APPEAL NO. 17-55036

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE ALEJANDRO ROJAS, *Plaintiff-Appellant*

vs.

FEDERAL AVIATION ADMINISTRATION, *Defendant-Appellee*

On Appeal from the United States District Court

For the Central District of California

Hon. Consuelo B. Marshall

Case No. CV15-5811-CBM

APPELLANT'S REPLY BRIEF

Michael W. Pearson
CURRY, PEARSON & WOOTEN, PLC
814 W. Roosevelt St.
Phoenix, Arizona 85007
Telephone: (602) 258-1000

Counsel for Plaintiff-Appellant

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I. INTRODUCTION

This appeal involves the public's right to know what the government is doing and why under the Freedom of Information Act ("FOIA"). The oft used term is "transparency", or in this case – the lack thereof. The Federal Aviation Administration ("FAA") seeks to withhold documents it characterizes as validation process "summaries" related to the 2015 Biographical Assessment ("BA") used to screen applicants for an Air Traffic Control Specialist ("ATCS") position.

In 2013 and 2014, the FAA changed its ATCS recruitment process – changes including the replacement of its employment exam, the Air Traffic – Aptitude Test ("ATSAT"). The ATSAT was a peer reviewed aptitude test developed and used by the FAA for decades in air traffic controller selection. The BA is one of the two pre-employment selection tests for the position. This new "examination" has yet to improve the hiring process or lead to an increase in qualified employees, and has accordingly garnered intense public and congressional scrutiny surrounding whether it was properly peer reviewed and subject to industry standards. While the FAA previously published foundational documents and studies for the ATSAT, they refuse to do the same for the BA. Plaintiff, Mr. Rojas, as well as the public, merely wishes to check the work performed by APTMetrics, a third-party human resources consultant the FAA allegedly contracted with to validate the BA. However, the FAA is taking a paternalistic approach in its response to Mr. Rojas' request for documents

related to the test validation – a disturbing course of action given the number of interested ATCS applicants who also find the validity of the BA dubious at best. The FAA is effectively attempting to circumvent the check on governmental opaqueness that Congress intended FOIA to be. Contrary to the FAA's assertions, disclosure of the requested documents would not harm the interests underlying attorney work-product privilege[1] – it would further the FOIA's fundamental purpose of exposing agency action to the light of public scrutiny.

II. ARGUMENT

The Court should vacate the District Court's granting of summary judgment in favor of the FAA and remand this case to supplement the record or for a bench trial for four reasons. First, both the District Court and the FAA erred in narrowly construing Mr. Rojas' FOIA request as limited to only the validation report summaries, rather than also including the validation reports. Second, the District Court erroneously concluded that the FAA conducted a search reasonably calculated to uncover all documents relevant to the request. Third, even if the District Court intended to include the validation reports in its interpretation of the request, its determination that such documents are protected as attorney work-product under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), is also erroneous. Lastly, the District

[1] The Agency's "Counter-Statement of the Issues for Appeal" mentions the deliberative process and attorney-client privileges. Neither of those exemption bases' are part of this action.

Court incorrectly found that the validation report summaries are protected under Exemption 5.

While Mr. Rojas disagrees with the District Court's ultimate ruling, the Court nonetheless correctly concluded that the validation report summaries are not subject to attorney-client privilege under Exemption 5, an issue which the FAA does not dispute[2].

A. THE ADEQUACY OF THE SEARCH ISSUE IS PROPERLY BEFORE THE COURT

The FAA argues that both parties stipulated that the subject documents were properly identified and that, consequently, the "only issue in the case concerned the legal basis for the FAA's decision to withhold the responsive records" listed in the Vaughn index. Answering Brief at 23. However, this assertion is belied by the fact that Mr. Rojas repeatedly argued that the FAA had not conducted an adequate search from the beginning. ER at 79, 81, 92, 93. Although Mr. Rojas' did exclude the other offices' responses to his request from this action, that does not change the fact that for a summary to exist, a source document must also exist.[3] In any event, the Court

2 The District Court correctly held that "[t]he FAA offers no evidence that the records withheld involve a client seeking legal advice from a professional legal adviser. Although the records were prepared by APTMetrics at the request of the Office of Chief Counsel, they contain no request for, or discussion of, legal advice." ER at 15.

