

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

_____)
H. RAY LAHR,)
)
Plaintiff,)
)
v.)
) No. CV 03-08023-AHM
NATIONAL TRANSPORTATION)
SAFETY BOARD and CENTRAL)
INTELLIGENCE AGENCY,)
)
Defendants.)
_____)

DECLARATION OF TERRY N. BUROKER
CENTRAL INTELLIGENCE AGENCY

I, TERRY N. BUROKER, hereby declare and say:

1. I am the Information Review Officer (IRO) for the Directorate of Intelligence (DI) of the Central Intelligence Agency (CIA). I have held this position since April 5, 2004. I have held various administrative and professional positions within the CIA since October 17, 1971.

APPROVED FOR
RELEASE DATE:
17-Sep-2010

2. The DI is the organization within the CIA responsible for the production of finished intelligence. Finished intelligence is the analytic product created by professional intelligence analysts based upon their review and analysis of all source intelligence reporting and other information that may be available. These sources may include, among other things, articles in the foreign press, liaison exchanges with foreign intelligence services, sophisticated technical platforms, or human sources.

3. As the DI/IRO, I am responsible for the final review of records and information originated by offices in the DI, or that contain DI information or equities, that may be responsive to Freedom of Information Act (FOIA), 5 U.S.C. § 552, or other requests for public disclosure. As part of my review of DI information, I ensure any determinations as to the release or withholding of such information are proper and do not jeopardize

national security, including CIA interests, functions, personnel, or facilities. As part of my official duties, I also task and coordinate record searches within the DI and ensure that all DI record systems and files reasonably likely to contain information responsive to FOIA and other requests are searched.

4. Through the exercise of my official duties, I am familiar with the above-captioned litigation and Plaintiff's FOIA request that is the subject of this case. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

5. I have determined, after carefully reviewing the information at issue, that the CIA documents described in the attached index must be either withheld in full, or in part, because:

(a) the information concerns the organization, functions, names, official titles, salaries or numbers of personnel employed by the CIA, all of which are protected from disclosure

under § 6 of the CIA Act of 1949, 50 U.S.C. § 403g, and is therefore exempt from disclosure pursuant to FOIA exemption (b)(3), 5 U.S.C. § 552(b)(3); and/or

(b) the information withheld is sensitive commercial or financial information that is privileged or confidential and is therefore exempt from disclosure pursuant to FOIA exemption (b)(4), 5 U.S.C. § 552(b)(4); and/or

(c) the information withheld is deliberative process, e.g., it consists of preliminary thoughts and assessments, reflects the candid exchange of ideas, and/or consists of uncoordinated intra- and inter-agency draft(s) and is therefore exempt from disclosure pursuant to FOIA exemption (b)(5), 5 U.S.C. § 552(b)(5); and/or

(d) the information contains third-party names and/or other identifying information that if disclosed, would constitute a clearly unwarranted invasion of personal privacy and is therefore exempt from disclosure pursuant to FOIA exemption (b)(6), 5 U.S.C. § 552(b)(6); and/or

(e) the information withheld was compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy and is therefore exempt from disclosure pursuant to FOIA exemption (b)(7)(C), 5 U.S.C. § 552(b)(7)(C).

6. The CIA reviewed carefully all of the documents containing information responsive to Plaintiff's request to determine what information, if any, could be released to Plaintiff. As of the

date of this Declaration, the CIA has released to Plaintiff all reasonably segregable, non-exempt information that is responsive to Plaintiff's request.

7. With regard to six documents that the CIA has withheld in full, I have determined that no reasonably segregable, non-exempt portion of those documents could be released. My determination of segregability was made based upon a careful review of the documents in this case, both individually and as a whole. When reviewing individual documents, a line-by-line review was conducted of each document at issue to identify and release reasonably segregable, non-exempt portions of documents.

