UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

NEW JERSEY COALITION AGAINST AIRCRAFT NOISE,	)	Civil Action
Plaintiff,	)	Dkt. No. 04-5555 (WGB)
-versus-	)	
THE FEDERAL AVIATION ADMINISTRATION,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW AND

LOCAL RULE 56.1 STATEMENT OF CONTESTED FACTS

IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CARTER H. STRICKLAND, JR. (CS7672)
Rutgers Environmental Law Clinic
123 Washington Street
Newark, New Jersey 07102
(973) 353-5695

Attorneys for Plaintiff

October 14, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Regulations

Rules

PRELIMINARY STATEMENT

A principle of our government is that records are generally available to the people it purports to represent. For over two years, Plaintiff New Jersey Citizens Against Aircraft Noise ("NJCAAN') has attempted without success to obtain information about the New York/New Jersey /Philadelphia Metropolitan Area Airspace Redesign (the "Project") from the Federal Aviation Administration ("FAA") under the Freedom of Information Act ("FOIA"). NJCAAN seeks factual information on a number of issues related to airplane routes and the modeling reports that show projected noise impacts from each route. In addition, NJCAAN seeks other information on routes and noise impacts that the FAA has shared with the aviation industry outside of the public view.

In its summary judgment papers, the FAA contends that the deliberative process privilege shields the information sought by NJCAAN. However, the FAA has not segregated factual matters from non-factual or policy matters. Instead, the FAA argues that even the underlying facts will somehow demonstrate the agency's deliberative process. If this argument were the law, then factual information would never be produced by any agency. Moreover, the FAA's conclusory invocations of the privilege cannot be taken at face value; instead, specific documents containing factual information should be reviewed in camera to determine whether the disclosure of redacted facts will improperly reveal agency deliberations and cause adverse consequences.

Even if withheld records initially fall within the deliberative process privilege, NJCAAN has come forth with evidence that the FAA has waived any privilege by selective disclosure to the aviation industry and not the public. NJCAAN seeks further, limited discovery to determine whether such waiver has occurred.

For these reasons, NJCAAN respectfully suggests that the Court should deny the FAA's

motion for summary judgment and allow discovery or, in the alternative, should grant a continuance of its deliberations on the motion until the necessary discovery is completed.

NJCAAN also requests oral argument on the motion.

COUNTERSTATEMENT OF UNCONTESTED AND CONTESTED FACTS

The FAA initiated the Project to increase air traffic capacity, efficiency and safety in the region. Db at 2. The Project will affect five major international airports, as well as many smaller facilities. It will reorganize the pattern of air traffic across five states and hundreds of communities, and may have a great effect on noise pollution in many regional communities.

On June 16, 2003, NJCAAN made twelve specific requests for records pursuant to FOIA on behalf of its members from 18 counties and 300 towns in New Jersey. Complaint, Ex. A; see Belzer Decl. ¶ 3. NJCAAN sought basic information about ocean and other route modeling reports that were prepared by the FAA, the MITRE Corporation, Leigh Fisher Associates and other consultants. Id. Such reports are highly dependent upon the raw factual data used in the models and the factual assumptions made about that data, and ultimately yield factual information about noise, fuel consumption, delays, operations problems and other facts. Feder Decl. ¶ 5. Access to the raw data, assumptions, and results is necessary for any meaningful involvement by citizens in evaluating alternative routes in the Project. Id.

Although FOIA mandates that all federal agencies are required to respond to requests within twenty business days, Plaintiff did not receive a response until five months later its request, on November 24, 2003. Complaint, Ex. B. The FAA's first response denied having any records related to several of the requests and admitted to having records related to the following three requests:

1. All modeling reports, other reports and studies prepared by the MITRE Corporation in connection with the Project,

including all reports concerning ocean routing.

2. All modeling reports, other reports and studies prepared by consultants other than MITRE in connection with the Project, including any reports concerning ocean routing and any reports by Lee-Fisher Associates.

4. All data or modeling reports that concern the impact of ocean routing on fuel costs and travel time in the airspace affected by the Project.

Id.

The FAA withheld those responsive records under FOIA Exemption 5 (also called the deliberative process privilege or exemption) found at 5 U.S.C. § 552(b)(5). Id. The November 2003 response did not provide detailed explanations for withholding the records, but simply stated they were covered by Exemption 5. Id. NJCAAN was unable to determine whether the agency properly withheld records, or whether, in fact, some or all of the documents contain factual or other material not covered by the deliberative process privilege. Consequently, on December 19, 2003, NJCAAN appealed the Agency's denial of those requests. Complaint, Ex. C. Among other things, NJCAAN requested a Vaughn Index setting forth justifications for the privilege in accordance with Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973).

The FAA responded to NJCAAN's initial appeal five months later, on May 21, 2004. Complaint, Ex. E. The FAA again stated it would withhold documents responsive to FOIA requests 1, 2 and 4 on the ground that such documents are within the deliberative process privilege. The FAA's explanation of its privilege claim consisted of a quote of the statutory standard, citation to a regulation that does not exist, the conclusory statement that "the documents are subject to the deliberative process privilege" and a list of 34 documents that it withheld. Id.

The list of 34 documents did not describe the improper consequences of disclosing the

withheld information. Id. Nor did the list distinguish between protected deliberations and facts; one of the records withheld, for example, is entitled "Raw Text Files for NY/NJ/PHL Census Block Population" which is obviously comprised entirely of facts. Id. In addition, many of the descriptions did not give any indication of the nature of the document or why it should remotely be considered privileged, but simply contained impenetrable titles such as "90per 2006 – Mitre2" or "AAD 2000-Mitre." Id. And several of the documents appear to be final data sets, including "2000 AAD Overflight Schedule," "Airports List," "Final Report-Evaluation of Proposed Oceanic Routing Procedures Prepared for The Port Authority of New York and New Jersey" and "NY/NJ/PHL Airspace Redesign Map Study Area." Id. One of NJCAAN's own documents, "NJCAAN-NJCER Report," is classified on the Vaughn Index as a document protected by the deliberative process privilege. Id. On June 22, 2004, NJCAAN appealed the second written denial as deficient. Complaint, Ex. F.