3 The FAA continues to withhold the 2015 BA validation studies on the grounds that no such studies exist. This is a logical fallacy because summaries of such studies cannot exist in a vacuum and without a source document.

applies a de novo standard of review in evaluating a trial court's granting of summary judgment, *Animal Legal Def. Fund v. Food & Drug Admin.*, 836 F.3d 987, 990 (9th Cir. 2016), and a FOIA defendant is entitled to summary judgment only when it (1) demonstrates that no material facts are in dispute, (2) **that it has conducted an adequate search for responsive records**, and (3) that each responsive record that is located has either been produced or is exempt from disclosure. *Zemansky v. U.S. Envtl. Prot. Agency*, 767 F.2d 569, 571 (9th Cir. 1985) (emphasis added). Courts view the evidence in the light most favorable to the nonmoving party for any genuine issues of material fact. *Animal Legal* at 989. Thus, the FAA must show that it conducted an adequate search before being entitled to summary judgment, regardless of whether Mr. Rojas expressly argued this issue before the trial court.

B. THE FAA AND DISTRICT COURT ERRED IN NARROWLY CONSTRUING THE FOIA REQUEST

Both the FAA and the District Court should have liberally construed Mr. Rojas' FOIA request and erred on the side of full disclosure, as Congress intended. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) ("In FOIA . . . a new conception of government conduct was enacted into law, a general philosophy of full agency disclosure."); *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 166-67 (1985) ("The mandate of the FOIA calls for broad disclosure of Government records."); *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 769-70

(9th Cir. 2015) ("Government transparency is critical to maintaining a functional democratic polity, where the people have the information needed to check public corruption [and] hold government leaders accountable."). Congress enacted FOIA to "facilitate public access to documents," *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), and to establish a "judicially enforceable public right to secure such information from . . . unwilling official hands." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Courts and agencies have a duty to construe FOIA requests liberally. *People for the Ethical Treatment of Animals v. Nat'l Insts.*, 745 F.3d 535, 544 (D.C. Cir. 2014). Where a FOIA request is reasonably susceptible to a broader reading, courts and agencies should give it the broader meaning. *LaCedra v. Exec. Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003) ("The drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof."). Agencies "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files." *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985).

Contrary to the FOIA intent, the FAA contends that it and the District Court properly construed Mr. Rojas' request narrowly by including only the validation summaries. Answering Brief at 22. A plain reading of Mr. Rojas expansive request belies any notion that he was seeking just nine pages of validation report summaries.

His request sought "information regarding the empirical validation of the biographical assessment noted in the rejection notification. *This includes any report, created by, given to, or regarding APTMetrics' evaluation and creation and scoring of the assessment,*" along with any "information regarding the empirical validation of the biographical assessment." ER at 332. Even if, *arguendo*, the FAA reasonably interpreted such wording to include only summaries, Mr. Rojas' request is reasonably susceptible to a broader reading and the FAA and the District Court should have construed it as including all documents and reports related to the BA. A narrower reading of the request is inconsistent with the FOIA.

C. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE FAA CONDUCTED A SEARCH REASONABLY CALCULATED TO UNCOVER ALL DOCUMENTS RELEVANT TO THE REQUEST

Given the fact that the FAA improperly construed Mr. Rojas' request and continues to peddle a narrow interpretation, the District Court's determination that it conducted a search reasonably calculated to uncover all responsive documents is erroneous – such a conclusion was based on the Court's misguided belief that Mr. Rojas' request was limited to only the validation summaries. An agency responding to a FOIA request must demonstrate that it has conducted a search "reasonably calculated" to uncover all relevant documents. *Hamdan*, 797 F.3d at 770. The agency demonstrates the adequacy of its search with "reasonably detailed, nonconclusory affidavits submitted in good faith." *Zemansky*, 767 F.2d at 571; *Lahr v. Nat'l Transp.*

Safety Bd., 569 F.3d 964, 986 (9th Cir. 2009) (holding that agency's search was adequate where it submitted detailed affidavits describing which databases and files were searched, including the specific paper records and computer systems of employees involved). Courts must "accord substantial weight to [an] agency's affidavits" only when the agency invokes an exemption in a case involving national security issues. *Hamdan*, 797 F.3d at 769 (quoting *Hunt v. Cent. Intelligence Agency*, 981 F.2d 1116, 1119 (9th Cir. 1992)).

