Air & Transportation Law Reporter

International Air & Transportation Safety Bar Association

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President's Message

by
Marc Warren

Dear Teammates,

I hope this note finds you and your families safe and healthy, and managing through these unusual times. I write to report that your Association is weathering the pandemic quite well. Unlike some other voluntary bar associations, our membership levels and renewals are steady, and our finances are sound. We are actively planning for an "in-person" conference in Washington, DC, in April 2021.

While the pandemic has caused the cancellation or postponement of several regional events, it has not dampened the spirit or enthusiasm of our members. You continue to zealously represent the interests of your clients and to markedly enhance the professionalism of the aviation bar.

You have joined with all of us to promote diversity and inclusion, and I am proud of the leadership and efforts of Jamie Rodriguez and Elizabeth Vasseur-Browne to implement a diversity and inclusion program for IATSBA.

We have a great Association and I encourage each of you to encourage others to join. If every current member recruited one new member, IATSBA would double in size. I also encourage you to consider becoming more involved in the governance of your Association and to share my open letter on that topic printed elsewhere in this newsletter.

Thank you for your membership and for your commitment to legal professionalism and transportation safety.

MARC WARREN is a partner and co-chair of the Aviation and Aerospace practice group at Jenner & Block, LLP. Prior to joining Jenner & Block, Marc chaired the Aviation practice group at Crowell & Moring, LLP. He served as acting chief counsel, deputy chief counsel, and deputy chief counsel for operations of the Federal Aviation Administration (FAA). Before joining the FAA, he retired after 26 years of service in U.S. Army Judge Advocate General's Corps.

INSIDE THIS ISSUE

Editor's Column

by
Greg Reigel

GREG REIGEL is a partner with the law firm of Shackelford, Bowen, McKinley and Norton, LLP in Dallas, Texas. He has more than two decades of experience working with airlines, charter companies, fixed base operators, airports, repair stations, pilots, mechanics, and other aviation businesses in aircraft purchase and sale transactions, regulatory compliance including hazmat and drug and alcohol testing, contract negotiation, airport grant assurances, airport leasing, aircraft related agreements, wet leasing, dry leasing, FAA certificate and civil penalty actions and general aviation and business law matters. Greg also has extensive experience teaching the next generation of aviation and legal professionals including in such courses as aviation law, aviation transactions, aviation security, business law and trial advocacy. Greg holds a commercial pilot certificate (single-engine land, single-sea and multi-engine land) with an instrument rating.

We are back with another edition of the Reporter as we all navigate this "one step beyond" COVID-19 era in which we find ourselves. The aviation industry is slowly recovering. Business aviation is adapting to the new processes and procedures necessary to ensure the safety of crew and passengers. Private aviation and charter are more attractive than ever, with an increase in inquiries by new customers searching for alternatives to the airlines.

The FAA continues to exercise its oversight over the aviation industry. Investigations into and enforcement against illegal charter operators continues. Implementation of the compliance philosophy/oversight also continues, although the Government Accountability Office is not sure of, and has asked the FAA to report on, the new approaches' actual impact on aviation safety.

And, of course, the business of law also continues, albeit with its own changes to adapt to the COVID-19 environment. We now Zoom through meetings, depositions, hearings, and even trials. Some are of the opinion that remote proceedings have enhanced the practice of law and benefitted our clients. Others are concerned that virtual proceedings are an inadequate replacement because they do not provide for the necessary sensory and other cues available during live testimony.

But for good or perhaps for bad, or some of both, I believe remote proceedings are here to stay, although the form, fashion, and full extent are yet to be determined. The legal profession will continue to adapt and, hopefully, make the most of the benefits and minimize any adverse impacts resulting from the use of this new technology. And on a good note, the Judge can't see my boots and jeans when I "Zoom"!

In this issue of the Reporter, our President, Marc Warren, provides an update on the IATSBA's activities and encouragement for members to get involved, including running for office in the association's upcoming election. Former IATSBA president Mike Dworkin gives us a glimpse into his experience teaching aviation law and the unique students pursuing careers in aviation.

