

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ACCOUNTABLE.US,)
 1919 M Street NW, Suite 450)
 Washington, District of Columbia, 20036)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES DEPARTMENT OF)
 TRANSPORTATION,)
 1200 New Jersey Ave SE)
 Washington, District of Columbia, 20590)
)
 Defendant.)
 _____)

Civil Action No. 20-cv-412

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Accountable.US brings this action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to compel the production by Defendant Department of Transportation (“DOT”) of records responsive to FOIA requests for records.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331.

3. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

4. Plaintiff Accountable.US is a District of Columbia nonprofit corporation incorporated under D.C. Code Title 29, Chapter 4. Accountable.US is a nonpartisan watchdog committed to ensuring that public officials advance policies that are in the public interest.

5. Defendant DOT is a federal agency within the meaning of FOIA, 5 U.S.C. § 552(f)(1). DOT has possession of and control over the records that Accountable.US seeks.

FACTUAL ALLEGATIONS

I. FOIA Requirements.

6. The purpose of FOIA is to “pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.” *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 869 (D.C. Cir. 2010) (quotation marks omitted). In enacting FOIA, Congress intended to provide our citizenry full disclosure of federal agency records, so long as information is not exempted by clearly delineated statutory language. *Id.*

7. FOIA establishes a broad right of public access to federal agency records, subject only to nine delineated exemptions. 5 U.S.C. § 552(b). “Each agency, upon any request” for enumerated records must “determine within 20 days (excepting Saturdays, Sundays, and legal holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such a request” of the “determination and the reasons therefore.” *Id.* § 552(a)(6)(A)(i). A requester “shall be deemed to have exhausted [its] administrative remedies”—and hence may file suit under the Act’s citizen suit provision—“with respect to [a] request if the agency fails to comply with the . . . time limit” set forth in the statute for a substantive response. *Id.* § 552(a)(6)(C)(i).

8. The federal regulations implementing FOIA for DOT are located at 49 C.F.R. § 7.1, *et seq.* 49 C.F.R. § 7.31 codifies the requirement that DOT respond within 20 working days of receiving a FOIA request with a determination of compliance.

II. Public Interest Need for Records Requested by Accountable.US.

9. On October 29, 2018, Lion Air Flight 610, a Boeing Company (“Boeing”) manufactured 737 MAX 8 aircraft, crashed thirteen minutes after taking off from Soekarno–Hatta International Airport in Jakarta, Indonesia, killing all 189 passengers and crew onboard.

10. On March 10, 2019, Ethiopian Air Flight 302, also a Boeing manufactured 737 MAX 8 aircraft, crashed six minutes after taking off from Addis Ababa Bole International Airport in Ethiopia, killing all 157 passengers and crew onboard.

11. Following Ethiopian Air Flight 302’s crash, numerous countries and organizations moved swiftly to protect air travelers by grounding 737 Max aircraft, including: Australia, Canada, China, Ethiopian Airlines, the European Union Aviation Safety Agency, Malaysia, Singapore, and the United Kingdom. In stark contrast, the United States waited three days to issue a similar order.

12. Finally, on March 13, 2019, the Federal Aviation Authority (“FAA”) issued an emergency order (the “Emergency Order”) prohibiting the operation of Boeing’s 737-8 and 737-9 (collectively “737 MAX”) aircraft by U.S. certificated operators. Federal Aviation Administration, *Operators of Boeing Company Model 737-8 and Boeing Company Model 737-9 Airplanes: Emergency Order of Prohibition*, 84 Fed. Reg. 9705 (Mar. 18, 2019). The agency noted that certain information developed at that point “indicates some similarities between the ET302 and JT610 accidents that warrant further investigation of the possibility of a shared cause.” 84 Fed. Reg. at 9706.

13. Following the Emergency Order, the media began to report that there were serious deficiencies not only with the 737 MAX aircraft, but also with the process by which the FAA certifies airworthiness.

