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

12 H. RAY LAHR, ) Case No. 03-08023 AHM (RZx)  
13 )  
14 Plaintiff, ) **PLAINTIFF'S OPPOSITION TO**  
15 v. ) **NTSB'S MOTION FOR SUMMARY**  
16 NATIONAL TRANSPORTATION ) **JUDGMENT**  
17 SAFETY BOARD, *et al.* )  
18 Defendants. )  
19 )

20 Date: August 2, 2004  
21 Time: 10:00. a.m.  
22 Place: Courtroom 14, 312 N. Spring  
23 Street, Los Angeles, CA 90012  
24 Judge: Honorable A. Howard Matz

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28 PROOF: AFFIDAVITS A THROUGH CC.

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LODGING – VIDEOTAPE / DISK

1. **VIDEOTAPE**

7	<b>EXPERTS</b> (Total Running Time: 16.5 minutes)	<u>Minutes/seconds</u>
8	Captain H. Ray Lahr (Ret) Air crash investigator. . . . .	1:45
9	Dr. Vernon Gross, Former NTSB member	
10	also, August 2000 Hearing excerpt. . . . .	2:44
11	Colonel Lawrence Pence U.S. Air Force, Ret. . . . .	1:05
12	Rear Admiral Clarence A. Hill, Jr., USN/Ret	
13	Former Commanding Officer USS Independence	
14	and air crash investigator. . . . .	2:45
15	Commander William S. Donaldson USN/Ret (deceased)	
16	Nationally recognized air crash investigator. . . . .	1:20
17	Dr. Thomas Stalcup, Ph.D. Physicist	
18	also, August 2000 Hearing excerpt. . . . .	3:05
19	James K. Kallstrom,	
20	Assistant-Director-in-Charge New York Field Office. . . . .	0:42
21	Captain Richard Russell, Ret.	
22	Air crash investigator. . . . .	0:35
23	James Sanders, investigative reporter. . . . .	2:56

**EXPERT EYEWITNESSES** (Total Running Time: 1 hour, 11 min.)

24	James Speer, Air Line Pilots Association representative,	
25	NTSB Flight 800 probe. . . . .	6:45
26	NTSB Investigator Hank Hughes. . . . .	1:05
27	August 2000 Hearing excerpt Master Chief Dwight Brumley, USN (Ret.) . . .	1:40
28	Eastwind Captain David McClaine. . . . .	0:08
29	August 200 Hearing excerpt, also Major Fred Meyer (Ret) . . . . .	51:00

**EYEWITNESSES** (Total Running Time 7.5 minutes)

30	NTSB excerpt from August 2000 Hearing, also Paul Angelides. . . . .	3:10
31	NTSB August 2000 Hearing, also Mike Wire. . . . .	2:29
32	Lisa Perry. . . . .	0:35
33	Family member Marge Krugar. . . . .	0:30
34	NTSB August 2000 Hearing excerpt re witness 649. . . . .	0:27

**ANIMATIONS** (Total Running Time 9.5 minutes)

1	Excerpts of CIA/NTSB animation "What did the eyewitnesses see?" . . . . .	.6:03
2	NTSB Animation # 1 "Flight Path View". . . . .	0:36
3	NTSB Animation # 2 "Flight Path View From Ground". . . . .	0:27
4	UNOFFICIAL ANIMATIONS:	
5	Mike Wire's View. . . . .	0:17
6	Missile Fire. . . . .	0:11
7	Missile Fire close-up. . . . .	0:11
8	Surface vessel missile launch, missile strike, military operating zone. . . . .	0:47
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10	2. DISK	
11	Witness 649 Animation . . . . .	0:05

1 **Memorandum of Points & Authorities**

2 **1. Preface**

3 The NTSB has not met a single of its burdens of production for entry of  
4 summary judgment in its favor.

5 **a. The records at issue**

6 Plaintiff seeks an order for disclosure of records upon which publicly-  
7 released reports of TWA 800's post-initiating-event flight path are based. Four  
8 such public reports exist: One written,<sup>1</sup> one CIA video-animation,<sup>2</sup> and two NTSB  
9 video-animations.<sup>3</sup> All report that the rear two-thirds of the airliner performed a  
10 "zoom-climb." The first and most public report of the crash sequence was that the  
11 blown-apart aircraft climbed over a half mile, and looked like a missile.

12 Notwithstanding the overall deficiency of the government's Vaughn index,  
13 the NTSB did identify a large part of the information that plaintiff seeks: The  
14 computer code of the NTSB's simulation program.

15 **b. The disaster**

16 On July 17, 1996, TWA Flight 800 left New York's Kennedy Airport, en  
17 route to Paris with 230 persons onboard, 18 crewmembers and 212 passengers, 38  
18 of whom were under the age of 18. Twelve minutes later, about 11 miles east of  
19 East Moriches, Long Island, as the aircraft reached an altitude of 13,700 feet, its  
20

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21  
22 <sup>1</sup> NTSB's written report primarily its three-part *Main Wreckage Flight Path Study*:

- 23
- 24 • November 21, 1997, the NTSB EX 22C *Main Wreckage Flight Path Study* (Vaughn index p. 543-65)
  - 25 • January 31, 2000, 18-page NTSB EX 22C *Addendum I to Main Wreckage Flight Path Study* (Vaughn index p. 568-85)
  - 26 • June 9, 2000 10-page NTSB EX 22F *Addendum II to Main Wreckage Flight Path Study* (Vaughn index p. 586-96)

27  
28 <sup>2</sup> Lodged.

<sup>3</sup> Lodged.

1 flight ended in tragedy. The airliner plunged into a tranquil Atlantic Ocean,  
2 preceded by multiple explosions.

3 The visibility, weather, location, and time of year made the tragedy the most  
4 watched airline disaster in history. During the first hours after the crash, numerous  
5 news stories related accounts of eyewitnesses having seen a flare-like object or  
6 missile streaking up into the air, followed by the plane falling from the sky.  
7 According to the FBI's count, 736 eyewitnesses, along the coast of Long Island,  
8 and on nearby aircraft and watercraft, saw various stages of the tragedy.

9 The NTSB's probe was its longest and most expensive in its history,  
10 spanning over four years and costing 40 million dollars.

11 **c. NTSB record itemization & legal arguments**

12 The NTSB identifies 31 records in its Vaughn index. There are 114 FOIA  
13 requests before the Court.

14 Defendant's Vaughn index is a list of records it claims not to have; few of its  
15 31 identified records are responsive to the 114 requests before the Court. It is  
16 internally inconsistent. Its claims are the opposite of those of the plaintiff's experts  
17 and are disputed by plaintiff's proof. Furthermore, the defendant does not correlate  
18 its 31 records to plaintiff's numbered FOIA Requests.

19 Defendant wishes to litigate the propriety of the exemptions it claims in the  
20 largely deliberative 31 records it identifies, while excluding from the purview of  
21 this action its obligation to respond to all FOIA requests and identify all responsive  
22 records.

23 As the Court will rule on plaintiff's FOIA Requests by their Request  
24 numbers, the NTSB's limiting of its responses renders a narrowing of the issues  
25 problematic. The resolution of this action must await the NTSB's production of a  
26 Vaughn index that, at a minimum, responds to every FOIA request before the  
27 Court, as they are plainly written.

