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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JEFFREY NATHAN LEWIS,)
 Plaintiff,) Case No. 3:13-cv-00992-HZ
 vs.) November 17, 2014
 FEDERAL AVIATION) Portland, Oregon
 ADMINISTRATION, and)
 FAA Administrator)
 Michael Huerta,)
 Defendants.)
 _____)

CORRECTED TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MARCO A. HERNANDEZ

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR THE PLAINTIFF: Mr. Jeffrey Nathan Lewis
 28242 S. Salo Road
 Mulino, Oregon

FOR THE DEFENDANTS: Mr. Kevin C. Danielson
 US Attorney's Office
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* * * * *

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1 PROCEEDINGS

2 (Open Court. 11:00 a.m.)

3 THE CLERK: Your Honor, we're here today on
4 the matter of Lewis vs. FAA, et al., civil case No.
5 3:13-cv-00992-HZ on motions for summary judgment Nos.
6 27 and 30.

7 Counsel, please state your appearance for the
8 record. And, Mr. Lewis, please state your appearance.

9 MR. LEWIS: My name is Jeffrey Lewis, and I
10 filed this action on June of 2013.

11 THE COURT: Thank you.

12 MR. DANIELSON: Kevin Danielson for the
13 defendant, Your Honor.

14 THE COURT: Thank you. Go ahead and have a
15 seat, Mr. Lewis. This is the Government's motion for
16 summary judgment.

17 As I understand it, Mr. Lewis is interested
18 in talking about actually two issues: The ATSAP report
19 from the July 25, 2010 event and ROI report of
20 investigation regarding a Swastika incident that looks
21 like that may have occurred, I don't know, back in 2008,
22 maybe. I'm not sure.

23 In any event, those are the two documents or
24 set of documents that Mr. Lewis is interested in talking
25 about, so I'd like you to focus your conversation about

1 those sets of documents.

2 The first question I have is what hasn't yet
3 been disclosed as regards each of those documents?
4 Maybe we can take up the ATSAP report first in our
5 conversation and then talk about the ROI, okay?

6 I'll hear from the Government first. It's
7 your motion.

8 MR. DANIELSON: Yes, Your Honor.

9 We have produced some of the documents and we
10 redacted some portions of the documents related to the
11 FOIA requests for ATSAP. That's how we pronounce that
12 acronym, Your Honor. And right now it has come to my
13 understanding with Mr. Lewis that we are focusing on the
14 actual ATSAP report made by one of the air traffic
15 controllers or one of the people in the tower at the
16 time this alleged incident occurred.

17 THE COURT: That's -- an event happens and
18 somebody in the control tower says, hey, an event
19 happened and made a report?

20 MR. DANIELSON: That's correct, Your Honor.

21 THE COURT: That's the document that we're
22 talking about?

23 MR. DANIELSON: I think it is just a
24 two-page report, Your Honor.

25 THE COURT: Okay. Is that something that

1 you brought with you, by the way?

2 MR. DANIELSON: I do not have it, Your
3 Honor. I've asked for it. The FAA said they would
4 produce it to me. Almost under guard in the sense that
5 they would bring over. They would let me look at it.
6 They wouldn't copy it and then they would take it back
7 with them.

8 THE COURT: Really? Do you think if I order
9 them to give it to me, they will give it to me?

10 MR. DANIELSON: Absolutely, Your Honor.

11 THE COURT: Oh, good. That's good to hear.
12 What do you want to tell me about your legal
13 arguments around that report?

14 MR. DANIELSON: The legal argument, Your
15 Honor, is that we are claiming Exemption 6, which under
16 FOIA, it is a privacy -- it is a claim of privacy where
17 the Court balances the privacy rights of the individual
18 versus the privacy rights -- I'm sorry, versus the
19 public right in disclosing the documents.

20 And the whole purpose of the ATSAP report is
21 to have FAA employees, if they see something relating to
22 safety or operational errors, be free to report the
23 errors without any fear of retaliation or embarrassment
24 or anything similar to that.

25 The idea is if employees see something wrong,

1 they should be able to report it freely. And it's in
2 the best interest of the FAA and the public safety,
3 everything in that sense, Your Honor, that it's positive
4 for the FAA to receive that information.

5 The privacy right of the individual is clear.
6 It's to prevent retaliation or any kind of adverse
7 action against them reporting something.

8 THE COURT: So is there any portion -- you
9 haven't seen the report, so let me back up a second.

10 Does that mean you don't know what the report
11 says?

12 MR. DANIELSON: I don't know what the report
13 says. I think that they are primarily wanting to
14 protect the identity of the person making the report.

15 THE COURT: So if there's a way to disclose
16 the report, in other words, what happened without
17 disclosing the identity of the person, is that
18 something that Exemption 6 would say that's okay?

19 MR. DANIELSON: I think the exemption would
20 allow that, Your Honor. The FAA in their affidavit has
21 said they've looked at the ATSAP report, and their
22 opinion is they cannot release any information on the
23 report without revealing -- that would reveal the
24 identity of the person or -- it would reveal the
25 identity of the person, Your Honor.

