Nos. 06-56717 & 06-56732

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

H. RAY LAHR,

Plaintiff-Cross-Appellant/Appellee,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, ET AL.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY/RESPONSE BRIEF FOR FEDERAL APPELLANTS

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FEDERAL APPELLANTS' REPLY TO PLAINTIFF'S RESPONSE BRIEF

SUMMARY OF ARGUMENT

This is a cross-appeal in a FOIA case regarding the crash of TWA Flight 800 in 1997. The government raises one issue in its appeal, and in our opening brief, demonstrated that the lower court erred in ordering the public disclosure of the names of eyewitnesses and FBI agents because this information is exempt from disclosure

under FOIA Exemptions 6 and 7(C) which protect personal privacy. The district court's judgment should be reversed on this single issue.

The government established that, in conducting the requisite balancing test under the privacy exemptions, the court below improperly denigrated the privacy interest at stake in this case and erred as a matter of law in imposing an undue evidentiary burden upon the government by requiring the government to contact individuals in order for the privacy exemptions to apply. The government also showed that the district court erred by failing to consider the impact of public release to all, which is required under the FOIA.

On the public interest side of the test, the government demonstrated that plaintiff failed to meet the threshold evidentiary test for establishing misconduct under National Archives & Records Administration v. Favish, 541 U.S. 157 (2004). It is not enough for plaintiff broadly to allege government misconduct or negligence with regard to the accident investigation. Rather, plaintiff must establish a "nexus" between the requested names and any alleged government misconduct, and support that claim with a "meaningful evidentiary showing." Plaintiff failed to do so.

Finally, the government showed that, while there is interest in understanding the cause of the crash of Flight 800, that interest has been served in the extensive reports already issued. Disclosing the names plaintiff seeks will provide no

additional information that would directly shed light on an agency's performance of its statutory duties.

In his opening brief, plaintiff devotes four and one-half of his sixty-seven pages to responding to the government's appeal. As we show below, plaintiff's response brief is more noteworthy for what it does not address, than for the passing comments that it does make. Plaintiff merely asserts in a broad and conclusory manner that he has "far exceeded his burden of proof of showing government malfeasance to dictate disclosure under the balancing test applicable to the FOIA's privacy exemptions." Plaintiff's Opening Brief ("Pl. Br.") at 43-44. Plaintiff's failure to come to grips with the government's specific arguments and case law is dispositive of the government's appeal.

ARGUMENT

I. SIGNIFICANT PRIVACY INTERESTS ARE AT STAKE IN THIS CASE.

1. On the privacy side of the equation, we pointed out that, over the past quarter century, the Supreme Court consistently has protected privacy interests, such as those at stake in this case, coming down on the side of privacy in six out of the last six such cases to reach the Court, including the landmark case of Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989), and culminating most recently in Favish, supra. See Government's Opening Brief ("Gov.

Br.") at 14-18 (and cases cited therein). With only a passing (and mistaken) reference to Favish regarding the public interest side of the test (discussed further infra), plaintiff does even mention any of this consistent and controlling Supreme Court precedent in his response brief.

We pointed out that the district court misinterpreted settled Supreme Court precedent by limiting the protection of names to criminal cases. See Govt. Br. at 18-20. Plaintiff does not rise to the defense of the lower court on this issue. We argued that the district court improperly imposed an undue evidentiary burden upon the government by insisting that the government proffer assertions by the eyewitnesses that they wish to avoid contact in order for the privacy exemptions to apply. See id. at 20-23. Again, plaintiff does not attempt to support the district court's opinion in this regard. We pointed out that the district court's judgment runs counter to the Supreme Court's recent recognition that the privacy interest "is at its apex" when disclosure would associate a private individual with a law enforcement investigation. See Favish, 541 U.S. at 166. See also SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (underscoring privacy interests of suspects, witnesses, and investigators, in not having their names connected with a criminal investigation); Govt. Br. at 24-25 (citing other cases). Plaintiff makes no response. We also set forth at length settled authority from numerous courts of appeals demonstrating that

the district court's order to disclose the names of FBI agents is against the great weight of circuit court authority, including this Court's holding in Hunt v. FBI, 972 F.2d 286, 288 (9th Cir. 1992). See Govt. Br. at 27-30 (and cases cited therein). Plaintiff does not take issue with any of this case law or make any attempt to distinguish it from the present circumstances.

2. We also demonstrated that the lower court incorrectly viewed disclosure in a vacuum and failed to consider the impact of public release to all, including "intense scrutiny by the media," which was such a critical factor in the Favish Court's determination that privacy interests should prevail in that case. See Govt. Br. at 24-17 (quoting Favish, 541 U.S. at 167). Here, at last, plaintiff weighs in - - making the sole argument in his brief regarding the privacy interests at stake - - to suggest that the media is not particularly interested in eyewitness accounts of the crash of TWA Flight 800. See Pl. Br. at 45 ("[t]he sad fact is that any eyewitness who wants to share his or her observations with the public via the media must purchase advertising to do so").

Of course, plaintiff's suggestion that the media is not interested in this matter runs counter to his repeated theme that the crash of TWA Flight 800 was "the most controversial aircraft disaster in history," and to his notation that "the three major networks broadcast excerpts of the CIA-produced animation entitled, 'What Did The

Eyewitnesses See?'" and that "CNN broadcast the 14 minute animation in its entirety." Pl. Br. at 2. Further, even aside from media interest, a court must take into account "the consequences" of FOIA disclosure upon personal privacy, including "public exploitation" of the records by either the requester or others. See Favish, 541 U.S. at 167-80. As plaintiff and the district court readily acknowledge, plaintiff seeks this information for the very purpose of making direct contact with eyewitnesses and FBI agents. See Govt. Br. at 26. See Painting Industry of Hawaii Market Recovery Fund v. Dept. of Air Force, 26 F.3d 1479, 1483 (9th Cir. 1994) (this Court recognized infringement of privacy interest where direct contact with named employees would occur).

The government's unrebutted arguments that the district court committed numerous errors of law regarding the privacy side of the balancing test establishes that significant privacy interests are at stake in this case.

II. THERE IS NO COGNIZABLE PUBLIC INTEREST IN DISCLOSURE OF THE NAMES AT ISSUE.

1. On the public interest side of the balancing test, here again the government set forth at length the numerous errors of law that underlie the district court's analysis and demonstrated that, applying settled precedent, there is no cognizable public interest in public disclosure of the names at issue. See Govt. Br. at 31-44. Among

other things, the government established that, after Favish, in order for an asserted public interest in disclosing official misconduct to outweigh legitimate privacy interests, the FOIA requester must make a "meaningful evidentiary showing" that would "warrant a belief by a reasonable person that the alleged government impropriety might have occurred." See Favish, 541 U.S. at 174. As we showed in our opening brief, plaintiff failed to meet this threshold evidentiary test in the court below. See Govt. Br. at 31-38.

Plaintiff's sole response to the government's arguments regarding the public interest side of the balancing test is the single conclusory statement that "plaintiff has far exceeded his burden of showing government malfeasance to dictate disclosure under the balancing test applicable to the FOIA's privacy exemptions." Pl. Br. at 43-44. Plaintiff makes no argument or citation to any evidence in support of this statement. In another portion of plaintiff's brief (in support of his cross-appeal regarding the application of the deliberative process privilege under FOIA Exemption 5 to four documents), plaintiff sets forth his claims of alleged government "misconduct," including, inter alia, that the government withheld and altered evidence during the Flight 800 probe, misrepresented radar data, altered underwater video tapes, and concealed the existence of a missile debris field. See Pl. Br. at 27-33. We can only assume that this is the government "malfeasance" to which plaintiff

refers in attempting to met Favish's threshold evidentiary test under Exemptions 6 and 7(C).

