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.

SETH D. HARRIS, Acting 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.

PLAINTIFFS REPLY TO RESPONSE BRIEF

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I. EXEMPTION 4: CONFIDENTIAL COMMERCIAL INFORMATION

A. BOARD CERTIFIED PHYSICIANS NAMES ARE NOT CONFIDENTIAL

OWCP confuses confidentiality with privacy. Board Certified physicians names are in the public domain and are therefore not confidential. The fact that referee physicians' work for OWCP is not in the public domain is irrelevant to confidentiality.

OWCP claims that the "data plaintiffs seek" is not available in the "public domain" and is therefore confidential. Resp. Br. 13. OWCP claims that the "specific information" plaintiffs seek "personal identifying information about certified physicians who serve as referee physicians" is not disclosed in the ABMS website. Resp. Br. 28. Thus, OWCP poses the question:

> "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.

Resp. Br. 25-26. The question must be answered separately for Exemption 4 and Exemption 6.

Exemption 4: OWCP claims that just the names and zip codes of board certified physicians are confidential commercial information under exemption 4. Plaintiffs answer that since the names and zip codes of all board certified physicians are in the public domain none are confidential. The ABMS lists all board certified physicians. The referee physicians are board certified. Therefore, the referee physicians are listed by the ABMS.

Exemption 6: OWCP claims that the release of the referee physicians names will disclose personal information about the physicians, i.e. that they work for OWCP and are therefore private under exemption 6. Plaintiffs answer that this information is not in the public domain at the ABMS site. But, under the Federal Funding Accountability and Transparency Act of 2006 the name and address of Government contractors are now in the public domain. *Infra* p. 19.

"Truly public" information is not confidential

By its basic nature a published directory is not confidential. It is published for sale like "The Colorado Legal Directory". It is intended to be bought, read and used by the public.

OWCP claims confidentiality of its own information – its record of referee evaluations. Elsevier has no idea who served as a referee physician.

The names and addresses of referee physicians are "truly public"

Exemption 4 concerns whether the release of information will impair the provider's competitive position. All precedents hold that if the information is "truly public" it is not confidential - such is the case here.

OWCP claims for the first time on appeal, that the names of board certified physicians are not "'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." Resp. Br. 27.

In support of its position, OWCP relies on public domain cases dealing with specific fact patterns arising under Exemptions 1(secret national defense policy), 3 (exempt by statute) and 7 (law enforcement records). All of these exemptions have standards that are different than those at issue in this case Exemptions 4 and 6.

OWCP claims that the "specific information sought must be 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). Resp. Br. 26. [1]

In *Students*, plaintiff made a FOIA request for reconnaissance photos of human rights violations by Bosnia Serb forces. The Agency claimed FOIA Exemptions 1 (secret national defense policy) and 3 (exempt by statute). The court found that the Secretary of State's display of the photos at a Security Council meeting was not a release into the public domain.

In dicta, the court noted that the information must be "truly public" and "preserved in a public record" citing: *Cottone v. Reno,* 193 F.3d at 155, 555 (D.C. Cir. 1999) (exemption 3 - specific statute for wiretapped tape

[1] The correct quote is: "For the public domain doctrine to apply, the specific information sought must have already been "disclosed and preserved in a public record." Citing *Cottone v. Reno,* 193 F.3d at 555.

recordings) and *Davis v. DOJ,* 968 F.2d 1276, 280 (D.C. Cir. 1992) (exemption 3 - exempt by statute and exemption 7(C) & (D) - law enforcement confidential tape recordings). In *Cottone,* the court noted that:

> We rejected the plaintiff's waiver argument in *Davis* because he could not identify which *specific* tapes had been played during trial…. " *Id.* at 1280. Indeed, to have compelled disclosure in the face of such uncertainty would have ignored the "injury that disclosure might cause innocent third parties,"

Cottone, 554-555. But,

> by no means did *Davis* establish a uniform, inflexible rule requiring every public-domain claim to be substantiated with a hard copy simulacrum of the sought after material….we must be confident that the information sought is truly public and that the requester receive no more than what is publicly available…. Phrased in the parlance of our public-domain cases, Cottone has "point[ed] to specific information in the public domain that appears to duplicate that being withheld"

Cottone, 555-556.

