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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' REPLY IN SUPPORT
OF ITS 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 reply memorandum in support of its motion for summary judgment. Dkt. 27.

Introduction

Plaintiff Jeffrey Lewis brought this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and alleged the FAA improperly withheld documents in response to his FOIA requests. Both parties have moved for summary judgment.

Argument and authority

I. The ATSAP reports were properly withheld under Exemption 6 based on privacy interests.

In Plaintiff’s FOIA request No. 2012-002082, he sought 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 under Exemption 5 based on attorney-client privilege. Dkt. 28, p. 28-32, Kreischer Dec., ¶ 20(c-k); Dkt. 28-1, pp. 31-32. Plaintiff argues the Air Traffic Safety Action Program (“ATSAP”) reports were improperly withheld. Dkt. 38, pp. 8-14. Contrary to Plaintiff’s argument, the ATSAP reports were properly withheld under Exemption 6.¹

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. *Id.* An ATSAP report contains the observations and specific details of an incident that involved or was witnessed by the person making the report. Dkt. 28, p. 30, Dec. of Kreischer, ¶ 20(h). Release of the

¹ This issue was briefed by the FAA in Defendants’ Response to Plaintiff’s Motion for Summary Judgment. Dkt. 33, pp. 5-6.

information would identify the person making the report and it could result in embarrassment, damage to that person's career, or retaliation from others. *Id.* The person making the ATSAP report has a clear privacy interest in keeping his identity confidential and this interest outweighs the public interest of disclosure. *Id.* at ¶ 20(j).

On the other hand, the FAA has released in full the Memorandum related to a complaint alleging that an operational error that occurred at the Camarillo Air Traffic Control Tower on July 25, 2010, was not reported. Memorandum, Attachment 1. The Memorandum states that a confidential ATSAP report was filed but does not reveal the identity of the person making the report. *Id.*, p. 2(d). Although this Memorandum does not contain the information from the ATSAP report, nevertheless, it provides sufficient information about the incident to let the public know that the matter was investigated. Therefore, the privacy interest of the person making the ATSAP report 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.

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II. The FAA properly withheld the report of investigation under Exemption 6 and 7(C) based on privacy interests.

Plaintiff's FOIA request No. 2012-007031 was related to an incident involving an Accountability Board case in which an employee "allegedly marked a swastika and made Hitler references about a management official." 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, Kreisler Dec., ¶ 24(b-j). The report of investigation ("ROI") was withheld in full under Exemption 6 and 7(C). *Id.* at ¶ 24(b); *Vaughn index*, Dkt. 28-1, p. 31.

Exemption 6

Exemption 6 protects an individual's personal privacy and a court must balance the privacy interest of withholding the information and the public interest of disclosing the information. The only relevant public interest is the extent to which disclosure would shed light on the performance of the agency.²

An ROI is developed and created by the appropriate FAA Security Office based on a thorough investigation. Dkt. 28, pp. 41, Kreisler Dec., ¶ 24(g). It contains a detailed narrative of the investigation and includes the names of witnesses and their statements.

Id. An ROI created by the FAA is kept in a Privacy Act System and is retrieved by the name of the subject of the investigation. *Id.* The FAA will release the full ROI to the subject of the investigation under the Privacy Act, subject to any exemptions. *Id.*, fn. 9.

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² The FAA has set forth the standard for Exemption 6 in Defendants' motion for summary judgment and will not repeat it here. Dkt. 27, pp. 10-11.

The ROI requested by Plaintiff contains a detailed narrative of the investigation including the names of witnesses and their statements. Dkt. 28, pp. 41-42, Kreisler Dec., ¶ 24(h-i). The individual being investigated has a significant privacy interest in keeping the details of the incident confidential in order to avoid embarrassment. *Id.* at ¶ 24(h). In addition, the individuals who provided witness statements have a privacy interest in keeping their statements confidential. *Id.* at ¶ 24(i). Moreover, the Letter of Decision, which was partially redacted and released to Plaintiff, shows that the FAA employee was suspended for 30 days. Letter of Decision, Attachment 2.

Here, the subject of the investigation and the witnesses have a significant privacy interest in keeping the ROI confidential. On the other hand, the FAA has released sufficient information in the Letter of Decision to let the public know what the government is up to and how it handled this situation by suspending the employee for 30 days. Therefore the privacy interest outweighs the public interest and the ROI was properly withheld under Exemption 6.

Exemption 7(C)

Exemption 7 protects records and information that were compiled by the government for law enforcement purposes. Exemption 7 applies to an agency's investigation of its own employees if the investigation focuses on alleged illegal acts of employees that could result in civil or criminal sanctions. Exemption 7 is triggered if the information can be characterized as an enforcement proceeding. Moreover, Exemption

7(C) provides broader protection than Exemption 6.³

Here, the FAA investigated an employee for violating the FAA Standards of Conduct. Attachment 2, p. 5. This investigation was an enforcement proceeding that resulted in the employee being suspended for 30 days. *Id.* Therefore, the ROI for this investigation falls under the protection of Exemption 7(C). In balancing the privacy interests and the public interest, the disclosure of the ROI could reasonably be expected to constitute an unwarranted invasion of personal privacy and outweighs the public interest. Accordingly, the FAA properly withheld the ROI under Exemption 7(C) and summary judgment should be granted in favor of the FAA.

Conclusion

Defendants' motion for summary judgment should be granted.

Dated this 24th day of September 2014.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney
District of Oregon

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

³ The FAA has set forth the standard for Exemption 7(C) in Defendants' motion for summary judgment and will not repeat it here. Dkt. 27, pp. 15-16.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of **DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** was sent by first-class postage and deposited in the United States mail in Portland, Oregon, on September 24, 2014, and addressed as follows:

Jeffrey Lewis
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Plaintiff, pro se

/s/Deanne Bateson
DEANNE BATESON
Legal Assistant

CERTIFICATE OF SERVICE