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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

H. RAY LAHR, Plaintiff, v. NATIONAL TRANSPORTATION SAFETY BOARD, *et al.*, Defendants.	No. CV 03-08023-AHM (RZx) Date: October 31, 2005 Time: 10 a.m. Judge: Hon. A. Howard Matz

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE CENTRAL INTELLIGENCE AGENCY

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STATEMENT

By letter dated October 8, 2003, plaintiff, H. Ray Lahr, submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to the Central Intelligence Agency (CIA) for all records upon which the CIA based its "publicly released aircraft flight path climb conclusion," i.e., its conclusion that TWA Flight 800 "continu[ed] to fly, over 3,000 [feet] up, after the nose of the aircraft separated from the fuselage." Buroker (Bur.) Decl. Ex. 1 at 72. In this action, plaintiff seeks compliance with this request. *See* Am. Compl. ¶ 17 & prayer ¶ 2.

The CIA has responded to plaintiff's request by conducting a search for responsive records and locating approximately 100 such records. Bur. Decl. ¶¶ 19-25. Roughly a third of these records were created by agencies other than the CIA. *Id.* ¶ 25. The CIA has referred these records to their agencies of origin for review and direct response to plaintiff. *Id.* Other such records were created by the CIA. The CIA has reviewed these records to determine the applicability of the statutory exemptions, 5 U.S.C. § 552(b). *See id.* ¶ 6. Every record created by the CIA has been released to plaintiff in full, except 26 that have been withheld in part pursuant to one or more of the statutory exemptions; six that have been withheld in full pursuant to one or more of those exemptions; and seven that contain information obtained from agencies other than the CIA. *See id.* ¶¶ 6, 14, 25 & n.3

& Doc. Index (DI) at 41-70 ; 2nd Bur. Decl. ¶¶ 11, 13, 18 & DI at 16-17; Koch Decl. ¶ 23. These records have been referred to the agencies from which the information was obtained for advice on its treatment. *See* Bur. Decl. ¶ 12. Pending receipt of such advice, the records have been withheld in full. *See id.* n.3.

Defendants, the CIA and the National Transportation Safety Board (NTSB), moved for summary judgment as to the NTSB in June 2004. In August 2005, they moved for partial summary judgment as to the CIA. Alleging that the CIA has conducted a sufficient search for records and has applied the statutory exemptions correctly, defendants ask that all claims against the CIA be dismissed, except any claim involving the application of the statutory exemptions to any record, created by the CIA, still undergoing review. Mem. P. & A. Supp't Defs.' Mot. at 8-25.

Plaintiff does not challenge the sufficiency of the search for records that the CIA has conducted or, for the most part, the manner in which the statutory exemptions have been applied. Instead, he alleges that FOIA Exemption 3 may not be relied upon to withhold the name "Randolph M. Tauss" because an individual so named had been identified in a newspaper article as a "CIA analyst"; that FOIA Exemption 4 may not be relied upon to withhold certain technical information concerning the Boeing 747-100 because certain such information has been released previously and because a sufficient showing has not been made that

the release of the information could cause competitive injury to the Boeing Company (Boeing); that FOIA Exemption 5 may not be relied upon to withhold certain material allegedly covered by the deliberative process privilege because the material withheld is postdecisional; and that FOIA Exemptions 6 and 7(C) may not be relied upon to withhold the job titles or job descriptions of federal employees. Pl.'s Opp'n CIA's Mot. Partial Summ. J. (Pl. Mem.) at 16-22. Plaintiff also alleges that defendants have not made a sufficient showing that all non-exempt material has been released and that numerous deficiencies exist in the CIA's production of records and in the materials that defendants have filed in support of their motion for partial summary judgment. *Id.* at 22-28.

These allegations are without merit. As a threshold matter, plaintiff has not shown that the CIA has misapplied any of the statutory exemptions. The name "Randolph M. Tauss" may be withheld pursuant to Exemption 3 because no association between the responsive records and anyone so named has been officially disclosed and because equitable balancing is generally inapplicable to exemption claims under FOIA. The technical information concerning the Boeing 747-100 may be withheld pursuant to Exemption 4 because the information has not been released previously and because defendants have made a sufficient showing that the release of the information could cause competitive injury to

Boeing. The material withheld in alleged violation of Exemption 5 has been withheld properly because the material is predecisional. No issue exists as to whether the job titles or job descriptions of federal employees may be withheld pursuant to Exemptions 6 or 7(C) because no such material has been withheld.

