

Other Supporting Documents

3:11-cv-01458-AC Lewis v.
Federal Aviation Administration et
al

RCVD 6-2-12

CONSENT

U.S. District Court

District of Oregon

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

JEFFREY NATHAN LEWIS,

Case No.:3:11-CV-01458-AC

Plaintiff,

**DEFENDANT FAA'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

v.

**FEDERAL AVIATION
ADMINISTRATION,**

Defendant.

**PAGE - 1 Defendant FAA'S Memorandum in Support of Motion for Summary
Judgment**

Lewis v. Federal Aviation Admin., 3:11-CV-01458-AC

Defendant Federal Aviation Administration, by S. Amanda Marshall, United States Attorney for the District of Oregon, through Assistant United States Attorney Kevin Danielson, submits this memorandum of law in support of its motion for summary judgment under Fed. R. Civ. P. 56(a).

Introduction

Plaintiff Jeffrey Nathan Lewis has alleged the Federal Aviation Agency (“FAA”) violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff alleges the FAA wrongfully withheld information under Exemption 5, 5 U.S.C. § 552(b)(5). CR 19, ¶¶ 4-5. Plaintiff also alleges the FAA used a “pay-to-play” tactic when it wrongfully withheld information under FOIA because it required him to pay exorbitant fees before it would release the requested information. CR 19, ¶¶ 4, 6.

Factual and procedural background

1. FOIA Request No. 2011-4258.

By letter dated March 17, 2011, Plaintiff made a FOIA request that asked for four specific emails. Declaration of Jeb Kreischer (“Kreischer Decl.”), ¶ 8, Ex. 1 at 1-2. In response, the FAA informed Plaintiff that three responsive emails were located but they were withheld in full under Exemption 5. Kreischer Decl., ¶ 8, Ex. 1 at 3-4. Plaintiff appealed this determination. Kreischer Decl., ¶ 8, Ex. 1 at 5-13. During the appeal process, the fourth email was found. Kreischer Decl., ¶ 8, Ex. 1 at 15.

As a result of the appeal decision, the FAA released two emails in their entirety. The FAA found that two emails, one dated 7/08/2008 and one dated 7/07/2008, contained information that was protected under Exemption 5 based on the deliberative process privilege and the attorney-client privilege.¹ Kreisler Decl., ¶ 8, Ex. 1 at 15, 18-20. The emails discussed possible disciplinary action related to Plaintiff's employment at the FAA. Kreisler Decl., Ex. 1 at 16; Ex. 8 at 2 - *Vaughn* index.

The FAA withheld this information under the deliberative process privilege because it was created during the course of Plaintiff's disciplinary action. Kreisler Decl., Ex. 8 at 2 - *Vaughn* index. The information precedes "the decision on what disciplinary action to pursue and what penalty to assess and were produced in the course of the disciplinary decision process." Kreisler Decl., Ex. 1 at 16; Ex. 8 at 2 - *Vaughn* index. Release of this information could "discourage the open and frank sharing of opinions and recommendations between agency employees that are helpful in formulating disciplinary decisions and would also create confusion in those cases where those opinions and recommendations are not adopted." Kreisler Decl.; Ex. 1 at 16; Ex. 8 at 2 - *Vaughn* index.

The information was also protected under Exemption 5 based on the attorney-client privilege. Kreisler Decl., Ex. 1 at 16; Ex. 8 at 2 - *Vaughn* index. The emails were

¹ These documents will be submitted to the Court for in camera review, as previously allowed by this Court.

from Don Bobertz, an FAA attorney, to an employee in the Labor Relations, Training, and Benefits Branch, regarding the Plaintiff's proposed removal. Kreischer Decl., Ex. 1 at 16; Ex. 8 at 2 - *Vaughn* index.

2. FOIA Request No. 2010-3323.

Plaintiff made a FOIA request dated March 2, 2010, and requested copies of all emails related to him between April 1, 2008, and March 1, 2009, that were sent by or received by Daniel Castellon. Kreischer Decl., ¶ 9, Ex. 2 at 1-2. The FAA found five responsive emails that were provided to Plaintiff at no charge. Kreischer Decl., Ex. 2 at 3. Plaintiff appealed the decision primarily based on the adequacy of the search. Kreischer Decl., Ex. 2 at 4-24. On appeal, the FAA determined the search was adequate. Kreischer Decl., Ex. 2 at 25-27. The appeal decision also noted that the FAA informed Plaintiff that a more refined search could be conducted but that Plaintiff had not paid the estimated \$900 cost of the search. Kreischer Decl., ¶ 9, Ex. 2 at 26, fn.1.

3. FOIA Request No. 2010-4091.

Plaintiff made a FOIA request dated March 29, 2010, and requested copies of all emails related to him between July 1, 2006, and March 1, 2009, that were sent by or received by Monique France. Kreischer Decl., ¶ 10, Ex. 3 at 1-2. The FAA conducted a search for responsive documents and none were found. Kreischer Decl., Ex. 3 at 16. Plaintiff appealed the adequacy of the search. Kreischer Decl., Ex. 3 at 17-18. On appeal,

the FAA determined that the search was adequate. Kreisler Decl., Ex. 3 at 20. The appeal decision also noted the FAA informed Plaintiff that a more refined search could be conducted but that Plaintiff had not paid the estimated \$900 cost of the search. Kreisler Decl., ¶ 10, Ex. 3 at 19, fn.2. The FAA estimated it would have taken 18 hours at \$50 per hour to search back-up tapes for the emails. Kreisler Decl., at ¶ 10.

