

# United States District Court

Western

DISTRICT OF

Tennessee

Mark S. Estabrook

## SUMMONS IN A CIVIL CASE

v.

CASE NUMBER:

96-2537 TU v

National Aeronautics and Space Administration

TO: (Name and address of defendant)

Hon. Janet Reno  
Attorney General  
U.S. Department of Justice  
Tenth Street & Constitution Avenue, N.W.  
Washington, D.C. 20530

**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Lee James Chase III  
William R. Bradley, Jr.  
GLANKLER BROWN  
Suite 1700, One Commerce Square  
Memphis, Tennessee 38103  
(901) 525-1322

an answer to the complaint which is herewith served upon you, within 30/60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

ROBERT R. DI TROLIO

CLERK

*Verita Griffin*

(BY) DEPUTY CLERK

DATE

5/17/96

# United States District Court

Western

DISTRICT OF Tennessee

Mark S. Estabrook

## SUMMONS IN A CIVIL CASE

v.

CASE NUMBER: 96-2537 TU

National Aeronautics and Space Administration

TO: (Name and address of defendant)

Daniel S. Goldin, Administrator  
Edward A. Frankle, General Counsel  
National Aeronautics and Space Administration  
Two Independence Square  
300 E. Street, S.W.  
Washington, D.C. 20546

**YOU ARE HEREBY SUMMONED** and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Lee James Chase III  
William R. Bradley, Jr.  
CLANKLER BROWN  
Suite 1700, One Commerce Square  
Memphis, Tennessee 38103  
(901) 525-1322

an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

ROBERT R. DI TROLIO

CLERK

5/17/96

DATE

(BY) DEPUTY CLERK

*Venita Griffin*

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE

MARK S. ESTABROOK  
2722 Morning Woods Drive  
Cordova, Tennessee 38018

Plaintiff,

v.

NATIONAL AERONAUTICS AND SPACE  
ADMINISTRATION  
Two Independence Square  
300 E Street, S.W.  
Washington, D.C. 20546

Defendant.

Civil Action No. \_\_\_\_\_

**COMPLAINT  
FOR INJUNCTIVE RELIEF  
(Freedom of Information Act)**

Plaintiff Mark S. Estabrook, by his attorneys, brings this Complaint requesting injunctive relief<sup>1</sup> against defendant National Aeronautics and Space Administration ("NASA") and states as follows:

<sup>1</sup> Simultaneously with this Complaint, Plaintiff is also filing a Motion for Preliminary Injunction and Memorandum of Facts and Law in Support of Motion for Preliminary Injunction.

## INTRODUCTION

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), to order the production of agency records relating to NASA's Technical Memorandum entitled *Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations* published in December 1995 (the "Technical Memorandum"), which records NASA has improperly withheld from Plaintiff.

2. This action seeks injunctive relief against NASA based upon its failure to comply with FOIA, which, under 5 U.S.C. § 552(a)(3), provides that an agency must make records promptly available to any person upon any request for records which reasonably describes such records and is made in accordance with published rules. NASA has violated FOIA by failing to release records in response to Plaintiff's FOIA request.

3. This action also seeks injunctive relief against NASA based upon its failure to comply with its own regulations implementing FOIA, codified at 14 C.F.R. Part 1206 ("Part 1206"). Section 1206.200(c) of Title 14 C.F.R. provides that NASA shall make records promptly available to any person upon request made in accordance with Part 1206. NASA has violated Part 1206 by failing to release records in response to Plaintiff's FOIA request.

## JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(3) and (a)(4)(B).

5. Venue in this Court is proper under 5 U.S.C. § 552(a)(4)(B) because Plaintiff resides in this district.

### PARTIES

6. Plaintiff Mark S. Estabrook is the requester of agency records which have been unlawfully withheld. He resides at 2722 Morning Woods Drive, Cordova, Tennessee 38018. Plaintiff is an airline pilot. Affidavit of Mark S. Estabrook ("Estabrook Affidavit"), attached hereto at Appendix A, at ¶¶ 1-2.

7. Defendant NASA is an agency of the United States as defined in 5 U.S.C. § 552(f) and has jurisdiction, possession, custody or control of the records Plaintiff seeks.

### FACTS

#### The FOIA Request

8. By letter dated September 29, 1995, addressed to Mr. Mike Marlaire, NASA's FOIA Officer at its Ames Research Center in California, Plaintiff requested copies of the following agency records or documents containing the following information:

**NASA Technical Memorandum: "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations," authors: Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber; to include *any or all supporting documentation*, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source *which the authors relied upon for the purpose of***

**authoring this report, study, or memorandum.**  
(Emphasis added.)

Estabrook Affidavit ¶ 9 & Exhibit 1.

9. Plaintiff's request reasonably describes the records he seeks and was made in accordance with NASA's published rules governing FOIA requests.

10. NASA provided an interim response to Plaintiff's request by letter dated October 16, 1995 from Mr. Marlaire. Estabrook Affidavit ¶ 10 & Exhibit 2.

11. By letter dated November 9, 1995 from Mr. Marlaire, NASA provided a preliminary response to Plaintiff's request, stating that NASA was "at present" denying the release of the records sought, pursuant to 5 U.S.C. § 552(b)(5) which codifies the exemption of "inter-agency or intra-agency memorandum[s] or letter[s] which would not be available by law to a party other than an agency in litigation with the agency." Estabrook Affidavit ¶ 14 & Exhibit 5.

12. In this November 9, 1995 letter, NASA further denied Plaintiff's request under 5 U.S.C. § 552(b)(5) by claiming that release of the records sought would harm NASA's interest "if the records were released pending a final agency decision," that this exemption protects from disclosure "the results of Government research before the results are published, such as the research relevant to your FOIA request here," and that "[u]ntil the investigators' research results are published, we must withhold all records associated with their research in order to protect their interests in the study." *Id.* NASA stated that it would send a copy of the "final Technical Memorandum" to Plaintiff "once it [was] published." Estabrook Affidavit ¶ 15 & Exhibit 5.

