

**No. 07-55709
CONSOLIDATED WITH
Nos. 06-56717 & 06-56732**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

H. RAY LAHR,

Plaintiff-Appellee,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, ET AL.,

Defendants-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**RESPONSE BRIEF OF APPELLEE H. RAY LAHR
IN NO. 07-55709**

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STATEMENT OF JURISDICTION

Appellee agrees with appellants' statement of (a) the statutory basis of subject matter jurisdiction of the district court, (b) the basis for claiming that the judgment or order appealed from is final, (c) the date of entry of the order appealed from, (d) the date of the filing of the notice of appeal, and (e) the statutory basis for this Court's jurisdiction.

STATEMENT OF THE ISSUE

If, in the merits appeal, this Court reverses the district court's application of the balancing test under the FOIA's privacy exemptions, will that holding dictate a remand of the fees judgment to the district court.

STATEMENT OF THE CASE

The district court proceedings are set forth in detail in Lahr's opening brief (at 15-20) in the merits appeal (Nos. 06-56717 & 06-56732).

Below, Lahr provides a summary of the district court proceedings.¹

¹ *Cf.* Government's Opening Brief at 2: "The underlying action is a Freedom of Information Act ('FOIA') (5 U.S.C. §§ 552, et seq.,) case related to the tragic crash of TWA Flight 800 in 1996. Plaintiff filed hundreds of FOIA requests with the National Transportation Safety Board ('NTSB'), and the Central Intelligence Agency ('CIA'). The government provided responsive records to plaintiff, withholding or redacting certain material under several FOIA exemptions. Dissatisfied with the government's response, plaintiff filed suit in district court."

In November 1997 the government released the CIA animation entitled "*What Did The Eyewitnesses See?*" In November of 2000, plaintiff made a FOIA request to the CIA for records of the basis of its zoom-climb conclusion as depicted in "*What Did The Eyewitnesses See?*" – the latter two-thirds of the 747 zoom-climbing up 3,000 feet.

In January of 2001, that agency responded: "[The] CIA simply incorporated the NTSB conclusions into our videotape. Therefore... you may wish to submit your request to the NTSB..."² Believing that the CIA's response to his FOIA request response was made in good faith, Lahr submitted his FOIA request to the NTSB.

On November 14, 2002, Lahr filed his FOIA complaint against the NTSB, seeking all records upon which both the NTSB's zoom-climb conclusion was based, as well as records upon which the CIA's zoom-climb conclusion was based (the predecessor district court action, No. 02-08708-AHM.)

² Lahr's Excerpts of Record in Case Nos. 06-56717 & 06-56732 (hereinafter "Lahr's Excerpts") II # 28 Ex. 16 at 399.

On October 3, 2003, the NTSB filed its *Vaughn* index (in CA 02-08708-AHM), wherein it denied knowledge of records upon which the CIA had based its zoom-climb conclusion.³

On October 8, 2003, plaintiff filed a second FOIA request with the CIA, again seeking all records upon which its zoom-climb conclusion was based,⁴ and, in December 2003, amended his complaint to add the CIA as a defendant.⁵

In May of 2004, the district court granted the CIA until February of 2005 to complete its processing of CIA-originated records.⁶

In June of 2004, the NTSB moved for partial summary judgment.⁷ Plaintiff's opposition papers included his *Statement of Genuine Issues*,⁸ to which the NTSB did not respond.

³ See *Second Amended Complaint* Lahr's Excerpts III # 82 at 642 ¶ 11.

⁴ CIA FOIA request, Lahr's Excerpts II # 57 at 521-36.

⁵ See CA 02-08708-AHM, Docket # 71, December 12, 2003, minute order: "In light of plaintiff filing a new complaint, Court instructs counsel to file proposed amended complaint under the new 2003 case number and dismiss the instant action without prejudice."

⁶ Docket # 20.

⁷ Docket # 27.

⁸ Lahr's Excerpts II # 41 at 492-518.

Because the CIA's intermittent releases to plaintiff included many records generated after its November 1997 broadcast of "*What Did The Eyewitnesses See?*" Lahr filed a third FOIA request to the CIA to include these post-decisional records.