After not receiving a response for yet another five-month period, NJCAAN filed the instant suit on November 12, 2004. The First Claim is under FOIA, 5 U.S.C. § 552, and the Second Claim is under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2. The claims are distinct but related. The FOIA claim contends that the FAA has not proven that the deliberative process privilege applies to all or parts of the identified documents or, alternatively, that any applicable deliberative process privilege was waived by selective disclosure of records to aviation industry members through meetings held by the Radio Technical Committee for Aeronautics ("RTCA"). The FACA claim contends that collaboration between the FAA, the RTCA and other industry officials on the Project should have occurred in public meetings upon notice, with adequate recordkeeping of all documents reviewed, received and produced.

Contested Factual Questions Regarding Whether Withheld Documents are Deliberative

In response to the FOIA claim, the FAA has asserted that the documents are deliberative. McCarthy Decl., ¶ 14 & Attachment, Items 2, 5-22; Db at 12. NJCAAN, on the other hand, contends that in general modeling reports contain raw factual data and factual assumptions made about that data, and ultimately yield factual information about noise, fuel consumption, delays, operations problems and other facts. Federal Decl. ¶ 5. For that and other reasons, NJCAAN believes that the documents withheld are entirely or partially non-deliberative.

For example, the Vaughn Index shows that the FAA has withheld raw census data. Item 2 is a disk describing the census block population over the study area. McCarthy Decl., Attachment p. 1. All areas subject to change in over-flight patterns should already have been defined as part of the scoping process, as should the geographic area to be examined for impacts. Feder Decl. ¶ 9. Since the scoping phase was completed prior to the request for information by NJCAAN, the census tracts affected by noise comprise factual data, not a policy choice to be deliberated. Id. Similarly, Item 5 contains census block centroids and populations for the study area. McCarthy Decl., Attachment p. 2. This data is essentially factual and immutable. Feder Decl. ¶ 10.

The Vaughn Index also shows that the FAA has withheld maps that are essentially factual. See McCarthy Decl., Attachment. Item 23 appears to be an updated version entitled "Airports List Draft Final 2-4-03 Overview." Item 24 is the "NY/NJ/PHL Airspace Redesign Map Study Area" and reportedly contains a map of the study area plus a graphical depiction of the airports considered. Airport location and operation counts are factual data. Feder Decl., ¶ 11. The study area and affected airports have been, or should have been, defined during scoping of the environmental impact statement. Id.

Other withheld documents are predominantly or completely factual in nature, or are from completed data sets, or both. Item 6 is an "Overview of Operation Counts and Rationale for Inclusion or Exclusion – 9/12/2001." McCarthy Decl., Attachment, p. 3. Item 7 describes arrival runway traffic for the year 2000 for various airports. Id. p. 4. Item 8 consists of baseline files with arrival and departure information for airports in the project. Id. Item 13 includes spreadsheets and other information containing factual descriptions of airport operations for the year 2000. Id. p. 8. All of these items contain factual data within final, complete datasets. Feder Decl., ¶¶ 12-14. In addition, the identity of airports to be included in the study has been, or should have been, defined in scoping for the environmental impact statement. Id.

Finally, Items 25 and 26 are two versions of the noise analysis for the no-action alternative. McCarthy Decl., Attachment, p. 13. These data sets are factual descriptions and analyses of the noise exposure for the no action alternative, i.e., a compilation of what is flying now. Feder Decl., ¶ 16. Regardless of agency decisions, the noise analysis results for the no-action alternative will remain the same. Id. Indeed, the FAA has admitted to Congress that the baseline noise analysis is complete. Belzer Decl. Ex. 5, p. 9.

The RTCA, Its Structure and Its Involvement in the Project

The RTCA is chartered by the FAA as an advisory committee under the Federal Advisory Committee Act. Db at 5 (summarizing Watrous Decl.) The RTCA is currently comprised of roughly 200 governmental, airline, aviation services, consultant and other member organizations, including the FAA, the Department of Commerce, the consulting firm MITRE, the Air Transport Association of America, Boeing, Lockheed Martin and the National Business Aviation Association. Belzer Decl. Ex. 1, p. i. The majority of RTCA's work is performed at the request of the FAA. Id., p. ii.

RTCA committees function on two levels. At the highest levels are committees that are formally constituted under FACA. Such committees must hold meetings open to the public after timely notice, keep detailed minutes, be fairly balanced in their membership, and retain all records, reports, working papers, drafts, studies and other documents for public inspection and copying. 5 U.S.C. App. 2, §§ 8(b)(2), 10(a)-(d). The FACA committee known as the Free Flight Steering Committee, and now known as the Air Traffic Management Advisory Committee, had formal responsibility for providing recommendations to the FAA on the Project. Watrous Decl. ¶¶ 4-6.

Much of the real work of the RTCA, however, happens in subcommittees that are not constituted under FACA and thus do not comply with the act's open meeting and public recordkeeping requirements. See Watrous Decl., ¶ 4; Belzer Decl. Ex. 1, p. ii. The bifurcated structure of RTCA committees has been criticized in a formal report by the Office of the Inspector General of the Department of Transportation, which noted that "significant deliberations are occurring and recommendations being formulated" at the non-FACA subcommittee level and that those recommendations are then adopted at the FACA committee level with little discussion. Belzer Decl., Ex. 1, p. 9. Those activities violate FACA because closed subcommittees cannot serve as proxies for open committees. Id. at v. Advisory committees must truly deliberate recommendations received from closed subcommittees, not "rubber stamp" them. Id. at vi. The audit also recognized that FAA involvement with the RTCA is more pervasive than at other agencies, which gives the impression that "FAA is ultimately providing advice to itself," id. at iv, and concludes that "the lines have now blurred between RTCA providing advice through recommendations and providing elements of program decision-

making and management ...." Id. at iii.[1]

The non-FACA subcommittees that have worked on the Project include the Free Flight Select Committee, its Regional Subgroups and most specifically, the Airspace Work Group. See Db at 16; Watrous Decl. ¶¶ 7-8, 10, 12, 16. (In early 2005, the Select Committee was retired and replaced by the "Requirements and Planning Work Group." Id. ¶ 9.) These groups are comprised of representatives of the FAA and aviation industry organizations, including Continental Air Lines, American Air Lines, the Air Transport Association of America and the National Business Aviation Association, Inc. Id. ¶ 12. The Airspace Working Group and the Select Committee did not advertise their meetings and did not invite members of the public. Id. ¶¶16-18.

