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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15 WESTERN DIVISION

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

- 24 1. REPLY IN SUPPORT OF DEFENDANTS' SECOND  
25 MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO  
26 THE CENTRAL INTELLIGENCE AGENCY  
27 2. THIRD DECLARATION OF DAVID M. GLASS  
28

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1                                   REPLY IN SUPPORT OF DEFENDANTS'  
2                                   SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT  
3                                   AS TO THE CENTRAL INTELLIGENCE AGENCY

4                                   STATEMENT

5                   In this action under the Freedom of Information Act (FOIA), 5 U.S.C.  
6  
7   § 552, plaintiff, H. Ray Lahr, seeks compliance with certain requests for records  
8   that he submitted to the National Transportation Safety Board (NTSB) and the  
9   Central Intelligence Agency (CIA) by letters dated October 8, 2003. *See* 2d Am.  
10   Compl. ¶¶ 6-8, 12, 19. The requested records deal with the explosion in 1996 of  
11   TWA Flight 800. Moye Decl. at 48; 1st Buroker Decl. at 72. Plaintiff believes  
12   that “[t]he government covered up the true cause of the disaster – missile fire” and  
13   that “a conspiracy to obstruct justice” existed. Pl.’s Opp’n CIA’s Mot. Partial  
14   Summ. J. (June 5, 2006) (Pl. Mem.) at 10, 21.  
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18               Defendants, the NTSB, the CIA, and the National Security Agency (NSA),  
19   have filed three motions for partial summary judgment: (1) NTSB’s Motion for  
20   Partial Summary Judgment (NTSB Motion); (2) Defendants’ Motion for Partial  
21   Summary Judgment as to the CIA (First CIA Motion); and (3) Defendants’ Second  
22   Motion for Partial Summary Judgment as to the CIA (Second CIA Motion). The  
23   NTSB Motion addresses the search for records that the NTSB conducted and 29  
24   records from which material has been withheld pursuant to the statutory  
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1 exemptions to FOIA, 5 U.S.C. § 552(b). Mem. P. & A. Supp't NTSB's Mot.  
2 Partial Summ. J at 4-5, 5 n.2, 10-25; *see* Moye Decl. 303-452, 456-60, 463-98.  
3  
4 The First CIA Motion addresses the search for records that the CIA conducted and  
5 26 records from which material has been withheld pursuant to the statutory  
6  
7 exemptions. Mem. P. & A. Supp't Defs.' Mot. Partial Summ. J. as to CIA at 8-25;  
8  
9 *see* 2d Buroker Decl. ¶ 8. The Second CIA Motion addresses 12 records from  
10  
11 which material has been withheld pursuant to the statutory exemptions. Mem. P.  
12 & A. Supp't Defs.' 2d Mot. Partial Summ. J. at 2-16; *see* Giles Decl. ¶ 7; 3d  
13  
14 Buroker Decl. at 50-56; 1st Supp. Moye Decl. ¶¶ 6(a)-(d). Taken together, the  
15  
16 three motions address all issues presented in this case, including all responsive  
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18 records from which contested withholdings have been made.

19  
20 Plaintiff opposes the Second CIA Motion. However, he has not shown that  
21  
22 the CIA has conducted an insufficient search for records; that any of the statutory  
23  
24 exemptions has been misapplied to any of the records covered by the Second CIA  
25  
26 Motion; that any segregable nonexempt material has been withheld from any of  
27  
28 those records; or that any such record should be reviewed *in camera*. The Second  
CIA Motion should therefore be granted.



1 not undermine the determination that the agency conducted an adequate search for  
2 the requested records.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C.Cir. 2004).

3  
4 In this case, the CIA has described in detail the search for responsive  
5 records that it made. 1st Buroker Decl. ¶¶ 15-25. That search began with a search  
6 of the automated records system within the CIA’s Directorate of Intelligence (DI).  
7 *Id.* ¶ 23. When that search proved unproductive, the search continued with a  
8 manual search of “office and individual analyst files, including local databases, e-  
9 mail, and desk files,” within the DI’s Office of Transnational Issues. *Id.* ¶ 24.  
10 This search sought “information on the TWA-800 project as a whole.” *Id.*

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14 Though contesting the sufficiency of the search that the CIA has conducted,  
15 plaintiff has not identified any place where the CIA should have looked, but did  
16 not. *See* Pl. Mem. at 23. Nor has he shown that the CIA has failed otherwise to  
17 “conduct[] a search reasonably calculated to uncover all relevant documents.”  
18 *See Citizens Comm’n*, 45 F.3d at 1328 (quoting *Zemansky*, 767 F.2d at 571). His  
19 allegation that the CIA has conducted an insufficient search for records should  
20 therefore be rejected.  
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1 II. PLAINTIFF HAS NOT SHOWN THAT ANY OF THE STATUTORY  
2 EXEMPTIONS HAS BEEN MISAPPLIED TO ANY RECORD COVERED  
3 BY THE SECOND CIA MOTION.