4. FOIA Request No. 2010-5324.

Plaintiff made a FOIA request dated May 22, 2010, and requested copies of all disciplinary letters for all air traffic controllers at four specific towers between June 1, 2006, and September 1, 2009. Kreisler Decl., ¶ 11, Ex. 4 at 1. In its initial response, the FAA provided one letter that was released with certain privacy information redacted. Kreisler Decl., at ¶ 11, Ex. 4 at 2-3. The search fees totaled \$225.50 and Plaintiff was sent an invoice which he paid. Kreisler Decl., Ex. 4 at 2, 6. Plaintiff appealed the adequacy of the search. Kreisler Decl., Ex. 4 at 4. The FAA remanded the matter for an additional search and the estimated search fee was \$550. Kreisler Decl., Ex. 4 at 5, 8. Plaintiff failed to pay the search fee and the request was closed. Kreisler Decl., ¶ 11.

5. FOIA Request No. 2010-5390.

Plaintiff made a FOIA request dated May 29, 2010, and requested copies of all emails between February 1, 2007, and November 30, 2008, containing the words "Jeff," "Lewis," "Ralph," "CCR," or "Concord." Kreisler Decl., ¶ 12, Ex. 5 at 1. The FAA

estimated the search fee at \$3,300 based on 66 hours at \$50 an hour and explained the reason why the search was so costly. Kreisler Decl., Ex. 5 at 3-5. On July 29, 2010, Plaintiff emailed the FAA to consider this FOIA request closed. Kreisler Decl., Ex. 5 at 6.

6. FOIA Request No. 2011-6114.

Plaintiff made a FOIA request dated May 15, 2011, and requested copies of all emails within Dick Fossier's archives as of the close of business on June 7, 2008, using an "HQ/IT" search for the words "Lewis," "Concord," or "CCR." Kreisler Decl., ¶ 13, Ex. 6 at 1. The FAA estimated the cost of the search at \$800 based on 16 hours of time at \$50 an hour. Kreisler Decl., Ex. 6 at 3. Plaintiff failed to agree to pay the search fee and the request was closed. Kreisler Decl., ¶ 13.

7. FOIA Request No. 2011-9148.

Plaintiff made a FOIA request dated September 1, 2011, and requested an unredacted copy of an email dated April 5, 2008, with the subject line of "SFO Hot Issues."² Kreisler Decl., ¶ 14, Ex. 7 at 1. Plaintiff was provided with a redacted version of the email because some information was withheld under Exemption 5. Kreisler Decl., Ex. 7 at 3, 6. Plaintiff appealed the decision. Kreisler Decl., Ex. 7 at 4-5. The appeal decision released part of the withheld information and found that part of

² These documents will be submitted to the Court for in camera review.

one sentence was properly redacted. Kreischer Decl., Ex. 7 at 7-10. The *Vaughn* index explains that the information was withheld under Exemption 5 because it contained the manager's proposed recommendation and that information was both predecisional and deliberative. Kreischer Decl., Ex., 8 - *Vaughn* index.

Summary judgment and FOIA

A party is entitled to summary judgment under Fed. R. Civ. P. 56(a) "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, the evidence is viewed in a light most favorable to the non-moving party. *Betz v. Trainer Wortham & Co.*, 486 F.3d 590, 593 (9th Cir. 2007).

Generally, FOIA cases are decided on summary judgment. *Lane v. Dep't. of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008). Summary judgment should be granted when a district court determines there is an adequate factual and legal basis to support the claimed exemption. *Id.* at 1135. A district court must give substantial weight to agency affidavits if the justification for the claimed exemption is not controverted by contrary evidence in the record or by evidence of bad faith by the agency. *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). A court may rely solely on government affidavits if the affiants are knowledgeable about the documents sought and the affidavits are detailed enough to allow the court to make an independent assessment of the claimed exemption. *Lane*, 523

F.3d 1135. If the affidavits contain reasonably detailed descriptions of the documents and allege sufficient facts to establish the exemption, a court need look no further. *Id.* at 135-36.

The Freedom of Information Act

Congress enacted FOIA to allow public access to government documents in order to keep citizens informed and to keep the government accountable to the people. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Disclosure of documents, and not secrecy, is the objective of the act. *Id.* FOIA provides “public access to official information ‘shielded unnecessarily’ from public view and establishes a ‘judicially enforceable public right to secure such information from possibly unwilling official hands.’” *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009) (quoting *Dept. of Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

When FOIA was enacted, Congress recognized that disclosure of some information might legitimately be kept from the public. *Lahr*, 569 F.3d at 973. FOIA mandates disclosure of agency documents unless the records are exempt. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). FOIA contains nine categories of documents that are exempt from disclosure by the government. 5 U.S.C. § 552(b)(1)-(9). Because of FOIA’s “strong presumption in favor of disclosure,” the nine exemptions are narrowly construed and the government bears the burden of proving the exemption applies to any

of the documents or portions of documents that are withheld. *Lahr*, 569 F.3d at 973.

