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CENTRAL DISTRICT OF CALIFORNIA
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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

H. RAY LAHR,
Plaintiff,

v.

NATIONAL TRANSPORTATION
SAFETY BOARD, CENTRAL
INTELLIGENCE AGENCY and
NATIONAL SECURITY
AGENCY,
Defendants.

CASE NO. CV 03-8023 AHM
(RZx)

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT CIA'S SECOND
MOTION FOR PARTIAL
SUMMARY JUDGMENT

INTRODUCTION

"Certain historical facts are unassailable, while others are constantly subject to attack and, ultimately, remain shrouded in mystery and confusion." *Minier v. Central Intelligence Agency*, 88 F.3d 796, 799 (9th Cir. 1996). This irrefutable observation aptly describes the controversy that triggered this lawsuit. Barely more than ten years ago, on July 17, 1996, a United States commercial aircraft - - TWA Flight 800 - - exploded in mid-air off the coast of Long Island. Everyone aboard perished. What happened? How? Why? Who was responsible? Was it an accident? A terrorist attack?

Of course there was an official investigation. And of course there was an

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1 official explanation. And of course there was an ensuing torrent of critics and
 2 skeptics who challenged the *bona fides* of the investigation and rejected the
 3 explanation.

4 Equally predictable, the doubters (or at least Plaintiff, representing one group
 5 of them) have now turned to the courts to seek a ruling ordering the Government to
 6 turn over information that it has thus far withheld. For the reasons set forth below,
 7 I find that plaintiff is entitled to some, but not all, of what he seeks. The Court
 8 therefore GRANTS summary judgment to Defendants only as to the records
 9 specified below.¹ In doing so, I do not purport to provide an answer to the above
 10 much-debated questions nor an affirmation or repudiation of the official government
 11 conclusion as to the cause of the flight's crash.

	<u>MORI</u>	<u>NTSB</u>	<u>PLAINTIFF</u>	<u>SUMMARY JUDGMENT</u>	<u>DISCLOSURE REQUIRED?</u>
13	551			GRANT	NO
14	552		48	DENY	YES
15	553			GRANT	NO
16	554		12	DENY	YES
17	555			GRANT	NO
18	556		1	GRANT	NO
19	302			DENY	YES
20	380	33	66	DENY	YES
21	382	34	76	DENY	YES
22	382	35	77	DENY	YES
23	???	36	78	DENY	YES
24	NSA Computer Program			GRANT	NO

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¹ The MORI references are to the last three digits of Government's numbering system. The multiple identifications reflect the sad fact that the parties affixed multiple and confusing identifications to given documents.

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1 I. Background

2 A. Factual Summary²

3 1. The Crash Investigation and Ensuing FOIA Litigation

4 The genesis of this suit lies in the tragic crash of Trans World Airline
5 (“TWA”) Flight 800 (“Flight 800”). On July 17, 1996, Flight 800 departed from
6 John F. Kennedy International Airport in New York City, en route to Charles de
7 Gaulle International Airport in Paris, France. The aircraft crashed into the Atlantic
8 Ocean twelve minutes after departure. There were no survivors of the accident and
9 the aircraft, a Boeing 747-131, was destroyed. Some eyewitnesses recounted having
10 seen “a streak of light, resembling a flare, moving upward in the sky to the point
11 where a large fireball appeared [and] split into two fireballs as it descended
12 toward the water.” *Moye Decl.*, Ex. IV, at p. 278.

13 The National Transportation Safety Board (“NTSB”) is an independent federal
14 agency charged with investigating civil aviation accidents in the United States. 49
15 C.F.R. §§ 800.3, 831.2. The NTSB conducts investigations in order to determine the
16 circumstances relating to and the probable causes of accidents and to make safety
17 recommendations that are intended “to prevent similar accidents or incidents in the
18 future.” *Id.* § 831.4. The NTSB has the authority to designate parties to assist the
19 agency in conducting an accident investigation. *Id.* § 831.11 (“Parties shall be
20 limited to those persons, government agencies, companies, and associations whose
21 employees, functions, activities, or products were involved in the accident or
22 incident and who can provide suitable qualified technical personnel actively to assist
23 in the investigation.”). Following an accident investigation, the NTSB issues its
24 probable cause determination and safety recommendations in an official report. *Id.*
25 § 831.4.

26 _____
27
28 ²The following factual summary incorporates facts presented in all three of the
Defendants’ various motions for partial summary judgment.

1 Per its mandate, the NTSB conducted an investigation of Flight 800. The
2 NTSB appointed several entities as party participants to assist in the investigation,
3 including the Boeing Commercial Airplane Group ("Boeing CAG") and the Air Line
4 Pilots Association ("ALPA").³ Boeing also voluntarily provided information to the
5 NTSB and Central Intelligence Agency ("CIA") concerning flight characteristics and
6 performance of Boeing 747s. *Third Buroker Decl.*, at ¶ 10. The investigation of
7 Flight 800 eventually produced a public docket containing approximately 2,750
8 documents. Public hearings were held in December 1997 and in August 2000. On
9 August 23, 2000, the NTSB adopted the "Aircraft Accident Report: In-flight
10 Breakup Over The Atlantic Ocean" (the "Accident Report") as the official NTSB
11 accident report on Flight 800. *See Moye Decl.*, Ex. IV. The parties do not dispute
12 that the Accident Report constitutes the NTSB's final conclusion as to the probable
13 cause of the Flight 800 accident, although Plaintiff claims that the CIA animation,
14 *see infra*, also constitutes a final conclusion.

15 The NTSB concluded that during the initial break-up of the aircraft, the
16 forward fuselage detached from the remainder of the aircraft. The remainder briefly
17 continued to climb in "crippled flight." *See Moye Decl.*, Ex. IV, at pp. 288, 290.
18 Plaintiff Lahr calls this conclusion, of which he is skeptical, the "zoom-climb"
19 conclusion.⁴

20 Dennis Crider, a National Resource Specialist for Vehicle Simulation in the
21

22 ³ The other parties included the Federal Aviation Administration; TWA; the
23 International Association of Mechanists, Aerospace Workers, and Flight Attendants;
24 the National Air Traffic Controllers Association; Pratt & Whitney; Honeywell; and
the Crane Company, Hydro-Aire, Inc. *Moye Decl.*, Ex. IV at p. 302.

25 ⁴ Defendants construed the term "zoom-climb" conclusion "to refer to the flight
26 path of the aircraft following the loss of the forward fuselage." *NTSB Mot'n*, at p. 4.
27 This construction of the term corresponds with Lahr's characterization of the "zoom-
28 climb" as "the aircraft's continuing to fly after the nose of TWA 800 was blown off,
climbing as much as 3,200 feet." *Moye Decl.*, Ex. I-1, at p. 48.

1 Vehicle Performance Division of the NTSB, was assigned to the investigation of
2 Flight 800. Crider was tasked with determining the trajectories of parts of the
3 aircraft and the flight path of the main wreckage following the loss of the forward
4 fuselage. *Crider Decl.*, at ¶¶ 3-5. Crider developed four reports in the course of his
5 involvement with the Flight 800 investigation: the Trajectory Study, the Main
6 Wreckage Flight Path Study ("Flight Path Study") and the Errata to the Main
7 Wreckage Flight Path Study, Addendum I to the Flight Path Study ("Addendum I"),
8 and Addendum II to the Flight Path Study ("Addendum II"). These reports form a
9 part of the extensive Flight 800 public docket and were considered by the NTSB
10 panel (the "Safety Board") prior to its issuance of the Accident Report.

11 On October 8, 2003, Plaintiff H. Ray Lahr filed over one hundred Freedom of
12 Information Act ("FOIA") requests with the NTSB and CIA, many of which have
13 since been withdrawn. Lahr basically seeks the records upon which the four Crider
14 reports, two video animations shown at the 1997 public hearing, and one CIA
15 animation broadcast on the Cable News Network ("CNN")⁵ are based. The requests
16 are divided into eleven distinct categories (many of the requests fall into more than
17 one category):

- 18 A. All records of formulas used by the NTSB in its computations of the
19 zoom-climb conclusions;
- 20 B. All records of the weight and balance data used by the NTSB in its
21 computations of the zoom-climb conclusions;
- 22 C. All records of the formulas and data entered into the computer
23 simulations regarding the NTSB's zoom-climb conclusions;
- 24 D. All records reflecting whether or not the NTSB conducted the computer
25 simulations in-house, and, if not, all records of when, where, and by
26 whom the computer simulations were performed;
- 27 E. The computer simulation programs used by the NTSB and CIA;
- 28 F. The printout of the computer simulations used by the NTSB;

⁵ The CIA animation was broadcast on November 17, 1997. *NTSB Opp'n*, at p. 17.

- 1 G. All records of the timing sequence of the zoom-climb, including, but
2 not limited to radar, radio transmissions, and the flight data recorder
3 ("FDR");
- 4 H. All records of the correlation of the zoom-climb calculations with the
5 actual radar plot;
- 6 I. All records of the information provided by Boeing to the NTSB used
7 by the NTSB to calculate these zoom-climb conclusions;
- 8 J. All records of the process by which the NTSB arrived at its zoom-climb
9 conclusions;
- 10 K. All records generated or received by the NTSB used in its computations
11 of its zoom-climb conclusions.

12 *Moye Decl.*, Ex. I-1, at p. 49.

13 The NTSB and CIA performed searches for these records and located a
14 number of responsive records in the public docket and in responses to prior FOIA
15 requests made by Lahr. They released certain records to Lahr, some of which were
16 redacted. Lahr challenges the adequacy of the agencies' searches and the agencies'
17 decisions to withhold, in full or in part, various records. The agencies assert that
18 their searches were adequate, that they have turned over all responsive records to
19 Lahr, and that they have properly withheld records, in full or in part, under
20 provisions of FOIA that create exemptions from the statute's fundamental mandate
21 of disclosure.

22 2. Plaintiff's Allegations of Government Impropriety

23 "[A]s a general rule, when documents are within FOIA's disclosure
24 provisions, citizens should not be required to explain why they seek the
25 information." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).
26 Here, however, the Government's basis for withholding many of the contested
27 records is Exemption 7(C) under FOIA, which permits the government to withhold
28 information compiled for law enforcement purposes that "could reasonably be
expected to constitute an unwarranted invasion of personal privacy." In such
circumstances, "to balance the competing interests in privacy and disclosure [that

1 courts must weigh in applying Exemption 7(C)], . . . the usual rule that the citizen
2 need not offer a reason for requesting the information must be inapplicable.” *Id.*
3 Instead, the requester must “establish a sufficient reason for the disclosure.” *Id.*
4 “[Where] the public interest being asserted is to show that responsible officials acted
5 negligently or otherwise improperly in the performance of their duties, the requester
6 must establish more than a bare suspicion in order to obtain disclosure. Rather, the
7 requester must produce evidence that would warrant a belief by a reasonable person
8 that the alleged Government impropriety might have occurred.” *Id.* at 174.

9 Here, Plaintiff seeks to prove that Defendants participated in a massive cover-
10 up of the true cause of the crash of Flight 800, which he believes was a missile strike
11 from an errant missile launched by the United States military. The following
12 summary of the evidence Plaintiff presented to meet the threshold requirement
13 described in *Favish* is based on Plaintiff’s “Statement of Genuine Issues in
14 Opposition to [the Second] CIA Motion for Partial Summary Judgment,” especially
15 the portion beginning at page 13. Defendants did not file any response to that
16 statement, so on this motion, at least, Plaintiff’s assertions have not been repudiated.
17 Nor did Defendants file objections to that evidence.⁶ The ensuing summary
18 characterizes the evidence in the light most favorable to Plaintiff, but does not reflect
19 or constitute any finding by the Court.

20 According to Plaintiff, then, the government withheld evidence from the Flight
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23 ⁶ Some of the evidence proffered by Plaintiff was clearly inadmissible and the
24 Court does not consider it. *See, e.g., Hill Aff.*, Exh. C, p. 2 (Bates 46) (Donaldson
25 statement meant to prove NTSB helped to hide witness lacks foundation concerning
26 personal knowledge); *Stalcup Aff.*, Exh. E, at ¶ 6 (Bates 126) (claim that FBI admitted
27 it recovered explosives material from the debris lacks foundation and contains
28 inadmissible hearsay); *Neal Aff.*, at ¶ 3 (Bates 150) (statement concerning possible
military operations is opinion without foundation, is irrelevant to the fact it allegedly
supports, and contains inadmissible hearsay); *Scalcup Aff.*, at ¶ 17 (Bates 121)
(whether disclosure would improve airline community’s understanding of crash is
irrelevant to whether standard accident investigation procedure was followed).

1 800 probe.⁷ The government altered evidence during the investigation.⁸ Evidence
2 was removed from the reconstruction hangar.⁹ The government misrepresented radar
3 data, which does not correspond to the “zoom-climb” conclusion.¹⁰ Radar data¹¹ and
4 flight recorder data¹² are missing. It appears that underwater videotapes of the debris
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8 ⁷ See *Affidavit of Rear Admiral Hill*, at ¶ 17, Exh. C, pp. 2-3 (Bates 46-47)
9 (adopting claims of William Donaldson, a deceased Naval Commander, that the
10 NTSB assisted DOJ in hiding a witness and that the head of the FBI investigation
11 placed the investigation in “pending inactive status” to avoid testing missile theory
12 and to hide witness testimony); *Affidavit of James Speer*, at ¶¶ 14-15 (Bates 184)
13 (ALPA’s representative during the official probe claims that FBI covered up positive
14 test for nitrates and hid airplane part); *Perry Aff.*, at ¶ 50 (Bates 253) (FBI agent stated
15 witness was too far away to see what she claimed); *Lahr Aff.*, at ¶¶ 52-54 (Bates 273)
16 (FBI would not allow Witness Group to conduct witness interviews, contrary to
17 normal NTSB procedure); *Young Aff.*, at ¶ 2(f) (Bates 394) (non-governmental parties
18 to investigation had no access to FBI witness summaries for over year).