Contested Factual Questions Regarding Waiver of the Deliberative Process Privilege

The FAA asserts that it has not waived any deliberative process privilege. See Db at 13. Based on FAA admissions and strong circumstantial evidence, NJCAAN contests that factual assertion, and believes that the RTCA had continuing access to some of the FAA information

[1] The audit is also discussed in a House Report that accompanied an appropriations bill, H.R. 4475, 106th Cong., 2d. Sess. (May 17, 2000) (House Rep. 622), which states in relevant part:

> *RTCA support.*—The Radio Technical Commission for Aeronautics (RTCA, Inc.) serves as a `utilized' federal advisory committee subject to the legal requirements and oversight of the Federal Advisory Committee Act. Many years ago, Congress enacted the Advisory Committee Act to bring about more oversight, openness, and accountability for advisory committees. RTCA is unusual among federal advisory committees, since it is one of only two `utilized' advisory committees, and since a primary source of funding is the dues paid largely by industry members. Last year, Congress directed the Office of Inspector General to conduct a review of the FAA's arrangement with RTCA, to determine whether procedures were adequate to ensure openness, a balance of viewpoints, and an `arms length' relationship with industry. The Inspector General's review, recently completed, raises a number of serious concerns which require attention of the FAA. The Inspector General found that FAA's presence at RTCA meetings is so extensive that there is an appearance the agency is providing advice to itself.

and documents now claimed as privileged in this case. In particular, the few documents that are publicly available without discovery indicate that the Airspace Work Group had access to Project information and that the FAA shared sufficiently detailed plans for the Airspace Work Group to assess the technical capability of the alternative routes.

For example, minutes of a May 8, 2003, meeting of the Airspace Work Group state that the New York subgroup will review updated information on the Integrated Airspace plan (one of the FAA's four alternative routes in the Project) including benefit estimates and distance impacts, at a meeting the following week. Belzer Decl. ¶ 9, and Ex. 2, p. 1. In a December 8, 2003, aviation industry seminar, the FAA reported that it reviewed Project alternatives with the industry. Belzer Decl. ¶ 12 and Ex. 3. The report states that the FAA has "[c]ompleted user/industry review of the NY/NJ/PHL Metropolitan Airspace Alternatives." Id. Minutes of a January 7, 2004, Select Committee meeting report that the Airspace Work Group "has been developing four proposals but has determined that more work is needed. An effort to develop a fifth proposal will convene shortly." Belzer Decl. Ex. 4, pp. 1-2 (Agenda Item 3). And minutes of a September 9, 2004, meeting of the Airspace Work Group state that it "is expected that the [Airspace Work Group] will be re-chartered under the [Air Traffic Management Advisory Committee] and that the pending recommendations of the [Airspace Work Group] will be publicly discussed at this meeting." Belzer Decl., Ex. 7, p. 1 (emphasis added).

The FAA, in a March 26, 2004, quarterly presentation to Congress, stated that it had already received draft recommendations from the RTCA, that the RTCA's committees had already participated in the Project, and that the FAA expects additional recommendations

directly from the RTCA:

> Final recommendations from the RTCA group are expected in mid-April. These recommendations may result in either design modifications to current alternatives or the development of an additional alternative that will be followed by operational and environmental modeling.

Belzer Decl., Ex. 5, p. 9 (emphasis added). The involvement of RTCA was considered so important to the FAA that it delayed release of the draft environmental impact statement. Id. The presentation also notes that baseline and future no action preliminary noise analyses are complete. Id. As to the Integrated Airspace alternative, the FAA states that it is "in development" pending "input from RTCA." Id. p. 14. (The RTCA Federal Advisory Committee responsible for the Project did not issue formal, final recommendations to the AFAA until February 2005. Watrous Decl. ¶ 23.)

In September 2004, the FAA presented a background briefing on the Project to a French air traffic controller group at a Washington, D.C. conference. Belzer Decl. Ex. 6. A page in that presentation is a map entitled "Project Area Configuration Rules" for the "NY/NJ/PHL Metropolitan Airspace Redesign Project" and shows the geographic scope of the Project and affected airports. Id., p. 10

Finally, FAA Administrator Marion Blakely has stated that the FAA has provided identified routings and modeling directly to the aviation industry and the Airspace Work Group, with sufficient detail for industry representatives to assess the technical requirements and models on an informal basis:

> The FAA solicited input from the airline industry through RTCA to obtain technical knowledge and information pertaining to aircraft operations and airspace design. The airline industry provided a pilot's perspective on aircraft performance while in flight and advised airspace designers on the "flyability" of proposed routings under development. The aviation industry provided airspace designers with the technical information and insight to issues that may not be obvious from modeling to ensure that the

proposed routings are designed as efficiently as possible.

Belzer Decl., Ex. 9, p. 1 (emphasis added). The RTCA has stated that the FAA disclosed key, detailed elements of the Project to the Airspace Work Group on an ongoing basis since at least 2003:

> Before providing specific recommendations, it should be acknowledged that the NY/NJ/PHL Airspace Redesign team's work has been conducted in a highly cooperative and collaborative manner using the RTCA's Free Flight Select Committee Airspace Working Group. In early August 2003, the design team presented a briefing to the airspace users on the integrated design. Discussion on the design, in the form of questions and comments was held with the design team.

Id. at Attachment, p. 2 (emphasis added). Technical people working in a "highly cooperative and collaborative manner" would have to have access to interim study results. See Feder Decl. ¶ 7. It would be consistent with past practices for the FAA to have shared MITRE, Leigh Fisher, and other studies with carriers and other interested parties to obtain their feedback on data and outcomes. Feder Decl. ¶ 17.

Contested Factual Questions Regarding the Flow of Information Outside of FACA

The FAA contends that it has complied with FACA at all times. Db at 16-18. It further contends that NJCAAN's FACA claim is based on "unfounded allegations." Db at 4; Watrous Decl. ¶¶ 4, 16.

