

Exhibit 12:

The following 4 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 #2011-2330, a 4-page cover letter signed by Victoria Wassmer, as received on March 22, 2013. It arrived with 99-pages of attached records, disclosing the gender references previously redacted by Defendant FAA. All other redactions were sustained.



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

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

RCVD 3-22-13

MAR 13 2013

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

RE: Freedom of Information Act Appeal 2011-002330A

Dear Mr. Lewis:

This letter responds to your November 28, 2011, administrative appeal under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your initial request, dated December 29, 2010, asked for entire printouts for all Accountability Board (AB) cases encoded with the Accountability Official as Teri Bristol, Kathryn Vernon, Mark Reeves, or any other Western Service Area official, for cases reported to the AB from January 1, 2006 to December 31, 2010. You said we could exclude eight specific cases because you had received them under a previous FOIA request.

In an initial response dated November 9, 2011, the Federal Aviation Administration's (FAA) Acting Assistant Administrator for Human Resources Management provided you with the records you requested. However, she redacted certain information including: (1) the name, functional title, gender, and facility location of the respondent; (2) the name, functional title, gender, and facility location of the reporting party; (3) who the allegation(s) were reported to and who reported them to the AB; and (4) personally identifying information contained in the Allegation Description section of the report. She determined that the redacted information was protected under Exemption 6 of the FOIA, which related to personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6).

In your appeal, you state that the 97 pages provided were excessively redacted. You assert that names, titles, facilities, gender pronouns, control positions, and other key details should not have been redacted. You state that none of these redacted details would invade any personal privacy. You believe that these details would shed light on the Agency's mission. You say that you are collecting the information to aid in producing an article to better inform the public about the AB and FAA's management. You ask that we provide all 97 pages without any redactions. You also ask to be provided with two pages that were not provided, page 2 of 2, for AB cases 20070091 and 20080022.

We have reviewed the partial denial in light of your appeal letter, the FOIA, and applicable case law and conclude that the gender references should be released and that information is provided as an enclosure to this letter. However, we find that the Acting Assistant Administrator for Human Resources Management properly withheld the names of the reporting party, respondent, facility location, identity of who the allegations were reported to

and who reported them to the AB, and the identifying information contained in the Allegation Description section of the report under Exemption 6. We have located the two pages you requested and they are also included as part of the enclosure, with redactions made to them as well.

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 redacted pages consisting of the identity of the respondents, the reporting parties, the facility, the identity of who the allegations were reported to and who reported them to the AB, and other identifying information. Based on the nature of the records of possible violations of rules and regulations, we find that these individuals have a significant privacy interest in not having their identities 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 individuals, 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). 2

You have asserted a qualifying public interest on whether the AB is effective and that management action is reviewed by the AB. You also state that you are collecting the information to produce an article to better inform the public at large. In this case you were provided with redacted AB records that provide information on what types of cases have been reported to the AB. Therefore, the public is aware that the AB is providing oversight concerning allegations of sexual harassment, misconduct of a sexual nature, and related reprisals. You have identified no specific nexus between knowing the identities of the individuals named in the records 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 interest of these individuals in personal privacy therefore outweighs any public interest in the disclosure of their identities.

In this case, simply redacting names cannot completely de-identify the employees 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 records 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).

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 Claire McKenna, 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,

A handwritten signature in cursive script, appearing to read "V. Wassmer".

Victoria B. Wassmer
Assistant Administrator for
Finance and Management

Enclosure