19 ⁸ See *Sanders Aff.*, at ¶¶ 9-10 (Bates 178-79) (investigative journalist quoting
20 TWA pilot and participant in investigation, who claims center wing tank was altered
21 after it was recovered).

22 ⁹ See *Lahr Aff.*, Exh. 10, at ¶ 1 (Bates 370) (citing International Association of
23 Machinists and Aerospace Workers’ finding that investigation team’s Cabin
24 Documentation Group stated cabin wreckage began to disappear from hangar, and
25 this appeared to be due to FBI; FBI never provided list of items taken, tests done or
26 results, or whether wreckage was returned).

27 ¹⁰ See *Fourth Schulze Aff.*, at ¶¶ 11-13 (electronic engineer claims that radar
28 data shows immediate descent of aircraft after explosion).

¹¹ See *Stalcup Aff.*, at ¶ 4 (Bates 126) (systems engineer with Ph.D. in Physics
states last Riverhead data sweep shows four data points deleted from where a missile
trajectory would have been located).

¹² See *First Schulze Aff.*, at ¶ 5 (Bates 467) (NTSB investigators admitted
“mishandling” last one-second line of data from tape; three to four seconds eventually
determined to be missing).

1 from the plane have been altered.¹³ The government concealed the existence of a
2 missile debris field and debris recovery locations.¹⁴ At its first public hearing, the
3 NTSB did not permit eyewitness testimony.¹⁵ Many eyewitnesses vehemently
4 disagree with the conclusions the CIA expressed in the video animation.¹⁶ The CIA
5 falsely reported that only twenty-one eyewitnesses saw anything prior to the
6 beginning of the fuselage's descent into the water.¹⁷ The FBI took over much of the
7 investigation from the NTSB, which should have been in charge,¹⁸ and the CIA never

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10 ¹³ See *Speer Aff.*, at ¶ 30 (Bates 186-87) (videotape shown had gaps in time
clock, and agent refused to show unedited videotape).

11 ¹⁴ See *Donaldson Aff.*, at ¶ 4, Exh. 1, p. 2 (Bates 69) (Commander William S.
12 Donaldson, a recognized aircraft crash investigator now deceased, stated that missile
13 established a separate debris field due to extreme energy level carrying it past plane,
14 which was captured by radar video; NTSB made no effort at recovery in area, and FBI
15 records and maps show it was specifically looking for missile body and first stage),
16 ¶¶ 14-19 (Bates 54-55), Exh. 9 (Bates 88) (map of alleged debris field); *Speer Aff.*,
at ¶ 21 (Bates 186) (keel beam recovery location changed by FBI).

17 ¹⁵ See *Hill Aff.*, at ¶ 7, Exh. 1, p. 2 (Bates 46) (no witnesses allowed to speak
18 at hearings); *Lahr Aff.*, at ¶ 24 & Exh. 2 (Bates 269, 306-09) (FBI objected to use of
CIA video and witness materials or testimony at public hearing).

19 ¹⁶ See *Brumley Aff.*, at ¶¶ 1-2 (Bates 210) (representation in video isn't close
20 to what he saw); *Wire Aff.*, at ¶¶ 2-5 (Bates 214) (what was in video did not represent
21 what he had told agent); *Fuschetti Aff.*, at ¶¶ 1-2 (Bates 191) (pilot of other plane
22 never saw vertical movement); *Meyer Aff.*, at ¶ 5(b) (Bates 193) (aircraft never
23 climbed); *Angelides Aff.*, at ¶ 5 (Bates 215) (animation bore no resemblance to what
24 he saw); *Lahr Aff.*, at ¶ 66 (Bates 277) (not aware of any witness produced by FBI,
CIA or NTSB that corroborated "zoom-climb" theory).

25 ¹⁷ See *Donaldson Aff.*, Exh. 16 (Bates 101) (Witness Group factual report states
26 that, of 183 witnesses who observed a streak of light, 96 said it originated from the
surface).

27 ¹⁸ See *Speer Aff.*, at ¶ 12 (FBI took over investigation even though not
28 qualified); *Meyer Aff.*, at ¶ 5(d) (Bates 192) (FBI would not allow NTSB Witness
Group chairman to interview Meyer); *Gross Aff.*, at ¶¶ 4-5 (Bates 211) (NTSB is

1 shared its data and calculations of the trajectory study with others for peer review,
2 which would have been appropriate.¹⁹

3 Plaintiff also submits evidence that the government's conclusion that there
4 was a center-wing fuel tank explosion and the government's "zoom-climb" theory
5 were physically impossible under the circumstances. For example, evidence
6 suggested there was no spark in the center-wing fuel tank.²⁰ Once an explosion
7 occurred, engine thrust would have been cut off with the loss of the nose of the
8 plane.²¹ Furthermore, the aviation fuel used in Flight 800 is incapable of an internal
9 fire or explosion.²² The zoom-climb theory is impossible because at least one wing

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13 charged with this sort of investigation); *Lahr Aff.*, Exh. 5 (Bates 325-29) (Air Line
14 Pilots Association stated that typical investigative practices such as witness
15 interviews and photographic documentation, were prohibited or curtailed and
16 controlled due to criminal investigative mandate), Exh. 10 (Bates 365) (trade union
party to investigation was at first excluded by FBI).

17 ¹⁹ See *Hill Aff.*, at ¶ 3 (Bates 50) (usual to share information and assessments
18 for peer review); *Lahr Aff.*, at ¶¶ 47-48, 50 (Bates 272) (flight path group should have
19 been formed and conclusions part of public record, but party process was violated;
20 conclusions that cannot be independently verified are not valid for accident
21 investigation purposes); *Young Aff.*, at ¶ 2(f) (Bates 394) (non-governmental parties
did not participate in simulation work).

22 ²⁰ See *Donaldson Aff.*, Exh. 1, p. 3 (Bates 70) (no signs of metal failure on
23 wing's scavenge pump); *Lahr Aff.*, at Exh. 10, § 4, ¶¶ 1-3 (Bates 366) (union report
24 compiled by International Association of Machinists and Aerospace Workers found
there was no spark in the center fuel tank).

25 ²¹ See *Affidavit of Lawrence Pence* (retired Air Force Colonel and Defense
26 Intelligence Agency aide), at ¶ 6 (Bates 259).

27 ²² See *Harrison Aff.*, p.2, at ¶¶ 1-9 (Bates 153) (combustible liquid, as used in
28 airplanes, is not capable of internal fire or explosion because of lack of flammable
vapors in tank).

1 separated early in the flash sequence.²³ Additionally, a steeper climb would likely
2 result in a reduction in ground speed, which contradicts radar evidence.²⁴ In fact,
3 Plaintiff's evidence suggests the "zoom-climb" theory is aerodynamically
4 impossible.²⁵

5 Finally, Plaintiff also claims that there were "military assets" conducting
6 classified maneuvers in the area at the time of the crash, and several vessels in the
7 area remain unaccounted for.²⁶

8 For the purpose of determining whether Exemption 7(C) (and other FOIA
9 provisions) are applicable, and only for that purpose, the Court finds that, taken
10 together, this evidence is sufficient to permit Plaintiff to proceed based on his claim

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12 ²³ See *Rivero Aff.*, at ¶ 13 (Bates 264) (center-wing tank explosion collapses
13 wings); *Stalcup Aff.*, at ¶ 9 (Bates 120) (debris field indicates left wing damaged early
14 in crash sequence); *Young Aff.*, at ¶¶ 2(a)-(b) (Bates 393) (loss of nose, and then
15 wings, caused significant reduction in forward momentum and kinetic energy).

16 ²⁴ See *Donaldson Aff.*, at ¶¶ 68, 72 (Bates 62-63) (applies principles to
17 evidence); *Stalcup Aff.*, at ¶ 3 (Bates 126) (examines physical principles).

18 ²⁵ See *Hill Aff.*, at ¶ 4 (Bates 51) (airplane at more than twenty degrees
19 inclination will stall because it will no longer produce lift); *Pence Aff.*, at ¶ 8 (Bates
20 259) (same); *Lahr Aff.*, at ¶ 62 (Bates 275) (plane would have stalled about one and
21 a half seconds after nose separation); see generally *Third Lahr Aff.* (under physical
22 characteristics concluded by government, aircraft could never have reached impact
23 point).

24 ²⁶ See *Donaldson Aff.*, at ¶ 11 & Exh. 7 (Bates 53, 85-86) (there were 25 vessels
25 in area of crash that NTSB and Navy were unwilling to identify), at ¶ 11, Exh. 6
26 (Bates 82-83) (Schiliro letter, on behalf of FBI, acknowledging existence of
27 unidentified vessel), at ¶ 11 & Exh. 7 (Bates 269, 306-09) (three naval vessels on
28 classified maneuvers and helicopter were part of radar hits); *Perry Aff.*, at ¶¶ 9-12
(Bates 246) (military ship had passed close to shore earlier that day); *Hill Aff.*, at ¶ 14
(Bates 43) (one surface ship left area at 32 knots). See also *Donaldson Aff.*, Exh. 16
pp. 4-5 (Bates 99-100) (U.S. Navy P-3 was allegedly passing by, turned around, and
briefly assisted in recovery efforts; P-3 had broken transponder); *Holtsclaw Aff.*, at
¶¶ 2-4 (Bates 173) (radar tape shows U.S. Navy P-3 passed over plane seconds after
missile hit).

1 that the government acted improperly in its investigation of Flight 800, or at least
2 performed in a grossly negligent fashion. Accordingly, the public interest in
3 ferreting out the truth would be compelling indeed.

4 **B. Procedural Summary**

5 On November 6, 2003, Plaintiff H. Ray Lahr filed suit against the NTSB.
6 Thereafter he added as defendants the CIA and National Security Agency ("NSA")
7 (together, "Defendants"). Lahr is a former Navy pilot and retired United Airlines
8 Captain who has served as ALPA's Southern California safety representative for
9 over fifteen years. Defendants are government agencies subject to FOIA, 5 U.S.C.A.
10 § 552. On December 17, 2003, Lahr filed a First Amended Complaint, and on
11 February 6, 2006, Lahr filed a Second Amended Complaint ("SAC"). The SAC
12 seeks proper identification by the Defendants of records responsive to requests that
13 Lahr has made under FOIA, preliminary and final injunctions prohibiting Defendants
14 from withholding the records at issue, and a mandatory injunction requiring
15 Defendants to make certain of their computer and software programs available to
16 Plaintiff for inspection. *SAC*, at pp. 6-7.

17 On August 16, 2005, the CIA moved for partial summary judgment on some
18 redacted or withheld records found in CIA files ("First CIA Motion"). On October
19 18, 2005, the Court took that motion under submission without oral argument,
20 anticipating that the motion now pending before the Court - - namely, the CIA's May
21 1, 2006 motion for partial summary judgment on the remaining redacted or withheld
22 records found in CIA files ("Second CIA Motion") - - would be filed. According to
23 the CIA, its second motion covers all CIA records not encompassed by its first
24 motion, but without any overlap; in other words, every disputed withholding of a
25 CIA record is challenged in one or the other of these motions. The Second CIA
26 Motion involves twelve such records, although Plaintiff does not oppose the
27 exemptions claimed in three of them.

28 On June 8, 2004, before the CIA filed its two partial summary judgment

1 motions, the NTSB moved for partial summary judgment on all redacted and
2 withheld records originally found in its agency files. On September 27, 2004, the
3 Court heard oral argument, took that motion under submission and ordered those
4 records be provided in unredacted form for *in camera* review. STANLEY

5 Thus, the Court has three summary judgment motions to decide. Its resolution
6 of these motions has been seriously impeded by the multiple and confusing
7 document identification systems that the parties utilized. As the Court has been
8 forced to note previously, the parties identified disputed documents with different,
9 non-overlapping numbering systems, and they could not agree which documents fell
10 within more than one reference, even after being instructed to do so by the Court.

11 On July 10, 2006, the Court held a hearing concerning the Second CIA
12 Motion. As a result of glaring deficiencies in the government's *Vaughn* index, the
13 Court thereafter ordered Defendants to submit for *in camera* review unredacted
14 copies of several documents at issue in this motion. The Court has now reviewed
15 those materials.

16 17 **II. Discussion**

18 **A. Legal Standards**

19 **1. Motion for Summary Judgment**

20 FOIA actions usually are resolved via summary judgment motion practice.
21 *See Miscavige v. Internal Revenue Serv.*, 2 F.3d 366, 369 (11th Cir. 1993). Federal
22 Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings,
23 depositions, answers to interrogatories, and admissions on file, together with the
24 affidavits, if any, show that there is no genuine issue as to any material fact and that
25 the moving party is entitled to judgment as a matter of law." The moving party bears
26 the initial burden of demonstrating the absence of a "genuine issue of material fact
27 for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is
28 material if it could affect the outcome of the suit under the governing substantive

1 law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond
2 the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477
3 U.S. 317, 324 (1986). SCANNED

4 “When the party moving for summary judgment would bear the burden of
5 proof at trial, it must come forward with evidence which would entitle it to a directed
6 verdict if the evidence went uncontroverted at trial. In such a case, the moving party
7 has the initial burden of establishing the absence of a genuine issue of fact on each
8 issue material to its case.” *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*,
9 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-
10 moving party bears the burden of proving the claim or defense, the moving party can
11 meet its burden by pointing out the absence of evidence from the non-moving party;
12 the moving party need not disprove the other party’s case. *See Celotex*, 477 U.S. at
13 325. Thus, “[s]ummary judgment for a defendant is appropriate when the plaintiff
14 ‘fails to make a showing sufficient to establish the existence of an element essential
15 to [his] case, and on which [he] will bear the burden of proof at trial.’” *Cleveland*
16 *v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (citing *Celotex*, 477 U.S.
17 at 322).

