U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

800 Independence Ave. S.W.
Washington, D.C. 20591

MAR 2 8 2018

Dean Griffith
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001

Re: Pilot Records Improvement Act

Dear Mr. Griffith:

This letter responds to your November 29, 2017, request for legal interpretation regarding the type of records that an air carrier must provide in response to a request under the Pilot Records Improvement Act (PRIA). In your letter, you ask two questions and present several hypothetical scenarios, which are addressed below. Your questions are:

1. *First, § 44703(h)(l)(B)(ii) addresses records "pertaining to the individual's performance as a pilot ... concerning ... any release from employment or resignation, termination, or disqualification with respect to employment." Does the scope of "performance as a pilot" encompass records relating to a pilot's termination or other release from employment based on actions outside of the duties assigned by the air carrier, but which nevertheless affect the safety of crewmembers, passengers, or the operating environment?*
2. *Second, § 44703(h)(l)(B)(i) addresses records "pertaining to the individual that are maintained by an air carrier ... under regulations set forth in ... section 121.683 of title 14." In sum, 14 C.F.R. § 121.683(a)(2) states that each certificate holder "shall ... [r]ecord each action taken concerning the release from employment or physical or professional disqualification of any flight crewmember." There is no "performance as a pilot" condition associated with such records. Would an air carrier that receives a PRIA request be required to release records relating to a pilot's termination or resignation under this provision, without regard to whether the termination or resignation related to "performance as a pilot"?*

As a general note, the separate provisions of the PRIA work in tandem to provide a complete record of potential pilot employment issues and to capture instances relating to an individual's performance as a pilot that do not fall into one of the provided statutory categories. PRIA is not a means for the FAA to arbitrate employment disputes.

As to your first question, regarding the "catch-all" provision in § 44703(h)(l)(B)(ii) and as noted in your letter, the FAA issued a legal interpretation in 2014 specifically

addressing the catch all provision and the sorts of records an air carrier must provide in response to a request under the Pilot Records Improvement Act (*Legal Interpretation to Jason T. Lorenzon*, 2014). We have included a copy for your convenience. The *Lorenzon* interpretation states, based on the legislative history of PRIA and the statute itself, that to the extent that a pilot's behavior directly disrupts safe aircraft operations, those records should be included in accordance with the "catch-all" provision.

With respect to your second question, § 44703(h)(l)(B)(ii) provides:

> **(1) IN GENERAL**. Subject to paragraph (14), before allowing an individual to begin service as a pilot, an air carrier shall request and receive the following information:
>
> **(B)** From any air carrier or other person, except a branch of the United States Armed Forces, the National Guard, or a reserve component of the United States Armed Forces, that has employed the individual as a pilot of a civil or public aircraft at any time during the 5-year period preceding the date of the employment application of the individual, or from the trustee in bankruptcy for such air carrier or person—
>
> **(i)** records pertaining to the individual that are maintained by an air carrier (other than records relating to flight time, duty time, or rest time) under regulations set forth in—
>
> **(I)** section 121.683 of title 14, Code of Federal Regulations;

Section 121.683 states, in pertinent part:

> (a) Each certificate holder shall—
> (2) Record each action taken concerning the release from employment or physical or professional disqualification of any flight crewmember or aircraft dispatcher (domestic and flag operations only) and keep the record for at least six months thereafter.

Neither the plain language of the statute or § 121.683 provide such condition as to limit the scope of the records to those related to the person's performance as a pilot.

Pilot infractions not related to pilot performance that would rise to a level grave enough to cause an air carrier to release a pilot from employment would be captured by this recordkeeping requirement, and a hiring air carrier would be required to request and receive those records.

The hypotheticals you present have the same conclusion, in that they likely do not create a § 44703(h)(l)(B)(ii) PRIA record, but could be captured under § 44703(h)(l)(B)(i) if they qualify under § 121.683.

Regarding your questions about FAA guidance documents, Advisory Circular (AC) 120-68G and all past versions of that AC are agency guidance documents that provide operators with methods for achieving compliance with the requirements of PRIA and examples. Although our office does not interpret guidance documents, we note that, in instances where guidance is inconsistent with a regulation or statutory provision, the regulation or statute controls.

We appreciate your patience and trust that the above responds to your inquiry. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Courtney Freeman, an attorney in the Regulations Division of the Office of the Chief Counsel, and coordinated with the Flight Standards Service.

Sincerely,



Lorelei D. Peter
Assistant Chief Counsel for Regulations

Enclosure

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November 29, 2017

VIA E-MAIL LORELEI.PETER@FAA.GOV

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Dear Ms. Peter:

We write to request an interpretation regarding the types of records that an air carrier must provide in response to a request under the Pilot Records Improvement Act ("PRIA"). Specifically, we seek an interpretation regarding records related to a pilot's release from employment or resignation, termination, or disqualification that must be provided pursuant to 49 U.S.C. §§ 44703(h)(1)(B)(i) and (ii). Although the direction to request and receive records is clear, and mandatory, the statute is not as clear about whether certain records must be provided.