In addition, plaintiff has not shown that defendants' motion for partial summary judgment should be denied for reasons other than the alleged misapplication of the statutory exemptions. All non-exempt material has been released, and no deficiency exists in the CIA's production of records or in the materials upon which defendants rely in moving for partial summary judgment. Defendants' motion should therefore be granted.

ARGUMENT

I. PLAINTIFF HAS NOT SHOWN THAT THE CIA HAS MISAPPLIED ANY OF THE STATUTORY EXEMPTIONS.

A. THE NAME "RANDOLPH M. TAUSS" MAY BE WITHHELD PURSUANT TO EXEMPTION 3 BECAUSE NO ASSOCIATION BETWEEN THE RESPONSIVE RECORDS AND ANYONE SO NAMED HAS BEEN OFFICIALLY DISCLOSED AND BECAUSE EQUITABLE BALANCING IS GENERALLY INAPPLICABLE TO EXEMPTION CLAIMS UNDER FOIA.

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

> The CIA recently declassified a once-secret report on eyewitnesses to the crash of TWA Flight 800 off Long Island, N.Y., on July 17, 1996. CIA analyst Randolph M. Tauss, who won an intelligence medal for his work on the crash, concluded that numerous eyewitnesses who saw a streak of light heading toward the Boeing 747 jetliner were wrong if they believed it was a surface-to-air missile going toward the jet.
>
> Based on sound-travel analysis and a spy satellite sensor, Mr. Tauss stated: "Any eyewitness who thinks he may have seen a missile shoot down Flight 800 needs to have seen something that occurred more than 42 seconds before the aircraft broke into 'two distinct

fireballs' and more than 49 seconds before the plane hit the water," he wrote. "CIA analysts are not aware of any eyewitness who did."

Evidence that the streak was burning fuel from the aircraft, which is believed to have exploded shortly after takeoff from a spark inside a center-wing fuel tank, is "extensive and compelling," Mr. Tauss stated.

"Nevertheless, a few people, driven by what they perceive to be an overwhelming number of eyewitnesses who 'saw' a missile attack the plane, persist in thinking otherwise," he said. "Confident that so many eyewitnesses cannot be 'wrong,' they have concluded that the government, for whatever reason, is covering up the true cause of the crash."

Lahr Aff. at 30.

The names of CIA employees are exempt from release under Exemption 3 and 50 U.S.C. § 403g. *Minier v. CIA*, 88 F.3d 796, 801 (9th Cir. 1996). In this case, the CIA has relied on Exemption 3 and § 403g to withhold the names of certain CIA employees. Bur. Decl. ¶ 27; *see, e.g., id.* DI at 41. Speculating that one of those employees is an individual named Randolph M. Tauss, plaintiff

alleges that the withholding of that name would be improper in view of the above article. Pl. Mem. at 22.

Plaintiff is mistaken. The disclosure of information that has been "'officially acknowledged'" may be compelled, "even over an agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). However, "official acknowledgment" requires that "the information requested * * * match the information previously disclosed." *Id.* Among other things, the "official disclosure" of information does not "waive the protection to be accorded information that pertain[s] to a later time period." *Id.*

In this case, the article in the Washington Times refers to certain statements allegedly made by Randolph M. Tauss in a "once-secret report." However, the "'once-secret' report is not among the documents that are responsive to Plaintiff's [FOIA] request." 2nd Bur. Decl. ¶ 9. In addition, none of the records from which the CIA has withheld the names of CIA personnel has been "previously released to the public." *Id.* Accordingly, any association between the responsive records and an individual named Randolph M. Tauss "has not been officially disclosed." *Id.*

In view of the foregoing, "the information requested [does not] match the information previously disclosed" even assuming, *arguendo*, that the "information requested" is the name "Randolph M. Tauss." *See Fitzgibbon*, 911 F.2d at 765.

Accordingly, plaintiff is mistaken when he alleges that the withholding of that name would be improper in the context of this lawsuit.

