

1 MEMORANDUM OF POINTS AND AUTHORITIES
2 IN SUPPORT OF DEFENDANTS' MOTION

3 PRELIMINARY STATEMENT

4 Suing the CIA and the National Transportation Safety Board (NTSB), H.
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6 Ray Lahr seeks certain records under FOIA pertaining to the explosion of TWA
7 Flight 800. As is shown below, the CIA has conducted a sufficient search for
8 records and, except for six records still undergoing review by the CIA, has applied
9 the statutory exemptions correctly. Except for claims involving the application of
10 the exemptions to the six records, defendants are entitled to summary judgment as
11 to the CIA, and the dismissal of all claims with respect thereto.
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14 STATEMENT OF FACTS

15 A. Background

16 TWA Flight 800, a Boeing 747-100, exploded in flight and crashed into the
17 Atlantic Ocean off Long Island on the night of July 17, 1996. Buroker (Bur.)
18 Decl. ¶ 50; Moye Decl. ¶ 10. The explosion of TWA Flight 800 precipitated a
19 criminal investigation by the Federal Bureau of Investigation (FBI) and a civil
20 investigation by the NTSB. Bur. Decl. ¶ 50; Moye Decl. ¶ 11. During the
21 criminal investigation, dozens of eyewitnesses reported having seen "a 'flare or
22 firework' ascend and culminate in an explosion." Bur. Decl. ¶ 50.
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1 “[I]nternational terrorism is an authorized CIA area of analysis.” Bur. Decl.
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3 n.5. Accordingly, the FBI asked the CIA to try to determine as part of its
4 investigation whether the “flare or firework” was a missile. *Id.* ¶ 50 & nn.5, 14.
5 The task of making such a determination was assigned within the CIA to weapons
6 analysts within the Directorate of Intelligence (DI), Office of Weapons,
7 Technology and Proliferation (OWTP). *Id.* n.5. DI is the component of the CIA
8 that “analyzes, interprets, and forecasts foreign intelligence issues and world
9 events,” and produces “finished intelligence reports for dissemination to
10 policymakers in the United States government.” *Id.* ¶ 22. OWTP was a
11 predecessor of the Office of Transnational Issues (OTI). *Id.* n.5.

15 Relying principally on materials furnished by the FBI, including eyewitness
16 reports, radar tracking data and certain NTSB observations regarding the cockpit
17 voice recorder and flight data recorder, the analysts were able to reconstruct the
18 approximate path of TWA Flight 800 from the instant its recordings ended until it
19 struck the water. 2nd Bur. Decl. ¶ 4. The analysts concluded that, just after the
20 aircraft exploded, it pitched up abruptly and climbed from its last recorded altitude
21 of approximately 13,800 feet to a maximum altitude of approximately 17,000 feet.
22 *Id.* This conclusion was consistent with information provided by NTSB
23 investigators and engineers for the Boeing Company (Boeing), who determined
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1 that the front third of the aircraft separated from the fuselage within four seconds
2 after the aircraft exploded. *Id.*
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4 The analysts further concluded that, about 20 seconds after the explosion, a
5 fireball erupted and the aircraft went into a steep and rapid descent, producing an
6 increasingly visible fire trail. 2nd Bur. Decl. ¶ 5. About 42 seconds after the
7 explosion, the aircraft's left wing separated, releasing unburned fuel which
8 subsequently ignited in a dramatic cascade of flames, and approximately seven
9 seconds later, the burning debris hit the water. *Id.*
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12 The eyewitness sightings of greatest concerns – those that raised the
13 possibility that the aircraft had been struck by a missile – took place *after* the
14 aircraft exploded. 2nd Bur. Decl. ¶ 6. Accordingly, the analysts concluded that the
15 eyewitnesses saw a Boeing 747 in various stages of crippled flight, not a missile.
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17 *Id.* This conclusion was incorporated into a video produced by the CIA and
18 shown to the public by the FBI on November 18, 1997. *Id.* The CIA subsequently
19 obtained additional data from the NTSB and continued to refine its analysis. *Id.*
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21 However, the CIA did not issue a final report because its conclusion that the
22 eyewitnesses did not see a missile did not change. *Id.*
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1 B. The Requests

2 “[I]t is a feature of famous cases,” like the explosion of TWA Flight 800,
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4 “that they generate controversy, suspicion, and the desire to second guess the
5 authorities.” *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1173 (9th Cir.
6 2000), *on subsequent appeal*, 541 U.S. 157 (2004); *see, e.g.*, [http://whatreally](http://whatreallyhappened.com/RANCHO/CRASH/TWA/twa.html)
7 [happened.com/RANCHO/CRASH/TWA/twa.html](http://whatreallyhappened.com/RANCHO/CRASH/TWA/twa.html) (Aug. 16, 2005). Plaintiff is an
8 “afficionado” of the explosion. *See* Reed Irvine, *Satellites Tell the Truth*,
9 Chattanooga Times Free Press, Oct. 21, 2001, at F5. By letters dated October 8,
10 2003, he submitted FOIA requests to the NTSB and CIA for certain records
11 pertaining to the explosion. Am. Compl. ¶¶ 9, 17. Broken into 105 sub-requests,
12 the request to the CIA sought “all records upon which [the] publicly released
13 aircraft flight path climb conclusion was based.” Bur. Decl. Ex. 1 at 72.

