

Entitlement to Actual/Nonpecuniary Damages for Governmental Violations of the Privacy Act of 1974

Introduction

I last wrote about Operation Safe Pilot in the Winter 2005 Edition of the NTSB Bar Association Newsletter (see Operation Safe Pilot and the Privacy Act of 1974—Routine Use of Governmental Abuse?).

To recap very briefly, In July 2005, the United States Government, acting through its U.S. Attorneys in San Francisco and Sacramento, criminally indicted 40 pilots for falsification of applications for airman medical certificates, in violation of Title 18 U.S.C. Section 1001. More or less concurrently, the FAA issued Emergency Orders of Revocation to 16 of the 40 pilots, and at least in one instance, initiated revocation action by means of the issuance of a Notice of Proposed Certificate Action. These actions stemmed from the FAA's, Social Security Administration's (SSA) and Department of Transportation, Office of Inspector General's (OIG) interagency exchanges of FAA aeromedical certification records and Social Security disability records without the knowledge or consent of the airmen. This was more than a simple database comparison or computer match. In each instance, hard copies of the pilots' complete SSA disability files, including but not limited to highly sensitive, confidential medical and treatment records, were provided by the SSA to FAA and OIG.

I had represented 4 of the 40 pilots involved and in the prior article, I used these cases as illustrative examples to suggest that the Government's actions transcended routine use and constituted violations of the Privacy Act (5 U.S.C. §552a, et seq.). In the interests of client confidentiality and privacy, I used pseudonyms for each of the clients—Edward, William, Mary and Albert (despite the names, none of them, to my knowledge, are now or have ever been members of British royalty).

Case History: William

One of the illustrative cases in the prior article involved "William", who had been a certificated pilot for some 40 years. Wil-

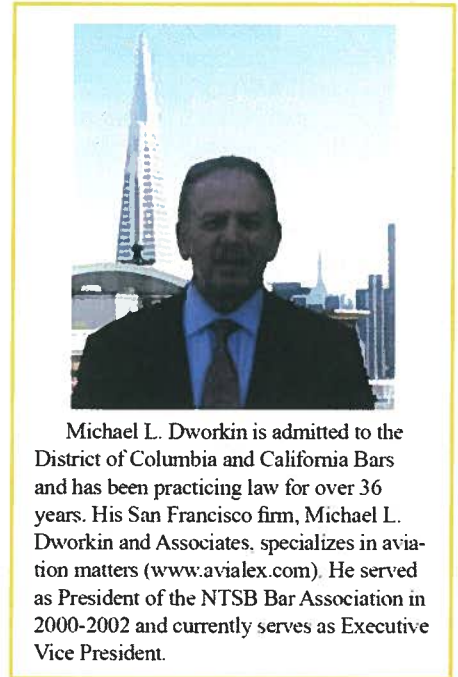
liam in real life is Stanmore C. Cooper.

In 1985, Mr. Cooper discovered that he was HIV positive. Knowing that the FAA was not issuing medical certificates to HIV-infected individuals at that time, he voluntarily grounded himself and allowed his airman medical certificate to lapse.

By 1995, Mr. Cooper's health had worsened and he left his job as Chief Network Architect with a financial services corporation and applied for and started receiving Social Security Disability Benefits. He was placed into a then-experimental program and treated with protease inhibitors. His health improved rapidly and markedly. In 1996, Mr. Cooper felt that he could return to work and requested that SAA terminate Disability Benefits, which it did. He went back to work and was ultimately promoted to Vice President-Global Strategy and Planning. He has since retired.

In 1998 Mr. Cooper wanted to return to flying. He did considerable research into what, if any, guidelines and standards the FAA had with respect to HIV-infected pilots. He found that there were not only no established eligibility guidelines but that there was substantial uncertainty and confusion within the FAA. Out of fear of being arbitrarily disqualified, Mr. Cooper applied for and was issued a Third Class Medical, withholding information as to his HIV infection. In 2000 Mr. Cooper saw the first published certification criteria for special issuance of medical certificates to HIV-infected persons. He verified that his cell counts and viral load were within the applicable criteria. He subsequently applied for and received Third Class Medicals in 2000, 2002 and 2004, again not disclosing his HIV status. Mr. Cooper admitted that withholding such information was wrong.

