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Administrator Michael Huerta

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JEFFREY NATHAN LEWIS,

Case No. 3:13-cv-00992-HZ

Plaintiff,

AFFIDAVIT OF JEB KREISCHER

v.

**FEDERAL AVIATION
ADMINISTRATION, and FAA
Administrator Michael Huerta,**

Defendants.

I, Jeb Kreischer, declare and state as follows:

1. I am employed by the Federal Aviation Administration (FAA) as a Freedom of Information Act (FOIA) Management Analyst and I have been so employed for the past 4 years and 4 months.

2. The FAA is a component of the Department of Transportation.
3. As part of my duties with the FAA, I am responsible for the development of FOIA policies, providing FAA FOIA policy and procedural guidance, providing training to all FOIA coordinators and other agency personnel, assisting FAA program offices in preparing their FOIA responses, and evaluating and responding to certain types of FOIA appeals. I, along with another FOIA Management Analyst, oversee the day-to-day operations of the FOIA program at the FAA.
4. The FAA administers FOIA through its regulations, specifically 49 CFR, Part 7. As a general matter, FOIA requests filed with the FAA receive an internal tracking number and are referred to one or more offices for response directly to the requestor. After the FAA responds to the initial request, the requestor has the right to dispute the FAA's determination through an administrative appeal. A requestor may appeal the FAA's decision to withhold documents pursuant to an exemption, to deny a fee waiver, and to deny expedited processing. In addition, a requestor may challenge the adequacy of the FAA's search for responsive records as well as a determination that no responsive records were located. Finally, a requestor may submit an administrative appeal if the FAA does not answer an initial request in accordance with the timeframes prescribed by law. An administrative appeal must be filed within 30 days of the date of receipt of the original denial.
5. The decision concerning an administrative appeal is considered a final agency decision for the purposes of review. Once the requestor is informed in writing of the appeal decision, he or she may seek review in the United States District Court.

6. From FY 2007 to the present time, Jeffrey Lewis has filed 233 initial Freedom of Information Act (FOIA) requests and 69 administrative appeals with the FAA.
7. I am familiar with the FOIA appeals listed below because they were all received and assigned by my office.
8. In many of the FOIA appeals at issue in this case, Mr. Lewis is asking for records involving certain issues that implicate sensitive privacy interests, and therefore necessitate the application of FOIA Exemption 6 and in some cases FOIA Exemption 7(c) as well. Exhibit 1 is a Vaughn index that identifies the FOIA exemptions and how they apply to the withheld information.
- 9(a). Mr. Lewis requested records related to specific Arbitration Review Board (ARB) and Merit Systems Protection Board (MSPB) cases. Our challenge in processing these types of requests is to balance the public interest in release (and the only public interest to be considered is the extent to which release of information would shed light on the activities of an agency) while taking into consideration and balancing any relevant personal privacy interests, and withholding only the minimum amount of information under FOIA Exemption 6 necessary to protect the privacy interest in question.
- 9(b). With regard to requests for these types of records, the relevant privacy interest to be considered is that of the grievant(s) in keeping their identity confidential. In these particular cases we have determined that, on balance, the public interest in disclosure of the identity of these grievant(s) is clearly outweighed by the privacy interest of the grievant(s) in keeping their identity confidential.
- 9(c). Having determined that the grievant(s) have a protectable privacy interest in disclosure of their identity, our dilemma is to release as much substantive information as possible

while taking care to protect the identity of the grievant(s). Our method in these cases has been to release the actual details and outcomes concerning the ARB and MSPB proceedings while withholding information that would tend to identify the grievant(s).

- 9(d). Because of the sensitive nature of these records, we have had to consider what constitutes identifying information as weighed both from the public viewpoint, and from the vantage point of those familiar with the grievant(s). Therefore, in addition to withholding the name of the grievant(s), we have also withheld information that, when taken together with the information being released, would tend to identify the grievant(s), particularly by those individuals (i.e. co-workers) familiar with the grievant(s). The type of information withheld is names of witnesses; name of grievant(s) manager(s); and grievant(s) facility location. In addition, we have redacted information such as docket numbers or case numbers where this information would identify the grievant(s) facility location.
- 9(e). One issue raised by Mr. Lewis pertaining to our withholding of this type of information is that witnesses and managers acting in an official capacity have no expectation of privacy. To this extent, Mr. Lewis is essentially correct, and our purpose in withholding this type of information is only to keep the identity of the grievant(s) confidential.
- 9(f). In summary, we believe that our method provides maximum release of the information that actually sheds light on the FAA's role and approach in connection with ARB and MSPB cases, which is fully consistent with the required balancing requirements relative to the application of FOIA Exemption 6. Also, these are records compiled for an administrative proceeding. As such, these records constitute "law enforcement records" under the FOIA. Therefore, the same information withheld under FOIA Exemption 6 may also be withheld under FOIA Exemption 7(c).

- 10(a). Another class of records that are the subject of several appeals at issue here are Accountability Board (AB) records. The mission of the AB is to provide oversight and ensure that management is accountable for responding to allegations of sexual harassment and sexual misconduct. Allegations of misconduct related to race, color, religion, sex, sexual orientation, national origin, age and disability also fall within the purview of the AB.
- 10(b). In AB records, reference is made to the Reporting Party and the Respondent. The Respondent is the individual(s) who is being accused of misconduct. The Reporting Party is either the individual(s) making the complaint or the individual(s), generally management officials, who either witness or receive reports of conduct that falls within the purview of the AB.
- 10(c). As with requests for records related to ARB and MSPB cases, our challenge in processing these types of requests is to balance the public interest in release (and the only public interest to be considered is the extent to which release of information would shed light on the activities of an agency) while taking into consideration and balancing any relevant personal privacy interests, and withholding only the minimum amount of information under FOIA Exemption 6 necessary to protect the privacy interests in question.
- 10(d). With regard to requests for these types of records, the relevant privacy interests to be considered are twofold: both the aggrieved party and the party accused of wrongdoing (Respondent). In connection with these particular cases, we have determined that, on balance, the public interest in disclosure of the identity of the aggrieved party(s) and the

Respondent(s) is clearly outweighed by the privacy interest of the aggrieved party(s) and the Respondent(s) in keeping their identities confidential.

10(e). Having determined that the aggrieved party(s) and the Respondent(s) have a protectable privacy interest in disclosure of their identity, our dilemma is to release as much substantive information as possible while taking care to protect the identity of the aggrieved party(s) and the Respondent(s).

10(f). Our method in these cases has been to release the actual details and outcomes concerning the AB cases while withholding information that would tend to identify the aggrieved party(s) and the Respondent(s). Because of the sensitive nature of these records, we have had to consider what constitutes identifying information as weighed both from the public viewpoint, and from the vantage point of those familiar with the aggrieved party(s) and the Respondent(s). Therefore, in addition to withholding the names of the aggrieved party(s) and the Respondent(s), we have also withheld information that, when taken together with the information being released, would tend to identify the aggrieved party(s) and the Respondent(s), particularly by those individuals (i.e. co-workers) familiar with the aggrieved party(s) and the Respondent(s). The type of information withheld is name of aggrieved party(s); name of Respondent(s); name of Reporting Party;¹ functional title of Reporting Party and Respondent; facility of Reporting Party and Respondent; position of Reporting Party and Respondent (only where the position is specific rather than generic); LOB (Line of Business) of either the Reporting Party or the

¹As noted above, in some cases this is the aggrieved party(s) and in some cases it is another individual(s), generally a management official(s), who witness conduct that falls within the purview of the AB. If the Reporting Party is an individual(s) other than the aggrieved party(s), particularly a management official, this person has very little if any expectation of privacy. However, disclosure of this individual(s) identity could, taken together with the details being released, identify the aggrieved party(s).

Respondent or both (only where the LOB would identify a specific office rather than a particular functional area).