13. By separate letters dated November 29, 1995 addressed to NASA's Administrator Daniel S. Goldin and to Mr. Marlaire, Plaintiff timely appealed NASA's

denial of his FOIA request, pursuant to 14 C.F.R. § 1206.605. Estabrook Affidavit ¶ 16 & Exhibits 6-7.

14. On or about December 14, 1995, Plaintiff spoke with John Hall, an attorney in NASA's General Counsel's Office, and a Mr. Terry Pagaduan of NASA about his administrative appeal of NASA's denial of his FOIA request. Estabrook Affidavit ¶ 18. During this conversation, Mr. Hall and Mr. Pagaduan agreed to a discretionary release of an August 1994 draft of the Technical Memorandum. *Id.*

15. By letter dated January 18, 1996, addressed to Mr. Hall, Plaintiff indicated that the release of only the August 1994 draft would not satisfy the terms of his request, and that he was continuing his administrative appeal. Estabrook Affidavit ¶ 23. Plaintiff also reiterated his FOIA request by quoting from his September 29, 1995 letter and stating:

... I would expect that all correspondence between Federal Express Corporation, its agents and employees, and NASA, its agents and employees, be included in the production of documents. These would necessarily include letters, faxes, e-mail, comments and all other forms of correspondence media.

*Id.*

16. By letter dated January 26, 1996 from Mr. J.R. Dailey, NASA's Associate Deputy Administrator, NASA denied Plaintiff's November 29, 1995 appeal, stating that it "affirm[ed] Mr. Marlaire's determination that the requested information may properly be withheld under FOIA Exemption (b)(5)." Estabrook Affidavit ¶ 24 & Exhibit 12.

17. In this January 26, 1996 letter, NASA also directed the Ames Research Center to make a discretionary release of "the draft Technical Memorandum provided to participating parties" in NASA's study in August 1994. Estabrook Affidavit ¶ 27

& Exhibit 12; see also *id.* ¶¶ 12-13, 17, 20-21 & Exhibits 9-10. NASA indicated its belief that release of this document would satisfy Plaintiff's FOIA request, and that it would therefore consider Plaintiff's appeal "moot." *Id.* ¶ 27 & Exhibit 12.

18. Sometime after February 22, 1996, Plaintiff received from NASA a copy of the final December 1995 Technical Memorandum. Estabrook Affidavit ¶ 29 & Exhibit 14. This document was not the 1994 draft that NASA had agreed to release in its January 26, 1996 letter. *Id.* ¶¶ 29-30 & Exhibit 15.

19. By letter dated March 11, 1996, Plaintiff responded to NASA's January 26, 1996 denial of his appeal, stating that NASA's asserted discretionary release of the August 1994 draft -- which he had not yet received -- would not constitute a full response to his FOIA request. Estabrook Affidavit ¶ 30 & Exhibit 15.

20. By letter dated March 21, 1996 from Mr. Dailey, NASA responded to Plaintiff's March 11, 1996 letter, reaffirming its denial of Plaintiff's FOIA request and appeal. Estabrook Affidavit ¶ 33 & Exhibit 18. NASA also advised Plaintiff that this was a final determination of his appeal and that he could seek judicial review under FOIA. *Id.* ¶ 35 & Exhibit 18.

21. On or about March 29, 1996, NASA provided a document to Plaintiff that it characterized as the August 1994 draft of the Technical Memorandum, although the document is not identified on its face as such. Estabrook Affidavit ¶ 36 & Exhibits 19-20.

22. Accordingly, NASA has refused to release all documents -- except a copy of the final Technical Memorandum and a copy of what it claims is the August 1994 draft -- responsive to Plaintiff's September 29, 1995 request, specifically including, but not limited to, other drafts of the report and the correspondence between Federal



Express Corporation and NASA referenced in Plaintiff's January 18, 1996 letter. Estabrook Affidavit ¶¶ 37, 23 & Exhibit 11.

23. Plaintiff has exhausted his administrative remedies under 5 U.S.C. § 552(a)(6). See Estabrook Affidavit ¶ 35 & Exhibit 18.

Immediate Need For The Records Requested,  
And Reasons For Preliminary Injunction

24. On December 11, 1995, the Federal Aviation Administration ("FAA") issued a notice of proposed rulemaking (the "NPRM") in which it proposes to revise aircrew flight and duty time regulations codified at 14 C.F.R. Parts 121 and 135. 60 Fed. Reg. 65951 (Dec. 20, 1995). The NPRM invited comments from interested parties on the proposed regulations, and allowed parties until March 19, 1996 to submit such comments. *Id.* A true and correct copy of the NPRM is attached at Appendix B.

25. On March 15, 1995, FAA extended the comment period until June 19, 1996. 61 Fed. Reg. 11492 (March 20, 1996). A true and correct copy of this extension is attached at Appendix C.

26. Plaintiff, in cooperation with the Independent Pilots Association, an interested pilots' organization, intends to submit comments in response to the NPRM. Estabrook Affidavit ¶¶ 39, 41. To prepare and submit meaningful comments and assure that FAA takes all relevant information into account in promulgating its flight safety rules, Plaintiff must obtain immediately and have some time to analyze the NASA records he requested on September 29, 1995. *Id.* ¶¶ 38, 40-41.

27. A comparison of the draft that NASA sent to Plaintiff and the published Technical Memorandum reveals that there are discrepancies between the information

presented in each document. See Estabrook Affidavit Exhibits 8, 20. One of the authors of the Technical Memorandum indicated that NASA was contemplating revisions to the August 1994 draft in response to the "fairly extensive comments" NASA received from Federal Express at or after the August 1994 release of the preliminary results of the study to Federal Express management. *Id.* ¶ 21 & Exhibit 10.