Nor would the release of the name be required by the allegation of plaintiff that "[t]he Ninth Circuit has consistently applied the equitable balancing test to all exemption claims under the FOIA." Pl. Mem. at 10. In making this allegation, plaintiff places principal reliance on *GSA v. Benson*, 415 F.2d 878 (9th Cir. 1969). *See id.* at 10-11. However, *Benson* "merely recognized that where documents normally privileged in the civil discovery context are involved, courts may employ in exemption 5 cases the same equitable principles that they may use to fix the scope of discovery in civil litigation against an agency." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1088 n.4 (9th Cir. 1997). Accordingly, "equitable discretion" to resolve exemption claims under FOIA does not exist except to the limited extent recognized in *Benson*. *Id.* at 1088 n.4. The lack of such discretion results from the fact that Congress "'created a scheme of categorical exclusion'" when it enacted FOIA; "'it did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis.'" *Id.* at 1087 (quoting *FBI v. Abramson*, 456 U.S. 615, 631 (1982)); *accord Schiffer v. FBI*, 78 F.3d 1405, 1411 (9th Cir. 1996); *see Minier*, 88 F.3d at 803 (similarly). Accordingly, "a district court lacks 'inherent authority' to require disclosure of

materials that are exempt under FOIA." *Maricopa Audubon Soc'y*, 108 F.3d at 1087.

In view of the foregoing, plaintiff is mistaken when he alleges that "[t]he FOIA's balancing test is well-settled law." Pl. Mem. at 11. His allegation that he is entitled to an order directing the release of material notwithstanding the applicability of the statutory exemptions, *see id.* at 16, should therefore be rejected.

B. THE TECHNICAL INFORMATION CONCERNING THE BOEING 747-100 MAY BE WITHHELD PURSUANT TO EXEMPTION 4 BECAUSE THE INFORMATION HAS NOT BEEN RELEASED PREVIOUSLY AND BECAUSE DEFENDANTS HAVE MADE A SUFFICIENT SHOWING THAT THE RELEASE OF THE INFORMATION COULD CAUSE COMPETITIVE INJURY TO BOEING.

"[I]n response to a request for technical assistance," Boeing provided certain information to the NTSB and CIA, on a voluntary basis, in support of their inquiries with respect to the explosion of TWA Flight 800. Breuhaus Decl. ¶¶ 3, 4. This information dealt with "the baseline mass properties, aerodynamic and engine characteristics of the Boeing Model 747-100 aircraft." *Id.* ¶ 5. In the judgment of Boeing, this information constitutes "trade secrets," the "public disclosure [of which] could cause Boeing competitive harm." *Id.* Accordingly,

the CIA has relied on FOIA Exemption 4 to withhold the information. Bur. Decl. ¶¶ 33-36.

Plaintiff challenges the withholding of the information on two grounds. First, he alleges that certain "Boeing-supplied data" was released in the "NTSB's Flight Path study." Pl. Mem. at 17. However, the specific information that plaintiff identifies has not been withheld by the CIA. Koch Decl. ¶ 19.[1]

Second, plaintiff alleges that defendants have not shown that the release of the withheld information could cause competitive injury to Boeing. Pl. Mem. at 17. This allegation relies on the affidavit of Brett M. Hoffstadt. *Id.* For two reasons, the reliance that plaintiff places on that affidavit is misplaced.

First, Mr. Hoffstadt alleges the existence of certain computer software programs involving computational fluid dynamics (CFD) that can take "the three-dimensional geometry of arbitrary aircraft configurations * * * and calculate the airflow, pressure, forces, and moments of such shapes in arbitrary flight conditions"; that one such program is VSAERO, a product of Analytical Methods,

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[1]Where, as here, "'[a] reply affidavit merely responds to matters placed in issue by the opposition brief and does not spring upon the opposing party new reasons for the entry of summary judgment, reply papers – both briefs and affidavits – may properly address those issues.'" *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 n.* (7th Cir. 1996) (quoting *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1457 (E.D. Wis. 1993)).

Inc. (AMI); and that, for a fee, "AMI provides the geometry of a Boeing 747-200 and a 747-300 aircraft for use with VSAERO." Hoffstadt Aff. ¶¶ 4, 6. Accordingly, Mr. Hoffstadt alleges that the information that the CIA has withheld has already entered the public domain, and has done so with the consent or acquiescence of Boeing. *See id.* ¶ 8.

