UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

FLORIDA MEDICAL ASSOCIATION, INC., et al., Plaintiffs, v. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al. Defendants.	)	Civil Action No. 3:78-cv-00178-MMH-MCR

RESPONSE OF DEFENDANTS DEPARTMENT OF HEALTH AND HUMAN SERVICES AND KATHLEEN SEBELIUS IN PARTIAL SUPPORT OF INTERVENORS' MOTIONS TO VACATE PERMANENT INJUNCTION

PRELIMINARY STATEMENT

The Court should lift the permanent injunction it entered in this case in 1979, and this is so even though the United States has for years taken the position that the Privacy Act of 1974, 5 U.S.C. § 552a, bars release of the data at issue here. Since the entry of the injunction, it has become clear that the injunction issued by the Court exceeded the limits of the remedies authorized by the Privacy Act and the Administrative Procedure Act, id. §§ 701–706. For reasons that the Eleventh Circuit explained in a later case in 1982, Edison v. Department of the Army, 672 F.2d 840 (11th Cir. 1982), those statutes only empowered this Court to issue an order to halt plans by the Department of Health and Human Services (HHS) to disclose 1977 physician reimbursement totals. The Court was not empowered to issue a broader permanent injunction barring potentially similar disclosures in the future. Edison amounts to a significant change in the law that makes continued enforcement of the injunction improper.

When this Court entered its permanent injunction in 1979, it acted based on an assumption that the Privacy Act authorized courts to issue broad injunctions to prevent disclosure of information that is subject to the Privacy Act. The Eleventh Circuit later made clear in Edison, however, that the Privacy Act does not authorize injunctive relief to prevent disclosure of information. Consequently, the only apparent basis for any relief barring disclosure of Privacy Act–protected information is the Administrative Procedure Act, 5 U.S.C. §§ 701–706. However, the Administrative Procedure Act also would not have authorized the injunction that this Court issued in 1979. The Administrative Procedure Act only authorizes a court to review and set aside a discrete "agency action"—a concrete decision to disclose data. It does not authorize more sweeping injunctions that further restrict potential future agency actions. The Administrative Procedure Act therefore empowered the Court to set aside HHS's decision to disclose 1977 data, but it did not empower the Court to issue a permanent injunction reaching potential future disclosures that were not yet contemplated at the time of the Court's decision. Accordingly, the Eleventh Circuit's decision in Edison amounts to a significant change in law that justifies relief from the injunction.

Such relief is particularly appropriate here, because invalidation of the injunction will not result in the immediate release of any data. For years, it has been the position of HHS that the Privacy Act and a complementary provision in the Freedom of Information Act, 5 U.S.C. § 552(b)(6), do not permit the release of the data at issue here, a position confirmed just three years ago by the D.C. Circuit. See Consumers' Checkbook, Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs., 554 F.3d 1046, 1056 (D.C. Cir. 2009). The

absence of immediate harm confirms that this Court should not maintain its 33-year-old injunction.

To be sure, HHS may later have reason to change its position in response to changes in the factual or legal landscape. And, of course, the intervenors cite a number of factual or legal developments since the Court's 1979 decision that they believe constitute such a change in the relevant landscape. But the possibility of future change in the agency's position provides no basis for maintaining the 33-year-old injunction here. For one thing, any such change in position by HHS would occur here—if at all—only after notice and an opportunity for interested groups to provide their views, followed (of course) by the opportunity for judicial review by the affected parties. And for another, whether or not the particular changes identified by plaintiffs are relevant or would, alone or in combination with additional considerations, cause the agency to change its previously expressed position, there is little doubt that the world is different in 2012 than it was in 1979, and any agency decision in 2012 should be reviewed without the constraint of an injunction put in place 33 years ago.

