correctly weighed the privacy interests at stake against the purported public interest in disclosure in accord with current Supreme Court jurisprudence. App. 177-79. The court found that "the physicians and private individuals appearing in case files have a clear privacy interest in their personal and business information," an interest that includes "'the individual's control of information concerning his or her person' and includes names and addresses." *Id.* at 178 (*citing Dep't of Defense v. FLRA*, 510 U.S. at 500).

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[6] The narrow reading of "similar files" in cases cited by plaintiffs (*see* Pl. Br. at 22, 24 (*citing Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980) and *Kurzon v. Dep't of Health & Human Services*, 649 F.3d 65, 69 (1st Cir. 1981)), has been replaced by a much broader view as exemplified by this Court's reading in *Forest Guardians*, 410 F.3d at 1217.

The courts, including the Supreme Court and this Court, consistently have found a substantial privacy interest in an individual's name and address contained in government files. This is now settled law. *See, e.g., Dep't of Defense v. FLRA*, 510 U.S. at 500 (privacy interest in home addresses); *Associated Press v. Dep't of Justice*, 549 F.3d 62, 65 (D.C. Cir. 2008) (privacy interest in names and addresses); *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122, 1125 (7th Cir. 2003) (same); *Forest Guardians v. U.S. Federal Emergency Management Agency*, 410 F.3d 1214, 1218 (10th Cir. 2005) (same); *Sheet Metal Workers Intern. Ass'n, Local No. 9 v. U.S. Air Force*, 63 F.3d 994. 998 (10th Cir. 1995).[7]

3. In their opening brief, plaintiffs attempt to denigrate the well-recognized privacy interest at stake here. Pl. Br. at 17-25. Plaintiffs

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[7] Here again, plaintiffs cite older case law which has been greatly undermined by more recent authority. *See* Pl. Br. at 23 (*citing Getman v. NLRB*, 450 F.3d 670, 675 (D.C. Cir. 1971) for the broad proposition that "the names and home addresses of employees invade privacy to only a very minimal degree"). *Getman* was decided long before the Supreme Court broadly redefined the concept of privacy in its seminal *Reporters Committee* case, and well before the Court held that the names and addresses of federal employees constituted a substantial privacy interest. *DoD v. FLRA*, 510 U.S. at 500.

present a "cramped notion" of privacy relying on outmoded case law which has been rejected by the Supreme Court. *See Reporters Comm.*, 489 U.S. at 763. First, plaintiffs contend, without supporting citation, that "Exemption 6 was developed to protect intimate details of personal family life, not business relationships." Pl. Br. at 22. The courts, however, repeatedly have rejected the notion that the privacy protections of Exemption 6 are limited to merely "intimate" or "highly personal" details. *See Dep't of State v. Washington Post Co.*, 456 U.S. at 600; *National Ass'n of Retired Fed. Emps.* (*"NARFE"*) *v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1078 (1990).

Plaintiffs also contend that "[t]he disclosure of information about an individual's business or professional activities does not impinge on cognizable interests in personal privacy." Pl. Br. at 22-23. Plaintiffs, however, point to no authority setting forth a uniform rule that "professional activities" falls outside the scope of Exemption 6. It is apparent that no such broad rule has been adopted by the Supreme Court or the courts of appeals from the case law which contains numerous instances where the courts have protected what plaintiffs might characterize as mere "professional activities." *See, e.g., Dep't of*

Defense v. FLRA, 510 U.S. 487, 500 (1994) (home addresses of federal employees represented by union protected from disclosure*); Forest Service Emps. for Envtl. Ethics v. U.S. Forest Service*, 524 F.3d 1021, 1025 (9th Cir. 2008) (protecting names of government employees). Plaintiffs' outmoded notion of personal privacy under FOIA must be rejected.