28. In order to present effective comments in a timely manner in response to FAA's NPRM, Plaintiff needs all of the records he requested immediately, so as to have time to analyze differences between other drafts, other preliminary materials used in developing such drafts, and the final report, as well as correspondence between Federal Express and NASA which may relate to the evolution of the analysis of the data in the August 1994 draft and final Technical Memorandum. Estabrook Affidavit ¶¶ 38, 40-41.

29. Because of the June 19, 1996 deadline for submission of comments to the FAA -- a deadline which has already been extended once, and which Plaintiff has no reason to think will be extended again -- Plaintiff will suffer immediate and irreparable harm if the NASA records responsive to his FOIA request are not made immediately available to him.

30. The public interest in aviation safety, and in ensuring that FAA considers all relevant information in formulating its final revised aircrew flight and duty time regulations, will only be served by Plaintiff's receipt of the requested records well in advance of the June 19, 1996 deadline for submitting comments in the rulemaking.

COUNT I (Violation Of FOIA)

31. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 30 herein as if set forth in their entirety.

32. Plaintiff has a statutory right of access under 5 U.S.C. § 552(a)(3) to the records he seeks, and there is no legal basis for NASA's denial of such access.

33. NASA's withholding of the requested records violates 5 U.S.C. § 552.

34. NASA's violation of FOIA causes immediate and irreparable injury to Plaintiff, and to the public interest in aviation safety, by precluding Plaintiff from responding effectively to FAA's rulemaking by the June 19, 1996 close of the comment period.

WHEREFORE Plaintiff requests the relief set forth in his Prayer for Relief.

COUNT II (Violation Of Part 1206 Regulations)

35. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 34 herein as if set forth in their entirety.

36. Plaintiff has a right of access under 14 C.F.R. § 1206.200(c) to the records he seeks, and there is no legal basis for NASA's denial of such access.

37. NASA's withholding of the requested records violates 14 C.F.R. Part 1206.

38. NASA's violation of 14 C.F.R. Part 1206 causes immediate and irreparable injury to Plaintiff, and to the public interest in aviation safety, by precluding Plaintiff from responding effectively to FAA's rulemaking by the June 19, 1996 close of the comment period.

WHEREFORE Plaintiff requests the relief set forth in his Prayer for Relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Mark S. Estabrook prays that this Court enter judgment on his behalf as follows:

1. An injunction requiring NASA to make all the requested records immediately available to Plaintiff;
2. An award to Plaintiff of his costs and reasonable attorneys fees expended in bringing this action; and
3. Such other and further relief as this Court may deem just and proper.

Dated: May 17, 1996

Respectfully submitted,

*Lee J. Chase III*

---

Lee James Chase III (JLCS DA)  
William R. Bradley, Jr.

GLANKLER BROWN  
Suite 1700, One Commerce Square  
Memphis, Tennessee 38103  
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Richard F. Riley, Jr.  
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Jamie Palter Rennert

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(202) 835-8000

Counsel for  
Plaintiff Mark S. Estabrook

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE

MARK S. ESTABROOK  
2722 Morning Woods Drive  
Cordova, Tennessee 38018

Plaintiff,

v.

NATIONAL AERONAUTICS AND SPACE  
ADMINISTRATION  
Two Independence Square  
300 E Street, S.W.  
Washington, D.C. 20546

Defendant.

Civil Action No. \_\_\_\_\_

**PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Mark S. Estabrook, by his attorneys, hereby moves this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure and Rule 11 of the Rules of the U.S. District Court for the Western District of Tennessee for a mandatory preliminary injunction against defendant National Aeronautics and Space Administration ("NASA"). Plaintiff requests a hearing on this motion before the Court.

As set forth more fully in the Complaint filed simultaneously with this Motion, and the accompanying Memorandum of Facts and Law in support of this motion, NASA has unlawfully withheld documents that are responsive to Plaintiff's request for agency records under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"). NASA's actions violate FOIA and NASA's regulations implementing FOIA, which

require NASA to make promptly available records requested by any person when the request reasonably describes the records sought and is made pursuant to published rules. 5 U.S.C. § 552(a)(3); 14 C.F.R. § 1206.200(c). Plaintiff's request both reasonably described the records sought and was made pursuant to NASA's regulations implementing FOIA, codified at 14 C.F.R. Part 1206 ("Part 1206"). This Court should therefore enjoin NASA from improperly withholding the records requested, and order NASA to make immediately available to Plaintiff the requested records.

NASA is an agency of the United States that, in 1987-88, conducted a study on the effects of sleep and circadian factors on Federal Express Corporation ("Federal Express") pilots engaged in overnight cargo operations. NASA released the draft results of this study to Federal Express and the Air Line Pilots Association, a labor organization representing Federal Express pilots, in August 1994. NASA published the results of the study in a Technical Memorandum in December 1995. The results of NASA's study, and all the data and communications underlying the study, are critical to the aviation industry. These documents underlying the study are especially important to those parties such as Plaintiff that are concerned about the health and safety of pilots and other aircrew, and the safety of the operations they conduct. The NASA study demonstrated that pilots flying overnight cargo operations are flying on less sleep than are their counterparts flying during the day, and that these pilots are more likely to be flying sick, fatigued, and less alert than are those flying daytime operations.

Immediate preliminary injunctive relief is necessary in this case because Plaintiff, himself an airline pilot for Federal Express, is facing a June 19, 1996 deadline for the submission of comments to the Federal Aviation Administration ("FAA") in a proceeding in which amendments are proposed to the FAA's pilot flight/duty time rules.

This deadline has already been extended once, and Plaintiff has no reason to think it will be extended again. These rules directly affect Plaintiff's own health and safety, and aviation safety overall. The NASA records relate directly to issues that should be considered in the FAA rulemaking, and Plaintiff must have immediate access to these records in order to review, analyze, and cite to them in the comments he and an interested pilots' organization intend to file in the FAA rulemaking proceeding.