14 By letter dated October 20, 2003, the CIA acknowledged receipt of
15 plaintiff’s request. Bur. Decl. ¶ 10. On November 6, 2003, plaintiff commenced
16 this action to compel production of the records that he had requested from the
17 NTSB and CIA. *See* Bur. Decl. ¶ 11. By order dated and filed May 13, 2004, the
18 Court extended through February 28, 2005, the time of the CIA “to complete its
19 processing of the CIA-originated records (not requiring third agency coordination)
20 responsive to plaintiff’s requests.” Order at 2. On June 7, 2004, defendants
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1 moved for summary judgment as to the NTSB. By stipulation and order dated and
2 filed July 13, 2005, the Court struck all but 17 of the 105 sub-requests contained
3 in plaintiff's request to the CIA. Stip. & order ¶ 2.

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5 C. The Searches

6 The Office of Information Management Services, Public Information
7 Programs Division (PIPD), is the initial reception point within the CIA for all
8 FOIA requests. Bur. Decl. ¶ 19. The CIA does not maintain a single, centralized
9 record system. *Id.* ¶¶ 15-16. Accordingly, each FOIA request that the CIA
10 receives is reviewed by PIPD to determine "which directorates of the CIA might
11 reasonably be expected to possess records that [might] be responsive to [the]
12 request." *Id.* ¶ 20. In this case, plaintiff sought "the underlying information on
13 which a DI analytic product was based." *Id.* ¶ 21. Accordingly, PIPD determined
14 that DI was the sole component "reasonably likely to possess responsive records"
15 and directed DI to conduct "all appropriate record searches." *Id.*

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21 DI responded by conducting a search of its automated records system. Bur.
22 Decl. ¶ 23. When this search proved unproductive, OTI was directed by the office
23 of the DI Information Review Officer (DI/IRO), the official who "task[s] and
24 coordinate[s] record searches within the DI," to conduct a separate search for
25 records. *Id.* ¶¶ 3, 24. This search was a manual search of "office and individual
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1 analyst files, including local databases, e-mail, and desk files” for “information on
2 the TWA-800 project as a whole.” *Id.* Conducted “[u]nder the direction of a
3 senior OTI weapons analyst (who was one of the principal analysts on the TWA-
4 800 team),” this search resulted in the assembly of a group of records dealing with
5 the “TWA-800 project.” *Id.* These records were forwarded to the office of the
6 DI/IRO, where they were searched manually for responsive material. *Id.* ¶ 24.
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8 The records were searched a second time after reviews of the records for purposes
9 of their possible release produced information indicating that a second search was
10 warranted. *Id.* ¶ 25.
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14 The CIA did not search for records responsive to the sub-requests into
15 which plaintiff had broken his request. Bur. Decl. n.7. Most of the sub-requests
16 were unintelligible, did not describe records in terms that were meaningful to the
17 CIA, or sought records that could only be found at the NTSB, if there. *Id.*
18 Accordingly, the CIA focused on plaintiff’s overarching request for “all records
19 upon which [the] publicly released aircraft flight path climb conclusion was
20 based,” as explicated by the sub-requests. *See id.*
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24 D. The Pre-Release Reviews

