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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12
 13 WESTERN DIVISION

)	No. CV 03-08023-AHM (RZx)
H. RAY LAHR,)	
)	Date: July 10, 2006
Plaintiff,)	Time: 10 a.m.
)	Judge: Hon. A. Howard Matz
v.)	
)	
NATIONAL TRANSPORTATION)	
SAFETY BOARD, <i>et al.</i> ,)	
)	
Defendants.)	
)	

- 23 1. DEFENDANTS' NOTICE OF MOTION AND SECOND MOTION
- 24 FOR PARTIAL SUMMARY JUDGMENT AS TO THE CENTRAL
- 25 INTELLIGENCE AGENCY

- 26 2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
- 27 OF DEFENDANTS' MOTION

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DEFENDANTS' NOTICE OF MOTION AND
SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO THE CENTRAL INTELLIGENCE AGENCY

PLEASE TAKE NOTICE that defendants, the National Transportation Safety Board (NTSB), the Central Intelligence Agency (CIA), and the National Security Agency (NSA), will move pursuant to Fed. R. Civ. P. 56 for partial summary judgment as to the CIA in the Courtroom of the Hon. A. Howard Matz on July 10, 2006, at 10 a.m. Defendants' motion will address all records responsive to the request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, that plaintiff, H. Ray Lahr, submitted to the CIA by letter dated October 8, 2003, that (a) are not addressed by the motion for partial summary judgment as to the CIA that defendants filed on August 16, 2005, and (b) contain contested withholdings.

The grounds for this motion are that no genuine issue of material fact exists and that defendants are entitled to partial summary judgment as to the CIA as a matter of law. The grounds for this motion are set forth in the memorandum of points and authorities submitted herewith, and upon such other and further arguments, documents, and grounds as may be advanced to the Court in the future. This motion is made following a series of communications between counsel, conducted pursuant to L.R. 7-3, that began on or about April 5, 2006, and continued through April 17, 2006.

1 MEMORANDUM OF POINTS AND AUTHORITIES
2 IN SUPPORT OF DEFENDANTS' MOTION

3 STATEMENT

4
5 By letters dated October 8, 2003, plaintiff submitted FOIA requests to the
6 NTSB and the CIA for certain records pertaining to the explosion in 1996 of TWA
7 Flight 800. 1st Am. Compl. ¶¶ 9, 17. In this action, plaintiff seeks compliance
8 with those requests. *Id.* prayer ¶ 3. On June 8, 2004, defendants filed a motion for
9 summary judgment as to the NTSB. On August 16, 2005, defendants filed a
10 motion for partial summary judgment as to the CIA. Defendants now move for
11 summary judgment as to all records responsive to plaintiff's FOIA request to the
12 CIA that (a) are not addressed by the motion for partial summary judgment that
13 defendants filed on August 16, 2005, and (b) contain contested withholdings. By
14 so moving, defendants seek to address all extant claims in this action that have not
15 been addressed by defendants' other two motions for summary judgment.
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20 Twelve records are covered by this motion. Withholdings have been made
21 from those records pursuant to FOIA Exemptions 3, 2, 4, 5, 7(C), and 6, 5 U.S.C.
22 §§ 552(b)(2)-(6), (7)(C). Giles Decl. ¶¶ 11, 14; 3d Buroker Decl. ¶ 8; 1st Supp.
23 Moye Decl. ¶ 7. One of the records covered by this motion is an NSA record that
24 the CIA referred to the NSA for review and direct response to plaintiff. Giles
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1 Decl. ¶ 7; 3d Buroker Decl. ¶ 7. Four of the records are NTSB records that the
2 CIA referred to the NTSB for review and direct response to plaintiff. 1st Supp.
3 Moyer Decl. ¶¶ 4, 6. The other seven records are CIA records. 3d Buroker Decl.
4 ¶ 3. One of those records was referred to the NTSB for review and direct response
5 to plaintiff, then referred back to the CIA. *Id.* n.1.
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8 As is shown below, Exemptions 3, 2, 4, 5, 7(C) and 6 have been applied
9 correctly to the records covered by this motion. In addition, all portions of those
10 records that require release have been released. Defendants' second motion for
11 partial summary judgment as to the CIA should therefore be granted.
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14 ARGUMENT

