

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

LAW OFFICES OF TONY B. JOBE, APLC)	
)	CIVIL NO.:
)	
Plaintiff,)	Division:
)	Section:
v.)	
)	Judge:
)	Magistrate:
NATIONAL TRANSPORTATION SAFETY BOARD,)	
)	COMPLAINT AND
)	SUMMONS TO
Defendant.)	ANSWER COMPLAINT

COMPLAINT - CIVIL ACTION FOR INJUNCTIVE RELIEF

NOW INTO COURT, comes The Law Offices of Tony B. Jobe, through undersigned counsel, who files this his Civil Action for Injunctive Relief under the Freedom of Information Act, 5 U.S.C. § 552 (hereinafter, “the FOIA”), seeking an order from this Court that enjoins the Defendant National Transportation Safety Board from any further violation of the FOIA by denying the production of agency records unlawfully withheld and unreasonably delayed, concerning the agency’s fact-finding phase of the investigation of the crash of an EC130 B4 helicopter on the Island of Molokai, State of Hawaii, on November 10, 2011 while on a sight-seeing tour of the island. That NTSB investigation was assigned agency designator WPA12MA034.

Mr. Jobe first requested documents, information, and things from the NTSB related to the crash and WPR12MA034 on July 31, 2014. Administratively, the NTSB assigned Mr. Jobe’s request a FOIA designator, FOIA number 2015-00001. Contemporaneously, an unknown entity submitted a request pursuant to the FOIA seeking “any and all records” related to

WPR12MA034. That FOIA request was assigned designator 2014-00449. Unbeknownst to Mr. Jobe at the time, approximately 3,000 pages of records that were produced to the unknown requestor in response to 2014-00449 were, as the NTSB has admitted, not disclosed to Mr. Jobe in response to FOIA request 2015-00001. Further, the NTSB withheld 2,349 pages claiming the protections of FOIA Exemption 5, 5 U.S.C. §552(b)(5).

On November 1, 2016, Mr. Jobe submitted a request pursuant to the FOIA for eleven (11) specific categories of documents related to WPR12MA034 that the NTSB had not produced in 2015. That request was assigned identifier 2017-00066. The NTSB produced only 333 pages of unresponsive documents. Given Mr. Jobe's appeals and requests for reconsideration in efforts to avoid this instant litigation, Mr. Matthew McKenzie, on behalf of the NTSB, offered to "review again" the 2,349 documents withheld in 2014 pursuant to Exemption 5 against the 2016 amended standard for withholding records pursuant to the FOIA Improvements Act of 2016. The NTSB further agreed to determine whether responsive records previously withheld pursuant to Exemption 5 could be released. However, the NTSB determined that, even though many of those documents were not protected by the 2016 FOIA statute, the agency would not release them because they were not responsive to 2017-00066. Likewise, the NTSB refused to voluntarily disclose to Mr. Jobe the approximately 3,000 pages of documents that were already disclosed to another unnamed FOIA requestor.

On October 23, 2018, Mr. Jobe filed a Complaint – Civil Action for Injunctive Relief in the United States District Court for the Eastern District of Louisiana. That case was assigned Docket No.: 18-10547-JCZ-DMD. ["FOIA I"]. On November 18, 2019, the Honorable Jay Zainey issued his Order and Decisions on the parties' cross-motions for summary judgment. The Court noted that the NTSB acknowledged that it had withheld 3,000 pages from Mr. Jobe that

had been provided to the unnamed entity in 2014. However, because those pages did not relate to the specific categories of documents requested in the 2016 FOIA that was before the Court, the Court did not address that issue. Likewise, the Court also limited its scope of review to 215 documents specifically related to the 2016 FOIA and did not address the 2,349 pages previously withheld under FOIA Exemption 5 in 2014. The NTSB has appealed the October 23, 2018 decision to the Fifth Circuit Court of Appeals, contesting the Court's ruling on the "consultant corollary" theory of FOIA Exemption 5. That issue is not central to this case.