1 THE COURT: Okay. Besides Exemption 6, are
2 you claiming any other exemptions?

3 MR. DANIELSON: Not for the ATSAP report,
4 Your Honor. But in balancing the -- in balancing
5 Exemption 6, it's a privacy right of the individual
6 versus the public interest in disclosure.

7 The public interest in disclosure focuses on
8 whether the disclosure of the information would shed
9 light on how the agency operates, what the agency is
10 doing.

11 And I have attached to my reply brief
12 Document 41. It is 41-1, which discusses in five pages
13 a memorandum about the ATSAP report, what was done, what
14 the allegations were, and that there was -- and their
15 conclusion in the sense that they could not find any
16 absolute evidence of any wrongdoing.

17 But if you look at those five pages, it
18 totally fulfills what FOIA was required to do. In the
19 sense it shows that the report was made. It shows that
20 the FAA investigated it, and it shows through many of
21 the details of the allegations of what happened. So it
22 does shed light on what the Government actually did in
23 this sense.

24 And my third argument in connection with the
25 ATSAP report is that document that was filed today,

1 it's -- it was filed in the federal register in the
2 sense that -- not in the sense that, Congress gave the
3 FAA authority to withhold certain documents if those
4 documents were going to -- if disclosure of those
5 documents were going to interfere with the safety of the
6 FAA.

7 And the FAA went through a process, and I
8 think it is a seven-page document where it responds to
9 the comments that were made in response to the proposal
10 by the FAA to withhold the ATSAP reports under FOIA.

11 It explains why they were doing it. And it
12 explains that the confidentiality of the ATSAP report is
13 critical to the function of the ATSAP report so that
14 employees will be confident that their information or
15 report that they made are kept private.

16 THE COURT: So that's the argument that
17 since -- presently there's an act of Congress that has
18 taken place that promises confidentiality. It is not
19 retroactive.

20 MR. DANIELSON: That's right.

21 THE COURT: So it doesn't cover this ATSAP
22 report, but, Judge, look, this is convincing or it's
23 strong argument as to why there's a privacy interest
24 here.

25 MR. DANIELSON: That's exactly right.

1 THE COURT: Use it in that way.

2 MR. DANIELSON: That's exactly right.

3 THE COURT: Okay.

4 MR. DANIELSON: That's all I have to say
5 about the ATSAP report.

6 THE COURT: Let me hear from the other side
7 about ATSAP, then we'll talk about the Swastika
8 incident.

9 MR. LEWIS: Okay. Thank you, Your Honor.
10 Especially thank you for granting my motion
11 for this. I'm not a lawyer. I'm a retired traffic
12 controller. I'm a whistleblower. I'm one of the people
13 that has felt the retaliation that he's alluded to in
14 terms of him speaking about problems.

15 I spoke up about a couple of issues. I have
16 brought them -- presented them in some of the large
17 amount of documentation where -- seemingly at least to
18 me a large amount of documentation that's gone in to
19 present this case to you in. And I appreciate evidently
20 you've been reading some of the larger picture.

21 THE COURT: Before we get to the merits of
22 your argument, one of the reasons we're having oral
23 argument today was because there was some indication
24 that if you could get the answer for the two classes of
25 documents that we're referring to today, that the Court

1 wouldn't need to address the other documents that are
2 at issue. I need you to kind of explain to me what you
3 meant by all of that.

4 MR. LEWIS: Yes, I would be happy to do
5 that, and thank you for helping me to focus better.

6 THE COURT: Yes.

7 MR. LEWIS: I did entertain a couple of
8 months ago the possibility that, you know, it really
9 comes down to of the 14 FOIA requests that I presented
10 in June of 2013, that I felt there was noncompliance by
11 the agency on, that there are two of them that are of
12 particular concern one. They had to do with the
13 Camarillo controller error.

14 THE COURT: Is that the ATSAP report?

15 MR. LEWIS: That's for which the ATSAP
16 report was written on July 25 of 2010. And the other
17 one had to do with a Swastika involving a union
18 representative at the Seattle TRACON. And just for
19 your information, that happened very early, like
20 January of 2007.

21 THE COURT: Okay.

22 MR. LEWIS: Before that, a slight bit of
23 digression.

24 I was basically fired a few years ago now and
25 for six months prior to becoming eligible to retire from

1 my 22-year air traffic control career. And in order
2 collect the pension that I needed and was eligible for
3 in those six months later, I went to the Merit Systems
4 Protection Board. It was the end of the Bush
5 administration and they were not, and to my
6 understanding, they are still not very good at trying to
7 balance things out.

8 And so what it evolved in to is hey, Jeff,
9 two months from now, you're eligible to retire. If you
10 voluntarily retire, we'll hold your removal in abeyance
11 and we'll let you collect that.

12 I had no choice. On the day I went to
13 hearing, the hearing never started, and it commenced
14 from there. But then after that, I started filing a few
15 FOIA requests in order to further document what really
16 should have been provided during the discovery process
17 for that Merit System Protection Board case in early
18 '09.

19 And in the process I've gotten well over
20 10,000 pages that I've received from the agency mostly
21 through FOIA. Some through other, you know, avenues.
22 And I found some pretty disconcerting documents that
23 show stuff that was clearly being -- improperly being
24 withheld from me when I needed it during that process.

