JOHN H. CLARKE [*Pro Hac Vice*]
Telephone: (202) 332-3030
JOHN F. DUNNE, JR. [SBN 32854]
1601 Cloverfield Boulevard
Second Floor, South Tower
Santa Monica, California 90404-4084
Telephone: (310) 393-9351
Facsimile: (310) 230-4066
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

H. RAY LAHR, Plaintiff, v. NATIONAL TRANSPORTATION SAFETY BOARD, *et al.* Defendants.	Case No. 03-08023 AHM (RZx) **PLAINTIFF'S OPPOSITION TO CIA'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Date: July 10, 2006
Time: 10:00. a.m.
Place: Courtroom 14, 312 N. Spring Street, Los Angeles, CA 90012
Judge: Honorable A. Howard Matz

(1) PLAINTIFF'S MEMORANDUM IN OPPOSITION TO CIA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(2) AFFIDAVIT OF GLEN L. SCHULZE

TABLE OF CONTENTS

Preliminary statement 1
Introduction 2

1. The law – equitable balancing test 2
   a. Balancing test 2
   b. The FOIA's purpose is to shed light on agency performance . . 4
   c. Evidence of agency malfeasance under the balancing test 5
   d. Burden of proof 5

2. The facts. 6

3. Application of the facts to the FOIA's balancing test 10

4. Exemptions asserted 11
   a. Exemption 4 "trade secrets" is inapplicable 11
   b. Exemption 5 "deliberative process privilege" is unavailable 13
      (1) CIA animation is an agency final report 13
      (2) Deliberative process privilege is unavailable to shield disclosure of post-decisional records 13
      (3) Deliberative process privilege does not apply to records adopted in a final agency disposition 13
      (4) Deliberative process privilege does not apply to purely factual, investigative records 15
   c. Exemptions 6 and 7(C) – privacy. 16
   d. Exemption 3 "other statutes". 18
      (1) NSA. 19
      (2) CIA. 20
   e. Exemption 2. 21
5. Failure to segregate 21
6. Unidentified records. 23
7. Bad faith 23
8. *In camera* inspection 24

Conclusion 25

TABLE OF ATTACHMENTS

EXHIBIT A
Excel Chart – all contested records. 27-59

EXHIBIT B
Excel Chart – unidentified records. 60-67

EXHIBIT C
Excel Chart – records in electronic format. 68-72

EXHIBIT D
Excel Chart – contested (b)(4) exemptions –
Boeing proprietary information – not contest name redactions. 73-80

EXHIBIT E
Excel Chart – contested (b)(5) exemptions
deliberative process privilege. 81-90

EXHIBIT F
Affidavit of Glen Schulze
All contested records with Record Disposition Reports. 92-632

EXHIBIT G
Excel Chart – claims of failure to segregate. 633-642

EXHIBIT H
Excel Chart – contested (b)(7)(C) exemptions
privacy in law enforcement records &
contested (b)(6) privacy exemptions 643-655

EXHIBIT I
Excel Chart – contested (b)(3) exemptions
CIA or NSA source or method. 657-666

EXHIBIT J
Excel Chart – plaintiff' seeks in camera inspection. 667-670

TABLE OF AUTHORITIES

Cases:

General Services Administration v. Benson, 415 F.2d at 880 (9th Cir. 1969) 2

Washington Post Co. v. Department of Health and Human Services, 690 F.2d 252 (D.C. Cir. 1982) 3

Newport Pac., Inc. v. County of San Diego, 200 F.R.D. 628 (S.D. Cal. 2001) 3

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974) 4

GC Micro Corp. v. Defense Logistics Agency, 33 F. 3d 1109 (9th Cir. 1994) 4, 12

U.S Dept. of Justice v. Reporters Committee For Freedom of Press,, 489 U.S. 749, 772-73 (1989). 4, 6, 17

Public Citizen Health Research Group v. FDA, 185 F.3d 898 (D.C. Cir. 1999) 4

Public Citizen Health Research Group v. National Institutes, 209 F. Supp. 2d 37 (D.D.C. 2002) 4

Beck v. Department of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir. 1993) 4

Castaneda v. United States, 757 F.2d 1010 (9th Cir. 1985) 5

Stern v. FBI, 737 F.2d 84, 90 (D.C. Cir. 1984) 5, 17

Hunt v. Federal Bureau of Investigation, 972 F.2d 286 (9th Cir. 1992) . .5, 6

Jones v. FBI, 41 F.3d 238 (6th Cir. 1994) 5, 19

Favish v. OIC, 217 F.3d 1168 (9th Cir. 2000) rev'd in part Nat'l Archives & Records Admin. v. Favish, 124 S. Ct. 1570 (U.S. 2004) 5, 6, 11

Citizens Commission on Human Rights v. FDA, 45 F.3d 1325 (9th Cir. 1995). 11

Church of Scientology v. U.S. Department of the Army, 611 F.2d 738 (9th Cir. 1979) 11

Hayden v. National Security Agency/Cent. Sec. Serv., 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). 11, 18

Hughes Aircraft v. Schlesinger, 384 F. Supp. 292 (N.D. Cal. 1974) 13

Rockwell Int'l Corp. v DOJ, 235 F.3d 598 (D.C. Cir. 2001) 14

Maricopa Audubon Soc'y v. U.S. Forest Service, 108 F.3d 1089 (9th Cir. 1997) 14

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975) 14

Exxon Corp. v. Federal Trade Com'n, 466 F. Supp. 1088 (D.C. 1978) . . . 14

Niemeier v. Watergate Spec. Prosecution Force, 565 F.2d 967 (7th Cir. 1977). 15

Newport Pac., Inc. v. County of San Diego, 200 F.R.D. 628 (S.D. Cal. 2001) 15

EPA v. Mink, 410 U.S. 73, 89 (1973) 15

Assembly of Cal. v. United States DOC, 797 F. Supp. 1554 (E.D. Cal. 1992) 15

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980) 15

Mead Data Cent., Inc. v. US Dept of Air Force, 556 F.2d 242 (D.C. Cir. 1977) 15

Playboy Enterprises, Inc. v. Department of Justice, 677 F. 2d 931 (D.C. Cir. 1982) 16