15 I. EXEMPTIONS 3, 2, 4, 5, 7(C), AND 6 HAVE BEEN APPLIED 16 CORRECTLY TO THE RECORDS COVERED BY THIS MOTION.

17 A. *Exemption 3 Has Been Applied Correctly.*

18 Records "specifically exempted from disclosure by statutes other than
19 FOIA" are protected from release by Exemption 3, 5 U.S.C. § 552(b)(3). *Students*
20 *Against Genocide v. Dep't of State*, 257 F.3d 828, 831 (D.C. Cir. 2001). The "sole
21 issue for decision" under Exemption 3 "is the existence of a relevant statute and the
22 inclusion of the withheld material within that statute's coverage." *Goland v. CIA*,
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1 607 F.2d 339, 350 (D.C. Cir. 1978); *see Minier v. CIA*, 88 F.3d 796, 801 (9th Cir.
2 1996) (similarly).

3
4 In this case, the NSA has relied on § 6(a) of the NSA Act of 1959, 50 U.S.C.
5 § 402 note, to withhold material under Exemption 3. Giles Decl. ¶¶ 12-14. The
6 CIA has relied on 50 U.S.C. § 403g. *See* 3d Buroker Decl. ¶ 9 (citing 1st Buroker
7 Decl. ¶¶ 26-32). As is shown below, both of these statutes have been applied
8 correctly to the records here at issue.
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11 1. *Section 6(a) Has Been Applied Correctly.*

12 Section 6(a) provides that nothing in the NSA Act “or any other law * * *
13 shall be construed to require the disclosure of the organization or any function of
14 the [NSA], of any information with respect to the activities thereof, or of the
15 names, titles, salaries, or numbers of the persons employed by such agency.”¹
16 Material that comes within the purview of § 6(a) may be withheld under
17 Exemption 3. *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.3d 1381, 1389 (D.C. Cir.
18 1979). “The protection afforded by section 6 is, by its very terms, absolute.”
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24 ¹The opening clause of § 6(a) creates an ostensible exception for disclosures
25 required by § 6(b) of the NSA Act. Section 6(b) provides: “The reporting
26 requirements of [10 U.S.C. § 1582] shall apply to positions established in the
27 [NSA] in the manner provided by [§ 4 of the NSA Act].” However, § 4 of the
28 NSA Act was repealed in 1996. National Defense Authorization Act for Fiscal
Year 1997, Pub. L. No. 104-201, tit. XVI, § 1633(b)(1), 110 Stat. 2751.

1 *Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996). Accordingly, the NSA need
2 only show that a particular record “concern[s] a specific NSA activity” and that its
3 disclosure “would reveal information integrally related to [that] activity.” *Id.* at
4 1390. No showing need be made as to “the particular security threats posed by the
5 release of the [record].” *Linder*, 94 F.3d at 696; *see Hayden*, 608 F.2d at 1390
6 (similarly).
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9 In this case, the NSA has relied on Exemption 3 and § 6(a) to withhold the
10 computer program that the CIA used to prepare its simulation of the explosion of
11 TWA Flight 800. *See* Giles Decl. ¶¶ 7, 12-14. The withheld program is an NSA
12 record. *See* 3d Buroker Decl. ¶ 7. The NSA uses the program to “analyze[] the
13 performance characteristics of foreign weapons systems that are aerodynamic or
14 ballistic.” *See* Giles Decl. ¶11. Because the release of the program would reveal
15 “information integrally related” to a “specific NSA activity,” its withholding
16 pursuant to Exemption 3 and § 6(a) was, and is, appropriate. *See Hayden*, 608 F.2d
17 at 1390.
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22 2. *Section 403g Has Been Applied Correctly.*

23 Material that comes within the purview of § 403g may be withheld under
24 Exemption 3. *Minier*, 88 F.3d at 801. Section 403g provides:
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1 [I]n order to implement section 403-1(i) of this title that the Director
2 of National Intelligence shall be responsible for protecting intelligence
3 sources and methods from unauthorized disclosure, the Agency [i.e.,
4 the CIA] shall be exempted from the provisions of * * * any * * * law
5 which require the publication or disclosure of the organization * * *
[or] names of personnel employed by the Agency.