18 When the moving party meets its burden, the “adverse party may not rest upon
19 the mere allegations or denials of the adverse party’s pleadings, but the adverse
20 party’s response, by affidavits or as otherwise provided in this rule, must set forth
21 specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e).
22 Summary judgment will be entered against the non-moving party if that party does
23 not present such specific facts. *Id.* Only admissible evidence may be considered in
24 deciding a motion for summary judgment. *Id.*; *Beyene v. Coleman Sec. Serv., Inc.*,
25 854 F.2d 1179, 1181 (9th Cir. 1988).

26 “[I]n ruling on a motion for summary judgment, the nonmoving party’s
27 evidence ‘is to be believed, and all justifiable inferences are to be drawn in [that
28 party’s] favor.’” *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quoting *Anderson*,

1 477 U.S. at 255). But the non-moving party must come forward with more than “the
2 mere existence of a scintilla of evidence.” *Anderson*, 477 U.S. at 252. Thus,
3 “[w]here the record taken as a whole could not lead a rational trier of fact to find for
4 the nonmoving party, there is no genuine issue for trial.” *Matsushita Elec. Indus.*
5 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

6 Simply because the facts are undisputed does not make summary judgment
7 appropriate. Instead, where divergent ultimate inferences may reasonably be drawn
8 from the undisputed facts, summary judgment is improper. *Braxton-Secret v. A.H.*
9 *Robins Co.*, 769 F.2d 528, 531 (9th Cir. 1985).

10 2. The Freedom of Information Act (FOIA)

11 Under FOIA, federal agencies are required to make a broad range of
12 information available to the public, including information regarding the agency’s
13 organization, general methodology, rules of procedure, substantive rules, general
14 policy, final opinions, statements of policy and interpretations it adopted. 5 U.S.C.A.
15 § 552(a). The purpose of FOIA is to protect “the citizens’ right to be informed about
16 ‘what their government is up to.’” *United States Dep’t of Justice v. Reporters*
17 *Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) [hereinafter *Reporters*
18 *Comm.*]. In deference to the “philosophy of full agency disclosure” that animates
19 FOIA, “[t]he Supreme Court has interpreted the disclosure provisions of FOIA
20 broadly” *Lion Raisins Inc. v. United States Dep’t of Agriculture*, 354 F.3d
21 1072, 1079 (9th Cir. 2004) (quotation omitted); see also *Dep’t of the Air Force v.*
22 *Rose*, 425 U.S. 352, 361 (1976) (“disclosure, not secrecy, is the dominant objective
23 of’ FOIA).

24 This Court has jurisdiction “to enjoin [an] agency from withholding agency
25 records and to order the production of any agency records improperly withheld from
26 the complainant.” 5 U.S.C.A. § 552(a)(4)(B); *Kissinger v. Reporters Comm. for*
27 *Freedom of the Press*, 445 U.S. 136, 150 (1980). The district court reviews *de novo*
28 an agency’s denial of requests made pursuant to FOIA. 5 U.S.C.A. § 552(a)(4)(B);

1 *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979),
2 *cert. denied*, 446 U.S. 937 (1980).

3 A requester may challenge an agency's response to a FOIA request in two
4 ways: first, the requester may claim that the agency failed to make a sufficient or
5 reasonable search of its records in response to a FOIA request, *see, e.g., Zemansky*
6 *v. United States Env'tl. Prot. Agency*, 767 F.2d 569, 571 (9th Cir. 1985) (requester
7 claiming that agency search was "deficient"), and second, the requester may claim
8 that the agency has claimed an exemption that does not apply to the records the
9 agency found but withheld. *See, e.g., Favish*, 541 U.S. at 160-64.

10 a. Adequacy of the Agency's Search

11 The agency carries the burden of demonstrating that "it has conducted a search
12 reasonably calculated to uncover all relevant documents." *Zemansky*, 767 F.2d at
13 571 (quotation omitted) (finding agency search adequate based on "relatively
14 detailed" affidavits). The standard is not whether there is a possibility that
15 undisclosed documents, responsive to a particular FOIA request, exist somewhere
16 in the agency's records, "but rather whether the *search* for those documents was
17 *adequate*. The adequacy of the search, in turn, is judged by a standard of
18 reasonableness and depends . . . upon the facts of each case." *Id.* (quotation omitted;
19 emphasis in original). The agency may use affidavits to establish that it has
20 conducted a sufficient search of its records, but "[a]ffidavits describing agency
21 search procedures are sufficient for purposes of summary judgment only if they are
22 relatively detailed in their description of the files searched and the search procedures,
23 and if they are nonconclusory and not impugned by evidence of bad faith." *Id.* at
24 573 (quotation omitted; alteration in original); *see also Meeropol v. Meese*, 790 F.2d
25 942, 952 (D.C. Cir. 1986) (noting that agency affidavits are entitled to a
26 "presumption of good faith"). If the court determines that "the agency has sustained
27 its burden of demonstrating that it conducted a reasonable search . . . the burden
28 [then] *shifts to the plaintiff[/requester]* to make a showing of agency bad faith

1 sufficient to impugn the agency's affidavits." *Katzman v. Cent. Intelligence Agency*,
2 903 F. Supp. 434, 437 (E.D.N.Y. 1995) (emphasis added) (noting that in a FOIA-
3 related motion for summary judgment the "facts are viewed in a light most favorable
4 to the requester of information"). On this motion - - the Second CIA Motion - -
5 Plaintiff does not contend that the Defendants' searches were inadequate.

6 b. Claims of Exemption (Generally)

7 An agency's withholding of documents must fall into one of nine exemptions.
8 5 U.S.C.A. §§ 552(b)(1)-(9), 552(d). In accordance with the broad disclosure
9 provisions of FOIA, the enumerated exemptions are narrowly construed. *See, e.g.*,
10 *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989), *reh'g denied*, 493
11 U.S. 1064 (1990). An agency must provide a requester with "[a]ny reasonably
12 segregable portion of a record . . . after deletion of the portions which are exempt
13 under [section 552(b)]" 5 U.S.C.A. § 552(b).

14 The agency seeking to withhold documents carries the burden of proving that
15 a claimed exemption is applicable to the record or portion of the record that has been
16 withheld. 5 U.S.C.A. § 552(a)(4)(B); *Lion Raisins*, 354 F.3d at 1079. In order to
17 establish that it has properly withheld records, the agency may submit, or may be
18 required to submit, a *Vaughn* index. *Wiener v. Fed. Bureau of Investigation*, 943
19 F.2d 972, 977, *reh'g denied*, 951 F.2d 1073 (9th Cir. 1991), *cert. denied*, 505 U.S.
20 1212 (1992); *see Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973), *cert.*
21 *denied*, 415 U.S. 977 (1974) ("[C]ourts will simply no longer accept conclusory and
22 generalized allegations of exemptions . . . but will require a relatively detailed
23 analysis in manageable segments."). A *Vaughn* index should "identify[] each
24 document withheld, the statutory exemption claimed, and a particularized
25 explanation of how disclosure of the particular document would damage the interest
26 protected by the claimed exemption." *Wiener*, 943 F.2d at 977. If the *Vaughn* index
27 is not sufficiently detailed, the court may order an *in camera* review of the withheld
28 documents. 5 U.S.C.A. § 552(a)(4)(B); *Lion Raisins*, 354 F.3d at 1079 (citation

1 omitted).

2 The CIA has withheld documents at issue in this motion under Exemptions 2,
3 3, 4, 5, 6 and 7(C). The Court first will review the principles underlying each of
4 these exemptions and afterward will apply those principles to the particular records
5 at issue.

6 i. *Exemption 2: Internal Personnel Rules and*
7 *Practices*

8 This exemption provides that the disclosure requirements of FOIA do not
9 apply to matters "related solely to the internal personnel rules and practices of an
10 agency." 5 U.S.C.A. § 552(b)(2). Although, in an attenuated sense, virtually
11 everything undertaken by a federal agency could be said to be related to the "internal
12 personnel . . . practices of . . . [that] agency," not everything is "solely" related, and
13 the "potentially all-encompassing sweep of a broad exemption . . . undercuts the
14 vitality of any such approach." *Maricopa Audubon Soc'y v. United States Forest*
15 *Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) (quoting *Vaughn*, 523 F.2d at 1150
16 (Leventhal, J., concurring)). For this reason, this exemption is construed narrowly.
17 *See Rose*, 425 U.S. at 367-68.

18 The Ninth Circuit has recognized that "law enforcement materials, the
19 disclosure of which may risk circumvention of agency regulation, are exempt under
20 Exemption 2." *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656
21 (9th Cir. 1980) (citation omitted). The term "law enforcement materials" is not
22 limited to enforcement of criminal laws. *See, e.g., Dirksen v. Dep't of Health &*
23 *Human Servs.*, 803 F.2d 1456, 1459 (9th Cir. 1986) (concerning processing
24 guidelines for Medicare program); *Ginsburg, Feldman & Bress v. Fed. Energy*
25 *Admin.*, 591 F.2d 717, 723-31, *aff'd en banc*, 591 F.2d 752 (D.C. Cir. 1978) (equally
26 divided court), *cert. denied*, 441 U.S. 906 (1979) (concerning audit guidelines).

27 In contrast to "administrative materials," which "involve the definition of the
28 violation and procedures required to prosecute the offense," law enforcement

1 materials involve “methods” of enforcing the laws, however interpreted. *Id.* at 657.

2 When an agency believes materials sought by a FOIA request are exempt as
 3 law enforcement materials, it must submit a detailed affidavit describing how
 4 disclosure would risk circumvention of agency regulation. *Hardy*, 631 F.2d at 657.
 5 If this explanation is reasonable, the court should find the materials exempt from
 6 disclosure unless an *in camera* examination reveals that they contain “secret law” - -
 7 *i.e.*, a non-public interpretation or policy that governs the agency’s actual practices -
 8 - or that the agency has not fairly described their contents. *Id.*

9 *ii. Exemption 3: Materials Specifically Exempted*
 10 *from Disclosure by Other Statutes*

11 This exemption provides that the disclosure requirements of FOIA do not
 12 apply to matters “specifically exempted from disclosure by statute . . . provided that
 13 such statute (A) requires that the matters be withheld from the public in such a
 14 manner as to leave no discretion on the issue, or (B) establishes particular criteria for
 15 withholding or refers to particular types of matters to be withheld.” 5 U.S.C.A. §
 16 552(b)(3). The exemption applies only if the proffered statute falls within the scope
 17 of Exemption 3 and if the requested information falls within the scope of the statute.
 18 *Minier*, 88 F.3d at 801.

19 Here, Defendants have relied on two statutes to justify withholding materials
 20 under Exemption 3. The first is the National Security Agency Act of 1959, Pub. L.
 21 No. 86-36, § 6(a), 73 Stat. 63 (1959), *codified at* 50 U.S.C.A. § 402.²⁷ Section 6(a)
 22 states:

23 Except as provided in subsection (b) of this section,²⁸ nothing in this
 24 _____

25 ²⁷ Section 6(a) of the National Security Agency Act of 1959 appears only as a
 26 note to 50 United States Code Annotated section 402.

27 ²⁸ Subsection (b) states that the “reporting requirements of section 1582 of title
 28 10, United States Code, shall apply to positions established in the National Security
 Agency in the manner provided by section 4 of this Act.” National Security Agency

1 Act or any other law . . . shall be construed to require the disclosure of
2 the organization or *any function of the National Security Agency, of any*
3 *information with respect to the activities thereof*, or of the names, titles,
4 salaries, or number of the persons employed by such agency.

5 (emphasis added). The protection afforded by section 6(a) is "by its very terms
6 absolute." *Linder v. Nat'l Sec. Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996).²⁹
7 Material within the purview of section 6(a) may be withheld under Exemption 3.
8 *Hayden*, 608 F.2d at 1389.

9 The second statute Defendants invoke to support their Exemption 3
10 withholding is 50 United States Code Annotated section 403g, which states:

11 In the interests of the security of foreign intelligence activities of the
12 United States and in order further to implement section 102A(I) of the
13 National Security Act of 1947 that the Director of National Intelligence
14 shall be responsible for protecting intelligence sources and methods
15 from unauthorized disclosure, the [Central Intelligence] Agency shall
16 be exempted from the provisions of . . . any . . . law which require[s] the
17 publication or disclosure of the organization, functions, names, official
18 titles, salaries, or numbers of personnel employed by the Agency.

19 Section 102A(I) of the National Security Act of 1947, 50 United States Code
20 Annotated section 403-1(i)(1), requires the Director of National Intelligence to
21 protect intelligence sources and methods from unauthorized disclosure.³⁰ Sections
22 401-1(i)(2) and (3) provide guidance on how to do so. Material within the purview
23 of sections 401-1 and 403g may be withheld under Exemption 3. *Minier*, 88 F.3d

24 _____
25 Act of 1959, Pub. L. No. 86-36, § 6(b), 73 Stat. 63 (2006). Section 4 of the Act was
26 repealed in 1996. See National Defense Authorization Act for Fiscal Year 1997, Pub.
27 L. No. 104-201, tit. XVI, § 1633(b)(1), 110 Stat. 2751 (1996). Therefore, this
28 codified "exception to the exception" was effectively eliminated even before Plaintiff
submitted his first FOIA request.

29 ²⁹ The Court cannot locate any decision granting disclosure of NSA records
requested under FOIA and purportedly withheld under section 6(a).

30 ³⁰ Section 102A(i) was enacted as part of the Intelligence Reform and
Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011, 118 Stat. 3638
(2004).

1 at 801 (citing section 403g and predecessor to 401-1).