Finally, this Court should likewise decline the intervenors' invitation to reject in this litigation the Government's previously expressed position that physician reimbursement totals are subject to the Privacy Act. As this Court recognized in its order in connection with the motions to intervene, any entitlement of the intervenors to data should be adjudicated only in connection with a separate action for judicial review after agency resolution of a proper FOIA request.

In short, the Court should dissolve the injunction to account for the Eleventh Circuit's intervening decision in Edison, and to enable any future government decisions to be reviewed

on the facts and the law as they are at the time of decision, not as they were more than three decades ago.

BACKGROUND

I. Legal provisions at issue—the Freedom of Information Act, the Privacy Act, and the Administrative Procedure Act

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, generally mandates disclosure, upon request, of government records held by an agency of the federal government. "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). While Congress designed FOIA to generally favor disclosure, Congress also "realized that legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." FBI v. Abramson, 456 U.S. 615, 621 (1982); see also 5 U.S.C. § 552(b). Congress thus enacted two complementary provisions to protect personal privacy interests by providing for special handling of Government records that contain certain information about individuals.

First, Congress included in FOIA a provision known as "Exemption 6," 5 U.S.C. § 552(b)(6), which allows withholding of information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." Id. Determining whether Exemption 6 is applicable "require[s] a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of

public scrutiny.'" Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); see also U.S. Dep't of Def. v. FLRA, 510 U.S. 487, 495–96 (1994). "[T]he only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" FLRA, 510 U.S. at 497 (alteration in original) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).

Second, Congress passed the Privacy Act, 5 U.S.C. § 552a, which was enacted "to protect the privacy of individuals identified in information systems maintained by Federal agencies" by "regulat[ing] the collection, maintenance, use, and dissemination of information by such agencies." Doe v. Chao, 540 U.S. 614, 618 (2004) (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896). The Privacy Act restricts government agencies from disclosing certain records pertaining to individuals without consent, but this restriction is subject to certain exceptions. See 5 U.S.C. § 552a(b) (establishing the general restriction on disclosure and eleven exceptions). One of these exceptions permits disclosure when disclosure is required under the Freedom of Information Act. See id. § 552a(b)(2) (making the general restriction inapplicable when disclosure is "required under section 552 of this title"). The combined result is that if information must be disclosed under the FOIA, then its disclosure does not violate the Privacy Act, but if the information can be withheld under FOIA Exemption 6, then the Privacy Act restricts its disclosure. See, e.g., FLRA, 510 U.S. at 494; Fla. Med. Ass'n v. Dep't of Health, Educ. & Welfare, 479 F. Supp. 1291, 1306 (M.D. Fla. 1979) ("[S]ince the Privacy Act expressly defers to the mandatory disclosure

provisions of the FOIA, information which is not exempt under Exemption 6 from disclosure would receive no Privacy Act protection. But if the release of information would 'constitute a clearly unwarranted invasion of personal privacy,' . . . not only does Exemption 6 of the FOIA relieve that information from obligatory disclosure, but the Privacy Act forbids its disclosure . . . ." (citation omitted)).

Congress provided for judicial review to ensure protection of the dual aims of disclosure and protection of privacy. Thus, under FOIA, a person who alleges that an agency has improperly withheld records can seek relief in federal court after exhausting administrative remedies. See 5 U.S.C. § 552(a)(4)(B). Likewise, the Privacy Act "gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals aggrieved by failures on the Government's part to comply with the requirements." Doe, 540 U.S. at 618.

The Administrative Procedure Act, 5 U.S.C. §§ 701–706, by contrast, sets background rules for actions taken by federal administrative agencies and provides for limited judicial review of final agency actions for which there is no other adequate remedy in a court. Review under the Administrative Procedure Act is generally available only after the agency has taken "final agency action," id. § 704, and review is limited in scope. A reviewing court's role is only to determine whether the agency committed legal error in rendering its final agency action, not to step into the shoes of the agency and "conduct its own investigation and substitute its own judgment for the administrative agency's decision." Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 87 F.3d 1242, 1246 (11th Cir. 1996); see also Pollgreen v. Morris, 770 F.2d 1536, 1544 (11th Cir. 1985)

("When an administrative agency makes an error of law, . . . the district court's duty . . . is to correct that error of law and remand the case to the agency to afford it an opportunity to receive and examine the evidence in light of the correct legal principle.").

