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July 13, 2016

Asst. Administrator for Finance &
Management (AFN-140)
Federal Aviation Administration
800 Independence Ave., SW
Washington, DC 20591

Via Email and Overnight Courier

RE: Freedom of Information Act (FOIA) Request – Control No. 2016-005647
APPEAL

Dear Assistant Administrator:

Pursuant to 5 U.S.C. § 552(a)(6), my client is appealing the partial denial of his FOIA request (sent via counsel on May 5, 2016 and attached as **Exhibit A**). It is respectfully requested that the FAA make a determination with respect to this appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of this appeal. If the partial denial of our FOIA request for records is in whole or in part upheld, it is respectfully requested that I be notified immediately so that judicial review in district court may be promptly initiated. Having been filed within 45 days of the date of initial determination, this appeal is timely.

SUMMARY OF APPEAL

I. The Request

1. On May 5, 2016, a FOIA request was sent on behalf of my client Kevin Johnson to three FAA Coordinators. See **Exhibit A**. The request was acknowledged by the FAA on May 6, 2016. See **Exhibit B**. To date, only partial document production has been received.

2. On June 16, 2016, a letter was sent to the requesting party concerning withheld documents. See **Exhibit C**. Ten pages of responsive documents and an invoice were sent with the letter. The letter indicated that at least twenty seven (27) pages were withheld under exemptions 4, 5, and 6.

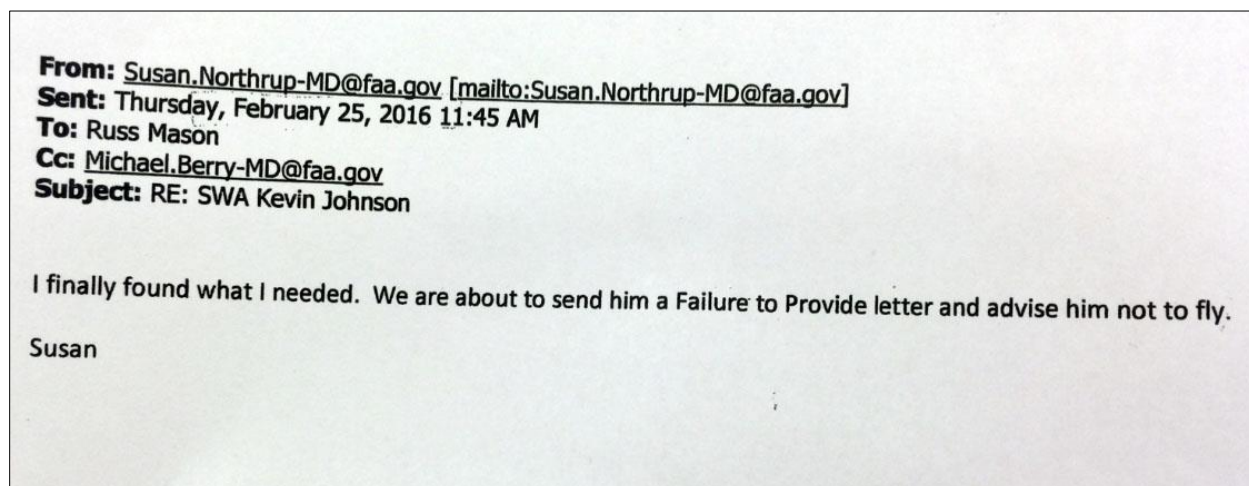
3. The following documents and materials were requested:

a. All emails sent to or from the email account of **Dr. Susan Northrup** (susan.northrup-md@faa.gov) that meet any the following criteria:

- Date range: October 1, 2015 to Present;
- Sent to or from the wnco.com domain;
- Reference “Kevin Johnson” in the subject or body of the message;
- Reference “3609041” in the subject or body of the message; and/or

- Contain the word “concerns” in the subject of the message.
- b. All emails sent to or from the email account of **Dr. Michael A. Berry** (michael.berry-md@faa.gov) that meet any the following criteria:
- Date range: October 1, 2015 to Present;
 - Sent to or from the wnco.com domain;
 - Reference “Kevin Johnson” in the subject or body of the message;
 - Reference “3609041” in the subject or body of the message; and/or
 - Contain the word “concerns” in the subject of the message.