Moreover, as even plaintiffs concede, their request in the instant action would result in disclosure of the income received by physicians who elect to serve as physician referees. *See* Pl. Br. at 32-33. The courts, however, have "often held that individuals have a privacy interest in the nondisclosure of their names and addresses in connection with financial information." *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999); *NARFE*, 879 F.2d at 875-76 (withholding release of name, address, and annuitant status). *See Sheet Metal Workers Int'l Ass'n, Local No. 9 v. U.S. Air Force*, 63 F.3d 994, 995, 998 (10th Cir.1995) (government contractors on federal construction projects have substantial privacy interest in payroll records). Indeed, in a closely analogous case, the D.C. Circuit held that data that would reveal the fees received by Medicare physicians was protected from disclosure by

Exemption 6. *See Consumers' Checkbook, Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs.*, 554 F.3d 1046 (D.C. Cir. 2009), *cert denied*, 559 U.S. 1067 (2010).

Even those who receive government funds as part of a government program or grant, have a privacy interest in those funds. *See Heights Community Congress v. Veterans Administration*, 732 F.2d 526 (6th Cir. 1984) (property addresses on VA-insured loans protected by Exemption 6); *Aronson v. Dep't of Housing & Urban Development*, 822 F.2d 182 (1st Cir. 1987) (holding that Exemption 6 protects names and addresses of those entitled to receive HUD refunds, and stating "[t]he privacy interest becomes more significant * * when names and addresses are combined with financial information"). *See Multi AG Media v. Department of Agriculture*, 515 F.3d 1224, 1230 (D.C. Cir. 2008) (data that would disclose the financial situation of farmers receiving federal subsidies protected from disclosure by Exemption 6). The fact that, as plaintiffs acknowledge, their request would not only disclose personal identifying information, but also financial information associated with individual physicians, only underscores the weight of the privacy interests at stake here.

Plaintiffs also attempt to diminish the privacy interest at stake here by pointing out that the "names of referee physicians are openly set forth in ECAB's published decisions." Pl. Br. at 18. In effect, plaintiffs contend that the government has waived the privacy rights of referee physicians by publishing these opinions. However, in order to establish waiver, plaintiffs must demonstrate that the exact same information that they seek previously has been disclosed. *See, e.g., Davis v. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (for waiver to apply, the requester must point to specific information "identical" to that being withheld). That is not the case here where, at most, the names of some (but not all) referee physicians - - but not their addresses and zip codes - - may have been disclosed along with their published opinions.

Moreover, not only has the government not waived physicians' privacy interests with regard to the data plaintiffs seek, but, indeed, the government cannot waive those interests. It is the individual whose privacy rights are at stake and the government cannot waive the rights of a private citizen. "Only the individual whose informational privacy interests are protected by Exemption 6 can affect a waiver of those

privacy interests." *See Sherman v. Dep't of the Army*, 244 F.3d 357, 364 & n. 4 (5th Cir. 2001) (compiling case law); *see also Lakin Law Firm, P.C. v. F.T.C*, 352 F.3d 1122, 1124 (7th Cir. 2003) (same); *Prison Legal News v. Exec. Office for U.S. Attorneys*, 628 F.3d 1243, 1249 (10th Cir.), *cert. denied*, 132 S. Ct. 473 (2011) (same).

Finally, plaintiffs ignore fundamental FOIA law that there is a "privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *Reporters Comm.*, 489 U.S. at 767, 769. *See Abraham & Rose P.L.C. v. United States*, 138 F.3d 1075, 1083 (6th Cir. 1998) ("[A] clear privacy interest exists with respect to such information as names, addresses, and other identifying information even if such information is already available on publicly recorded filings").

B. The Purported Public Interest Asserted Here Does Not Outweigh the Substantial Privacy Interests at Stake.

1. Against the privacy interests at stake, a court must weigh the "public interest" in disclosure. *See Reporters Comm.*, 489 U.S. at 762. The term "public interest" under FOIA is a limited term of art and does not mean anything that the public might be interested in. To be a cognizable "public interest" under FOIA Exemption 6, the disclosure

must "shed light on an agency's performance of its statutory duties." *Id*. In other words, the disclosure must inform the public about "what the[] government is up to," not simply provide "information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id*. at 772-73.