6 In this case, the CIA has relied on Exemption 3 and § 403g to withhold an
7 intelligence method from two records; CIA “organizational data” from one record;
8 and the names of CIA personnel from six records. 3d Buroker Decl. ¶ 9 & p. 50.
9 The withholding of such material comes within the literal purview of § 403g, and
10 is therefore appropriate. *See Minier*, 88 F.3d at 801 (so holding with respect to the
11 use of § 403g to withhold the names of CIA personnel).
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14 When plaintiff responded to the motion for partial summary judgment that
15 defendants filed on August 16, 2005, he did not object to the use of Exemption 3
16 and § 403g to withhold an intelligence method or to withhold the acronym of a
17 CIA component. *See* Mem. P. & A. Supp’t Defs.’ Mot. Partial Summ. J. as to CIA
18 (Def. Mem.) at 14; Pl.’s Opp’n CIA’s Mot. Partial Summ. J. (Pl. Opp’n) at 21-22.
19 Nor, with one exception, did he object to the use of Exemption 3 and § 403g to
20 withheld the names of CIA personnel. *See* Pl.’s Opp’n at 21-22. The exception
21 consisted of the use of Exemption 3 and § 403g to withhold the name “Randolph
22 M. Tauss.” *Id.* An individual by that name had been identified by a newspaper as
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1 a “CIA analyst” who had “won an intelligence medal for his work on the crash [of
2 TWA Flight 800].” *Id.* at 31.

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4 In this case, the CIA has relied on Exemption 3 and § 403g to withhold the
5 names of more than one of its personnel. *See, e.g.*, 3d Buroker Decl. at 52 (stating
6 that the “names of CIA employees (sender/addressees)” constitute “[t]he only
7 information withheld” from a particular record). Even assuming, *arguendo*, that
8 one of those names is “Randolph M. Tauss,” the association between that name and
9 the record or records from which it has been withheld has not been officially
10 disclosed. *See* 2d Buroker Decl. ¶ 9. Accordingly, the name “Randolph M. Tauss”
11 may be withheld from the records here at issue because “the information
12 requested” does not match “the information previously disclosed.” *See Fitzgibbon*
13 *v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990).

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18 B. *Exemption 2 Has Been Applied Correctly.*

19 “[L]aw enforcement materials, the disclosure of which may risk
20 circumvention of agency regulation, are exempt under Exemption 2.” *Hardy v.*
21 *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980)
22 (discussing 5 U.S.C. § 552(b)(2)). In contrast to “administrative materials, which
23 *define* violations of the laws,” law enforcement materials “involve enforcement
24 *methods.*” *Dirksen v. U.S. Dep’t of HHS*, 803 F.2d 1456, 1458 (9th Cir. 1986)
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1 (emphasis in the original). Processing guidelines for the Medicare program have
2 been held to come within the purview of Exemption 2. *Id.* at 1459. Accordingly,
3 the term “law enforcement materials” is not limited for purposes of Exemption 2 to
4 materials involving enforcement of the criminal law.
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7 In this case, the NSA has relied on Exemption 2 to withhold the same
8 computer program that it has withheld pursuant to Exemption 3 and § 6(a). Giles
9 Decl. ¶¶ 10-11. As stated above, the NSA uses the program to “analyze[] the
10 performance characteristics of foreign weapons systems that are aerodynamic or
11 ballistic.” *See id.* ¶ 11. Accordingly, the program “involve[s] law enforcement
12 methods.” *See Dirksen*, 803 F.2d at 1458 (emphasis deleted). Release of the
13 program would “risk circumvention of agency regulation” because the release
14 would disclose the capabilities and vulnerabilities of the program. *See Hardy*, 631
15 F.3d at 656. In view of these facts, the NSA has acted correctly in withholding the
16 program pursuant to Exemption 2.
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21 C. *Exemption 4 Has Been Applied Correctly.*