Powell v. United States, Dep't of Justice, 584 F. Supp. 1508 (N.D. Cal., 1984). 16

National Wildlife Federation v. United States Forest Service, 861 F.2d 1114 (9th Cir. 1988). 16

Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977) 17

Butler v. DOJ, No. 86-2255, 1994 WL 55621 (D.D.C. Feb. 3, 1994) 17

Hayden v. Nat'l Sec. Agency, 608 F.2d 1381, 1390 (D.C. Cir. 1979) 18

Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976) 18

Irons v. Parker, 434 U.S. 965 (1977) 18

Iglesias v. CIA, 525 F. Supp 547 (D.D.C. 1981) 18

Perlman v. DOJ, 312 F.3d 100 (2d Cir. 2002) 18

Jefferson v. DOJ, No. 01-1418 (GK) (D.D.C. Mar. 29, 2003) 18

Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) 19, 24

Long v. IRS, 742 F.2d 1173 (9th Cir. 1984) 19

Campaign for Effective Transplantation v. U.S. Food and Drug Admin., 219 F. Supp. 2d 106 (D.D.C. 2002) 19

Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973) 19

Weiner v. FBI, 943 F. 2d 972, 979 (9th Cir. 1991) 19

Oglesby v. Department of Army, 79 F.3d 1172 (D.C. Cir. 1996). 20

Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993) 20

Yeager v. Drug Enfocement Administration,
678 F.2d 315 (D.C. Cir. 1982. 21

Mead Data Central, Inc. v. U.S. Dept. of Air Force,
566 F. 2d 242, 368 (D.C. Cir. 1977) 22

Voinche v. F.B.I., 46 F. Supp. 2d 26, 33 (D.D.C. 1999) 22

Coleman v. F.B.I., 972 F. Supp. 5 (D.D.C. 1997) 22

Krikorian v. Department of State, 984 F.2d 461 467
(D.C. Cir. 1993) 22

Long v. IRS, 596 F.2d 362, 365 (9th Cir. 1979) 22

Animal Legal Defense Fund, Inc. v. Department of Air Force, 44 F.
Supp. 2d 295 (D.D.C. 1999) 22

Iturralde v. Comptroller of the Currency,
315 F.3d 311, 315 (DC Cir. 2003). 23

Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978). 24

Allen v. CIA, 636 F.2d 1287, 1298 (D.C. Cir. 1980) 24

N.L.R.B. v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978). . . . 25

Statutes:

Fed. R. Ev. 105. *Limited Admissibility*. 11
5 U.S.C. § 552 (b)(4)(b) 11
5 U.S.C. § 552(b)(5) 13
5 U.S.C. § 552 (b)(6) 16
5 U.S.C. § 552(b)(7)(C) 16
5 U.S.C. § 552(b)(3) 18
50 U.S.C. § 402 20
5 U.S.C. § 552(b) 22

OFFER OF PROOF

Bates

Filed herewith:

EXHIBIT F
Affidavit of Glen Schulze. 92-99

Affidavit of H. Ray Lahr (filed under separate cover)

Filed in Opposition to CIA
Motion for Partial Summary Judgment – Docket # 63:

1 Affidavit of H. Ray Lahr 30-31

2 Affidavit of Brett M. Hoffstadt. 32-41

3 Affidavit of Glen H. Schulze. 42-112
Excel spreadsheets 113-126

Filed in Opposition to NTSB
Motion for Partial Summary Judgment – Docket # 28:

A Affidavit of Brett Hoffstadt. 35-39

B Affidavit of Darryl Hambley. 40

C Affidavits of Rear Admiral Clarence A. Hill, Jr., USN (Ret) 41-51

D Affidavit of Robert Donaldson. 52-119

E Affidavits of Thomas Stalcup, Ph.D. 120-128

F Affidavit of David Neal 150

G Affidavit of Marge Krugar. 151

H Affidavit of Gregory A. Harrison, Ph.D., P.E. 152-154

I Affidavit of Michael Hull, Ph.D. 158-159

J Affidavit of James A. Holtsclaw 173

K Affidavits of James D. Sanders. 174-179

L Affidavit of James Speer. 183-187

M Affidavit of Captain Richard Russell. 188-190

N Affidavit of Vincent Fuschetti. 191

O Affidavit of Major Fred Meyer. 192-206

P Affidavits of Dwight Brumley 207-210

Q Affidavit of Dr. Vernon Gross. 211

R Affidavit of Mike Wire. 214

S Affidavit of Paul Angelides. 215-222

T Captain David McClaine 223-244

U Affidavit of Lisa Perry. 245-257

V Affidavit of Colonel Lawrence Pence USAF (Ret) 258-260

W Affidavit of Michael Rivero. 261-264

X Affidavit of Captain H. Ray Lahr (Ret.) 265-292

Y Affidavit of Robert Young 393-395

Z Affidavit of Tom Leffler 396-460

AA Affidavit of Graeme Sephton 461-466

BB Affidavit of Glen Schulze 467-469

CC Affidavit of Dan McGauley 470-479

MEMORANDUM OF POINTS & AUTHORITIES

Preliminary Statement

On September 27, 2004, at oral argument on the NTSB's motion for partial summary judgment, the Court circulated a chart and ordered the parties to meet and confer in preparation of their joint statement of disputed items, to be filed by not later than October 25, 2004. The Court instructed the parties to make the chart short. In his first entry of this chart, plaintiff wrote, "The Court specifically instructed the parties to keep this submission short, yet, the NTSB's submission to plaintiff was almost 900 pages long." The chart, filed on October 27, 2004, was almost 1,000 pages long – so unwieldy that it was useless.

