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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JEFFREY NATHAN LEWIS,

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

Plaintiff,

v.

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT &
MEMORANDUM IN SUPPORT**

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

Defendants.

CERTIFICATE OF COMPLIANCE WITH LR 7-1

Pursuant to LR 7-1, counsel for the Defendants has discussed the issues raised in this motion with pro se Plaintiff Jeffrey Lewis. The parties have made a good-faith effort to resolve this dispute and have been unable to do so.

MOTION

Defendants Federal Aviation Administration and FAA Administrator Michael Huerta (“FAA”), by S. Amanda Marshall, United States Attorney for the District of Oregon, through Assistant U.S. Attorney Kevin Danielson, move this Court for summary judgment under Fed. R. Civ. P. 56. In support, the FAA submits the accompanying declarations and *Vaughn* index.

MEMORANDUM

Introduction

Plaintiff Jeffrey Lewis brought this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff alleges the FAA unlawfully withheld information in response to his 14 separate FOIA requests.

Summary of the argument

Plaintiff is a former air traffic controller who is seeking information about the conduct of the FAA. Dkt. 7, ¶ 12. In response to Plaintiff’s FOIA requests, the FAA has produced approximately 2,100 pages of documents. The FAA withheld in full, and/or in part, information under Exemption 5 based on the attorney-client privilege, the work-product doctrine, and the deliberative process privilege. In addition, the FAA withheld in full, and/or in part, information under Exemption 6 and Exemption 7(C) based on privacy interests. The FAA has submitted a detailed declaration and *Vaughn* index explaining why an exemption applies to a document. Because of the large number of documents, the FAA has, when possible, explained the exemptions based on the categories of the documents.

Statement of facts

1. FOIA No. 2010-008248

Plaintiff requested information related to specific Arbitration Review Board and Merit Systems Protection Board (“MSPB”) cases. Declaration of Jeb Kreisler, ¶ 12(a); Declaration of Kevin Danielson, Ex. 1, pp. 1-2. The FAA produced documents FAA 1-626 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreisler Dec., ¶ 12(c-d); Ex. 1, pp. 3-9.

2. FOIA No. 2011-001765

Plaintiff requested information for all Administrator’s Hotline Information System printouts from 8/1/2006 to 3/1/2007. Kreisler Dec., ¶ 13(a); Danielson Dec., Ex. 1, p. 3. The FAA produced documents FAA 627-744 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreisler Dec., ¶ 13(c-g); Ex. 1, pp. 9-13.

3. FOIA No. 2011-002164

Plaintiff requested information for a number of records related to three Accountability Board cases and one MSPB appeal. Kreisler Dec., ¶ 14(a); Danielson Dec., Ex. 1, pp. 4-5. The FAA produced documents FAA 745-764 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreisler Dec., ¶ 14(a-c).

4. FOIA No. 2011-002330

Plaintiff requested information related to Accountability Board case reports that were encoded with a Western Service Area Accountable Official from 1/1/2006 to 12/31/2010. Kreisler Dec., ¶ 15(a); Danielson Dec., Ex. 1, p. 6. The FAA produced

documents FAA 765-874 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreischer Dec., ¶ 15(b-e); Ex. 1, pp. 13-14.

5. FOIA No. 2011-002662

Plaintiff requested Administrator's Hotline Information System printouts and action office response letters for all complaints filed after 1/1/2004 from several California Air Traffic Control Towers (San Francisco, San Jose, Concord, Napa and Reid-Hillview). Kreischer Dec., ¶ 16(a); Danielson Dec., Ex. 1, p. 7. The FAA produced documents FAA 875-977 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreischer Dec., ¶ 16(b-e); Ex. 1, pp. 15-20.

6. FOIA No. 2011-004047

Plaintiff requested 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" were requested. Kreischer Dec., ¶ 17(a); Danielson Dec., Ex. 1, pp. 8-10. The FAA produced documents FAA 978-1120 and withheld information under Exemption 6 based on privacy interests. Kreischer Dec., ¶ 17(b).

7. FOIA No. 2011-007535

Plaintiff requested the following information related to a controller who slept during his shift at the Knoxville Terminal Radar Approach Control: (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. Kreischer Dec., ¶ 18(a); Danielson Dec., Ex. 1, p. 11. The FAA produced documents FAA 1284-1370 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreischer Dec., ¶ 18(b-1); Ex. 1, pp 20-27.

8. FOIA No. 2011-008134

Plaintiff requested 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 involving an Air Traffic Controller who was watching a movie while working a radar position. Kreischer Dec., ¶ 19(a); Danielson Dec., Ex. 1, p. 12. The FAA produced documents FAA 1130-1233 and withheld information under Exemption 6 based on privacy interests. Kreischer Dec., ¶ 19(b).