Based on the above other facts, NJCAAN further believes that the non-FACA subcommittees made specific suggestions for the airplane routes privately and directly to the FAA without adequate public vetting by the FACA committees. The few documents that are publicly available without discovery include many references to extensive and detailed alternative airplane routes that were proposed from the Airspace Work Group directly to the FAA, and also indicate that the FAA used the Airspace Work Group to review detailed proposals

that the FAA generated.

There is no indication in the record that relevant non-FACA committee recommendations were adequately vetted at the FACA committee level, despite assertions by the FAA that vetting occurred. Db. at 5. The RTCA did not provide notice or materials to the public before an Air Traffic Management Advisory Committee meeting on October 7, 2004, which was the first scheduled public meeting to discuss RTCA's formal recommendations on the Project. Belzer Decl. ¶ 19. Apparently, the non-FACA Select Committee had submitted a report to the FACA committee for that meeting, Watrous Decl. ¶ 21, which the public has never seen. At the October 2004 meeting, however, the RTCA eliminated any discussion of the Project, which was the last agenda item, and did not distribute any material on the Project. Belzer Decl., ¶ 19.

The RTCA rescheduled the public discussion of the recommendations for the Project to the February 25, 2005, Air Traffic Management Advisory Committee meeting. Belzer Decl., ¶ 20. The RTCA did not provide any information about the Project to the public before the meeting. Id. The RTCA presentation at that meeting included a single page with 14 bullet points of recommendation topics. Feder Decl., Ex. 2. The RTCA devoted only 10-15 minutes to presentation of the Project. Feder Decl., ¶ 6; Obrock Decl. ¶ 5. The FACA committee asked only a few questions at the most, did not deliberate, and did not vote on the recommendations in the public portion of that meeting. Feder Decl., ¶ 6; Obrock Decl. ¶ 6.

Despite these deficiencies, the RTCA apparently submitted five pages of formal, detailed recommendations to the FAA, and claims that the recommendations were adopted at the RTCA's February 25, 2005, meeting. Belzer Decl. Ex. 9, Attachment. The recommendations contain much more detail and additional proposals than the one-page, bullet-point list that the RTCA provided to the public at the February 25, 2005, meeting. In particular, the report by the RTCA

provides detailed recommendations regarding the Integrated Airspace plan, separation between airplanes, arrival and departure routes, airspace capacity and routes for a runway extension at the Philadelphia airport, and parallel arrival routes at Newark airport. Id. The recommendations also admit that the FAA had worked "in a highly cooperative and collaborative manner using the RTCA's Free Flight Select Committee Airspace Working Group" and had discussions at that non-FACA level years before anything was publicly vetted at the FACA level. Id. at Attachment, p. 2.

NJCAAN believes that non-FACA channels of communication are likely because the FAA's significant presence on the non-FACA subcommittees and working groups provides an opportunity for sharing information outside of public, formal channels. For example, the Airspace Work Group includes four FAA officials, two members of MITRE, an FAA consultant, and representatives of various airlines. Belzer Decl., Ex. 2, p. 2. The Select Committee also included four employees of the FAA and one employee of its consultant, MITRE corporation. Belzer Decl. Ex. 4, p. 4. One of the FAA representatives on the Select Committee is Mike Cirrillo, Vice President of System Operations, who has overall responsibility for the Project from the FAA's perspective. Id.; Watrous Decl., ¶ 23. The FAA's presence is slightly less on the FACA committee level, where two committee members are from the FAA, and one from its contractor MITRE. Belzer Decl. ¶ 18.

Non-FACA committee meetings also meet with greater frequency than the ostensibly public FACA meetings, indicating that the real work is done at the subcommittee level. The non-FACA Airspace Work Group and Select Committees met approximately on a monthly basis throughout the year, except in December. Belzer Decl. ¶¶ 10, 14. At the same time, the FACA Steering Committee met only three times in 2000 and twice each year from 2001 to 2003. Belzer

Decl. ¶ 18. Its successor, the Air Traffic Management Advisory Committee, met twice in 2004, and is scheduled to meet on a quarterly basis in 2005 and 2006. Id. The FACA committee meetings are typically three hours long and cover a great number of topics, with little time to devote to any one topic. Id.

The FAA has asserted that there was sufficient public process and opportunity to obtain information. See Watrous Decl. ¶¶ 16, 19-20, 23. That assertion is irrelevant to the FACA violations at issue in this case. Moreover, the assertion is not borne out by the facts. For example, NJCAAN submitted a written request for information on the Project and the subcommittee's recommendations before the October 7, 2004, meeting and at the February 25, 2005, meeting. Belzer Decl. ¶¶ 19, 20. Neither the RTCA nor the FAA has responded to NJCAAN's standing request for information as of October 12, 2005, almost eight months later. Id. At the February 25, 2005, meeting, the RTCA directed any additional inquiries about the Project to Mike Cirillo of the FAA. Belzer Decl., ¶ 21. Mr. Cirillo has not returned telephone calls requesting information or responded to a subsequent NJCAAN letter. Id.

ARGUMENT

The FAA moved for summary judgment on September 14, 2005. NJCAAN's FOIA claim focuses on the narrow question of whether the FAA properly withheld documents under the deliberative process privilege or should have redacted factual information, and whether the FAA waived any privilege that might apply. Material, contested facts relevant to both points render summary judgment inappropriate until both in camera review of the withheld documents and limited discovery is conducted about whether the FAA waived any privilege by disclosure to the RTCA and other third parties.[2] Finally, there are material, contested facts as to whether the FAA obtained recommendations directly from RTCA subcommittees outside of the public FACA process. For these reasons, NJCAAN respectfully suggests that the Court should deny the FAA's motion for summary judgment and allow discovery or, in the alternative, should grant a continuance of its deliberations on the motion until the necessary discovery is completed.

I. Overview of the Summary Judgment Standard in FOIA cases

Summary judgment requires the Court to find that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the affidavits and other papers opposing summary judgment set forth specific facts showing that there are genuine factual issues to be resolved, Fed. R. Civ. P. 56(e), or state reasons why further discovery must be had to determine whether such issues remain, Fed. R. Civ. P. 56(f), the Court should deny summary judgment. As the D.C. Circuit held, "an agency may not defeat its opponent's right to an evidentiary hearing on such an issue merely by filing an affidavit purporting to support a motion for summary judgment. Rather, 'the request may ....