The FAA maintains that its search was reasonably calculated to uncover all responsive documents because "[t]he Armstead Declaration confirms that all of the attorneys within the Office of the Chief Counsel who provided legal advice related to the revisions to the ATCS hiring process were asked to search their records, and that the search for records within the AGC-100 was reasonably calculated to obtain documents responsive to [Rojas'] FOIA request." Answering Brief at 23. Such conclusory statements, devoid of any detail, are insufficient to demonstrate an adequate search. The Court is only required to lend Ms. Armstead's Declaration substantial weight if the case involves issues of national security. However, the FAA is invoking attorney work-product privilege, an interest that has no relevance to national security under Exemption 1. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (holding that the purpose of the work-product privilege is to protect the adversary process by shielding the "mental impressions of an attorney" in the

"preparation of a client's case."); *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 576 (9th Cir. 1992) ("The primary purpose of the work product rule is to prevent exploitation of a party's efforts in preparing for litigation."). As the withheld documents are not related at all to national security, the Court should not lend Ms. Armstead's Declaration the significant weight the FAA relies on.

An agency must show that it made a good-faith effort to conduct a search for requested records, "using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (superseded by statute on other grounds). *See also Davin v. Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995) ("[T]he party seeking disclosure does not know the contents of the information sought and is . . . helpless to contradict the government's description of the information."); *Am. Civil Liberties Union v. U.S. Dep't of Homeland Sec.*, No. 15-00247, 2017 WL 3478658, at 5 (D. Ariz. Aug. 14, 2017) ("[T]hose searches that fail to detail the terms or criteria used to identify responsive documents are inadequate . . . [A]ny declaration that simply relies on a subject matter expert and manual searches or merely identifies the locations searched . . . must be supplemented."). The adequacy of an agency's search is judged by a standard of reasonableness with the facts construed in the light most favorable to the requesting party. *Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F.3d 1325, 1328 (9th Cir. 1995). And while an agency need not demonstrate that *all*

responsive documents were found, *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982), or that other documents *might* exist, *Citizens Comm'n*, 45 F.3d at 1328, the FAA has failed to produce validation reports that *undoubtedly* exist and are fundamental to Mr. Rojas' request. The validation reports are not peripheral, obscure documents – they exist and are a crucial point of disagreement in this litigation. After all, how can a validation study summary exist in the absence of a validation report?

Despite this logical fallacy, the FAA continues to argue that "there is no indication that the search for documents was limited to summaries, excluded a validation study, or that any additional documents exist." Answering Brief at 23. However, additional indication that validation reports for the 2015 BA do exist is the fact that previous studies are over 100 pages in length (ER at 118-264), compared to the allegedly nonexistent studies in this case. The FAA would have Mr. Rojas and the Court believe that, prior to this litigation, it happened to (conveniently) depart from its long-standing practice of publishing voluminous, detailed studies of the examinations. The FAA attempts to explain away this report length discrepancy (and its nonexistence) by drawing an irrelevant distinction between "interim validation work" and a "full validation study." Answering Brief at 26-27. The FAA alleges that because the "interim" validation work is "entirely different" from the "full" validation studies done in years prior, there is no reason to believe that the "interim" studies conducted for the 2014 or 2015 BA are similar in length to the "full" studies.

Although such an explanation is plausible, it fails to address a fatal flaw in the claim that it conducted an adequate search: how can there be a validation report summary without validation reports? It's unreasonable to argue that a summary was written on nonexistent reports, let alone when those allegedly nonexistent reports typically consist of hundreds of pages (ER at 118-264) and that APTMetrics had been working under contract for the government for several years. To draw an analogy, one cannot write a book review on a book that does not exist. Yet, all the FAA's search purportedly produced – and which they now withhold – is nine pages of summary across three documents. ER at 296-299. The FAA's explanation also glosses over Rickie Cannon, an FAA official in charge of ATCS hiring's, sworn testimony in which he stated before Congress that the 2015 BA modifications were made because "we had enough time to do a job task analysis [and] to take a deeper look at the occupation to see if it had changed." ER at 23. Such a "deeper look" surely yielded more than nine pages of related documents.

Additionally, the rejection notifications given to candidates who failed the exam demonstrates the existence of additional documents; the FAA's notice avows that the exam "was independently validated by outside experts." ER at 339. In an October 2014 letter, the FAA stated the examination was "professionally developed and validated … in accordance with relevant professional standards and legal guidelines." ER at 285. Mr. Rojas is simply seeking the documents relied upon to

arrive at that conclusion. The FAA continues to use the BA. It cannot classify something as "interim," claim that a full validation study is not necessary, and then continue to use it.