In our opening brief, we specifically addressed these assertions and established that these general claims are irrelevant for present purposes since plaintiff does not assert, and the district court did not find, that they had any bearing on the names of eyewitnesses or FBI agents which are the sole subject of the government's appeal. See Govt. Br. at 32-38. In his response brief, plaintiff merely repeats his broad, general allegations of misconduct without any attempt to rebut the government's argument that they do not bear upon the issue at hand.

As we previously stated, Favish and the courts of appeals have emphasized the "nexus required between the requested documents and the purported public interest served by disclosure." Favish, 541 U.S. at 174 (emphasis added). See, e.g., Senate of the Commonwealth of Puerto Rico v. Dept. of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (requestor must show that there is a public interest in the "specific information being withheld"). See also Govt. Br. at 33 (and cases cited therein). As we have shown, neither plaintiff nor the district court established any nexus between plaintiff's claims of alleged government impropriety and the names that are the subject of this appeal. See id. at 34-37. In his responsive brief, plaintiff makes no attempt to do so. In the absence of any support in the record

that any government agency engaged in any improper conduct with regard to the witness statements at issue in this appeal, plaintiff has failed to demonstrate any cognizable public interest in disclosure of the names of eyewitnesses and FBI agents. Under these circumstances, the balancing test tips decisively in favor of the significant privacy interests at stake.

2. Further, in our opening brief, we demonstrated that disclosure of the requested names will shed no additional light on any cognizable public interest above and beyond that already accomplished by the extensive reports regarding the crash of TWA Flight 800 already issued, a critical factor in determining whether disclosure is warranted. See Govt. Br. at 39-42 (and cases cited therein). Plaintiff makes no response to this argument.

Finally, we pointed out that the district court erred in factoring a "derivative use" into the public interest side of the balancing test. See Govt. Br. at 42-44. Here again, plaintiff fails to come to the defense of the district court or to respond to this argument except to affirm that his design for the requested records is, in fact, a derivative use.

In sum, the cause of the tragic crash of Flight 800 has been extensively investigated and virtually all the records associated with that investigation, including the actual statements of eyewitness, have been made public. Still, as the district court

noted, as is often the case in such situations, "there was an ensuring torrent of critics and skeptics who challenged the bona fides of the investigation and rejected the explanation." See Federal Appellants' Excerpts of Record ("Fed. E.R.") at 544. These skeptics, such as plaintiff, are perfectly free to do so. However, in the absence of substantiated allegations of misconduct on the part of the government in obtaining eyewitness statements, under fundamental FOIA principles, plaintiff is not entitled to make public the names of persons involved in the investigation. Even where there is general public interest in the subject matter of governmental action, the disclosure of records with individual names redacted is the accepted practice. See Dept. of State v. Ray, 502 U.S. 164, 173-79 (1991) (upholding release of interview summaries but approving redaction of names of Haitian refugees interviewed by State Department); Minnis v. Dept. of Agriculture, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985) (although recognizing a valid public interest in questioning the fairness of an agency lottery system awarding rafting permits, this Court held that the release of names of the applicants would not further that interest). This is precisely what the government properly did in this case.

With the exhaustive public materials in hand, plaintiff may continue to question the cause of the crash of TWA Flight 800 and to investigate any alleged government malfeasance. What he may not do, under settled law, is subject an individual, "'who

is not suspected of any wrongdoing, to involuntary personal involvement in [plaintiff's] investigation" because "[h]olding a person's privacy hostage in this fashion is contrary * * * to the basic right in this nation simply to be left alone.'" Painting Industry of Hawaii Market Recovery Fund, 26 F.3d at 1483 (quoting Heights Community Congress v. Veterans Admin., 732 F.2d 526, 630 (6th Cir.), cert. denied, 469 U.S. 1034 (1984). For the forgoing reasons, and the reasons previously stated in the government's opening brief, the district court's judgment that the names of eyewitnesses and FBI agents must be publically disclosed, should be reversed.

FEDERAL APPELLANTS' RESPONSE TO PLAINTIFF'S CROSS-APPEAL

STATEMENT OF ISSUES ON CROSS-APPEAL

1. Whether the district court correctly held that certain records are protected from disclosure pursuant to the deliberative process privilege under FOIA Exemption 5?

2. Whether the district court correctly held that the government's search for responsive records was adequate?

3. Whether the government's Vaughn index was sufficient?

4. Whether the district court erred in its findings regarding certain computer programs and their "inputs?"

SUMMARY OF ARGUMENT

Plaintiff devotes the bulk of his opening brief to his cross-appeal. In that appeal, plaintiff chiefly argues that the district court erred in granting summary judgment to the government regarding four documents on the grounds that they are protected from disclosure under the deliberative process privilege of Exemption 5. Plaintiff contends that the privilege does not apply here in the face of alleged government "fraud" or "illegality" or "misconduct," and that the records at issue are "predecisional."

As we show below, plaintiff has waived any argument that a "fraud/illegality/misconduct" exception vitiates the deliberative process privilege under Exemption 5 by failing to raise this issue below. Assuming plaintiff did not waive this argument, there is considerable question whether any such "exception" even exists. In any event, plaintiff has failed to establish any irregularity with regard to the documents at issue, and, as the district court correctly found, the documents are predecisional and part of the CIA's continuing deliberative process in analyzing information about the crash.

The remainder of plaintiff's cross-appeal raises arguments that the government's search and Vaughn index were inadequate, and that certain specific records, primarily concerning "computer runs" and their input "data" were not located

and/or produced by the government. The underlying theme to this portion of plaintiff's appeal is his belief that the government possesses additional records, since data which plaintiff is convinced must exist were not located in the government's search and other located records are not particularly useful to plaintiff.

As we show below, it is well-settled that mere speculation that documents might exist is not enough to undermine a finding of adequate search. Not only did the district court correctly find that the government had conducted an adequate search here, but it repeatedly rejected plaintiff's claims that the government's search and/or Vaughn index was tainted by "bad faith." In short, plaintiff's cross-appeal is meritless.

ARGUMENT

I. PLAINTIFF'S CROSS-APPEAL REGARDING EXEMPTION FIVE (DELIBERATIVE PROCESS PRIVILEGE) LACKS MERIT.

A. The Disputed Records Are Protected Under Exemption 5.

Plaintiff devotes a considerable portion of his opening brief to the argument that the district court erred in granting the government's summary judgment motion with regard to four documents withheld under Exemption 5's deliberative process privilege. See Pl. Br. at 23-41.[1] This exemption provides that the FOIA disclosure

[1] Plaintiff fails to identify the specific records at issue. However, they are (continued...)

requirements do not apply to information that qualifies as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This provision shields "those documents, and only those documents, normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Accordingly, it includes a "deliberative process" privilege. Dept. of Interior v. Klamath Water Users Protective Assoc., 532 U.S. 1, 8 (2001). The purpose of this privilege is "to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny." Assembly of the State of California v. Dept. of Commerce, 968 F.2d 916, 920 (9th Cir. 1992), as

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[1](...continued)
Plaintiff's Record No. 27 (an eighteen-page CIA "'draft report containing analysis and preliminary conclusions'" concerning the crash, dated March 3, 1998, where the court ordered the title, date and bolded titles to be released, and found the remainder to be "unsegregable" and exempt from disclosure) (see Fed. E.R. at 631-32); No. 28 (a seventeen-page CIA "'[d]raft report concerning preliminary analysis and conclusions regarding radar tracking,'" dated March 17, 1998, where the court ordered the title, date, bolded titles, Figure 1 and accompanying notation, and the entirety of the Appendix to be released and found the remainder to be "unsegregable" and exempt from disclosure) (see id. at 632-33); No. 43 (a five-page undated CIA "'draft with handwritten annotations reflecting candid discussion and opinion * * * regarding CIA analysis of eyewitness report'" about the crash, held to be exempt from disclosure in its entirety) (see id. at 633-34); and No. 74 (an undated NTSB record consisting of fifteen pages of data, comments, and notes tracking the location in the ocean of debris from TWA Flight 800, where the court held the comments and handwritten notes only were exempt from disclosure) (see id. at 634-35).

amended on denial on reh'g (Sept. 17, 1992). See Sears, 421 U.S. at 150-52 (the "ultimate purpose" of Exemption 5 is "to prevent injury to the quality of agency decisions" by protecting the "decision-making processes of government agencies"). Thus, Exemption 5 covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Klamath, 532 U.S. at 8 (citation and internal quotation marks omitted). See EPA v. Mink, 410 U.S. 73, 87 (1973) (Exemption 5 shields agencies from prematurely "'operat[ing] in the fishbowl'") (quoting S. Rep. No. 813, 89 Cong., 1st Sess. 9 (1965)).