HIV today is no longer, in and of itself, medically disqualifying. In fact, the FAA Aeromedical Certification Division had issued a policy statement to the effect that



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HIV-infected individuals who voluntarily revealed their previously unreported infections would not be subject to FAA enforcement action. Mr. Cooper learned of the FAA policy statement in February 2005 and was in the process of gathering documents and records to submit to the FAA to avail himself of this amnesty program. However, before doing so, in March 2005, Mr. Cooper received a telephone message from a person he later learned to be an agent with the Department of Transportation ("DOT") Office of Inspector General ("OIG"), requesting a meeting for the purpose of discussing certain "certification irregularities". A meeting was arranged for the next day. At the meeting Mr. Cooper was shown numerous documents from his SSA file which, according to the OIG Agent, had been obtained as a result of a "pilot computer match" between SSA and FAA. At this meeting, Mr. Cooper fully cooperated and spoke freely to the OIG agents. He was not advised that he was the subject of a criminal investigation, that

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a criminal proceeding would ensue or that anything that he said would be used against him. Before this meeting ended, the OIG Agent served Mr. Cooper with a copy of an Emergency Order of Revocation revoking his pilot and medical certificates for violations of FAR §67.403 (prohibition against intentionally false or fraudulent statements in an application for airman medical certificate) and Mr. Cooper surrendered his certificates on the spot.

Mr. Cooper appealed the certificate action. His extensive and repetitive efforts to obtain pre-hearing discovery of communications between SSA, FAA and OIG were essentially thwarted (in fact, it was not until long after this case was concluded that the Government acknowledged the existence, rationale or methodology of Operation Safe Pilot). The FAA filed a Motion for Summary Judgment, which Mr. Cooper opposed arguing that the documents and materials upon which the FAA's Motion were based were illegally

obtained in violation of the Privacy Act. The Administrative Law Judge granted the FAA's Motion. Mr. Cooper's appeal to the full Board was equally unsuccessful (NTSB Order EA-5212).

As if the FAA enforcement action was not enough, Mr. Cooper was indicted on 3 counts of making false statements under 18 U.S.C. §1001. He eventually pled guilty to one count of making a false official writing, a misdemeanor under 18 U.S.C. §1018 and was sentenced to two years on probation and fined \$1,000.

Mr. Cooper has since applied for and has been issued new airman and medical certificates and is once again an active pilot. He is also building an airplane.

Lawsuit for Violation of Privacy Act

In 2007, Mr. Cooper filed suit against the FAA, SSA and DOT in U.S. District Court for the Northern District of California, alleging that the defendants had willfully or intentionally violated the Privacy Act by their interagency exchange of his

medical and disability records, causing him "to suffer humiliation, embarrassment, mental anguish, fear of social ostracism and other severe emotional distress."

The Privacy Act forbids federal agencies from disclosing an individual's records without that person's written consent, unless the disclosure falls within one of the Act's narrow exceptions, 5 U.S.C. §552a(b). If an agency fails to comply with these requirements, the individual may file a civil action against the agency if the unauthorized disclosure has an "adverse effect" on the individual, §552a(g)(1)(D), and if the individual can demonstrate that the agency acted in a manner which was intentional or willful, the individual can recover "actual damages sustained", but not less than \$1,000. §552a(g)(4)(A).

In disposing of the parties' respective cross-motions for summary judgment, the District Court concluded that the Government failed to comply with its record-keep-

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JDA Aviation Technology Solutions Training in Regulatory Affairs

Hays Hettinger

NTSBBA President, Tony Jobe kindly arranged with Josh Plave for me to attend a training conference sponsored by JDA Aviation Technology Solutions, held on May 25 and 26 at the AA Training Center, DFW Airport, Tex.

The JDA was created by Joe Del Balzo, former FAA Acting Administrator, to assist the aviation industry in safety, certification, and compliance elements of aviation regulatory requirements, as well as airspace analysis/obstruction evaluation and business and commercial aviation solutions for corporate and charter operators. The company's team is composed of former FAA supervisors and inspectors and investigators of the NTSB, as well as personnel from airline/operator organizations.

In July, 2005, JDA became one of the first two consulting firms to be an FAA-

Qualified Certification Consultant for new FAR 121 operators.

I attended the session with representatives of major airlines, regional carriers, major repair stations, and other industry reps, as well as one of my former bosses, J.E. "Sandy" Murdock, former FAA Chief Counsel. The dialogue was excellent and conducted well.

One snippet from the conference for us in the NTSBBA: we often forget that Joe was one of the forerunners of the Flight Standards "Bible" which is FAA Order 8900.1 Flight Standards Information Management System ("FSIMS").