Furthermore, how could the FAA conduct a reasonably calculated search with such a narrow construal of Mr. Rojas' request? No reasonable person can consider a search adequate if it turns up only summaries of a report, without the report itself. Given the FAA's extremely narrow reading of the request, it is not a far cry to assume that FAA Counsel instructed subordinate attorneys to limit their searches accordingly, notwithstanding Ms. Armstead's self-serving, conclusory statement to the contrary. Nothing in the record reasonably describes the search performed by the attorneys who provided "legal advice" regarding the hiring process.

Despite the volume and publication of previous validation studies, the FAA dismisses Mr. Rojas' contention that more documents must exist as "speculation." Answering Brief at 18. It cannot be speculative when APTMetrics performed a "comprehensive review of the ATCS selection and hiring process" since 2012. Answering Brief at 26. The validation and development of the BA is part and parcel with the work that APTMetrics was contracted to perform. Three documents, totaling nine pages, cannot constitute a "study." For the FAA to produce this in response to a request for any documents related to the 2015 BA and APTMetrics' validation of such is nonsensical. Simply put, the search was not reasonably

calculated to produce all documents responsive to the request. Consequently, the Court should remand this case back to the District Court for the FAA to be ordered to perform a supplemental, proper search.

D. THE VALIDATION STUDY REPORTS ARE NOT PROTECTED UNDER EXEMPTION 5 OF THE FOIA AND SHOULD BE DISCLOSED

The FAA sidesteps the issue of whether the validation study reports fall under Exemption 5 and instead defers to its argument that these reports were beyond the scope of Mr. Rojas' request. Answering Brief at 30-31. Even if the validation study summaries are indeed protected under Exemption 5, the District Court never addressed whether the validation studies fell within the exemption – creating a genuine issue for determination on remand.

1. The FAA Requested That APTMetrics Conduct Validation Studies On The 2015 BA In The Course Of Ordinary Business – Not In Preparation Of Litigation

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. § 552(b)(5); *Klamath Water*, 532 U.S. at 8. The attorney work-product doctrine safeguards from discovery documents or compilations of materials prepared by agents of an attorney in preparation of litigation. *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (citing *United States v. Nobles*, 422 U.S. 225, 238 (1975); *See also* Fed. R. Civ. P. 26(b)(3). For a document to qualify as one produced in preparation for litigation, the document must

(1) be prepared in anticipation of litigation (2) by or for another party or by or for that other party's representative. *In re Grand Jury Subpoena, Mark Torf/ Torf Envtl. Mgmt.*, 357 F.3d 900, 907 (9th Cir. 2004). This limitation is critical to the work-product doctrine and to the concerns underlying FOIA. *See Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 586-87 (D.C. Cir. 1987) ("[I]f an agency [was] allowed to withhold any document prepared by any person in the Government with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated.").

The record contains insufficient evidence demonstrating the FAA anticipated litigation prior to validating the 2015 BA. In January 2014, FAA officials admitted that the BA was validated and that the FAA *had not then* anticipated litigation. ER at 113-114. The FAA retained APTMetrics for an extended period of time to work on the ATCS hiring process as part of its normal course of business. Answering Brief at 11-12. APTMetrics also conducted the 2014 and 2015 validation reports in the ordinary course of business. In the FAA's own words, APTMetrics "performed work related to [the] process" of revising the Biographical Assessment, which became the "newly refined BA" used in the 2015 ATCS hiring process. Answering Brief at 13-14.

At best, the FAA must argue that the validation reports served a dual purpose. In circumstances where a document was not prepared exclusively for litigation,

courts must apply the "because of" test. *Richey*, 632 F.3d at 567-68. Dual-purpose documents are considered prepared in preparation of litigation if, "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared . . . because of the prospect of litigation." *Id.* (quoting *In re Grand Jury Subpoena*, 357 F.3d at 907). Courts must consider the totality of the circumstances to determine whether the document at issue was "created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation." *Richey*, 632 F.3d at 568 (quoting *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998)).

