**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| H. RAY LAHR,<br><br>Plaintiff,<br><br>v.<br><br>NATIONAL SAFETY TRANSPORTATION BOARD, et al.,<br><br>Defendants. | CASE NO. CV 03-8023 AHM (AJWx)<br><br>ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' FIRST TWO SUMMARY JUDGMENT MOTIONS |

## I. Background

On July 17, 1996, TWA Flight 800 exploded in mid-air off the coast of Long Island. The government conducted an investigation and issued its findings concerning the cause of the crash. Plaintiff H. Ray Lahr contends that the government's investigation was tainted by improper conduct and, perhaps, a cover-up. Partially in response, he filed this Freedom of Information Act ("FOIA") suit seeking access to records that the government created or utilized during this investigation.

This Order addresses two motions for summary judgment separately filed by the government: one by the National Transportation Safety Board ("NTSB")

and one by the Central Intelligence Agency ("CIA").[1] Each agency claims that its search for records in response to Lahr's FOIA requests was adequate and that it properly redacted or withheld certain records based on exemptions authorized by FOIA.

Having reviewed the parties' arguments, evidence, and the records themselves, the Court GRANTS IN PART AND DENIES IN PART both the NTSB's Motion for Summary Judgment and the CIA's First Motion for Partial Summary Judgment. The Court finds that in most, but not all, respects the NTSB's search was adequate, and that the CIA's search was fully adequate. The deficiencies in the NTSB's search are set forth *infra*. (Essentially, they apply to Requests 76, 96 and 97. The NTSB must search for records of the formulas and data used for the BREAKUP program and for the BREAKUP and BALLISTIC computer programs themselves.) As to the exemptions, the following chart summarizes the outcome, as explained more fully in the text of this Order.

**NTSB RECORDS**

| NTSB | PLAINTIFF | SUMMARY JUDGMENT | DISCLOSURE REQUIRED? |
|---|---|---|---|
| 6 | 56 | DENY | YES |
| 8 | 59 | DENY | YES |
| 15 | 70 | DENY | YES |
| 27 | 74 | GRANT/DENY IN PART | SOME (WITH SEGREGATION) |

**CIA RECORDS**

| DOC. INDEX | MORI[2] | PLAINTIFF | SUMMARY JUDGMENT | DISCLOSURE REQUIRED? |
|---|---|---|---|---|
| 903 | 603 | 50 | DENY | YES |

[1] The CIA also filed a separate, Second Motion for Partial Summary Judgment, which was resolved by this Court's Order of August 31, 2006. *See, Lahr v. Nat'l Transport. Safety Bd.*, ___ F.Supp. 2d ___ 2006 WL 2789870.

[2] The Document Index and MORI references are to the last three digits of the Government's numbering system. As the Court previously noted, the parties affixed multiple and confusing identifications to given documents.

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|---|---|---|---|---|
| 318 | 343 | 2 | DENY | YES |
| 334 | 344 | 23 | GRANT | NO |
| 342 | 350 | 7 | DENY | YES |
| 324 | 352 | 18 | DENY | YES |
| 014 | 014 | 41 | DENY | YES |
| 015 | 015 | 9 | GRANT | NO |
| DOC. INDEX | MORI | PLAINTIFF | SUMMARY JUDGMENT | DISCLOSURE REQUIRED? |
| 016 | 016 | 10 | DENY | YES |
| 017 | 017 | 13 | DENY | YES |
| 018 | 018 | 42 | DENY | YES |
| 200 | 200 | 45 | DENY | YES |
| 202 | 202 | 32 | DENY | YES |
| 320 | 320 | 52 | DENY | YES |
| 194 | | 28 | GRANT/DENY IN PART | SOME (WITH SEGREGATION) |
| 195 | | 27 | GRANT/DENY IN PART | SOME (WITH SEGREGATION) |
| 196 | | 29 | DENY | YES |
| 024 | | 43 | GRANT | NO |
| 209 | | 46 | DENY | YES |

## A. Factual Summary

### 1. The Crash Investigation and Ensuing FOIA Litigation

The government's investigation of the crash of Trans World Airline ("TWA") Flight 800 ("Flight 800") on July 17, 1996 has already been addressed in depth in the Court's August 31, 2006 First Summary Judgment Order. The Court expressly adopts that background and the findings set forth in that Order.

### 2. Plaintiff's Allegations of Government Impropriety

Plaintiff's main contention, which he seeks to prove through his FOIA requests, is that the Defendants helped participate in a massive cover-up of the true cause of the crash of Flight 800, which he believes was a missile strike. Because

Plaintiff alleges

> that responsible officials acted negligently or otherwise improperly in the performance of their duties, [he] 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.

*Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). In the First Summary Judgment Order, the Court considered the evidence proffered by Plaintiff in support of his contention that the government acted negligently or improperly in its investigation. Defendants did not object to or even respond to this evidence in any of the three motions, so Plaintiff's assertions have not been repudiated.

In adopting here its previous finding that the evidence is sufficient to suggest that the government acted improperly in its investigation of Flight 800 (or at least performed in a grossly negligent fashion), the Court reiterates that that conclusion is based on a characterization of the evidence in the light most favorable to Plaintiff, but does not reflect or constitute any finding by the Court.

**B. Procedural Summary**

On November 6, 2003, Plaintiff H. Ray Lahr filed suit against the NTSB, and later added as defendants the CIA and National Security Agency. Lahr is a former Navy pilot and retired United Airlines Captain who has served as the Air Line Pilots Association's Southern California safety representative for over fifteen years. Each defendant is a government agency subject to FOIA, 5 U.S.C.A. § 552. On December 17, 2003, Lahr filed a First Amended Complaint, and on February 6, 2006, he filed a Second Amended Complaint ("SAC"). The SAC seeks proper identification by the Defendants of records responsive to requests that Lahr has made under FOIA, preliminary and final injunctions prohibiting Defendants from further withholding the records at issue, and a mandatory injunction requiring certain of Defendants' computer and software programs to be made available to Plaintiff for inspection. *SAC*, at pp. 6-7.

The three separate partial summary judgment motions that Defendants have filed cover all records from which the government has redacted material, either in full or in part. First, on June 8, 2004, the NTSB filed a Motion for Partial Summary Judgment as to all redacted and withheld records originally found in that agency's files. On September 27, 2004, the Court heard oral argument, took the motion under submission, and ordered these records be provided in unredacted form for *in camera* review.

Second, on August 16, 2005, the CIA filed its First Motion for Partial Summary Judgment, concerning records found in CIA files. On October 18, 2005, the Court took that motion under submission without oral argument, and recently ordered that the records at issue in that motion be provided in unredacted form for *in camera* review.

Third, on May 1, 2006, the CIA filed its Second Motion for Partial Summary Judgment, concerning the remaining records found in CIA files. As already noted, on August 31, 2006, this Court issued its First Summary Judgment Order, granting in part and denying in part that motion. Many of the records included in the Defendants' first and second motions are no longer at issue, and the Court need not consider them at this time. However, the government's use of FOIA exemptions to withhold or redact four records from the first motion and eighteen from the second motion are still disputed. So are Defendants' requests for a ruling that their respective searches for these records were adequate.

## II. Discussion

### A. Legal Standards

The relevant legal standards concerning both motions for summary judgment and FOIA are found in the First Summary Judgment Order. 2006 WL 2789870 at *6 - 16. The Court expressly adopts the legal standards set forth in that Order and incorporates them herein, by reference. In addition, the Court notes the following.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 50 U.S.C.A. § 552(b). The burden lies with an agency to demonstrate that "no segregable, nonexempt portions [of a record] remain 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). Agencies may meet this burden by describing through affidavit, in a non-conclusory manner, why such information is not reasonably segregable. *Wilkinson v. Fed. Bureau of Investigation*, 633 F. Supp. 336, 350 (C.D. Cal. 1986). Furthermore, an agency cannot justify withholding an entire document simply by showing it contains some exempt material; instead the non-exempt portions must be disclosed unless they are "inextricably intertwined" with the exempt portions. *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 556 F.2d 242, 260 (D.C. Cir. 1977). Conversely, if an entire document is properly exempt, then no segregation is necessary.

**B. Analysis**

**1. <u>The Adequacy of the NTSB and CIA Searches</u>**

Defendants moved for summary judgment that the NTSB and CIA's searches were adequate.[3] Plaintiff challenges Defendants' contentions. Defendants have the burden of establishing that their searches were adequate. (See pages 16-17 of the First Summary Judgment Order.)

a. The NTSB Search

Plaintiff submitted 145 specific FOIA requests to the NTSB. *Moye Decl.*, at ¶ 21. In order to establish that it conducted a reasonable search, the NTSB submitted

[3] The NTSB's Motion for Summary Judgment did not explicitly state it was so moving, but Defendants argued the merits of such a motion, both factually and legally. Plaintiff's Opposition and Defendants' Reply treated this as a proper motion, and therefore Plaintiff had an adequate opportunity to oppose it. Therefore, the Court will treat Defendants' arguments as a properly-noticed motion.

the declarations of Melba D. Moye, the Chief of the Public Inquiries/FOIA Branch in the Office of Research and Engineering at the NTSB; Dennis Crider, a National Resource Specialist for Vehicle Simulation in the Vehicle Performance Division of the Office of Research and Engineering of the NTSB; and Doug Brazy, a Mechanical Engineer in the Vehicle Recorder Division.

