SCHEDULED FOR ORAL ARGUMENT ON OCTOBER 10, 2008

APPEAL NO. 07-5343

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSUMERS' CHECKBOOK,
CENTER FOR THE STUDY OF SERVICES,

Plaintiff-Appellee,

vs.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,

Defendants-Appellants.

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF APPELLEE

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Paul J. Orfanedes
Dale L. Wilcox
JUDICIAL WATCH, INC.
501 School Street, SW, Suite 500
Washington, DC 20024
(202) 646-5172
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Judicial Watch Inc. ("Judicial Watch") is a not-for-profit, public interest organization that has no parent company. No publicly-held corporation has a 10% or greater ownership interest in Judicial Watch.

CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Parties, Intervenors and Amici The Parties, Intervenors and Amici appearing in the lower court and in this appeal are listed in the Brief for Federal Appellant.

Ruling Under Review The ruling under review in this appeal is the August 22, 2007 Order of The Honorable Emmet G. Sullivan, reproduced at pages 267.3-267.4 in the Joint Appendix ("JA"). The Memorandum Opinion accompanying this Order is reported at *Consumers' Checkbook, Center for Study of Services v. Department of Health and Human Services*, 502 F. Supp. 2d 79 (D.D.C. 2007).

Related Cases None.

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GLOSSARY

FOIA	Freedom of Information Act, 5 U.S.C. § 552
HHS	U.S. Department of Health and Human Services
JA	Joint Appendix

INTEREST OF AMICUS CURIAE

Founded in 1994, Judicial Watch is a non-profit, non-partisan, public interest organization headquartered in Washington, D.C. that seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly investigates and monitors the actions of government by requesting access to government records under the provisions of FOIA. Judicial Watch then reports its findings -- both the good and the bad -- to the American public via its website and monthly newsletter and through other outreach efforts.

The case at bar concerns FOIA's personal privacy exemption, also known as Exemption 6. The government argues in its principal brief that, under Exemption 6, courts should not consider any derivative use of information contained in government records when weighing the public interest in disclosure of such records against an individual's interest in non-disclosure. Judicial Watch is concerned that, if validated, the government's "derivative use" argument would impede efforts to investigate and monitor government activity and otherwise restrict the free flow of information to the public about the actions of government. Judicial Watch thus seeks to submit its *amicus curiae* brief to the Court to elaborate on the "derivative use" issue, which, from Judicial Watch's perspective,

is not likely to be addressed by the parties adequately. Pursuant to Federal Rule of Appellate Procedure 29(b) and Circuit Rule 29(b), Judicial Watch is filing contemporaneously herewith an unopposed motion for leave to file its *amicus curiae* brief.

STATEMENT REGARDING STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Federal Appellant.

SUMMARY OF THE ARGUMENT

The American public has a right to know what their government is up to, and FOIA was enacted to secure this right. FOIA requires full disclosure of government records unless a requested record falls with one of the statute's nine, narrowly-construed exemptions. The burden is on the government to prove that withheld records fall within an exemption. The government's burden under Exemption 6 is a heavy one.

Congress has erected an imposing barrier to nondisclosure under Exemption 6 by restricting its reach to cases where harm to an individual's privacy caused by disclosure is not only "unwarranted" but is "clearly" so. Any alleged privacy

interest must be weighed against the public's interest in disclosure. The only public interest in disclosure identified by the U.S. Supreme Court is informing the public about "what their government is up to." *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989).

Appellant U.S. Department of Health and Human Services ("HHS") argues that, in weighing the public interest in disclosure of a particular record against an individual's interest in non-disclosure under Exemption 6, a court should consider the public interest in disclosure of that particular record only and not how the record might be used to benefit the public interest. First, neither the text of FOIA nor FOIA's legislative history provides any support for excluding such "derivative use" from the Exemption 6 balancing test. Second, a substantial number of courts have considered "derivative use" information in performing this public interest analysis. Finally, it is disingenuous for HHS to argue that "derivative use" information should not be considered in weighing the public interest in disclosure of a particular record because its entire argument that releasing the requested information will cause a clearly unwarranted invasion of privacy hinges on the derivative use of the requested information on the privacy interest side of the scale.

In the District Court, Appellee Consumers' Checkbook posited possible uses for the requested information that clearly would be of substantial benefit to the public. The District Court properly analyzed those uses in light of the privacy interests asserted by HHS and came to the obvious conclusion that the balancing of these interests weighed in favor of disclosure. Not only should this finding not be disturbed, but this Court should confirm that the District Court properly considered the "derivative uses" that Consumers' Checkbook intends to make of the information at issue in analyzing the public interest in its disclosure.

ARGUMENT

I. FOIA Exists to Provide the Public With Information to Make Intelligent, Informed Choices Regarding the Nature, Scope, and Procedure of Federal Governmental Activities.

In crafting FOIA, Congress declared that "government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty." S. Rep. No. 813, 89th Cong., 1st Sess., 10 (1965).

The U.S. Supreme Court has declared that FOIA "is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S.

73, 80 (1973). The Court also has observed that FOIA's ultimate purpose is to enable "the public to have sufficient information to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974) (quoting *Frankel v. SEC*, 460 F.2d 813, 816 (2nd Cir. 1972), *cert. denied*, 409 U.S. 889 (1972)). Similarly, the Court has declared that the "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004) ("FOIA is often explained as a means for citizens to know 'what the[] Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.").

Indeed, "ours is a democratic form of government where the public's right to know how its government is conducting its business has long been an enduring and cherished value." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1122 (D.C. Cir. 2004). The U.S. Senate made express reference to this

overarching principle when it quoted James Madison in the "Purpose of Bill" section of its Report on FOIA:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

S. Rep. No. 813, 89th Cong., 1st Sess., at 2-3 (1965).

II. FOIA Embodies a Strong Presumption "Of Full Agency Disclosure" and the Government Bears a Heavy Burden to Justify Withholding Information.

The Senate Report accompanying FOIA also states "[i]t is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965). Consequently, this Court has declared that, "[a]t all times, courts must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure.'" *Nat'l Ass'n of Homebuilders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (quoting *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). FOIA "requires federal agencies to disclose information upon request unless the statute expressly exempts the information from disclosure." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309,

1310 (D.C. Cir. 2003). "Although Congress enumerated nine exemptions from the disclosure requirement, 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *Norton*, 309 F.3d at 32 (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Because "[t]he legislative plan creates a liberal disclosure requirement, limited only by specific exemptions," the exemptions "are to be narrowly construed." *Bristol-Myers Co. v. Federal Trade Com.*, 424 F.2d 935, 938 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); *see also Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (Exemptions from disclosure "must be narrowly construed, in such a way as to provide the maximum access consonant with the overall purpose of the Act.").

As a result of FOIA's presumption of full disclosure, the government bears the burden of justifying its decision to withhold requested information. As the Senate Report accompanying FOIA states:

> Placing the burden of proof upon the agency puts the task of justifying withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action.

S. Rep. No. 813, 89th Cong., 1st Sess., at 8 (1965). The U.S. Supreme Court thus has declared that "[u]nlike the review of other agency action that must be upheld if

supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter *de novo*.'" *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 755 (quoting 5 U.S.C. § 552(a)(4)(B)); *see also King v. Dep't of Justice*, 586 F. Supp 286, 290 (D.D.C. 1983), *aff'd*, 830 F.2d 210 (D.C. Cir. 1987) ("Congress has directed the courts to make a *de novo* review of the agency's classification decisions with the burden on the agency to justify non-disclosure.") (citations omitted). "The burden is not a light one." *Alliance for the Wild Rockies v. Dep't of the Interior*, 53 F. Supp. 2d 32, 35 (D.D.C. 1999). "And there is nothing about invoking Exemption 6 that lightens the agency's burden. In fact, 'under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.'" *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (quoting *Norton*, 309 F.3d at 32).

III. The Contours of Exemption 6.

Exemption 6 of FOIA exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 522(b)(6). In determining the applicability of Exemption 6, this Court applies a well-settled, three-step analysis. The first

inquiry considers whether the requested information contained in "personnel [or] medical files [or other] similar files." 5 U.S.C. § 552(b)(6). The second inquiry is whether the disclosure of the requested information would compromise substantial privacy interests. *Id.* If the privacy interests at issue are *de minimis*, then disclosure cannot amount to a "clearly unwarranted invasion of personal privacy" in light of FOIA's broad policy favoring disclosure. *Ripskis v. Dep't of Housing and Urban Development*, 746 F.2d 1, 2-3 (D.C. Cir. 1984). The third inquiry balances the public interest in disclosure of the requested information with the potential harm to privacy that would result from the disclosure. 5 U.S.C. § 552(b)(6). In creating Exemption 6, "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act." *Ripskis* , 746 F.2d at 2-3. "If the balance favors the privacy element, the agency is justified in withholding the data; if the interests of the public in full revelation are stronger, the information must be released; if the weights are approximately equal, the court must tilt the balance in favor of disclosure, the overriding policy of the Act." *Board of Trade v. Commodity Futures Trading Com.*, 627 F.2d 392, 398 (D.C. Cir. 1980); *see also Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984) (Exemption 6's language "require[s] a balance tilted emphatically in favor of disclosure").

"[T]he scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" S. Rep. No. 813, 89th Cong., 1st Sess., at 9 (1965); *see also Rose*, 425 U.S. at 378 n.16 (Congress' use of the "clearly unwarranted" language "was a considered and significant determination."). "Exemption 6 does not protect against disclosure [of] every incidental invasion of privacy -- only such disclosures that constitute 'clearly unwarranted' invasions of personal privacy." *Rose*, 425 U.S. at 382. Exemption 6 is directed "at threats to privacy interests more palpable than mere possibilities." *Id.* at 381 n.19. "Withholding information to prevent speculative harm is indeed contrary to the statute's policy favoring disclosure." *Carter v. United States Dep't of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987). "By restricting the reach of Exemption 6 to cases where the invasion of privacy caused by disclosure is not only unwarranted but clearly so, Congress has erected an imposing barrier to nondisclosure under this exemption." *Kurzon v. Dep't of Health & Human Services*, 649 F.2d 65, 66 (1st Cir. 1981). Indeed, it is a "rare case" when "the calculus unequivocally supports withholding . . . because Congress has weighted the balance so heavily in favor of disclosure." *Id.*

"The only relevant public interest to be considered in disclosure to be weighed in this balance is the extent to which disclosure would serve the core

purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government.*" *Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994) (emphasis in original); *see also Renegotiation Bd.*, 415 U.S. at 17 ("Congress was principally interested in opening administrative processes to the scrutiny of the press and general public when it passed the Information Act") (internal quotations and citations omitted). Uncovering corruption is an important component of this public interest. *See NLRB*, 437 U.S. at 242 ("basic purpose of FOIA is to ensure an informed citizenry . . . needed to check against corruption . . .."); *see also Washington Post Co. v. Dep't of Health & Human Services*, 690 F.2d 252, 264 n.39 (D.C. Cir. 1982) (noting that one principal purpose of FOIA is to monitor official conduct) (citation omitted). It is not the only component, however.[1] The broad public interest in

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[1] HHS errs in arguing that a requester must provide evidence of government corruption or misconduct in order to defeat a withholding under Exemption 6. Appellant's Brief at 30-31 and n.4. No such rule exists for Exemption 6. It is only with respect to Exemption 7, pertaining to law enforcement records, that this Court "adopted a categorical rule permitting an agency to withhold information identifying private citizens mentioned in law enforcement records, unless disclosure is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (internal quotation marks omitted). In any event, as Consumers' Checkbook has show in its brief, the Medicare program perennially has been rife with fraud. Brief of Appellee at 28-30; *see also* Carrie Johnson, *Medicare Fraud a Growing Problem: Medicare Pays Most Claims Without Review*, The Washington Post, June 13, 2008, at A1.

being informed about "what the[] government is up to" encompasses many other important components, including monitoring whether an agency is carrying out its statutory duties and exposing agency inefficiency, prejudice, favoritism, and incompetence. *See, e.g.*, *Multi AG Media LLC*, 515 F.3d at 1232 (ordering release of data regarding farmers who receive farm subsidies because "the information will enable the public to more easily monitor whether the agency is carrying out its statutory duty" of "catching cheaters and lawfully administering its subsidy and benefit programs.").[2] "Because the 'basic purpose of [FOIA] . . . focuses on the citizens' right to be informed about what their government is up to," any information that "sheds light on an agency's performance of its statutory duties is

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[2] The Court also noted that the presumption of disclosure is "of special force" and there exists "a special need for public scrutiny" where agency action "distributes extensive amounts of public funds in the form of subsidies and other financial benefits." *Multi AG Media LLC*, 515 F.3d at 1232 (citing *Brock v. Pierce County*, 476 U.S. 253, 262 (1986) ("[T]he protection of the public fisc is a matter that is of interest to every citizen."); *News-Press v. Dep't of Homeland Sec.*, 489 F.3d 1173, 1192 (11th Cir. 2007) ("easily" concluding that there is a substantial public interest under FOIA *Exemption 6* in "learning whether FEMA is a good steward of (sometimes several billions of) taxpayer dollars in the wake of natural and other disasters"); *United States v. Suarez*, 880 F.2d 626, 630 (2nd Cir. 1989) ("[T]here is an obvious legitimate public interest in how taxpayers' money is being spent, particularly when the amount is large.")).

in the public interest." *Id.* at 1231 (quoting *Reporters Comm. for Freedom of Press*, 489 U.S. at 773) (internal quotation marks omitted).

