IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLYERS RIGHTS EDUCATION FUND, INC, *et. al*.,	)	
	)	
Appellants,	)	
v.	)	Case No. 21-5257
	)	
FEDERAL AVIATION ADMINISTRATION,	)	
	)	
Appellee.	)	
	)	

RESPONSE OF APPELLANTS TO FEDERAL AVIATION ADMINISTRATION'S MOTION FOR SUMMARY AFFIRMANCE

Two Boeing 737 MAX aircraft crashed within a period of five months, in October 2018 and March 2019, resulting in the deaths of 346 passengers and crew members. Appellee Federal Aviation Administration ("FAA") grounded the aircraft for twenty months. Throughout 2019, Boeing submitted to the FAA proposed fixes to the problems that caused the crashes, seeking to have the aircraft ungrounded.

Top FAA and Boeing officials promised the public complete transparency with regard to the ungrounding process. But in response to a Freedom of Information Act suit brought by Appellant Flyers Rights Education Fund, Inc. ("Flyers Rights") to compel public disclosure of the documents actually relied on by the FAA in making any decision to unground the aircraft, the FAA claimed essentially all of these documents were exempt from disclosure under FOIA Exemption 4, as confidential commercial information. The District Court ultimately upheld that

claim. Memorandum Opinion, R. 32 ("District Ct. Op.").[1] In the meantime, the FAA ungrounded the aircraft and allowed it to fly again.

This case presents a significant issue of first impression in this Circuit: whether under the Supreme Court's interpretation of Exemption 4 in *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019), confidentiality of proprietary information is lost at least when the agency has publicly and affirmatively announced that the general type of information at issue would be disclosed and not kept private. This case also presents the questions of whether an agency can effectively conceal its rules under FOIA, by delegating rulemaking to a private company; whether information developed collaboratively by the agency and a private submitter is "obtained from a person" for purposes of Exemption 4; and whether a conclusory agency affidavit suffices to show inability to segregate non-exempt portions of thousands of pages of documents.

At stake in this Court's determination of these important issues is whether the public will be able to learn the substance of the information the FAA actually considered in deciding that an aircraft that killed 346 people is now safe to fly again. In these circumstances, the FAA clearly has not met its "heavy burden of establishing that the merits of [its] case are so clear that expedited action is justified" and that "no benefit will be gained from further briefing and argument…."

[1] Citations to "R." are to the District Court's docket entry number.

Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297-98 (D.C. Cir. 1987). The FAA's Motion for Summary Affirmance ("FAA Motion") should therefore be denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. Certification and Failure of 737 MAX

The B737 MAX aircraft series is the fourth generation of the B737 aircraft. Boeing applied for certification of the B737 MAX in 2012, and the FAA certified the aircraft in March 2017. *Boeing 737 MAX Flight Control System: Joint Authorities Technical Review: Observations Findings and Recommendations* I (Oct. 2019) ("JATR Report"). Twenty months later, on October 29, 2018, a 737 MAX operated by Lion Air crashed after taking off from Jakarta, Indonesia, killing all 189 passengers and crew members. On March 10, 2019, a 737 MAX operated by Ethiopian Airlines similarly crashed minutes after takeoff from Addis Ababa, Ethiopia, killing all 157 passengers and crew members. The FAA then grounded the aircraft. *Operators of Boeing Company Model 737-8 and Boeing Company Model 737-9 Airplanes: Emergency Order of Prohibition*, 84 Fed. Reg. 9705 (March 18, 2019).

The 737 MAX had engines that did not fit under the wings of the older version of the airplane. Boeing pigeonholed the new engines by taking certain steps to mount them forward of the wing and further away from the ground,

generating greater lift for the aircraft and creating a tendency for the nose to pitch up during flight. R. Vartabedian, *How a 50 Year Old Design Came Back to Haunt Boeing With Its Troubled 737 MAX Jet*, Los Angeles Times (March 15, 2019), https://www.latimes.com/local/california/la-fi-boeing-max-design-20190315-story.html. To compensate, the 737 MAX's flight control system contains a Maneuvering Characteristics Augmentation System ("MCAS"), that is automatically activated when one sensor indicates the nose going up, signaling a potential stall situation. MCAS causes the horizontal stabilizer to force the nose down. But in the crashes, the MCAS activated repeatedly, when it should not have, with the pilots unable to control the aircraft or override MCAS, so that the MCAS kept forcing the planes to head down until they crashed. Majority Staff, U.S. Senate Committee on Transportation and Infrastructure, *The Design, Development & Certification of the Boeing 737 MAX* 7-12 (Sept. 2020).