This request poses two general questions derived from the references in PRIA about records pertaining to a pilot's separation from the air carrier.

- First, § 44703(h)(1)(B)(ii) addresses records "pertaining to the individual's performance as a pilot … concerning … any release from employment or resignation, termination, or disqualification with respect to employment." Does the scope of "performance as a pilot" encompass records relating to a pilot's termination or other release from employment based on actions outside of the duties assigned by the air carrier, but which nevertheless affect the safety of crewmembers, passengers, or the operating environment?

- Second, § 44703(h)(1)(B)(i) addresses records "pertaining to the individual that are maintained by an air carrier … under regulations set forth in … section 121.683 of title 14." In turn, 14 C.F.R. § 121.683(a)(2) states that each certificate holder "shall … [r]ecord each action taken concerning the release from employment or physical or professional disqualification of any flight crewmember." There is no "performance as a pilot" condition associated with such records. Would an air carrier that receives a PRIA request be required to release records relating to a pilot's termination or resignation under this provision, without regard to whether the termination or resignation related to "performance as a pilot"?

In addition to answers to these questions, we respectfully request your analysis of several specific scenarios air carriers could face when responding to PRIA requests.

1. **Scope of "Performance as a Pilot" Under 49 U.S.C. § 44703(h)(1)(B)(ii).**

As noted, PRIA requires air carriers to furnish records concerning "any release from employment or resignation, termination, or disqualification with respect to employment" pertaining to "the individual's performance as a pilot." 49 U.S.C. § 44703(h)(1)(B)(ii)(III).

In 2014, the FAA addressed questions related to "pilot performance" under PRIA in a legal interpretation in which it concluded that "pilot performance" is not limited only to flight skills but also includes "events that occurred . . . in connection with a flight operation." *Legal Interpretation to Jason T. Lorenzon*, 2014 WL 4681961, *3-4 (Sept. 12, 2014) ("Lorenzon Interpretation"). However, the interpretation defined relevant actions to be those occurring as "part of the pilot's duties for that employer," which would appear to preclude the release of records for employment actions taken as a result of pilot actions while not on duty. *Lorenzon Interpretation*, at *4. It concluded that a pilot's resignation to attend college was not required to be disclosed under PRIA because it did not bear on pilot performance, but a corrective action plan was a disciplinary record subject to disclosure.

In the Lorenzon Interpretation, the FAA did not address situations where a pilot's termination or other release from employment results from actions taken while off duty that nevertheless have an impact on the safety of the passengers or crew. Determining a person's competency as a pilot can involve more than their actions taken while on duty for an air carrier and PRIA is designed to make prospective employers aware of such dangers. Notably, the Lorenzon Interpretation did recognize that "the duty to maintain safe aircraft operations includes ensuring the safety of crewmembers, passengers, cargo, the aircraft and the operating environment." *Lorenzon Interpretation*, at *3.

The FAA recognizes that pilot safety and proficiency concerns are not tied solely to technical proficiency and do not begin when a pilot goes on duty for an air carrier or end when a pilot's duty is complete. As recognized by the FAA, a basic crew resource management ("CRM") concept is that "high technical proficiency cannot guarantee safe operations in the absence of effective crew coordination" and "human error is a contributing factor in 60 to 80 percent of all air carrier incidents and accidents." FAA Advisory Circular 120-51E, *Crew Resource Management Training*, paras. 7, 9 (Jan. 22, 2004). The FAA also recommends team building and maintenance, including interpersonal relationships, effective leadership, and individual factors/stress reduction as CRM training curriculum topics. *Id.* at ¶ 12. Although it would be unrealistic to expect that there would never be discord among crewmembers, pilots may engage in behavior that could irreparably damage the ability for the crew to work together

effectively while in flight, particularly as crewmembers may be paired together for days or weeks at a time. If a pilot engaged in inappropriate conduct towards a crewmember while on duty, or on an aircraft, and the crewmember was subsequently terminated or resigned as a result, records relating to that event would be subject to disclosure under PRIA. What is less clear is whether such records must be disclosed if the same behavior occurred while the pilot was off-duty and away from the aircraft.

An earlier version of the FAA's Advisory Circular ("AC") regarding PRIA contemplated reporting adverse employment actions for behavior occurring while off duty if it was a factor in the pilot's termination or release from employment. Specifically, AC 120-68F advised PRIA respondents to "[r]eport *any disciplinary actions* you took against the pilot that played *any role* in the individual's termination or release from employment." FAA AC 120-68F, ¶ 4-5(b) (May 31, 2012) (emphasis added). The AC distinguished this from reporting of lesser forms of disciplinary actions, advising that respondents should only report disciplinary actions "unrelated to an individual's termination or release from employment if the actions involved the individual's performance as a pilot." *Id.*, ¶ 4-5(c).