In January 2006 plaintiff asked the government to work with plaintiff to submit a short chart to assist the Court in the adjudication of the issues herein. The government declined. On February 6, 2006, plaintiff provided the government with a sample page of the proposed chart, and again asked that the government participate in formulating this chart. Again, the government declined, stating that the previous chart did not assist the Court in adjudicating the issues because of its length. Plaintiff responded that he would file a chart, and cull the government's position from its pleadings.

Plaintiff's chart is attached hereto as Exhibit A. It is 33 pages long, and identifies a total of 62 records at issue as to all three defendants, including 21 records that are unidentified (also separately listed under Exhibit B). (The records are listed in chronological order by agency, with undated records following dated records.) To facilitate any categorical ruling the Court may wish to undertake, plaintiff includes charts categorized by the exemptions claimed (Exhibits D, E, H & I). Additionally, plaintiff includes a chart of records in electronic format (Exhibit C), one for claims of failure to segregate (Exhibit G), and one itemizing records that plaintiff suggests that the Court inspect *in camera* (Exhibit J).

Lastly, plaintiff includes copies of all contested records under Exhibit F, [1] attached to the affidavit of Glen L. Schulze. Each record is preceded by plaintiff's Record Disposition Report, setting forth the parties' positions. Records that were not identified in the government's Vaughn index are denoted by a letter following the number.

Introduction

Plaintiff seeks disclosure of records upon which the CIA based its November 17, 1997, conclusion that on July 17, 1996, TWA Flight 800 performed a nose-less, 3,200-foot zoom-climb. Trajectory simulation computer models are central to plaintiff's FOIA request. A simulation printout (Record 32) is dated 2004.

It appears that the animated zoom-climb conclusion was simply propaganda – and that the CIA's post-decisional simulations are an attempt to justify its already-released conclusion.

The CIA is required to identify any pre-decisional simulation. It has not.

1. The law – equitable balancing test

a. Balancing test

The Ninth Circuit has consistently applied the equitable balancing test to assertions under the FOIA of (1) the deliberative process privilege, (2) proprietary interest claims, and (3) privacy interests. In General Services Administration v. Benson, 415 F.2d at 880 (9th Cir. 1969), the government claimed that commercial information was protected under exemption (b)(4), and that intra-agency memoranda was protected under exemption (b)(5). The court held:

---

[1] Because plaintiff removed records during his review process, record numbers are skipped – there is no record 8, 17, 19, 25-26, 30, 33-34, 37-40, 47, 49. 51, 53, 55, 58, 61, 63, 65, 67-69, 71, & 73.

> In exercising the equity jurisdiction conferred by the Freedom of information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles, and determine the best course to follow in given circumstances. The effect on the public is the primary consideration.[2]

There is no conflict among the circuits. See, e.g., Washington Post Co. v. Department of Health and Human Services, 690 F.2d 252, 268 (D.C. Cir. 1982), after remand, 795 F.2d 205 (D.C. Cir. 1986), sub. op. 865 F.2d 320 (D.C. Cir. 1989), construing a (b)(4) proprietary information assertion:

> A minor impairment cannot overcome the disclosure mandate of FOIA. Rather, the question must be whether the impairment is significant enough to justify withholding the information…. This inquiry necessarily involves a rough balancing test of the extent of impairment and the importance of the information against the public interest in disclosure.

---

[2] See also Newport Pac., Inc. v. County of San Diego, 200 F.R.D. 628, 638 (S.D. Cal. 2001) (construing (b)(5) deliberative process claim) ("[T]he Court is compelled to take the analysis a step further and determine whether the government's interest in nondisclosure outweighs the interests of the litigants and public in disclosure. In In re Franklin, the district court… weighed the 'public interest in opening for scrutiny the government's decision making process.'" (internal citation omitted)

The DC Circuit's seminal case construing a (b)(4) proprietary interest exemption is National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The 9th Circuit followed National Parks in GC Micro Corp. v. Defense Logistics Agency, 33 F. 3d 1109, 1115, (9th Cir. 1994): "We agree with the D.C. Circuit that, in making our determination, we must balance the strong public interest in favor of disclosure against the right of private businesses to protect sensitive information."

The FOIA's balancing test is well-settled law.[3]

b. The FOIA's purpose is to shed light on agency performance

In 1989 the Supreme Court recited that the FOIA is intended to "shed light on an agency's performance of its statutory duties." U.S Dept. of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749, 772-73 (1989). Its "central purpose is to ensure that the government's activities be opened to the sharp eye of public scrutiny." Id. at 774.

The more notorious the subject, the greater is the public interest in disclosure.[4]

---

[3] See e.g., Public Citizen Health Research Group v. FDA, 185 F.3d 898, 908-909 (D.C. Cir. 1999) ("[W]e have twice held that Exemption 4 requires a balancing in the interest sought in non-disclosure 'against the public interest in disclosure'…. We held that [t]his inquiry necessarily involves a rough balancing of the extent of the impairment and the importance of the information against the public interest in disclosure" (citations omitted); Public Citizen Health Research Group v. National Institutes, 209 F. Supp. 2d 37, 45 (D.D.C. 2002) (construing (b)(4) exemption) ("The Court is therefore charged with balancing the public interest in disclosure against private interest in withholding the information").

[4] Cf. Beck v. Department of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir. 1993) (agency's "Glomarized" request for records concerning alleged wrongdoing by two named employees was proper because of the absence of evidence of wrongdoing or widespread publicity of the investigation).

c. Evidence of agency malfeasance under the balancing test

"Where it appears that the motives or truthfulness of the investigator are in doubt, the public need for supervision and disclosure is necessarily heightened." Castaneda v. United States, 757 F.2d 1010 (9th Cir. 1985). "[T]he public may have an interest in knowing that a government investigating itself is comprehensive, that the report of an investigation released publicly is accurate." Stern v. FBI, 737 F.2d 84, 90 (D.C. Cir. 1984). "[T]he public interest in ensuring the integrity and reliability of government investigation procedures is greater where there is some evidence of wrongdoing on the part of the government official." Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 289 (9th Cir. 1992). Jones v. FBI, 41 F.3d 238 (6th Cir. 1994):

> [E]ven where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself, there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue. Where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of Vaughn affidavits alone.