The NTSB searched three sets of agency records: the NTSB Public Docket, the Accident Briefs/Summaries and NTSB Accident Investigation Files. *NTSB S.G.I.* ¶ 16; *Moye Decl.*, at ¶¶ 20(a)-(c). Moye described how the NTSB searched the electronic indexes and databases constituting the NTSB Public Docket and the Accident Briefs/Summaries. *Id.* at ¶¶ 20(a)-(b). To search the Accident Investigation Files, the NTSB FOIA office contacted staff who might have potentially responsive records and asked them to search for records responsive to Plaintiff's FOIA requests. *Id.* at ¶¶ 20(c), 22. The NTSB searched for potentially responsive information only where it believed it was reasonably expected to be located, based upon its construction of the term "zoom-climb" that Plaintiff used in his requests. *Id*. at ¶ 24. (Both parties agree that the term "zoom-climb" referred to the "flight path of the aircraft following the loss of the forward fuselage." *NTSB S.G.I.* ¶ 14.) Similarly, the NTSB construed the term "animation" to mean the "four graphical accident reconstructions shown at the public hearing on December 8, 1997." *NTSB S.G.I.* ¶ 23; *Moye Decl.*, at ¶ 25. These searches ultimately found several responsive records. *Id*. at ¶ 30.

Crider was the only NTSB staff member "responsible for deriving the calculations and/or computations of the flight path for TWA flight 800 [and] was the only NTSB staff [member] who created a computer simulation of the flight path of the accident airplane." *NTSB S.G.I.* ¶ 21; *Moye Decl.*, at ¶ 27; *Crider Decl.*, at ¶ 46. Crider claims that by the time he received Plaintiff's FOIA requests, he had already searched his files and provided all of his Flight 800-related records to the NTSB's FOIA office, in response to previous requests Lahr had made. *Id*. at ¶ 47. These

prior records included his "handwritten notes, draft reports with handwritten comments, preliminary graphs of results from the simulation program, a copy of the executable computer simulation program from the TWA flight 800 investigation," data provided by Boeing, and some records from the Trajectory Study. *Id*. at ¶¶ 36-37, 40. In response to Plaintiff's October 8, 2003 FOIA request, Crider reviewed the Flight 800 records he had previously handed over to the FOIA office and also searched for more records. *Id*. at ¶ 47. However, he located no new responsive records. *Id*. Later, Crider located both "the last control system source file and the aerodynamics source file specific to TWA Flight 800." *Supp. Crider Decl.*, at ¶ 6. Crider's declaration explains, in detail, how he conducted records searches to respond to groups of related FOIA requests by Plaintiff. *Crider Decl.*, at ¶¶ 48(a)-(*l*).

As a preliminary matter, simply because Crider located two responsive records after his initial search and the NTSB's initial response to Lahr does not necessarily undermine the adequacy of his search. A search is not unreasonable simply because it fails to produce all relevant and responsive materials. *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986). To reach the opposite conclusion "would work mischief . . . by creating a disincentive for an agency to reappraise its position, and when appropriate, release documents previously withheld." *Id*. at 953 (quotation omitted).

Brazy was the only NTSB staff member "responsible for creating the animations of the flight path of TWA flight 800 shown at the public hearing on December 8, 1997." *NTSB S.G.I.* ¶ 22; *Moye Decl.*, at ¶ 28; *Brazy Decl.*, at ¶¶ 5, 7. Brazy searched both his office and the space around the computer systems used to create the four animations for records responsive to Plaintiff's requests. *Id*. at ¶ 30. He provided the records he located to the FOIA office on two compact discs (CDs), both containing electronic files; Brazy located no paper records responsive to Lahr's requests. *Id*. at ¶ 38. Brazy also located two CIA files, which were referred to that agency for response. *Id*. at ¶ 39; *Moye Decl.*, at ¶ 31.

Plaintiff submits a great deal of evidence that he believes is supportive of a finding of agency bad faith regarding the crash investigation itself, but this evidence is irrelevant to an analysis concerning the adequacy of the NTSB's search. Because Lahr provides no evidence suggestive of bad faith of the NTSB in conducting its search, the Court finds that it conducted the search in good faith. *See Meeropol*, 790 F.2d at 952.

An agency's search for documents must only be reasonable and does not have to uncover every record that may potentially exist. *Zemansky*, 767 F.2d at 571. In *Oglesby v. United States Department of the Army*, 920 F.2d 57, 67-68 (D.C. Cir. 1990), *appeal after remand*, 79 F.3d 1172 (D.C. Cir. 1996), the Court of Appeals for the District of Columbia considered the adequacy of the State Department's search for records. The FOIA requestor challenged the reasonableness of the search "because the agency only searched the record system 'most likely' to contain the requested information." *Id*. at 67. The court noted that "[t]here is . . . no requirement that an agency search every record system." *Id*. at 68. However, the court found that,

> [a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched, is necessary to afford a FOIA requestor an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.

*Id*. The court concluded that the agency had failed to satisfy its burden. *Id*. (noting that the agency affidavit failed to "identify the terms searched or how the search was conducted.").

Here, the NTSB recounted the general areas where responsive records were reasonably likely to be located. *Moye Decl.*, at ¶ 20. Lahr was referred to public records, which the NTSB also searched to no avail. *Id*. at ¶¶ 20(a)-(b). Regarding the NTSB's Accident Investigation Files, the NTSB searched the locations where it believed potentially responsive documents were located. *Id*. at ¶ 20(c). This included the paper and computer files of NTSB employees from the Vehicle

Performance and Vehicle Recorder Divisions of the Office of Research and Engineering whom the NTSB labeled as "principally responsible for the final Main Wreckage Flight Path Study . . . and the creation of the animations." *Id*. at ¶ 26. The NTSB identified the employees who worked on the Main Wreckage Flight Path Study as its focus because it was that study that led to the simulation of the flight path of the main wreckage after the separation of the forward fuselage. *Id*. The Vehicle Performance Division also searched for records related to the Trajectory Study because some of that work ultimately contributed to the Main Wreckage Flight Path Study. *Id*.

At first glance, it might seem that a search limited to those employees "principally responsible" for the Main Wreckage Flight Path Study and animations, *id*., rather than *all* employees who worked on them, would not be "reasonably calculated" to locate all relevant documents. However, it is undisputed that Crider was the *only* staff member responsible for deriving the calculations and computations of the flight path of Flight 800, and Brazy was the *only* staff member responsible for the animations. *NTSB S.G.I.* ¶¶ 21-22. It stands to reason that they would have all records concerning Plaintiff's requests. Therefore, the Court finds that the NTSB's general search was adequate.

Turning to several specific requests that Lahr complains about, the Court notes preliminarily that simply because the NTSB located no responsive records for many of such requests does not make its search inadequate. Nor does Plaintiff cite authority for his contention that the NTSB was required to correlate each record in its *Vaughn* index to a specific FOIA request. Finally, that Plaintiff was provided with some material beyond the scope of his requests does not render the NTSB's search inadequate. With these principles in mind, the Court now will address specific claimed deficiencies in the NTSB's search.

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**(i) Records of Formulas NTSB Used for Its "Zoom-Climb" Conclusion .**

"Category 1" of each of Plaintiff's FOIA requests 4-68 asks for "[a]ll records of formulas used by the NTSB in its computations of the 'zoom-climb' conclusions." (This refers, in part, to 64 graphs in the Main Wreckage Flight Path Study, and to two Addendums.) The NTSB responded that some of these formulas are found in the public docket, but beyond that, "the investigators may have referred to one or more textbooks when working with the computer program for the TWA Flight 800 Main Wreckage Flight Path Study, but no record was created." *Moye Decl.*, at ¶ 33(a); *Crider Decl.*, at ¶ 48(a). Furthermore, some of these formulas are found in the simulation program - - presumably Plaintiff's Record 70, see *infra* - - but according to Crider they are not comprehensible as part of the simulation code, nor can they be segregated without creating a new record. *Id*. Ultimately, beyond the records in the public docket and the simulation program, the NTSB located no further responsive records to these requests. *Moye Decl*., at ¶ 33(a).

In arguing that the NTSB's search for these records was not adequate, Plaintiff cites to the June 16, 2004 Affidavit of Brett M. Hoffstadt, a computational fluids engineer, who states: "In my opinion, it is highly unlikely that Mr. Crider has no record of any data, and no record of any formula, that he used to write any of these 64 graphs." *Hoffstadt Aff. (June 16, 2004)*, at ¶ 7. This is "insufficient to raise a material question of fact with respect to the adequacy of the agency's search." *Oglesby*, 920 F.2d at 68 n.13; *see SafeCard Servs. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (speculation that documents might exist not enough to undermine finding of adequate search). Plaintiff's contention regarding "Category 1" of each of Plaintiff's FOIA requests 4-68 lacks merit.

The same is true as to Plaintiff's bald assertion, based solely on his expert's opinion, that the NTSB must have records of correlation of flight trajectory radar, radio transmissions and flight recorder data. *See NTSB Opp'n*, at p. 25. Such a

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contention, without supporting evidence, is not sufficient to dispute the government's declarations that no such records were found.

**(ii) <u>Records Upon Which the CIA Animation Was Based.</u>**

Plaintiff submitted four FOIA requests for such records. However, Moye claims the NTSB had "no role in the creation of the animation presented by the [CIA] in November 1997" and does "not know what, if any, information was used by the CIA in creating its video." *Moye Decl.*, at ¶ 38; *see also Crider Decl.*, at ¶ 53; *Beazy Decl.*, at ¶ 41.