- 10(g). The primary issue raised by Mr. Lewis pertaining to our withholding of this type of information is that management officials and other employees named in these records are acting in an official capacity and therefore have no expectation of privacy. To this extent, Mr. Lewis is essentially correct. However, our purpose in withholding this type of information is only to keep the identity of the aggrieved party(s) and the Respondent(s) confidential.
- 10(h). In summary, we believe that our method provides maximum release of the information that actually sheds light on the FAA's approach in handling AB cases, which is fully consistent with the required balancing requirements relative to the application of FOIA Exemption 6. Also, these are records compiled for the purpose of determining if wrongdoing occurred and if any laws were broken. As such, these records constitute "law enforcement records" under the FOIA. Therefore, the same information withheld under FOIA Exemption 6 may also be withheld under FOIA Exemption 7(c).
- 11(a). An additional class of records at issue here are Administrator's Hotline Information System (AHIS) records. The purpose of the Administrator's Hotline is to provide FAA employees with high level management attention for their issues and concerns. A caller to the Administrator's Hotline may do so anonymously or may request confidentiality. In any case, the identity of a caller is shared only within the FAA on a "need to know" basis.
- 11(b). If a caller asks for anonymity or confidentiality, a response from the action office to the Hotline Complaint is addressed to the Hotline Operations staff. However, the action office will provide a direct response to the employee who submitted the complaint, with a

copy to the Hotline Complaint Operations staff in cases where anonymity or confidentiality is not requested. These types of records are kept in a Privacy Act System and are retrieved by the name of the individual who submitted the complaint.

- 11(c). Our challenge in processing these types of requests is to balance the public interest in release (and the only public interest to be considered is the extent to which release of information would shed light on the activities of an agency) while taking into consideration and balancing any relevant personal privacy interests, and withholding only the minimum amount of information under FOIA Exemption 6 necessary to protect the privacy interests in question.
- 11(d). With regard to requests for these types of records, the relevant privacy interests to be considered are those of the employee submitting the Hotline Complaint and those of any party accused of wrongdoing. With regard to these particular cases, we have determined that, on balance, the public interest in disclosure of the identity of the complaining employee and any party(s) accused of wrongdoing is clearly outweighed by the privacy interest of the complaining employee and any party(s) accused of wrongdoing. Having determined that the complaining employee and any party(s) accused of wrongdoing have a protectable privacy interest in disclosure of their identity, our dilemma is to release as much substantive information as possible while taking care to protect the identity of the complaining employee and any party(s) accused of wrongdoing.
- 11(e). Our method in these cases has been to release the actual details and outcomes concerning these cases while withholding information that would tend to identify the complaining employee and any party(s) accused of wrongdoing. Because of the sensitive nature of

these records, we have had to consider what constitutes identifying information as weighed both from the public viewpoint, and from the vantage point of those familiar with the complaining employee and any party(s) accused of wrongdoing. Therefore, in addition to withholding the name and address of the complaining employees and any party(s) accused of wrongdoing, we have also withheld information that, when taken together with the information being released, would tend to identify the complaining employee and any party(s) accused of wrongdoing, particularly by those individuals (i.e. co-workers) familiar with the complaining employee and any party(s) accused of wrongdoing.

11(f). In summary, we believe that our method provides maximum release of the information that actually sheds light on the FAA's approach in handling Administrator's Hotline cases, which is fully consistent with the required balancing requirements relative to the application of FOIA Exemption 6. Also, these are records compiled for the purpose of determining if wrongdoing occurred and if any laws were broken. As such, these records constitute "law enforcement records" under the FOIA. Therefore, the same information withheld under FOIA Exemption 6 may also be withheld under FOIA Exemption 7(c).

12(a). **FOIA Control Number 2010-008248**: The initial FOIA request dated September 8, 2010 asked for certain records related to specific Arbitration Review Board (ARB) and Merit Systems Protection Board (MSPB) cases.

12(b). In the initial response from the Western-Pacific (AWP) Human Resource Office (AHR) dated October 18, 2010, all responsive records were withheld under FOIA Exemption 6 and FOIA Exemption 2. In a letter dated November 12, 2010, Mr. Lewis appealed this determination. In a letter dated July 15, 2011, this was remanded to AWP AHR for

additional action. In a response related to this remand dated October 14, 2011, AWP AHR provided Mr. Lewis with all records responsive to his request, but some information that would tend to identify the grievant(s) was withheld under FOIA Exemption 6. In this case, the following information was withheld: name of the grievant(s), names of witnesses, name of grievant(s) manager(s), grievant(s) facility location, grievant(s) date of initial hire, docket numbers, case numbers. Mr. Lewis appealed this determination in a letter dated November 8, 2011, and challenged each redaction.

12(c). In the appeal response dated May 10, 2013, the initial determination made by AWP AHR was upheld in full under FOIA Exemption 6 and FOIA Exemption 7(c). In order to arrive at this determination, we balanced the personal privacy interests at issue with any qualifying public interest. In this case, the privacy interests are those of the grievant(s), and we have determined that these individuals have a very substantial interest in keeping their identities confidential.

12(d). With regard to the public interest in release of this information, Mr. Lewis essentially states the public needs this information in order to determine the effectiveness of the FAA. As noted in the FAA's March 13 response to Mr. Lewis, he was given redacted ARB and MSPB records that provide information on the specific circumstances and disposition surrounding each case adjudicated by the ARB and MSPB. Mr. Lewis identified no specific nexus between the withheld information and the asserted public interest served by disclosure. Therefore, the interest of the grievant(s) in keeping their identities private clearly outweighs any public interest in disclosure.

- 12(e). The records at issue in this request with spot redactions are FAA-0023 through FAA-0626A-18.
- 12(f). Please see Section 9 of this Affidavit for a detailed summary of our approach related to FOIA requests for these types of records.
- 13(a). **FOIA Control Number 2011-001765:** The initial FOIA request dated December 9, 2010 asked for all Administrators Hotline Information System (AHIS) printouts from August 1, 2006 to March 1, 2007 at all FAA Air Traffic Control Facilities in the State of California.
- 13(b). In the initial response from the Office of Audit and Evaluation (AAE) dated January 13, 2011, Mr. Lewis was provided with responsive records, but certain information was withheld under FOIA Exemption 6 in order to protect the personal privacy of either the complainant or the subject of the complaint. In addition, seven pages of records were withheld in full. In a letter dated January 20, 2011, Mr. Lewis appealed on the basis that the records were overly redacted.
- 13(c). With regard to the AAE initial response, Mr. Lewis was in fact provided with more information than he should have been. For example, facility locations of the complaining employees and/or the party(s) accused of wrongdoing was inappropriately released. Notwithstanding this, in our May 10, 2013 response to this appeal, Mr. Lewis was provided with less redacted versions of these records, to the extent that previously redacted gender references were provided. However, the names of the complaining employees and any party(s) accused of wrongdoing were redacted throughout under FOIA Exemption 6 and FOIA Exemption 7(c).

- 13(d). In addition, with regard to FAA-0714, some minimal information of a highly personal nature was withheld in an abundance of caution on the basis that enough information may in fact have been improperly released through FOIA that identification of the individual in question may be possible, and that any further disclosure poses a significant threat to this individual's personal privacy (in his memorandum outlining details of his complaint related to this FOIA, Mr. Lewis did not challenge this redaction).
- 13(e). With regard to the 7 pages of records withheld in full, we agree these records should be released with only the following information withheld: name and facility location of hotline caller, name and facility location of individual who was the subject of the complaint. These records are numbered FAA-0744-A-1 through FAA-0744-A-7.
- 13(f). With regard to the spot redactions in FAA-0719, FAA-0720, FAA-0726, FAA-0727, FAA-0731, FAA-0732, FAA-0733, FAA-0740, FAA-0741 and FAA-0742, these redactions consist of the names of the complainant and/or FAA employees accused of wrongdoing.
- 13(g). In summary, the basis for continuing to withhold this information is that the privacy interest of these employees in keeping their identity confidential is substantial and, on balance, outweighs any minimal public interest in release of the withheld information, particularly in light of the substantial details and information already released concerning these cases. In order to arrive at this determination, we balanced the personal privacy interests at issue with any qualifying public interest. In this case, the privacy interests are those of the complainant and the party(s) accused of wrongdoing, and we have determined that these individuals have a very substantial interest in keeping their identities confidential.

