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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ELECTRONIC PRIVACY  
INFORMATION CENTER,

Plaintiff,

v.

NATIONAL AERONAUTICS  
AND SPACE ADMINISTRATION,

Defendant.

Case No. C 04-00296 (RMW/PVT)

**DECLARATION OF  
LORIE M. PESONEN**

I, Lorie M. Pesonen, do hereby as follows:

1. I am currently an Attorney Advisor with the Commercial and International Law Division, Office of the General Counsel at the National Aeronautics and Space Administration ("NASA"). The Commercial and International Law Division is to conduct NASA's Freedom of Information Act (FOIA) appeals process.

2. One of my responsibilities is to review incoming FOIA administrative appeals, when assigned, and draft the final Agency FOIA decisions for review and

signature by the NASA Deputy Associate Administrator. This responsibility includes reviewing the appeal, the initial determination, and the agency documents responsive to the appeal, and applying the law. When required, I serve as the Agency contact point for litigation involving FOIA.

3. I was responsible for the administrative appeal of the initial determination issued by Mr. Terence Pagaduan, FOIA Officer at NASA's Ames Research Center (ARC), filed by the plaintiff, the Electronic Privacy Information Center (EPIC), under FOIA, 5 U.S.C. § 552 *et seq.*, by letter dated December 17, 2003.

4. Due to the nature of my official duties, I am familiar with NASA's obligations under FOIA, including the application of FOIA exemptions.

5. The statements made in this declaration are based upon my personal knowledge, information made available to me in the performance of my official duties, and conclusions reached in accordance therewith.

6. The purpose of this declaration is to set forth the subject of the plaintiff's FOIA request, chronology of correspondence relating to the plaintiff's FOIA request, and the bases for the redaction or withholding of information from certain responsive documents.

#### **Background on NASA's Aviation Security Research Effort**

7. After the tragic events of September 11, 2001, NASA undertook exploratory studies to determine how the agency could contribute to enhancing aviation security. As part of that effort, ARC management requested ideas from its researcher's for aviation security-related research. ARC management initiated an aviation security planning process to develop a subset of the ideas, submitted by researchers, into a set of potential activities that could be pursued to enhance the security of the national airspace.

8. This initial aviation security research effort was coordinated with the Federal Aviation Administration (FAA). This coordination included exchange of information and participation in workshops.

9. ARC is located at Moffet Field, California, and is one of NASA's ten field centers and directly supports NASA's Aerospace Technology Enterprise. The Aerospace Technology Enterprise is NASA's advanced technology developer and provider for long-term aerospace technologies, including engineering tools and processes, and system concepts. ARC was founded on December 20, 1939, as an aircraft research laboratory by the National Advisory Committee for Aeronautics. In 1958, ARC became part of NASA. The airline industry has an historic relationship with researchers at ARC because it has long provided critical research and testing on numerous aspects of air travel.

10. From the researchers' submissions, ARC management selected passenger threat assessment for further study. Passenger threat assessment includes the use of data analysis algorithms, a computational procedure with a finite number of steps, to determine the degree to which a passenger poses a threat to an aircraft. Data mining is one type of data analysis. It is an information extraction activity. The goals of this activity are to discover hidden facts contained in databases. NASA uses data mining and other data analysis techniques to detect anomalies in large volumes of scientific and engineering data.

11. In order to test the hypothesis that NASA's data analysis algorithms could help with passenger threat assessment, the ARC researchers informed ARC management that a sufficiently large amount of actual passenger data would be needed to test the ability of the algorithms to scale up to the large volumes of data used by the airlines.

12. To that end, NASA requested three (3) months worth of passenger data from Northwest Airlines (NWA) in December 2001. NASA received compact disks containing one (1) day's worth of data in December 2001. In March 2002, NWA voluntarily provided NASA with three (3) months worth of passenger data.

13. The NWA data was one of several databases used to support the data analysis research. The other databases were commercially available. ARC researchers used a small portion of the NWA data, which they stripped of personal identifying information prior to running some initial analysis. Research funding was terminated before ARC had the capability to run analysis on the entire three (3) months worth of passenger data.

14. In March and September 2002, the ARC researchers exchanged electronic mail messages (e-mails) with IBM researchers that sought advice as to what type of IBM products could assist with certain NASA requirements in this research. IBM provided this information voluntarily. These discussions did not go beyond the exploratory stage.

15. In October 2002, ARC management began to refocus the aviation security-related research and in February 2003, decided to terminate the funding for the data mining research using the NWA data. As a result, ARC management decided to terminate the research prior to its completion. No final report was issued.