25 In the course of those few years, not so much

1 the last two years, but up through about 2012, I filed
2 quite a few FOIA requests. But increasingly, they
3 transitioned away from what I needed for my personal
4 case to try to help my previous employer to recognize
5 the problem and fix it and make me whole.

6 They increasingly transitioned to become
7 things related to a website I started two years ago,
8 which blogs on issues of the need for reform within the
9 FAA, not the least of which is the fact that they
10 conceal safety information.

11 There's a long history of these voluntary
12 safety information submissions, programs such as ATSAP.
13 ATSAP was modeled after one called ASAP, which was used
14 by airline pilots starting in the early 1990's.

15 They make arrangements with the airlines.
16 The airlines and the pilot unions that said, you know, a
17 lot of you guys are getting climb clearances to, say,
18 climb to 10,000, and whoops, you end up at 11,000.

19 And if you just admit that right away via
20 this process, we won't take a certificate action. We
21 won't remove your ability to do your job and maybe
22 completely, you know, destroy your career because of
23 what may have been an inadvertent mistake.

24 It was a good idea to try to open up the flow
25 of safety information. However, the pilots also had at

1 their disposal prior to ASAP, and controllers continue
2 to have at their disposal regardless of the new
3 development of ATSA, which came about at 2008 with the
4 FAA, another avenue through NASA. They have a reporting
5 system that has collected more than 1 million reports.

6 And the key incentive for pilots to submit to
7 that is that if they provided that information, it will
8 be sanitized, but they will not -- it's basically a
9 get-out-of-free jail card.

10 If they go out on a runway or, you know, they
11 don't make the turn when they are landing, they miss a
12 turn, and they -- or they were supposed to take this
13 taxiway, but they keep going to that taxiway, and it
14 creates a problem, and they -- within a few days they
15 submit to the ASRS that report, they get immunity. This
16 same basic incentive exists within ATSA.

17 The only substantial change in ATSA is that
18 FAA and contractors paid by FAA control the ATSA
19 information. But more problematically, it's how they
20 process that information.

21 They do similar to what they do in the NASA
22 program that's been around since 1978. And like I said,
23 over a million -- a million reports in 2012, very, very
24 successful. That NASA report, by the way, it will
25 make -- you can go online and you can look up Camarillo,

1 and you can look up July 2010, and it will show you if
2 there was an NASA ASRS report filed.

3 And what it would say -- it wouldn't say the
4 name of the controller. It wouldn't even say the date.
5 It would just say July 2010, Camarillo. Pilot said he
6 landed. The controller told him turn, and he didn't
7 hear it. He kept going, and he turned at the next
8 taxiway.

9 And I realize because behind me on the radio,
10 I heard him telling the next guy taking off, "cancel
11 take-off clearance," I realize, oh, that may have been
12 my mistake, so here I am filling out this report.

13 That report doesn't exist. The controller in
14 the tower cab, had there not been an ATSAP, would have
15 created -- I assure you from my experience in 22 years
16 and the people that I've known in air traffic control
17 there, had there not been an ATSAP report, at least one
18 of the three controllers, the two controllers and a
19 manager in the tower cab at Camarillo on that day would
20 have completed an ASRS report into the NASA program.

21 We would have something to look at that would
22 document that, yes, in fact, somebody was on the runway
23 when this guy started his take-off and was told by the
24 controller "cancel take-off clearance," which was very
25 problematic because if he had immediately reacted, he

1 would have been coming down to land right next to, maybe
2 even on top of the Cessna ahead taxiing and getting
3 ready to turn on the wrong taxiway.

4 This was observed by the one controller, Mike
5 Marcotte, as documented in what's been presented, and
6 nobody ever interviewed him. It was observed by -- at
7 the last second, all three of these people observed, by
8 One' Nielsen who was a local controller and a fairly new
9 controller, whereas Mike had, it was kind of like me,
10 20-plus years of experience. It was also observed by a
11 youngish, in his 30s or so supervisor named Kevin
12 Pruitt.

13 According to FAA's orders Kevin Pruitt had a
14 responsibility to act on this and document, which -- you
15 know, investigate, which would have included turning
16 right around to Mike within a few days and getting his
17 written statement, at this date and this time, this is
18 what I saw. And then we wouldn't have an issue.

19 But what happened instead is they swept it
20 under the rug. They didn't do any investigation. But
21 we do know, according to some of the long history that
22 yes, at least one, we don't know if it's one or two
23 ATSAP reports were filed. And the FAA has been very coy
24 in trying to ensure that that report doesn't get out.

25 A controller doesn't file an ATSAP report

1 unless something happened that shouldn't have happened.
2 So it's kind of between the lines. We know that the
3 report is going to say that there were -- there was an
4 error here.

5 And yet, the agency, when they finally got
6 around to investigating this 11 months later, the fourth
7 time around when they actually did interview Mike
8 Marcotte and he said -- what he said was solidly, you
9 know, consistent with what is on the audiotapes, which
10 fortunately were preserved because of my previous
11 coworker working in Camarillo, Don Hiebert, he was
12 concerned about this the way he and I were both
13 concerned years before in 1999 when there was an actual
14 collision in San Jose that fortunately didn't produce
15 any fatalities.