OWCP concedes the critical zip codes are available at the ABMS site

OWCP states that the ABMS certification matters tool does not appear to release the street mailing address; but that, it does provide the physician zip code which is used as the basis for the selection process. "[C]ity/state and zip code are the extent of its geographic precision" Resp. Br. 29-30.

The Referee physicians name and zip code are critical segregable requested data. 5 U.S.C. §552(b).

Hearsay evidence offered for the first time on appeal claims that physicians can withhold information from ABMS. If so, it is also withheld from Elsevier

On appeal, OWCP attempts trial by internet. For the first time on appeal, it offers internet links to information. This hearsay information is not authenticated. It was not offered at trial. It is not admissible for the first time on appeal. Failure to offer this material at trial foreclosed discovery and rebuttal evidence.[2]

OWCP interprets the FAQ's on the ABMS website as stating that "a doctor may decline to provide certain information, such as a zip code, and those fields designated 'private' in an ABMS search." Resp. Br. 30. Actually, the FAQ's only state that "[p]hysicians may voluntarily elect not to provide any information." It does not refer to any particular "fields" being designated private.

OWCP assumes that if a doctor asks the AMBS to keep information private that ABMS would still provide that information to Elsevier. Resp. Br. 30. This assumption requires a leap of faith. The FAQ's do not state that if a physician declines to provide information it will nevertheless appear in the database licensed to Elsevier. How can ABMS provide information to

[2] Plaintiffs were required to and did authenticate all the information obtained from the internet and submitted as evidence.

Elsevier that the physician elects not to provide to ABMS in the first place? The more logical assumption is that ABMS did not have or would not release the information to Elsevier.

OWCP also claims that an internet search for "Dinenberg, S" does not return a matching hit. This may or may not be true. It is not in the record on appeal. Nevertheless, OWCP assumes that this means that "Dinenberg, S" did not authorize the release of any information to the public. Resp. Br. 31. However, an equally valid assumption is that the ABMS did not release this information to Elsevier or that "Dinenberg, S" is not board certified.

Finally, OWCP claims that an internet search under zip code 80228 did not bring up Dr. Sabin's name although the zip code does show up on Dr. Sabin's website and on an unidentified physician usage report. Resp. Br. 30-31. Again, this may or may not be true. It is not in the record on appeal. OWCP speculates that this means that Dr. Sabin did not authorize ABMS to release his zip code. Again, an equally valid assumption is that ABMS did not release the information to Elsevier. In any event, the ABMS notes Dr. Sabin is located in Lakewood, Colorado which is zip code 80228. Thus, this is a distinction without a difference.

ABMS information is preserved over time in public CD ROM's

OWCP claims *ipso facto* that the ABMS website is not searchable for historical information. Resp. Br. 31. This may or may not be true. It is not in the record on appeal. The claim of infinitesimal differences does not negate the fact that the names of board certified physicians are "truly public".

Clearly, the ABMS information is preserved over time. CD ROM's are sold to the public. As pointed out in plaintiffs brief you can buy the discs for $895.00 and keep them forever. Pls.' Br. 14. Discs are updated quarterly. Pls.' Br. 39-40. App. 912-916. OWCP contends that the CD ROM attached to its 12/12/13 letter contains the Elsevier database. Pls.' Br. 39-40. App. 912-916.

In addition, the CD ROM's are found in "medical and public libraries" where they can be reviewed for historical information.

> "The Official ABMS Directory of Board Certified Medical Specialists" provides up-to-date professional and biographical information on physicians who have met the certification requirements of their respective medical specialty boards. "The Official ABMS Directory" can be found in many medical and public libraries

http://www.certificationmatters.org/is-your-doctor-board-certified.aspx

Unpublished portions of the Elsevier database are not requested

OWCP claims that Elsevier's competitors and the public do not have access to some portions of the ABMS database and information that it collects directly. And, that if they did, its competitive position would be destroyed. Resp. Br. 28. Yet, plaintiffs do not request this information. This information is not contained in the redacted documents.

