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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

New Jersey Coalition Against Aircraft Noise *Plaintiff(s)*, v. Federal Aviation Administration *Defendant(s)*	Hon. William G. Bassler *Civil Action No.* 04-5555 (WGB)

Memorandum of Law and Statement of
Uncontested Facts in Support of the
Defendant's Motion for Summary Judgement

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PRELIMINARY STATEMENT

The following Memorandum of Law is submitted by the defendant Federal Aviation Administration in support of its motion for summary judgement. As is demonstrated in the affidavits of Moira Keane, Freddy Valerio, Thomas Latimer, Tracy Paquin and Mary McCarthy, the agency's search for records responsive to plaintiff's Freedom of Information Act request was a reasonable one, and the agency's assertion of privilege as to certain of the responsive documents should be upheld. Furthermore, as established by the affidavit of David Waltrous, there has been no violation of the Federal Advisory Committee Act, and none of the documents plaintiff seeks were shared with RTCA or its committees. Accordingly, the Court should grant the FAA's motion for summary judgement.

STATEMENT OF UNCONTESTED FACTS

THE FOIA CLAIM

According to plaintiff's complaint, on approximately June 16, 2003, plaintiff New Jersey Coalition Against Aircraft Noise ("NJCAAN") submitted to the Federal Aviation Administration ("FAA") a request for documents pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Complaint, Exh. A. The subject of the FOIA request was the FAA's "New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign Project" ("Project"). The purpose of the Project is to study alternatives to the current airspace design to determine whether modification of the airspace design could lead to more efficient and effective air transportation into and out of the New York, New Jersey and Philadelphia area. See, generally, http://aea.faa.gov/airspace/NYNJPHL_Airspace _Redesign/. Once the study is completed and alternatives identified, the FAA must publish a Draft Environmental Impact Statement ("DEIS") for public review and comment. Once the DEIA is published, the final versions of the studies that the FAA relied upon will be available to the public. Declaration of Mary McCarthy ¶¶ 16-19.

Mr. Freddy Valario, the FOIA Coordinator with the Quality Assurance Staff for the Eastern Terminal Services Unit, was responsible for responding to the plaintiff's FOIA request. Declaration of Freddy Valario ¶¶ 1, 3 ("Valario Dec."). Mr. Valario conducted a search for any responsive documents within the Quality Assurance Staff. In addition, he sent copies of the FOIA request to the Airspace

Branch of the Eastern Region office of the FAA, which was the branch responsible for the Project, and also to the Flight Procedures Branch of the Eastern Region office of the FAA, which is responsible for instrument approach procedures and conceivably could have had correspondence with airlines, and also to the Washington D.C. headquarters office of the FAA ("FAA HQ"). Valario Dec. ¶¶ 5-7. Neither the Flight Procedures Branch nor FAA HQ had any responsive documents. Declaration of Thomas L. Latimer ("Latimer Dec."); Declaration of Tracy Paquin ("Paquin Dec.").

Moira Keane, an Environmental Specialist with the Airspace and Procedures Branch responded to Mr. Valario's request. She conducted a search of the Airspace Branch files and found a number of responsive documents. Those documents that were discloseable were sent to Mr. Valario, and those that were privileged were described to Mr. Valario. Declaration of Moira Keane ¶¶ 1-5 ("Keane Dec"). She also informed Mr. Valario that she did not find any documents responsive to FOIA requests numbered 3 and 9. Keane Dec. ¶¶ 7-14.

Plaintiff alleges that 106 pages of documents responsive to its request were delivered approximately November 24, 2003. Complaint ¶ 17 and Exh. B. On or about December 2, 2003, Mr. Valario informed plaintiff that the other offices to which the FOIA request was sent reported having no responsive documents. Complaint ¶ 18 and Valario Dec. ¶ 11. On December 19, 2003, plaintiff filed an administrative appeal of part of the decision. Complaint Exh. C. The FAA remanded the request to the Eastern Region for reconsideration. Complaint Exh.

D. On May 21, 2004, the Eastern Region responded to the remand, maintaining its original finding that it had no further non-privileged records, and providing a list of the titles of the documents that were deemed privileged pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), the deliberative process privilege. Complaint Exh. E. The documents are, generally, preliminary or draft portions of studies that are being conducted as a preliminary to the Draft Environmental Impact Statement. An in-depth discussion of each such document is attached to the McCarthy Declaration. The Plaintiff filed an administrative appeal from the remand response. Complaint Exh. F.

