PREDICTABILITY OF OUTCOMES IN DISCOVERY DISPUTES AT CBCA IMPROVES OVER CBCA'S FIRST TEN YEARS WITH TREND TOWARD PUBLICATION OF DISCOVERY ORDERS

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Introduction

Ten years ago, Congress consolidated eight civilian agencies' boards of contract appeals to create the U.S. Civilian Board of Contract Appeals ("Civilian Board" or "Board").[1] The Civilian Board is charged under the Contract Disputes Act ("CDA") to hear and decide government contractors' appeals of contracting officer final decisions arising from or related to a civilian agency contract.[2] Specifically, the Civilian Board's jurisdiction to hear contract disputes extends to all agencies of the federal government except the Department of Defense, the National Aeronautics and Space Administration, the U.S. Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority.[3]

Based on our review of all Civilian Board decisions issued during its first ten years, among other trends outside the scope of this article, we identified a notable increase in the number of published decisions containing substantial discussions of discovery issues.[4] Indeed, we identified 24 published decisions opining on discovery issues, and *more than half of those were published since 2014.* Instead of issuing its findings orally or through summary orders, the Board chose to publish these discovery decisions, thereby providing important guidance to practitioners who may be faced with the same (or similar) discovery issues in the future. We believe that this trend toward publication should generally result in more predictability of outcomes in discovery disputes, and therefore should facilitate the resolution of potential discovery disputes more efficiently.

In this article, we focus on three interesting decisions that illustrate this recent development in Board practice. Specifically, these cases pit certain statutory requirements related to the disclosure/production of information – the Privacy Act, the Inspector General Act, and the Freedom of Information Act, respectively – against the bounds of permissible discovery before the Board. These three decisions should provide a relatively high degree of outcome predictability in similar cases

because of the rigid statutory requirements at issue.[5]

The bottom line: the Board's apparent increased willingness to publish discovery-related decisions should better equip practitioners to assess the acceptable bounds of (and expectations related to) discovery, thereby allowing parties to spend less time sidelined by discovery issues and more time focused on the underlying substantive merits of the appeal.

Privacy Act Cannot Be Used to Shield Relevant Information from Disclosure in Litigation

In *Kepa Servs., Inc. v. Dep't of Veterans Affairs*, the Department of Veterans Affairs' ("VA") objected to the appellant's request for copies of several agency employees' personal employment files (including, but not limited to, all performance evaluations for each employee) and the names and last known duty stations of certain employees' supervisors, arguing that the information was protected under the Privacy Act.[6] After delineating the scope of the Privacy Act's non-disclosure obligations with regard to civil discovery and analyzing the relevance of the information sought to the contract dispute pending before it, the Board rejected the appellant's request, in part, through a February 2015 published decision.[7]

The Board began by recognizing that the Privacy Act "does not create an evidentiary privilege precluding disclosure in litigation."[8] Then, the Board noted that, even if the Privacy Act did create such an evidentiary privilege, an agency's presentation of relevant material to an administrative tribunal, such as the Board, during the conduct of civil litigation would be a "routine use" of protected information, an exception to the Privacy Act's nondisclosure obligations.[9] The Board emphasized that "[n]evertheless, before the routine use exception will apply, the material has to be relevant to the matters pending before" it.

The underlying substantive claims involved work performed under a contract for gravesite expansion and cemetery development at the Abraham Lincoln National Cemetery. In support of its alleged right to discover VA employee performance evaluations, the appellant argued that such records were necessary for it to prove "a pattern of persistent VA interference, negligent administration, harassment of personnel, and obstructive project oversight."[10] However, characterizing "this type of broad request for employee personnel files [as] more like a fishing expedition for information to embarrass or harass the employees at issue," the Board failed to see the relevance of the requested information and ruled that the VA withholding such information was appropriate.[11] Although the Board recognized that disclosure of the evaluations was not barred by the Privacy Act, the Board concluded that the appellant failed to "explain[] how a broad and wholesale review of VA employee

personnel files" was relevant to the pending dispute.[12]

