

Exhibit 10:

The following 6 pages are submitted as an Exhibit for 'Plaintiff's Memo, Presenting Details of his Complaint'.

Description of Exhibit Contents:

This is Defendant FAA's Appeal Response for FOIA #2011-2164, as signed by Victoria Wassmer, and received on June 8, 2013. Nearly all elements of the Appeal were denied. However, a 1-page attachment provided a partially-redacted copy of the SF-50 showing the removal of the manager at NCT.



U.S. Department
of Transportation
**Federal Aviation
Administration**

JUN 03 2013

Mr. Jeffrey Lewis
28242 S. Salo Road
Mulino, OR 97042

Assistant Administrator for Finance
and Management
800 Independence Ave., SW.
Washington, DC 20591

RCVD 6-8-13
(6p) (5pp + 1p att)

RE: Freedom of Information Act Appeal 2011-002164A

Dear Mr. Lewis:

This letter responds to your February 14, 2011 administrative appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. In your initial request dated December 29, 2010, you asked for the following: (1) a copy of the Douglas Factors checklist, a copy of the settlement or other agreement that may have followed the appeal filing, and a copy of the SF-50 proving what final action was taken for the anonymous Air Traffic Manager at Northern California TRACON (NCT) for whom a 4/9/07 removal Decision Letter precipitated Merit System Protection Board (MSPB) Appeal SF-0752-07-0540-I-1; (2) a copy of the final decision letter, as well as a copy of the SF-50 proving the action was in fact taken for the removal action at Ontario Air Traffic Control Tower (ATCT) proposed in Accountability Board (AB) Case 2008-0138 as initially reported to the AB on or about 3/14/08; (3) a copy of the final disciplinary action letter as was (or should have been) provided to the AB in accordance with Federal Aviation Administration (FAA) Order 1110.125A, paragraph 15(e) for the incident and internal inquiry at San Francisco ATCT related to AB Case 2008-0174, as initially reported to the AB on or about 4/10/08; and (4) a copy of the final decision letter, as well as a copy of the SF-50 proving the action was in fact taken for the suspension action at Tucson TRACON related to AB Case 2008-0160 as initially reported to the AB on or about 5/2/08.

You also requested copies of the following for each Record of Investigation (ROI) produced related to the above four cases: (1) a signed copy of FAA Form 1600-32 showing allegations, distributions, etc.; (2) a copy of the entire "Summary of Findings" section of the ROI; and (3) a copy of the entire "Index of Exhibits" for the ROI. You asked for the entire documents with minimal redactions. You specifically said that names only could be withheld.

The Western-Pacific Region provided you with two responses. In an initial response dated January 19, 2011, the Western-Pacific Regional Administrator said that the Joint Security and Hazardous Materials Office, West, could not retrieve ROIs related to the four AB cases you requested. He said that the ROIs were being withheld under Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). The Regional Administrator said that release of the ROIs would constitute a clearly unwarranted invasion of personal privacy.

In an initial response dated February 1, 2011, the Regional Administrator said that the Human Resource Management Office had responsive records. He explained that no Douglas Factor checklist, settlement records, or other agreements were found for the NCT. He also stated that the Notification of Personnel Actions (SF-50s) relating to this employee were being withheld under Exemption 6 as well as 5 CFR 293.311(a) which prohibits disclosure of an SF-50 on a current or former Federal employee. The Regional Administrator said that no final decision letter was issued to the respondent at the Ontario ATCT but he was withholding the SF-50s relating to this employee. He said that no proposal or decision letter was issued to the respondent at the San Francisco ATCT but he was withholding the SF-50s relating to this employee. He said that no final decision letter was issued in the case at the Tucson TRACON but he was withholding the SF-50s relating to this employee.