16 Don pursued that with a FOIA request, and he
17 was able to get a copy of a CD with the audio recording
18 that day. And he and I as previous coworkers with the
19 shared concern have gone back and forth on this, and
20 we're trying to, you know, get this information out
21 there.

22 Um, do you have any questions?

23 THE COURT: Well, my original question,
24 which still remains unanswered.

25 MR. LEWIS: Sorry.

1 THE COURT: That's okay. Was that I
2 understood that you were interested in now two sets of
3 documents: The ATSAP report which you've been
4 discussing and this report regarding the Swastika
5 incident.

6 MR. LEWIS: Okay.

7 THE COURT: You left the Court with the
8 impression that if we could get those two things
9 resolved, the other documents were no longer at issue
10 as far as you were concerned. But I don't want to put
11 words in your mouth. That's how it sounded to me.

12 I wanted you to tell me what is it that you
13 were meaning, what is it that you want to convey to the
14 Court on that issue, and then we'll get -- I'll give you
15 a chance to talk about ATSAP.

16 MR. LEWIS: I'm glad I asked you that. I
17 did stray a little bit.

18 Yes, so there were 14 initially filed. When
19 it came down to it, when we got to motions for summary
20 judgment, the most obvious differences existed on the
21 two documents that you presented when you first sat down
22 and reviewed what we're going to talk about today.

23 And that's why I then discussed on the phone
24 briefly with the defense counsel the prospect of, you
25 know, if we looked at these and we discussed these and

1 we're able to establish -- if we're able to resolve one
2 or both of these, the other ones aren't really that
3 important to me.

4 I still feel, and I believe I articulated
5 this in what I filed with that motion for this oral
6 argument that there was some substantial agency failures
7 and noncompliance with the FOIA.

8 THE COURT: Let me interrupt and get you
9 back on track.

10 MR. LEWIS: Okay.

11 THE COURT: So my question is, is if I rule
12 on these two sets of documents, do I need to consider
13 all of the other documents? And the reason I'm asking
14 that question is, it is a work issue for me.

15 Do I need to write an opinion that deals with
16 just these two documents, or do I need to write an
17 opinion that deals with these two documents as well as
18 the 12 other documents or 14 other documents?

19 That's my question. If you're telling me I
20 don't care about those other documents, then I'm going
21 to write my opinion he doesn't care about those other
22 documents, so I'm not writing about it.

23 If you're telling me, yes, I still care about
24 those other documents, then I'm going to need to review
25 how much bigger body of work and figure out what to do

1 about all of the rest of the documents.

2 Do you understand?

3 MR. LEWIS: I think I do understand. I will
4 offer then this, that based on your excellent questions
5 to defense, it's clear to me that you intend to look
6 closely at the two documents that I listed when I
7 requested this oral argument. And if we just proceed
8 with that, let's disregard the other stuff.

9 THE COURT: Okay. So then as regards the
10 other documents, I'm going to kind of, based upon what
11 you're telling me, issue an order that says the other
12 documents are no longer in issue. The request of those
13 documents is dismissed on your motion.

14 Is that acceptable to you?

15 MR. LEWIS: Yes. I'll accept that.

16 THE COURT: Okay. All right. Now, let's
17 talk about these documents.

18 MR. LEWIS: Okay.

19 THE COURT: They've raised what they call
20 exemptions, and I assume you are familiar with their
21 legal arguments.

22 MR. LEWIS: Quite. They've also repeatedly
23 raised 7(C), which keeps coming up all over the place,
24 which relates to criminal matters and stuff, but I
25 think it's kind of a boilerplate.

1 THE COURT: I think we're at Exemption 6
2 right now. If you want to respond to their legal
3 argument on Exemption 6 and why that doesn't work for
4 them, now is your chance.

5 MR. LEWIS: Okay. Well, as was being
6 articulated, it's kind of a balance between the private
7 interest, which like I was describing there a bit ago
8 with ASRS and could just as easily be done with the
9 ATSAP, is provided for by sanitizing the ATSAP copy and
10 not including the name of the reporting party.

11 There were three people involved. We don't
12 know which one of them submitted that particular ATSAP
13 report. And frankly, in a lot of ways, we don't and
14 shouldn't even care because the important thing was,
15 especially at that point in time in July of 2010, is
16 that these people, whoever, if one or two of those
17 people submitted an ATSAP report, they did so knowing
18 they were getting the immunity from having to be
19 retrained or having to be disciplined, possibly even to
20 the furthest extent, lose their job.

21 THE COURT: So do you have an issue with the
22 notion that if the ATSAP report is given to the Court,
23 that the Court will redact anything that identifies who
24 made the report? You agree that Exemption 6 provides
25 for that process; in other words, we need to protect

1 the identity of the reporter?

2 MR. LEWIS: We need to protect the identity
3 of the reporter in context with the other contents of
4 that document.

5 If, however -- if I were to have been told --
6 I do not personally know the identity of who filed, if
7 there was one ATSAP, but in the other document we're
8 going to talk about, I was told by the agency the name
9 of the union representative. And they are using that as
10 an excuse not to share the contents of the report of
11 investigation.

12 THE COURT: Yes. Let's stay focused on this
13 one.

14 MR. LEWIS: So, so to the extent that, you
15 know, I've always agreed with the concept that, yeah, a
16 person has a right to their own personal name, privacy,
17 their address, their phone number, things like that not
18 showing up on FOIA-released documents.