IV. Derivative Use of Information Is Not Prohibited by FOIA.

One of HHS's principal arguments for reversal is that the District Court allegedly erred by considering derivative uses Consumers' Checkbook intends to make of the requested information in balancing the public interest in disclosure against any privacy interests that might exist. Appellant's Brief at 37-38. HHS's argument has no merit for several reasons. First, there is no support in either the text or legislative history of FOIA for a prohibition on considering "derivative uses" of information in performing the balancing test required under Exemption 6. In fact, considering "derivative uses" of information is entirely consistent with FOIA's basic purpose of informing the public about "what the[] government is up to." Although information disclosed under FOIA may, on its face, reveal "what the[] government is up to," more often than not the information is a missing piece of a larger puzzle that, when combined with other sources of information, exposes governmental inefficiency or impropriety, which is unquestionably within the

public's right to know. If the information is not released, the true nature of the government's activities may never be known.[3]

There are many examples of where a piece of critical information was obtained through FOIA, that, on its face, appeared to be of little or no utility or consequence, or seemed innocuous or insignificant. Upon further analysis or investigation, however, or when the information obtained through FOIA was combined with other information, the result revealed important conclusions about what the government has been up to. The following articles are only a few examples of the many instances where "derivative use" was made of information obtained through FOIA and was critical in uncovering governmental inefficiency or impropriety:

> **Gilbert M. Gaul, *Inefficient Spending Plagues Medicare; Quality Often Loses Out as 40-Year-Old Program Struggles to Monitor Hospitals, Oversee Payments*, The Washington Post, July 24, 2005, at A1.** As part of a large-scale investigation into the quality and monitoring of Medicare services, the Washington Post obtained records of hospital visits by Medicare patients under the Freedom of

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[3] It should be noted that Consumers' Checkbook posited uses for the requested information that advance the public interest which do not require resort to derivative use information, *e.g.*, tabulating physician's procedure volume as an indicator of quality of service, and monitoring whether Medicare has reimbursed physicians who have submitted a suspiciously large number of procedures. *See* Brief of Appellee at 22 and 26. Nonetheless, the Court should use this opportunity to define the contours of derivative use information in this Circuit for the trial courts.

Information Act. The records, along with further investigatory work, revealed that Medicare officials knew of a number of health care facilities that were out of compliance and that conditions at some facilities put patients in jeopardy. At one Florida hospital that handles many Medicare patients, a high rate of recurring infections in heart patients actually served to benefit the hospital, which is reimbursed equally for new cases and for patients readmitted with complications from medical errors or poor care. Critics of Medicare cite as problems the incentive for health care providers to charge for additional services and to focus on receiving greater payments rather than on patient needs and prevention.[4]

Charles Ornstein, *Report Slams UCI's Kidney Transplant Care*, Los Angeles Times, February 16, 2006. An investigation into the kidney transplant program at UCI Medical Center in Orange County in December 2005 aided by documents released under the Freedom of Information Act found that the hospital failed to ensure that all staff completed required training, and did not institute federally-mandated patient care reviews and oversight, including monitoring the diets of organ donor recipients. UCI hospital shut down its liver transplant program last year, after an investigation by The Times revealed that more than 30 patients had died waiting for organs, although the hospital turned down numerous donors.[5]

Greg Gordon, *On Range, deadly illness went unreported; Mesothelioma strikes years after victims' exposure to asbestos*, Star Tribune Minneapolis, MN, August 21, 2005, at 9B. Because of a loophole in report requirements, the LTV Steel Mining Company did not report a trend of mesothelioma and other debilitating asbestos-related illnesses among workers in its Minnesota taconite mines dating from1980, according to records obtained from the Mine Safety and Health Administration under the Freedom of Information Act. A 1977 agency rule requires companies to report work-related illnesses

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4 http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm

5 http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm

> among active workers, but because mesothelioma usually does not appear for more than 20 years after exposure to asbestos, LTV did not report illnesses and deaths among its retirees, and so no action was taken to improve safety of other workers at the mine. The gross failure of companies to report lung disease cases among mine workers was evident from the documents, after reporters spoke with families of dozens of affected workers in the Iron Range region alone. According to MSHA, the maximum penalty for companies that fail to report an illness is $60.[6]

The effect of such "derivative use" of information obtained through FOIA cannot be overstated. Articles such as these not only have kept the public informed about "what the[] government is up to," but also can be the driving force behind public outrage that leads to governmental action, as the government itself has admitted elsewhere. *See* The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States at 103 (2004) (acknowledging that a democracy's "best oversight mechanism" is "public disclosure" as investigative journalists and watchdog groups "spur[] congressional committees into action."). FOIA was crafted precisely for this reason. *See NLRB*, 437 U.S. at 242 (observing that the "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

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[6] http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm

HHS's argument that the district court erred by considering derivative uses of the information at issue also has no merit because it is contrary to well-established precedent. This Court has recognized the viability of considering derivative uses of information for purposes of the Exemption 6 balancing test when it found that the disclosure of information obtained through FOIA could "provide leads for an investigative reporter seeking to ferret out what government is up to." *Painting and Drywall Work Preservation Fund v. Dep't of Housing and Urban Development*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (internal quotations omitted).

Similarly, the U.S. Court of Appeals for the Eleventh Circuit has recognized in the context of Exemption 6 that, although information itself may not further the purposes of FOIA by informing the public of what the Government is doing, the release of information can serve the public interest "by allowing third persons to investigate further our Government's conduct." *Ray v. U.S. Dep't of Justice*, 852 F. Supp. 1558, 1564 (S.D. Fla. 1994). In fact, in a related matter before the U.S. Supreme Court, *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991), the government had argued that an analysis of the derivative use of information should be excluded from the Exemption 6 balancing test, but the Court declined to adopt any such categorical exclusion. *Id.*

In *Painting Indus. of Haw. Mkt. Recovery Fund v. U. S. Dep't of the Air Force*, 26 F.3d 1479 (9th Cir. 1994), the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") considered derivative uses of information in analyzing the public interest in the release of records subject to a claim of withholding under Exemption 6. The Court declared, "[i]f 'derivative' public benefits are merely those which require some tabulation of data released under FOIA, or perhaps some further research on the part of the requester, we see no reason why the extra effort required of the requester should, in every case, render a proffered public benefit more or less strong." *Id.* at 1485. In *Rosenfeld v. Dep't of Justice*, 57 F.3d 803 (9th Cir. 1995), *cert. dismissed*, 516 U.S. 1103 (1996), the Ninth Circuit reaffirmed the validity of using derivative use information when it found that the public interest would be served by disclosing a list of names of people whom the FBI had investigated so that the list might later be compared to other publicly available information to determine whether and to what extent the FBI investigated individuals for participating in political protests.

In *Detroit Free Press v. DOJ*, 73 F.3d 93 (6th Cir. 1996), the U.S. Court of Appeals for the Sixth Circuit utilized derivative use information in its public interest analysis when it affirmed a district court's order compelling release of mug shot photographs. The Court stated that the mug shot photographs could be

used to subject the government to public oversight. *Id.* at 98. Obviously, this oversight function could only occur by making a derivative use of the photographs, as the photographs in themselves would explain nothing. The Court cited two examples:

> [R]elease of a photograph of a defendant can more clearly reveal the government's glaring error in detaining the wrong person for an offense than can any reprint of only the name of an arrestee. Furthermore, mug shots can startlingly reveal the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot. Had the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug shot of Mr. King released to the media would have alerted the world that the arrestee had been subjected to much more than a routine traffic stop and that the actions and practices of the arresting officers should be scrutinized. *Id.*

Likewise in *City of Chicago v. Dep't of the Treasury*, 287 F.3d 628 (7th Cir. 2002), *rev'd and remanded on other grounds*, 537 U.S. 1229 (2003), the U.S. Court of Appeals for the Seventh Circuit utilized derivative use information in its public interest analysis when affirming a district court's order compelling release of the individual names and addresses of all firearm purchasers, manufacturers, dealers and importers in two databases kept by the Bureau of Alcohol, Tobacco and Firearms ("ATF"). The Court found that, although the information concerning private individuals did not, on its face, reveal anything about the agency's performance, disclosure of the information would facilitate studies on national

patterns of gun trafficking, which in turn would inform the public of "ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking, as well as determining whether stricter regulation of firearms is necessary." *Id.* at 637.

Finally, in *Alley v. Dep't of Health and Human Services*, No. 07-0096 (N.D. Ala. May 8, 2008), a case very similar to the case at bar, the U.S. District Court for the Northern District of Alabama was called upon to review HHS's withholdings under Exemption 6 of Medicare provider-identifying information.[7] In addition to raw data on the type and number of procedures performed, the requestor in *Alley* also sought the name, address, and city location of providers.[8] The Court found

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[7] In *Alley*, HHS advanced the same arguments that it advances here, including that an injunction issued by the U.S. District Court for the Middle District of Florida prohibits it from disclosing the requested information and that release of the information would constitute a clearly unwarranted invasion of privacy as releasing Medicare provider-identifying information along with information concerning procedures performed could be combined with publicly available fee schedules to determine individual provider's Medicare income. The Court in *Alley* disposed of these arguments easily and ordered the release of the requested information. A copy of the Court's ruling in *Alley* is included in the Addendum, for the Court's convenience.

[8] In this case, Consumers' Checkbook does not go so far. Consumers' Checkbook does not request the name and address of the provider, but only the provider's physician-identifying number, which will allow Consumers' Checkbook to later identify the provider using other publicly available information. It is also important to note that the court in *Alley* inadvertently stated that Consumers' Checkbook requested annual Medicare reimbursement totals for

that disclosure of this information would serve FOIA's basic purpose of shedding light on government conduct. Specifically, the Court found that several derivative uses of the information would provide the public with information about what their government was up to, including "any analysis of how the government is spending Medicare dollars and whether Medicare dollars are being funneled toward physicians with high operation success rates and low patient recovery periods who use their Medicare dollars efficiently or, on the other hand, toward doctors who have either appalling records or simply inefficient ones." *Alley*, No. 07-0096, slip op. at 22 (N.D. Ala. May 8 2008). The Court weighed this "substantial public interest" against the "very limited privacy interest" of the mere possibility of someone discovering the amount an individual provider is reimbursed by Medicare annually and found "that the information withheld does not constitute a clearly unwarranted invasion of privacy." *Id.* at 29.[9]

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each provider (as opposed to raw Medicare claims data). *Alley*, No. 07-0096, slip op. at 29 (N.D. Ala. May 8 2008). In fact, Consumers' Checkbook requested 29 raw Medicare data elements, none of which include any monetary amounts. Brief of Appellee at 36-37.

[9] Other examples of courts relying on derivative uses of information when performing the balancing test required under Exemption 6 include the following: *Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725 (D. Md. 2001) (names and addresses of individuals who received property seized under federal law could enable the public to assess the government's exercise of its power to seize and dispose of property); and *Oregon Natural Desert Ass'n v.*

In sum, HHS's argument that derivative use information is disfavored by the courts cannot be sustained, as a substantial number of courts have recognized, if not utilized, derivative use information in performing the Exemption 6 balancing test.

Finally, it is disingenuous for HHS to argue that derivative use information should not be considered on the public interest side of the scale because its entire argument that releasing the requested information will cause a clearly unwarranted invasion of privacy hinges on the derivative use of the requested information on the privacy interest side of the scale. Indeed, HHS has placed a great deal of weight on speculative scenarios when evaluating the providers' alleged privacy interests. It is not the release of provider information itself that HHS purports to protect, but the combination of this information together with other, publicly available information that, according to HHS, might possibly reveal information about individual providers' annual Medicare reimbursement income.