- 13(h). With regard to the qualifying public interest in release of this information, Mr. Lewis did not assert one. As noted in the FAA's May 10 response to Mr. Lewis, he was given redacted AHIS printouts and response letters that provide information on the specific circumstances and disposition surrounding each case. Mr. Lewis identified no specific nexus between the withheld information and the asserted public interest served by disclosure. Therefore, the interest of the complainants and the party(s) accused of wrongdoing in keeping their identities private clearly outweighs any public interest in disclosure.
- 13(i). Please see Section 11 of this Affidavit for a detailed summary of our approach related to FOIA requests for these types of records.
- 13(j). As a separate issue, Mr. Lewis asked for "best available copies" of FAA-0713, FAA-0714, and FAA-0728. We are able to provide slightly higher quality copies, and agree to provide such copies.
- 14(a). **FOIA Control Number 2011-002164:** The initial request dated December 29, 2010 asked for a number of records related to three Accountability Board (AB) cases and one MSPB Appeal. This request was multi-assigned to AWP AHR and the Joint Security and Hazardous Materials Office-West, and these offices provided separate responses dated February 1, 2011 and January 19, 2011 respectively. Each office withheld all responsive records under FOIA Exemption 6. In a letter dated February 14, 2011, Mr. Lewis appealed these determinations.
- 14(b). In the appeal response dated June 3, 2013, Mr. Lewis was informed that based on discussions with the Joint Security and Hazardous Materials Office-West, a Report of Investigation (ROI) was not created in connection with any of the four cases cited.

Therefore, the response from this office should have been that no responsive records were located.

- 14(c). With regard to the MSPB Appeal, a copy of the SF-50 documenting the final action taken (Removal) was provided with redaction of the employee's name, social security number, date of birth, veteran's preference, and facility location under FOIA Exemption 6 and FOIA Exemption 7(c). No other records asked for by Mr. Lewis were located in connection with this action.
- 14(d). With regard to the three AB cases, no responsive records were located. In two of the cases, the Respondent retired before action could be taken. In the third case, it was determined that the allegations were not substantiated and no action was taken.
- 14(e). In his memorandum outlining details of his complaint related to this FOIA, Mr. Lewis essentially challenged the determination that no ROI was created in connection with the four cases he cited. In this case, the records in question, if they existed, would be located in the Investigation Tracking System (ITS) database and would be retrievable by the name of the individual under investigation. As noted above, the Joint Security and Hazardous Materials Office-West searched the ITS database but was unable to locate an ROI related to any of the four cases cited by Mr. Lewis.
- 14(f). In an abundance of caution and in response to the concerns expressed by Mr. Lewis, a second search of the ITS database was conducted by the Headquarters Office of Security and Hazardous Materials Safety (HQ ASH), and they also verified that no ROI was created in connection with any of the four cases he cited.
- 15(a). **FOIA Control Number 2011-002330**: The initial FOIA request dated December 29, 2010 asked for AB Case Reports encoded with a Western Service Area (WSA)

Accountable Official for the period January 1, 2006 to December 31, 2010. In the initial response from the Headquarters (HQ) Office of Human Resources (AHR) dated November 9, 2011, Mr. Lewis was provided with all responsive records, except that information that would tend to identify the Reporting Party and/or the Respondent was withheld under FOIA Exemption 6.

15(b). The information withheld was as follows: name of whom the incident was reported; name of who reported the incident to the AB; name, functional title, and facility of Reporting Party; name, functional title, and facility of Respondent; names of witnesses and their functional titles; references identifying a facility; and personal pronouns and gender references. In a letter dated November 28, 2011, Mr. Lewis appealed on the basis that the records were overly redacted.

15(c). In the appeal response dated March 13, 2013, Mr. Lewis was provided with these records in less redacted form, to the extent that all personal pronouns and gender references were released. However, all other information redacted by the HQ AHR was upheld in full under FOIA Exemption 6 and FOIA Exemption 7(c).

15(d). In order to arrive at this determination, we balanced the personal privacy interests at issue with any qualifying public interest. In this case, the privacy interests are those of the Reporting Party as well as the Respondent, and we have determined that these individuals have a very substantial interest in keeping their identities confidential. With regard to the public interest in release of this information, Mr. Lewis essentially states the public needs this information in order to determine whether the AB is effective. He also states that he is collecting information to produce an article on the AB in order to better inform the public at large.

- 15(e). As noted in the FAA's March 13 response to Mr. Lewis, he was given redacted AB records that provide information on what types of cases have been reported to the AB. Therefore, the public is aware the AB is providing oversight concerning issues that fall within its purview. Mr. Lewis identified no specific nexus between knowing the identities of the Reporting Party or the Respondent and the asserted public interest served by disclosure. Therefore, the interest of the Complainant(s) and the Respondent(s) in keeping their identities private clearly outweighs any public interest in disclosure. Further, release of the withheld information, taken together with the information already released, would likely identify the individuals in question.
- 15(f). The records at issue in this request with spot redactions are FAA-0768 through FAA-0866.
- 15(g). Please see Section 10 of this Affidavit for a detailed summary of our approach related to FOIA requests for these types of records.
- 16(a). **FOIA Control Number 2011-002662:** The initial request dated January 18, 2011 asked for AHIS printouts and action office response letters for all AHIS complaints filed after January 1, 2004, from several California Air Traffic Control Towers (San Francisco, San Jose, Concord, Napa and Reid-Hillview).
- 16(b). In the initial response from AAE dated April 18, 2011, a number of responsive records were provided, but with certain information withheld under FOIA Exemption 6 in order to protect the identity of the complaining employee and any party(s) accused of wrongdoing. However, 23 pages of records were withheld in full where it was determined the records could not be meaningfully redacted in order to protect the privacy interests of the complaining employee and/or any party(s) accused of wrongdoing. In a

letter dated May 15, 2011, Mr. Lewis appealed the withholding of all information, except for the name, telephone number and address of the complaining party.

16(c). With regard to the AAE initial response, Mr. Lewis was in fact provided with more information than he should have been. For example, facility locations of the complaining employee and the party(s) accused of wrongdoing was inappropriately released.

Notwithstanding this, in our May 10, 2013 response to this appeal, Mr. Lewis was provided with less redacted versions of these records to the extent that gender references were released. In addition, Mr. Lewis was provided with unredacted copies of two records titled "San Jose Tower Briefing Item," which documents which employees were present for a particular training or briefing (we agree there was no basis to withhold any part of these two records based on the fact that, as noted above, the facility location had been previously released).

16(d). In his memorandum outlining details of his complaint related to this FOIA, Mr. Lewis is challenging the withholding of 23 pages of records in full as well as a number of spot redactions in the records provided to him.

16(e). With regard to the 23 pages of records comprising four separate AHIS complaints withheld in full, we agree these records should be released. With regard to FAA-0977-A-1 through FAA-0977-A-3, we are withholding the name and facility location of the individual who was the subject of the complaint. With regard to FAA-0977-A-4 through FAA-0977-A-6, we are withholding the name and phone number of the hotline caller as well as the name and facility location of the individual who was the subject of the complaint. With regard to FAA-0977-A-7 through FAA-0977-A-9, we are withholding the name and facility location of the individual who was the subject of the complaint.

With regard to FAA-0977-A-10 through FAA-0977-A-23, we are withholding the name, home address, personal telephone number, OSHA file number, personal e-mail address and facility location of the hotline caller. We are also withholding the names and e-mail addresses of the individuals who are the subject of the complaint.

16(f). With regard to the spot redactions, they consist of the following: FAA-00877 through FAA-00879 (names of employees investigated for wrongdoing), FAA-00883 (name of employee accused of wrongdoing), FAA-00890 through FAA-00891 (names of employees involved in the issue of whether or not an incident should be reclassified as an Operational Error), FAA-0895 (name of employee accused of wrongdoing), FAA-0897 through FAA-0898 (name of employee accused of wrongdoing), FAA-0933 (name of complainant, name of individual who declined job, name of individual who accepted job), FAA-0935 through FAA-0948 (name of complainant, name of individual who declined job, name of individual who accepted job, name of other unsuccessful applicants), FAA-0957 through FAA-0965 (these are duplicative of FAA-0933 and certain pages in the FAA-0935 through FAA-0948 sequence), FAA-0969 through FAA-0977 (these are duplicative of FAA-0933 and FAA-0958 through FAA-0965).

