



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

MAY 10 2013

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

RCD 5/17/13 (59)
5-16-13

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

RE: Freedom of Information Act Appeal 2012-007031A

Dear Mr. Lewis:

This letter responds to your November 2, 2012 administrative appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your initial request dated July 23, 2012, asked for copies of records referenced in a Briefing Item for an Accountability Board (AB) Case reported on January 25, 2007, in which a Certified Professional Controller (CPC) at a Washington State Air Traffic Control facility allegedly marked a swastika and made Hitler references about a management official. You specifically asked for: (1) a copy of "Management's Investigation" as referenced in the April 26, 2007 update (a memo detailing what was found in the initial investigation, prior to referring the matter for a more formal Security Investigation); (2) the memo or email in which the Accountable Official requested a security investigation from Northwest Mountain Region's Security (referenced as Update 2/8/07); (3) the completed Security Investigation report (the Report of Investigation (ROI)); (4) the proposed disciplinary action (initially proposed as a 30 day suspension); and (5) the final disciplinary action as issued. You asked us to provide a gridded copy if available. You accept that the names of the respondents will be redacted but ask for the names of management officials and witnesses.

Your initial request was assigned to three separate offices for response. In an initial response dated August 30, 2012, the Northwest Mountain Acting Regional Administrator said the Regional Human Resource Management Office was responding to items 4 and 5 of your request. That office found nine responsive pages consisting of the proposed disciplinary action and final action associated with the referenced AB case. You were provided with redacted copies of the pages, where personal information was deleted pursuant to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). That information was withheld because release would constitute a clearly unwarranted invasion of personal privacy. Additional information was redacted because it fell outside the scope of your initial request. In the second initial response dated September 26, 2012, the Acting Regional Administrator said that the Office of Security and Hazardous Materials Safety found 86 pages of responsive records that were contained in a ROI numbered ANM20070041. The ROI was withheld in its entirety under Exemption 6 of the FOIA because release would constitute a clearly unwarranted invasion of personal privacy. In the last initial response dated October 17, 2012, the Acting Regional Administrator said that the Air Traffic Organization, Western Service Area was responding to items 1 and 2 of your request. He said no responsive records were found and it was likely they had been destroyed in accordance with FAA Order

7210.3W, Facility Operation and Administration and Order 1350.15C, Records Organization, Transfer, and Destruction Standards.

In your appeal, you assert that the records were excessively redacted. You ask for a copy of the records without any redactions. You question the withholding of documents that are “not responsive” to your request. You also want to know the allegations contained in the ROI because they will shed light on the handling of your own personnel case.

We have reviewed the partial denial in light of your appeal letter, the FOIA, and applicable case law and conclude that you should have been provided with the e-mail sent by the Accountable Official requesting a security investigation. A copy of that e-mail is enclosed. However, we find that the Acting Regional Administrator properly withheld the ROI and the name of the employee, names of witnesses, facility location, manager name, and other identifying information in the records under Exemption 6.

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 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 ROI 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 appeal you state that this information would shed light on the handling of your own personnel case. In this case you were provided with redacted disciplinary decision 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. 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 and withhold the ROI under Exemption 6 of the FOIA.

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).

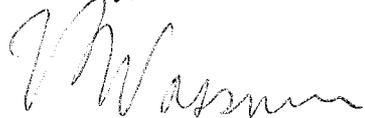
No Records or Nonresponsive Records

Under the FOIA, agencies are required to conduct a search that is “reasonably calculated to uncover all relevant documents.” Weisberg v. U.S. Dep’t of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). In item #1 of your initial request, you asked for a copy of “Management’s Investigation” related to a specific Accountability Board case. In this instance, FAA Order 1350.15C, Records Organization, Transfer, and Destruction Standards, Item 3770, prescribes a five year retention period for these types of records. As noted in the initial response to you from the Western Service Area, they reasonably believe that the record you requested related to this aspect of your request, if it ever existed, has likely been disposed in light of the fact that the disposition date of this record occurred prior to your submission of your initial request. Nevertheless, a search for responsive records was conducted in the Northwest Mountain Office of Human Resources as well as in the office files of the facility where the incident occurred and in the files of the managers in this employee’s chain of command, which are the locations where responsive records would reasonably be located. Notwithstanding this thorough search, no records responsive to your request were located.

The nonresponsive portions of the documents concern other allegations that are not specific to your request and, therefore, are considered outside the scope of your request.

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



Simmons/ANM/FAA@FAA
Subject Re: AB Allegation out of [REDACTED]

Debbie - I am requesting Security to do the investigation into the allegation at [REDACTED]. Please let me know if I need to provide any additional information. Thank you.

Teri Bristol
Acting Director of Terminal Operations
Western Service Area

-----Debbie Williams/AWA/FAA wrote: -----

To: Teri Bristol/AWA/FAA@FAA
From: Debbie Williams/AWA/FAA
Date: 01/31/2007 11:01AM
cc: Debbie Williams/AWA/FAA@FAA, Dino Camporeale/ANM/FAA@FAA, Pat Simmons/ANM/FAA@FAA
Subject: AB Allegation out of [REDACTED]

Hi Teri --

I have been informed that you want Security to do the investigation into the allegation out of the [REDACTED]. In order to make that request to Security, I need you to send me an email requesting Security's assistance in the subject case. I can't process the case until I receive your email.

Thanks



*Debbie Williams, AHA-1
Accountability Board Consultant
202-267-7334
202-493-4852 Fax*