Plaintiff disagrees, citing to additional records. For example, he purports to quote a transcript of the CIA's presentation of the animation on CNN. Plaintiff claims that the transcript states: "The preceding CIA analysis included . . . data provided by the NTSB." *See NTSB S.G.I.* ¶ 27. However, the transcript *actually* reads: "This [the CIA's conclusion as to the flight path of the aircraft] is consistent with information provided by NTSB investigators and Boeing engineers who determined that the front third of the aircraft, including the cockpit, separated from the fuselage within four seconds after the aircraft exploded." *Donaldson Aff.*, at ¶ 57 & Exh. 19 (CIA Animation Transcript), p. 1 (Bates 111). The transcript goes on to explain the process by which the CIA came to its conclusions; at no point does it mention utilization of any NTSB data. *Id.*, Exh. 19, pp. 1-2 (Bates 111-12).

Plaintiff also cites to a portion of the Crider Declaration, in which Crider states: "I learned that Boeing was providing [aircraft data] to the Central Intelligence Agency (CIA), as well as developing its own basic estimate of the flight path, so Boeing then included the NTSB on the routing of this data." *Crider Decl.*, at ¶ 13. This excerpt does not support Plaintiff's contention that the NTSB was involved in the creation of the CIA animation.

Next, Plaintiff also quotes from a response from the CIA to an earlier FOIA request that he had made. The CIA letter states that, in response to requests for records pertaining to the computer program and data used to produce the computer

simulation of Flight 800, "the pertinent data, and resulting conclusions, were provided by the National Transportation Safety Board (NTSB). CIA simply incorporated the NTSB conclusions into our videotape." *Lahr Aff.*, Exh. 16 (Bates 391). Although Defendants have repeatedly explained the difference between a "simulation" and "animation" (or graphical reconstructions), the second sentence of the CIA's response - - that the NTSB conclusions were incorporated into the CIA's videotape - - would be sufficient to raise a material issue of fact as to whether the CIA animation also incorporated data provided by the NTSB. Nevertheless, the record is clear that the NTSB conducted a proper search for all the records it used in its calculations concerning the "zoom-climb" conclusion.

**(iii) Records "Related To" The NTSB Animations.**

Plaintiff challenges the NTSB's response to his request for essentially all records "related to" the four NTSB animations of the crash that were shown at a December 8, 1997 public hearing. Defendants claim that all responsive records found in the possession of Brazy were released to Plaintiff (with the exception of two records referred to the CIA).[4] *Moye Decl.*, at ¶ 34. As noted earlier, Brazy was the only NTSB staff member responsible for creating these animations. *NTSB S.G.I.* ¶ 22; *Moye Decl.*, at ¶ 28; *Brazy Decl.*, at ¶¶ 5, 7. Presumably, he would have the data or other information that he used in creating the animations. *See Id*. at ¶¶ 8-12, 16, 18-19, 33. Brazy stated that the "animations are a visual depiction of the data presented from the radar sources, the digital flight data recorder, and/or the data from the simulations presented in the Main Wreckage Flight Path and Trajectory Studies." *Id*. at ¶ 8. He also noted that the animations used "verified data and FDR data," as well as the results of the Main Wreckage Flight Path Study, which was based in part on Crider's simulation data. *Id*. at ¶¶ 17-18. Crider agreed with Brazy's descriptions. *Crider Decl.*, at ¶¶ 50-51. Brazy searched his office "and the space around the

[4] Plaintiff mistakenly states that the NTSB claimed it had "no responsive records." *NTSB Opp'n*, at p. 24. *See, infra.*

computer systems" used to create the four animations. *Id*. at ¶ 30. If Plaintiff had simply requested materials used directly to create the animations, Brazy's search would have been sufficient. However, many of Plaintiff's requests concerning the animation ask for *all* records used by the NTSB to come to the zoom-climb conclusion upon which the animations were based. Essentially, this is the same request discussed earlier, however, and if the NTSB had limited its search only to the efforts of Brazy, it might have been inadequate, because the NTSB also was required to search for underlying records used in the analysis leading to the "zoom-climb" conclusion.

Although Lahr's FOIA requests encompassed the records underlying the data Brazy used to create the animations, and not just the data he directly used in doing so, the NTSB's search still was not inadequate, because it did look for all records of formulas used in its calculations concerning the "zoom-climb" conclusion.

Finally, Plaintiff argues that the records Brazy actually located are inadequate because they are not useful for his purposes, at least not without additional information. *See McGauley Aff*., at ¶¶ 3-4 (Bates 470). Whether the responsive records are useful or not is irrelevant to the adequacy of the NTSB search.

**(iv) <u>The BALLISTIC and BREAKUP Programs.</u>**

The Court finds that the NTSB's search for records responsive to FOIA requests 76, 96, and 97 was inadequate.

Plaintiff challenges the NTSB's failure to produce two computer programs - - the BALLISTIC program and the BREAKUP program - - in response to several FOIA requests. Defendants contend that the "predicate for Lahr's 145 [FOIA] requests was the 'zoom-climb conclusion,'" and if the programs were not used to come to this conclusion, they were not responsive. *See NTSB Reply*, at p. 23. Defendants argue that these two programs were not used to determine the aircraft's flight path after the separation of the nose section and forward fuselage. *See Moye Decl.*, at ¶ 36. Moye explains that the BREAKUP program provided the *timing* of

when the nose separated from the aircraft, which was used in the simulation, and both programs were used to determine the trajectory of certain pieces of the aircraft (not including the main body, apparently). *Id*.

The Court agrees with Plaintiff that, concerning FOIA request 76, the BREAKUP program was used to help reach the "zoom-climb conclusion," so far as the nose separation timing was a factor in this conclusion. *See id*. Therefore, the Court ORDERS NTSB to review its records to locate "[a]ll records of the formulas and data entered into the computer simulations" that involved the calculation of the nose separation timing and provide any responsive records to Plaintiff, subject to any applicable exemptions.

Defendants have adequately established that no records were responsive to FOIA request 77 because the BALLISTIC program was not used in any manner in connection with the "zoom-climb conclusion."

FOIA requests 96 and 97, although inartfully drafted, are for the BREAKUP and BALLISTIC programs themselves. Despite Defendants' contentions, there is no modifying language that limits the requests for these programs. *See Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984) (FOIA request is read as drafted, not as someone wishes it might be drafted). Therefore, the Court ORDERS the NTSB to review its records to locate the BREAKUP and BALLISTIC programs and provide those programs, if located, to Plaintiff, subject to any applicable exemptions.

**(v) Records of the Process by Which the NTSB Reached its "Zoom Climb" Conclusions.**

Plaintiff disputes the adequacy of the NTSB's search in response to his request for "[a]ll records of the process by which the NTSB arrived at its zoom-climb conclusions." (FOIA request 136 and FOIA requests 138 through 141, which are subsets of request 136.) The NTSB did not search for records responsive to this request, stating that the request "is too inexact for the agency to determine how to search for responsive records." *Moye Decl.*, at ¶ 33(j). The NTSB suggested to Lahr

that he amend this request to more clearly identify which records he sought, but he did not do so. *Id*. Plaintiff responds that the term "process" is "broad but not too inexact for defendant to search for records of the method by which it arrived at its zoom-climb conclusion." *See Joint Statement*, at p. 923.

Under FOIA, an agency is required to make records promptly available upon a request that "reasonably describes" the records sought. 5 U.S.C.A. § 552(a)(3)(A). "A description 'would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.'" *Marks v. United States Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (citation omitted). This requirement should not be treated as a loophole by agencies, but "broad, sweeping requests lacking specificity are not permissible." *Id*.

If an agency knows "'precisely' which of its records have been requested and the nature of the information sought" from those records, then the records requested have been adequately described. *See, e.g., Yeager v. Drug Enforcement Agency*, 678 F.2d 315, 326 (D.C. Cir. 1982). Here, unlike in *Yeager*, there is evidence that the agency was truly and understandably unclear as to the nature of Plaintiff's request. *See Moye Decl.*, Exhs. II-14, II-15 (November 6, 2002 and November 6, 2003 letters to Plaintiff that requested clarification of the meaning of "process"). If Lahr intended this to be a catch-all provision - - as is suggested by his description that this "request seeks any records not otherwise specifically identified" - - then even if he had drafted it as such the NTSB could not have conducted a reasonable search, under the circumstances.

b. The CIA Search

Plaintiff originally submitted 105 FOIA requests to the CIA, but the Court struck all but 17, pursuant to a Stipulation and Order dated July 13, 2005. The CIA has moved for a ruling that it conducted a reasonable search of its records to find all responsive records to those remaining requests. In support of this, the CIA

submitted the declaration of Terry Buroker, the Information Review Officer for the Directorate of Intelligence ("DI") of the CIA. *First Buroker Decl.*, at ¶ 1. Buroker explained that the Public Information Programs Division ("PIPD") in the Office of Information Management Services is the initial reception point in the CIA for all FOIA requests. *Id*. at ¶ 19. The CIA does not maintain a centralized records system. *Id*. at ¶¶ 15-16. Therefore, each FOIA request is analyzed to determine which of four directorates of the CIA might reasonably be expected to possess responsive records. *Id*. at ¶ 19. PIPD will forward copies of the request with instructions to conduct such a search for these records. *Id*. That is the procedure that was followed in this case. *Id*. at ¶ 20.