25 The above searches resulted in the identification of approximately 100
26 responsive records. Bur. Decl. ¶ 25. Each record was reviewed to determine
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1 “what information, if any, could be released to [p]laintiff.” *Id.* ¶ 6. Thirty-two of
2 the records had been created by agencies other than the CIA. *Id.* ¶ 25. These
3 records were referred to their agencies of origin for review and direct response to
4 plaintiff. *Id.* ¶¶ 12, 25; 2nd Bur. Decl. ¶ 7. The records that had been created by
5 the CIA were reviewed by the CIA on a line-by-line basis. Bur. Decl. ¶¶ 6, 7.
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7 Certain of these records contained information obtained from other agencies. *See*
8 *id.* ¶ 12. In a process known as “coordination,” this information was forwarded to
9 those agencies for review and response to the CIA. *See id.*
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12 Except for six records that have been withheld pending the completion of
13 coordination, the review of the records created by the CIA has resulted in the
14 release of all “reasonably segregable, non-exempt” material. Bur. Decl. ¶ 7 & n.3;
15 2nd Bur. Decl. ¶ 18. Including two records referred to the CIA by the NTSB, and
16 one record returned to the CIA after being referred to the FBI, the CIA has
17 withheld 26 records in part and six in their entirety. Bur. Decl. ¶¶ 7, 12, 14, 25; 2nd
18 Bur. Decl. ¶¶ 7, 18. In withholding records or portions of records, the CIA has
19 relied on FOIA Exemptions 3, 4, 5, 7(C), and 6. Bur. Decl. ¶¶ 5, 12, 14; 2nd Bur.
20 Decl. Doc. Index (DI) at 16-17. Except for the records withheld in their entirety,
21 most of the withholdings have been minimal. Bur. Decl. ¶ 25; *see* 2nd Bur. Decl.
22 ex. A (copy of the records as released to plaintiff, showing the withholdings.)
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ARGUMENT

The basic questions in any action under FOIA are whether the agency has conducted a sufficient search for records and whether it has applied the statutory exemptions correctly. *See, e.g., Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995). In this case, the CIA has conducted a sufficient search and, except for the records still undergoing review, has applied the statutory exemptions correctly. Except as to those records, defendants are entitled to summary judgment as to the CIA, and the dismissal of all claims with respect thereto.

I. THE CIA HAS CONDUCTED A SUFFICIENT SEARCH FOR RECORDS.

An agency receiving a FOIA request must conduct “a search reasonably calculated to uncover all relevant documents.” *Citizens Comm'n*, 45 F.3d 1328 (quoting *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985)). “[A]ffidavits describing agency search procedures are sufficient for purposes of summary judgment * * * if they are relatively detailed in their description of the files searched and the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith.” *Citizens Comm'n*, 45 F.3d at 1328 (quoting *Zemansky*, 767 F.2d at 571).

1 In determining the sufficiency of a search, “the issue to be resolved is not
2 whether there might exist any other documents possibly responsive to the request,
3 but rather whether the *search* for those documents was *adequate*.” *Citizens*
4 *Comm’n*, 45 F.3d at 1328 (quoting *Zemansky*, 767 F.2d at 571) (court’s emphasis).
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6 In general, the sufficiency of a search is determined by the “appropriateness of the
7 methods” used to carry it out, “not by the fruits of the search.” *Iturralde v.*
8 *Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Accordingly,
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10 the failure of an agency “to turn up a particular document, or mere speculation that
11 as yet uncovered documents might exist, does not undermine the determination
12 that the agency conducted an adequate search for the requested records.” *Wilbur*
13 *v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004).
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16 In this case, defendants rely on the initial declaration of Terry N. Buroker,
17 the DI/IRO, to establish the sufficiency of the search conducted by the CIA. This
18 declaration is “relatively detailed in [its] description of the files searched and the
19 search procedures, * * * nonconclusory and not impugned by evidence of bad
20 faith.” *See Citizens Comm’n*, 45 F.3d at 1328 (quoting *Zemansky*, 767 F.2d at
21 571). As the declaration shows, the CIA employed a series of “search
22 procedures” that were “reasonably calculated to uncover all relevant
23 documents.” *See id.* First, PIPD reviewed plaintiff’s request to determine which
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1 components of the CIA “might reasonably be expected to possess records that
2 [might] be responsive to [the] request.” Bur. Decl. ¶¶ 19, 20. The conclusion of
3 PIPD that DI was the sole component likely to possess responsive records was
4 appropriate. DI is the component of the CIA that analyzes information and
5 prepares reports, and the information that plaintiff was seeking was “the
6 underlying information on which a DI analytic product was based.” *Id.* ¶¶ 21, 22.
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9 Second, DI conducted two separate searches. Bur. Decl. ¶¶ 23-24. The first
10 was a search of DI’s automated records system. *Id.* ¶ 23. When that search proved
11 unproductive, OTI conducted a separate search at the direction of the office of the
12 DI/IRO. *Id.* ¶ 24. This search consisted of a manual search of “office and
13 individual analyst files, including local databases, e-mail, and desk files,” for
14 “information on the TWA-800 project as a whole.” *Id.* OTI was the appropriate
15 locus of the search because the task of studying the “flare or firework” was
16 assigned to weapons analysts within a predecessor of OTI. *Id.* n.5. In addition, an
17 appropriate person was put in charge of the search: “a senior OTI weapons analyst
18 (who was one of the principal analysts on the TWA-800 team).” *Id.* ¶ 24.
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20 Accordingly, this is not a case in which the CIA “failed or refused to [make use] of
21 government officials for whom there was strong evidence they might [be] helpful
22 in finding [responsive] documents.” *See Iturralde*, 315 F.3d at 315.
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1 Third, the records concerning the “TWA-800 project as a whole” were
2 forwarded to the office of the DI/IRO, where they were searched manually twice
3 for information responsive to plaintiff’s request. Bur. Decl. ¶¶ 24-25. The second
4 search took place after initial reviews of certain of the records for purposes of their
5 possible release produced information indicating that a second search was
6 warranted. *Id.* ¶ 25. Accordingly, this is not a case in which the CIA “ignored
7 indications in documents found in its initial search that there were additional
8 responsive documents elsewhere.” *See Iturralde*, 315 F.3d at 315.