As explained in the accompanying Memorandum of Facts and Law in support of this motion, Plaintiff has demonstrated that he has a substantial likelihood of success on the merits of his claim against NASA for violation of FOIA and the Part 1206 regulations. In addition, injunctive relief will save Plaintiff from irreparable injury caused by NASA's withholding of the records. Plaintiff's right to submit evidence in support of his comments for FAA's consideration in revising its flight and duty time rules is jeopardized by his inability to obtain the requested records from NASA. Because of the impending June 19 deadline for submission of comments to the FAA, immediate injunctive relief is the only remedy that will adequately address Plaintiff's injury. Moreover, an injunction will not harm NASA; NASA has published the final results of its study in a Technical Memorandum. In fact, directing NASA to release the withheld records will be consistent with the clear and unambiguous command of FOIA that the public be fully informed of government activities, will also promote NASA's own articulated policy regarding dissemination of information to the public, and will foster aviation safety. NASA cannot claim injury when the consequence of the Court's order will be compliance with federal law. Finally, injunctive relief will serve the public interest and promote aviation safety by ensuring that FAA is able to consider all

relevant information about safety factors in overnight flight operations in the course of preparing revisions to its flight and duty time regulations.

CERTIFICATE OF CONSULTATION BY COUNSEL

Pursuant to Rule 11(a)(1)(B) of the Rules of the U.S. District Court for the Western District of Tennessee, Plaintiff's attorney Richard F. Riley, Jr. hereby certifies and affirms that on May 16, 1996, he conferred by telephone with attorney John Hall of the Office of General Counsel of defendant National Aeronautics and Space Administration. Mr. Hall was advised that Plaintiff intended to file this action and the instant motion. Mr. Hall stated that, to his knowledge, NASA had not changed its position that it would not disclose to Plaintiff any further records responsive to Plaintiff's September 29, 1995 FOIA request.



CONCLUSION

For the foregoing reasons, the Court should grant a preliminary injunction against defendant NASA substantially in the form of the proposed order attached hereto, enjoining NASA from withholding the requested documents and requiring NASA to immediately make available to Plaintiff the records sought in his FOIA request.

Dated: May 17, 1996

Respectfully submitted,

*Lee J. Chase III*

---

Lee James Chase III (8443 2A)  
William R. Bradley, Jr.

GLANKLER BROWN  
Suite 1700, One Commerce Square  
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888 Sixteenth Street, N.W.  
Washington, D.C. 20006  
(202) 835-8000

Counsel for  
Plaintiff Mark S. Estabrook

**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 1996, a copy of the foregoing Plaintiff's Motion for Preliminary Injunction was served by certified mail and by hand delivery upon each of the following:

Veronica Coleman, Esquire  
U.S. Attorney for the Western District of Tennessee  
U.S. Attorney's Office  
1026 Federal Building  
Memphis, Tennessee 38103

Hon. Janet Reno  
Attorney General  
U.S. Department of Justice  
Tenth Street & Constitution Avenue, N.W.  
Washington, D.C. 20530

Daniel S. Goldin, Administrator  
Edward A. Frankle, General Counsel  
National Aeronautics and Space Administration  
Two Independence Square  
300 E Street, S.W.  
Washington, D.C. 20546

  
Jamie Palter Rennert

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE

MARK S. ESTABROOK  
2722 Morning Woods Drive  
Cordova, Tennessee 38018

Plaintiff,

v.

NATIONAL AERONAUTICS AND SPACE  
ADMINISTRATION  
Two Independence Square  
300 E Street, S.W.  
Washington, D.C. 20546

Defendant.

Civil Action No. \_\_\_\_\_

**PLAINTIFF'S MEMORANDUM OF FACTS AND LAW  
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Mark S. Estabrook, by his attorneys, hereby submits this Memorandum of Facts and Law in support of his Motion for Preliminary Injunction against defendant National Aeronautics and Space Administration ("NASA").

**INTRODUCTION**

In this action, Plaintiff seeks injunctive relief against NASA because it has improperly withheld records subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), in violation of FOIA and applicable regulations implementing FOIA, codified at 14 C.F.R. Part 1206 ("Part 1206").

In September 1995, Plaintiff requested from NASA records relating to NASA's Technical Memorandum entitled *Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations*, ultimately published in December 1995 (the "Technical Memorandum").<sup>1</sup> Over the ensuing months, NASA denied Plaintiff's request, and rejected his administrative appeal of this denial -- with the exception of a discretionary release of one document requested -- claiming that the records sought were exempt from disclosure under 5 U.S.C. § 552(b)(5) ("Exemption (b)(5)").

The specific undisclosed records believed by Plaintiff to be responsive to his FOIA request consist of drafts, revisions, and notes of the Technical Memorandum's authors along with communications between NASA and Federal Express Corporation that relate to, and may have influenced, the preparation of the Technical Memorandum. Plaintiff, however, seeks disclosure of all responsive records, whether he presently knows what they are or not. Because the records sought are subject to release under FOIA and Part 1206, NASA cannot be permitted to continue to withhold them in violation of these laws. Plaintiff asks this Court to act now to protect Plaintiff's right of access to these records, and the public interest in their release.

Under the familiar four-part test for injunctive relief, as explained in more detail herein, Plaintiff is entitled to immediate access to the requested records.

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<sup>1</sup> The Technical Memorandum discusses data demonstrating that overnight cargo operations involve physiological disruption to pilots not found in those pilots conducting daytime operations, that pilots' adaptation to night duty is incomplete, and that pilots' flying at night do so experiencing fatigue and low alertness.

First, Plaintiff has a substantial likelihood of success on the merits of his claim against NASA for violation of FOIA and the Part 1206 regulations. The purpose of FOIA and NASA's implementing regulations is to ensure that the public is well informed of its government's activities. The records Plaintiff seeks are, or relate directly to, scholarly, scientific evaluation of factual material. In addition, NASA has made selective disclosures of at least some of the records requested, creating the intolerable impression of special interest influence upon the results of its scientific analysis. Congress enacted FOIA to eliminate, not promote, selective disclosure of records.