In this case, PIPD determined that the Directorate of Intelligence ("DI") was the only directorate "reasonably likely to have records responsive to the Plaintiff's request[s]." *Id*. at ¶ 21. The DI is the CIA component that "analyzes, interprets, and forecasts foreign intelligence issues and world events of importance to the United States." *Id*. at ¶ 22. DI personnel who are trained to conduct FOIA and other record searches conducted a search of the automated DI records system. *Id*. at ¶ 23. "No responsive information was located in the automated records systems at the directorate level." *Id*. When this search proved unproductive, Buroker's office requested the Office of Transnational Issues ("OTI") in the DI to conduct a separate search for records. *Id*. at ¶ 24. A senior OTI weapons analyst who was one of the principal analysts on the Flight 800 team participated in the search, which extended to "office and individual analyst files, including local databases, e-mail, and desk files." *Id*. This search led to records that were forwarded to Buroker's office. *Id*.

The records were searched a second time, which led to additional responsive material. *Id*. at ¶ 25. Buroker claims that most of the specific requests were "unintelligible, did not describe records in terms that were meaningful to the CIA, or sought records that could only be found at the NTSB," *id*. at ¶ 25 n.7. Therefore, Buroker's staff focused on Plaintiff's overarching request for "records upon which

[the] publicly released aircraft flight path climb conclusion was based." *Id*. at ¶ 24. Ultimately, this resulted in the identification of about one hundred records. *Id*. at ¶ 25.

The CIA submitted its first *Vaughn* index, attached to the First Buroker Declaration, on June 20, 2005. On August 16, 2005, the CIA supplemented this *Vaughn* index by submitting the Second Buroker Declaration, to which was attached copies of all records that were withheld only in part by the government. The Second Buroker Declaration also added two records not previously identified in the CIA's first *Vaughn* index.

Plaintiff's first challenge to the adequacy of the CIA's search argues that the CIA's *Vaughn* index was filed without a copy of the records, and that the 107 pages accounted for in the index did not match the 246 pages the CIA supposedly produced in February, 2005. Plaintiff also argues that, adding the 128 pages for the two new records identified in the Second Buroker Declaration, the total should have been 255 pages, but the filing contained 388 pages. Plaintiff is wrong. The CIA's response appears to be in good faith. The motion and the *Vaughn* index included 327 pages of records withheld in full or in part and attached to one or the other of the CIA's February and June 17, 2005 transmittal letters. Plaintiff submits no evidence in dispute of this.[5] The Second Buroker Declaration adds two additional records, together totaling 128 more pages, to the thirty records and 327 pages identified in the *Vaughn* index. Together, 32 records consisting of 455 pages are at issue. Given that the CIA withheld in full six records consisting of 66 pages, 389 pages should appear in the Second Buroker Declaration. This is *exactly* how many actually appear. Plaintiff's contention is without merit or mathematical support.

[5] For instance, Plaintiff does not submit as evidence copies of the attachments at Tabs B and C of the February and June letters, and his page totals found in footnotes 1, 2 and 4 of the Sur-Reply lack supporting evidence and contain mathematical errors such that the Court cannot rely on them.

Next, Plaintiff argues that the MORI numbering system utilized by the CIA did not allow Plaintiff "to decipher what records were produced and withheld, nor to correlate the exemptions asserted with the records withheld." With this, the Court cannot agree, although the *Vaughn* index was inadequate to the extent that it did not include redacted copies of those records withheld only in part and that it contained a different document indexing system than that used in the CIA's earlier transmittal letters. Notwithstanding that the CIA's MORI document numbering system is confusing and frustrating, in ¶ 8 of his Second Declaration Buroker clearly identified, via cross references, each record based on the CIA's MORI Document ID number (as found in the transmittal letters), its *Vaughn* Document Index number (essentially a "second" MORI number), and its *Vaughn* Document Index page number (which contained the government's bases for withholding all or part of each record). From this chart, Plaintiff was able to compare these record numbers, and refer to the government's description of each record. For Plaintiff to note two typographical errors, *see Schulze Aff.*, at ¶ 25, is typically nit-picky; Plaintiff was clearly able to identify and rectify these errors with little trouble and they are not evidence of bad faith. Finally, although Plaintiff claims there is no entry for the "Analyst Note" identified on page 59 of the *Vaughn* index, the fact that this record had been withheld in full was clearly revealed in paragraph 16 of the Second Buroker Declaration, and because it was withheld in full, there was no redacted record for Plaintiff to review.

Next, Plaintiff argues that multiple records contained the same MORI numbers, and, conversely, other records were spread out in pages containing differing MORI numbers. *See also Schultze Aff.*, at ¶ 22. Defendant explains that much of the responsive material to Lahr's FOIA request was located in analyst working files. *Koch Decl.*, at ¶ 15. As such, this material may not contain official document numbers, page numbers or dates, and may be handwritten or contain handwritten annotations. Alternatively, it may be in electronic form or consist of copies of

electronic communications. *Id*. Furthermore, such documents are not necessarily "complete" and may contain extracts of documents, books or other "snippets of information." *Id*. One record often consists of multiple documents containing attachments, such as cover memoranda or notes to files with attachments. *Id*. at ¶ 16. Such information is copied and produced "as is," and the CIA does not alter the content by reorganizing documents. *Id*. at ¶ 17. The government's explanation is adequate, and Plaintiff's allegations are not evidence of governmental bad faith.

Next, Plaintiff argues that at least four records previously produced in redacted form were missing from the Second Buroker Declaration, and the "document records have been redacted by removing an unknown number of important pages." *See Schultze Aff.*, at ¶¶ 30-32, 39, 61. Unfortunately, the Schultze Affidavit itself is largely incomprehensible, and the affiant often fails to provide support for conclusory statements that pages have been removed. (*E.g.*, ¶¶ 31, 32 and 49.) As already noted, the CIA has no obligation to reassemble or reconstruct the original document.

Next, Schultze argues that MORI Document ID numbers 1147417 and 1147418 were listed in the CIA index but not produced with the Second Buroker Declaration. *Schultze Decl.*, at ¶¶ 61-62. The Court could not find such references in the CIA's indexes listed in the February and June letters, the *Vaughn* index, and the Second Buroker Declaration. Once again, these allegations do not establish bad faith on the part of the government.

Next, Plaintiff complains that one record - - an "Analyst Note" - - appearing in the *Vaughn* index did not appear in the Second Buroker Declaration, and that although Buroker states six records were withheld in full, only five appear in the *Vaughn* index. There was an error at page 59 of the *Vaughn* index, and it was corrected. *Second Buroker Decl.*, at ¶ 16. Again, there is no evidence of bad faith on the part of the government concerning this record.

Next, Plaintiff argues that the CIA failed to identify nine responsive records which it maintains in electronic format. *See Id*. at ¶¶ 31, 33, 44, 47, 62, 66-69.

Plaintiff offers no persuasive basis for finding that some of these records even exist. Nor is there evidence to suggest that the CIA searched in bad faith or did not conduct an adequate search for these records.

Finally, Plaintiff argues, in his Sur-Reply, that the *Vaughn* index was inadequate because it was essentially spread out among two documents: the *Vaughn* index filed on June 20, 2005, and the Second Buroker Declaration filed on August 16, 2005. A *Vaughn* index should be "contained in one document, complete in itself." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). Additionally, an index with as many records and pages as this one should contain a table of contents as well as tabs for each document, as did the CIA's recent *in camera* submission. Although the CIA did not present the index this way, the Court cannot find that its actions were in bad faith.

The CIA's search for records was adequate.

**2. Claims of Exemption**

a. Exemptions 6 and 7(C) (Privacy Redactions): Plaintiff's Records 2, 7, 10, 18, 28, 41, 42, 43, 50 and 52

In ten records, the CIA redacted the names of eyewitnesses, eyewitness identification numbers, or both, claiming the redactions were proper under Exemptions 6 and 7(C). Plaintiff challenges many of these reactions. Preliminarily, the Court finds (because a balancing analysis is in order) that the government's investigation and findings concerning the crash of TWA Flight 800 involve a matter of great public interest. *See*, First Summary Judgment Order, ___ F.Supp. 2d ___, 2006 WL 2789870 at *20.

Defendants describe Plaintiff's Record 2,[6] dated February 12, 1997, as an "[i]nternal memo that makes recommendations as to questions that should be asked specific eye witnesses to the explosion during interviews." *First Buroker Decl.*, at

[6] Plaintiff's Record 2 is also identified by Document Index # 1147318 and MORI Document ID # 1176343.

p. 43. It is one page in length and the sender and recipients are redacted in the released copy. The deletion of their names is not contested, but eighteen redactions of eyewitness names under Exemptions 6 and 7(C) are challenged. Plaintiff's Record 7[7] is a "Technical Analysis Briefing of TWA Flight 800 prepared for James K. Kallstrom, Assistant Director, FBI, containing background information, data sources, analysis, diagrams and summaries of eye witness accounts." *Id*. at p. 49. It appears to be a 38-page PowerPoint presentation from March 1997. The names of two FBI Special Agents, for whom this record was apparently also prepared, are redacted.

Defendants describe Plaintiff's Record 10,[8] dated April 16, 1997, as an "[i]nternal email containing information relating to one particular eyewitness account of TWA 800 explosion and analysis attempting to place relative to second eyewitness." *Id*. at p. 64. It is one page in length and eyewitness names are redacted.[9]

Defendants describe Plaintiff's Record 18,[10] dated October 17, 1997, as an "[i]nternal email discussing new radar plots, certain eyewitness accounts, how they correlate, and impact on analysis." *Id*. at p. 51. It is two pages in length. Plaintiff contests ten redactions of eyewitness names or identification numbers under Exemptions 6 and 7(C); eight other redactions, either of CIA employees under Exemption 3 or FBI special agents under Exemptions 6 and 7(C), are not contested.