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12 The sufficiency of the search that the CIA conducted is not undercut by
13 allegations that other responsive records might exist. *See, e.g., Stalcup Aff.* (Glass
14 Decl. Ex. A) ¶¶ 6-8. One record allegedly overlooked – a record analyzing the
15 statements of eyewitnesses – was returned by the FBI to the CIA and released with
16 redactions. *See id.* ¶ 9; 2nd Bur. Decl. ¶ 7 & DI at 17. The alleged failure of the
17 CIA to find other responsive records, or “mere speculation” that other such
18 records might exist, “does not undermine the determination that [the CIA]
19 conducted an adequate search.” *See Wilbur*, 355 F.3d at 678. To the contrary, the
20 “appropriateness of the methods used to carry out the search” is the determinative
21 factor, not “the fruits of the search.” *See Iturralde*, 315 F.3d at 315.
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1 II. EXCEPT FOR THE RECORDS STILL UNDERGOING REVIEW, THE
2 CIA HAS APPLIED THE STATUTORY EXEMPTIONS CORRECTLY.

3 “FOIA contains nine exemptions * * * which a government agency may
4 invoke to protect certain documents from public disclosure.” *Minier v. CIA*, 88
5 F.3d 796, 800 (9th Cir. 1996) (citing 5 U.S.C. § 552(b)). Certain of the exemptions
6 require the balancing of competing interests, but FOIA as a whole does not.
7 “Congress ‘did not invite a judicial weighing of the benefits and evils of
8 disclosure on a case-by-case basis.’” *Minier*, 88 F.3d at 803 (quoting *FBI v.*
9 *Abramson*, 456 U.S. 615, 631 (1982)).
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13 Where, as here, responsive records are withheld, “[c]ourts are permitted to
14 rule on summary judgment * * * solely on the basis of government affidavits
15 describing the documents sought.” *Lion Raisins v. USDA*, 354 F.3d 1072, 1082
16 (9th Cir. 2004). All that is required is that “the affiants [be] knowledgeable about
17 the information sought” and that “the affidavits [be] detailed enough to allow the
18 court to make an independent assessment of the government’s claim.” *Id.* “If the
19 affidavits contain reasonably detailed descriptions of the documents and allege
20 facts sufficient to establish an exemption, the district court need look no further.”
21 *Citizens Comm’n*, 45 F.3d at 1329 (quoting *Lewis v. IRS*, 823 F.2d 375, 378 (9th
22 Cir. 1987)).
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1 To date, the CIA has relied on FOIA Exemptions 3, 4, 5, 7(C), and 6 to
2 withhold 32 records in whole or in part. As is shown in the affidavits that
3 defendants have submitted, the CIA has applied each of these exemptions
4 correctly.
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7 A. THE CIA HAS APPLIED EXEMPTION 3 CORRECTLY.

8 Records “specifically exempted from disclosure by statutes other than
9 FOIA” are protected from release by Exemption 3, 5 U.S.C. § 552(b)(3). *Students*
10 *Against Genocide v. Dep’t of State*, 257 F.3d 828, 831 (D.C. Cir. 2001). The “sole
11 issue for decision” under Exemption 3 “is the existence of a relevant statute and
12 the inclusion of the withheld material within that statute’s coverage.” *Goland v.*
13 *CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978).
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16 50 U.S.C. § 403g is “precisely the type of statute[] comprehended by
17 exemption (b)(3).” *Goland*, 607 F.2d at 349 (quoting *Weissman v. CIA*, 565 F.2d
18 692, 694 (D.C. Cir. 1977)); see *Minier*, 88 F.3d at 801 (similarly). By its terms,
19 § 403g exempts the CIA from “the provisions of any other law which require the
20 publication or disclosure of the organization, functions, names, official titles,
21 salaries, or numbers of personnel employed by the Agency.” Together with a
22 statute that directs Director of National Intelligence to “protect intelligence
23 sources and methods from unauthorized disclosure,” § 403g provides “a ‘near
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1 blanket FOIA exemption,' which is 'only a short step [from] exempting all CIA
2 records from FOIA.'" *Pipko v. CIA*, 312 F. Supp. 2d 669, 679 (D.N.J. 2004)
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4 (quoting *Minier*, 88 F.3d at 801) (internal quotation marks omitted).

