

1 McGREGOR W. SCOTT
United States Attorney
2 YOSHINORI H. T. HIMEL #66194, Assistant U. S. Attorney
501 I Street, Suite 10-100
3 Sacramento, California 95814
Telephone: (916) 554-2760
4 ELIZABETH SHAPIRO
Assistant Director
5 CAROLINE LEWIS WOLVERTON
Trial Attorney
6 U.S. Department of Justice
Civil Division, Federal Programs Branch
7 P.O. Box 883
Washington, D.C. 20044
8 Telephone: (202) 514-3336
Facsimile: (202) 318-2672
9

10 Attorneys for Defendant,
CENTRAL INTELLIGENCE AGENCY

11
12 IN THE UNITED STATES DISTRICT COURT FOR THE
13 EASTERN DISTRICT OF CALIFORNIA
14

15 LARRY BERMAN,
16 Plaintiff,
17 v.
18 CENTRAL INTELLIGENCE AGENCY,
19 Defendant.
20

CIV. S-04cv2699 DFL-DAD
**DEFENDANT'S REPLY IN
SUPPORT OF ITS STATEMENT
OF UNDISPUTED FACTS**

Date: June 1, 2005
Time: 10:00 a.m.
Courtroom: 7 (14th floor, DFL)

21 Defendant Central Intelligence Agency ("CIA") responds to Plaintiff's Opposition to
22 Defendant's Statement of Undisputed Facts as follows:¹

- 23 1. The CIA's Declaration fully supports Defendant's Undisputed Fact No. 1. See Buroker Decl.
24 ¶ 34 ("Each of the Requested PDBs contains information specifically stating sensitive sources
25 or methods of collection, in addition, the nature of the information contained in each of the
26

27
28 ¹ The paragraph numbers herein correspond to the numbered paragraphs in Defendant's
Statement of Undisputed Material Facts and Plaintiff's Opposition thereto.

1 Requested PDBs provides substantial information about its provenance to an educated reader”
2 (emphasis added); id. ¶ 26 (“Information that Seems innocuous on its face can provide the
3 pieces necessary to complete a puzzle (or a mosaic) and expose targeting strategies, gaps in
4 intelligence capabilities, or more specifically reveal a source or an intelligence capability”); id.
5 ¶ 28 (“The mosaic theory is particularly important in the context of the PDB... [because]
6 precautions taken to protect intelligence sources that are common in the creation of other
7 intelligence products are not taken in the production of the PDB.”).

8 2. The CIA’s Declaration fully supports Defendant’s Undisputed Fact No. 2. The Declaration
9 states that the information in the Requested PDBs (i.e., those at issue in this case) provides
10 substantial information about its provenance to an educated reader and explains why this is
11 the case. See Buroker Decl. ¶ 28 (“The PDB contains information that is often known by only
12 a few individuals at very high level and is often reported to the President on a real-time
13 basis... a hostile intelligence service may reliably infer that a human source for information
14 contained in the PDB is most likely one of a very few number of individuals with access to the
15 subject information, and that the source must have provided the information very close in time
16 to when it was reported in the PDB”).

17 3. The CIA’s Declaration fully supports Defendant’s Undisputed Fact No. 3. See Buroker Decl.
18 ¶ 36 (“The daily decisions of where to focus the CIA’s resources and energy, from operations
19 officers in the field to analysts at CIA headquarters, are directly affected by the PDB process
20 of presenting analysis, discussing its implications, and receiving questions and tasking from
21 the President and his most senior advisors. The PDB process affects the conduct of
22 intelligence both on a daily and more long-term basis”).

23 4. Contrary to Plaintiff’s argument that Defendant’s evidence is insufficient, the CIA’s
24 Declaration specifically states that the “Requested PDBs contain explicit references to
25 information provided by foreign officials as well as other information that may incorporate
26 information from foreign liaison relationships.” Buroker Decl. ¶ 49. Plaintiff is incorrect in
27 asserting that it is not relevant that such information is in the Requested PDBs when
28 information provided by a foreign government is specifically enumerated as the kind of

1 information that is subject to classification. Executive Order 12,958, as amended by
2 Executive Order 13,292 § 1.4(a), 68 Fed. Reg. 15315, 15317 (Mar. 28, 2003).

3 5. Plaintiff's opinion and his reliance on the opinions of his declarants do not undercut the
4 determination of the CIA must make about the possible harm that would result from the
5 disclosure classified information, as discussed in Defendant's Reply Memorandum at 7-9,
6 11-12.

7 6. See response to Plaintiff's Opposition to Defendant's Undisputed Fact 4, supra.

8 7. See response to Plaintiff's Opposition to Defendant's Undisputed Fact 5, supra.

9 8. Contrary to Plaintiff's argument that Defendant's evidence is insufficient, in addition to
10 Paragraph 54 of the CIA's Declaration, Paragraph 53 states, "The Requested PDBs each
11 contain references to intelligence gained from individual human sources and from confidential
12 liaison relationships."

