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

13 H. RAY LAHR,) Case No. 03-08023 AHM (RZx)
14)
15 Plaintiff,) **PLAINTIFF'S NOTICE OF**
16) **MOTION AND MOTION FOR**
17 v.) **LEAVE TO AMEND COMPLAINT**
18)
19 NATIONAL TRANSPORTATION)
20 SAFETY BOARD, *et al.*)
21)
22 Defendants.)
23)
24)

25 Date: February 6, 2006
26 Time: 10:00. a.m.
27 Place: Courtroom 14, 312 N. Spring
28 Street, Los Angeles, CA 90012
Judge: Honorable A. Howard Matz

- (1) PLAINTIFF'S NOTICE OF MOTION FOR LEAVE TO AMEND COMPLAINT
(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION
(3) AFFIDAVIT OF H. RAY LAHR

1
2 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
3 OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

4 **A. FACTS**

5 **1. Central Intelligence Agency**

6 The FOIA request now before the Court seeks disclosure of records upon
7 which the government's TWA Flight 800 flight path trajectory, or zoom-climb,
8 conclusions were based. The government first released the zoom-climb hypothesis
9 to the public via a widely broadcast narrated CIA video-animation, on November
10 17, 1997. The NTSB released its video-animation (report) the following month.

11 (In 2000, at the age of seventy-five, plaintiff had submitted a FOIA request
12 to the CIA for the same records at issue herein.¹)

13
14
15
16 ¹ See Second Amended Complaint ¶ 9-10:

17
18 By November 10, 2000 FOIA request, plaintiff sought disclosure of
19 the CIA's zoom-climb records. The CIA's January 6, 2001, response
20 states in part:

21 This acknowledges receipt of your 10 November 2000 letter
22 requesting records under the provisions of the Freedom of
23 Information Act (FOIA). Specifically, your request is for
24 records pertaining to the computer program and data used to
25 produce **the computer simulation of TWA Flight 800, 17**
26 **July 1996, losing its nose section, then climbing about 3,000**
27 **feet.** For identification purposes... We have researched this
28 matter, and have learned that the pertinent data, and resulting
conclusions were provided by the National Transportation
Safety Board (NTSB). CIA simply incorporated the NTSB
conclusions into our videotape... Accordingly, you may want
to submit your request to the NTSB... (bolded in original)
(Docket # 28 *Opposition to NTSB summary judgment*)

1 Attached to the CIA's August 16, 2005 Second Buroker Declaration are
2 zoom-climb records generated after November of 1997. Plaintiff was unaware of
3 these post-decisional records until the CIA produced them.

4 Although the CIA identified many of these records, this Court does not have
5 jurisdiction over them because they fall outside the scope of plaintiff's FOIA
6 request, seeking disclosure of pre-decisional records.

7 On September 13, 2005, plaintiff's made a FOIA Request to the CIA. A
8 copy is attached as Exhibit A. It states in part:

9 This FOIA request is for all records created as part of the analysis
10 that continued after the CIA video-animation concerning the
11 explosion of TWA Flight 800 was shown to the public.

12 The CIA has to date failed to respond to plaintiff's September 13, 2005,
13 FOIA request. An agency is required to make a "determination" on any FOIA
14 request within twenty working days of receipt. 5 U.S.C. § 552(a)(6)(A)(i). The
15 FOIA expressly provides that a requestor "shall be deemed to exhausted his
16 administrative remedied... if the agency fails to comply with the applicable time
17 limit provisions" for initial and appellate determinations, under 5 U.S.C. §
18 552(a)(6)(C). Thus, plaintiff has constructively exhausted his administrative
19 remedies, and plaintiff's amended complaint is ripe.

20 **2. National Security Agency**

21 Plaintiff received a November 7, 2005 letter from the National Security
22 Agency, a copy of which is Exhibit B. The NSA letter states that "Item 83 of
23 your index, requesting a copy of the computer simulation and animation program
24 used by the CIA and / or the National Transportation Safety Board (NTSB) was
25 referred to the National Security Agency / Central Security Service by CIA for our
26 review and direct response to you."

27 The letter denied the request in its entirety.

28 On November 16, 2005, plaintiff administratively appealed the NSA's
November 7, 2005 denial. A copy of plaintiff's appeal letter is Exhibit C.

1 The NSA has not to date responded to plaintiff's November 16, FOIA
2 administrative appeal, and thus plaintiff has exhausted his administrative remedies
3 under 5 U.S.C. § 552(a)(6)(C).