These allegations are addressed and refuted by Richard S. Breuhaus, Chief Engineer of Air Safety for Boeing. Expanding on the statements made in his initial declaration, Mr. Breuhaus says:

> 7. Mr. Hoffstadt's belief that CFD models are essentially equivalent to actual 747 baseline mass properties, aerodynamic and engine characteristics is woefully mistaken. As explained in my initial Declaration[], the Records [at issue in this case] are not CFD program outputs. Contrary to his belief, even state-of the art CFD programs cannot produce aerodynamic data to the level of accuracy required for all of the commercial purposes for which Boeing and third parties use the data presented in or derivable from the Records. Boeing verifies its preliminary CFD information using aircraft models in a wind tunnel and, contrary to Mr. Hoffstadt's assertion, Boeing continues to make extensive use of wind tunnels. The wind tunnel

results are adjusted for scale effects and aeroelasitc differences, and are then verified through actual flight testing. Boeing then extracts the aircraft's aerodynamic characteristics from the flight test data.

8. While Boeing has released certain airplane geometry information and a limited amount of wind tunnel data in the past without restriction, the information is limited to partial model configurations without the tail of the aircraft and does not represent a configuration of the complete aircraft. In addition, the wind tunnel data encompasses a limited range of flight[] conditions (e.g. Mach number and angle of attack). Neither the geometry information nor the wind tunnel data include modeling of the aeroelastic effects of the Boeing Model 747-100 aircraft. Further, Boeing provides such information only in very limited circumstances.

9. The CFD model licensed by AMI and discussed by Mr. Hoffstadt has not been validated by flight testing or comprehensive wind tunnel testing. To the best of our knowledge and belief, CFD models typically have an error factor of 5 - 30 percent (compared to the actual in-flight airplane characteristics) depending upon the factor at issue. If one developed a simulator based upon the CFD model

discussed by Mr. Hoffstadt and without validation using wind tunnel and flight test data, the Federal Aviation Administration would not certify that flight simulator.

2nd Breuhaus Decl. ¶¶ 7-9.

Second, Mr. Hoffstadt alleges that the release of the withheld information "will most likely have zero to negligible impact on the market value, competitive advantage, or sole source position of Boeing and its subsidiaries in relation to the 747 Classic simulator data package, simulators, and related services." Hoffstadt Aff. ¶ 44. This allegation is likewise refuted by Mr. Breuhaus. Disagreeing with Mr. Hoffstadt that "the flight information in the Records has little commercial value to Boeing," Mr. Breuhaus says:

> My initial Declaration explained that Boeing offers a variety of goods and services to the owners and operators of the 501 747 Classic aircraft that are currently available for service and widely used throughout the world. Further, Boeing is currently working on the design of a 747 Large Cargo Freighter and the 747 Advanced. While these new 747 models will certainly include many features not previously availible, it is also true that they will include portions of the original 747 design.

2d Breuhaus Decl. ¶¶ 10, 12.

To justify the withholding of records under Exemption 4, the government must show "a likelihood of substantial competitive injury if the information were released." *Lion Raisins Inc. v. USDA*, 354 F.3d 1072, 1079 (9th Cir. 2004). In this case, the statements of Mr. Breuhaus constitute precisely such a showing.[2]

As a further matter, plaintiff asks that an expert be appointed to consider the appropriateness with which the CIA has withheld the Boeing information. Pl. Mem. at 9. This request should be denied. In adjudicating the validity of withholdings under Exemption 4, "[c]ourts can rely solely on government affidavits so long as the affiants are knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government's claim." *Lion Raisins,* 354 F.3d at 1079. In this case, Mr. Breuhaus is the Chief Engineer of Air Safety for Boeing. 2nd Breuhaus

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[2]The D.C. Circuit has held that information "given to the Government voluntarily" should be "treated as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public." *Critical Mass Energy Project v. NRC,* 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc). The Ninth Circuit "has not yet addressed the *Critical Mass* distinction between voluntary and mandatory information." *Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996). If applicable, however, *Critical Mass* would permit the information at issue in this case to be withheld. Boeing provided that information to the NTSB and CIA voluntarily, and does not disclose such information "without appropriate restrictions on [its] use and further disclosure." Breuhaus Decl. ¶¶ 3, 5.