9. FOIA No. 2012-002082

Plaintiff requested the following information: (1) a recording made at Camarillo Air Traffic Control Tower 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. Kreischer Dec., ¶ 20(a); Danielson Dec., Ex. 1, p. 13.

The FAA produced documents FAA 1561-1672 and withheld information under Exemption 6 and 7(C) based on privacy interests and Exemption 5 based on attorney-client privilege. Kreischer Dec., ¶ 20(d-k), Ex. 1, pp. 31-32.

10. FOIA No. 2012-006573

Plaintiff requested the Report of Investigation (“ROI”) AWP 20070078 as it exists in the Investigation Tracking System. Kreischer Dec., ¶ 21(a); Danielson Dec., Ex. 1, p. 14. 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. The FAA now understands 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, the FAA agrees to promptly reprocess this request under the purview of the Privacy Act. Kreischer Dec., ¶ 21(b-d).

11. FOIA No. 2012-006826

Plaintiff requested all records held by the Western-Pacific (“AWP”) Office of the Assistant Chief Counsel (AWP-7) in their 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. Kreischer Dec., ¶ 22(a); Danielson Dec., Ex. 1, p. 15. In addition to producing numerous other documents, the FAA produced documents FAA 1371-1536 and withheld information under Exemption 6 and 7(C) based on privacy interests. In addition, the FAA withheld documents under Exemption 5 based on the attorney-client privilege, the work-product doctrine, and the deliberative process privilege. Kreischer Dec., ¶ 22(b-h); Ex. 1, pp. 27-29.

12. FOIA No. 2012-006967

Plaintiff requested the Accountability Board (“AB”) Case Report related to AB Case Number 2007-0266 and for all AB Cases handled by the Western-Pacific Region or the FAA Northwest Mountain Region for the years 2007, 2008 and 2009. Kreischer Dec., ¶ 23(a); Danielson Dec., Ex. 1, p. 16. The FAA produced documents FAA 1673-2114 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreischer Dec., ¶ 23(f); Ex. 1, pp. 32-36.

13. FOIA No. 2012-007031

Plaintiff requested the following information pertaining to a specific Accountability Board case: (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; and (5) a copy of final disciplinary action. Kreischer Dec., ¶ 24(a); Danielson Dec., Ex. 1, p. 17. The FAA produced documents FAA 1537-1560 and withheld information under Exemption 6 and 7(C) based on privacy interests. Kreischer Dec., ¶ 24(b-j).

14. FOIA No. 2013-001654

Plaintiff requested records related to grievance file NC-08-77405 in connection with an air traffic controller at the San Jose Air Traffic Control Tower. Kreischer Dec., ¶ 25(a); Danielson Dec., Ex. 1, p. 18. The FAA withheld information under Exemption 6 and 7(C) based on privacy interests. Kreischer Dec., ¶ 25(c-d).

15. FOIA No. 2013-004161

This FOIA request was incorrectly identified in the complaint and Plaintiff meant to identify FOIA No. 2013-001654. Dkt. 7, p. 46, ¶ 80; Kreischer Dec., ¶ 26(c).

Summary judgment and FOIA

A party is entitled to summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party. *Betz v. Trainer Wortham & Co.*, 486 F.3d 590, 593 (9th Cir. 2007).

Summary judgment may be granted in a FOIA case based on the information provided by the agency that: (1) describes the document; (2) justifies the nondisclosure with reasonably specific detail; (3) demonstrates that the withheld information logically falls within the claimed exemption; and (4) is not controverted by either contrary evidence or by evidence of bad faith by the agency. *Odland v. FERC*, -- F. Supp. 2d --, 2014 WL 1244773 at *4 (D.D.C. Mar. 27, 2014).

The Freedom of Information Act

Congress enacted FOIA to allow public access to government documents in order to keep citizens informed about the operation of the government and to keep the government accountable to the people. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Disclosure of documents, and not secrecy, is the objective of the act. *Id.* FOIA provides “public access to official information ‘shielded unnecessarily’ from public view and establishes a “judicially enforceable public right to secure such information from

possibly unwilling official hands.” *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009) (quoting *Dept. of Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

When FOIA was enacted, Congress recognized that disclosure of some information might legitimately be kept from the public. *Lahr*, 569 F.3d at 973. FOIA mandates disclosure of agency documents unless the records are exempt. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). FOIA contains nine categories of documents that are exempt from disclosure by the government. 5 U.S.C. §552(b)(1)-(9). Because of FOIA’s “strong presumption in favor of disclosure,” the nine exemptions are narrowly construed and the government bears the burden of proving the exemption applies to any of the documents or portions of documents that are withheld. *Lahr*, 569 F.3d at 973.

