

# A QUEST FOR SECRET PLANS: A JOURNEY INTO THE LAND OF OZ

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The Fairchild F-45 is a 1930s era airplane manufactured by the long defunct Fairchild Aircraft Corporation. It is a four seat, low wing, partially fabric covered airplane powered by a Wright radial engine that is actually a contemporary of the Model A Ford, but unlike the Model A, the airplane achieved little or no financial success. Only twelve or so were built, the last in the year 1939. Of the five that remain today, two are in flying condition with a probable worth of between eighty and one hundred thousand dollars, and another is owned by Greg Herrick, a well known restorer and collector of many types of antique aircraft. Mr. Herrick was repairing the tail surfaces of his F-45 as part of his flying museum and decided that the most expedient way of approaching the project is to obtain the plans that were submitted to the Civil Aeronautics Agency (CAA), the predecessor of the Federal Aviation Administration (FAA), in the 1930s as part of the application for an aircraft type certification (TC). He sent a Freedom of Information Act (FOIA) request to the FAA in the Fall of 1997.



After over ten years of litigation in two federal district courts, two U.S. Circuit Courts of Appeal and the U.S. Supreme Court, and now on remand to the federal court for the District of Columbia, the plans for this antique airplane continue to remain in putative secrecy in the archives of the (FAA). The irony of this legal odyssey is that it could well have been avoided had the FAA simply given deference to its own regulations. Instead, the government spent untold hundreds of thousands of dollars and a public corporation spent in excess of a million dollars in legal fees and expenses defending (FOIA) lawsuits for plans that are essentially worthless.

An aircraft type certificate (TC) is issued by the FAA (formerly the CAA) if proposed plans submitted by a manufacturer are determined to meet minimum safety regulations. While submitted plans and specifications are regarded as trade secrets, in exchange for the FAA's imprimatur, the TC holder is required to maintain maintenance discrepancy reports and other safety information to assist owners and operators with repair and maintenance. The FAA claims that the TC holder is obligated to "support" the product. However, there seems to be no consensus within the FAA on exactly what that means,

and along with this uncertainty comes a lack of meaningful guidance or enforcement.

The original plans are still on file with the FAA in the New England Region, but they require a bit of work to retrieve and copy to comply with a FOIA request. Although Mr. Herrick agreed to pay for any necessary expense for retrieval and copying, the FAA's response was that he

must first obtain permission from the owner of the TC. That task is tantamount to requiring Dorothy in the Wizard of Oz to "first bring back the witch's broom" because the FAA requires, by regulation, sales and transfers of TCs be recorded in writing, and there is simply no record indicating a sale or transfer of ownership to any entity that exists today. Probably with the hope that Herrick would just go away, the FAA insisted that he still had to get "permission" from someone. So, he researched the name "Fairchild" and discovered The Fairchild Corporation, incorporated in 1990. This new corporation, referred to in this article as simply "Fairchild," does not build aircraft, but is engaged largely in real estate development.

Fairchild at first did not even seem to know what an F-45 is. It could have been a pistol for all they knew. However, for some inexplicable reason, seemingly provoked by Herrick's explanation and request, someone in that company developed the notion that the plans for this antique must have significant commercial value and instructed the FAA to defend the FOIA request, claiming any such information to be its valuable "trade secret." Despite the fact that the FAA records are devoid of any mention of this new Fairchild company as owning anything of an F-45 type certificate, the FAA sheepishly obeyed Fairchild's wishes and refused the request under Exemption 4, the trade secret exemption of FOIA.

The FAA's conscious disregard of its own TC transfer regulations and failure to insist on some proof of ownership in the new Fairchild's name eventually caused untold expenses for all parties and the public. After unsuccessfully exhausting the required prerequisite administrative remedies within the FAA, Mr. Herrick filed his FOIA lawsuit in the U.S. District Court for the District of Wyoming, his place of his residence. During the discovery process in that case, the FAA produced a copy of

the current Type Certificate showing the last recorded owner to be Fairchild Aircraft Division of the Fairchild Engine & Airplane Corporation that went out of business in the mid to late 1950s. The FAA also produced a copy of a 1955 letter from that owner that relinquished any claimed trade secrecy by granting blanket permission to the CAA to loan out the plans and specifications to anyone needing them to repair airplanes. Nothing in the FAA files even remotely mentioned the new Fairchild as owning anything regarding this aircraft. In fact, "the FAA admits that it has not located, to date, such a document." Likewise, nothing in the produced file contained any modification or retraction of the 1955 letter.

