

# Memorandum

**TO:** RULES AND OPEN GOVERNMENT  
COMMITTEE

**FROM:** John Aiken, A.A.E.

**SUBJECT: PUBLIC RECORDS APPEAL -  
DAN CONNOLLY**

**DATE:** April 3, 2019

Approved

*D. D. S. L.*

Date

*4/5/19*

## **RECOMMENDATION**

Deny the appeal from Dan Connolly regarding the City's response to his request for public records seeking records related to the Downtown Airspace Capacity Study.

## **BACKGROUND**

On February 5, 2019, Dan Connolly sent an email to Matthew Kazmierczak at the Airport requesting "to receive ALL the actual responses from the airlines with reference to the Downtown Airspace Capacity Study" (Attachment A).

The Downtown Airspace Capacity Study was conducted by Landrum and Brown (L&B) to explore the potential impact of potential land use changes in selection locations around Downtown San José and the Diridon Station Area Plan.

As part of this study, L&B received directly from the airlines their responses to the selected scenarios under review by the Steering Committee overseeing the study. As the airlines designated their detailed flight procedures to be proprietary and trade secrets, L&B maintained sole possession of these airline responses and only provided the City with a summary of the Airline responses to these potential changes. The City has not been in possession of these airline responses at any time. The City provided Mr. Connolly with the same summary of information from L&B as was provided to the City and to the Steering Committee, prior to his February 5, 2019 request.

The same PowerPoint presentations that were provided to the Steering Committee were also provided Mr. Connolly and to the public at-large as part of the January 14, 2019 public special Airport Commission meeting called to explore the issue of One-Engine Inoperative. These documents included:

- September 13, 2018 Stakeholder Presentation
- November 13, 2018 Steering Committee Presentation #7
- December 13, 2018 Steering Committee Presentation #8

This information remains available to the public on the Airport Commission website:

<https://www.flysanjose.com/commission-agendas-and-minutes>

On February 12, 2019, the City responded to the February 5, 2019 public records request to let Mr. Connolly know that the City does not have in its possession the information requested (Attachment B).

On March 13, 2019, Mr. Connolly sent an appeal to his February 5, 2019 Public Records Request to the City Clerk, Toni Taber (Attachment C).

### **ANALYSIS**

Mr. Connolly is contesting the City's response to his public records request. He acknowledges that the City does not have the information he is seeking in his public records request but feels his request should require the City to get access to these documents maintained solely by the City's consultant, L&B. While the City's consultant agreement with L&B provides that the City owns work product produced by L&B during the course of its services under the consultant agreement, the consultant agreement does not provide or require that L&B provide to the City documents, such as the airline technical responses that were provided to L&B as confidential and trade secret documents.

Even if the City maintained the requested documents in its files, these documents would be subject to withholding by the City pursuant to California Government Code Section 6254(k) and California Evidence Code Section 1060, as airline confidential and proprietary trade secrets.

### **CONCLUSION**

Because the requested records have not been in the City's possession at any time, staff did not produce the requested records. Staff recommends that the Rules and Open Government Committee deny the appeal from Dan Connolly.

**COORDINATION**

This memorandum was coordinated with the City Attorney's Office.

/s/  
JOHN AITKEN, A.A.E  
Director of Aviation

For questions, please contact Matthew Kazmierczak, Manager of Strategy and Policy for the Airport, at (408) 392-3640.

Attachments

## ATTACHMENT A

**Kazmierczak, Matthew**

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**From:** ACSATM, Inc. <acsarmored@aol.com>  
**Sent:** Tuesday, February 5, 2019 12:01 AM  
**To:** Kazmierczak, Matthew; Airport Commission 10  
**Subject:** Re: Request to receive actual airline responses to 10-04-18 (Due from airlines by 10-25-18) Scenario information - Do you need a FOIA Request?

Dear Matthew,

I know we have had a lot of emails going back and forth and it is easy to have one slip through the cracks.

I wanted to follow up on my request to receive ALL the actual responses from the airlines with reference to the Downtown Airspace Capacity Study. (10/04/18 due back by 10-28-18). It is easy with all the emails to have one slip through the cracks.

I don't know if you need me to make a FOIA request in order for me to obtain these documents. I rely on your counsel, so please advise the proper action you need me to take on this request.