THE FACA CLAIM

Plaintiff alleges, in the Second Claim in the complaint, that the work of certain subcommittees of chartered Federal Advisory Committees ("FAC") violated the Federal Advisory Committee Act by meeting privately before presenting their findings to the FAC. Plaintiff further alleges, without support, that the FAA shared privileged documents with the committees and subcommittees. However, plaintiff's unfounded allegations notwithstanding, the subcommittees are not FACs, they do not make recommendations to the FAA, their work was reported to and deliberated upon by the chartered FAC in public meetings, and that the FAA did not share any privileged document with the FAC. Declaration of David Waltrous. ("Waltrous Dec.)

RTCA, Inc., is a Federal Advisory Committee chartered by the FAA, as is the Air Traffic Management Advisory Committee of RTCA, formerly known as the Free Flight Steering Committee ("The Committees"). Waltrous Dec. ¶ 2–6. The Committees from time to time utilized subcommittees to explore particular issues and report back to the Committees in public sessions. The subcommittees were not empowered to provide recommendations to the FAA, and their meetings were not public, though summaries of their work were published on RTCA's website. Waltrous Dec. ¶ 7-23. The subcommittee work was reported to the Committee in public session, and plaintiff's representative was present during that public session and was asked whether he or she had any comment. The representative did not. Waltrous Dec. ¶ 21-23.

POINT 1

THE AGENCY CONDUCTED A
REASONABLE SEARCH IN RESPONSE
TO PLAINTIFF'S FOIA REQUESTS AND IS
THEREFORE ENTITLED TO SUMMARY JUDGMENT

A. STANDARD FOR SUMMARY JUDGMENT

In order to prevail on a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *White v. ABCO Engineering Corp.*, 221 F.3d 293, 300 (2d Cir. 2000). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson,* 477 U.S. at 247-48 (emphases omitted).

Summary judgment is the preferred method of resolving cases brought under FOIA. Indeed, most actions brought under the FOIA are resolved in this fashion. See, e.g., *Miscavige v. IRS*, 2 F. 3d 366, 369 (11th Cir. 1993) (FOIA cases should be handled on motions for summary judgment once the documents in use are properly identified). Summary judgment should be freely granted where as here there are no material facts at issue and the agency is entitled to judgment as a matter of law. *See, Alyeska Pipeline Service Co. v. EPA*, 856 F. 2d 309, 314-315 (D.C. Cir. 1988); *Military Audit Project v. Casey*, 656 F. 2d 724, 738 (D.C. Cir.

1981).“To prevail on a motion for summary judgment in a FOIA case, the defending agency bears the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA.” (citations omitted) *Tarullo v. United States Department of Defense*, 170 F. Supp.2d 271, 274 (D.Conn. 2001).

B. THE FAA HAS CONDUCTED A REASONABLE AND ADEQUATE SEARCH

The law requires that agencies confronted with FOIA requests conduct a “reasonable” search for responsive records. *Oglesby v. United States Department of the Army*, 920 F. 2d 57, 68 (D.C. Cir. 1990); *Weisberg v. United States Department of Justice*, 705 F. 2d 1344, 1350-51 (D.C. Cir. 1983); *Cleary Gotlieb Steen & Hamilton v. Dept. of Health, et al.*, 844 F. Supp. 770, 776 (D.D.C. 1993). “The fundamental question is not whether there may exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.” *Weisberg v. United States Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The search for records only need be reasonable. It does not have to be exhaustive. *Miller v. U.S. Department of State*, 779 F. 2d 1378, 1383 (8th Cir. 1986).

The agency can establish the reasonableness of its search by affidavit if they are relatively detailed, non-conclusory, and made in good faith. *Weisberg*, 745 F.2d at 1485. Summary judgment is appropriate where the agency submits a

"'reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched'", unless "a review of the record raises substantial doubt" about the adequacy of the search. *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999), quoting *Oglesby v. Dept. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

FOIA does not require that an agency search every division or field office in response to a FOIA request when responsive documents are likely to be located in a limited number of places. *Marks v. Dept. of Justice*, 578 F.2d 261, 263 (9th Cir. 1978). "When a request does not specify the locations in which an agency should search, the agency has discretion to confine its inquiry to a central filing system if additional searches are unlikely to produce any marginal return; in other words, the agency generally need not "search every record system.'" *Campbell v. U.S. Dept. of Justice,*164 F.3d 20, 28 (D.C.Cir. 1998), quoting *Oglesby,* 920 F.2d at 68. "The agency is not required to speculate about potential leads" to the location of responsive documents, *Kowalczyk v. Dept. of Justice*, 73 F.2d 386, 389 (D.C.Cir. 1996), although it is required "to follow through on obvious leads to discover requested documents." *Valencia-Lucena*, 180 F.3d at 325. "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Safecard Serv., Inc. v. Securities & Exchange Comm'n*. 926 F.2d 1197, 1201 (D.C.Cir. 1991).