16(g). In summary, the basis for continuing to withhold this information is that the privacy interest of these employees in keeping their identity confidential is substantial and, on balance, outweighs any minimal public interest in release of the withheld information, particularly in light of the substantial details and information already released concerning these cases. In order to arrive at this determination, we balanced the personal privacy interests at issue with any qualifying public interest. In this case, the privacy interests are those of the complainant, the party(s) accused of wrongdoing, and certain other specific

individuals referenced (ex. unsuccessful applicants) in these records. We have determined that these individuals have a very substantial interest in keeping their identities confidential.

16(h). With regard to the qualifying public interest in release of this information, Mr. Lewis did not assert one. As noted in the FAA's May 10 response to Mr. Lewis, he was given redacted AHIS printouts and response letters that provide information on the specific circumstances and disposition surrounding each case. Mr. Lewis identified no specific nexus between the withheld information and the asserted public interest served by disclosure. Therefore, the interests of the complainant and the party(s) accused of wrongdoing in keeping their identities private clearly outweighs any public interest in disclosure.

16(i). Please see Section 11 of this Affidavit for a detailed summary of our approach related to FOIA requests for these types of records.

17(a). **FOIA Control Number 2011-004047:** The initial request dated March 8, 2011 asked for the following records from October 1, 2007 through June 1, 2009: (1) e-mails from Tymeka Walton, Nina Dillard and/or any other employee showing distribution of the "AWP Terminal Report; (2) "Conduct and Discipline" pages with entries related to "Concord," "CCR" or "Lewis;" (3) "Watch Items" pages with entries related to "Concord," "CCR" or "Lewis." In addition, after December 1, 2008, copies of "Litigation" pages related to "Concord," "CCR," or "Lewis." In the initial response from AWP AHR dated May 22, 2012, all responsive records that were located were provided. These records were comprised of pages from fourteen Conduct and Discipline Reports,

five Watch Items Reports, and six Litigation Reports. In addition, Mr. Lewis was provided with seven distribution e-mails.²

- 17(b). These records were released in full, except that certain information related to employees other than the requestor and that would tend to identify these individuals subject to agency discipline was withheld under FOIA Exemption 6. In a follow-up letter dated July 31, 2012, AWP AHR provided additional records, and noted that they were inadvertently omitted from the initial May 22 response. Mr. Lewis appealed this determination in a letter dated June 4, 2012, and stated that he believed neither all distribution e-mails nor all Terminal Reports were provided. Mr. Lewis reiterated his belief that Terminal Reports were produced on a bi-monthly schedule and that they furthermore should have been retained in accordance with FAA Records Disposition standards. Mr. Lewis also challenged the veracity of some the records provided, and stated that they were presented as being created on a particular day but with content that could only have been created at a later date.
- 17(c). In the appeal response dated September 14, 2012, Mr. Lewis was informed that all AWP AHR employees responsible for distributing the Terminal Reports thoroughly searched their e-mail and all responsive records that were located were provided. With regard to the claim that incorrect dates are reflected on some of the Terminal Reports, the FAA fulfilled its obligation under the FOIA by searching for and providing all Terminal Reports that were located. If there are errors or discrepancies in these records, the FOIA does not require the FAA to explain or reconcile these errors to the satisfaction of a requestor.

² The "Terminal Reports" requested by Mr. Lewis are ad hoc reports prepared for the purpose of reporting out to management on the status of disciplinary cases and other labor relations issues.

- 17(d). In addition, Mr. Lewis was informed that while Terminal Reports were regularly prepared, they were not routinely produced on a bi-monthly basis, and his contention that simply because multiple Terminal Reports were not provided for a given month is evidence that many Terminal Reports were being intentionally concealed is without merit.
- 17(e). Finally, Mr. Lewis was informed that these types of records are considered “short term temporary files” which may be destroyed when two years old or when no longer needed, whichever is sooner. Therefore, his contention that AWP AHR violated records retention standards is also without merit.
- 17(f). As a separate issue, on August 9, 2012, Mr. Lewis submitted correspondence appealing the July 31 follow-up response. Mr. Lewis was informed that all issues raised in his August 9 letter were the same as those in his June 4 letter, and that the FAA would address them in the response to his June 4 letter.
- 18(a). **FOIA Control Number 2011-007535:** The initial FOIA request dated July 11, 2011 asked for records related to a controller who slept during his shift at the Knoxville Terminal Radar Approach Control (TRACON). Specifically, Mr. Lewis asked for (1) correspondence communicating details of this incident to management; (2) investigative reports produced to establish facts surrounding this incident; (3) disciplinary letters issued to anyone associated with this incident; and (4) copies of all FOIA response letters related to FOIA requests in connection with this incident.
- 18(b). This request was assigned to the Air Traffic Organization Eastern Service Area (ATO ESA). In the initial response dated October 31, 2011, Mr. Lewis was provided with fifty-nine pages of records. He was further informed that nine pages of these records were

being redacted in their entirety under FOIA Exemption 6, and that certain other portions of the remaining records were also being withheld under FOIA Exemption 6.

- 18(c). In a letter dated November 8, 2011, Mr. Lewis appealed this determination, and challenged the withholding of all information under FOIA Exemption 6. In addition, Mr. Lewis essentially challenged the adequacy of the search for responsive records. The FAA was not able to complete its response to this administrative appeal prior to Mr. Lewis filing this litigation, although in the interim we believe we have fully addressed the issues raised by Mr. Lewis.
- 18(d). With regard to (2) in his initial request, Mr. Lewis was provided with a six page document dated March 18, 2011 and titled “Report of Investigation: Knoxville Approach Controllers Unresponsive.” This record was provided to Mr. Lewis in full unredacted form as part of the FAA initial response, and constitutes the FAA’s only responsive record related to this aspect of his request.
- 18(e). With regard to (4), the FAA responded to only one FOIA request related to this issue, and Mr. Lewis was provided with a full and unredacted copy of this two page response letter as part of the FAA’s initial response. This record constitutes the FAA’s only responsive record related to this aspect of his request.
- 18(f). With regard to (3), the responsive records in question constitute a three page “Acknowledgement Copy” proposing to remove the employee accused of sleeping on duty, eighteen pages of employee interviews supporting this action, eight pages of internal FAA administrative penalties guidance, and five pages of personal correspondence from the accused employee to the FAA explaining his state of mind. In the initial response to Mr. Lewis, the “Acknowledgement Copy” as well as the five pages

of personal correspondence was withheld in full, while the eighteen pages of employee interviews were released with certain redactions. The eight pages of internal FAA administrative penalties guidance was released in full.

18(g). With regard to the “Acknowledgment Copy” proposing to remove the employee and the five pages of personal correspondence, we are continuing to withhold these records in full under FOIA Exemption 6 and FOIA Exemption 7(c). In this case, the identity of the accused employee as well as the circumstances surrounding this issue and the final outcome is public knowledge. Given this high level of public knowledge, we can see no useful purpose to be served in releasing these records. In fact, we have balanced the personal privacy interests at issue with any qualifying public interest. In this case, the privacy interests are those of the accused employee, and we have determined that this individual has a very substantial interest in keeping private the details contained in this proposed letter of removal as well as his personal correspondence related to this issue. With regard to the public interest in release of this information, Mr. Lewis stated in his administrative appeal that the public has an interest in ensuring that “the FAA has comprehensively investigated, has released all releasable details, and has held all employees accountable with the timely imposition of adequate disciplinary measures.” As noted above, Mr. Lewis has been provided with an unredacted copy of the FAA investigation pertaining to this issue. In addition, as noted above, it is well documented that the individual in question is no longer employed by the FAA. Therefore, we believe the public interest in release of the proposed removal letter and the accused employee’s personal correspondence is minimal at best, while the embarrassment of having such intimate details revealed for public scrutiny remains substantial for the accused

employee. As such, the personal privacy interests of the accused employee in keeping confidential the contents of these records outweigh any public interest in release. Please see FAA-1294, FAA-1318 through FAA-1320, and FAA-1347 through FAA-1351.