Decl. ¶ 1. His declarations are "detailed enough to allow the court to make an independent assessment of the government's claim." *See Lion Raisins*, 354 F.3d at 1079. The appointment of an expert is therefore unnecessary.

C. THE MATERIAL WITHHELD IN ALLEGED VIOLATION OF EXEMPTION 5 HAS BEEN PROPERLY WITHHELD BECAUSE THE MATERIAL IS PREDECISIONAL.

The CIA analysts who studied the explosion of TWA Flight 800 "concluded that what the[] eyewitnesses saw was the Boeing 747 in various stages of crippled flight." 2nd Bur. Decl. ¶ 6. "This conclusion was incorporated into a video produced by the CIA and shown to the public by the FBI on November 19, 1997." *Id.* "CIA subsequently obtained additional data from the NTSB and continued to refine its analysis." *Id.* "However, since the CIA's conclusion – that the eyewitnesses saw the burning aircraft and not a missile – remained unchanged, a final report was not issued." *Id.*

In this case, the CIA has relied on the deliberative process privilege and Exemption 5 to withhold, in full or in part, four records created as part of the effort of the CIA to "refine its analysis" after the "additional data [was obtained] from the NTSB." Bur. Decl. DI at 44, 56-58; *see* 2nd Bur. Decl. ¶¶ 11, 17. The CIA has treated these records as responsive to plaintiff's request even though they are not

records upon which the "publicly released flight path climb conclusion" was based.[3]

Alleging that the above records were postdecisional, not predecisional, plaintiff challenges their withholding. Pl. Mem. at 19. Plaintiff is mistaken. "[B]oth Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made which are not." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). Accordingly, a record is predecisional if an agency can "identify a specific decision to which [the record] is predecisional." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997). In this case, the records at issue were prepared by the CIA to help it determine whether conclusions different from the ones portrayed in the CIA video should be reached in view of the additional information obtained from the NTSB. In view of this fact, the records are predecisional because they involve a specific and identifiable

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[3]By letter dated September 13, 2005, plaintiff submitted a request to the CIA "for all records created as part of the analysis that continued after the CIA video-animation concerning the explosion of TWA Flight 800 was shown to the public." Koch Decl. ¶ 21. The response of the CIA to the request at issue in this action covers this request. *Id.*

decision made after the video was shown to the public. Accordingly, the CIA has acted properly in withholding the records, in full or in part, pursuant to Exemption 5.

D. NO ISSUE EXISTS AS TO WHETHER THE JOB TITLES OR JOB DESCRIPTIONS OF FEDERAL EMPLOYEES MAY BE WITHHELD PURSUANT TO EXEMPTIONS 6 OR 7(C) BECAUSE NO SUCH MATERIAL HAS BEEN WITHHELD.

Plaintiff alleges that he "does not contest the CIA's withholdings of the names of individuals" pursuant to Exemptions 6 or 7(C), but objects to "any redaction of an individual's job title and job description" because "such information would tend to 'shed light on an agency's performance of its statutory duties.'" Pl. Mem. at 21 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989)). Even assuming, *arguendo*, that the disclosure of such information would shed any such light – and defendants disagree that it would – the CIA has not relied on Exemption 6 or 7(C) to withhold the job title or job description of any federal employee. *See* Koch Decl. ¶ 20 (noting the release of the phrase "Special Agent, FBI" in the one instance in which it has been withheld inadvertently). Accordingly, no issue exists in this case with respect to the correctness with which Exemptions 6 and 7(C) have been applied.

II. PLAINTIFF HAS NOT SHOWN THAT DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED FOR REASONS OTHER THAN THE ALLEGED MISAPPLICATION OF THE STATUTORY EXEMPTIONS.