28 The NTSB claims three exemptions:

- 5 U.S.C. § 552 (b) 4: Boeing trade secrets;

- 5 U.S.C. § 552 (b) 5: NTSB's deliberative process; &
- 5 U.S.C. § 552 (b) 6: Individuals' privacy interests.

Plaintiff posits:

- Years ago Boeing released all information that may be in the records sought, and, in any event, these records are segregable, contrary to the NTSB's assertion;
- There is no deliberative process privilege in records underlying a final agency disposition (zoom-climb conclusion), nor in factual records;
- Plaintiff waives his right to contest challenges to privacy redactions except as to government employees;<sup>4</sup>
- Where the records would shed light on the inner workings of the government (FOIA's public interest), and an exemption applies, the Court must balance the public interest against the interest sought to be protected by the exemption.

## 2. No Exemption 5 deliberative process privilege protection available

All claims of exemptions are to be narrowly construed and reviewed *de novo* with no deference to the NTSB's action.<sup>5</sup>

Exemption 5 was intended to incorporate the government's common law

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<sup>4</sup> See Stipulation entered 6/10/04 noting that plaintiff does not contest (b)(6) privacy withholdings re Boeing employees. Note: Plaintiff hereby waives (b)(6) redaction re ALPA employees. He waives the identified (b)(6) redactions re all non-government employees. See Wilkinson v. FBI, 633 F. Supp. 336, 345 (C.D. Cal. 1986) ("the Court agrees with the above case that the balancing process may come out in favor of disclosure if it appears that the agents supervising the investigation were engaging in misconduct"); Castaneda v. United States, 757 F.2d 1010 (disclosure of undercover agent's identity appropriate where investigative reports contained internal inconsistencies and truthfulness of investigator was in doubt).

<sup>5</sup> Favish v. OIC, 217 F.3d at 1172 (9th Cir. 2000) rev'd in part Nat'l Archives & Records Admin. v. Favish, 124 S. Ct. 1570, 1581 (U.S. 2004).

1 privilege from disclosure in litigation, including the deliberative process privilege.<sup>6</sup>

2 Many of the descriptions of the NTSB's 31 records include the statement that  
3 "[t]he five-member Safety Board is the ultimate decision-maker as to the probable  
4 cause(s) of an accident," implying that the record is deliberative because it was  
5 given to the Safety Board. This claim would shield from disclosure the records  
6 underlying virtually every public government report. Other frequently occurring  
7 phases and terms in the record descriptions include "preliminary," "varying  
8 versions," "predecisional," and "does not reflect the agency's position."

9 Plaintiff seeks only records upon which the NTSB's flight path reports are  
10 based. The NTSB responds as if it were unaware of this.

11 **a. Inapplicable to records adopted in an agency disposition**

12 Defendant claimed deliberative process exemptions in 18 of its Vaughn  
13 index's 31 enumerated records. Plaintiff waived any challenge to four,<sup>7</sup> responded  
14 to ten that he "contest[ed] to the extent that records [were] adopted in published  
15 report(s)."<sup>8</sup> Plaintiff challenged only four,<sup>9</sup> including one that was undated and  
16 thus cannot be determined to be pre-decisional.<sup>10</sup> The government claimed  
17 privilege in over half the records it identified, many justified. Plaintiff has no  
18 interest in comments or any other records that were not incorporated into, or  
19 ultimately relied upon, in its public reports of the aircraft's trajectory. Plaintiff  
20 follows well-established law in his responses to the (b)(5) privilege assertions.

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21  
22  
23 <sup>6</sup> 5 U.S.C. § 552(b)(5) exempts from disclosure "[I]nter-agency or intra-  
24 agency memorandums or letters which would not be available by law to a  
25 party other than an agency litigation with the agency."

26 <sup>7</sup> Dismissed any (b)(5) challenges to NTSB record Nos. 12, 13, 19, 21 by  
27 Stipulation entered 6/10/04.

28 <sup>8</sup> Memorialized this position re (b)(5) assertions by 6/31/04 email under L.R.  
7-3 re NTSB record Nos. 16, 17, 18, 20, 23, 25, 26, 29, 30, 31.

<sup>9</sup> Challenge (b)5 assertions in NTSB record Nos. 14, 15, 27, 28. Id.

<sup>10</sup> Challenge to NTSB record No. 14 "as undated." Id.

1 In 1997, the Seventh Circuit rejected an Exemption 5 claim and ordered  
2 disclosure of records underlying a published agency report. The record at issue  
3 was an inter-office memorandum relied upon by the Watergate Special Prosecutor  
4 in declining to seek an indictment of President Nixon.

5 [The exemption is] overridden by the fact that the... memorandum was  
6 expressly adopted or incorporated as part of a final disposition of the  
7 allegations of criminal liability of President Nixon and is therefore  
8 disclosable under 5 U.S.C. § 552(a)(2)(A)\*\*\* Thus, we hold that, if  
9 an agency chooses expressly to adopt or incorporate by reference an  
10 intra-agency memorandum previously covered by Exemption 5 in  
11 what would otherwise be a final opinion, that memorandum may be  
12 withheld only on the ground that it falls within the coverage of some  
13 exemption other than Exemption 5.<sup>11</sup>

14 The NTSB's reports of its zoom-climb hypothesis is an agency "final  
15 opinion" under the FOIA.<sup>12</sup>

16 **b. Inapplicable to factual records**

17 Conclusions as to factual matters are not privileged. In construing the  
18 deliberative process privilege under the FOIA, the Supreme Court recognized the  
19 distinction between "materials reflecting deliberative or policy making processes  
20 on the one hand, and purely factual, investigative matters on the other."<sup>13</sup>

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21  
22 <sup>11</sup> Niemeier v. Watergate Spec. Prosecution Force, 565 F.2d 967, 971-72 (7th  
23 Cir. 1977), citing NLRB v. Sears, Roebuck, & Co. 421 U.S. 132, 95 S.Ct.  
24 1504, 44 L.Ed.2d 29 (1975); see also Tax Analysts v. IRS, 117 F.3d 607  
(D.C. Cir. 1997) (same).

25 <sup>12</sup> "It appears to us that the [Supreme] Court meant in Sears to establish as a  
26 general principle that action taken by the responsible decision maker in an  
27 agency's decision-making process which has the practical effect of disposing  
28 of a matter before the agency is 'final' for purposes of FOIA." Rockwell  
Int'l Corp. v DOJ, 235 F.3d 598, 602 (D.C. Cir. 2001) (internal citation  
omitted).