8. The purpose of this Declaration is to explain the CIA's responses to Plaintiff's request for information under the FOIA. For the Court's convenience, I have divided this Declaration into three parts:

a. In Part I, I will briefly summarize Plaintiff's FOIA request and its procedural history.

b. In Part II, I will describe the CIA's search for information responsive to Plaintiff's request.

c. In Part III, I will describe the applicable FOIA exemptions (b)(3), (b)(4), (b)(5), (b)(6) and (b)(7)(C) invoked to withhold certain information contained in records responsive to Plaintiff's request and explain why this information is exempt from disclosure.

Finally, I have attached a *Vaughn* index that describes the individual documents, lists the applicable FOIA exemptions, and identifies the categories of exempt information discussed in part III contained in each.

I. SUMMARY OF PLAINTIFF'S FOIA REQUEST

9. By letter dated October 8, 2003, after noting that in November 1997, "the NTSB and FBI released the CIA-produced video-animation of Flight 800 continuing to fly, over 3,000 up," after nose separation, Mr. Lahr requested "all records upon which this publicly released aircraft flight path climb conclusion was based, and the 105 FOIA requests are itemized in the enclosed Excel printout" (30 pages). Plaintiff did not request expedited processing or identify any exceptional need or urgency in processing. (A true and exact copy of the Lahr FOIA request is attached as Exhibit 1.)

10. By letter dated October 20, 2003, the CIA acknowledged receipt (by facsimile and regular mail) of Mr. Lahr's request and assigned it reference number F-2004-00078 for identification purposes. The letter went on to inform Mr. Lahr that "[O]ur analysts will review your request, and

we will advise you of any problems...or whether we can search without any additional information." (A true and exact copy of CIA's letter, dated October 20, 2003, is attached as Exhibit 2.)

11. On November 6, 2003, Plaintiff filed the instant complaint with the Court. The CIA subsequently filed a motion to stay the proceedings to allow for the orderly processing of Plaintiff's request in accordance with Agency regulations employing "first in, first out" processing of FOIA requests. The Court granted the Agency's motion to stay the proceedings on May 13, 2004, and directed the CIA *inter alia* to complete "its processing of CIA-originated records (not requiring third agency coordination)", and to "provide a written response to plaintiff" by February 28, 2005.¹

12. By letter dated February 28, 2005, the CIA informed Plaintiff that a thorough search for

¹ In addition, the CIA was directed to file a status report with the Court on March 14, 2005, "as to the status of ... any records where coordination with other agencies was necessary if such coordination was not completed by February 28, 2005," and to propose "the date by which the *Vaughn* index will be filed."

records responsive to his request had been conducted and that "processing included a search for records in existence as of October 8, 2003." The CIA enclosed with this letter 42 documents, 27 of which were released in their entirety, and 15 (including two located by the National Transportation Safety Board and referred to CIA),² which were released in segregable form with deletions made on the basis of FOIA exemptions (b) (3), (b) (6), and/or (b) (7) (C). The CIA also informed requester that additional material had been located which required the CIA to consult with other federal agencies or to refer documents to the originating agencies for their review and direct response to him. (A true and exact copy of the CIA's letter, dated February 28, 2005, is attached as Exhibit 3.)

13. On March 14, 2005, in accordance with the Court's May 14, 2004 Order, the CIA filed a status

² In response to Mr. Lahr's FOIA request to the NTSB (Request #2004-0027) that agency located two CIA-originated records which it referred to the CIA for review and direct response to the requester. These documents were included with the CIA's 28 February 2005 response.

report addressing the status of records in coordination as of February 28, 2005. At that time, the CIA proposed filing, on or before June 20, 2005, a *Vaughn* index covering such records ("if the coordination process has been completed as to those records by the time the indices are filed") as well as those "records released by CIA with redactions on February 28, 2005, and the record originated by Boeing."