5 In this case, the CIA has relied on Exemption 3 and § 403g to withhold the
6 names of CIA employees; contact information for certain such employees; the
7 acronym of a CIA component; and an intelligence method not involved in that
8 portion of the CIA's analysis relating to the "publicly released aircraft flight path
9 climb conclusion." Bur. Decl. ¶¶ 26-27, 31 & DI at 41, 44-48, 50-53, 54, 58, 60-
10 62, 64-66, 68-70; 2nd Bur. Decl. ¶¶ 10-12 & DI at 16. Because § 403g "exempt[s]
11 the CIA from any law that requires publication or disclosure of the organization or
12 function of the CIA, or any information with respect to the agency's employees or
13 activities," this material has been withheld properly. *Judicial Watch v. U.S. Dep't*
14 *of Commerce*, 337 F. Supp. 2d 146, 167 (D.D.C. 2004); see *Minier*, 88 F.3d at 801
15 (holding that the names of CIA employees are exempt from release under § 403g).
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21 Nor is disclosure of the name of a particular CIA employee required by the
22 publication of a newspaper article alleging that the CIA had "recently declassified
23 a once-secret report on eyewitnesses to the crash of TWA Flight 800," and that the
24 aforementioned employee was a "CIA analyst" who had "won an intelligence
25 medal for his work on the crash." Bill Gertz & Rowan Scarborough, *Inside the*
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1 Ring, Wash. Times, Dec. 5, 2003, at A6. The disclosure of information that has
2 been “officially acknowledged” may be compelled, “even over an agency’s
3 otherwise valid exemption claim.” *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C.
4 Cir. 1990). However, “official acknowledgment” requires, among other things,
5 that the information requested “match the information previously disclosed.” *Id.*
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7 In this case, none of the records, responsive to plaintiff’s request, from which the
8 names of CIA personnel have been withheld has been released to the public
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10 previously. 2nd Bur. Decl. ¶ 9. Even assuming, *arguendo*, that the name identified
11 in the newspaper article is one that the CIA is withholding, the association of that
12 name with the information contained in the responsive records has not been
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14 “officially acknowledged.” *Id.* Accordingly, the withholding of the name would
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16 be proper.
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18 B. THE CIA HAS APPLIED EXEMPTION 4 CORRECTLY.

19 Exemption 4 “allows government agencies to withhold documents that
20 contain ‘commercial or financial information obtained from a person and
21 privileged or confidential.’” *Lion Raisins*, 354 F.3d at 1079 (quoting 5 U.S.C.
22 § 552(b)(4)). Information is “confidential” for purposes of Exemption 4 if its
23 disclosure “could cause ‘substantial harm to the competitive position of the person
24 from whom the information was obtained.’” *Id.* (quoting *G.C. Micro Corp. v. Def.*
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1 *Logistics Agency*, 33 F.3d 1109, 1112-13 (9th Cir. 1994)). To justify the
2 withholding of records under Exemption 4, “the government need only show that
3 there is (1) actual competition in the relevant market, and (2) a likelihood of
4 substantial competitive injury if the information were released.” *Lion Raisins*, 354
5 F.3d at 1079.
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8 In this case, the CIA has relied on Exemption 4 to withhold certain
9 information concerning the “baseline mass properties, aerodynamic and engine
10 characteristics of the Boeing Model 747-100 aircraft.” Bur. Decl. ¶ 35 & DI at 56-
11 58, 60, 62-63, 66, 69. Provided to the government voluntarily by Boeing, this
12 information is part of the training simulator database that Boeing has developed
13 for Boeing 747-100's, 200's, and 300s (747 Classics). Breuhaus Decl. (Bur. Decl.
14 Ex. 5) ¶¶ 3-4, 9; *see id.* ¶ 11. Information in this database is used for various
15 purposes by Boeing and its licensees, “including flight training, aircraft
16 certification, and engineering.” Breuhaus Decl. ¶ 18; *see id.* ¶ 22. “In providing
17 these services, Boeing competes with other companies and enjoys a competitive
18 advantage because it is the sole source of the training simulator data.” *Id.* ¶ 18. A
19 competitor wishing to “reproduce Boeing’s data and sell its own version of
20 Boeing’s 747 Classic simulator data package would need to make an investment in
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1 the order of magnitude of \$20 million in development costs.” *Id.* ¶ 15. Free
2 access to the withheld information “would substantially assist in this effort.” *Id.*
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4 As a further matter, the CIA has relied on Exemption 4 to withhold the
5 name of, and contact information for, an employee of Boeing. Bur. Decl. n. 13 &
6 DI at 60, 66; 2nd Bur. Decl. ¶ 14. Disclosure of this material would make it easier
7 for competitors of Boeing to solicit the unauthorized disclosure of the technical
8 information concerning the Boeing 747-100 that the CIA has withheld. Breuhaus
9 Decl. ¶ 42; *see* Bur. Decl. n.13.
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12 Accordingly, the CIA has used Exemption 4 to withhold information that is
13 relevant to a market in which “actual competition” exists and in which “substantial
14 competitive injury” would result “if the information were released.” *See Lion*
15 *Raisins*, 354 F.3d at 1079. For these reasons, the CIA has acted correctly in
16 applying Exemption 4.
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19 C. THE CIA HAS APPLIED EXEMPTION 5 CORRECTLY.