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[7] Plaintiff's Record 7 is also identified by Document Index # 1147342 and MORI Document ID # 1176350.

[8] Plaintiff's Record 10 is also identified by MORI Document ID # 1215016.

[9] Although somewhat confusing due to a numbering mistake, the Joint Chart makes clear that Plaintiff only means to challenge this record's privacy redactions under Exemptions 6 and 7(C).

[10] Plaintiff's Record 18 is also identified by Document Index # 1147324 and MORI Document ID # 1176352.

Defendants describe Plaintiff's Record 28,[11] dated March 17, 1998, as a "[d]raft report containing preliminary analysis and conclusions regarding radar tracking of TWA Flight 800." *Id*. at p. 56. This seventeen-page record, entitled "Analysis of Radar Tracking of the TWA 800 Disaster on July 17, 1996," was withheld in full and contains a redaction of the name of an FBI special agent.

Plaintiff's Record 41[12] consists of "[b]ar charts of data illustrating the timeline of eyewitness visual and audio accounts of TWA 800 explosion and handwritten analyst notes containing underlying data." *Id*. at p. 67. It is undated and is nine pages long, consisting of seven pages of computer-generated bar graphs, with each witness's name redacted adjacent to graphs of the timing of their observations of the crash, and two pages of handwritten notes, of which the only redacted portion is handwritten eyewitness names. Plaintiff contests all of these redactions.

Defendants describe Plaintiff's Record 42,[13] dated November 14, 1997, as an eight-page "[i]nternal email with attachments described as final reports to FBI: key points of analysis, TWA 800 questions and answers, reports as to what eyewitnesses saw, and two subsets of brief summaries of certain eyewitness accounts." *Id*. at p. 70. Plaintiff contests twenty-three redactions of eyewitness names under Exemptions 6 and 7(C); other redactions under Exemption 3 are not contested.

Defendants describe Plaintiff's Record 43[14] as a "draft with handwritten annotations reflecting candid discussion and opinions of individuals both within and between FBI and CIA regarding CIA analysis of eyewitness reports." *Id*. at p. 65.

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[11] Plaintiff's Record 28 is also identified by MORI Document ID # 1215194. This record also contains other contested redactions which are addressed later in this Order.

[12] Plaintiff's Record 41 is also identified by MORI Document ID # 1215014.

[13] Plaintiff's Record 42 is also identified by MORI Document ID # 1215018.

[14] Plaintiff's Record 43 is also identified by MORI Document ID # 1215024. This record also contains other contested redactions which are addressed later in this Order.

It is five pages long, undated and withheld in full. Plaintiff does not contest Defendants' redactions of names of CIA employees under Exemption 3, although he does contest the redactions of the names of FBI special agents and eyewitnesses under Exemptions 6 and 7(C), as well as the withholding of the entire record under Exemption 5.

Plaintiff's Record 50[15] is a 48-page spreadsheet "containing names of eyewitnesses (over 230) interviewed following TWA 800 explosion and other associated data - - e.g., location utilized in sound propagation analysis." *Id*. at p. 55. The record is undated. The CIA redacted every eyewitness name from this document, and Plaintiff challenges each redaction.

Defendants describe Plaintiff's Record 52[16] as a report that "[c]ontains eyewitness accounts of the destruction of TWA Flight 800, including location, observations, and analysis regarding distance and direction of respective eyewitness at the time of the explosion and elapsed time for initial sound to reach the witness." *Second Buroker Decl.*, at p. 17. It is undated, and the record contains redactions of names and initials of eyewitnesses on each page, all of which Plaintiff challenges.[17]

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[15] Plaintiff's Record 50 is also identified by Document Index # 1080903 and MORI Document ID # 1175603.

[16] Plaintiff's Record 52 is also identified by MORI Document ID # 1232320.

[17] Plaintiff did not initially contest most of Defendants' redactions under Exemptions 6 and 7(C). In their Reply to the CIA's Second Motion for Partial Summary Judgment, Defendants stated:

> When plaintiff responded to the First CIA Motion, he did not oppose the use of Exemption 6 or, in the alternative[,] Exemption 7(C) to withhold, from the records covered by the First CIA Motion, the names of FBI 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 above exemptions to withhold, from those records, the names of FBI agents and eyewitnesses.

*Def. Reply*, at p. 16 n.2. However, in the Joint Chart filed on July 21, 2006, Plaintiff opposed the redactions in all of these nine records on Exemption 6 and 7(C) grounds, and Defendants did not object to Plaintiff's right to do so (as they did to some of

As with the Second CIA Motion, Defendants argue that the eyewitnesses to the crash have a privacy "interest in not being subjected to unofficial questioning about the analytic project or investigation at issue and in avoiding annoyance or harassment in their . . . private lives." *First Buroker Decl.*, at ¶ 46. Defendants' support for their asserted privacy interest is identical to that set forth in the Second CIA motion.

For the reasons set forth in the August 31, 2006 Summary Judgment Order, the Court finds that Defendants have not established a protectible privacy interest that would be implicated by the release of witness identification numbers, and that the public interest in uncovering alleged agency malfeasance and wrongdoing in the investigation of the crash of Flight 800 outweighs the privacy interest that conceivably exists in eyewitness names. F.Supp. 2d ___, 2006 WL 2789870 at *14-16 and *20-21. The Court further finds that under Exemption 7(C) the release of these names could not reasonably be expected to constitute an unwarranted invasion of personal privacy, and, under Exemption 6, their release would not constitute a clearly unwarranted invasion of personal privacy. For these reasons, the Court DENIES summary judgment concerning the eyewitness names, initials and identification numbers in these records.

Defendants also redacted names of FBI agents involved in the investigation of the crash of Flight 800. (That was not an issue in the Second CIA Motion.) Are privacy rights in the names of FBI agents different than those in the names of eyewitnesses? "FBI agents have a legitimate interest in keeping private matters that could conceivably subject them to annoyance or harassment." *Hunt v. Fed. Bureau of Investigation*, 972 F.2d 286, 288 (9th Cir. 1992). Exemption 7(C) is often invoked

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Plaintiff's other contentions). Defendants claim Plaintiff's earlier statement should be treated as a binding waiver. *Id*. However, the Court finds that Plaintiff's express arguments in the Second CIA Motion, coupled with the parties' joint submission of Plaintiff's contested redactions as found in the Joint Chart, provided clear notice that Plaintiff intended to ultimately challenge these redactions. Moreover, Defendants were permitted an opportunity to respond to Plaintiff's arguments. Therefore, the Court will consider Plaintiff's opposition to these redactions.

when agents are involved in criminal or quasi-criminal investigations. *See, e.g.*, *Cleary v. Fed. Bureau of Investigation*, 811 F.2d 421, 423-24 (8th Cir. 1987); *Coleman v. Fed. Bureau of Investigation*, 13 F. Supp. 2d 75, 80 (D.D.C. 1998). The identity of the target or defendant in a criminal investigation is the key factor in whether agents are likely to be harassed or annoyed if their names are disclosed. For instance, in *Cleary*, the court concluded that exposing agents to harassment by persons carrying grudges were sufficient reasons to avoid disclosure, although it also noted that these privacy interests might be outweighed if the public interest in disclosure is greater. 811 F.2d at 424. Here, the investigation ultimately concluded that there was no criminal wrongdoing. There being no aggrieved "target" or defendant, the Court finds it unlikely that the FBI agents will be subjected to harassment or annoyance. Furthermore, without revealing other contact information, such as addresses or phone numbers, it is less likely, ten years later, that "revealing their names will engender an avalanche of inquiries to these officials." *See Gordon v. Fed. Bureau of Investigation*, 388 F. Supp. 2d 1028, 1044 (N.D. Cal. 2005). In *Gordon*, plaintiffs argued that government redactions of Transportation Security Agency employees' names under Exemptions 6 and 7(C) were improper. The court found that the Government's creation and maintenance of travel watch-lists were part of government policy-making, and that "[k]nowing *who* is making government policy with respect to the watch lists is relevant to understanding *how* the government operates." *Gordon*, 388 F. Supp. 2d at 1041 (emphasis in original). The same could be said here. The FBI agents were integrally involved in developing the information that the government points to for its ultimate conclusion regarding the probable cause of Flight 800's crash. Similarly, when the reliability of an investigation's methodology is in doubt, investigators have less of a right to be sheltered from public scrutiny. *Castaneda v. United States*, 757 F.2d 101, 1012 (9th Cir. 1985).

Moreover, because Plaintiff has alleged that "responsible officials acted negligently or otherwise improperly in the performance of their duties," the agents'

privacy interest is diminished. *Favish*, 541 U.S. at 174; *see SafeCard Servs. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (access to names which might confirm or refute evidence of agency impropriety increases public interest); *Neely v. Fed. Bureau of Investigation*, 208 F.3d 461, 464 (4th Cir. 2000) (with allegations of agency impropriety, release of names would help supplement public understanding of the agency's activities).

The Court concludes that the release of the names of FBI agents could not reasonably be expected to constitute an unwarranted invasion of their privacy. Therefore, the Court DENIES summary judgment concerning the agents' names found in these records.

b. Exemption 3 (CIA Redactions): Plaintiff's Records 9 and 23

Defendants describe Plaintiff's Record 9,[18] dated April 15, 1997, as an "[i]nternal email noting that one FBI agent thinks the accuracy of the clock [aboard] TWA Flight 800 may be problematic." *First Buroker Decl.*, at p. 68. It is one page in length and the sender and recipients, all CIA employees, are redacted in the released copy. Plaintiff challenges the redactions of the name of the author of this email, which is found in redactions 1 and 5.