II. History of this case

This case began in March 1978, when the Florida Medical Association, Inc., and six individual physicians brought a class action seeking to enjoin HHS's decision to disclose a list of all medical providers who received Medicare payments in 1977. Compl. (Mar. 24, 1978); see Fla. Med. Ass'n v. Dep't of Health, Educ. & Welfare, 479 F. Supp. 1291, 1297 (M.D. Fla. 1979). In May 1978, the Court certified a plaintiff class of "all of the members of the Florida Medical Association, Inc. and all other physicians licensed to practice in the State of Florida who (1) are providers of Medicare services within the meaning of the Medicare Act, and (2) whose personally and individually identifiable annual Medicare reimbursement amounts would be disclosed by the Secretary's declared policy and intended actions." Order Certifying Class Action 3 (May 18, 1978).

In June 1978, the American Medical Association and five individual physicians sought leave to intervene as plaintiffs. Appl. for Leave to Intervene as Parties Pl. (June 8, 1978). The Court granted the request, Order Granting Intervention as Parties Pl. (June 12, 1978), and recertified the plaintiff class to include "all physicians licensed to practice in Florida . . . and all other members of the AMA who are not Florida physicians, if (1) they are providers of Medicare services within the meaning of the Medicare Act, and (2) they would be individually identified by the Secretary in a disclosure of annual Medicare reimbursement amounts," Order Recertifying Class Action 4 (June 16, 1978). The Court ordered that the

recertified class would be represented jointly by the Florida Medical Association and the AMA. Order Recertifying Class Action 4 (June 16, 1978).

On October 22, 1979, the Court found that the terms of FOIA Exemption 6, and thus the restrictions of the Privacy Act, applied to physicians' Medicare reimbursement totals because physicians' privacy interests in information about their incomes outweighed the public interest in disclosure. Fla. Med. Ass'n v. Dep't of Health, Educ. & Welfare, 479 F. Supp. 1291, 1304–05 (M.D. Fla. 1979). The Court thus held that the Secretary's proposed disclosure was exempt from required disclosure under the FOIA and would violate the Privacy Act. See id. at 1311. The Court issued a permanent injunction barring HHS "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," and declaring that any such disclosure would be a violation of federal law. Final Declaratory J. & Permanent Inj. ¶¶ 1–2 (Oct. 22, 1979). The defendants filed a notice of appeal, but they later moved for voluntary dismissal of the appeal, and the clerk entered dismissal on June 11, 1980. Notice of Appeal (Dec. 21, 1979), Mot. to Voluntarily Dismiss Appeal, Fla. Med. Ass'n v. Dep't of Health, Educ. & Welfare, No. 79-4087 (5th Cir. June 3, 1980); Entry of Dismissal, Fla. Med. Ass'n, No. 79-4087 (5th Cir. June 11, 1980).

On December 2, 1982, in response to a request by the Government, this Court issued an order clarifying the scope of the October 1979 injunction. Order (Dec. 2, 1982). The Court clarified that its injunction was only intended to address disclosures that were "prohibited by the Privacy Act without the prior written consent of the affected individual."

Order 3 (Dec. 2, 1982). The Court made it clear that the October 1979 injunction "did not cover disclosure pursuant to . . . any . . . exception set forth in subsection (b) of the Privacy Act, since the statute, by its terms, does not prohibit such disclosure, even where no written consent is obtained." Order 3 (Dec. 2, 1982).