Regarding the appellant's ability to discover the names and last known duty stations of certain employees' supervisors, the Board determined that such information was relevant and that the VA mistakenly attempted to assert the Privacy Act as a basis for its nondisclosure.[13] The Board generally noted that, "[a]lthough it seem[ed] that a list of particular employees' supervisors [was] of limited relevance and value in the circumstances" of the pending dispute, the Board could not "say that it [was] so far outside the realm of permissible discovery that the VA should not have to produce those names and last-known VA duty station addresses."[14] More pointedly, based on legislative history, the Board declared that "Congress did not intend the Privacy Act to prohibit the disclosure to the public of information such as 'names, titles, salaries, and duty stations of most Federal employees.'"[15]

This decision puts parties on notice that the Board most likely will not treat the Privacy Act as an evidentiary privilege precluding disclosure of relevant information in pending litigation.

Without a Subpoena, Inspector General Act Cannot Be Used to Sidestep Discovery Rules

Two months later, again in *Kepa Servs., Inc. v. Dep't of Veterans Affairs*, the Civilian Board confronted the appellant's request for the Board "to stop, or at least place limits upon, an audit being conducted by" the VA's Office of Inspector General ("VA OIG") because the OIG's requests for information were not directed through counsel, in contravention of discovery rules. As one basis for its authority to conduct the audit without going through appellant's counsel, the VA asserted the Inspector General Act ("IG Act" or "Act"). Based on the plain language of the Act, however, the Board determined that the VA, in the absence of a subpoena directing the production of materials responsive thereto, improperly relied upon the IG Act as authority for the audit its OIG was conducting on the appellant's claims.[16]

The VA OIG was attempting to conduct the audit at issue through administrative audit letters. However, while recognizing that the VA may have been carrying out the main purpose of the IG Act, which "is to ensure that the OIGs have the power to ferret out fraud, waste, and abuse in federally funded programs," the Board interpreted the Act to require only *by subpoena* the production of information responsive to an audit request.[17] Therefore, the Board concluded: "Unless and until the VA OIG issue[d] subpoenas to Kepa and its subcontractors, the VA OIG [had] no ability under the IG Act to take any action against Kepa to compel compliance."[18] Accordingly, the Board concluded that the administrative audit

letters "at best, request[ed] voluntary compliance by the recipient."[19]

In the absence of another source of authority, the Board concluded that its discovery rules were the only means the VA had to compel compliance with audit requests.[20] Thus, citing to Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, which provides that a lawyer cannot "communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so," the Board emphasized that "the VA must run" any audit requests through the appellant's counsel.[21]

This decision emphasizes that, when not preempted by an agency's statutory authority to discover information related to a pending dispute, the Board's discovery rules will normally control. The process for obtaining information based on such statutory authority will likely be strictly enforced at the Civilian Board.

Prior Disclosure Under Freedom of Information Act Waives Ability to Protect Documents During Litigation

In *Golden Key Grp., LLC v. Dep't of Veterans Affairs*, the agency moved to exclude several exhibits from the appeal record or, in the alternative, to place those documents under a protective order limiting their distribution.[22] In a March 2016 published order, the Civilian Board denied the agency's motion because the documents sought to be excluded or protected had been produced to the appellant through the procedures outlined in the Freedom of Information Act ("FOIA").[23] In its motion, the VA argued that the documents sought to be excluded or protected were covered either by the attorney-client, the investigative files/law enforcement, or the deliberative process privileges.[24] However, the Board concluded that the VA waived those privileges when it previously chose to release the documents at issue to the public through FOIA.[25]

The Board began by recognizing that the asserted privileges are all "available to government agencies in appropriate circumstances."[26] Regarding FOIA's non-disclosure obligations, the Board concluded that "[e]xemptions 5 and 7 . . . are essentially coextensive with these privileges and permit agencies 'to withhold from disclosure [in response to a FOIA request] documents that would be 'privileged in the civil discovery process.'"[27] However, the Board concluded that "[e]ach of these privileges is waived . . . when an agency voluntarily and intentionally discloses to a third party the material covered by [them]."[28]

Indeed, recognizing that "[t]he exemptions are permissive, and an agency may voluntarily release information that it would be permitted to withhold under the