Considering that the FAA has retained APTMetrics for several years to conduct evaluations of their hiring process and to produce validation reports, the purpose of the 2014 and 2015 BA validation reports was not so different from the course of ordinary business that it can fairly be said to have been conducted in anticipation of litigation. Given the totality of the circumstances and the purpose of the FAA's relationship with APTMetrics, the 2014 and 2015 BA validation reports would have been created in substantially similar form even in the absence of the FAA's alleged anticipation of litigation. The FAA cannot argue that it would not have conducted its allegedly unique "interim" validation report "but for" the prospect of litigation, when it has admitted that this validation study resulted from something entirely unrelated to litigation: "In 2014, as part of the annual workforce

plan, the FAA identified the need to hire ATC specialists to address estimated losses . . . As a result, in February 2014, the FAA implemented the '2014 Interim Hiring Process' for one-time use, incorporating as many of APTMetrics' initial recommendations as practicable including the BA." Answering Brief at 12. Despite the "interim" label, the exam is still being used to date. The FAA's claim that an "interim" process does not require a full validation study does not square with the fact that it nevertheless has contracted with APTMetrics since 2012, and has repeatedly told Congress and the public that the exam has been validated.

The FAA began contracting with APTMetrics in November 2012. Answering Brief at 11. The FAA further states that in 2013, "APTMetrics modified the Biographical Assessment ('BA') that was previously part of the AT-SAT screen for developmental ATCS applicants and validated the modified BA test." Answering Brief at 12. Mr. Rojas disagrees that the BA was previously a part of the AT-SAT. All of the published AT-SAT validation studies belie this assertion. That APTMetrics began validating and issuing studies on the BA at least several months prior to any EEO complaint undermines any argument that APTMetrics' later validation reports were conducted primarily – or even partially – in anticipation of litigation.

The FAA suggests that, following the filing of a "Formal Complaint" and petition for class certification "by an unsuccessful applicant for an ATCS position,"

it "revised the BA used in the 2014 interim hiring process . . . and APTMetrics performed work related to that process." Answering Brief at 13. However, if the "2014 Interim Hiring Process" was truly for "one-time use," then the FAA would have requested that APTMetrics perform its standard validation work following the 2014 hiring cycle, regardless of anticipated litigation, for the purpose of developing a new or amended BA to implement in the 2015 ATCS hiring process. Under no interpretation of these facts can it be said that APTMetrics would not have created the "interim" validation report "but for" the prospect of litigation. Therefore, even if the FAA argues that the 2015 BA validation reports serve a dual purpose, the "because of" test demonstrates that they were created in the ordinary course of business and not in anticipation of litigation.

2. The EEO Complaint That The FAA Claims Initiated Its Anticipation Of Litigation Pertained To An Entirely Separate, Unrelated Lawsuit

In any event, the March 2014 EEO letter that the FAA argues initiated its anticipation of litigation (a copy of which isn't in the record), stems from a civil rights suit regarding the replacement of the Qualified Applicant Register in place before the ATCS hiring changes[4]. Answering Brief at 13. That action and the April

[4] *Brigida v. U.S. Dep't. of Transportation, et. al.*, 1:16-cv-02227-DLF, a Civil Rights action, filed in the District of Arizona on December 30, 2015, and transferred to the District of Columbia on November 8, 2016. The Complaint speaks for itself, and although it mentions that there was a failure to validate this exam, it does not challenge or include a claim for relief regarding it.

2015 "Formal Complaint" do not challenge the use of the BA. The administrative litigation and the *Brigida v. DOT* action do not concern the test validation and the FAA has yet to offer any evidence demonstrating the contrary. The EEO complaint litigation is related to the *replacement* of the previous applicant register – an issue not relevant to this case. Consequently, the FAA could not have requested that APTMetrics conduct validation studies on the BA in anticipation of *this* litigation when the EEO complaint it repeatedly points to as the source of this anticipation is unrelated to the BA.

E. THE DISTRICT COURT ERRED IN ITS FINDING THAT THE VALIDATION STUDY SUMMARIES ARE PROTECTED UNDER EXEMPTION 5

In defense of the District Court's ruling, the FAA urges the Court to apply an expansive reading of Exemption 5 – such an approach is inconsistent with fundamental FOIA principles. The enumerated exemptions to the FOIA's demand for disclosure "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. Courts have consistently construed the FOIA's exemptions narrowly. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 630 (1982). Accordingly, the agency bears the burden of justifying its nondisclosure of documents. *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135-36 (9th Cir. 2008). Exemption 5 "protects from disclosure inter-agency or intra-agency

memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." *Klamath Water*, 532 U.S. at 8. Thus, to be protected the agency must show that the withheld document meets two threshold conditions: (1) its source must be a government agency and (2) "it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Id.*

1. The District Court Erred In Its Finding That The Validation Study Summaries Are Protected Under Exemption 5 Because They Are Not Inter- or Intra-Agency Memorandums

