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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
12 **WESTERN DIVISION**

13 H. RAY LAHR,) CASE NO. . 03-08023 AHM(RZx)
14 18254 Coastline Drive)
15 Malibu, CA 90265-5702)
16)
17 Plaintiff,) **SECOND AMENDED**
18) **COMPLAINT**
19 v.)
20)
21 NATIONAL TRANSPORTATION)
22 SAFETY BOARD,)
23 490 L'Efant Plaza East, S.W.)
24 Washington, DC 20594)
25)
26 and,)
27)
28 CENTRAL INTELLIGENCE AGENCY)
Washington, DC 20050,)
and)
NATIONAL SECURITY AGENCY)
Fort George G. Meade, MD 20755)
Defendants.)

1 SECOND AMENDED COMPLAINT
2 (Freedom of Information Act)

3 1. Plaintiff H. Ray Lahr, by counsel, brings this action under the
4 Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, which gives
5 district courts exclusive jurisdiction to "enjoin the agency from withholding agency
6 records and to order the production of any agency records improperly withheld
7 from the complainant." 5 U.S.C. § 552(a)(4)(B).

8 Parties

9 2. Plaintiff Captain H. Ray Lahr is an individual, a resident of the State
10 of California, County of Los Angeles, and lives within the jurisdiction of the
11 United States District Court for the Central District of California. Plaintiff resides
12 at 18254 Coastline Drive, Malibu, California. Plaintiff is a former Navy pilot, a
13 graduate engineer, retired from his position as United Air Lines Captain, a lifetime
14 member of the *Air Line Pilots Association* (ALPA), and served as ALPA's southern
15 California safety representative for over fifteen years, having been a party to seven
16 major NTSB airline accident probes.

17 3. Defendant National Transportation Safety Board ("NTSB") is an
18 agency of the United States subject to suit under the FOIA.

19 4. Defendant Central Intelligence Agency ("CIA") is an agency of the
20 United States subject to suit under the FOIA.

21 5. Defendant National Security Agency ("NSA") is an agency of the
22 United States subject to suit under the FOIA.

23 **Count I – NTSB**
24 **October 8, 2003 FOIA Request**

25 6. On October 8, 2003, Plaintiff made his FOIA Request to the NTSB. It
26 states in part:

27 The FOIA Requests are for all records upon which all publicly
28 released aircraft flight path climb-conclusions are based,
including, but not limited to, the underlying data and basis of all
written reports and all video-animation-depictions. This

1 includes but is not limited to all computer simulation and
2 animation programs, and the data entered into all such
3 programs*** [a]ll records of formulas used by the NTSB in its
4 computations of the zoom-climb conclusions*** [and] [a]ll
5 records generated or received by the NTSB used in its
6 computations of its zoom-climb conclusions.

6 Exhaustion of Administrative Remedies

7 7. On November 7, 2003, the NTSB sent to plaintiff a request for a ten-
8 working-day-extension within which to respond to the FOIA requests.

9 8. An agency is required to make a "determination" on any FOIA request
10 within twenty working days of receipt under 5 U.S.C. § 552(a)(6)(A)(i). As of
11 December 17, 2003, the day that plaintiff filed his first amended complaint, twenty
12 working days had passed since the NTSB had received but made no determination
13 on plaintiff's FOIA request, and so plaintiff had constructively exhausted his
14 administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i) when he filed this action.

15 **Count II – CIA**

16 **October 8, 2003, and September 13, 2005 FOIA Request**

17 November 10, 2000 FOIA Request

18 9. By November 10, 2000 FOIA request, plaintiff sought disclosure of
19 the CIA's zoom-climb records.

20 10. The CIA's January 6, 2001, response states in part:

21 This acknowledges receipt of your 10 November 2000 letter
22 requesting records under the provisions of the Freedom of
23 Information Act (FOIA). Specifically, your request is for
24 records pertaining to the computer program and data used to
25 produce **the computer simulation of TWA Flight 800, 17**
26 **July 1996, losing its nose section, then climbing about 3,000**
27 **feet.** For identification purposes... We have researched this
28 matter, and have learned that the pertinent data, and resulting
conclusions were provided by the National Transportation
Safety Board (NTSB). CIA simply incorporated the NTSB
conclusions into our videotape... Accordingly, you may want
to submit your request to the NTSB... (bolded in original)
(Docket # 28 *Opposition to NTSB summary judgment*)

1
2 11. Among the FOIA requests at issue in the predecessor action against
3 the NTSB, Case No. CV 02-8708-AHM(RZx), is a request for all records upon
4 which the CIA had relied in its 13-minute narrated video-animation-report, which
5 was widely broadcast on November 17, 1997. The NTSB responded that it did
6 not have the records or knowledge of the "pertinent data and resulting
7 conclusions" that the CIA claimed to have "simply incorporated" into its video-
8 animation-report.

9 October 8, 2003 FOIA Request

10 12. On October 8, 2003, plaintiff made a FOIA request to the CIA for the
11 same zoom-climb records identified in his November 2000 request. Plaintiff's
12 2003 CIA FOIA request states, in part, that the "Requests are for all records upon
13 which this publicly released aircraft flight path climb conclusion was based."

14 Exhaustion of Administrative Remedies

15 13. By October 20, 2003 letter, the CIA acknowledged receipt of
16 plaintiff's October 8 request, assigning it Reference Number F-2004-00078.

17 14. The CIA's failure to respond within working 20 days constituted
18 constructive exhaustion of plaintiff's administrative remedies under 5 U.S.C. §§
19 552(a)(6)(A)(i) and (a)(6)(C)(i), and this action was ripe when plaintiff
20 commenced it on December 17, 2003.