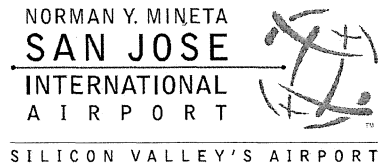
Thank you again for all your help you have provide me through this process.

Dan  
Sincerely,

**Dan L. Connolly**

Dan L. Connolly, President  
ACSATM, Inc. - Armed Courier Service  
855 Civic Center Drive, Unit 8  
Santa Clara, CA 95050-3962  
408/241-0910 Office  
408/241-2060 fax  
acsarmored@aol.com

## ATTACHMENT B



Dan L. Connolly  
ACSATM, Inc. Armed Courier Service  
855 Civic Center Drive, Unit 8  
Santa Clara, CA 95050-3962

Re: Request for Records

Dear Mr. Connolly,

This is in response to your Public Records Act Request that you emailed to Matthew Kazmierczak on February 5, 2018. You requested all the "actual responses" from the airlines with reference to the Downtown Airspace Capacity Study (10/14/18 due back by 10/28/18).

The "actual responses" from the airlines that you refer to in your request were sent to and are maintained solely by the City's consultant, Landrum and Brown, and the City does not have copies of the airlines' responses in its files. Therefore, the City does not have any documents in its files that are responsive to your request. The City does maintain a summary of the responses in its files, and a copy of the summary is enclosed with this letter.

Please note that the airlines have designated their responses that were sent to and are maintained by the City's consultant to be proprietary trade secrets. Therefore, the airlines' responses would be subject to withholding by the City pursuant to California Government Code Section 6254(k) and California Evidence Code Section 1060, in any event.

Chief Deputy City Attorney Kevin Fisher participated in the preparation of this response.

Should you believe that you have been inappropriately denied access to City of San José public records, you may appeal that denial with the City Council Rules and Open Government Committee. For more information on the appeals process, see <http://www.sanjoseca.gov/DocumentCenter/View/1078>.

## ATTACHMENT C

Open Government Manager  
Office of the City Manager  
200 E. Santa Clara Street, 17th Floor  
San Jose, CA 95113  
408/535-1260

Office of the City Clerk  
200 E. Santa Clara Street, 14th Floor  
San Jose, CA 95113  
408/535-1260

Dear Members of City Council, Open Government Manager, Office of the City Manager & City Clerk,  
Office of the City Clerk,

This email serves as a **"Request to Appeal the decision of Airport Director of Aviation John Aitken, whom on the following grounds has DENIED my Public Records Act Request"** to receive the "Actual" airline responses involved in the Downtown Airspace Capacity & Building Height Study.

I believe that negative assessment and response **information may be being concealed from** the Airport Commission and **City Council** Members in reference to the Downtown Airspace Capacity and Building Height Study. My request is to see the "ACTUAL" true responses from airlines at Mineta San Jose International Airport. It is my understanding that Director of Aviation Aitken also denied a City Council Member access to these records, even in a redacted form, or in a Closed Session. I further have reason to believe that concerns or complaints that have been lodged by the airlines, to airport administration or the hired consultant, may be being withheld from City Council.

An example of the information being withheld showing possible negative impacts to an East Coast City is found in the Google Briefing of 11-02-19. Page 8 of this briefing references United Airlines flight information from **SJC to EWR (Newark, NJ) flying a B737-900ER**. During South Flow this flight showed a passenger penalty of (21W - 41S). **Meaning 21 Passengers would have to be removed from the flight in the Winter, and 41 people removed from the flight in the summer.** Would this not also indicate that their may be greater East Coast impacts than are being presented to Council?

Yet, the memo you are provided, attached to this email (Page 12 of CED Memo), appears to minimize the airlines concern stating "Hawaiian and United reported only minor cargo penalties and potentially minor passenger penalties and larger cargo penalties depending on destination and aircraft." **Note: On A 179 passenger B737-900ER, a summer penalty of 41 passengers, in my opinion is not a "minor passenger penalty". That equates to a 23% decrease in passengers load for that type of aircraft.**

My request was denied based upon the following:

### Denial Reason #1

"The "actual responses" from the airlines that you refer to in your request were sent to and are maintained solely by the City's consultant, Landrum and Brown, and the City does not have copies of the airlines' responses in its files."