4 **B. ARGUMENT**

5 Fed. R. Civ. P. 15(a), *Amendments*, directs the Court to grant leave to amend
6 "when justice so requires," and in practice the burden is usually on the party
7 opposing the amendment to demonstrate why the amendment should not be
8 permitted. See, e.g., Forman v. Davis, 371 US 178, 83 S.Ct. 227, 9 L.Ed.2d
9 (1962). The CIA cannot demonstrate why the amendment should not be
10 permitted. The CIA cannot fault plaintiff for being unaware of the fact that most
11 of the CIA's records were generated after November 17, 1997 – when the CIA
12 announced, by video-animation, broadcast to tens of millions of Americans, that
13 the eyewitnesses had seen Flight 800 zoom-climb, "not a missile." (emphasis in
14 video caption)

15 Regarding the joinder of the NSA as defendant, the disclosure of zoom-
16 climb records involve questions of law and fact that are common to all defendants,
17 the records were generated during the same transactions and occurrences, and so
18 Fed. R. Civ. P. 20(a), *Permissive Joinder*, is clearly applicable.² See, e.g., Mosley
19 v. General Motors Corp., 497 F. 2d 1333 (8th Cir. 1974), "[A]ll reasonably related
20 claims for relief by or against different parties [should] be tried in single
21 proceeding."

22 Plaintiff has exhausted his administrative remedies.

23
24 ² Fed. R. Civ. P. 20(a), *Permissive Joinder*, in part:

25 All persons... may be joined in one action as defendants if there is
26 asserted against them jointly, severally, or in the alternative, any right
27 to relief in respect of or arising out of the same transaction,
28 occurrence, or series of transactions or occurrences and if any
question of law or fact common to all defendants will arise in the
action.

1 Also, granting the relief sought would not would not broaden the issues
2 before the Court, as plaintiff still seeks the same zoom-climb records.

3 Conclusion

4 WHEREFORE, plaintiff H. Ray Lahr respectfully moves for leave to amend
5 his complaint to include post-November 17, 1997 CIA-records, and to add the
6 National Security Agency as a defendant.

7 Plaintiff's proposed Second Amended Complaint is filed herewith, as is his
8 proposed order.

9 Date: January 5, 2006.

10
11 Respectfully submitted,
12 H. Ray Lahr
13 By Counsel

14 _____
15 John H. Clarke

16 **PROOF OF SERVICE**

17 **DISTRICT OF COLUMBIA:** I am a resident of the District of Columbia, over the
18 age of 18 years. My business address is 1717 K Street, NW, Suite 600,
19 Washington, DC 20036. I am counsel for plaintiff. On January 5, 2006, I served
20 a true copy of (1) PLAINTIFF'S NOTICE OF MOTION FOR LEAVE TO
21 AMEND COMPLAINT, (2) MEMORANDUM OF POINTS AND
22 AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION, (3) AFFIDAVIT OF
23 H. RAY LAHR on the interested parties in this action, by hand, to:

24 David M. Glass, Esquire
25 Assistant United States Attorney
26 20 Massachusetts Avenue, NW, Room 7140
27 Washington, DC 20530

28 I declare under penalty of perjury that the foregoing is correct and that this
Proof of Service was executed on January 5, 2006.

John H. Clarke

Captain H. Ray Lahr (ret)
8524 Coastline Drive
Malibu, CA 90265
(310) 459-2232

September 13, 2005

FREEDOM OF INFORMATION ACT REQUEST

By facsimile (703) 613- 3007

Information and Privacy Coordinator
CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505

Re: Records regarding the November, 1997 CIA video-animation
depicting the July 17, 1996 downing of TWA Flight 800

Dear Coordinator:

This is a Freedom of Information Act request under 5 U.S.C. 552 et seq. (the "FOIA"). In November 1997, the CIA released its video-animation of Flight 800 continuing to fly; over 3,000 feet up, after the nose of the aircraft had separated from the fuselage (the "zoom-climb"). This request is for records generated after the public release of the zoom-climb animation.

My October 8, 2003, FOIA request for similar records is currently the subject of pending litigation. (Lahr v. NTSB et al, CDCA, No. CV 03-08023). This FOIA request is for all records 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.

Sincerely,

H. Ray Lahr

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11-07-05



**NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE**
FORT GEORGE G. MEADE, MARYLAND 20755-6000

2005 OCT 19 10 58 AM
NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 47448
7 November 2005

Captain H. Ray Lahr (ret)
8524 Coastline Drive
Malibu, CA 90265

Dear Captain Lahr:

This responds to your Freedom of Information Act (FOIA) request of 8 October 2003, originally submitted to the Central Intelligence Agency (CIA) for information relating to the NTSB's probe into the downing of TWA flight 800. A copy of your request is enclosed. Item #83 of your index, requesting a copy of the computer simulation and animation program used by CIA and/or the National Transportation Safety Board (NTSB), was referred to the National Security Agency/Central Security Service by CIA for our review and direct response to you. This referral was received in our office on 19 October 2005, and has been assigned Case Number 47448.