Second, an immediate injunction will save Plaintiff from irreparable harm. Plaintiff is a commercial airline pilot concerned about the safety of his overnight cargo operations. He needs the requested records immediately so that he can develop an effective response to the Federal Aviation Administration's ("FAA") proposed revision of aviation safety regulations that govern his flight schedules. The deadline to respond to FAA is June 19, 1996. Plaintiff's interest in promoting aviation safety and his right to participate in FAA's rulemaking will effectively be abrogated if he does not receive the requested records immediately. Preliminary injunctive relief is the only adequate remedy for NASA's improper withholding of the records requested.

Third, an immediate injunction will not cause NASA any foreseeable harm. NASA has published the results of its scientific analysis in final form, as a Technical Memorandum. It disclosed the preliminary results of its research to non-governmental parties prior to publication of the Technical Memorandum. Directing NASA to release the requested records relating to the evolution of the final report is mandated by FOIA's clear and unambiguous obligation to inform the public of government activities, NASA's

own policy regarding dissemination of information to the public, and the goal of improving aviation safety. NASA cannot claim injury when the consequence of the Court's order will be compliance with federal law.

Fourth, a preliminary injunction will serve the public interest because it will both effect the purposes of FOIA and applicable regulations, and promote aviation safety. Immediate release of the requested records (including a draft report conveyed by NASA to an air carrier, and that air carrier's proposed revisions to the draft) will enable Plaintiff to use this information to respond to FAA's rulemaking. It will also enable FAA to consider information critical to its contemplated revision of flight safety rules. Further, immediate injunctive relief will dissuade agencies from selectively sharing information with private parties and then hiding behind FOIA's exemptions.

#### **STATEMENT OF FACTS**

On September 29, 1995, Plaintiff requested from NASA copies of the following agency records or documents containing the following information:

NASA Technical Memorandum: "Crew Factors in Flight Operations VII: Psychophysiological Responses to Overnight Cargo Operations," authors: Philippa H. Gander, Kevin B. Gregory, Linda J. Connell, Donna L. Miller, Mark R. Rosekind, and R. Curtis Graeber; to include ***any or all supporting documentation***, such as drafts, revisions, attachments, supplements, statistics, reports, scientific research or information relating to data collected from Federal Express Corporation aircrew members or any other source ***which the authors relied upon for the purpose of authoring this report, study, or memorandum***. (Emphasis added.)

Affidavit of Mark S. Estabrook ("Estabrook Affidavit"), attached to Plaintiff's Complaint for Injunctive Relief ("Complaint") at Appendix A, at ¶ 9 & Exhibit 1. The Technical Memorandum entitled *Crew Factors in Flight Operations VII; Psychophysiological Responses to Overnight Cargo Operations* (the "Technical Memorandum"), published in final form in December 1995, sets forth the results of NASA's 1987-88 study of the effects of sleep and circadian factors in flying overnight cargo operations. Estabrook Affidavit, Exhibit 8. NASA published the Technical Memorandum as the seventh in a series of NASA studies on physiological and psychological effects of flight operations on flight crews, and on the operational significance of these effects. *Id.*, Exhibit 8, § 1.0. NASA conducted this study on Federal Express Corporation ("Federal Express") pilots and other aircrew members. *Id.*, Exhibit 8, Acknowledgments (at pg. 41). Plaintiff was not a participant in this study.

The results presented in the Technical Memorandum are sobering. The Technical Memorandum demonstrates, for example, that during daytime layovers between flights, the average number of hours that pilots are able to sleep is three hours (or 41%) less than the average number of hours they can sleep during nighttime layovers. Estabrook Affidavit, Exhibit 8, § 1.0. Further, this sleep is lighter, less restorative, and of poorer quality overall than is the sleep obtained at night. *Id.* Pilots' sleeping periods during these daytime layovers are frequently split into several episodes and total 1.2 hours less per day than on pre-trip days. *Id.* Around the time that pilots complete their overnight operations is the time of day at which their level of fatigue is highest, and their degree of alertness is lowest. *Id.*, Exhibit 8, Summary (at pg. 1) & § 5.7. These are some of the conclusions presented in the final published Technical

Memorandum. However, the Technical Memorandum reflects changes NASA made in response to extensive comments from Federal Express. *Id.* ¶ 21 & Exhibit 10. The conclusions reached in an earlier "pre-Federal Express influenced" version of this report may have been even more disturbing.

On November 9, 1995, NASA provided a preliminary response to Plaintiff's request, stating that NASA was "at present" denying the release of the records sought pursuant to 5 U.S.C. § 552(b)(5) ("Exemption (b)(5)"), which codifies the exemption of "inter-agency or intra-agency memorandum[s] or letter[s] which would not be available by law to a party other than an agency in litigation with the agency." Estabrook Affidavit ¶ 14 & Exhibit 5. NASA further denied Plaintiff's request by claiming that release of the records sought would harm NASA's interest "if the records were released pending a final agency decision," that Exemption (b)(5) protects from disclosure "the results of Government research before the results are published," and that "[u]ntil the investigators' research results are published, we must withhold all records associated with their research in order to protect their interests in the study." *Id.*, Exhibit 5.

On November 29, 1995, Plaintiff timely appealed NASA's denial of his FOIA request, pursuant to 14 C.F.R. 1206.605. Estabrook Affidavit ¶ 16 & Exhibits 6-7. NASA denied Plaintiff's appeal on January 26, 1996, affirming the preliminary response that the requested information was withheld under Exemption (b)(5). *Id.* ¶ 24 & Exhibit 12. Also on this date, NASA agreed to release a draft of the Technical Memorandum to Plaintiff. *Id.* ¶ 27 & Exhibit 12. Plaintiff continued to pursue his FOIA request with NASA, and did not receive a final determination subject to judicial review until March



21, 1996. *Id.* ¶¶ 28-33, 35 & Exhibits 13-18. Plaintiff has exhausted his administrative remedies under 5 U.S.C. § 552(a)(6). *Id.* ¶ 35 & Exhibit 18.