As a subset of its derivative use argument, HHS also asserts that the district court improperly took into account the particular needs of Consumers' Checkbook for the requested information. Appellants' Brief at 24. HHS misapprehends the

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Dep't of the Interior, 24 F. Supp. 2d 1088 (D. Or. 1998). These and a number of similar, unreported cases are cited on pages 8 and 9 of the *Department of Justice Guide to the Freedom of Information Act* (2004).

process of identifying whether the information requested will inform the public about what the government is up to. The Supreme Court has explained 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." *Favish*, 541 U.S. at 172. "When disclosure touches upon certain areas defined in the exemptions, however, the statute recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it. . . . To effect this balance and to give practical meaning to the exemption, the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable." *Id.* Instead, the requester must indicate how disclosing the withheld information "would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *FLRA*, 510 U.S. at 495 (quotation marks and emphasis omitted).

In other words, the only way to determine whether requested information will inform the public about what the government is up to is through an analysis of the potential uses of the information. This analysis must be information-specific. It need not depend upon the identity of the requester or the requester's motivation

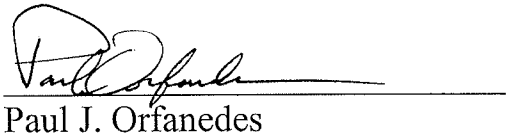
in seeking the information, but it must focus on possible uses. Below, Consumers' Checkbook posited possible uses for the information that clearly would advance the public interest. The District Court properly analyzed those uses in light of the public interest and came to the proper conclusion that disclosure of the requested information serves the public interest. Not only should this finding not be disturbed, but the Court should confirm that the District Court properly considered the "derivative uses" that Consumers' Checkbook intends to make of the information at issue in analyzing the public interest in its disclosure.

CONCLUSION

For the foregoing reasons, the ruling of the District Court should be affirmed.

Dated: June 17, 2008

Respectfully Submitted,



Paul J. Orfanedes
Dale L. Wilcox
JUDICIAL WATCH, INC.
501 School Street, SW, Suite 500
Washington, DC 20024
(202) 646-5172

Counsel for Amicus Curiae

ADDENDUM

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FILED
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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

JENNIFER D. ALLEY and REAL TIME MEDICAL DATA, LLC	]	
Plaintiffs,	]	
v.	]	**CV-07-BE-0096-E**
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES.,	]	
Defendant	]	

MEMORANDUM OPINION

This matter is before the court on "Defendant's Motion for Summary Judgment" (doc. 30) and Plaintiffs' "Motion for Summary Judgment" (doc. 35). For the reasons stated in this opinion, the court will GRANT in part and DENY in part Plaintiffs' Motion for Summary Judgment, and will GRANT in part and DENY in part Defendant's Motion for Summary Judgment.

FACTUAL BACKGROUND

The following facts are undisputed, except where the court designates otherwise.

This case involves a disagreement over a Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), request. The Plaintiffs[1] in this case are Real Time Medical Data, L.L.C. ("Real

[1] The original complaint included only one Plaintiff, Jennifer Alley, but after HHS filed an answer, her complaint was amended to add Plaintiff Real Time. Although HHS's memorandum brief objects that the complaint was amended without leave of court or the permission of HHS, because HHS has filed no *motion* objecting to the

Time")[2] and its owner/agent, Jennifer Alley. Plaintiffs are in the business of providing Medicare claims data to hospital and other healthcare organization clients. Defendant, the United States Department of Health and Human Services ("HHS")[3], has regularly provided Medicare outpatient data regarding Alabama Medicare providers to Plaintiffs beginning in September of 2001.

February 6, 2003 FOIA Request

On February 6, 2003, Plaintiffs submitted a FOIA request that HHS provide them with "data on Medicare claims paid on any inpatient or outpatient procedure performed (all CPT's) in the states of Georgia, Tennessee, Mississippi and Florida between January 1, 2002 and December 31, 2002." (doc. 37, Ex. 6). HHS initially denied this request on June 2, 2003 because it claimed that creating a program to provide the data "would involve a significant amount of programming time [that would not fall within its] customary two-hour threshold," and it further stated that FOIA does not require federal agencies "to create records in response to FOIA requests." (doc. 37, Ex. 7). On June 17, 2003, Plaintiffs appealed that denial to HHS's Deputy Administrator, as part of the administrative process.

On June 10, 2003, eight days after the denial of its request for Medicare data *in the four states surrounding Alabama*, Plaintiffs submitted a request for Medicare data regarding *Alabama*

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amended complaint during the ten months since its filing, the court will accept the amended complaint. For simplicity's sake, the court will refer to Alley and/or Real Time as Plaintiffs in the plural even though some of the correspondence may refer to only one of the Plaintiffs and only one Plaintiff technically existed in this matter before May 25, 2007.

[2] Real Time was known as "Healthcare Strategic Resources L.L.C." until February of 2004. To avoid confusion, the court will refer to the entity as "Real Time" before and after February of 2004.

[3] For simplicity's sake, the court has not distinguished between HHS and the related entities such as Centers of Medicare and Medicaid or Cahaba Government Benefit Administrators, but refers collectively to those entities as "HHS" in this opinion.

outpatient services; HHS had already been providing Plaintiffs with such Medicare data in Alabama for inpatient services. Subsequently, HHS provided the data requested for Alabama outpatient services and continued to provide such Medicare data regarding Medicare inpatient and outpatient services in Alabama until February of 2007. Plaintiffs claim that the inpatient and outpatient data requested in February of 2003 regarding the states surrounding Alabama – which HHS initially refused to provide – was identical to the data requested and provided for inpatient and outpatient services in Alabama.

On January 11, 2007, Plaintiffs filed the instant lawsuit against HHS, requesting preliminary and permanent injunctive relief regarding Plaintiffs' FOIA request for the 2002 Medicare data in Florida, Georgia, Mississippi, and Tennessee. On May 14, 2007, HHS reversed its denial of that request, issuing a disclosure decision that the following data *would* be released:

- all of the requested Part A *outpatient* data;
- the requested Part A *inpatient* data, with the exception of patient control numbers; and
- the requested Part B *outpatient* data, with the exception of "certain data elements" to be withheld under FOIA's Exemption 6, as explained in a separate communication.

(doc. 32, Ex. 3). Exemption 6 to the FOIA allows the government to withhold "personnel and medical files and *similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy*." 5 U.S.C. § 552(b)(6) (emphasis added).

On June 12, 2007, HHS issued to Plaintiffs a supplemental disclosure decision for the Part B outpatient data detailing the data to be withheld under Exemption 6 and the decision of *Fla. Med. Ass'n, Inc. v. Dep't of Health, Ed., & Welfare,* 479 F. Supp. 1291 (M.D. Fla. 1979). The data elements withheld from the requested Part B outpatient data from Georgia, Tennessee,

and Mississippi were as follows:

- provider name, provider address and provider city of individual physicians;
- provider name, provider address and provider city when the provider group is a practice that consists of only one or two individual physician members (i.e., small group practices that can be considered closely held corporations); and
- provider zip codes for individual physicians and small group practices where less than 5 providers are located.

(doc. 32, Ex. 4). The data elements to be withheld from the requested Part B outpatient data from Florida were slightly different:

- provider name, provider address and provider city of individual physicians and all group practices; and
- provider zip codes where less than 5 individual providers are located in the zip code.

(doc. 32., Ex. 4).

In its decision, HHS explained that small group practices have privacy interests worthy of protection under Exemption 6, and that specific zip code data was being withheld to prevent identification of individual providers in small communities. It further advised Plaintiffs that if they agreed to pay the costs to produce the data requested, production of the information would take up to sixty days from the communication of the agreement to pay. HHS subsequently released all of the data requested on February 6, 2003 except the data elements that it designated to be withheld in the disclosure decisions of May and June of 2007.

Plaintiffs appealed the decision to withhold the specified data elements to HHS's Deputy Administrator[4] and on August 10, 2007, the agency responded with a final decision upholding the

[4]Although Plaintiffs mailed their "appeal" to the Director of FIG, not to the Deputy Administrator, Centers for Medicare & Medicaid Services, as provided in the administrative appeal process, the Deputy Administrator granted their letter appeal status.

June 12, 2007 decision but including the correction of a typographical error.

April 13, 2007 FOIA Requests for Alabama Data

On April 13, 2007, subsequent to the filing of the instant suit, Plaintiffs submitted two FOIA requests to one of HHS's carriers: one seeking Alabama Medicare data for inpatient and outpatient services performed in February of 2007, and the other seeking the same type of data for March of 2007. In early May of 2007, Plaintiffs inquired about the pending request for Alabama data, and HHS advised them that it would not be releasing the Alabama data and that a denial letter would follow. On May 25, 2007, Plaintiffs filed an "Amended the Complaint" in the instant case, asking the court to require HHS to provide the requested March 2007 Alabama Medicare data (but not the February 2007 Alabama Medicare data that was also requested), in addition to the 2002 Medicare data from the states surrounding Alabama. On June 1, 2007, Plaintiffs filed a Motion for Preliminary Injunction relating to the requested Alabama Medicare data, which this court subsequently denied. On June 4, 2007, Plaintiffs submitted to one of HHS's carriers a FOIA request for Alabama Medicare data for May of 2007.

On June 15, 2007, HHS issued a disclosure decision regarding the April and June FOIA requests. The decision provided for the release of the requested Part A data in full and for the release of the requested Part B data with the following exceptions:

- provider name, provider address and provider city of individual physicians;
- provider name, provider address and provider city for group practices consisting of only one or two physicians (i.e., small group practices that can be considered closely held corporations); and
- provider zip codes for individual physicians and small group practices where less than 5 providers are located in the zip code.

(Doc. 32, Ex. 7). The asserted legal basis for the withholding was the same as the basis stated in

HHS's June 12, 2007 disclosure decision regarding the states surrounding Alabama. However, as these new requests did not pose the same retrieval and segregation issues as the 2003 request, the decision did not discuss anticipated variances. With respect to the April and June 2007 FOIA requests, HHS released through Cahaba the requested Part A data in full and the requested Part B data except for the specified withheld data elements.

The June 2007 disclosure decision specifically advised Plaintiffs of their right to appeal the decision and advised them that their "appeal should be mailed within 30 days of the date of this letter to: The Deputy Administrator, Centers for Medicare & Medicaid Services . . . ." (doc. 32, Ex. 7). Plaintiffs did not submit an appeal of the June 15, 2007 decision within the thirty day period or at any time thereafter. Plaintiffs have not subsequently amended their complaint to include their February or May of 2007 requests for Alabama Medicare data.

On June 22, 2007, HHS filed an "Answer to Amended Complaint," that included language objecting to the Amended Complaint, but HHS has not filed any motion based on those objections. On November 16, 2007, HHS filed a Motion for Summary Judgment, requesting that this court dismiss all claims in this lawsuit. Plaintiffs subsequently filed a Cross-Motion for Summary Judgment, asking the court to find that HHS improperly withheld the data requested in violation of the FOIA and to further order HHS to release the requested information to Plaintiffs.

STANDARD OF REVIEW

The Eleventh Circuit Court of Appeals has noted that once documents at issue are properly identified, FOIA cases are properly resolved on motions for summary judgment. *See Miccosukee Tribe of Indians of Fla.*, 516 F.3d 1235, 1243 (11th Cir. 2008); *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993). Summary judgment is appropriate in a FOIA action when

"viewing the facts in the light most favorable to the non-moving party, no genuine issue of material fact remains." *Burka v. Dep't of Health & Human Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996); *see* Fed. R. Civ. P. 56(c).

The court shall determine *de novo* the issue of whether the federal agency's nondisclosure was proper. *See* 5 U.S.C. § 552 (a)(4)(B). The burden rests on the government agency seeking to withhold information to prove that the information is exempt from disclosure under at least one FOIA Exemption. *See U.S. Dep't of State v.* Ray, 502 U.S. 164, 172 (1991); *News Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1191 (11th Cir. 2007); *see also Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479 (11th Cir. 1992), *overruled on other grounds by U.S. Dep't of Justice v. Landano,* 508 U.S. 165 (1993). To sustain its burden of justifying the withholding of data or records under FOIA, the government must submit "affidavits or declarations that describe the withheld material with reasonable specificity and explain why the records fall within the claimed FOIA exemptions." *Times Publ'g Co. v. U.S. Dep't of Commerce*, 104 F. Supp. 2d 1361, 1363 (M.D. Fla. 2000), *rev'd and remanded on other grounds*, 236 F.3d 1286 (11th Cir. 2001); *see also Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1492 (D.C. Cir. 1984).