***Vaughn* index**

In order to meet its burden of establishing that an exemption applies and that it properly withheld a document, an agency must submit a declaration or *Vaughn* index that: (1) identifies the documents withheld; (2) identifies the FOIA exemption; and (3) gives a particularized explanation how the claimed exemption applies to each document. *Lahr*, 569 F.3d at 989 (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)).

A *Vaughn* index may also contain brief or categorical descriptions in order not to reveal the information the agency wants to protect. *ACLU v. CIA*, 710 F.3d 422, 432 (D.C. Cir. 2013). To justify an exemption under FOIA, an agency may submit a declaration in combination with, or in lieu of, a *Vaughn* index. *Id.* at 432. The materials provided to the court may take any form provided that they give the court a reasonable basis to evaluate the claimed exemption. *Id.* at 433.

Argument and authority

I. The FAA properly withheld information under Exemption 6 because release of the information would constitute a clearly unwarranted invasion of privacy.

Exemption 6 protects an individual's personal privacy. The exemption allows an agency to withhold the following documents: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The exemption protects individuals from the embarrassment and injury that can result when personal information is unnecessarily disclosed. *Gonzales and Gonzales Bonds and Insurance Agency Inc. v. U.S. Dep't of Homeland Security*, 913 F. Supp. 2d 865, 878 (N.D. Cal. 2012).

Under Exemption 6, the term "similar files" is broadly interpreted and the threshold test is passed when the government documents contain information regarding particular individuals. *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 524 F.3d 1021, 1024 (9th Cir. 2008). Here, the information meets the "similar files" requirement of Exemption 6 because it contains information about particular individuals.

Once the requested documents meet the "similar files" requirement of Exemption 6, a court must determine whether disclosure of the information would constitute "a clearly unwarranted invasion of personal privacy." *FSEEE*, 524 F.3d at 1024. In making that determination, a court "must balance the privacy interest protected by the exemptions against the public interest in government openness that would be served by disclosure." *Lahr*, 569 F.3d at 973.

In evaluating whether Exemption 6 applies, a court's first step is to evaluate whether disclosure implicates a "nontrivial" personal privacy interest. *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 693 (9th Cir. 2012). This determination involves looking at the nature of the privacy interest and the likelihood that disclosure of the information would invade that interest. *Id.* Personal privacy interests include a broad range of concerns related to an individual's private, personal information and keeping those facts away from the public. *Lahr*, 569 F.3d at 974.

If the agency establishes a privacy interest, the second step is to balance the privacy interest of withholding the information with the public interest of disclosing the information. *Yonemoto*, 686 F.3d at 694. The only relevant public interest is the extent to which disclosure would "she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 497 (quoting *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989)). A requestor's personal reasons for requesting information are irrelevant. *Reporters Committee*, 489 U.S. at 772-73 (stating that where the FOIA requestor only has a purely private reason, it bears no weight in the balance against privacy interests).

A. Arbitration Review Board and Merit Systems Protections Board information.

Plaintiff requested information related to specific Arbitration Review Board and Merit Systems Protection Board cases. The FAA redacted information to keep the identity of the grievant confidential. In addition to withholding the name of the grievant,

the FAA withheld information that would tend to identify the grievant such as: (1) the names of witnesses; (2) the name of the grievant's manager; (3) the location of the facility where the grievant worked; and (4) docket numbers or case numbers that would identify the facility location. Kreischer Dec., ¶ 9(d-e). The FAA released the actual details and outcomes of the proceedings. Kreischer Dec., ¶ 9(c).

Here, the grievant has a strong privacy interest in keeping his identity confidential. In balancing the privacy interest and the public interest to determine whether the name of the grievant is protected, the privacy interest of the individual clearly outweighs the public interest and should be protected. Information about the details and outcomes of the proceedings was properly released because it sheds light on the FAA's performance of its duties. Accordingly, the FAA properly withheld information that would identify the name of the grievant under Exemption 6 and summary judgment should be granted in favor of the FAA.

B. Accountability Board records.

Plaintiff requested information related to Accountability Board records. The Accountability Board is responsible for handling allegations of misconduct related to sexual harassment, sexual misconduct, race, color, religion, sex, sexual orientation, national origin, age, and disability. Kreischer Dec., ¶ 10(a). In Accountability Board records, the respondent is the person who is accused of the misconduct and the reporting party is either the person making the complaint or individuals who witness or receive reports of the misconduct. *Id.*, ¶ 10(b).