4 A. *Plaintiff Has Not Shown That Exemption 2 to Has Been Misapplied to*  
5 *Any of the Records Covered by the Aforesaid Motion.*

6 The NSA has relied on Exemption 2 to withhold, from the records covered  
7 by the Second CIA Motion, the computer program that the CIA used to prepare its  
8 simulation of the explosion of TWA Flight 800. *See* Giles Decl. ¶¶ 7, 11. The  
9 aforementioned computer program is an NSA record that the CIA referred to the  
10 NSA for review and direct response to plaintiff. *Id.* ¶ 7; 3d Buroker Decl. ¶ 7.  
11 NSA was made a defendant in this action so that plaintiff might contest the  
12 withholding of the program. *See* Mem. P. & A. Supp't Pl.'s Mot. Lv. Am. Compl.  
13 at 4, 5.

14 In this case, plaintiff contests the withholding on the ground that Exemption  
15 2 “relates only to the internal rules [or] practices of an agency.” Pl. Mem. at 21  
16 (purporting to quote “the Attorney General’s Oct[.] 12, 2001 Report”; in fact  
17 quoting S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965)). However, the  
18 interpretation of Exemption 2 upon which plaintiff relies was rejected in *Hardy v.*  
19 *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980). Adopting  
20 the interpretation of Exemption 2 contained in H.R. Rep. No. 1497, 89th Cong, 2d  
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1 Sess. 10 (1966), *Hardy* held that “law enforcement materials, the disclosure of  
2 which may risk circumvention of agency regulation, are exempt under Exemption  
3 2.” 631 F.2d at 656. By so holding, *Hardy* became one of the progenitors of the  
4 principle that Exemption 2 “encompass[es] two distinct categories of  
5 information”: “internal matters of a relatively trivial nature – often referred to as  
6 ‘low 2’ information” and “more substantial internal matters, the disclosure of  
7 which would risk circumvention of a legal requirement – often referred to as ‘high  
8 2’ information.” U.S. Department of Justice, Office of Information & Privacy,  
9 *Freedom of Information Act Guide & Privacy Act Overview* at 191 (2004).  
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14 In this case, the NSA has relied on the interpretation of Exemption 2  
15 adopted in *Hardy* to withhold the computer program used by the CIA to prepare its  
16 simulation of the explosion of TWA Flight 800. *See* Giles Decl. ¶¶ 10-11.  
17 Plaintiff has not attempted to show – let alone shown – that the program is *not*  
18 entitled to protection under that interpretation. *See* Pl. Mem. at 21. The  
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21 withholding of the program should therefore be upheld.  
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1           B.     *Plaintiff Has Not Shown That Exemption 3 Has Been Misapplied to*  
2                 *Any of the Records Covered by the Second CIA Motion.*

3                 1.     *Plaintiff Has Not Shown That Exemption 3 Has Been*  
4                     *Misapplied by the NSA to Any of the Records Covered by the*  
5                     *Second CIA Motion.*