Another IATSBA former president, Tony Jobe, discusses Exemption 5 to the Freedom of Information Act and the "Consultant Corollary" theory for withholding of investigation records. Finally, I have included an article discussing a recent case involving the FAA's use of administrative subpoenas in connection with an investigation in an alleged illegal charter case.

I want to personally thank our contributors – both in this issue, as well as those who have contributed articles

Editor's Column

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in the past. The Reporter would not be possible without you. Thank you! For everyone else, you still have a chance to contribute!

If you would like to submit an article or if you have an announcement, news, a press release or an event you would like to share with other IATSBA members, please send me the details so we can include your information in the Reporter. I encourage content that would be interesting and useful to our members.

I hope you enjoy this issue of the Reporter.

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Open Letter from the President

by
Marc Warren

EARLY NOTIFICATION OF OFFICER ELECTIONS

Dear IATSBA Members,

I write to give you early notification of officer elections to be held in the winter of 2020 or early spring of 2021. The goal is to complete the elections in time to have the newly elected leadership in position at our 2021 CLE conference, to be held in Washington, D.C., on April 21-23, 2021. I am writing everyone now to encourage participation in the election, including by giving consideration to running for office. My hope is that interested members can use the months ahead to become more involved in IATSBA activities and enhance their qualifications for elected office.

I ask all of our current and prior officers and directors to encourage and assist members to become involved in the Bar Association's governance. In particular, I ask our present and past officers and directors to teach, coach, and mentor members who have not previously served in leadership positions and who represent constituencies that have been underrepresented on our Board. As an organization, we are committed to promoting diversity and inclusion, and that includes diversity and inclusion in governance.

The 2021 election will be critical to the future of our Bar Association. Every single officer position, including all regional vice presidents, will be open for election. Look for announcements on the IATSBA website and in future newsletters about deadlines to express interest in running for office and election procedures. In the interim, please let me know if you have any questions or concerns.

v/r, Marc

Aviation Law Students

by:
Michael L. Dworkin

ANOTHER REASON WHY I LOVE BEING AN AVIATION LAWYER

For the past two years, in addition to practicing law and managing my firm, I have been teaching an aviation law course at San José State University. (A brief commercial plug—SJSU's Aviation and Technology Program is the largest and oldest program of its kind on the West Coast and graduates receive a Bachelor of Science Degree in Aviation).

For many of my students, they were the very first in their families to attend college. They are diverse—representing virtually every continent, ethnicity and religion on the face of the earth. Some are Dreamers. Some have names that it took me a while to learn to pronounce. For some, English is not their native language.

But all of these young people have one thing in common—they love aviation and want to pursue aviation careers, whether as pilots, maintenance personnel, aviation managers or in some other position in the aviation industry. Some want to go to work for the airlines; others in business and commercial aviation; others in the MRO field; others in manufacturing; others in UAS and urban mobility developement and others in airports. (None of them expressed any interest in going to law school and becoming an aviation lawyer.) Many of them hold part- and full-time jobs—not because they want to, but because they need to. (Despite being in the heart of Silicon Valley, some 43% of the student body is food insecure.)

They have two more things in common. One, aside from being hard-working, they have worked incredibly well together (something that they could probably teach society as a whole and many of our government leaders). Two, they know how to handle adversity. When the COVID-19 pandemic hit, they adapted to cancellation of in-person live classes, introduction of virtual classes and campus closure. Many of them had to vacate their dorms and apartments on short notice and move back home with parents or other relatives. Many lost their jobs. Aside from these stresses, and concerns about personal health and safety, they also had to deal with the prospect that the aviation jobs that they hoped would be awaiting them after graduation could very well evaporate in an economic crash. Despite the rug being pulled out from under them, they not only pressed on, but didn't miss a beat. It would be an understatement to say that I was very proud of them.

