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Monday, August 19, 2013

U.S. Department of Transportation
Docket Operations, M-30
1200 New Jersey Avenue SE.
West Building Ground Floor, Room W12-140
Washington DC 20590-0339

Dear Sir or Madam:

Please accept these comments for docket number FAA-2013-0375, a proposed rule in the 7/19/13 *Federal Register*, with the title: **Technical Operations Safety Action Program (T-SAP) and Air Traffic Safety Action Program (ATSAP)**. A paragraph near the top of this Federal Register posting invited comments, and the comments that follow conform with your invitation.

I am strongly opposed to the proposed rule, for all of the following reasons:

1. **This regulatory proposal is contrary to the Open Government Initiative.**¹
Effectively, FAA Administrator Huerta is proposing to formalize and legitimize FAA's ongoing and improper practice of denying disclosable, de-identified ATSAP records to FOIA requestors. As such, he is running counter to the President's clearly articulated goals aimed at maximizing transparency, open government, and accountability. Furthermore, these laudable goals were not just an off-the-cuff comment; the Administration has restated them many times since.

Here are the first three paragraphs of *President Obama's FOIA Memorandum*,² issued on 1/21/09, the day of his first Inauguration:

President
Obama's
view

"A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

¹ view online at: <http://www.whitehouse.gov/open>

² view online at: <http://aireform.com/wp-content/uploads/20090121..-FOIA-Statement-by-President-Obama-2p.doc>

“The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

“All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

And, here is the heart of what Attorney General Holder added to the record, in his memo dated March 19, 2009:³

Attorney
General
Holder’s
view

“First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

“Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

*“At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, **“The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”***

Here are the two opening paragraphs added to the record by OMB Director Peter Orszag, with his **Open Government Directive** memo, dated December 8, 2009:

OMB
Director
Orszag’s
view

“In the Memorandum on Transparency and Open Government, issued on January 21, 2009, the President instructed the Director of the Office of Management and Budget (OMB) to issue an Open Government Directive. Responding to that instruction, this memorandum is intended to direct executive departments and

³ view online at: <http://aireform.com/wp-content/uploads/20090319.-Eric-Holder-FOIA-memo-3p.pdf>

agencies to take specific actions to implement the principles of transparency, participation, and collaboration set forth in the President's Memorandum. This Directive was informed by recommendations from the Federal Chief Technology Officer, who solicited public comment through the White House Open Government Initiative.

"The three principles of transparency, participation, and collaboration form the cornerstone of an open government. Transparency promotes accountability by providing the public with information about what the Government is doing. Participation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society. Collaboration improves the effectiveness of Government by encouraging partnerships and cooperation within the Federal Government, across levels of government, and between the Government and private institutions."

2. **The true aim of this regulatory proposal is to bypass Congress' FOIA mandate.**

Congress crafted FOIA in the mid-1960's, responding to growing citizen concern about arbitrary bureaucratic overreach. Congress made additional amendments to FOIA as needed for cultural and technological shifts. Congress has mindfully defined and adjusted the rules, but FAA is choosing to work around those rules. Effectively, FAA Administrator Huerta is proposing to formalize and legitimize FAA's ongoing and improper practice of denying de-identified ATSAP records to FOIA requestors. Which raises the interesting legal question:

...since Mr. Huerta has proposed a new rule to protect ATSAP reports from FOIA disclosure, and since that new rule has still not been effectuated, how does FAA justify these past few years where they have been arbitrarily denying hundreds of FOIA requests for the currently disclosable de-identified ATSAP records?

3. **This regulatory proposal is a pathetic re-tooling of ASRS, aimed at gutting the virtues of that excellent NASA program.** All citizens aware of recent aviation history know that, in recent years, there has been an explosion of new programs soliciting voluntarily reported safety data from various aviation employee groups. The granddaddy of all these safety-reporting systems is NASA's ASRS. It was initiated in the mid-1970's, more than three decades before ATSAP. It has been hugely successful, so much so that the one millionth ASRS safety incident report was filed in March 2012. For nearly thirty years, FAA encouraged all aviation employees to report to ASRS; the enticement was an offer of disciplinary immunity to ASRS reporters. Additionally, FAA has enjoyed use of judiciously de-identified ASRS data (and data products, like NASA's monthly safety newsletter, 'CALLBACK') to train and support safety personnel such as air traffic controllers. So, one has to ask: **why is FAA now encouraging its employees to voluntarily report to ATSAP instead of ASRS, and why would FAA want to bury their ATSAP data?**

4. **This regulatory proposal will diminish Public confidence.** FAA routinely produces reports that go to great lengths to present FAA in a positive light. One example is the **FY2011 Performance and Accountability Report.**⁴ At page 40, FAA states: “*The level of public confidence in the safety of air travel has a huge impact on the economic health of both the industry and the United States.*”

Clearly, the level of public confidence will decline when serious incidents happen, and confidence will further decline when the public learns of FAA scandals and sees FAA trying to conceal information.