16. NASA returned the NWA data to NWA in September 2003.

### **Chronology of Administrative Action and Correspondence**

17. By letter dated October 3, 2003, Ms. Marcia Hoffman, staff counsel with EPIC, requested documents under FOIA (hereinafter "EPIC's FOIA Request"). A copy of EPIC's FOIA Request is attached as Exhibit A.

18. EPIC's FOIA Request sought the following documents:

1. Any correspondence between representatives of Northwest Airlines and NASA Officials or employees regarding the disclosure of Northwest passenger data to NASA;
2. Any documents detailing, describing or concerning disclosure of Northwest passenger data to NASA; and
3. Any materials related to negotiations or communications between NASA and other commercial airlines for passenger data.

19. Mr. Terence Pagaduan, NASA ARC FOIA Officer, acknowledged receipt of EPIC's FOIA Request by e-mail dated October 9, 2003. A copy of the response is attached as Exhibit B.

20. By e-mail dated October 20, 2003, Ms. Hoffman clarified EPIC's request FOIA (hereinafter "EPIC's Amended FOIA Request"). A copy of EPIC's Amended FOIA Request is attached as Exhibit C. EPIC specified it was not interested in obtaining the any actual passenger data that an airline may have disclosed to NASA. EPIC 's Amended FOIA Request includes the following records:

1. records of negotiations, discussions, or other communications regarding disclosure of passenger data from Northwest or other airlines to NASA;
2. any documents related to how NASA has used passenger data received by Northwest or any other airline; and,
3. any documents indicating the scope of such disclosure.

21. By letter dated December 16, 2003, NASA ARC provided the initial determination to EPIC's Amended FOIA Request (hereinafter "ARC's Initial Determination"). A copy of ARC's Initial Determination is attached as Exhibit D.

22. Of the records identified as responsive to EPIC's Amended FOIA Request, NASA

ARC released seven (7) documents in their entirety (36 pages) and withheld the remaining responsive documents in their entirety under applicable exemptions under FOIA.

23. Specifically, ARC's Initial Determination denied the release of the remaining responsive records under 5 U.S.C. § 552 (b)(5) as "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." NASA ARC explained that the documents withheld under Exemption 5 included drafts and other documents that are preliminary and pre-decisional in nature.

24. NASA ARC also withheld records in full or part under 5 U.S.C. § 552 (b)(4) as "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

25. ARC's Initial Determination advised EPIC of its right to appeal the initial determination and instructed EPIC that the Appeal must be addressed to the Administrator, NASA Headquarters.

26. By letter dated December 17, 2003, EPIC appealed the ARC Initial Determination to the "FOIA Appeal Administrator" at NASA Headquarters (hereinafter "EPIC FOIA Appeal"). A copy of the EPIC FOIA Appeal is provided at Exhibit E.

27. In the appeal, EPIC appealed the ARC Initial Determination on the grounds that:

1. ARC applied the exemptions too broadly;
2. ARC failed to segregate exempted material from non-exempted material; and,
3. it appeared likely that ARC had not conducted an adequate search for the responsive material.

28. Due to administrative error, EPIC's FOIA Appeal was not forwarded to the Commercial and International Law Division for action until January 21, 2004.

29. On January 21, 2004, Mr. E. Jason Steptoe, Associate General Counsel for Commercial and International Law Division, Office of the General Counsel, NASA Headquarters, spoke with Ms. Hoffman via telephone. During the that telephone conversation, and confirmed by letter dated the same date, Mr. Steptoe confirmed NASA's intention to expedite the final determination of EPIC's appeal no later than close of business February 5, 2004. A copy of the confirmation letter is provided as Exhibit F.

30. EPIC filed its Complaint for Injunctive Relief on January 22, 2004.

31. On or about January 29, 2004, ARC provided paper documents and documents saved to an electronic disk that resulted from a search for correspondence between representatives of Northwest Airlines and NASA officials or employees regarding the disclosure of Northwest passenger data to NASA; any documents detailing, describing or concerning the disclosure of Northwest passenger data to NASA; and any materials related to negotiations or communications between NASA and other commercial airlines for passenger data. These records were obtained from the hard copy files and computer hard drives of NASA employees from the Aviation Systems Division and the Information Sciences and Technology Directorate at NASA's Ames Research Center. These program offices at ARC had the responsibility for conducting the aviation security research related to the FOIA request.

32. By letter dated February 5, 2004, and provided via fax, I confirmed that NASA was proceeding with the EPIC FOIA Appeal and intended to release its final determination on February 20, 2004. A copy of the letter dated February 5, 2004 is provided as Exhibit G.