18(h). With regard to the eighteen pages of employee interviews found at FAA-1321 through FAA-1338, we redacted the name and initials of each interviewee as well as pejorative statements concerning the accused employee that were not directly related to the incident in question. In this case, the relevant privacy interests are those of the interviewees in keeping their identity confidential, and those of the accused employee in having derogatory statements directed at him publicly disclosed. We balanced these interests with the public interest set forth by Mr. Lewis, which as we noted above is to ensure that “the FAA has comprehensively investigated, has released all releasable details, and has held all employees accountable with the timely imposition of adequate disciplinary measures.” In this instance, we assert that the information in the interviews that have been released by the FAA is in fact the information that sheds light on the incident in question as well as the way the FAA handled its investigation and resolution, and is therefore the information of interest and of use to the public. We assert that the withheld information provides virtually no additional insight into how the FAA handled this issue, and the public interest in release is therefore non-existent. Accordingly, we have determined that, on balance, the public interest in release is not sufficient to overcome the substantial privacy interests of the interviewees and the accused employee, and this information is continuing to be withheld under FOIA Exemption 6 and FOIA Exemption 7(c).

- 18(i). With regard to (1), Mr. Lewis was provided with seventeen pages of records, with portions of several pages withheld under FOIA Exemption 6 and FOIA Exemption 7(c). In addition, one record not responsive to this FOIA request (FAA-1295) was provided, although all text was redacted. These records are found at FAA-1295 through FAA-1311. The information withheld from these records was the name of the accused employee as well as other employee(s) who were later witnesses.
- 18(j). With regard to FAA-1295, this record discusses issues related to the processing of this FOIA request. Although we cannot explain why it was provided in redacted form, we can verify that it is clearly non-responsive to this FOIA request. With regard to the several redactions of employee names in FAA-1296 through FAA-1311, we assert that the individuals in question have at least a modest interest in keeping their identities confidential in light of the public scrutiny surrounding this event. We balanced these interests with the public interest set forth by Mr. Lewis, which as we noted previously is to ensure that “the FAA has comprehensively investigated, has released all releasable details, and has held all employees accountable with the timely imposition of adequate disciplinary measures.” In this instance, we assert that the information in the employee statement and the event transcripts that have been released by the FAA is in fact the information that sheds light on the incident in question as well as the way the FAA handled its investigation and resolution, and is therefore the information of interest and of use to the public. We assert that the withheld information provides virtually no additional insight into how the FAA handled this issue, and the public interest in release is therefore non-existent. Accordingly, we have determined that, on balance, the public interest in release is not sufficient to overcome the privacy interests of the individuals

involved, and this information is continuing to be withheld under FOIA Exemption 6 and FOIA Exemption 7(c).

18(k). At FAA-1354 through FAA-1365 are e-mails that document the reporting of this incident to FAA management.³

18(l). The search for responsive records was conducted by identifying the FAA officials in the “straight line” chain of command, and having each of them conduct a search of their individual e-mail accounts and any other relevant files and locations for responsive records. These records were provided to Mr. Lewis in full, except that the name of the accused employee as well as the cell phone number of a current FAA employee was withheld. The basis for these withholdings is the same as those found in 18(g) and 18(j), respectively. In addition, parts of these e-mails dealt with issues separate and aside from the actual details of the specific event involving the controller.⁴ As such, these portions were and continue to be redacted as not responsive to the initial request. These records constitute the responsive records related to this aspect of his request.

19(a). **FOIA Control Number 2011-008134:** The initial FOIA request dated July 31, 2011 asked for investigative records, letters proposing discipline, and letters implementing final discipline related to an April 17, 2011 incident at the Cleveland Air Route Traffic Control Center (ARTCC) involving an Air Traffic Controller who was watching a movie while working a radar position.

19(b). This request was multi-assigned to the Headquarters Office of Human Resource Management (HQ AHR) and the Air Traffic Organization Central Service Area (ATO

³ These records, which were not part of the FAA’s initial response to Mr. Lewis, were provided to him as part of a supplemental disclosure subsequent to this litigation.

⁴ In (1) of his initial request, Mr. Lewis asked for the “correspondence used to communicate details of this incident.” We construed the scope of this aspect of his request as comprising the details of the actual incident itself, which occurred on February 19, 2011.

CSA), and these offices provided initial responses dated November 22, 2011 and November 9, 2011 respectively. Mr. Lewis was provided with a number of records, some of which contained redactions of information under FOIA Exemption 6 that would identify the individuals under investigation or interviewed in connection with the investigation. In a letter dated December 23, 2011, Mr. Lewis appealed the withholding of all information, and also challenged the initial FAA determination that no letters proposing or implementing discipline was located.

- 19(c). In the appeal response dated June 3, 2013, we noted that some of the records were excessively redacted, and less redacted versions of these records were provided on appeal. However, notwithstanding the fact that a thorough search was conducted at the Cleveland ARTCC, no records related to proposed or final discipline were located.
- 19(d). In his memorandum outlining details of his complaint related to this FOIA, Mr. Lewis explicitly states that he is only interested in one particular interview conducted in connection with this incident (related documents are FAA-1163 through FAA-1178), and that he is asking for the identity of the officials attending the interview and the portion of the closing comment that were redacted. We agree that release of this information would not violate the personal privacy of the interviewee, and will promptly provide the two pages containing this information (FAA 1163 and FAA-1178).
- 20(a). **FOIA Control Number 2012-002082:** The initial request dated December 15, 2011 asked for (1) recording made at Camarillo Air Traffic Control Tower (ATCT) on July 25, 2010 involving an Air Traffic Control Operational Error; (2) interviews of all FAA personnel working in the cab at the time the Local Controller attempted to cancel takeoff clearance; (3) Air Traffic Safety Action Program (ATSAP) reports related to the incident

in question; (4) e-mails and written correspondence to any FAA officials related to investigating or drawing conclusions related to the incident in question.

20(b). This initial request was assigned to the FAA Western Service Area (WSA), the FAA Office of Aviation Safety (AVS), the FAA Office of Air Traffic Oversight (AOV), the FAA Office of Audit and Evaluation (AAE) and the FAA Office of Safety and Technical Training (AJI). At the time this litigation was submitted, only AAE had responded to this request.

20(c). In the initial AAE response, Mr. Lewis was provided with a number of records responsive to his request, with portions withheld under FOIA Exemption 6.

20(d). In supplemental correspondence with Mr. Lewis, he was provided with a number of additional records responsive to (2) and (4). These additional records are found at FAA-1596 through FAA-1672. We are continuing to withhold records responsive to (3) under FOIA Exemption 6. With regard to (1), we inadvertently omitted the CD containing the requested recording, but we agree to provide it to Mr. Lewis without delay.

20(e). With regard to records related to (3), the records in question would constitute an ATSAP Report. As noted above, we are continuing to withhold these records. Before discussing the application of FOIA Exemption 6 to ATSAP records, a brief outline of ATSAP is necessary. ATSAP is designed to encourage confidential, voluntary reporting of air traffic related safety and operational concerns, without fear of reprisal or punitive action. Under the program, the FAA can learn about and address aviation safety hazards of which it was unaware or more fully understand and implement corrective measures for events or safety issues made known by it through other means. In order to encourage voluntary and confidential reporting and to maintain the integrity of the ASAP program,

the content of any report concerning an aviation safety or security matter that is submitted by a qualified participant and the name of the submitter are not publicly disclosed. In essence, the FAA promises confidentiality to these submitters. In this case, the issue under consideration is the extent to which an individual who submits an ATSAP report has a privacy interest, and whether those interests are outweighed by the public interest in disclosure.

- 20(f). FOIA Exemption 6 protects individuals against clearly unwarranted invasions of personal privacy. However, in order to be covered under FOIA 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.” United States Dep’t. of State v. Washington Post Co., 456 U.S. 595, 602 (1982). With regard to ATSAP reports, they are submitted voluntarily by an individual and contain the observations of the submitter. As such, these records are of a type that “applies to a particular individual” and clearly constitute “similar files.” Therefore, the threshold requirement for considering the applicability of FOIA Exemption 6 has been met.
- 20(g). Since the threshold requirement above has been 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). In United States Dep’t. of Justice v. Reporters Committee for 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).