14. By letter dated June 17, 2005, the CIA provided to Plaintiff fifteen documents, of which six were released in their entirety, and nine were released in segregable form. The CIA also determined that six documents were exempt from release pursuant to FOIA exemptions (b)(3), (b)(4), (b)(5), (b)(6) and/or (b)(7)(C). In addition, the CIA informed requester that additional material requiring consultation with other federal agencies

had been subsequently identified.³ A true and exact copy of the June 17, 2005, letter is attached hereto as Exhibit 4.

II. CIA'S SEARCH FOR RESPONSIVE RECORDS

15. The purpose of this part of the Declaration is to explain the CIA's records systems and the administrative processing of FOIA requests and hereby assure this Court that the CIA conducted an adequate search in response to Plaintiff's request.

16. The CIA's records systems are designed to support the CIA's intelligence activities and responsibilities. In short, they are diverse, decentralized and compartmented. The CIA's ability to retrieve data from a given records system depends upon the type of information stored in that system and the way the system is designed to

³ Seven documents are currently in coordination with other agencies. As noted in this letter, a number of documents were inadvertently not addressed in earlier response [or, as a result, in the March status report]. Also, additional responsive documents were identified as a result of the review or coordination process.

retrieve that information. Records systems and indexing systems vary among CIA components because they must reflect, and respond to, the established responsibilities and needs of those individual CIA components. For example, various CIA records systems are organized to facilitate the collection of intelligence and others to facilitate the analysis of intelligence information, depending on the missions of the particular CIA component.

17. In addition, prudence dictates that an intelligence agency take appropriate counterintelligence and security precautions to minimize the potential damage to national security that could result from a spy in its midst or other hostile intrusion. One way to minimize such damage is strictly to limit the amount of information to which any particular employee has access by employing a "need-to-know" policy, i.e., an employee only has access to that information required to perform his/her duties. The CIA

implements this policy, and also seeks to minimize the risks of technical penetration, by decentralizing and compartmenting its records systems. However, improved counterintelligence and security comes with some tradeoffs, namely, that records search and retrieval processes are inherently complex and not always a model of efficiency.

18. All CIA records are maintained by one of four directorates and the independent offices and other entities under the Director, Central Intelligence Agency (D/CIA): the Directorate of Intelligence (DI), the Directorate of Operations (DO), the Directorate of Science and Technology (DS&T), the Directorate of Support (DS), and the D/CIA Area.

19. The CIA has the following established procedures for processing FOIA requests. The Public Information Programs Division (PIPD) in the office of Information Management Services is the

initial reception point in the Agency for all FOIA requests received by the CIA. Experienced information management professionals in PIPD analyze each request and determine which directorates of the CIA might reasonably be expected to possess records that may be responsive to a particular request. PIPD then forwards copies of the requester's letter to each such component with instructions that a search be conducted for any responsive documents. Components then conduct searches among all of their respective indices that might reasonably be expected to have any information relating to the subject(s) of the request. Component personnel responsible for carrying out these searches are information management professionals who conduct all CIA searches, whether they are for another component of the Agency, the Director, the Department of Justice, Congress, or in response to a FOIA or PA request.

20. The CIA processed Plaintiff's request following the same procedures as set forth above. That is, the request was received by PIPD, reviewed by PIPD personnel expert in the tasking of record searches, and tasked to the component(s) reasonably likely to have responsive records.

21. In the instant case, the search focused on the one directorate -the DI-- determined to be reasonably likely to have records responsive to the Plaintiff's request. Given the nature of their respective missions, functions, and records systems,⁴ as well as the nature of the information sought, i.e., the underlying information on which a DI analytic product was based, no other directorate