20 Exemption 5 protects records “normally privileged in the civil discovery
21 context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (discussing 5
22 U.S.C. § 552(b)(5)). Accordingly, the scope of Exemption 5 extends to records
23 covered by the deliberative process privilege. *Maricopa Audubon Soc’y v. U.S.*
24 *Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997). Records are covered by that
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1 privilege if they are “‘predecisional’ in nature” and form “‘part of the agency’s
2 ‘deliberative process.’” *Maricopa*, 108 F.3d at 1092 (quoting *Sears*, 421 U.S. at
3 151-52). “A ‘predecisional’ document is one ‘prepared in order to assist an
4 agency decisionmaker in arriving at his decision,’ and may include
5 ‘recommendations, draft documents, proposals, suggestions, and other subjective
6 documents which reflect the personal opinions of the writer rather than the policy
7 of the agency.’” *Maricopa*, 108 F.3d at 1093 (quoting *Assembly of the State of*
8 *Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992)). “A
9 predecisional document is part of the ‘deliberative process,’ if ‘the disclosure of
10 [the] materials would expose an agency’s decisionmaking process in such a way as
11 to discourage candid discussion within the agency and thereby undermine the
12 agency’s ability to perform its functions.” *Id.*

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18 In this case, the CIA has relied on the deliberative process privilege and
19 Exemption 5 to withhold certain materials created as part of the analysis that
20 continued after the CIA video concerning the explosion of TWA Flight 800 was
21 shown to the public. These materials are the following:
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24 1. An excerpt from six pages of handwritten “analyst notes” dated
25 December 2-4, 1997. These notes “includ[e] mathematical calculations and
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1 reflect[] daily work and consultations with other analysts, regarding
2 aerodynamics.” Bur. Decl. DI at 44; 2nd Bur. Decl. ¶ 11.
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4 2. The entirety of an 18-page draft report, dated March 3, 1998,
5 captioned “Dynamic Flight Simulation.” This report contains “analysis and
6 preliminary conclusions regarding further assessment of TWA Flight 800.” Bur.
7 Decl. DI at 57.
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9 3. The entirety of a 17-page draft report, dated March 17, 1998,
10 captioned “Analysis of Radar Tracking of the TWA 800 Disaster on July 17,
11 1996.” This report contains “preliminary analysis and conclusions regarding radar
12 tracking of TWA Flight 800.” Bur. Decl. DI at 56.
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15 4. The entirety of 22 pages of charts and graphs. Prepared by one or
16 more CIA analysts, these materials contain “intra-agency and inter-agency
17 deliberations with NTSB, including [the] analyst’s selection of variables,
18 assumptions, calculations, and graphical representations regarding [the] analyst’s
19 preliminary analysis of radar tracking data provided by NTSB.” Bur. Decl. DI at
20 58; 2nd Bur. Decl. ¶ 17.
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23 The CIA has also relied on the deliberative process privilege and Exemption
24 5 to withhold certain materials reflecting the give-and-take between the CIA and
25 other agencies. These materials are the following:
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1 1. The entirety of an undated five-page draft, with handwritten
2 annotations, captioned "Response to Allegations of SA [Special Agent] Regarding
3 CIA Analysis." This draft "reflect[s] candid discussion and opinions of
4 individuals both within and between FBI and CIA regarding CIA analysis of
5 eyewitness reports." Bur. Decl. DI at 65.
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8 2. The entirety of three pages of handwritten analyst's notes
9 containing "intra-agency and inter-agency deliberations with NTSB, including the
10 analyst's preliminary assessment, comments, and notations regarding select radar
11 tracking data provided by NTSB." Bur. Decl. DI at 59; 2nd Bur. Decl. ¶ 16.
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14 These materials consist of "recommendations, draft documents, proposals,
15 suggestions, and other subjective documents which reflect the personal opinions
16 of the writer[s] rather than the policy of the agency." *See Maricopa*, 108 F.3d at
17 1093 (quoting *Assembly of the State of Cal.*, 968 F.2d at 920). If disclosed, they
18 would "expose [the CIA's] decisionmaking process in such a way as to
19 discourage candid discussion [within the CIA and between the CIA and other
20 agencies] and thereby undermine [the CIA's] ability to perform its functions." *See*
21 *id.* Because these materials are both predecisional and deliberative, their
22 withholding pursuant to the Exemption 5 is appropriate. *See id.*
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1 D. THE CIA HAS APPLIED EXEMPTION 7(C) CORRECTLY.