6           As an alternative ground for withholding the aforementioned computer  
7 program, the NSA has relied on Exemption 3 and § 6(a) of the NSA Act of 1959,  
8 50 U.S.C. § 402 note. *See* Giles Decl. ¶¶ 12-14. Plaintiff contests the withholding  
9 on two grounds. First, he alleges that the CIA, the NSA, or both have placed  
10 improper reliance on Exemption 3 and § 6(a) to withhold simulations prepared  
11 through the use of the program, or material input into the program to produce the  
12 simulations. *See* Pl. Mem. at 19, 20. Plaintiff is mistaken. Only the program has  
13 been withheld pursuant to Exemption 3 and § 6(a), and only the NSA has withheld  
14 it.  
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19           Second, plaintiff alleges that the “*Vaughn* index” that the NSA has  
20 submitted contains insufficient information to permit the program to be withheld.  
21 *See* Pl. Mem. at 19. Here, too, plaintiff is mistaken. To justify a withholding  
22 under FOIA, an agency must give the requester “sufficient information to present a  
23 full legal argument.” *Minier v. CIA*, 88 F.3d 796, 804 (9th Cir. 1996). In this  
24 case, the NSA has done so. Section 6(a) permits the withholding of “any  
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1 information with respect to the activities of [the NSA].” The protection provided  
2 by § 6(a) “is, by its very terms, absolute.” *Linder v. NSA*, 94 F.3d 693, 698 (D.C.  
3 Cir. 1996). Accordingly, the NSA need only show that a particular record  
4 “concern[s] a specific NSA activity” and that its disclosure “would reveal  
5 information integrally related to that activity.” *Hayden v. NSA/Cent. Sec. Serv.*,  
6 608 F.2d 1381, 1390 (D.C. Cir. 1979).  
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9  
10 In this case, the declaration submitted by the NSA alleges that the disclosure  
11 of the above computer program “could expose how the U.S. Government analyzes  
12 the performance characteristics of foreign weapons systems that are aerodynamic  
13 or ballistic.” Giles Decl. ¶ 11. By doing so, the declaration gives the parties  
14 “sufficient information to present a full legal argument” as to the applicability of  
15 § 6(a) to the program. *See Minier*, 88 F.3d at 804. Plaintiff makes no attempt to  
16 present such an argument, much less a persuasive attempt. *See Pl. Mem.* at 19-20.  
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20 2. *Plaintiff Has Not Shown That Exemption 3 Has Been*  
21 *Misapplied by the CIA to the Records Covered by the Second*  
*CIA Motion.*

22 The CIA has relied on Exemption 3 and 50 U.S.C. § 403g to withhold, from  
23 five of the records covered by the Second CIA Motion, the names of CIA  
24 personnel. 3d Buroker Decl. ¶ 9. Conceding that he “could not find a case where  
25 a court ordered the disclosure of CIA names,” plaintiff asks that a “balancing test”  
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1 be applied to Exemption 3 and that the names be disclosed. *See* Pl. Mem. at 20-  
2 21. However, “the sole issue for decision [under Exemption 3] is the existence of  
3 a relevant statute and the inclusion of withheld material within that statute’s  
4 coverage.” *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1979). Accordingly, it is  
5 well established that no “balancing test” exists under Exemption 3. *See, e.g.*,  
6 *McDonnell v. United States*, 4 F.3d 1227 1248 (3d Cir. 1993) (holding that the  
7 withholding of grand jury material under Exemption 3 does not require application  
8 of a “factual balancing test”); *id.* at 1250 n.17 (holding that “a court reviewing an  
9 agency’s withholding under Exemption 3 does not balance the privacy interest of  
10 the subject of the documents, as it should in applying Exemption 7(C)”) & 1250  
11 n.17; *Meyerhoff v. U.S. EPA*, 958 F.2d 1498, 1505 n.3 (9th Cir. 1992) (Rymer, J.,  
12 concurring) (stating that “presuming a balancing result in the face of congressional  
13 silence” would “render Exemption 3 superfluous”); *Fla. Immigrant Advocacy Ctr.*  
14 *v. NSA*, 380 F. Supp. 2d 1332, 1334 (S.D. Fla. 2005) (holding that, “if either  
15 Exemption 1 or 3 of the FOIA applies, that is an absolute bar to the Plaintiff’s  
16 request without resort to the balancing of Plaintiff’s need for the information  
17 verses [sic] the extent of the national security interests involved”).

18 Even assuming, *arguendo*, that a “balancing test” did exist under Exemption  
19 3, disclosure of the names that the CIA has withheld would not be justified.  
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1 Plaintiff alleges that the individuals whose names have been withheld have  
2 “committed crimes.” Pl. Mem. at 20. However, he points to no evidence that  
3 would “warrant a belief by a reasonable person” that anyone engaged in criminal  
4 behavior when he or she took part in the analysis of the explosion of TWA Flight  
5 800 that the CIA conducted. *See Nat’l Archives & Records Admin. v. Favish*, 541  
6 U.S. 157, 174 (2004). Accordingly, no justification would exist for disclosure of  
7 the names that the CIA has withheld even assuming, *arguendo*, that a balancing  
8 test existed under Exemption 3.  
9