⁴ The DO is the CIA component responsible for the clandestine collection of foreign intelligence information from human sources. The DO system of records contains information on persons who are of foreign intelligence or counterintelligence interest to the CIA and other U.S. Government agencies. The DS&T is the R&D arm of the CIA; it creates and applies technology in support of the intelligence collection mission. The DS&T also houses the Foreign Broadcast Information Service, which publishes foreign media reports. The DS is the principal administrative and support arm of the CIA. It maintains, *inter alia*, records on all current and former employees of the CIA as well as other individuals for whom security processing or evaluation was required, property of the CIA and financial operations. The D/CIA Area encompasses the Office of the Director and independent offices and components, such as the Offices of General Counsel, Inspector General, Congressional Affairs, and Public Affairs, which report to the Director.

would be reasonably likely to possess responsive records. Accordingly, PIPD tasked the DI, i.e., Plaintiff's request was sent to me as the DI/IRO, to oversee the search and to ensure that all appropriate records searches were conducted.

22. As noted above, the DI is the CIA component that analyzes, interprets, and forecasts foreign intelligence issues and world events of importance to the United States. It is responsible for the production of finished intelligence reports for dissemination to policymakers in the United States government. The DI is the component within the CIA that produced the video referenced in Plaintiff's FOIA request.

23. DI personnel trained to conduct FOIA searches and other record searches, and who conduct such searches as part of their regular responsibilities, conducted a thorough and diligent search of the automated DI records system. No

responsive information was located in the automated records systems at the directorate level.

24. Because searches of the DI automated records system had located no responsive information (and due to the atypical nature of the project),⁵ my office tasked the request to the Office of Transnational Issues in the DI.⁶ Under the direction of a senior OTI weapons analyst (who was one of the principal analysts on the TWA-800 team), office and individual analyst files, including local databases, e-mail, and desk files, were searched for information on the TWA-800

⁵ At the request of the FBI and in accordance with its charter (international terrorism is an authorized CIA area of analysis), CIA weapons analysts in the Office of Weapons, Technology and Proliferation (and, following a reorganization, the Office of Transnational Issues or OTI) focused on determining whether the eyewitnesses saw a missile, i.e., determining what the eyewitnesses had seen. The CIA inquiry was very limited in scope, i.e., explain what the eyewitnesses saw (not what happened to the aircraft). The CIA is not an investigative body and was not the investigating the accident. Federal investigators considered three possibilities for the cause of the crash: mechanical failure, a bomb and a missile. The possibility that a missile caused the crash was considered seriously because many eyewitnesses described what could have been a missile ascending toward the aircraft. Accordingly, the FBI sought the assistance of the CIA to determine what the eyewitnesses had seen, i.e., whether or not it was a missile (as part of the FBI's investigation into whether or not the crash was the result of a criminal act).

⁶ As noted in the April 2004 Tate Declaration (paragraph 13), when a request, such as the Plaintiff's, "seeks underlying information, which is not readily identified", the only option may be manual searches of individual analyst "shoe-box" files (or the equivalent thereof), if indeed, such searches are even feasible.

project as a whole. Once assembled, these records were then forwarded to my office, where members of my staff who were familiar with Plaintiff's request, then manually searched the TWA-800 "collection" for information responsive to Plaintiff's request, i.e., "records upon which this publicly released aircraft flight path climb conclusion was based." This material was specifically searched for information describing, calculating, or analyzing the climb of the aircraft.

25. All reasonable efforts were made to identify, retrieve, and process the records responsive to Plaintiff's FOIA request.⁷ In fact, members of my staff followed up on information that surfaced as a result of review and/or coordination, and completed a second pass through the TWA-800 records, which subsequently identified additional

⁷ The members of my staff were familiar with Plaintiff's request, general as well as specific; however, the specifically enumerated items did not add anything to the general request or alter the parameters of the search. Moreover, most of the specifically enumerated items were unintelligible, did not reasonably describe records in terms of the CIA, or sought records, which if they existed, could only be located at the NTSB.

responsive material. In all, approximately 100 responsive records were located. Fifty-seven records were released to Plaintiff in whole or in part (with minimal information redacted) and six were withheld in full. Thirty-two documents were referred to other agencies⁸ for their review and direct response to requester.