FOIA cases have an interesting legal process, usually resolved by motions and countermotions for summary judgment, with discovery seldom necessary or allowed. The burden does fall upon the requested agency to prove the application of a FOIA exemption, but the level of evidence needed to meet that burden could be very subjective. For example, in Herrick's case, in its pleadings submitted to the court, the FAA proffered an affidavit from the new Fairchild counsel who swore that he was personally familiar with the TC materials for this aircraft, and that they contain pricing information, secret marketing strategies, subcontractor and vendor bidding information and the like (all from the mid-1930s) the disclosure of which would cause his new company great financial loss. No one ever offered an explanation why any modern day corporation would ever consider this information as a valuable trade secret. It is hardly conceivable that Fairchild, essentially a real estate conglomerate, is seriously thinking of revising the small airplane business by manufacturing this seventy year old relic any more than Ford would think about reviving the American auto industry by reintroducing the Model T, and starting off by spending nearly a million dollars just to secure the plans.

Although the FAA was well aware that materials submitted for TCs hardly contain such information, even back in the 1930s, and that it was highly unlikely that the affiant ever laid eyes on the documents (they are in the FAA archives in the North East Region), the FAA essentially vouched for this affidavit and submitted it to the court as its pivotal evidence in rejecting the FOIA request. Since it became readily apparent to Herrick that the FAA did not care about the veracity of the affidavit, he tried to subpoena the affiant for a deposition. Attempts failed. Herrick was repeatedly told that this corporate officer was "out of town" and "would not be back for several months." It became rather obvious that this new corporation could not afford to subject this person to questions under oath about his affidavit and his purported personal familiarity, and the FAA went along in complicity.

Mr. Herrick had no choice but to present a counter affidavit. He related how he became a shareholder in this new corporation and brought up the subject of his request at a shareholder's meeting. One of the corporate officers, whom he mentioned by name, said that after looking into the matter, they determined that the TC for this aircraft indeed remained with one of the old bankrupt

predecessor companies and was never transferred to the new Fairchild. That certainly comported with the FAA records. When asked for the minutes of that meeting in the subsequent FOIA litigation, it was claimed that they no longer exist. The FAA ignored all this evidence (or lack thereof) and continued to defend the FOIA suit, conducting no inquiry on its own as to the efficacy or veracity of the new Fairchild's claims of ownership. It never was fully explained why someone in the FAA would not look at this situation with a modicum of common sense, except for the existence of a law that makes it a potential crime for an agency employee to release FOIA protected information. Unfortunately, it is this fear that seems to have propelled FAA logic to fly around in tighter and tighter circles.

No one disputes the fact that plans and specifications submitted to the FAA to support applications for TCs are generally trade secrets that fall within Exemption 4 of the FOIA. Indeed, Boeing would not want to disclose to its competitors the plans for the B777 that are submitted to the FAA for the TC application. However, Herrick's argument in the district court was twofold: (1) that trade secrecy regarding this material was abandoned long ago by the 1955 letter, and (2) that the FAA could not meet its burden to show that this new Fairchild owned the materials in the first place and, if it did, that it took steps to protect trade secrecy over the last half a century. Herrick further argued that FAA recordation of ownership required by regulation is evidence of not only standing, but also evidence of intent to preserve secrecy. Discouragingly, the district court gave deference to the FAA's arguments, actually calling the ownership and recordation requirement of the regulations a "red herring," and that the highly questioned affidavit of the Fairchild's counsel essentially rescinded the 1955 letter and restored trade secrecy to the requested materials.

Mr. Herrick appealed the decision to the Appellate Court for the Tenth Circuit. During the argument and in its decision the Court made it quite clear that the ownership issue had become irrelevant because the 1955 letter did in fact end any trade secrecy of the requested materials for all purposes. Surprisingly, however, the Appellate Court found in favor of the FAA. While the Court held that trade secrecy or Exemption 4 status no longer existed, it reversed the burden of proof and went on to state that because Mr. Herrick failed to argue that it is impossible for secrecy of public documents to be re-established, it will be legally "assumed" that it is possible. Upon that "assumption," it was further "assumed," as the Court put it, that the lower court's conclusion that trade secrecy was re-established should be affirmed. Ironically, the only evidence the lower court had about re-establishment of secrecy was the highly questionable affidavit of Fairchild's counsel.