OWCP admits that the redacted names and addresses "are disclosed to the public." OWCP notes that "small specific portions...are only disclosed to the public". Resp. Br. 28. It was OWCP not Elsevier that decided to keep a record of these releases.

The names of the referee physicians are not commercial information

OWCP claims that plaintiffs did not challenge the finding that the information sought is not commercial. Resp. Br. 20. To the contrary, this argument is presented at Pls.' Br. 38. Moreover,

> Not every type of information provided to the government by an entity engaged in commerce falls within (b) (4). *See Getman v. NLRB,* 450 F.2d 670, 673 (D.C.Cir.1971). The material withheld includes the name of an airline and information relating to the strategy of airline companies in negotiating with BAA. This simply cannot be said to be information that falls within the ordinary meaning of the terms "commercial" or "financial."

British Airports Auth. v. U. S. Dep't of State, 530 F. Supp. 46, 49 (D.D.C. 1981).

B. THE *NAT'L PARKS* TEST IS NOT MET WHERE OWCP RELIES ON HEARSAY TO PROVE IMPAIRMENT OF ABILITY TO OBTAIN INFORMATION IN THE FUTURE AND COMPETITIVE HARM

OWCP has the burden to prove that the release of the names and addresses of the referee physician will impair its ability to obtain the information in the future or cause competitive harm to Elsevier. It did not carry its burden with admissible evidence.

OWCP claims the Elsevier letter proves impairment and competitive harm

> 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.

Resp. Br. 33.

OWCP's contention is based on a false premise. OWCP concedes that, "[g]ranted, at issue in that letter was a FOIA request for the entire database and Plaintiff's FOIA request only seeks parts of that database. [3] D reply in support of MSJ. App. 158.

[3] Nevertheless, on appeal OWCP still makes believe that plaintiffs request the entire database. "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." Resp. Br. 29. This is nonsensical. It would be much easier to get the database by buying it or checking it out of public library.

OWCP concedes that the Elsevier letter was not offered to "establish the truth" of anything in the letter

"[T]he 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." Resp. Br. 37.

Hearsay cannot not establish impaired ability to obtain information or competitive harm

Any alleged threat to Elsevier's business must be proven by admissible evidence. *See Generally Pac. Architects & Engineers Inc. v. Renegotiation Bd*., 505 F.2d 383, 385 (D.C. Cir. 1974) (specific factual or evidentiary material required to resolve conflicting claims concerning the applicability of exemption 4). *Utah v. DOI,* 256 F.3d 957, 970 (10th Cir. 2001). *San Juan Citizens Alliance v. Dep't of Interior*, No. 13-CV-02466-REB-KMT, 2014 WL 4854841 (D. Colo. 9/30/14).

OWCP notes 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" citing *Echo Acceptance Corp. v. Household Retail Servs., Inc.,* 267 F.3d 1068, 1090 (10th Cir. 2001). Resp. Br. 36-37.

However, *Echo* affirmed the trial court's rejection of a hearsay letter offered to show notice.

> The Federal Rules of Evidence define "hearsay" as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). By contrast, "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Fed.R.Evid. 801 advisory committee's note (1972).

Echo, 1087. "[W]e fail to see the relevance of whether or not Echo had notice of 'HRSI's position'…. the district court did not abuse its discretion in rejecting notice as a basis to admit the exhibits at issue." *Echo*, 1090.

Notice of an objection goes to OWCP's state of mind. OWCP claims that it is entitled to credit Elsevier's evaluation of the threat to its business. Resp. Br. 33. However, OWCP's belief that Elsevier objected to the release of its' complete database is irrelevant to prove impairment or competitive harm.

OWCP did not submit evidence that the author of the Elsevier letter had authority to make that business decision, that his assertions were within the scope of his employment or that he had personal knowledge of Elsevier's position regarding impairment.

Critical question: why didn't OWCP get an affidavit from Elsevier?

Critical question: why didn't OWCP give Elsevier notice of plaintiffs' requests?

Critical question: why didn't OWCP give Elsevier notice of this lawsuit?

OWCP not plaintiffs speculates that Elsevier objects to the release of the name and address of the referee physicians.

