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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JOHN GILDING, a married man,

Plaintiff,

v.

JOHN S. CARR, a married man; et. al.

Defendant(s).

No.: **CV2007-016329**

PLAINTIFF'S MOTION FOR A JUDGE ISSUED SUBPOENA/ORDER PURSUANT TO 5 U.S.C. § 552A(B)(11), AND 5 C.F.R. § 297.401, ET. SEQ.

(The Honorable Thomas Dunevant, III)

(Discovery Master: Honorable Barry Schneider, Ret.)

As federal regulations require that the judge, and not a clerk of court, sign a subpoena or order requesting an administrative record of investigation ("ROI"), the Plaintiff hereby requests this Court, through its designated discovery master the Honorable Judge Barry C. Schneider (ret.), issue an order and subpoena, in the form attached hereto, so that Plaintiff may obtain the ROIs produced by the Federal Aviation Administration ("FAA") on Defendants Robert Marks and Jerry Johnston. The administrative ROIs are material, probative, and therefore relevant to Plaintiff's invasion of privacy claim(s) as pled in the Complaint. This request is made pursuant to 5 U.S.C. § 552a(b)(11), and 5 C.F.R. § 297.401, et seq. and is supported by the attached Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

Plaintiff alleges that on or about March 25, 2003, Defendant Johnston, acting individually and as an agent of NATCA and PHX, wrongfully obtained confidential personnel files pertaining to John Gilding and therefore invaded his privacy. Furthermore, on or about May 1, 2003, and other unknown dates, Defendant Johnston transmitted information obtained from Mr. Gilding's confidential personnel file to Defendant Marks, who then transmitted the data to Defendant Carr, and other unknown third parties.[1]

Plaintiff first became aware of Defendants' outrageous actions in obtaining, retaining, transmitting, and/or utilizing confidential personnel files on January 18, 2008, when the document in question was obtained by plaintiff's counsel via a subpoena of Johnston's records.[2] The data obtained, retained, and transmitted to third parties included the Plaintiff's birth date and social security number. Such data is considered private in accord with both federal and state law.[3]

On or about May, 2008, the FAA commenced an administrative security investigation into the alleged illegal activities of Defendants Johnston and Marks in obtaining and distributing Plaintiff's confidential personal information. The investigation resulted in administrative Records of Investigation ("ROI") on both Defendants. The underlying suit was amended to add a count of Invasion of Privacy due specifically to the Defendants' actions as investigated by the FAA. The ROIs are material, probative and, therefore, particularly relevant to Plaintiff's invasion of privacy claim(s) as pled in the Complaint. Accordingly, and as more fully outlined below, Plaintiff is legally entitled to the information contained in the ROIs.

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[1] *See* Attached Exhibit A (Gilding's personnel file, bates-stamped by Johnston's legal counsel); Exhibit B (fax from Johnston to Marks).

[2] The subpoena was issued, and responded to, prior to Johnston being made a party to this action.

[3] *Scottsdale Unified School Dist. No. 48 of Maricopa County v. KPNX Broadcasting Co.*, 191 Ariz. 297, 301-02, 955 P.2d 534, 538-39 (1998), citing *Olivia v. United States*, 756 F.Supp. 105, 107 (N.Y. 1991); 42 U.S.C. § 405(c)(2)(C)(viii)(I).

II. LEGAL ARGUMENT

A. THE FAA IS REQUIRED TO PROVIDE THE REQUESTED RECORDS TO THE PLAINTIFF PURSUANT TO STATE COURT ORDER OR SUBPOENA

Disclosure of personnel records is governed by the provisions of the Privacy Act of 1974, 5 U.S.C. § 552a. The essential point of the 5 USC § 552a(b)(11) disclosure exception is that the Privacy Act "cannot be used to block the normal course of court proceedings, including court-ordered discovery."[4] Under federal law, a federal agency such as the FAA must disclose Records of Investigation, generated pursuant to a security investigation, when directed to do so by a state court order.[5] The union contract ("Contract") between the FAA and NATCA also requires the release of such information, regardless of the affected employees' agreement, pursuant to the same regulation and statute. The Contract states:

> **Section 9.** In the event an employee is the subject of a security investigation and such investigation produces a negative determination, any information or documents obtained and made a part of the Security file shall not be released or shared without the express written authorization of the employee, except pursuant to 5 USC 552a(b) and 5 CFR 297.401. [underline added].[6]

As both Defendants Marks and Johnston are employees of the FAA, their respective administrative "rights" as employees regarding the release of security investigation information are addressed by the collective bargaining agreement. The collective bargaining agreement, in turn, specifically defers to federal statute and regulation when determining whether security ROI will be released. Under 5 USC §552a(b):

> b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, **unless disclosure of the record would be**--
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> ***
>
> (11) **pursuant to the order of a court of competent jurisdiction**; [emphasis added].