In October 2019, an expert international panel commissioned by the FAA harshly criticized the process followed by the FAA in its original certification of this aircraft, including delegating many agency functions to Boeing. JATR Report at II-XIII.

B. Ungrounding Process and FOIA Request

Throughout 2019, Boeing submitted proposed solutions and fixes to the FAA, seeking FAA's determination that aircraft would be safe to fly again. FAA,

See FAA Updates on Boeing 737 MAX https://www.faa.gov/newsroom/faa-updates-boeing-737-max-0 (last visited Feb. 18, 2022).

In October 2019, FlyersRights submitted a FOIA request to the FAA seeking the Boeing submissions on which the FAA would rely in determining when the 737 MAX aircraft should be re-certified to fly. R. 1-1. In December 2019, FlyersRights filed suit in the District Court to compel the FAA to produce the requested records. R. 1. After the parties narrowed the scope of the request by agreement, the FAA identified 86 responsive documents consisting of 9,443 pages. R. 9; District Ct. Op. at 4.

Ultimately the FAA filed a *Vaughn* Index identifying 108 documents. R. 19-1. Of those 108 documents, the FAA produced only five in full. Some meaningless cover sheets were released. The remaining 83 documents were either withheld in full or all of the substantive contents were redacted under Exemption 4. *Vaughn* Index, R. 19-1; District Ct. Op. at 5.

The key categories of information withheld are documents showing the actual process followed by the FAA in determining that, with Boeing's proposed design changes, the aircraft is safe to fly again--specifically, the certification plans, which set out the steps to be taken by the manufacturer to show that the aircraft complies with FAA standards; methods to be used to test the aircraft and particular components; plans for flight tests; the actual results of those tests; and

safety analyses, that is, the results of assessments of how design changes mitigate potential failure situations. Appellants pressed their FOIA claim for access to these categories of documents, referred in the District Court proceeding as the "Disputed Information Categories." *See* District Ct. Op. at 4.

In the fall of 2020, the parties filed cross-motions for summary judgment. R. 21, 22, 23, 24, 25.

In November 2020, while those motions were pending before the District Court, the FAA issued two related orders: one ungrounding the 737 MAX, FAA, *Notification of Rescission of Emergency Order of Prohibition*, 85 Fed. Reg. 74260 (Nov. 20, 2020) ("Ungrounding Order") ; and a final Airworthiness Directive, finding the 737 MAX fit and safe to operate again based on Boeing's submitted design changes. FAA, *Airworthiness Directives: The Boeing Company Airplanes, Final Rule*, 85 Fed. Reg. 74560 (Nov. 20, 2020)("Final AD"). The agency also issued a final *Summary of FAA's Review of the Boeing 737 MAX* (Nov. 18, 2020) (R. 27-1)(the "Final Summary").

On January 7, 2021, Boeing admitted to a criminal conspiracy to defraud the FAA by withholding critical information from and misleading the agency about the 737 MAX, and agreed to pay $2.5 billion in fines and compensation. Deferred Prosecution Agreement, *United States v. The Boeing Co*., No. 4:21-cr-00005-O (N.D. Tex., Jan. 7, 2021), Doc. No. 4. A key element of the conspiracy

was the withholding by Boeing of information about a test flight (*id*. at A9-A11)--exactly the type of information withheld by the FAA, at Boeing's insistence, in this case.

Dozens of 737 MAX aircraft were re-grounded for several weeks in April 2021 due to production-related electrical problems. FAA *Airworthiness Directive 2021-09-08*, 86 Fed. Reg. 22860 (April 30, 2021). According to a recent report by a former Boeing senior manager, since the MAX was ungrounded, pilots have reported 42 instances of flight malfunctions, half involving the flight control system. Ed Pierson, *Boeing 737 MAX—How Is It Really Going* https://assets.website-files.com/605147e156c3ef53cbf81d16/61e4ac0fb36e3b386c66ee75_Boeing%20737%20MAX%20-%20How%20Is%20It%20Really%20Going%3F.pdf (Feb. 10, 2022).