In order "[t]o fall within the deliberative process privilege, a document must be * * * [1] 'predecisional and [2] deliberative.'" Carter v. Dept. of Commerce, 307 F.3d 1084, 1089-91 (9th Cir. 2002) (citation omitted). "A 'predecisional' document is one 'prepared in order to assist an agency decisionmaker in arriving at his decision,' and may include 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. A predecisional document is a part of the 'deliberative process,' if 'the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its

functions.'" Assembly, 968 F.2d at 920 (quoting Formaldehyde Inst. v. Dep't of Health and Human Servs., 889 F.2d 1118, 1122 (D.C. Cir.1989)).

After reviewing the four records at issue in camera, the district court here found them to be both predecisional and deliberative and, thus, protected from disclosure under FOIA Exemption 5, either in whole or part. See Fed. E.R. at 630-40. In his cross-appeal, plaintiff does not dispute that the records at issue are deliberative. Instead, plaintiff presents three arguments: (1) a "crime/fraud/misconduct exception" vitiates the applicability of the deliberative process privilege in this case; (2)) the court erred in not applying a "balancing test"to Exemption 5; and (3) the records at issue were not predecisional. See Pl. Br. at 25-41. Plaintiff's arguments are meritless.

B. Plaintiff Waived His "Crime/Fraud/Misconduct" Exception Argument And, Even If He Did Not, If Any Such Exception Exists, It is Inapplicable Here.

1. In his opening brief, plaintiff states that "[t]he district court did not adjudicate whether plaintiff had made a prima facie case of fraud in the underlying activities which generated the records at issue." Pl. Br. at 26. Plaintiff claims that "[b]ecause "fraud or illegality vitiates any privilege, as a matter of law, this was error." Id. (emphasis added). See also id. at 34 ("Had the Court properly applied the law to the government's privilege assertions, it would have ordered disclosure of

what otherwise may be deliberative materials"). The simple reason that the court below did not address this issue is because plaintiff did not make this argument in the district court. As discussed above, and in our opening brief (see Govt. Br. at 32-38), plaintiff did argue generally that the government engaged in "malfeasance" for purposes of establishing a "public interest" under the balancing test applied pursuant to FOIA Exemptions 6 and 7(C). However, plaintiff never contended - - as he does for the first time in this Court - - that Exemption 5's deliberative process privilege is inapplicable in this case because of government fraud, crime, or misconduct. In his opening brief, plaintiff fails to indicate where, if anywhere, he raised this argument in the district court.

Of course, it is well-settled that since plaintiff did not make this argument in the district court * * *it is therefore waived." Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1130-31 (9th Cir.1998), cert. denied, 526 U.S. 1111 (1999) . When the government raised Exemption 5's deliberative process privilege as an exemption from disclosure in moving for summary judgment, plaintiff did not argue that the government's alleged fraud or crime vitiated the privilege. See Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 912 (9th Cir.1995) (plaintiff's failure to raise this issue in opposition to summary judgment has resulted in waiver on appeal). See also Ritchie v. United States, 451 F.3d 1019, 1026

& n. 12 (9th Cir.2006), cert. denied, 127 S. Ct. 1337 (2007) (concluding that failure to raise an issue before district court resulted in waiver on appeal, particularly where the issue involved district court's broad discretion and district court "might have been able to address the problem" if raised).

Nor do any of the exceptions to this recognized waiver rule apply here. See Bolker v. C.I.R., 760 F.2d 1039, 1042 (9th Cir. 1985) (recognizing exceptions (1) if there are "exceptional circumstances" why the issue was not raised in the trial court; (2) "the new issue arises while the appeal is pending because of a change in the law," or (3) the issue presented is "purely one of law" and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court). Because there are no "exceptional circumstances," nor is this a "new issue," and it raises issues of fact, not law, plaintiff has waived this argument by raising it for the first time in this Court.

2. Even assuming arguendo that plaintiff has not waived this argument, it is without merit. In the first instance, there is considerable question whether such an "exception" to the invocation of the deliberative process privilege even exists. Plaintiff primarily addresses the "exception" in terms of "fraud" or crime," but it is settled that the crime/fraud exception applies to the attorney-client privilege, not the deliberative process privilege. See, e.g., In re Grand Jury Subpoena 92-1(SJ), 31 F.3d

826, 829 (9th Cir.1994) (the crime-fraud exception applies to attorney-client communications which "solicit or offer advice for the commission of a crime or fraud"). Indeed, plaintiff seems to acknowledge as much. See Pl. Br. at 27 (citing United States v. De La Jara, 973 F.2d 746, 748 (9th Cir. 1992) (recognizing crime-fraud exception to attorney-client privilege). Plaintiff fails to cite a single authority applying the "crime/fraud exception" to the deliberative process privilege and the government is not aware of any such case law.

Plaintiff cites to a single district court case, focusing not on fraud or crime, but government "misconduct." See Pl. Br. at 26 (citing Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 134 (D.D.C. 2005) (Federal Tort Claims Act action alleging malicious prosecution and abuse of process; court held "[t]he deliberative process privilege yields * * * when government misconduct is the focus of the lawsuit").

However, neither Tri-State nor any of the other authorities cited therein were FOIA cases or discussed Exemption 5, and the documents at issue in that case were also being withheld on a claim of attorney-client privilege. See 226 F.R.D. at 136, n.15. Moreover, for the most part, the authorities cited in Tri-State refer to dicta. See Tri-State, 226 F.R.D. at 135 (citing In re Sealed Case, 121 F.3d 729, 746 (D.C. Cir.1997) (the "presidential communications privilege was at issue; the court stated

in dicta that the deliberative process privilege "disappears altogether when there is any reason to believe government misconduct occurred"); In re Subpoena Served Upon Comptroller of Currency, 967 F.2d 630, 634 (D.C. Cir.1992) (the "bank examination privilege was at issue; in dicta, court stated deliberative process privilege could be overcome to "'shed light on alleged government malfeasance'") (citation omitted); In re Subpoena Duces Tecum Served on Office of the Comptroller of Currency, 145 F.3d 1422, 1424 (D.C. Cir.1998) (acknowledging in dicta (but not applying) misconduct exception to deliberative process privilege, court held that "the common law deliberative process privilege is not appropriately asserted * * * when a plaintiff's cause of action turns on the government's intent"). Plaintiff also cites Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (in support of its statement that "the deliberative process privilege is 'a discretionary one,'" the court stated in dicta, that "'where the documents sought may shed light on alleged government malfeasance,' the privilege is routinely denied") (citations omitted). See Pl. Br. at 27.

Further, in Tri-State, the court stated that "it is impossible to know, without reviewing the documents in camera, whether the documents are in fact privileged and whether they lose their privileged status because they contain information about the government's misconduct. Accordingly, the government must submit all responsive

documents, along with a reasonably detailed privilege log, to chambers for in camera review." Tri-State, 226 F.R.D. at 135-36 (citing United States. v. Zolin, 491 U.S. 554, 570-72 (1989)). In the instant action, the court reviewed the documents at issue in camera and, because plaintiff failed to argue that they were tainted by any fraud, crime, or misconduct, the court made no finding in that regard. The court addressed whether the records were "predecisional," the only argument raised by plaintiff. See Fed. E.R. at 630-40. In addition, it should be noted that, even on appeal, plaintiff does not contend that these particular documents were tainted by crime, fraud, or misconduct. Plaintiff only reasserts his general allegations of governmental misconduct regarding the investigation as a whole.