Based on the Court's Order in FOIA I, on December 18, 2019, the Law Offices of Tony B. Jobe ["Law Offices"] submitted a request pursuant to the FOIA to release:

1. All records, believed to be approximately 2,300 pages, withheld pursuant to Exemption 5 in 2015, given the amendment to the FOIA since 2015 and the recent decision of the United States District Court Eastern District of Louisiana (*Jobe v. NTSB*, Civ. Case No.: 18-10547) that denied the NTSB's withholding of records based on the "consultant corollary" theory of Exemption 5;
2. Several thousand pages that were "uploaded to the file for another request related to accident WPR12MA034, but were not uploaded to the file for the Law Offices' 2015 request, such that those records have already been released to the public but were either purposefully or inadvertently not released to the Law Offices of Tony B. Jobe;
3. Records that were generated by the Federal Aviation Administration ("FAA"), the National Oceanic and Atmospheric Administration ("NOAA"), and other unidentified "outside sources" as none of those agencies responded to FOIA Request 2015-00001.

The Law Offices received no response to that request for over twenty (20) working days in violation of the FOIA. 5 U.S.C. §552(a)(3)(A). On February 4, 2020, the Law Offices of Tony B. Jobe sent a second request that the NTSB disclose records described in the December 17, 2019 request. On February 12, 2020, a paralegal at the Law Offices of Tony B. Jobe contacted an independent contractor for the NTSB FOIA Office by phone who saw no evidence of the December 17, 2019 request in the electronic system but agreed to look into the status of that request. That same day, The Law Offices sent a follow-up email with a copy of the request.

On February 13, 2020, Ms. Tamara Crawford from the NTSB FOIA Requester Service Center sent an email to Mr. Jobe with an attached letter dated December 23, 2019. However, that letter indicates that it was sent to an address that the NTSB knows, and has known for several years, no longer belongs to The Law Offices. The letter indicated that the NTSB's FOIA backlog made it "difficult to say when [the Law Offices could] expect a response [to FOIA Request No. 2020-00. However, barring no delays, [the NTSB] plan[ned] to respond by late fall." Stunningly, however, attached to that email was an email, sent approximately three (3) hours earlier that day, from Ms. Crawford to Ms. Melba Moye, the NTSB FOIA Public Liaison and Chief of the NTSB Records Management Division. Ms. Crawford's email said, "See attached correspondence from Tony Jobe regarding the Hawaii accident in 2011. Are we still in litigation? Is Stephanie handling this?" [emphasis added].

In response, on February 13, 2020 the Law Offices sent a letter to Ms. Crawford objecting to the "late fall" release date. The letter explained that the several thousand pages that had already been released to the public should be immediately disclosed. The letter also explained that the 2,349 pages previously withheld in 2015 under Exemption 5 had already been reviewed for application of the exemption by NTSB counsel, Matthew McKenzie, and should be ready for immediate release as well. The letter confronted the NTSB with the appearance of purposeful delay due to litigation and posited that litigation on an unrelated legal issue did not justify a months long delay in disclosure of records to which The Law Offices is entitled. The Law Offices asked that the NTSB FOIA Office respond within thirty (30) days. As of the date of this filing, over 30 working days have elapsed with no word from the NTSB FOIA Office. The NTSB's failure to respond constitutes a final agency decision to deny The Law Offices' request pursuant to the FOIA, incredulously and improperly withholding some documents for nearly five

(5) years.

Thus, The Law Offices of Tony B. Jobe seeks an order of this Court that requires the NTSB to immediately disclose 1) all of several thousand pages that were “uploaded to the file for another request related to accident WPR12MA034, but were not uploaded to the file for the Law Offices’ 2015 request, such that those records have already been released to the public but were either purposefully or inadvertently not released to the Law Offices of Tony B. Jobe; and 2) all of the records withheld in 2015 pursuant to Exemption 5 that were approved for disclosure in Mr. Matthew McKenzie’s 2018 analysis. The Law Offices of Tony B. Jobe reserves its right to seek disclosure of additional documents responsive to this request that have been improperly withheld based on the “consultant corollary” theory pending the decision of the Fifth Circuit Court of Appeals in Case No.: 20-30033. The Law Offices also reserves its right to seek disclosure of additional documents responsive to this request that the NTSB must Further, The Law Offices of Tony B. Jobe seeks an order of this Court awarding attorneys’ fees and costs associated with this action, pursuant to 5 U.S.C. § 552(a)(4)(E).