### DEFENSE TO DENIAL #1

**The agreement between the City of San Jose and Landrum & Brown Inc, originally dated June 14, 2014,** clearly states the following:

**Page 7, Section #16 - Confidential Information:** "All data, documents, discussions or other information developed or received by or for consultant in performance of this agreement are confidential and not to be disclosed to any person except as authorized by City, or as required by law."

- Therefore the City has full authority to authorize Landrum & Brown, Inc. to disclose the information or to provide the information to the City so that it may disclose said information.

**Page 7, Section #17 - Ownership of Materials:** *"All reports, documents or other materials developed or discovered by consultant or any other person engaged directly or indirectly by consultant to perform the services required hereunder shall be and remain the property of the CITY without restriction or limitation upon their use."*

- Therefore, everything in the possession of Landrum & Brown, Inc. under said contract for services is OWNED BY and IN DIRECT CONTROL of the CITY. Therefore the CITY does have access to these documents, and even if not in the direct possession of the CITY, must make said documents available under the Public Records Act.

**Master City of San Jose Consultant Agreement between Landrum & Brown, Inc. - Dated June 14, 2017**

Page 14, Section #13 - Ownership of Work Product 13.1, 13.2 and

Page 15, Section #14 - Disclosure of Work Product 14.1, 14.2, 14.3, and 14.4

- The aforementioned sections reaffirm that the CITY is the sole owner of this work product and all copyrights of such material are the property of the CITY. The CONSULTANT is PROHIBITED from disclosing information to a third party.

**Denial Reason #2**

"Please note that the airlines have designated their responses that were sent to and are maintained to be proprietary trade secrets. Therefore, the airlines' responses would be subject to withholding by the City pursuant to California Government Code Section 6254(k) and California Evidence Code Section 1060, in any event."

**DEFENSE TO DENIAL #2**

In consultation with Attorney Davis Snyder, of the First Amendment Coalition, San Jose is obligated to obtain the requested records from its consultant and the City cannot determine something is a "Trade Secret" based upon a third party claim. He was also quoted 02/12/19 by the San Jose Spotlight, Attorney David Snyder, executive director of the First Amendment Coalition, said both arguments don't pass muster. San Jose is obligated to get the records from its consultant, Snyder said, and the city cannot determine something is a "trade secret" based on what a third party — the airlines, in this case — says. "They can't delegate their obligation to determine whether records have to be disclosed to someone else," Snyder said.

Additionally, I contend that these records do not fall under Government Code, Title 1, Chapter 3.5 Inspection of Public Records, Section 6254 or Evidence Code, Division 8, Chapter 4, Article 11, Section 1060, quoted below.

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**GOVERNMENT CODE - GOV**

**TITLE 1. GENERAL [100 - 7914]**

( Title 1 enacted by Stats. 1943, Ch. 134. )

**DIVISION 7. MISCELLANEOUS [6000 - 7599.2]**

( Division 7 enacted by Stats. 1943, Ch. 134. )

## **CHAPTER 3.5. Inspection of Public Records [6250 - 6276.48]**

*( Chapter 3.5 added by Stats. 1968, Ch. 1473. )*

### **ARTICLE 1. General Provisions [6250 - 6270.7]**

*( Article 1 heading added by Stats. 1998, Ch. 620, Sec. 1. )*

6254. Except as provided in Section 6254.7 and 6254.13, this chapter does not require the disclosure of any of the following records: (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

## **Evidence Code - EVID**

### **DIVISION 8. PRIVILEGES [900 - 1070]**

*( Division 8 enacted by Stats. 1965, Ch. 299. )*

## **CHAPTER 4. Particular Privileges [930 - 1063]**

*( Chapter 4 enacted by Stats. 1965, Ch. 299. )*

### **ARTICLE 11. Trade Secret [1060 - 1063]**

*( Article 11 enacted by Stats. 1965, Ch. 299. )*

#### **1060.**

If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

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Further, I contend that if said work products were considered to truly be "Trade Secrets" then airlines involved in the study would not readily provide such information, by a simple telephone inquiry and email exchange, as is shown below for one such airline. I have also had conversations with another airline and they also stated that the response by their airline is also not a "Trade Secret" and are directing their staff, at the time of this writing to provide me with their response and attachments.