The Court already addressed this issue in its previous Summary Judgment Order, and adopts its reasoning and conclusion here. See ___ F.Supp. 2d ___, 2006 WL 2789870 at *9-10. The CIA is exempted from disclosing the names of its employees. 50 U.S.C.A. § 403g; *see Minier v. Central Intelligence Agency*, 88 F.3d 796, 801 (9th Cir. 1996) (material within the purview of section 403g may be withheld under Exemption 3). Once it is determined that the CIA has statutory authority to withhold the document, the information is categorically exempt. *Id.* Therefore, for this reason, the Court GRANTS summary judgment concerning the redactions found in Plaintiff's Record 9.

[18] Plaintiff's Record 9 is also identified by MORI Document ID # 1215015.

Defendants describe Plaintiff's Record 23[19] as "[m]ultiple analyst notes (handwritten) including mathematical calculations and reflecting daily work and consultations with other analysts, regarding aerodynamics." *First Buroker Decl.*, at p. 44. It contains multiple dates in November and December 1997, is six pages long, and contains redactions under Exemptions 3, 5, 6 and 7(C). Plaintiff contests only the singular redaction premised on Exemption 3, found on the third page of the record. This redaction apparently is the "acronym of a CIA component." *Second Buroker Decl.*, at ¶ 11. The CIA component acronym falls within Defendants' redaction on the same page based on Exemption 5, which is unopposed (as are the redactions under Exemptions 6 and 7(C)). For that reason, the Court GRANTS summary judgment concerning the redactions found in Plaintiff's Record 23.

Plaintiff argues that Exemption 3 cannot apply to the name of a certain CIA employee whose name has appeared in a *Washington Times* article referring to an intelligence medal he supposedly won for his work on the crash. If information has been "'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 765 (D.C. Cir. 1990) (citation omitted). For an item to be "officially acknowledged," however, the information requested must be as specific as the information previously released, it must match the information previously disclosed, and it must already have been made public through an official and documented disclosure. *Id*. (citation omitted).

Defendants have not waived their right to invoke Exemption 3 to withhold this individual's name. The "once-secret" report identified in the *Washington Times* article is *not* among the documents responsive to Plaintiff's FOIA request. *Second Buroker Decl.*, at ¶ 9. Conversely, none of the records from which the CIA withheld names of CIA personnel have been previously released to the public. *Id*.

[19] Plaintiff's Record 23 is also identified by Document Index # 1147334 and MORI Document ID # 1176344.

c. Exemption 4 (Confidential Commercial Information): Plaintiff's Records 13, 27, 28, 29, 32, 45, 46, 56, 59 and 70

This exemption was analyzed in the August 31, 2006 Order. ___ F.Supp. 2d ___, 2006 WL 2789870 at *10-14.

To assist in the crash investigation, Boeing voluntarily provided information to the CIA and NTSB. *Breuhaus Decl.*, at ¶ 3. This material apparently relates to "baseline mass properties, aerodynamic and engine characteristics of the Boeing Model 747-100 aircraft." *First Buroker Decl.*, at ¶ 35. Boeing claims this information is confidential and proprietary and has detailed the "substantial competitive harm" that disclosure allegedly would cause. *Id*. *See generally Breuhaus Decl*. Furthermore, Boeing claims that in the future it would "be forced to reconsider" providing information such as this if it has to be disclosed in this case. *Second Breuhaus Decl.*, at ¶ 14.

In ten records, the CIA and NTSB redacted allegedly proprietary Boeing information, under Exemption 4. Defendants describe Plaintiff's Record 13,[20] dated May 12, 1997, as an "[i]nternal email providing information relating to several points to be addressed in the CIA video." *First Buroker Decl*., at p. 69. It is one page in length. Redaction 4, made under Exemption 4, apparently redacts information that refers to the pitch angle of the aircraft that Boeing "gets."

Defendants describe Plaintiff's Record 27,[21] dated March 3, 1998, as a "[d]raft report containing analysis and preliminary conclusions regarding further assessment of TWA Flight 800." *Id*. at p. 57. This eighteen-page document, entitled "Dynamic Flight Simulation," was completely withheld under Exemptions 4 and 5.

[20] Plaintiff's Record 13 is also identified by MORI Document ID # 1215017.

[21] Plaintiff's Record 27 is also identified by MORI Document ID # 1215195. This record also contains other contested redactions which are addressed in the next section of this Order.

Plaintiff's Record 28, discussed above, is a seventeen-page record concerning radar tracking.

Defendants describe Plaintiff's Record 29,[22] with pages containing various dates in 1998 as well as multiple undated pages, as "[v]arious charts, extract of draft report, and notes regarding radar data, which contain or reflect preliminary conclusions re analysis of TWA Flight 800, ie. [sic], subset of data and preliminary analysis of draft report." *Id*. at p. 58. The record is twenty-two pages long and was withheld in full. Plaintiff challenges the redactions under Exemption 4 (as well as Exemption 5).

Defendants describe Plaintiff's Record 32[23] as a "[p]rint out containing trajectory simulation program setup and data." *Id*. at p. 62. It is titled "MVS Trajectory Program 2D Study" and is twenty-eight pages long. The first page of the record has writing that says "3/98" and also "3/15/04." None of the data in the printout is redacted, but two sections of handwritten information on the first page are redacted under Exemptions 3 and 4, respectively. Plaintiff challenges only the Exemption 4 redaction.

Defendants describe Plaintiff's Record 45[24] as an "[e]mail conveying trajectory simulation program input, 'best estimate' re certain radar data plots, and resulting charts depicting certain aspects of flight simulation." *Id*. at p. 60. It is fifteen pages long and undated. Plaintiff challenges redactions 4 through 6, made under Exemption 4. These redactions are found on pages 2, 4 and 5 of the document.

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[22] Plaintiff's Record 29 is also identified by MORI Document ID # 1215196. This record also contains contested redactions under Exemption 5 which are addressed in the next section of this Order.

[23] Plaintiff's Record 32 is also identified by MORI Document ID # 1215202.

[24] Plaintiff's Record 45 is also identified by MORI Document ID # 1215200.

Defendants describe Plaintiff's Record 46[25] as "[m]ultiple graphs conveying technical data." *Id*. at p. 63. The single page document is titled "Free Response to Mass Prop and Aero Change Variation due to Thrust," and is marked "Preliminary #1." This record was withheld in full based upon Exemption 4.

Defendants describe Plaintiff's Record 56,[26] dated March 25, 1997, as two sets of graphs and charts depicting left and pitching moment coefficients of Boeing Model 747 aircraft. *Moye Decl.*, at p. 338. The four-pages long record is dated March 24, 1997. It was created by Boeing, *Id*. at ¶ 54, and was withheld in full. Boeing claims that a "competent engineer with access to the hypothetical configuration represented in the graphs and tables . . . could determine the baseline lift coefficient and pitching moment coefficient for the Boeing Model 747-100 aircraft." *First Breuhaus Aff.*, at ¶ 8. Plaintiff challenges Defendants' withholding of this record based on Exemption 4.

Defendants describe Plaintiff's Record 59,[27] dated April 4, 1997, as three graphs and two charts depicting lift, pitching moment, and drag coefficients of the Boeing Model 747 aircraft. *Moye Decl.*, at p. 356. The record was created by Boeing. *Id*., at ¶ 54. It is five pages long and was withheld in full based on Exemption 4. The charts and graphs compare the baseline coefficients with those for an aircraft minus its forward body. Boeing claims that a "competent engineer with access to the hypothetical configuration represented in the graphs and tables . . . could determine the baseline lift coefficient, pitching moment coefficient, and drag coefficient for the Boeing Model 747-100 aircraft." *First Breuhaus Aff.*, at ¶ 11. Plaintiff challenges Defendants' withholding of this record based on Exemption 4.

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[25] Plaintiff's Record 46 is also identified by MORI Document ID # 1215209.

[26] Plaintiff's Record 56 is also identified as NTSB Record 6.

[27] Plaintiff's Record 59 is also identified as NTSB Record 8.

Finally, Defendants describe Plaintiff's Record 70[28] as a "[c]omputer program written by NTSB staff to simulate the flight path of aircraft." *Moye Decl.*, at p. 416. It is undated and found in electronic form only.[29] Defendants withheld this program in full under Exemption 4 because it incorporated engine thrust and draft, lift and pitching moment coefficient data provided by Boeing. *Id*. at p. 419. The program apparently cannot operate without this data; as such, Defendants claim it is not segregable. *Id*. Plaintiff challenges Defendants' withholding of this record.

As they did in the Second CIA Motion, Defendants argue that, under the *National Parks* test, release of this information likely would impair the government's ability to obtain comparable information in the future, and that the disclosure of this information would cause Boeing substantial competitive harm. Defendants rely primarily on the Affidavits and Declarations of Richard S. Breuhaus (Chief Engineer of Air Investigation Safety for Boeing) as well as the Declarations of Melba Moye (Chief of the NTSB's FOIA branch) and its attached *Vaughn* index record descriptions, the Declarations of Terry N. Buroker (the CIA's Information Review Officer, in the Directorate of Intelligence) and the Declarations of Dennis Crider (the NTSB engineer intimately involved in the Flight 800 investigation). The Court discussed several of these materials, such as the Breuhaus Declarations and the First Buroker Declaration, in its previous order, along with the September 8, 2005 Hoffstadt Affidavit, on which Plaintiff relies. See ___ F.Supp. 2d ___, 2006 WL 2789870 at *17-19. The declarations and affidavits the Court previously considered contain information that overlaps the additional declarations and affidavits described

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[28] Plaintiff's Record 70 is also identified as NTSB Record 15. This record also contains contested redactions under Exemption 5 which are addressed in the next section of this Order.