OWCP claims that plaintiffs speculate that Elsevier would not object to the release of the redacted name and address of the referee physicians. Resp. Br. 33-34 citing Pls.' Br. 49. To the contrary, it is OWCP that requires the court to speculate in order to meet its burden of proof, to wit:

> OWCP asked Elsevier if it objected to the release of its entire database…. 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.

Pls.' Br. 49. This shows that OWCP's claims of impairment and competitive harm are based on a false premise.

The sole basis of OWCP's contention that Elsevier could object to release of the redacted names and addresses is that the license prohibits releasing any "parts". Resp. Br. 29. App 916 ¶ 2.8. Under OWCP's interpretation of the license it could not release any information at all. Yet, OWCP concedes that "small, specific portions…are only disclosed to the

public". Resp. Br. 29. As noted in plaintiffs opening brief, the names and addresses were released to the public as a permitted use under the license agreement. Pls.' Br. 47. If OWCP can't release the name and address obtained from the Elsevier database it can't schedule a referee evaluation.

Hearsay evidence offered for the first time on appeal on competitive harm test

At trial, OWCP did not address the competitive harm test. "Because OWCP meets the impairment test, it is not necessary to discuss the competitive harm test." Def. Reply in support of MSJ. App. 158.

Now for the first time on appeal, OWCP offers an internet link to a list of companies to support its allegation that "many companies…obtain physician information from ABMS". Resp. Br. 37-38.

This hearsay is not authenticated. It was not offered at trial. Failure to offer this material at trial foreclosed discovery and rebuttal evidence.

Nevertheless, this internet link does not prove competitive harm by the release of a few names. Taken at face value it shows only that the names and addresses of board certified physicians are not confidential but rather are freely available in the public domain. OWCP cannot have it both ways.

OWCP also offers an internet link to a single company to support its contention that Elsevier "competes with other companies in selling that information to subscribers". Resp. Br. 37-38.

This hearsay is not authenticated. It was not offered at trial. Failure to offer this material at trial foreclosed discovery and rebuttal evidence.

Nevertheless, this link does not prove competitive harm by the release of a few names. Taken at face value it shows only that OWCP would not be impaired in its ability to obtain the information from another source. Again, OWCP cannot have it both ways.

Critical question: why didn't OWCP authenticate and offer this information at trial? Now it's too late:

> Our circuit "generally will not consider an issue raised for the first time on appeal." *Tele–Communications, Inc. v. C.I.R.,* 104 F.3d 1229, 1232 (10th Cir.1997). This rule is particularly apt when dealing with appeals from grants of summary judgment "because the material facts are not in dispute and the trial judge considers only opposing legal theories." *Anschutz Land and Livestock Co., Inc. v. Union Pacific Railroad,* 820 F.2d 338, 344 n. 5 (10th Cir.1987). We "require[ ] that an issue be presented to, considered [and] decided by the trial court" before it can be raised on appeal. *Lyons v. Jefferson Bank & Trust,* 994 F.2d 716, 721 (10th Cir.1993).

Essary v. Fed. Express Corp., 161 F. App'x 782, 785 (10th Cir. 2006)(new theory of retaliation in sex discrimination claim):

> Whether an appellate court will for the first time take judicial notice of a judicially notable fact rests largely in its own

> discretion." *Mills v. Denver Tramway Corp.,* 155 F.2d 808, 812 (10th Cir.1946). Defendants offer no explanation for why they did not seek to introduce the auto accident fatality statistics before the district court…. We therefore decline to take judicial notice of the auto accident fatality statistics…. *See Am. Stores Co. v. Comm'r of Internal Revenue,* 170 F.3d 1267, 1270 (10th Cir.1999) ("Judicial notice is not a talisman by which gaps in a litigant's evidentiary presentation ... may be repaired on appeal." (quotation omitted)).

