

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. MISKIEL, Jr. : CIVIL ACTION
 :
 v. :
 :
 THE EQUITABLE LIFE ASSURANCE :
 SOCIETY OF THE UNITED STATES : NO. 98-3135

MEMORANDUM ORDER

Plaintiff has asserted a claim for bad faith denial of insurance benefits. Presently before the court is defendant's motion to enforce a subpoena for records of the United States Department of Justice.

Plaintiff filed a claim with defendant for benefits under a disability insurance policy. Defendant stopped making payments after asserting it had discovered that plaintiff made misrepresentations regarding his income as a physician when he applied for the policy on August 26, 1992. Defendant asserts plaintiff represented in his application that he earned \$70,000 in 1991 and \$75,000 in 1992. Defendant asserts that plaintiff's federal income tax returns show his income in 1991 was less than \$3,000 and that he had a net loss for 1992.

Defendant learned during discovery that the government is prosecuting a civil action against plaintiff, apparently for alleged Medicare fraud. In a letter to the judge to whom that case is assigned, plaintiff stated that his "debarment" from

Medicare reimbursements which occurred on April 6, 1992, prior to his application for disability insurance, cost him two-thirds of his practice or about \$60,000 per year. During a deposition in this action, plaintiff stated that he meant to say that his debarment resulted in a two-thirds reduction of his Medicare practice.

Defendant now seeks to compel the production by the United States Attorney's Office of documents obtained by the government during the course of its litigation including plaintiff's tax returns, plaintiff's billing and medical practice records, statements by plaintiff and all witnesses made during the course of the litigation, all discovery responses and deposition transcripts, as well as any investigative reports and analyses of plaintiff's billing practices.

Defendant served a subpoena duces tecum for the government's "entire unedited file" and all documents related to the government's case. The subpoena was directed to Assistant United States Attorney Virginia R. Powel. The U.S. Attorney's Office advised defendant that, pursuant to Department of Justice regulations, it was required to submit a summary of the information sought and its relevance to the instant case. Defendant provided a summary. The U.S. Attorney informed defendant that the material sought is covered by the Privacy Act, 5 U.S.C. § 552a, and that much of it is also subject to attorney-

client, work product and law enforcement privileges. The U.S. Attorney offered to arrange for the review by defendant's counsel of any publicly filed documents in the government's case and offered to provide deposition transcripts in the case, which have not been filed, upon agreement to an appropriate protective order.

Department of Justice regulations, promulgated under the authority of the Federal Housekeeping Statute, 5 U.S.C. § 301, provide that:

[i]n any federal or state case or matter in which the United States is not a party, no employee of the Department . . . shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties . . . without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

28 C.F.R. § 16.22.

The regulations provide that disclosure will generally be authorized unless the proper Justice Department official considers it unwarranted in light of the rules of procedure or the law of privilege applicable in the case in which the demand arose. See 28 C.F.R. § 16.26(a). Disclosure will not be authorized if, inter alia, it would violate a statute or rule of procedure. See 28 C.F.R. § 16.26(b)(1), (c). Disclosure will

not be authorized if it would reveal investigatory records compiled for law enforcement purposes and would interfere with enforcement proceedings or disclose investigative techniques and procedures, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. See 28 C.F.R. § 16.26(b)(5).

Thus, Ms. Powel lacks the authority on her own to produce the documents. An executive department may withdraw a subordinate's authority to give testimony or produce documents. See generally United States ex rel Touhy v. Ragan, 340 U.S. 462 (1951).

An agency decision not to provide testimony or documents may be challenged under the Administrative Procedure Act and set aside if "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." See 5 U.S.C. § 706; Kauffman v. United States Dept. of Labor, 1997 WL 825244, *2 (E.D. Pa. Dec. 19, 1997). The court, however, may not substitute its judgment for that of the agency. See Davis v. United States Environmental Protection Agency, 877 F.2d 1181, 1186 (3d Cir. 1989).

Plaintiff has not challenged the government's decision under the APA. Further, the court could not conscientiously conclude from the record presented that the decision to withhold the requested documents was "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with the law."

The Privacy Act, 5 U.S.C. § 552a, provides, with certain enumerated exceptions, that

no agency shall disclose any record which is contained in a system of records by any means of communication to any person , or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.

5 U.S.C. § 552a(b).

The Privacy Act defines a "system of records" as a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

5 U.S.C. § 552a(a)(5). A "record" is defined as

any item, collection or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Defendant argues that plaintiff's income tax returns, billing records, medical practice records, statements by him or by witnesses to the government, discovery responses and deposition transcripts are not covered by the Privacy Act because

this information did not "originate from" Justice Department records. The Act, however, encompasses records collected and maintained or controlled by an agency. Defendant's reliance on Winters v. Board of County Commissioners, 4 F.3d 848, 852 (10th Cir. 1993) and Thomas v. United States Department of Energy, 719 F.2d 342, 345 (10th Cir. 1983) is misplaced.