A. ALL NON-EXEMPT MATERIAL HAS BEEN RELEASED.

"[W]hen materials exempt under the FOIA contain reasonably segregable parts that are not exempt, those parts should be disclosed." *Hayden v. NSA/Cent. Sec. Serv.*, 608 F.2d 1381, 1388 (D.C. Cir. 1979); *see* 5 U.S.C. § 552. In this case, plaintiff challenges the sufficiency of the certification of the Information Review Officer of the Directorate of Intelligence of the CIA that "the CIA has released to Plaintiff all reasonably segregable, non-exempt information that is responsive to Plaintiff's request." Pl. Mem. at 22-23; *see* Bur. Decl. ¶ 6. However, defendants do not rely exclusively on the above certification to show that all non-exempt material has been released. To reinforce the point, they have submitted a copy of each record withheld in part by the CIA in the form in which the record was released. 2nd Bur. Decl. ¶ 8 & Ex. A. Included among these records are the two records released with the Second Buroker Declaration. *See id.* Ex. A at 280-407. As these records show on their face, the amount of material withheld by the CIA has been "minimal." *See* Bur. Decl. ¶ 25. An example is the record reproduced at

Second Buroker Declaration, Ex. A at 19. This record consists of a page of handwritten notes. Excerpts from four lines have been withheld.

Suggesting that *something* should have been released from the six records withheld in full, plaintiff relies on the allegation of Glen Schulze that the CIA has withheld the records "most likely because they are the critical evidentiary components which, if released to the public, would provide a sturdy foundation for citizen destruction and ridicule of the CIA TWA FL 800 work product." Schulze Aff. ¶ 84 (quoted at Pl. Mem. at 24). However, "'the mere allegation of bad faith' should not 'undermine the sufficiency of agency submissions.'" *Minier*, 88 F.3d at 803 (quoting *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987). In this case, the allegation of Mr. Schulze that the CIA has withheld non-exempt material for improper purposes is a "mere allegation of bad faith." *See id.* Accordingly, it should not be credited by the Court.

B. NO DEFICIENCY EXISTS IN THE CIA'S PRODUCTION OF RECORDS OR IN THE MATERIALS UPON WHICH DEFENDANTS RELY IN MOVING FOR PARTIAL SUMMARY JUDGMENT.

Plaintiff alleges that the identification numbers that the CIA has assigned to the records responsive to his request are confusing and otherwise improper; that the document indexes that defendants have submitted are incomplete and

inaccurate; that the set of redacted records that defendants have filed is likewise incomplete; and that the CIA has failed to produce responsive material or otherwise to account for it. Pl. Mem. at 24-28. Alleging on the basis of these allegations that the CIA has acted in bad faith, plaintiff asks that defendants be directed to file a further declaration in support of their motion for partial summary judgment. *Id.* at 27-28; *see id.* at 9, 23. No such relief is warranted. No defect exists in the identification numbers that the CIA has assigned to the responsive records; the document indexes that defendants have submitted are accurate and complete; the set of withheld records filed with the Court is likewise complete; and no merit exists to plaintiff's allegation that the CIA has failed to produce responsive material or otherwise to account for it. No impediment therefore exists to the granting of defendants' motion for partial summary judgment.

1. NO DEFECT EXISTS IN THE IDENTIFICATION NUMBERS THAT THE CIA HAS ASSIGNED TO THE RESPONSIVE RECORDS.

Certain of the records withheld in part have two identification numbers: one appearing on the face of each record and one appearing in the description of the record contained in the first of defendants' two document indexes. *See* Koch Decl. ¶¶ 5-10 (explaining the multiple numbers). In view of this fact, plaintiff suggests that he has had difficulty identifying those records. Pl. Mem. at 24-25;

see id. at 27. For two reasons, this allegation is unpersuasive. First, defendants have provided plaintiff with a chart showing which numbers apply to which records. *See* 2nd Bur. Decl. ¶ 8. Plaintiff admits that he possesses the chart. Pl. Mem. at 25. Second, the document indexes that defendants have provided contain the following information for each record withheld in part: number of pages, document type, and subject. *E.g.*, Buroker Decl. DI at 41. Using this information, plaintiff can determined which identification number applies to which record merely by looking at the face of each such record.

Plaintiff also finds fault with the fact that a single identification number can cover a group of records; that multiple records having the same content can have separate identification numbers; that the assignment of identification numbers appears to have been "random"; and that one of the declarations upon which defendants rely misstates, because of typographical errors, the identification numbers appearing on the face of two records. Pl. Mem. at 25-27. However, none of these allegations has any significance. Records frequently appear in files as attachments to other records. Accordingly, it is not error for a single identification number to apply to a group of records. Multiple copies of the same or similar records are frequently retained in files. Accordingly, it is not error for records having the same content to have separate identification numbers. Identification

numbers are just that: identification numbers. It is not error for the numbers to be random. The declaration in which the identification numbers were misstated contained a cross reference to the copy of each record attached to the declaration. *See* 2nd Bur. Decl. ¶ 8. By looking at the copy of the cross-referenced records, plaintiff could have determined – and *did* determine – the correct identification numbers for the two records for which the numbers were misstated. *See* Pl. Mem. at 26.