19 But at the same time the agency should not be
20 making that error like I just described with the other
21 record as a means of saying gosh, sorry, we goofed. We
22 can't give you anything now. We can't give you anything
23 now, leave us alone, which seems to be what they
24 intended to do with the other document.

25 What I will also say, though, is it goes back

1 to that issue of balance. I've had a few FOIA appeals
2 in the last few years, and I've seen a considerable
3 amount of boilerplate presentation back from the agency.

4 It takes years of -- for them to get these
5 appeal responses back, but they always just repeat the
6 same stuff. And they talk about that balance. And they
7 talk about it from a perspective that, well, gosh,
8 clearly, the personal privacy is huge and nobody else
9 really cares about this.

10 The public cares deeply, as they should, when
11 traffic controller errors happen. Those errors can be
12 prevented if we have an aggressive safety programs.
13 When we have a law, a set of guidelines for the FAA
14 passed by Congress and for other agencies, or you, know,
15 right at 50 years ago, it's designed to help people see
16 what's happening within -- how the agency is working.

17 We cannot -- we need a press, nowadays a
18 little bit differently. We need bloggers who are going
19 to be able to apply their expertise and shine a light on
20 that so that the agency will recognize that we need to
21 fix this or we're going to end up having some fatal
22 accidents here.

23 Um, that's why I really would like to see
24 what's on that ATSAAP for July 25, 2010, because the
25 agency is clearly, in my opinion, improperly hiding that

1 record.

2 THE COURT: Thank you.

3 I need -- before I can rule, I'm going to
4 need to look at the report, so I will direct you to give
5 a copy of the report to me.

6 Do you need something?

7 MR. DANIELSON: Would you mind entering a
8 minute order judgment?

9 THE COURT: No problem. I'll enter a minute
10 order that requires you to -- requires the FAA to give
11 me a copy of that report unredacted.

12 MR. DANIELSON: Understood, Your Honor. I
13 will review the report in camera and determine whether
14 any of it or some of it or none of it can be disclosed
15 after I've taken a look at it.

16 THE COURT: Okay. Next. Let's talk about
17 the Swastika incident.

18 MR. DANIELSON: The Swastika incident
19 occurred in 2007. An FAA employee apparently made a
20 reference to one of his supervisors as Hitler. Made
21 some kind of a Swastika drawing on some kind of a
22 document.

23 The FAA security office did an investigation
24 of it, as they are required to do. It produced
25 approximately, I think, an 80-page report where they

1 interviewed maybe 20 different witnesses, admitted
2 exhibits, and then ultimately suspended the FAA employee
3 for 30 days.

4 We claim Exemption 6, which is a privacy
5 exemption as using the same balancing tests that I've
6 mentioned earlier. And they've also claimed Exemption
7 7(C). Exemption 7(C) is called a law enforcement
8 exemption, but it does apply for enforcement proceedings
9 of any kind. And it does apply to when an employee is
10 disciplined and goes through a disciplinary process.

11 Even though both Exemption 6 and 7(C) claim a
12 privacy exemption, Exemption 6 requires a clearly
13 unwarranted invasion of privacy, whereas Exemption 7(C)
14 has a lower burden. It's just a clearly -- it's just a
15 clearly unwarranted invasion of privacy. I'm sorry, I
16 just said that in the reverse order.

17 Exemption 6 requires clearly unwarranted.
18 Exemption 7(C) is just an unwarranted invasion of
19 privacy. It is definitely a lower burden.

20 THE COURT: So 7(C) applies. In other
21 words, it's easy to meet a 7(C) standard than a 6?

22 MR. DANIELSON: It is. One you meet 7(C),
23 you've already met Exemption 6.

24 THE COURT: All right.

25 MR. DANIELSON: In the same context, we have

1 attached Attachment 2, which is a memorandum regarding
2 the investigation. It discusses the reference to
3 Hitler. I think refers to the Swastika. It shows that
4 the employee was suspended for 30 days.

5 So in terms of the balancing of the test of
6 privacy in the public interest, it already shows what
7 the Government was up to and the function of the agency.
8 It shows that they investigated this incident and that
9 the person was disciplined. I don't think that -- it
10 satisfied the requirement for the public to know that's
11 what occurred and that's what the agency is up to.

12 Any more information that would be released
13 would invade the privacy of the individuals if you
14 release the report with investigation.

15 THE COURT: He already knows who it is;
16 right, as I recall? I mean, there was a blown
17 incident. They inadvertently disclosed the name of the
18 individual that was involved in this thing.

19 Does that change the analysis in any way?

20 MR. DANIELSON: It doesn't change the
21 analysis for the witnesses, Your Honor.

22 THE COURT: Oh, okay, because there's other
23 witnesses.

24 MR. DANIELSON: There are approximately 20
25 different witnesses who were interviewed as part of

1 this investigation.

2 THE COURT: I see. Okay.

3 MR. DANIELSON: And the fact that Mr. Lewis
4 may know the name of the person being investigated does
5 not change the analysis because it's not what Mr. Lewis
6 knows, it's what the entire public knows. And that you
7 have to balance the privacy rights of the person
8 investigated and his privacy rights.