14. On information and belief, 737 MAX aircraft were equipped with engines that were larger and heavier than previous 737 models. As a result, the 737 MAX had a tendency to pitch up in response to the aerodynamic effects of the larger and heavier engines. To compensate for this, Boeing installed a Maneuvering Characteristic Augmentation System (“MCAS”) on the 737 MAX. Under certain conditions, the MCAS would automatically move a control surface at the tail of the plane in order to mitigate the 737 MAX’s tendency to pitch.

15. However, also on information and belief, as a result of fundamental design flaws in the MCAS and the 737 MAX, and also as a result of Boeing’s failure to properly inform pilots about, and to train them on, the operation of the MCAS, the MCAS could pull the nose of the airplane down sharply, suddenly, and repeatedly, with pilots unaware of why that was happening or how to override it.

16. Accountable.US is concerned that the apparent design flaws in the 737 MAX, and Boeing’s apparent failure to properly inform and to train pilots, were not addressed in part because the FAA outsourced large portions of its certification process to the very companies, like Boeing, that it was tasked with regulating.

17. For example, in response to an October 15, 2015 report from the DOT’s Office of Inspector General, the FAA, a component agency of DOT, wrote: “The Agency is committed to continuously enhancing its oversight of the program, but the ever expanding magnitude of the U.S. aerospace industry requires that the Agency delegate an increasing number of oversight functions.”

III. Accountable.US’s FOIA Requests.

18. As part of its mission to identify instances where public officials may have taken actions that run contrary to the public interest, Accountable.US submitted four FOIA requests

seeking records regarding the period immediately following the tragic loss of Ethiopian Air Flight 302.

19. On December 30, 2019, Accountable.US submitted those four FOIA requests to the DOT via email. Accountable.US’s requests sought information regarding DOT’s response to Ethiopian Air Flight 302’s crash and certain contemporaneous contacts with private sector influencers regarding the Boeing 737 MAX.

20. The First Request, attached hereto as Exhibit A, requested:

all drafts of all press releases from the Federal Aviation Administration (“FAA”), the Office of the Secretary of Transportation (“Secretary’s Office”), and/or any division of the FAA or the Secretary’s Office, drafted between March 10, 2019 and March 17, 2019, related to (i) Ethiopian Airlines Flight 302, (ii) Lion Air Flight 610, or (iii) the Boeing 737 MAX.

21. The Second Request, attached hereto as Exhibit B, requested: “access to and copies of all calendars, including electronic and/or hard copy versions, for Transportation Secretary Elaine Chao for the period of March 10, 2019 until March 17, 2019.”

22. The Third Request, attached hereto as Exhibit C, requested: “access to and copies of all correspondence to and from Transportation Secretary Elaine Chao for the period of March 10, 2019 until March 17, 2019.”

23. The Fourth Request, attached hereto as Exhibit D, requested:

access to and copies of all correspondence, for the period of March 10, 2019 until March 17, 2019, between any Department of Transportation (“DOT”) employee(s) listed in column A and any individual(s) listed in column B (email addresses have been included for this group when known, but the other names are also presumably @boeing.com domains):

COLUMN [A]	COLUMN [B]
Steven G. Bradbury, Acting Deputy Secretary and General Counsel	Arthur E. Cameron (art.cameron@boeing.com) Timothy J. Keating (tim.keating@boeing.com)

<p>Daniel Elwell, FAA Deputy Administrator and former Acting Administrator</p> <p>D. Kirk Shaffer, FAA Associate Administrator for Airports</p> <p>Ali Bahrami, FAA Associate Administrator for Aviation Safety</p> <p>Philip O. Newman, FAA Assistant Administrator for Government and Industry Affairs</p>	<p>Heath D. Bumgardner (heath.bumgardner@boeing.com)</p> <p>Peter Pagano (peter.a.pagano@boeing.com)</p> <p>Kevin Rozelsky (kevin.m.rozelsky@boeing.com)</p> <p>Theodore Austell III (theodore.austell@boeing.com)</p> <p>Tom McLemore (tom.mclemore@boeing.com)</p> <p>David A. Young (dave.young@boeing.com)</p> <p>Kevin P. Varney (kevin.varney@boeing.com)</p> <p>Christine Ramsdell (christine.h.ramsdell@boeing.com)</p> <p>Arthur W. Beckman (Arthur.w.beckman@boeing.com)</p> <p>Steven Bachmann (steven.e.bachmann@boeing.com)</p> <p>Daniel P. Curran (Daniel.p.curran@boeing.com)</p> <p>Meredith Mellody (Meredith.mellody@boeing.com)</p> <p>Michael Waclawski (mike.waclawski@boeing.com)</p> <p>Jeness Simler (jeness.b.simler@boeing.com)</p> <p>Dario J. Gomez</p> <p>Amy B. Smith</p> <p>Nicole Young</p> <p>Krista O’Neill</p> <p>Thomas Culligan</p>
--	---