The District Court erroneously determined that the 2015 BA validation report summaries constitute inter-agency memorandums. The FAA cites to three D.C. Circuit cases in support of its argument that the withheld summaries "clearly" meet the definition of inter- and intra-agency memorandums. Answering Brief at 32. However, the FAA's reliance on these cases is misinformed. First, a careful reading of the cases reveals only tangential support for the idea that reports created by contractors are protected under Exemption 5. *See Soucie v. David*, 448 F.2d 1067, 1075-77 (D.C. Cir. 1971) (holding that the Office of Science and Technology qualifies as an "agency" subject to the FOIA and remanding the case for a determination as to whether a report produced by the OST fell under Exemption 5 or any of the other exemption); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (in the context of the Trade Secrets Act, whether privilege attaches

to agency-commissioned reports conducted by outsiders depends on the role of the documents in the agency's deliberative process); *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 184 (D.C. Cir. 1987) (discussing how the *Machin* privilege is incorporated into Exemption 5 of the FOIA and protects confidential statements made to military crash-safety investigators, and subsequently upholding the district court's ruling protecting from disclosure third-party witness statements to military accident investigative boards).

Second, even if these cases demonstrate that the D.C. Circuit extends Exemption 5 protection to reports created by outside contractors, the FAA cites no controlling case law from the Ninth Circuit or the Supreme Court in support of this and the Courts of Appeals are split on the matter. The closest the Supreme Court has gotten to addressing the issue is its discussion of the "consultant corollary" in *Dep't of the Interior v. Klamath Water Users*, in which the Court notes that the statutory definitions listed in the FOIA "underscore the apparent plainness of [inter-agency and intra-agency]." 532 U.S. at 9. Moreover, in an earlier case, Justice Scalia stressed that the "most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." *Dep't of Justice v. Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J. dissenting). Despite its heavy suggestion towards a plain reading of the statutory language, the *Klamath Water* Court did not expressly rule on the issue. *See Klamath Water*, 532 U.S. at 12

("assuming, *which we do not decide*, that [outside consultants' reports] may qualify as intra-agency under Exemption 5.") (emphasis added).

The Court should follow the Sixth Circuit's reasoning and reject any incorporation of the consultant corollary principle into Exemption 5. *Lucaj v. Fed. Bureau of Investigation*, 852 F.3d 541, 548-49 (6th Cir. 2017). In *Lucaj*, the court acknowledged the strong interest of government agencies in confidential communications with non-agency contractors but ultimately held that, given the court's responsibility to narrowly construe FOIA exemptions combined with the plain meaning of 'intra-agency,' intra-agency memorandums do not include outsider communications. *Id*. Furthermore, the *Lucaj* court interpreted the *Klamath Water* opinion as the Supreme Court's express rejection of any extension of Exemption 5 protection to outside contractor communications. *Id*. at 548. In closing, the court emphasized a plain reading of Exemption 5: "Congress chose to limit the exemption's reach to inter-agency or intra-agency memorandums or letters, . . . not to memorandums or letters among agencies [and] independent contractors." (internal quotations omitted). *Id*. at 549. FOIA is clear regarding what constitutes an agency and the Court's review accordingly ends there. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

The *Klamath Water c*ourt's discussion of the meaning of "intra-agency" highlights a third critical shortcoming in the FAA's argument: the cases they cited

refer to intra-agency memorandums[5], not inter-agency memorandums, and the District Court expressly held that the documents at issue constituted "inter-agency" memorandums. ER at 10. Answering Brief at 33. Additionally, the *Klamath Water* court's discussion is exclusively in reference to intra-agency memorandums, and the cases the Court cites likewise pertain to intra-agency memorandums. While the FAA will attempt to gloss over this distinction, Mr. Rojas respectfully emphasizes the difference on appeal because the District Court's finding that the validation report summaries are *inter*-agency is erroneous and the case law that the FAA cites to support the court's holding does not do so.