13 9. Contrary to Plaintiff's argument that Defendant's evidence is insufficient, the CIA's
14 Declaration repeatedly details, how disclosure of sources and methods and confidential liaison
15 relationships could reasonably be expected to cause exceptionally grave damage to the
16 national security. See Buroker Decl. ¶ 52 ("Any disclosure by the CIA of information that
17 could lead to the exposure of a past or current liaison relationship could cause serious damage
18 to the CIA's ability to maintain current relationships, even with countries other than the source
19 of the disclosed information, or to establish new ones"), id. ¶ 54 ("The exposure of a source's
20 relationship with the CIA could lead to embarrassment, political ruin, retribution, and for
21 individual human sources imprisonment, torture or even death or the source or of the source's
22 family and friends"), id. ¶ 56 ("Disclosure of information leading to the exposure of an
23 intelligence source, no matter how inadvertent, could cripple the CIA's ability to recruit new
24 individuals, establish new relationships, or even to maintain current relationships with
25 intelligence sources"), id. ¶ 60 ("Secret information-collection techniques, capabilities, or
26 technological devices are valuable from an intelligence-gathering perspective only so long as
27 they remain unknown. Once the nature of an intelligence method or the fact of its use in a
28 certain situation is discovered, the method may become useless").

- 1 10. See response to Plaintiff’s Opposition to Defendant’s Undisputed Fact No. 5, supra.
- 2 11. Contrary to Plaintiff’s argument that Defendant’s evidence is insufficient, the CIA’s Declarant
3 is the Information Review Officer for the Directorate of Intelligence, which is responsible for
4 production of the PDB. The Declaration describes the unique nature of the PDB in
5 comparison to other intelligence documents. See Buroker Decl. ¶¶ 21-22. The Declaration
6 also states how the information in the PDB is particular sensitive and provides an especially
7 useful means for an entity hostile to the United States to dissect and analyze the information to
8 discover intelligence sources and methods. See id. ¶ 28.
- 9 12. Contrary to Plaintiff’s argument that Defendant’s evidence is insufficient, the CIA explains in
10 detail the rationale behind the mosaic theory and the way an entity hostile to the United States
11 could use information from the Requested PDBs in combination with other information to
12 discover intelligence sources and methods. See Buroker Decl. ¶¶ 26-28.
- 13 13. Contrary to Plaintiff’s argument that Defendant’s evidence is insufficient, the CIA explains in
14 detail how it is more risky to disclose information in the PDB under the mosaic theory than
15 other intelligence documents. See Buroker Decl. ¶ 28.
- 16 14. Contrary to Plaintiff’s argument that Defendant’s evidence is insufficient, the CIA explains
17 how repeated disclosures of the PDB over time would result in more information being made
18 available to entities hostile to the United States. See Buroker Decl. ¶¶ 29-30. The CIA also
19 explains how the information in the PDB is more sensitive than information in other
20 intelligence documents. See id. ¶¶ 20-24.
- 21 15. Contrary to Plaintiff’s argument that Defendant’s evidence is insufficient, the CIA explains
22 that “[t]imely intelligence necessarily includes judgments based upon available information
23 that evolves as additional information and insight emerge through further collection and
24 through policy-makers’ comments, questions, and deliberation. Disclosure of the pre-
25 decisional policy analysis and deliberation reflected in the PDB would effectively stifle and
26 “chill” the presentation of timely intelligence collection and analysis.” Buroker Decl. ¶ 74.
27 The CIA further explains that “[i]f those contributing to and producing the PDB believe that
28 their work will be critiqued years later by those with the benefit of twenty-twenty hindsight

1 and their own agenda to pursue, there is a risk that they will be less willing to offer
2 speculative analysis that might later be mischaracterized or proved wrong, with the eventual
3 result that the PDB will be of less use to policymakers' deliberative process." Id. ¶ 75.

4 16. Contrary to Plaintiff's argument that Defendant's evidence is insufficient, the CIA explains in
5 detail how the PDB is a deliberative pre-decisional document and how the Requested PDBs in
6 particular are deliberative pre-decisional documents used to conduct national security and
7 foreign policy. Buroker Decl. ¶¶ 68-73.

8 17. Contrary to Plaintiff's argument that Defendant's evidence is insufficient, the CIA explains in
9 detail how and why analysts and U.S. intelligence officials could react to the fact that the PDB
10 is disclosed to public examination after a number of years. Buroker Decl. ¶¶ 74-75.

11 18. Contrary to Plaintiff's argument that Defendant's evidence is insufficient, the CIA explains
12 that "[a]ll of the information in the Requested PDBs is related to intelligence activities,
13 sources and methods, foreign government information, foreign relations and activities and or
14 the deliberative process" and that "any intelligible information that is not properly classified
15 as a specific item is nevertheless a part of a mosaic of PDB information such that a
16 compilation of PDBs would tend to reveal gravely damaging insight into how the CIA
17 conducts its intelligence business." Buroker Decl. ¶ 78.

18 19. See response to Plaintiff's Opposition to Defendant's Undisputed Fact No. 18, supra.

19 Dated: May 11, 2005

Respectfully submitted,

20 McGREGOR W. SCOTT
21 United States Attorney
22 YOSHINORI H. T. HIMEL #66194
23 Assistant U. S. Attorney

24 ELIZABETH J. SHAPIRO
25 Assistant Director
26 CAROLINE LEWIS WOLVERTON
27 Trial Attorney
28 U.S. Department of Justice
Civil Division, Federal Programs Branch

Of Counsel:

JONATHAN FERRY
Assistant General Counsel
Litigation Division
Central Intelligence Agency

By: /s/ Caroline Lewis Wolverton