22 Exemption 4 “allows government agencies to withhold documents that
23 contain ‘commercial or financial information obtained from a person and
24 privileged or confidential.’” *Lion Raisins v. U.S. Dep’t of Agric.*, 354 F.3d 1072,
25 1079 (9th Cir. 2004) (quoting 5 U.S.C. § 552(b)(4)). Information is “confidential
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1 for purposes of Exemption 4 if its disclosure “could cause ‘substantial harm to the
2 competitive position of the person from whom the information was obtained.’”
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4 *Lion Raisins*, 354 F.3d at 1079 (quoting *G.C. Micro Corp. v. Def. Logistics*
5 *Agency*, 33 F.3d 1109, 1112-13 (9th Cir. 1994)).
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7 In this case the CIA has relied on Exemption 4 to withhold, from two
8 records, “information relat[ing] to the flight characteristics and performance of a
9 Boeing 747, for example, lift coefficient, drag coefficient, and pitching moment
10 coefficient data.” 3d Buroker Decl. ¶ 10. The Boeing Company (Boeing)
11 considers this information to be proprietary and so, therefore, does the CIA. *See*
12 *id.*
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15 When plaintiff responded to the motion for partial summary judgment that
16 defendants filed on August 16, 2005, he objected to the use of Exemption 4 to
17 withhold the same or similar information. *See* Pl. Opp’n at 16-18. According to
18 plaintiff, the withheld information had already entered the public domain and
19 would be unlikely to have a significant competitive impact on Boeing if released.
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21 *See id.* at 16-17. However, defendants have submitted a declaration from Boeing
22 that refutes those contentions. *See* 2d Breuhaus Decl. ¶¶ 7-10, 12. The
23 withholding of the information should therefore be upheld.
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1 D. *Exemption 5 Has Been Applied Correctly.*

2 Exemption 5 protects inter-agency and intra-agency records “normally
3 protected in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S.
4 132, 149 (1975) (discussing 5 U.S.C. § 552(b)(5)). The scope of Exemption 5
5 extends to records covered by the deliberative process privilege, i.e., records that
6 are “‘predecisional’ in nature” and that form “‘part of the agency’s deliberative
7 process.’” *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092,
8 1093 (9th Cir. 1997) (quoting *Sears*, 421 U.S. at 151-52). For purposes of
9 Exemption 5, “[a] ‘predecisional’ document is one ‘prepared in order to assist an
10 agency decisionmaker in arriving at his decision,’ and may include
11 ‘recommendations, draft documents, proposals, suggestions, and other subjective
12 documents which reflect the personal opinions of the writer rather than the policy
13 of the agency.’” *Maricopa*, 108 F.3d at 1093 (quoting *Assembly of the State of*
14 *Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 926, 920 (9th Cir. 1992)). A
15 predecisional document is “part of the ‘deliberative process’” if its disclosure
16 “‘would expose an agency’s decisionmaking process in such a way as to
17 discourage candid discussion within the agency and thereby undermine the
18 agency’s ability to perform its functions.’” *Maricopa*, 108 F.3d at 1093 (quoting
19 *Assembly*, 968 F.2d at 920).
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1 In this case, the NTSB has relied on Exemption 5 and the deliberative
2 process privilege to withhold, from two records, certain "preliminary radar data"
3 and certain "handwritten notes concerning that data." 1st Supp. Moye Decl.
4 ¶¶ 6(a), (d). The data that the NTSB has withheld "provided a starting point for the
5 [NTSB's] simulations of the [TWA Flight 800] flight path." *Id.* "The author(s)
6 culled these data from an enormous collection of radar returns to contribute to the
7 flight path derived from the simulations." *Id.* Because "[t]he very act of distilling
8 the significant facts from the insignificant facts constituted an exercise of judgment
9 by agency personnel," the data are both "predecisional and deliberative in nature."
10 *Id.* Their withholding under Exemption 5 and the deliberative process privilege is
11 therefore appropriate.

12 The NTSB has also relied on Exemption 5 and the deliberative process
13 privilege to withhold, from two records, certain graphs depicting "various versions
14 of the radar data provided by the Federal Aviation Administration (FAA) for TWA
15 flight 800" and certain graphs depicting "various outcomes of the Main Wreckage
16 Simulation for TWA flight 800, depicting differing parameters on the x and y
17 axes." 1st Supp. Moye Decl. ¶¶ 6(b), (c). Other such graphs have been released.
18 *Id.* However, the graphs that have been withheld "reflect the personal opinion of
19 the writer rather than the policy of the agency." *Id.* ¶ 6(c) & p. 74. Accordingly,
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1 their withholding is appropriate because, “[w]ithout the protection provided by
2 [Exemption 5], full and frank discussion of options and opinions so vital to the
3 decision-makers would be impossible.” *Id.* ¶ 6(b).

