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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JEFFREY NATHAN LEWIS,

Case No. 3:13-cv-0992-HZ

Plaintiff,

v.

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

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

Defendants.

Defendants Federal Aviation Administration and Michael Huerta ("FAA"), by S. Amanda Marshall, United States Attorney for the District of Oregon, through Assistant U.S. Attorney Kevin Danielson, submit this response to Plaintiff's motion for summary judgment (Dkt. 30).

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. The FAA produced more than 2,000 pages of documents and also withheld information, in full and/or in part, under Exemptions 5, 6 and 7(C). The FAA has moved for summary judgment and submitted a detailed declaration and *Vaughn* index justifying each exemption. Dkt. 27, 28.

Argument and authority

I. The FAA properly withheld information under Exemption 6 and 7(C) in order to protect the privacy rights of individuals.

Plaintiff argues the FAA improperly withheld information regarding “locations, facility names, record numbers, gender references, names/titles of FAA officials, names/titles of NATCA officials, and names/titles of all others functioning in an official capacity.” Plaintiff’s Motion for Summary Judgment, Dkt. 30, p. 2. Contrary to Plaintiff’s challenge, the FAA properly withheld the information to protect the privacy rights of individuals.

The FAA set forth three categories of documents, as examples, to show that it properly withheld information under Exemptions 6 and 7(C): (1) Arbitration Review Board and Merit Systems Protections Board information; (2) Accountability Board records; and (3) Administrator’s Hotline Information System records. Dkt. 28, pp. 3-9. Kreischer Dec. ¶¶ 9(a)-11(f). In addition, the *Vaughn* index and the Declaration of Jeb Kreischer detailed each application of Exemptions 6 and 7(C). Dkt. 28, Dkt. 28-1.

In connection with the Arbitration Review Board and Merit Systems Protection Board information, the FAA redacted information to keep the identity of the grievant confidential. The FAA also 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. Dkt. 28, p. 4, Kreisler Dec., ¶ 9(d-e). The FAA released the actual details and outcomes of the proceedings. Dkt. 28, pp. 3-4, Kreisler Dec., ¶ 9(c). This information was properly withheld under Exemption 6.

In connection with the Accountability Board records, the FAA redacted information to keep the identity of the aggrieved party and the respondent confidential. Dkt. 28, pp. 6-7, Kreisler Dec., ¶ 10(f-g). The FAA also 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.* This information was properly withheld under Exemption 6.

In connection with the Administrator's Hotline Information System records, the FAA redacted information that tended to identify the employee making the complaint and anyone accused of wrongdoing. Dkt. 28, pp. 8-9, Kreisler 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.* This information was properly withheld under Exemption 6.

The *Vaughn* index and the Declaration of Jeb Kreischer: (1) identify the documents withheld under Exemptions 6 and 7(C); (2) identify the FOIA exemption; and (3) give a particularized explanation how the exemption applies to each document. Therefore, summary judgment should be granted in favor of the FAA on the information it withheld under Exemptions 6 and 7(C).

II. 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.” Dkt. 29-1, pp. 8-10. In addition, after December 1, 2008, copies of “Litigation” pages related to “Concord,” “CCR,” or “Lewis” were requested. Dkt. 28, pp. 19-20, Kreischer Dec., ¶ 17(a).

Plaintiff has alleged that some of the documents have not been produced, specifically Terminal Reports, Conduct and Discipline Reports, and Watch Items. Dkt. 30, p. 2; Dkt. 30-1, p. 9. However, the FAA produced all responsive documents but withheld information, in full and/or in part, under Exemption 6 based on privacy interests. Dkt. 28, pp. 19-21, Kreischer Dec., ¶ 17(a-f). Because the FAA has properly supported and justified the exemptions, summary judgment should be granted in favor of the FAA.

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III. FOIA No. 2011-007535

Plaintiff requested the information related to a controller who slept during his shift at the Knoxville Terminal Radar Approach Control. Dkt. 29-1, p. 11. The FAA produced all responsive documents and withheld information, in full and/or in part, under Exemptions 6 and 7(C) based on privacy interests. Dkt. 28, pp. 21-26, Kreischer Dec., ¶ 18(b-1); Dkt. 28-1, *Vaughn* index, pp. 20-27. Because the Declaration of Jeb Kreischer and the *Vaughn* index support the exemptions, summary judgment should be granted in favor of the FAA.