<sup>13</sup> EPA v. Mink, 410 U.S. 73, 89 (1973). See also Assembly of Cal. v. United

1 "The privilege applies only to the 'opinion' or 'recommendatory' portion of a  
2 document, not to factual information which is contained in the document."<sup>14</sup> "[A]  
3 predecisional, deliberative communication sheds the privilege if adopted as policy  
4 or in public dealings."<sup>15</sup>

5 The selection of facts to be included in a report is not part of the deliberative  
6 process,<sup>16</sup> nor is outside expert scientific opinion.<sup>17</sup>

7  
8 States DOC, 797 F.Supp. 1554, 1567 (E.D. Cal. 1992) (court found that "the  
9 material [computer tapes with adjusted census data] was purely factual and  
10 in no way divulged the reasoning process... [and disclosure] would not  
11 reveal anything more about the deliberative process than has already been  
12 disclosed by the agency."); Martin Marietta Aluminum, Inc. v.  
13 Administrator, General Services Administration, 444 F. Supp. 945, 950  
14 (C.D. Cal. 1977) ("independent appraisers' reports... not part of the  
15 decision-making process, do not create harm when released after sale...");  
16 Tennessean Newspapers, Inc. v. Federal Housing Administration, 464 F.2d  
17 657, 660 (6th Cir. 1972) (same re appraisers' reports); Philadelphia  
18 Newspapers, Inc. v. Department of Housing & Urban Development, 343 F.  
19 Supp. 1176, 1178 (E.D. Pa. 1972) (same), Dworman Bldg. Corp. v. General  
20 Services Administration, 468 F.Supp 389 (S.D.N.Y. 1979) (same).  
21 <sup>14</sup> Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 867 (D.C.  
22 Cir. 1980).  
23 <sup>15</sup> Newport Pac., Inc. v. County of San Diego, 200 F.R.D. 628, 637-8 (S.D.  
24 Cal. 2001).  
25 <sup>16</sup> Playboy Enterprises, Inc. v. Department of Justice, 677 F. 2d 931, 935 (D.C.  
26 Cir. 1982) ("mere fact that a person writing a factual report must select  
27 certain facts and omit others does not qualify factual report for deliberative  
28 process privilege"). See also Powell v. United States, Dep't of Justice, 584  
F. Supp. 1508, 1519 (N.D. Cal., 1984) ("factual material contained in  
deliberative memoranda cannot be considered to be intertwined with legal or  
policy matters solely on the broad theory that the very choice of which facts  
to present necessarily reveals the writer's viewpoint."); National Wildlife  
Federation v. United States Forest Service, 861 F.2d 1114, 1119 (9th Cir.  
1988) ("the ultimate objective of exemption 5 is to safeguard the deliberative  
process of agencies, not the paperwork generated in the course of that  
process").  
<sup>17</sup> Union of Concerned Scientists v. NRC, 824 F.2d 1219 (D.C. Cir 1987). See



1 **3. No Exemption 4 trade secret protection available**

2 The NTSB asserts Exemption (b)(4),<sup>18</sup> claiming Boeing trade secrets.  
3 "[E]vidence revealing (1) actual competition and (2) a likelihood of substantial  
4 competitive injury is sufficient to bring commercial information under  
5 Exemption 4."<sup>19</sup> The government has not produced such evidence.

6 **a. According to Boeing, it provided only "basic aerodynamic  
7 information"**

8 Boeing issued a press release on November 17, 1997 (which it has since  
9 removed from its website), the same day that the government's first video-  
10 animation, depicting a 3,200-foot climb, was televised. The press release stated in  
11 part that "Boeing was not involved in the production of the video shown today,  
12 nor... fully understand the data used to create it. While we provided basic  
13 aerodynamic information,, [and] we are not aware of the data that was used to  
14 develop the video."<sup>20</sup>

15 The government and Boeing want it both ways. The "basic aerodynamic  
16 information" is now a trade secret ("these embedded data"<sup>21</sup>) in the NTSB's  
17 simulation-computer-code, preventing the NTSB from disclosing it.

18 **b. Boeing's "basic aerodynamic information" is published**

19 From 1997 through July 2002, Boeing employed aerodynamicist Brett  
20 Hoffstadt. Mr. Hoffstadt reports that what Boeing's "Breuhaus cites as proprietary  
21 data... is also contained in Figures 1, 2, and 3, respectively, in the NTSB's *Main*

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22  
23 also LaRoque v. Department of Justice, 1990 U.S. App. LEXIS 15970 (D.C.  
24 Cir. Aug. 30, 1990) (same).

25 <sup>18</sup> 5 U.S.C. § 552 (b)(4)(b); "This section does not apply to matters that are  
26 trade secrets and commercial or financial information obtained from an  
27 individual and privileged or confidential"

28 <sup>19</sup> GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir.  
1994).

<sup>20</sup> **D** Donaldson Aff. Ex. 21 Bates 114.

<sup>21</sup> Crider declaration Vaughn index p. 515.

1 *Wreckage Flight Path Study*, Exhibit 22C, Docket Number SA-516, by Dennis  
2 Crider."<sup>22</sup>

3 Additionally, as plaintiff's recites in his own affidavit,<sup>23</sup> the NTSB released  
4 the following data:

5 **BOEING TWA FLIGHT 800 DATA**

Parameter	Before Nose Separation	After Nose Separation
Gross Weight (lbs.)	574000	494606
C.G. %MAC	21.1	57.8
lyy slug-ft <sup>2</sup>	27790000.0	15780000.0
lxx slug-ft <sup>2</sup>	19110000.0	18970000.0

6  
7  
8  
9 **c. All other information Boeing may have provided is publicly  
10 available**

11 Mr. Hoffstadt is "intimately familiar with the... types of tools... available  
12 to professionals to make such calculations for all types of aerospace vehicles,  
13 including commercial aircraft."<sup>24</sup> He explains that Analytical Methods,  
14 Incorporated, sells a widely used computational fluid dynamics (CFD) computer  
15 program (VSAERO), and sells the geometry of Boeing 747s.

16 Breuhaus cites as proprietary data the lift coefficient, pitching  
17 moment, and drag coefficient of the 747-100 aircraft in two  
18 configurations: the aircraft's baseline configuration and a hypothetical  
19 configuration in which the aircraft's forward fuselage has been  
20 removed. All of these data and more can be obtained from the  
21 publicly available CFD models of the 747-200 and 747-300, which  
22 can be modified to represent a 747-100 if desired.<sup>25</sup>

23  
24 <sup>22</sup> A Hoffstadt Aff. ¶ 2 Bates 39.

25 <sup>23</sup> X Lahr Aff. ¶ 57 Bates 273.

26 <sup>24</sup> A Hoffstadt Aff. ¶ 5 Bates 35.

27 <sup>25</sup> A Hoffstadt Aff. ¶ 2 Bates 39. See also X Lahr Aff. ¶ 43 Bates 272: "The  
28 performance data and the weight and balance data is given to every operator  
of a Boeing aircraft, and it is generally known by competitors as well. Thus,  
the detailed operational performance of B-747s is certainly not a secret,  
being available from at least four sources. 1. Operator Handbooks 2. B-747

1 Boeing surely recognizes this and wouldn't have permitted public  
2 release of this geometry if it believed any sensitive or proprietary data  
3 were still at risk.<sup>26</sup>

4 Moreover, the government's burden includes explaining how release of the  
5 withheld data, of an aircraft placed in service 31 years ago, and since succeeded by  
6 three successive models, could competitively harm Boeing.<sup>27</sup>

7 The government is not permitted to withhold records of information that  
8 Boeing's competitors already know.<sup>28</sup>

9 **d. NTSB falsely claims that it cannot segregate Boeing-supplied**  
10 **records without creating a new record**

11 An agency need not create a record to respond to a FOIA request. The  
12 NTSB invokes a "new record" defense. Dennis Crider claims:

13 I cannot segregate these formulas from the program without  
14 translating the relevant parts of the code into recognized mathematical  
15 terms, thus creating a new record.<sup>29</sup>

16 This is false, and the FOIA instructs agencies on the redaction process to be  
17 used for electronic records.<sup>30</sup> Redaction does not create a new record. The

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19 Flight Training Simulator 3. B-747 Flight Data Recorders 4. Authoritative  
20 treatise"

21 <sup>26</sup> Id. ¶ 4.