Requests (a) and (b) include a request for the entire email conversation (or thread) relating to this email dated February 25, 2016:



- c. All emails sent to or from the email account of **Amos Lapp (SWA CMO)** that meet any the following criteria:
- Date range: October 1, 2015 to Present;
 - Sent to or from the wnco.com domain;
 - Reference “Kevin Johnson” in the subject or body of the message; and/or
 - Reference “3609041” in the subject or body of the message.
- d. All emails sent to or from the email account of **L. Paul Kriner, III (SWA CMO)** that meet any the following criteria:
- Date range: October 1, 2015 to Present;
 - Sent to or from the wnco.com domain;
 - Reference “Kevin Johnson” in the subject or body of the message; and/or
 - Reference “3609041” in the subject or body of the message.
- e. All emails sent to or from the email account of **David L. Sloan (SWA CMO)** that meet any the following criteria:

- Date range: October 1, 2015 to Present;
- Sent to or from the wnco.com domain;
- Reference “Kevin Johnson” in the subject or body of the message; and/or
- Reference “3609041” in the subject or body of the message.

f. All documents currently or previously in the possession of Dr. Susan Northrup or her assistant Areta Williams containing the following reference numbers: PI # 2250238 APP ID # 1996435797

g. All documents in the possession of the FAA or an FAA employee concerning Airman Kevin Johnson (Pilot Cert # 3609041) that were sent by Southwest Airlines Co. or their agents/representatives. This request includes all written correspondence and faxes.

h. All documents in the possession of the FAA or an FAA employee concerning the medical treatment, diagnosis, evaluation, or medical history of airman Kevin Johnson (Pilot Cert # 3609041).

Because medical information was a part of this request, a records release authorization was provided by my client. *See* **Exhibit D**.

II. Argument

Exemption 4 Does Not Apply To This Request

4. In her letter, Dr. Susan E. Northrup, M.D. states that she is withholding document production under Exemption 4 of FOIA, stating that they contain commercial information that is privileged or confidential. Exemption 4 protects “commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). To invoke the exemption, an agency must show that “the information is: (1) commercial or financial; (2) obtained from a person; and (3) privileged or confidential.” Canadian Commercial Corp. v. Dep’t of Air Force, 442 F.Supp.2d 15, 30 (D.D.C.2006), *aff’d*, 514 F.3d 37 (D.C.Cir.2008). The information requested is neither commercial or financial in nature, nor could it be considered privileged or confidential.

5. To the extent the FAA seeks to withhold information regarding Southwest Airlines Co.¹, it has failed to show how responsive documents contain privileged or confidential information. It is unlikely that the responsive documents could be shielded or protected from “every privilege known to civil discovery.” *See, e.g., Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 690 F.2d 252, 267-68 (D.C. Cir. 1982). The material requested would also not be considered confidential. Using the *National Parks* test, materials may only be withheld as confidential if they would have the following effects: (1) to impair the Government’s ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Nat’l Parks & Conservation

¹ Requestor seeks emails to or from the **wnco.com** domain, i.e., emails sent from Southwest Airlines employees to the FAA and the FAA’s response.

Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). In this instance, the documents and communications do not relate to the business activities of Southwest Airlines Co. but rather specific inquiries concerning the requestor Kevin Johnson. No competitive harm would result to Southwest Airlines Co. if the materials were released and document production would not impair the Government's ability to obtain the necessary information in the future. Indeed, as a company strictly regulated by DOT/FAA, Southwest Airlines Co. is routinely required to provide information to the Government.