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12 C. *Plaintiff Has Not Shown That Exemption 4 Has Been Misapplied to*  
13 *Any of the Records Covered by the Second CIA Motion.*

14 The CIA has relied on Exemption 4 to withhold, from two records covered  
15 by the Second CIA Motion, “information relate[d] to the flight characteristics and  
16 performance of Boeing 747, for example, lift coefficient, drag coefficient, and  
17 pitching moment coefficient data.” 3d Buroker Decl. ¶ 10. The Boeing Company  
18 (Boeing) considers this information to be proprietary and so, therefore, does the  
19 CIA. *See id.*  
20  
21

22 Contesting the withholding of this information, plaintiff alleges that “there  
23 is no chance that Boeing would suffer a substantial competitive injury upon  
24 disclosure” because the Boeing 747 is “an aircraft placed in service 38 years ago,  
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1 and since succeeded by three successive models.” Pl. Mem. at 12, 13. However,  
2 this allegation is undercut by Boeing’s continued production and marketing of new  
3 and modified 747s. As a recent news article stated:  
4

5           Boeing has confirmed that first deliveries of its stretched  
6 fuselage B747-8 freighter will take place in 2009.  
7

8           Luxembourg airline Cargolux has already ordered 10, while  
9 Nippon Cargo Airlines has placed a firm order for eight of the  
10 aircraft.  
11

12           Further orders are anticipated from Nippon Cargo because the  
13 carrier, an offshoot of leading shipping line Nippon Yusen Kaisha,  
14 has said it will operate 14 advanced Boeing 747-8Fs in 2009 and up  
15 to 24 in 2015.  
16

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18           \* \* \* \*

19           [Boeing sales and marketing vice-president Randy Tinseth  
20 said] production of the 747-400 freighter would stop when the 747-8  
21 variant entered service.  
22

23           The company had “a handful of positions left” for the 747-400  
24 freighter, he said. Cathay Pacific Airways has already expressed  
25 interest in taking some of the aircraft, according to media reports.  
26  
27

1           Asked \* \* \* if the 747-8 freighters would compete for orders  
2  
3           with the existing 747-400 freighters and Boeing's programme to  
4           convert 747-400s to freighters, Mr. Tinseth believed there was  
5           enough demand for all three types.

6  
7           Keith Wallis, *Lengthened Boeing Freighters Earmarked for 2009 Delivery*,  
8           Lloyd's List Int'l (June 5, 2006) (3d Glass Decl. at 24-25).

9           Because the 747 continues to be an important part of Boeing's business,  
10          plaintiff is wrong to suggest that "there is no chance that Boeing would suffer a  
11          substantial competitive injury" if the material withheld pursuant to Exemption 4  
12          were disclosed. Pl. Mem. at 12. Accordingly, plaintiff has not shown that  
13          defendants have misapplied Exemption 4 to the records covered by the Second  
14          CIA Motion.  
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18          D.     *Plaintiff Has Not Shown That Exemption 5 Has Been Misapplied to*  
19                 *Any of the Records Covered by the Second CIA Motion.*

20          The NTSB has relied on Exemption 5 and the deliberative process privilege  
21          to withhold, from two of the records covered by the Second CIA Motion, certain  
22          "preliminary radar data." 1st Supp. Moye Decl. ¶¶ 6(a), (d). Contesting the  
23          withholding of the data from one of those records, plaintiff alleges that "[c]harts  
24          of radar data are simply factual evidence, to which there is no deliberative process  
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1 privilege.” Clarke Decl. at 59.<sup>1</sup> However, plaintiff ignores the fact that “[t]he  
2 author(s) culled these data from an enormous collection of radar returns to  
3 contribute to the flight path derived from the [NTSB’s] simulations.” 1st Supp.  
4 Moye Decl. ¶ 6(d). Accordingly, he ignores the fact that “[t]he very act of  
5 distilling the significant facts from the insignificant facts constituted an exercise of  
6 judgment by agency personnel.” *Id.*

7  
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9  
10 The NTSB has also relied on Exemption 5 and the deliberative process  
11 privilege to withhold, from two of the records covered by the Second CIA Motion,  
12 certain graphs that “depict various versions of the radar data provided by the  
13 Federal Aviation Administration (FAA) for TWA flight 800” and certain graphs  
14 that “depict various outcomes of the Main Wreckage Simulation for TWA flight  
15 800, depicting differing parameters on the x and y axes.” 1st Supp. Moye Decl.  
16 ¶¶ 6(b), (c). Contesting the withholding of these graphs, plaintiff alleges without  
17 having seen the graphs that they involve “false assumptions.” Clarke Decl. at 58.