The Declarations of Freddy Valario, Thomas Latimer, Tracy Paquin and Moira Keane demonstrate that the agency's search for responsive records was reasonable. Mr. Valario searched for responsive records in the Quality Assurance office, and made requests to the office with direct authority over the Program that was the subject of the FOIA request, and requested that a search be conducted there. Additionally, he sent the request to another Eastern Region office and Washington, D.C., headquarters. From two of those offices he receive replies that they had no such documents, Valerio Dec. ¶¶ 7-11; Latimer Dec.; Paquin Dec. Moira Keane, the Environmental Specialist actually working on the Project that was the subject of the FOIA request, searched her own files, disclosed 106 pages of responsive documents, and withheld additional documents determined to be privileged. Based on her personal knowledge, she was aware that the agency did not have two of the categories of requested documents, and she reported that fact to Mr. Valario. Keane Dec. ¶¶ 7-14. With respect to documents that may have been received prior to her employment the Air Traffic Division, Ms. Keane conducted a search of the files where any such documents would be maintained, and found none. Keane Dec. ¶ 8. After conducting a search Thomas Latimer concluded that his office has no relevant documents. Latimer Dec. ¶ 5-6, nor did FAA HQ. Paquin Dec. ¶ 1-6.

It is respectfully submitted that the scope of the agency's search is reasonable as a matter of law, and summary judgement should be granted on plaintiff's claim.

POINT II

THE DOCUMENTS THAT WERE WITHHELD
FROM DISCLOSURE ARE PRIVILEGED

Plaintiff's FOIA request involves the FAA's "New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign Project" ("Project"). The purpose of the Project is to study alternatives to the current airspace design to determine whether modification of the airspace design could lead to more efficient and effective air transportation into and out of the area. See, generally, http://aea.faa.gov/airspace/NYNJPHL_Airspace_Redesign/. The FAA is in the process of preparing a draft environmental impact statement regarding the Project. Declaration of Mary McCarthy ¶¶ 16-18 ("McCarthy Dec.). The purpose of the environmental impact statement is to assess the potential environmental impacts resulting from the proposed modifications to air traffic routings under consideration. See, http://www.epa.gov/fedrgstr/EPA-IMPACT/2001/January/Day-222/i1859.htm. The process of developing the draft environmental impact statement requires the agency to develop alternative courses of action for airspace re-design, assess the environmental impacts of the alternatives and publish a draft environmental impact statement for public review and comment. After considering public comments, a preferred alternative will be identified, and a final environmental impact statement, along with a Record of Decision, will be published. See, http://aea.faa.gov/airspace/NYNJPHL_Airspace _Redesign/images/PreScoping_Newsletter%202.PDF at p. 4. McCarthy Dec. ¶ 19.

The FAA identified 27 documents it determined to be responsive to plaintiff's FOIA request, but subject to the Deliberative Process Privilege pursuant to 5 U.S.C. § 552(b)(5). Those documents were described in general terms to plaintiff in response to its FOIA administrative appeal, and plaintiff was informed that they were withheld pursuant to the deliberative process privilege. See, Complaint, Exh. E.

A. THE DELIBERATIVE PROCESS PRIVILEGE

FOIA requires a federal agency to disclose records to a requester, subject to nine exemptions. 5 U.S.C. § 552(a), (b). The agency bears the burden of proving by a preponderance of the evidence that a responsive document falls within the claimed objection. 5 U.S.C. § 552(a)(4)(B).

Exemption 5 exempts from disclosure communications that are "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)("Exemption 5"). Documents reflecting the deliberative or policy-making processes of the agency are exempt from disclosure pursuant to exemption 5. *E.P.A. v. Mink*, 410 U.S. 73, 86-86, 93 S.Ct. 827, 835-36 (1973).

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussions among those who make them within the Government.

Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9, 121 S.Ct. 1060, 1066 (2001).