2 iii. *Exemption 4: Trade Secrets and Confidential*
3 *Commercial or Financial Information* SCANNED

4 This exemption applies to information that qualifies as “trade secrets and
5 commercial or financial information obtained from a person and privileged or
6 confidential.” 5 U.S.C.A. § 552(b)(4). The terms “commercial” and “financial”
7 retain their ordinary meaning and the term “person” includes “an individual,
8 partnership, corporation, association, or public or private organization other than an
9 agency.” 5 U.S.C.A. § 551(2) (person); *Pub. Citizen Health Research Group v.*
10 *Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (commercial and
11 financial). The meaning of the term “confidential” is not so easily determined,
12 however.³¹ FOIA contains no definition and the once widely-applied test for
13 “confidentiality” has recently been modified by the Court of Appeals for the District
14 of Columbia, the court which initially created that test.

15 The original test was established by *National Parks & Conservation Ass'n v.*
16 *Morton*, 498 F.2d 765 (D.C. Cir. 1974). In *National Parks*, the appellant sought
17 access to records of the Department of the Interior consisting of audits, annual
18 financial statements and other financial information of companies operating
19 concessions in national parks. *Nat'l Parks*, 498 F.2d at 770. The district court
20 determined that the “information [sought] was of the kind ‘that would not generally
21 be made available for public perusal’” and declined to order disclosure. *Nat'l Parks*
22 *& Conservation Ass'n v. Morton*, 351 F. Supp. 404, 407 (D.D.C. 1972) (citation
23 omitted). The Court of Appeals reversed. *Nat'l Parks*, 498 F.2d at 771.

24 In interpreting the scope of the requirement that agency-withheld commercial
25

26 _____
27 ³¹ “[W]hether the information is of a type which would normally be made
28 available to the public, or whether the government has promised to keep the
information confidential is not dispositive under Exemption 4.” See *G.C. Micro*
Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994).

1 or financial material be “confidential,” the *National Parks* court was guided by the
2 congressional understanding that the Exemption “is necessary to protect the
3 confidentiality of information which is obtained by the Government through
4 questionnaires or other inquiries, but *which would customarily not be released to the*
5 *public* by the person from whom it was obtained.” *Nat’l Parks*, 498 F.2d at 766
6 (citing S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)) (emphasis added). In light
7 of this explanation, the Court of Appeals announced that,

8 [for the purposes of Exemption 4,] commercial or financial matter is
9 “confidential” . . . if disclosure of the information is likely to have
10 either of the following effects: (1) *to impair the Government’s ability*
11 *to obtain necessary information in the future; or (2) to cause*
12 *substantial harm to the competitive position of the person from whom*
13 *the information was obtained.*

14 *Id.* at 770 (emphasis added).

15 In light of the *National Parks* test, the Court of Appeals found that the district
16 court had failed “inquire into the possibility that disclosure [would] harm legitimate
17 private or governmental interests in secrecy” and remanded the matter to the district
18 court “for the purpose of determining whether public disclosure of the information
19 in question pose[d] the likelihood of substantial harm to the competitive positions
20 of the parties from whom it ha[d] been obtained.” *Nat’l Parks*, 498 F.2d at 770-71
21 (also noting that “[s]ince the concessioners [were] *required* to provide [the
22 requested] financial information to the government, there is presumably no danger
23 that public disclosure will impair the ability of the Government to obtain this
24 information in the future” (emphasis added)).

25 Nearly two decades later, the Court of Appeals for the District of Columbia
26 revisited the *National Parks* test. *See Critical Mass Energy Project v. Nuclear*
27 *Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S.
28 984 (1993) (hereinafter *Critical Mass*). In *Critical Mass*, the Critical Mass Energy
Project (“CMEP”), a public interest organization, sought access to safety reports
prepared by the Institute of Nuclear Power Operations (“INPO”), which INPO

1 voluntarily submitted to the Nuclear Regulatory Commission ("NRC") on the
2 condition that the NRC maintain the confidentiality of those records. *Critical Mass*,
3 975 F.2d at 874. Citing Exemption 4, the NRC claimed that the INPO reports
4 contained confidential commercial information. *Id.* The panel decision granted
5 summary judgment in favor of the NRC on the grounds that the reports were both
6 commercial and confidential and therefore properly withheld pursuant to Exemption
7 4. *Id.* The Court of Appeals ordered that the case be heard *en banc*, in part "to
8 reconsider the definition of 'confidential' set forth in *National Parks* . . . for the
9 purposes of applying . . . [Exemption 4]." *Id.* at 875 (quotation omitted).

10 The *en banc* panel refined the *National Parks* test insofar as that test applied
11 to information that had been voluntarily submitted to an agency, as was the
12 information Boeing provided to the NTSB. *Id.* at 877-79. The court explained that
13 "when information is obtained under duress [as it had been in *National Parks*], the
14 Government's interest is in ensuring its continued *reliability*; [but] when that
15 information is volunteered, the Government's interest is in ensuring its continued
16 *availability*." *Id.* at 878 (emphasis added). The court noted that the distinction
17 between voluntary and compelled information was equally salient when considering
18 the second ("competitive injury") prong of the *National Parks* test. It reasoned that,
19 where the production of information is compelled,

20 there is a presumption that the Government's interest is not threatened
21 by disclosure . . . and as the harm to the private interest (commercial
22 disadvantage) is the only factor weighing against FOIA's presumption
23 of disclosure, that interest must be significant. Where, however, the
24 information is provided to the Government voluntarily, the presumption
25 is that the [Government's] interest will be threatened by disclosure as
the persons whose confidences have been betrayed will, in all
likelihood, refuse further cooperation. *In those cases, the private
interest served by Exemption 4 is the protection of information that, for
whatever reason, "would customarily not be released to the public by
the person from whom it was obtained"*

26 *Id.* at 878-79 (quotation omitted and emphasis added).

27 The *en banc* panel went on to conclude,

28 Accordingly, while we reaffirm the *National Parks* test for determining
the confidentiality of information submitted under compulsion, we

1 conclude that financial or commercial information provided to the
2 Government on a voluntary basis is “confidential” for the purpose of
3 Exemption 4 if it is of a kind that would customarily not be released to
4 the public by the person from whom it was obtained.

SCANNED

4 *Id.* at 879.

5 In a strong dissent, then-Judge Ruth Bader Ginsberg argued that the court was
6 misguided in altering the standard of “confidentiality” for “all cases in which
7 commercial or financial information is given to the Government voluntarily.” *Id.* at
8 882 (Ginsberg, J., dissenting). The dissent saw this alteration as “slackening” the
9 objectivity of the *National Parks* test³² and explained that, “[t]o the extent that the
10 [majority] allows [voluntary] providers to render categories of information
11 confidential merely by withholding them from the public long enough to show a
12 custom, the revised test is fairly typed ‘subjective’ and substantially departs from
13 *National Parks*.” *Id.* at 883. Further, the dissent argued, the “slackened” test for
14 voluntary submissions was “difficult to reconcile” with the statutory mandate of
15 FOIA to construe exemptions narrowly, because under the refined standard parties
16 opposing disclosure are not required “to show in each case ‘how disclosure will
17 significantly harm some relevant or private governmental interest.’” *Id.* at 884-85
18 (citation omitted).

19 The Ninth Circuit and the majority of the other circuits adopted the initial
20 *National Parks* test for “confidentiality,” *see, e.g., Pac. Architects & Eng’rs, Inc. v.*
21 *Dep’t of State*, 906 F.2d 1345, 1347 (9th Cir. 1990), but the Ninth Circuit has not
22 addressed the *Critical Mass* modification of that test for voluntarily-submitted
23 information. *See, e.g., Frazee v. United States Forest Serv.*, 97 F.3d 367, 372 (9th
24 Cir. 1996) (noting that because the information at issue was not voluntarily
25

26
27 ³² Exemption 4 is “objective” in the sense that “a bare claim of confidentiality
28 ... [does not] immunize agency files from scrutiny.” *Bristol-Myers Co. v. Fed. Trade*
Comm’n, 424 F.2d 935, 938 (D.C. Cir. 1970). Rather, it is the district court that must
“determin[e] the validity and extent of the claim” *Id.*

1 submitted to the agency, the court need not address the distinction "between
2 voluntary and mandatory information" established in *Critical Mass*). However, in
3 *Dow Jones Co., Inc. v. Federal Energy Regulatory Commission*, 219 F.R.D. 167
4 (C.D. Cal. 2003) (Snyder, J.), the district court considered the *Critical Mass* test and
5 rejected it in favor of adherence to the more stringent *National Parks* test. *Id.* at 177.

6 In *Dow Jones*, the plaintiffs sought disclosure "of [an appendix] relating to an
7 investigation [and interviews] conducted by [the] Federal Energy Regulatory
8 Commission (FERC) of energy production and sales at two California power plants."
9 *Id.* at 169. The defendant claimed that disclosure of the appendix would jeopardize
10 the government's ability to obtain like information in the future. *Id.* at 178. The
11 district court, in large part relying on the *Critical Mass* dissent, noted that "the
12 holding [in *Critical Mass*] is not consistent with Ninth Circuit jurisprudence, nor
13 with the purposes of Congress in enacting FOIA, which mandates the courts to favor
14 disclosure to serve the public interest." *Id.* The Court observed that an agreement
15 for or a claim of confidentiality was insufficient to avoid disclosure and that if such
16 a standard were adopted "any agency could, theoretically, simply hand out promises
17 of confidentiality to individuals who gave information in order to avoid judicial
18 review . . ." *Id.* at 178. For these reasons, the Court held that Exemption 4 did not
19 apply because the defendant had failed to establish that disclosure would result in
20 a harm to the government or to a private interest. *Id.* at 179.

21 This Court, too, finds that the *National Parks* test is the appropriate test to be
22 applied in circumstances, such as those here, where information has been voluntarily
23 given to an agency. However, the "government need not show that releasing the
24 documents would cause 'actual competitive harm.' Rather, the government need
25 only show that there is (1) actual competition in the relevant market, and (2) a
26 likelihood of substantial competitive injury if the information were released." *Lion*
27 *Raisins*, 354 F.3d at 1079 (citing *G.C. Micro Corp.*, 33 F.3d at 1113) (finding
28 likelihood of substantial competitive harm because the withheld documents

1 contained commercial information provided by the requester's competitors and
2 disclosure would allow the requester to underbid its competitors).

3 In the context of Exemption 4, competitive harm analysis "is . . . limited to
4 harm flowing from the affirmative use of proprietary information *by competitors*.
5 Competitive harm should not be taken to mean simply any injury to competitive
6 position . . ." *Pub. Citizen Health Research Group*, 704 F.2d at 1291-92 & n.30
7 (quotation omitted; emphasis in original) (affirming the district court's conclusion
8 that the FDA could withhold certain clinical test information that manufacturers of
9 intraocular lenses had been required to submit to the agency, based on a finding that
10 disclosure of the commercial information would cause "substantial competitive
11 injury"). Although "the court need not conduct a sophisticated economic analysis
12 of the likely effects of disclosure[,] . . . [c]onclusory and generalized allegations of
13 substantial competitive harm . . . are unacceptable and cannot support an agency's
14 decision to withhold requested documents." *Id.* at 1291 (internal citation omitted).

15 Plaintiff argues that for any record falling under Exemption 4, the Court must
16 apply a balancing test between the public interest in disclosure and the private
17 interests protected by the exemption. However, Plaintiff cites no applicable
18 precedent for this proposition. The only test the Court may apply is that found in
19 *National Parks*. See *Pub. Citizen Health Research Group v. Food & Drug Admin.*,
20 185 F.3d 898, 904 (D.C. Cir. 1999) (*National Parks* test is the balancing test).³³

21 *iv. Exemption 5: Privileged Inter- and Intra-Agency*
22 *Communication*

23 This exemption provides that the FOIA disclosure requirements do not apply
24 to information that qualifies as "inter-agency or intra-agency memorandums or
25 letters which would not be available by law to a party other than an agency in
26

27 ³³ Similarly, this Plaintiff-proposed balancing test is inapplicable to Exemption
28 5, discussed in the next section. There, the only test the Court may apply is whether
the record is both predecisional and deliberative.

1 litigation with the agency.” 5 U.S.C.A. § 552(b)(5). The privilege that Defendants
2 rely on here is commonly referred to as the “deliberative process privilege,” which
3 is commonly understood to “cover[] ‘documents reflecting advisory opinions,
4 recommendations and deliberations comprising part of a process by which
5 governmental decisions and policies are formulated” *Dep’t of the Interior &*
6 *Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8
7 (2001) (quoting *Nat’l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132,
8 150 (1975)) (internal quotation marks omitted in original).

9 In order “[t]o fall within the deliberative process privilege, a document must
10 be . . . [1] ‘predecisional’ and [2] ‘deliberative.’” *Carter v. United States Dep’t of*
11 *Commerce*, 307 F.3d 1084, 1089-91 (9th Cir. 2002) (citation omitted) (holding that
12 statistically adjusted census data which had not been released as official 2000
13 Census numbers was neither predecisional nor deliberative). “A document may be
14 considered predecisional if it was ‘prepared in order to assist an agency
15 decisionmaker in arriving at his decision.’” *Assembly of the State of California v.*
16 *United States Dep’t of Commerce*, 968 F.2d 916, 921 (9th Cir. 1992) (en banc)
17 (hereinafter *Assembly*) (citation omitted), *as amended on denial of reh’g* (Sept. 17,
18 1992). A predecisional document “may include ‘recommendations, draft documents,
19 proposals, suggestions, and other subjective documents which reflect the personal
20 opinions of the writer rather than the policy of the agency[.]’” *Id.* at 920 (citation
21 omitted). A predecisional document is “deliberative” if the “disclosure of [the]
22 materials would expose an agency’s decisionmaking process in such a way as to
23 discourage candid discussion within the agency and thereby undermine the agency’s
24 ability to perform its functions.” *Id.* at 921 (quotation omitted; alteration in
25 original). Although early cases “contrasted ‘factual’ and ‘deliberative’ materials,”
26 that distinction has lost strength. *Id.* at 921. Now, “[t]he key inquiry is whether
27 revealing the information exposes the deliberative process. The factual/deliberative
28 distinction survives, but simply as a useful rule-of-thumb favoring disclosure of

1 factual documents, or the factual portions of deliberative documents where such a
 2 separation is feasible.” *Id.* (internal citation omitted). If the release of factual data
 3 would “enable the public to reconstruct any of the protected deliberative process” it
 4 may properly be withheld by the agency. *Id.* at 922-23.

