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Subject: COMMENTS In the matter of Protection of Voluntarily Submitted

BEFORE THE
FEDERAL AVIATION ADMINISTRATION
Washington, D.C.

In the matter of
Protection of Voluntarily Submitted
Information; Proposed Rule

COMMENTS OF

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

The Reporters Committee is a voluntary, unincorporated association established in 1970 by news editors and reporters to defend the First Amendment and freedom of information rights of the print and broadcast media. The Reporters Committee sponsors, as a special project, the FOI Service Center, which advises reporters on issues of access to governmental records and proceedings.

The FOI Service Center of the Reporters Committee handles calls daily from reporters and editors around the country who are frustrated in their efforts to obtain information from the federal government. They have faced arbitrary use of the exemptions to the Freedom of Information Act, lengthy delays in responses to their FOI and other requests and outright refusal by federal agencies to acknowledge the public's interest in information about the workings of its government.

The failure of federal agencies to provide information on their activities affects the ability of reporters to cover government activities accurately and promptly.

In turn, the inability of reporters to gain information that should be available to the public ultimately means many citizens who rely upon the media cannot get information. They cannot reap the benefits of open government intended by Congress when it initially enacted the FOI Act and as it has repeatedly amended it in the years since its passage.

PURPOSE OF THESE REPORTERS COMMITTEE COMMENTS

The purpose of these Reporters Committee Comments is to urge the FAA to implement cautiously the legislation regarding protection of voluntarily submitted information, a segment of a 1996 appropriations measure. In our view, the agency must consider the limitations on withholding that Congress set out in this measure.

It is questionable whether the federal courts could allow this measure in the 1996 appropriations law to block public access to information that has been subject to the Freedom of Information Act for more than 30 years.

We would challenge the law's sufficiency as a nondisclosure statute under the strenuous requirements of Exemption 3 to the FOI Act.

We also seriously doubt that the judicially developed standards for protecting "voluntarily submitted" commercial and financial

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information under Exemption 4 would, by analogy, justify a law protecting safety information from public scrutiny. Exemption 4 considers that commercial entities outside the government would only voluntarily submit information that might harm their competitive position if the agency can promise secrecy. That is a far different scenario than this one in which an agency charged with protecting public safety chooses to seek cooperation from that industry.

Recognizing that the FAA must implement this new law whatever its deficiencies, we would nonetheless exhort the agency to limit the scope of the protection for information to the greatest extent possible.

Reporters have an excellent record in reporting on safety problems in the airline and other industries. Repeatedly they have used the FOI Act to monitor government regulation of industries and identify the need for change. In turn, lawmakers have considered and adopted remedies.

In our view, there cannot be too many eyes on safety. However thorough the FAA and the National Transportation Safety Board may be in monitoring the airline industry, the public will be better assured that the airlines are safe when the press and public are also watching for problems.

In these comments we ask the FAA to revise several specific proposals that we feel impose too great of a limitation on public access.

We also hope that in drawing up final rules, the agency will consider other ways of making as much information as possible available to the public even as it provides for the limitations on disclosure in the brief outline of the new law.

Although the FAA acknowledges a strong public interest in information involving airline safety, its specific commentary on these proposals promises broad withholding, not broad disclosure.

We hope that the final rules will recognize the need for required submissions of information concerning safety and security.

THESE PROPOSALS ENCOURAGE VOLUNTARY NOT MANDATORY SUBMISSIONS

We strongly believe that the FAA should obtain needed information by mandate when that information involves safety and security and should not rely on the voluntary submissions of information by the industry it regulates. Certainly it should encourage whistle-blowing and the protection of whistleblowers but already there are strong laws for their protection.

However gracious and pleasant the relationship between the FAA and the industry it regulates might be, if the industry could choose to provide safety and security information rather than be required to do so, we believe that a responsible agency will require, not just "ask for," information it needs to insure safety and security.

Similarly we believe that a responsible press and public will act with additional eyes to monitor the issues of safety and security, matters of compelling public interest. They can do so only if they are able to obtain as much information as possible.

SPECIFIC PROPOSALS PROVIDE FOR TOO MUCH WITHHOLDING

We have examined several specific proposals which we believe should be

revised.

* Section 193.3: "Information" to be withheld is broadly defined

In commentary to this section, the FAA promises submitters that it will consider the definition of information to be "inclusive," covering data, reports, source and other information.

In complying with this law, the FAA should only withhold information which, if disclosed, would discourage similar important voluntary submissions in the future. It should withhold no more information than that. If a submitter bolsters its case with data, reports, etc., those data and reports should be publicly available unless there is substantial reason to believe their release would lead the submitters to refuse to supply that information in the future. If submitted information will not even identify the submitter, it certainly should be available for public as well as agency evaluation.

* Section 193.3: "Summarized" not only "statistical" or "general"

This definition of "summarized" appears to discourage release of an actual description of any event describing a safety problem, promising instead that the FAA will only describe the events "statistically" or in some other more general form.

This promise goes too far. The law allows nondisclosure of submitted records to protect the submitter of information. Any withholding beyond that limited purpose should not be allowed.

The public may well gain a clearer understanding of the parameters of safety from anecdotal information than from statistical or general information. And any release of information that can contribute to public understanding of airline safety issues is very important.

* Section 193.3: "Voluntary" designations would be too broad

The FAA's commentary on the definition of "voluntary" indicates that information may be designated as "voluntary" because it is part of a program, existing or future, that the FAA will use to collect information from willing participants.

Although we are not entirely clear as to what "programs" are anticipated here as "voluntary" and, therefore, secret, we object to the labeling of information gathered in an entire program as "voluntary" in order to avoid disclosure. Withholding information from the public on matters of airline safety and security is a serious matter. Withholding must be limited to those items that actually meet the criteria outlined in the appropriations law.

* Section 193.7 Disclosure of Information

We are very, very concerned about the agency's claim with regard to the requirement that the Administrator must find that withholding the information would be consistent with safety and security.

Although the new disclosure provision in the appropriations law specifically requires the agency to find withholding would be "consistent with safety and security," the FAA says that "it will be infrequent that the FAA will find it advisable to release the information" if the other factors are met.

We believe that the FAA should give thoughtful consideration to the law's requirement here. Withholding information in government files should never be a rubber-stamp operation. When the law requires the agency to make a finding that withholding "is consistent with" safety and security, it MUST do so. Absent that considered finding by the agency, the new law simply does not apply.

* Section 193.9 FOQA would receive too broad protection

An example of a protected program described in the commentary is the FOQA flight recorder program.

It is our understanding that airlines avoid the collection of information for fear that disclosure would be required, that information routinely collected is recorded over even though an analysis of the details contained in these recordings would be enormously useful to the FAA and the public in evaluating safety issues.

The FAA understandably could better regulate airline safety if the airlines made this information available to it.

We do not understand why the FAA cannot require airlines to maintain, rather than destroy, this information. This would seem to us to be well within the mandate of the agency to regulate the industry for purposes of safety.

We note that the federal government has experienced no difficulty under the existing Freedom of Information Act in protecting privacy of individuals (Exemptions 6 and 7c) or against harm of competitive interests (Exemption 4).

What the FOI Act does mandate, however, is release of segregative portions of records, portions that do not cause the harms that these exemptions protect against.

We are fearful that the FAA's intention to designate information in whole programs as not available not only exceeds the mandate of the appropriations law but will keep the public and the press from reviewing records that no one intended to be off limits.

Respectfully submitted,

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