On September 16, 2021, the District Court denied FlyersRights' motion for summary judgment and granted the FAA's cross-motion. R. 31, 32. This appeal followed.

ARGUMENT

I. THE WITHHELD RECORDS ARE NOT CONFIDENTIAL BECAUSE BOEING COULD NOT HAVE BEEN ASSURED PRIVACY GIVEN THE FAA'S PUBLIC STATEMENTS ABOUT THE UNGROUNDING PROCESS

"At all times courts must bear in mind that FOIA mandates a 'strong presumption in favor of disclosure'. . . ." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)(quoting *Dept. of Sate v. Ray*, 502 U.S. 164, 173 (1991)). The "agency bears the burden of justifying the applicability of FOIA exemptions, which are exclusive and must be narrowly construed." *Mobley v. Central Intelligence Agency*, 806 F.3d 568, 580 (D.C. Cir. 2016).

In this case, the District Court endorsed a wholesale withholding by the FAA of all of the substantive information about how the agency actually tested and evaluated the proffered fixes to the 737 MAX and the results—essentially all of the crucial information forming the basis for the FAA's decision to unground the aircraft. The District Court permitted all of that information to be treated as confidential, despite explicit assurances by the FAA, not of confidentiality or privacy, but of complete transparency, with respect to the ungrounding process.

The legal significance of those assurances is an issue of first impression in this Circuit. Exemption 4 protects from disclosure "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). In *Food Marketing Institute*, the Supreme Court rejected the substantial

competitive harm test of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), that had been applied by courts for decades. In its place, the Supreme Court set out a new test: that information will be considered confidential "whenever it is customarily kept private, or at least closely held, by the person imparting it." *Food Marketing Inst.*, 139 S. Ct. at 2363. The Court further indicated that "information might be considered confidential only if the party receiving it provides some assurance that it will remain secret." *Id.* The Court found it unnecessary, however, to decide whether this second condition has to be satisfied, because it determined that this condition was satisfied in the case before it. *Id.* at 2363-64.

"[I]t is an open question in this Circuit whether government assurances that information will remain private is necessary for such information to qualify as 'confidential' under Exemption 4." *WP Co. v. U.S. Small Business Admin.*, 502 F. Supp. 3d 1, 12 (D.D.C. 2020). In this case, as in *Food Marketing*, the District Court found it unnecessary to address that question because the Court determined that the withheld information "was provided by Boeing to the FAA under an 'assurance of privacy.'" District Ct. Op. at 16. In reaching that conclusion, the District Court relied on FAA general guidelines precluding release of proprietary information; an agreement with Boeing requiring the agency to obtain written permission to include company information in airworthiness documents; and "implied" assurances "based

on the context and the history of the FAA and Boeing's relationship" as described in declarations submitted by the agency. *Id*. at 16-17.

A. **FAA and Boeing Public Pledges of Transparent Re-Certification**

Notwithstanding these general guidelines and past practices, with respect to the specific classes of documents submitted by Boeing to support ungrounding, the FAA gave every indication that those documents would *not* be maintained in confidence. To the contrary, there was effectively an express affirmative commitment by FAA that these documents would be made public.

In March 2019, the then-FAA Acting Administrator told a Senate Committee under oath that "[s]afety requires…. the open and transparent exchange of information." *Statement of Daniel Elwell; The State of Airline Safety: Federal Oversight of Commercial Aviation, Hearing before the Senate Commerce Committee, Subcommittee on Aviation and Space* 116th Cong. 2 (March 27, 2019). Specifically as to re-certification of the 737 MAX, he stated, "The 737 MAX will return to service for U.S. carriers and in U.S. airspace only when the FAA's analysis of the facts and technical data indicate that it is appropriate. In our quest for continuous safety improvement, *the FAA welcomes external review of our systems, processes and recommendations*." *Id*. at 9 (emphasis added)

In December 2019, a new FAA Administrator, Steve Dickson, told a U.S. House committee that, "Today's unprecedented U.S. safety record was built on the

willingness of aviation professionals to embrace hard lessons….*The FAA both welcomes and invites scrutiny of our processes and procedures*." *The Boeing 737 MAX: Examining the Federal Aviation Administration's Oversight of the Aircraft's Certification: Hearing before the House Comm. on Transportation & Infrastructure,* 116th Cong. 14 (Dec. 11, 2019) (emphasis added).