[2] For some reason, the FAA's submissions deal at length with a claim not found in NJCAAN's complaint, namely that the FOIA search was insufficiently diligent. See Db at 7-9 (Point I); Keane Decl.; Lattimer Decl.; Paquin Decl.; Valerio Decl. Those materials are irrelevant.

produce countervailing evidence," and if any genuine issue of material fact remains, summary judgment is improper." Washington Post Co. v. United States Dep't of State, 840 F.2d 26, 29 (D.C. Cir. 1988), vacated on other grounds, 898 F.2d 793 (1990).

Materiality is informed by the underlying claims. FOIA requires federal agencies to disclose records to the public. 5 U.S.C. § 552(a). The statute "was enacted in furtherance of the belief that 'an informed electorate is vital to the proper operation of a democracy.'" Coastal States Gas Corp. v. United States Dep't of Energy, 644 F.2d 969, 974 (3d Cir. 1981) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). The obligation of the government to share records is subject to nine limited exemptions. 5 U.S.C. § 552(b). The government bears the burden of showing that requested material falls within a FOIA exemption. 5 U.S.C. § 552(a)(4)(B); Redland Soccer Club, Inc. v. Dep't of the Army of the United States, 55 F.3d 827, 854 (3rd Cir. 1995). In light of FOIA's overarching policy of disclosure, exemptions are to be construed "as narrowly as consistent with efficient Government operation." United States Envtl. Protection Agency v. Mink, 410 U.S. 73, 87 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965))

In FOIA cases, the Rule 56(f) standard requires record seekers to come forward with a showing of bad faith on the part of the agency or "tangible evidence" that an exemption does not apply. See Carney v. United States Dep't of Justice, 19 F.3d 807, 812-813 (2d Cir. 1994). Thus, where a non-moving party produced books and press accounts suggesting an exemption does not apply, summary judgment has been denied. Washington Post , 840 F.2d at 28.

Once that de minimis evidentiary threshold is met, the requesting party is typically entitled to limited discovery. In allowing limited discovery regarding the authenticity and completeness of the material produced by an agency, another District Court in this Circuit, citing

Third and other Circuit decisions, stated that

> limited discovery is generally permitted in FOIA cases, at least those not involving national security, because the government is in control of the relevant information. Church of Scientology v. IRS, 991 F.2d 560, 563 (9th Cir. 1993), vacated in part on other grounds, 30 F.3d 101 (9th Cir. 1994); see also Benavides v. DEA, 968 F.2d 1243, 1249-50 (D.C. Cir.), mod. on other grounds, 976 F.2d 751 (D.C. Cir. 1992). "[A]s a matter of basic epistemology, one obviously cannot know the facts one does not know," Hanover Potato Prods., Inc. v. Shalala, 989 F.2d 123, 129 (3d Cir. 1993), making it all but impossible without discovery for a FOIA plaintiff to know whether the government has complied with the statutory mandate.

Pennsylvania Dep't of Human Welfare v. United States, 1999 WL 1051963, *3 (W.D. Pa. Oct. 12, 1999). See also Murphy v. Fed. Bureau of Investigation, 490 F. Supp. 1134, 1136 (D.D.C. 1980) ("It is beyond question that discovery is appropriate and often necessary in a FOIA case."). In FOIA actions, discovery is particularly important because the government controls the information relevant to the validity of nondisclosure or partial disclosure. Schaffer v. Kissinger, 505 F.2d 389, 391 (D.C. Cir. 1974) (relying on Rule 56(f) to order discovery on the justification for confidential classification of State Department documents); American Broadcasting Companies, Inc. v. United States Info. Agency, 599 F. Supp. 765, 768 (D.D.C. 1984) (holding that Rule 56(f) motions shall be grated liberally where material facts are in possession of opposing party).

II. Material Contested Facts About Whether Documents are Privileged in Their Entirety or Contain Information that Must be Produced in Redacted Version, Can Only be Resolved by In Camera Review

The FAA withheld documents under the deliberative process privilege that is incorporated into FOIA's limited exception for "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). In order to qualify for the privilege, a document must precede a decision on agency policy and make a significant contribution to deliberations about policy

matters. See generally Mink, 410 U.S. 73. Under the deliberative process privilege, factual information must generally be disclosed, but materials incorporating officials's opinions are generally exempt. See id. at 87-91 (discussing distinction between fact and opinion).

The FAA has the burden of proving by a preponderance of the evidence that the limited exemption applies to each document withheld. 5 U.S.C. § 552(a)(4)(B); Schreiber v. Society for Savings Bancorp., 11 F.3d 217, 221 (D.C. Cir. 1993). An agency claiming an exemption under the deliberative process privilege "must present more than a bare conclusion or statement that the documents sought are privileged." Redland Soccer Club, 55 F.3d at 854.

A. Inadequacy of the Vaughn Index to Justify Withholding Documents

Agencies withholding documents under the deliberative process privilege must provide a "clear explanation" why each document withheld is "putatively exempt from disclosure." Schulz v. Hughes, 250 F. Supp.2d 470, 474-75 (E.D. Pa. 2003) (quoting Hinton v. United States Dep't of Justice, 844 F.2d 126, 129 (3d Cir. 1988)). The Third Circuit has explained that agencies must make a strong showing to withhold documents:

> A withholding agency must describe each document of [sic] portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after information . . . Categorical description of redacted materials coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.

Davin v. United States Dep't of Justice, 60 F.3d 1043, 1051 (3d Cir. 1995) (quoting King v. United States Dep't of Justice, 830 F.2d 210, 233-34 (D.C. Cir. 1987)) (emphasis in the original).