III. The Eleventh Circuit's decision in Alley v. U.S. Department of Health and Human Services

The October 1979 injunction entered in this case played a role in a recent decision by the Eleventh Circuit, Alley v. U.S. Department of Health and Human Services, 590 F.3d 1195 (11th Cir. 2009). The plaintiffs in Alley had submitted a Freedom of Information Act request to HHS seeking data on all Medicare claims paid in 2002 for procedures performed in Florida, Georgia, Mississippi, and Tennessee, including the names and addresses of the physicians who had provided those services and procedures. Id. at 1200. HHS had provided some data in response to this request, but had withheld other data, asserting that the data could be withheld based on this Court's October 1979 injunction and FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which specifies that "personnel and medical files and similar files" are exempt from disclosure under FOIA if their disclosure "would constitute a clearly unwarranted invasion of personal privacy." See id. at 1200–01. The Eleventh Circuit held that this Court's October 1979 injunction justified the agency's withholding of records, and did not reach the issue of whether FOIA Exemption 6 separately justified the agency's withholding of records. See id. at 1210; see also id. at 1201 n.9.[1] The court also held that

[1] In a similar case, Consumers' Checkbook, Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs., 554 F.3d 1046 (D.C. Cir. 2009), cert. denied sub nom. Consumers' Checkbook, Ctr. for the Study of Servs. v. Dep't of Health & Human Servs., 130 (continued . . .)

the plaintiff could not challenge this Court's October 1979 injunction in FOIA proceedings in the Northern District of Alabama. See id. at 1210. Rather, the court held that the plaintiff or any other party seeking records whose disclosure was barred by the October 1979 injunction "must first succeed in having the issuing court"—that is, this Court—"modify or vacate the injunction barring disclosure. . . . A direct attack, instead of a collateral one, is the proper procedure." Id. at 1204. "If Alley believes the FMA injunction is invalid, overly broad, or outdated," the court wrote, "she can challenge it in the Middle District of Florida after joining all necessary parties." Id. at 1210.

IV. Reopened proceedings in this case

The most recent round of proceedings in this case began in early 2011, when the plaintiffs in the Alley case, Jennifer D. Alley and Real Time Medical Data, L.L.C. (RTMD), and a third party, Dow Jones & Co., Inc., filed motions to intervene in the case. The intervenors sought to intervene in this case for purposes of requesting relief from the injunction and asserting various new claims against HHS for disclosure of Medicare data. HHS opposed the motions in part, arguing that the intervenors should perhaps be permitted to intervene for the limited purpose of seeking relief from the injunction under Rule 60(b) of the Federal Rules of Civil Procedure but should not be permitted to bring new claims against HHS.

S. Ct. 2140 (2010), the D.C. Circuit, in a split decision, took a different approach, holding that the agency's withholding of records was justified under FOIA Exemption 6 and declining to reach the issue of whether this Court's October 1979 injunction justified the agency's withholding of records. See id. at 1050 n.3, 1056.

On September 26, 2011, the Court entered an order that granted Dow Jones's motion to reopen the case and authorized Dow Jones, Alley, and RTMD to intervene only for the limited purpose of filing motions under Rule 60(b) seeking dissolution of the injunction, while specifying that the intervenors would not be permitted to bring their proposed new claims. Fla. Med. Ass'n v. Dep't of Health, Educ., & Welfare, No. 78-cv-178, 2011 WL 4459387 at *16 (M.D. Fla. Sept. 26, 2011). The intervenors filed the present Rule 60(b) motions on March 19, 2012. Mot. to Vacate Permanent Inj., ECF No. 55; Dow Jones & Company, Inc.'s Mot. to Vacate Permanent Inj. and Incorporated Mem. of P. & A., ECF No. 56.

ARGUMENT

I. The 1979 injunction should be lifted because the Eleventh Circuit's 1982 decision in Edison v. Department of the Army established that the injunction is unauthorized, and because the injunction has outlived its purpose.