24. As part of each request, Accountable.US sought a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), on the basis that disclosure would contribute to the understanding of the public at large and would not further Accountable.US’s commercial interests.

25. In the alternative, Accountable.US sought a limitation of the duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) in recognition of Accountable.US’s “news media” status.

26. In response, Accountable.US received form letters from DOT acknowledging receipt of each FOIA request, attached hereto as Exhibits E, F, G, and H. Since receiving those acknowledgements, Accountable.US has not received any determination regarding its FOIA Requests—or any other communication regarding the status of any of the four requests—from DOT, in violation of the statutory deadlines and other requirements of FOIA.

27. The public, including Accountable.US, has a strong interest in the records related to the 737 MAX crashes, and particularly in records illuminating the reasons for DOT's delayed response to these crashes.

28. Sunlight is the best disinfectant, and knowledge of DOT's response to the 737 MAX crashes, including any communications with executives from Boeing, is critical to the public's understanding of whether DOT is able to safeguard air travelers.

CLAIM FOR RELIEF

29. The allegations of paragraphs 1-28 are incorporated by reference as if set forth in full herein.

30. Pursuant to FOIA, 5 U.S.C. § 552(a)(6)(A)(i), DOT's responses to Accountable.US's December 30, 2019 FOIA requests were due within 20 working days of DOT's receipt of the requests. Such responses were due on or before January 29, 2020. Within that time period, DOT was required to determine whether to comply with each request and to notify Accountable.US of those determinations, the reasons therefore and the right to appeal any adverse determination. DOT has failed to provide Accountable.US any written notice of any extension of the 20-day period under 5 U.S.C. § 552(a)(6)(B).

31. DOT has failed to make timely determinations regarding Accountable.US's requests for fee waivers and fee limitations.

32. By reason of DOT's failure to comply with the applicable time limits, as set forth in paragraphs 30-31, Accountable.US is deemed, pursuant to 5 U.S.C. § 552(a)(6)(C)(i), to have exhausted its administrative remedies with respect to its December 30, 2019 FOIA requests.

33. On information and belief, the requested records cannot lawfully be withheld from Accountable.US pursuant to any of the exemptions set forth in FOIA, 5 U.S.C. § 552(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Accountable.US prays that this Court:

- A. Order Defendant DOT to conduct a search for any and all responsive records to Accountable.US's FOIA Requests using search methods reasonably likely to lead to discovery of all responsive documents;
- B. Order Defendant DOT to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Plaintiff's FOIA Requests and a Vaughn Index justifying the withholding of any responsive records withheld under claim of exemption;
- C. Enjoin Defendant DOT from continuing to withhold any and all non-exempt responsive records;
- D. Order Defendant DOT to grant Accountable.US's requests for fee waivers;
- E. Award Accountable.US its costs and attorneys' fees for this action; and
- F. Grant such further relief as the Court deems just and proper.

Dated: February 13, 2020

Respectfully submitted,

/s/ William Pittard

William Pittard, D.D.C. No. 482949

Norman Anderson, (*pro hac vice* application forthcoming)

KaiserDillon PLLC

1099 14th Street NW 8th Floor West,

Washington, DC 20005

(202) 640-2850

wpittard@kaiserdillon.com

nanderson@kaiserdillon.com

Counsel for Plaintiff Accountable.US