The cited regulation allows the same disclosure. According to 5 C.F.R. § 297.401(k):

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[4] *Clavir v. United States*, 84 F.R.D. 612, 614 (S.D.N.Y. 1979); *see also, e.g.*, *Martin v. United States*, 1 Cl. Ct. 775, 780-82 (Cl. Ct. 1983); *Newman v. United States*, No. 81-2480, slip op. at 3 (D.D.C. Sept. 13, 1982).

[5] 5 U.S.C. § 552a(b)(11); 5 C.F.R. § 297.402, et. seq.; *see also* footnotes 6, 7 and 8 infra.

[6] Current Contract between the FAA and NATCA, June 5, 2006, Article 22, section 9.

§ 297.401 Conditions of disclosure. An official or employee of the Office or agency should not disclose a record retrieved from a Government wide system of records to any person, another agency, or other entity without the express written consent of the subject individual **unless disclosure is**—

***

(k) **Pursuant to the order of a court of competent jurisdiction**. [emphasis added].

The personnel records at issue require that the judge, and not the clerk of court, sign the subpoena requesting them.[7] State courts are courts of competent jurisdiction pursuant to regulation[8] and case law.[9] A subpoena regarding requests for Privacy Act records, signed by a judge, is a valid court order.[10] The law clearly demonstrates that this Court has the authority to issue a subpoena, thereby ordering the release of Defendants Marks' and Johnston's ROIs.

[7] 5 C.F.R. § 297.402 (a) ("For purposes of this section, the Office considers that a subpoena signed by a judge is equivalent to a court order."); Amend 57 FR 56732-01, Monday, November 30, 1992 (Through this amendment the Office of Personnel Management adopted a regulatory change regarding privacy procedures for personnel records covered by the Privacy Act of 1974, 5 U.S.C. 552a. This regulatory change clarifies that records covered by the Privacy Act are not to be disclosed in response to attorney-issued or clerk-issued subpoenas, unless the subpoena has the specific approval of a judge of a court of competent jurisdiction).

[8] According to 5 C.F.R. § 297.402 (a) "(a) The Office may disclose, without prior consent of the data subject, specified information from a system of records whenever such disclosure is pursuant to an order signed by the appropriate official of a court of competent jurisdiction or quasi-judicial agency. In this subpart, a court of competent jurisdiction includes the judicial system of a state, territory, or possession of the United States." [underline added].

[9] *Robinett v. State Farm Mutual Automobile Insurance Company*, No. 02-0842, 2002 WL 31498992, at 3-4 (E.D. La. Nov. 7, 2002), aff'd per curiam, 83 Fed. Appx. 638 (5th Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3615 (U.S. Mar. 10, 2004) (No. 03-1306), the court looked to subsection (b)(11) and held that State Farm "properly obtained" an order from the state court for release of plaintiff's medical records where "plaintiff's medical condition was relevant to the litigation," and that the Department of Veterans Affairs' "determination that plaintiff's records were subject to release based on the court order . . . was therefore correct." The district court's holding in *Robinett* was affirmed per curiam by the Court of Appeals for the Fifth Circuit, which specifically stated that the medical records were "released pursuant to the exception for orders of a court of competent jurisdiction contained in 5 U.S.C. § 552a(b)(11)." 83 Fed. Appx. at 639; *see also Moore v. USPS*, 609 F. Supp. 681, 682 (E.D.N.Y. 1985) (assuming without explanation that state court subpoena, required by state law to be approved by judge, constituted proper subsection (b)(11) court order; issue of "competent jurisdiction" was not addressed); *cf. Henson v. Brown*, No. 95-213, slip op. at 4-5 (D. Md. June 23, 1995) (although not disputed by parties, stating that judge's signature elevated subpoena to court order within meaning of subsection (b)(11) in context of determining whether defendant complied with order); *Tootle v. Seaboard Coast Line R.R.*, 468 So. 2d 237, 239 (Fla. Dist. Ct. App. 1984); cf. *Saulter v. Mun. Court for the Oakland-Piedmont Judicial Dist.*, 142 Cal. App. 3d 266, 275 (Cal. Ct. App. 1977) (suggesting that state court can order state prosecutor to subpoena federal records for purpose of disclosing them to criminal defendant in discovery).