Each year, the initial homework assignment is the submission of a brief autobiography, so that I can get to know my students as quickly as possible and get an insight into their thinking (this past semester I had 49 students). Here is one of the more noteworthy submissions:

MICHAEL L. DWORKIN is the founder and Managing Partner of Avialex Law Group, LLP, a San Francisco, California law firm specializing in aviation matters providing clients with a wide range of legal services on a nationwide and worldwide basis. He has been in private practice since 1981, when he established Michael L. Dworkin and Associates, which in 2018 became Avialex Law Group, LLP.

STREET TO SEAT

It is one hell of a day to be alive! For a millennial born from immigrant parents from Eritrea, a small country in Northern Eastern region of Africa demanding its sovereignty from Ethiopia in 1991, my family traveled across the Atlantic to the United States as refugees with our country divided in civil turmoil.

I have experienced the best of both worlds, my brother was 3 years old, I was only 1. My upbringing was purely traditional as many families fled their homeland to seek asylum in hopes of providing their children the great American dream. That dream wasn't picture perfect as I've encountered many trials and tribulations by the time, I reached my later adolescent age although ominous forewarnings which had laid ahead. The lack of prudence in the activities, decisions, and company I kept caused unprecedented consequences with the law and many bridges I've returned to burned with no rope or wood insight. However, this isn't a sad story but rather an underdog, an eye of the tiger shall I say a survivor of many self-inflicted challenges. Growing up in East Oakland exposes you to experiences one would imagine to be in a motion picture, although there were never cameras shooting, but Ruger's and Glock 23's. Unlike many aviation enthusiasts, I did not grow up in a family of pilots, military members, nor did I ever have an interest in flying. This vision appears to be precarious to many who grow up with banal aspirations to become a neighborhood drug dealer, an athlete if you found out early you have the talent, and in my era, everyone hopes to become the next musical music sensation artist thanks to YouTube.

My Aviation story starts at age 23, boarding a flight to Atlanta I gazed at the horizon the entire trip from my small window, the weather was phenomenal for flying, and my mind rushed with many thoughts as to where I was heading in in the present tense, as well as for my future. While visiting a friend who attended Moorehouse college, Justice was perhaps the only friend I knew who went to college. Spending a week with him in his campus dormitory enlightened me to become someone in this world who I never thought I could be. To this day I cannot put my finger on it, but there was something spiritual about this historical campus that

Aviation Law Students

...continued

shifted my perspective and the beliefs I've once held. After high school, my school attending days were over. This amplified those thoughts I had on the plane, which was all the better. Meeting new people, hearing their stories as they expressed similar experiences to mine cracked my thick skull to take accountability for the remainder of my life.

Returning to California, I reflected on this life changing trip and began to ride life by the bullhorns. The first course of action I faced came re-enrolling in a community college which I dropped out with an average GPA of 0.86, quite pitiful. Regaining my academic spirit was a challenge in itself once the utopic fever dropped from visiting my friend. Reminiscing of students chasing their passion on that ride, an illusion appeared in my head where I began to gaze at the horizon once again. There it dawned on me, becoming a pilot began to pique an interest although I wasn't sold on this until taking a discovery ride at the local Oakland airport. Turbulence in an Airbus is one thing, however the turbulence I felt in a small trainer 152 not only thrilled me but scared the life out of me simultaneously. I'm not sure what possessed me to spend $200 for that flight although I feel as if it was the best two C-notes I've spent which has now multiplied in the amount I've spent in flight training through the Part 61 program. Choosing the flight-ops route at San José State University was the strategic route being that I belong to a flight club in which I learn from seasoned pilots while pursuing my degree at SJSU. I have much to learn about aviation and the learning never stops as my instructors embed in me. I've never been so eager to learn about the sciences and mathematical principles involved with aeronautics and it has motivated me to remain open minded in acquiring knowledge and various methodologies applied within the realm of flight and striving to be a better individual aside from the cockpit.