22 <sup>27</sup> X Lahr Aff. Ex. 13 Bates 375-378 recounts that four models have succeeded  
23 the Flight 800 aircraft, a 747-100. Boeing placed the 747-100 in service in  
24 1969, succeeded by the 747-200 in 1983, the 747-300 in 1989, and the 777  
in 1995.

25 <sup>28</sup> Hughes Aircraft v. Schlesinger, 384 F. Supp. 292, 304 (N.D. Cal. 1974).

26 <sup>29</sup> Vaughn index ¶ 48a p. 513-14.

27 <sup>30</sup> See Electronic FOIA Amendment 104 P.L. 2,319 Computer Redaction:  
28 "Section 552(b) of Title 5, United States Code, is amended in the matter  
following paragraph (9) by inserting after the period the following: 'The  
**amount of information deleted shall be indicated on the released portion**  
**of the record**, unless including that indication would harm an interest

1 government's next Vaughn index need expound on Mr. Crider's "new record"  
2 defense.

3 Aerodynamicist Hoffstadt opines that defendant could segregate the Boeing-  
4 supplied data from the simulation computer code, contrary to Mr. Crider's claim.<sup>31</sup>

5 Mr. Crider wrote his simulation program in C++. It is highly likely  
6 that he could release this program's code in a non-executable version,  
7 after removing any Boeing-supplied information, without printing the  
8 code. Review of the simulation's computer code program, without  
9 Boeing supplied data, would permit review of much of the simulation  
10 program's inputs. Care and diligence must be taken, however, to  
11 avoid removing other unrelated but essential coding which would  
12 make review of this program possible.<sup>32</sup>

13 **e. Performance data not trade secret**

14 Plaintiff has "unique experience in regard to aircraft performance."<sup>33</sup> His  
15 affidavit:

16 There are two categories of information pertaining to the development  
17 of a new aircraft: (1) design and manufacturing information to build

18  
19 protected by the exemption in this subsection under which the deletion is  
20 made. **If technically feasible**, the amount of the information deleted shall be  
21 indicated **at the place in the record where such deletion is made.**"

22 <sup>31</sup> Crider Dec. ¶ 10 p. 502: "These data are integrated with the computer  
23 code. The program cannot operate without these data; thus the program is  
24 not segregable from the proprietary data." The Court must rule on this  
25 segregability claim. Krikorian v. Department of State, 984 F.2d 461, 467  
(D.C. Cir. 1993).

26 <sup>32</sup> A Hoffstadt Aff. ¶ 8 Bates 39.

27 <sup>33</sup> X Lahr Aff. ¶ 118 Bates 287: "Starting with the DC-10 in the late sixties  
28 and continuing to my retirement in 1985, I was chairman of the ALPA  
Aircraft Evaluation Committee. In that capacity, I was privileged to meet  
with the management, the engineers, and the test pilots of all major  
manufacturers including Boeing. Never was I refused an answer about the  
performance of an aircraft."

1 the aircraft, and (2) operation and performance information of the  
2 finished product... However, there is no legitimate propriety  
3 information in the second category. The zoom-climb pertains to  
4 performance.<sup>34</sup>

5 "Physical and performance characteristics of airbags do not qualify as trade  
6 secrets"<sup>35</sup> under the FOIA – nor do the performance characteristics of an aircraft.

7 **f. Broader protection for "voluntarily produced" records**  
8 **unavailable**

9 The NTSB argues that disclosure of the voluntarily produced records at issue  
10 could impede the its ability to obtain such records in the future. However, this  
11 broader protection for voluntarily produced records should not be given where the  
12 agency withholding the records has subpoena power, as does the NTSB,<sup>36</sup> because  
13 disclosure could have no effect on the agency's ability to subpoena records in the  
14 future.<sup>37</sup>

15 **4. FOIA's balancing test mandates disclosure**

16 In 1989 the Supreme Court recited that the FOIA is intended to "shed light  
17 on an agency's performance of its statutory duties"<sup>38</sup> and that its "central purpose is

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19  
20 <sup>34</sup> X Lahr Aff. ¶¶ 115-118 Bates 287.

21 <sup>35</sup> Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d 144,  
22 150-51 (D.C. Cir. 2001).

23 <sup>36</sup> 49 USCA § 1113. Administration

24 (a) General authority. – (1) The National Transportation Safety Board,  
25 and when authorized by it, a member of the Board, or an  
26 administrative law judge employed by or assigned to the Board, may  
27 conduct hearings to carry out this chapter, administer oaths, and  
28 require, by subpoena or otherwise, necessary witnesses and evidence.

29 <sup>37</sup> See, e.g., Niagara Mohawk Power Corp. v. United States DOE, 169 F.3d 16,  
30 18 (D.C. Cir. 1999): "[A]ffidavits claiming that disclosure would impair the  
31 EIA's ability to collect such information in the future... inherently weak  
32 where, as here, the agency has secured the information under compulsion."

33 <sup>38</sup> United Sates Department of Justice v. Reporters Committee For Freedom Of

1 to ensure that the government's activities be opened to the sharp eye of public  
2 scrutiny."<sup>39</sup> An order of disclosure in this case will benefit the public by "bringing  
3 the government into compliance with the Act and by securing for society the  
4 benefits assumed to flow from the disclosure of government information."<sup>40</sup>

5 Should the Court find any merit in defendant's exemption claims, it employs  
6 a balancing of the FOIA's public interest in disclosure (shedding light on the  
7 agency's inner workings), against the interest sought to be protected by the  
8 exemption. Cases have consistently held that agency bad faith is a relevant inquiry  
9 under the balancing test.

10 Plaintiff seeks disclosure on alternative grounds.

11 Plaintiff does not ask the Court to adjudicate the cause of Flight 800's  
12 demise.<sup>41</sup> The relevant issues under FOIA are the genesis and breadth of the  
13 controversy and the NTSB's pattern and practice of bad faith in the underlying  
14 activities that generated the records at issue.

15 Where it appears that the motives or truthfulness of the investigator  
16 are in doubt, the public need for supervision and disclosure is  
17 necessarily heightened.<sup>42</sup>

18 [T]he public interest in ensuring the integrity and reliability of  
19 government investigation procedures is greater where there is some  
20 evidence of wrongdoing on the part of the government official.<sup>43</sup>

21  
22  
23 <sup>39</sup> The Press, 489 U.S. 749, 772-73 (1989).

24 <sup>40</sup> Id. at 774.

25 <sup>41</sup> Crooker v. United States Parole Commission, 776 F. 2d 366, 367 (1st Cir.  
26 1985).

27 <sup>42</sup> Fed. R. Ev. 105. Limited Admissibility: "When evidence which is  
28 admissible as to one party or for one purpose but not admissible as to  
another party or for another purpose is admitted, the court, upon request,  
shall restrict the evidence to its proper scope..."

<sup>43</sup> Castaneda v. United States, 757 F.2d 1010 (9th Cir. 1985).

Hunt v. Federal Bureau of Investigation, 972 F.2d 286, 289 (9th Cir. 1992).