In any event, as Tri-State itself stated: "in order to invoke such an exception, 'the party seeking discovery must provide an adequate factual basis for believing that the requested discovery would shed light upon government misconduct.'" Tri-State, 226 F.R.D. at 135 (citation omitted) (emphasis added). Plaintiff did not do so here.

3. As discussed, the court below made no finding of government crime, fraud, illegality, misconduct or malfeasance in regard to documents protected by the deliberative process privilege. This is due to the fact that plaintiff made no such argument nor presented any such evidence in the district court. At most, in the face of the government's lack of response on the issue, in considering the public interest

prong of the Exemptions 6 and 7(C) privacy test, the court stated in its August 2006 opinion that

> For the purpose of determining whether Exemption 7(C) (and other FOIA provisions are applicable, and only for that purpose, the Court finds that, taken together, this evidence is sufficient to permit Plaintiff to proceed based on his claim that the government acted improperly in its investigation of Flight 80 or at least performed in a grossly negligent fashion. Accordingly, the public interest in ferreting out the truth would be compelling indeed.

Fed. E.R. at 553-54 (emphasis added).[2]

In its October 2006 opinion, the district court reiterated that it was making no finding of government impropriety, even under its privacy exemption analysis, stating

> In adopting here its previous finding that the evidence is sufficient to suggest that the government acted improperly in its investigation of Flight 800 (or at least performed in a grossly negligent fashion), the Court reiterates that that conclusion is based on a characterization of the evidence in the light most favorable to Plaintiff, but does not reflect or constitute any finding by the Court.

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[2] The government's non-response to plaintiff's scattershot allegations of "misconduct" should not be taken as a concession that plaintiff's claims have merit. As the Supreme Court stated in Favish: "allegations of misconduct are 'easy to allege and hard to disprove.'" See 541 U.S. at 175 (citation omitted). Since, as we have demonstrated in our opening brief and again in this brief, plaintiff's misconduct charges did not bear upon the eyewitness statements being withheld under Exemption 6 and 7(C) (and plaintiff did not argue any misconduct with regard to Exemption 5's deliberative process privilege), there was no need for the government to respond to plaintiff's various and sundry, and otherwise irrelevant, claims of misconduct, such as removing evidence from the reconstruction hangar. See Pl. Br. at 28-33.

Fed. E.R. at 601(emphasis added).

To be clear, the government does not fault the district court for considering the evidence in the light most favorable to plaintiff. Under settled principles, it was correct to do so in considering the government's motion for summary judgment. The government has only argued in our opening brief and here that there was no such evidence regarding the eyewitnesses statements and, therefore, where the court erred was in according any weight to the public interest side of the balancing test under FOIA Exemptions 6 and 7(C) with regard to the disclosure of the names of eyewitnesses and FBI agents. In addition, for present purposes, the government underscores that the court itself made no finding of misconduct with regard to Exemptions 6 and 7(C) (and certainly not with regard to Exemption 5, where the claim had not even been presented).

In both of its opinions, the district court returned to this theme, repeatedly emphasizing that it was not making a finding of government illegality, misconduct, or even bad faith. See Fed. E.R. at 544 ("I do not purport to provide * * * an affirmation or repudiation of the official government conclusion as to the cause of the flight's crash"); id. at 549 ("[t]he ensuing summary judgment characterizes the evidence in the light most favorable to Plaintiff, but does not reflect or constitute any finding by the Court") (emphasis in original). See also id. at 615 (CIA's response to

search "appears to be in good faith"); id. at 616 (any CIA Vaughn index errors "are not evidence of bad faith"); id. at 617 (with regard to FOIA processing, "the government's explanation is adequate, and Plaintiff's allegations are not evidence of governmental bad faith"); id. ("once again, these allegations do not establish bad faith on the part of the government").

This is the critical and dispositive point with regard to plaintiff's Exemption 5 argument. The court considered the government's Vaughn index and viewed the records at issue in camera. At no point did the court make any finding of government misconduct or bad faith with regard to the four records at issue under the deliberative process privilege. Indeed, plaintiff made no such allegations concerning these specific documents in the court below nor does he in this Court. There simply is no support in the record that the documents at issue were prepared other than as honest attempts to analyze the accident and provide accurate information to the decisionmakers.

In short, even assuming that plaintiff has not waived his "misconduct exception" argument, and even assuming that such an exception exists, nevertheless, plaintiff has failed to "'provide an adequate factual basis for believing that the requested discovery would shed light upon government misconduct.'" Tri-State, 226 F.R.D. at 135 (citation omitted).

C. FOIA'S "Balancing Test" Does Not Apply to Exemption 5.

Plaintiff contends that the district court erred in not applying a "balancing test" to the deliberative process determination under Exemption 5. See Pl. Br. at 36-37. The short answer to plaintiff's argument was correctly provided by the district court when it stated that the "balancing test is inapplicable to Exemption 5." See Fed. E.R. at 568, n. 33. There are only two requisite elements for establishing that the deliberative process privilege protects records from disclosure under Exemption 5: the records must be "predecisional" and "deliberative." See Carter, 307 F.3d at 1089-91. This Court has refused to read any additional elements into the Exemption 5 test. See National Wildlife Federation v. Forest Service, 861 F.2d 1114, 1117 (9th Cir. 1988) (rejecting addition of third element, i.e., that the deliberative materials concern "law or policy").

Further, applying a balancing test under Exemption 5 is inconsistent with current FOIA jurisprudence. Under the civil discovery process, "the deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." F.T.C. v. Warner Communications Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). However, under now settled FOIA law, "the identity of the requesting party has no bearing on the merits of his or her FOIA

request'" and the public interest test "'cannot turn on the purposes for which the request for information is made." Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 771 (1989). Thus, plaintiff's identity, purpose, or purported need for the requested information cannot be factored into FOIA's exemptions, as would generally be the case under the deliberative process privilege in civil litigation.

We are unaware of any authority that supports plaintiff's argument with the exception of the sole case cited by plaintiff that predates the more recent FOIA law cited above. See Pl. Br. at 36 (citing General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969). In that case, the court did not hold that "the FOIA's balancing test applies to Exemption 5," as plaintiff argues here. Rather, it merely stated that "the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles." Id. at 880. More critically, the court in that case did not engage in any sort of balancing, but found the documents at issue there either were not "deliberative" or were largely "factual." Id.[3]

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[3] See Assembly, 968 F.2d at 921 ("[t]he earliest cases to examine the deliberative process privilege contrasted "factual" and "deliberative" materials. * * * Soon, however, the Supreme Court warned against a 'wooden' application of this distinction that would make the amount of material deemed factual within a document the deciding factor. * * * The factual/deliberative distinction survives, but simply as a useful rule-of-thumb favoring disclosure of factual documents, or the factual portions of deliberative documents where such a separation is feasible") (citations omitted).

This Court has stated that Benson "merely recognized that where documents normally privileged in the civil discovery context are involved, courts may employ in Exemption 5 cases the same equitable principles that they may use to fix the scope of discovery in civil litigation against an agency." Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1088 n.4 (9th Cir. 1997). Accordingly, the Court made clear that "equitable discretion" to resolve exemption claims under FOIA does not exist except to the limited extent recognized in Benson. Id. The Court further underscored the extremely limited nature of that discretion by pointing out that Congress "'created a scheme of categorical exclusion'" when it enacted FOIA; "'it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.'" Id. at 1087 (quoting FBI v. Abramson, 456 U.S. 615, 631 (1982)); accord Schiffer v. FBI, 78 F.3d 1405, 1411 (9th Cir. 1996); see Minier v. CIA, 88 F.3d 796, 803 (9th Cir. 1996). Accordingly, this Court concluded that "a district court lacks 'inherent authority' to require disclosure of materials that are exempt under FOIA." Maricopa Audubon Soc'y, 108 F.3d at 1087. Plaintiff's claim that he is entitled to an order directing the release of material notwithstanding the applicability of a statutory exemption should therefore be rejected.