The Court in Thomas held that an Energy Department official did not violate the Privacy Act by informing Energy Department personnel that plaintiff, an Energy Department courier, had been ordered to undergo psychiatric evaluation and probably would not return because the information had not come from any "records" at all. Rather, the official acquired the information through discussions with other Energy Department personnel regarding plaintiff's behavior and a superior official's oral directive that plaintiff undergo a psychiatric evaluation. See id. at 344. Not surprisingly, the Court held that an oral disclosure based on personal observation or knowledge not obtained from "any record which is contained within a system of records" did not violate the Privacy Act. The Court in Winters merely held that a disclosure from records kept by persons or organizations other than federal agencies is not covered by the Privacy Act. See Winters, 4 F.3d at 852. Hooks v. Ridley Township, 1997 WL 762784 (E.D. Pa. Dec. 9, 1997) is not to the contrary. In that case the plaintiff did not object to

the release of a statement he had given to the FBI.

With the arguable exception of deposition transcripts, any Justice Department employee's knowledge of the information sought would come from the records defendant seeks. Deposition transcripts would also appear to fall within the definition of a "record" if kept in a "system of records" retrievable by a case number or plaintiff's name. In any event, as noted, the government has offered to make the transcripts available.

Defendant also argues that even if the requested documents are covered by the Privacy Act, there are "compelling reasons" to justify their disclosure. A court of competent jurisdiction may order disclosure of otherwise protected records. See 5 U.S.C. § 552a(b)(11).

The Privacy Act does not specify the standard by which such disclosure may be ordered and there has been some disparity among the courts on the appropriate standard. Compare, e.g., Perry v. State Farm Fire & Casualty Co., 734 F.2d 1441, 1447 (11th Cir. 1984) (courts must balance need for disclosure against potential harm from disclosure), cert. denied, 469 U.S. 1108 (1985); with Laxalt v. McClatchy, 809 F.2d 885, 888 (D.C. Cir. 1987) (standard for court order is same as usual discovery standard); Forrest v. United States, 1996 WL 171539, *1 (E.D. Pa. Apr. 11, 1996); Huang v. Dalton, 1994 WL 325944, *1 (E.D. Pa. June 30, 1994). Assuming the standard for a § 552a(b)(11) order

is the same as that for normal discovery, most of what defendant seeks would warrant protection under Fed. R. Civ. 26(c) and the privileges asserted by the U.S. Attorney. Moreover, most of the information sought is of tangential relevance at best and that which is particularly relevant is already available to defendant.

The instant case does not involve fraudulent billing practices. The key issue is rather straightforward. It is whether plaintiff misrepresented his annual earnings for 1991 and 1992 in his insurance application. Defendant has the application in which plaintiff apparently represented he earned \$70,000 and \$75,000 respectively for those years. Defendant acknowledges that it has copies of plaintiff's tax returns as filed with the IRS for those years showing substantially less earnings. There is no suggestion that plaintiff is contending that these tax returns are false and do not constitute accurate sworn statements of his earnings for the years in question. Defendant acknowledges that it has a copy of plaintiff's letter to the court regarding the effect of his debarment and as a document directed to the court by a litigant in a pending civil action, presumably the original has been made a part of the court record to which public access is provided. Upon defendant's agreement to an appropriate form of order, the U.S. Attorney has offered to make available the deposition transcripts from the government's case.

Insofar as defendant suggests that Brown v. Federal Bureau of Investigation, 658 F.2d 71 (2d Cir. 1981) stands for the proposition that Justice Department investigative files and analyses of plaintiff's billing practices before suit was filed are not protected by the Privacy Act because their release is not prohibited under the Freedom of Information Act, 5 U.S.C. § 552, defendant misreads Brown. The Court in Brown merely noted that the Privacy Act absolutely prohibits the non-consensual release of personal information contained in a system of records unless the Freedom of Information Act requires otherwise. Id. at 74. In assessing whether information should be disclosed under the Freedom of Information Act, the Court in Brown made clear that it is the public's interest in disclosure and not that of a private litigant which is pertinent. The public interest does not require that the government turn over to a private litigant documents revealing its investigative procedures, detailing its deliberative processes in pursuing civil litigation or reflecting the work product of government attorneys and the agents working at their behest in preparing to file and prosecute a lawsuit.

ACCORDINGLY, this day of February, 1999, upon consideration of defendant's Motion to Enforce Subpoena Issued to the United States Department of Justice (Doc. #28), and the responses of plaintiff and the Justice Department thereto, **IT IS**

HEREBY ORDERED that said Motion is DENIED.

BY THE COURT:

JAY C. WALDMAN, J.