III. APPLICABLE FOIA EXEMPTIONS AND JUSTIFICATIONS

A. FOIA Exemption (b)(3)

26. Many of the instances where information has been withheld (numerous instances, but minimal redactions) concern CIA organizational, functional,

⁸ As the CIA previously indicated in the 14 March 2005 status report required by the Court's May 13, 2004 order, 30 documents were referred to other agencies for their review and direct response to requester. Upon further review, additional documents were identified that required referral to or coordination with other agencies. As was stated in the CIA produced video and discussed at some length in the 84-page "Transcript of the CIA Briefing to the Witness Group", April 30, 1999, NTSB Docket No. SA-516, Appendix FF, (available on the NTSB public web site), the principal underlying sources of information utilized by CIA were eyewitness reports, radar tracking data, and certain NTSB observations regarding the cockpit voice recorder and flight data recorder, which were provided to CIA by the FBI (see pages 4-5, of aforementioned CIA Briefing). This both accounts for the relatively high proportion of records requiring coordination or referral, and it also explains CIA's response in January 2001 to Mr. Lahr's earlier request, wherein he was referred to the FBI and NTSB (and may also explain NTSB's subsequent negative response to Plaintiff since the NTSB information used by CIA in the production of the video was originally provided to CIA by the FBI and not directly by NTSB.)

and personnel information and is thus exempt from disclosure pursuant to FOIA exemption (b)(3).

Exemption (b)(3) states that the FOIA does not apply to matters that are:

Specifically exempted from disclosure from disclosure by statute (other than §552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

27. Certain information was withheld from disclosure pursuant to FOIA Exemption (b)(3) and the Central Intelligence Agency Act of 1949, 50 U.S.C.A. 403(g) (West Supp. 2004). Section 6 of this Act⁹ provides that the CIA shall be exempt from the provision of any other law requiring the publication or disclosure of information regarding the organization, functions, names, official titles, salaries, or numbers of personnel employed

⁹ Section 6 provides in part that "... in order to further implement Section 103(c)(7) of the National Security Act of 1947 [re the protection of intelligence sources and methods from unauthorized disclosure]... the Agency shall be exempted from ... the provisions of any other laws which require the publication or disclosure...." Both statutes have been held to meet the requirements of § 552(b)(3).

by the CIA. Accordingly, CIA employees names and personal identifiers (e.g., employee signatures or initials), titles, functional information, including an intelligence method, and internal organizational data, have been deleted from the documents at issue.

28. The names of CIA employees are withheld because the Agency does not routinely disclose the identity and affiliation of its employees who may come into public view during the course of their duties. Such employees may have in the past served under cover or in sensitive positions or operations, may be doing so now, or may do so in the future. Revelation of their affiliation with the CIA could compromise past, present, or future intelligence operations or activities, identify them as targets for recruitment by hostile intelligence services, impair the usefulness of such individuals to the Agency, or place their lives, the lives of members of their families, and

the lives of intelligence sources they have worked with, in jeopardy. This rationale also applies to other information that would tend to identify a CIA officer, such as signatures and initials. The nature and extent of this information is clearly evident on the face of the released documents from the surrounding context, e.g., addresses/senders, "to" and "from" lines, and recipients of "cc" email messages.

29. Generally, intelligence methods are the means by which, and the manner in which, an intelligence agency accomplishes its mission, i.e., carries out its functions. Some intelligence methods are commonly utilized in intelligence work; other methods may be uniquely employed by an intelligence agency. Often, the fact that a particular intelligence method is utilized, as well as the details of its use, must be protected from unauthorized disclosure.

