

1 DANIEL G. BOGDEN  
United States Attorney

2 HOLLY A. VANCE  
3 Assistant United States Attorney  
4 100 West Liberty Street, Suite 600  
5 Reno, Nevada 89501  
6 Tel: (775) 784-5438  
7 Fax: (775) 784-5181

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA

10 JED MARGOLIN,  
11 Plaintiff,

12 v.

13 NATIONAL AERONAUTICS  
14 AND SPACE ADMINISTRATION  
15 Defendant.

Case No. 3:09-CV-00421-LRH-VPC

**OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT AND CROSS-  
MOTION FOR SUMMARY JUDGMENT**

16 COMES NOW Defendant, National Aeronautics and Space Administration (“NASA”),  
17 by and through its undersigned counsel, and submits this Opposition and Cross-Motion for  
18 Summary Judgment in response to Plaintiff’s Motion for Summary Judgment.

19 This is a Freedom of Information Act (“FOIA”) action in which Plaintiff appeals NASA’s  
20 decision to withhold certain information in response to Plaintiff’s FOIA request. The withheld  
21 information is protected from disclosure based on the following FOIA exemptions: Exemption 3  
22 (information withheld pursuant to federal statute); Exemption 4 (trade secrets, commercial and  
23 financial information, attorney-client communications and attorney work product); Exemption 5  
24 (deliberative process information, attorney-client communications and attorney work product);  
25 and Exemption 6 (personnel, medical or “other” files the disclosure of which would constitute a  
26 clearly unwarranted invasion of privacy). Accordingly, this Court should deny Plaintiff’s Motion  
27 for Summary Judgment and grant Defendant’s Cross-Motion for Summary Judgment, as  
28

1 explained more fully below. This motion is made pursuant to Federal Rule of Civil Procedure 56  
2 and is supported by the declaration of Courtney B. Graham.

3 **BACKGROUND**

4 **A. June 7, 2003 — Plaintiff's claim for patent infringement against NASA**

5 On June 7, 2003, Plaintiff submitted an administrative claim for patent infringement  
6 against NASA. (Graham Dec. ¶ 7; Def. Ex. B).<sup>1/</sup> Plaintiff owned the patents at the time of the  
7 claim, but the patents were subsequently acquired by Optima Technology Corporation. (Graham  
8 Dec. ¶ 7).

9 An administrative claim for patent infringement is a claim for money damages for patent  
10 infringement against the federal government. (Graham Dec. ¶ 8). A claimant may challenge an  
11 agency's final determination on a patent infringement claim by seeking review in the Court of  
12 Federal Claims. 28 U.S.C. § 1498(a). (Graham Dec. ¶ 8). A successful claimant may recover  
13 "reasonable and entire compensation" for a patent infringement. *Ibid.* (Graham Dec. ¶ 8).  
14

15 The Commercial and Intellectual Property Law practice group ("CIPL") in the NASA  
16 Office of Special Counsel was assigned to review Plaintiff's patent infringement claim. (Graham  
17 Dec. ¶¶ 9-11; Def. Ex. B). The claim was designated case number I-222. (Graham Dec. ¶ 7;  
18 Def. Ex. B). The CIPL personnel assigned to investigate and review case number I-222 were  
19 CIPL attorneys Gary Borda, Jan McNutt, Robert Rotella, Alan Kennedy and CIPL legal  
20 technician Kathy Bayer. (Graham Dec. ¶ 11).

21 When NASA receives a patent infringement claim, the assigned CIPL attorneys transmit  
22 the claim to NASA field centers that are likely to have technology or activities related to the  
23 claim. (Graham Dec. ¶ 9). Field center patent attorneys review the patent infringement claim  
24 and investigate the patent infringement allegations. (Graham Dec. ¶ 9). As part of their  
25

---

26  
27 <sup>1/</sup> "Def. Ex. \_\_\_\_" refers to "Defendant's Exhibit" and the respective exhibit number.  
28 "Graham Dec. ¶ \_\_\_\_" refers to the declaration of Courtney Graham and the respective paragraph  
of her declaration.

1 investigation, the patent attorneys interview scientists and engineers who may have knowledge of  
2 relevant technology. (Graham Dec. ¶ 9). The patent attorneys also review the asserted patents  
3 and analyze the activities and technologies at the NASA field centers to determine whether the  
4 patents covers those activities. (Graham Dec. ¶ 9). The patent attorneys summarize the results of  
5 their review and investigation and provide to the CIPL attorneys a legal opinion about the patent  
6 infringement claim. (Graham Dec. ¶ 9). The assigned CIPL attorneys then prepare a  
7 consolidated analysis in consultation with the field center patent attorneys and develop the legal  
8 opinion that supports a final determination on the claim. (Graham Dec. ¶ 10).

9  
10 Here, the CIPL attorneys communicated extensively with the patent attorneys from the  
11 field centers in reviewing and investigating Plaintiff's patent infringement claim. (Graham Dec.  
12 ¶ 18). Personnel from the following field centers were assigned to investigate the patent  
13 infringement claim: NASA Langley Research Center, Johnson Space Center and Dryden Flight  
14 Research Center. (Graham Dec. ¶ 12). At NASA Langley Research Center, attorneys Helen  
15 Galus and Barry Gibbens investigated the patent infringement claim. (Graham Dec. ¶ 13). At  
16 Johnson Space Center, attorneys Edward Fein, Kurt Hammerle and Theodore Ro and engineer  
17 Francisco Delgado investigated the claim. (Graham Dec. ¶ 14). At Dryden Flight Research  
18 Center, attorney Mark Homer and engineer John Del Frate investigated the claim. (Graham Dec.  
19 ¶ 15).