5 v. *Exemption 6: Protection of Personal Information*
 6 *Contained in Personnel, Medical, or Similar*
 7 *Files*³⁴

8 Under this exemption, an agency may properly withhold documents that are
 9 “personnel and medical files and similar files the disclosure of which would
 10 constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C.A. §
 11 552(b)(6). “Congress’ primary purpose in enacting Exemption 6 was to protect
 12 individuals from the injury and embarrassment that can result from the unnecessary
 13 disclosure of personal information.” *United States Dep’t of State v. Washington Post*
 14 *Co.*, 456 U.S. 595, 599 (1982).

15 For purposes of Exemption 6, a “file” is a compilation of agency records.
 16 James T. O’Reilly, 2 *Federal Information Disclosure* § 16:3 (3d ed. 2005).
 17 “Records” includes “all books, papers, maps, photographs, machine readable
 18

19 ³⁴ In their Reply on the current motion, Defendants state:

20 When plaintiff responded to the First CIA Motion, he did not oppose the
 21 use of Exemption 6 or, in the alternative[,] Exemption 7(C) to withhold,
 22 from the records covered by the First CIA Motion, the names of FBI
 23 agents or of eyewitnesses to the explosion of TWA Flight 800 . . .
 Changing his position, he now alleges that he *does* contest the use of the
 24 above exemptions to withhold, from those records, the names of FBI
 agents and eyewitnesses.

25 *Def. Reply*, at p. 16 n.2. Defendants claim Plaintiff’s earlier statement should be
 26 treated as a binding waiver. *Id.* (citing *United States v. Olano*, 507 U.S. 725, 733
 27 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))). Without determining
 28 at this point whether the earlier statement operates as a binding waiver concerning
 documents which are at issue in the previously-filed motions, the Court finds it does
 not preclude Plaintiff from contesting these exemptions with regard to documents at
 issue in the present motion.

1 materials, or other documentary materials, regardless of physical form or
2 characteristics, made or received by an agency of the United States Government
3 under Federal law or in connection with the transaction of public business.” 44
4 U.S.C.A. § 3301; *see Forsham v. Harris*, 445 U.S. 169, 183 (1980) (adopting section
5 3301 definition of “records” because FOIA does not define term).
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6 Examples of records whose release might invade individuals’ privacy include
7 arrest records, discipline records, passport or Social Security numbers, job
8 performance records, union membership cards, and the like. *See James T. O’Reilly*,
9 *2 Federal Information Disclosure* § 16:16 (3d ed. 2006). Moreover, it is conceivable
10 that in certain situations, the release of an individual’s name, in and of itself, would
11 violate his or her privacy interest, although such disclosure is not inherently a
12 significant threat to an individual’s privacy. *Nat’l Ass’n of Retired Fed. Employees*
13 *v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989).

14 To determine whether a document, or portion thereof, was properly withheld
15 under Exemption 6, a court must balance the privacy interest protected by Exemption
16 6 against the “the public interest in disclosure.” *United States Dep’t of Defense v.*
17 *Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quotation omitted). The
18 agency seeking to withhold information has the burden of establishing “the
19 significance of the privacy interest at stake.” *United States Dep’t of State v. Ray*,
20 502 U.S. 164, 176 (1991) (finding that release of the names and addresses of Haitian
21 interviewees in conjunction with highly personal information regarding marital and
22 employment status would constitute a “significant” invasion of privacy). The public
23 interest in disclosure “focuses on the citizens’ right to be informed about ‘what their
24 government is up to.’ Official information that sheds light on an agency’s
25 performance of its statutory duties falls squarely within that statutory purpose.” *Id.*
26 at 177-78 (citation omitted; emphasis in original).

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1 vi. *Exemption 7(C): Records or Information*
2 *Compiled for Law Enforcement Purposes*

3 Under Exemption 7(C), an agency may properly withhold "records or
4 information compiled for law enforcement purposes, but only to the extent that the
5 production of such law enforcement records or information . . . could reasonably be
6 expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C.A. §
7 552(b)(7)(C). Exemption 7(C) may not be used when an agency does not have the
8 law enforcement power to conduct an investigation. See *Weissman v. Cent.*
9 *Intelligence Agency*, 565 F.2d 692, 696 (D.C. Cir. 1977).

10 Because of their similar language, Exemption 7(C) is often closely associated
11 with Exemption 6. However, Exemptions 7(C) and 6 "differ in the magnitude of the
12 public interest that is required to override the respective privacy interests protected
13 by the exemptions," the former being more protective of privacy than the latter.
14 *Dep't of Defense*, 510 U.S. at 496 n.6. Exemption 7(C) applies to any disclosure that
15 "'could reasonably be expected to constitute' an invasion of privacy that is
16 'unwarranted,' while Exemption 6 bars any disclosure that 'would constitute' an
17 invasion of privacy that is 'clearly unwarranted.'" *Id.* (emphasis added).

18 In *Department of Defense*, the Supreme Court held that an employer-agency's
19 disclosure of its employees' home addresses to the employees' collective bargaining
20 representative would constitute a clearly unwarranted invasion of personal privacy
21 under Exemption 6. 510 U.S. at 489. In reaching that conclusion, the Supreme
22 Court noted that while *Reporters Committee, supra*, turned on Exemption 7(C), not
23 Exemption 6, the two exemptions overlap to the extent that "the dispositive issue .
24 . . is the *identification* of the relevant public interest to be weighed in the balance,
25 not the *magnitude* of that interest." *Id.* at 496 n.6 (emphasis in original).

26 As the Court noted in Section I(A)(2), above,

27 Where there is a privacy interest protected by Exemption 7(C) and the
28 public interest being asserted is to show that responsible officials acted
negligently or otherwise improperly in the performance of their duties,
the requester must establish more than a bare suspicion in order to

1 obtain disclosure. Rather, the requester must produce evidence that
2 would warrant a belief by a reasonable person that the alleged
Government impropriety might have occurred.

3 *Favish*, 541 U.S. at 174. There is a presumption of legitimacy accorded to a
4 government official's conduct, *id.* (citing *Ray*, 502 U.S. at 178-79), and the evidence
5 must be sufficient to overcome it.

6 **B. Analysis**

7 1. The Adequacy of the NTSB's Search

8 In this motion, Defendants do not move for summary judgment that their
9 search was adequate, although they did so in the still-pending previous summary
10 judgment motions.

11 2. Claims of Exemption

12 Defendants have moved for summary judgment as to twelve documents not
13 addressed by their earlier motions for partial summary judgment.

14 a. Exemptions Claimed and Not Contested by Plaintiff

15 Defendants moved for summary judgment that the CIA properly invoked the
16 claimed exemptions to withhold or redact information in the records identified by
17 MORI Document ID numbers 1255551, 1255553 and 1255555. Plaintiff does not
18 contest the use of these exemptions. For this reason, the Court GRANTS summary
19 judgment to Defendants as to these uncontested documents.

20 b. Exemption 4 (Confidential Commercial Information):

21 MORI Document ID# 1305302 and Plaintiff's Record

22 12

23 In two documents - - one identified by the Government as MORI Document
24 ID# 1305302 and the other by Plaintiff as Record 12³⁵ - - the CIA has redacted
25 information provided by Boeing for use in the investigation of the crash of Flight
26

27 ³⁵ Plaintiff's Record 12 can also be identified by MORI Document ID#
28 1255554. This record also contains other contested redactions under Exemptions 6
and 7(C), which are addressed in the next section of this Order.

1 800, claiming it may be withheld under Exemption 4. Plaintiff challenges these
2 redactions, arguing that their release would not cause Boeing substantial competitive
3 harm.

4 To assist in the crash investigation, Boeing voluntarily provided information
5 to the CIA and NTSB. *Third Buroker Decl.*, at ¶ 10. This material apparently relates
6 to “flight characteristics and performance of a Boeing 747, for example, lift
7 coefficient, drag coefficient and pitching moment coefficient data.” *Id.* Boeing has
8 stated that this information, which concerns the Boeing 747-100, is confidential and
9 proprietary and it has detailed the “substantial competitive harm” disclosure
10 allegedly would cause. *Buroker Decl.*, at ¶ 35. *See generally Breuhaus Decl.*
11 Furthermore, Boeing claims that it would “be forced to reconsider” providing
12 information such as this in the future, if the information is disclosed in this case.
13 *Second Breuhaus Decl.*, at ¶ 14.

14 Plaintiff does not dispute that, for purposes of FOIA, the information provided
15 by Boeing and withheld by Defendants qualifies as commercial or financial
16 information obtained from a person. Whether it is confidential is the question.

17 MORI Document ID# 1305302³⁶ consists of two “pages of tabular data from
18 or relating to JFK and ISP radars and nine pages of graphs (preliminary), containing
19

20 ³⁶ The June 22, 2006 Declaration of John Clarke, Plaintiff’s counsel, did not
21 contain arguments in opposition to summary judgment which cited to MORI
22 Document ID# 1305302. However, it did contain opposition to MORI Document ID#
23 1215200, which Plaintiff split in two and designated as Records 14 and 45. MORI
24 Document ID# 1215200 and 1305302 are, at the least, substantially similar, and the
25 redacted pages appear to be duplicates of each other. For this reason, in a conference
26 following a hearing in this matter on July 10, 2006, both parties’ counsel stipulated
27 that Plaintiff’s arguments in opposition to summary judgment for MORI Document
28 ID# 1215200 shall also apply to MORI Document ID# 1305302. Because Plaintiff’s
Record 14 contains the three pages found in MORI Document ID# 1305302 and
redacted under Exemption 4, the Court will consider Plaintiff’s arguments found in
his response to Record 14 as they relate to the redactions within MORI Document
ID# 1305302.

1 handwritten annotations and relating to technical characteristics, e.g., lift coefficient,
2 drag coefficient and pitching coefficient.” *Third Buroker Decl.*, at p. 56 Three
3 pages of graphs are redacted in full; the remaining six graphs that were released
4 appear to consist of plotted data points and simulation results.

5 Plaintiff’s Record 12 is a six-page email dated April 29, 1997. The *Vaughn*
6 index describes it as “addressing points raised by a FBI special agent concerning
7 CIA analysis and conclusions during interagency coordination.” The sender and
8 recipient are not identified on the portion that was released. Nor are the initials of
9 various witnesses who are mentioned. From the third page of the released portion
10 of the email, the CIA also redacted slightly more than one line of text. Plaintiff
11 posits that this redaction concerns “wing tip separation under G-load,” evidently
12 basing this assumption on the immediately preceding text of the email.

13 The Court has reviewed the email (MORI Document ID# 1255554 and
14 Plaintiff’s Record 12) and the radar graphs (MORI Document ID# 1305302) in their
15 entirety, both having been filed *in camera* and under special seal. Applying the
16 *National Parks* test, the Court finds that Defendants have not proffered evidence
17 sufficient to meet their burden to show that release of this information likely would
18 impair the government’s ability to obtain comparable necessary information in the
19 future. Indeed, they do not argue that it would. Simply because Boeing speculates
20 that it would reconsider its policies of providing information such as this to the
21 government is, by itself, not enough.

22 The parties disagree whether the disclosure of this information would cause
23 Boeing substantial competitive harm. Defendants maintain that this and other
24 Boeing-provided information is confidential commercial information that has
25 “independent economic value to Boeing because [it is] not freely ascertainable or
26 publicly available for use by other parties.” *Breuhaus Decl.*, at ¶¶ 6, 8. The 747
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1 Classic³⁷ was first developed in the 1960s. *Id.* at ¶ 13. From the point of view of
2 aircraft and computer technology, that distant era was relatively unsophisticated.
3 Now, more than forty years later, aircraft design and manufacture have been
4 modified and refined to a level not only strikingly different, but undoubtedly far
5 superior. This proposition requires no further elaboration. One may therefore
6 reasonably conclude that a one-line reference to this once-confidential information
7 in Plaintiff's Record 12 (MORI Document ID# 1255556) has little or no remaining
8 commercial value insofar as aircraft design is concerned. The same is true of the
9 withheld graphs.

10 Nevertheless, Defendants maintain, the deleted information retains
11 independent economic value due to its use in flight simulators. Boeing invested
12 several million dollars in compiling this data, and it licenses the data for use in
13 proprietary flight simulators for flight training, engineering and other commercial
14 purposes. *Id.* at ¶¶ 7, 13.³⁸ Sometimes, these licensees are in direct competition with
15 Boeing. *Id.* A flight simulator data package license for the 747 Classic costs
16 approximately \$1 million.³⁹ *Id.* at ¶ 22. Additionally, Boeing claims that no other
17 company has invested the resources to reproduce its training simulator database. *Id.*
18 at ¶ 16. Boeing competes with other companies in providing flight training, aircraft
19 certification and engineering services through its training simulator database, but
20 enjoys a competitive advantage due to its status as the "sole source" of the training
21

22 ³⁷ The 747-100, 747-200, and 747-300 are aerodynamically similar and the
23 series is known as the "747 Classic." *Breuhaus Decl.*, at ¶ 11.

24 ³⁸ In their Reply, Defendants contend that Boeing also plans to release a new
25 line of 747 commercial transport aircraft in 2009. *See Third Glass Decl.*, at ¶ 2, Exh.
26 A. However, they fail to show how the release of this information will cause
27 competitive injury to Boeing's sale of these aircraft, to simulator business concerning
28 these aircraft, or otherwise.

³⁹ Since 1991, Boeing has sold ten 747 Classic simulator data package licenses
to third parties, the most recent having been sold in 2001. *Breuhaus Decl.*, at ¶ 22.