33. By letter dated February 5, 2004, and provided via fax, I confirmed that NASA was proceeding with the EPIC FOIA Appeal and intended to release its final determination on

February 20, 2004. A copy of the letter dated February 5, 2004 is provided as Exhibit H.

34. By telephone call on March 31, 2004, and confirmed by letter dated April 2, 2004, I informed Ms. Hoffman of NASA's decision to close the administrative process relating to EPIC's FOIA appeal because the documents were now the subject of litigation. A copy of the letter dated April 2, 2004, is provided as Exhibit I.

35. On April 27, 2004, NASA released additional documents, either in full or in part, to EPIC. A copy of the letter dated April 27, 2004, is provided as Exhibit J.

36. Of the documents forwarded by ARC, a total of 121 documents were identified as responsive to the EPIC FOIA Appeal. Thirty-Six (36) documents (63 pages) were released to EPIC in full; twenty-five (25) documents (58 pages) pages were released to EPIC in part; and, sixty-one (61) documents (525 pages) were withheld in full under applicable FOIA exceptions.

#### **Documents Withheld**

37. A description of each document, or document type, withheld in the whole or in part by NASA, and the bases for withholding information contained in each document is set forth in the Index attached as Exhibit K. The reasons for NASA's determination that certain information responsive to EPIC's FOIA request is exempt from the FOIA's disclosure requirement are set out in more detail below.

#### **Exemption 4**

38. Exemption 4 of the FOIA protects two broad categories of information: 1) trade secrets and 2) information that is commercial or financial, where that information has been obtained from a person and is privileged or confidential. 5 U.S.C. § 552(b)(4).



39. As addressed in paragraphs 12 and 13, when the ARC researchers asked for information from NWA and IBM, each volunteered their corporate information.

40. Consistent with NASA FOIA regulations, 14 C.F.R. § 1206.610, both NWA and IBM were contacted to ascertain whether either objected to release of the responsive records under Exemption 4. NWA did not object to the release of NWA-related records under Exemption 4. NWA, however, did object to the release of some passenger-related information pursuant to Exemption 6, discussed below.

41. By letter dated April 21, 2004, Douglas R. Duberstein, IBM's Staff Counsel, objected to the release of information contained in Document Nos. 70 and 85. Specifically, IBM objected to the release of the IBM employees' names and associated data contained in the records under Exemption 4 and Exemption 6 (discussed below). IBM objected to the release of its employees' identities under Exemption 4 because it considers its employees to be corporate assets and guards the identity of its employees in order to prevent competitors from raiding them. Secondly, IBM objected to the release of the product information contained in the e-mails under Exemption 4 because the e-mails discuss the application of specific IBM products to NASA's specific requirements. IBM noted that such information would undermine IBM's competitive advantage by allowing competitors access to ideas and design details that they would not have had or would have had to spend considerable funds to develop on their own. A copy of IBM's letter, dated April 12, 2004, is provided at Exhibit L (IBM has permitted NASA to include this letter in support of Exemption 4).

42. IBM has a commercial interest in the records because the records contain confidential or privileged information disclosure of which is likely to cause substantial harm to

IBM's competitive position, and they do not contain the type of information that would be customarily released to the public. Moreover release of this information would harm the government's ability to obtain this type of information in the future. Thus, I have redacted the information from Document Nos. 70 and 85 under Exemption 4.

#### Exemption 5

43. NASA has redacted information or withheld documents from disclosure under Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5). Exemption 5 exempts from release "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption is meant to guard against the chilling effect that disclosure might have on frank and open discussions within deliberative bodies. Exemption 5 protects from release records that are predecisional and a direct part of the process by which governmental decisions and policies are made.

44. The documents withheld under Exemption 5 of FOIA consist of draft versions of presentations, reports or other documents. See Document Nos. 2, 6, 8, 10, 13-17, 19, 20-27, 29, 35, and 36.

45. The documents withheld or the information redacted under Exemption 5 of FOIA also consist of pre-decisional advice, opinions and recommendations regarding the course of the aviation security research and do not reflect the final agency policy, documents, or actions. See Documents Nos. 28, 30-32, 34, 41, 42, 45, 46, 48, 52, 55-63, 67, 69, 78, 80, and 81.

46. The documents withheld or the information redacted under Exemption 5 of FOIA also consist of internal NASA deliberations among the ARC researchers and the researchers and management, or interagency deliberations regarding the aviation security

research and/or possible collaboration. See Document Nos. 1, 3-5, 7, 9, 11, 12, 18, 21, 33, 37- 40, 49-51,53, 54, 66, 68, 71, 72, and 84.