Exemption 5 Does Not Apply To This Request

5. Dr. Susan E. Northrup, M.D. states that she is withholding document production under Exemption 5 of FOIA, citing deliberative process privilege. This privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Nat'l Labor Relations Bd., 421 U.S. at 150 (quoting Stiftung v. V.E.B., 40 F.R.D. 318, 324 (D.D.C. 1966) (internal quotation marks omitted)). An agency withholding records under this privilege has the burden of proving that the materials are both "predecisional and deliberative." Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 512 (D.C. Cir. 2011). The materials requested and withheld do not constitute "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." It is unlikely that narrow communication concerning an individual (Kevin Johnson) could be considered materials relating to governmental policies or decisions. Indeed, most if not all of the communications were between two FAA employees and members of the public, not internal deliberative communications. Further, any privilege under Exemption 5 was waived when representatives from Southwest Airlines Co. presented some of the requested communications to Kevin Johnson during a meeting. See below:

From: Susan.Northrup-MD@faa.gov [mailto:Susan.Northrup-MD@faa.gov]
Sent: Thursday, February 25, 2016 11:45 AM
To: Russ Mason
Cc: Michael.Berry-MD@faa.gov
Subject: RE: SWA Kevin Johnson

I finally found what I needed. We are about to send him a Failure to Provide letter and advise him not to fly.

Susan

Russ Mason

From: Susan.Northrup-MD@faa.gov
Sent: Thursday, March 24, 2016 11:36 AM
To: Russ Mason
Subject: RE: concerns
Signed By: susan.northrup-md@faa.gov

WE have not disqualified him yet, but did send a letter that he was not to exercise the privileges of his certificate 3.18.16. I can't prove that he received it. You might want to FOIA a copy of his records.

Portions of Dr. Northrup's email which state that "I finally found what I needed" and "WE have not disqualified him yet" indicate an ongoing communication between Dr. Northrup (an FAA employee) and representatives from the Southwest Airlines Co. (members of the public). The materials the agency seeks to withhold on the basis they contain deliberative process communications are clearly not deliberative in nature, but rather non-privileged communications between a government employee and the public. Further, any communications not expressly between a government employee and a government attorney would not be protected by attorney-client privilege. To invoke the attorney-client privilege, the agency must demonstrate that the material it withheld both "involves 'confidential communications between an attorney and his client'" and "relates to 'a legal matter for which the client has sought professional advice.'" Judicial Watch, Inc. v. U.S. Postal Serv., 297 F.Supp.2d 252, 267 (D.D.C. 2004) (quoting Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 252 (D.C. Cir. 1977)). In the FOIA context, "an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship contemplated by the privilege." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C.Cir.1980). It is hard to imagine what legal counsel Drs. Northrup and Berry would have sought in providing information to Southwest Airlines Co. relating to Kevin Johnson.

Exemption 6 Does Not Apply To This Request

6. While not specifying whose privacy she sought to protect in withholding information under Exemption 6, it is clear that the exemption does not apply in any case. If the individual to be protected is Kevin Johnson, because some of the information requested relates to him personally, his provision of a records release authorization and the retention of an attorney to handle the FOIA request clearly demonstrates the concern is unwarranted. If the protected person is Dr. Northrup or any other government employee, there is no reasonable expectation of privacy in the conduct of one's job as a governmental employee, and thus the concern is invalid. "[i]n the [FOIA] generally, and particularly under Exemption 6, there is a strong presumption in favor of disclosure that must be indulged ... by the courts." United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 598 v. Dep't of the Army, Corps of Eng'rs, 841 F.2d 1459, 1463 (9th Cir.1988). "[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the [FOIA]." Wash. Post Co. v. Dep't of Health & Hum. Servs., 690 F.2d 252, 261 (D.C.Cir.1982). The FAA fails to state whose privacy interest is being protected and how disclosure would amount to an unwarranted invasion of personal privacy. The personal privacy interest in this instance (if there is one) is not overcome by the public interest and benefit of disclosure.

III. Conclusion

7. For the reasons stated herein, the requesting party, acting through counsel, respectfully appeals and requests reconsideration of the partial denial of his FOIA request. It is requested that upon appeal and reconsideration, every responsive document requested be produced, or in the event documents continue to be withheld pursuant to a claimed exemption, that notice thereof be promptly provided so the requesting party may seek judicial review.

Thank you for your prompt attention to this matter. The undersigned requests a response within 20 days as required by 5 U.S.C. § 552(a)(6)(A)(ii).

Very truly yours,

A handwritten signature in black ink, appearing to read 'J. Verde', with a stylized flourish at the end.

Joshua A. Verde

cc: File
Client

FOIA Appeal
ASO-300
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Atlanta, GA 30320