When the pleadings and the submitted affidavits and declarations demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, the court must grant the motion for summary judgment. *See Alyeska Pipeline Serv. Co. v. U.S.E.P.A.*, 856 F.2d 309,313-14 (D.C. Cir. 1988). However, the mere filing of cross-motions for summary judgment does not preclude the existence of genuine issues of material fact. *See Slay v. State of Alabama*, 636 F.2d. 1045, 1047 (11th Cir. 1981). If the pleadings and submissions show that a federal agency improperly withheld information from a requesting party,

FOIA gives the federal district court jurisdiction to enjoin that "agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B); *see Kissinger v. Reporters Comm. for Freedom of the* Press, 445 U.S. 136, 139 (1980).

DISCUSSION

The FOIA is "a broad disclosure statute which evidences a strong public policy in favor of public access to information in the possession of federal agencies." *News Press*, 489 F.3d at 1196. "[T]he Act is broadly conceived, and disclosure, not secrecy, is the dominant objective of the Act." *Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 53 (D.C. Cir. 2006) (citations omitted). The FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Envtl. Prot. Agency v. Mink*, 410 U.S. 78, 80 (1973) (statement quoted not questioned but case superseded by statute/rule as stated in *Zweibon v. Mitchell*, 516 F.2d 594, 642 (D.C. Cir. 1975)). "In enacting the FOIA . . ., Congress sought to open agency action to the light of public scrutiny. Congress did so by requiring agencies to adhere to 'a general philosophy of full agency disclosure.'" *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting S. Rep. No. 89-813, 89th Cong., 2nd Sess. 3) (other quotation marks and citations omitted). Accordingly, the FOIA *requires* agencies of the federal government to release records to the public upon request, *unless* one of the nine statutory exemptions applies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). When a requester challenges a federal agency's denial of a FOIA request, "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . [have not been]

improperly withheld." *Tax Analysts*, 492 U.S. at 142 n. 3.

In their amended complaint, Plaintiffs allege – and HHS does not dispute – that HHS continues to withhold[5] the following data that Plaintiffs requested under FOIA:

2002 Medicare Part B outpatient data in Florida, Georgia, Mississippi

- provider name, provider address and provider city of individual physicians;
- provider name, provider address and provider city when the provider group is a practice that consists of only one or two individual physician members (i.e., small group practices that can be considered closely held corporations); and
- provider zip codes for individual physicians and small group practices where less than 5 providers are located in the zip code.

2002 Medicare Part B outpatient data in Florida

- provider name, provider address and provider city of individual physicians and all group practices; and
- provider zip codes where less than 5 individual providers are located.

March 2007 Medicare Part B outpatient data in Alabama

- provider name, provider address and provider city of individual physicians;
- provider name, provider address and provider city for group practices consisting of only one or two physicians (i.e., small group practices that can be considered closely held corporations); and
- provider zip codes for individual physicians and small group practices where less than 5 providers are located in the zip code.

The court must determine whether HHS has met its burden of justifying the nondisclosure of this data.

A. 2002 Medicare Part B Outpatient Data in Florida, Georgia, Mississippi, and Tennessee

The first set of records that Plaintiffs requested was the 2002 Medicare data for the states of Florida, Georgia, Mississippi, and Tennessee. Although the data withheld from the Florida request is slightly different, that difference is not material to this analysis and the court will discuss the claim involving data for all four states at the same time.

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[5]Although HHS also withheld patient control numbers from Part A inpatient data, Plaintiffs' amended complaint does not contest that nondisclosure.

1. "Mootness" of Claim Involving Released Data

Although HHS originally denied Plaintiffs' request of February 6, 2003, it has since reversed its decision and has provided for the release of all data requested with the specified data exceptions previously and subsequently discussed. Plaintiffs admit that – after they filed this FOIA suit and almost four years after the initial request – they have finally received the 2002 records minus the specified data exceptions. This reversal of position would ordinarily moot any claims for the data released. *See Brown v. U.S. Dep't of Justice*, 169 F. App'x 537, 540 (11th Cir. 2006) (*per curiam*) (citing *Lovell v. Alderete*, 630 F.2d 428, 430-31 (5th Cir. 1980) (holding that the FOIA issue was moot when plaintiff received documents sought, even though the agency delivered them late)). "A declaration that an agency's initial refusal to disclose requested information was unlawful, after the agency made that information available, would constitute an advisory opinion in contravention of Article III of the Constitution." *Payne Enter. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988). If, however, Plaintiffs are able to demonstrate that HHS operates under an internal "policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA," then the mootness doctrine would not invalidate their claim; they could assert that the agency policy represents a "continuing injury" that will prevent their access to information in the future. *See id.*

The court has examined Plaintiffs' amended complaint and submissions and sees no allegations or facts that would support an argument that HHS has established a policy of delay whereby records are routinely withheld at the initial processing level, but consistently released after an administrative appeal. In contrast, Plaintiffs admit that HHS *routinely granted* their other requests at the initial processing level between September 9, 2001 and April 13, 2007.

Plaintiffs complain, however, that the initial denial letter in June of 2003 referred to an internal "policy or practice" that violates the FOIA. In that letter, HHS explained that to respond to Plaintiffs' request, it would have to create a new computer program that would greatly exceed "our customary two-hour threshold." (doc 37, Ex. 7). Plaintiffs argue that any practice of denying requests that generate more than two-hours' response time is improper under the FOIA; the FOIA does not contain an exception that allows a federal agency to withhold available information merely because compiling the data would require more than two hours' work. *See Army Times Publ'g Co. v. Dep't of Army*, 684 F. Supp. 720, 723 (D. D.C. 1988) (explaining "administrative inconvenience and burden are not criteria by which Congress allowed FOIA requests to be judged"); *Ferguson v. Kelly*, 455 F. Supp. 324, 326 (D.C. Ill. 1978) (finding that an agency's claim that a "response to a FOIA request may be time-consuming or burdensome is not a valid defense"). In fact, Congress has specifically considered whether to amend the FOIA to allow for the discretionary denial of requests that agencies deem to be unusually difficult or expensive and has declined to do so, choosing instead to enact measures that require requesters to pay a fee if fulfilling a request will be especially costly and to give agencies extra time for compliance with particularly challenging requests. *See* 5 U.S.C. §§ 552(a)(4)(A) & 552(a)(6)(B).

If the evidence does in fact demonstrate that HHS is following an "impermissible practice" of denying any claim that requires more than two hours of response time, then Plaintiffs' claim based on withholding the data may be moot, but their challenge to the *policy* remains viable. The phrase "customary two-hour threshold" in the initial denial letter troubles the court because that language supports the allegation that this wrongful application of the FOIA is a custom as opposed to "isolated mistakes." *See O'Neill v. U.S. Dep't of Justice*, 2007 WL

983143, at *7 (E.D. Wis. March 26, 2007) (quoting *Payne,* 837 F.3d at 491). In addition, the denial letter's discussion of its "creation of a new record" excuse reveals a misapplication of that excuse in a computer programming situation. *See Schladetsch v. U.S. Dep't of Hous. & Urban Dev.*, 2000 WL 33372125, at *3 (D. D.C. 2000) (finding that creating "programming necessary to instruct the computer to conduct the search does not involve the creation of a record").

The May 14, 2007 letter reversing the original decision does not advise that the previous decision misstated HHS policies or that those policies had been changed, nor does it characterize the old decision as an isolated mistake. In fact, it provides no explanation for changing the decision but does provide reasons that are completely unrelated to the old ones for continuing to withhold certain data elements. Accordingly, the court has no way of knowing why the reversal occurred and whether the policies and practices referenced in the original denial letter are still in use.

Despite Plaintiffs' assertions that HHS has a policy of unreasonably denying FOIA requests that take over two hours to process and/or that require it to create computer programming, the government essentially ignores those assertions, insisting only that any claim related to the released data is moot. Although Plaintiffs' allegations may ultimately prove to be unfounded, the court cannot – on the record before it – conclude that HHS does not have a policy that violates the FOIA. Plaintiffs are entitled to conduct discovery to flesh out this claim. Therefore, the court finds that although the request for the data provided is moot, the challenge to the policy under which that data was originally withheld is not. However, a genuine issue of material fact remains regarding this claim and the court will DENY both parties' motions for summary judgment on this claim at this point and will grant Plaintiffs leave to conduct limited

discovery on this issue should they wish to pursue it.

2. Injunction

The court turns next to Plaintiffs' claims regarding the data from Florida, Georgia, Tennessee and Mississippi that has not yet been released. HHS asserts that it is bound by the decision in *Florida Med. Ass'n v. Dep't of Health, Ed., & Welfare*, 479 F. Supp. 1291 (M.D. Fla. 1979) ("*FMA*") and accompanying injunction that allegedly prohibits HHS from releasing the withheld data.

If the *FMA* injunction does indeed apply to the withheld data, then this court has no jurisdiction under FOIA to order disclosure. Federal courts have jurisdiction over FOIA requests only if the agency has "(1) *improperly* (2) withheld (3) agency records." *See GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 384 (1980) (emphasis added); *see also* 5 U.S.C. § 552(a)(4)(B). Because an agency's withholding of data in lawful obedience to a court injunction could not be characterized as "improper," another court may not order disclosure of the data enjoined. *See GTE Sylvania, Inc.*, 445 U.S. at 387. Persons and agencies subject to the injunction must obey that decree until it is modified or reversed, even if they have proper grounds to object to it. *Id.* at 386; *see generally Citizens Concerned About Our Children v. School Bd.*, 193 F.3d 1285, 1292 (11th Cir. 1999) (noting that, in the FOIA context, the law considers an enjoined party to have lost the discretion to contravene a court order, and citing *GTE Sylvania, Inc.*). Furthermore, this court may not modify the scope of a permanent injunction that another court has issued. *See* Fed. R. Civ. P. 60(b).

Therefore, even if this court were to disagree with the reasoning of the federal court issuing the injunction in the *FMA* decision, it could neither modify the injunction nor order the

agency to produce any data *if the injunction applied to that data and forbid its disclosure.* Plaintiffs predictably argue that the *FMA* injunction does not apply to their request. Accordingly, this court will examine the *FMA* decision and determine whether it enjoins HHS from releasing the data in the instant case.

In the *FMA* decision, the federal court in the Middle District of Florida issued a permanent injunction prohibiting the Secretary of Health, Education and Welfare ("HEW"),[6] the predecessor to HHS, from publishing an annual list of all physicians and healthcare providers, their addresses, and the net amount of Medicare reimbursements paid to each. 479 F. Supp. at 1297. HEW had begun voluntarily publishing this list to the general public, and medical associations petitioned for an injunction to stop this disclosure, claiming that the information fell under Exemption 6 to the FOIA and was prohibited by the Privacy Act. The court analyzed the petition under Exemption 6, balancing personal privacy interests against public interest in disclosure, and found that the list "was exempt from required disclosure under the FOIA because it would 'constitute a clearly unwarranted invasion of personal privacy.'" *Id.* at 1311. It further found that the Privacy Act prohibited the "disclosure of annual Medicare reimbursement amounts, in a way that will identify individual Medicare providers and their amounts of reimbursements" without those individuals' prior written consent. *Id.*

In tandem with this decision, the court entered a "permanent injunction on behalf of plaintiffs and the recertified class that they represent;" that class included all physicians licensed

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[6] The HEW was a department of the United States government from 1953 to 1979. In 1979, the government formed a separate department for education and renamed HEW as the Department of Health and Human Services.

to practice in Florida, and all other members of the American Medical Association ("AMA") who are not Florida physicians if they are Medicare providers and would be individually identified in HEW's disclosure list. *Id.* at 1295-6, 1311. The accompanying permanent injunction provides in relevant part as follows:

> 1. Defendants, Department of Health, Education and Welfare . . . are permanently enjoined from disclosing *any list of annual Medicare reimbursement amounts* for any years, *which would personally and individually identify those providers* of services under the Medicare program who are members of the recertified class in this case.
> 2. Any *such disclosure of annual Medicare reimbursement amounts*, for any years, in a *manner that would personally and individually identify the providers* of services under the Medicare program who are members of the recertified class in this case is declared to be contrary to federal law.

(doc. 32, Ex. 1, Attach. A) (emphasis added).

HHS, who has the burden of proving that this injunction compels the withholding of the information requested, argues that the data falls within the scope of the *FMA* injunction because: (1) the class enjoined includes Florida physicians as well as physicians from Georgia, Mississippi, and Tennessee who are AMA members and are Medicare providers; and (2) the data requested can be combined with the public Physician Fee Schedule to determine the annual reimbursement amount for identified individual providers.