D. The Disputed Records Are "Predecisional."

Finally, plaintiff contends that the records at issue are not subject to Exemption 5 because they are not "predecisional." See Pl. Br. at 37-41. Plaintiff argues that the CIA's November 17, 1997 animation, "What did the Eyewitnesses See?", which depicts the agency's view that the crash of TWA Flight 800 was caused by an explosion in the aircraft's center fuel tank, was the CIA's final agency "conclusion" regarding the cause of the crash. Plaintiff maintains that since the disputed documents post-date that broadcast, they are not "predecisional." Id.[4] Plaintiff's argument fails for several reasons.

First, as the district court correctly observed, "just because [the] animation was a final disposition does not mean it was the only final disposition." See Fed. E.R. at 631 (emphasis in original). The government presented uncontroverted evidence that, following the production of the CIA animation, the NTSB presented the CIA new data for analysis, which resulted in the documents at issue. Id. After reviewing the new evidence, the CIA did not change its initial conclusions. As the court below correctly stated: "[t]hat the later conclusion was no different than the previous one does not preclude it from being 'final' for purposes of FOIA." Id.

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[4] Plaintiff's argument would apply to only three of the four documents at issue (Nos. 27, 28, and 43) since they were CIA records. The remaining document (No. 74) was a NTSB record. See n. 1, supra.

The court's holding is consistent with settled precedent. The Supreme Court has underscored that

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, 421 U.S. at 152, n. 18 (emphasis added). Accord Access Reports v. Department of Justice, 926 F.2d 1192, 1196 (D.C. Cir.1991) (rejecting requirement that government " 'pinpoint' a single decision to which the [withheld] memorandum contributed"); Judicial Watch v. Export-Import Bank, 108 F.Supp.2d 19, 35 (D.D.C.2000)("To establish that the document is predecisional, the agency need not point to an agency final decision, but merely establish what deliberative process is involved, and the role the documents at issue played in that process").

Indeed, it is particularly noteworthy that plaintiff, in a September 13, 2005 FOIA request, sought records from the CIA that were "created as part of the analysis that continued after the CIA video-animation concerning the explosion of TWA Flight 800 was shown to the public." See Fed. E.R. at 479, ¶ 18 (emphasis added).

Plaintiff himself, therefore, recognized that there were further CIA deliberations after the airing of its November 17, 1997 animation.

In support of its argument, plaintiff relies exclusively upon this Court's statement in Maricopa Audubon Soc'y, supra, that "the agency must identify a specific decision to which the document is predecisional." See 108 F.3d at 1094; see also Pl. Br. at 39. However, the facts of that case appear to undermine that blunt statement and render it dicta. In Maricopa, the documents at issue were prepared to advise the Chief of the Forest Service how to respond to allegations of unethical conduct. The court noted that various factors "obscure [d]the actual decision * * * reached" but that "[o]ur inability to identify the actual decision that was made does not alter the fact that the withheld materials were 'prepared in order to assist an agency decisionmaker in arriving at his decision.'" See 108 F.3d at 1094 (citation omitted) (emphasis added).

Thus, the district court's decision here is not inconsistent with Maricopa. Just because the CIA's decision not to revise the conclusions reached in its first animation was not needlessly memorialized in a second animation is not dispositive of the issue here. Nor does it "alter the fact that the withheld materials were 'prepared in order to assist an agency decisionmaker in arriving at his decision.'"

Finally, plaintiff concedes that the only agency here that was authorized to reach any "conclusions" was the NTSB, not the CIA. See Pl. Br. at 41 ("the CIA never had any jurisdiction to make any conclusions"). This is correct. The NTSB is the independent federal agency charged with investigation of civil aviation accidents in the United States. 49 C.F.R. § 800.3, 831.2. The NTSB conducts investigations in order to determine the circumstances relating to and the probable causes of accidents and to make safety recommendations that are intended "to prevent similar accidents or incidents in the future." Id., § 831.4. The Board has the authority to designate parties to assist the agency in conducting an accident investigation. Id., § 831.11. Following an accident investigation, the Board issues its probable cause determination and safety recommendations in an official report. Id., § 831.4. As we pointed out in our opening brief, the CIA's role in the investigation was initiated at the request of the FBI during that agency's criminal investigation into the crash. See Govt. Br. at 5; see also Fed. E.R. at 261, n.5 and 280, ¶ 50.

Thus, the only official final agency conclusion here was the NTSB's Aircraft Accident Report, issued on August 23, 2000. The records at issue predated that report and were, thus, predecisional to the only final agency decision that mattered. For example, Record No. 28, one of the documents at issue here, is marked "draft" and includes on the first page the hand-written note "shown to NTSB but never

finalized." See Fed. E.R. at 632. See also Renegotiation Bd. v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 185-86 (1975) (reports of Regional Boards, which had no legal authority to decide whether a contractor had received "excessive profits," but could only investigate and recommend to the Board, the only entity authorized to decide, were not "final opinions"but were predecisional consultative memoranda exempted from compulsory disclosure under Freedom of Information Act).

II. THE GOVERNMENT'S SEARCH WAS ADEQUATE.

1. The remainder of plaintiff's cross-appeal is based on his speculative view that records which were not located during the government's search and, therefore, not described in its Vaughn index must, nevertheless, exist. Plaintiff takes the district court to task for not ordering their production. While plaintiff's arguments in this regard are not a model of clarity, the government will attempt to address them specifically infra. However, the general and dispositive response to plaintiff's various claims in this regard was provided by the court below, relying upon this Court's settled precedent: "[t]he standard is not whether there is a possibility that undisclosed documents * * * exist somewhere in the agency's records, 'but rather whether the search for those documents was adequate. The adequacy of the search, in turn, is judged by a standard of reasonableness.'" See Fed. E.R. at 558 (quoting

Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985) (emphasis in original). Agency affidavits detailing its searches are entitled to a "presumption of good faith." Id. (quoting Meeropol v. Meese, 790 F.2d 942, 952 (D.C. Cir. 1986)). If "'the agency has sustained its burden of demonstrating that it conducted a reasonable search * * * the burden [then] shifts to the plaintiff[/requester] to make a showing of agency bad faith sufficient to impugn the agency's affidavits.'" Id. at 558-59 (quoting Katzman v. CIA, 903 F. Supp. 434, 437 (E.D.N.Y. 1995) (emphasis added by district court in instant action).

The court below set forth in detail the government's thorough search for responsive records in this case. See Fed. E.R." at 603-618 (the district court's October 2006 opinion, wherein the court devoted 15 of its 38 pages of analysis to this issue); see also id. at19-242, 539-542 (government declarations regarding NTSB search), and at 245-474, 492-538 (government declarations regarding CIA search). The record demonstrates that the government made "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Nation Magazine v. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995). In the end, the court rejected plaintiff's contentions regarding the adequacy of the government's search with the exception of ordering the government to conduct further searches with regard to the BREAKUP and

BALLISTIC programs (see Fed. E.R. at 611-12), which order the government has not appealed.

The court held that "[b]ecause Lahr provides no evidence suggestive of bad faith of the NTSB in conducting its search, the Court finds that it conducted its search in good faith." See Fed. E.R. at 606. Thus, the court found that the "NTSB's general search was adequate." Id. at 607. Turning to specific claimed deficiencies about the NTSB's search for certain requests, the court correctly stated that "simply because the NTSB located no responsive records for many of such requests does not make its search inadequate." Id. See In re Wade, 969 F.2d 241, 249 n. 11 (7th Cir. 1992) (the issue is not whether other documents might exist, but whether search was "adequate"). See also Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003) (the sufficiency of a search is determined by the "appropriateness of the methods" used to carry it out, "not by the fruits of the search"). Ultimately, after thoroughly discussing the specific alleged deficiencies in the government's search, the court rejected each in turn and held that (with the single exception noted above), the NTSB's search was adequate and withstood judicial scrutiny. See Fed. E.R. at 608-13.