1 [E]ven where there is no evidence that the agency acted in bad faith  
2 with regard to the FOIA action itself, there may be evidence of bad  
3 faith or illegality with regard to the underlying activities which  
4 generated the documents at issue. Where such evidence is strong, it  
5 would be an abdication of the court's responsibility to treat the case in  
6 the standard way and grant summary judgment on the basis of Vaughn  
7 affidavits alone.<sup>44</sup>

8 [FOIA] request focuses on how the OIC conducted its investigation...  
9 in complete conformity with the statutory purpose... showing that he  
10 has knowledge of misfeasance by the agency...<sup>45</sup>

11 [T]he public may have an interest in knowing that a government  
12 investigating itself is comprehensive, that the report of an  
13 investigation released publicly is accurate.<sup>46</sup>

14 Under the FOIA, the more publicity, the higher the scrutiny. One case held  
15 that an agency's "Glomarized" request for records concerning alleged wrongdoing  
16 by two named employees was proper because of the absence of evidence of  
17 wrongdoing or widespread publicity of the investigation.<sup>47</sup> This case represents the  
18 other extreme.<sup>48</sup> TWA Flight 800 is the most controversial disaster in aviation  
19 history.<sup>49</sup> The NTSB's Flight 800 probe is a study in bad faith.

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22 <sup>44</sup> Jones v. FBI, 41 F.3d 238 (6th Cir. 1994).

23 <sup>45</sup> Favish v. OIC, 217 F.3d 1168, 1172-73 (9th Cir. 2000) rev'd in part Nat'l  
Archives & Records Admin. v. Favish, 124 S. Ct. 1570, 1581 (U.S. 2004).

24 <sup>46</sup> Stern v. FBI, 737 F.2d 84, 90 (D.C. Cir. 1984).

25 <sup>47</sup> Beck v. Department of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir 1993).

26 <sup>48</sup> See, e.g., Hardy v. FBI, No. 95-883, slip op at 21 (D. Ariz. July 29, 1997)  
(release names of supervisory FBI agents publicly associated with Waco);  
27 Weiner v. FBI, No. 83-1720, slip op. at 7 (C.D. Cal. Dec. 6, 1995) (public  
28 interest dictated the release of names and addresses of agents involved in  
supervision of FBI's publicized probe into John Lennon's death).

<sup>49</sup> See, e.g., Z Leffler Aff. ¶ 58-60 Bates 405-07.

1 The Supreme Court recently defined FOIA plaintiffs' burden of proof of  
2 agency bad faith.

3 We hold that where... the public interest being asserted is to show that  
4 responsible officials acted negligently or otherwise improperly in the  
5 performance of their duties, the requester must establish more than a  
6 bare suspicion in order to obtain disclosure. Rather, the requester  
7 must produce evidence that would warrant a belief by a reasonable  
8 person that the alleged Government impropriety might have  
9 occurred.... the less stringent standard we adopt today is more faithful  
10 to the statutory scheme.<sup>50</sup>

11 **a. The balancing test applies to all claimed exemptions**

12 The balancing test applies to all but one of FOIA's nine exemptions,<sup>51</sup> and  
13 cases support its application to the three exemptions asserted by the NTSB.<sup>52</sup> The  
14 public's interest is in shedding light on an agency's performance of its statutory  
15 duties, and here, disclosure of the records would do just that.

16 The DC Circuit employed the balancing test to an Exemption (b)(4)  
17 proprietary information assertion, first assessing whether the harm caused by  
18 disclosure of proprietary information was "minor," or "significant," then balancing  
19

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20 <sup>50</sup> Nat'l Archives & Records Admin. v. Favish, 124 S. Ct. 1570, 1581 (U.S.  
21 2004).

22 <sup>51</sup> Effective August 1, 1982, FOIA's balancing test not applicable to Exemption  
23 1 by Executive Order 12356 "eliminate[ing] the requirement that the  
24 government apply a balancing test based on the interest in disclosure and  
25 possible harm to national security." 37A Am Jur 2d Freedom of Information  
26 Acts § 81.

27 <sup>52</sup> Defendant posits that FOIA's balancing test applies only to the two  
28 exemptions which seek to protect individuals' personal privacy (personnel  
and similar records under (b)(6) and law enforcement records under  
(b)(7)(C)). Privacy issues are by far the most litigated issue under the FOIA,  
however, the balancing test also applies to Exemption (b)(4), trade secrets,  
and Exemption (b)(5), the deliberative process privilege.



1 the impairment that disclosure would cause against the public interest in  
2 disclosure:

3 A minor impairment cannot overcome the disclosure mandate of  
4 FOIA. Rather, the question must be whether the impairment is  
5 significant enough to justify withholding the information.... This  
6 inquiry necessarily involves a rough balancing test of the extent of  
7 impairment and the importance of the information against the public  
8 interest in disclosure.<sup>53</sup>

9 The District Court in San Diego applied the balancing test to an Exemption  
10 (b)(5) deliberative process contention.

11 [T]he Court is compelled to take the analysis a step further and  
12 determine whether the government's interest in nondisclosure  
13 outweighs the interests of the litigants and public in disclosure. In In  
14 re Franklin, the district court... weighed the "public interest in  
15 opening for scrutiny the government's decision making process"  
16 (internal citation omitted)<sup>54</sup>

17 **b. Geneses and chronology of zoom-climb hypothesis fuels**  
18 **controversy**

19 Plainly, the government created the zoom-climb hypothesis to refute  
20 eyewitnesses to missile fire. The FBI recorded a hundred witnesses seeing it  
21 emanate from the ground. Eastwind Airlines Pilot David McClaine had been  
22 staring at Flight 800 pre-explosion. His observations are recorded in real time,<sup>55</sup>

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24 <sup>53</sup> Washington Post Co. v. Department of Health and Human Services, 690  
25 F.2d 252, 268 (D.C. Cir. 1982), after remand, 795 F.2d 205 (D.C. Cir.  
1986), subsequent op 865 F.2d 320 (D.C. Cir. 1989).

26 <sup>54</sup> Newport Pac., Inc. v. County of San Diego, 200 F.R.D. 628, 638 (S.D. Cal.  
27 2001).

28 <sup>55</sup> See, e.g., ATC recording Lodged: Eastwind Cap. David McClaine:  
32:01 [EA 507]: Ah we just saw an explosion up ahead of us here  
[(somewhere's about)] sixteen thousand feet or something like that *it just*

1 and any zoom-climb would have been right through his altitude. Blackhawk  
2 helicopter pilot Fritz Meyer, holder of the Distinguished Flying Cross for his  
3 service rescuing downed pilots in North Vietnam's "iron triangle," followed a  
4 missile, carving an arc in the sky, in an overshoot-correct mode, before the first,  
5 ordnance explosion, whereupon the aircraft dropped "like a stone."<sup>56</sup>

6  
7 The two eyewitnesses featured in the CIA video were active duty US Navy  
8 Master-Chief Dwight Brumley (an airborne witness) and Vietnam veteran Mike  
9 Wire. Brumley's affidavit states the animation "wasn't even close to being an  
10 accurate representation" of what he had seen,<sup>57</sup> and Wire "assumed that they have  
11 used it just to... pacify the general public, because it didn't represent" what he had  
12 seen.<sup>58</sup> After the November 1997 video-animation's release, both Lisa Perry<sup>59</sup> and  
13 Paul Angelides<sup>60</sup> called the FBI, angry.