THE PARTIES

1. THE LAW OFFICES OF TONY B. JOBE is a corporation registered with The Louisiana Secretary of State, engages in the practice of law, and is a “person” for purposes of the FOIA, 5 U.S.C. §551(2). The corporation’s principal place of business is located at 1144 Hardy Drive, Covington, Louisiana 70433. The Law Offices of Tony B. Jobe issued its request for disclosure of documents pursuant to the FOIA to the NTSB and bearing NTSB FOIA identification number 2020-00112 on December 18, 2019.

2. Defendant, NATIONAL TRANSPORTATION SAFETY BOARD (“NTSB”), is an independent federal governmental agency organized and existing pursuant to Title 49 of the

United States Code. The NTSB is charged by statute with investigating civil aircraft crashes pursuant to 49 U.S.C. § 1131(a)(1)(A) and § 1132 (a)(1)(A). Upon information and belief and by agency admission, the NTSB generated or caused to be generated all of the documents requested in FOIA Request No. 2020-00112 and the NTSB maintains possession, custody, and/or control of all of the documents responsive to FOIA Request No. 2020-00112.

JURISDICTION

3. This Honorable Court has jurisdiction over this civil litigation arising out of the law of the United States pursuant to 28 U.S.C. § 1331, as it presents a federal question. This United States District Court also has jurisdiction pursuant to the specific dictate of the FOIA at 5 U.S.C. 552 (a)(4)(B). In pertinent part, the FOIA at (a)(4)(B) states:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

Documents generated in the course of an NTSB investigation are subject to disclosure pursuant to the FOIA and governed by federal regulations at 49 C.F.R. § 801.55.

4. Pursuant to 5 U.S.C. §552(a)(6)(C)(i), the Law Offices are “deemed to have exhausted [its] administrative remedies because the NTSB has “fail[ed] to comply within the applicable time limit provisions.”

VENUE

5. The United States District Court for the Eastern District of Louisiana is proper venue for this civil litigation pursuant to 28 U.S.C. §1402(b) as The Law Offices of Tony B. Jobe is a corporation headquartered in and residing in the Parish of St. Tammany, State of Louisiana,

within the boundaries of the Eastern District of Louisiana. The Law Offices of Tony B. Jobe is the requestor of record for FOIA No. 20-00112 and is Plaintiff/Complainant herein.

NATURE OF THIS ACTION

6. This is a civil action brought against the NTSB pursuant to claims of statutory violations of the FOIA.

7. The NTSB has admitted that approximately 3,000 pages responsive to FOIA 2015-00001 were uploaded to the file for another request related to accident WPR12MA034, but were not uploaded to the file for the Law Offices' 2015 request, such that those records have already been released to the public but were either purposefully or inadvertently not released to the Law Offices of Tony B. Jobe. *Jobe v. NTSB*, Case No.: 18-10547, Rec. Doc. 28-2, n.1, Rec. Doc. 28-3, n.1, U.S.D.C. Eastern District of Louisiana (2019). FOIA 2020-00112, Document Request Category 2.

8. "Under [the] public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). Even if the documents provided to the unnamed requestor in 2014-2015 contain privileged documents (and the NTSB did not suggest that they did), the NTSB has waived any assertion to privilege for those documents and must disclose them to Law Offices.

9. Because those documents are already in the public domain, processing of Law Offices request for those documents should have been a simple request. However, the NTSB posited that it would take an untold number of months, possibly up to a year, to respond to that simple request.

10. Law Offices seeks documents in the possession and control of the NTSB, whose counsel

has already analyzed those documents for the application of the deliberative process exemption, 5 U.S.C. §552(b)(5). Document Request Category 1.

11. In 2018, Mr. Matthew McKenzie, on behalf of the NTSB, offered to re-review the documents withheld in 2014 under Exemption 5 under the revised Exemption 5 standard enacted in the FOIA Improvements Act of 2016. However, Mr. McKenzie never intended to disclose any of those documents unless they were responsive to FOIA 2017-00066. Case No.: 2:18-cv-10547-JCZ-DMD, Rec. Doc. 28-5 at ¶21 (July 10, 2019).

12. Because the NTSB has already identified those documents and NTSB counsel has already reviewed those documents for application of FOIA Exemption 5, the NTSB's delay into the late fall 2020 to disclose those documents is unreasonable.