At a Senate hearing in June 2020, specifically about the FAA's oversight of aircraft certification, Administrator Dickson reiterated, in his prepared statement, that "we believe that transparency, open and honest communication . . are the keys to restoring public trust in the FAA and in the safety of the 737 MAX when it is returned to service." *Examining the Federal Aviation Administration's Oversight of Aircraft Certification: Hearing before the Committee on Commerce, Science and Transportation*, 116th Cong., (June 17, 2020) https://www.commerce.senate.gov/2020/6/examining-the-federal-aviation-administration-s-oversight-of-aircraft-certification at 35:37.

Boeing itself supported the agency's commitment to complete transparency in the re-certification process. In a television interview, Boeing's CEO stated that, "I think transparency of the lessons I learned over the past year. . . That is where Boeing fell short and we will not fall short on that subject under my leadership. It will be uncomfortable but *we will be transparent on every subject*, *whether it's the certification process*, everything along the way….[Y]ou'll know what I know."

CNBC Interview (Jan. 29, 2020) https://www.youtube.com/watch?v=kOuIKggApLc (emphasis added).

A. Transparency Pledges Could Only be Interpreted As Commitment to Disclose Documents Forming the Factual Basis for the Ungrounding

Such public pledges of transparency with respect to re-certification were not mere generalities or niceties. In the context of the re-certification of this specific aircraft, and against the backdrop of concealment and fraud that led to the MAX tragedies, these pledges could only reasonably be interpreted as meaning that the FAA would publicly disclose all the essential information needed to evaluate and assess its ungrounding decision. And in that regard, Appellants submitted to the District Court uncontroverted declarations from seven independent experts making clear that, without access to the Disputed Information Categories, it would not be possible to determine whether the fixes submitted by Boeing, and relied upon by the FAA, actually make the aircraft safe to fly again. R. 21-4; 21-5;21-6; 21-7-7; 21-8; 21-9; 2-11; 27-7; 27-8.

For example, Dr. Javier de Luis, an expert aeronautical engineer and scientist, noted that while the FAA claims more than 4,000 hours of flight testing, the "FAA does not disclose what the test flight plans actually were or any of the specific results of the test flights. Without such information, there is no way to confirm whether the test flight for particular component or feature actually demonstrated that the component or feature worked properly and safely." R. 21-6 ¶2. After reviewing the

Final Summary, Dr. de Luis explained that the "key question in evaluating the basis for the FAA's decision is, is the MAX safe to fly without MCAS?" R. 27-7 ¶ 10. He stated, however, that it "is impossible for me or any other independent expert to address this question. . . without being able to review results of the actual test of the aircraft conducted with and without MCAS in operation—the information contained in the Disputed Information Categories. . . Without knowing the design and results of the tests and analyses performed, there is no way to tell whether the MCAS fixes approved by the FAA are adequate." *Id*. ¶11.

Similarly, Appellants' expert Michael Neely, who spent 20 years at Boeing as a system engineer and project engineer and has direct knowledge of Boeing's engineering processes, noted that the Final Summary indicates that the "updated flight control system was tested and asserts in conclusory fashion that it worked." Supplemental Declaration of Michael Neely R. 27-8. ¶7 (citing Final Summary at 40-42). "But in the 100 some pages of the Final Summary, there is no actual information how this design change was concluded and tested with specific test results." *Id.* "[W]ithout the Disputed Information Categories withheld by the FAA from public disclosure in this case, . . . it is not possible for me or any other independent expert . . .to determine whether the design modifications that the FAA has determined now make the 737 MAX safe to fly in fact do make it safe to fly." *Id*. ¶5.