20(h). In the case of ATSAP reports, the submitter has an expectation of privacy from the outset because of the confidential nature of the ATSAP program. Thus, the disclosure of any portion of an ATSAP report necessarily intrudes on an expectation of privacy. An ATSAP report contains the observations of the submitter and will necessarily include specific details of a particular incident either involving or witnessed by the submitter. If the submitter’s identity were disclosed, embarrassment and/or damage to their professional prospects/reputation or retaliation from colleagues or management is reasonably foreseeable. As such, individuals who submit ATSAP reports have a very significant privacy interest in keeping his/her identify confidential. See Holy Spirit Ass’n v. FBI, 683 F.2d 562, 564 (D.C. Cir. 1982) (recognizing that persons have an expectation that in providing information to the government they will not be damaged in their persons or reputations by disclosure of the source).

20(i). Since those individuals who submit ATSAP reports have a viable privacy interest in non-disclosure of their identities, we are required to balance that privacy interest against any articulated qualifying public interest in disclosure. Further, we must assess the nature of the privacy interest at stake, which in the case of an ATSAP submitter is demonstrably high due to the confidential nature of ATSAP. 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. Prison Legal News v. Lappin, 436 F.Supp.2d 17, 22 (D.D.C. 2006); Reporters Committee, *supra*, at 774. A qualifying public interest is one that “shed[s] light on an agency’s performance of its statutory duties.” *Id.* at 773.

20(j). In this case, Mr. Lewis is arguing that disclosure of the ATSAP Report would demonstrate there was a controller error. In this case, the public is aware that an ATSAP report was filed related to this incident. In addition, based on other records released in connection with this request, the public is also aware that the FAA has thoroughly investigated this incident. On balance, we determined the personal privacy of the individual submitting an ATSAP Report and their expectation that it was being submitted privately and anonymously outweighs the public interest. As required by the FOIA, we considered whether it was possible to redact personal identifying information and release the remainder of the ATSAP report. However, we determined that this would not be adequate to provide necessary privacy protection, as we must take into consideration what constitutes identifying information as weighed both from the public viewpoint, and from the vantage point of those familiar with the submitter. Cappabianca v. Comm’r, U.S. Customs Serv., 847 F. Supp. 1558, 1565 (M.D. Fla. 1994). Based on our analysis, the specific details contained in the ATSAP report would be generally known to the submitter’s colleagues. Therefore, it is reasonably foreseeable that release of these details would lead to the identity of the submitter becoming known. Therefore, in this case, it is only possible to protect the submitter from an unwarranted invasion of personal privacy by withholding the complete ATSAP report.⁵

⁵ Please be advised that as of May 15, 2014, the type of information at issue here is exempt from disclosure under 49 U.S.C. 40123 and 14 C.F.R. 193.7. While this statute is not retroactive and therefore does not apply in this case, we believe this fact provides context and demonstrates the FAA’s belief that the protection of the identity of ATSAP

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- 20(k). With regard to (2) and (4), the FAA has provided Mr. Lewis with all records located in response to these aspects of his request.⁶ In each case, the individuals and offices that would be expected to have responsive records were required to search their e-mail and files, and the records located in response to these searches have been provided to Mr. Lewis, with some information withheld under FOIA Exemption 6 and FOIA Exemption 5 (attorney client privilege). The records with redactions are FAA-1646, FAA-1648 and FAA-1666 through FAA-1672.
- 21(a). **FOIA Control Number 2012-006573:** The initial request dated July 11, 2012 asked for a copy of ROI AWP 20070078 as it exists in the Investigation Tracking System (ITS). This ROI pertained to the requestor, and is kept in a system subject to the Privacy Act, with retrieval of the record by the name of the subject of the investigation.
- 21(b). In the initial response dated August 9, 2012 from the Joint Security and Hazardous Materials Safety Office-West, Mr. Lewis was informed that his request was duplicative as he had already received a complete copy of his ROI in connection with a previous FOIA request under FOIA Control Number 2007-007547. In addition, Mr. Lewis received a corrected copy in connection with a Privacy Act Request dated January 6, 2011. Mr. Lewis was informed that no action was being taken on this request since it was duplicative and because the FAA had already provided him with the requested record.
- 21(c). In a letter dated September 5, 2012, Mr. Lewis appealed the initial determination. In the FAA response to this appeal, Mr. Lewis was informed that the FOIA does not require an

submitters is necessary not only from a FOIA perspective but is also inextricably linked with the integrity of the ATSAP Voluntary Reporting Program.

⁶ Please note that one additional e-mail dated June 14, 2011 was located and is now being provided to Mr. Lewis.
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agency to provide a requestor with multiple copies of a record already provided under FOIA simply because it may also exist in a different file or location.

- 21(d). We now understand that the scope of this request is broader than simply the ROI as it exists in ITS, and that it includes other records in ITS related to the ROI. Since this is a first party request for records in a system covered by the Privacy Act, we agree to promptly reprocess this request under the purview of the Privacy Act.
- 22(a). **FOIA Control Number 2012-006826:** The initial FOIA request dated July 23, 2012 asked for all records held by the AWP Office of the Assistant Chief Counsel (AWP-7) in their Merit Systems Protection Board (MSPB) case file related to his specific case, including e-mails sent by employees in AWP-7 as well as records used or considered in the handling of his case.
- 22(b). In an interim response from AWP-7 dated September 20, 2012, Mr. Lewis was provided with 662 pages of records. In the final initial response dated October 12, 2012, Mr. Lewis was provided with an additional 598 pages of records. A total of 109 pages were withheld in full, and several pages were released but with redactions under FOIA Exemption 5 (deliberative process, attorney-client privilege) and FOIA Exemption 6. In addition, some information not pertaining to Mr. Lewis was redacted as not responsive to his request.
- 22(c). In a letter dated November 2, 2012, Mr. Lewis appealed and asked that certain specific records withheld in part be provided with no redactions. In addition, he asked that all records withheld in their entirety be released in full. On January 16, 2013, the FOIA Program Management Branch (AFN-140) determined that the records withheld in full or

in part had in fact been too heavily redacted, and so they were remanded and returned to AWP-7 for additional work.

- 22(d). In a response dated February 12, 2013, AWP-7 again responded to Mr. Lewis. With regard to the 109 pages initially withheld in full, AWP-7 provided 92 pages in full, and 17 pages with redactions. In addition the several pages released with redactions were released in less redacted form. With regard to the withheld information, FOIA Exemption 6 was used to withhold certain information in the records not pertaining to Mr. Lewis or his MSBP case. In addition, FOIA Exemption 5 was used to withhold information that was deliberative and predecisional as well as information subject to the attorney-client privilege.
- 22(e). In a letter dated March 14, 2013, Mr. Lewis again appealed. In this appeal, Mr. Lewis asked that the FAA provide the partially redacted records in full. In addition, Mr. Lewis essentially argued that there were certain records provided to him in connection with other FOIA requests that, in his opinion, reasonably should have also been provided to AWP-7 for use in his MSPB case and that should have therefore been provided to him in connection with this FOIA request. Mr. Lewis asked that AWP-7 either produce these records or confirm their receipt or non-receipt during assembly of the MSPB discovery package.⁷
- 22(f). In a letter dated July 12, 2013, Mr. Lewis was provided with one record in full which had been previously redacted. However, the remaining information which had been withheld under FOIA Exemption 6 and FOIA Exemption 5 (deliberative process, attorney-client

⁷ Mr. Lewis has made it clear in his correspondence related to this FOIA that he believes the FAA deliberately failed to produce certain e-mails and other correspondence during the discovery phase related to his MSPB case, and he is now attempting to use the FOIA process to prove this claim. As noted in 22(f) and 22(h), the FOIA is not the proper venue to prove or disprove such a claim.

privilege and attorney work product) was upheld. In addition, Mr. Lewis was informed that the logical location where information related to his request would exist would be the MSPB case file, and that he had been provided with all records contained therein, with some redactions in certain records. Further, Mr. Lewis was informed that the FOIA does not obligate the FAA to either confirm receipt or non-receipt of any record(s). Rather, the FAA is only obligated to conduct a reasonable search for the requested records, which in this case required the FAA to search the MSPB case file maintained by AWP-7. The FOIA is not the proper venue and the FAA is not obligated to provide a timeline, verification, or answer questions with regard to which records were or were not provided to AWP-7 in connection with his MSPB case.