Likewise, the district court detailed the exhaustive search conducted by the CIA, as described in its affidavits. See Fed. E.R. at 613-18. Here again, the court

found the CIA's search to have been undertaken "in good faith." Id. at 615. See id. at 617 ("Plaintiff's allegations are not evidence of governmental bad faith"). Here again, the court thoroughly discussed each of plaintiff's claimed deficiencies in the agency's search and rejected each claim, ultimately holding that "[t]he CIA's search for records was adequate." Id. at 613-18.

2. In his cross-appeal, plaintiff does not challenge the adequacy of the NTSB's search. Rather, he raises only two matters concerning the adequacy of the CIA's search, challenging the agency's search for "radar data" (see Pl. Br. at 51) and its alleged failure to produce what plaintiff refers to as the "Tauss Report (see id. at 52-54). Plaintiff's claims on appeal were correctly addressed by the district court, rightly rejected, and lack merit.

Plaintiff repeats his claim that the CIA failed to produce requested records regarding "radar data." See Pl. Br. at 51. Specifically, plaintiff argues that the CIA failed to identify nine responsive records which it maintains in electronic format. See Pl. Br. at 51-52. The court succinctly and correctly found that "[p]laintiff offers no persuasive basis for finding that some of these records even exist. Nor is there evidence to suggest that the CIA searched in bad faith or did not conduct an adequate search for these records." See Fed. E.R. at 617-18. In his brief argument regarding this matter, plaintiff merely repeats his speculation that such records do exist and that

the CIA conducted an inadequate search for them. He adds nothing to what the district court had already found to be unpersuasive. Nor does plaintiff allege in this Court that the CIA acted in bad faith in conducting its search for these records. Under settled principles, the court's judgment should be affirmed. See Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) (the failure of an agency "to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records").[5]

Finally, plaintiff references a December 5, 2003 Washington Times report describing a "recently declassified" article on the crash of TWA Flight 800 reportedly authored by "CIA analyst Randolph M. Tauss." See Pl. Br. at 52-53. In the court below, the government invoked Exemption 3 to withhold the names of CIA employees. See Minier v. CIA, 88 F.3d 796, 801 (9th Cir. 1996). The court upheld the government's claim with regard to the name of the alleged CIA employee in the Times report. See Fed. E.R. at 625. Plaintiff does not appeal this ruling.

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[5] The district court rejected the government's Exemption 5 claim with regard to four records regarding radar data and graphs of simulations based on this data, and ordered their release. See Fed. E.R. at 584-91 (Record Nos. 66, 76, 77, and 78). The government has not appealed this order.

Instead, plaintiff contends that "the CIA must either produce the Tauss Report or explain its conspicuous absence in its Vaughn index." Pl. Br. at 54. However, the district court considered this claim and rejected it, stating that the article identified in the Washington Times report "is not among the documents responsive to Plaintiff's FOIA request." See Fed. E.R. at 321, ¶ 9 and 625.[6]

In sum, plaintiff's claims of inadequate searches appear to stem from his belief that records, which the government could not locate, must exist, and his concern that certain records, although produced to plaintiff, are not useful to him in their present form. The short answer is that, as noted above, mere speculation that documents might exist is not enough to undermine a finding of an adequate search. See SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991) ("the factual question * * * is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant"); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325,1328 (9th Cir. 1995) (adequacy of search not undermined by inability to located 137 out of 1000 volumes of responsive

[6] The article to which plaintiff apparently refers is entitled "The Crash of TWA Flight 800" and is publically available in the CIA's FOIA electronic reading room at http://www.tiny.cc/ud4su.

material, absent evidence of bad faith, when affidavit contained detailed account of search).

Further, in response to plaintiff's argument that certain located records were inadequate because they were not useful for his purposes, the court below stated in language equally applicable to plaintiff's challenges to the government's searches and Vaughn index here: "whether the responsive records are useful or not is irrelevant to the adequacy of the * * * search." See Fed. E.R. at 611. In short, the role of the court is to determine the reasonableness of the search, "not whether the fruits of the search met plaintiff's aspirations." Boggs v. United States, 987 F. Supp. 11, 20 (D.D.C. 1997). That role has been faithfully executed here and the government's search rightly determined to be adequate.

III. THE VAUGHN INDEX WAS ADEQUATE.

1. In order to establish that it has properly withheld records, the agency generally submits a Vaughn index, which may take the form of agency affidavits. See Vaughn v. Rosen, 484 F.2d 820, 827-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). If the Vaughn index is not sufficiently detailed, the court may order an in camera review of the withheld documents. See 5 U.S.C. § 552(a)(4)(B); Lion Raisins, Inc. v. Dept. of Agriculture, 354 F.3d 1072, 1079 (9th Cir. 2004); Pollard v.

FBI, 705 F.2d 1151, 1154 (9th Cir. 1983); Maynard v. CIA, 986 F.2d 547, 557 (1st Cir. 1993); Simon v. Dept. of Justice, 980 F.2d 782, 784 (D.C. Cir. 1992).

In his cross-appeal, plaintiff asserts that the government's Vaughn index was inadequate as it related to radar data, the dates the CIA ran its time-step simulation, various records plaintiff claims exists, but for which the government allegedly "failed to account," several alleged instances of "confusion" caused by differing document and page numbering filings, and an alleged instance of "bad faith" where a document was allegedly removed. See Pl. Br. at 54-63. Plaintiff's various Vaughn Index arguments are meritless.

2. Plaintiff argues that his request encompassed "records of the timing sequence of the zoom climb, including * * * radar, radio transmissions, and the flight data recorder * * * [and] correlation of the zoom climb calculations with the actual radar plot" and complains that such "correlation records" were not identified in the government's Vaughn index. See Pl. Br. at 54 (emphasis added). Plaintiff is incorrect. Any such records were plainly identified in the government's index. See Fed. E.R. at 39-40, ¶¶ g-h (Moye Declaration stating that "responsive material might be available in the public docket," that responsive material was produced to plaintiff in previous litigation, that no such records exist in relation to radio transmissions, and that any other located responsive records not publically available or previously

released were being withheld under Exemption 5). See also id. at 21-22, ¶¶ h-i) (Crider Declaration stating that responsive documents are publically available).

In addressing a different aspect of the data in the context of the adequacy of the government's search, the district court stated that plaintiff had failed to establish "that the NTSB must have records of correlation of flight trajectory radar, radio transmission and flight recorder data," having offered this "bald assertion [] based solely on his expert's opinion." See Fed. E.R. at 608. The court concluded that "[s]uch a contention, without supporting evidence, is not sufficient to dispute the government's declarations that no such records were found." Id. at 608-09.

Thus, the government plainly identified any such responsive records in its Vaughn index and the court correctly held that no further records were located, On appeal, plaintiff merely repeats his argument, but now claims that "correlation records" were identified in the declaration of Douglas Brazy, who prepared the four NTSB animations of the crash that were shown at a December 8, 1997 public hearing). See Pl. Br. at 54 & n. 66. Of course, if this were the case, it does not support plaintiff's argument that the government's Vaughn index was inadequate.

In his declaration, however, Mr. Brazy does not reference "correlation records." Brazy only stated that the animations he prepared were "a visual depiction of the data presented from the radar sources, the digital flight data recorder, and/or

the data from the simulations presented in the Main Wreckage Flight Path and Trajectory Studies for TWA flight 800." See Fed. E.R. at 212, ¶ 8). He also stated that the animations used "verified data and FDR data." Id. at 214, ¶ 17. Most significantly, Brazy stated that the "verified radar" used in the animations is included in The Air Plane Performance Study * * * and the "FDR data" is included in the Flight Data Recorder Group Chairman Factual Report, both of which "are available in the public docket and on the NTSB's website." Id. See Fed. E.R. at 39, ¶ g (Moye Decl. (same)); id. at 114, ¶ 11 (Crider Decl. (same)).