Directly on point in this Circuit is Favish v. OIC, 217 F.3d 1168, 1172-73 (9th Cir. 2000) rev'd in part on other grounds Nat'l Archives & Records Admin. v. Favish, 124 S. Ct. 1570, 1581 (U.S. 2004): "The [FOIA] request focuses on how the OIC conducted its investigation… [and is] in complete conformity with the statutory purpose… [of] showing that he has knowledge of misfeasance by the agency…"

d. Burden of proof

The Supreme Court recently defined a FOIA plaintiff's burden of proof on the issue of agency bad faith in Nat'l Archives & Records Admin. v. Favish, 124 S. Ct. 1570, 1581 (U.S. 2004), which balanced a privacy claim under exemption

(b)(7)(C). (Privacy claims under (b)(6) & (b)(7)(C) are the most litigated FOIA exemptions.)

> We hold that where… the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred…. the less stringent standard we adopt today is more faithful to the statutory scheme.

Thus, evidence of "bad faith or illegality with regard to the underlying activities which generated the documents at issue" (Hunt id.) is relevant to the Court's balancing of the FOIA's "central purpose" of ensuring "that the government's activities be opened to the sharp eye of public scrutiny" (Reporters Committee id.) against the interest sought to be protected by the exemption. Plaintiff's burden of proof is evidence that "would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Favish at 1581.

The more publicity associated with the subject, the greater the public interest in disclosure. Equity dictates that the more probative the evidence of government impropriety, the more weight is to be given the public interest in disclosure.

2. The facts

Analysis of the government's probe into the Flight 800 tragedy is a study in government impropriety. The government first withheld,[5] and then misrepresented

---

[5] *Statement of Genuine issues in Opposition to CIA's Motion for Summary Judgment*, statement number 27.

forensic test results of the aircraft debris;[6] which in fact showed the presence of explosive residue on pieces of the destroyed aircraft.[7] The government physically altered the parts of the aircraft debris from the reconstruction hanger to hide the central fact that the initiating event was external to the aircraft.[8] It surreptitiously seized debris from the hanger that showed that missile fire caused the tragedy.[9] It misrepresented Radar data that showed missile fire as well as the absence of any zoom-climb of the already severed aircraft.[10] It deleted Radar data,[11] Flight Data Recorder data,[12] and portions of underwater videotapes of the debris.[13] The government concealed the existence of the missile debris field.[14] The government concealed that military assets conducted classified maneuvers in the air, on and under the ocean, at the time of and in close proximity to the disaster.[15]

---

[6] Id. statement number 26.

[7] Id. statement number 49.

[8] Id. statement number 30.

[9] Id. statement number 28.

[10] 3rd Schulze Aff. ¶ 13 Bates 97.

[11] Stalcup Aff. Docket # 28 Ex. E Bates 126 ¶ 4.

[12] 1st Schulze Aff. Docket # 28 Ex. BB Bates 467 ¶ 5.

[13] Speer Aff. Docket # 28 Ex. L Bates 186-87 ¶¶ 30-31.

[14] *Statement of Genuine issues in Opposition to CIA's Motion for Summary Judgment*, statement numbers 50 & 51.

[15] Id. statement number 56 & 57.

At its first public hearing, the NTSB banned eyewitness testimony;[16] including the only two witnesses featured in the CIA video-animation,[17] hundreds of eyewitnesses who saw a missile traveling at supersonic speed,[18] and airborne eyewitnesses.[19]

At its second public hearing, the NTSB fabricated accounts of eyewitnesses who they never interviewed.[20] There is not a single eyewitness who corroborates a "zoom-climb" theory,[21] and the CIA knowingly and falsely reported that only 21 eyewitnesses saw a projectile rising.[22] The NTSB violated its statutory mandate by ceding control of the probe to the FBI,[23] and violated its own investigative procedure by its failure to utilize the party process – in the all important trajectory study.[24]

The records upon which the CIA video-animation was based, including post-decisional records, are the subject of this action. The animation is a fictional account designed to explain away the hundreds of eyewitness accounts of missile fire.

> In order for the government to advance the mechanical failure theory, it was necessary to explain away the missile-like streak seen by… the

---

[16] Id. statement number 29.

[17] Id. statement number 39.

[18] Id. statement number 40.

[19] Id. statement number 41.

[20] Id. statement number 26.

[21] Id. statement number 42.

[22] Id. statement number 44.

[23] Id. statement number 54.

[24] Id. statement number 55.

> eyewitnesses. The CIA made an astonishing proposal…. [T]he missile-like streak was the burning aircraft itself…. The CIA would have us believe that when the nose was blown away, the aircraft continued to fly and zoom-climb from 13,800 to 17,000 feet, before it rolled over and crashed into the sea. The burning zoom-climb is supposedly the streak seen by the eyewitnesses. Never mind that the eyewitnesses saw the streak rising from the surface, not from 13,800 feet.[25]

A center-wing-tank explosion could not possibly have been the initiating event because the fuel tank was empty,[26] there was no ignition source,[27] and engine thrust was cut with the loss of the nose.[28] In any event, the fuel is combustible, like kerosene, and is not flammable – it is incapable of exploding.[29] The zoom-climb is impossible because at least one wing separated early in the crash sequence, [30] a center-wing-tank explosion would have destroyed the spar supporting the wings, [31] the aircraft did not slow and so could not have climbed, [32] and, in any event, the alleged zoom-climb is aerodynamically impossible. [33]

---

[25] **X** Lahr Aff. Bates 281 ¶ 88.