Plaintiff's experts further confirmed that Boeing could not reasonably have expected confidential treatment, given FAA's assurances of transparency. As Mr. Neely concluded:

> The technical details of how Boeing intends to demonstrate compliance of various equipment and software components with FAA requirements; how Boeing intends to achieve certification of these components by the FAA; the methods of testing; and the results of testing including safety analyses and flight test results, *are the most critical and essential information that would need to be made public in order to disclose the actual basis for any decision by the FAA to unground the aircraft*;. . .It is my understanding that the FAA specifically and publicly committed to transparency with the public regarding the re-certification process of 737 MAX . . . *Consequently Boeing would have clearly understood the FAA could not meet its commitment to transparency without making these categories of information publicly available.*

Neely Declaration, R. 21-4 ¶¶25-27, 32 (emphasis added).

B. Given the Affirmative Pledges by FAA and Boeing, There Could Be No Expectation of Confidentiality

The District Court found that Appellants did not "'identify any statements in which these [FAA and Boeing] executives and officials committed to releasing any specific document or any particular piece of Boeing's proprietary information.'" District Ct. Op. at 19 (quoting FAA Cross Motion for Summary Judgment, R. 23-4 at 22). FAA's representation to the District Court, however, was actually that "FAA's statements regarding the importance of transparency were not a commitment or indication by the FAA that it intends to release Boeing's proprietary certification documents, or information within these documents, to the public *beyond what is necessary to document and explain changes to the 737 MAX before it is*

returned to service." Declaration of Earl Lawrence, R. 23-7 ¶13 (emphasis added). And the uncontroverted sworn declarations of Appellants' experts established that release of the Disputed Information Categories of documents is indeed absolutely "necessary to document and explain changes" to the aircraft before it was returned to service.

In these circumstances, this Court need not decide whether an agency needs to meet the second prong of the *Food Marketing* test. It is only necessary to hold that Exemption 4 does not apply at least where the agency has affirmatively indicated that a category of privately-submitted information *would* be disclosed. That position has been endorsed by the U.S. Department of Justice, which has explained that agency "notices or communications could also explicitly notify submitters of the agency's intention to publicly disseminate the information. In those situations, the information, when objectively viewed in context, would be deemed to have lost its 'confidential' character under Exemption 4,… given that the submitter was on notice that it would be disclosed." Dept. of Justice, *Exemption 4 after the Supreme Court's Ruling in Food Marketing Institute v. Argus Leader Media*, https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media (last visited Feb. 14, 2022). And, post *Food Marketing*, several courts have ruled to the same effect. *American Society for Prevention of Cruelty to Animals v. Animal & Plant Health Insp. Serv.*, No. 19-civ-

3112 (NRB), 2021 WL 1163627 at *5 (S.D.N.Y, March 25, 2021); *WP Co*., 2020 WL 6504534 at *9; *Center for Investigative Reporting v. U.S. Dep't of Labor*, No. 19-cv-05603-SK, 2020 WL 3639646 at *14 (N.D. Cal., July 6, 2020).

Whatever else, the Court's ruling in *Food Marketing* cannot mean that an agency can pledge complete transparency with respect to a specific category of documents submitted to the agency by a company, then treat all of those documents as confidential under Exemption 4. The District Court erred in allowing the FAA to do so.

II. THE DISTRICT COURT ERRED IN PERMITTING FAA TO WITHHOLD A BODY OF SECRET LAW IN THE FORM OF BOEING'S "MEANS OF COMPLIANCE"

As the *Vaughn* Index indicates, numerous documents withheld under Exemption 4 set out Boeing's "means of compliance" with FAA regulations—in other words, the procedures by which the FAA would allow Boeing to show that its fixes to the MAX would meet FAA requirements. As the FAA explained, "FAA and some standards organizations publish means of compliance that have already been accepted" and "applicants can choose to use these available methods;" but the FAA also allows aircraft manufacturers to "develop their own means of compliance that are specific to their airplane design." Declaration of Susan Cabler, R. 23-5 ("Cabler Decl.") ¶¶26, 29.

These "means of compliance," in other words, are procedures that, if followed ,will result in a determination of compliance. They are applied by the FAA to make a legally binding determination about whether a particular design complies with FAA regulations. They are substituted for procedures published by FAA itself (or by private bodies and publicly adopted by the FAA). That FAA—consistent with its penchant for delegating security of the henhouse to the foxes—evidently allows Boeing to make up its own procedures for demonstrating compliance, does not change the nature of these procedures as binding rules. Inherently, such a set of procedures cannot be withheld under FOIA.