14 ● **December 30, 1996 – CIA idea**

15 A CIA-NTSB conference transcript plainly shows that "[o]n the 30th of  
16 December, 1996," a CIA analyst had the idea which is central to this action:  
17 "[Y]ou can explain what the eyewitnesses are seeing with only the burning  
18 aircraft." The CIA "immediately alerted" the FBI because "we wanted them to be  
19 aware."<sup>61</sup> Thus, 18 weeks into the probe, the government devised its plan to  
20 explain away the eyewitness evidence.

21  
22 *went down – in the water*

23 33.48 [EA 507]: And center for stinger bee ah five oh seven we are directly  
24 over the site with that airplane or whatever it was *just exploded and sent into*  
*the water*

25 <sup>56</sup> O Meyer Aff. Bates 192-206. Lodged.

26 <sup>57</sup> P Brumley Supp. Aff. ¶ 1 Bates 210. Lodged.

27 <sup>58</sup> R Wire Aff. ¶ 4 Bates 214. Lodged.

28 <sup>59</sup> U Perry Aff. ¶ 504 Bates 253. Lodged.

<sup>60</sup> S Aff. Angelides ¶ 33 Bates 221: Videotape: "didn't resemble it in any  
way." Lodged.

<sup>61</sup> X Lahr Aff. Ex. 1, CIA-NTSB conference transcript, Bates 304-305.

1           •       **November 17, 1997 – broadcast of CIA animation**

2           On November 17, 1997, fifty weeks after the CIA Analyst had his idea,  
3 network news broadcast it, in animation form, to millions of Americans.<sup>62</sup> It  
4 depicts the forward third of the airliner breaking away and falling, followed by the  
5 remaining portion of the aircraft performing a steady, steep, and flaming, 3,200-  
6 foot zoom-climb. The animation's narrator stated that "this may have looked like a  
7 missile attacking an aircraft" – claiming that the streak of light reported by  
8 eyewitnesses was actually the plane itself, climbing sharply due to a weight  
9 imbalance from its nose having separated from the fuselage.<sup>63</sup>

10           Simultaneously with the NTSB's November 17 release and broadcast of the  
11 CIA-produced animation, the FBI withdrew from the probe.

12           •       **November 17, 1997 – Boeing's contemporaneous press release**

13           As noted above, Boeing issued a press release the same day as the release of  
14 the CIA's 3,200-foot-climb animation, stating that it "was not involved in the  
15 production of the video shown today,' it did not "understand the data used," that it  
16 "provided basic aerodynamic information" and was "not aware of the data that was  
17 used."<sup>64</sup>

18           •       **December 8, 1997 – release of NTSB-produced animations**

19           The NTSB held one of two public hearings on the matter in Baltimore from  
20 December 8 through 12, 1997, during which time the NTSB played two video  
21 animations of the zoom climb.<sup>65</sup> These animations depict a zoom-climb of 1,700  
22 feet, half of the CIA's claim.

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23  
24  
25 <sup>62</sup> D Donaldson Aff. Ex. 19, CIA-video transcript, Bates 111-112. Lodged .

26 <sup>63</sup> See, e.g., *First Strike*, J. Cashill, WND Books 2004, p. 155: "[T]he boldest  
27 and most flagrant lie ever visited on the American people in peacetime."

28 <sup>64</sup> D Donaldson Aff. Ex. 21, *Boeing Press Release*, November 18, 1997, Bates  
114.

<sup>65</sup> Lodged.

1           •       **December 8, 1997 – release of NTSB Exhibit 4-A;  
2                           not in public docket**

3           NTSB Exhibit 4A, dated October 16, 1997, is its 12-page *Witness Group*  
4 *Factual Report*. This Report was distributed at the Baltimore hearing, but the  
5 NTSB withholds it from the public docket. It counts 94 FBI 302s of eyewitnesses  
6 having seen the streak of light rise from the surface<sup>66</sup> out of 458 FBI 302's.

7           On August 23, 2000, two-and-a-half years after the Baltimore hearing, the  
8 NTSB held its second Flight 800 hearing, in Washington DC. The NTSB  
9 precluded eyewitnesses from testifying, again, grossly under-reported the number  
10 of eyewitness accounts conflicting with the zoom-climb, again, and misrepresented  
11 their accounts, again.

12           **c.       NTSB's bad faith violation of its enabling statute**

13           If the NTSB had needed intra-agency participation to determine the aircraft's  
14 flight path, its logical choices would include the Department of Transportation, or  
15 the FAA, or Air Force, or Navy. But the NTSB's conduct is more than curious; it  
16 is illegal. The NTSB's enabling statute mandates that it exercise primary  
17 jurisdiction.<sup>67</sup>

18           Not only did the NTSB surrender its investigative mandate to the CIA, it  
19 relinquished control of the probe to the FBI for the first 17 months, until November  
20 17, 1997.

---

21  
22  
23 <sup>66</sup>       **D** Donaldson Aff. Ex. 16 NTSB Ex. 4A, Oct. 16, 1997, *Witness Group*  
24 *Factual Report*, Bates 100, 102.

25 <sup>67</sup>       49 U.S.C. § 1131 ¶ (a)(2), *General Authority*  
26 (2)     An investigation by the Board under paragraph (1)(A)-(D) or (F) of  
27 this subsection has priority over any investigation by another  
28 department, agency, or instrumentality of the United States  
Government. The Board shall provide for appropriate participation by  
other departments, agencies, or instrumentalities may not participate  
in the decision of the Board about the probable cause of the accident.

1           **d.     NTSB's bad faith violation of its party process**

2           The NTSB excluded among its 18 groups any trajectory group or flight path  
3 group, removing the calculations at issue in this case from party process peer  
4 review. The Party Process a codified, and mandatory ("shall"<sup>68</sup>). It is a  
5 fundamental principle of NTSB disaster probes.

6           The NTSB's Dennis Crider wrote both the trajectory and flight path flight  
7 path studies,<sup>69</sup> ran all time-step computer simulations, and provided all data used to  
8 produce the animations, using his own invention; the still-secret time-step  
9 computer simulation program, withheld as both privileged and proprietary. (Mr.  
10 Crider' observes that the program "is intuitive to" him.<sup>70</sup> Any program is intuitive  
11 to its author.)

12           In their submission to the NTSB's final report, the *Air Line Pilots*  
13 *Association* protested only Crider's having access to the data at issue, in violation  
14 of the party process:

15                   [A]lthough ALPA does not doubt the technical capability of the  
16 NTSB, we are concerned that this analysis [Component Trajectory  
17 Study] was essentially accomplished by only one individual at the  
18 Board, with little or no party input or participation.

19                   As cited in the previous section, the trajectory study utilized several  
20 and uncertain or erroneous component recovery locations... Had this  
21 study been conducted as a group activity... necessary cross-checking  
22 and party consensus building..."<sup>71</sup>

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25 <sup>68</sup> 49 USC § 1131, *General Authority*, ¶ (a)(3), ending: "The Board and other  
26 departments, agencies, and instrumentalities shall ensure that appropriate  
27 information developed about the accident is exchanged in a timely manner."