For purposes of this request and based on the information you provided in your letter, you are considered an "all other" requester. As such, you are allowed 2 hours of search and the duplication of 100 pages at no cost. There are no assessable fees for this request; therefore, we did not address your request for a fee waiver.

Your request has been processed under the provisions of the FOIA, and the information that you seek remains exempt from disclosure. Subsection (b)(2) of the FOIA exempts from disclosure matters related solely to the internal personnel rules and practices of an agency. This exemption has been held to apply to matters that are "predominantly internal," the release of which would "significantly risk circumvention of agency regulations or statutes." Crooker v. Bureau of Alcohol, Tobacco, and Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981). The information contained within the program meets the criteria for exemption (b)(2) protection as that statutory provision has been interpreted and applied by the Federal Judiciary.

In addition, this Agency is authorized by various statutes to protect certain information concerning its activities. Accordingly, we have determined that the program is exempt from disclosure pursuant to the third exemption of the FOIA, which provides for the withholding of information specifically protected from disclosure by statute. The specific statute applicable in this

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Captain H. Ray Lahr (ret)
8524 Coastline Drive
Malibu, CA 90265
(310) 459-2232

November 16, 2005

FREEDOM OF INFORMATION ACT APPEAL

By Regular Mail and Certified Mail Return Receipt Requested

National Security Agency/Central Security Service
NSA / CSS FOIA Appeal Authority (DC 34)
NATIONAL SECURITY AGENCY
9800 Savage Road
Suite 6248
Fort George G. Meade, MD 20755-6248

Re: FOIA Case 47448

Dear NSA:

Your FOIA denial letter identified FOIA request number 83, "[t]he computer simulation and animation programs used by the CIA and/or the NTSB." This is an administrative appeal of that denial.

As the originating agency has standing to assert any exemptions, and your letter is silent on the issue, please inform me as to whether the National Security Agency is the originating agency.

You asserted exemption (b)(2), which exempts "matters that are... related solely to the internal personnel rules and practices of an agency." The Attorney General's Oct 12, 2001 Report states that (b)(2) "relates only to the internal rules of practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." Your other reference, to Crooker v. Bureau of Alcohol, Tobacco, and Firearms 670 F.d 2d 1051, 1074 (DC Cir. 1981), a case involving a law enforcement agent's training manual, does not state what Crooker has to do with nondisclosure of the "computer simulation." In sum, you have given no reason how (b)(2) could be applicable to the simulation.

You also rely on (b)(3), other statutes, and cite "50 U.S. Code 402 note." However, there is nothing in that statute, *National Security Council*, nor its note, totaling 29 pages, to justify withholding the records of "[t]he computer simulation and animation programs used by the CIA and the NTSB."

Lastly, the NSA's denial letter states that the simulation is not segregable. The NSA failed to identify what records it seeks to segregate. Moreover, this claim is false. Section 9 of the E-FOIA provides guidance to redact from computer records in such a way as to show how much information was redacted, and from where.

After the first two hours of search time and first one hundred pages of duplication costs are used, kindly timely notify me if the agency has determined that the fee will exceed \$250, as required.

Sincerely,

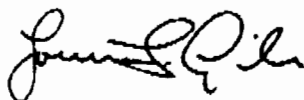
H. Ray Lahr

FOIA Case: 47448

case is Section 6, Public Law 86-36 (50 U.S. Code 402 note). No portion of the information is reasonably segregable.

Since your request has been denied, you are hereby advised of this Agency's appeal procedures. Any person denied access to information may file an appeal to the NSA/CSS Freedom of Information Act Appeal Authority. The appeal must be postmarked no later than 60 calendar days after the date of the initial denial letter. The appeal shall be in writing addressed to the NSA/CSS FOIA Appeal Authority (DC34), National Security Agency, 9800 Savage Road STE 6248, Fort George G. Meade, MD 20755-6248. The appeal shall reference the initial denial of access and shall contain, in sufficient detail and particularity, the grounds upon which the requester believes release of the information is required. The NSA/CSS Appeal Authority will endeavor to respond to the appeal within 20 working days after receipt, absent unusual circumstances.

Sincerely,



LOUIS F. GILES
Director of Policy

Encl:
a/s

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