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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.

**SUPPLEMENTAL ATTACHMENT
TO DEFENDANTS' REPLY BRIEF**

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

Defendants.

Defendants Federal Aviation Administration and Michael Huerta (“Defendants”),
by S. Amanda Marshall, United States Attorney for the District of Oregon, through
Assistant U.S. Attorney Kevin Danielson, submit this supplemental attachment,

Attachment 3, to Defendants' Reply Brief regarding the Air Traffic Safety Action Program reports (Dkt. 41, p. 3). This action by the FAA was referred to in the Declaration of Jeb Kreischer, Dkt. 28, ¶ 20(j).

Dated this 17th day of November 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' COMBINED RESPONSE AND REPLY TO MOTIONS FOR SUMMARY JUDGMENT** was sent by first-class postage and deposited in the United States mail in Portland, Oregon, on November 17, 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



PROPOSED RULES

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 193

[Docket No. FAA-2013-0375]

Technical Operations Safety Action Program (T-SAP) and Air Traffic Safety Action Program (ATSAP)

Thursday, May 15, 2014

AGENCY: Federal Aviation Administration (FAA), DOT.

***27817 ACTION:** Notice of order designating safety information as protected from disclosure; disposition of comments.

SUMMARY: This action affirms the policy and responds to comments received in response to the Notice published on July 19, 2013 ([78 FR 43091](#)) regarding the application of our regulations, Technical Operations Safety Action Program (T-SAP) and Air Traffic Safety Action Program (ATSAP). The Notice proposed that safety information provided to the FAA under the T-SAP and ATSAP programs be designated by an FAA Order as protected from public disclosure in accordance with the provisions of our regulations, Protection of Voluntarily Submitted Information. The designation is intended to encourage persons to voluntarily provide information to the FAA under the T-SAP and ATSAP, so the FAA can learn about and address aviation safety hazards and implement, as appropriate, corrective measures for events or safety issues.

DATES: This action becomes effective May 15, 2014.

ADDRESSES: For information on where to obtain copies of documents and other information related to this action, see “How to Obtain Additional Information” in the SUPPLEMENTARY INFORMATION section of this notice.

FOR FURTHER INFORMATION CONTACT: For questions concerning this action, contact Ms. Coleen Hawrysko, Group Manager, Air Traffic Organization (ATO) Safety Programs, Federal Aviation Administration, 490 L'Enfant Plaza, Suite 7200, Washington, DC 20024; telephone (202) 385-4571, email coleen.hawrysko@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

Under [Title 49 of the United States Code \(49 U.S.C.\), section 40123](#), certain voluntarily provided safety and security information is protected from disclosure in order to encourage persons to provide the information. In accordance with 14 CFR part 193, Protection of Voluntarily Submitted Information, the FAA must issue an Order

that specifies why the agency finds that the information should be protected. If the Administrator issues an Order designating information as protected under [49 U.S.C. 40123](#), that information will not be disclosed under the Freedom of Information Act (FOIA) (Title 5 of the United States Code ([5 U.S.C.](#))), [section 552](#) or other laws, except as provided in [49 U.S.C. 40123](#), 14 CFR part 193, and the Order designating the information as protected. This Order is issued under part 193; section 193.11, which sets out the notice procedure for designating information as protected.

The designation of protected information is intended to encourage persons to voluntarily provide information to the FAA under the T-SAP and ATSAP, so the FAA can learn about and address aviation safety hazards of which it was unaware or more fully understand and implement corrective measures for events or safety issues known by it through other means. The designation is applicable to any FAA office that receives information covered under this designation from T-SAP, established in Notice JO 7210.807, and which will be incorporated in FAA Order JO 7200.20, Voluntary Safety Reporting Programs, or the ATSAP described in FAA Order JO 7200.20. The designation will also apply to any other government agency to receive T-SAP or ATSAP information covered under the designation from the FAA, and each such agency must first stipulate in writing that it will abide by the provisions of part 193 and the Order designating T-SAP and ATSAP as protected from public disclosure under 14 CFR part 193.

Except for T-SAP or ATSAP reports that involve possible criminal conduct, substance abuse, controlled substances, alcohol, or intentional falsification, the following information will be protected from disclosure:

(1) The content of any report concerning an aviation safety or security matter that is submitted by a qualified participant under the T-SAP or ATSAP report, and the name of the submitter of the report. Notwithstanding the foregoing, mandatory information about occurrences that are required to be reported under FAA Orders, Notices or guidance is not protected under this designation, unless the same information has also been submitted or reported under other procedures prescribed by the Agency. The exclusion is necessary to assure that the information protected under this designation has been voluntarily submitted. It also permits changes to FAA Orders, Notices and guidance without requiring a change to this designation.