A. Standards applicable to a motion seeking relief under Rule 60(b) of the Federal Rules of Civil Procedure

Rule 60(b)(5) of the Federal Rules of Civil Procedure authorizes a district court to grant relief from a judgment or order if "applying it prospectively is no longer equitable." Id.; see Fla. Med. Ass'n v. Dep't of Health, Educ., & Welfare, No. 78-cv-178, 2011 WL 4459387 at *15 n.17 (M.D. Fla. Sept. 26, 2011) (citing Rule 60(b)(5)); Alley v. U.S. Dep't of Health & Human Servs., 590 F.3d 1195, 1204 (11th Cir. 2009) (citing Rule 60(b)(5)). The Supreme Court explained in Horne v. Flores, 129 S. Ct. 2579 (2009), that:

> Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or in law" renders continued enforcement "detrimental to the public interest." The party seeking relief bears the burden

> of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion "when it refuses to modify an injunction or consent decree in light of such changes."

Id. at 2593 (citations omitted). A change "in either statutory or decisional law" can justify Rule 60(b)(5) relief. Agostini v. Felton, 521 U.S. 203, 215 (1997).

A second provision, Rule 60(b)(6), authorizes relief from an order for "any other reason that justifies relief." Id. The Eleventh Circuit has held that this provision "can be used to remedy a mistake in the application of the law." Ritter v. Smith, 811 F.2d 1398, 1401 (11th Cir. 1987); see also id. at 1402 ("[C]ourts . . . have, almost uniformly, recognized that it would be unjust to give prospective effect to a judgment now known to be improper."). However, a court should usually consider whether relief is warranted under other parts of Rule 60(b), such as Rule 60(b)(5), before examining whether relief is warranted under Rule 60(b)(6). See BUC Int'l Corp. v. Int'l Yacht Council Ltd., 517 F.3d 1271, 1275 n.4 (11th Cir. 2008) ("Rule 60(b)(6) 'applies only to cases that do not fall into any of the other categories listed in parts (1)–(5) of Rule 60(b).'").

B. The Eleventh Circuit's decision in Edison v. Department of the Army effected a significant change in law making the 1979 injunction improper.

When this Court entered its injunction in 1979, it assumed that the Privacy Act authorized injunctive relief to prevent disclosure of information covered by the Act. But that assumption was later proved false by Edison v. Department of the Army, 672 F.2d 840 (11th Cir. 1982), in which the Eleventh Circuit held that the Privacy Act does not authorize such injunctive relief. Thus, it is now clear that the Court's 1979 injunction is not authorized by any statute and therefore should be lifted.

By the time of the Court's original ruling in this case, it was already clear that the Freedom of Information Act did not provide a private right of action to prevent disclosure of Government records. See Fla. Med. Ass'n v. Dep't of Health, Educ. & Welfare, 479 F. Supp. 1291, 1301 (M.D. Fla. 1979) ("[T]he FOIA exemptions do not forbid the disclosure of information, and therefore do not authorize an inverse-FOIA action for injunctive relief." (citing Chrysler Corp. v. Brown, 441 U.S. 281, 285, 290–94 (1979))). However, it was not clear at that time whether the Privacy Act authorized courts to issue injunctive relief to prevent disclosure of information.

The Court assumed that the Privacy Act did authorize injunctive relief, and it entered a permanent injunction based on that assumption. See id. at 1299 n.8 ("The general grant of a right of action, and of corresponding jurisdiction in the district courts, under [5 U.S.C.] § 552a(g)(1)(D) confers the subject matter jurisdiction upon the Court to issue injunctive and declaratory relief."). However, that assumption was shown to be incorrect three years later, when the Eleventh Circuit decided Edison v. Department of the Army, 672 F.2d 840 (11th Cir. 1982). The court in Edison squarely held that the Privacy Act authorizes injunctive relief only in two limited circumstances, and does not authorize injunctive relief for other purposes, such as to prevent wrongful disclosure of information:

> The Privacy Act . . . authorizes the courts to issue injunctions in only two instances: to amend (i.e. correct) the individual's record, 5 U.S.C. § 552a(g)(2)(A), and to order an agency to produce agency records improperly withheld from an individual, 5 U.S.C. § 552a(g)(3)(A). The Act fails to authorize injunctive relief against violating the Act in other ways. Where a statute provides for certain types of relief, but not others, it is not proper to imply a broad right to injunctive relief.