1 simulator data.⁴⁰ *Id.* at ¶ 18. A competitor attempting to reproduce this data and sell
2 its own version of the data package would need to make an investment of some \$20
3 million in developmental costs, claims Boeing, and Boeing is aware of no other
4 company that has done so. *Id.* at ¶¶ 15-16.

5 In response, Plaintiff contends that the data in these records can be
6 independently obtained through the use of computational fluid dynamics (“CFD”).
7 CFD computer programs are used in the aerospace industry to calculate and simulate
8 aircraft performance. *Hoffstadt Aff. (Sept. 8, 2005)*, at ¶¶ 4-6.⁴¹ CFD computer
9 programs can be used to model three dimensional models of arbitrary aircraft
10 configurations and can calculate “airflow, pressure, forces, and moments of such
11 shapes” *Id.* at ¶ 4. One such program, called VSAERO, is sold by Analytical
12 Methods, Inc. (“AMI”), for \$27,500. *Id.* at ¶ 6. AMI also sells the geometry of the
13 747-200 and the 747-300 for use with VSAERO for \$5,000. *Id.* Using VSAERO,
14 in conjunction with this geometry, one can replicate the type of aerodynamic data
15 contained in the withheld records. *Id.* at ¶ 27. Plaintiff’s expert, Hoffstadt, states
16 that these records cannot be considered trade secrets because the same information
17 can be obtained from the CFD model with a high degree of precision. *Id.* at ¶¶ 9, 17.
18 Hoffstadt further states that (1) the number of Classic 747s in service continues to
19 drop, lowering the market for these services, and Boeing ceased any new deliveries
20 in 1990; (2) it is unclear to what extent, if any, release of this data would enable a

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23 ⁴⁰ A wholly owned subsidiary of Boeing operates flight training for the 747
24 Classic using these simulators. *Breuhaus Decl.*, at ¶ 19. Revenue for these services
25 in 2003 was approximately \$7 million. *Id.* at ¶ 20. Boeing also offers engineering
26 services that allow owners and operators of 747 Classic aircraft to secure
27 “Airworthiness Certificates” for modified 747s. No financial information regarding
28 these engineering services was set forth in the NTSB’s submissions.

27 ⁴¹ Hoffstadt is an aerodynamicist who apparently was employed as a technical
28 specialist in the Aerodynamics Group at Boeing from 1997 through 2002. *Hoffstadt
Decl. (Oct. 20, 2002)*, at ¶ 4.

1 competitor to develop such a package without still having to incur the full amount
2 of Boeing's claimed development costs; and (3) Boeing has not sold any licenses for
3 four years. *Id.* at ¶¶ 29-30, 34, 43.⁴² Furthermore, Hoffstadt notes, any competitor
4 would still have to obtain approval and certification from each applicable national
5 aviation regulatory agency, and to do so the competitor would have to present actual
6 flight test data. Boeing has not previously released such data and it would not be
7 required to do so as a result of this motion. *Id.* at ¶¶ 39-40.

8 In *Greenberg v. Food & Drug Administration*, 803 F.2d 1213 (D.C. Cir.
9 1986), an attorney with the Public Citizen Health Research Group requested that the
10 FDA disclose lists of names of customers who had purchased a particular
11 manufacturer's CAT scanners. *Id.* at 1214. The FDA withheld the requested
12 information as "confidential commercial information," save that which had already
13 been disclosed in a newspaper article. *Id.* The district court granted summary
14 judgment to the manufacturer, but the Court of Appeals reversed. The court
15 explained that when "requested information is available at some cost from an
16 additional source, the court must analyze '(1) the *commercial value* of the requested
17 information, and (2) the *cost of acquiring* the information through other means.'" *Id.*
18 at 1218 (quotation omitted). The court concluded that summary judgment was not
19 appropriate because both the cost and availability of the information was contested.
20 *Id.*; see also *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981)
21 (holding that summary judgment was inappropriate where the issue of the feasibility
22 of reverse engineering was disputed).

23 For purposes of the pending motion, the Court is required to draw inferences
24 in Lahr's favor. See *Painting Indus. of Hawaii Mkt. Recovery Fund v. United States*
25 *Dep't of the Air Force*, 751 F. Supp. 1410, 1415 (D. Haw. 1990), *rev'd on oth.*

26
27 ⁴² Defendants and Boeing reply that CFD programs *cannot* reproduce aircraft
28 aerodynamics data to the level of accuracy required for all of the commercial
purposes for which Boeing and third parties use the data. *Breuhaus Decl.*, at ¶ 10.

1 grounds, 26 F.3d 1479 (9th Cir. 1994) (summary judgment denied when contrary
2 affidavits show factual dispute about whether release of records would harm
3 competitive position of company). The Court therefore assumes that CFD programs,
4 alone, can reproduce the aerodynamics data of the Classic 747s to the level necessary
5 for the simulation software, as stated by Hoffstadt.

6 Because Defendants have failed to establish a likelihood that release of this
7 information will cause Boeing substantial competitive harm, the Court DENIES
8 summary judgment as to the graphs withheld from the record constituting MORI
9 Document ID# 1305302, for which Exemption 4 is Defendants' sole basis for
10 withholding this record. As to Plaintiff's Record 12, the Court also DENIES
11 summary judgment to Defendants as to the portion of that email that defendants
12 claim is exempt under Exemption 4.

13 c. Exemptions 6 and 7(C) (Privacy Redactions): Plaintiff's
14 Records 48 and 12

15 In two records -- Plaintiff's Records 48 and 12, which Defendants identified
16 and referred to as MORI Document ID# 1255552 and 1255554, respectively -- the
17 CIA redacted eyewitness identification numbers and the names of eyewitnesses to
18 the crash of Flight 800, claiming both Exemptions 6 and 7(C). Defendants claim that
19 the CIA withheld these names and numbers at the request of the FBI. *Third Buroker*
20 *Decl.*, at ¶ 9. Preliminarily, both records are emails that qualify as "similar files"
21 under Exemption 6. *Washington Post Co.*, 456 U.S. at 600-02.

22 Record 48 is entitled "Response to DIA Concerns on TWA 800 Findings."
23 The document redacts the names of six witnesses whose observations concerning the
24 sight and sound of the crash contradict the CIA's ultimate conclusion of how the
25 crash occurred, but it does contain the CIA's unredacted responses to their
26 observations.

27 As noted above, Record 12 is a six-page email which addresses "points raised
28 by a FBI Special Agent concerning the CIA analysis and conclusions during

1 interagency coordination.” This document was released in part, with 28 redactions⁴³
 2 invoking Exemptions 3, 5, 6 and/or 7(C). Plaintiff contests only twelve redactions,
 3 one under Exemption 4 (discussed above) and the rest under Exemptions 6 and
 4 7(C).⁴⁴ Plaintiff challenges redactions 7-9, 11-18 (including 12A) and 21-22. To the
 5 extent that Plaintiff does not challenge the other redactions, such as those claimed
 6 to be CIA “assets,” I GRANT summary judgment to Defendants.

7 Preliminarily, the Court finds (because a balancing test is in order) that the
 8 crash of Flight 800 and the government’s investigation and findings are matters of
 9 great public interest.

10 *i. Privacy Redactions under Exemption 6*

11 To determine if information should be exempted from disclosure under
 12 Exemption 6, a court must balance the privacy interests protected by that exemption
 13 against the “the public interest in disclosure.” *Fed. Labor Relations Auth.*, 510 U.S.
 14 at 495. The “only relevant ‘public interest in disclosure’ . . . is the extent to which
 15 disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contributing
 16 significantly to public understanding of the operations or activities of the
 17 government.’” *Id.* (quoting *Reporters Comm.*, 489 U.S. at 775) (emphasis in
 18 original). The privacy interest, meanwhile, “encompass[es] the individual’s control
 19 of information concerning his or her person.” *Fed. Labor Relations Auth.*, 510 U.S.
 20 at 500 (quoting *Reporters Comm.*, 489 U.S. at 773) (alteration in original).

21 Plaintiff argues that no privacy interests are involved in the release of
 22

23 ⁴³ Plaintiff erroneously states there were 27 redactions, but apparently missed
 24 one. The Court’s analysis encompasses the missed redaction.

25 ⁴⁴ Plaintiff lists twelve challenged redactions - - redactions 6-9, 11-18 and 21-
 26 22 - - but redaction 6 does not concern Exemptions 6 or 7(C). At the same time,
 27 however, Plaintiff failed to assign a number to a redaction concerning Exemptions 6
 28 and 7(C) - - found between redactions 12 and 13 - - which the Court will consider
 challenged and refer to as 12A. Thus, the Court must address twelve challenged
 redactions after all.

1 eyewitness identification numbers, and any withholding of eyewitnesses is subject
2 to the balancing test described above.

3 Defendants have not established a protectable privacy interest that would be
4 implicated by the release of witness identification numbers. The privacy interest to
5 which they point is that these persons have an "interest in not being subjected to
6 unofficial questioning about the analytic project or investigation at issue and in
7 avoiding annoyance or harassment in their . . . private lives." *Buroker Decl.*, at ¶ 46.
8 Defendants do not explain how the disclosure of witness identification numbers,
9 alone, could provide access to these individuals or any personally identifying
10 information about them. Furthermore, the identification numbers are not personal
11 information of a nature ordinarily protected by the courts under Exemption 6, such
12 as social security numbers or personnel records. *See James T. O'Reilly, 2 Federal*
13 *Information Disclosure* § 16:16 (3d ed. 2006). For this reason, the Court finds that
14 Defendants have not raised sufficient privacy interests in the identification numbers
15 and DENIES summary judgment on that ground.

16 As to these eyewitnesses' names, the burden is on Defendants to show that
17 disclosure "would constitute a clearly unwarranted invasion of personal privacy."
18 5 U.S.C.A. §§ 552(a)(4)(B), 552(b)(6); *Lion Raisins*, 354 F.3d at 1079. Defendants
19 have not met their burden of establishing "the significance of the privacy interest at
20 stake." *Ray*, 502 U.S. at 176. The required "particularized explanation," *see Wiener*,
21 943 F.2d at 977, is absent in both the *Vaughn* index and the accompanying affidavits,
22 although the Third Buroker Declaration does cite to Buroker's previous conclusory
23 assertion that those witnesses have an interest in "not being subjected to unofficial
24 questioning about the . . . investigation at issue and in avoiding annoyance or
25 harassment in their official, business, and private duties." *Buroker Decl.*, at ¶ 46
26 (cited in *Third Buroker Decl.*, at ¶ 9).

27 The cases under Exemption 6 that have found privacy interests in witnesses'
28 names, separate and apart from other personal information, typically involved

1 witnesses in criminal or quasi-criminal cases; the disclosure of their identities might
2 compromise the case or endanger them. *See, e.g., Balderrama v. United States Dep't*
3 *of Homeland Sec.*, 2006 U.S. Dist. LEXIS 19,421, at *25 (D.D.C. Mar. 30, 2006)
4 (unpublished). In *United States Department of Defense v. Federal Labor Relations*
5 *Authority*, the Court found a "nontrivial" privacy interest in nondisclosure of home
6 addresses due to wishes of federal employees to avoid unwanted contact at home.
7 510 U.S. at 500-01. However, in that case the employees made an affirmative
8 decision not to provide their home addresses to the union. *Id.* Here, the disclosed
9 records would consist of names, not addresses. Defendants proffer no assertions by
10 any of the eyewitnesses, even *in camera*, that they wish to avoid being asked for
11 information. Even assuming these individuals ultimately were contacted, if they
12 were not interested in responding to inquiries, they could easily decline to be
13 interviewed. Therefore, the consequences arising from disclosure appear slight.

14 On the other hand, disclosure of these persons' identities ultimately could
15 contribute significantly to the "public understanding of the operations or activities
16 of the government." *Fed. Labor Relations Auth.*, 510 U.S. at 495 (quotation
17 omitted). Plaintiff is trying to contribute significantly to the public's knowledge of
18 what he contends is a massive cover-up by the government of a missile strike on
19 Flight 800. To be sure, Plaintiff already is privy to the government's versions of the
20 accounts these individuals allegedly provided to investigators concerning what they
21 saw, insofar as such information was set forth in the records adjacent to where their
22 names would have appeared had they not been redacted. Disclosure might
23 nevertheless assist Plaintiff in investigating and uncovering government malfeasance
24 by, for instance, leading to individuals who might repudiate what the government
25 attributed to them or might even declare that the government misused or
26 misrepresented the information they provided.

27 The Court concludes that the balance favors disclosure - - the release of the
28 eyewitnesses' names would not constitute a clearly unwarranted invasion of privacy.

1 Therefore, the Court DENIES Defendants' claims concerning the names of
2 eyewitnesses based upon Exemption 6.

3 ii. *Privacy Redactions under Exemption 7(C)* SCANNED

4 Defendants also claim that the names of eyewitnesses and the eyewitness
5 identification numbers - - the same names and numbers contested under Exemption
6 6 - - should be exempted from disclosure based upon Exemption 7(C). To the extent
7 the issue at hand is the *magnitude* of the public interest to be weighed in the balance,
8 the privacy interest protected by Exemption 7(C) is greater than that protected by
9 Exemption 6, *Reporters Comm.*, 489 U.S. at 756 - - assuming Exemption 7(C) is
10 applicable in the first place.

11 For Exemption 7(C) to apply, the record must be compiled for "law
12 enforcement purposes." Paragraph three of the Third Buroker Declaration states:
13 "As indicated in *note 5* of my June 20, 2005 declaration, CIA's analytical effort was
14 limited in scope. At the request of the FBI, the focus of the CIA inquiry on TWA
15 Flight 800 was to determine what the eyewitnesses saw, not what happened to the
16 aircraft" (emphasis added). Note 5 of the First Buroker Declaration does not
17 illuminate how the CIA's analytic effort was limited in scope and does not explain
18 the relationship between the CIA and FBI during this process. Buroker apparently
19 meant to point to *paragraph 50* of his earlier declaration, which states:

20 The information at issue in this case was clearly compiled for law
21 enforcement purposes. The possibility that the explosion of TWA
22 Flight 800 with the loss of all 230 passengers and crew on board may
23 have been the result of a criminal act precipitated what was at that time
24 the most expensive criminal investigation in U.S. history. Of particular
25 concern to FBI investigators were the reports they compiled from
dozens of eyewitnesses who reported seeing . . . 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.