In your appeal, you say that you are challenging both initial decisions. You state that you did not ask for the entire ROIs, but only specific pages for the four listed cases. You assert that those pages are releasable under FOIA. You challenge the characterization that “no final decision letter was issued” on the Ontario case because new allegations were reported to the AB on 3/14/08, the AB internal inquiry was completed on 3/19/08, a removal proposal was sent to the Air traffic Management (ATM) on 4/22/08, a draft decision letter was being reviewed by Legal on 6/3/08, and the controller dodged the second removal by retiring on 6/17/08.

You say that for item four, agency records show a 10-day suspension letter was issued and that the recipient of this disciplinary action was the Air Traffic Manager at Tucson TRACON. You allege that the records show that this Manager signed an acknowledgement receipt on 6/26/08. To resolve this appeal, you ask for all responsive records with minimal redactions.

In reviewing your appeal, we contacted the Western-Pacific Joint Security and Hazardous Materials Office, West. We determined that none of the four cases resulted in ROIs. Therefore the initial response should have been a “no records” determination.

We also contacted the Human Resource Management Office and were informed that for item number one there was no settlement agreement. We are enclosing a redacted copy of the SF-50 showing what final action was taken in the matter. For item number two, no final decision letter was issued and there is no SF-50 proving that action was in fact taken for the removal action. For item number three, no final disciplinary action letter was issued. For item number four, no final decision letter was issued and there is no SF-50 proving the action was in fact taken for the suspension action. Z

We have reviewed the partial denial in light of your appeal letter, the FOIA, and applicable case law and conclude that the name of the employee, social security number, date of birth, facility location, veteran’s preference information, service computation date, duty station, and duty station code should be redacted from the SF-50 under Exemptions 6 and 7(C). We also find that an adequate search was done to find responsive records for your request.

Exemption 6 – Personal Privacy Information Regarding Conduct/Discipline

Exemption 6 protects individuals against clearly unwarranted invasions of personal privacy. In order to be covered under Exemption 6, information must first meet a threshold requirement: it must fall within the category of “personnel and medical files and similar files.” 5 U.S.C. § 552(b)(6). This is read broadly and includes all information that “applies to a particular individual.” U.S. Dep’t of State v. Washington Post Co., 456 U.S. 595, 602 (1982). Once that threshold is met, the focus turns to whether disclosure of the information would “constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). This requires balancing the individual’s right to privacy against the public’s right to disclosure. Dep’t of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

We have reviewed the SF-50 and determine to redact the identity of the employee, social security number, date of birth, the facility, and other identifying information. Based on the nature of the records of possible violations of rules and regulations, we find that the individual has a significant privacy interest in not having his or her identity disclosed. The courts have held that internal investigations of mid and low-level employees can be protected under Exemption 6 of the FOIA. See Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984) (finding that employees have a privacy interest in their association with investigations); Neely v. FBI, 208 F.3d 461, 464 (4th Cir. 2000) (indicating that individuals mentioned or interviewed in the course of an investigation have a “well-recognized and substantial privacy interest[]....”).

Having found a viable privacy interest in non-disclosure of the withheld information about the individual, we were required to balance that privacy interest against the public interest in disclosure, if it was a qualifying public interest. The burden of proof is on the requester of the information to identify a qualifying public interest in disclosure of the information, not an interest of the individual requester. See Carter v. U.S. Dep’t of Commerce, 830 F.2d 388, 390 n.8, 391 n.13 (D.C. Cir. 1987).

Prior to the Supreme Court’s decision in United States Dep’t of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749 (1989), the courts recognized a variety of public interest factors entitled to heavy weight. However, the Supreme Court in Reporters Committee narrowed the scope of the public interest to be considered under the FOIA’s privacy exemptions. The analysis now turns on the nature of the document and its relationship to the “core purpose” of the FOIA, which is to shed light on an agency’s performance of its duties. Id. at 773. The Court held that information that does not directly reveal the operations of the federal government “falls outside the ambit of the public interest that the FOIA was enacted to serve.” Id. at 775. The Supreme Court reaffirmed this analysis in United States Dep’t of Defense v. Fed. Labor Relations Auth., 510 U.S. 487 (1994).