Prior to publishing the Technical Memorandum in December 1995, NASA shared its preliminary findings from this study with Federal Express management and with the Air Line Pilots Association ("ALPA"), the labor union that has represented Federal Express's pilots since June 1993, in two separate August 1994 meetings. Estabrook Affidavit ¶¶ 12-13, 17, 20-21 & Exhibits 4, 9-10. The attendees at these meetings included persons other than Federal Express employees and aircrew members that participated in the study. *Id.* ¶ 13 & Exhibit 4. At these meetings, NASA distributed a draft of the Technical Memorandum to the meeting attendees. *Id.* ¶¶ 12, 17, 21 & Exhibits 4, 9-10. It appears that NASA made revisions to the draft Technical Memorandum based on the feedback it received from Federal Express management. *Id.* ¶ 21 & Exhibit 10.

In fact, Dr. Mark Rosekind, one of the NASA scientists conducting the study and authoring the Technical Memorandum, explained that NASA was taking some time to respond to the "fairly extensive" comments from Federal Express management and to review the Technical Memorandum for possible changes based on the input of Federal Express. Estabrook Affidavit ¶ 21 & Exhibit 10. Specifically, Dr. Rosekind informed a Federal Express pilot that:

**. . . we [NASA] briefed the study to [Federal Express] management and ALPA personnel separately this past fall and left a draft of the NASA Technical Memorandum (TM) for comments; *we received some fairly extensive comments back from the management personnel and it is taking us some time to respond to each item and to review the entire TM for possible changes based on***

***their comments and questions*** . . . so we are now in the process of generating a letter responding to the Co. comments and a final revision of the TM . . . . (Emphasis added.)

*Id.* Thus, to Plaintiff's knowledge, the records responsive to his request include, but are not limited to, drafts, revisions and notes in the development of the data into the August 1994 draft and its further evolution into the final 1995 December Technical Memorandum, as well as correspondence between Federal Express and NASA between August 1994 and December 1995.

NASA's study of sleep and circadian factors in overnight cargo operations is a technical evaluation by expert scientists of data conducted during a scientific study. Estabrook Affidavit, Exhibit 8. The results of this study are of critical importance to the aviation industry, especially to pilots and other aircrew of commercial airlines engaged in overnight operations, because they bear on their health and safety and on the safety of airline operations. *Id.* ¶ 40 & Exhibit 8. As described above, NASA found that the sleep of pilots during daytime layovers between night operations is more fragmented, lighter, less restorative, and of poorer quality overall than is the sleep that aircrew get during evening layovers between flights. Overall, pilots flying overnight cargo operations average 1.2 hours less sleep per day on duty days than they do on off-duty days. *Id.*, Exhibit 8, § 1.0. Crew members accumulate a sleep "debt" over the course of their multiple-day flight schedules. *Id.* When awake on duty at night, pilots rate their fatigue higher and their "activation" or alertness lower than when they were awake during off-duty days. *Id.* Flying at night disrupts the normal relationship between an individual's internal processes, such as sleep, hunger, and digestion. See

*id.* Pilots' reports of headaches increase by 400%, congested noses by 200%, and burning eyes by 900% on duty days as compared with pretrip days. *Id.* Moreover, there are currently no known safe and effective countermeasures to overcome this incomplete adaptation of persons to overnight work. *Id.* In short, the results of this study directly impact the health and safety of all who fly overnight, including pilots, other aircrew, and airline passengers.

On December 11, 1995, FAA issued a notice of proposed rulemaking (the "NPRM") in which it proposes to revise aircrew flight and duty time regulations codified at 14 C.F.R. Parts 121 and 135. *Id.* ¶ 19; 60 Fed. Reg. 65951 (Dec. 20, 1995), attached to the Complaint at Appendix B. **The deadline for submission of public comments on these proposed regulations is June 19, 1996.** 61 Fed. Reg. 11492 (March 20, 1996), attached to the Complaint at Appendix C. This deadline has already been extended once, and Plaintiff has no reason to expect that it will be extended again. Plaintiff, in cooperation with the Independent Pilots Association, an interested pilots' organization, intends to submit comments in response to the NPRM. Estabrook Affidavit ¶¶ 19, 39. To prepare and submit meaningful comments by the June 19 deadline, Plaintiff must have immediate access to copies of the NASA records he requested on September 29, 1995. *Id.* ¶¶ 38, 40-41.

### **ARGUMENT**

The U.S. Court of Appeals for the Sixth Circuit, and this Court, have repeatedly articulated standards governing the issuance of preliminary injunctions. Four factors are important in determining whether a preliminary injunction is proper: (1) the

likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction. See *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1175 (6th Cir. 1995); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985); *Whitehead v. Federal Express Corp.*, 878 F. Supp. 1066, 1069 (W.D. Tenn. 1994). A preliminary injunction is appropriate where the moving party can show "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Whitehead*, 878 F. Supp. at 1070 (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 103 (6th Cir. 1982)). In this case, Plaintiff has satisfied all of the above criteria for the issuance of a preliminary injunction.

I. PLAINTIFF WILL LIKELY SUCCEED ON THE MERITS OF HIS CLAIM AGAINST NASA.

Plaintiff will likely succeed on the merits of his claim against NASA for violation of FOIA and the Part 1206 regulations. As the Sixth Circuit has stated in a case that directly governs the instant motion, the purpose of FOIA is "to open the records of government agencies to public scrutiny." *Parke, Davis & Co. v. Califano*, 623 F.2d 1, 2 (6th Cir. 1980). NASA has recognized its duty under FOIA in adopting the following policy statement: "In compliance with [FOIA], a positive and continuing obligation exists for NASA to make available upon request by members of the public to the fullest extent practicable, all agency records under its jurisdiction . . . ." 14 C.F.R. § 1206.102(b).