APTMetrics is not an "agency" within the meaning of the FOIA. *See* 5 U.S.C. § 551(1); *Klamath Water*, 532 U.S. at 9 ("Statutory definitions underscore the apparent plainness of this text . . . 'agency' means 'each authority of the government of the United States,' . . . and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent

[5] The FAA claims that its cited case law supports the notion that "federal courts have given the 'inter-agency' portion of Exemption 5 an expansive reading." Answering Brief at 32. The FAA either misrepresents or misreads these cases. None of these cases provide direct support for the FAA's claim. None of the FAA's pinpoint citations or quoted material included in their parentheticals expressly uses the term "inter-agency memorandums," and one citation – *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) – includes neither a pinpoint citation nor an explanatory parenthetical. At best, these cases discuss intra-agency memorandums.

regulatory agency."). The plain meaning of an "inter-agency memorandum" is a document sent from one agency to another, distinct agency. *See Lucaj*, 852 F.3d at 546 ("[*I*]*nter-agency memorandums* necessarily means memorandums between agencies—one agency generating the memorandum and another agency in receipt of the memorandum"). Since APTMetrics is not an "agency" within the statutorily prescribed definition of the FOIA, the FAA's argument and the District Court's conclusion, fails because the validation report summaries fail to meet the threshold requirement mandating that they originate with a government agency. *Klamath Water*, 532 U.S. at 8.

For the validation report summaries to constitute inter-agency memorandums, APTMetrics and the FAA must constitute distinct government agencies. Opening Brief at 31. This is not the case here. If, as the District Court concluded, APTMetrics "stood in the shoes" of the FAA (ER at 10), then the validation report summaries cannot be inter-agency because such a phrase implies that APTMetrics and the FAA are the same entity. The only way that the validation report summaries can qualify as inter-agency memorandums is if "inter-agency" and "intra-agency" assume the same meaning. This is an unlikely conclusion belied by the definitions of "inter" and "intra" as well as the construction of the statutory language, which creates a distinction between the two types of memorandums: "inter-agency *or* intra-agency memorandums." 5 U.S.C. § 552(b)(5) (emphasis added). Thus, the District Court's

conclusion and the FAA's argument on appeal improperly eviscerate and conflate the difference between "inter-agency" and "intra-agency" memorandums.

2. The District Court Erred In Its Finding That The Validation Study Summaries Are Protected Under Exemption 5 Because They Were Not Prepared In Anticipation Of Litigation

The FAA argues that the validation study summaries "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it" because they are attorney work-product privilege. ER at 9; *Klamath Water*, 532 U.S. at 8. The attorney work-product doctrine protects documents prepared by agents of an attorney in preparation of litigation. *Richey*, 632 F.3d at 567; Fed. R. Civ. P. 26(b)(3). As discussed above in greater detail, documents that would have been prepared in the ordinary course of business irrespective of possible litigation do not qualify as "prepared in anticipation of litigation." *Richey*, 632 F.3d at 567-68.

In this case, the FAA requested that APTMetrics conduct the 2014 and 2015 BA validation summaries in the ordinary course of business because they were required to do so by law. 29 CFR § 1607. Title VII of the Civil Rights Act prohibits discriminatory selection procedures. 42 U.S.C. § 2000e-2(h). More specifically, 29 CFR § 1607.1 "does not require a user to conduct validation studies of selection procedures *where no adverse impact results*." (emphasis added). Thus, while the language of § 1607.1 may not mandate that the FAA conduct validation studies of

its BA, how else would an agency know that it complied with Title VII and its regulations? The FAA couldn't know whether there was any adverse impact resulting from the BA unless it conducted regular validation studies and reviewed reports/ summaries. As it turns out, the results revealed an adverse impact ratio of .73 for African-Americans. ER at 87. This ratio is sufficiently high to constitute evidence of adverse impact, *See* 29 CFR § 1607.4(D), thus putting the FAA on notice that it needed to continue to conduct validation studies and review the attendant summaries. 29 CFR § 1607.5. 29 CFR § 1607.9 and 29 CFR § 1607.14 also provide standards and requirements regarding a duty to validate within the ordinary course of business.

According to the FAA however, Mr. Rojas abandoned this argument on appeal because "these authorities [Title VII and regulations] do not support his argument." Answering Brief at 34. That Mr. Rojas did not abandon this argument is supported by his June 28, 2017 Motion filed with this Court, directing the Court's attention Rickie Cannon, then FAA Human Resources Deputy Administrator for Human Resource's, sworn testimony. Motion for Judicial Notice, Dkt 7, at 3. ER at 23. The FAA has never objected to the inclusion of this statement in the record. Nor did the FAA's Answering Brief respond to this element of Mr. Rojas' argument. Evidence that the FAA did know or believe it had to validate such exams in the normal course of business would create a genuine issue of material fact bearing on

both issues, demonstrating that summary judgment was improper. If the FAA believed it had a legal obligation to validate the tests, or if it did in fact attempt validation studies, it would show that the FAA's FOIA search methods were inadequate because no such records were recorded in the *Vaughn* index.