(2) Any evidence gathered by the Event Review Committee during its investigation of a safety-related or security-related event reported under T-SAP or ATSAP, including the T-SAP or ATSAP investigative file.

T-SAP or ATSAP participants register for, and submit a report into, the electronic reporting system. These programs continue as long as provided for by Order, Notice, policy or a collective bargaining agreement.

On July 19, 2013, the FAA issued a notice ([78 FR 43091](#)), Notice of Proposed Order Designating Safety Information as Protected from Disclosure (hereinafter, the “notice”). The notice sought comment on the FAA’s intent to designate information voluntarily received under T-SAP or ATSAP as protected from public disclosure in accordance with the provisions of 14 CFR part 193.

Discussion of Comments

Three commenters submitted comments in response to docket number—FAA 2013-0375. The occupations and/or any group affiliations of the commenters were not stated. The commenters all opposed this action, and raised the following issues:

***27818 •** This action is contrary to the President's Open Government Initiative (OGI).

- Denying public access to voluntarily-submitted reports would inhibit efforts to improve safety.
- Disagreement with the FAA's assertion that this policy is needed to insure that safety events would be reported by FAA personnel.
- Requirements contained in part 193 are not applicable to federal employees.

I. The President's Open Government Initiative

The commenters asserted that this policy of non-disclosure of information to the public is contrary to the goals of the OGI. The OGI is an initiative that includes executive orders, action plans, memoranda, etc., which espouses enhanced principles of open government, transparency and greater access to information.

The FAA's position is that OGI provides for the appropriate protection of data where there is a compelling public safety interest. The FAA believes the public is best served by systematic risk mitigation, rather than by a sporadic focus on high-profile or emotionally-charged incidents. This can only be achieved through broad-based data collection and analysis in an environment of trust and confidence that the results will not be inappropriately released. To the issue of scope, the OGI does not conflict with the law regarding protection of safety data.

The following summarizes the policy intent of the President's Memorandum on Transparency and Open Government: "This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." The full text can be found at:

(The President's MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, SUBJECT: Transparency and Open Government, <http://www.whitehouse.gov/the-press-office/Transparency-and-Open-Government/>).

The balance of needs is demonstrated in the Memorandum for the Heads of Executive Departments and Agencies: "Moreover, nothing in this Directive shall be construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would threaten national security, invade personal privacy, breach confidentiality, or damage other genuinely compelling interests." The full text can be found at: (Office of Management and Budget, Open Government Directive, December 8, 2009, M-10-06, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, <http://www.whitehouse.gov/open/documents/open-government-directive>).

Based on 49 U.S.C. 40123, the Administrator has found that the disclosure of T-SAP and ATSAP information would inhibit the voluntary provisions of that type of information and that the receipt of that type of information aids in fulfilling the agency's safety and security responsibilities. The Administrator has issued regulations under 49 U.S.C. 40123 to carry out provisions in this section. 14 CFR part 193 and follow on directives FAA Order JO 7200.20 and Notice JO 7210.807 detail FAA's Voluntary Safety Reporting Programs. The Administrator has further found that withholding such information from disclosure would be consistent with the agency's safety and security responsibilities allowed under 49 U.S.C. 40123, and this change will protect such information from public disclosure.

II. Denying Public Access to Voluntarily-Submitted Reports Would Inhibit Efforts To Improve Safety

One commenter asserted that the ability of the public to hold the FAA accountable for its actions and policies is

based on full access to very detailed information. The FAA disagrees. Public access to certain voluntarily-provided safety data is expressly limited by statute for the fundamental reasons already articulated—privacy and confidentiality concerns must be addressed before information will flow freely. The true aim of this regulatory change is to protect the flying public and aid in fulfilling the Administrator's safety responsibilities. The commenter's opinion that no harm would occur should protections be removed is contrary to history, industry consensus and Congressional intent. The fact that Aviation Safety Action Programs reports have been covered under Part 193 and FAA Order 8000.82 since 2003 is evidence of the understanding that this information will only be obtained if confidentiality under the law is maintained.