26 *Buroker Decl.*, at ¶ 50. The FBI furnished eyewitness reports to the CIA for this
27 analysis. *Third Buroker Decl.*, at ¶ 5.

28 To determine whether a record is compiled for law enforcement purposes, the

1 court applies a two-part test. An “agency may only invoke Exemption 7 if: (1) the
2 records were created as part of an investigation related to the enforcement of federal
3 laws and (2) that investigation was within the agency’s law enforcement authority.”
4 *Whittle v. Moschella*, 756 F. Supp. 589, 593 (D.D.C. 1991) (citing *Pratt v. Webster*,
5 673 F.2d 408, 420-21 (D.C. Cir. 1982)). “The investigation need not result in an
6 arrest or indictment, and the FBI’s authority to conduct an investigation can rest on
7 a plausible basis to believe that the law has been violated.” *Whittle*, 756 F. Supp. at
8 593 (citing *King v. United States Dep’t of Justice*, 830 F.2d 210, 230-31 (D.C. Cir.
9 1987)). Here, the CIA may invoke the law enforcement exemption on the FBI’s
10 behalf, because it was the FBI that compiled these eyewitness names and statements.

11 Like Exemption 6, Exemption 7(C) requires a balancing of “the competing
12 interests in privacy and disclosure.” *Favish*, 541 U.S. at 172. Defendants’ asserted
13 privacy interests in individuals’ names are the same as those asserted with respect
14 to Exemption 6, above. Exemption 7(C)’s broad privacy rights generally concern
15 criminal or quasi-criminal investigations where those identified may be subject to
16 embarrassment, reputational harm, or worse. *See, e.g., SafeCard Servs. v. Sec. &*
17 *Exch. Comm’n*, 926 F.2d 1197, 1205 (D.C. Cir. 1991). Although this privacy
18 interest is broader than that of Exemption 6, under these facts, the public interest in
19 uncovering agency malfeasance and wrongdoing outweighs it.

20 Therefore, to the extent Plaintiff challenges Defendants’ redactions, I DENY
21 the motion for summary judgment as to Plaintiff’s Records 48 and 12 in full.

22 d. Exemption 5 (Deliberative Process Privilege):

23 Plaintiff’s Records 66, 76, 77 and 78

24 Defendants move for summary judgment based on Exemption 5 on Plaintiff’s
25 Records 66, 76, 77 and 78. All four of these records are NTSB files found in CIA
26 records, and all four, to varying degrees, contain factual material that Defendants
27 maintain is exempt from disclosure because it is organized in a deliberative manner.
28 These “facts” range from organized radar data to graphs of simulations based upon

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1 this data. Plaintiff argues that they may not be redacted because facts, without more,
2 do not reveal the deliberative process of an agency.

3 In the Ninth Circuit,

4 the scope of the deliberative process privilege should not turn on
5 whether we label the documents "factual" as opposed to "deliberative"
6 . . . Factual materials [are] exempt from disclosure to the extent that
7 they reveal the mental processes of decisionmakers . . . In other words,
whenever the unveiling of factual materials would be tantamount to the
'publication of the evaluation and analysis of multitudinous facts'
conducted by the agency, the deliberative process privilege applies.

8 *Nat'l Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir.
9 1988) (citations omitted). The Ninth Circuit has provided examples of factual
10 materials considered both deliberative and non-deliberative. On one hand, the court
11 in *National Wildlife Federation* held that the United States Forest Service had
12 properly withheld draft Forest Plans and draft Environmental Impact Statements
13 under the deliberative process privilege, because the materials "represent[ed] the
14 mental processes of the agency in considering alternative courses of action prior to
15 settling on a final plan." *Id.* at 1122 (noting that "[m]aterials that allow the public
16 to reconstruct the predecisional judgments of the administrator are no less inimical
17 to [E]xemption 5's goal of encouraging uninhibited decisionmaking than materials
18 explicitly revealing his or her mental processes.").

19 On the other hand, in *Assembly of the State of California*, the Ninth Circuit
20 held a computer tape containing adjusted census data was neither predecisional nor
21 deliberative and could not be withheld under Exemption 5. *Assembly*, 968 F.2d at
22 917. The court found that release of this factual material would not enable the public
23 to reconstruct the formulas used by the Census Bureau to generate the adjusted
24 census data. *Id.* at 922. The court also found the deliberative process of the agency
25 had already been revealed. *Id.* at 923.

26 *i. Plaintiff's Records 66 and 78*

27 Plaintiff's Record 66 (also NTSB Record 33 and MORI Document ID#
28 1147380) is a nine-page document presenting "preliminary radar data" that,

1 Defendants state, "provided a starting point for the simulations of the aircraft's flight
2 path." *See Moye Supp. Decl.*, at ¶ 6(a). Defendants claim that "[t]he author(s) culled
3 these data from an enormous collection of radar returns to contribute to the flight
4 path derived from the simulations." *Id.* Defendants argue this information is
5 predecisional and deliberative, and distilling the "significant facts from the
6 insignificant" constituted an exercise of judgment. *Id.*

7 Plaintiff's Record 78 (also NTSB Record 36) is a sixty-two page document
8 presenting "preliminary radar data" that, Defendants state, also "provided a starting
9 point for the simulations of the aircraft's flight path." *See id.* at ¶ 6(d). Defendants
10 make the same claim that they did as to Record 66 as to its supposed predecisional
11 and deliberative nature. *Id.*

12 According to Defendants, a "staff member of the NTSB created the
13 information represented on [both Records 66 and 78] to present some preliminary
14 radar data." *Id.* at pp. 62, 115.

15 As to whether Records 66 and 78 are predecisional, Defendants do not present
16 evidence, but merely imply that they were, in that they were used to compile the final
17 Aircraft Accident Report. *See Second CIA Mot'n*, at pp. 11-12. Plaintiff argues that
18 the records are not predecisional in that they post-date the CIA video animation,
19 which was broadcast on November 17, 1997. Record 66 has several handwritten
20 dates ranging from November 12, 1997 to December 16, 1997 (with two undated
21 pages). The first page of Record 78 contains a handwritten date of November 12,
22 1997; no other pages are dated. The CIA video animation surely has the status of a
23 final agency decision, but that does not mean it was the *only* final agency decision;
24 the August 23, 2000 NTSB Aircraft Accident Report also is a final agency decision,
25 and to the extent that it does not expressly incorporate the earlier CIA findings,
26 further work on the matter after the November 17, 1997 broadcast would be
27 predecisional. That said, because Defendants have not directly presented evidence
28 that these data sets were used in preparing the final Aircraft Accident Report - -

1 conclusorily stating that they were "preliminary" is not enough - - summary
2 judgment would not be appropriate.

3 As to whether Records 66 and 78 are deliberative, Defendants state that the
4 preliminary data "is reflected in the Airline Performance Study and/or the data
5 supporting the Study and the data that matches the publicly available data has been
6 released." *Id.* The headings were released, but handwritten notes and preliminary
7 data have been redacted. *Id.* at pp. 62, 115. Defendants argue that the "selection of
8 these data culled from hundreds of pages of data give an indication of the
9 preliminary thoughts of how data may be used in the simulation program." *Id.* at pp.
10 63, 116. In other words, Defendants essentially argue that the release of this data
11 would reveal the deliberative process, because some staff member selected *this*
12 specific data for a reason.

13 Defendants attempt to explain how disclosure of this data might harm the
14 decision-making process of the NTSB by conclusorily stating that "without the
15 protection provided by the exemption, full and frank discussion of options and
16 opinions so vital to the decision-makers would be impossible." *Id.* at pp. 63, 116
17 (citing *Crider Decl.*, at ¶¶ 31-32). The Crider Declaration basically contains only
18 tautological support for this proposition, not an explanation or description of the
19 communicative or evaluative procedures the NTSB followed in doing its "culling."
20 Nor does Crider demonstrate why disclosure of what the report did not incorporate
21 would impede other or future deliberations. Simply stating that this data provided
22 a "starting point" for the simulations of the aircraft flight path is not enough.
23 Instead, the agency must show that the deliberative process (or at least part of it) can
24 be determined from the data alone. *Carter*, 307 F.3d at 1091. Thus, for example,
25 information about how data was evaluated, by whom, and how differing views or
26 results were communicated within the investigative team might have established a
27 stronger basis for defendants' claim of exemption.

28 Defendants have failed to carry their burden that what has been withheld

1 “represent[ed] the mental processes of the agency in considering alternative courses
2 of action prior to settling on a final plan.” *Nat’l Wildlife Fed’n*, 861 F.2d at 1122.
3 Defendants’ contention would invite agencies to claim that the mere notion that one
4 set of facts was culled from a larger set of facts always and necessarily renders the
5 culled material evidence of the agency’s deliberative process.⁴⁵

6 *ii. Plaintiff’s Record 76*

7 Defendants also move for summary judgment on Plaintiff’s Record 76. This
8 record (also designated as NTSB Record 34 and MORI ID# 1147382)⁴⁶ is a twenty-
9 nine-page document that graphically depicts “various versions of the radar data”
10 provided by the Federal Aviation Agency. *See Moye Supp. Decl.*, at ¶ 6(b).
11 Defendants released twenty-five pages in full, and redacted four. *Id.* Defendants
12 state that the charts “illustrate staff’s coordination of various types of data, such as
13 this radar data, used to prepare and/or update evaluations of the accident flight.” *Id.*
14 They argue that the data reflects “the personal opinion of the writer [presumably
15 meaning the creator of the graphs] rather than the policy of the agency.” *Id.* at p. 74.
16 Plaintiff again argues that this data is factual, does not reflect the personal opinion
17 of the compiler and therefore is not covered by the deliberative process exemption.

18 These graphs typically consist of grids on which entries have been placed in
19 the form of various symbols. Some contain what literally appear to be lines
20 connecting dots. There is accompanying text that explains the symbols. To a
21 layman, there do not appear to be any differences between the redacted and
22 unredacted pages in either their format or appearance.

23
24 ⁴⁵ To the extent there are handwritten notes found on Records 66 and 78, even
25 Plaintiff does not dispute their presumptive deliberative character. However, because
26 in any event Defendants have not shown that these records are “predecisional,” they
must still be produced in their entirety.

27 ⁴⁶ Both this record and Plaintiff’s Record 77/NTSB Record 35 share MORI ID#
28 1147382. The parties, persistently disorganized and indifferent to the impact of
sowing confusion, offer no explanation for this overlap.

1 First, Defendants do not present evidence that the withheld portions of this
2 record or the record in its entirety is predecisional. The date of the document is
3 "unknown," *id.* at p. 74, and it is unclear in what manner, exactly, the document was
4 used. Defendants merely suggest that it helped lead to the final NTSB report and
5 conclusions because it was "used to prepare and/or update evaluations of the
6 accident flight." *Id.* at ¶ 6(b).

7 Second, Defendants have not shown that this record is deliberative. As with
8 Records 66 and 78, the data contained within these graphs is purely factual. There
9 appears to be no basis for surmising that the withheld portions "expose an agency's
10 decisionmaking process in such a way as to discourage candid discussion within the
11 agency and thereby undermine the agency's ability to perform its functions."
12 *Assembly*, 968 F.2d at 921 (quotation omitted).

13 The notion put forth by Defendants that the "graphs of the radar data have
14 been redacted under exemption (b)(5) [because] these data reflect the personal
15 opinion of the writer," *Moye Supp. Decl.*, at p. 74, makes no sense. Simply creating
16 several graphs does not equate to advocating a point of view. It is telling that other
17 graphs that are part of this record and that contain similar radar data were not
18 withheld. If those graphs reflect the writer's "opinion," then such opinion was
19 incorporated into the final agency decision anyway.

20 Defendants have not met their *Celotex* burden of showing that this material is
21 predecisional or deliberative, and the Court therefore DENIES summary judgment
22 concerning Record 76.

23 *iii. Plaintiff's Record 77*

24 Next, Defendants move for summary judgment on Plaintiff's Record 77. This
25 record (also designated as NTSB Record 35 and MORI Document ID# 1147382) is
26 a ten-page document prepared by the NTSB staff that depicts in graphic form
27 "various outcomes of the Main Wreckage Simulation for TWA flight 800 depicting
28 differing parameters on the x and y axes." *See Moye Supp. Decl.*, at ¶ 6(c). One

1 graph was released in full; the other nine have been redacted. *Id.* Defendants argue
2 that the data reflects “the personal opinion of the [creator of the graphs, who was a
3 member of the accident investigation team] rather than the policy of the agency.” *Id.*

4 Plaintiff responds, once again, that this data is factual and cannot reflect the
5 personal opinion of the person who compiled it. Plaintiff also argues that the
6 “deliberative process privilege is not available to shield the disclosure of these
7 representations of the simulation because the NTSB claims to have incorporated
8 these conclusions into its report of its final disposition.”⁴⁷

9 These graphs are undated and Defendants do not present evidence that this
10 record is predecisional. Although this fails to satisfy Defendants’ *Celotex* burden,
11 Plaintiff does not contest summary judgment on this ground. Assuming, therefore,
12 that Record 77 was predecisional, Defendants have nevertheless failed to
13 demonstrate that it is deliberative. Factual materials are exempt from disclosure only
14 to the extent that they reveal the mental processes of decisionmakers. *Nat’l Wildlife*
15 *Fed’n*, 861 F.2d at 1119. These graphs of simulation data may (or may not) be the
16 product of the outcomes of various simulations run by the NTSB to determine where
17 wreckage would have been found under various different scenarios, but even if these
18 graphs represent scenarios the NTSB investigated and ultimately rejected, disclosure
19 of the results would not reveal the “mental processes of decisionmakers.” The fact
20 of their existence and the apparent absence of any reference to them in a final report
21 does not reveal how or why the NTSB reached its conclusions. Even if one posits
22 that these graphs might be inconsistent with the NTSB’s conclusion, the mere
23 disclosure of an inconsistency does not “blow the lid” on the process of
24 decisionmaking. Indeed, in a sophisticated, lengthy and closely-watched

25
26 ⁴⁷ Plaintiff also claims that the one unredacted page shows that the NTSB made
27 false assumptions in its calculations and/or analysis, and he goes on to present a
28 technical basis for that assertion. *Clarke Decl. (June 22, 2006)*, at p. 29 (Record 77
comments). This argument is irrelevant and lacks merit. It has no bearing on whether
such simulations might still expose the agency’s decision-making process.