The FAA redacted information to keep the identity of the aggrieved party and the respondent confidential. *Kreischer Dec.*, ¶ 10(f-g). In addition, the FAA withheld information that would tend to identify the aggrieved party and the respondent such as: (1) the name of the reporting party; (2) the functional title of the reporting party and the respondent; (3) the facility of the reporting party and respondent; (4) the position of the reporting party and respondent; and (5) the line of business of either the reporting party or the respondent if it would identify a specific office. *Id.* at ¶ 10(f). The FAA released the details and outcomes of the cases. *Id.*

Here, the aggrieved party and the respondent have a strong privacy interest in keeping their identities confidential. In balancing the privacy interest and the public interest to determine whether the names of the individuals are protected, the privacy interests of the individuals clearly outweigh the public interest and should be protected. Information about the details and outcomes of Accountability Board cases was properly released because it sheds light on the FAA's performance of its duties. Accordingly, the FAA properly withheld information that would identify the name of the aggrieved party and respondent under Exemption 6 and summary judgment should be granted in favor of the FAA.

C. Administrator's Hotline Information System records.

Plaintiff requested information related to the FAA's Administrator's Hotline Information System records. The Administrator's Hotline provides FAA employees a venue to raise issues with high-level management. A caller may do so anonymously or

may request confidentiality. Kreischer Dec., ¶ 11(a). When confidentiality or anonymity is not requested, the employee will get a response to his complaint.

The FAA redacted information that tended to identify the employee making the complaint and any one accused of wrongdoing. Kreischer Dec., ¶ 11(e). In addition to withholding these two names, the FAA withheld information that would tend to identify the complaining employee and the accused. *Id.* The FAA released information about the actual details and outcomes of the complaints. *Id.*

Here the complaining employee and the individual accused of wrongdoing have a strong privacy interest in keeping their identities confidential. In balancing the privacy interest and the public interest to determine whether the names of the individuals are protected, the privacy interests of the individuals clearly outweigh the public interest and should be protected. Information about the details and outcomes of reports to the Hotline was properly released because it sheds light on the FAA's performance of its duties. Accordingly, the FAA properly withheld information that would identify the names of the individuals under Exemption 6 and summary judgment should be granted in favor of the FAA.

D. Summary of Exemption 6

The FAA has presented these three categories of documents to show that it properly withheld information under Exemption 6. In addition, the *Vaughn* index and the Declaration of Jeb Kreischer, combined together, go into further detail about each FOIA request made by Plaintiff and: (1) identify the documents withheld; (2) identify the FOIA exemption; and (3) give a particularized explanation how the claimed exemption applies to

each document. Accordingly, summary judgment should be granted in favor of the FAA on the information it withheld under Exemption 6.

II. The FAA properly withheld information under Exemption 7(C) because release of the information could reasonably be expected to constitute an unwarranted invasion of privacy.

Exemption 7 protects records and information that were compiled by the government for law enforcement purposes. Congress limited that exemption to six specific circumstances which are identified under Exemption 7(A-F). Exemption 7(C) protects the following material:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .

5 U.S.C. § 552(b)(7)(C).

Exemption 7 does not apply to internal investigations when an agency simply supervises its employees. *National Whistleblower Center v. Dept. of Health and Human Services*, 849 F. Supp. 2d 13, 27 (D.D.C. 2012). However, Exemption 7 does apply to an agency's investigation of its own employees if the investigation focuses on alleged illegal acts of particular officials that could result in civil or criminal sanctions. *Id.* Exemption 7 is triggered if the requested information "can fairly be characterized as an enforcement proceeding." *Id.*

Under Exemption 7(C), a court "must balance the privacy interest protected by the exemptions against the public interest in government openness that would be served by disclosure." *Lahr*, 569 F.3d at 973. Exemption 6 protects privacy information when the

invasion of privacy is “clearly unwarranted.” 5 U.S.C. § 552(b)(6). Exemption 7(C) provides broader protection to individuals than Exemption 6 because it prevents disclosure of information that “could reasonably be expected to constitute an unwarranted invasion of privacy.” *Lahr*, 569 F.3d. at 974.

Here, based on Exemption 7(C), the FAA redacted information to protect the privacy of individuals in records from the Arbitration Review Board, the Merit Systems Protection Board, the Administrator’s Hotline Information System, the Accountability Board, and other records related to enforcement proceedings. *Kreischer Dec.*, ¶¶ 9(f), 10(h), 11(f). In balancing the privacy interest and the public interest, disclosure of that information could reasonably be expected to constitute an unwarranted invasion of privacy. Accordingly, the FAA properly withheld information that would identify the names of the individuals under Exemption 7(C) and summary judgment should be granted in favor of the FAA.