It is a bedrock principle of FOIA that "an agency is not permitted to develop a 'body of "secret law," used by it in the discharge of its regulatory duties…'" *Electronic Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014)(quoting *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983)(internal quotation omitted)). . "'[T]o prevent the development of secret law, we must require [an agency] to disclose orders and interpretations which it actually applies to cases before it, . . .'" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)(quoting *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971)). Although these cases involved Exemption 5, "[i]f secret law can be withheld under any of these exemptions, FOIA becomes a license for secret law rather than a limit. There is good reason to believe that the exemptions were not meant to permit

withholding of agency law." Jonathan Manes, *Secret Law*, 106 GEO. L. J. 803, 851 (2018).

The District Court erroneously believed that the "means of compliance" are not binding agency policy because the FAA ultimately determines whether the manufacturer has demonstrated that its design complies with applicable regulations. District Ct. Op. at 13. But the FAA uses the means of compliance to make that *determination. The FAA may have the right to accept or reject Boeing's means of compliance. But if it accepts them, those means *do* function as "working law" for the FAA—contrary to the FAA's assertion. FAA Motion at 10.

For these reasons, the District Court erred in finding that the "means of compliance" could be withheld under Exemption 4.

III. THE WITHHELD FAA COMMENTS WERE NOT "OBTAINED FROM A PERSON"

In order to be covered by Exemption 4, information must be "obtained from a person." 5 U.S.C. §552(b)(4). The FAA concedes that it has withheld in full 79 pages of "records that contain FAA comments to Boeing certification documents." FAA Memorandum in Support of Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion, R. 23-4 at 13. *See* Vaughn Index, R. 19-1, Docs. No. 41, 45, 50, 83. Exemption 4 does not apply to any "FAA Comments." Rather, it "has been interpreted to encompass only information received from persons

outside the Government." *Grumman Aircraft Engineering Corp. v Renegotiation Bd*., 425 F.2d 578, 582 (D.C. Cir. 1970).

The FAA contended that the 79 pages entirely withheld "consisted of charts created through collaboration by Boeing and FAA," containing FAA comments that "would reveal technical data and Boeing's proprietary methods of compliance if released." Cabler Decl., R. 23-5 ¶51. The District Court concluded that these charts were "obtained from a person" because disclosure could "'allow others to extrapolate'" Boeing's proprietary information. District Ct. Op at 10-11 (quoting *Ctr. For Auto Safety v. Dep't of Treasury*, 133 F. Supp. 3d 109, 123 (D.D.C. 2015)).

To be sure, if an agency-created record contains information that was supplied by a company, it could be considered to have been "obtained from a person." *Gulf & Western Indus., Inc. v. U.S.*, 615 F.2d 527, 529-30 (D.C. Cir. 1980). On the other hand, "the mere fact that information was the product of negotiations between a 'person' and the agency does not make that information 'obtained from a person"…" *Southern Alliance for Clean Energy v. U.S. Dept. of Energy*, 853 F. Supp. 2d 60, 68 (D.D.C. 2012). "[I]nformation generated by the government is not exempt from disclosure under Exemption 4 simply because it is based upon information supplied by persons outside the agency." *Id*. at 75. "[T]he key distinction---is between information that is either repeated verbatim or slightly modified by the agency and

information that is substantially reformulated by the agency such that it is no longer a 'person's' information…." *Id*. at 68.

In this case, the FAA itself has described the withheld charts as a product of "collaboration" between the FAA and Boeing, and has characterized the charts in the *Vaughn* index as "FAA comments" to Boeing's certification documents. These charts manifestly do not consist merely of Boeing information "repeated verbatim." Whatever Boeing supplied was sufficiently "reformulated" by FAA to the point that FAA itself characterized the charts as containing the FAA's *own* comments. Those comments are not "obtained from a person." The FAA was obligated to release them. The District Court erred in finding otherwise.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE FAA RELEASED ALL REASONABLY SEGREGABLE INFORMATION

Of the more than 9,000 pages of documents the FAA identified as being responsive to Appellants' narrowed FOIA request, the FAA essentially released nothing of substance. FOIA requires that "any reasonably segregable portion of a record" must be released after redaction of the exempt portions. 5 U.S.C. §552(b). In this case, the District Court accepted FAA's blanket assertion that its decision to withhold all of the substantive information in those documents reflected a line-by-line review in which no reasonably segregable information was found. District Ct. Op. at 20-21.