Godspeed to you, Aman…and to Adrian, Ahmed, Ashida, Bryson, Dami, Edan, Kevin, Jason, Jennie, Julia, Matthew, Rogelio, Seneca and all of the others who made this class so special, and to the next generation of aviation professionals in meeting these challenges. Just remember that each challenge produces a new opportunity. May you not only succeed, but continue to pursue your dreams (and have some fun in the process).

I may have taught the class, but I learned a lot from these talented young people.

FOIA Exemption 5

by
Tony Jobe

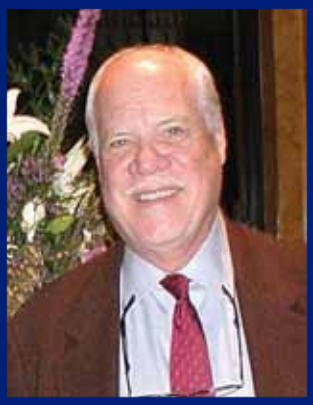
FOIA EXEMPTION 5 AND THE DISCLOSURE OF NTSB INVESTIGATION RECORDS: THE "CONSULTANT COROLLARY" THEORY FOR WITHHOLDING OF INVESTIGATION RECORDS

The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, enacted in 1966 and amended numerous times since then most recently in 2016, is a vital part of American democracy, providing any person a right, enforceable in court, to view federal agency records, subject to discrete exceptions. In a January 21, 2009 memo, President Barack Obama declared the following policy for the Executive Branch: "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. . . The presumption of disclosure should be applied to all decisions involving FOIA." Presidential Memorandum for the Heads of Executive Departments and Agencies., 74 Fed. Reg. 4683 (Jan. 26, 2009).

The U.S. Supreme Court "repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-152 (1989). The FOIA was meant to be a "disclosure statute," not a "withholding statute." *Milner v. Dep't of the Navy,* 562 U.S. 521, 565 (2011). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

FOIA "mandates that an agency disclose records on request, unless they fall within one of nine exemptions." *Milner*, 562 U.S. at 565 (2011). These exemptions are "explicitly made exclusive … and must be narrowly construed." *Id*. Further, these nine statutory exemptions are "limited exemptions [and] do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose, 425 U.S.* 352, 360-361 (1976).

Thus, to prevail in a FOIA action, the burden is on the agency to "demonstrate 'that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.'" *Ruotolo v. Dep't of Justice, Tax Div.,* 53 F.3d 4, 9 (2nd Cir. 1995), quoting *Nat'l Cable Television Ass'n, Inc. v. FCC*, 479 F.2d



TONY B. JOBE is a litigator with forty-five (45) years of experience in highly specialized and technical areas of the law including aviation, maritime, products liability, environmental, truck, bus and highway, fuel tank integrity, serious personal injury and wrongful death. He is and has been for over three decades an AV rated attorney by Martindale-Hubbell and is listed in Martindale's Bar Register of Preeminent Lawyers in his primary specialty of aviation law. In 2009, he was selected as a "Top Lawyer" by the New Orleans Magazine. Mr. Jobe is a former President of IATSBA.

183, 186 (D.C.Cir.1973). All doubts regarding the agency's claims to exemptions are to be "resolved in favor of disclosure." *Halpern v. Fed. Bureau of Investigation*, 181 F. 3d 279, 287 (2nd Cir. 1999).

The exemption that is the focus of this article is Exemption 5. Exemption 5 is arguably the most frequently invoked exception to the mandated disclosure requirement for agency documents. This exemption allows an agency to withhold disclosure if the document meets two requirements: (1) it is an "interagency or intra-agency memorandum" that (2) "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).

Courts have construed this provision to "exempt those documents, and only those documents that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). (The three most frequently invoked privileges that have been held to be incorporated into Exemption 5 are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege). Thus, for example, if a document is not an "agency document," an agency may not withhold it even if it reflects the agency's deliberative process. Similarly, an agency must disclose documents that would otherwise be protected under Exemption 5 if that agency waives that right by voluntarily sharing the document with third parties. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 253 (D.C. Cir.1977).