[10] 5 C.F.R. § 297.402 (a) ("For purposes of this section, the Office considers that a subpoena signed by a judge is equivalent to a court order.")

B. A SHOWING OF "NEED" IS NOT A PREREQUISITE TO INITIATING DISCOVERY OF THE REQUESTED RECORDS.

Unlike similar provisions in other federal confidentiality statutes, 5 USC §552 subsection (b)(11), contains no standard governing the issuance of an order authorizing the disclosure of otherwise protected Privacy Act information.[11]

Because the Privacy Act does not itself create a qualified discovery "privilege," a showing of "need" is not a prerequisite to initiating discovery of protected records.[12] Rather, the D.C. Circuit's decision in *Laxalt* establishes that the only test for discovery of Privacy Act-protected records is "relevance" under Rule 26(b)(1) of the Federal Rules of Civil Procedure.[13]

As the material requested is an administrative investigation into the alleged activities of several Defendants, as alleged in the Complaint, the investigation is clearly relevant. This would be akin to a plaintiff in a civil battery case requesting a copy of the police report of the same underlying incident giving rise to the civil cause of action.

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[11] *See, e.g.*, 42 U.S.C. § 290dd-2 (2000) (listing "good cause" factors to be weighed by court in evaluating applications for orders permitting disclosure of records pertaining to substance abuse).

[12] *See Laxalt v. McClatchy*, 809 F.2d 885, 888-90 (D.C. Cir. 1987); *see also Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) (noting that objection to discovery of protected records "does not state a claim of privilege"); *Bosaw v. NTEU*, 887 F. Supp. 1199, 1215-17 (S.D. Ind. 1995) (citing *Laxalt* with approval, although ultimately determining that court did not have jurisdiction to rule on merits of case); *Ford Motor Co. v. United States*, 825 F. Supp. 1081, 1083 (Ct. Int'l Trade 1993) ("[T]he Privacy Act does not establish a qualified discovery privilege that requires a party seeking disclosure under 5 U.S.C. § 552a(b)(11) to prove that its need for the information outweighs the privacy interest of the individual to whom the information relates."); *Clavir v. United States*, 84 F.R.D. at 614 ("it has never been suggested that the Privacy Act was intended to serve as a limiting amendment to . . . the Federal Rules of Civil Procedure.").

[13] 809 F.2d at 888-90; *see also, e.g., Snyder v. United States*, No. 02-0976, 2003 WL 21088123, at 2-3 (E.D. La. May 12, 2003); *Lynn v. Radford*, No. 99-71007, 2001 WL 514360, at 3 (E.D. Mich. Mar. 16, 2001); *Anderson v. Cornejo,* No. 97 C 7556, 2001 WL 219639, at 3 (N.D. Ill. Mar. 6, 2001); *Hernandez v. United States*, No. 97-3367, 1998 WL 230200, at 2-3 (E.D. La. May 6, 1998); *Forrest v. United States*, No. 95-3889, 1996 WL 171539, at 2 (E.D. Pa. Apr. 11, 1996); *Bosaw*, 887 F. Supp. at 1216-17 (citing *Laxalt* with approval, although ultimately determining that court did not have jurisdiction to rule on merits of case); *Ford Motor Co.*, 825 F. Supp. at 1083-84; *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 49 (N.D.N.Y. 1991); *O'Neill v. Engels*, 125 F.R.D. 518, 520 (S.D. Fla. 1989); *Murray v. United States*, No. 84-2364, slip op. at 1-3 (D. Kan. Feb. 21, 1988); *Broderick v. Shad*, 117 F.R.D. 306, 312 (D.D.C. 1987); *Smith v. Regan*, No. 81-1401, slip op. at 1-2 (D.D.C. Jan. 9, 1984); *In re Grand Jury Subpoenas Issued to USPS*, 535 F. Supp. 31, 33 (E.D. Tenn. 1981); *Christy v. United States*, 68 F.R.D. 375, 378 (N.D. Tex. 1975).

C. THE ROI'S ARE RELEVANT TO THE PLAINTIFF'S CASE ACCORDING TO RULE 26(B)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND, THEREFORE, THE PLAINTIFF IS ENTITLED TO THE RECORDS.