Serious incidents do happen at FAA; just look at the U.S. fatal accidents this year:

- ..for the first quarter at: http://aireform.com/?page_id=2565
- ..for the second quarter at: http://aireform.com/?page_id=5207
- ..and, for the present quarter of 2013 at: http://aireform.com/?page_id=7897

FAA scandals, and improper concealment of information, do happen, too. Consider the following, just some of FAA’s dismal news stories, all of which occurred during the past few years, while FAA and NATCA have been offering ATSAP as a protection from disciplinary action, to those controllers who file ATSAP reports:

- 4/3/08: A Congressional Hearing exposed that FAA management was scuttling efforts by subordinate Aviation Safety Inspectors and enabling Southwest Airlines to excessively delay making safety repairs related to cracking fuselages and rapid cabin depressurization. In other words, the Inspectors were doing their jobs, but Southwest and higher FAA managers were agreeing to indefinite delays. One testifying whistleblower even endured death threats.
- 11/13/08: The U.S. Office of Special Counsel sent a letter to President Obama substantiating whistleblower Anne Whiteman’s charges, that FAA management at DFW had coverup up controller errors with 62 identified events mis-classified as pilot errors.
- 7/3/09: The U.S. Office of Special Counsel sent a letter to President Obama substantiating whistleblower Rand Foster’s charges related to noncompliant and unsafe modifications on emergency response helicopters.
- 11/24/09: The U.S. Office of Special Counsel sent a letter to President Obama substantiating whistleblower Ray Adams charges of persistent safety hazards at Newark International Airport. Mr. Adams had also been locked out from work in retaliation for his whistleblowing.
- 4/1/10: The U.S. Office of Special Counsel sent a letter to President Obama substantiating whistleblower Douglas Peters’ charges that FAA management

⁴ view copy at: <http://aireform.com/wp-content/uploads/FAAs-FY2011-Performance-Accountability-Report.pdf>

had intervened on behalf of American airlines, permitting "... the continued operation of aircraft that were not in compliance with an FAA safety directive...."

- 7/22/10: The U.S. Office of Special Counsel sent a letter to President Obama substantiating whistleblower Mark Lund's charges that "...*FAA failed to provide effective oversight of Northwest Airlines and to address Northwest's systemic non-compliance with FAA Airworthiness Directives (AD's)....*"
- 11/4/10: The U.S. Office of Special Counsel sent a letter to President Obama substantiating whistleblower Andrew Blosser's disclosure that FAA's Certificate Management Office in Fort Worth was failing to effectively oversee the American Airlines Inspection and Maintenance program.
- Spring 2011: the public was repeatedly alarmed by a rash of stories wherein controllers were asleep while working their overnight shifts. The worst example came in Knoxville, where a controller used couch cushions to build a bed, then dozed off for hours. What the Public was not told (but was detailed via FOIA records) was the tower controller who panicked at the situation and provided radar ATC services from the tower cab was NOT CERTIFIED to work radar traffic; he was simply winging it.
- 4/17/11: A controller at Cleveland Center was watching a DVD movie on his laptop computer while working air traffic. He inadvertently had the mic keyed for three minutes, and the story made the news the next day. An FAA internal investigation is conducted. In one sworn statement by a veteran controller, he assured that management was aware of the movie-watching: "...*they walk through the building and for 20 years no one has said anything.*"
- 5/8/12: Catching up with FAA whistleblower disclosures that had been delayed through the Scott Bloch debacle, the Office of Special Counsel issued a set of eight letters to the President, mostly substantiating an array of FAA employee complaints. Perhaps the most egregious was the New York TRACON case, which exposed extraordinary safety failures in late 2010 and early 2011. A labor-management relationship had evolved wherein management was reluctant to address controller misconduct issues. The charges were substantiated, and included sleeping and watching movies (plus the common use of other disallowed personal electronic devices).
- And, lastly, there is the matter of the concealed controller error at Camarillo Tower. It happened on July 25, 2010 and was witnessed by a veteran controller and a supervisor. The ATC audio tapes and the sworn statement of the veteran controller make the error indisputable, yet the supervisor (who failed to file papers) insists he has no memory and cannot explain the tapes. The worst part is FAA officials have looked at it repeatedly and keep acting like they cannot see it. In another case, an EEO complaint at the same tower, FAA submitted an affidavit signed by Lisbeth Mack,⁵ FAA's ATSAP