[29] In response to the Court's order for *in camera* submission of the NTSB records, Defendants submitted "five pages of the main-body simulation executable," which they state are "representative of Record 15." This printout appears to consist of data matrices in binary code and would undoubtedly be incomprehensible to anyone lacking computer, technical or scientific expertise.

just above. In fact, some of the testimony is repeated word-for-word from one declaration to another.

For the reasons set forth in the previous Summary Judgment Order, *Id.*, the Court finds that there is a factual dispute as to whether Boeing will suffer substantial competitive harm and Defendants have not proffered evidence sufficient to meet their burden to show that release of this information likely would impair the government's ability to obtain comparable necessary information in the future. Therefore, the Court DENIES summary judgment concerning the contested uses of Exemption 4 in each of these ten records.

d. Exemption 5 (Deliberative Process Privilege): Plaintiff's Records 27, 28, 29, 43, 70 and 74

Defendants withheld six records in whole or in part based upon the deliberative process privilege and Exemption 5. The Court reviewed these records *in camera*. Although each record must be analyzed separately, Plaintiff argues that *none* of them was predecisional, because they were all generated following the broadcast of the CIA animation on November 17, 1997, which, Plaintiff argues, constituted a final agency report. Defendants respond that the CIA's final conclusion concerning what these eyewitnesses saw occurred after the records at issue here were generated. The CIA did obtain additional data after that broadcast and it continued to refine its analysis, although the additional data did not change the CIA's ultimate conclusion concerning what eyewitnesses saw. Nor was any report explicitly characterized as "final" subsequently issued. *Id.*

Exemption 5 distinguishes "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). Thus, a record is predecisional if

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an agency can identify a specific decision to which it is predecisional. *Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997).

The Court agrees with Plaintiff that the CIA animation was a final disposition of that agency. However, just because it was *a* final disposition does not mean it was the *only* final disposition. The CIA could have published some sort of addendum stating it had received and considered new data and that it had (or had not) changed its ultimate conclusion. Although this is not what occurred, it also is not what was required. Defendants have presented uncontroverted evidence that the CIA analyzed new data that led it to reach a conclusion. That the later conclusion was no different than the previous one does not preclude it from being "final" for purposes of FOIA. Therefore, the Court finds that so long as the records in question predate the CIA's second conclusion concerning what eyewitnesses saw (which incorporated new data provided by the NTSB), they may properly be considered "predecisional" (if they otherwise qualify for that status).

The Court will now describe and analyze each record.

*i. Plaintiff's Record 27*

Plaintiff's Record 27, discussed above, is an eighteen-page "[d]raft report containing analysis and preliminary conclusions" concerning the crash. It is entitled "Dynamic Flight Simulation." *First Buroker Decl.*, at p. 57. It is dated March 3, 1998. It was withheld in full based upon the deliberative process privilege.

The handwritten edits and the language used by the author of Record 27 demonstrate that it was written prior to the final agency decision, and Plaintiff presents no evidence to the contrary. Therefore, the Court finds that this record is predecisional.

Record 27 also is deliberative, in that its disclosure would expose the CIA's "decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."

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*Assembly of the State of California v. United States Dep't. of Commerce*, 968 F.2d, 916, 921 (9th Cir. 1992) (en banc), as amended on denial of reh'g (Sept. 17, 1992). The text confirms that the document was prepared "in order to assist an agency decisionmaker in arriving at his decision." *Maricopa*, 108 F.3d at 1093. The language, context, and handwritten edits in the record support that it was deliberative in nature. The document explains the steps CIA analysts took in calculating the flight simulation, particular challenges they faced, which data and other information they found important, shortcomings of their analysis to that point, and recommendations for the ultimate decision-makers.

Record 27 is not segregable, except to very limited extent that its title, date and the bolded titles may be released. The entire text of the document otherwise encompasses the deliberative process of its author(s). The Court therefore GRANTS summary judgment as to the remainder of Record 27, including its text, graphs and handwritten notes.

*ii. Plaintiff's Record 28*

Plaintiff's Record 28, also discussed above, is a seventeen-page "[d]raft report concerning preliminary analysis and conclusions regarding radar tracking" and is entitled, appropriately, "Analysis of Radar Tracking." *Id.* at p. 56. It is dated March 17, 1998. Defendants withheld this record in full based upon the deliberative process privilege.

Record 28 contains both text and graphs. Handwriting on the first page states "draft" and "shown to NTSB but never finalized." The "never finalized" notation and the language in the text support that it was written prior to the final agency decision, and Plaintiff presents no evidence to the contrary. Therefore, Record 28 is predecisional. It also is deliberative. It contains conclusions and thoughts of CIA analysts concerning the viability and accuracy of certain radar data, the application of such data in determining the flight path of Flight 800, the problems with certain data and the thought processes of individuals who analyzed the data. As a whole, the

text of this document shows that it was prepared "in order to assist an agency decisionmaker in arriving at his decision." *Maricopa*, 108 F.3d at 1093. Its disclosure would expose the CIA's "decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly*, 968 F.2d at 921.

As with Record 27, the Court finds that Plaintiff's Record 28 is not segregable, except to the very limited extent of its title, date, the bolded titles of each section of the memorandum, Figure 1 (on page 3 of the record) along with its accompanying notation, and the entirety of the Appendix.[30] Release of those portions of Record 28 would neither discourage candid discussions among agency personnel nor undermine the agency's ability to perform its functions. To that extent only, the Court DENIES summary judgment as to Plaintiff's Record 28, but GRANTS summary judgment as to the remainder of Record 28, including its text and additional graphs.

*iii. Plaintiff's Record 43*

Plaintiff's Record 43, also discussed above, is a five-page undated "[d]raft with handwritten annotations reflecting candid discussion and opinion . . . regarding CIA analysis of eyewitness reports" about the crash. *Id*. at p. 65. It is entitled "An Overview of the C.I.A.'s Analysis of Witness Statements in the TWA Flight 800 Investigation." The cover page preceding the overview is described as a "Response to allegations of SA [Name] regarding C.I.A. analysis." Many comments and edits appear on each of the five pages, in different handwritings. The shaded word "draft" appears across the entirety of the four pages of text. Defendants withheld this record in full based upon the deliberative process privilege.

Notwithstanding the uncertainty as to the date(s) of its creation, Record 43 appears to be predecisional and almost certainly is deliberative. It contains assessments of the CIA's analysis of witness statements during the investigation. The

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[30] The data found in the Appendix is not deliberative for the same reasons as it was not in Plaintiff's Records 66 and 78 in the First Summary Judgment Order. ___ F.Supp. 2d ___, 2006 WL 2789870 at *23-25. See Plaintiff's Record 74, below.

handwritten comments unquestionably are part of a give-and-take exchange. The Court GRANTS summary judgment to defendants as to this Exemption.

*iv. Plaintiff's Record 74*

Defendants describe Plaintiff's Record 74[31] as a "[t]able tracking the location in the ocean of debris from TWA flight 800." *Id*. at p. 483. The undated record, which was withheld in full, "consists of fifteen pages of data . . . that were collected, collated and prepared or edited by NTSB staff in order to track and categorize the latitude, longitude, description and comments concerning pieces of debris from TWA flight 800 located in the ocean." *Id*. Defendants state that this data "provided a starting point and confirmation for the sequencing, as measured by the location of the debris, of events that occurred during the crash," and that the sequence ultimately developed from this data was used in the creation of simulations included in Addendum II. *Id*. Defendants state this data was preliminary in nature and subject to confirmation and correction. *Id*. at p. 484. Record 74 also contains handwritten comments, opinions and speculations of investigators. *Id*.

Moye declared that the data in this document was collated in anticipation of and ultimately used in the creation of Addendum II. *Id*. at p. 483. The Court finds that, although the document itself is undated, Defendants have shown that this record is preliminary in nature.

Defendants maintain that the act of collecting and organizing data regarding the position of ocean debris is deliberative. The Court cannot agree. For the reasons set forth in the previous Summary Judgment Order, especially as applied to Plaintiff's Records 66 and 78, the Court finds that the NTSB's selection and organization of factual data concerning debris recovery, without more, is not deliberative.

This determination is not the end of the Court's inquiry, however. Record 74 contains seven columns in addition to the numerous handwritten notes and comments. Six of these columns - - all but the "Comments" column - - contain raw

[31] Plaintiff's Record 74 is also identified as NTSB Record 27.

information that does not reflect or reveal mental processes of the NTSB investigators. However, having reviewed the document *in camera*, the Court concludes that the information found under the column entitled "Comments," as well as the handwritten notes found in the record, *are* deliberative; they evaluate and analyze the facts contained in the other columns. Disclosure of the "Comments" column and the handwritten annotations "would expose [the NTSB's] decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Assembly*, 968 F.2d at 921 (quotation omitted).

FOIA requires that a reasonably segregable portion of a record shall be provided following deletion of the portions which are exempt. 50 U.S.C.A. § 552(b). Although the NTSB may not withhold the entirety of Record 74 simply because it contains some exempt material, that material is not "inextricably intertwined" with the non-exempt portions. *See Mead Data Central*, 556 F.2d at 260. Therefore, the Court GRANTS IN PART AND DENIES IN PART Defendants' use of Exemption 5 to withhold Plaintiff's Record 74. Only the Comments column and the handwritten notes may be withheld.