30. Detailed knowledge of the methods and practices of an intelligence agency must be protected from disclosure because such knowledge would be of material assistance to those who would seek to penetrate, detect, prevent, or damage the intelligence operations of the United States. The result of disclosure of a particular intelligence method can lead to the neutralization of that method, whether the intelligence methods are those used for the collection of intelligence information, the conduct of clandestine activities, or those techniques utilized in the analysis and evaluation of intelligence information. That is, public disclosure of information concerning intelligence methods would allow anyone in the public to pinpoint the actual intelligence methods at issue, thereby possibly compromising the past and future value of the particular methods.

31. Additionally, the titles or other organizational identifiers and filing instructions

of CIA internal organizational components have been deleted.

32. The aforementioned information has been withheld to prevent detailed knowledge of CIA personnel, structure, organization, functions, including the means to carry out those functions, and procedures from becoming publicly available and possibly used as a tool for hostile penetration or manipulation. Such information falls under the CIA Act of 1949, 50 U.S.C.A. § 403g, and is, therefore, properly exempt from disclosure pursuant to FOIA Exemption (b) (3).

B. FOIA Exemption (b) (4)

33. FOIA Exemption (b) (4), 5 U.S.C. §552(b) (4) protects (1) "trade secrets" and (2) "commercial or financial information obtained from a person [that is] privileged or confidential." This exemption is intended to protect the interests of both the government and the submitters of information. Commercial or

financial information is confidential if its disclosure is likely (1) to impair the government's ability to obtain necessary information in the future or (2) cause substantial competitive harm to the submitter of the information.

34. Certain information in this case was withheld because it is commercial or financial information which was identified as proprietary information and voluntarily submitted by a person, i.e., the Boeing Company, and is privileged or confidential, i.e., of a kind that would not customarily be released to the public by the submitter. Business information obtained by the CIA from a submitter, "any person or entity who provides confidential commercial information to the United States Government" shall not be disclosed pursuant to a FOIA request except in accordance with 32 C.F.R. § 1900.31, which requires notice to the submitter (with limited exception).¹⁰

¹⁰ Notice to such submitters is also required by Executive Order 12600, 52 Fed. Reg. 23781 (June 23, 1987).

35. Accordingly, by letters dated February 24, 2005 and March 1, 2005, the CIA provided notice to the Boeing Company of Plaintiff's request and identified the responsive information. With one exception, Boeing through its counsel reiterated the confidential, proprietary nature of the information it had previously submitted, identifying "trade secrets" and/or "confidential business and technical information" regarding the baseline mass properties, aerodynamic and engine characteristics of the Boeing Model 747-100 aircraft" and detailing the substantial competitive harm that it would suffer if the information were to be disclosed. Attached hereto as Exhibit 5 is a true and exact copy of the declaration from Richard S. Breuhaus, Chief Engineer of Air Safety Investigation for the Boeing Company¹¹ attesting to

¹¹ The records to which Mr. Breuhaus refers by "MORI number" are not attached. The referenced documents contain information (other than trade secrets or confidential commercial information) which is or may be exempt from release pursuant to other FOIA exemptions. Also, the specific MORI numbers to which he refers are preliminary until the last step in administrative processing, i.e., the final release decision is made, and the MORI number of record regarding the release decision is affixed.

the preceding and certifying the protections Boeing takes to ensure such information is not disclosed publicly.

36. I have reviewed the documents¹² in question, the correspondence from counsel for the Boeing Company, and the Declaration of Mr. Bruehaus. As a result, I have determined that certain information responsive to this request consists of trade secrets or confidential business information, voluntarily submitted to the U.S. Government, by a person and is therefore appropriately withheld pursuant to FOIA exemption (b) (4).

C. FOIA Exemption (b) (5)

37. FOIA Exemption (b) (5), 5 U.S.C. § 552(b) (5), provides that the FOIA does not apply to matters that are "inter-agency or intra-agency

¹² Eight documents identified in the accompanying index were withheld in whole or in part pursuant to FOIA exemption (b) (4). Two records were originated and transmitted by Boeing to the U.S. Government: one was released in full and one was withheld in its entirety. The remaining documents were originated by the CIA and contained information provided by Boeing to the U. S. Government.

memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The scope of Exemption (b)(5) is quite broad, incorporating virtually all civil discovery privileges, including specifically the deliberative process privilege.