[26] *Statement of Genuine issues in Opposition to CIA's Motion for Summary Judgment*, statement number 31.

[27] Id. statement number 32.

[28] Id. statement number 35.

[29] Id. statement number 33.

[30] Id. statement numbers 34 and 36.

[31] Id. statement number 36.

[32] Id. statement number 38.

[33] Id. statement number 37.

The probe was so obviously a politicized[34] cover-up[35] that investigators smuggled out evidence showing that missile fire was the initiating event.[36] The government even determined the positions from which missiles were fired.[37]

The facts stated above come from an impressive array of 29 expert and fact witnesses, including two aerodynamicists and six air crash investigators, three of whom were parties to the TWA Flight 800 probe. Seven eyewitness accounts are included; four of whom witnessed the disaster from the air, and two of whom are featured in the CIA's animation. One affiant is a retired Admiral. One is a former NTSB Board member. And one lost her brother in the disaster.

3. Application of the facts to the FOIA's balancing test

Under the FOIA, this Court must balance the interest sought to be protected by the exemption against public the interest in opening the inner working of government to public scrutiny.

The Flight 800 tragedy is the most controversial disaster in aviation history. The CIA's zoom-climb animation is so outrageous as to be characterized as "the boldest and most flagrant lie ever visited on the American people in peacetime."[38] The probe's investigative history, virtually all the forensic evidence, the eyewitness accounts, and the application of the immutable laws of physics, can all be reconciled with only one conclusion: The government covered up the true cause of the disaster – missile fire.

---

[34] Id. statement number 59.

[35] Id. statement number 61.

[36] Id. statement number 52.

[37] Id. statement number 53.

[38] First Strike, J. Cashill & J. Sanders, WND Books 2003, Chap. 9, *The Big Lie*, at 155.

The assertion that "the CIA personnel who attempted to determine 'what the witnesses [to the explosion of TWA Flight 800] saw' acted in good faith in doing so" (CIA motion at 13) is contradicted by *all* of the available forensic and testimonial evidence.

Plaintiff does not ask the Court to adjudicate the cause of Flight 800's demise.[39] Plaintiff seeks the underlying records upon which the CIA's zoom-climb conclusion was alleged to have been based, and he is hard-pressed to imagine a more fit case for the application of the FOIA's equitable balancing test.

4. Exemptions asserted

The agency has the burden to justify the nondisclosure of records and establish that a particular record, or portion thereof, is exempt from disclosure. Citizens Commission on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995); Church of Scientology v. U.S. Department of the Army, 611 F.2d 738, 742 (9th Cir. 1979). Under the FOIA, an agency's decision to withhold information from a FOIA requester is subject to de novo review by the district court. Hayden v. National Security Agency/Cent. Sec. Serv., 608 F.2d 1381, 1384 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). And all claims of exemptions are to be narrowly construed. Favish v. OIC, 217 F.3d at 1172 (9th Cir. 2000) rev'd in part Nat'l Archives & Records Admin. v. Favish, 124 S. Ct. 1570, 1581 (U.S. 2004).

---

[39] Fed. R. Ev. 105. *Limited Admissibility*: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope…"

a. Exemption 4 "trade secrets" is inapplicable

The NTSB asserts Exemption (b)(4),[40] claiming Boeing trade secrets. "[E]vidence revealing (1) actual competition and (2) a likelihood of substantial competitive injury is sufficient to bring commercial information under Exemption 4." GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994).

Contrary to the government's assertion, there is no chance that Boeing would suffer a substantial competitive injury upon disclosure, as former Boeing aerodynamicist Brett Hoffstadt's affidavit makes abundantly clear:

> In summary, the release of data in the Records will most likely have zero to negligible impact on the market value, competitive advantage, or sole source position of Boeing and its subsidiaries in relation to the 747 Classic SDP, simulators and related services. The remaining barriers and investments for a competitor to offer similar products and services are incredibly high, the market for these products and services has long past its peak demand, the future demand is in predictable permanent decline known to eventually be nonexistent, and Boeing would nonetheless remain the established authority and preferred source for these products and services due to its position as the developer and manufacturer of the aircraft in question.[41]

---

[40] 5 U.S.C. § 552 (b)(4)(b): "This section does not apply to matters that are trade secrets and commercial or financial information obtained from an individual and privileged or confidential"

[41] Docket # 63: **2** Hoffstadt Aff. Bates 40 ¶ 45.

The government failed its burden of proving that release of the withheld data, of an aircraft placed in service 38 years ago, and since succeeded by three successive models, could competitively harm Boeing.[42]

And Boeing's affidavit is belied by Boeing's own press release, issued the same day the CIA's video-animation was broadcast:

> "Boeing was not involved in the production of the video shown today, nor… fully understand the data used to create it. While we provided basic aerodynamic information… we are not aware of the data that was used to develop the video."[43]

The government is not permitted to withhold records of information that Boeing's competitors already know. Hughes Aircraft v. Schlesinger, 384 F. Supp. 292, 304 (N.D. Cal. 1974).

b. Exemption 5 "deliberative process privilege" is unavailable

Exemption 5 was intended to incorporate the government's common law privilege from disclosure in litigation, including the deliberative process privilege.[44]

(1) CIA animation is an agency final report

"It appears to us that the [Supreme] Court meant in Sears to establish as a general principle that action taken by the responsible decision maker in an agency's decision-making process which has the practical effect of disposing of a matter

---

[42] Docket # 28: **X** Lahr Aff. Bates 375-378 Ex. 13 (Boeing 747 series).

[43] Docket # 28: **D** Donaldson Aff. Ex. 21 Bates 114.

[44] 5 U.S.C. § 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency litigation with the agency."

before the agency is 'final' for purposes of FOIA." Rockwell Int'l Corp. v DOJ, 235 F.3d 598, 602 (D.C. Cir. 2001) (internal citation omitted).