28 <sup>69</sup> Vaughn index Bates 440-510.

<sup>70</sup> Vaughn index Crider declaration Bates 513 ¶ 48.

<sup>71</sup> X Lahr Aff. Ex. 5 ALPA submission Bates 329.

1 As plaintiff Captain Lahr, a 15-year ALPA safety representative, observes,  
2 the withholding of the aircraft's performance data from any party to any NTSB  
3 probe is unprecedented.<sup>72</sup>

4 The *International Association of Machinist and Aerospace Workers'*  
5 submission to the NTSB's final report reflects its outrage at the NTSB's party  
6 process violations, relating that "[w]e feel that our expertise was unwelcome and  
7 not wanted by the FBI. Threats made during the first two weeks of the  
8 investigation were unwarranted and unforgettable."<sup>73</sup>

9 Officials inside the probe were so frustrated that they smuggled out physical  
10 evidence, the debris-field database,<sup>74</sup> and radar evidence.<sup>75</sup>

11 And the FBI's concealing of eyewitness' accounts violated the party process.

12 Experts agree that the NTSB violated the party process in its probe, as well  
13 as in generating the records at issue.

14 **e. NTSB's bad faith suppression of witness accounts**

15 Although ostensibly and legally an NTSB probe from its inception, the FBI  
16 forbade all parties and groups, including the NTSB Witness Group,<sup>76</sup> from  
17 interviewing any eyewitnesses. FBI agents interviewed the eyewitnesses – which,  
18 in and of itself, was "unprecedented"<sup>77</sup> and violated the NTSB's statutory charter.

---

21  
22 <sup>72</sup> Id. ¶ 135 Bates 288: "I also participated in [seven] major NTSB  
23 accident investigations. Never in this experience were the parties to an  
24 NTSB investigation refused information about the performance of the  
aircraft involved."

25 <sup>73</sup> **X** Lahr Aff. Ex. 10, IAMAW submission Bates 365.

26 <sup>74</sup> **K** Sanders Aff. ¶¶ 6, 8 Bates 175. See also Vaughn index p. 483 Record  
No. 27 claiming deliberative process in debris-field.

27 <sup>75</sup> **J** Holtsclaw Aff. ¶¶ 2-3 Bates 173; **M** Russell Aff. ¶ 8 Bates 189.

28 <sup>76</sup> **O** Meyer Aff. ¶5d, Bates 193, relating that the FBI "forbade" NTSB  
Witness Group Chairman Weidermier from contacting Meyer.

<sup>77</sup> **Q** Grose Aff. ¶ 4 Bates 211: "[I]t's unprecedented because, by a mandate of

1 Eastwind Captain David McClaine is the only civilian ever to be interviewed  
2 by the NTSB Witness Group, one year after the adoption and broadcast of the  
3 zoom-climb hypothesis.

4 The NTSB suppressed eyewitness accounts at both its hearings, in December  
5 of 1997<sup>78</sup> and August 2000.

6 Not one eyewitness relates seeing what the government's animations depict.

7 **f. NTSB's bad faith science**

8 Virtually every piece of relevant eyewitness and physical evidence in this  
9 case is irreconcilable with the NTSB's zoom-climb theory.

10 The tragedy occurred within range of several radars, at least three of which  
11 picked up Flight 800's path after the on-board loss of power to the transponder.  
12 Radar shows that aircraft did not slow. Thus, it did not climb.<sup>79</sup>

13 Here, summary reports on the government's conclusions defy the laws of  
14 physics, and the government refuses to produce the data upon which its  
15 conclusions are based.

16 There are several instances of the NTSB's defying the immutable laws of  
17 physics.

18  
19  
20 the Congress, there is one body, the National Transportation Safety Board,  
21 that is entirely charged with the investigation of any transportation  
22 accident."

22 <sup>78</sup> X Lahr Aff. ¶ 24 Ex. 2 & 3 Bates 306-311: FBI to NTSB letter objecting  
23 to use of eyewitnesses materials or testimony at Hearing, and return letter  
24 agreeing.

24 <sup>79</sup> E Stalcup Supp. Aff. ¶ 3 Bates 126. Lodged: "The law of conservation  
25 energy says, that you use kinetic energy and that's the speed you have  
26 already and you convert that to altitude but there is a price, the price that you  
27 pay is that you slow down. It is like when you ride a bike up a hill, at the  
28 top of the hill you're going pretty slow, you know, you use your energy up.  
Well the radar data showed the plane did now slow down. If it didn't slow  
down, it didn't climb. If the witnesses didn't see the plane climb, they saw  
something else."

1           When the nose was blown off of TWA 800, the center of gravity  
2           moved aft of the center of lift. Now you've got the center of lift going  
3           up. That would rotate the aircraft through complete stall in less than  
4           two seconds, and the most the aircraft could have climbed would be  
5           about 200 feet.<sup>80</sup>

6           The government's conclusion that the center-wing-tank explosion was the  
7           initiating event is also impossible. The fuel, which is as volatile as kerosene, is a  
8           combustible liquid, as opposed to a flammable liquid. A combustible liquid  
9           "simply cannot" give off "flammable vapors."<sup>81</sup> All cars have fuel pumps inside  
10          their gas tanks, carrying a flammable liquid. Not one has ever exploded. No 747-  
11          100 pumps were replaced after the disaster.<sup>82</sup> Flight 800's center-wing-tank was  
12          empty, the residual from the previous flight having been drained by sump-pump.<sup>83</sup>

13          Moreover, the center-wing-tank explosion is a self-defeating theory because  
14          "the front of the support frame for the aircraft wings" would have been destroyed  
15          (as the NTSB admits), resulting in loss of the wings.<sup>84</sup>

16          The *International Association of Machinist and Aerospace Workers*, a party  
17          to the probe, unequivocally rejected defendant's probable cause finding.<sup>85</sup> TWA  
18          also rejects it.<sup>86</sup>

---

19  
20 <sup>80</sup> X Lahr Aff. ¶ 88 Bates 281. Lodged.

21 <sup>81</sup> H Harrison Aff. ¶¶ 7-9 Bates 153.

22 <sup>82</sup> C Hill Aff. ¶ 4 Bates 50.

23 <sup>83</sup> C Hill Aff. ¶ 4 Bates 50-51 "...Captain Mundo... used that sump pump to  
24          take out any residual jet fuel... because... they didn't need it... that tank was  
25          empty... a thimble-full of kerosene, or the equivalent, vapor... [in] a huge  
26          tank... And there's no way that you can ignite a thimble-full of kerosene and  
27          blow off the left wing of the strongest airplane ever built."

28 <sup>84</sup> W Rivero Aff. ¶ 13 Bates 264. Lodged.

<sup>85</sup> X Lahr Aff. Ex. 10, IAMAW submission, Bates 371: "The center wing  
fuel tank did explode. We find that this explosion was as the result of the  
aircraft breakup. The initial event caused a structural failure in the area of  
Flight Station 854 to 860, lower left side of the aircraft. A high-pressure



1           Probably the starkest evidence of bad faith is that the government *deleted*  
2 *data* prior to its public release, including radar<sup>87</sup> and the Flight Data Recorder.<sup>88</sup>

3 **5.   NTSB's limited search, absence of responsive records,**  
4 **and bad faith, requires resubmission under Vaughn**

5           See generally the accompanying Statement of Genuine Issues for an analysis  
6 of the NTSB's Vauhgn index, citing the record. Defendant's Vaughn index is a list  
7 of records it claims not to have; it contains almost no responsive records to the 114  
8 requests before the Court. It is internally inconsistent. Its claims are disputed by  
9 plaintiff's proof are it claims are directly at odds with claims of plaintiff's experts.<sup>89</sup>

12           event breached the fuselage and the fuselage unzipped due to the event. The  
13 explosion was the result of this event."