Within a matter of weeks, the Tenth Circuit decision appeared in several trade journals as a new twist in the law regarding trade secrets. It certainly became a controversial subject in the antique aviation community. A well known and respected member of that community, Mr. Brent Taylor of the Antique Airplane Association, had

been working with the FAA for years addressing the issue of abandoned TCs or where existing owners are incapable or unwilling to support the product as the FAA says is required. When he learned of the Herrick decision, he thought it incredulous that one part of the FAA was working to resolve the question while another part of the FAA was exacerbating it by championing a disregard of the regulations. He became annoyed that the FAA seemed to be "speaking from both sides of its mouth," on one hand trying to develop a procedure by which dormant TCs escheat to the public domain, particularly when there is no entity supporting the product, but on the other hand, wasting public money to vest ownership, without proof, in an entity that is technically unable to support the product. Taylor viewed these conflicting positions as potential precedent setting with many other dormant aircraft TCs that could not only adversely affect the preservation of antique aircraft generally, but also adversely affect their safety. Since the Tenth Circuit expressly limited its decision solely to Mr. Herrick, Taylor was as free as any other member of the public to litigate the same FOIA case on his own behalf and hired Herrick's former counsel to represent him.

After unsuccessfully exhausting his administrative remedies with the FAA, Taylor filed his FOIA case in the District Court for the District of Columbia, one of the permitted venues under FOIA. He attached the Herrick decision to his complaint, requesting the court to give deference to the Tenth Circuit's holding that these documents no longer have Exemption 4 protection. Fairchild successfully moved to intervene as a co-defendant with the FAA.

The judge's clerk held a telephone conference with the parties in order to set a briefing schedule. At that time, Taylor expressed the need to conduct first limited discovery on how the agency was intending to meet its burden of proof that this new Fairchild entity had any title or ownership to the TC and, if so, just how the 1955 letter was (or could be) rescinded. He certainly did not wish to be trapped by the same multiple factual and legal "assumptions" that defeated Mr. Herrick. If the FAA, working with this new Fairchild, was going to claim again that secrecy was re-established for these documents, Taylor wanted to know when, how and by what policy such a thing could be accomplished. The requested discovery, if answered truthfully, hopefully would resolve those issues in a most speedy and efficient manner without having to spend more resources. However, both defendants vehemently opposed proceeding that way, and the judge's clerk, giving deference to the FAA, advised Mr. Taylor that he would have to make a specific motion to allow such discovery.

Generally, the major objection to discovery in most FOIA cases is that it often requires an invasive analysis of the protected materials. In such cases, there are ways the courts have to prevent that intrusion and still satisfy the rights of the requestor. Taylor filed his motion for discovery, pointing out to the court that such an invasion would not occur in this case because the FAA's regulatory documents pertaining to ownership and registry of

TCs, many of which were produced in the Herrick case, are public documents kept separately from the requested materials. Taylor argued that discovery of that information would force the defendants to prove, once and for all, what they claimed vested ownership in this new entity and what caused the re-establishment of secrecy. However, the court ruled that the motion for discovery was premature, deferring it until after the filing of the summary judgment motions.

Fairchild filed its motion for summary judgment, and again avoided the main issue by requesting the court to dismiss Mr. Taylor's case based on a little known or understood legal theory called "virtual [not quite real] representation." It argued that because of a "close association" between Mr. Taylor and Mr. Herrick by the fact they both belonged to many of the various aviation associations and were both interested in antique aircraft, Mr. Taylor's FOIA rights were already abrogated by the Herrick decision, essentially that he had no right to bring his own case. Giving the FAA some credit, they did not seem to agree and actually briefed to the court that res judicata (the finality of the Herrick decision) does not generally bar the same or similar FOIA requests by successive plaintiffs. However, in the same brief, the FAA went along with Fairchild's idea of precluding Mr. Taylor's action anyway. Unfortunately, the court again gave deference to the agency, avoided a ruling on Taylor's motion for discovery and dismissed his case.

Importantly, the DC district court never ruled on the merits of the FOIA case. Taylor was thrown out by this little known "virtual representation" concept, denying him his day in court. To make it even more uncomfortable for Taylor and his counsel, the decision was accompanied by an order to show cause why Taylor and his attorney should not pay the legal fees and expenses incurred by the defendants. Fairchild alone submitted fees and expenses in excess of ninety thousand dollars for essentially two briefs. Now, the defendants were able to continue avoiding the FOIA issues, ownership of a TC and supporting documents would default to the new Fairchild and secrecy would be re-established, not by operation of law, but rather by fear of judicial punishment of anyone daring to raise a challenge. Fortunately, Taylor did not flinch. He saw this as a dangerous precedent and threat to freedom and decided to fight on. If the court ruled against him on the merits, so be it. He just felt that no one should be so intimidated when seeking his or her day in court.