"The threshold question with the application of any privilege under Exemption 5 is whether the records are 'inter-agency or intra-agency.'" 5 U.S.C. § 552(b)(5); *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 3 (2001). For FOIA purposes, the term "agency" generally means "each authority of the Government of the United States." 5 U.S.C. §§ 551(1), 552(f)(1). Thus, "intra-agency and inter-agency are ordinarily read to refer only to documents created by officers or employees within the U.S. Government." *Pub. Emps. For Envtl. Responsibility v. U.S. Section, International Boundary & Water Comm'n*, 740 F.3d 195, 202 (D.C. Cir. 2014).

The Supreme Court has recognized that although specific language in the FOIA or various statutory definitions do not address whether records created outside the U.S. Government can be considered "agency records," it has pointed out that in various circumstances appellate courts have treated these types of documents as "intra-agency" records. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 9-11. To date, every appellate court with the exception of the Ninth Circuit, has acknowledged the "consultant corollary" theory under Exemption 5. The consultant corollary extends protection to certain communications between agency employees and outside consultants. The consultant corollary is a judicially created rule that treats some third-party documents as agency documents for purposes of the FOIA when a private individual or thirty party was acting "just as a government employee would be expected to do." *Id. at 3*. The

justification for application of the theory has been that the consultants' "only obligations are to truth and its sense of what good judgment calls for, and in those respects, it functions just as an employee would be expected to do." *Id*. If, on the other hand, the consultant was "an interested party seeking a government benefit at the expense of other applicants," Exemption 5 is wholly inapplicable. Id., at 12-13, n.4; *Hoover v. U.S. Dep't of the Interior,* 611 F.2d 1132, 1137 (5th Cir. 1980).

The NTSB relied on the consultant corollary to withhold records of accident investigations that are authored by and shared with non-NTSB employees who are participants in the investigation as representatives or technical advisors of the manufacturers, owners, lessors, and operators of the aircraft involved in the crash. By regulation, the NTSB authorizes representatives of American manufacturers, owners, and operators to participate as parties to the NTSB's accident investigation. 49 CFR § 831.11 (2017). In addition, pursuant to the Convention on International Civil Aviation Organization (ICAO), Annex 13, foreign governments may designate accident investigators, reconstructionists, engineers, and scientists from foreign manufacturers as participants in the NTSB's investigation.

Those representatives remain under the supervision of a foreign authority ("accredited representative"), such as the Bureau d'Enquetes et d'Analysis ("BEA" of France). Throughout the NTSB's entire investigative process, party representatives and technical advisors to the investigation, including the manufacturers and operator defendants in civil litigation, by virtue of their status as parties to the investigation have access to the NTSB's investigation file, includingthe NTSB's draft and official "factual" reports and draft final reports of the agency's determination of the probable cause(s) of the crash.

The accident victims and their families, on the other hand, are not entitled to obtain NTSB investigative records prior to their release by the NTSB in a public docket because they are not parties to the investigation. 49 CFR § 845.31 (2015). The NTSB party representatives have the right to visit the accident scene, examine the wreckage, obtain witness information, and suggest areas of questioning. They also have the right to obtain full access to relevant evidence, to receive copies of pertinent documents, to participate in media events, to participate in off-scene investigative activities and investigation-progress meetings, and to make submissions." ICAO: Annex 13, Legal Guidance for the Protection of Information from Safety Data Collection and Processing Systems, ¶ 5.25. The accident victims and families and their representatives are not given that right.