The FAA had initially taken a rather casual approach to this obligation. The FAA's initial response did not even attempt to justify the exemption, let alone describe the specific consequences of disclosure. Complaint, Ex. B. The FAA's second response was scarcely improved, consisting of a quote of the statutory standard, citation to a regulation that does not

exist, and the conclusory statement that "the documents are subject to the deliberative process privilege." Complaint, Ex. E. The FAA also provided a list of 34 separate documents that it claimed were exempt under the deliberative process privilege, without describing the improper consequences of disclosing the withheld information. Id. Several documents submitted by NJCAAN and the Port Authority of New York and New Jersey were listed, id., and those documents are obviously not deliberative since they were not even produced by the FAA. By producing three of the withheld documents on September 13, 2005, the day before it filed its motion, the FAA admitted that its initial classification was too broad. See McCarthy Decl., ¶ 15 and Index Nos. 1, 3 and 4.

With its summary judgment motion, the FAA finally made an attempt to justify the deliberative process exemption by attaching a Vaughn Index to the Declaration of Mary McCarthy. The Vaughn Index is deficient to carry the FAA's burden. Most obviously, it does not cover all 34 documents that were listed in the FAA's May 2004 response. See Complaint, Ex. E. The Vaughn Index attached to Declaration of Mary McCarthy lists 26 items (although the index count goes to Item 27, Item 19 is missing). See McCarthy Decl., Attachment. Accordingly, at least eight documents were withheld but omitted from the Vaughn Index. As to those documents, there is no question that the FAA has failed to justify withholding them, and should produce them to NJCAAN.

As to the other 26 documents that are listed in the Vaughn Index, the stated justifications for withholding are categorical boilerplate and do not state, with specificity, why disclosure will harm the government's interests. The FAA states that disclosure will harm its interests because the disclosure of data and facts would indirectly reveal agency decision-making. In its argument, the FAA relies upon National Wildlife Federation v. United States Dep't of the Interior, 861 F.2d

1114 (9th Cir. 1988). In that case, the Court found that prospective assessments of the underlying facts – i.e., projected levels of various activities, estimated costs and benefits for future actions, and estimates as to the forest's maximum capacity – would reveal "the issues that the Forest Service considers important and provide telling clues as to the Forest Service's proposed course of action in addressing the conflicting demands on the Forest's resources." Id. at 1121.

The facts in this case are fundamentally different from those at issue in National Wildlife Federation. Most of the withheld information is from past years and represent completely closed data sets, including raw census data from the census block population, census block centroids, maps, historical airport arrival and departure figures and other information, . Supra, pp. 5-6. But areas subject to changes in over-flight patterns should already have been defined as part of the scoping process, as should the geographic area to be examined for impacts. Feder Decl. ¶¶ 9, 12-14. Since the scoping phase was completed prior to the request for information by NJCAAN, the census tracts and areas affected by noise comprises factual data, not a policy choice to be deliberated. Id. Other withheld information includes noise analysis for the no-action alternative. McCarthy Decl., Attachment, p. 18. These data sets are factual descriptions and analyses of the noise exposure for the no action alternative, i.e., a compilation of what is flying now. Feder Decl., ¶ 16. Regardless of the ultimate agency decision on it preferred route system, the noise analysis results for the no-action alternative will remain the same. Id. In summary, here the historical data and other factual information themselves contain no advice, recommendations or policy judgments and should be disclosed.

In similar circumstances, courts have held that such documents must be disclosed. In Petroleum Info. Corp. v. United States Dep't of Interior, 976 F.2d 1429, 1431 (D.C. Cir. 1992)

(Ruth Bader Ginsburg, J.), the court ordered the disclosure of the location and acreage of certain land parcels contained in a portion of a computer database system then under development. The D.C. Circuit found that the Bureau compiled the database by transferring existing information from public documents to the new database system and making corrections to that data as the process unfolded. Id. at 1432. Since the estimates and data about public land did not involve "forecasts" or "judgment calls," id. at 1438, disclosure would not harm the Government's interests, id. at 1435.[3] In summary, here the historical data and other factual information themselves contain no advice, recommendations, policy judgments, or analyses that would contribute to the FAA's ultimate decisions in the Project.

NJCAAN also seeks modeling reports that involve some manipulation of raw data to produce factual results. Even extensive manipulation of raw data must be disclosed if the result is essentially factual. Thus, courts have held that the statistically adjusted census data was not protected under the deliberative process privilege, even though it was the "product of a complex and elastic statistical model . . . ." Carter v. United States Dep't of Commerce, 307 F.3d 1084, 1091 (9th Cir. 2003). The advisory committee report and adjusted figures that were released included detailed and technical information about the adjusted data, including specifications for methodology, quality indicators, equations, criteria about the usefulness of unadjusted data and undercount percentages. Id. at 1087. See also Assembly of California v. United States Dep't of

[3] See also Southwest Ctr. for Biological Diversity v. United States Dep't of Agriculture, 170 F. Supp. 2d 931, 941 (D. Ariz. 2000) (holding that "raw research data" underlying a government report on possible endangered species not deliberative because "[w]hatever [the government] might subsequently do with the data, the data itself does not expose the deliberative process"); Greenpeace v. Nat'l Marine Fisheries Serv., 198 F.R.D. 540, 544 (W.D. Wash. 2000) (holding that expert analysis of scientific data on groundfish fisheries was not deliberative because to be protected "expressions of expert opinion and professional judgment must relate to the exercise of policy-oriented judgment"); National Sec. Archive v. Fed. Bureau of Investigation, 759 F. Supp. 872, 880 (D.D.C. 1991) (holding that briefing book prepared by agents to assist in congressional testimony not deliberative because its "focus was upon reporting facts, not weighing policies").

Commerce, 968 F.2d 916, 923 (9th Cir. 1992) (reaching the same conclusions for the 1990 census). Like the studies at issue in those cases, the results, as well as the data and other technical underpinning, of the MITRE Corp., Lee-Fisher Associates and other modeling reports sought by NJCAAN are essentially factual and should be released.

The FAA also argues in its Vaughn Index that the shifting pattern of underlying facts might reveal agency deliberations. McCarthy Decl. Attachment, pp. 1-2, 5-19. This theory, if accepted by the court, would impose no limit on the deliberative process privilege, and the limited exception would become so indiscriminate that it would swallow the general rule that facts should be disclosed. Facts, observations or other data do not change once recorded, and disclosure cannot change the fact of their existence, which is why the law favors their disclosure.