⁵ see attached 4-page Affidavit. Alternatively, view online at: <http://aireform.com/wp-content/uploads/20120411.-Lisbeth-Mack-Affidavit-for-CMA-EEOC-4p.pdf>

Manager, insisting that the ATSAP report filed after the incident was not releasable. Oddly, the FAA/AOV investigator, Mark McClure, who flew down from Seattle to conduct an investigation in June 2011, did NOT reference the ATSAP, nor did he request the filing controller to provide a copy. Had it been released, it might have aided the Supervisor's memory.⁶

5. **This regulatory proposal disempowers the individual citizen.** It strips the citizenry of their FOIA rights, blocking their individual access to records that show the effectiveness – or failure – of FAA employees in the conduct of their duties. Citizens without information cannot hold their civil servants accountable; they become slaves to the arbitrary whim of an ascendant bureaucracy.
6. **This regulatory proposal is a gross overreach by FAA.** To see the proper application of 49 U.S.C. § 40123, one needs to look closely at the legislation that produced this code section.⁷ It is also helpful to look at the context which led to that legislation. Two major commercial air crashes in 1996 undermined the Public confidence: the ValuJet crash in Florida, in May, and the TWA explosion near Long Island, in July. Many felt that the investigations were mishandled and trust in FAA (and aviation in general) was severely damaged. Congress deliberated, and passed legislation to help protect whistleblowers from retaliation. At that time, they were primarily focused on airline employees and others in the private sector; it is only in the past ten years that citizens are becoming increasingly concerned about an apparent FAA culture of corruption.

This proposal by Mr. Huerta seeks to apply a legislative objective aimed at private sector employees onto federal (public sector) employees.

Furthermore, 49 U.S.C. § 40123 specifies that, to legally justify protection of these records from FOIA disclosure, Administrator Huerta must convincingly prove that:

- (1) *the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and*
- (2) *withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities.*

As regards the first requirement, Mr. Huerta has not proven this, nor will he, as it is false. The present form of ATSAP is very successfully generating voluntary reports, thus is not suffering any inhibition to produce reports. The present form of ATSAP is also legally required to produce the de-identified ATSAP reports responsive to FOIA requests. As regards the second requirement, Mr. Huerta has produced no compelling argument that FAA's safety or security responsibilities are served by the withholding of any de-identified ATSAP report contents.

⁶ an article with links to the audio, a diagram, and details is at: <http://aireform.com/?p=965>

⁷ view online at: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title49/html/USCODE-2011-title49-subtitleVII-partA-subpartI-chap401-sec40123.htm>

Lastly, consider the predecessor (and granddaddy) to ATSAP: NASA's ASRS. As of March 2012, more than thirty years after the first ASRS volunteer submitted the first ASRS report, more than a million ASRS reports have now been filed. In accordance with NASA's successful safety methodology, these reports were all de-identified, and then all other content was injected into the publicly disclosable ASRS database. Even more, NASA has aggressively shared ASRS report contents within their monthly safety newsletter, **CALLBACK**. Here is a description, of this newsletter, from page 37 of NASA's **ASRS Program Briefing**:

"CALLBACK, the ASRS monthly safety newsletter, has been published since

1979 in a popular "lessons learned" format. CALLBACK presents ASRS report excerpts that are significant, educational, and timely. In addition, occasional features on ASRS program developments and research are presented. Over 385 issues have been published and distributed throughout the U.S. and to the international aviation community. All issues since December 1994 are available for download at the ASRS website at:

<http://asrs.arc.nasa.gov/publications/callback.html>

a PDF copy of **ASRS Program Briefing** is viewable at:
http://asrs.arc.nasa.gov/docs/ASRS_ProgramBriefing2011.pdf

NASA is clearly proud of their good work, as they should be; for more than thirty years they have managed this data collection and used it quite effectively to educate the public.

In contrast, FAA should be ashamed; they have taken the successful ASRS model and are trying to finish transforming it into a black hole for the consumption and destruction of valuable safety data. And, to make matters worse, in the process Mr. Huerta's program is offering malfeasant FAA personnel a vacation from accountable performance.

CONCLUSION: In the interest of public safety, governmental efficiency, and to ensure an effective and sustainable Democratic process with informed and engaged citizens, FAA's proposal needs to be abandoned. FAA should immediately drop Mr. Huerta's absurd proposal, which seeks principally to protect FAA's 45,000 employees (and the many thousands of contract employees, too) from accountability.

Thank you for the opportunity to be heard.