Id. at 846 (citations omitted); see also FAA v. Cooper, 132 S. Ct. 1441, at 1459 n.4 (2012) (Sotomayor, J., dissenting) ("[I]njunctive relief is available under the [Privacy] Act only for a limited category of suits: suits to amend a record and suits for access to a record.").

Consequently, the only apparent basis for an injunction barring wrongful disclosure of information is the Administrative Procedure Act. See Chrysler Corp., 441 U.S. at 317–18 (concluding that the agency's decision to disclose records was reviewable under the APA); Cooper, 132 S. Ct. at 1455 n.12 (majority opinion) (explaining that the Privacy Act "possibly . . . allow[s] for injunctive relief under the Administrative Procedure Act"). But the injunction that this Court issued in 1979 went farther than could have been authorized under the Administrative Procedure Act. The Administrative Procedure Act at most could have supported an injunction directed at the specific decision to disclose information from 1977 that gave rise to this action. It could not have supported the broader injunction that this Court entered in 1979, which also restricts potential future disclosures that were not at issue in the 1978 lawsuit.

The Administrative Procedure Act limits the kinds of actions that can be the subject of judicial review and the scope of the relief a court can issue when it conducts judicial review. Plaintiffs suing under the Administrative Procedure Act generally may challenge only specific, concrete decisions or actions already made or taken by an agency; they may not challenge hypothetical future agency actions that have yet to be taken. See 5 U.S.C. § 704 (requirement of "final agency action"); Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62 (2004) (noting that challenges under the APA must target "circumscribed, discrete agency actions"); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) ("Under the terms of the

APA, respondent must direct its attack against some particular 'agency action' that causes it harm."); Fanin v. U.S. Dep't of Veterans Affairs, 572 F.3d 868, 876–77 (11th Cir. 2009) (explaining that the APA authorizes only "specialized challenges to specific 'final agency actions'" and does not authorize courts to order "[s]ystemic improvement and sweeping actions"). Moreover, plaintiffs generally may only obtain relief setting aside the particular actions being challenged; they may not obtain broader injunctive relief that purports to constrain future action by the agency. See 5 U.S.C. § 706 (authorizing a reviewing court to "set aside" actions held unlawful); Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 87 F.3d 1242, 1246 (11th Cir. 1996) (noting that "[t]he role of the court is not to . . . substitute its own judgment for the administrative agency's decision" and explaining that the usual remedy under the APA is to remand the matter to the agency to allow the agency to correct the error); Pollgreen v. Morris, 770 F.2d 1536, 1544 (11th Cir. 1985) ("When an administrative agency makes an error of law, . . . the district court's duty . . . is to correct that error of law and remand the case to the agency to afford it an opportunity to receive and examine the evidence in light of the correct legal principle."); Ray v. U.S. Dep't of Justice, 908 F.2d 1549, 1560 (11th Cir. 1990) (rejecting an argument that the APA authorized a district court to enjoin deportation proceedings against the plaintiffs), rev'd on other grounds sub nom. U.S. Dep't of State v. Ray, 502 U.S. 164 (1991).