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<sup>1</sup>This objection appears in an exhibit to plaintiff’s memorandum in  
22 opposition to the Second CIA Motion, not in the memorandum itself. The same is  
23 true of other objections that plaintiff makes. *See, e.g.*, Clarke Decl. at 58.  
24 However, plaintiff’s memorandum is already as long as L.R. 11–6 permits. For  
25 this reason alone, the objection should be rejected. *See Solaiia Tech. LLC v.*  
26 *Arvinmeritor, Inc.*, 361 F. Supp. 2d 797, 826 (N.D. Ill. 2005) (striking a “seven-  
27 page extended exegesis” on the ground that the exegesis constituted “an improper  
28 attempt to file seven additional pages of argument in violation of page limits for  
the briefs”) (emphasis omitted).

1 However, the deliberative process privilege protects ““subjective documents which  
2 reflect the personal opinions of the writer rather than the policy of the agency.””

3  
4 *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir.  
5 1997) (quoting *Assembly of the State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d  
6 916, 920 (9th Cir. 1992)). In this case, the graphs that the NTSB has withheld  
7 reflect just such “personal opinions” 1st Supp. Moye Decl. ¶ 6(c) & p. 74.

8  
9 Accordingly, the graphs are entitled to protection under Exemption 5 and the  
10 deliberative process privilege even assuming, *arguendo*, that the assumptions they  
11 involve are “false.”  
12

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14 E. *Plaintiff Has Not Shown That Exemption 6 Has Been Misapplied to*  
15 *Any of the Records Covered by the Second CIA Motion.*

16 The CIA has relied on Exemption 6 to withhold, from three of the records  
17 covered by the Second CIA Motion, the names of special agents of the Federal  
18 Bureau of Investigation (FBI) and of eyewitnesses to the explosion of TWA Flight  
19 800. 3d Buroker Decl. ¶ 9. Plaintiff contests its having done so. Pl. Mem. at 16  
20 n.48. For two reasons, he has no basis for doing so.  
21

22  
23 First, Exemption 6 requires ““a court [to] balance the public interest in  
24 disclosure”” against the interest that an individual possesses in the ““control of  
25 information concerning his or her person.”” *U.S. Dep’t of Defense v. Fed. Labor*  
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1 *Relations Auth. (FLRA)*, 510 U.S. 487, 495, 500 (1994) (quoting *Dep't of Justice*  
2 *v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763, 776 (1989)).

3  
4 “[T]he only relevant ‘public interest in disclosure’ to be weighed in this balance is  
5 the extent to which disclosure would serve ‘the core purpose of the FOIA,’ which  
6 is ‘contribut[ing] significantly to public understanding of the operations or  
7 activities of the government.’” *FLRA*, 510 U.S. at 495 (quoting *Reporters Comm.*,  
8 489 U.S. at 775) (emphasis omitted). In this case, plaintiff alleges that the names  
9  
10 of the eyewitnesses should be disclosed because disclosure “would enable the  
11 public to ask these eyewitnesses whether they are amenable to being interviewed,  
12 and would shed light on the agency’s performance.” Clarke Decl. at 69.

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15 However, none of the eyewitnesses whose names have been withheld took part in  
16 the analysis of the explosion of TWA Flight 800 that the CIA conducted.

17  
18 Accordingly, none of them could “shed [any] light on the agency’s performance.”

19 *See id.*

20  
21 Second, the eyewitnesses as a group have an interest in avoiding  
22 “annoyance or harassment.” *See* 1st Buroker Decl. ¶ 34. However, “[a]nnoyance  
23 [and] harassment” are precisely what would happen if “the public” were given  
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1 information about the eyewitnesses that would lead to their being pestered for  
2 interviews. The withholding of their names should therefore be upheld.<sup>2</sup>  
3

4 F. *Plaintiff Has Not Shown That Exemption 7(C) Has Been Misapplied*  
5 *to Any of the Records Covered by the Second CIA Motion.*