#### **Hawaiian Airlines Response, including original outreach letter from Landrum & Brown:**

-----Original Message-----

From: Sloat, Kalani <[Kalani.Sloat@hawaiianair.com](mailto:Kalani.Sloat@hawaiianair.com)>

To: [ACSArmored@aol.com](mailto:ACSArmored@aol.com) <[ACSArmored@aol.com](mailto:ACSArmored@aol.com)>

Sent: Mon, Feb 25, 2019 8:01 pm

Subject: HA response to SJC project "cake"

Dan,



Thank you for reaching out, and letting me know that there are members of the airport commission at SJC that want to protect the airspace around the airport from excessive vertical development.

Attached above is the analysis we provided in response the request that we received, and the emailed response. The text of that email from our Performance engineering group is below:

Please find attached my analysis of the various SJC runway 12L/12R obstacle scenarios. Note that we are uncomfortable with providing sensitive financial information such as passenger and cargo penalty costs, so these figures have not been provided. However, I have attempted to provide a thorough assessment of the potential performance impact on our planned A321neo operations of the proposed obstacle scenarios.

Although we currently operate the 767 and A330 at SJC, these aircraft types will eventually be replaced by the A321neo. Each obstacle scenario has been evaluated for each of the following A321neo performance cases. This is not meant to imply that we will necessarily be operating to every single one of these destinations, but they are potential candidates worthy of consideration.

- **SJC-HNL**
  - Winter (19°C OAT, February enroute winds)
    - Runway 12L
    - Runway 12R
  - Summer (30°C OAT, August enroute winds)
    - Runway 12L
    - Runway 12R
- **SJC-OGG**
  - Winter (19°C OAT, February enroute winds)
    - Runway 12L
    - Runway 12R
  - Summer (30°C OAT, August enroute winds)
    - Runway 12L
    - Runway 12R
- **SJC-LIH**
  - Winter (19°C OAT, February enroute winds)
    - Runway 12L
    - Runway 12R
  - Summer (30°C OAT, August enroute winds)
    - Runway 12L
    - Runway 12R
- **SJC-KOA**
  - Winter (19°C OAT, February enroute winds)
    - Runway 12L
    - Runway 12R
  - Summer (30°C OAT, August enroute winds)
    - Runway 12L
    - Runway 12R

The bottom line is that the least desirable scenario is number 9, described as “No OEI protection (TERPS only), increased FAA height limits”. The next least desirable scenario is number 4, described as “No OEI protection (TERPS only)”. Otherwise, the rest of the scenarios have no impact. Scenario 10 has no impact on our takeoff performance because the obstacle in question is located outside of the obstacle splay of our departure flight patch (i.e. the FAA Advisory Circular 120-91 Obstacle Accountability Area).

To add to the engineering analysis, we have had very poor experiences with the FAA Obstacle Evaluation program and their ability and willingness to restrict vertical development around airports. Even when projects are initially

designated a hazard to aviation due to penetrating a protected surface, they are often approved anyway, with airlines being forced to modify procedures to accommodate the new obstacle.

Thank you for reaching out and if we can assist in promoting Scenario 10-B, or anything other than 9 or 4, please let me know.

Kalani Sloat

**Kalani Sloat – Manager, Flight Operations**

P.O. BOX 30008, Honolulu, HI 96813

P 808.835.3655 • M 808.352.8764 • F 808.835.3144

[Kalani.Sloat@HawaiianAir.com](mailto:Kalani.Sloat@HawaiianAir.com) • [HawaiianAirlines.com](http://HawaiianAirlines.com)

<image001.png>

Hi James,

Please find attached my analysis of the various SJC runway 12L/12R obstacle scenarios. Note that we are uncomfortable with providing sensitive financial information such as passenger and cargo penalty costs, so these figures have not been provided. However, I have attempted to provide a thorough assessment of the potential performance impact on our planned A321neo operations of the proposed obstacle scenarios.