47. Some of the documents withheld or the information redacted under Exemption 5 of FOIA consist of deliberations between NASA researchers and representatives of corporations who were acting as outside consultants to the researchers. In the case of Document Nos. 70 and 85, NASA researchers sought advice and recommendations from IBM researchers concerning the capabilities of IBM products to meet the demands of ARC's data mining research using the NWA passenger data. As these discussions remained informative and IBM did not seek a benefit from the government, IBM remained in a consultant status. Therefore, I have withheld these records as predecisional.<sup>1</sup>

48. In addition to providing passenger data, NWA also acted as consultants by providing expertise to the ACR researchers as to how to access and read the passenger data. Because NWA did not directly benefit from the government, and NWA airlines remained in a consultative role, NASA has withheld Document Nos. 43, 44, 64, and 65, under Exemption 5.

49. Some document or information withheld under Exemption 5 include correspondence between the ARC researchers and ARC's Public Affairs Officer and contain advice, opinions and recommendations as to how to respond to press inquiries regarding the NWA data. These records present the deliberative process ARC used to develop responses to media inquiries bout the NWA data and the exchange of

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<sup>1</sup> As explained above, information in these documents identifying the IBM employees and associated personal information, as well as descriptions of IBM products and their capabilities, have been redacted under Exemption 4.

information to ensure that the ARC spokesman answered media questions accurately and thoroughly. Because these records are reflective of ARC's deliberative process and do not represent a final agency decision or documents, NASA has withheld in part Document Nos. 73-77, 79, 82, 83.

50. The documents or information withheld under Exemption 5 consists of preliminary and informal suggestions, ideas, and proposals at early stages of a research project and reflect the agency's decision-making process. These suggestions and ideas do not purport to represent NASA's policies and have not been refined in a form for public release. If such sketchy and preliminary information were to be released and subjected to public scrutiny before it could be debated and refined, the employees involved would be reluctant to make such proposals, or at least commit them into writing. The result would be to deprive the decision maker of the collective wisdom of employees involved in the day-to-day administration of this research.

51. Additionally, because the research was intended to identify possible means to increase airport security, some of the preliminary discussions, documents and presentations identify the researchers thoughts and analysis of the weaknesses that exist in airport security. Release of this deliberative, predecisional information would be harmful to the government because individuals wishing to exploit airport weaknesses could potentially use it in a detrimental manner.

#### **Exemption 6**

52. Exemption 6 of the FOIA permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly

unwarranted invasion of personal privacy.” 5 U.S.C. § 552 (b)(6). In making the determination to withhold information under Exemption 6, NASA considered whether disclosure of this information would: (1) implicate a significant privacy interest, (2) shed light on the activities and operations of the government, and (3) after balancing these factors, constitute a clearly unwarranted invasion of personal privacy.

53. Under FOIA Exemption 6, NASA is withholding the personal e-mail addresses of its employees. This personal contact information was occasionally provided over the course of the research to ensure ARC researchers could be reached if required. Because the ARC researchers have a privacy interest in their personal contact information, the public has no interest in such information, and it does not shed any light on the functioning of the government, NASA has withheld this information. See Document Nos. 45, 47, 48, 55, and 67.

54. Pursuant to IBM’s objections, the names and associated personal data of IBM employees contained in Document Nos. 70 and 85 are withheld under Exemption 6. As IBM noted, release of this information would be an unwarranted invasion of privacy. As addressed above, this information is also being withheld under Exemption 4.

55. Additionally, NASA concurs with NWA objections and withholds the personal information obtained from the NWA passenger data that is duplicated within NASA documents, as release of this information would constitute an unwarranted invasion of the passengers’ privacy and that the passengers’ privacy interest in this information outweighs the public interest in its release. See Document No. 21. Moreover, this information is non-responsive to EPIC’s FOIA request because EPIC specifically

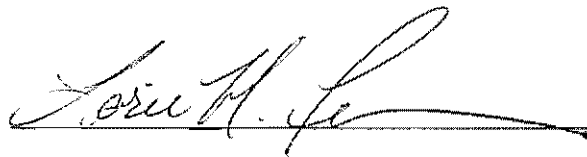
noted that it was not interested in obtaining actual passenger data. See Exhibit C.

**Segregation of Non-Exempt Material**

56. In the case of all documents, all reasonable information has been released wherever possible unless such information is inextricably intertwined with information properly withheld under the exemptions asserted in this declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing is true and correct.

Dated: April 27, 2004

A handwritten signature in black ink, appearing to read "Lorie M. Pesonen", with a long horizontal flourish extending to the right.

Lorie M. Pesonen  
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