FOIA exemptions,"[29] the Board found that the VA exercised its discretion to release the subject documents under FOIA.[30] To the Board, "it [was] clear that they were produced through FOIA, as virtually all of them contain[ed] redactions marked with a specific FOIA exemption number."[31] The Board thus concluded that the VA "elected to release the allegedly privileged documents at issue to Golden Key in response to a FOIA request."[32]

Therefore, pursuant to FOIA, the Board held that such release made the documents "available to the public" and not properly subject to the VA's claim of privilege.[33] The Board explained that, "[o]nce it voluntarily made these documents available to the public through FOIA, the VA waived any . . . privilege claims that it had over the portions of the documents released."[34] Similarly, regarding the VA's alternative request that the documents be placed under a protective order, the Board concluded that the VA could not show good cause to have the documents so protected because the documents had already been released to the public.[35]

This decision betters the predictability of outcomes in discovery disputes over the privileged nature of documents previously produced in response to a FOIA request. Parties are on notice that the voluntary disclosure of documents pursuant to a FOIA request should negate a later attempt to protect such documents at the Civilian Board.[36]

Concluding Thoughts

The Civilian Board's recent trend of publishing more rulings on discovery issues should have a lasting positive impact on the efficiency of proceedings. With these discovery decisions in hand, attorneys who litigate disputes before the Board on behalf of contractors and the Government should be better equipped to assess likely outcomes of discovery disputes and engage accordingly. As we look ahead to the next 10 years of Board practice, we are hopeful that the Civilian Board will continue the trend of publishing meaningful discovery-related decisions.

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Endnotes

1 Specifically, the General Services Board of Contract Appeals, the Department of Transportation Board of Contract Appeals, the Department of Agriculture Board of Contract Appeals, the Department of Veterans Affairs Board of Contract Appeals, the Department of the Interior Board of Contract Appeals, the Department of Energy Board of Contract Appeals, the Department of Housing and Urban Development Board of Contract Appeals, and the Department of Labor Board of Contract Appeals were consolidated to form the Civilian Board. National Defense Authorization Act of 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391-393 (2006) (later codified at 41 U.S.C. § 7105(b) (2012)).

2 41 U.S.C. § 7105(e)(1)(B).

3 *Id.*

4 Other trends that we identified include: (1) that the Civilian Board, when interpreting its discovery rules, appears to be more regularly providing parallel cites to – and federal court analysis regarding – analogous Federal Rules of Civil Procedure; and (2) that most published decisions (including orders indicating that a case has been settled and is dismissed) from the Civilian Board seem to relate to contracts entered into by the General Services Administration and the Department of Veterans Affairs.

5 Other recent published decisions opining on discovery issues include: (1) *Lynchval Sys. Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792 (denying Government's motion to strike declaration of contractor's Chief Financial Officer ("CFO") for failure to disclose CFO as a person with relevant knowledge before discovery closed because "[a]lthough [contractor] waited until after the close of discovery, it did supplement its interrogatory response to put [the Government] on notice that the CFO was a person with knowledge"); (2) *Yates-Desbuild Joint Venture v. Dep't of State*, CBCA 3350, et al., 15-1 BCA ¶ 36,027 (impressing upon the interested parties "their burden to consider vigilantly the need for protection of each document" under a blanket protective order because of the inefficiency that results from wholesale branding of documents as protected); and (3) *Bryan Concrete & Excavation, Inc. v. Dep't of Veterans Affairs*, CBCA 2882, 16-1 BCA ¶ 36,339 (denying as premature appellant's motion to compel because "[t]here [was] no indication that the parties . . . attempted to resolve [the] discovery issues before appellant filed its motion," as required by Civilian Board Rule 13(f)(2)).

6 CBCA 2727, et al., 15-1 BCA ¶ 35,889.

7 *Id.*

8 *Id.* (citing *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987)).

