

# SUBPOENAS ON THE FAA: *Time Well-Wasted?*

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Imagine yourself in the following situation. You're involved in litigation in which the DOT/FAA is not a current party and probably won't ever be, but has documentary evidence of potential interest to you and your client. After some (perhaps hasty) thought, you decide to issue a subpoena for the records. The documents might be related to airman medical or enforcement issues, aircraft registration or certification documents, or to issues arising from your client's employment by the DOT/FAA or other federal agency – disciplinary action, discrimination, worklife policies, whatever.

Or perhaps you'd like to take a deposition of an agency official or employee. You know where they work, but you also know there's a US Attorney's office that's probably closer than the federal building or the airport control tower, so you send your process server and subpoena over there, and meanwhile start sketching out your oral examination. So far, so good?

Not really. Making it up as you go along doesn't work much better here than it does in flying. Let's see why.

First, the United States has no broad waiver of its sovereign immunity, and the limited waiver for its officials, agencies and employees under the Federal Tort Claims Act, 28 USC section 2680 et seq, gives jurisdiction to federal, not state, courts. Consequently, a *response* to the subpoena or the production of documents **is not subject to compulsory process**. See *United States ex rel Touhy v. Ragan*, 340 US 462 (1951); *State of Louisiana v. Gsell, US Probation Officer*, 978 F.2d 226 (5th Cir. 1992); *Houston Business Journal v. Dept. of the Treasury*, 86 F.3d 1208 (DC Cir. 1996).

What happens to your paper progeny, then? Applicable federal regulations have that covered. If your case is private litigation, 49 CFR Part 9 provides that such requests 'will ordinarily be handled in accordance with [DOT's] procedures

concerning requests for records found at 49 CFR Part 7." 49 CFR section 9.13(a).

Thus your subpoena(s) will be processed under the Freedom of Information Act, 5 USC 552 (FOIA) and assigned to the appropriate FAA office(s) for records search, review, and release. These could be the Airman or Aircraft Certification Branches, or the Civil Aerospace Medical Institute (CAMI), all located at the Mike Monroney Aeronautical Center in Oklahoma City, or an FAA Human Resources Branch, located throughout the United States.

The FOIA review process described above will quite probably take longer when a subpoena, rather than a FOIA records request, is involved. Each page of each document may be subject to a withholding from disclosure under any of the nine FOIA exemptions established by Congress. Certain exemptions involve categories of information that protect against harms such as an invasion of personal privacy or harm to law enforcement investigations.

If personal information is involved, such as medical records, those records likely will be located in an FAA Privacy Act system of records. And regulations have made clear that **no record contained within an FAA system of records may be released except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains**. 49 CFR sec 10.35(a); see also 5 USC sec 552a; 49 CFR Part 10.

So what is the *easier* way? Get the advance written consent of your client, or your opponent's client, depending on who wants whose records. The written consent must contain the individual's "unique identifier," such as date of birth. Copies of FAA-approved written releases for airman certification or medical records can be obtained on request.

Note that there may be additional requirements for access to records located in a Privacy Act system of records;

for example, requests for airman medical records must include a statement under penalty of perjury that you are who you claim to be. 75 Federal Register 68849 (2010). And if your request is assigned to multiple FAA program offices, it is your responsibility to make sure that each office receives the required information. You can, by the way, request certified or electronic records when you make your request.

As you can see, it is not worth the effort to issue a subpoena for documents; it will be processed as a FOIA request and likely take additional time, which you may not have under judicial time restrictions. Follow the guidelines above and submit your request to:

FAA National Freedom of  
Information Act Office, AFN-400  
800 Independence Avenue SW  
Washington DC 20591  
Phone: 202-267-9165

Once received, your FOIA request will be acknowledged by letter notifying you which office is processing your request, with a contact name and number. Now you're getting somewhere.

We've covered documents, but what about DOT/FAA employee testimony? Suppose your client is bringing a wrongful-termination suit against an employer which is an aviation business subject to regulation and inspection by the FAA, and you'd like the testimony of the FAA Aviation Safety Inspector concerning their knowledge of the regulatory compliance, or lack thereof, of the defendant.

If you've issued a subpoena, you've again run afoul of the *Touhy* prohibition against compulsory process. You'll have to correct that by filing a proper FOIA request for compliance information and await the required review by the agency.

Once you've done *that*, and you've received and reviewed such documents as the agency may release, if the docu-

ments don't have the information you were seeking you have *another* decision to make. You must either submit a single set of interrogatories, or request the employee's statement or affidavit, or file a proper request to take the deposition of the employee.

The deposition request must be submitted at least 30 days in advance of the requested date and follow 49 CFR 9.15, which includes (but is not limited to) the following requirements:

- the official name of the case and the court/forum in which it is filed;
- a summary of the unresolved (factual) issues applicable to the testimony sought;
- a certification with support that the (factual) information desired is not reasonably available from other sources, including departmental documents or publications;
- a certification that you will **not** seek expert or opinion testimony from the FAA if a deposition is granted **nor** seek the employee's live testimony at a hearing or trial in the proceeding;
- provide a written certification that all parties or potential parties to the litigation will be served with notice of the deposition, if granted, since the employee would only be made available for a *single deposition* in the case;
- provide a copy of any prior request(s) to the Department (including the FAA) or other agency of the United States for records pertaining to the matter being litigated and of the response to the request(s).

If the FAA determines that its employees will be made available for deposition, it will be under the following conditions:

- the deposition will be held at the FAA employee's place of business or other place designated by agency counsel, during normal business hours, and completed in one day or less;
- the employee will testify only to facts within their personal knowledge;
- the employee will not provide expert or opinion testimony or privileged information, such determinations to be made by agency counsel;

- the employee will bring no documents with them to the deposition; and
- your law firm will provide a copy of the deposition to the Office of Chief Counsel, at your expense.

#### Conclusion

Hopefully it is apparent that the issuance of a subpoena for agency documents or employee testimony is a waste of everyone's time. Compliance

with the applicable agency regulations will prove more efficient and protective of personal information that may be involved. Save "time well-wasted" for that beach hammock!

For questions not specific to the facts of a particular ongoing matter, please contact the author, Michael McKinley, at 202-267-7100 or michael.f.mckinley@faa.gov.