The NTSB has maintained that documents authored by and shared with any of those party representatives are exempt from disclosure mandated by the FOIA by virtue of Exemption 5, asserting the consultant corollary. Specifically, the NTSB claims that the representatives of the manufacturers, owners, and operators function as agency employees and qualify as "consultants" in the context of

Exemption 5. To the contrary, this author has argued that all of the parties to an investigation, both foreign and domestic, represent the interests of the manufacturers and operator who benefit from their participation in the investigation and are not "consultants" as intended by the courts in the context of the consultant corollary. Consequently, this author contends that the reports and submissions of any of the parties to an investigation, including possible defendants in civil litigation, such as aircraft manufacturers and operators, are neither intra-agency documents nor documents subject to litigation privilege and, therefore, may not be withheld from disclosure based on Exemption 5.

In a 2019 decision in the United States District Court for the Eastern District of Louisiana, the district court found "the NTSB's arguments unpersuasive." *Jobe v. NTSB*, No. 18-10547, 2019 WL 6134185 (E.D. La. Nov. 18, 2019) (Zainey, J.) Instead, the Court found that the manufacturers' representatives to the investigation "demonstrate the epitome of 'self-interested' individuals. *Jobe* at Page 11. The Court went on to say that while the role of manufacturers' representatives is to assist in the NTSB's investigation, "they also were undoubtedly there to collect information to prepare for inevitable future litigation." *Id*. As such, the party representatives obtain a government benefit at the expense of the victims and their families.

The District Court relied on the U.S. Supreme Court's reasoning in *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) Jobe v. Nat'l Transp. Safety Bd. (E.D. La. 2019)and held that party representatives to an NTSB investigation are not consultants in the context of the consultant corollary to Exemption 5. Consequently, the district court held that NTSB investigation records that are authored by party representatives and technical advisors to an investigation are not protected from disclosure based on Exemption 5. *Jobe* at Page 12.

In addition, the District Court held that documents the NTSB distributed to those outside representatives are not protected by Exemption 5's deliberative process privilege. *Jobe* at Page 13. The Court explained that by sharing documents it authored with non-agency entities like the aircraft's manufacturers and lessor, the NTSB waived its deliberative process privilege and those records must be disclosed pursuant to the FOIA. *Id*.

The District Court's decision obviously has significant ramifications for the victims of aircraft crashes, their families, and their attorneys. The NTSB has appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. Briefing has been completed, but a decision may be a year or more away. In the meantime, the district court's decision lays a foundation for greater transparency in the NTSB's accident investigative process that is consistent with the statutory purpose of the agency, consistent with the intent of the FOIA, and consistent with sound public policy that avoids further disadvantage to victims of aviation accidents. This article will be updated pending the decision of the Fifth Circuit.

Illegal Charter Investigations

by:
Greg Reigel

INSIGHTS FROM AN FAA ILLEGAL CHARTER INVESTIGATION

Recent FAA press releases have publicized the enforcement actions the agency is taking against those involved in illegal charter. However, what is not publicized is how the FAA is investigating these cases. A recent case in the U.S. District Court for the Southern District of Indiana provides an interesting glimpse into one such investigation.

The Case

In *Elwell v. Bade et al*., 2020 WL 3263656, the FAA received complaints regarding alleged illegal charter activity. In response, the FAA opened what has turned out to be a six year investigation.

During its investigation, the FAA issued three sets of subpoenas over a three year period. The last set asked for production of all documents related to agreements associated with use, ownership, and/or leasehold interest in certain aircraft under investigation for a specified period of time. The recipients of the subpoenas (the "*Respondents*") objected and refused to produce any documents.

The FAA filed a petition with the U.S. District Court requesting enforcement of the subpoenas. The Respondents objected to the subpoena by filing a motion to quash the subpoenas. The Court refused to quash the FAA's administrative subpoenas and ordered their enforcement.

The Court observed that an administrative subpoena is enforceable when "(a) the matter under investigation is within the authority of the issuing agency, (b) the information sought is reasonably relevant to that inquiry, and (c) the requests are not too indefinite." *Bade*, 2020 WL 3263656 at Page 3 (quoting *United States v. Morton Salt Co*., 338 U.S. 632, 652-653 (1950) (establishing the test for determining enforcement of administrative subpoenas)).