22(g). After reviewing the memorandum from Mr. Lewis outlining details of his complaint related to this FOIA, we agree to release the following records without the redactions requested by Mr. Lewis: FAA-1388 through FAA-1391; FAA-1412 through FAA-1416 ; FAA-1419 through FAA-1423; FAA-1464; and FAA-1491. We maintain that the redactions under FOIA Exemption 5 reflected on the following documents are wholly appropriate: FAA-1465 through FAA-1468 (attorney work product; redactions are a discussion between two agency attorneys concerning litigation strategy); FAA-1478 through FAA-1479 (attorney-client privilege; redactions concern trial strategy related to a personnel action involving Mr. Lewis); FAA-1481 through FAA-1483 (attorney work product; redactions concern trial strategy); FAA-1493 through FAA-1494 (attorney-client privilege; redactions concern trial strategy); FAA-1497 (attorney-client privilege; redactions concern trial strategy); FAA-1498 (attorney-client privilege; redactions concern trial strategy); FAA-1499 through FAA-1502 (attorney work product; redactions

reflect the substance of an argument developed by an agency attorney related to the Petition for Review); FAA-1503 through FAA-1505 (attorney-client privilege; redaction concerns trial strategy); FAA-1506 through FAA-1509 (attorney client privilege; redacted portion concerns trial strategy).

22(h). As an additional item in his memorandum, Mr. Lewis again raises the issue of documents that were provided to him in connection with other FOIA requests and that he believes should have also been provided to AWP-7 in connection with his MSPB case and should therefore be provided to him again in connection with this FOIA request (or alternatively, that the FAA should confirm whether or not they were ever received or considered by AWP-7 in connection with his MSPB case). As outlined above, Mr. Lewis was informed that the logical location where information related to his request would exist would be the MSPB case file, and that he has been provided with all records contained therein, with some redactions in certain records. Further, Mr. Lewis was informed that the FOIA does not obligate the FAA to either confirm receipt or non-receipt of any record(s). Rather, the FAA is only obligated to conduct a reasonable search for the requested records, which in this case required the FAA to search the MSPB case file maintained by AWP-7. As noted above, Mr. Lewis has been provided with all records found therein, with spot redactions in certain records under FOIA Exemption 5, FOIA Exemption 6 and FOIA Exemption 7(c).

23(a). **FOIA Control Number 2012-006967:** The initial FOIA request dated July 26, 2012 asked for the AB Case Report related to AB Case Number 2007-0266 and for all AB Cases handled by AWP or the FAA Northwest Mountain Region (ANM) for the years 2007, 2008 and 2009.

- 23(b). In the initial response from the HQ AHR dated July 31, 2013, Mr. Lewis was provided with all responsive records, except that information that would tend to identify the Reporting Party and/or the Respondent was withheld under FOIA Exemption 6. The information withheld was as follows: name of who the incident was reported to; name of who reported the incident to the AB; name, functional title, and facility of Reporting Party; name, functional title, and facility of Respondent; names of witnesses and their functional titles; references identifying a facility; and personal pronouns and gender references. In addition, certain AB Case Reports provided to Mr. Lewis in connection with other FOIA requests were not produced again in connection with this FOIA request.
- 23(c). In a letter dated September 14, 2013, Mr. Lewis submitted an administrative appeal alleging that the records provided were overly redacted and also stating that certain AB Case Reports provided to him in connection with other FOIA requests should be produced again. However, the FAA did not respond to this administrative appeal in light of the fact that Mr. Lewis included this specific FOIA request as part of his litigation.
- 23(d). In his memorandum outlining details of his complaint related to this FOIA, Mr. Lewis reiterated his request that the FAA produce less redacted copies of the records provided to him as well as produce certain AB Case Reports previously provided to him in connection with other FOIA requests. With regard to the claim by Mr. Lewis that the FAA is obligated to produce AB Case Reports already provided to him in connection with other FOIA requests, 5 U.S.C 552(a)(3)(A) states “each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”

- 23(e). In this case, the records in question were made available and provided to Mr. Lewis in connection with other previous FOIA requests which were also the subjects of separate administrative appeals and which constitute final agency determinations relative to those records. We do not see where the FOIA requires agencies to provide the same records multiple times, particularly where the records in question have been the subject of an administrative appeal and a final agency determination. Therefore, we continue to maintain that we do not have an obligation to produce the records outlined by Mr. Lewis in (1) through (12) in his memorandum outlining details of his complaint related to this FOIA.
- 23(f). With regard to the records released to Mr. Lewis (FAA-1680 through FAA-2114), we assert that all information redacted by the HQ AHR under FOIA Exemption 6 was appropriate. Further, we assert that this same information qualifies for withholding under FOIA Exemption 7(c). In order to arrive at this determination, we balanced the personal privacy interests at issue with any qualifying public interest. In this case, the privacy interests are those of the Reporting Party as well as the Respondent, and we have determined that these individuals have a very substantial interest in keeping their identities confidential. With regard to the public interest in release of this information, Mr. Lewis essentially states the information in question is necessary in order to determine whether the AB is operating in an effective manner. In this case, redacted AB records have been produced to Mr. Lewis that provide information on what types of cases have been reported to the AB as well as the outcome of those cases. Therefore, the public is aware the AB is providing oversight concerning issues that fall within its purview.

- 23(g). Mr. Lewis identified no specific nexus between knowing the identities of the Reporting Party or the Respondent and the asserted public interest served by disclosure. Therefore, the interest of the Complainant(s) and the Respondent(s) in keeping their identities private clearly outweighs any public interest in disclosure. Further, release of the withheld information, taken together with the information already released, would likely identify the individuals in question.
- 23(h). Please see Section 10 of this Affidavit for a detailed summary of our approach related to FOIA requests for these types of records.
- 24(a). **FOIA Control Number 2012-007031:** The initial request dated July 23, 2012 asked for certain records pertaining to a specific Accountability Board (AB) case. This request was multi-assigned to Northwest Mountain Security (ANM-700), Northwest Mountain Office of Human Resources (ANM-10), and the Air Traffic Organization (ATO) Western Service Area (WSA), and these offices provided separate responses dated September 26, 2012,⁸ August 30 2012, and October 17, 2012 respectively. Specifically, Mr. Lewis requested the following: (1) document referred to as “Management’s Investigation;” (2) document in which Accountable Official requested a Security Investigation; (3) Report of Investigation related to the Security Investigation; (4) copy of proposed disciplinary action; (5) copy of final disciplinary action.
- 24(b). In the ANM-10 response, Mr. Lewis was provided with records related to (4) and (5), except that certain information was withheld under FOIA Exemption 6, and some information was redacted and identified as not responsive to the initial request. In connection with the ANM-700 response, the record related to (3) was withheld in full under FOIA Exemption 6. With regard to the ATO WSA response, it was stated that no

⁸ In the initial response from ANM-700, the subject of the investigation was inappropriately identified by name.
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records related to (1) could be located. In addition, the ATO WSA stated the fact that this record could not be located indicated it had likely been disposed of in accordance with FAA records retention requirements. Finally, (2) was not addressed by any of the three action offices.

24(c). In a letter dated November 2, 2012, Mr. Lewis challenged the withholding of all information and records. In addition, Mr. Lewis essentially claimed that an adequate search related to (1) and (2) was not conducted, and alleged the ANM-10 determination that certain information in the records released to him in connection with (4) and (5) was not responsive to his request was incorrect. In the appeal response dated May 10, 2013, Mr. Lewis was provided with a copy of an e-mail from the Accountable Official asking for a Security Investigation, which addressed item (2).

24(d). With regard to (1), Mr. Lewis was informed that this particular record was subject to a five year retention period in accordance with FAA's records disposition manual (FAA Order 1350.15C, Records Organization, Transfer, and Destruction Standards, Item 3770). Given the fact that the disposition date of this record occurred prior to submission of the initial request by Mr. Lewis, it is likely it has been destroyed in accordance with this schedule. Nevertheless, a search for this record was conducted in ANM-10 as well as in the office files of the facility where the incident occurred and in the files of the several managers in the chain of command of the individual who was the subject of this investigation. Notwithstanding a thorough search of these locations, the record in question was not located. These are the locations where this record would logically be found, if it still existed. We are unaware of any other locations where this record would logically be located.