Sincerely,



Jeff Lewis

ATTACHED: 4/11/12, Affidavit of Lisbeth Mack (4p)

DECLARATION OF LISBETH MACK

Group Manager, Safety Programs
Office of Safety, Air Traffic Organization,
Federal Aviation Administration, Department of Transportation

I, LISBETH MACK, hereby declare and state:

1. I am over the age of 18 years, and attest that I am competent to testify as to the following:

2. I am the Group Manager, Safety Programs, Office of Safety, Air Traffic Organization ("ATO"), Federal Aviation Administration, Department of Transportation, Washington, D.C. My responsibilities include overseeing the management of the ATO's confidential Voluntary Safety Reporting Programs, which include the Air Traffic Safety Action Program ("ATSAP") and the Technical Operations Safety Action Program ("T-SAP") along with the Confidential Information Sharing Programs that the ATO maintains with certain airlines' Aviation Safety Action Programs. I also oversee the activities association with Safety Culture, Safety Promotions, Crew Resource Management and the Partnership for Safety programs. Prior to my appointment as Group Manager, I had been the ATSAP Manager since April 2009.

3. This Declaration is in support of the Agency's Response to 2/14/12 Order and Motion for Reconsideration To Produce ATSAP Report, regarding [REDACTED] Department of Transportation, EEOC No. 480-2011-00360X, Agency No. 2011-23458-FAA-06.

4. I am aware that [REDACTED] and his EEO representative, Don Hiebert, allege that another controller from Camarillo Air Traffic Control Tower ("ATCT"), Camarillo, California, was responsible for an operational error on July 25, 2010, and pursuant thereto, they seek a copy of the actual ATSAP report filed as a result of that alleged incident.

5. I am further aware that an ATSAP report was filed by a controller regarding a July 25, 2010 incident at Camarillo ATCT.

6. The surrounding facts and alleged witnesses of this alleged July 25, 2010 incident appear to be best described in the Air Traffic Oversight Office's August 2, 2011 Report of Investigation produced in response to Mr. Hiebert's Administrator's Hotline complaint and already in Mr. Hiebert's possession, and attached to the Agency's response as Exhibit 3.

7. ATSAP is governed by FAA Order JO 7200.20. This Order proscribes the processes and procedures for filing an ATSAP report and reviewing an ATSAP report. Prior to the issuance of this Order on January 30, 2011, there was a revision to Order JO 7210.56 in July 2009, which changed the Agency's previous policy of naming specific individuals alleged to have committed or been involved in losses of separation such as operational errors. That previous policy, which could result in disciplinary action, was deemed less effective than encouraging self-reporting.

8. ATSAP encourages the voluntary submission of safety reports from covered Agency employees involved in the delivery of air traffic services. In order to encourage such submissions, the Agency agrees to maintain and protect the reporting individual's

confidentiality. Only the individual himself or herself may agree to waive that confidentiality. The effectiveness of the ATSAP can only be maintained when the confidentiality of the reporting employee and the contents of his or her report are ensured.

9. A covered individual may file an ATSAP report using the online reporting system. An ATSAP report is delivered via this system, which is housed on a separate server maintained by a third-party contractor. The Agency does not have access to this server or the actual report filed with the contractor. Once the report is filed with the contractor, the contractor de-identifies all personally identifiable information of the individual in order to maintain that individual's confidentiality. The contractor then provides electronic access to a redacted ATSAP report to the individuals who comprise the ATSAP Event Review Committee ("ERC") for review and an acceptance decision.

10. The ERC is a three-member panel made up of one employee representing ATO management, one employee representing the National Air Traffic Controllers Association ("NATCA"), and one individual from the Air Traffic Safety Oversight Office ("AOV"). As Order JO 7200.20 describes, the ERC meets to discuss ATSAP reports. The ERC may request an investigation based on safety issues identified in the technical data transmitted by the contractor from the ATSAP report, but this is rare. However, the ERC does not investigate events themselves, nor do they determine whether the event should be categorized as an operational deviation, operational error, pilot deviation, proximity event or any other classification. The reports are subjective and qualitative.

11. Three ERCs in three separate ATO Service Areas review approximately 300 de-identified ATSAP reports per week using an online third-party database. Most of the reports cover events or incidents of some type, but some are simply reports about an identified safety issue, in which no event has occurred. Importantly, the ATSAP information reviewed by the ERCs does not identify the reporting individual. Typically, most ATSAP reports do not warrant additional action or further investigation. Each ATSAP report is reviewed and analyzed individually to determine what, if any, recommended action is needed in response to that particular incident.

12. Pursuant to standard practice, my understanding is that the contractor de-identified the subject ATSAP report regarding a July 25, 2010 report.

13. Here, the ERC accepted the report about the July 25, 2010 event and no further action was recommended or taken.

14. I declare under penalty of perjury that the foregoing is true and correct.

15. Dated this 11th day of April 2012 in Washington, D.C.

Lisbeth Loe Mack

Lisbeth Mack