HHS has already produced to Plaintiffs the Medicare data without the corresponding names, addresses, cities, etc. of certain providers. HHS acknowledges that the data requested does not correlate exactly to the HEW list in *FMA*; the HEW list included already calculated annual reimbursement totals for each individual provider, while the request at bar asks for raw data. HHS argues that this difference represents a distinction in form but not in substance because the requested information does "personally and individually identify those providers"

and further, provides the tools needed to calculate the net Medicare reimbursement amounts for them. Releasing that data, they assert, would nevertheless "lead to the disclosure of annual Medicare reimbursement amounts for individual, identified providers" (doc. 32, Ex. 1 ¶5) and, thus, run afoul of the injunction.

In support of that argument, HHS offers the affidavit of Spike Duzor who provides a rather tortuous explanation of how "easily" the raw data can be transformed into calculated reimbursement totals. The affiant's breezy testimony – that a CMS analyst could combine raw data, internet access, Medicare codes, and a calculator, and in a mere "*twenty minutes*," calculate a physician's reimbursement amount for a *single procedure* – does not convince the court that providing such raw data is tantamount to providing the "annual net Medicare reimbursement amounts" tied to individually-identified providers as prohibited by the *FMA* injunction.

In addition, the court must give the words of the injunction their plain meaning and resist any urge to expand the stated scope of the injunction; injunctive relief must be limited in scope to afford only the relief that is necessary to protect the interest of the parties in the case. *See Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003) (citing *Gibson v. Firestone,* 741 F.2d 1268, 1273 (11th Cir.1984)) (constitutional violation context); *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir.1984) ("Injunctive relief should be narrowly tailored to fit the specific legal violations adjudged."); *Consolidation Coal Co. v. Disabled Miners of So. W.Va.,* 442 F.2d 1261, 1267 (4th Cir.1971) (An injunction "should be tailored to restrain no more than what is reasonably required to accomplish its ends"). The importance of honoring the narrow scope of an injunction is particularly important when, as here, that injunction is a permanent one enjoining a federal agency with nationwide effect. HHS has

not proven to this court that the *FMA* injunction covers the data requested in the instant case, and this court will not broadly construe the language of the injunction to expand its scope.

A federal district court sitting in the District of Columbia faced a similar issue in *Consumers' Checkbook* v. *U.S. Dep't of Health & Human Svcs.*, 502 F. Supp. 2d 79 (D. D.C. 2007). Plaintiffs in that case requested disclosure from HHS of all 2004 Medicare claims submitted by physicians in four states and Washington, D.C. HHS originally denied the request but, after plaintiff filed suit, it revised its ruling and agreed to produce responsive documents. Subsequently, HHS changed course again and invoked Exemption 6 to withhold the physician-identifying information in the records that plaintiff requested. Although HHS's original denial of plaintiff's request apparently did not refer to the *FMA* injunction, HHS argued to the court in that case – as it does in the instant case – that the *FMA* injunction barred the proposed disclosure. The court rejected this argument and relegated its explanation to a footnote, merely stating: "As plaintiff seeks different records, however, the injunction is immaterial to this Court's analysis."

performed, this information was raw data. Anyone wishing to determine the amount of annual Medicare reimbursements paid to physicians would have to take the data provided, combine that data with other information available to the public, and perform a number of calculations. In short, the raw Medicare data requested was dissimilar in nature to the already-calculated annual Medicare reimbursement totals of the *FMA* decision and injunction. Accordingly, the court finds that the *FMA* injunction does not apply to the data requested in the instant case and did not represent a proper basis for HHS's withholding the data. Because HHS improperly withheld agency records, this court has jurisdiction to order disclosure of the withheld data. *See GTE Sylvania, Inc.*, 445 U.S. at 384 (1980).

3. Exemption 6

Although the *FMA* injunction does not apply to the data withheld, HHS may nevertheless satisfy its burden by proving that the information falls under at least one FOIA Exemption. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52 (1989). Yet, because the FOIA emphasizes the need for "fullest responsible disclosure," the Supreme Court has "repeatedly stated that the policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly." *Dep't of the Air Force v. Rose*, 425 U.S. 325, 362, 366 (1976) (quotation marks and citations omitted).

HHS asserts that it properly withheld the data under Exemption 6. Exemption 6 provides that FOIA's mandatory disclosure requirement does not apply to "personnel and medical files and *similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy*." 5 U.S.C. § 552(b)(6) (emphasis added). To determine whether HHS may properly invoke that exemption, the court must apply a two-step analysis. *See News Press*, 489

F.3d at 1196.

a. Step One: "Similar Files"

The first step in this analysis is determining whether the requested information qualifies as "personnel or medical files or similar files." The categories of data in the instant case are not personnel files and, although they relate to medical information, they are not medical files. Consequently, if they qualify under Exemption 6, they will do so – like the vast majority of the cases applying that exemption – under the term "similar files."

The United States Supreme Court has explained that the phrase "similar files" has a broad, rather than a narrow, meaning. *Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982); *see also New York Times v. Nat'l Aeronautics & Space*, 852 F.2d 602, 605 (D.C. Cir. 1988). The term usually includes "detailed Government records on an individual which can be identified as applying to that individual." *News-Press*, 489 F.3d at 1196-97. Names and addresses potentially qualify as "'similar files' under Exemption 6." *Id.* at 1199.

Given the term's broad interpretation, the *FMA* decision found that Medicare reimbursement amounts fell within the meaning of "similar files." It explained:

> The legislative history indicates that the exemption was intended by Congress to apply to information within the Veterans Administration, the HEW department, the Selective Service Administrative, and the United States Bureau of Prisons. . . .The common denominator and pivotal characteristic of all information to which the term "similar files applies Prima facie is the personal quality and nature of that information. Hence, information identifiable as applying to some particular individual, and disclosure of which would cause some special embarrassment to that individual, is presumptively included within the term "similar files" of Exemption 6. Personal or "personalized" financial information may well qualify under the "similar files" rubric of exemption six, at least insofar as it contains "embarrassing disclosures" or involves "sufficiently intimate details.". . . .There can be no doubt that the list of annual reimbursements to Medicare providers which the HEW Secretary proposes to disclose is information included within the term "similar files" of Exemption 6 of the FOIA. Such information

is obviously stored with, and compiled by the HEW department.

FMA, 479 F. Supp. at 1303-4 (citations omitted).

Because the term "similar files" is broadly construed and because the data in the instant case is compiled by HHS and relates for the most part to individual physicians, including names and addresses as well as personal financial information, the court finds that it falls within the term "similar files" of Exemption 6. This conclusion, however, is not determinative.

b. Step Two: Balancing Privacy Interest against Public Interest in Disclosure

The second step in the Exemption 6 analysis requires an analysis balancing the privacy interests of the individual against the public interest in disclosure; courts must determine whether a defendant has proved that disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This burden of proof "is an onerous one." *News-Press*, 489 F.3d at 1198. Exemption 6's "clearly unwarranted" language weighs the balancing scales "in favor of disclosure." *Ripskis v. Dep't of House. & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). "Under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere under the Act." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (quoting *Washington Post*, 690 F.2d at 261).

In the instant case, HHS eventually produced the Medicare information requested except for certain provider-identifying data, such as the names and addresses of individual physicians or small group practices. (doc. 37, Ex. 12). This court must identify the public and privacy interests involved and carefully weigh them.

(1) Public Interest in Disclosure

To begin the Exemption 6 balancing process, the court focuses first on the public interest

in disclosing the requested information. As a general rule, citizens requesting government documents under FOIA do not need to explain why they seek the information or how they intend to use it. *See Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 172 (2004). Yet, once exemptions to FOIA are invoked, the purpose of the use becomes important so that the court is able to balance the competing interests most effectively. *Id.* The requester must then answer the key question of how disclosure of the requested information "would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." *News-Press*, 489 F.3d at 1191 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994)). In other words, FOIA's basic purpose is to inform the public about "what their government is up to. . . . That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773-4 (1989). The court must, therefore, not only examine the public interest asserted but also determine whether the release of the withheld data informs the members of the public about the operations or activities of their government.

In the case at bar, Plaintiffs run a business that purportedly uses Medicare claims data to assist hospitals and other healthcare providers with strategic healthcare planning to best utilize Medicare funds. As part of their business, Plaintiffs requested the disclosure of Medicare data and assert that the information "is not merely helpful, but essential to assess the efficiency of Medicare and determine how the system may improved (sic) both quality of care and costs to taxpayers." (Pls.' Br. 38). Further, Plaintiffs insist that the data would help the hospitals and

Medicare providers to know what services they are missing that the patient population is going elsewhere to receive: "the requested data helps determine what medical equipment is purchased and when Medicare services are provided, and also helps in the hiring and placement of physicians." (Pls.' Br. 27).

HHS does not dispute the benefit to the public of the disclosure of Medicare data and has released the data requested with the exception of individual physician-identifying information – names, addresses, cities and, in some cases, zip codes. The question for the court is not whether general Medicare information informs the members of the public about their government, but rather, whether the withheld provider-identifying information does so.

At the hearing held on April 16, 2008 regarding these motions, the Plaintiffs further clarified the public interest in the provider-identifying information. Their clients and the public-at-large may use that information to evaluate the physicians with whom Medicare contracts. They may determine, for example, which doctors receive Medicare funds and then examine those doctors' operation success rates and patient post-operation recovery periods. This information would aid in any analysis of how the government is spending its Medicare dollars and whether Medicare dollars are being funneled toward physicians with high operation success rates and low patient recovery periods who use their Medicare dollars efficiently or, on the other hand, toward doctors who have either appalling records or simply inefficient ones. When physicians with less than stellar records are identified, Plaintiffs' hospital clients may also choose to consult with the physicians and counsel them about how to improve their services and ultimately charge Medicare less. To perform these analyses, Plaintiffs' clients and the members of the public need not only general Medicare data but also physician-identifying information.

The case of *Consumers' Checkbook v. U.S. Dep't of Health & Human Svcs.*, 502 F. Supp. 2d 79 (D.D.C. 2007), involved similar facts to the instant case. As discussed previously, the plaintiff in that case requested disclosure under FOIA of Medicare claims submitted by physicians in certain states and HHS eventually produced the information requested except for physician-identifying information. *Id.* at 82. The federal court in *Consumers' Checkbook* characterized as "important" the public interest of obtaining data to evaluate Medicare providers. *Id.* at 86. Because the object of the plaintiff's data in *Consumers' Checkbook* was to evaluate Medicare *providers* themselves, the court noted that "the Medicare claim information must include physician-identifying information linked to each Medicare service or procedure." *Id.* at 84.

The *FMA* case also involved similar facts and a comparable public interest "in knowing the amounts of public funds spent in reimbursing Medicare providers annually." 479 F. Supp. 1304. The court found such Medicare data to be "unquestionably one of legitimate and important interest," particularly in light of the "national debate over putative legislative activity involving national health insurance." *Id.* at 1304-5. But while the Medicare data itself was a "serious public interest," the court could not agree that the weight of that interest extended to "unnecessarily identifying disclosures." *Id.* at 1305.

Having examined the public interest side of the balancing scale, the court finds that the facts of this case are similar to those in *Consumer Checkbook* and distinguishable from those in the *FMA* decision; the provider-identifying data is important to the analysis of "what the government is up to." *See Reporters Comm.*, 489 U.S. at 773-4. Therefore, the court further finds that Plaintiffs have identified a substantial public interest under FOIA that extends not only

to the Medicare information already disclosed but also to the provider-identifying information withheld.

(2) Privacy Interest[7]

Having examined the public interest in disclosure of Medicare data, the court next turns to the privacy interests involved. Once the requester has identified a substantial public interest under FOIA in the disclosure of the information, the burden shifts to the agency to justify its withholding. *News Press*, 489 F.3d at 1192. HHS's letter explained that Exemption 6 protected this information "because release of these identifiers along with the requested CPT codes could, in combination with readily available public information, be used to determine annual Medicare reimbursement amounts to individually identified physicians." (Doc. 37, Ex. 12). Consequently, HHS concluded not only that Exemption 6 protected this information but also that the Privacy Act forbid its disclosure without the prior written consent of the physicians. *Id.* With respect to the information withheld that did not relate specifically to individual physicians, the HHS explained:

> Please note that I have protected the identities of small group practices because such practices can be considered closely held corporations, which have privacy interests worthy of protection under Exemption 6. Also note that the specified zip code data is withheld to prevent identification of an individual provider based on zip code.

Id. The court will examine the information withheld according to category.