2 “Exemption 7(C) excuses from disclosure ‘records or information compiled
3 for law enforcement purposes’ if their production ‘could reasonably be expected to
4 constitute an unwarranted invasion of personal privacy.’” *Favish*, 541 U.S. at 160
5 (quoting 5 U.S.C. § 552(b)(7)(C)). The application of Exemption 7(C) requires a
6 balancing of “the competing interests in privacy and disclosure.” *Favish*, 541 U.S.
7 at 172. If “the public interest being asserted is to show that responsible officials
8 acted negligently or otherwise improperly in the performance of their duties,” the
9 requester “must produce evidence that would warrant a belief by a reasonable
10 person that the alleged Government impropriety might have occurred.” *Id.* at 174.
11 A “bare suspicion” of misconduct is insufficient. *Id.*

12 In this case, the CIA has relied on Exemption 7(C) to withhold, at the
13 request of the FBI, the names and initials of eyewitnesses to the explosion of TWA
14 Flight 800; the names of special agents and other employees of the FBI; and
15 contact information for certain such individuals. Bur. Decl. ¶ 51 & DI at 43-44,
16 49, 51, 53, 55-56, 64-65, 67-68, 70; 2nd Bur. Decl. ¶ 15 & DI at 16-17. This
17 information comes from records created as part of the criminal investigation that
18 the FBI conducted into the explosion of TWA Flight 800, including that portion of
19 the investigation with which the CIA assisted. Accordingly, the information is
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1 information within the purview of Exemption 7(C), i.e., “information compiled for
2 law enforcement purposes.” See 5 U.S.C. § 552(b)(7).

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4 “Exemption 7(C) ‘affords broad[] privacy rights to suspects, witnesses, and
5 investigators.’” *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991)
6 (quoting *Bast v. Dep't of Justice*, 1251, 1254 (D.C. Cir. 1981)). It does so because
7 such individuals could experience “embarrassment and harassment in the conduct
8 of their official duties and personal affairs” if their identities were disclosed.
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11 *Massey v. FBI*, 3 F.3d 620, 624 (2nd Cir. 1993) (FBI agents); see *Anderson v. U.S.*
12 *Postal Serv.*, 7 F. Supp. 2d 583, 587 (E.D. Pa. 1998) (interviewees and witnesses)
13 (similarly). In this case, the individuals whose identities have been withheld took
14 part in the investigation of a “famous case[] that [has] generate[d] controversy,
15 suspicion, and the desire to second guess the authorities.” See *Favish*, 217 F.3d at
16 1173. Accordingly, the release of their identities would create a particular danger
17 of their being embarrassed and harassed. See Bur. Decl. ¶ 46. In addition,
18 plaintiff has identified no evidence that would “warrant a belief by a reasonable
19 person” that any “Government impropriety might have occurred” during the
20 investigation of of TWA Flight 800. See *Favish*, 541 U.S. at 174. Accordingly,
21 no public interest exists in this case that would outweigh the privacy interest of the
22 individuals whose identities have been withheld.
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1 E. THE CIA HAS APPLIED EXEMPTION 6 CORRECTLY.