21 September 13, 2005 FOIA Request

22 15. On August 16, 2005, the CIA produced zoom-climb records which
23 had been generated after the November 1997 public release of the CIA's video-
24 animation report.

25 16. These records are not sought by plaintiff's October 8, 2003 FOIA
26 requests, which seek disclosure of records upon which the "publicly released
27 aircraft flight path climb conclusion was based." The CIA's post-decisional
28 records would not be within the jurisdiction of this Court, but for this pleading.

1 17. Plaintiff was unaware of the existence of these post-decisional records
2 until the CIA produced them, and had no reason to know of their existence.

3 18. On September 13, 2005, plaintiff made a FOIA Request to the CIA
4 for post-decisional records. That letter states:

5 This is a Freedom of Information Act request under 5 U.S.C. 552
6 et seq. (the "FOIA"). In November 1997, the CIA released its
7 video-animation of Flight 800 continuing to fly; over 3,000 feet
8 up, after the nose of the aircraft had separated from the fuselage
9 (the "zoom-climb"). This request is for records generated after the
10 public release of the zoom-climb animation.

11 My October 8, 2003, FOIA request for similar records is currently
12 the subject of pending litigation. (Lahr v. NTSB et al, CDCA, No.
13 CV 03-08023). This FOIA request is for all records created as part
14 of the analysis that continued after the CIA video-animation
15 concerning the explosion of TWA Flight 800 was shown to the
16 public.

17 Exhaustion of Administrative Remedies

18 19. The CIA has to date failed to respond to plaintiff. Over 20 working
19 days has elapsed since plaintiff's September 13, 2005 request was made, and so
20 plaintiff has constructively exhausted his administrative remedies under 5 U.S.C.
21 §§ 552(a)(6)(A)(i) and (a)(6)(C)(i).

22 **Count III – NSA**

23 November 7, 2005 NSA response

24 20. Plaintiff was unaware of the existence of any NSA computer
25 simulation program until his receipt of the NSA's November 7, 2005, letter. The
26 CIA had referred plaintiff's request to the NSA. The NSA's letter states in part:
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28

1 Item 83 of your index, requesting a copy of the computer
2 simulation and animation program used by the CIA and / or the
3 National Transportation Safety Board (NTSB) was referred to
4 the National Security Agency / Central Security Service by CIA
for our review and direct response to you.

5 21. The NSA's November 7, 2005 letter denied plaintiff's request for the
6 computer simulation, in its entirety.

7 Exhaustion of Administrative Remedies

8 22. On November 16, 2005, plaintiff filed an administrative appeal with
9 the NSA. The NSA has not to date responded to plaintiff's administrative appeal.
10 Thus, under 5 U.S.C. §§ 552(a)(6)(A)(i) and (a)(6)(C)(i), plaintiff has
11 constructively exhausted his administrative remedies as to the NSA.

12 **PRAYER FOR RELIEF**

13 23. Plaintiff realleges paragraphs 1 through 22 as if fully repeated here.

14 24. Plaintiff's FOIA requests "reasonably describes such records" within
15 the meaning of 5 U.S.C. § 552(a)(3)(A)(2)(i). Defendants' refusal to disclose the
16 records to plaintiff is wrongful and without lawful reason or excuse, and plaintiff is
17 entitled to the relief that the FOIA provides.

18 WHEREFORE, plaintiff H. Ray Lahr respectfully asks this Court to enter
19 judgment in his favor, for entry of preliminary and final injunctions prohibiting
20 further withholding the records at issue by defendants National Transportation
21 Safety Board, Central Intelligence Agency, and National Security Agency.

22 Plaintiff prays that this Court:

- 23 (1) Order defendants to conduct a thorough search for all responsive
24 records;
- 25 (2) Order defendants to provide a proper Vaughn index inventorying all
26 responsive records and itemizing and justifying all withholdings from
27 plaintiff;
- 28 (3) Order defendants to promptly make available to plaintiff the
defendants' computer and software programs and other records in

1 electronic format;

2 (4) Order defendants to make all other of the requested records promptly
3 available to plaintiff;

4 (5) Order defendants to promptly provide all nonexempt records or
5 portions of records which were referred to other government agencies;

6 (6) Expedite this action in every way pursuant to 28 U.S.C. § 1657(a);
7 and

8 (7) Award plaintiffs reasonable costs and attorneys' fees as provided in 5
9 U.S.C. § 552 (a)(4)(E) and 28 U.S.C. § 2412(d).

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11 Date: January 5, 2006.

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14 Respectfully submitted,
15 H. Ray Lahr
16 By Counsel

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18 _____
19 John H. Clarke
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1 **PROOF OF SERVICE**

2 DISTRICT OF COLUMBIA:

3
4 I am a resident of the District of Columbia, over the age of 18 years. My business
5 address is 1717 K Street, NW, Suite 600, Washington, DC 20036. I am counsel
6 for plaintiff. On January 5, 2006, I served a true copy of plaintiff's SECOND
7 AMENDED COMPLAINT on the interested parties in this action, by hand, to:

8 David M. Glass, Esquire
9 Assistant United States Attorney
10 20 Massachusetts Avenue, NW
11 Room 7140
12 Washington, DC 20530
13 David.Glassus@usdoj.gov

14 I declare under penalty of perjury that the foregoing is correct and that this
15 Proof of Service was executed on January 5, 2006.

16 _____
17 John H. Clarke
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