The CIA video-animation, broadcast to millions of Americans on November 18, 1997, was unquestionably a final agency disposition, contrary to the CIA's assertion.[45]

(2) Deliberative process privilege is unavailable to shield disclosure of post-decisional records

To fall within the deliberative process privilege, the record must be 'predecisional' in nature." Maricopa Audubon Soc'y v. U.S. Forest Service, 108 F.3d 1089 (9th Cir. 1997) quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).

The CIA claims the deliberative process privilege in 5 records. All five are undated or postdate the public release of its zoom-climb video-animation.[46] No portions of these records can be withheld under the deliberative process privilege. The court in Exxon Corp. v. Federal Trade Com'n, 466 F. Supp. 1088, 1097 (D.C. 1978) recognized that Exemption (b)(5) is unavailable to shield post-decisional records from disclosure. "As a matter of logical extension of this principle courts have established the general rule that pre-decisional, deliberative memoranda are privileged, while post-decisional memoranda — communications designed to explain a decision already made — are not." (citations omitted.)

---

[45] Docket # 59: *CIA Motion for Partial Summary Judgment* at 18: "In this case, the CIA has relied on the deliberative process privilege and Exemption 5 to withhold certain materials created as part of the analysis that continued after the CIA video concerning the explosion of TWA Flight 800 was shown to the public."

[46] See Exhibit E: Record numbers 27, 28, 29, 43, & 44.

(3) Deliberative process privilege does not apply to records adopted in a final agency disposition

Nor is the privilege applicable to records adopted in an agency disposition, as the court observed Niemeier v. Watergate Spec. Prosecution Force, 565 F.2d 967, 971-72 (7th Cir. 1977). "[I]f an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5."

"[A] predecisional, deliberative communication sheds the privilege if adopted as policy or in public dealings." Newport Pac., Inc. v. County of San Diego, 200 F.R.D. 628, 637-8 (S.D. Cal. 2001).

(4) Deliberative process privilege does not apply to purely factual, investigative records

The privilege is not applicable to "purely factual, investigative matters" which do not "reflect[] deliberative or policy making processes." EPA v. Mink, 410 U.S. 73, 89 (1973). Plaintiff seeks factual data. This case is like Assembly of Cal. v. United States DOC, 797 F. Supp. 1554, 1567 (E.D. Cal. 1992), where the court found that "the material [computer tapes with adjusted census data] was purely factual and in no way divulged the reasoning process… [and disclosure] would not reveal anything more about the deliberative process than has already been disclosed by the agency."

"The privilege applies only to the 'opinion' or 'recommendatory' portion of a document, not to factual information which is contained in the document." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980). Segregable portions of factual material which would not expose the deliberative process are not subject to the deliberative process privilege. Mead Data Cent., Inc. v. US Dept of Air Force, 556 F.2d 242, 246 (D.C. Cir. 1977). Here, the CIA claims this privilege to two purely factual records – which it denied in full –

Record 32A, the simulation, and Record 28, a radar tracking record (See Exhibit E).

Contrary to defendant's argument, the selection of facts to be included in a record is not part of the deliberative process.[47]

c. Exemptions 6 and 7(C) – privacy

5 U.S.C. § 552 (b)(6) permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."

5 U.S.C. § 552(b)(7)(C) provides that the FOIA does not apply to matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy..."

Plaintiff challenges the CIA's privacy withholdings in 12 records,[48] one of which it denied in full (Record 43). Given the overwhelming evidence of the CIA's dishonesty with regard to the eyewitness accounts, the FOIA's balancing test

---

[47] See Playboy Enterprises, Inc. v. Department of Justice, 677 F. 2d 931, 935 (D.C. Cir. 1982) ("mere fact that a person writing a factual report must select certain facts and omit others does not qualify factual report for deliberative process privilege"). See also Powell v. United States, Dep't of Justice, 584 F. Supp. 1508, 1519 (N.D. Cal., 1984) ("factual material contained in deliberative memoranda cannot be considered to be intertwined with legal or policy matters solely on the broad theory that the very choice of which facts to present necessarily reveals the writer's viewpoint."); National Wildlife Federation v. United States Forest Service, 861 F.2d 1114, 1119 (9th Cir. 1988) ("the ultimate objective of exemption 5 is to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process.").

[48] See Exhibit H: Record numbers 2, 7, 10-12, 18, 28, 41-43, 48, 50, & 52.

favors disclosure, contrary to the government's position that such a disclosure would be a "clearly unwarranted" invasion of privacy. Plaintiff challenges these redactions as disclosure would "shed light on an agency's performance..." U.S Dept. of Justice v. Reporters Committee For Freedom of Press, 489 U.S. 749, 772-73 (1989).

The standard for overcoming Exemption 6 ("clearly unwarranted") is lower than Exemption 7(C)'s standard ("unwarranted").

Exemption 7(C) is unavailable to the CIA, as where it is clear that an agency does not have law enforcement power to conduct the investigation, Exemption 7 cannot be invoked. See Weissman v. CIA, 565 F.2d 692, 696 (D.C. Cir. 1977), where the court held that Exemption 7(C) does not apply to records of extensive CIA investigation of American citizens living in the U.S. because the CIA is statutorily prohibited from conducting domestic law enforcement activities.

Nor should the CIA permitted to invoke privacy redactions for high-level government officials engaged wrongdoing. In Stern v. FBI, 737 F.2d at 91-94, in the context of "potential association with notorious and serious allegations of criminal wrongdoing," the D.C. Circuit concluded that the balance favored disclosure of the name of a high-level FBI employee "found to have participated deliberately and knowingly in the withholding of damaging information in an important inquiry," but did not favor disclosure of names of lower-level employees "found to have contributed only inadvertently to the wrongdoing under investigation."