1. Federal Rule of Civil Procedure Rule 26

The Plaintiff has alleged a claim for invasion of privacy (intrusion upon seclusion) in the Complaint. Therefore, obtaining the relevant ROI's on Johnston and Marks is within the allowable scope of discovery. According to the pertinent Rule:

> (b) Discovery Scope and Limits.
>
> (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.[14]

Arizona Rule 26(b) defines a much broader scope for discovery. Generally, discovery may be had of "any matter" which is "not privileged" that is either "relevant to the subject matter" of the litigation or which "appears reasonably calculated to lead to the discovery of admissible evidence."[15] Under *either* rule the material is relevant, as discussed *infra*, and therefore subject to discovery.

2. The Records Regarding Defendants Johnston and Marks Are Relevant to the Plaintiff's Invasion of Privacy Claim.

Arizona Rule of Evidence 401, is identical to its federal counterpart. Under both rules "relevant evidence" is defined as "…evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence…."[16] To satisfy Rule 401's standards, evidence need only have some basis in reason to prove a material fact. It is not necessary that the evidence in and of itself be sufficient to support a finding of that fact; it is enough if the evidence renders the fact more probable or less probable than it would be without the evidence being received.[17]

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[14] Rule 26 (b)(1), Fed.R.Civ.P.
[15] Rule 26(b)(1)(A), Ariz.R.Civ.P.
[16] Rules 401 Fed.R.Evid. and Ariz.R.Evid.
[17] *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 733 P.2d 1073 (1987); *Reader v. General Motors Corp.*, 107 Ariz. 149, 483 P.2d 1388 (1971); *Acuna v. Kroack*, 212 Ariz. 104, 128 P.3d 221 (Ct. App. Div. 2 2006); *Brown v. U.S. Fidelity and Guar. Co.*, 194 Ariz. 85, 977 P.2d 807 (Ct. App. Div. 1 1998).

The fact to be inferred from the evidence must be material, i.e., "of consequence in the action." The materiality of a fact will be defined by the law applicable to the claims and defenses properly raised by the pleadings. Evidence is admissible if it is relevant to facts supporting any theory of recovery.[18] Evidence need only have "any tendency" to make an inference of a material fact more or less probable, a minimal test which places substantial discretion in the trial judge. As the Plaintiff has properly pled a cause of action for invasion of privacy pursuant to the Restatement of Torts, and the underlying ROIs pertain specifically to the actions of the Defendants in obtaining the private information of the plaintiff, the ROIs are evidence "…having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence…."[19] Therefore, the ROIs are relevant and discoverable according to controlling statute and precedent.

3. The ROI Regarding Defendants Johnston and Marks is Not Privileged

Arizona's law of privileged communication is governed by a combination of statute and common law.[20] The Privacy Act does not expand traditional concepts of privilege,[21] and there are no common law rules that apply.[22] A police report would certainly not be privileged under these circumstances, so this Court should grant the Motion for a Subpoena.

III. CONCLUSION

For the reasons expressed above, Plaintiff respectfully requests that this Court, through judicial signature, issue the attached proposed Order and sign the attached Subpoena Duces Tecum and return them to plaintiff, via enclosed self-addressed envelope, for issuance and service. This subpoena will allow the plaintiff to lawfully serve the FAA and obtain the ROIs that are highly relevant to a claim pled in the underlying Complaint.

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[18] *Rossell v. Volkswagen of America*, 147 Ariz. 160, 709 P.2d 517 (1985).
[19] Rules 401 Fed.R.Evid. and Ariz.R.Evid.
[20] Ariz.R.Evid. 501; *see also* A.R.S. § 12-2231 et seq.
[21] *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980) (noting that objection to discovery of protected records "does not state a claim of privilege"); *Ford Motor Co. v. United States*, 825 F. Supp. 1081, 1083 (Ct. Int'l Trade 1993) ("[T]he Privacy Act does not establish a qualified discovery privilege that requires a party seeking disclosure under 5 U.S.C. § 552a(b)(11) to prove that its need for the information outweighs the privacy interest of the individual to whom the information relates."); *Clavir v. United States*, 84 F.R.D. at 614 ("it has never been suggested that the Privacy Act was intended to serve as a limiting amendment to . . . the Federal Rules of Civil Procedure.").
[22] *e.g. Powers v. Dole*, 782 F.2d 689, 692 (C.A.7 1986) (FAA ROI admitted as evidence without question).

Dated this 2nd day of June, 2009.

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Honorable Judge Thomas Dunevant, III
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Phoenix, Arizona 85003-2243

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