The critical fact in this discourse is that the court found that "all responsive records found in the possession of Brazy were released to Plaintiff" (with the exception of two records which were referred to the CIA). Fed. E.R. at 43, ¶ 34.[7] See id. (indicating that the government "made a discretionary release in full of Mr. Brazy's collection of records for the four animations"). In short, regarding any responsive "correlation records," they were fully described in the government's declarations, publically available, previously released to plaintiff, or properly withheld.

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[7] The two referenced documents subsequently were released by the CIA in segregable form with redactions made on the basis of FOIA Exemptions 3, 6 and/or 7(C) to protect the names of CIA employees, FBI agents, and third-party eyewitnesses. See Fed. E.R. 253, ¶ 12.

3. The court also carefully answered plaintiff's complaints about the CIA's page numbering (see Fed. E.R. at 615 (stating that the "CIA's response appears to be in good faith" and that "plaintiff's contention is without merit or mathematical support"); the CIA's document numbering (id. at 616 (calling the original system "confusing and frustrating," but noting that, in its second declaration, the agency "clearly identified" each record, allowing plaintiff to "compare these record numbers, and refer to the government's description of each record")); and alleged missing pages (see id. at 617 (calling plaintiff's declaration in support of this charge "largely incomprehensible, and stating that the affiant "fail[ed] to provide support for conclusory statements that pages have been removed").

4. In the few instances where the district court found the government's declarations to be inadequate, it ordered the statutorily provided alternative of in camera inspection. See, e.g., Fed. E.R. at 596 (regarding NSA computer program). Thus, to the limited extent the government's Vaughn index was deficient, the court rectified any error by conducting its own in camera inspection, as the FOIA provides, and the courts have upheld. See 5 U.S.C. § 552(a)(4)(B); Lion Raisins, Inc., 354 F.3d at 1079; Pollard v. FBI,705 F.2d at 1154; Maynard, 986 F.2d at 557. See also Simon v. Dept. of Justice, 980 F.2d at 784 (holding that despite inadequacy of Vaughn

index, in camera review "is the best way to [en]sure both that the agency is entitled to the exception it claims and that the confidential source is protected").

Finally, in his claim for relief, plaintiff seeks, inter alia, "remand to the district court with instructions that further affidavits in the CIA's Vaughn index shall * * * be based on personal knowledge under Fed. R. Civ. P. 56(e). See Pl. Br. at 67. The courts consistently have held that the affidavit of an agency official who is knowledgeable about the way in which information is processed satisfies the "personal knowledge requirement" of Fed. R. Civ. P. 56(e). See, e.g., Carney v. Dept. of Justice, 19 F.3d 807, 814 (2d Cir.), cert. denied, 513 U.S. 823 (1994); Maynard, 986 F.2d at 560.

IV. THE DISTRICT COURT CAREFULLY CONSIDERED AND RIGHTLY REJECTED PLAINTIFF'S ARGUMENTS REGARDING CERTAIN "COMPUTER RUNS."

Plaintiff also takes issue with the district court's findings concerning the disclosure of certain computer programs and their "inputs." See Pl. Br. at 46-50.[8]

[8] Plaintiff's challenges are directed at: (1) an NSA computer program (unnumbered document) which the district court held to be exempt under FOIA Exemption 3(exempting matters "specifically exempted from disclosure by statute" (5 U.S.C. § 552(b)(3)) (see Fed. E.R. at 594-96); (2) Document No. 70, an NTSB computer program, which the district court held not to be exempt under FOIA Exemption 5, and ordered its release (see id. at 636-40); and (3) the BALLISTIC and BREAKUP computer programs (unnumbered) which the court ordered the NTSB to search for and, if located, to provide to plaintiff, subject to any applicable exemptions (continued...)

Oddly enough, with regard to one of these records, Document No. 70, plaintiff actually prevailed before the district court, the government has not taken an appeal, and the document will be disclosed. See Fed. E.R. at 636-40. And with regard to other such records, the BALLISTIC AND BREAKUP programs, as mentioned above, the court ordered the government to search further for these records and, if located, to provide them to plaintiff subject to any applicable FOIA exemptions. The government has not appealed this order and will comply. See Fed. E.R. at 611-12.

With regard to all these records, plaintiff's complaint seems to be that the district court did not order disclosure of what he refers to as "computer time-step program runs," and, in particular, the "data" for these "computer runs." See Pl. Br. at 46 & n. 47 ("[t]his lawsuit seeks the input data and formulas used for the CIA and NTSB simulations"); 47 ("[t]he inputs to the NSA's simulation are segregable"); 48 (referencing "formulas, inputs, assumptions and outputs" with regard to the NTSB's simulation); 50 (arguing that the district court "did not order a search for the inputs used for Flight 800 run of the BALLISTIC program). Like his arguments regarding the government's search and its Vaughn index, much of plaintiff' contentions in this regard amount to nothing more than his speculation that data, not located or

[8](...continued)
(see id. at 611-12).

produced, either exist or are segregable from protected documents. These claims lack merit. The district court thoroughly discussed the basis for its order with regard to each record plaintiff seeks.

1. The NSA Computer Program.

Concerning the NSA computer program which the district court held to be exempt under FOIA Exemption 3, plaintiff concedes that the computer program itself "is exempt under FOIA's Exemption 3" (see Pl. Br. at 46-47), but contends that the "inputs to the NSA's simulation are segregable." Id. at 47. The court addressed this issue at length. See Fed. E.R. at 594-96. It correctly held that the entire program, including any "inputs," was exempt from disclosure by virtue of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6(a), 73 Stat. 63, codified at 50 U.S.C. § 402. Id.[9] The court credited the NSA's declaration that "'[p]ublic disclosure of either

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[9] Section 6(a) provides in pertinent part that

> nothing in this Act or any other law * * * shall be construed to require the disclosure of the organization of any function of the National Security Agency, or any information with respect to the activities thereof, of of the names, titles, salaries, or number of the persons employed by such agency.

50 U.S.C. § 402 (note) (emphasis added). The government also invoked the protection of Section 102A(I) of the National Security Act of 1947, 50 U.S.C. § 403-1(i)(1), but, in its opinion, the court relied principally upon § 6(a) of the National

(continued...)

the capability to collect specific communications or the substance of the information itself can easily alert targets to the vulnerability of their communications. Disclosure of even a single communication holds the potential of revealing intelligence collection techniques,' which might then be thwarted." Id. at 595.

With regard to plaintiff's claim that the NSA erred in failing to disclose the "inputs" to the program, the court correctly responded that the argument was "irrelevant and misplaced" because the government sought "summary judgment that the program itself is exempted from disclosure, not merely that the simulation's inputs are exempt." See Fed. E.R. at 595 (emphasis added). Moreover, the court went further to address the concern plaintiff raises here. Since a computer program does not easily lend itself to in camera review, the court ordered the government to submit an affidavit describing how the programs works. After reviewing that affidavit in camera, the court credited the declarant's unequivocal assertion that "disclosure of this software, or any part of it, could harm the nation." Id. at 596 (emphasis added). The court concluded that "[b]ecause Exemption 3 is applicable as to the software in its entirety, the Court need not address * * * the government's supposed failure to demonstrate that 'no segregable, nonexempt portions remain

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[9](...continued)
Security Agency Act. See Fed. E.R. at 561-62, 595.

withheld.'" Id. at 596, n. 51 (referencing FOIA's segregability requirement, 5 U.S.C. § 552(b) (emphasis added).

By holding that the program was exempt in its entirety and that no part of it could be released, the court implicitly, if not expressly, considered and rejected plaintiff's claim here that segregable portions remain. FOIA's segregability requirement only provides that an agency must disclose "[a]ny reasonably segregable portion of a record * * * to any person requesting such record after deletion of the portions which are exempt under this subsection." See 5 U.S.C. § 552(b) (emphasis added). Thus, where a document is withheld in its entirety under Exemption 3, there simply are no "reasonably segregable' portion[s]" to release "after deletion of the portions which are exempt. " Therefore, a remand for the court to conduct another in camera review of the affidavit it has already reviewed in order to determine whether computer "inputs" may be disclosed would be a waste of judicial resources in light of the court's plain finding that no part of the program should be disclosed.