An Exemption 7(C) claim for the identity of an FBI supervisor was rejected in Butler v. DOJ, No. 86-2255, 1994 WL 55621 (D.D.C. Feb. 3, 1994), where the

court noted that "FBI agents and other law enforcement personnel 'may not have as great a claim to privacy as that afforded ordinarily to private citizens.'"[49]

d. Exemption 3 "other statutes"

5 U.S.C. § 552(b)(3) "Exemption 3" provides that the FOIA does not apply to matters that are exempted from disclosure by statute.[50]

As with all FOIA exemptions, the government bears the burden of proving that requested records are properly withheld. Accordingly, the obligation to prepare a detailed Vaughn index applies fully in Exemption 3 cases, and the agency must "show specifically and clearly that the requested materials fall into the category of documents" that Congress has exempted from mandatory disclosure. Hayden v. Nat'l Sec. Agency, 608 F.2d 1381, 1390 (D.C. Cir. 1979), *cert denied* 446 U.S. 937 (1980). Moreover, the requirements regarding segregability applies in Exemption 3 cases so that agencies must divulge all portions of documents that are not specifically exempted from disclosure by statute. See Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976), *cert denied sub nom*; Irons v. Parker, 434 U.S. 965 (1977). Finally, since the applicability of Exemption 3 often turns on the factual

---

[49] See also Iglesias v. CIA, 525 F. Supp 547 (D.D.C. 1981) (names of SEC investigators not exempt, since there is a public interest in subjecting them to inquiry); Perlman v. DOJ, 312 F.3d 100 (2d Cir. 2002) (former INS general counsel could not expect the same level of privacy in his senior level position that a lower level employee might enjoy – the court found the counsel had been accused of serious wrongdoing); Jefferson v. DOJ, No. 01-1418 (GK) (D.D.C. Mar. 29, 2003) (supervisory DOJ FOIA attorney not have an expectation of privacy in her alleged mishandling of a request).

[50] 5 U.S.C. § 552(b)(3): "[S]pecifically exempted from disclosure by statute, (other than section 552(b) of this title) provided that such a statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

content of specific documents, the criteria for determining the appropriateness of an *in camera* inspection is the same for Exemption 3 as for other exemptions. See Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978).

(1) NSA

Here, the NSA's Vaughn index falls woefully short of providing the required information. It has, apparently, provided plaintiff with a 2004 printout of one simulation that it used. But it did not, as it must, state:

(a) The dates that it, or the CIA, ran the subject simulations;

(b) Specifically why the program cannot be segregated to release its non-exempt portions; and most importantly

(c) The inputs into the simulation(s), including the assumptions that the CIA made about the condition of the aircraft.[51]

The NSA did not, and cannot, state how the simulation's inputs are protected by any statute – it provided one run of the simulation's outputs – filed herewith as Record 32 (Exhibit F at Bates 290-317). In Long v. IRS, 742 F.2d 1173 (9th Cir. 1984), the court stated that the appropriateness of a statue's invocation must be assessed even after it was found that the statute qualified under Exemption 3.

"Without a proper Vaughn index, a requester cannot argue effectively for disclosure and this court cannot rule effectively." Campaign for Effective Transplantation v. U.S. Food and Drug Admin., 219 F. Supp. 2d 106, 116 (D.D.C. 2002). The NSA's Vaughn index cannot possibly "'enable[] the court to make an independent assessment of the claim[s] of exemption.'" Jones v. F.B.I., 41 F. 3d 238, 242 (6th Cir. 1994) (quoting Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973).[52] "The description and explanation the agency offers should reveal as much

---

[51] See 3rd Lahr Affidavit filed herewith.

[52] See also Weiner v. FBI, 943 F. 2d 972, 979 (9th Cir. 1991) (remanding case for a more thorough Vaughn index.)

detail as possible as to the nature of document without actually disclosing information that deserves protection." Oglesby v. US Dept. of Army, 79 F.3d 1172, 1176, (D.C. Cir. 1996).

The NSA relies on 50 US Code 402, and its note, to justify its withholding of the simulations. However, there is nothing in that statute, *National Security Council*, nor its note, totaling 29 pages, to justify withholding the records of the computer simulation programs' inputs.

(2) CIA

Although plaintiff could not find a case where a court ordered the disclosure of CIA names, plaintiff sees no difference between Exemption 3 and Exemptions 4, 5, 6, and 7(C), insofar as this Court's balancing test is concerned. FOIA exemptions are based on underlying policy considerations, and such considerations do not include the protection of the identities of government officials who have committed crimes – as here.

Additionally, the mere fact that the CIA claims that disclosure would reveal an intelligence source or method does not end the Court's inquiry. In Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993), the appellate court remanded the district court's holding that the CIA's claim that disclosure would reveal sources and methods "is without substance and is, indeed, the height of bureaucratic disingenuousness" – the court of appeals found that it was "'arguable' that the requested information falls within the CIA's exception (b)(3) statute." Thus, whether disclosure would reveal CIA sources or methods is a question of fact to be determined after a de novo review by this Court.

As to Randolph M. Tauss, the CIA incorrectly argues that the information does not "match the information previously disclosed" and it has not been "officially acknowledged." The Washington Times article (docket # 63 1 Lahr Aff. at Bates 31) identifies Randolph M. Tauss as having received "an intelligence medal for his work on the crash." That December 2003 article further states that

"[t]he CIA recently declassified a once-secret report on the eyewitnesses to the crash." Clearly, this reporthas been officially acknowledged, and the information withheld, the name Randolph M. Tauss, "match[es] the information previously disclosed."

This "declassified [] once-secret report on the eyewitnesses to the crash" is unquestionably responsive. Inasmuch as the Washington Times published Randolph Tauss' name and his role in the Flight 800 probe, he is entitled to less protection from disclosure than Valerie Plame – given Mr. Tauss' obvious role in a conspiracy to obstruct justice.

e. Exemption 2

The NSA also asserts that the simulation is properly withheld under Exemption 2, designed to protect from disclosure "matters that are… related solely to the internal personnel rules and practices of an agency." However, the Attorney General's Oct 12, 2001 Report states that (b)(2) "relates only to the internal rules of practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like."