Taylor appealed the dismissal of his action to the U.S. Court of Appeals for the District of Columbia and filed a response to the lower court's order to show cause. Concerning the order to show cause, Taylor pointed out that he was unaware of the Herrick case until he heard of the final decision. He was not hiding anything. In fact, he attached the Tenth Circuit's decision to his complaint, noting that it unequivocally held that any trade secrecy of the subject plans had been abandoned in 1955. He had every reason to believe that he had the same right to bring his FOIA case as would any member of the public, a right that is not dependent on his affiliations or reason

for the requested materials. His FOIA rights are likewise unaffected by the attorney he chooses, that hiring Herrick's former attorney is not "collusion" as the court accused. In fact, a different attorney would be free to contact Herrick's former counsel and have access to the same public information contained in the Herrick court files. Most importantly, he argued that, as any member of the public, he should be free to use the FOIA to seek the truth about the status of government documents, undaunted by the fear of financial punishment for trying. The court withdrew the order to show cause and the order of dismissal based on virtual representation proceeded on appeal.

Because the merits of the FOIA exception were never adjudicated by the lower court, the appeal to the Court of Appeals had to be based solely on this obscure "virtual representation" idea. The term supposedly means that one person or entity is bound by the finality of a prior similar lawsuit if that person can be said to have been closely related or had the same interests in the subject matter as the party in that prior case. The few courts around the country that dealt with this theory varied widely in their interpretations and approach. Some courts held that in order for the second litigant to be bound by the former suit, he or she would have to have been aware of the pendency of that suit and have had the opportunity to participate. Other courts required some form of notice that the pending suit was intended to bind others who were not appearing before them. The lower DC courts seemed to do a subjective analysis based upon a multitude of amorphous standards that were very confusing. After all, this concept potentially takes away a person's right to his day in court by a proceeding of which he or she was never aware.

As an interesting aside, in the early stages of the American Revolution, the British Parliament rationalized the imposition of taxes on the unrepresented Colonies on the theory that they were "virtually represented." William Pitt, a defender of Colonial rights, ridiculed the concept of virtual representation, calling it "the most contemptible idea that ever entered into the head of man; it does not deserve serious refutation." Parliament rejected criticism from both sides of the Atlantic, and passed the Declaratory Act in 1766, asserting the right to legislate for the colonies, notwithstanding the absence of actual representation in Parliament.

The Aircraft Owners and Pilots Association (AOPA) and Public Citizen, an organization originally started by Ralph Nader, involved in many legal issues that affect the public at large, agreed to join the fight. The AOPA filed an amicus brief with the Court of Appeals asserting the importance of the recordation regulation upon which the aviation public has a right to rely, and that had the FAA adhered to it with the same sanguine energy with which it enforces regulations on everyone else, the case probably would have been resolved long ago. Public Citizen recognized broader implications of this case, that a court, by the subjective application of an amorphous legal doctrine, could deny a person his or her day in court by someone else's case of which he or

she knew nothing about, much the same way that the British Parliament did with the Colonies just prior to the American Revolution. Public Citizen also filed a brief with the Court and took part in the lengthy oral argument.

In June of 2007, the Court of Appeals for the DC Circuit published its decision, affirming the lower court that deprived Taylor of his day in court. Recognizing that that "other courts vary widely in their approach" to the doctrine of virtual representation, the Court constructed its own multiple part test to determine whether a party is bound by the result of another person's lawsuit. The first part of the test is that the two parties must have the same interest. Of course, both Mr. Taylor and Mr. Herrick are interested in antique airplanes, so the Court held that requirement was met. Secondly, it must appear that Mr. Taylor was "adequately represented" by Mr. Herrick in the earlier action. The Court held that requirement was met also because Mr. Taylor had the benefit acquiring some helpful information from Mr. Herrick's action by the use of the same attorney. Although the Court found no evidence of tactical maneuvering on Mr. Taylor's part, the fact that he could possibly use the requested materials to repair Mr. Herrick's airplane was enough of a "close relationship" between the two that would preclude Mr. Taylor of his FOIA rights, even though the Court recognized that he had never had the opportunity for participation in Mr. Herrick's case.

It is well established that under FOIA that the status of the requester or reason for the request is of no import as long as the request does not fall within one or more of the listed exceptions in the Act. Unfortunately, the Court of Appeals decision made pertinent the status of the requester and reason for the request, conflicting with well established FOIA law. The long avoided adjudication of the FOIA issues and the FAA's strange protection of the Fairchild's putative claim were now resulting in more legal anomalies. According to the decision, Taylor or anyone in his class is precluded from litigating for these materials, while a person disinterested in antique aircraft and unfamiliar with Taylor or Herrick would not be. Taylor and Public Citizen agreed that this was making bad law and filed a petition for certiorari to the U.S. Supreme Court. On January 11, 2008, the petition was granted. Unfortunately, the Supreme Court review was restricted to the virtual representation issue because there was no ruling from the courts below on the FOIA issues.