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[7]The court notes that Plaintiffs argue strenuously that HHS has been providing for years the same information requested but withheld in the instant case, including physician identifiers, without raising Exemption 6 and privacy violations. To the extent that this argument asserts waiver, the court notes that Exemption 6 protects privacy interests that belong to the individual – here the Medicare providers – and not the agency; therefore, the agency cannot waive the individual's privacy interests. *See Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 363 (5th Cir. 2001) (citing *Reporters Comm.*, 489 U.S. at 763-5).

When performing an Exemption 6 analysis, the Supreme Court concluded that privacy "encompass[es] the individual's control of information concerning his or her person." *Reporters Comm.*, 489 U.S. at 763. Privacy interests attach to "intimate details" such as "marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcoholic consumption, family fights, reputation, and so on . . . ." *Rural Hous. Alliance v. Dep't of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974). Yet, privacy interests are not necessarily limited to information that would be embarrassing if revealed, *see Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989); they also attach to information that is restricted to a person or a group and is simply not intended to be available to the public. *See Reporters Comm.*, 489 U.S. at 763-4.

The Eleventh Circuit has noted that names and addresses do not automatically fall within the exemption:

> As a threshold matter, the legislative histories behind the FOIA and the Privacy Act show that Congress did not intend either names or addresses to automatically be withheld, even when they could be linked with other information about these individuals. Between 1973 and 1977, numerous bills were introduced that would have amended the FOIA (or established an independent law) by either prohibiting or limiting the sale or distribution by federal agencies of lists of names and addresses, including names and addresses of individuals registered with, or required to provide information to, an agency. Agencies would have been permitted to release such lists only if specifically authorized to do so by statute or by their statutory function, or if the recipient certified that it would not use the list for commercial or other solicitation. None of these bills survived committee. Moreover, the Privacy Act prohibits federal agencies from *selling or renting* an individual's name and address, but specifically cautions that this provision "shall not be construed to require the withholding of names and addresses otherwise permitted to be made public." 5 U.S.C. § 552(a)(n).
>
> Similarly, the federal courts have held that while names and addresses qualify as potentially protectable "similar files" under Exemption 6, the release of a list of names and other identifying information does not inherently and always constitute a "clearly unwarranted" invasion of personal privacy. Instead, "whether disclosure of a list of

> names is a significant or a de minimis threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue."

News-Press, 489 F.3d at 1198-99 (internal case cites omitted).

In the instant case, HHS would not be producing the providers' names and addresses in isolation; it objects to producing those names and addresses in conjunction with Medicare reimbursement amounts. In other words, producing these provider names and addresses is also producing – at least potentially – their Medicare income. Courts have recognized that a valid privacy interest exists in protecting income amounts and income-related information. *See Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999) (upholding Exemption 6 protection of individual's name and address when matched with personal financial information that would invite solicitation); *Hopkins v. U.S. Dep't of Hous. & Dev.*, 929 F.2d 81, 89 (2nd Cir. 1991) (upholding under Exemption 6 the withholding of identifying information contained in certified payroll records); *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d at 875-80 (upholding the withholding of names and addresses of individuals receiving federal employee retirement benefits); *Diemert & Assoc. v. Fed. Aviation Admin.*, 218 Fed App'x 479 (6th Cir. 2007) (holding that release of employee's income and/or medical information within employee's workers' compensation file was an unwarranted invasion of personal privacy).

Yet, some courts have provided less privacy protection when the financial information withheld relates to business activities, particularly when the business has a governmental or quasi-public function. For example, in *Washington Post v. U.S. Dep't of Agric.*, 943 F. Supp. 31 (D. D.C. 1996), the court found that Exemption 6 did not protect the disclosure of names and addresses of individuals and the amount of farm subsidies that the government provided to them.

Rather, it found that the strong public interest in understanding the government's administration of the subsidy program outweighed the privacy interest in protecting an individual's business interests. *Id.* at 35-37.

Similarly, in *Public Citizen Health Research Group v. Dep't of Health, Ed., & Welfare*, 477 F. Supp. 595 (D.D.C. 1979), *rev'd on other grounds*, 668 F.2d 537 (D.C. Cir. 1981), the federal court found that Exemption 6 did not protect the disclosure of physician profiles of certain Medicare providers and Medicare services studies. It explained:

> Practitioners who contract with the government to provide medical services in exchange for federal payments perform a quasi-public function. The argument that substantial privacy rights attach to such performance loses much of its force when viewed in the context of Congress's abiding concern to deliver cost-efficient public health care and physicians' clear prerogative to avoid government business.

Id. at 604-5.

The two cases that the parties have offered to this court as most closely analogous to the instant case, *Consumers' Checkbook* and *FMA*, unfortunately reach different results and, therefore, provide this court with conflicting guidance. Defendants in both cases invoked Exemption 6 to withhold physician-identifying information in the Medicare records that plaintiffs requested. One court found Exemption 6 did not apply and the other court found that it did.

In *Consumers' Checkbook*, the court found that Exemption 6 *does not protect* the disclosure of all Medicare claims submitted by physicians in five specified states during 2004. The public interest identified in *Consumers' Checkbook* involved the use of data to evaluate the performance of the Medicare program, including the evaluation of individual Medicare providers. Reasoning that the public interest in understanding the functioning of the governmental program outweighed the physicians' privacy interest in their business Medicare

income[8], the court found that disclosure was not "clearly unwarranted." Yet, the court was careful to emphasize that the identity of the Medicare providers was key to the Medicare evaluation; *the data was being used to evaluate Medicare providers themselves and, thus, the link between the task and the identifying information requested was direct and crucial.* Giving the privacy interest only "limited" and "minimal" weight but characterizing the public interest as "important," the court ordered defendant to provide "a complete production of the records requested." *Id.* at 86, 89-90.

In the *FMA* decision, physicians brought an action to enjoin the Secretary of HEW from disclosing "information concerning the annual amounts of reimbursements paid to Medicare providers in a way that would individually identify . . . providers." 479 F. Supp. at 1294-5. Upon weighing the competing interests, the court agreed that the public's right to know how its Medicare money was spent represented a "legitimate and important" interest but questioned whether the provider-identifying information was specifically required to further that interest. The court ruled that disclosing a list of Medicare providers' names, addresses, and annual net Medicare reimbursement amounts did " 'constitute a clearly unwarranted invasion of personal privacy' since in advancing those public interests there is no justifiable reason for exposing the personally identifying details to public view." 479 F. Supp. at 1305 (citations omitted).

The court finds the instant case to be more closely aligned with the *Consumer Checkbook* case. As in that case, the provider-identifying data in the case at bar is not unnecessary to the

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[8] The court emphasized that the annual Medicare reimbursement amount would not reveal to the public the physicians' total income, but merely a portion of it, and further noted that the only portion revealed would relate to compensation from *government* funds. *Id.* at 85. Because the raw data to be released in the instant case implicates less privacy intrusion than *Consumer Checkbook's* annual Medicare reimbursement totals, the balancing analysis in the instant case would weigh more heavily in favor of releasing the data.

public interest, but instead, is helpful to the public's analysis of which providers do or do not make efficient use of Medicare funds. In addition, in both *Consumer Checkbook* and the instant case, the provider data was confined to "the physicians' participation in and compensation from a government program, and thus implicates very *limited* privacy interests." *See Consumer Checkbook*, 502 F. Supp.2d at 86 (emphasis added). Indeed, the data requested in this case – unlike that of *Consumer Checkbook* – is raw data that has not been converted into annual Medicare reimbursement totals for each provider; consequently, the release of provider-identifying information connected with that raw data implicates even less privacy interests than the *Consumer Checkbook* data. This court weighs the substantial public interest in this case against the very limited privacy interest and finds that the information withheld does not constitute a clearly unwarranted invasion of personal privacy. Accordingly, Exemption 6 does not protect the names, addresses, and zip codes withheld, and HHS is obligated under FOIA to disclose them. Further, the court agrees with the reasoning in *Public Citizen* that physicians who contract with the government to provide medical services in exchange for federal payments give up some privacy rights, as they perform a quasi-public function.

This court will GRANT summary judgment in favor of Plaintiffs and against Defendant regarding the withholding of the following data from Plaintiffs' request for 2002 Medicare Part B Outpatient Data in Florida, Georgia, Mississippi, and Tennessee:

- provider name, provider address and provider city of individual physicians;
- provider name, provider address and provider city when the provider group is a practice that consists of only one or two individual physician members (i.e., small group practices that can be considered closely held corporations); and
- provider zip codes for individual physicians and small group practices where less than 5 providers are located in the zip code.

The court will enter by separate order a final injunction directing Defendant to make such agency records available to Plaintiffs and permit the inspection and copying of such records.

B. March 2007 Medicare Part B Outpatient Data in Alabama

Having examined Plaintiffs' claim requesting Medicare Part B data in states surrounding Alabama, the court next turns to their claim for March 2007 Medicare Part B outpatient data in Alabama. HHS asserts that Plaintiffs have not constructively exhausted their administrative remedies regarding this claim and, consequently, that this court has no jurisdiction over it

"Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990); *see Taylor v. Appleton,* 30 F.3d 1365, 1367 (11th Cir. 1994). A plaintiff's failure to exhaust administrative remedies, including agency appeals, means that he has not met the "condition precedent" to filing suit and, consequently, the claim in question is not "ripe" for judicial review. *Taylor*, 30 F.3d. at 1367 n. 3. The FOIA recognizes two different means of exhaustion: actual and constructive. *Taylor*, 30 F.3d at 1367. A plaintiff meets the requirement of actual exhaustion "when the agency denies all or part of a party's document request." *Id.* at 1368. Constructive exhaustion, on the other hand, occurs when the agency fails to meet certain statutory requirements. *Id.*

Although HHS denied part of their claim for Alabama data, Plaintiffs acknowledge that they did not appeal HHS's decision withholding part of the data requested and thus, did not complete the steps required for actual exhaustion. They claim, however, that they constructively exhausted their administrative remedies because of HHS's failure to process their claim within

the requisite time limit.

According to the provisions of the FOIA, constructive exhaustion of administrative remedies occurs if the agency fails to comply with its time limitation provisions. 5 U.S.C. § 552(a)(6)(C). Paragraph (a) states two time limits. The first – which Plaintiffs invoke – concerns the time within which the agency must act upon a FOIA request. It provides that the agency, upon receipt of a FOIA request, shall

> determine within twenty days (excepting Saturdays and Sundays and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.

5 U.S.C. § 552(a)(6)(A)(i).

FOIA also provides that the time limits may be extended in "unusual circumstances" for up to ten working days by written notice to the requester. 5 U.S.C. § (a)(6)(B)(iii). The act defines "unusual circumstances" as:

> I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
>
> (II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or
>
> (III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

5 U.S.C. § 552(a)(6)(B). If the agency does not respond within the statutory time limits, the requester's administrative remedies are constructively exhausted and he may bring suit. *Taylor*, 30 F.3d at 1368.

In the instant case, Plaintiffs submitted the claim for Alabama data on April 13, 2007 and

HHS advised Plaintiffs in early May of its denial. Although the exact date of the denial is unclear, the denial appears to have occurred within the twenty-day statutory time period. The June 15, 2007 denial letter, which provided the reasons for the denial and advised Plaintiffs of their appeal rights, is dated a few days after the expiration of the twenty day period. Thus, HHS did not ignore Plaintiffs' claim and it did communicate the denial within the prescribed time period, but its official response was a few days late. The court notes that Plaintiffs sued on this claim – by amending their previously-filed lawsuit to include the Alabama claims – before the expiration of the twenty day statutory period.

The parties have not pointed this court to case law addressing analogous facts to the case at bar. The court recognizes the importance of the statutory time limits in FOIA, which "promote a timely agency response and contribute to the faster release of the information sought." *Taylor,* 30 F.3d at 1368. The court also acknowledges, however, Congress's intent that the administrative process be pursued to the end. Instead of cutting short the process and interjecting a federal court into the matter before the response is due, the FOIA administrative procedure was set up to provide the agency not only time to respond but also time to correct or re-think any misjudgments or errors. *See id.* at 1369 (citing *Oglesby*, 920 F.2d at 64-65); *see also Dettman v. Dep't of Justice*, 802 F.2d 1472, 1476 n. 8 (D.C. Cir. 1986) (applying exhaustion requirement because "it would be both contrary to 'orderly procedure and good administration' and unfair 'to those who are engaged in the tasks of administration' to decide an issue which the FBI never had a fair opportunity to resolve prior to being ushered into litigation").

In the instant case, Plaintiffs truncated the administrative process when they amended the current lawsuit to include the Alabama claim without waiting for the denial letter and without

proceeding through the normal appeals process. Plaintiffs did not do so because the agency waited so long on this claim that it languished and was constructively denied; indeed, the statutory response time had not even run when they amended their complaint. Under these circumstances, the court finds that Plaintiffs did not constructively exhaust their administrative remedies. Consequently, Plaintiffs' claim regarding the March 2007 Alabama Medicare data is due to be dismissed and the court will GRANT summary judgment on this claim in favor of Defendant and against Plaintiffs.