Plaintiff also contends that the NSA's affidavit, which the court reviewed in camera, should be unsealed "to permit plaintiff to file a transverse affidavit on remand." See Pl. Br. at 57-58. As we have demonstrated, there is no need for a remand. In addition, plaintiff, in effect, argues for a role in the in camera review process, a claim soundly rejected by the courts of appeals, including this Court. See

Hayden v. NSA, 608 F.2d 1381, 1385 (D.C. Cir. 1979) (specifically rejecting the notion that plaintiff's counsel should be allowed to participate in in camera inspection of classified declaration), cert. denied, 446 U.S. 937 (1980). This Court has endorsed this view. Pollard v. FBI, 705 F.2d at 1154 (upholding use of ex parte in camera review).

2. The NTSB Computer Program.

Regarding Document No. 70, an NTSB computer program, the district court held that this record was not exempt under FOIA Exemption 5's deliberative process privilege, denied the government's motion for summary judgment on this document, and ordered its release. See Fed. E.R. at 636-40. The government has not appealed this part of the judgment. In short, plaintiff will get what he requested, but, apparently, he is not satisfied with that.

In his opening brief, plaintiff concedes that "[t]he court did order the NTSB to produce its time step simulation." Pl. Br. at 49. Still, plaintiff argues that the court "did not specifically order disclosure of the Flight 800 computer run." See Pl. Br. at 49 (emphasis added). Plaintiff does not explain what he means by "computer run," but does state that "[f]ull disclosure could be accomplished by production of the program itself with its run of the Flight 800 simulation, which would allow plaintiff to analyze its formulas, inputs, assumption, and outputs." Id. at 49. In addition,

plaintiff contends that "the NTSB should be ordered to disclose its 'five pages of the main-body simulation executable.'" Id.[10] Plaintiff also contends that "it is not clear whether the court ordered disclosure of all records of the NTSB's in house time step simulation," and that he intends "to seek leave of this Court to file a motion in the district court seeking clarification of this issue under Fed. R. Civ. P. 60(a)." Id. and n. 56.

As exemplified by these passages, plaintiff's requests to the agencies and its arguments below are not a model of clarity. Nevertheless, both the government and the district court forthrightly endeavored to comprehend plaintiff's contentions and to respond to them in good faith. Regarding the arguments plaintiff repeats here, the district court opined at length, stating in relevant part that Record No. 70

> is a computer program written to simulate the flight path of Flight 800, and available only in electronic form. * * * Dennis Crider, an NTSB employee, developed a flight simulation software program prior to joining NTSB. * * * While at NTSB, Crider further developed and used the simulation program in several accident investigations, including that of Flight 800.
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[10] This refers to records submitted to the court for in camera review which were representative of a small part of Document No. 70. The court found them "to consist of data matrices in binary code and would undoubtedly be incomprehensible to anyone lacking computer, technical or scientific expertise." See Fed. E.R. at 629, n. 29. Nevertheless, since they were submitted as part of Document No. 70, and the court ordered release of that document, these records will be provided to plaintiff.

> To run a specific simulation, the program needs such information as the starting condition (airspeed, position, altitude, etc.), specific configuration of the flight (such as flap setting and landing gear position), the aircraft's weight and center of gravity, and some basis for guiding the aircraft. * * * The flight data recorder and radar data provided much of this information for Flight 800.[11]
>
> * * *
>
> The source code of the simulation used by Crider is no longer available, as it has been updated and improved over time. Therefore, the only "simulation software" maintained as a record is the executable file, which consists of binary machine language (0s and 1s).[12]
>
> * * *
>
> Crider explains that, over time, he would run simulations using his program and the data inputs would be changed between each run to attempt to make the simulations results 'best represent the action of the aircraft as reflected by the radar data.' Crider claims this is a 'deliberative, analytical process in which staff must be free to adjust and experiment without fear that staff work at whatever stage will be released and compared to the Safety Board's ultimate conclusions.
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[11] As discussed above, the flight data recorder and radar data upon which the NTSB animations were based is part of the public record. See supra at 40-41 & Fed. E.R. at 214, ¶ 17.

[12] As noted above (see n. 10), this executable file will be provided to plaintiff as part of the release of Document 70. The court noted that "Crider did retain the last control system source file and aerodynamics source file specific to Flight 800. * * * However, these do not appear to be a part of Plaintiff's Record No. 70, but rather two separate responsive records." Fed. E.R. at 638, n. 35. In this regard, the court was mistaken. The referenced documents are part of Record No. 70, and will be released to plaintiff along with that record.

> Plaintiff does not challenge that this record is predecisional, and the Court finds that it is. However, the Court does not agree with Defendants that content of the simulation program, as opposed to that of the input or output files, is deliberative.
>
> * * *
>
> Therefore, I DENY Defendants' use of Exemption 5 and the deliberative process privilege to withhold this record.

Fed. E.R. at 636-40 (citations to Crider Declaration omitted) (emphasis added). In short, as with plaintiff's arguments regarding the government's searches and Vaughn index, here also plaintiff only speculates that a record (which will be produced to him in full) should contain more information than it does. However, as the court correctly found, Record No. 70 consists of an executable program file, which it ordered released to plaintiff. Plaintiff's speculation that the record should consist of more than that, including data from a "computer run" is just that, mere speculation. As with other records discussed above about which plaintiff is unhappy with the government's search, No. 70 is what it is, and will be provided in its entirety to plaintiff.

There is no lack of clarity regarding what the district court ordered released. It ordered the disclosure of Document No. 70, no more and no less. That the court considered the record to be an executable program file that did not include "input" data is apparent from its opinion. See Fed. E.R. at 636 ("Plaintiff's Record No. 70

* * * is a computer program written to simulate the flight path of Flight 800). To the extent the court addressed any hypothetical input data that might or might not be part of the program, the court found it to be "deliberative." Id. at 639. Plaintiff has not challenged that finding on appeal.

3. The BALLISTIC And BREAKUP Computer Records.

Finally, plaintiff takes issue with the district court's handling of the BALLISTIC and BREAKUP computer records. See Pl. Br. at 50. Here again, plaintiff largely prevailed because, with regard to the BREAKUP program, the court ordered the NTSB to search its records for "the formulas and data entered into the computer simulations" and provide any responsive records to plaintiff, subject to any applicable exemptions. See Fed. E.R. at 612. The court also ordered the agency to search for and, if located, to release the BREAKUP program itself, subject to applicable exemptions. Id. With regard to the BALLISTIC program, the court also ordered NTSB to search for the program and, if located, to provide it to plaintiff subject to any applicable exemptions. Id. The government has not appealed from this portion of the court's judgment.

Plaintiff's argument here appears to be that the district court did not order the agency to search for and release "inputs" with regard to the BALLISTIC program, having found that "no records were responsive" to this request . See Fed. E.R. at 612.

The court held that plaintiff's FOIA request for this material was specifically limited to matters used in connection with the "zoom-climb conclusion." Id. The court found that the government had adequately established that this program "was not used in any manner in connection with the 'zoom-climb conclusion.'" Id. Plaintiff does not challenge this finding on appeal.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the government's opening brief, the Court should reverse the judgment of the district court in so far as the court held that the names of third party eyewitnesses and FBI agents are not protected from public disclosure under FOIA Exemptions 6 and 7(C), and otherwise affirm the judgment of the court below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitations set forth in Rule 32(a)(7) of the Federal Rules of Appellate Procedure and, uses a proportionally spaced font (Times New Roman), has a typeface of 14 point, and contains 12,341 words, according to the word processing system used to produce the text.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2007, I filed and served the foregoing Reply/Response Brief for Federal Appellant by Federal Express overnight mail with the Court and counsel of record listed below:

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