You have not asserted a qualifying public interest in releasing this information. You have identified no specific nexus between knowing the identity of the individual named in the record and the asserted public interest served by their disclosure. See Nat’l Archives and Records Admin. v. Favish, 541 U.S. 157, 172-73 (2004). The individual’s interest in

personal privacy therefore outweighs any public interest in the disclosure of his or her identity.

In this case, simply redacting the name cannot completely de-identify the employee involved. Alirez v. NLRB, 676 F.2d 423, 428 (10th Cir. 1982) (“Even sanitized, these documents would enable [the requester] and others who had specific knowledge of these incidents, to identify readily the informant and persons discussed in each document.”); see also Rose, 425 U.S. at 380 (“what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage point of those who would have been familiar, as fellow cadets or Academy staff, with other aspects of his career at the Academy.”). Therefore, we are continuing to redact the record under Exemption 6 of the FOIA.

Exemption 7(C) – Personal Privacy Information in Law Enforcement Records

FOIA Exemption 7(C) employs a balancing test nearly identical to the Exemption 6 balancing test, but the protection of the exemption is limited to records compiled for law enforcement purposes where the disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); see, e.g., Stern, 737 F.2d at 91-92. The “law” to be enforced within the meaning of the term “law enforcement purposes” includes both civil and criminal statutes, as well as those statutes authorizing administrative (i.e., regulatory) proceedings. Kay v. FCC, 867 F. Supp. 11, 17-18 (D.D.C. 1994). Once a privacy interest has been identified, it must be weighed against the public interest in revealing the information. The requester must identify a public interest and demonstrate that the public interest in disclosure is great enough to overcome legitimate privacy interests. See Senate of P.R. v. U.S. Dep’t of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987). This is a lower burden than the “clearly unwarranted invasion of personal privacy” burden under Exemption 6. Exemption 7(C) has been regularly applied to withhold references to persons who are not targets of investigations and who were merely mentioned in law enforcement files. See, e.g., Rugiero v. DOJ, 257 F.3d 534, 552 (6th Cir. 2000) (withholding names of third parties mentioned or interviewed in course of investigation). Accordingly, these cases and the above-cited cases supporting withholding under Exemption 6 support withholding under Exemption 7(C).

Adequacy of the Search

Under the FOIA, agencies are required to conduct a search that is “reasonably calculated to uncover all relevant documents.” Weisberg v. U.S. Dep’t of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). As explained earlier in this response, no ROIs were prepared for these four cases. We contacted the Western-Pacific Resources Management Office and they performed an additional search which determined that: (1) for item number two, no final decision letter was issued and there is no SF-50 proving that action was in fact taken for the removal action; (2) for item number three, no final disciplinary action letter issued; and (3) for item four, no final decision letter was issued and there is no SF-50 proving the action was in fact taken for the suspension action. For item one, there was no settlement agreement

but we are enclosing a redacted SF-50 showing the final action taken in this matter. Therefore, we are satisfied that an adequate search was conducted for responsive records.

I am the official responsible for this decision which constitutes the final administrative action on your appeal, and has been concurred in by the FAA Office of Chief Counsel, as well as by John Allread, an attorney in the Department of Transportation Office of General Counsel. You are advised that under the provisions of 5 U.S.C. §552(a)(4)(B), you are entitled to seek judicial review of this decision in the U.S. District Court in the district where you reside, the district where you have your principal place of business, the district where the records are kept, or the District of Columbia.