LEGAL BACKGROUND

13. The U.S. Supreme Court "repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-152 (1989). The FOIA was meant to be a "disclosure statute," not a "withholding statute." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1266 (2011). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

14. "[T]he time provisions of the Act are central to its purpose." *Hayden v. U.S. Dep't of Justice*, 413 F. Supp. 1285, 1288 (D.D.C. 1976). The FOIA requires federal agencies to "promptly" make records available upon request. 5 U.S.C. §552(a)(3)(A). Agencies must "determine ... whether to comply" with a request within 20 working days of receiving the

request, and they must “immediately notify” the requester of that determination. 5 U.S.C. §552(a)(6)(A); 49 C.F.R. §801.21.

15. To make a “determination” under the FOIA, “the agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.” *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013).

16. Agencies may extend their deadline for responding by up to 10 working days if unusual circumstances apply and they provide timely notice to the requester. 5 U.S.C. §552(a)(6)(B). NTSB regulations define “unusual circumstances” as those in which the search and collection of responsive documents from field offices that are removed from the office processing the request, the search and collection of voluminous records and searches that require extensive consultation with outside entities. 49 C.F.R. § 801.22.

17. Under both NTSB regulations and the FOIA, if the NTSB seeks to extend a deadline further than 10 working days, the NTSB must extend an opportunity to the requester to modify the request so that it may be processed within that 10-day time frame or an opportunity to arrange an alternative time frame for processing the request or a modified request. 5 U.S.C. § 552(a)(6)(B)(ii); 49 C.F.R. § 801.23(b)(2).

18. As of the date of the filing of this Complaint, the statutorily and regulatorily mandated deadlines for the NTSB to process Plaintiff’s requests have long-sense passed. The NTSB has not properly processed Plaintiff’s requests, has not offered Plaintiff an opportunity to limit its request and has not responded to The Law Offices request to arrange an alternative time frame for processing its request.

19. The NTSB has unlawfully withheld documents pursuant to the FOIA.

CLAIMS FOR RELIEF

Count I. Violation of the FOIA.

20. The Law Offices incorporates by reference paragraphs 1 through 19 of this Complaint as if fully stated herein.

21. Defendant NTSB has violated the FOIA and the agency's own regulations by failing to provide The Law Offices any opportunity to limit or modify FOIA Request No. 2020-00112 or to arrange an alternative time frame for the agency's response. In fact, The Law Offices' February 13, 2020 request to modify the scope of the request and to arrange a different time frame within which the NTSB would respond to the modified request was met with silence.

22. The NTSB has violated the FOIA and the agency's own regulations by failing to provide The Law Offices with any responsive records to the December 18, 2019 FOIA request bearing identifier 2020-00112.

23. The NTSB's improper withholding and unduly delayed disclosure of properly requested records is unlawful and a violation of the FOIA.

24. Unless enjoined by this Court, the NTSB will continue to violate The Law Offices' legal right to disclosure of the records it has requested as described in herein *supra*.

WHEREFORE, Plaintiff respectfully prays that this Honorable Court:

(1) Hold that the Defendant herein, National Transportation Safety Board, unlawfully withheld records properly requested in FOIA No. 20-0112 pursuant to the statute [5 U.S.C. §552];

(1) Order Defendant, National Transportation Safety Board, to provide access to all of the requested documents, including but not limited to documents delineated in categories 1 and 2 of

FOIA Request No. 20-00112 as follows:

- a) All records, believed to be approximately 2,300 pages, withheld pursuant to Exemption 5 in 2015, given the amendment to the FOIA since 2015 and the recent decision of the United States District Court Eastern District of Louisiana (*Jobe v. NTSB*, Civ. Case No.: 18-10547) that denied the NTSB's withholding of records based on the "consultant corollary" theory of Exemption 5;
- b) Several thousand pages that were "uploaded to the file for another request related to accident WPR12MA034, but were not uploaded to the file for the Law Offices' 2015 request, such that those records have already been released to the public but were either purposefully or inadvertently not released to the Law Offices of Tony B. Jobe;

(2) Award The Law Offices of Tony B. Jobe costs and reasonable attorney's fees in this action, as provided in 5 U.S.C. § 552(a)(4)(E); and

- (3) Grant such other and further relief as may deem just and proper.

Respectfully submitted,

Dated: March 30, 2020.

/s/ Tony B. Jobe
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