9 *Id.* (citing 5 U.S.C. § 552a(b)(3)). The Civilian Board explained that "[n]umerous agencies [including the respondent agency, the Department of Veterans Affairs (78 Fed. Reg. 76,897, 76,898-99 (Dec. 19, 2013)] have defined presentation of relevant material to administrative tribunals, which would include [the] Board, during the conduct of civil litigation as a 'routine use' of information that falls within the exception, sometimes even expressly mentioning the agency's ability to produce such information to opposing counsel in response to civil discovery before such tribunals (so long as the agency determines that the information is relevant)." *Id.* (citing 80 Fed. Reg. 4637, 4638 (Jan. 28, 2015) (Dep't of the Treasury); 80 Fed. Reg. 239, 239-40 (Jan. 5, 2015) (Dep't of Homeland Security); 79 Fed. Reg. 78,839, 78,840 (Dec. 31, 2014) (Bureau of Consumer Financial Protection); 79 Fed. Reg. 70,181, 70,183 (Nov. 25, 2014) (Federal Housing Finance Agency); 79 Fed. Reg. 61,599, 61,600 (Oct. 14, 2014) (Dep't of Commerce)).

10 15-1 BCA ¶ 35,889.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* (citing H.R. Rep. No. 93-1416, at 13 (Oct. 2, 1974)); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 82 (D.C. Cir. 1982); *Nat'l Western Life Ins. Co. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) ("It cannot be seriously contended that postal employees have an expectation of privacy with respect to their names and duty stations.")).

16 CBCA 2727, et al. 15-1 BCA ¶ 35,942.

17 *Id.* (quoting 5 U.S.C. app. 3 § 6(a)(4)). Circumscribing its authority with regard to IG subpoenas, the Civilian Board noted that "[t]o the extent that an entity wants to challenge a subpoena that an OIG issues under the purported authority of the IG Act, or to the extent that an OIG wants to enforce such a subpoena, the IG Act specifically provides that such subpoenas are 'enforceable by order of any appropriate United States district court.' 5 U.S.C. app. 3 § 6(a)(4). Pursuant to that provision, the United States district courts have exclusive jurisdiction to decide whether to enforce, as well as whether to quash, an IG subpoena." *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 CBCA 5092, 16-1 BCA ¶ 36,318.

23 *Id.*

24 *See id.*

25 *Id.*

26 *Id.* (citing *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011) (attorney-client privilege is available to the Government); *Confidential Informant 59-05071 v. United States*, 108 Fed. Cl. 121, 131-32 (2012) (discussing the Government's deliberative process and investigatory files privileges)).

27 *Id.* (quoting *Mehl v. U.S. EPA*, 797 F. Supp. 43, 47 (D.D.C. 1992) (quoting *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)); *Sears,*

Roebuck, 421 U.S. at 150 (discussing deliberative process privilege under FOIA Exemption 5); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977) (discussing attorney-client privilege under FOIA Exemption 5); *Mehl*, 797 F. Supp. at 47 (discussing investigative files privilege under FOIA Exemption 7)).

28 *Id.* (citing *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) ("release of a document waives . . . [executive privilege (including the deliberative process privilege)] for the document or information specifically released"); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) ("any voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege"); *Clark v. Powe*, No. 07-C-1616, et al., 2008 WL 4686151, at *4 (N.D. Ill. May 30, 2008) (discussing investigative files privilege waiver through disclosure to third parties)).

29 *Id.* (quoting *Mobil Oil Corp. v. United States Environmental Protection Agency*, 879 F.2d 698, 700 (9th Cir. 1989) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 290-94 (1979))).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* (citing 5 U.S.C. § 552(a)).

34 *Id.* (citing *Melendez-Colon v. United States*, 56 F. Supp. 2d 142, 145 (D.P.R. 1999) ("[T]he Report has already been produced by the Department of the Navy, in part, under the FOIA. The Court finds that the prior disclosure of the Report pursuant to the FOIA waives Defendant's privilege argument regarding the use of the Report in the instant case."); *U.S. Student Ass'n v. Central Intelligence Agency*, 620 F. Supp. 565, 570 (D.D.C. 1985) (document "cannot be withheld if it has been the subject of prior 'official and documented disclosure'" (quoting *Afshar v. Dep't of State*, 702 F.2d 1125, 1133 (D.C. Cir. 1983))).

35 *Id.*

36 *See also* Justin M. Ganderson & Kevin T. Barnett, *The Contractor's Secret Weapon: Using FOIA When Asserting a Claim*, THE PROCUREMENT LAWYER, Volume 50, Number 2 (Winter 2015) (discussing how contractors can use FOIA to their advantage when prosecuting a claim against the federal government).