- 24(e). With regard to (4) and (5), these are draft and final letters of discipline. As was noted in the ANM-10 initial response, portions of these records were redacted as non-responsive since they do not pertain in any way to the AB case in question, and are therefore clearly outside the scope of the initial request submitted by Mr. Lewis. Additionally, with regard to (4) and (5), all redactions under FOIA Exemption 6 (ex. name of subject, name and address of facility, facility manager's name) were made in order to protect the identity of the individual who was the subject of the disciplinary action.
- 24(f) As stated in the footnote above, the identity of the subject of the investigation has been disclosed by the FAA. In this case, the only argument raised by Mr. Lewis in support of release of this information is to allow him to compare the handling of this case with his personal case involving the FAA. We believe the asserted interest by Mr. Lewis to compare this case with his own case clearly does not constitute a qualifying public interest. The release of the name was clearly in error, and we do not want to compound that oversight by releasing additional information that is covered by the exemptions. Therefore, we are continuing to withhold the information under FOIA Exemptions 6 and 7(C) in connection with (4) and (5).
- 24(g). With regard to (3), the record in question is the Report of Investigation (ROI) related to this incident. This record is kept in a Privacy Act System and is retrieved by the name of the subject of the investigation.⁹ An ROI is developed and produced by the appropriate FAA Security Office based on a thorough investigation, and contains a detailed narrative of the details of the investigation, and includes names of witnesses and their statements.

⁹ The FAA will release the full ROI to the subject of the investigation under the Privacy Act, subject to any appropriate exemptions countenanced by the Privacy Act. The FAA typically withholds under FOIA Exemption 6 and FOIA Exemption 7(c) any part of an ROI from a third party requestor. A limited exception would be in a case where a witness requests his/her own statement. In such cases, the FAA has released only that portion of the ROI.

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- 24(h). This particular ROI involves the investigation of a mid-level employee, and while other records containing enough information to inform the public of the nature as well as the resolution of the issue have been released, the information contained in the ROI is substantially more detailed and potentially more embarrassing and damaging to the subject of the investigation, as well as to the witnesses who provided statements with regard to this investigation. In this case, the individual who is the subject of this investigation and whose identity is known has a significant interest in keeping the graphic and explicit details of this incident confidential in order to avoid any further public embarrassment or stigma.
- 24(i). In addition, the individuals who provided witness statements have a privacy interest in keeping their statements confidential. As noted above, the public interest asserted by Mr. Lewis in release of this record is that it would allow him to compare the handling of this case with his personal case. We believe this is clearly a personal rather than a public interest, and is not cognizable under the FOIA. Further, we believe the public interest has been served by release of the records provided to Mr. Lewis in connection with this FOIA request, as well as by the AB Case Report, which was released to Mr. Lewis in connection with a different FOIA request.
- 24(j). In summary, we believe it is clear that the privacy interest of the individual who is the subject of the ROI as well as those who provided witness statements must prevail in this case, given the fact that Mr. Lewis failed to assert a cognizable public interest and in light of the fact that enough detail to inform the public of the circumstances surrounding this case and its resolution have already been released, and any additional release of information would constitute a clearly unwarranted invasion of personal privacy,

especially in light of the fact that the individual who is the subject of this investigation is known.

- 24(k). In his memorandum outlining details of his complaint related to this FOIA, Mr. Lewis raised the following issues: (a) the e-mail provided to him in connection with his administrative appeal did not contain header information (ex. date, time, list of recipients); (b) the full ROI should be provided to him; (c) the “Management Investigation” document should be provided to him; (d) less redacted versions of the draft disciplinary and final disciplinary letters.
- 24(l). With regard to (b), our reasons for continuing to withhold this record in full are set forth above. With regard to (c), we continue to assert that a reasonable search was conducted for this record. With regard to (d), we agree, as outlined above, that less redacted versions of these records may be provided. With regard to (a), we agree to provide the e-mail with the headers intact.
- 25(a). **FOIA Control Number 2013-001654:** The initial FOIA request dated November 28, 2012 asked for records related to grievance file NC-08-77405 in connection with an air traffic controller at the San Jose Air Traffic Control Tower (ATCT).
- 25(b) In the initial response from AWP AHR date February 18, 2013, Mr. Lewis was provided with all records responsive to his request, except that some information that would tend to identify the grievant was withheld under FOIA Exemption 6. The information withheld was as follows: name of grievant, union representative name, grievant official name, facility location identifier, name of grievant in another case, name of point of contact for grievant, name of person grievance is filed against, social security number of arbitrator, type of illness suffered by grievant, name of grievant’s manager, some text

related to a specific incident that would tend to identify the grievant (see page 5 of Arbitration Opinion and Award), name of medical facility visited by grievant. Mr. Lewis appealed this determination in a letter dated March 17, 2013, and stated the records were overly redacted.

25(c). In the appeal response dated May 10, 2013, the initial determination made by AWP AHR was upheld in full under FOIA Exemption 6 and FOIA Exemption 7(c). In order to arrive at this determination, we balanced the personal privacy interests at issue with any qualifying public interest. In this case, the privacy interests are those of the grievant, and we have determined that this individual has a very substantial interest in keeping his identity confidential. With regard to the public interest in release of this information, Mr. Lewis did not assert one. In any event, Mr. Lewis has been provided with minimally redacted grievance records that provide information on the specific circumstances and disposition surrounding this case.

25(d). Mr. Lewis has identified no specific nexus between the withheld information and a qualifying public interest in disclosure. Therefore, the interest of the grievant in keeping his identity private clearly outweighs any public interest in disclosure. Further, release of the withheld information, taken together with the information already released, would likely identify the individual in question.¹⁰

25(e). Please see Section 9 of this Affidavit for a detailed summary of our approach related to FOIA requests for these types of records.

¹⁰ In this case, Mr. Lewis specifically stated in his initial request that the requested records pertained to an air traffic controller at the San Jose Air Traffic Control Tower. Given the fact that this information was known, no amount of redaction would have been sufficient to truly protect the identity of the grievant, and none of these records should have been released at the initial stage.

- 26(a). **FOIA Control Number 2013-004161:** In the initial request dated April 17, 2013, Mr. Lewis asked for the following records related to a cancelled grievance arbitration involving himself: (1) all e-mail and other correspondence related to the collection of evidence and exhibits; (2) all records coordinated or discussed with NATCA which were to be submitted as joint exhibits at the arbitration hearing; (3) all records coordinated or discussed with NATCA which were not to be submitted as exhibits at the arbitration hearing; (4) all records not coordinated or discussed with NATCA, but which Bobby Rodriguez (FAA representative) was considering submitting as exhibits at the arbitration hearing; and (5) all records not coordinated or discussed with NATCA, but which Mr. Rodriguez had decided would not be submitted as Exhibits at the arbitration hearing.
- 26(b). In the initial response dated May 24, 2013, AWP-10 informed Mr. Lewis the only logical place where records would be found would be in the single file created by Mr. Rodriguez, who was the Labor Relations Specialist responsible for this arbitration. With regard to (1), Mr. Lewis was provided with e-mails between Mr. Rodriguez and NATCA union representatives. With regard to (2)-(5), Mr. Lewis was informed no responsive records were located. No administrative appeal related to this FOIA request has been received by the FAA.
- 26(c). In a revised filing dated August 8, 2013, Mr. Lewis stated that he incorrectly cited this FOIA Control Number as being at issue in his litigation. In fact, he clarified that he intended to cite FOIA Control Number 2013-001654 rather than FOIA Control Number 2013-004161. Therefore, there is no need to address FOIA Control Number 2013-004161.

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

Executed on AUGUST 7, 2014



JEB KREISCHER

CERTIFICATE OF SERVICE

I CERTIFY that a copy of DECLARATION OF JEB KREISCHER was sent by first-class postage and deposited in the United States mail in Portland, Oregon, on August 11, 2014, and addressed as follows:

Jeffrey Lewis
28242 S. Salo Rd.
Mulino, OR 97042

Plaintiff, pro se

/s/ Jan E. Sands

JAN E. SANDS

Legal Assistant

CERTIFICATE OF SERVICE