14 <sup>86</sup> **Y** Young Aff. ¶ 3 Bates 394: "As the TWA Flight 800 Investigation Party  
15 Coordinator and Chief Accident Investigator, I can confirm that TWA did  
16 not subscribe to the "zoom climb" scenarios of either the CIA or NTSB,  
based on the following..."

17 <sup>87</sup> **E** Stalcup Supp. Aff. ¶ 4 Bates 126, Lodged: "The last sweep of  
18 the river head radar shows the four dot points deleted in a – right where  
19 Flight 800 was, and that's where any missile would have been that was  
going to hit it, now that data has been completely deleted... this isn't, that's  
20 not something that just happened by itself."

21 <sup>88</sup> **BB** Schulze Aff. ¶¶ 3, 5, Bates 461-463: "I have devoted between 1200 and  
22 1500 hours reviewing the entire collection of... Flight 800 Cockpit Voice  
Recorder (CVR) and the Flight Data Recorder (FDR) Accident Tapes....  
23 Detailed analysis performed by me in conjunction with my peers... of the  
24 FDR tape revealed a clear and glaring omission of the last three to four  
seconds of the FDR tape data... presented the results... in person to the  
25 Niberts and Chairman Jim Hall and his FDR specialists, Cash, Grossi and  
26 Ellingstad. At the end of this meeting Mr. Nibert formally requested the  
original FDR tape be temporarily made available to me for an independent  
27 analysis... Mr. Hall and the NTSB refused this request and immediately  
28 terminated all correspondence with me about the FDR tape thereby leaving  
my serious claim of missing FDR data unanswered."

<sup>89</sup> See generally **Z** Leffler Aff.

1 The NTSB claims not to have a single responsive record to plaintiff's first 64  
2 requests for the data underlying the 64 graphs in its written report. Defendant's  
3 sole response is that Crider "may have referred to one or more textbooks when  
4 working with the computer program for the TWA Flight 800 Main Wreckage  
5 Flight Path Study, but no record was created." Brett Hoffstadt opines that "it is  
6 highly unlikely that Mr. Crider has no record of any data, and no record of any  
7 formula, that he used to write any of these 64 graphs." The fact that a significant  
8 number of responsive records have not been identified is a "positive indication[] of  
9 overlooked materials."<sup>90</sup>

10 In response to the four requests seeking records upon which the CIA  
11 animation was based, Mr. Crider claims he has "no records concerning what, if  
12 any, computer simulation program was used by the CIA." The NTSB "does not  
13 know what, if any," information the CIA used to create its video-animations. But  
14 the 1997 CIA animation ends: "The preceding CIA analysis included... data  
15 provided by the NTSB." And the CIA's 2001 FOIA response is that "the pertinent  
16 data, and resulting conclusions, were provided by the National Transportation  
17 Safety Board (NTSB). CIA simply incorporated the NTSB conclusions into our  
18 videotape." Crider relates that he "learned [in 1997] that both Boeing and the CIA  
19 were using different methods to simulate the flight path" and Boeing-supplied  
20 information was "routed" through him. This is another failure to identify records.

21 Nine requests seeks records upon which the NTSB's video-animation reports  
22 are based, including the data converted for animations (as well as the programs  
23 themselves). Here too NTSB claims it has "no responsive records." Yet, the  
24 NTSB writes that "[t]he animations are a visual depiction of the data presented  
25 from the radar sources, the digital flight data recorder, and/or the data from the  
26 simulations." The NTSB relates that it "convert[ed] units of angular measurement"  
27 and "linearly interpolate[d] all data." Another failure to identify responsive

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28 <sup>90</sup> Oglesby v. Department of Army, 79 F.3d 1172, 1185 (D.C. Cir. 1996).

1 records. None of these records are among the NTSB's 31 identified records, which  
2 are for the most part non-responsive, and deliberative.

3 As to the all-important record of the NTSB's simulation code, the NTSB  
4 baldly claims that the code is deliberative as "utilized by the agency's decision  
5 makers." The NTSB also claims that proprietary Boeing data is embedded in the  
6 code precluding Crider from segregating the Boeing information, contrary to  
7 plaintiff's expert's opinion. (Later, in response to requests for records supplied by  
8 Boeing, defendant claims it has no responsive records.) The request for the  
9 computer codes BREAKUP and BALLISTIC are ignored ("no responsive  
10 records"), because they were not used for the main simulation. Defendant limits  
11 plaintiff's requests at its whim.

12 And on it goes. The NTSB has no record of any correlation of the flight  
13 trajectory to radar, radio transmissions, or flight data recorder, contrary to  
14 plaintiff's expert's opinion.

15 Plaintiff ended his list of FOIA requests by asking for all records of the  
16 process by which defendant arrived at its zoom-climb hypothesis. Defendant  
17 responded that the word "process" was too imprecise for a FOIA response.

18 The NTSB's index does not correlate its 31 records to plaintiff's numbered  
19 FOIA Requests, making a narrowing of requests at issue nearly impossible. The  
20 Court must rule on every FOIA request before the Court. Plaintiff's 114 FOIA  
21 Requests are taken from the NTSB's own public docket, so the NTSB has no  
22 excuse for not identifying these records in its Vaughn index. The Court cannot  
23 adjudicate unidentified records.

## 24 **6. Conclusion: Plaintiff seeks relief on alternative grounds**

25 For the reasons of inadequate identification, inapplicability of exemptions,  
26 and, alternatively, the public interest in disclosure, plaintiff opposes the NTSB's  
27 motion for summary judgment.

28 As plaintiff will be presenting his case in PowerPoint, he needs to know how  
much time the Court will allocate for the August 2 hearing.

1  
2 Respectfully submitted,  
3 H. Ray Lahr

4 By Counsel

5  
6 \_\_\_\_\_  
7 John H. Clarke  
8  
9  
10  
11

12 **PROOF OF SERVICE – BY HAND**

13 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES  
14

15 I am a resident of the State of California, over the age of 18 years. My address is  
16 18254 Coastline Drive, Malibu, CA 90265-5702.

17 On July 6, 2004, I served a true copy of **PLAINTIFF’S OPPOSITION TO**  
18 **NTSB’S MOTION FOR PARTIAL SUMMARY JUDGMENT** and  
19 **PLAINTIFF’S OFFER OF PROOF: AFFIDAVITS A THROUGH CC** on the  
20 interested parties in this action by hand delivery to defendants' attorney:  
21

22 Jan L. Luymes, Esquire  
23 Assistant United States Attorney  
24 300 North Los Angeles Street, Room 7516  
25 Los Angeles, California 90012

26 I declare under penalty of perjury that the foregoing is correct and that this  
27 Proof of Service was executed on July 6, 2004.  
28

\_\_\_\_\_

H. Ray Lahr