1 investigation such as this, who would be so naive as to assume that there was, or
2 even could be, only one possible conclusion? How could one reasonably expect that
3 there would be no data inconsistent with whatever the conclusion was? Merely
4 confirming contradictions when one would expect them to be present anyway does
5 not say much about an agency's internal deliberations.

6 The Court DENIES summary judgment concerning this record.

7 e. Plaintiff's Record 1

8 Defendants move for summary judgment that under Exemption 3 certain
9 names and intelligence methods were properly redacted from Plaintiff's Record 1,
10 also designated as MORI Document ID# 1255556. Record 1 is a one-page email
11 "reflecting discussion between two CIA employees relating principally to airspeed
12 and one's [sic] analyst's views regarding implications for climb/descent." *Third*
13 *Buroker Decl.*, at p. 55. Redactions 1 and 7 allegedly consist of names of CIA
14 employees, which the CIA is exempted from disclosing. 50 U.S.C.A. § 403g; *see*
15 *Minier*, 88 F.3d at 801 (material within the purview of section 403g may be withheld
16 under Exemption 3). Once it is determined that the CIA has statutory authority to
17 withhold the document, the information is categorically exempt. *Id.*; *Spurlock v.*
18 *Fed. Bureau of Investigation*, 69 F.3d 1010, 1016 (9th Cir. 1995). There is no
19 judicial balancing test in the application of this statute to Exemption 3. *Minier*, 88
20 F.3d at 801 (citing *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 631
21 (1982) (Congress's scheme is one of categorical exclusion)); *McDonnell v. United*
22 *States*, 4 F.3d 1227, 1248 (3d Cir. 1993) (Exemption 3 does not require factual
23 balancing test).

24 The CIA retains broad power to make these determinations. It is the
25 "responsibility" of the CIA, "not of the judiciary, to weigh the variety of complex
26 and subtle factors in determining whether disclosure of information may lead to
27 unacceptable risk of compromising the Agency's intelligence-gathering process."
28 *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 180 (1985). Absent evidence of

1 bad faith in applying the statute, the Agency's determination is "beyond the purview
2 of the courts." *Knight v. Cent. Intelligence Agency*, 872 F.2d 660, 664 (5th Cir.
3 1989).

4 Plaintiff argues that the two unidentified persons who exchanged views in this
5 email were high government officials engaged in criminal misconduct. He bases this
6 unfounded contention on two lines from the email: "I say the plane flattened its
7 trajectory because I want it to be at about 8000 feet when it fireballs . . ." and "The
8 trick is to come up with a combination of speeds and descent angles that gets you to
9 the right altitude at fireball time." These statements are taken out of context and
10 unfairly distorted. Even those who are cynical have no basis to view such statements
11 as evidence of an unlawful conspiracy. In *Arabian Shield Development Co. v.*
12 *Central Intelligence Agency*, 1999 U.S. Dist. LEXIS 2,379 (N.D. Tex. Feb. 26, 1999)
13 (unpublished), Plaintiff contended that "the agency should not be permitted to
14 conceal evidence of crime by classifying documents that are otherwise protected
15 under the National Security Act." *Id.* at *14. The court rejected that contention and
16 declined to abridge the CIA's broad power to protect documents, stating that the
17 plain meaning of the statute "may not be squared with any limited definition that
18 goes beyond the requirement that the information fall within the Agency's mandate
19 to conduct foreign intelligence." *Id.* (citing *Sims*, 471 U.S. at 169). I reach the same
20 conclusion here.

21 Plaintiff also challenges Defendants' redaction of alleged "sources and
22 methods" of intelligence in Redactions 2, 4, 5 and 6.⁴⁸ Although Defendants state
23 that the CIA relied on 50 United States Code Annotated section 403g to withhold
24 intelligence methods, the statute that deals with the withholding of intelligence
25

26
27 ⁴⁸ In his Opposition papers, Plaintiff did not originally contest Redaction 3, but
28 later did so. Neither Exhibit F to that Opposition nor the later June 22, 2006 Clarke
Declaration explain why Redaction 3 was improper, and as such, the Court GRANTS
summary judgment as to that redaction.

1 sources and methods is actually section 403-1(I). Under that statute, the CIA may
2 withhold information that would “disclose ‘sources and methods’ of intelligence
3 gathering.” *Minier*, 88 F.3d at 801 (citations omitted) (concerning disclosure of
4 names of employees). However, the CIA must present evidence, by affidavit or
5 otherwise, that the release of the contested information would actually do so. *See*
6 *Church of Scientology v. United States Dep’t of the Army*, 611 F.2d 738, 742-43 (9th
7 Cir. 1979); *see also Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984). The First
8 Buroker Declaration presents such evidence only in a general sense, but does not
9 address specific sources and methods of intelligence information. Nor does the
10 Third Buroker Declaration; it only reiterates that “the CIA has withheld an
11 intelligence method” from this document. Having reviewed Record 1 *in camera*, the
12 Court cannot discern just how the extremely limited and few redactions disclose an
13 “intelligence method.” However, “the ‘sources and methods’ statutory mandate [is]
14 a ‘near-blanket FOIA exemption,’ which is ‘only a short step [from] exempting all
15 CIA records from FOIA.’” *Minier*, 88 F.3d at 801 (quoting *Hunt v. Cent.*
16 *Intelligence Agency*, 981 F.2d 1116, 1120-21 (9th Cir. 1992)) (alteration in original).
17 For this reason, the Court finds the CIA’s information is sufficient to justify the
18 exemption.

19 Plaintiff argues Redaction 2 is improper for the additional reason that the
20 information contained in the redaction - - supposedly “an infrared satellite” - - is
21 incorporated into the agency final decision, in that it was allegedly “recited” in the
22 November 18, 1997 CIA video animation. Plaintiff does not provide support for this
23 assertion. Moreover, by incorporating the content of a record into an agency final
24 decision, the agency loses only the right to invoke the deliberative process privilege
25 via Exemption 5; the agency may still invoke any other exemption. *Sears, Roebuck*
26 *& Co.*, 421 U.S. at 161 (“if an agency chooses expressly to adopt or incorporate by
27 reference an intra-agency memorandum previously covered by Exemption 5 in what
28 would otherwise be a final opinion, that memorandum may be withheld only on the

1 ground that it falls within the coverage of some exemption *other than* Exemption 5”
2 (emphasis added). As such, Plaintiff’s argument fails.

3 The Court GRANTS summary judgment to Defendants on Plaintiff’s Record

4 1.

5 f. The NSA Computer Program

6 Defendants move for summary judgment that, under Exemptions 2 and 3, they
7 properly withheld in full an NSA computer simulation and animations program.⁴⁹
8 Item #83 of Plaintiff’s FOIA request sought a copy of the computer simulation and
9 animation program the CIA and/or the NTSB may have used. It appears that the CIA
10 did use an NSA computer simulation program during its investigation. *See Third*
11 *Buroker Decl.*, at ¶ 7 (“One record located by the CIA was referred to the [NSA] for
12 its review and direct response to the requester. This ‘record’ was responsive to [Item
13 #83].”) In refusing to release the computer program, the NSA concluded that it
14 “would reveal investigative techniques” and that it “could expose how the U.S.
15 Government analyzes the performance characteristics of foreign weapons systems
16 that are aerodynamic or ballistic.” *Giles Decl.*, at ¶¶ 10-11.

17 The NSA also concluded that the computer program related to the NSA’s core
18 functions and activities, and as such was exempted from release under Exemption
19 3. *Id.* at ¶¶ 12-14.⁵⁰ Gathering primary signals intelligence is one of the NSA’s core
20 functions. *Id.* at ¶ 4. Its mission “is to intercept communications of foreign
21 governments in order to obtain foreign intelligence information necessary to the

22 _____
23 ⁴⁹ Defendants have not assigned a document identifier to this program.

24 ⁵⁰ Defendants’ Statement of Uncontroverted Facts, paragraph three, cites to
25 paragraph 11 of the Giles Declaration for support that the “NSA uses the [computer]
26 program to ‘analyze[] the performance characteristics of foreign weapons systems
27 that are aerodynamic or ballistic.’” This is not exactly what the declaration says - -
28 it merely describes how release of the program “could expose how the U.S.
Government analyzes” performance characteristics. *Giles Decl.*, at ¶ 11. In any
event, Plaintiff does not dispute this statement. *See Pl. S.G.I.*, ¶ 3.

1 national defense, national security, or the conduct of the foreign affairs of the United
2 States.” *Id.* The NSA states that “[p]ublic disclosure of either the capability to
3 collect specific communications or the substance of the information itself can easily
4 alert targets to the vulnerability of their communications. Disclosure of even a single
5 communication holds the potential of revealing the intelligence collection
6 techniques,” which might then be thwarted. *Id.* at ¶ 6.

7 Section 6(a) of the National Security Agency Act of 1959 states that nothing
8 “shall be construed to require the disclosure of the organization or any function of
9 the National Security Agency, of any information with respect to the activities
10 thereof, or of the names, titles, salaries, or number of the persons employed by such
11 agency.” Accordingly, the NSA need only show that the computer program concerns
12 a specific NSA activity and that its disclosure would reveal information integrally
13 related to that activity. *Hayden*, 608 F.2d at 1390. No showing need be made
14 concerning “the particular security threats posed by the release of the” program.
15 *Linder*, 94 F.3d at 696.

16 Because of the implications of disclosure of sensitive information by the NSA,
17 courts have recognized the importance of describing only in general terms the
18 content of NSA records and, at times, have allowed the NSA (and other agencies) to
19 file sealed affidavits to further explain the content of withheld materials.

20 Plaintiff’s argument that this record is discoverable, notwithstanding the
21 statutory immunity from disclosure that the NSA enjoys, is based largely on his
22 contention that the NSA failed to disclose (1) the dates the simulation program was
23 used and (2) the inputs into the simulation. These arguments are irrelevant and
24 misplaced. Defendants seek summary judgment that the program itself is exempted
25 from disclosure, not merely that the simulation’s inputs are exempt.

26 Plaintiff also argues that the *Vaughn* index does not include the information
27 Plaintiff requires in order to oppose the claim of exemption. Plaintiff is correct that
28 it is not clear from the Giles Declaration how the computer program used during the

1 investigation of Flight 800's explosion related to the NSA's core mission, insofar as
2 there was no showing (through affidavit or otherwise) that the program involved
3 signal intelligence. The program itself was incomprehensible, consisting in essence
4 of source code. SEARCHED

5 Given the inadequacy of the government's *Vaughn* index and because a
6 computer program does not easily lend itself to *in camera* review, I ordered
7 Defendants to submit an affidavit, to be reviewed *in camera*, describing how the
8 program concerns a function of the NSA, as well as a general explanation of the
9 purposes for which the program is used, how it works, and how it is operated.
10 Defendants submitted such an affidavit, executed by a 38-year employee of the NSA
11 who is a member of that agency's Orbit and Trajectory Modeling Team and is
12 personally familiar with the software. His declaration unequivocally asserts that the
13 software "is a unique tool for foreign weapons system analysis . . ." and he provides
14 facts sufficient to support that assertion. The declarant further describes how
15 disclosure of this software, or any part of it, could harm the nation.

16 Having reviewed this submission *in camera*, the Court concludes that
17 Exemption 3 is applicable and on that basis GRANTS summary judgment to
18 Defendants as to the NSA computer program.⁵¹

19 20 **III. Conclusion**

21 For the foregoing reasons, the Court GRANTS summary judgment to
22 Defendants on five of the disputed records at issue in the CIA's Second Motion, and
23 DENIES summary judgment on the remaining seven. (The specific rulings are

24 _____
25 ⁵¹ Because Exemption 3 is applicable as to the software in its entirety, the Court
26 need not address Plaintiff's contentions as to Exemption 2 or the government's
27 supposed failure to demonstrate that "no segregable, nonexempt portions remain
28 withheld." *Paisley v. Cent. Intelligence Agency*, 712 F.2d 686, 700 (D.C. Cir. 1983),
vacated in part on oth. grounds, 724 F.2d 201 (D.C. Cir. 1984); *Allen v. Cent.*
Intelligence Agency, 636 F.2d 1287, 1293 (D.C. Cir. 1980).

1 summarized on page 2 of this Opinion.)

2 Defendants will not be required to actually provide the required records until
3 the Court rules on the two remaining summary judgment motions, which the Court
4 hopes to do within thirty days. At that point, a single, comprehensive Judgment may
5 be procedurally appropriate and the parties will be in a position to determine whether
6 to appeal.

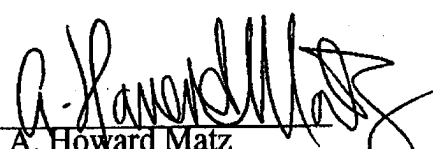
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8 IT IS SO ORDERED.

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10 DATE: August 31, 2006

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A. Howard Matz
United States District Judge

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