

Jeffrey Nathan Lewis v. Federal Aviation Administration, et al.
Civil Action No. 3:11-CV-1458-AC

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This index describes the documents at issue in the above-referenced case and identifies the exemptions claimed. The agency claims that Exemption 5 permits the redaction or withholding of each document described in the table beginning on page 2 below.

Summary of Exemption

Exemption 5 - Inter- and Intra-Agency Communications Not Available to Party in Litigation with Agency

Exemption 5 protects "interagency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." Included within Exemption 5 are documents protected by the deliberative process privilege and the attorney-client privilege.

Deliberative Process Privilege

One purpose of the deliberative process privilege is to promote good agency decisionmaking by encouraging "open, frank discussions" between government employees. Another is to protect against public confusion that might result from disclosure of matters that were not ultimately the basis for agency action. Factual matters are not ordinarily exempt, but may be so if they reflect the agency's deliberative process. Drafts are especially likely to be exempt under the deliberative process privilege; the evolution of a draft into a final document can reveal the deliberative process at work.

The FAA has redacted from the documents below or withheld matters that reveal the agency's deliberative process, including draft documents and preliminary data that could cause confusion if released to the public.

Attorney-Client Privilege

This exemption protects confidential communications between attorneys and their clients relating to legal matters for which the clients have sought advice. The agency has redacted such privileged communications from the documents below.

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DESCRIPTION OF DOCUMENT

Portion of email from FAA attorney Don Bobertz to FAA employee Clemortee R Marable dated 7/8/08, Subject: Re: Jeffrey Lewis Proposed Removal Letter.

EXEMPTION

5 U.S.C. § 552(b)(5); Deliberative Process Privilege and Attorney-Client Privilege.

JUSTIFICATION

The e-mail precedes the decision on what disciplinary action to pursue and what penalty to access and was produced in the course of the disciplinary decision process. It contains the attorney's evaluation of the facts of the case and his recommendations. The e-mail qualifies for the deliberative process privilege.

The e-mail also qualifies under the attorney-client privilege. The information imparted by Mr. Bobertz, an attorney in the office of the Western-Pacific Regional Counsel, is confidential, litigation-sensitive advice, conveyed to an employee in the Labor Relations, Training & Benefits Branch at her request.

DESCRIPTION OF DOCUMENT

The body of an e-mail from FAA attorney Don Bobertz to FAA employee Clemortee R Marable dated 7/7/08, Subject: Re: Jeffrey Lewis Proposed Removal Letter.

EXEMPTION

5 U.S.C. § 552(b)(5); Deliberative Process Privilege and Attorney-Client Privilege.

JUSTIFICATION

The e-mail precedes the decision on what disciplinary action to pursue and what penalty to access and was produced in the course of the disciplinary decision process. It contains the attorney's evaluation of the facts of the case and his recommendations. The e-mail qualifies for the deliberative process privilege.

The e-mail also qualifies under the attorney-client privilege. The information imparted by Mr. Bobertz, an attorney in the office of the Western-Pacific Regional Counsel, is confidential, litigation-sensitive advice, conveyed to an employee in the Labor Relations, Training & Benefits Branch at her request.

DESCRIPTION OF DOCUMENT

Portion of email from FAA employee Dick Fossier to FAA employee Clemortee R. Marable dated 4/5/08, Subject: SFO Hot Issues.

EXEMPTION

5 U.S.C. § 552(b)(5); Deliberative Process Privilege.

JUSTIFICATION

The withheld portion of the email is part of an evaluative process that pre-dates, is directly related to, and actually played a role in making, a decision in determining what disciplinary action should be taken. It contains the manager's proposed recommendations on what he considers to be appropriate in this matter. However, in this case the recommendations were not adopted as the final agency action. It is reasonably foreseeable that releasing the withheld information would discourage the open and frank sharing of opinions and recommendations between agency employees that are helpful in formulating personnel and disciplinary decisions and would also create confusion in those cases where those opinions and recommendations are not adopted.