

1 JOHN H. CLARKE [*Pro Hac Vice*]
2 Telephone: (202) 332-3030
3 JOHN F. DUNNE, JR. [SBN 32854]
4 1601 Cloverfield Boulevard
5 Second Floor, South Tower
6 Santa Monica, California 90404-4084
7 Telephone: (310) 393-9351
8 Facsimile: (310) 230-4066
9 *Attorneys for Plaintiff*

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 SUR-REPLY TO**
16) **CIA'S REPLY TO OPPOSITION**
17 v.) **TO MOTION FOR PARTIAL**
18) **SUMMARY JUDGMENT**
19 NATIONAL TRANSPORTATION)
20 SAFETY BOARD, *et al.*)
21)
22 Defendants.)
23)
24)
25)
26)
27)
28)

Date: October 31, 2005
Time: 10:00. a.m.
Place: Courtroom 14, 312 N. Spring
Street, Los Angeles, CA 90012
Judge: Honorable A. Howard Matz

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1 **I. THE CIA'S VAUGHN INDEX MUST BE IN ONE DOCUMENT**

2 The CIA's Vaughn index is spread out in two documents – first, its June 20,
3 1995 document, titled "Vaughn index," and second, its August 16 Second
4 Declaration of Terry N. Buroker (later corrected in the September 30 Declaration
5 of Scott A. Koch). As set forth in plaintiff's opposition to the CIA's summary
6 judgment motion, the latter is needed to decipher the former.

7 As it stands, any given redaction can be reviewed only by first, correlating
8 the record's seven-digit Mori Doc. Id No. in the CIA's September 30 chart with the
9 seven-digit Document number, second, checking for corrections to the *Document*
10 *Disposition Index* pages listed at ¶¶ 10-17 in the August 16 filing, and third,
11 comparing the document to the CIA's June 20 *Document Disposition Index* page,
12 taking into consideration any corrections.

13 The CIA's format of submitted records and Vaughn index is contrary to
14 precedent. As the court observed in Founding Church of Scientology of
15 Washington, D.C. v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979), such a format does
16 not satisfy the requirements of a Vaughn index:

17 On remand the agency should concentrate on three **indispensable**
18 **elements** of a Vaughn index:

- 19 (1) The index should be contained **in one document,**
20 **complete in itself.**
- 21 (2) The index must adequately describe each withheld
22 document or deletion from a released document.
- 23 (3) The index must state the exemption claimed for each
24 deletion or withheld document, and explain why the
25 exemption is relevant.... sufficiently specific to permit a
26 reasoned judgment as to whether the material is actually
27 exempt under the FOIA.
- 28

1 These requirements do place an administrative burden on the
2 agencies, but less exacting standards would not satisfy the
3 FOIA's unambiguous policy in favor of the fullest possible
4 disclosure of government records.
5 (emphasis added)

6
7 **II. THE CIA'S VAUGHN INDEX DOES NOT MATCH ITS**
8 **RECORD PRODUCTION**

9 **A. February 28, 2005 production and transmittal letter**
10 **identified 218 pages as released in redacted form**

11 The CIA first provided plaintiff 245 pages of records.

12 The CIA's February transmittal letter claimed to have included 42 records,
13 divided into three sections – A, B & C. It stated that 15 documents were released
14 in segregated form.

15 It contained no page count and the corresponding records are not
16 sequentially numbered.

17 By counting the pages of the documents corresponding to the MORIDoc ID
18 numbers which were identified as having been released in part, it was possible to
19 extrapolate from the production that a total of 218 pages were claimed to have
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1 been released in redacted form.¹

2 And it was possible, if unclear, to discern that six documents were being
3 withheld pending coordination with other agencies.²

4 Also, this first transmittal letter overstated the number of documents
5 produced by 17.³

6
7 ¹ Vaughn index p. 110, February 28 transmittal letter ¶ 3: "Enclosed at Tab B
8 are 13 documents... which can be released in segregable form with
9 deletions... 1176341-1176345, and 1176347-1176354"