During his testimony before a congressional subcommittee, Mr. Cannon stated that the FAA had APTMetrics validate the BA because the FAA was under a legal duty to do so: "[The validation work] is legally an obligation we have as an agency, that any selection procedure or tool we use must be validated under the uniform guidelines." ER at 23. Thus, one of the FAA's own agents admitted before Congress that the FAA is legally obligated to validate its BA to ensure that it complies with current regulations, which directly undermines any claim that the validation report summaries were created in anticipation of litigation. During the very same subcommittee hearing, the NATCA (the controllers union) President, Mr. Rinadli, stated that "[The BA] was never validated with air traffic controllers. So it wasn't valid, and that is why it had a horrible success rate." If in fact the test was not properly validated as Mr. Rinadli asserts, than the reasons for the FAA's refusal to produce the requested documents is self-evident. ER at 23. Motion for Judicial Notice, Dkt 7, at 3.

Lastly, in its October 2014 letter, the FAA stated that the BA was "professionally developed and validated … in accordance with relevant professional

standards and legal guidelines." ER at 285. This demonstrates that the FAA has additional documents. The notice stated that the exam "was independently validated by outside experts." ER at 339. The FAA cannot claim that it has performed validation studies but then list only summaries in its *Vaughn* index. In any event, industry standards require the FAA to publish validation studies. APTMetrics' own website, following these industry standards, stresses the *requirement* to validate employment exams. ER at 269-270, 273-279, 280-282.

III. CONCLUSION

The FAA's withholding of the validation reports and summaries is inconsistent with its long history of transparency with respect to ATCS hiring. Congress enacted the FOIA to furnish citizens with the ability to shed light on agency action. It is the public's only legal avenue for reviewing such action and, if necessary, holding the government accountable. For the foregoing reasons, neither the validation reports nor the validation report summaries pertaining to the FAA's 2015 Biographical Assessment are protected from disclosure under Exemption 5 of the FOIA. Accordingly, Mr. Rojas respectfully requests that the Court vacate the District Court's order granting summary judgment in favor of the FAA and remand this case to either supplement the record or for a bench trial.

/ / /

RESPECTFULLY SUBMITTED this 11th day of January, 2018.

CURRY, PEARSON & WOOTEN, PLC

/s/ Michael W. Pearson
Michael W. Pearson
814 W. Roosevelt St.
Phoenix, AZ 85007
Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, I certify that Plaintiff-Appellant's Reply Brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,484 words, excluding the portions exempted by Fed. R. App. 32(a)(7)(b)(iii).

RESPECTFULLY SUBMITTED this 11th day of January, 2018.

CURRY, PEARSON & WOOTEN, PLC

/s/ Michael W. Pearson
Michael W. Pearson
814 W. Roosevelt St.
Phoenix, AZ 85007
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2018, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participates in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

RESPECTFULLY SUBMITTED this 11th day of January, 2018.

CURRY, PEARSON & WOOTEN, PLC

/s/ Michael W. Pearson
Michael W. Pearson
814 W. Roosevelt St.
Phoenix, AZ 85007
Attorney for Plaintiff-Appellant

ADDENDUM

5 U.S.C. § 551(1):

For the purpose of this subchapter—

(1)"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix

5 U.S.C. § 552(b)(5):

(b)This section does not apply to matters that are –

…

(5) inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

42 U.S.C § 2000e-2(h):

(h) **Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions**

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of title 29.

Fed. R. Civ. P. 26(b)(3):

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

29 CFR § 1607.1 – Statement of Purpose:

A. *Need for uniformity - Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

29 CFR § 1607.14 – Technical standards for validity studies:

The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which

the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies* -

(1)*Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2)*Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3)*Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where

performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4)*Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5)*Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6)*Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors remain the same, the greater the magnitude of the relationship (e.g., correlation

coefficient) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7)*Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: cross-validation is another.

(8)*Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a)*Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b)*Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c)*General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d)*When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e)*Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following:

> **(i)** An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f)*Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies* -

(1)*Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2)*Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on

the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3)*Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4)*Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, orability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of theselection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5)*Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6)*Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7)*Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8)*Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9)*Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies* -

(1)*Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort

involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2)*Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3)*Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4)*Use of construct validity study without new criterion-related evidence* - (a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the

standards of subparagraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b)*Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

29 CFR § 1607.4(D):

D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

CRF § 1607.5 – General standards for validity studies:

A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, DC, 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A “reasonable period of time” will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

CRF § 1607.9 – No assumption of validity:

A. *Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of its validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job