W. Coast Life Ins. Co. v. Hoar, 558 F.3d 1151, 1156 (10th Cir. 2009)

OWCP's 12/12/12 letter to Elsevier is inadmissible without the attached CD ROM

> The rule of completeness provides that "the opponent, *against whom a part of an utterance has been put in,* may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 171, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988) (citation omitted, emphasis added); *see also* Fed.R.Evid. 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction *at that time* of any other part or any other writing or recorded statement which ought in fairness to be considered *contemporaneously* with it.") (emphasis added). The rule of completeness, both at common law and as partially codified in Rule 106, functions as a defensive shield against potentially misleading evidence proffered by an opposing party. *See United States v. Collicott,* 92 F.3d 973, 981 n. 9 (9th Cir.1996)

Echo, 267 F.3d 1089-90 (10th Cir. 2001).

Deputy Dir. Tritz' hearsay statement might establish the Vaughn index but not other facts, especially in light of the credibility issues

OWCP asserts that Deputy Dir. Tritz' affidavit is not hearsay because declarations by "an agency official in charge of processing FOIA requests" satisfies the "personal knowledge" requirement of Rule 56(c). Resp. Br. 35.

By this reasoning, OWCP could declare the world is flat since it is in charge of processing FOIA requests.

OWCP cites cases that address the compilation of the Vaughn index noting that affidavits are "accorded a presumption of good faith". However, Deputy Dir. Tritz does not even state that she supervised the collection of information in the Vaughan index. App. 886 ¶ 2.

Moreover, the Vaughn index does not even include the fact that OWCP withheld the CD ROM that was attached to its letter to Elsevier.

C. THE CRITICAL MASS CUSTOMARY RELEASE TEST IS MET

In support of its contention that the information is not customarily released, OWCP incorporates its argument that the names of the referees are not in the public domain. Resp. Br. 38.

OWCP fails to recognize that the customary release test under *Critical Mass* is different than the public domain exemption.

OWCP did not rebut plaintiffs showing that the names and addresses of referee physicians are customarily released to the public for free and by

sale. This information is obtained by the ABMS. It is customarily released by the ABMS. This information is licensed to Elsevier. It is customarily released by Elsevier.

To date, the Tenth Circuit has not applied the *Critical Mass* test. *San Juan Citizens Alliance v. Dep't of Interior*, No. 13-CV-02466-REB-KMT, 2014 WL 4854841 (D. Colo. 9/30/14).

II. EXEMPTION 6: PRIVACY

A. FEDERAL CONTRACT PHYSICIANS HAVE NO PRIVACY INTEREST

Federal contractors do not have a privacy interest

On December 8, 2009 the Office of Management and Budget directed that agencies provide full and easy access to information on government spending to promote accountability by allowing detailed tracking and analysis of the deployment of government resources. Such tracking and analysis allows the public and public officials to gauge the effectiveness of expenditures and to modify spending patterns as necessary to achieve the best possible results. Transparency also gives the public confidence that the government is properly managing its funds and allows taxpayers to track federal spending. Open Government Directive (12/8/09) (OMB Directive M-10-06) whitehouse.gov/…/omb/assets/memoranda_2010/m10-06.pdf.

The Federal Funding Accountability and Transparency Act of 2006, 31 U.S.C. § 6101 Note, Pub. L. 109-282, 120 Stat. 1186, created a free, searchable web site at USASpending.gov that discloses to the public the names of all businesses and non-profit organizations that receive payments through federal grants, contracts, loans and insurance payments.

The website allows anyone to access by zip code the recipient, the amount of the award, the award ID number, the agency and the award date.

Finally, The Center for Medicare & Medicaid Services provides an annual on-line list of the names and addresses of physicians who provide services under Medicare along with the medical service provided and the money received for each service. Medicare_Provider_Util_Payment_PUF_s, CP2013.xlsx.

Since the enactment of the above legislation and government actions, there is no question concerning the public nature of federal government contracts in order to allow the public to assess the operations of government agencies.

A business address is not private

OWCP notes the privacy interest in an individual's name and home address. Resp. Br. 43. But, OWCP does not cite any authority finding a

business address is private. Unlike a home address a business wants the broad public to know its address so that it may take advantage of the services offered.

Referee physicians have no expectation of privacy

OWCP claims that only the referee physician can waive his privacy interest. Resp. Br. 47. They did just that by agreeing to act as expert witnesses and government contractors. Pls.' Br. 17 – 19.