9 And the fact that one person who is making
10 the FOIA request knows more information does not change
11 the analysis.

12 That's all, Your Honor.

13 THE COURT: Thank you.

14 All right. Mr. Lewis, you're up.

15 MR. LEWIS: Thank you, Your Honor.

16 I'm not convinced it was actually
17 inadvertently produced, the name of the individual. I
18 assumed it was just a controller. I didn't even know
19 the facility, but --

20 THE COURT: Well, I'm going to guess that
21 they wished they hadn't given that name out. Looking
22 back on the incident, I would guess that they wished
23 that that had not happened, but that doesn't matter.

24 MR. LEWIS: That's a guess. And in
25 actuality, the reality of the relationship at the time

1 between the agency and its controller union, which has
2 been quite contentious. Thirty-three years ago, the
3 vast majority of controllers walked, and many of them
4 lost their jobs probably while I was in college.

5 Um, there's such a contentious relationship,
6 that it is quite possible that they recognize, gosh, if
7 we leak this name, so what they sent me was a response
8 saying, you asked for this. We have a copy of this.
9 This is the Louis Dan Olson, ROI number such-and-such.
10 And it's not releasable because it is an ROI. Goodbye.
11 Leave us alone, roughly.

12 And then when I filed an appeal to that
13 response for FOIA, I basically articulated why I felt
14 they needed to produced it, and explained how it related
15 to mine because it was contemporary with mine. They did
16 about a 80- or 90-page ROI on mine that had a huge
17 number of errors in it. And it proved nothing other
18 than one non-disparaging comment I had said, quoting a
19 Randy Newman lyric with the "N" word in it.

20 Other than that, which I had always said I
21 had done, there was nothing in the ROI that is being
22 discussed here -- there was nothing in my ROI that
23 legitimized my being eventually fired a year and a half
24 later.

25 So what I'm trying to do is show a side by

1 side. This one goes -- this document -- this record
2 goes much more to my personal case, obviously. I'm
3 trying to show a side by side of disparate treatment in
4 terms of how the ROI was done, what evidence was
5 collected and what action was taken.

6 In this case we have no evidence. We have a
7 letter here as presented by counsel that there was a
8 decision letter, but that doesn't mean the decision was
9 actually implemented.

10 I do know from other online research that
11 this particular person was the union rep and he did
12 retire a year or two later. I do have every reason to
13 believe largely from information and documents, records
14 I've gotten through my other FOIA requests and posted on
15 my website, that he probably had ample support from the
16 union defending him so that he never served any of the
17 time.

18 So we don't know. The public would likely be
19 misled to believe that he actually served that 30-day
20 suspension. If the union fought it and won, he would
21 get all that money as back-pay, too, and these things
22 happened.

23 The agency regrettably to the -- and this
24 doesn't help the public to understand how the agency
25 functions. The agency is of the habit of hiding details

1 such as these so nobody ever finds out.

2 This is not just about FOIA Exemption 6 and
3 7(C). It actually goes a little bit further. The
4 document he's referring to, the letter of decision,
5 dated June 5 of 2007, it's within their discovery set,
6 and we can chase down a document as far as where it
7 would have been submitted to the Court. I'm assuming
8 you don't have that. It has numerous blocks on it where
9 it is all lined through and says "not responsive to
10 request" handwritten in the margin.

11 It runs on -- wait a minute -- yeah. It runs
12 on. On the first page there's one of those. The third
13 page has that, and then again on the fourth and again on
14 the fifth page. And so they've got all this stuff.

15 They are basically saying it is not
16 responsive to the request. Their request sought the
17 letters that actioned discipline, you know, in terms of
18 proposing what we propose and what we decide to do for
19 this particular controller.

20 I did not know the identity. I didn't even
21 know the location, the work location of that controller
22 when I filed the FOIA request way back in 2011 or
23 whenever it was.

24 And they have just arbitrarily chosen to
25 blackout all those and say this, what you're asking for

1 is not responsive. I asked for the document. I didn't
2 ask for specific contents of the documents.

3 So like Reason No. 1, I have one of these
4 letters that proposed my firing that I received in the
5 summer of 2008, 16 months after I was locked out and put
6 in a paid status to stay home and wonder what's going
7 on. I have one of these where they layout Reason No. 1,
8 Reason No. 2.

9 And what it generally does is it articulates
10 that so-and-so, you know, it is charged that you did A,
11 B, C, D, and it goes through, and this violates such and
12 such rule or whatever. I mean, this is common sense.

13 Why that should be properly redacted and not
14 labeled as B(6), not labeled as 7(C), but just margined
15 as "not responsive to request" is clearly absurd.

16 I'm not convinced that even counsel has seen
17 what they are hiding, because what we understand, for
18 example, with the other critical document is they are in
19 the habit of even hiding from their counsel on the other
20 side of the country their own records. So they don't
21 even want him to see.

22 So my -- I wouldn't be surprised at all to
23 find that he doesn't know what is concealed by these
24 particular "not responsive to request" paragraphs.

25 So I would like to see those. I requested

1 those with this FOIA -- I requested them years ago with
2 the FOIA and then the appeal, and I brought that up
3 again when I filed this action in June of '13.