III. Disagreement With the FAA's Assertion That This Policy of Non-Disclosure Is Needed To Insure That That Safety Events Are Reported by FAA Personnel

One commenter referred to the NASA Aviation Safety Reporting System (ASRS), and claimed the de-identified reports are providing adequate information into their publicly disclosable ASRS database. The FAA asserts that ASRS and ATSAP programs are both an important source of information, but are not the same, and thus require different parameters and guidelines. ASRS does not accept reports related to accidents, thus critical protection may not be available when it is most needed. In addition, ASRS does not provide the comprehensive background and organizational structure to adequately implement corrective actions, as NASA does not have regulatory or enforcement authority. On a positive note, however, ATSAP directly supports the ASRS program, as submitters may voluntarily request de-identified reports be provided to ASRS. In fact, since November of 2010, a significant portion of the ATSAP safety data already resides in that publicly-available database. Prior to providing this option, ASRS was receiving a very low number of reports from controllers. The monthly average went from less than 50 to more than 500 after the option to send a copy of a submitted ATSAP report to ASRS was provided. ASRS further redacts information from ATSAP reports, and makes only about 10 percent of those reports available on their public site. Simply removing names, as the commenter suggests, would do little to preserve confidentiality or privacy, as descriptions of airports, aircraft and time of day point directly to officially-available records of who was on duty at the time of an event. As stated in the NASA paper, "ASRS: The Case for Confidential Incident Reporting Systems", "People are generally willing to share their knowledge if they are assured their identities will remain confidential, and ultimately, anonymous and the information they provide will be protected from disciplinary and legal consequences."

IV. Requirements Contained in Part 193 Are Not Applicable to Federal Employees

All commenters stated they believed that the provisions contained in 14 CFR part 193 do not preclude participation by government employees; however, they all were resolute in their opinion that government employees should not be included and they asserted that not including them was the original intent.

The distinction between the airlines Aviation Safety Reporting Programs and the FAA's Voluntary Safety Reporting Program (VSRP) is irrelevant to the intent and language of part 193, as the focus is on protecting safety information *27819 regardless of its source. Federal employees engaged in public safety are no less affected by concerns regarding their privacy and undue scrutiny than industry employees. The goal of the protective provisions of a VSRP is to remove barriers to reporting for anyone with relevant knowledge of a safety issue, and there is no functional difference between private and public sector employees who may have concerns for confidentiality. As noted by one commenter, part 193 does not prohibit the protection of the FAA employees from the disclosure of safety and security information voluntarily submitted to the FAA.

14 CFR 193.1 states, “. . . FAA protects from disclosure safety and security information that you submit voluntarily to the FAA.” § 193.5(b) states that “You may be any person, including an individual, a company, or an organization.” Any person may voluntarily submit information if it is accomplished under a designated safety reporting program. Additionally, there is no explicit exclusion of any group or individual. The determination of the Administrator to designate safety information for protection is fully within the scope and intent of the law.

Two commenters asserted that the FAA is changing its rationale for withholding information. This policy merely strengthens the FAA's determination that the protection of certain voluntarily provided safety information from disclosure under the FOIA enhances the agency's ability to obtain safety information that it would likely not otherwise have received.

Additional Background

Since receiving its first report in July 2008, ATSAP has received over 73,000 reports, a remarkable record of success compared to previous years when traditional reporting yielded information on perhaps a few hundred incidents per year. Of those VSRP reports, significant numbers provide information about safety issues that are not technically required to be reported, providing an avenue for risk identification that was previously nonexistent.

There have been over 100 Corrective Action Requests issued as the result of ATSAP reports and over 60 as the result of T-SAP reports to date, of which nearly half have been fully mitigated. Information disclosed in ATSAP reports over the past 5 years has contributed to more than 200 safety improvements, including local, regional and national actions to improve safety. T-SAP reports received in the past 3 years have contributed to over 100 safety improvements. The continued identification of hazards in the National Airspace System as a result of reports received from front line personnel is vital to the safety of the flying public. Without protecting the confidentiality of these voluntary safety report submitters there is no way to build the trust necessary to encourage the reporting of actual and potential safety hazards to the degree the FAA is now realizing, if at all.

In addition to countless informal contacts initiated to resolve safety issues, the FAA's VSRPs publish safety briefing sheets and alerts to thousands of aviation safety professionals regarding issues identified in VSRP reports, often including de-identified excerpts from reports that are significant, educational, and timely.