The argument that software can be withheld as an internal agency record under Exemption 2 has been rejected where the software is necessary to read computer data. Yeager v. Drug Enforcement Administration, 678 F.2d at 318 (D.C. Cir. 1982).

5. Failure to segregate

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletions of the portions which are exempt." [53] "The focus in the FOIA is information not documents and an

---

[53] 5 U.S.C. § 552(b) (sentence immediately following exemptions).

agency cannot justify withholding an entire document simply by showing that it contains some exempt material." Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F. 2d 242, 368 (D.C. Cir. 1977).

The court in Voinche v. F.B.I., 46 F. Supp. 2d 26, 33 (D.D.C. 1999) refused to grant summary judgment because agency's blanket statement was inadequate,[54] as are the CIA's claims that it cannot segregate records. Plaintiff's challenges to the CIA's claims of the inability to segregate 16 records are itemized in Exhibit G, 15 of which are withheld in their entirety.

The court in Coleman v. F.B.I., 972 F. Supp. 5, 9 (D.D.C. 1997) rejected narratives on "deleted page sheets" and required the agency to redo its index to "inform the court as to the contents of individual documents and the applicability of the individual Exemptions." Similarly, the court in Krikorian v. Department of State, 984 F.2d 461 467 (D.C. Cir. 1993), remanded the case for a segregability determination for "each of the withheld documents."

An important issue in this case is the segregability of the computer simulations. "[T]he FOIA applies to computer tapes to the same extent it applies to any other documents." Long v. IRS, 596 F.2d 362, 365 (9th Cir. 1979) (Kennedy, J.), *cert. denied,* 446 U.S. 917 (1980).

The 1996 amendments to the FOIA provide that (1) the "amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in his subsection under which the deletion is made," and (2) the amount of the information deleted shall be indicated at the place in the record where such deletion occurred and it is "technically feasible" to do so. 5 U.S.C. § 552(b).

---

[54] See also Animal Legal Defense Fund, Inc. v. Department of Air Force, 44 F. Supp. 2d 295, 301, (D.D.C. 1999) (court denied the government's motion for summary judgment in part because its declaration was insufficient on the segregability issue).

The analysis of the segregability of the NSA's simulation is the same as that of the NTSB's:

> "Even if Boeing's data is found to be proprietary, it is segregable, and can be redacted from the simulation program's source code. The NTSB claims its simulation program "cannot operate" with Boeing's data redacted, and thus the data is not segregable from the code. This is irrelevant. An executable version of the source code is unnecessary for plaintiff to inspect the source code to determine simulation's dynamics."[55]

6. Unidentified records

Exhibit B is an itemization of records that the government failed to identify, 17 of which are CIA records. Six of these are in electronic format. In each instance, plaintiff submits a CIA record referencing the record that the CIA did not identify in its Vaughn index.

Thus, this is clearly a case where the CIA "ignored indications in the documents found in its initial search that there were responsive records elsewhere." Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (DC Cir. 2003), and the CIA should be ordered to search for each of 17 records that plaintiff identified.

7. Bad faith

The CIA's bad faith is not limited to its activities generating the records at issue. By November 10, 2000 FOIA request, plaintiff sought disclosure of the CIA's zoom-climb records. The CIA's January 6, 2001, response states in part:

> This acknowledges receipt of your 10 November 2000 letter requesting records under the provisions of the Freedom of

---

[55] Docket # 27, Leffler Aff. Bates 404 ¶ 53.

> Information Act (FOIA). Specifically, your request is for records pertaining to the computer program and data used to produce **the computer simulation of TWA Flight 800, 17 July 1996, losing its nose section, then climbing about 3,000 feet**. For identification purposes… We have researched this 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…[56]
> (bolded in original)

The CIA's assertion that it "simply incorporated the NTSB conclusions into our videotape" was a blatant fabrication, which ultimately resulted in a years-long delay in plaintiff's quest to obtain the records upon which the government's zoom-climb conclusion was based, as well as the otherwise needless expenditure of resources.

Compelling evidence of the NTSB's bad faith includes its production of its Record 36 (plaintiff's Record 78), which is 62 pages of radar data. Close inspection reveals that 22 pages of this record is the *very same redacted page*, over and over again.[57]

8. *In camera* inspection

Exhibit J is an itemization of six records that plaintiff suggests is appropriate for in the Court's *in camera* inspection.

"Where the record contains a showing of bad faith, the district court would likely require *in camera* inspection." Ray v. Turner, 587 F.2d 1187, 1195 (D.C.

---

[56] Docket # 28: Lahr Aff. Ex. 16 Bates 391-92.

[57] See April 4, 2006 Vaughn index pages 118-179 (pages numbered 141 through 162 the same page).

Cir. 1978). In Allen v. CIA, 636 F.2d at 1298 (D.C. Cir. 1980), the court observed that "*[i]n camera* inspection does not depend on a finding or even tentative finding of bad faith. A judge has discretion to order *in camera* inspection on the basis of uneasiness, or a doubt he wants satisfied before he takes responsibility for a *de novo* determination."

"In cases that involve a strong public interest in disclosure there is . . . a greater call for *in camera* inspection." Allen (id.) at 1294 (D.C. Cir. 1980).

Conclusion

"[A] basic purpose of the FOIA is to… [provide] a needed check against corruption."[58] Plaintiff has far exceeded his burden of proof of showing government malfeasance to dictate the application of the FOIA's balancing test. Relevant issues under the balancing test include the breadth of the controversy, the government's pattern and practice of bad faith in the underlying activities that generated the records at issue, and the extent to which disclosure would subject the inner workings of government to public scrutiny.

Date: June 5, 2006

Respectfully submitted,

Captain H. Ray Lahr
By Counsel

_____
John H. Clarke

---

[58] N.L.R.B. v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978).