*v. Plaintiff's Record 29*

Plaintiff's Record 29, discussed earlier, consists of twenty-two pages of charts, draft reports and notes regarding radar data that allegedly "contain or reflect preliminary conclusions" concerning the crash, according to Defendants' *Vaughn* index. Having reviewed this record *in camera*, the Court does not adopt the government's description.

Record 29 appears to consist of several sets of papers that apparently were assembled as one file. The first three pages contain the date March 17, 1998, in handwriting, and consist of graphs of azimuth and elevation from a specified location. The fourth page appears to be a printout of an execution from a computer file. It is dated January 6, 1998, and contains what appears to be several data entries

expressed in numeric form. The fifth page contains two formatted graphs, one concerning altitude and one radar range. It is undated. Almost all the remaining seventeen pages consist of undated graphs of various data (with the exception of one graph dated January 14, 1998). For example, one graph depicts radar tracking by various local radar sites and the flight path of the aircraft. Another page shows the radar locations of four sites mapped by latitude and longitude.

Defendants submit two conclusory statements in support of their argument that this record is preliminary. *See First Buroker Decl.*, at p. 58; *Second Buroker Decl.*, at ¶ 17. If those pages that contain dates between January and March 1998 were created at those times, that would be during the period when the CIA reviewed and incorporated "new" NTSB data into its analysis, and that would be consistent with Defendants' characterization. However, these charts are not deliberative, despite Defendants' conclusory statements to the contrary.

Defendants claim that these graphs and charts contain "intra-agency and inter-agency deliberations with NTSB, including analyst's selection of variables, assumptions, calculations and graphical representations. . ." *See First Buroker Decl.*, at p. 58; *Second Buroker Decl.*, at ¶ 17. I do not agree. This record contains, at most, graphical representations of factual data. If any deliberation concerning the manipulation of such data occurred, it could only be about how to represent the data in this manner. Therefore, for the reasons set forth in the previous Summary Judgment Order from pages 42 through 49, especially as it applies to Plaintiff's Record 76, See ___ F.Supp. 2d ___, 2006 WL 2789870 at *25, I find that these graphical representations of factual data concerning debris recovery are not deliberative. I therefore DENY Defendants' use of Exemption 5 and the deliberative process privilege to withhold Plaintiff's Record 29.

*vi. Plaintiff's Record 70*

Plaintiff's Record 70, (NTSB Record 15) also discussed above, is a computer program written to simulate the flight path of Flight 800, and available only in

electronic form. *Moye Decl.*, at p. 416. This program was withheld in full based upon the deliberative process privilege.

Dennis Crider, an NTSB employee, developed a flight simulation software program prior to joining the NTSB. *Crider Decl.*, at ¶ 9; *Moye Decl.*, at p. 416. While at the NTSB, Crider further developed and used the simulation program in several accident investigations, including that of Flight 800. *Crider Decl.*, at ¶ 9; *Moye Decl.*, at p. 416.

There is no standardization for simulation code, and the program was never intended for public use, so it was written in a format intuitive to Crider.[32] *Crider Decl.*, at ¶ 8. At the time of the Flight 800 investigation, there were no instructions or guides for using the program except for limited comments written by Crider. *Id.* (Defendants do not explain the comments.) The program itself uses mathematical models[33] that describe the forces acting on the specific aircraft type at issue to derive the motion resulting from these forces. *Id.* The mathematical formulations necessary for the simulation program are written in computer code, and according to Crider are not segregable. *Id.*

One of Crider's assignments during the investigation of Flight 800 was to determine the flight path of the aircraft after it lost its forward fuselage. *Moye Decl.*, at p. 416. Crider modified his program for this task. *Crider Decl.*, at ¶ 19; *Moye Decl.*, at p. 416. NTSB management reviewed and commented on his work after the initial simulation was complete. *Crider Decl.*, at ¶ 19. Crider explained that, over time, he continued to exercise his own judgment in determining whether the program was operating as designed and whether it was representing and using data

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[32] This program is written in C++, with portions written in C. *Crider Decl.*, at ¶ 9.

[33] Some of these mathematical models contain information the government claims is proprietary to Boeing . *Moye Decl.*, at p. 417.

appropriately. He modified the program and the simulation as necessary, such as when new data became available. *Id*. at ¶¶ 20-21, 23-24.

To run a specific simulation, the program needs such information as the starting condition (airspeed, position, altitude, etc.), specific configuration of the flight (such as flap setting and landing gear position), the aircraft's weight and center of gravity, and some basis for guiding the aircraft. *Crider Decl.*, at ¶¶ 11-12; *Moye Decl.*, at p. 418. The program may be adjusted and adapted to analyze differing versions of aerodynamic data and physical attributes of aircraft.[34] *Id*. at p. 421. The flight data recorder and radar data provided much of this information for Flight 800. *Id*. at p. 418.

Defendants claim this program was used to provide information the NTSB used in determining the probable cause of the crash of Flight 800 and the safety recommendations that followed. They claim that an understanding of the flight path following the separation of the plane's nose was expected to aid the NTSB in understanding the causes of the crash. *Id*. at pp. 421-22. Defendants argue that Crider used the program to pursue different possibilities related to the flight path of Flight 800. *Id*. at p. 422. Crider considers his simulation to be a tool to do so. *Supp. Crider Decl.*, at ¶ 5. The source code of the simulation used by Crider is no longer available, as it has been updated and improved over time. *Id*. at ¶ 5. Therefore, the only "simulation software" maintained as a record is the executable file, which consists of binary machine language (0s and 1s).[35] *Id*.

Crider explains that, over time, he would run simulations using his program and the data inputs would be changed between each run to attempt to make the

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[34] Even so, though, the record at issue is simply a fixed iteration consisting of the program at a certain time, *not* a series of programs that might reveal how they changed as Crider refined them.

[35] Crider did retain the last control system source file and aerodynamics source file specific to Flight 800. *Supp. Crider Decl.*, at ¶ 6. However, these do not appear to be a part of Plaintiff's Record 70, but rather two separate responsive records.

simulation results "best represent the action of the aircraft as reflected by the radar data." *Id*. at ¶¶ 8-9. Crider claims this is a "deliberative, analytical process in which staff must be free to adjust and experiment without fear that staff work at whatever stage will be released and compared to the Safety Board's ultimate conclusions . . . ." *Id*. at ¶ 10.

Plaintiff does not challenge that this record is predecisional, and the Court finds that it is. However, the Court does not agree with Defendants that content of the simulation program, as opposed to that of the input or output files, is deliberative.

First, although Crider clearly utilized some judgment in selecting "relevant" data he needed for his simulation program, *see Crider Decl.*, at ¶¶ 18, 23-24, the selection of some data from a larger set does not, alone, amount to a deliberative process under Exemption 5. *See First Summary Judgment Order*, ___ F.Supp. 2d ___, 2006 WL 2789870 at *14, 23. Instead, the government must show that the deliberative process can be determined from the selection of the data alone. *Carter v. United States Dep't of Commerce*, 307 F.3d 1084, 1091 (9th Cir. 2002). Defendants present no evidence to this end.

Second, Crider explains that he "performed all of the calculations and made all of the necessary adjustments to the computer program to simulate the flight path of TWA flight 800 for the NTSB." *Crider Decl.*, at ¶¶ 19, 24. Although Crider may have used his "engineering knowledge and professional judgment" in making these decisions, *see Id*. at ¶ 20, there is no evidence that, by reviewing the disclosed source file, a reader would be able to understand or reconstruct the NTSB's deliberative process. *See Assembly*, 968 F.2d at 922-23.

Finally, Crider states that management reviewed and commented on his work after the initial simulation was completed. *See Crider Decl.*, at ¶ 19. However, there is no allegation, much less evidence, that disclosure of this program would disclose the content of that review and content. Indeed, generally speaking, Crider does not claim that the disclosure of the program would "expose an agency's decisionmaking

process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[36] *See Assembly*, 968 F.2d at 921 (quotation omitted). His simulation program was merely a tool used in connection with other data to derive a result based upon that data. Defendants have failed to carry their burden that what has been withheld "represent[ed] the mental processes of the agency in considering alternative courses of action prior to settling on a final plan." *Nat'l Wildlife Fed'n*, 861 F.2d at 1122. Therefore, I DENY Defendants' use of Exemption 5 and the deliberative process privilege to withhold this record.

## III. Conclusion

For the foregoing reasons, the Court GRANTS summary judgment as to Plaintiff's Records 9, 23, 27 (in part), 28 (in part), 43 and 74 (in part). For Records 27 and 28, Defendants shall produce the title, date, bolded sub-titles and (in the case of Record 28) Figure 1 and the Appendix. For Record 74, Defendants shall produce everything but the "Comments" column and the handwritten notes. The Court DENIES Defendants' summary judgment motions as to all the other disputed Records.

Not later than ten days from the date of this Order the parties shall lodge a stipulated "[Proposed] Judgment" reflecting this Court's rulings on all three summary judgment motions. By stipulating to the terms of the "[Proposed] Judgment," neither side shall waive his or its right to challenge those rulings on appeal. If the parties fail

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[36] Conversely, Crider does make such a claim concerning the release of the input and output files used in connection to this simulation program. *Supp. Crider Decl.*, at ¶ 10.

to stipulate to such a "[Proposed] Judgment," the Court may sanction monetarily any party or lawyer whose position was unreasonable.

IT IS SO ORDERED.

DATED: October _____, 2006

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A. Howard Matz
United States District Judge