In order to qualify for the privilege, a document must be both predecisional and deliberative. A document is predecisional when it is actually antecedent to the adoption of an agency policy and deliberative when it is actually related to the process by which policies are formulated. *Enviro Tech International v. U.S. E.P.A.*, 371 F.3d 370, 375 (7th Cir. 2004)(documents prepared to assist the EPA in preparing a recommendation for workplace exposure limit for chemical held privileged).

B. THE SUBJECT DOCUMENTS ARE PRIVILEGED

The documents withheld from disclosure in this case are clearly predecisional, because the final decision, release of the draft environmental impact statement and publication of the final version of the studies relied upon in formulating the draft environmental impact statement, has not been made, nor has a final draft environmental impact statement been completed. They are deliberative, because review of the documents, and comparison of early versions with later versions, will necessarily reveal the development of the agency's thinking with respect to the airspace redesign study and reveal the results of agency deliberation with respect to the relative weight it gave to the various factors under consideration.

As demonstrated by the Declaration of Mary McCarthy, the 24[1] the documents are, generally, preliminary or draft portions of the study that is being conducted as a preliminary to the Draft Environmental Impact Statement. The draft documents would tend to reveal the agency's thought processes in designing the study area for the Airspace Design Project by disclosing ideas that were considered but then possibly rejected in deciding how to conduct the study. The privileged documents contain selected factual data defining the scope of the study area, the populations selected and the airports selected for inclusion in the study. The documents also contain preliminary projections of airspace use, and preliminary drafts of noise analyses, all of which are subject to change depending upon the discussions among project participants. Project participants need to be free to criticize the preliminary data to arrive at final decisions with regard to the reliability of the data and the design of the study to be performed, and should be free to assess the study to determine the alternatives to be considered in the draft environmental impact statement.

A factually similar dispute was decided in *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114 (9th Cir.1988). In *Natonal Wildlife*, a FOIA requester sought access to the preliminary "forest plans" and drafts and comments

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[1] The FAA originally designated 27 documents privileged. Upon further review, Ms. McCarthy has determined that three such documents were classified in error, and the agency has revoked its claim of privilege as to the documents numbered 1, 3 and 4 and disclosed those documents to plaintiff. McCarthy Dec. ¶ 15, and attachment.

regarding a Forest Service environmental impact statement. After reviewing the documents *in camera* the Court held them to be privileged. The Court of Appeals affirmed. In doing so, the Court noted that the nub of the deliberative process privilege is the effect that disclosure would have on the *process.* "Accordingly, the deliberative process privilege has been held to cover all 'recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency,' as well as documents which would 'inaccurately reflect or prematurely disclose the views of the agency.' *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C.Cir. 1980)." *Id.* at 1118-19. In this matter, release of the documents would prematurely disclose preliminary opinions with respect to the scope of the study, since the scope of the study has not yet been finally determined. In addition, disclosure would inaccurately reflect the views of the agency, because the scope of the study area is still subject to ongoing debate within the agency, and no final decision has been made which reflects agency, as opposed to individual employee or consultant, opinion.

The problem with premature disclosure of preliminary opinions or drafts of evolving documents is that, in the process of forming a final opinion, a policymaker may alter his view of the relevancy of certain facts and their impact upon the final policy. "Subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent." *Id.* at 1120. Furthermore, the disclosure of revisions of draft

documents under consideration before the final study plan is completed would tend to reveal the decision-making process itself. *Id.* at 1119; *City of Virginia Beach, Va. v. United States Department of Commerce*, 995 F.2d 1247, 1256 (4th Cir. 1993) (holding "[t]he [district] court failed, however, to examine the documents closely to prevent the City from 'uncover[ing] any discrepancies between the draft[s]' and the final letters, which would reveal the agency's deliberations," quoting *National Wildlife,* 861 F.2d at 1122).

It is therefore respectfully submitted that the District Court should uphold the FAA's invocation of the deliberative process privilege and grant summary judgement in its favor.

POINT III

RTCA AND THE AIR TRAFFIC MANAGEMENT ADVISORY COMMITTEE ARE FEDERAL ADVISORY COMMITTEES, AND THEIR WORK HAS BEEN PUBLIC. THE SUBCOMMITTEES DID NOT VIOLATE FACA, AND NO PRIVILEGED DOCUMENTS WERE SHARED

In their Second Claim, Complaint p. 9 *et seq.*, plaintiff alleges that various committees and subcommittees of RTCA, Inc. violated the Federal Advisory Committee Act, 5 U.S.C. App. II, because the subcommittees did some work in non-public settings and, according to plaintiff, were given access to documents withheld from plaintiff. Plaintiff is mistaken.