2. THE DOCUMENT INDEXES THAT DEFENDANTS HAVE SUBMITTED ARE ACCURATE AND COMPLETE.

One of defendants' document indexes describes a particular record as withheld in part instead of withheld in full. Bur. Decl. DI at 59. Because of this fact, plaintiff alleges that he could not identify the record. Pl. Mem. at 27. This allegation is without merit. The mischaracterization of the record was addressed in the second of defendants' two declarations, and the record clearly identified there. 2nd Bur. Decl. ¶ 16.

Plaintiff also alleges that certain of the records released by the CIA are not identified in either of defendants' document indexes, and that the number of pages released by the CIA does not match the number of pages identified in those indexes. Pl. Mem. at 25, 26, 28. These allegations ignore the fact that the CIA has

released certain records in full. *See* Bur. Decl. ¶ 25. The sole purpose of a document index is to explain the basis for the application of the statutory exemptions to particular records. *See, e.g., Lion Raisins*, 354 F.3d at 1082. No need exists for records released in full to be listed or discussed in such indexes.

3. THE SET OF WITHHELD RECORDS FILED WITH THE COURT IS LIKEWISE COMPLETE.

Plaintiff alleges that a copy of certain of the records withheld in part has not been filed with the Court. Pl. Mem. at 26, 27. Plaintiff is mistaken. A complete copy of *every* record withheld in part has been filed with the Court. *See* Koch Decl. ¶ 22 (matching each of the records withheld in part to the copy of the records filed with the Court).

4. NO MERIT EXISTS TO PLAINTIFF'S ALLEGATION THAT THE CIA HAS FAILED TO PRODUCE RESPONSIVE MATERIAL OR OTHERWISE TO ACCOUNT FOR IT.

Plaintiff alleges that "[t]he CIA claims to have produced around 100 records" but has produced far fewer than that. Pl. Mem. at 27. However, the CIA alleges that it has *located* "approximately 100 responsive records," not that it has produced them. Bur. Decl. ¶ 25. Numerous records have been referred to their agencies of origin for review and direct response to plaintiff. *See id.*

Plaintiff also finds fault with the fact that certain of the responsive records lack dates. Pl. Mem. at 27. However, records are frequently undated. The CIA would be acting improperly if it gave dates to records that did not bear them.

Finally, plaintiff alleges that the CIA has failed to produce or otherwise account for certain responsive material that plaintiff believes to exist. This material includes certain pages allegedly removed from records otherwise released in full, and certain records alleged to exist in electronic format. Pl. Mem. at 26-28. This allegation is without merit. "[An] agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004). In this case, plaintiff offers nothing more than speculation in alleging that responsive material exists that the CIA has neither produced nor accounted for.

Plaintiff believes that "that the government's probe into the Flight 800 tragedy is a study in government impropriety." Pl. Mem. at 13. Even assuming, *arguendo*, that plaintiff is correct – and the allegation that he makes is based on a tissue of speculation and innuendo, *see id.* at 13-15 – no impropriety exists in the way that the CIA has responded to plaintiff's FOIA request. Neither does any deficiency exist in the materials that defendants have filed in support of their

motion for partial summary judgment. Plaintiff's allegations to the contrary should therefore be rejected.

CONCLUSION

For the foregoing reasons, defendants' motion for partial summary judgment as to the CIA should be granted.

Dated: September 30, 2005

Respectfully submitted,

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PROOF OF SERVICE BY MAILING

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On September 30, 2005, I served **REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO THE CENTRAL INTELLIGENCE AGENCY** on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: September 30, 2005. Place of mailing: Los Angeles, California.

Person(s) and/or Entity(s) to Whom mailed:

John F. Dunne, Jr., Esq.
1601 Cloverfield Boulevard
2nd Floor South Tower
Santa Monica, CA 90404-4084

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: **September 30, 2005** at Los Angeles, California.

Francis Vargas
FRANCIS VARGAS