After a lengthy analysis of the subpoenas at issue, the Court determined that they were enforceable. However, if we look beyond just the Court's conclusion, the Court's analysis and rationale also provide insight into some of the things the FAA can do, and when it can do them, in an illegal charter investigation.

Here are some of the key takeaways:

The FAA Has Authority To Issue Subpoenas In Connection With An Investigation

Under 49 U.S.C. § 46101(a), the FAA may investigate violations as long as the agency has "reasonable grounds." Neither an enforcement action nor a lawsuit is necessary. When a court reviews an agency's subpoena requests, the court must make sure the agency does not exceed its authority. And the threshold for the relevance of the documents/information requested by the administrative subpoenas is relatively low. The court must also confirm that the requests are not for an illegitimate purpose.

In illegal charter investigations such as the *Bade* case, the FAA typically asks for

- aircraft flight logs
- flight summaries
- aircraft lease agreements
- operating agreements
- interchange agreements
- pilot services agreements
- pilot payrolls
- operating invoices
- receipts etc.

And, as in *Bade*, a court will likely hold that such requests are proper and do not exceed the FAA's authority.

Stale Complaint Rules Do Not Bar Subpoenas During An Investigation

As you may know, stale complaint rules act to bar the FAA from acting in certain situations after a period of time. For example, in certificate actions heard before a National Transportation Safety Board Administrative Law Judge, 49 C.F.R. § 821.33 may prevent the FAA from acting if it does not initiate the case within six months of advising the respondent of the reasons for the proposed action. Similarly, in a civil penalty case, a case may be dismissed under 14 C.F.R Part 13.208(d) if the FAA does not initiate action within two years.

However, these stale complaint rules do not apply to ongoing investigations where no action has been initiated. According to the *Bade* court, the "FAA may conduct an investigation to assure itself that its regulations are being followed, regardless if it ultimately determines civil enforcement or formal charges are not warranted." *Bade* at Page 6.

Similarly, the FAA may investigate a target who is "engaged in a continuing violation of [FAA's] safety regulations." In *Bade*, the FAA argued it was not investigating stale claims. Rather, it believed the respondents were engaged in continuing violations where "the statute of limitations restarts every day." *Bade* at Page 10. And the Court agreed.

(Interestingly, the Court did not address whether this analysis, and its decision, would have changed if the aircraft involved had been sold and/or the flight operations had ceased. As a result, it is unclear whether the investigation would have been moot if applicable stale complaint rules prohibited enforcement action.)

The FAA Does Not Have To Tell The Target Of An Investigation About Subpoenas

Under 49 U.S.C. § 46104(c), an agency must only give notice to "the opposing party or the attorney of record of that party." However, an investigation has no "record." As a result, since the target of the investigation is not the one being deposed nor is counsel to those targets being deposed, the target does not have a statutory right to receive notice of third-party depositions.

The *Bade* court also noted that "'failing to receive notice of one or more depositions does not prove that the FAA's investigation is a sham,' and has 'nothing to do with the enforceability of the Subpoenas or the motive of the FAA in conducting this investigation.'" *Bade* at Page 8.

So, potential respondents do not get to participate at third-party depositions or receive copies of documents produced in response to subpoenas. This certainly makes defending against an illegal charter investigation a more difficult task.

The FAA's Order 2150.3C Is Only "Guidance"

In *Bade* the Respondents argued that the FAA had not followed its own policies when conducting the investigation. Specifically, they argued the FAA failed to follow *FAA Order 2150.3 - FAA's Compliance and Enforcement Program*. However, the Court rejected the argument. It observed that Order 2150.3 is not regulatory. *Bade* at Page 9.

Rather, Order 2150.3 merely provides guidelines to FAA personnel for performing their duties. *Id*. Thus, the Court concluded that the FAA's failure to strictly adhere to Order 2150.3's "guidance" did not negate its authority to investigate. *Id*. Nor did it mean the FAA was pursuing the investigation for an improper purpose. *Id*.