CONCLUSION

For the reasons stated above, this court will rule as follows:

(1) Request for 2002 Medicare Part B Outpatient Data in Florida, Georgia, Mississippi, and Tennessee: With respect to the data *already released* under this request, the court will DENY BOTH parties' motions for summary judgment on this claim. However, the court will GRANT Plaintiffs leave to conduct limited discovery – if they choose to pursue it – on the following issue: whether Defendant initially denied that request because it had/has an agency policy in place violating FOIA and that policy represents a continuing injury, threatening to prevent Plaintiffs' access to information in the future.

With respect to the data withheld under this request, this court will GRANT summary judgment in favor of Plaintiffs and against Defendant, finding that Defendant improperly withheld the following data:

- provider name, provider address and provider city of individual physicians;
- provider name, provider address and provider city when the provider group is a practice that consists of only one or two individual physician members (i.e., small group practices that can be considered closely held corporations); and
- provider zip codes for individual physicians and small group practices where less than 5

providers are located in the zip code.

The court will ENTER a final injunction directing Defendant to make such agency records available to Plaintiffs and permit the inspection and copying of such records.

(2) Request for March 2007 Medicare Part B Outpatient Data in Alabama: With respect to the data withheld under this request, the court will GRANT summary judgment on this claim in favor of Defendant and against Plaintiffs, because Plaintiffs failed to exhaust their administrative remedies.

Dated this 8th day of May, 2008.

Karon O. Bowdre

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

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As far back as 1999, federal and state regulators began to receive complaints that the heart surgery unit at Palm Beach Gardens Medical Center in Florida was a breeding ground for germs.

Dust and dirt covered some surgical equipment. Trash cans and soiled linens were stored in hallways. IV pumps were spattered with dried blood. One patient's wife said she saw a medical assistant tear surgical tape with his teeth.

State inspectors in 2002 found "massive post operative infections" in the heart unit, requiring patients to undergo more surgery and lengthy hospital stays.

In a four-year period, 106 heart patients at Palm Beach Gardens developed infections after surgery, according to lawsuits and government records. More than two dozen were readmitted with fevers, pneumonia and serious blood infections. The lawsuits included 16 patients who died.

How did Medicare, the federal health insurance program for the elderly, respond?

It paid Palm Beach Gardens more.

Under Medicare's rules, each time a patient comes back for another treatment, a hospital qualifies for an additional payment. In effect, Palm Beach Gardens was paid a bonus for its mistakes.

Medicare's handling of Palm Beach Gardens is an extreme example of a pervasive problem that costs the federal insurance program billions of dollars annually while rewarding doctors, hospitals and health plans for bad medicine. In Medicare's upside-down reimbursement system, hospitals and doctors who order unnecessary tests, provide poor care or

even injure patients often receive higher payments than those who provide efficient, high-quality medicine.

"It's the exact opposite of what you would expect," said Mary Brainerd, chief executive officer of HealthPartners, a nonprofit health plan based in Bloomington, Minn. Her Medicare HMO ranked among the top 10 in the nation last year for quality but was paid thousands of dollars less per patient by Medicare than lower-performing plans.

"The way Medicare is set up," Brainerd said, "it actually punishes you for being good."

As Medicare approaches its 40th anniversary on July 30, much of the debate about the nation's largest health insurance program revolves around whether it will remain solvent for aging baby boomers. Yet another critical question is often overlooked: whether taxpayers and patients get their money's worth from the $300 billion Medicare spends each year -- now about 15 percent of federal spending and projected to grow to nearly a quarter of the budget in a decade.

Along with its sister program, Medicaid -- which provides health coverage for the poor -- Medicare exerts a huge influence on the entire health care system. Hundreds of insurers, large and small, follow its lead. In that sense, the government health program provides a window into the quality shortcomings that plague most of American medicine.

For a year, The Washington Post crisscrossed the country to examine the economics of Medicare and how it monitors the quality of its services -- reviewing thousands of documents and interviewing hundreds of researchers, regulators and patients. The system is highly valued by 42 million elderly and disabled beneficiaries, but it wastes an enormous amount of money on inefficient medicine, the examination found.

Researchers at Dartmouth Medical School, who have been studying Medicare's performance for three decades, estimate that as much as $1 of every $3 is wasted on unnecessary or inappropriate care. Other analysts put the figure as high as 40 percent.

"It is astounding," said Arnold Millstein, an expert on medical quality and a member of an advisory board to Medicare. Increasingly, he added, the waste is driving up the overall cost of health care. "We are medically impoverishing increasing numbers of Americans in part because of our inattention to eliminating waste," he said.

Medicare has difficulty controlling waste because of deficiencies in the way it monitors and enforces quality standards. Its oversight system is fragmented, underfunded and marred by conflicts of interest, records and interviews show. For every $1,000 that it pays to hospitals and doctors, it invests just $1 or $2 to oversee and improve patient care.

"The amount we spend on quality is a pittance," said Kenneth W. Kizer, a physician and president of the National Quality Forum, a nonprofit that works with Medicare officials to develop standards of care.

Medicare has outsourced many enforcement activities to private groups that have overlooked or missed cases in which patients were injured or killed, according to hundreds of inspection reports and interviews with state regulators. In some cases, facilities have gone years without an inspection.

Medicare officials do collect reams of information on quality of care. Yet in many cases the data aren't analyzed or are locked inside incompatible 20-year-old computers.

One result: striking variations in what Medicare pays for care in different states, or even neighboring Zip codes. In 2001, the typical Medicare patient in Los Angeles cost the government $3,152 more than a comparable patient in the District. A patient in Miami cost $3,615 more than one in Baltimore.

Those disparities cannot be explained by differences in local prices or rates of illness, said John E. Wennberg, a Dartmouth physician and an expert on geographical variations in medical care. Rather, higher spending is related to the number of specialists, hospital beds and technology available. "If you have twice as many docs in a community," said Wennberg, "you end up with twice as many office visits."

Yet most high-spending states rank near the bottom in quality of care, Medicare data show. Louisiana ranked 50th in quality yet first in Medicare spending in 2001, the most recent year available. New Hampshire was first in quality but 47th in spending.

Medicare acknowledges that its system rewards bad care. Officials have only recently begun to address the problem.

This year, Medicare began requiring hospitals to report their performance on a handful of measures, such as how many heart attack patients received recommended beta blockers and aspirin. Officials say the reports will pressure hospitals to improve and save money. But officials don't use the data to punish poor performers or to steer patients to the best performers.

"We have to develop systems that address the problem and certainly not pay people for bad care," said Barry M. Straube, acting chief medical officer for the Centers for Medicare and Medicaid Services, the agency that oversees the federal insurance program.

At the same time, he said, Medicare must move cautiously. "You don't want to be too drastic until we know what we're doing," Straube said.

There may be no starker illustration of Medicare's upside-down economics than Palm Beach Gardens Medical Center, a 204-bed hospital on Florida's east coast. The hospital, part of the Tenet Healthcare Corp. chain, boasted one of the busiest cardiac programs in South Florida in the 1990s, performing more than 1,000 open-heart operations annually.

The heart unit was plagued by infections, which came to public view in 2002 as a result of patient lawsuits.

State regulators first received complaints in 1999 but had dismissed them, state records show. In May 2002, under mounting pressure, regulators returned to the hospital for a three-day inspection.

They found that 13 of 24 heart patients whose records they reviewed had "developed serious infections after their surgical procedures, requiring more major, re-constructive surgery." The state cited and later fined the hospital for violating state law.

Florida regulators forwarded their findings to the regional Medicare office in Atlanta. A few months later, in an Oct. 15, 2002, memorandum, an official there warned colleagues that Palm Beach Gardens "continued to be out of compliance" with Medicare requirements and that those conditions posed an "immediate jeopardy to patients' health and safety."

Some patients had to have additional operations or return multiple times to the hospital as a result of infections, according to state and federal records obtained under the Freedom of Information Act.

One patient, George M. Brown, 77, a West Palm Beach real estate broker and former Marine, died after he developed an infection following open-heart surgery, according to his daughter Susan. In all, her father had five operations, she said. The family sued and eventually reached a settlement with Tenet.

"Let's just say this," Susan Brown said before signing a confidentiality agreement that was part of the settlement, "he had a lot more time left."

When reimbursing hospitals, Medicare does not distinguish between new cases and problems that result from medical errors or poor care, officials of the insurance program said. So Palm Beach Gardens was eligible for additional payments each time a heart patient had to be readmitted. Medicare officials said they could not calculate how much more the hospital was paid.

Even though Medicare had no way to reduce its payments to Palm Beach Gardens, it could have removed the

hospital from the program entirely. In October 2002, after the "immediate jeopardy" memo, Medicare officials in Atlanta informed Palm Beach Gardens that they proposed to do just that. Such a move could be fatal for any hospital, cutting off one of its largest sources of funds. For that reason, Medicare rarely expels hospitals, even for dangerous care.

The warning to Palm Beach Gardens proved to be no different. Medicare never cut off the hospital's payments. After the hospital filed a "plan of correction," it was back in Medicare's good graces.

State regulators did fine Palm Beach Gardens -- $323,800 in March 2003. But they quickly reduced it to $95,000. Elizabeth Dudek, Florida's top health regulator, said they did so "to avoid what could be a costly and lengthy appeal."

Hospital officials agreed to the fine without acknowledging any wrongdoing. Tenet, the hospital's owner, said in a statement last week that it "would be inaccurate to conclude" that all of the patients who were readmitted came back because of infections acquired during surgery. The company did not give further details about the cases.

Hospital officials have said their infection rate was about equal to the national average and that some results of the inspections were misleading. "There is no aggregate clinical evidence to show that these infections occurred as a result of care provided at the facility," Tenet said in its statement.

In 2004, Tenet settled more than 100 civil lawsuits for $31 million, again without admitting wrongdoing. After suffering a drop-off in business, Palm Beach Gardens is once again busy. The hospital's Web site touts its heart program as among the nation's best.

One of the losers in Medicare's payment system can be found near Minneapolis. Amid supersize bookstores and upscale coffee shops, doctors and nurses at the suburban Woodbury clinic tend to nearly 23,000 patients belonging to HealthPartners, the highly ranked Medicare HMO.

As a Medicare HMO, HealthPartners receives a flat fee from the federal health program to provide care to each member, unlike traditional Medicare, in which doctors and hospitals are paid each time they provide a service. Medicare bases that HMO fee in part on what it pays for its traditional fee-for-service members in that region.

The result is that HMOs that happen to be in areas where patients use more services and overall Medicare spending is high are paid thousands more annually per member than HMOs in low-cost areas such as Minnesota -- regardless of how the patients fare.

For example, WellCare, a Miami HMO, receives $11,834 to treat each of its Medicare members. HealthPartners: $7,851 -- a difference of $3,983 per patient per year.

Yet HealthPartners outperforms WellCare on 13 out of 14 Medicare quality measures.

More of its patients get flu shots and colorectal exams. Turnover among HealthPartners' doctors is lower. And patients of the Minnesota HMO -- whose average age is 78 -- report being happier with their care.

In 2003, the most recent year for which data were available, HealthPartners outperformed every Medicare HMO in the Miami area, Medicare quality data show. Still, over the average lifetime of a Medicare patient, the federal program will pay Miami's HMOs about $50,000 more per patient.

What happens to the extra money? It does not all go to the bottom line of the health plans. Rather, it benefits patients in Miami. Under Medicare rules, the HMOs are required to use much of the extra funds to eliminate premiums or provide benefits such as prescription drugs and eyeglasses.

In Minnesota, though, members of HealthPartners pay for their own eyeglasses. They get no prescription drug plan and are charged a monthly $120 premium -- or nearly $1,500 per year -- above and beyond what Medicare pays

the health plan.

Medicare "comes out of an old model of care that makes no sense," said HealthPartners' Brainerd. "It isn't fair to those of us who do a better job, and it isn't fair to our patients who end up paying higher out-of-pocket costs."

Donna Burtanger, a spokeswoman for WellCare, said the Miami HMO provides "high quality care and a good value" to Medicare patients. She added that is "extremely difficult to compare cost and quality of services across various regions of the country."

But Peter T. Wyckoff, executive director of the Minnesota Senior Federation, said that his and other low-cost states end up subsidizing less efficient states.

"It's the worst sort of medical welfare," Wyckoff said. "Can you imagine if Social Security were to pay you $50,000 more because you lived in another part of the country? There would be hell to pay. There would be a revolution."

