U.S. Department
of Transportation
**Federal Aviation
Administration**

Assistant Administrator for Finance
and Management
800 Independence Ave., SW.
Washington, DC 20591

MAY 10 2013

RCVD 5-16-13 (4pp)

Mr. Jeffrey Lewis
28242 S. Salo Road
Mulino, OR 97042

RE: Freedom of Information Act Appeal 2011-001765A

Dear Mr. Lewis:

This letter responds to your January 20, 2011, administrative appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your initial request dated December 9, 2010, asked for copies of all Administrator Hotline Information System (AHIS) printouts for Hotline complaints filed between August 1, 2006 and March 1, 2007 at all Federal Aviation Administrations (FAA) Air Traffic Control Tower (ATCT) facilities in the state of California. You said that the names of the subjects could be redacted a as well as the facility name/location.

In his initial response to your request dated January 13, 2011, the FAA Director, Office of Audit and Evaluation found 23 records and released 60 pages of responsive material.[1] He withheld three of the 23 records, which comprise seven pages, under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). He redacted the names, addresses and certain information from the rest of the pages under Exemption 6 as well because release would constitute a clearly unwarranted invasion of personal privacy.

In your appeal, you assert that the records were excessively redacted. You assert that the caller's identity cannot be properly concealed because the contents of the Hotline generally do not contain information that applies to the caller. You also say that a caller can report anonymously so there is no rationale for redacting the name of a caller who freely provides his or her name. On appeal you ask that: (1) all data be provided except for the Name/Phone/Address; (2) for the "What do you want to talk about" section redact only names, while retaining all other words; and (3) the names/signatures/sign-for's of the official who signed the response memos.

We have reviewed the partial denial in light of your appeal letter, the FOIA, and applicable case law and conclude that the Director, Office of Audit and Evaluation properly withheld names of employees, names of witnesses, manager names, and other identifying information in the records under Exemption 6. However, we find that gender identification should have been released and we are providing a revised copy of the initially released records as an enclosure.

Exemption 6 – Personal Privacy Information Regarding Conduct/Discipline

Exemption 6 protects individuals against clearly unwarranted invasions of personal privacy. In order to be covered under Exemption 6, information must first meet a threshold requirement: it must fall within the category of "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6). This is read broadly and includes all information that "applies to a particular individual." U.S. Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982). Once that threshold is met, the focus turns to whether disclosure of the

[1] Review of the materials on appeal show that 61 pages were initially released.

information would "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This requires balancing the individual's right to privacy against the public's right to disclosure. Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

We have reviewed the withheld pages and the redacted pages consisting of the identity of the employee, witnesses, manager, the facility, and other identifying information. Based on the nature of the records of possible violations of rules and regulations, we find that these individuals have a significant privacy interest in not having their identities disclosed. The courts have held that internal investigations of mid and low-level employees can be protected under Exemption 6 of the FOIA. See Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984) (finding that employees have a privacy interest in their association with investigations); Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (indicating that individuals mentioned or interviewed in the course of an investigation have a "well-recognized and substantial privacy interest[]....").

Having found a viable privacy interest in non-disclosure of the withheld information about the individuals, we were required to balance that privacy interest against the public interest in disclosure, if it was a qualifying public interest. The burden of proof is on the requester of the information to identify a qualifying public interest in disclosure of the information, not an interest of the individual requester. See Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 390 n.8 & 391 n.13 (D.C. Cir. 1987).

Prior to the Supreme Court's decision in United States Dep't of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749 (1989), the courts recognized a variety of public interest factors entitled to heavy weight. However, the Supreme Court in Reporters Committee narrowed the scope of the public interest to be considered under the FOIA's privacy exemptions. The analysis now turns on the nature of the document and its relationship to the "core purpose" of the FOIA, which is to shed light on an agency's performance of its duties. Id. at 773. The Court held that information that does not directly reveal the operations of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." Id. at 775. The Supreme Court reaffirmed this analysis in United States Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994).

You have not asserted a qualifying public interest in releasing this information. In your initial request you reference an anonymous Hotline complaint directed against you and it appears that your request for other Hotline information is to further your personal interests. In this case you were provided with redacted Hotline printouts and response letters. You have identified no specific nexus between knowing the identities of the individuals named in the records and the asserted public interest served by their disclosure. See Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 172-73 (2004). These individuals' interest in personal privacy therefore outweighs any public interest in the disclosure of their identities.

In this case, simply redacting names cannot completely de-identify the employees involved. This also applies to the seven pages withheld in their entirety. Alirez v. NLRB, 676 F.2d 423, 428 (10th Cir. 1982) ("Even sanitized, these documents would enable [the requester] and others who had specific knowledge of these incidents, to identify readily the informant and persons discussed in each document."); see also Rose, 425 U.S. at 380 ("what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage point of those who would have been familiar, as fellow cadets or Academy staff, with other aspects of his career at the Academy."). Therefore, we are continuing to redact the records we are releasing to you and withhold in full the seven pages under Exemption 6 of the FOIA. 7

Exemption 7(C) – Personal Privacy Information in Law Enforcement Records

FOIA Exemption 7(C) employs a balancing test nearly identical to the Exemption 6 balancing test, but the protection of the exemption is limited to records compiled for law enforcement purposes where the disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)7)(C); see, e.g., Stern, 737 F.2d at 91-92. The "law" to be enforced within the meaning of the term "law enforcement purposes" includes both civil and criminal statutes, as well as those statutes authorizing administrative (i.e., regulatory) proceedings. Kay v. FCC, 867 F. Supp. 11, 17-18 (D.D.C. 1994). Once a privacy interest has been identified, it must be weighed against the public interest in revealing the information. The requester must identify a public interest and demonstrate that the public interest in disclosure is great enough to overcome legitimate privacy interests. See Senate of P.R. v. U.S. Dep't of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987). This is a lower burden than the "clearly unwarranted invasion of personal privacy" burden under Exemption 6. Exemption 7(C) has been regularly applied to withhold references to persons who are not targets of investigations and who were merely mentioned in law enforcement files. See, e.g., Rugiero v. DOJ, 257 F.3d 534, 552 (6th Cir. 2000) (withholding names of third parties mentioned or interviewed in course of investigation). Accordingly, these cases and the above-cited cases supporting withholding under Exemption 6 support withholding under Exemption 7(C).

I am the official responsible for this decision which constitutes the final administrative action on your appeal, and has been concurred in by the FAA Office of Chief Counsel, as well as by John E. Allread, an attorney in the Department of Transportation Office of General Counsel. You are advised that under the provisions of 5 U.S.C. §552(a)(4)(B), you are entitled to seek judicial review of this decision in the U.S. District Court in the district where you reside, the district where you have your principal place of business, the district where the records are kept, or the District of Columbia.

Sincerely,

Victoria B. Wassmer
Assistant Administrator for
Finance and Management

Enclosure