10 [Note: 1176341 is 1 page
11 1176342 is 3 pages
12 1176343 is 1 page
13 1176344 is 5 pages
14 1176345 is 13 pages
15 1176347 is 31 pages
16 1176348 is 11 pages
17 1176349 is 40 pages
18 1176350 is 48 pages
19 1176351 is 2 pages
20 1176352 is 2 pages
21 1176353 is 1 page
22 1176354 is 1 page Total pages: 159]

23 Id. p. 111 ¶ 1: "Enclosed at Tab C are two CIA-originated documents...
24 released in segregable form..."

25 [Note: 1175601 is 1 page
26 1176603 is 48 pages Total pages: 59]

27 ² Id. ¶ 2: "During our searches, we identified ten documents that require this
28 agency to coordinate with other federal agencies or entities. Coordination of
four of these documents have been completed, and the documents are among
those addressed in Tab B above."

³ 3 Schulze Aff. Bates 53 ¶ 29: "...Discrepancies in CIA Letter of
Transmittal of 28 February, 2005... Tab A contained only 10 uniquely
identifiable contextual documents, not 27 documents as stated by Mr.
Koch.... Some Tab A documents do not appear contextually in their
entirety as stated by Mr. Koch.

1 **B. June 17, 2005 production and transmittal letter**
2 **identified 68 pages as released in redacted form**

3 Four months later, the CIA produced another set of records with a
4 transmittal letter. This transmittal letter claimed that these records were divided
5 into 15 documents, nine of which it recites it enclosed in segregable form. The
6 records claimed to have been produced in redacted form totaled 68 pages.⁴

7 It further stated that the CIA had "identified ten additional documents that
8 required consultation" – four of which are included in the packet and one of which
9 required consultation with another agency. Apparently, five, or more,⁵ documents
10 were being withheld in their entirety (transmittal letter at pp. 114-15 Vaughn
11 index).

12 Thus, as of June 17, 2005, as far as one can tell, comparing these two
13 transmittal letters with the records produced, there were a total of 57 documents
14 claimed to have been produced; 24 documents were produced in redacted form and
15 seven were withheld pending consultations with other agencies. Further,

16 ⁴ Vaughn index p. 113 ¶ 3: "Also enclosed at Tab B are nine documents...
17 (1215013-1215018 and 1215200-1215201) which may be released in
18 segregable form with deletions..."

19 [Note: 1215013 is 1 page (misidentified as 1215018 in CIA chart)
20 1215014 is 9 pages
21 1215015 is 1 page (misidentified as 1215016 in CIA chart)
22 1215016 is 1 page (not identified in CIA chart)
23 1215017 is 1 page
24 1215018 is 8 pages
25 1215200 is 15 pages
26 1215201 is 4 pages
27 1215202 is 28 pages Total pages: 68]

28 ⁵ Id. p. 114 ¶ 1: "Five are exempt from release and must be denied in their
entirety on the basis of exemptions (b)(4) and (b)(5)." But see id. p. 113 ¶
4: "We also located additional material, which we have determined is
exempt from release and must be denied in its entirety on the basis of FOIA
exemptions (b)(5), (b)(6), and (b)(7)(C)."

1 according to these two letters, five or more documents are claimed to be entirely
2 exempt from production. And, according to the CIA's February 28 and June 20
3 transmittal letters and records enclosed, it was possible to determine that there
4 were a total of 286 pages claimed to have been produced in redacted form.

5
6 **C. June 20, 2005 Vaughn index identified 261 pages
7 as released in redacted form – a 25-page discrepancy, and
8 provided no correlation of the redactions to the records
9 themselves**

10 The defendant filed its Vaughn index (docket # 57). That index identified
11 30 records in the CIA's one-page *Document Disposition Index* forms (pp. 41-70).
12 The CIA did not file a copy of the records to which the *Document Disposition*
13 *Index* forms referred. It identified the records by document number, and, because
14 the only numbers appearing on the records themselves are MORI DocID numbers,
15 plaintiff had no way of determining which records the CIA's Vaughn index
16 purported to identify.