FACA defines an advisory committee as

> any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof...which is ... *established* or *utilized* by one or more agencies, in the interest of obtaining advice or recommendations for ... one or more agencies or officers of the Federal Government.

5 U.S.C. App. II, § 3(2) (emphasis added). Established means "actually formed by the agency" and utilized means "amenable to 'strict management by agency officials.'" *Byrd v. U.S. E.P.A.*, 174 F.3d 239, 245-46 (D.C.Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000), relying upon *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 109 S.Ct. 2558 (1989). The subcommittees at issue in this case are neither actually formed by the FAA, nor are the subcommittees strictly managed by the agency.

It is true that certain of RTCA's committees are Federal Advisory Committees ("FAC"). Declaration of Davis Waltrous ¶ 4 ("Waltrous Dec."). The Free Flight Steering Committee, later called the Air Traffic Management Advisory Committee, functioned as FACs. Waltrous Dec. ¶ 5-6. At various times, the Free Flight Steering Committee and the Air Traffic Management Advisory Committee ("The Committees") formed subcommittees to explore particular issues. Those sub-committees did not make recommendations directly to the FAA, but rather made recommendations to the Committee that chartered them, which recommendations were publicly discussed and deliberated upon at the FAC's public meetings.[2] Waltrous Dec. ¶ 7-22. *See, National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control,* 557 F.Supp. 524, 529 (D.D.C.) (task forces formed by and reporting to FAC are not FACs themselves because they have no authority to make recommendations to the President and their findings are reported at public meeting of FAC), *aff'd,* 711

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[2] Title 41of the Code of Federal Regulations, Subpart D-Advisory Committee Meeting and Recordkeeping Procedures, provides at § 102-3.145: "If 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 this subpart." (emphasis added). In this case, the subcommittees were not empowered to provide recommendations to the FAA. Rather, the subcommittees provided their recommendations to the Committees, which deliberated publicly, with plaintiff's participation, over the recommendations and thereafter provided the FAA with the FAC's recommendations. Furthermore, the work of the subcommittees was made publically available on RTCA's website. Waltrous Dec. ¶ 13-14, 21-22. Accordingly, the subcommittees were not FACs, and their work did not violate FACA.

F.2d 1071 (D.C. Cir.1983).[3] Accordingly, the subcommittees are not FACs and their work did not violate FACA.

Furthermore, plaintiff's unsupported allegation that the FAA shared reports or studies with the RTCA and its committees is simply untrue. *See* Waltrous Dec. ¶ 13. The only information provided to the Airspace Working Group (and it is not clearly supplied by the FAA) was a power point presentation of draft ideas regarding broad concepts suggesting traffic flows. But reports and studies were not shared with RTCA or its committees and subcommittees, and therefore there is no waiver of the agency's claim of privilege with respect to such reports and studies.

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[3] The present case is factually closer to *National Anti-Hunger Coalition* than to *Ass'n of Amer. Physicians and Surgeons v. Clinton*, 997 F.3d 898 (D.C.Cir. 1993). In *Amer. Physicians*, *id.* at 911-916, the Circuit Court distinguished *National Anti-Hunger Coalition* on the grounds that the Circuit Court found that the parent group was *not* a FAC, and remanded for further findings whether certain working groups advising the parent group acted as "the point of contact between the public and the government." *Id.* at 913. In this case, as in *National Anti-Hunger Coalition*, it is admitted that RTCA and the Free Flight Steering Committee, later called the Air Traffic Management Advisory Committee, were FACs. Waltrous Dec. ¶ 2, 5 and 6. Since the subcommittees were not empowered to provide recommendations to the FAA, but merely "provides the Federal Advisory Committee with the factual basis for making recommendations to the FAA," Waltrous Dec. ¶ 7, and because their recommendations are discussed and considered by the FAC in public meetings, Waltrous Dec. ¶ 21-23, the subcommittees are not FACs and are not in violation of FACA.

CONCLUSION

The FAA made a reasonable search for records responsive to plaintiff's FOIA request; the documents that were not disclosed are privileged; the subcommittee work performed for RTCA did not violate FACA; and no privileged documents were shared with RTCA. Accordingly, the FAA is entitled to summary judgement and the complaint should be dismissed.

Respectfully submitted,

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