5 The CIA has relied on Exemption 5 and the deliberative process privilege to
6 withhold “a draft letter written by a CIA analyst for the consideration and signature
7 of his office management.” 3d Buroker Decl. ¶ 11. Drafted in March 1998, “this
8 document contains subjective evaluation and individual judgments regarding
9 preliminary analysis of newly acquired data.” *Id.* Accordingly, the withholding of
10 the draft letter is appropriate because the letter is “both predecisional and
11 deliberative.” *Id.*

12 When plaintiff responded to the motion for partial summary judgment that
13 defendants filed on August 16, 2005, he objected to the use of Exemption 5 and the
14 deliberative process privilege to withhold CIA records created after November 19,
15 1997. *See* Pl. Opp’n at 19. According to plaintiff, records created after that date
16 were not predecisional because they were created after the CIA simulation of the
17 explosion of TWA Flight 800 had been shown to the public by the Federal Bureau
18 of Investigation (FBI). *Id.* However, the draft letter described above “contains
19 subjective evaluation and individual judgments regarding preliminary analysis of
20 newly acquired data.” 3d Buroker Decl. ¶ 11 (emphasis supplied). Accordingly,
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1 the letter is properly withheld because it deals with a new decision, i.e., a decision
2 not to revisit the analysis already conducted.

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4 E. *Exemption 7(C) Has Been Applied Correctly.*

5 “Exemption 7(C) excuses from disclosure ‘records or information compiled
6 for law enforcement purposes’ if their production ‘could reasonably be expected to
7 constitute an unwarranted invasion of personal privacy.’” *Nat’l Archives &*
8 *Records Admin. v. Favish*, 541 U.S. 157, 160 (2004) (quoting 5 U.S.C.
9 § 552(b)(7)(C)). The application of Exemption 7(C) requires a balancing of “the
10 competing interests in privacy and disclosure.” *Favish*, 541 U.S. at 172.
11 “Exemption 7(C) ‘affords broad[] privacy rights to witnesses, and investigators.’”
12 *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (quoting *Bast v.*
13 *Dep’t of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)). To overcome these rights,
14 a requester “must establish more than a bare suspicion” that “responsible officials
15 acted negligently or otherwise improperly in the performance of their duties” if the
16 alleged misconduct of the officials is to serve as a basis for disclosure. *Favish*, 541
17 U.S. at 174. To make a sufficient showing, “the requester must produce evidence
18 that would warrant a belief by a reasonable person that the alleged Government
19 impropriety might have occurred.” *Id.*
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1 In this case, the CIA has relied on Exemption 7(C) to withhold, from three
2 records, the names of certain FBI special agents and the names of certain
3 eyewitnesses to the explosion of TWA Flight 800. 3d Buroker Decl. ¶ 9. When
4 plaintiff responded to the motion for partial summary judgment that defendants
5 filed on August 16, 2005, he did not contest the use of Exemption 7(C) to withhold
6 the names of such individuals. See Def. Mem. at 21; Pl. Opp'n at 21. Were he to
7 take a different position now, he would have to "produce evidence that would
8 warrant a belief by a reasonable person" that "responsible officials acted
9 negligently or otherwise improperly in the performance of their duties." See
10 *Favish*, 541 U.S. at 174. However, the materials produced in this case show that
11 the CIA personnel who attempted to determine "what the witnesses [to the
12 explosion of TWA Flight 800] saw" acted conscientiously and in good faith in
13 doing so. See 3d Buroker Decl. ¶ 4. Even assuming, *arguendo*, that plaintiff
14 disagrees with certain of the conclusions that they reached, he cannot show that
15 they acted "negligently or otherwise improperly" in conducting the analysis that
16 led to those conclusions. See *Favish*, 541 U.S. at 174. Accordingly, the CIA has
17 acted correctly in withholding the names of the FBI agents and eyewitnesses
18 pursuant to Exemption 7(C).
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1 F. *Exemption 6 Has Been Applied Correctly.*