4 THE COURT: Thank you.

5 MR. DANIELSON: May I respond?

6 THE COURT: You may. Just a second.

7 Okay. Go ahead.

8 MR. DANIELSON: My understanding, Your
9 Honor, was that Mr. Lewis was focusing on the ROI and
10 not this other document, because I don't -- I could be
11 wrong, this has been a long, complicated case with lots
12 of documents, but I don't recall Mr. Lewis even
13 bringing up the blackened-out parts, the redacted parts
14 on this Attachment 2 in the motions for summary
15 judgment.

16 THE COURT: So the document he's referring
17 to is not the ROI?

18 MR. DANIELSON: It's not. It's not.

19 THE COURT: Oh, okay.

20 MR. DANIELSON: And my argument was that
21 Attachment 2 sheds light on what the Government by
22 investigating this incident, but it's totally a
23 separate document. It's like a memorandum of what
24 occurred after the investigation.

25 THE COURT: Okay. Can you tell me from your

1 perspective what the name of the document he's
2 referring to is? Is that Attachment 2?

3 MR. DANIELSON: It's Attachment 2, Your
4 Honor. If I might make -- Bates document FAA 1555 was
5 inadvertently added to that, and it should be omitted
6 and removed from Attachment 2.

7 THE COURT: Is that something that we have?

8 MR. DANIELSON: You do. Attachment 2 starts
9 out page 1556 followed by 1555, and it was just
10 inadvertently added.

11 THE COURT: I'm sorry. What was
12 inadvertently added that you --

13 MR. DANIELSON: Page 1555 should just be
14 removed from that attachment.

15 THE COURT: That's because it includes
16 information that should not have been disclosed?

17 MR. DANIELSON: It just comes from a
18 different document, Your Honor.

19 THE COURT: Okay.

20 MR. DANIELSON: It precedes page 1556.

21 THE COURT: Is there anything that is
22 privileged or otherwise non-disclosable in 1555?

23 MR. DANIELSON: No. They've redacted some
24 PIN stuff, personal information, but it's just a
25 signature blocks that I have redacted.

1 THE COURT: Okay. Well, I won't consider
2 it, but I'm not trying to go through the process of
3 declaring document shouldn't be -- have been --

4 MR. DANIELSON: Yeah. I'm just saying for
5 your information, that 1555 is out of order.

6 THE COURT: Oh, perfect. Okay. Thank you.

7 MR. DANIELSON: That was my only
8 clarification or point of clarification, Your Honor, is
9 that attachment two is not the report of the
10 investigation that we were focusing on.

11 THE COURT: Okay. I'll give him a chance to
12 respond. Before you sit down, did you submit a
13 redacted or any part of the ROI?

14 MR. DANIELSON: No. I do have it, Your
15 Honor.

16 THE COURT: So I'm going to require through
17 a minute order that you do the same thing. I need to
18 be able to review the ROI in its entirety unredacted in
19 camera.

20 MR. DANIELSON: I understand.

21 THE COURT: It will also be part of the
22 minute order.

23 MR. DANIELSON: Thank you.

24 THE COURT: Did you have anything else you
25 wanted to tell me?

1 MR. LEWIS: Um, I have one of those ROI's
2 and, it is, I believe, standard practice, it would be
3 cumbersome for me to locate it. I could find it if we
4 were on a short break quite easily, but I believe the
5 letter proposing disciplinary action and the letter of
6 actual deciding action is commonly included in that
7 depending upon the timing of the ROI.

8 But regardless, if there were witnesses, I'm
9 not disputing -- and he said there was 20, I believe,
10 I'm not disputing the concealment of their identity.

11 But if they are saying things such as in this
12 case they allegedly had marked graffiti, a large
13 Swastika on an initial binder that everybody had to look
14 at when they came into work before they started working
15 their airplanes. You know, if people are recording
16 that, it would be helpful as it relates to, you know,
17 comparing, you know, my theory of disparate treatment in
18 my own personal whistleblower retaliation case in the
19 FAA, to hear exactly what these people had said with
20 their identities concealed.

21 And I would -- as far as the other stuff, not
22 responsive to request, I would again, be able within a
23 couple of minutes to look up a copy. And it's in the
24 record somewhere, but it is so voluminous. It would
25 take some effort to identify exactly how it was phrased.

1 I believe if I read, for example --

2 THE COURT: I'm having a little bit of
3 trouble understanding exactly what's going on here.

4 I understand the Government is saying that
5 the document that you are referring to is not the ROI,
6 that that is Attachment 2. And that's different than
7 the ROI. That's what I understand the Government is
8 saying.

9 And so if you think you've got any part of
10 the ROI redacted or otherwise, you are mistaken because
11 they have it. You're probably right. They haven't even
12 disclosed it to him yet, but that's what I'm going to
13 require them to give to me.

14 That's the document that's in issue. It is a
15 completely different document than the one that you were
16 referring to that's been redacted. The one that you are
17 referring to from their perspective is called Attachment
18 2.

19 Does that make sense to you?

20 MR. LEWIS: I have a copy of that that I'm
21 looking at here that I discussed that has all those
22 black blocks on it. If they are asserting that that's
23 separate, then I'll trust that's the case, but we may
24 find differently when we look at the ROI.