IV. FOIA No. 2012-002082

Plaintiff requested information related to an incident at the Camarillo Air Traffic Control Tower on July 25, 2010. Dkt. 29-1, p. 13. The FAA produced documents and withheld information under Exemptions 6 and 7(C) based on privacy interests and Exemption 5 based on attorney-client privilege. Dkt. 28, p.28-32, Kreischer Dec., ¶ 20(d-k); Dkt. 28-1, pp. 31-32. Plaintiff is asking this Court to require the FAA to produce Air Traffic Safety Action Program (“ATSAP”) reports and emails he requested. Dkt. 30, p. 2.

ATSAP reports

ATSAP reports are voluntary, confidential reports made by FAA employees regarding air traffic safety and operational concerns. Dkt. 28, pp. 28-29, Dec. of Kreischer, ¶ 20(e). The FAA promises confidentiality to those making the reports and the FAA withheld the information under Exemption 6. An ATSAP report contains the observations and specific details on an incident that involved or was witnessed by the

person making the report. Dkt. 28, pp. 30-31, Dec. of Kreisler, ¶ 20 (h-j). Release of the information would identify the person making the report and it could result in embarrassment, damage to that person's career, or in retaliation from others. *Id.* Accordingly, the person making the report has a clear privacy interest in his identity that outweighs the public interest.

The FAA determined that the ATSAP report must be withheld in its entirety because it could not be redacted in a way to protect the identity and privacy of the individual making the report. Dkt. 28, p. 31, Dec. of Kreisler, ¶ 20(j). In addition, beginning May 15, 2014, this report is exempt by law from disclosure under FOIA based on 49 U.S.C. § 40123 and 14 C.F.R. § 193.7. Although the statute is not retroactive, it supports the FAA's position that the information was properly withheld to preserve the privacy of the individual making the report. Therefore, the information was properly withheld under Exemption 6.

V. FOIA No. 2012-006573

Plaintiff requested the Report of Investigation ("ROI") AWP 20070078 as it exists in the Investigation Tracking System. Dkt. 29-1, 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. Dkt. 28, pp. 32-33; Kreisler Dec., ¶ 21(b-d).

VI. 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. Dkt. 29-1, p. 15. In addition to producing numerous other documents, the FAA produced documents numbered FAA 1371-1536 and withheld information under Exemptions 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. Dkt. 28, pp. 33-36, Kreischer Dec., ¶ 22(b-h); Dkt. 28-1, 27-29. Because the Declaration of Jeb Kreischer and the *Vaughn* index support the exemptions, summary judgment should be granted in favor of the FAA.

VII. 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. Dkt. 29-1, p. 16. The FAA produced documents numbered FAA 1673-2114 and withheld information under Exemptions 6 and 7(C) based on privacy interests. Dkt. 28, Kreischer Dec., ¶ 23(f); Dkt. 28-1, pp. 32-36. Because the Declaration of Jeb Kreischer and the *Vaughn* index support the exemptions, summary judgment should be granted in favor of the FAA.

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VIII. 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. Dkt. 29-1, p. 17. The FAA produced documents numbered FAA 1537-1560 and withheld information under Exemption 6 and 7(C) based on privacy interests. Dkt. 28, pp. 39-43, Kreischer Dec., ¶ 24(b-j). Because the Declaration of Jeb Kreischer and the *Vaughn* index support the exemptions, summary judgment should be granted in favor of the FAA.

Conclusion

Plaintiff’s motion for summary judgment should be denied.

Dated this 2nd day of September 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' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was sent by first-class postage and deposited in the United States mail in Portland, Oregon, on September 2, 2014, and addressed as follows:

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

Plaintiff, pro se

/s/Deanne Bateson
DEANNE BATESON
Legal Assistant

CERTIFICATE OF SERVICE