Conclusion

Upon review of the issued notice and submitted comments, the FAA has affirmed the proposed policy, and designates information received from a T-SAP or ATSAP submission as protected under 49 U.S.C. 40123 and 14 CFR 193.7.

Voluntarily-Provided Information Protected From Disclosure Under the Designation

Except for T-SAP or ATSAP reports that involve possible criminal conduct, substance abuse, controlled substances, alcohol, or intentional falsification, the following information is protected from disclosure:

(1) The content of any report concerning an aviation safety or security matter that is submitted by a qualified participant under the T-SAP or ATSAP, that is accepted into either program, including the T-SAP or ATSAP narrative report, and the name of the submitter of the report. Notwithstanding the foregoing, mandatory information about occurrences that are required to be reported under FAA Orders, Notices or guidance is not protected

under this designation, unless the same information has also been submitted or reported under other procedures prescribed by the Agency. The exclusion is necessary to assure that the information protected under this designation has been voluntarily submitted. It also permits changes to FAA Orders, Notices and guidance without requiring a change to this designation.

(2) Any evidence gathered by the Event Review Committee during its investigation of a safety- or security-related event or issue reported under T-SAP or ATSAP, including the T-SAP or ATSAP investigative file.

Ways To Participate

Individuals who are qualified participants register for, and submit a report into, the electronic reporting system.

Duration of Voluntary Safety Reporting Programs

These programs continue as long as provided for by Order, Notice, policy or a collective bargaining agreement.

Summary of Why the FAA Finds That the Disclosure of the Information Would Inhibit Persons From Voluntarily Providing That Type of Information

The FAA finds that disclosure of the information would inhibit the voluntary provision of that type of information. Individuals are unwilling to voluntarily provide detailed information about safety events and concerns, including those that might involve their own failures to follow Agency directives and policies, if such information could be released publicly. If information is publicly disclosed, there is a strong likelihood that the information could be misused for purposes other than to address and resolve the reported safety concern. Unless the FAA can provide assurance that safety-related reports will be withheld from public disclosure, personnel will not participate in the programs.

Summary of Why the Receipt of That Type of Information Aids in Fulfilling the FAA's Safety Responsibilities

The FAA finds that receipt of information in T-SAP or ATSAP reports aids in fulfilling the FAA's safety responsibilities. Because of its capacity to provide early identification of needed safety improvements, this information offers significant potential for addressing hazards that could lead to incidents or accidents. In particular, one of the benefits of T-SAP and ATSAP is that they encourage the submission of narrative descriptions of occurrences and actual and potential safety hazards that provide more detailed information than is otherwise available. The T-SAP and ATSAP produce safety-related data that is not available from any other source. Receipt of this previously unavailable information has provided the FAA with an improved basis for modifying procedures, policies, and regulations to improve safety and efficiency.

Consistencies and Inconsistencies With FAA Safety Responsibilities

The FAA finds that withholding T-SAP and ATSAP information from public release is consistent with the FAA's safety responsibilities because it ***27820** encourages individuals to provide important safety information that it otherwise might not receive.

The FAA designates the following information as protected from disclosure in accordance with [49 U.S.C. 40123](#) and 14 CFR part 193:

b. Description of the type of information that may be voluntarily provided under the program and a summary of

why the FAA finds that the information is safety-related.

(1) The following types of reports are ordinarily submitted under the T-SAP or ATSAP:

i. Noncompliance reports. Noncompliance reports identify specific instances of a failure to follow FAA directives.

ii. Aviation safety concern reports. Aviation safety concerns that do not involve specific noncompliance with FAA directives. These may include, but are not limited to, potential safety events or perceived problems with policies, procedures, and equipment.

(2) Technical Operations personnel support the delivery and efficiency of flight services through maintenance of the National Airspace System facilities, systems and equipment. Reports submitted by these employees under T-SAP ordinarily involve matters or observations occurring during the performance of their job responsibilities, and therefore the information submitted is inherently safety related. Air Traffic personnel provide and support the provision of air traffic services at FAA facilities throughout the NAS. Reports submitted by these employees under ATSAP ordinarily involve occurrences or problems identified or experienced during the performance of their job responsibilities which directly affect safety.

Issued in Washington, DC, on May 9, 2014.

Michael P. Huerta,

Administrator, Federal Aviation Administration.

[FR Doc. 2014-11150 Filed 5-14-14; 8:45 am]

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