17 The *Document Disposition Index* forms listed a total of 261 pages,⁶
18 supposedly identifying all records that the CIA withheld in part. But, as revealed
19 in the foregoing footnotes, the redacted records produced by the CIA totaled 286
20 pages. The CIA offers no explanation for this 25-page discrepancy.

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23
24 ⁶ This number takes into account the CIA's subsequent filing correcting
25 *Document Disposition Index* form at p. 59 changing "withheld in part" to
26 "withheld in full." (The June 20 first Buroker declaration recites that the
27 CIA withholds six documents in full (¶ 7), but that filing included five
28 *Document Disposition Index* forms corresponding to documents withheld in
their entirety (pp. 56-58, 63 & 65).

1 **D. August 16, 2005 Vaughn index and production listed numerous**
2 **corrections to its June 20 filing, contained no page correlation,**
3 **omitted records, and misidentified records**

4 With its motion for summary judgment filed on August 16, 2005, the CIA
5 produced 388 pages of records, attached to its Second Declaration of Terry N.
6 Buroker. That Declaration recites (at ¶ 8) that "A true and correct copy of the
7 records withheld in part, as released to the Plaintiff, is attached hereto as Exhibit
8 A."

9 Attached to that Buroker Declaration were two *Document Disposition Index*
10 pages, corresponding to two new documents released therein, in redacted form,
11 totaling 128 pages. Thus, the CIA's June 20 *Document Disposition Index* pages,
12 identifying 261 pages, plus the two more August 16 *Document Disposition Index*
13 page, should have totaled 389 pages produced in redacted form.

14 The Second Buroker Declaration included a chart (at ¶ 8) that purports to
15 enable plaintiff to correlate the records by MORI DocID number with the
16 Document Number listed on the *Document Disposition Index* pages. But the
17 August 16 chart misstated the MORI DocID numbers corresponding to *Document*
18 *Disposition Index* pages 66 and 68 (3 Schulze Aff. ¶ 25), and there is no entry for
19 an "Analyst Note" identified at p. 59 of the Vaughn index – leaving the plaintiff
20 and the Court no way to identify that record. (The CIA did not cure these
21 deficiencies until it filed its Memorandum in Reply on September 30.)

22 Adding to the confusion, the second Buroker Declaration includes a list of
23 mistakes and omissions in the CIA's June 20 Vaughn index: See ¶ 11 (correcting
24 description of withheld material, adding exemption claim, correcting dates); ¶ 12
25 (correcting description of withheld information); ¶ 13 (correcting exemption,
26 clarifying withheld information); ¶ 14 (adding additional information regarding
27 withheld information); ¶ 15 (adding additional information regarding withheld
28

1 information⁷); ¶ 16 (correcting entry from "withheld in part" to "withheld in full");
2 and ¶ 17 (repeating deliberative process withholding justification⁸).
3

4 **E. September 30 Declaration's explanation of Vaughn index**
5 **contains a 65-page discrepancy**

6 The CIA claims to have cured its earlier deficiencies in its September 30,
7 2005 Koch Declaration ¶ 12 (by copying the chart assembled by Mr. Schulze in his
8 affidavit at ¶ 25). Regarding the page discrepancies noted above, it merely makes
9 the bald assertion that "there are no such discrepancies." *Id.* ¶ 12. In the paragraph
10 immediately following, Mr. Koch states:

11 "The June 2005 Vaughn index addressed only those documents from
12 which information was withheld in the CIA's February and June
13 responses (i.e., 30 documents, consisting of 327 pages.) In August
14 2005, the CIA released in part two additional documents (consisting
15 of 128 pages) which are described in the Second Declaration of Terry
16 Buroker filed in this case, August 15, 2005."

17 Thus, according to Mr. Koch, the CIA released a total of 454 pages in
18 redacted form. Even if this were the case, it would not ameliorate the confusion
19 that the CIA has caused. The number of pages addressed by the CIA's two
20 submissions of *Document Disposition Index* pages totals 389 pages – 65 pages less
21 than Mr. Koch claims that the CIA released in redacted form.
22

23
24 ⁷ This correction omitted the corresponding *Document Disposition Index*
25 page number.