38. The deliberative process privilege protects the internal deliberations of the government by exempting from release recommendations, analyses, speculation and other non-factual information prepared in anticipation of or as part of decision-making, i.e., predecisional. Exemption 5 allows for the withholding of material that contains or was prepared in connection with the formulation of opinions, advice, evaluations, deliberations, policy formulation, proposals, conclusions, or recommendations, i.e., reflect the give and take of the consultative or decisionmaking process. Release of this type of information would

have an inhibitive effect upon the development of policy and administration in the government.

39. Certain information withheld from release in this case is protected by the deliberative process privilege, i.e., it is information representing recommendations or opinions of agency personnel on matters preceding final agency action. The information consists of candid internal discussions and judgments, including e-mail messages between analysts reflecting the candid "give-and-take" inherent in any collaborative, analytic process, draft memorandum, preliminary assessments, and recommendations and proposed statements and answers addressing various options and issues, and reflect in some instances internal CIA, and in others inter-agency, deliberations. This information is properly withheld pursuant to FOIA Exemption (b)(5).

40. Factual material was examined carefully to determine whether it could be segregated and

released. However, in some instances given the nature of underlying event and the analytic effort to determine what the eye witnesses saw, what constitutes "facts" in this scenario has become the warp and woof of deliberative process, i.e., is an integral part of the deliberative process itself. And, in some instances, the facts are so inextricably intertwined with privileged deliberations that they cannot reasonably be segregated and released.

41. Because Plaintiff's request seeks information about an analytic process, which is inherently deliberative, much of the underlying documentation contains information which qualifies for withholding under FOIA exemption (b) (5). While preliminary analyses and/or reflections of analytical "give-and take" would be validly exempt, in several instances the CIA determined that there was no significant harm in releasing certain e-mail

and analytic notes, and accordingly made discretionary releases.

42. Notwithstanding the preceding, I have determined that all other material that is pre-decisional deliberative information, consisting largely of uncoordinated or draft memorandums and other documentation reflecting candid exchanges, e.g., e-mail, analyst notes, etc., and deliberations within, between and among agencies, is appropriately withheld pursuant to Exemption (b) (5).

D. FOIA Exemption (b) (6)

43. FOIA Exemption (b) (6), 5 U.S.C. § 552(b) (6), provides that FOIA does not apply to matters that are "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The CIA has withheld certain information on the grounds that the information, if disclosed, would constitute a clearly unwarranted

invasion of the personal privacy of third parties. Specifically, the information withheld would reveal the names and other identifying information about these third parties.

44. The threshold question for invoking FOIA Exemption (b)(6) is whether the particular information in question qualifies as "personnel," "medical," or "similar" files. Information that applies to or describes a particular individual meets the threshold requirement for FOIA Exemption (b)(6) protection. Here, the information at issue identifies the names of, and/or identifying information, about specific individuals, including CIA employees and other Federal employees as well as private citizens. Certain of this information, i.e., names or identifying information of eyewitnesses and FBI special agents and other investigative and support personnel is also withheld at the request of the FBI. (As discussed below, such information is also withheld pursuant

to FOIA exemption (b) (7) (C).) I have therefore determined that the names of the third parties and/or their identifying information qualify as "similar" files and are thus amenable to (b) (6) protection.

45. Once the threshold issue of "similar" files has been met, one must balance the interests between the safeguarding of an individual's private affairs from unnecessary public scrutiny against the public's right to government information. In each instance where information was withheld, it was determined that that the individual did have a privacy right and that the individual's privacy interest was not outweighed by any public interest. In all such instances, I was unable to identify any overriding public interest that would require disclosing the names of affected third parties or other identifying information about them.