The current version of the AC, however, revised the guidance to tie pilot performance to the concepts articulated in the Lorenzon Interpretation. The AC no longer distinguishes between records relating to actions that played a role in a pilot's termination or release from employment and those relating to lesser discipline. Rather, the AC applies the "performance as a pilot" rubric to both categories of disciplinary actions. *See* FAA AC 120-68G, ¶¶ 4.5.1-4.5.2. (June 21, 2016).

In providing advice regarding the disclosure of disciplinary records, the current AC focuses on whether or not the individual's actions related to "pilot performance" regardless of the level of disciplinary action imposed. The AC defines "pilot performance" as "an activity or event specifically related to an individual's completion of the core duties and responsibilities of a pilot, as assigned by the employer and established by the FAA, to maintain safe operations." AC 120-68G, ¶ 4.5.1. The AC states that "pilot performance" is not limited solely to the pilot's demonstration of proficient flying skills and compliance with FAA requirements, but also encompasses "adherence to certain established company procedures during all aspects of aircraft operation"; "certain events that occurred while on the ground during the preflight or postflight activities in connection with a flight operation"; and "ensuring the safety of other crewmembers, passengers, cargo, the aircraft, the operating environment, and others operating within that environment." *Id.*, ¶¶ 4.5.1.2, 4.5.1.3. It specifically excludes, however, records of disciplinary actions "arising out of the pilot's noncompliance with company policies unrelated to safe aircraft operations." *Id.*, ¶ 4.5.2.2. Among the examples of records that would not have to be reported are those relating to an "unfriendly or argumentative interaction with other company employees or the public," and "other morality- or behavior-based action unrelated to pilot performance." *Id.*

The guidance in the current AC appears to assume that a crewmember's behavior when not on duty can have no impact on the safety of the air carrier's operations. In fact, pilots have been terminated, or resigned in lieu of termination, after engaging in off-duty behavior that implicates their ability to pilot proficiently. Below are several hypothetical situations that could lead to pilot termination or other release from employment:

(1) A pilot accesses secure parts of the airport while not on duty in violation of company policy.

(2) A pilot is disciplined for violating company policy prohibiting consumption of alcoholic beverages prior to operating an aircraft (but does not violate 14 C.F.R. § 91.17).

(3) A pilot is disciplined after threatening a member of the public while on a Part 117 compliant rest period.

(4) A pilot is disciplined after threatening another flightcrew member while on a Part 117 compliant rest period.

(5) A pilot is disciplined after physically assaulting a member of the public while not on duty.

(6) A pilot is disciplined after physically assaulting a crewmember while on an overnight.

It would appear to be contrary to the intent of PRIA, an act "designed to ensure that airlines would be able to make informed hiring decisions[,]" to withhold records relating to such events from a PRIA response. *See* H.R. Rep. 105-372 (Oct. 31, 1997), 1997 WL 689813 (Leg. Hist.), at *3. However, it is unclear from the AC's definition of "pilot performance" – and its exclusions from that definition – whether the FAA believes such events relate to "pilot performance," and thus whether records relating to such events should be provided in response to a PRIA request. We request the FAA's guidance on that question generally, and with respect to each of the above hypotheticals specifically.[1]

2. **Records to be Furnished Under 49 U.S.C. § 44703(h)(1)(B)(i).**

[1] In responding to the hypotheticals, please assume that the air carrier took disciplinary action leading to the pilot's termination or resignation and that no FAA enforcement action or other record exists apart from an air carrier's employment record.

FAA regulations require air carriers to "[r]ecord each action taken concerning the release from employment or physical or professional disqualification of any flight crewmember." 14 C.F.R. § 121.683(a)(2). PRIA, in turn, requires the air carrier to release those records in response to a request under the Act. 49 U.S.C. § 44703(h)(1)(B)(i)(I). Unlike 49 U.S.C. § 44703(h)(1)(B)(ii), there is no explicit "performance as a pilot" limitation on such records.

We are seeking interpretation regarding whether disciplinary records of a pilot's off-duty behavior that lead to his or her release from employment (such as for the reasons set forth in the hypotheticals provided above) would be responsive to a PRIA request, regardless of whether they would have to be reported under 49 U.S.C. § 44703(h)(1)(B)(ii). This would seem to be consistent with the plain language of 14 C.F.R. § 683(a)(2), which treats records related to the release from employment separately from those relating to a pilot's physical disqualification or professional disqualification. It also would be consistent with the purpose of PRIA, which was to prevent problem pilots from moving from one carrier to another without the hiring carrier's knowledge of the pilot's problems.

We appreciate your consideration of these questions. Please contact me with any questions at (202) 897-3412.

Very truly yours,



Dean E. Griffith

Admitted in Maryland
Not admitted in District of Columbia (directly supervised by Douglas W. Hall, a licensed D.C. Bar member)