26 ⁸ The purpose of this repetition is imperceptible. The corresponding
27 *Document disposition Index* page contains the same deliberative process
28 justification, and, additionally, withholdings based on exemptions (b)(3) and
(b)(4).

1 **II. THE CIA'S VAUGHN INDEX DOES NOT INCLUDE ALL**
2 **RESPONSIVE RECORDS – PLAINTIFF DOES CHALLENGE THE**
3 **SUFFICIENCY OF THE SEARCH**

4 The CIA asserts that the "[p]laintiff does not challenge the sufficiency of the
5 search for of the records..." Reply at 2. This is incorrect. There can be no
6 dispute that the CIA failed to identify in its Vaughn index all responsive records it
7 has in its possession.

8 **A. The CIA failed to identify any records it has in electronic**
9 **format**

10 The most significant of these electronic records is the simulation. The CIA
11 produced a 28-page printout of the simulation results, MORI Doc. ID No. 121502.
12 The date, March 15, 2004, appears nine times on this record, revealing that it was
13 printed after plaintiff had submitted his FOIA request. By failing to produce the
14 simulation itself, the CIA deprives plaintiff of its inputs – which is central to the
15 plaintiff's request for the data upon which the alleged zoom-climb was based.

16 The CIA produced two documents, not identified in its Vaughn index (and
17 so not filed with the Court), which also unequivocally reveal the existence of
18 records in electronic format, MORI DocID Nos. 1175568 and 1175570. The first
19 is a one-page "List of Computer 'output files,'" and the second is "Computer
20 program 'LATSn91' for Lat/Long distances." See 3 Schulze Aff. ¶¶ 31, 33.
21 These records underscore the confusion generated by the CIA's failure to identify
22 in its Vaughn index records which it claims to have released in full. See also id., ¶
23 38 (same).

24 Other examples of the CIA's failure to produce records in electronic format
25 include two printouts of radar data conclusions, MORIDoc. ID Nos. 1176348 and
26 1176349 (Second Buroker Declaration, pp. 76-77 and 97), which similarly deprive
27 plaintiff of the programs' inputs.

28 In sum, the CIA failed to identify at least nine responsive records which it
has in electronic format. (See 3 Schulze Aff. ¶¶ 31, 33, 44, 47, 62, 66-69.) The

1 fact that a significant number of responsive records have not been identified is a
2 "positive indication[] of overlooked materials." Oglesby v. Department of Army,
3 79 F.3d 1172, 1185 (D.C. Cir. 1996).

4
5 **B. The CIA' Vaughn index failed to identify the report of Randolph**
6 **M. Tauss**

7 The CIA's recitation of the Report by Mr. Tauss clearly demonstrates that
8 this Report is responsive to plaintiff's request for all records upon which the zoom-
9 climb is based. CIA Reply at p. 5:

10 In an article published on December 5, 2003, The Washington
11 Times said the following about "Randolph M. Tauss":

12 The CIA recently declassified a once-secret report on
13 eyewitnesses to the crash of TWA Flight 800 off Long Island,
14 N.Y., on July 17, 1996. CIA analyst Randolph M. Tauss, who
15 won an intelligence medal for his work on the crash, concluded
16 that numerous eyewitnesses who saw a streak of light heading
17 toward the Boeing 747 jetliner were wrong if they believed it
18 was a surface-to-air missile going toward the jet.

19 Based on sound-travel analysis and a spy satellite
20 sensor...

21 The CIA baldly claims (at p. 7) that the "'once-secret' report is not among the
22 documents that are responsive to Plaintiff's [FOIA] request." The CIA does not,
23 and cannot, elaborate on how this Report, purporting to explain away the hundreds
24 of eyewitness reports of missile fire, is not among the records upon which the
25 zoom-climb hypothesis was based. This Report was so pivotal in the CIA's zoom-
26 climb conclusion that the CIA awarded Mr. Tauss a medal, and thus, this Report is
27 clearly responsive to plaintiff's request for records upon which the CIA's zoom-
28 climb theory was based.