It is well-established that the "'an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.'" *Stolt-Nielsen Transp. Group Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008)(quoting *Mead Data Cent,, Inc v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). An "'agency may not sweep a document under a general allegation of exemption.'" *Id*. (quoting *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C. Cir. 1973)).

According to the FAA's description of the information it has withheld, however, it is apparent that the agency has not shown that it would be unable reasonably to segregate the information Appellants seek from Boeing's proprietary technical information. For example, Plaintiff is seeking flight test plans and criteria that would address some very basic questions: What was going to take place in a test flight and what was supposed to be shown? What maneuvers would the pilot attempt? What would the pilot do to put the formerly problematic features of the aircraft through their paces? How long was the test? Where would the plane be flown and under what kind of weather and other conditions?

None of this information constitutes proprietary technical information—and the FAA has not really claimed that it does. Rather, the FAA simply avers that flight test plans "are specific to a particular manufacturer's airplane design as they *contain* descriptions of the airplane's flight control systems, flight characteristics such as stability and maneuverability and the flight control laws and algorithms encoded in

the flight control computer." Cabler Decl., R. 23-5 ¶30 (emphasis added). But the fact that technical information is "contained" in these plans does not mean that the entire plan consists of such information. And it does not make sense that it would. FAA has not explained why the technical design details cannot be separated from the information that Plaintiff seeks and that the FAA necessarily pledged to disclose.

Similarly, with respect to flight test results, FAA states that the "results of an applicant's flights tests describe how their design performed and whether it met FAA requirements…" Cabler Decl. R. 23-5 ¶32. The agency suggests that "flight test results *include* detailed technical flight test data gathered through extensive instrumentation and analyzed after the test to correlate and confirm the perceived results of any specific test." *Id.* (emphasis added). But the FAA does not claim that the test results themselves consist solely of technical details about the aircraft design or that any such details could not be redacted.

Rather, the FAA simply asserted in conclusory fashion that all of the information being withheld "is so inextricably intertwined with the technical information and the proprietary compliance information that segregation and release would result in disclosure of only partial sentences or single sentences…" Cabler Decl., R. 23-5 ¶67. In *Stolt-Nielson*, the agency similarly submitted a "conclusory affidavit…declaring that a Division paralegal had 'reviewed each page line by line to assure himself that he was withholding from disclosure only information exempt

pursuant to the Act.'" *Stolt-Nielsen*, 534 F.3d at 734. This Court held that the agency's "conclusion on a matter of law is not sufficient support for a court to conclude that the self-serving conclusion is the correct one." *Id*. This Court also rejected the agency's assertion that so little could be released that it would be meaningless. "FOIA does not require that information must be helpful to the requestee before the government must disclose it. FOIA mandates disclosure of information, not solely disclosure of helpful information." *Id.*

In this case, as in *Stolt-Nielsen*, the District Court simply accepted the agency's conclusory affidavit without making the required "specific findings of segregability regarding the documents to be withheld." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007). That was error. The case should be remanded to the District Court for a new review of what reasonably segregable portions of the withheld documents can be released.

CONCLUSION

There are ample grounds to reverse the District Court's decision. It is not remotely the case that the merits of this appeal are so clearly in favor of the FAA that it does not even warrant further briefing and argument. The FAA's Motion for Summary Affirmance should be denied.

Respectfully submitted,

_/s/ Joseph E. Sandler

February 22, 2022

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CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)

I hereby certify that the foregoing Response complies with the length limitation of Fed. R. App. P. 27(d)(2) because the Motion was prepared using a 14-point Times New Roman font and contains 5,189 words using the Word Count function of Microsoft Word.

/s/ Joseph E. Sandler
Joseph E. Sandler
Counsel for Petitioners

Dated: February 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of February 2022, I served the foregoing Response of Appellants to Federal Aviation Administration's Motion for Summary Affirmance through the Court's ECF system which caused a copy to be served on each counsel of record

/s/ Joseph E. Sandler

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