On November 7, 2005, the National Security Agency (NSA) responded to Lahr, stating that it had responsive records to his FOIA request for a "copy of the computer simulation... used by the CIA..."⁹

On February 6, 2006, plaintiff filed his Second Amended Complaint, which added the NSA as a defendant, and sought additional disclosures by the CIA; its post-decisional records.

In August of 2005, the CIA moved for partial summary judgment.¹⁰ Plaintiff's opposition papers included a *Statement of Genuine Issues*,¹¹ to which the CIA did not respond.

In May of 2006, the CIA filed its second partial summary judgment motion, addressing additional redacted or withheld records it had produced or identified since it had filed its first dispositive motion, as well as

⁹ *Second Amended Complaint*, Lahr's Excerpts III # 82 ¶ 20 at 643.

¹⁰ Docket # 59.

¹¹ Lahr's Excerpts III # 64 at 563-637.

responsive NSA records.¹² Plaintiff's opposition papers included a *Statement of Genuine Issues*,¹³ to which the CIA filed no response, again.

The district court took all three motions under submission after oral arguments and *in camera* reviews.¹⁴

On August 31, 2006, the district court issued its memorandum order, ruling on the CIA's second motion for partial summary judgment, granting it in part and denying it in part. Under the heading, *Plaintiff's Allegations of Government Impropriety*, referring to Lahr's *Statement of Genuine Issues*,¹⁵ the district court wrote that "[d]efendants did not file any response to that statement, so on this motion, at least, Plaintiff's assertions have not been repudiated."¹⁶

On October 4, 2006, the court issued its second memorandum order, ruling on the NTSB's motion for summary judgment and the CIA's first

¹² Docket # 85.

¹³ Lahr's Excerpts IV # 88 at 977-1025.

¹⁴ See minute orders including *in camera* submissions: (1) Docket # 45; (2) IV # 95 at 1058-59; (3) Docket # 103.

¹⁵ Lahr's Excerpts V # 104 at 1105.

¹⁶ *Id.* at 1104-05.

motion for partial summary judgment, also granting in part and denying in part these two motions.¹⁷

On March 19, 2007, the district court entered an order awarding plaintiff \$146,442 in attorney's fees and costs. *Fee Award Order*, government's Excerpts of Record, filed in this appeal, at 1-8.

On December 19, 2007, this Court denied the government's motion to stay this fees appeal, and consolidated this appeal with the merits appeal (Nos. 06-56717 & 06-56732).

STATEMENT OF FACTS

The background to this appeal and the facts related to the underlying merits case are set forth at length in Lahr's opening brief in the merits appeal.

The district court found that Lahr had "substantially prevailed" and was "thus eligible for an award of attorney's fees and costs." *Id.* at 1. The district court had ordered disclosure of 26 of the 32 records at issue, ruling adversely to the government:

- (1) Boeing-supplied data was not proprietary information under Exemption 4;
- (2) Undisclosed records withheld under Exemption 5's deliberative process privilege were wrongfully withheld in whole or in part; and

¹⁷ *Id.* # 113.

- (3) The FOIA's two privacy Exemptions, 6 and 7(C), do not shield disclosure of the names of eyewitnesses and FBI agents.

The government appealed only the district court's holding that the FOIA's two privacy exemptions¹⁸ do not protect the names of 458 eyewitnesses and two FBI agents from disclosure.

STANDARD OF REVIEW

The Court reviews an award of attorney fees and costs under FOIA for abuse of discretion. *See United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting v. Dept. of the Army*, 841 F.2d 1459, 1461 (9th Cir. 1988).

¹⁸ 5 U.S.C. § 552 (b)(6) permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."

5 U.S.C. § 552(b)(7)(C) provides that the FOIA does not apply to matters that are "records or information compiled for law enforcement purposes, but only to the extent that the production of law enforcement records or information... could reasonably be expected to constitute an unwarranted invasion of personal privacy..."

SUMMARY OF ARGUMENT

On summary judgment, the government's failure to dispute any of Lahr's statements of fact alleging government impropriety precludes reversal in the merits appeal, and, thus, the Court should affirm the district court's fee award.