OWCP cites a line of cases noting that there is a privacy interest in information in government files even where such information is available in remote and scattered publicly recorded documents. The reasoning of these cases is inapposite to the facts presented herein.

In *Dept. of Justice v. Reporters Committee,* 489 U.S. 749 (1989) the court found that a FOIA request for an individual's criminal history (rap sheet) compiled by the FBI from various law enforcement agencies contained personal private information disclosure of which could constitute an unwarranted disclosure under FOIA exemption 7 because the compilation showed little or nothing about the agencies conduct, i.e. what the government was up to. At. 756. There, the Court addressed facts opposite to those presented in this case.

> the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by

> disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Dep't of Justice, 764.

In this case, ABMS not the Government compiled all the data for the public and published it. OWCP records contain the "hard-to-obtain" information.

The redacted names will not disclose income

OWCP claims that plaintiffs acknowledge that their FOIA requests would disclose financial information citing Pls.' Br. 32-33. Resp. Br. 46. This is not true. Plaintiffs merely ask that OWCP fill in the redacted names and addresses from the documents it produced.

There is no financial information of any kind in any of the redacted documents. Financial information was never released in response to plaintiffs FOIA requests.

OWCP never claimed that the cost of referee evaluations was confidential. Over the past many years OWCP freely released financial information to the public showing that hundreds of thousands of dollars are spent on referee evaluations without any accountability.

B. THE PUBLIC INTEREST IN THE INTEGRITY OF FECA OUTWEIGHS THE PRIVACY INTEREST IF ANY OF GOVERNMENT CONTRACTORS

FECA's statutory mandate is found at 5 U.S.C. § 8123(a)

OWCP claims that plaintiffs fail to cite a statutory or regulatory mandate that requires physician rotation and instead rely on FECA's Program Manual. Resp. Br. 49.

However, OWCP cites the statutory mandate to select referee physicians in its brief - 5 U.S.C. § 8123(a). Resp. Br. 5. "If there is a disagreement between the physician…for the United States and the physician of the employee, the Secretary shall appoint a third physician". 5 U.S.C. § 8123(a).

OWCP also cites the regulatory mandate 20 C.F.R. § 10.321. Resp. Br. 3.

> (b) If a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser or consultant, OWCP shall appoint a third physician to make an examination (see § 10.502). This is called a referee or impartial examination. OWCP will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case. The employee is not entitled to have anyone present at the examination unless OWCP decides that exceptional circumstances exist.

20 C.F.R. § 10.321(b).

Plaintiffs do not have to meet the exemption 7 standard of offering evidence of negligence when the sole asserted public interest is government negligence

Plaintiffs produced evidence of agency misfeasance but this was not required. In fact, evidence of corruption in the operation of Government programs increases the public interest in disclosure. "The basic purpose of FOIA is to ensure an informed citizenry,…needed to check against corruption." *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 152 (1989). Pls.' Br. 25.

The public interest is ensuring the integrity of the FECA selection. The negligence of responsible officials is an interrelated issue. Plaintiffs produce strong unrebutted evidence of agency misfeasance. OWCP lead Elsevier to object, misrepresented to the court that it sent plaintiffs FOIA requests to Elsevier, withheld the CD ROM that it attached to the letter to Elsevier, and shunted over a million dollars of tax money to a select few physicians.

OWCP contends that plaintiffs must show negligence of agency officials to establish a public interest in the names of referee physicians. Resp. Br. 50, citing *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). However, *Favish* only applies to Exemption 7(C) - information compiled for law enforcement purposes, the release of which

could reasonably be expected to constitute an unwarranted invasion of personal privacy. Exemption 7(C) is "notable" in that it requires a balance that "is not similarly 'tilted emphatically in favor of disclosure.' " *Senate of Puerto Rico v. Dep't of Justice,* 823 F.2d 574, 587 (D.C. Cir. 1987) (R. Ginsburg, J.) (quoting *Bast v. Dep't of Justice,* 665 F.2d 1251, 1254 (D.C. Cir. 1981).