Finally, the FAA argues that the release of the records could somehow cause confusion in the minds of the public. See, e.g., McCarthy Decl., Attachment pp. 1-6, 8-18. Again, this unsupported assertion, if accepted, would create a boundless exemption to FOIA's principle of open government. It is also contradicted by the fact that NJCAAN seeks the records to further public participation in and understanding of the Project.

B. Failure to Produce Facts in Redacted Documents

FOIA mandates disclosure of factual and other non-deliberative material that can be segregated from deliberative material. See 5 U.S.C. § 552(b). The Supreme Court held that memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government. Mink, 410 U.S. at 87-88. Even the Department of Transportation's own policy states that it will "make its records available to the public to the greatest extent possible, in keeping with the spirit of FOIA . . . [including]

providing reasonably segregable information from documents that contain information that may be withheld." 49 C.F.R. § 7.13(a).

FAA admits that withheld documents contain factual data. Db at 13. It refuses to produce any redacted versions of these documents, however, on the theory that Project participants "need to be free to criticize the preliminary data to arrive at final decisions with regard to the reliability of the data." Id. This is insufficient to justify the FAA's burden of justifying withholding all portions of the requested reports.

C. In Camera Review is Required to Assess the FAA's Privilege Claims

Given these outstanding questions, NJCAAN has requested that the Court undertake in camera review of the relevant documents to determine whether they are pre-decisional and non-factual or not, and whether the materials were properly redacted.

FOIA explicitly states that the district court may conduct an in camera review of the government records withheld by an agency claiming a FOIA exemption. 5 U.S.C. § 552(a)(4)(B). The Supreme Court has held that in camera review of the withheld documents is appropriate to determine whether they are pre-decisional and non-factual, and whether the materials were properly redacted. Kerr v. United States Dist. Court for Northern Dist. of Cal., 426 U.S. 394, 405-06 (1976); United States Dep't of Air Force v. Rose, 425 U.S. 352, 373-377 (1976). The Third Circuit has endorsed in camera review as an appropriate mechanism for resolving FOIA disputes. See Paterson v. Fed. Bureau of Investigations, 893 F.2d 595, 599 (3rd Cir. 1990); Redland Soccer Club, 55 F.3d at 855. To prevent in camera review, the government must establish with reasonable detail why the materials are privileged, that the agency's claim of exemption is not opposed in the record, and that there is no indication of bad faith on the part of the government. Manna v. United States Dep't of Justice, 832 F. Supp. 866, 874 (D.N.J. 1993)

(citing Center for Auto Safety v. United States Envtl. Protection Agency, 731 F.2d 16, 22 (D.C. Cir. 1977). The government has not met its burden. Among other things, the FAA's claim of exemption is opposed on the record and the FAA's initial stonewalling of NJCAAN and admittedly overbroad Vaughn Index show bad faith.

III. Material Contested Facts About Whether any Deliberative Process Privilege was Waived through Selective Disclosure to Industry Groups can only be resolved through Discovery

Selective disclosure is contrary to FOIA and acts as a waiver of the deliberative process privilege, for any shared records are no longer solely inter- or intra-agency documents. See Mobil Oil Corp. v. Envtl. Protection Agency, 879 F.2d 698, 700-01 (9th Cir. 1989) ("Voluntary disclosure of documents, either in whole or in part, to third parties has sometimes been held to waive FOIA exemptions for those documents.") (citations omitted); Shell Oil Co. v. Internal Revenue Service, 772 F. Supp. 202, 209 (D. Del. 1991) (authorized disclosure to non-Federal party waives deliberative process privilege, whether or not disclosure is denominated as confidential); Clark v. Township of Falls, 124 F.R.D. 91, 93-94 (E.D. Pa. 1988) (municipality waived any claim of executive privilege by prior disclosure); Nissen Foods v. NLRB, 540 F. Supp. 584, 586 (E.D. Pa. 1982).[4] If the FAA shared data or other facts in the studies with parties outside the Federal Government, including FACA committees or non-FACA subcommittees and working groups at the RTCA, that selective disclosure would have waived any privilege for intra- or inter-agency communication.

NJCAAN has the initial burden of pointing to specific evidence of disclosure in the

[4] See also Afshar v. Department of State, 702 F.2d 1125, 1133 (D.C. Cir. 1983); City of Virginia Beach, Va. v. United States Dep't of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) (agency may waive deliberative process privilege through voluntary, authorized release of material to a non-governmental recipient); Mead Data Central, Inc. v. Dep't of the Air Force, 566 F.2d 242, 253, 260-62 (D.C. Cir. 1977) (the deliberative process privilege may be waived if the information contained in the documents has been disclosed to third parties).

public domain. See, e.g., Assassination Archives and Research Ctr. v. Cent. Intelligence Agency, 334 F.3d 55, 59 (D.C. Cir. 2003); Afshar, 702 F.2d at 1130. In meeting that obligation, NJCAAN has provided to the Court information that the FAA disclosed relevant information and documents regarding the Project to RTCA committees, subcommittees and working groups. The few publicly-available documents indicate that the RTCA worked on redesign issues and had access to the records sought, in both FACA and non-FACA committees, that that the Airspace Work Group had access to Project information, that the FAA shared more that mere concepts with the Airspace Work Group to develop into its own proposals, and that the FAA used the Airspace Work Group to review detailed proposals that the FAA generated. See supra, pp. 6-7, 8-10.

For example, Item 27 on the FAA's Vaughn Index is a draft 2003 MITRE operational analysis and modeling results for the various airspace alternatives. See McCarthy Decl. Attachment p. 19; Feder Decl. ¶ 17. This is a scientific study, conducted by MITRE, on the various airspace designs. The no-action and ocean routing alternatives were fully defined by that time. The report was likely shared with RTCA subgroups due to the "highly cooperative and collaborative" nature of the joint work of the FAA with the RTCA's Airspace Work Group. The preliminary analysis results for the project alternatives would be, after the alternatives themselves, the most basic information to share if one were working with a group in a "highly cooperative and collaborative" manner.