46. Even if some minuscule public interest would be served by the disclosure of the third

party information withheld in this case, the balance would still tilt dramatically against disclosure of the information. The nature of this information -- the names of and identifying information about third parties, in this case, CIA employees, FBI special agents, and private citizens, i.e., Boeing employees¹³ and eyewitnesses -- is such that disclosure would clearly violate the personal privacy of the third parties. At the very least, all of these individuals have a privacy interest in not being subjected to unofficial questioning about the analytic project or investigation at issue and in avoiding annoyance or harassment in their official, business, and private lives.

47. Consequently, because privacy interests clearly outweigh the negligible public interest arguably served by disclosure of the information, I

¹³ In addition, names of and identifying information about Boeing employees is also protected under FOIA exemption (b)(4) in that these individuals have access to or knowledge of commercially valuable proprietary data that may be of interest to the public in general and to economic competitors in particular.

have determined that this third party information is properly exempt under FOIA exemption (b)(6).

E. FOIA Exemption (b)(7)(C)

48. FOIA Exemption (b)(7)(C), 5 U.S.C. §552 (b)(7)(C), authorizes the Government to withhold records or information "compiled for law enforcement purposes" if the production of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

49. A balancing test is applied when asserting exemption (b)(7)(C), which requires an agency to identify and evaluate the privacy interest, if any, implicated in the requested records. When a personal privacy interest is identified, the second step in the balancing process requires an assessment of the public interest in disclosure. When both the privacy interest at stake and the public interest in disclosure have been ascertained, it must be determined which is the

greater result of disclosure: harm to personal privacy or the benefit to the public. The only FOIA-recognized public interest is that which sheds light on the operations and activities of the federal government.

50. The information at issue in this case was clearly compiled for law enforcement purposes. The possibility that the explosion of TWA Flight 800 with the loss of all 230 passengers and crew on board may have been the result of a criminal act precipitated what was at that time the most expensive criminal investigation in U.S. history. Of particular concern to FBI investigators were the reports they compiled from dozens of eyewitnesses who reported seeing on the evening of July 17, 1996, a "flare or firework" ascend and culminate in an explosion. Thus, it was as part of this investigation that the FBI requested the assistance

of CIA weapons analysts in determining what these eyewitnesses saw.¹⁴

51. Certain information contained in CIA records was withheld at the request of the FBI, i.e., names and identifying information of FBI special agents and employees as well as other government officers and private citizens who were eyewitnesses interviewed by the FBI as part of its criminal investigation.

52. The privacy interests of these individuals are detailed above (see paragraphs 35-37). As also discussed above, disclosure of the identities of these individuals would shed no light on the operations or activities of the FBI or the federal government. Consequently, because privacy interests clearly outweigh the negligible public interest that might arguably be served by the

¹⁴ Not only were the individual eyewitness reports and other information provided by the FBI to CIA compiled for law enforcement purposes, but the records at issue in this case as a whole could be considered an part of the FBI's criminal investigation inasmuch as the CIA's assistance was requested by the FBI as part of its criminal investigation.

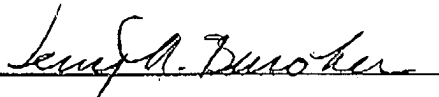
disclosure of this information, which was compiled for law enforcement purposes, I have determined that the information should not be disclosed pursuant to FOIA exemption (b)(7)(C).

53. At the time of this Declaration, there are approximately seven records in coordination with other Executive Branch departments or agencies. Once the consultation process is complete, we will provide a supplemental response to the Plaintiff.

54. The attached Document Disposition Index addresses the thirty documents which have been withheld in whole or in part. Each entry contains a brief description of the document, a listing of the exemptions claimed, and a description of the information withheld.

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

Executed this 20 day of June 2005.


Terry N. Buroker

Information Review Officer,
Directorate of Intelligence,
Central Intelligence Agency