Thus, when a plaintiff brings suit under the Administrative Procedure Act to challenge a decision to disclose information, the court can only grant relief directed at the specific disclosure decision that gave rise to the suit; the court cannot issue an order barring other decisions that have yet to be made or that otherwise are not before the court. See Doe

No. 1 v. Veneman, 380 F.3d 807, 819 (5th Cir. 2004) ("Where a plaintiff seeks review pursuant to the APA, an injunction that enjoins an agency from disclosing more [information] than has been requested or more than the agency has determined to release is overbroad because it exceeds the legal basis for the lawsuit."); Brancheau v. Sec'y of Labor, No. 11-cv-1416, 2012 WL 140239, at *2 (M.D. Fla. Jan. 18, 2012) (holding that the plaintiffs could not seek an injunction against disclosure of information under the Administrative Procedure Act since the agency had not made a determination that it would release the information at issue), appeal docketed, No. 12-10770 (11th Cir. Feb. 13, 2012).

In the context of this case, this means that the Administrative Procedure Act could have supported this Court's 1979 order to the extent that it halted the planned disclosure of 1977 Medicare data and invalidated Department of Health, Education and Welfare regulations that purported to categorically exclude business information from the scope of the Privacy Act. See Fla. Med. Ass'n, 479 F. Supp. at 1307–11. But the Administrative Procedure Act could not have supported a broader order restricting potential future releases of information that were not even contemplated, much less planned, at the time of the lawsuit.

Thus, as a consequence of the Eleventh Circuit's ruling in Edison, there is no longer any statutory basis for the 1979 permanent injunction. Edison therefore amounts to a significant change in law that makes continued enforcement of the 1979 injunction improper. Cf. Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 388 (1992) (explaining, in considering a consent decree, that such a decree must be modified if "one or more of the obligations placed upon the parties has become impermissible under federal law").

C. Decisions regarding access to physician-specific reimbursement data should be assessed under the facts and law at the time of decision, not as they existed in 1979.

In cases concerning federal court supervision of state institutions, the Supreme Court has explained that long-lived consent decrees can become detrimental to the public interest over time as officials remain bound to obsolete restrictions even though circumstances have changed. See, e.g., Horne v. Flores, 129 S. Ct. 2579, 2593–95 (2009) ("[I]njunctions . . . often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment."). In such cases, the Court has held, interests of federalism demand that courts ensure that "'responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant." Id. at 2595. Moreover, when relief is sought from such a decree, "a critical question" is whether the original objectives of the decree have been achieved. "If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." Id.; see also id. at 2597 (holding that a court should consider "whether ongoing enforcement of the original order was supported by an ongoing violation of federal law").

For similar reasons, the separation of powers among the three Branches of the Federal Government may require a court to reexamine an injunction issued against a federal agency, to ensure that agency (and judicial) decisionmaking reflects current facts and law and to ensure that the injunction remains required to prevent any "ongoing violation of federal law."

Cf. Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010) (opinion of Kennedy, J.) ("A court must find prospective relief that fits the remedy to the wrong or injury that has been established. . . . The relevant question is whether an ongoing exercise of the court's equitable authority is supported by the prior showing of illegality, judged against the claim that changed circumstances have rendered prospective relief inappropriate.").

Under those standards, lifting the injunction is proper here. For years, HHS has taken the position that the Privacy Act restricts disclosure of physician reimbursement totals. Indeed, in the years since the original proceedings in this case, HHS not only has acquiesced in this Court's ruling that physician reimbursement totals are covered by the Privacy Act, but has adopted that position as its own in other litigation. See, e.g., Consumers' Checkbook, Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs., 554 F.3d 1046, 1049 (D.C. Cir. 2009) (noting that HHS took the position that physician reimbursement data was exempt from disclosure under FOIA Exemption 6); Alley v. U.S. Dep't of Health & Human Servs., 590 F.3d 1195, 1200–01 (11th Cir. 2009) (noting that HHS took the position that physician reimbursement data was exempt from disclosure under FOIA Exemption 6). Given this position, lifting the injunction will not result in any immediate release of data by HHS, and there is no justification for "ongoing exercise of the court's equitable authority."