ARGUMENT

The only issue the government appealed was the district court's application of the FOIA's equitable balancing test. The district court held:

"[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Here, however, the Government's basis for withholding many of the contested records is Exemption 7(C) under FOIA, which permits the government to withhold 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 courts must weigh in applying Exemption 7(C)], . . . the usual rule that the citizen need not offer a reason for requesting the information must be inapplicable." *Id.* Instead, the requester must "establish a sufficient reason for the disclosure." *Id.* "[Where] the 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 obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 174. Here, Plaintiff seeks to prove that Defendants participated in a massive cover-up of the true cause of the crash of Flight 800, which he believes was a missile

strike from an errant missile launched by the United States military. The following summary of the evidence Plaintiff presented to meet the threshold requirement described in *Favish* is based on Plaintiff's "Statement of Genuine Issues in Opposition to [the Second] CIA Motion for Partial Summary Judgment," especially the portion beginning at page 13. Defendants did not file any response to that statement, so on this motion, at least, Plaintiff's assertions have not been repudiated.¹⁹

A FOIA plaintiff "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish* at 174. Here, the plaintiff *far* exceeded this burden of proving government impropriety.²⁰ Defendants did not contest a single of plaintiff's allegations of government impropriety, much of which the district court summarized in its first memorandum order.²¹

¹⁹ Lahr's Excerpts V # 104 at 1104-1105.

²⁰ Lahr's 29 affiants include two aerodynamicists and six air crash investigators, three of whom were parties to the TWA Flight 800 probe. Seven eyewitness accounts are included; four of whom witnessed the disaster from the air, and two of whom are featured in the CIA's animation. Three of Lahr's experts hold doctorates, one is a retired Admiral, and one is a former NTSB Board member.

²¹ Lahr's Excerpts V # 104 at 1105-1110; reprinted in merits appeal Lahr's Opening Brief at 28-33.

The complete absence of transverse affidavits regarding government impropriety mandates the finding that Lahr met his burden.

Moreover, Lahr's cross-appeal sets forth a persuasive case of fraud²² — a matter of some significance on the issue of government impropriety.

In the merits appeal, the government challenges the order to disclose of the identities of 458 eyewitnesses and two FBI agents. The eyewitnesses, according to the government, are not witnesses to any crime. Of the two FBI agents, at least one was serving in a supervisory capacity.

²² See merits appeal Lahr's Reply Brief, TABLE OF CONTENTS:

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The government's authorities are simply inapplicable absent a reversal, in whole or in part, of the district court's judgment,²³ and this Court has *no record* upon which to base a reversal of the district court's findings of government impropriety.

CONCLUSION

For the foregoing reasons, Lahr prays that this Court:

- (1) Affirm the district court's award, under 5 U.S.C. § 552 (a)(4)(E), of attorney's fees and costs in the amount of \$146,442; and
- (2) Award an additional sum representing interest thereon from the date of the entry of judgment, May 19, 2007, under 28 U.S.C. § 1961(b).

²³ *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 999 (9th Cir. 2007) (vacating and remanding fees award upon partial reversal of judgment); *Fanucchi & Limi Farms v. United Agri Products*, 414 F.3d 1075, 1089 (9th Cir. 2005) (vacating and remanding fees award in light of summary judgment reversal); *Comedy Club, Inc. v. Improv West Associates*, — F.3d —, 2007 WL 4754350 at * 12, n. 18 (9th Cir. 2007) (same); *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1116 (9th Cir. 1994) (same); *Cascade Health Solutions v. PeaceHealth*, — F.3d —, 2008 WL 269506 at * 24 (9th Cir. 2008) (vacating fee award as plaintiff was "no longer prevailing party").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitations set forth in Rule 28.1 (e)(2)(B)(i) of the Fed. Cir. R. App. P. for the Ninth Circuit, uses a proportionally spaced font (Times New Roman), has a typeface of 14 point, and contains 2,324 words, according to the word processing system used to produce the text.

John H. Clarke

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Fed. Cir. R. App. P. for the Ninth Circuit, counsel for the cross-appellant is not aware of any related cases pending in this Court.

John H. Clarke

CERTIFICATE OF SERVICE

I hereby certify and affirm that on February 29, 2008, I served a copy of the foregoing by first class mail and by email to counsel of record listed below:

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