6 Alternatively, the CIA has relied on Exemption 7(C) as a ground for  
7 withholding the names of the aforesaid FBI agents and eyewitnesses. 3d Buroker  
8 Decl. ¶ 9. Contesting its having done so, plaintiff alleges that the CIA “does not  
9 have law enforcement power to conduct an investigation.” Pl. Mem. at 17.  
10

11 However, Exemption 7(C) applies by its terms to “records or information  
12 compiled for law enforcement purposes,” not merely to investigatory records.  
13

14 Even assuming, *arguendo*, that this were not the case, the CIA conducted its  
15 analysis of the explosion of TWA Flight 800 solely because the FBI asked it to do  
16  
17

---

18 <sup>2</sup>When plaintiff responded to the First CIA Motion, he did not oppose the  
19 use of Exemption 6 or, in the alternative Exemption 7(C) to withhold, from the  
20 records covered by the First CIA Motion, the names of FBI agents or of  
21 eyewitnesses to the explosion of TWA Flight 800. To the contrary, he said:  
22 “Plaintiff does not contest the CIA’s withholdings of the names of individuals.”  
23 Pl.’s Mem. Opp’n CIA’s Mot. Partial Summ. J. (Sept. 13, 2005) at 21. Changing  
24 his position, he now alleges that he *does* contest the use of the above exemptions  
25 to withhold, from those records, the names of FBI agents and eyewitnesses. *See*,  
26 *e.g.*, Clarke Decl. at 68. However, his statement that he did not contest the  
27 withholding of such names from such records should be treated as a binding  
28 waiver. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (defining a waiver  
as the “intentional relinquishment or abandonment of a known right”) (quoting  
*Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

1 so as part of the criminal investigation, concerning the explosion, that the FBI was  
2 conducting. 1st Buroker Decl. ¶ 50. In addition, it has withheld the names of the  
3 FBI agents and eyewitnesses solely because the FBI asked it to do so. 3d Buroker  
4 Decl. ¶ 9. Plaintiff does not allege that the FBI lacks “law enforcement power to  
5 conduct an investigation.”  
6

7  
8 Plaintiff also contests the withholding of the names on the ground that  
9 Exemption 7(C) may not be used to redact the names of “high level government  
10 employees.” Pl. Mem. at 17. However, the names of “high level government  
11 employees” have not been redacted here. To the contrary, the names that have  
12 been redacted are the names of “FBI special agents.” 3d Buroker Decl. ¶ 9.  
13  
14

15 Plaintiff further contests the withholding of the names on the ground that  
16 “overwhelming evidence” exists of “the CIA’s dishonesty with regard to  
17 eyewitness accounts.” Pl. Mem. at 16. However, a requester who wishes to  
18 contest the withholding of material under Exemption 7(C) by “show[ing] that  
19 responsible officials acted negligently or otherwise improperly in the performance  
20 of their duties \* \* \* must produce evidence that would warrant a belief by a  
21 reasonable person that the alleged Government impropriety might have occurred.”  
22 *Favish*, 541 U.S. at 173. In this case, plaintiff has produced no evidence  
23 suggesting that anyone who worked for the CIA handled any eyewitness account  
24  
25  
26  
27  
28

1 “dishonest[ly],” i.e., in a manner “characterized by fraud; indicating a lack of  
2 probity; knavish; fraudulent; unjust’ or ‘disposed to cheat or defraud.” See  
3  
4 *Sherwood & Roberts – Kennewick, Inc. v. St. Paul Fire & Marine Ins. Co.*, 322  
5 F.2d 70, 74-75 (9th Cir. 1963) (quoting *Webster’s New International Dictionary*  
6 (2d ed.)). Accordingly, plaintiff has not shown that the CIA has misapplied  
7  
8 Exemption 7(C) to any record covered by the Second CIA Motion.

9  
10 III. PLAINTIFF HAS NOT SHOWN THAT ANY SEGREGABLE  
11 NONEXEMPT MATERIAL HAS BEEN WITHHELD FROM ANY  
12 RECORD COVERED BY THE SECOND CIA MOTION.