The FAA admissions and other circumstantial evidence cited above strongly suggest that RTCA's work on the Project has involved selective access to some of the FAA information and documents now claimed as privileged in this case, including references to extensive and detailed alternative airplane routes proposed directly from the Airspace Work Group to the FAA. Indeed,

the RTCA President admits that the FAA made power point presentations to the Airspace Work Group. Watrous Decl., ¶ 14. Despite Mr. Watrous' assertion that these presentations were drafts and were not provided in paper or electronic format, the presentation nonetheless constituted a waiver. Shell Oil, 772 F. Supp. at 211 (holding that the government waived deliberative process privilege when employee orally read from draft notice of proposed rule at public meeting of government and industry officials).

Definitive proof, however, cannot properly be established through the affidavits submitted by NJCAAN in opposition to the FAA's summary judgment motion. See Fed. R. Civ. P. 56(f). Only additional discovery will provide information necessary to ascertain whether the FAA and its members on the non-FACA subcommittees provided modeling reports, underlying data and other information to aviation officials and other members of those committees in order for them to make recommendations to FAA.

Discovery is appropriate in waiver cases because "[t]he inquiry into whether a specific disclosure constitutes waiver is fact specific." Mobil Oil Corp., 879 F.2d at 700. Collectively, the documents produced by NJCAAN far exceed the threshold for discovery set forth in the few reported cases on waiver of FOIA exemptions. North Dakota v. Andrus, 581 F.2d 177, 180-82 (8th Cir. 1978) (finding waiver where the government voluntarily disclosed records sought to a third party); Mead Data Central, 566 F.2d at 253 (same); Shell Oil, 772 F. Supp. at 209. Only the complete absence of documents or corroborating proof of waiver can foreclose further discovery. Mobil Oil, 879 F.2d at 700-01; Exxon Corp. v. Federal Trade Comm'n, 663 F.2d 120, 127-28 (D.C. Cir. 1980); see Nissen Foods, 540 F. Supp. at 586-87.

Under this case law, once plaintiffs make a de minimis evidentiary showing, discovery of the breadth of prior disclosures to non-governmental entities or individuals is appropriate to

determine the scope of any waiver. NJCAAN seeks only limited discovery of third-party meetings and disclosures – including all documents provided by the FAA to the Airspace Work Group, other RTCA groups and their members and discussions of meetings at which FAA representatives were present – to determine whether the FAA has waived the deliberative process privilege by sharing withheld documents on a selective basis.

IV. Material Contested Facts as to whether the non-FACA Subcommittees are Provided Recommendations to the FAA Directly or through FACA Committees

FACA requires advisory committees to make public all reports, records or other documents that they receive or review. 5 U.S.C. App. 2, § 2(a), § 10(b). In addition, FACA regulations provide that "[i]f a subcommittee makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee, then the subcommittee's meetings must be conducted in accordance with all openness requirements [of FACA]." 41 C.F.R. § 102-3.145 (emphasis added).

The evidence that NJCAAN has already produced shows, at a minimum, that there are discoverable issues regarding whether the non-FACA subcommittees made specific suggestions for the airplane routes directly to the FAA without adequate vetting by the FACA committees. Supra, pp. 11-13. There is no indication in the record that recommendations from non-FACA subcommittees and work groups were vetted at the FACA committee level. Id. pp. 11-12. Indeed, the relevant FACA committee never deliberated or voted on the formal recommendations that it ultimately provided to the FAA. Id. Under the FAA's own regulations, as well as the governing law, the FAA should disclose all of the underlying reports from non-FACA committees that were ever provided to the agency or to the FACA committee

Furthermore, the record shows that the FAA has shared sufficiently detailed plans that the

aviation industry could provide technical and other feedback before the formal, FACA recommendations. Id. p. 8. Extensive, informal channels of communication are consistent with the fact that the non-FACA subcommittees and work groups met with much greater frequency that the FACA committee, and the fact that FAA officials were extensively involved in those non-FACA groups. Id. p. 12-13. It strains credulity to assume that FAA officials did not share or obtain recommendations and information on their RTCA committees. Even David Watrous admits that the FAA made at least one presentation on the Project to the Airspace Work Group. Watrous Decl. ¶ 14.

The FAA argues that the facts of this case are closer to National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524, 529 (D.D.C.), aff'd 711 F.2d 1071 (D.C. Cir. 1983), than Association of American Physicians & Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993). Db at 18. The FAA would distinguish these cases on the ground that in National Anti-Hunger the subcommittees were not empowered to provide advice to the government whereas it was an open question in Association of American Physicians. But surely that purported distinction begs the question of whether the advice actually flowed from the working group to the government so as to bring it under the requirements of FACA, a question that only discovery can answer. Indeed, in National Anti-Hunger the court evaluated deposition testimony before holding that "[t]here is no reliable evidence that the task forces ... have actually started advising agencies on policy recommendations." 557 F. Supp. 524, 529-30. In Association of America Physicians, by contrast, the D.C. Circuit held that "[w]e simply have insufficient material in the record to determine the character of the working group and its members" and therefore "further proceedings, including expedited discovery, are necessary before the district court can

confidently decide whether the working group is a FACA committee." 997 F.2d 898, 916. On remand, the District Court granted plaintiff's motion to compel interrogatories and production of documents. Association of American Physicians & Surgeons v. Clinton, 837 F. Supp. 454 (D.D.C. 1993).

Similarly, in the instant only discovery will answer to whether the recommendations on the Project have not been vetted in any meaningful way in the higher, FACA committees, or whether the non-FACA committees provided advice directly to the FAA.[5]

CONCLUSION

For these reasons, NJCAAN respectfully suggests that the Court should deny the FAA's motion for summary judgment and allow discovery, or in the alternative should grant a continuance of its deliberations on the motion until the necessary discovery is completed. NJCAAN also requests oral argument on the motion.

Dated: Newark, New Jersey
October 14, 2005

/s Carter H. Strickland, Jr.

CARTER H. STRICKLAND, JR. (CS7672)
Rutgers Environmental Law Clinic
123 Washington Street
Newark, New Jersey 07102
(973) 353-5695
Attorneys for Plaintiff

[5] The FAA's submissions also suggest that there were alternative opportunities to obtain information. See Watrous Decl. ¶ 16, 19-20, 23. That is irrelevant, and it is also not borne out by the facts. See supra p. 13.