Sincerely,



Victoria B. Wassmer
Assistant Administrator for
Finance and Management

Enclosure

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle) ██████████	2. Social Security Number ██████████	3. Date of Birth ██████████	4. Effective Date 04/18/2007
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FIRST ACTION		SECOND ACTION	
5-A. Code 330	5-B. Nature of Action REMOVAL	6-A. Code	6-B. Nature of Action
5-C. Code ZVB	5-D. Legal Authority P.L. 104-50	6-C. Code	6-D. Legal Authority
5-E. Code	5-F. Legal Authority	6-E. Code	6-F. Legal Authority

7. FROM: Position Title and Number SUPV AIR TRAFFIC CONTROL SPEC WPRA32 NCT11L							15. TO: Position Title and Number					
8. Pay Plan AT	9. Occ. Code 2152	10. Grade/Level LL	11. Step/Rate 00	12. Total Salary \$168000	13. Pay Basis PA		16. Pay Plan	17. Occ. Code	18. Grade/Level	19. Step/Rate	20. Total Salary/Award	21. Pay Basis
12A. Basic Pay \$164790	12B. Locality Adj. \$ 3210	12C. Adj. Basic Pay \$168000	12D. Other Pay \$ 0			20A. Basic Pay	20B. Locality Adj.	20C. Adj. Basic Pay	20D. Other Pay			

14. Name and Location of Position's Organization WESTERN-PACIFIC REGION AIR TRAFFIC DIVISION ██████████ ██████████	22. Name and Location of Position's Organization
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EMPLOYEE DATA			24. Tenure	25. Agency Use	26. Veterans Preference for RIF
23. Veterans Preference 1 - None 2 - 5-Point 3 - 10-Point/Disability 4 - 10-Point/Compensable 5 - 10-Point/Other 6 - 10-Point/Compensable/30%			1 - None 2 - Conditional 3 - Permanent 4 - Indefinite		██████████

27. FEGLI Z1 BASIC + OPTIONAL(5X) + STANDARD +	28. Annuitant Indicator 9 NOT APPLICABLE	29. Pay Rate Determinant 0
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30. Retirement Plan 1 CSRS	31. Service Comp. Date (Leave) ██████████	32. Work Schedule F FULL-TIME	33. Part-Time Hours Per Biweekly Pay Period
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POSITION DATA		35. FLSA Category E - Exempt N - Nonexempt	36. Appropriation Code 0006554	37. Bargaining Unit Status 8888
34. Position Occupied 2 1 - Competitive Service 2 - Excepted Service 3 - SES General 4 - SES Career Reserved				

38. Duty Station Code ██████████	39. Duty Station (City - County - State or Overseas Location) ██████████
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40. Agency Data FCLS 00	41. VET-STAT N	42. EDUC LV 06	43. SUPV STAT 2	44. POS SENSITIVITY NONCRITICAL-SENSITI
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45. Remarks
FORWARDING ADDRESS: ██████████
BLOCK 10 IDENTIFIES YOU IN THE ATC COMPENSATION PLAN AS:
MSS4,ATC FACILITY LEVEL 12
SALARY IN BLOCK 12C INCLUDES A LOCALITY-BASED PAYMENT OF 18.99%.
EMPLOYEE IS ELIGIBLE FOR 03.20% OF BASIC RATE OF PAY UNDER THE CONTROLLER INCENTIVE PAY AGREEMENT
ATC POSITION NOT COVERED BY PL 92-297 FOR EARLY RETIREMENT PURPOSES
REASON(S) FOR REMOVAL: FALSIFICATION OF INFORMATION ON LABOR DISTRIBUTION REPORTS AND TIME AND ATTENDANCE RECORDS.
LUMP-SUM PAYMENT TO BE MADE FOR ANY UNUSED ANNUAL LEAVE, SF-8 ISSUED TO EMPLOYEE
SF-8, SF2810 AND SF2819 ISSUED.
SF 2819 WAS PROVIDED. LIFE INSURANCE COVERAGE IS EXTENDED FOR 31 DAYS DURING WHICH YOU ARE ELIGIBLE TO CONVERT TO AN INDIVIDUAL POLICY
REMARKS CONTINUED ON SECOND PAGE

46. Employing Department or Agency TD - FAA	47. Agency Code TD03	48. Personnel Office ID 1660	49. Approval Date 05/29/2007	50. Signature/Authentication and Title of Approving Official CELESTE TAYLOR-DIXON PERSONNEL STAFFING ASSISTANT
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Enclosure