Further, NASA has its own policy of openness and public accountability embodied in the National Aeronautics and Space Act of 1958, as amended, which obligates NASA to "provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof." 42 U.S.C. § 2473(a)(3); accord 14 C.F.R. § 1206.102(a); see also, H.R. Rep. No. 1770, 85th Cong., 2d Sess. (unnumbered pages) (1958), reprinted in 1958 U.S.C.C.A.N. 3160, 3168, 3183; Conf. Rep. No. 2166, 85th Cong., 2d Sess. (unnumbered pages) (1958), reprinted in 1958 U.S.C.C.A.N. 3190, 3197. There is no reason for NASA's withholding of the requested records in light of the above policies and the nature of the Technical Memorandum and requested documents.

The Technical Memorandum is an objective, scientific report on scientific research; it does not set, interpret, or guide the development of law within NASA's jurisdiction, and it is not a decision or policy of NASA. Therefore, records relating to the Technical Memorandum similarly do not set, interpret, or guide the development of law, an agency decision or policy, and cannot be withheld under FOIA Exemption (b)(5). The Technical Memorandum was produced by and credited to individual authors, including individuals who are not NASA employees. These authors are not NASA decisionmakers, and the Technical Memorandum was not issued by NASA's Administrator or any delegate with policymaking authority. No NASA officials made agency decisions or policy based on the Technical Memorandum. Far from intending to interpret law or even to make recommendations for the revision of existing law within NASA's purview, the Technical Memorandum is merely intended to document

the physiological and psychological effects of overnight cargo operations on flight crews.

In *Parke, Davis*, the U.S. Court of Appeals for the Sixth Circuit upheld a district court's order to an agency to release scientific reports constituting the interpretation of technical data where those reports did not contain expert opinion reflecting the deliberative process of decision- or policy-making. In *Parke, Davis*, a drug manufacturer, pursuant to FOIA, sought records from the Food & Drug Administration ("FDA") that FDA had generated as part of its review and denial of the manufacturer's request for approval to sell a drug over-the-counter. FDA withheld certain documents, claiming that they were exempt under Exemption (b)(5). The court found that the requested records were subject to release under FOIA where there was "no indication that they relate to general policy decisions of the agency. . . . The fact that a document contains advice or recommendations from a subordinate is not enough [to protect the document from release]." *Parke, Davis*, 623 F.2d at 6.

The records that Plaintiff has requested here are closely analogous to the documents requested in *Parke, Davis* because they contain expert opinion and interpretation (*i.e.*, the opinions of NASA scientists and other independent scientists conducting the study), yet do not relate to any policy decision of NASA. These records are thus subject to release under FOIA, Part 1206, and *Parke, Davis*. See also *Moore-McCormack Lines, Inc. v. I.T.O. Corp. of Baltimore*, 508 F.2d 945, 948-49 (4th Cir. 1974) (Department of Labor, *amicus curiae*), where the court held that inferences about the cause of an accident that are drawn from facts in an investigation -- even if labeled opinions or conclusions -- must be disclosed pursuant to FOIA along with the facts,

because they are not deliberative or policymaking information; *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1163-64 (W.D. Wash. 1986), where the court held that, under the Federal Rules of Civil Procedure, draft reports of the Comptroller of the Currency's bank examination were not exempt under executive privilege, because a final bank examination report is not a decision and it does not announce any action or policy of the Comptroller. Reliance on expertise does not transform interpretations of fact into communications protected by the deliberative process privilege. *Seafirst*, 644 F. Supp. at 1163 (citing *Parke, Davis*).

Moreover, NASA has selectively disclosed the preliminary results of its study to non-Federal parties in its August 1994 meetings with Federal Express and ALPA. At these meetings, NASA distributed drafts of the Technical Memorandum to the meeting attendees, many of whom were not participants in the study. NASA scientist Dr. Rosekind informed a Federal Express pilot that Federal Express made "fairly extensive comments" on the draft Technical Memorandum, comments that NASA considered and responded to in the process of developing the final Technical Memorandum. See Estabrook Affidavit, Exhibit 10. NASA reviewed these third party comments "for possible changes" to the final Technical Memorandum. *Id.* The Technical Memorandum and its scientific credibility may therefore have been tainted by outside influence.

NASA cannot be permitted to release information to certain third parties and then later claim that the information is protected from public disclosure. *North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978), *reh'g & reh'g en banc denied*; *Committee to Bridge the Gap v. Department of Energy*, No. CV90-3568-ER,

1991 U.S. Dist. LEXIS 15660 (C.D. Cal. Oct. 11, 1991)<sup>2</sup>, *aff'd without opinion*, 10 F.3d 808 (9th Cir. 1993); *see also Bergman v. Kemp*, 97 F.R.D. 413, 416 (W.D. Mich. 1983) (under federal rules of evidence and civil procedure, voluntary disclosure of portion of privileged matter of report waived the critical self-examination report privilege).

In *Bridge the Gap*, the court held that the Department of Energy ("DOE") had waived the deliberative process privilege by voluntarily disclosing to a third party an earlier version of an agency order, and ordered DOE to release the draft and all subsequent revisions. The court reasoned that selective disclosure and preferential treatment of certain parties are the very actions that Congress intended FOIA to eliminate. *Bridge the Gap*, 1991 U.S. Dist. LEXIS 15660 at \*3; *see also Andrus*, 581 F.2d at 182 (selective disclosure is offensive to purposes of FOIA; FOIA was intended to obviate preferential treatment of persons or interest groups). Further, "[w]hen an agency voluntarily releases a draft document to a specially interested non-Federal party, and then revises the document, it creates the intolerable impression that the document was revised precisely because feedback was received from the special interest." *Bridge the Gap*, 1991 U.S. Dist. LEXIS 15660 at \*3-4. The *Bridge the Gap* Court therefore ordered disclosure to prevent DOE from selectively releasing documents and then asserting the deliberative process privilege over the documents.