1 **C. The CIA's Vaughn index failed to identify numerous other**
2 **responsive records**

3 Mr. Schulze's affidavit cites numerous examples of unidentified and
4 incomplete records. A partial list includes four examples of missing pages and
5 figures (**3 Schulze Aff.** ¶¶ 30, 31, 39, 61); missing computer printouts (*id.* ¶¶ 34,
6 40-41); missing eyewitness accounts (*id.* ¶¶ 42, 51-60); missing supporting records
7 (*id.* ¶¶ 50, 70); missing referenced attachments (*id.* ¶ 52); and missing responses
8 (*id.* ¶ 63).

9
10 **III. THE CIA'S VAUGHN INDEX DOES NOT FACILITATE THE**
11 **COURT'S ADJUDICATION OF THIS CASE**

12 The CIA's September 30 Declaration of Scott A. Koch relates (at ¶ 9) that
13 "MORI Doc. ID numbers are simply a tracking device and convey nothing about
14 the identity, nature, or substantive contents of a record." Further, Mr. Koch
15 explains (at ¶ 16), "[d]uring a search, one frequently encounters 'multiple' records
16 as one, e.g., documents containing attachments such as memoranda or notes filed
17 with attachments. In the case of email, a string of messages treated as one
18 document is quite common..." But Mr. Koch's explanation of using the CIA's
19 "tracking device" as a means to treat "a record" as a single document for purposes
20 of its adjudication is, in most instances herein, unworkable.

21 For example, page 48 of the June 20 *Document Disposition Index* identifies
22 Record Number 1147340 as a single record. *Document Disposition Index* page 48
23 relates the following information is withheld from this 41-page "document":
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1 "intelligence source and/or method"⁹ and third party information (name and email
2 address)." To locate the record, one must go to the September 30 chart, which
3 identifies MORI DocID number 1176349 as the referenced record, at pages 78
4 through 118. Then, after checking the August 16 Buroker Declaration for
5 corrections,¹⁰ one must go to the August 16 production, where *seventeen* records
6 appear:

- 7 (a) Pages 78 through 88 are maps; page 80 denotes "Witness
8 Placements of Missile Launch" and page 85 reflects "Witness
9 placing of Shooter;"
- 10 (b) Pages 89 through 96 are handwritten notes with redactions;
- 11 (c) Page 97 is a redacted computer printout with handwritten notes
12 on it – some of which are barely perceptible on the
13 photocopy and therefore unintelligible;
- 14 (d) Page 98 and 99 are handwritten notes;
- 15 (e) Page 100 is a computer printout of "TWA Transponded data
16 from FAA Radar" with handwritten notes on it – some of which
17 are barely perceptible on the photocopy and unintelligible;
- 18 (f) Pages 101 through 102 is a computer printout of "USAIR
19 Transponded data from FAA Radar;"
- 20
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22

23 ⁹ The use of "and/or" does not enable the Court or the plaintiff to ascertain
24 whether the three (b)(3) redactions, appearing at page 90, withhold an
25 intelligence source, or an intelligence method, or both. See also June 20
26 *Document Disposition Index* pages 46, 51, 56-58, 60, 63, and 67, also using
27 conjunctive with disjunctive "and/or." And see id. pages 61, 62, 65 and 69
28 using disjunctive "or."

¹⁰ There are two corrections regarding this set of records in the August 16
Buroker Declaration, at ¶ 13.

- 1 (g) Page 103 is a computer printout of "VIRGIN 009 Transponded
2 data from FAA Radar" – but this record is otherwise blank,
3 with no indication of any redaction;
- 4 (h) Page 104 is a computer printout of "STINGER Transponded
5 data from FAA Radar;"
- 6 (i) Page 105 is a computer printout of "Non transponded data from
7 FAA Radar – with the last line being unreadable as half of it did
8 not come through on the photocopy;"
- 9 (j) Page 106 is a computer printout of "Non transponded data from
10 Sikorsky Radar;"
- 11 (k) Page 107 is a computer printout without any heading, and is not
12 a continuation of the previous page;
- 13 (l) Pages 108 and 109 are a computer printout of "STINGER
14 Transponded data from Sikorsky Radar;"
- 15 (m) Page 110 is a computer printout of "VIRGIN Transponded data
16 from Sikorsky Radar;"
- 17 (n) Page 111 is a computer printout without any heading, and does
18 not appear to be a continuation of the previous page;
- 19 (o) Page 112 is a computer printout without any heading, and is not
20 a continuation of the previous page;
- 21 (p) Pages 113 and 114 are a computer printout of "USAIR
22 Transponded data from Sikorsky Radar;" and
- 23 (q) Pages 115 through 118 is a computer printout of "TWA 800
24 Transponded data from Sikorsky Radar" – apparently with
25 pages missing or out of order.