In *Favish* the plaintiff made a FOIA request for death scene photographs of the body of the president's deputy counsel. *Favish* thought that the government investigations' conclusion that it was a suicide were untrustworthy. The court noted that:

> The exemption is in marked contrast to Exemption 6, which requires withholding of personnel and medical files only if disclosure "would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C)'s comparative breadth - it does not include "clearly" and uses "could reasonably be expected to constitute" instead of "would constitute" – is no drafting accident, but is the result of specific amendments to an existing statute. Because law enforcement documents often have information about persons whose link to the official inquiry may be the result of mere happenstance, there is special reason to protect intimate personal data, to which the public does not have a general right of access in the ordinary course.

Favish, 157-58. The court noted that:

> as a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose.

Favish, 171-72. The court held that:

> where there is a privacy interest protected by Exemption 7(C) and 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 establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred

Favish, 174.

OWCP also cites *McCutchen v. U.S. Dep't of Health % Human Servs.,* 30 F. 3d 183 (D.C. Cir. 1994) and *Miller v. Bell,* 661 F. 2d 623, 630 (7th Cir. 1981) for the proposition that a mere desire to review how an agency is doing its job, coupled with bare allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C). Resp. Br. 49. This is simply another effort to apply the heightened standards of Exemption 7(C) improperly to an Exemption 6 case.

In *McCutchen* plaintiff made a FOIA request for the names of scientists exonerated during investigations and individuals who alleged misconduct. The court found these names were protected from disclosure pursuant to FOIA Exemption 7.

The purpose of FOIA is to allow the public to throw light on the workings of the government, not to duplicate government investigations of wrongdoing without evidence of government misconduct. *Reporters Committee*, 489 U.S. at 775. FOIA does not allow requesters to undertake their own shadow investigations of any law-enforcement operation that interests them. Such watchdog activities based on unsupported allegations of wrongdoing give the government no defense against requests for private information under circumstances of private citizens trying to challenge the findings of an investigation. *See Dep't of State v. Ray,* 502 U.S. 164, 192 (1991). Hence, Congress created the heightened standards for public interest in Exemption 7(C) cases where the only claimed public interest is in exposing Government negligence.

In this case, OWCP is not engaging in law enforcement and has not investigated whether its rotation system for selection of Referee Physicians is being applied neutrally or correctly. Plaintiffs are not second-guessing any law enforcement or OWCP investigations. The public has a right to know how OWCP is assigning referee physicians and that interest impacts many people who are injured in employment. What the government is up to in selecting referee physician vital to the integrity of the FECA program.

There is no alternative means to the information

OWCP contends that if there are "alternative means" of satisfying the public interest then the public interest should be discounted citing *Dept. of Def*. *v. FLRA*, 964 F.2d 26, 29 (D.C. Cir. 1992). But *Dept. of Def.* noted that "to the extent there are 'alternative means' available to obtain the information, the need for enforced disclosure under the FOIA of privacy-implicating information is diminished." At. 29.

However here, there are no "alternative means", the information can only come from OWCP.

Individual appeals cannot expose systemic problems in referee selection

OWCP claims that individual claimants can challenge the selection of a referee physician in the administrative review process. But plaintiffs do not seek to challenge the selection of referee physicians in their individual claims. The issues in their claims were decided long ago. Rather, plaintiffs represent the public interest in the integrity of the selection process. Plaintiffs address systemic not individual failure. Individual decisions can never disclose the redacted information vital to the integrity of the selection process.

Moreover, individual claimants are not usually represented by counsel. They do not know the rules. They are not capable of enforcing

them. In addition, there is no discovery to ferret out OWCP's failure to properly select referee physicians. There is no judicial review.

In *Rose v. USA,* 138 F. 3d 1075 (6th Cir. 1998) plaintiffs FOIA request sought IRS computerized records of tax liens. The court found that was improper to deny the request because the information was publicly available citing *U.S. v. DOJ,* 492 U.S. 136, 151 (1989) noting that "agency records which do not fall within one of the [nine] exemptions are improperly withheld." At. 1078.