2 Exemption 6 “provides that FOIA disclosure requirements do not apply to
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4 ‘personnel and medical files and similar files the disclosure of which would
5 constitute a clearly unwarranted invasion of personal privacy.’” *U.S. Dep’t of State*
6 *v. Ray*, 502 U.S. 164, 166 (1991) (quoting 5 U.S.C. § 552(b)(6)). As is the case
7 with Exemption 7(C), the application of Exemption 6 requires “‘the public interest
8 in disclosure’” to be balanced against “‘the interest Congress intended the
9 [e]xemption to protect.’” *U.S. Dep’t of Defense v. FLRA*, 510 U.S. 487, 495
10 (1994) (quoting *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*,
11 489 U.S. 749, 776 (1989)). Because of differences in the statutory language, “the
12 Government’s burden in establishing the requisite invasion of privacy to support
13 an Exemption 6 claim is heavier than the standard applicable to Exemption 7(C).”
14 *Ray*, 502 U.S. at 172. However, the government’s burden under Exemption 6 is
15 not insurmountable. To the contrary, “[t]he privacy interest protected by
16 Exemption 6 ‘encompass[es] the individual’s control of information concerning
17 his or her person.’” *FLRA*, 510 U.S. at 500 (quoting *Reporters Comm.*, 489 U.S. at
18 763). In contrast, “the only relevant public interest in the [Exemption 6] balancing
19 analysis [is] the extent to which disclosure of the information sought would
20 ‘she[d] light on an agency’s performance of its statutory duties’ or otherwise let
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1 citizens know 'what their government is up to.'" *FLRA*, 510 U.S. at 495 (quoting
2 *Reporters Comm.*, 489 U.S. at 773). As is the case with Exemption 7(C), "[m]ere
3 speculation about hypothetical public benefits cannot outweigh a demonstrably
4 significant invasion of privacy." *Ray*, 502 U.S. at 179.
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7 In this case, the CIA has relied on Exemption 6 to withhold the names and
8 initials of eyewitnesses to the explosion of TWA Flight 800; the names of
9 employees of the NTSB, CIA, FBI, Boeing, and other private companies; and
10 contact information for certain of these individuals. Bur. Decl. DI at 42-45, 47-49,
11 51, 53-56, 60, 64-68, 70; 2nd Bur. Decl. ¶¶ 12-14 & DI at 16-17. Most of this
12 information has also been withheld pursuant to Exemptions 3, 4, or 7(C). Bur.
13 Decl. DI at 43-45, 47-49, 51, 53-56, 60, 64-68, 70; 2nd Bur. Decl. ¶ 15 & DI at 16-
14 17. However, all of the information may be withheld under Exemption 6. None
15 of the information explains why the CIA reached its "publicly released aircraft
16 flight path climb conclusion." Accordingly, the disclosure of the information
17 would not "'she[d] light on an agency's performance of its statutory duties' or
18 otherwise let citizens know 'what their government is up to.'" *See FLRA*, 510 U.S.
19 at 495 (quoting *Reporters Comm.*, 489 U.S. at 773). By contrast, the individuals
20 to whom the information pertains "have a privacy interest in not being subject to
21 unofficial questioning about the analytic project or investigation at issue and in
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1 avoiding annoyance or harassment in their official, business, and private lives.”

2 Bur. Decl. ¶ 46. Accordingly, the balance of interests required by Exemption 6

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4 militates in favor of the withholdings made here.

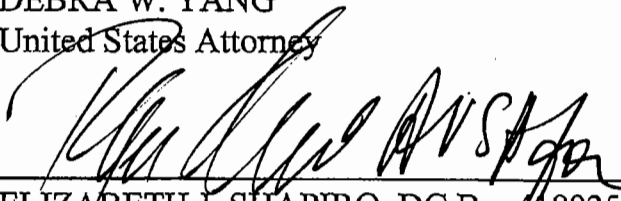
5 CONCLUSION

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

9 Dated: August 16, 2005

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12 Respectfully submitted,

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1 PROOF OF SERVICE BY MAILING

2 I am over the age of 18 and not a party to the within action.

3 I am employed by the Office of United States Attorney, Central
4 District of California. My business address is 300 North Los Angeles
5 Street, Suite 7516, Los Angeles, California 90012.

6 On August 16, 2005, I served:

- 7 1. DEFENDANTS' NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY
8 JUDGMENT AS TO THE CENTRAL INTELLIGENCE AGENCY
9 2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS'
10 MOTION

11 on each person or entity named below by enclosing a copy in an
12 envelope addressed as shown below and placing the envelope for
13 collection and mailing on the date and at the place shown below
14 following our ordinary office practices. I am readily familiar with
15 the practice of this office for collection and processing
16 correspondence for mailing. On the same day that correspondence is
17 placed for collection and mailing, it is deposited in the ordinary
18 course of business with the United States Postal Service in a sealed
19 envelope with postage fully prepaid.

20 Date of mailing: August 16, 2005. Place of mailing: Los
21 Angeles, California.

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

23 **John F. Dunne, Jr. Esq.**
24 **1601 Cloverfield Boulevard**
25 **2nd Floor South Tower**
26 **Santa Monica, California 90404-4084**

27 I declare under penalty of perjury under the laws of the United
28 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: August 16, 2005 at Los Angeles, California.


OLIVIA ROMERO