26 The CIA's production and Vaughn index are replete with similar examples
27 of clumping records together as one document.

28 Plaintiff is not asking the CIA to insert dates (cf. September 30 Koch
Declaration ¶ 17). It need only insert a *Document Disposition Index* page

1 immediately preceding each distinct record, including those records which it
2 claims to have released in their entirety. The CIA *Document Disposition Index*
3 forms have an entry for "Released in full." The assignment of MORI DocID
4 numbers is accomplished by its release category – withheld in part, withheld in
5 full, or released in full.¹¹

6 Additionally, ten records contained the same MORI DocID numbers (3
7 Schulze Aff. ¶¶ 43, 45-46, 48, 55, 56-58, & 59-60), three records are spread out in
8 pages with different MORI DocID numbers (id. ¶¶ 30, 34 & 41), it did not include
9 records that had been previously produced in redacted form (id. ¶¶ 30-32, 39 &
10 61), and at least two records have had pages removed (id. ¶¶ 30 & 39).

11 The Court cannot efficiently adjudicate this case until the CIA files a
12 meaningful Vaughn index.

13 Also, the CIA's Vaughn index is clearly inadequate on the issue of the
14 release of reasonably segregable records – it withholds six records in their entirety,
15 totaling 66 pages. Its cryptic *Document Disposition Index* pages fall well below
16 the standard for describing entirely withheld records. "The description and
17 explanation the agency offers should reveal as much detail as possible as to the
18 nature of document without actually disclosing information that deserves
19 protection." Oglesby v. US Dept. of Army, 79 F.3d 1172, 1176, (D.C. Cir. 1996).
20 The court in Krikorian v. Department of State, 984 F.2d 461 467 (D.C. Cir. 1993),
21 remanded the case for a segregability determination for "each of the withheld
22 documents."

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27 ¹¹ See September 30 Koch Declaration ¶ 8 note 4: "This process is
28 accomplished by category, i.e., documents released in full, released in part
or withheld, so that generally the MORI Doc. ID numbers fall sequentially
within each category, but not across categories...."

1 **IV. THE CIA'S SUPPLEMENTAL BOEING AFFIDAVIT DOES NOT**
2 **UNDERMINE PLAINTIFF'S ARGUMENT THAT RELEASE OF**
3 **BOEING-SUPPLIED DATA IS NOT LIKELY TO CAUSE BOEING**
4 **SUBSTANTIAL COMPETITIVE HARM**

5 Lastly, the CIA filed another Declaration of Richard Breuhaus, wherein the
6 affiant asserts that the Boeing-supplied data could not be derived from a
7 Computational Fluid Dynamics (CFD) program because these programs "have an
8 error factor of 5-30 percent" (Breuhaus Declaration ¶ 9), whereas plaintiff's affiant,
9 Brett Hoffstadt, "a full-time salaried CFD engineer," avers that the error factor is
10 "typically within 1%." Hoffstadt Affidavit ¶ 24.

11 But the resolution of this question of fact is not dispositive of whether there
12 would be "a likelihood of substantial competitive injury" upon disclosure. GC
13 Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994).

14 Both parties agree that before any competitor could utilize the data in a flight
15 simulator, it would have to obtain FAA certification. See Breuhaus Declaration ¶
16 9, and Hoffstadt Affidavit ¶ 39. "To accomplish this, the competitor would have
17 to present actual flight test data of the 747 Classic aircraft" (Hoffstadt Affidavit ¶
18 40), which "would require purchasing or obtaining at least one 747 Classic
19 aircraft, significant on-board flight test data hardware, and then subjecting this
20 aircraft to substantial modifications to install this hardware. It would also require
21 ground station equipment and facilities, related staffing and engineering support,
22 access to a large airport, aviation fuel, maintenance equipment and facilities and
23 staff, in addition to many other expenses." Id. ¶ 42.