So-called "reasonable explanation" for physicians conducting excessive exams

OWCP explanation for the fact that Dr. Sabin's conducted 108 evaluations while 4 other physicians in the same zip code conducted only 4 evaluations is that "many physicians are bypassed…because they are not available or have decided not to serve as referee physicians." Resp. Br. 51. Clearly, the 4 other physicians in the same zip code are available and willing to serve as referee physicians. This is the same tired excuse that OWCP gives to ECAB when it reviews referee selection. OWCP offers no evidence for this speculation.

OWCP stands silent in the face of the evidence that – 3 doctors did 39% of the evaluations and 12 physicians performed all 209 orthopedic evaluations. Pls.' Br. 30 – 33.

The public interest clearly outweighs any privacy interest.

FOIA 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 Justice v. Reporters Comm.,* 489 U.S. 749, 773 (1989).

"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." Pls.' Br. 26

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

> Disclosure…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

Pls. Br. 20.

III. SCREEN SHOTS OF MMA MENU SCREENS ARE FOIA RECORDS

"In 1996, Congress amended the definition of "record" to include electronic records. Electronic Freedom of Information Act Amendments of 1996, Pub.L. 104-231, 110 Stat. 3048, 3049 (codified as amended at 5 U.S.C. § 552(f)(2))." *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006)

OWCP intentionally misconstrues the request for "all" pull down menus as a request for only screens shown during the referee selection process

Clearly, plaintiffs' requests do not concern, mention or are otherwise limited to the "referee selection process". OWCP acknowledges the broad scope of plaintiffs' requests for pull down menus. Resp. Br. 52-52.

Nevertheless, as it did at trial, OWCP misconstrues the request as a narrow one limited to screens displayed during the referee selection process in a specific claim. OWCP claims that, "the MMA could not produce similar records because physician referee process can only be done for an actual claimant". DMSJ, App. 128. The "physician referee process can only be done for an actual claimant and screenshots are not created or maintained as part of the scheduling process. D. Resp. PMSJ, App. 96.

OWCP's declaration does not address the ability to print all pull down menus

> 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.*

Resp. Br. 54. OWCP notes that the Court relied **"**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". Resp. Br. 16-17.

The only evidence that OWCP gives in support of its contention that it cannot print pull down menus is Deputy Dir. Tritz statement that:

> 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.

This statement is a mere cut and paste from OWCP's unverified responses to plaintiffs FOIA requests.

Clearly, plaintiffs' requests do not seek records created "as part of the scheduling process". This was communicated to OWCP many times.

The only explanation for OWCP's refusal to respond to the plain meaning of the requests is the obstruction of FOIA regulations encouraging agencies to make as much information as possible to the public. OWCP obstructs the production of the pull down menus so that plaintiffs cannot

obtain additional reports and information about what it is doing. This bad faith again raises questions about OWCP's credibility in this proceeding.

Every person reading this brief at a computer sees pull down menu buttons – press the button and hit print. That was easy!

OWCP's unverified contention that pull down menus are "transitory images" that "momentarily appear" for "fleeting moments" in "scheduling a referee exam"

> [T]he 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 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.

Resp. Br. 54-55. Here the Solicitor testifies to facts that are not in the record.

Plaintiffs are entitled to an Order that their requests for pull down menus are not limited to the "referee selection process" and that OWCP shall print out all pull down menus that can be accessed by the MMA software.

CONCLUSION

The names of board certified physicians are clearly not confidential. They are posted at the ABMS website and are sold to the public by Elsevier.

The names of board certified physicians are customarily released by ABMS and Elsevier.

OWCP's claim that Elsevier would incur competitive harm is based hearsay which is in turn based on the false premise that plaintiffs requested its entire database.

OWCP makes not claim of exemption for its electronic pull down menus. Since these are clearly FOIA records they must be produced.

The court should reverse the granting of summary judgment in favor of OWCP and direct entry of summary judgement in favor of plaintiffs together with reasonable attorney fees and costs.

Date: July 27, 2015

Respectfully submitted,

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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.

SETH D. HARRIS, Acting 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 6,892 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 Microsoft Word in 14 point Arial.

/s/ Jodi M. Waldron

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 27th day of July 2015 I electronically filed the foregoing Reply to Response Brief with the Clerk of the Court using ECF system which will send notification of such filing to the following email address:

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