Argument

I. **The FAA properly withheld information under the deliberative process privilege and the attorney-client privilege.**

Exemption 5 protects disclosure of internal government documents based on the deliberative process privilege, attorney-client privilege, and attorney work-product.

Maricopa Audubon Society v. U.S. Forest Service, 108 F.3d 1089, 1092 (9th Cir. 1997).

Exemption 5 provides that an agency may withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The purpose of the deliberative process privilege is to shield intra-agency communications from disclosure so the agency can engage in internal debates, explore possibilities, and play devil’s advocate without fearing public scrutiny. *Lahr*, 569 F.3d at 979. To fall within Exemption 5, a document must be both predecisional and deliberative. *Id.*

A ‘predecisional’ document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the agency. A predecisional document is a part of the ‘deliberative process,’ if the disclosure of the materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussions within the agency and thereby undermine the agency’s ability to perform its functions.

Id. at 979-80.

A. FOIA Request No. 2011-4258.

The FAA determined that two emails, one dated 7/08/2008 and one dated 7/07/2008 contained information that was protected under Exemption 5 based on the deliberative process privilege and the attorney-client privilege. Kreischer Decl., Ex. 8 - *Vaughn* index. The emails preceded the decision on the type of disciplinary action to pursue and was part of the disciplinary decision process related to Plaintiff's employment. Kreischer Decl., Ex. 8 - *Vaughn* index. The information was both predecisional and deliberative and is protected under Exemption 5 because it would expose the agency's decision-making process and disclosure of the information would undermine FAA's ability to perform its function.

In addition, the email originated from Don Bobertz, an attorney in the office of the Western-Pacific Regional Counsel, and was conveyed to an employee in the Labor Relations, Training & Benefits Branch. The information was intended to be confidential and discussed litigation-sensitive advice related to Plaintiff's possible removal. Kreischer Decl., Ex. 8 - *Vaughn* index. Accordingly, the information falls within the attorney-client privilege and is protected under Exemption 5.

B. FOIA Request No. 2011-9148.

Plaintiff requested an unredacted copy of an email dated April 5, 2008, with the subject line of "SFO Hot Issues." The FAA has withheld two lines of information under

Exemption 5. Kreischer Decl., Ex. 7 at 10. The FAA withheld this information because it contained the manager's proposed recommendation and that information was both predecisional and deliberative. Kreischer Decl., Ex., 8 - *Vaughn* index. The recommendation was not followed and adopted as the final agency action. Kreischer Decl., Ex., 8 - *Vaughn* index. Release of this information would discourage the open and frank sharing of opinions between FAA employees in formulating personnel and disciplinary decisions. Kreischer Decl., Ex., 8 - *Vaughn* index. Accordingly, the information is protected under Exemption 5 based on the deliberative process privilege.

II. Plaintiff failed to exhaust his administrative remedies when he did not pay the search fees.

FOIA allows an agency to charge a fee in order to process a request. 5 U.S.C. § 552(a)(4)(A)(i). Agencies are required to promulgate regulations that set a schedule for fees that varies depending on whether the records are requested: (1) for commercial use; (2) for educational or noncommercial scientific institutions; (3) by the news media; or (4) by others. 5 U.S.C. § 552(a)(4)(A)(ii). Department of Transportation regulations that cover the FAA and apply to FOIA are set forth in 49 C.F.R. §§ 7.1-7.46.

A civil action cannot be brought alleging a violation of FOIA unless the requester has exhausted his administrative remedies. *King v. U.S. Dep't of Justice*, 772 F. Supp. 2d 14, 18 (D.C. 2010). A failure to exhaust administrative remedies is treated as a failure to state a claim on which relief may be granted. *Id.* A FOIA requester has not exhausted his

administrative remedies until the required fees are paid or the requester appeals the agency's refusal to waive the fees. *Id.*

Here, Plaintiff has failed to exhaust his administrative remedies by failing to pay the required search fees in FOIA Request No. 2010-3323; No. 2010-4091; No. 2010-5324; and No. 2011-6114. In addition, Plaintiff withdrew his FOIA request in No. 2010-5390. Therefore, Plaintiff has failed to exhaust his administrative remedies and summary judgment should be granted in favor of the FAA.

Respectfully submitted this 31st day of May 2012.

S. AMANDA MARSHALL
United States Attorney
District of Oregon

/s/ Kevin C. Danielson
KEVIN C. DANIELSON
Assistant United States Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DEFENDANT FAA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was placed in a first class postage prepaid envelope, and deposited in the United States Mail within the offices of the United States Attorney according to established office practice at Portland, Oregon, on May 31, 2012 addressed to::

Jeffrey Nathan Lewis
28242 S. Salo Road
Mulino, Oregon 97042
Plaintiff, *Pro Se*

/s/ Deryl G. Looney
DERYL G. LOONEY
Paralegal Specialist

CERTIFICATE OF SERVICE