Public Citizen took up the laboring oar with the brief and the argument. It became obvious that this case had major implications regarding an individual's access to the courts, not only in FOIA cases, but also for many other types of cases as well. For that reason, The American Dental Association, Reporters' Committee for Freedom of the Press, The National Whistleblower Center, Openthegovernment.Org, The Electronic Frontier Foundation, the National Security Archive and Professors of ten major law schools throughout the country joined in and filed amicus briefs in support of Taylor.

The argument was heard on April 16, 2008. The Justices acknowledged that a FOIA request may be

made by anyone, without having to explain the reasons for the request. If a FOIA request does not fall within one of the exceptions, the government must produce the requested items. On June 12, 2008 a unanimous Court held for Mr. Taylor and rejected the virtual representation theory entirely, laying out very specific, limited occasions when the result of a lawsuit will preclude litigation by someone who was not a party to that lawsuit. The Court recognized that the underlying cherished principle is that every person has a right to his or her day in court. The Court pointed out that preclusion would be appropriate only where, for example, a person had agreed to be bound by the result of another's action, in class actions when proper notice is given to potentially affected parties, where there is a agency or guardian relationship or where the subsequent litigator is acting as an agent for the first one. In other words, if the government could prove that Mr. Taylor was acting as an agent for Mr. Herrick, perhaps Mr. Taylor would be bound by the decision in Herrick's case. The case was remanded to the district court for a determination of that question before proceeding on the merits.

Now, another anomaly presented itself, which the Supreme Court never addressed in the remand. While it is undisputed that the status of requestor and reasons for the request are irrelevant in a FOIA case, the remand required a perversion of that fundamental FOIA concept. In any event, Fairchild filed bankruptcy and its attorneys withdrew from the case. The FAA, recognizing that Mr. Taylor and Mr. Herrick were indeed acting independently, decided to abandon the agency issue and to proceed finally on the merits of the case.

The Taylor case is now back in the district court. The motions and briefs are filed, and hopefully the court will finally hold the FAA to its burden of proof as required by FOIA. However, the FAA's arguments have not changed. In fact, the FAA continues to vouch for and submit as pivotal evidence of its defense the same affidavit of Fairchild's counsel in which he swears that he is personally familiar with the requested information and that it contains such things as 1930s pricing, marketing strategies and subcontractor bidding information of significant trade secret and competitive value to his company. Even more disingenuous is a novel concept that only the FAA could invent - that a type certificate is regarded by the FAA as separate from the submitted plans and specifications that support it. In other words, the FAA suggests that one can abandon or sell a type certificate, but still independently own the supporting data, and vice-versa. Notwithstanding the lack of evidence that either the plans or the TC is owned by Fairchild, anyone familiar with the type certificate concept, the obligations of a type certificate holder and the underlying regulations would wince at such an absurdity. It seems that government agencies sometimes flounder in their own convoluted rhetoric, abandoning responsibility by forgetting that courts will often give deference to their statements, even if absurd or unsupported, because of their supposed expertise.

Shortly after the remand, the counsel and trustee

of the Fairchild bankruptcy, the same person who submitted the FAA's pivotal evidence, the above-mentioned affidavit, swearing personal familiarity with the plans for the F-45, contacted Taylor offering for sale for several hundred thousand dollars its ownership to any old type certificate it has, including the one for the F-45. Mr. Taylor responded with a request to see first copies of the type certificates or other proof of ownership of whatever it is that is being offered for sale. Apparently not able to comply, Mr. Taylor was told that "Fairchild's records are in storage units in several locations across the country," Fairchild's counsel further told Taylor that he "may have to do some 'mining' and that "[i]f he discovers that 'there is gold in them thar' hills' more power to him." So much for Fairchild's sworn affidavit claiming personal familiarity with the requested documents for which the FAA vouches, defends and bases its entire case spending untold amounts of public resources in the process.

In view of the past proceedings, it is difficult to predict what the court may now do with this FOIA case and what appeals may follow. It has been nearly thirteen years since the first FOIA request to view FAA documents for the F-45. Over that time, the issue evolved from a mere request to view the plans for this ancient plane into an issue of basic legal rights threatened by ineptness and avoidance of accountability of government employees afraid of doing something wrong. There is hardly a creature that evokes fear more than a government that acts in fear. Whatever the outcome of the FOIA case may be, Mr. Taylor will accept it only if it based on the facts and law afforded him by FOIA. Fortunately, there are people like Herrick and Taylor who are willing, often at great personal risk and expense, to take up the cause, especially when the cherished American right to a day in court is threatened.