



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

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

RCVD 6-8-13

JUN 03 2013

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

RE: Freedom of Information Act Appeal 2011-008134A

Dear Mr. Lewis:

This letter responds to your December 23, 2011, administrative appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your initial request dated July 31, 2011, asked for the entire unredacted copies of all investigative records, all letters proposing discipline, and all letters implementing the final disciplinary action regarding a controller and a Front Line Manager (FLM) for the apparent viewing of a DVD movie at Cleveland Air Route Traffic Control Center (ARTCC) on April 17, 2011.

Your initial request was assigned to two separate offices for response. In an initial response dated November 9, 2011, the Federal Aviation Administration (FAA) Southwest Regional Administrator said the Air Traffic Organization, Central Service Center found 75 pages of responsive records, which was sent to you.¹ However, information such as names and telephone numbers were redacted under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). In the second initial response dated November 22, 2011, the FAA Acting Executive Director, Office of Human Resource Management found 43 responsive pages, which was sent to you. However, personally identifiable information was redacted under Exemption 6 as well.

In your appeal, you assert that the records were excessively redacted. You assert that entire pages (the draft and final disciplinary letters for the controller and the supervisor) were fully redacted, but not declared. You ask for a copy of the disciplinary actions. You say that the April 18, 2011 FAA Press Release stated that “the controller and the front line manager have been suspended.”

We have reviewed the partial denial in light of your appeal letter, the FOIA, and applicable case law and conclude that the Regional Administrator properly withheld the names of employees and other identifying information in the records under Exemption 6.

We find that the Acting Executive Director, Office of Human Resource Management excessively redacted the Communications Timeline document and the Transcript. However, you were provided the same documents from the Regional Administrator with less excessive redactions and we find that you were given properly redacted copies. We also find that certain handwritten statements on a Weingarten Investigation document should be released, which we are enclosing on appeal. We also find that rosters of employees' actual signatures

¹ I review of the records shows that correct page count to be 46 pages in total.

should continue to be withheld. The released rosters contain the typewritten names of the employees.

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 responsive records and the redacted pages consisting of the identity of the employees and witnesses. 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).

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You have asserted a qualifying public interest in releasing this information. In your initial request you state that full disclosure would serve the core purpose of the FOIA by

contributing significantly to public understanding of the operations or activities of the government. In this case you were provided with redacted records of interviews, statements, and other documents. 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.

As for the redacted signatures of employees on the rosters, we find no public interest in release of that information. You were provided with the typed names of the employees, so you do have their identities. Release of the signatures could subject the employees to identity theft or other personal harms.

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 Determination

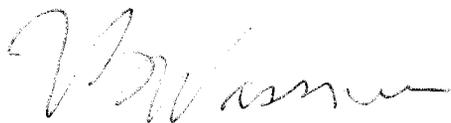
Under the FOIA, agencies are required to conduct a search that is “reasonably calculated to uncover all relevant documents.” Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). In your initial request, you asked for all letters proposing disciplinary action and all letters implementing the final disciplinary decision. In this case, a thorough search for responsive records was conducted at the Cleveland ARTCC. Notwithstanding this thorough search, no records responsive to your request were located.

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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 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,

A handwritten signature in cursive script, appearing to read "Victoria B. Wassmer".

Victoria B. Wassmer
Assistant Administrator for
Finance and Management

Enclosure

Weingarten Investigation

Investigation with: [REDACTED]

Date/Time: 4/18/2011

In attendance (name/title): Ron Lilly, [REDACTED]

Laura Vilag

Representative: Todd Parkman Drew MacQueen

Declined: _____

Will be given opportunity to review tapes & amend ^{statement} if needed

> Read the following statements and record the employee's, representatives, and other participants' response(s):

Human Resource Policy Manual (HRPM) ER-4.1, Standards of Conduct states, "It is the duty and requirement of every employee to give, orally and/or in writing as directed, to any supervisor or DOT official conducting an investigation, inquiry, or hearing in the interest of the agency, **complete and truthful** information and testimony pertaining to all matters in which queried." Additionally, failure to cooperate in an investigation itself is grounds for disciplinary action, as is giving false testimony.

• Do you understand this statement? *I do.*

CBA 2009, Article ¹¹, section 9 states: Radios, television sets, appropriate magazines/publications, pagers/cell phones, and electronic devices will be permitted in designated non-work areas at all facilities for use at non-work times. Pagers/cell phones will be permitted in operational areas but shall be set in the "off" position due to possible interference with NAS communications equipment. The operation of weather radios shall be permitted in operational areas.

On 1/5/2011 you signed MBI P10278 which briefed on electronic devices (see attached briefing). You read and acknowledged by your signature, is this your signature?

That is

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Enclosure

A HAM radio operator called and reported a movie interference with frequencies 124.4 and 121.2. VADER22 also reported interference on the frequencies and the appearance of a movie playing in the background.
Explain what happened.

Was not feeling good that day ^{I called in sick on my shift}
Was fatigued... put a movie on to help stay awake
Wanted to make sure I stayed awake + provided a service

Were you sleeping on duty? NO

Who else was in the area? [REDACTED]

Anything abnormal with any equipment? Other than stuck keys - No

How many aircraft were you working? - ONE
almost sure of it one - need to re-verify position
Understand against FAA regs - Yes I do

Was the FLM aware you were watching the movie? He came down after he got the phone call and video player was off @ time

When the FLM walked into the area did he observe you watching a movie?

If so, what was his response?

What FLM say to you when he walked in the area
Can't remember exact words was to effect (he obviously knew we were watching) the movie

He told us to pause the movie if we were watching transmitting. He did not say to put it away.

Has this happened before as far as watching movie on air. Occasionally to keep myself about 50% I don't get sleepy or tired. Occasionally = rarely 2-3 times was paying attention to his traffic. Only time I was watching movie.. [REDACTED]

You + [REDACTED] was when nothing to say to [REDACTED] - I was monitoring the whole time (freq + radar scope)

Anything to add

Managers aware? - Not to my knowledge. Never had words, but managers have walked by without saying anything. Have observed others watching movie on mind. - Can't be specific I don't know everyone

Did you file an ATISAP - NO

You were assigned a midnight shift and working the morning of 4/17/2011 and working R53 0400 - 0827Z (monitoring frequencies: 126.95, 121.2, 124.4 and 126.72).

At 0530:38 - 0536:49 non ATC communications were broadcasting over the frequency as aircraft are attempting and unable to communicate with you.

You were working [REDACTED] and he was under your control and responsibility. Did you hear [REDACTED] attempt to reach you on your frequency and then again on guard frequency at about 0536:42.

What were you doing at this time and why did this interruption to ATC service occur?

Explain how this happened. Initially checked in and I did answer
Best on my recollection
Barbled over guard ~~1st~~ time
2nd time did hear him on guard + did answer
I took my shoe off + rested my foot in my shoe
There was a stuck mike
Shoe depressed foot pedal causing a stuck mike

Never neglected duties & provided safe environment
Always been vigilant

The information collected during this meeting will be reviewed with Human Resources for a determination of the appropriate follow-up action.

In the meantime you are reminded that you are expected to: **It is my expectation that you comply with all FAA directives, orders and initiatives. Maintain focus on the safe and efficient operation of ATC services. This is a ongoing investigation; you are asked to maintain the confidentiality of this matter. You are not permitted to work an operational position pending the conclusion of this investigation.**

I am offering you an EAP referral should you feel the need to utilize this service.

Interviewed by:

Rama Kelga

Date:

4-18-11

Q
SOURCE: FI-8134 APPEND RESPONSE
RND 6-8-13