In this case, plaintiffs assert that the "names and zip codes of 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 compliance from a roster of all board certified physicians in that geographic area." Pl. Br. at 27. Plaintiffs fail to cite any statutory or regulatory mandate that requires physician rotation. Instead, they rely on FECA's Program Manual for such a directive. *See* Pl. Br. at 12 (*citing* FECA PM 3-500.4(b)(1)(3/94)); App. 703-04.

Plaintiffs' vague allegation that the agency is not following the directive in its Program Manual is not sufficient to raise a cognizable public interest in disclosure. It is settled that "[a] mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests" protected by FOIA's privacy exemptions. *See McCutchen v.*

Dep't of Health & Human Servs., 30 F.3d 183, 188 (D. C. Cir.1994). *See also Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981) (rejecting purported public interest to "use the information to serve as a watchdog over the adequacy and completeness of an FBI investigation").

2. Moreover, where, as is the case here, a plaintiff alleges actual misconduct on the part of the government, plaintiff must meet a higher standard of proof to demonstrate a cognizable public interest under Exemption 6. After the Supreme Court's *Favish* decision, where "the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties," the requester must make a "meaningful evidentiary showing" before the potential misconduct can serve as a public interest "counterweight" to the privacy interest. *See* 541 U.S. at 172-74.[8]

[8] Since *Favish* was issued, numerous courts of appeals have applied its heightened standard to allegations of government misconduct and found plaintiff failed to meet the requisite evidence required by *Favish*. *See, e.g., Carpenter v. Dep't of Justice*, 470 F.3d 434, 442 (1st Cir. 2006); *Wood v. FBI*, 432 F.3d 78, 89 (2d Cir. 2005); *Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1041 (2006); *Oguaju v. United States*, 378 F.3d 1115, 1117 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 983 (2005).

Plaintiffs fail to meet the *Favish* test. Their mere assertion that "[o]n 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," hardly satisfies the high bar set by *Favish* where government misconduct is alleged. Nor does the allegation that one physician (Dr. Sabin) conducted a disproportionate number of referee exams in his geographic area. Pl. Br. at 29-32. This is especially the case where plaintiffs do not take into account the reasonable explanation that many physicians often are bypassed for appointments because they are not available or have decided not to serve as referee physicians. Plaintiffs' meager evidentiary showing is insufficient to satisfy the strict *Favish* standard where uncovering alleged government misconduct is set forth as the public interest in disclosure.

3. Further it is settled that, if there are alternative means of satisfying the purported public interest that do not invade personal privacy, the public interest in disclosure should be "discounted" accordingly. *Dep't of Defense v. FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992). Here, the persons most concerned with the functioning of the

OWCP selection process—the claimants themselves—have the ability to challenge the selection of the referee physician in the administrative review process. *See* 5 U.S.C. § 8124 (providing for a hearing before OWCP); 5 U.S.C. § 8149; 20 C.F.R. §§ 501.2(c), 501.3(e) (providing for *de novo* review of OWCP decision in an appeal to the Employees' Compensation Appeals Board).

In sum, substantial and settled privacy interests are at stake here which outweigh any purported interest in public disclosure. The district court, therefore, correctly held that the requested data is independently protected from disclosure on privacy grounds under FOIA Exemption 6.

III. PLAINTIFFS' REQUEST FOR "SCREEN SHOTS" WOULD REQUIRE THE AGENCY TO CREATE NEW RECORDS WHICH IT IS NOT REQUIRED TO DO UNDER FOIA.