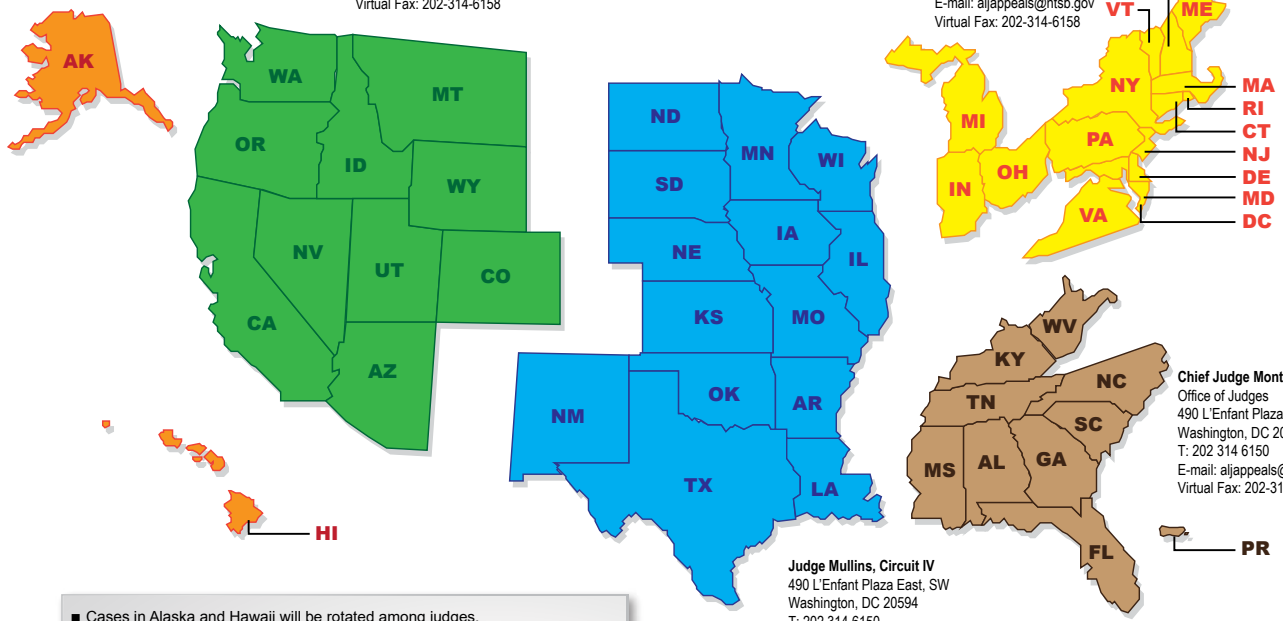
Conclusion

Illegal charter is a high priority for the FAA at the moment and will be for the foreseeable future. As a result, the agency will continue to investigate complaints of illegal charter. It is important to understand how the FAA conducts these investigations and the extent of its authority.

And it is imperative to know the rights of an aircraft owner or operator who is the target of an illegal charter investigation. If you believe you are the target of an illegal charter investigation, contact us now so we can help you navigate the investigation and protect your rights.

Circuit Assignments

NTSB LAW JUDGE CIRCUIT ASSIGNMENTS



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Judge Mullins, Circuit IV
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- Cases in Alaska and Hawaii will be rotated among judges.
- Emergencies will be assigned across circuits based on availability.

10.06.002

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PLEASE CIRCLE MEMBERSHIP TYPE

Checks are to be made payable to "IATSBA" and sent to the mailing address below.
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Regular/Full Annual Membership: ---------- $119.00
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(Within two years of graduation from law school) ---------- $49.00
Law School Student Annual Membership: ---------- NO CHARGE
Associate Annual Membership
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Associate with listing: ---------- $129.00
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