25 THE COURT: Well, they are going to give me

1 a document that is called ROI because I'm ordering them
2 to give me a document that is called ROI in writing my
3 opinion.

4 Regardless of what I do, I will be sure and
5 compare it with the portions of Attachment 2, which I
6 think we do have as part of the exhibits. I can compare
7 them and make sure that they are not the same document.

8 MR. LEWIS: Okay. But we wouldn't be
9 disputing this particular letter of decision or the
10 letter of proposed disciplinary action that preceded it
11 in relation to the redactions on it if it wasn't for
12 the fact that I didn't just request the ROI.

13 I did recall vividly making a FOIA request.
14 I was in pretty good practice with these things in
15 laying out quite -- I had to do this in order to get
16 information from the FAA and nail it down. I mean, it
17 wasn't just the ROI. It was also the documents related
18 to the interaction and decision-making would include the
19 letter of proposal, the letter of decision.

20 THE COURT: Do you know whether the letter
21 of proposal and letter of decision are parts of the ROI
22 or not?

23 MR. DANIELSON: I don't believe they are,
24 Your Honor. I can't absolutely say that with
25 certainty.

1 THE COURT: And again, as I understand it,
2 your focus is on the ROI. If you get the ROI, you're
3 happy?

4 MR. LEWIS: Um, I should refresh on that. I
5 was actually trying to focus on those two of 14
6 disputed. You know, the records for that and ROI was
7 just I think the one that presented itself as the
8 example. I certainly would like to see what's on this
9 record. If I --

10 THE COURT: Whenever you say the word
11 "this," I have no idea what you mean.

12 MR. LEWIS: On this letter of decision,
13 these substantial reactions that say "not responsive."

14 THE COURT: Is that Attachment 2?

15 MR. LEWIS: Yes, Attachment 2 that he refers
16 to.

17 THE COURT: Okay. So that's different than
18 your ROI, as I understand it. And now you understand
19 that it's different from what they are calling the ROI.

20 MR. LEWIS: Yes. But in answer and in
21 direct response to your question, I'm working on it. I
22 would have to take a look at my document.

23 And if I goofed and made it narrowly focused
24 for that particular FOIA for just the ROI, it is my bad,
25 yes. But I didn't goof. My intent when I wrote that

1 was to impress upon you, the Court, that we could maybe
2 make this thing a lot clearer and simpler and be done
3 with it if we focus on -- I was particularly concerned
4 with these FOIA requests.

5 THE COURT: Okay. Again, when you say
6 "these two," we're not sure at this juncture whether
7 you're talking about ROI or whether you're talking
8 about Attachment 2.

9 MR. LEWIS: The FOIA requests for the
10 Camarillo ATSAP and the FOIA request that covered the
11 ROI for the Swastika incident at Seattle TRACON.

12 Those were the two FOIA request that I was
13 proposing that we could have oral argument on. And
14 hopefully from that, and I think we're making some
15 progress in this direction, recognize there's a need to
16 at least look at these documents and establish whether
17 some stuff is being needlessly concealed.

18 THE COURT: Well, at this juncture my
19 assignment for myself is to review the ATSAP report
20 that we have been discussing and the ROI report which
21 you don't even have a redacted version of. You have
22 none of it. So I will review those two documents and I
23 will rule as regards those two documents. My ruling
24 will only be contained to those two documents.

25 Do you understand?

1 MR. LEWIS: Okay.

2 THE COURT: Are you okay with that?

3 MR. LEWIS: Yeah.

4 THE COURT: Okay.

5 MR. DANIELSON: No questions, Your Honor.

6 THE COURT: Okay. How long is it going to
7 take you to get the documents?

8 MR. DANIELSON: I have the ROI.

9 THE COURT: Oh, you do have that.

10 MR. DANIELSON: I do have that.

11 THE COURT: And it's unredacted?

12 MR. DANIELSON: It is, Your Honor.

13 THE COURT: Okay. So that's immediate.

14 MR. DANIELSON: Could I contact the FAA and
15 send an email to Ms. Ross in about when I can get that?

16 THE COURT: How about if I give you just ten
17 days.

18 MR. DANIELSON: All right. That should be
19 fine, Your Honor.

20 THE COURT: That should be plenty of time
21 for them to give you a document.

22 MR. DANIELSON: I understand.

23 THE COURT: Ten days for both documents.
24 You can give them to me at the same time.

25 MR. DANIELSON: And I will submit them to

1 your chambers?

2 THE COURT: Yes. Put them in an envelope,
3 my name, sealed, Court size only, and I will take care
4 of it.

5 MR. DANIELSON: All right. Thank you,
6 Judge.

7 THE COURT: Thank you. We are in recess.
8 That's everything for today. I'll take it under
9 advisement, and I'll get an opinion out when I get an
10 opinion.

11 MR. DANIELSON: Okay. Thank you.

12 THE COURT: You're welcome.

13 (Proceedings concluded.)

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CERTIFICATE

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I certify, by signing below, that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter. A transcript without an original signature, a conformed signature, or digitally signed is not certified.

This the 1st day of December 2014.

/s/ Karen M. Eichhorn

KAREN M. EICHORN, CSR, CRR

My Certificate Expires: 6-30-15