1. Plaintiffs requested "print outs of all MMA menu screens" for "all the possible screens in the MMA system." Pl. Br. at 55. The broad scope of this request is illustrated by plaintiffs' request regarding the Schedule Appointment screen. Plaintiffs point out that this screen shows "file, action, view and help buttons," as well as "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," and also a "Start Menu, Inbox, iFECS Application, Workload Org., Imaging, 2 windows, Schedule ap. 2 Microsoft, Correspondence, 4 Microsoft, and Virtually There buttons." *Id.* Plaintiffs' FOIA request directs the agency to "click on all of these buttons and print the resulting screens. If those screens have further pull down menus, click and print those screens until all the options are exhausted." *Id.* at 55-56. In addition to the Schedule Appointment Screen, plaintiff requested print outs of all menus related to the Bypass Doctor screen and the MM Locate Doctor screen. *Id.* at 56.

The district court correctly granted the government's motion for summary judgment on this issue on the ground 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.'" App. 179 (*quoting Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980)). In *Physicians Committee for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1, 6 (D.D.C. 2000) (cited by plaintiffs in their opening brief at 24), the court stated that "[a]n agency

'is under no duty to disclose documents not in its possession,' *Rothschild v. Department of Energy*, 6 F. Supp. 2d 38, 40 (D.D.C.1998), nor is an agency required to create documents to respond to FOIA requests, *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161–62 (1975). *See also Goldgar v. Office of Administration, Executive Office of the President*, 26 F.3d 32, 35 (5th Cir.1994)." This is well-settled FOIA jurisprudence and controls here.[9]

The district court followed this established authority. *See* App. 179-80; 907, ¶ i. The government explained in its declaration that the computer menus plaintiffs seek only appear during the referee selection process of an actual claimant and that "screenshots are not printed or otherwise created or maintained as part of the scheduling process." *Id.*

In other words, the computer software used by the agency is not designed in such a way that the menus requested by plaintiffs can be shown, except to the extent that they momentarily appear while the

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[9] Plaintiffs cite *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982) in support of their general argument that "computer stored information is a 'record' under FOIA." Pl. Br. at 57. However, in that case, the court of appeals held that FOIA does not require an agency to use its "computer capabilities" to "compact" and "condense" data as part of its duty to segregate. *Id.* at 327.

medical scheduler in the district office is in the middle of the process of scheduling a referee exam through the MMA application. Thus, it would be impossible to take a screen shot of a pull-down menu from a past scheduling appointment since those transitory images no longer exist and are not maintained as permanent agency records. Likewise, it would be impossible to take a screen shot of a pull-down menu for a current or future appointment unless that were part of the process of scheduling an actual appointment for a real claimant. And, in that case, the pull-down menus that might appear would vary depending upon the information inputted during the scheduling process. In short, in order to respond to plaintiffs' request for screen shots of pull-down menus, the agency would be required to create new records which FOIA does not mandate.

2. Further, although the FOIA does not contain a formal definition of an "agency record," documents "should be considered 'agency records' subject to disclosure under FOIA if they were 'agency records' under the definitions set forth in the Federal Records Act (FRA)." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 162 (1980). Under the FRA, an "agency record" "includes all

recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and *preserved* or appropriate for preservation by that agency * * *." 44 U.S.C. § 3301 (emphasis added).

The fleeting moments that pull-down menus might appear (in varying forms) during the course of an actual scheduling appointment are not "preserved" within the meaning of an "agency record" and the agency is not required to recreate them in response to plaintiffs' FOIA request. *See International Brotherhood of Teamsters v. National Mediation Board*, 712 F.2d 1495, 1496 (D.C. Cir. 1983) (Scalia, J.) (transitory one-time possession of address labels did not make them "agency records subject to disclosure under the Freedom of Information Act").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,078 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Steve Frank
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CERTIFICATIONS

I hereby certify that:

1. All required privacy redactions have been made pursuant to 10th Cir. R. 25.5;
2. The required paper copies to be submitted to the Court within two business days of this filing are exact copies of the version submitted electronically; and,
3. The electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program (Trend Micro Officescan 6.5), and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system and by email.

/S/ STEVE FRANK
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