24 "At this point the futility and financial foolishness of the endeavor
25 should be obvious, considering this enterprise is for a market whose
26 primary source (the 747 Classic aircraft) ceased deliveries in
27 September 1990 (almost 15 years ago), whose market has already
28 declined 26% from its one-time maximum, and whose market is in
predictable permanent decline." Id. ¶ 43.

1 In sum, the "barriers and investments for a competitor to offer similar
2 products and services are incredibly high, the market for these products and
3 services has long past its peak demand, the future demand is in predictable
4 permanent decline known to eventually be nonexistent, and Boeing would
5 nonetheless remain the established authority and preferred source for these
6 products and services due to its status as the developer and manufacturer of the
7 aircraft in question." Id. ¶ 43.

8 The CIA has the burden to demonstrate the applicability of the exemption,
9 Citizens Commission on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir.
10 1995), and all claims of exemptions are to be narrowly construed. Favish v. OIC,
11 217 F.3d at 1172 (9th Cir. 2000) rev'd in part Nat'l Archives & Records Admin. v.
12 Favish, 124 S. Ct. 1570, 1581 (U.S. 2004). Here, the CIA has failed its burden of
13 showing that there is a likelihood of substantial competitive injury upon
14 disclosure.

15 **Conclusion**

16
17 Aside from the requirement that a Vaughn index be "contained in one
18 document, complete in itself" (Founding Church of Scientology of Washington,
19 D.C. v. Bell, 603 F.2d at 949 (D.C. Cir. 1979)), the CIA must know that judicial
20 economy dictates that it not submit, numerous times, multiple records as a single
21 document. Summary judgment is inappropriate where there exist material issues
22 of fact to be determined, and this Court cannot reach that question until the CIA
23 files a sufficient Vaughn index.

24 The record in this case of the CIA's production cannot be reconciled with its
25 Vaughn index, requiring resubmission; with the records attached, for clarity. The
26 index should include all records produced, providing the Court a simple way to
27 adjudicate whether the CIA did, in fact, release in their entirety all records that the
28 CIA claims to have so released.

1 And, given the fact that plaintiff seeks "electronic records, particularly the
2 trajectory simulation computer model,"¹² the CIA's failure to include any
3 electronic-format records in its Vaughn index is in and of itself grounds to deny its
4 motion for partial summary judgment.

5 Furthermore, for clarity, the records produced should be sequentially
6 numbered beginning with Record number one.

7 A proposed order consistent with the foregoing is filed with plaintiff's
8 opposition to the CIA's motion for partial summary judgment.

9
10 Date: October 17, 2005.

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13 Respectfully submitted,
14 H. Ray Lahr
15 By Counsel

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17 _____
18 John H. Clarke

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¹² 3 Schulze Aff. Bates 47 ¶ 18.

1 **PROOF OF SERVICE – BY HAND**

2 DISTRICT OF COLUMBIA:

3
4 I am a resident of the District of Columbia, over the age of 18 years. My business
5 address is 1717 K Street, NW, Suite 600, Washington, DC 20036. I am counsel
6 for plaintiff.

7 On October 17, 2005, I served a true copy of **PLAINTIFF'S SUR-REPLY TO**
8 **CIA'S REPLY TO OPPOSITION TO MOTION FOR PARTIAL**
9 **SUMMARY JUDGMENT** on the interested parties in this action, by hand, to:

10 David M. Glass, Esquire
11 Assistant United States Attorney
12 20 Massachusetts Avenue, NW
13 Room 7140
14 Washington, DC 20530

15
16
17
18 I declare under penalty of perjury that the foregoing is correct and that this
19 Proof of Service was executed on October 17, 2005.

20
21 _____
22 John H. Clarke
23
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28