2 Exemption 6 “provides that FOIA disclosure requirements do not apply to
3 ‘personnel and medical files and similar files the disclosure of which would
4 constitute a clearly unwarranted invasion of personal privacy.’” *U.S. Dep’t of State*
5 *v. Ray*, 502 U.S. 164, 166 (1991) (quoting 5 U.S.C. § 552(b)(6)). Exemption 6
6 requires “‘a court [to] balance the public interest in disclosure’” against the interest
7 that an individual possesses in the “‘control of information concerning his or her
8 person.’” *U.S. Dep’t of Defense v. Fed. Labor Relations Auth. (FLRA)*, 510 U.S.
9 487, 495, 500 (1994) (quoting *Dep’t of Justice v. Reporters Comm. for Freedom of*
10 *the Press*, 489 U.S. 749, 763, 776 (1989)). The sole “public interest” relevant to
11 the balancing “is the extent to which disclosure would serve ‘the core purpose of
12 the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the
13 operations or activities of the government.’” *FLRA*, 510 U.S. at 495 (quoting
14 *Reporters Comm.*, 489 U.S. at 775 (emphasis deleted)).

15 In this case, the CIA has relied on Exemption 6 to withhold the same names
16 that it has withheld pursuant to Exemption 7(C). 3d Buroker Decl. ¶ 9. When
17 plaintiff responded to the motion for partial summary judgment that defendants
18 filed on August 16, 2005, he did not contest the CIA’s use of Exemption 6 to
19 withhold such names. *See* Def. Mem. at 21; Pl. Opp’n at 21. Were he to take a
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1 different position now, he would have to show that the disclosure of the names
2 would ““contribut[e] significantly to public understanding”” of the efforts made by
3 the CIA to determine “what the eyewitnesses [to the explosion] saw.” *See FLRA*,
4 510 U.S. at 495 (quoting *Reporters Comm.*, 498 U.S. at 775); 3d Buroker Decl. ¶ 4.
5
6 However, the CIA has already made extensive disclosures, in this case and
7 elsewhere, about its efforts to make that determination. Accordingly, the release of
8 the names would add little or nothing to the ““public understanding”” of those
9 efforts. *See FLRA*, 510 U.S. at 497 (quoting *Reporters Comm.*, 498 U.S. at 775).
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11 In view of this fact, the CIA has acted correctly in withholding the names of the
12 FBI agents and eyewitnesses pursuant to Exemption 6.
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15 II. ALL PORTIONS OF THE RECORDS COVERED BY THIS MOTION
16 THAT REQUIRE RELEASE HAVE BEEN RELEASED.

17 “[W]hen materials exempt under the FOIA contain reasonably segregable
18 parts that are not exempt, those parts should be disclosed.” *Hayden*, 608 F.2d at
19 1388; *see* 5 U.S.C. § 552b. In this case, the CIA has withheld six records in part
20 and the NTSB has withheld four records in part. *See* 3d Buroker Decl. ¶¶ 9-10; 1st
21 Supp. Moye Decl. ¶¶ 6(a)-(d). A copy of the records, marked to show the
22 withholdings, is submitted herewith. *See* 3d Buroker Decl., pp. 22-35, 37-48; 1st
23 Supp. Moye Decl., pp. 65-73, 75-103, 105-14, 118-79. As the records show on
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1 their faces, the CIA and NTSB have taken pains to withhold only those portions of
2 the records that come within the scope of the statutory exemptions. Accordingly,
3 all portions of the records that *should* have been released *have* been released.
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5 Two records have been withheld in full: the draft letter that the CIA has
6 withheld pursuant to Exemption 5 and the computer program that the NSA has
7 withheld pursuant to Exemptions 2 and 3. The CIA has determined that “no non-
8 exempt material can reasonably be segregated” from the draft letter because of the
9 “role [of the letter] in the deliberative processes” and because of its “preliminary
10 nature.” 3d Buroker Decl, p. 50. The NSA has determined that no non-exempt
11 material “can be reasonably segregated” from the computer program because the
12 program “concerns the functions and activities of the NSA.” Giles Decl. ¶ 14. In
13 view of these determinations, the withholding of both records, in full, should be
14 upheld.
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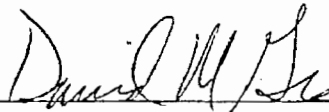
19 CONCLUSION

20 For the foregoing reasons, defendants’ second motion for partial summary
21 judgment as to the CIA should be granted.
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23 Respectfully submitted,

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28 Dated: May 1, 2006