13  
14 Plaintiff alleges that defendants have failed to release segregable non-  
15 exempt material from nine of the records at issue in this case. Clarke Decl. at 61-  
16 66. However, none of those records is a record covered by the Second CIA  
17 Motion. *See id.*

18 IV. PLAINTIFF HAS NOT SHOWN THAT ANY RECORD COVERED BY  
19 THE SECOND CIA MOTION SHOULD BE REVIEWED *IN CAMERA*.

20 FOIA “does not mandate that the documents be individually examined in  
21 every case.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1976). To  
22 the contrary, the *in camera* review of responsive records is a “discretionary”  
23 procedure, to be employed “when the issue before the District Court could not be  
24 otherwise resolved.” *Id.* Accordingly, “an *in camera* inspection, even of one  
25  
26  
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28

1 document, should not be undertaken to satisfy the whim of a party that a searching  
2 inquiry is required if only to provide peace of mind. \* \* \* \* In other words, *in*  
3 *camera* review should not be used routinely on the theory “it can’t hurt.” *Xerox*  
4 *Corp. v. United States*, 12 Cl. Ct. 93, 95 n.3 (1987) (quoting *Ray v. Turner*, 587  
5 F.2d 1187, 1195 (D.C. Cir. 1978)).  
6  
7

8 In this case, plaintiff asks the Court conduct an *in camera* review of one of  
9 the records covered by the Second CIA Motion because he believes that the CIA  
10 has relied on Exemption 3 and 50 U.S.C. § 403g to redact the names of “high level  
11 officials.” Clarke Decl. at 79. However, plaintiff is wrong to believe that the  
12 names of “high level officials” are not protected by § 403g:  
13  
14

15 Section 403g provides “that in order to implement [50 U.S.C.  
16 § 403–1(i)], . . . the Agency shall be exempted” from disclosing “the  
17 organization, functions, *names*, official titles, salaries, or numbers of  
18 personnel employed by the agency.” Reading these two statutes  
19 together, the CIA may withhold the names of its employees because  
20 release of this information would disclose “sources and methods” of  
21 intelligence gathering. Thus, the plain language of §§ [403–1(i)] and  
22 403g expressly provides that the CIA is exempted from disclosing the  
23 names of its employees.  
24  
25  
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1 *Minier*, 88 F.3d at 801 (citations omitted; emphasis in the original).

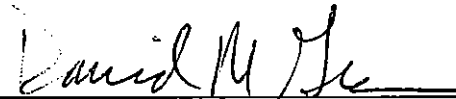
2  
3 Section 403g does not provide that the CIA may withhold the names of  
4 certain of its employees, but not the names of others. The request of plaintiff that  
5 the Court conduct an *in camera* review of the record for which he asks such  
6  
7 review should therefore be denied.

8 CONCLUSION

9  
10 For the foregoing reasons, the Second CIA Motion should be granted.

11 Respectfully submitted,

12 PETER D. KEISLER  
13 Assistant Attorney General  
14 DEBRA W. YANG  
15 United States Attorney

16 

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25  
26  
27  
28 Dated: June 26, 2006



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12 Attorneys for Defendants

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15 WESTERN DIVISION

16	_____ )	No. CV 03-08023-AHM (RZx)
17	H. RAY LAHR, )	
18	Plaintiff, )	Date: July 10, 2006
19	v. )	Time: 10 a.m.
20	NATIONAL TRANSPORTATION )	Judge: Hon A. Howard Matz
21	SAFETY BOARD, <i>et al.</i> , )	
22	Defendants. )	THIRD DECLARATION OF DAVID
23	_____ )	M. GLASS

24 DAVID M. GLASS says:

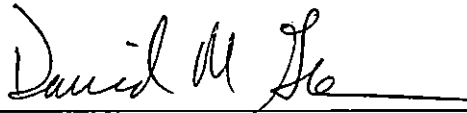
25 1. I am an attorney for the Department of Justice, Civil Division, Federal  
26 Programs Branch. I am lead counsel for defendants in this action. I make this  
27

1 declaration in support of defendants' second motion for partial summary judgment  
2 as to the Central Intelligence Agency.  
3

4 2. Attached hereto as Ex. A is a true and correct copy of Keith Wallis,  
5 *Lengthened Boeing Frieghters Earmarked for 2009 Delivery*, Lloyd's List Int'l  
6 (June 5, 2006), as downloaded from WestLaw.  
7

8 3. I declare under penalty of perjury that the foregoing is true and correct.

9 Executed June 26, 2006.  
10

11 

12  
13 DAVID M. GLASS  
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1 LAHR v. NTSB  
2 No. CV 03-08023-AHM (RZx)

3  
4 3d GLASS DECL.