III. The FAA properly withheld information Exemption 5 based on the attorney-client privilege, the deliberative process privilege, and the work-product doctrine.

Exemption 5 provides that an agency may withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). In order for Exemption 5 to apply: (1) the government agency must be the source of the document; and (2) the information must “fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency.” *Dep’t of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Assoc.*, 532 U.S 1, 8 (2001).

Exemption 5 protects disclosure of internal government documents based on the deliberative process privilege, the attorney-client privilege, and the attorney work-product doctrine. *Maricopa Audubon Society v. U.S. Forest Service*, 108 F.3d 1089, 1092 (9th Cir. 1997).

Attorney-client privilege

An attorney-client privilege exists: “(1)[w]hen legal advice of any kind is sought (2) from a professional legal advisor in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client’s instance, permanently protected (7) from disclosure by the client or legal advisor (8) unless the protection be waived.” *Center for Biological Diversity v. Office of Management and Budget*, 625 F. Supp. 2d 885, 892 (N.D. Cal. 2009) (quoting *U.S. v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002)).

The attorney-client privilege protects confidential disclosures made by a client seeking legal advice from an attorney and the attorney’s advice in response to those disclosures. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009). In the FOIA context, the agency’s lawyers are the attorneys and the agency is the client. *Electronic Frontier Foundation v. C.I.A.*, 2013 WL 5443048 at *16 (N.D. Cal. Sept. 30, 2013). In the context of a *Vaughn* index, the federal agency has the burden to establish that the documents involved specific legal advice or that they were intended to be confidential and were kept confidential. *Center for Biological Diversity*, 625 F. Supp. 2d at 892.

Work-product doctrine

The work-product doctrine provides that “material obtained and prepared by an attorney or the attorney’s agent in anticipation of litigation or preparation for trial may be immune from discovery.” *Kandel v. Brother Int’l Corp*, 683 F. Supp. 2d 1076, 1083 (C.D. Calif. 2010) (citing Fed. R. Civ. P. 26(b)(3)). “At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.” *U.S v. Nobles*, 422 U.S. 225, 238 (1975). A primary purpose of the work-product doctrine is to prevent one party from exploiting the efforts of the other party’s preparation for litigation. *Kandel*, 683 F. Supp. 2d at 1083. The work-product doctrine is considered a qualified immunity, not a privilege, and the qualification of the immunity is based on a showing of good cause or necessity. *Id.* The party claiming work-product immunity has the burden of proof. *Id.*

Deliberative process privilege

The purpose of the deliberative process privilege is to shield intra-agency communications from disclosure so that an agency can engage in internal debates, explore possibilities, and “play devil’s advocate” without fearing public scrutiny. *Lahr*, 569 F.3d at 979. To fall within Exemption 5, a document must be both predecisional and deliberative. *Id.*

A ‘predecisional’ document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the agency. A predecisional document is a part of the ‘deliberative process,’ if the disclosure of the materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussions within the agency

and thereby undermine the agency's ability to perform its functions.

Id. at 979-80 (citation omitted).

Here, the FAA submits a *Vaughn* index and the Declaration of Jeb Kreischer to support the information it withheld. These materials identify each document the FAA withheld in part or in whole, identify the exemption claimed, and give a particularized description of how Exemption 5 applies to that document. The *Vaughn* index and Declaration of Jeb Kreischer meet all of the requirements that an agency must set forth when withholding a document under FOIA because this information gives this Court a reasonable basis to evaluate the exemption. Therefore, the FAA has properly withheld agency records under Exemption 5 and summary judgment should be granted in favor of the FAA.

IV. The FAA conducted a proper search for documents.

FOIA requires an agency to demonstrate that it conducted a search that was reasonably calculated to discover all relevant documents. *Lahr v. NTSB*, 569 F.3d 964, 987 (9th Cir. 2009). In evaluating whether an agency's search was sufficient, the issue is whether the search was adequate; the issue is not whether there might exist other documents possibly responsive to the request. *Id.*

Here, as set forth in the Declaration of Jeb Kreischer, the FAA adequately searched for documents that were responsive to Plaintiff's FOIA request.

Conclusion

Summary judgment should be granted in favor of the FAA.

Dated this 11th day of August 2014.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney
District of Oregon

/s/Kevin Danielson
KEVIN DANIELSON
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I CERTIFY that a copy of **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT & MEMORANDUM IN SUPPORT** 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
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Plaintiff, pro se

/s/ Jan E. Sands

JAN E. SANDS

Legal Assistant

CERTIFICATE OF SERVICE