NASA's disclosure to Federal Express was similarly a release to a specially interested non-Federal party. NASA revised the Technical Memorandum after its August 1994 meeting with Federal Express. By the course of its actions, NASA has

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<sup>2</sup> For the Court's convenience, a copy of this decision is attached to this Memorandum.



created the intolerable impression that it revised the Technical Memorandum based on the influence of non-Federal parties. The Court should not permit NASA to shield the requested documents -- including communications from Federal Express seeking to influence the Technical Memorandum -- from Plaintiff.

II. THE INJUNCTION WILL SAVE PLAINTIFF FROM IRREPARABLE INJURY.

Second, an order enjoining NASA from withholding the records and directing NASA to make them immediately available to Plaintiff will save Plaintiff from irreparable harm. Plaintiff will lose his right to respond effectively to FAA's rulemaking by the June 19, 1996 comment deadline if he does not receive the requested records immediately. Plaintiff's interest in promoting safety in the aviation industry will similarly be compromised.

The objective of the NPRM is "to contribute to an improved aviation safety system by ensuring that flight crewmembers are provided with the opportunity to obtain sufficient rest to perform their routine and emergency safety duties." See 60 Fed. Reg. 65951 (Dec. 20, 1995), attached to the Complaint at Appendix B. FAA literally invites the submission of the very type of information Plaintiff seeks from NASA. The NPRM states:

The FAA believes that it is critical, whenever possible, to incorporate scientific information on fatigue and human sleep physiology into regulations on flight crew scheduling. Such scientific information can help to maintain the safety margin and promote optimum crew performance and alertness during flight operations.

*Id.*

It is therefore essential that Plaintiff obtain the records he has been seeking from NASA in time to use them to submit comments to FAA by the June 19, 1996 deadline. Once the June 19, 1996 deadline has passed, FAA is under no obligation to consider any comments submitted. See, e.g., *United States Steel Corp. v. EPA*, 649 F.2d 572, 576 (8th Cir. 1981) (agency's offer to receive comments on rule after promulgation of rule is not a substitute for the right to comment in time to influence the rulemaking process); *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974) (same). The only adequate remedy for NASA's improper withholding of the documents is immediate release of the requested documents.

### III. THE INJUNCTION WILL NOT HARM OTHERS.

Third, an injunction will not harm others. NASA has published the Technical Memorandum in final form, as an independent publication that is part of a series of published studies on similar aviation safety issues. NASA has completed its work on this study and has made public the results. In its correspondence with Plaintiff, NASA has not identified any harm that post-publication release of the requested records could cause. See Estabrook Affidavit ¶¶ 25, 34 & Exhibits 5, 12, 18. Directing NASA to release the withheld records would be consistent with FOIA's clear and unambiguous mandate to agencies to inform the public, with NASA's own policies regarding dissemination of information to the public, and with the goal of improving safety in the aviation industry. The initial findings of NASA scientists conducting the study -- prior to the possible influence of outside interests -- need to be released in order to ensure that they may be presented to the FAA in its flight safety rulemaking. The study contains important information affecting aviation safety. Even the final Technical

Memorandum indicates that pilots fly overnight operations more fatigued and sick, on diminished quality and quantity of sleep, and with greater disruption to their bodies than do pilots who fly daytime operations. Moreover, there are no known operationally safe and effective countermeasures that can be used to combat this hazardous overnight flying.

NASA cannot claim injury from disclosure when the consequence of the Court's order will be compliance with federal law. An immediate injunction is the only remedy that will permit Plaintiff to safeguard his statutory and regulatory rights of access to the requested information.

#### IV. THE INJUNCTION WILL SERVE THE PUBLIC INTEREST.

Fourth, a preliminary injunction will serve the public interest because it will (i) effect the purposes of FOIA and the Part 1206 regulations, and (ii) promote safety in the airline industry. The public has an interest in timely disclosure of records subject to release under FOIA. An injunction will ensure that the parties in this case adhere to the law enacted to guide their conduct. The public interest is served by ensuring that federal agencies comply with federal regulations, and by reminding the public and those agencies that courts will uphold and enforce these laws. Freedom to flout the law as NASA has done here would undermine confidence in the provisions and purposes of FOIA. This Court should simply ensure that NASA complies with the law. Unless this Court issues an injunction ordering NASA to make available immediately to Plaintiff the records Plaintiff has requested, public policy will be thwarted.

The public also has an interest in dissemination of information bearing upon the safety of airline operations. Plaintiff's use of the requested records in formulating his

comments in response to FAA's rulemaking on aircrew flight and duty time regulations will serve the public interest by ensuring that FAA has as much information as possible -- including initial NASA findings prior to any involvement by outside interests -- on the effects of sleep and circadian factors on overnight flight operations to consider in promulgating revised rules.<sup>3</sup>

### **CONCLUSION**

Because Plaintiff has shown that he is likely to succeed on the merits of his case, that the injunction will save him from irreparable injury, that the injunction will not harm NASA, and that the injunction will serve the public interest, Plaintiff respectfully

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<sup>3</sup> For instance, while there are no known operationally safe and effective countermeasures to overcome the incomplete adaptation of pilots to overnight operations, the Technical Memorandum offers suggested approaches for minimizing sleep loss, such as careful scheduling of the timing and duration of rest periods, appropriate scheduling of the number of consecutive nights of flying, and education and training on sleep and circadian physiology. Estabrook Affidavit, Exhibit 8, § 1.0.

requests that the Court grant Plaintiff's Motion for Preliminary Injunction and order NASA to disclose to Plaintiff immediately all records responsive to his FOIA request.

Dated: May 17, 1996

Respectfully submitted,

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