Medicare's built-in incentive to provide more services is one cause of the striking variations in spending, analysts say.

"Geography is destiny," said Wennberg, head of the Dartmouth project that has studied Medicare records for 30 years.

Wennberg said differences in spending from region to region aren't caused by varying rates of illness. Rather, they are usually linked to the kinds of extra health services provided in the high-spending areas, such as visits to specialists, tests, costly MRI and imaging scans, and a plethora of minor procedures. The greater the supply, the higher the number of services delivered.

Miami, which has twice as many specialists as the national average, more hospital beds and more technology, is far more expensive than Minneapolis -- a city in a low-cost, high-quality state -- even after adjusting for differences in patients' age, sex, race and medical condition.

In 2001, a traditional Medicare patient in Miami used $10,113 in services, on average. A Medicare patient in Minneapolis: $4,888.

Doing more doesn't necessarily mean doing better, according to Wennberg's colleague, Elliott S. Fisher, who has found that patients in high-spending regions fare no better than those in lower-cost regions. "There is just no evidence that doing more helps," he said. "At best, you do the same, and in some cases you actually do worse."

Recently Medicare officials have begun an effort to transform the way the program pays for care, with a renewed focus on quality. Congress also has joined in, mandating that Medicare try ways to increase competition and link payments to quality.

Medicare has a pilot program to reconfigure how it pays for patients with chronic conditions such as diabetes, heart disease and kidney failure. While relatively small as a percentage of all patients, these beneficiaries account for about half of all money spent. Medicare is testing the idea of paying doctors a single, all-inclusive fee for managing each patient's care, linking the payment to whether the patient gets better.

Another initiative is studying the effect of paying doctors and hospitals small bonuses when they provide preventive treatments such as an annual eye exam for diabetics. Recently, Medicare also began tapping its databanks to give patients access to basic information about the quality of care provided by hospitals, nursing homes, home health and dialysis centers. Much of the information is now reported by the health care providers and posted on Medicare Web sites.

By linking payments to performance, Medicare hopes to shift the culture of medicine away from automatically doing more. In theory, that could lead to savings and improve care.

Mark B. McClellan, head of the Centers for Medicare and Medicaid Services, declined to be interviewed for this article. Straube, his acting chief medical officer, said the savings from reform would be substantial. "Some say billions, some say tens of billions," he said.

To achieve that goal, however, Medicare will have to up the ante, not only rewarding high-quality providers but also withholding payments from those that don't measure up.

"We want to assure that every patient gets the right care every time," Straube said. "That's the vision."

For now, Medicare's reforms are research demonstrations or pilot programs, not actual requirements. Nor is Medicare using its clout to penalize underachieving providers. Hospitals are rewarded for simply reporting how they do on specific measures of quality, but not for their actual performance. Those posting superior results are still paid the same as underachievers.

To obtain more ambitious savings, some analysts say, Medicare will have to take a more aggressive stance. But that requires confronting the powerful lobby of hospitals, doctors and nursing homes.

"The more successful [Medicare officials] are, the more likely provider interest will rise up to prevent the program from ever implementing these changes on other than a demonstration basis," said Robert A. Berenson, a physician and former top Medicare official now based at the Urban Institute.

There is ample history to support Berenson's view.

In the mid-1990s, Medicare paid a select group of high-performing Midwest medical centers an all-inclusive fee for open-heart surgery. Medicare received a 10 percent discount from the package price.

An analysis of the program by federal officials declared it a success. But when Medicare proposed expanding it to include knee- and hip-replacement surgeries, some hospitals balked and the idea was dropped, according to former Medicare officials. "They objected to the identification of particular institutions as being more worthy than other institutions," said Bruce C. Vladeck, Medicare's director from 1993 to 1997.

Vladeck said Minnesota's Mayo Clinic was one of the most vocal opponents. Mayo executives were interested in both projects but backed away, saying in a March 1997 letter that the primary criterion used by Medicare was "large discounts," not excellence.

Vladeck, however, said it was his recollection that Mayo executives took the position they shouldn't have to give Medicare a steep price break but at the same time didn't want their rivals to get special recognition.

"They said, 'We're Mayo and we don't give anyone discounts,' " Vladeck said. " 'You're going to call these others Centers of Excellence, and we won't be one.' "

In 1997, Congress ordered Medicare to conduct a demonstration of competitive bidding involving Medicare HMOs to see if lower prices resulted. Two locations were Kansas City, Mo., and Phoenix.

HMOs in Phoenix worked behind the scenes to kill the demonstrations, including lobbying Congress, said Bryan Dowd, a health policy professor at the University of Minnesota who studied the project.

"It was well-orchestrated opposition," Dowd said. "The local plans organized picketing by beneficiaries. I think they may have even bused them in. And they got to the Arizona [congressional] delegation."

In July 1999, the Senate amended a health care bill to ban the projects in Kansas City and Phoenix. A few months later, similar language found its way into the main 2000 federal spending legislation. The same Congress that ordered the demonstration project was responsible for killing it.

Dowd made that point when he testified before the House subcommittee on health in September 1999.

"Only the most cynical among you will not be surprised," he told lawmakers, "when I tell you that the greatest current threat to this congressionally mandated demonstration is Congress itself."

LOAD-DATE: July 24, 2005

1 of 1 DOCUMENT

Los Angeles Times

February 16, 2006 Thursday
Home Edition

SECTION: CALIFORNIA; Metro; Metro Desk; Part B; Pg. 5

LENGTH: 536 words

HEADLINE: Report Slams UCI's Kidney Transplant Care

BYLINE: Charles Ornstein, Times Staff Writer

BODY:

The kidney transplant program at UCI Medical Center failed to provide adequate training to staff, monitor the diets of organ recipients or regularly review the care provided to patients as required, according to a federal inspection report released Wednesday.

The 11-page report by the U.S. Centers for Medicare and Medicaid Services is the latest to raise concerns about transplant services at UCI.

The Orange County hospital shut down its liver program in November after The Times reported that more than 30 patients died on its waiting list in 2004 and 2005, even as the hospital turned down scores of organs that might have saved some of them. Subsequently, the kidney program came under scrutiny as well.

The release of the federal report comes as UCI Medical Center is struggling to recover from a series of troubles in its transplant programs and beyond.

A task force appointed by university Chancellor Dr. Michael V. Drake will issue a far broader report today on what's gone wrong, along with recommendations to fix the shortcomings.

"Whatever changes are necessary are going to be made, period," said Drake, who took over in July and has said he was caught off guard by the transplant problems.

The Medicare agency found that UCI did not ensure nurses and others completed their training or that their training was comprehensive, according to the report. A nurse manager and another nurse couldn't provide basic information on how to evaluate a transplant patient's diet, which is important because kidneys are crucial for removing impurities from the blood.

The report also faulted the hospital for failing to review the care provided to transplant patients, a routine quality-control procedure in hospitals known as peer review.

One member of the medical staff explained to an inspector that "there was no member of the medical staff who either had the expertise or competency" to do the reviews.

The document was based on an inspection in December that was released Wednesday under the Freedom of Information Act.

In its response, UCI said it had improved training and oversight and had put in place a system for reviewing transplant care. The problems were not deemed serious enough by regulators to pull the program's certification, officials have said.

UCI officials said that none of the deficiencies caused patient harm and that the program was thriving under Dr. Clarence Foster, a kidney transplant surgeon hired in July.

Before Foster began work, UCI's kidney program suffered from some of the same problems that doomed its liver program.

UCI accepted only 8.7% of the kidneys offered on behalf of its patients from July 2000 to June 2005, one of the lowest rates in the nation. Many of the patients on UCI's waiting list would have had a far greater chance of receiving a transplant had they gone to other hospitals, data showed.

To satisfy regulators, UCI has pledged to provide a written explanation for every kidney turned down for patients on its transplant waiting list. Those refusals would be reviewed by top officials, including the university chancellor.

Data submitted by UCI to the Medicare agency showed that the hospital accepted more than two-thirds of the kidneys offered between July and October.

LOAD-DATE: February 16, 2006

5 of 14 DOCUMENTS

Star Tribune (Minneapolis, MN)

August 21, 2005, Sunday, Metro Edition

SECTION: NEWS; Pg. 9B

LENGTH: 441 words

HEADLINE: On Range, deadly illness went unreported;
Mesothelioma strikes years after victims' exposure to asbestos.

BYLINE: Greg Gordon; Staff Writer

BODY:

Health experts call mesothelioma a "sentinel disease" because it usually signals other disabling or lethal asbestos illnesses.

Had mining companies notified the Mine Safety and Health Administration of some of at least 29 mesothelioma cases among Minnesota taconite mine workers since 1980, federal health officials might have focused on asbestos diseases on the Iron Range.

But a loophole in a 1977 agency rule requires companies to report possible work-related illnesses only among active workers, said Carol Jones, MSHA's former Health Division chief. Because it takes 20 to 40 years after asbestos exposure for mesothelioma to strike, the deadly disease mainly strikes retirees, she said.

The taconite companies say their employees' health and safety is their foremost priority, yet none of the 29 mesothelioma cases was reported.

Family members of two of the victims - Tony Plevell and Jim Stanisich - say companies knew of their illnesses before they retired.

Jill Plevell, an Arizona psychologist, said managers of the LTV Steel Mining Company's pit near Babbitt "absolutely knew" her father had mesothelioma because he was on disability for weeks before he retired on March 1, 1996. He died two months later.

Neither LTV, which declared bankruptcy in 2001, nor Cleveland-Cliffs, which managed the LTV mine for 15 years before it closed, told MSHA about Plevell's illness, according to agency records obtained under the Freedom of Information Act.

Cleveland-Cliffs says its duty was only to run LTV's "day-to-day mining operations," and that LTV retained responsibility for filing illness reports. LTV's few remaining employees were liquidating its assets and declined to comment.

U.S. Steel Corp. did not notify MSHA of the December 2003 mesothelioma death of Jim Stanisich, a 47-year-old maintenance worker who was employed for more than 29 years at its Minntac plant, according to the records. Stanisich "was working in the mines when he was diagnosed" and "retired after he died," said his widow, Judy Stanisich, of Eveleth.

Citing privacy reasons, U.S. Steel spokesman John Armstrong said he could not comment.

Maximum penalty for failure to report an illness: $60.

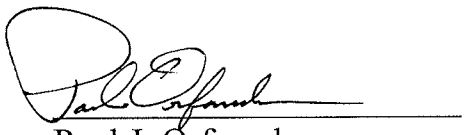
From 1977 through 2004, the only two firms to report lung diseases at Minnesota mines were U.S. Steel, which informed MSHA of four cases of mild lung scarring, and the former EVTAC mine near Virginia, which reported two suspected tuberculosis cases, the records indicate.

Steve Hawn, a lawyer representing mine workers, says dozens of former LTV employees were active miners when they filed workers' compensation claims for lung ailments.

LOAD-DATE: August 23, 2005

CERTIFICATE OF COMPLIANCE PURSUANT TO
F.R.A.P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)(2)

I certify that pursuant to F.R.App.P. 32(a)(7)(C) and Circuit Rule 32(a)(2), the attached brief is proportionally spaced, has a typeface of 14 points or more and contains 5,683 words.



Paul J. Orfanedes

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Counsel for Appellants

Leonard Schaitman
Steve Frank
U.S. Department of Justice
Civil Division, Appellate Staff
905 Pennsylvania Ave., NW, Room 7245
Washington, DC 20530

R. Craig Lawrence
US Attorney's Office, Civil Appellate Division
555 4th Street, NW
Washington, DC 20530

Counsel for Movant-Intervenor American Medical Association

Jack R. Bierig
Tacy F. Flint
Sidley & Austin, LLP
One South Dearborn Street
Chicago, IL 60603

Counsel for Appellee

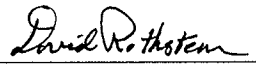
Patrick J. Carome
Paul R.Q. Wolfson
Nicole Rabner
Jenny R. Chou
Wilmer Cutler Pickering
Hale & Dorr, LLP
1875 Pennsylvania Ave., NW
Washington, DC 2006

Counsel for Amicus Curiae American Academy of Dermatology, *et al.*

Robert M. Portman
Hilton Marcus
Powers Pyles Sutter & Verville, PC
1501 M. Street, NW, Seventh Floor
Washington, DC 20005

Counsel for Amicus Curiae
American Association of Retired Persons

Stacy J. Canan
Michael R. Schuster
Bruce B. Vignery
American Association of Retired Persons
601 E. Street, NW, Fourth Floor
Washington, DC 20049



David Rothstein