5  
6 EX. A

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6/5/06 Lloyd's List Int'l (Pg. Unavail. Online)  
2006 WLNR 9494029

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**June 5, 2006**

Lengthened **Boeing** freighters earmarked for 2009 delivery

Keith Wallis in Hong Kong

**BOEING** has confirmed that first deliveries of its stretched fuselage B747-8 freighter will take place in 2009.

Luxembourg airline Cargolux has already ordered 10, while Nippon Cargo Airlines has placed a firm order for eight of the aircraft.

Further orders are anticipated from Nippon Cargo because the carrier, an offshoot of leading shipping line Nippon Yusen Kaisha, has said it will operate 14 advanced **Boeing 747-8Fs** in 2009 and up to 24 in 2015.

**Boeing sales** and marketing vice-president Randy Tinseth said the aircraft would be able to carry an extra 21 tonnes of freight at 15.1% lower tonne-mile cost than the conventional **Boeing 747-400** freighter.

Cargo capacity rises to 134 tonnes against 113 for a **747-400** after **Boeing** stretched the fuselage by 5.56 m.

The passenger version of the aircraft will also be able to carry more cargo in the belly space after **Boeing** increased the length of the fuselage by 3.5 m.

Speaking in Hong Kong, Mr Tinseth said the **Boeing 747-8F** would be 17.3% more fuel-efficient than the **747-400** freighter.

He added that production of the **747-400** freighter would stop when the **747-8** variant entered service.

The company had 'a handful of positions left' for the **747-400** freighter, he said. Cathay Pacific Airways has already expressed interest in taking some of the aircraft according to media reports.

Asked by Lloyd's List if the **747-8** freighter would compete for orders with the existing **747-400** freighters and **Boeing's** programme to convert passenger **747-400s** to freighters, Mr Tinseth believed there was enough demand for all three types.

He said the three aircraft, two when **747-400** production ended, would be operated by customers with different perspectives on freighter use.

The **747-8** freighter would continue to have a hinged nose while being more fuel efficient and reliable. The converted **747-400** freighter would have a cheaper capital cost.

Nippon Cargo Airlines is using the **747-8** freighter as cornerstone to becoming an independent, global all-cargo airline over the next 10 years.

Under its so-called Phoenix project the carrier will use the three years before the new aircraft are delivered to implement flight and maintenance operations.

Arrival of the **747-8Fs** in 2009 will coincide with an increase in landing and take-off slots at Tokyo's Narita and Haneda airports, scheduled to be available from 2009.

This would follow completion of an extension to Narita's B runway and the resumption of international operations at Haneda airport.

---- INDEX REFERENCES ----

COMPANY: CATHAY PACIFIC AIRWAYS LTD; CARGOLUX AIRLINES INTERNATIONAL SA; **BOEING CO** (THE); NIPPON CARGO AIRLINES

NEWS SUBJECT: (Major Corporations (1MA93))

INDUSTRY: (Commercial Aircraft (1CO01); Freight Transportation (1FR88); Manufacturing (1MA74); Transportation (1TR48); Aerospace & Defense (1AE96); Air Transportation (1AI53); Air Freight (1AI70); Freight Transportation Regulatory (1FR22); Water Transportation (1WA23); Aerospace (1AE56); Fixed-Wing & Helicopters (1FI11); Ocean Shipping (1OC22))

REGION: (Japan (1JA96); Asia (1AS61); Far East (1FA27); Eastern Asia (1EA61))

Language: EN

OTHER INDEXING: (**BOEING**; CATHAY PACIFIC AIRWAYS; NARITA; NIPPON CARGO; NIPPON CARGO AIRLINES; NIPPON YUSAN KAISHA) (Arrival; Lengthened Boeing; Lloyd; Randy Tinseth; Tinseth) (Europe; Western Europe; Luxembourg)

KEYWORDS: (Company News); (Contracts & New Orders)

COMPANY TERMS: CARGOLUX AIRLINES INTERNATIONAL SA

PRODUCT: TRANSPORTATION EQUIPMENT; unknown; Aircraft Parts & Equipment, NEC; Aircraft; Transportation Equipment Mfg; Other Aircraft Part & Auxiliary Equipment Mfg; Aircraft Mfg; Aerospace Product & Parts Mfg

SIC: 3700; 3720; 3728; 3721

NAICS CODE: 336; 336413; 336411; 33641

Word Count: 495

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