This Order is FAA policy for everything from certification, surveillance, investigation and oversight to Compliance & Enforcement. When checking FAA's compliance with its own policies, remember that FAR 13 and Handbook

2150.3 are NOT the only standards; they include 8900.1. For example, FAA inspectors become "sloppy" sometimes and when investigating accidents with the NTSB, merge NTSB reports with FAA EIR statements, which is forbidden by 8900.1. Another key point: every practitioner handling an enforcement case should review the Enforcement Decision Process ("EDP") in Vol 14, which was amended as recently as 01/14/10. This is a "decision tree" that tells you the procedures and criteria for FAA's evaluation of the proposed sanction for enforcement actions. Critical to this analysis is the 14-142 Definitions that guide the FAA throughout informal and formal actions.

For more information on this company in Bethesda, contact them at: www.jdasolutions.aero. ■

Operation Safe Pilot: The Aftermath

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Russ had his ATP airman certificate with all of his type ratings revoked, his medical certificate revoked, and was then charged with a felony for falsifying his medical application.

The criminal trial of Russell H. Johansen took place over a two week period in March, 2006, and I attended most of the court sessions. In the end, a mistrial was declared because the jury was unable to reach a verdict. The jury was polled after the trial, and a majority of the twelve jurors said there was no way they would convict Russ of anything.

After the mistrial, the US Attorney offered both Russ and me a new plea agreement without the onerous restrictions of the initial one offered. Facing the cost of another trial (\$50,000 to \$100,000) and in debt for his legal expenses, Russ accepted the plea. I also

accepted the same plea agreement, in which we plead guilty to a single misdemeanor, paid a \$1,000 fine, a \$25.00 fee and served two years probation.

Between his certificate revocation appeal and his criminal defense, Russ spent over \$150,000 in legal expenses, virtually wiping out his retirement savings.

On March 8, 2007, after a thorough review of his medical records, Russ was issued an unrestricted third class medical certificate. This casts doubt about the materiality of the emergency revocations and criminal prosecution.

Because of the emergency revocations, Russ has been unable to secure post-retirement employment as a simulator instructor. Because of the egregious nature of government violations during Operation Safe Pilot, he went from a true hero to a pariah due to circumstances not of his doing.

Russell Johansen is innocent of any

charges that could possibly have justified the revocations of his medical and airman certificates. He was the victim of an illegal investigation, a rush to judgment, and overzealous prosecution. He has paid a very heavy price for the government's misconduct. Justice demands that the FAA reverse the emergency revocation of his ATP airman certificate with all of its ratings, and apologize for its actions.

Acknowledgement

Without the thousands of hours of legal work devoted to my civil lawsuit and subsequent appeal by my pro bono Reed Smith LLP attorneys, the violations of Operation Safe Pilot would never have come to light. Attorneys James Wood, Tiffany Thomas, Ray Cardozo, and David Bird doggedly pursued discovery from the government defendants, and have my eternal gratitude. ■

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ing obligations under the Act, but finding the term "actual damages" to be ambiguous, construed the waiver of sovereign immunity strictly in favor of the Government and ruled against Mr. Cooper, holding that due to the strictly nonpecuniary nature of his damages, there was no actual issue of material fact as to his having suffered "actual damages" under the Act.

Mr. Cooper appealed to the Ninth Circuit.

Ninth Circuit: Clear Purpose—Agencies Subject to Civil Suit for Any Damages

In its Opinion filed February 22, 2010 (No. 08-17404), the Ninth Circuit Court of Appeals stated:

Congress articulated a clear purpose behind the Act, stating that "the right to privacy is a personal and fundamental

right protected by the Constitution..." To protect that right, Congress passed the Act "to "provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies... to...be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act."

One can readily envision circumstances in which these types of injuries might flow from the disclosure of one's confidential medical records, which often contain some of the most sensitive and intimate information about one's physical, mental, and emotional well-being, and sexual orientation. Given the nature of the injuries that most frequently flow from privacy violations, it is difficult to see how Congress's stated goal of subjecting federal agencies

to civil suit for any damages resulting from a willful or intentional violation of the Act could be fully realized unless the Act encompasses both pecuniary and nonpecuniary damages.

The Court remanded the matter to the District Court for further proceedings.

As the Court's Opinion is only a few months old, there is no doubt that there will be subsequent developments.

To be continued....

Author's Note:

On June 18, 2010 the FAA issued Report Number FI-2010-060 which provides a summary of the FAA's efforts in setting up the legal framework allowing it to share information with other agencies. That report can be found at [http://www.oig.dot.gov/sites/dot/files/MSS%20Final%20Report%20\(signed\)%206-18-2010.pdf](http://www.oig.dot.gov/sites/dot/files/MSS%20Final%20Report%20(signed)%206-18-2010.pdf). ■