That said, changes in the law and the facts can justify an agency change in position. And, as noted, the intervenors identify a host of changes that they believe make such a change appropriate. Whether or not the intervenors are correct is beside the point here—the critical point is that review of agency policy changes should reflect any changes in the facts and the law, and not outdated assumptions and legal frameworks long since abandoned.

Again, that is not to say that the Government has concluded that any change is appropriate, but merely to say that government agencies should be free to make those calls. And, because HHS would not undertake any such change in its expert assessment of the balance of public and private interests without providing interested parties, including the plaintiffs in this action, adequate notice and an opportunity to have their views heard, followed by the opportunity for judicial review at that point, plaintiffs have little cause for complaint. Thus, enforcing the Privacy Act's restrictions through continued exercise of the Court's equitable powers is no longer either necessary or appropriate.

D. It is not necessary for the Court to reach the intervenors' arguments that the Privacy Act no longer restricts disclosure of physician reimbursement data.

Because the Court can and should lift the injunction for the reasons just set forth, the Court should resist the intervenors' invitation to wade into the merits of the Exemption 6 arguments and should decline the intervenors' invitation to reject at this point the frequently expressed position of the United States (affirmed by the D.C. Circuit) and hold that the Privacy Act does not restrict disclosure of physicians' Medicare reimbursement totals. In its Motion to Intervene, Dow Jones sought to expand the scope of these proceedings by adding counterclaims for additional data that postdated the data at issue in this case. HHS opposed the addition of counterclaims, insisting that "[a]ny new claims against HHS should be brought in a new separate action, not a case involving other parties that was closed 32 years ago." Partial Opp'n of Defs. to Dow Jones & Company, Inc.'s Mot. to Intervene 12, ECF No. 8. Indeed, we noted in that opposition that there were substantial venue concerns with Dow Jones bringing a FOIA action in this Court, which raised the possibility that Dow Jones

might be seeking to "evade unfavorable precedent in the D.C. Circuit." Partial Opp'n of Defs. to Dow Jones & Company, Inc.'s Mot. to Intervene 20.

In its ruling granting intervention, this Court expressly rejected Dow Jones's efforts to add counterclaims, limiting Dow Jones's participation to a request to vacate or modify the injunction. See Fla. Med. Ass'n v. Dep't of Health, Educ., & Welfare, No. 78-cv-178, 2011 WL 4459387 at *11–15 (M.D. Fla. Sept. 26, 2011). In so doing, the Court expressly anticipated that Dow Jones would file a specific FOIA request, and that further litigation would be required to address Dow Jones's request for access to the physician data they sought, noting that "in the event that the 1979 FMA Injunction is vacated or modified, the proposed intervenors will be free to file their own FOIA lawsuits seeking the desired documents." Id. at *15.

Against this backdrop, reaching the merits of the intervenors' Exemption 6 arguments would undermine the careful balance this Court struck in its intervention decision. To be sure, the intervenors' arguments are not entirely irrelevant here. While one could take issue with the forcefulness of the arguments presented, the arguments raised by the intervenors demonstrate that the facts and the law in this area continue to change, and thus they reinforce the Government's position that the injunction should be lifted. But the injunction should be lifted so that a proper FOIA request can be submitted to the agency and litigated in an appropriate forum, with full consideration of the current facts and law. If this Court were to move beyond lifting the injunction and were to rule on the Exemption 6 arguments, the Court would risk short-circuiting the very route that this Court identified in its September intervention ruling as providing the proper course for resolving the core of the intervenors'

concerns. Moreover, such a ruling is not necessary to protect plaintiffs' interests, because HHS has not changed its position on the application of Exemption 6 in this context, and because any future change in the agency's expert assessment of the interests at stake would provide for an opportunity for public comment and would be subject to judicial review, as this Court anticipated. Accordingly, the intervenors' efforts to convince the Court of the merits of their view of Exemption 6 and the Privacy Act are misplaced.

CONCLUSION

The Court should grant the intervenors' motion to lift the injunction.

Date: May 3, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants at their last known addresses:

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