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  - Runway 12L
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Regards,

Jonathan DeVilbiss  
Principal Performance Engineer  
Hawaiian Airlines  
808-838-5537

**From:** James Terry <[jterry@landrum-brown.com](mailto:jterry@landrum-brown.com)>

**Sent:** Thursday, October 04, 2018 3:49 PM

**To:** Devilbiss, Jonathan <[jonathan.devilbiss@hawaiianair.com](mailto:jonathan.devilbiss@hawaiianair.com)>; Sloat, Kalani <[Kalani.Sloat@hawaiianair.com](mailto:Kalani.Sloat@hawaiianair.com)>; Antin, Nicolas <[Nicolas.Antin@hawaiianair.com](mailto:Nicolas.Antin@hawaiianair.com)>

**Cc:** Tom Cornell <[tcornell@landrum-brown.com](mailto:tcornell@landrum-brown.com)>

**Subject:** SJC Project CAKE Aircraft Performance Assessment - Obstacle Data Transfer (Hawaiian Airlines)

Hello All,

Thank you for participating in the conference call this afternoon pertaining to the Project CAKE Airline Aircraft Performance Assessment at Mineta San José International Airport. And thank you in advance for your assistance in performing the requested aircraft performance /obstacle evaluation assessment to assist us in furthering progress on this project.

Attached to this email are the following documents that should be used for the requested aircraft performance assessment:

1. **2018-10-04 SJC\_CAKE - Airline Aircraft Performance Assessment.pdf**  
(Presentation that was presented on the conference call this afternoon. Please refer to this document for reference purposes.)
2. **SJC Project CAKE Critical Obstacles for Aircraft Performance – 20180904.xls**  
(Spreadsheet contained obstacle data for the five airspace scenarios that we are requesting your assistance with evaluating.)
3. **SJC Project CAKE Aircraft Performance Assessment Results Template – 20180904.xls** (Spreadsheet and requested format for the results of the airline aircraft performance assessment to be populated.)

For your reference, the obstacle spreadsheet contains data for the following scenarios:

Scenario 1: Existing airspace (OEI and TERPS)

Scenario 4: No OEI protection (TERPS Only)

Scenario 7: Straight-Out OEI protection (no West OEI Corridor)

Scenario 9: No OEI Protection (TERPS Only) with increased FAA procedure minimum heights

Scenario 10: Straight-Out OEI with West OEI Corridor alternatives

Please note that all heights listed in the obstacle data spreadsheet are in feet mean sea level (MSL).

**We are requesting that the obstacle evaluation be completed and returned to us no later than October 25, 2018 which is approximately three weeks from today.** This will allow us time to compile and process the results of your assessment in preparation for meetings in early November 2018.

If requested, the airline performance assessment results can be generalized and not depicted on a specific airline basis. If requested, teleconferences with individual carriers can be arranged if additional clarification or coordination is required.

#### **Newly Published SJC Obstacle Data:**

We wanted to make sure that carriers at SJC were aware that the newly published airport obstacle dataset for SJC is available from the FAA. **I have attached the new SJC UDDF obstacle file to this email (2018\_SJC\_VGA\_6371.SPC.txt).** Please note that we encourage air carriers participating in this assessment to supplement the previously described obstacle data for each airspace scenario that we are providing you with and incorporate this new obstacle data into your assessment. If any existing man-made or vegetative (trees) obstacles from the UDDF file are identified in your aircraft performance assessment as being more critical in nature, please feel free to report this information back to us and we will forward it to the City of San Jose Planning staff. However for vegetative (tree) obstacles, please note that these obstacles can reasonably be mitigated so for aircraft performance assessment purposes please **identify**, but **do not include** these as critical obstacles as this may skew the results of your assessment for each of the individual airspace protection scenarios that we are requesting you to evaluate. Our primary focus is on the impacts of man-made obstacles.

Thank you again for your assistance as your feedback and the results of your aircraft performance assessment will be very helpful in our ongoing study. Please feel free to contact me directly with any questions that may arise during your evaluation. If I have not included key staff member within your company on this email, please forward the information to them and I will add them to my contact list for future correspondence.

Thank you!

**James Terry**

Managing Consultant

**Landrum & Brown**

Global Aviation Planning & Development

T +1 510 220 6612

[landrum-brown.com](http://landrum-brown.com)

----- (End of Hawaiian Airlines Response)

**In closing, in the spirit of open government and transparency, I ask that my appeal be approved and these records be released immediately.** Additionally, City Council members are even being prevented seeing from airline responses, and this is too important of a decision not to allow City Council to have all the facts.

I furthermore believe the way this entire study has been handled, outside of the view of the public, should be investigated for its lack of transparency and withholding of information.

Sincerely,

**Dan L. Connolly**

Dan L. Connolly

855 Civic Center Drive, Unit 8

Santa Clara, CA 95050-3962

408/241-0910 Office

[acsarmored@aol.com](mailto:acsarmored@aol.com)