20 CIPL and Johnson Space Center personnel also communicated with persons associated  
21 with Rapid Imaging Software, Inc. ("Rapid Imaging") regarding Plaintiff's patent infringement  
22 claim. (Graham Dec. ¶ 16). Rapid Imaging is a NASA contractor that creates flight visualization  
23 tools such as software that permits users to fly through virtual terrain — a technical area related  
24 to case number I-222. (Graham Dec. ¶ 16). Rapid Imaging had separately received allegations  
25 of infringement relating to the same patents asserted against NASA in case number I-222.  
26 (Graham Dec. ¶ 16). Under the terms of a contract, NASA is responsible for any patent  
27 infringement activities conducted by Rapid Imaging in the performance of its contracts. (Graham  
28

1 Dec. ¶ 16). Under the circumstances, NASA and Rapid Imaging had a common interest in  
2 defending against Plaintiff's patent infringement claims. (Graham Dec. ¶ 16).

3 In reviewing Rapid Imaging's work, NASA communicated with Michael Abernathy,  
4 Benjamin Allison, and Richard Krukar regarding the substance of the claims at issue in case  
5 number I-222. (Graham Dec. ¶ 17). Mr. Abernathy is the principal of Rapid Imaging. Mr.  
6 Allison and Mr. Krukar are Rapid Imaging's legal counsel. (Graham Dec. ¶ 17). As a result of  
7 these discussions, Rapid Imaging provided NASA with copies of attorney work-product  
8 documents prepared by Mr. Krukar in anticipation of litigation in response to the patent claims  
9 asserted against Rapid Imaging. (Graham Dec. ¶ 17). Rapid Imaging also provided NASA with  
10 privileged attorney-client communications between Rapid Imaging and its attorneys. (Graham  
11 Dec. ¶ 17). These documents were provided by Rapid Imaging to assist NASA's attorneys in  
12 determining the agency's potential liability as a result of the claims of patent infringement  
13 against Rapid Imaging, as a NASA contractor. (Graham Dec. ¶ 17).

14 On March 19, 2009, NASA issued a final determination denying Plaintiff's claim for  
15 patent infringement. (Graham Dec. ¶¶ 7, 18; Def. Ex. C).

16 **B. June 28, 2008 — Plaintiff's FOIA request**

17 By e-mail dated June 28, 2008, Plaintiff submitted a FOIA request to NASA, seeking  
18 copies of "all documents related to Administrative Claim of Jed Margolin for Infringement of  
19 U.S. Patent Nos. 5,566,073 and 5,904,724; NASA Case No. I-222." (Graham Dec. ¶ 4; Def. Ex.  
20 A; Complaint Ex. 2). The FOIA specialist at NASA Headquarters determined that records  
21 responsive to the FOIA request would be found at the CIPL in the NASA Office of Special  
22 Counsel. (Graham Dec. ¶ 6). Accordingly, Plaintiff's FOIA request was forwarded to that  
23 office. (Graham Dec. ¶ 6).

24 The CIPL reviewed Plaintiff's FOIA request and searched its records for responsive  
25 documents. On January 21, 2009, the CIPL forwarded a copy of the case file for case number  
26 I-222 to the FOIA specialist. (Graham Dec. ¶ 19).

1 **C. May 14, 2009 — NASA’s response to Plaintiff’s FOIA request**

2 On May 14, 2009, the NASA FOIA specialist produced approximately 63 documents in  
3 response to Plaintiff’s FOIA request. (Graham Dec. ¶ 20).<sup>2/</sup> Approximately 227 documents were  
4 withheld from disclosure. (Graham Dec. ¶ 20). The NASA FOIA specialist determined that the  
5 withheld documents were protected by Exemption 5 — the deliberative process privilege.  
6 (Graham Dec. ¶ 20; Def. Ex. D).

7 **D. June 10, 2009 — Plaintiff’s administrative appeal**

8 On June 10, 2009, Margolin sought administrative review of NASA’s response to his  
9 FOIA request. Specifically, Plaintiff appealed the following:

- 10 • NASA’s failure to provide a copy of the March 19, 2009 final determination on case  
11 number I-222 in response to Plaintiff’s FOIA request;
- 12 • NASA’s failure to release a copy of a “patent report” containing evidence related to the  
13 validity of the patent at issue in case number I-222; and
- 14 • NASA’s failure to produce records between NASA and Rapid Imaging “which provided  
15 the synthetic vision system for the X-38 project.”

16 (Graham Dec. ¶ 21; Def. Ex. E).

17 On August 5, 2009, NASA affirmed the agency’s response to Plaintiff’s FOIA request.

18 (Graham Dec. ¶ 25; Def. Ex. F). First, NASA determined that the March 19, 2009 final  
19 determination was already in Plaintiff’s possession, as evidenced by Plaintiff’s quoting the final  
20 determination in his appeal and including the document as an appendix attached to his appeal.

21 (Graham Dec. ¶ 25; Def. Ex. F). Second, NASA concluded that the documents relevant to the  
22 patent infringement claim were either prepared by NASA attorneys or developed by NASA  
23 employees at the direction of NASA’s attorneys in order to evaluate the claims of patent  
24 infringement against NASA. As such, those records were created in anticipation of litigation and  
25 constitute attorney work product or privileged attorney-client communications exempt from

26 \_\_\_\_\_  
27 <sup>2/</sup> Those documents were also produced in a November 5, 2009 supplemental response to  
28 Plaintiff’s FOIA request. (Graham Dec. ¶ 20; Ex. I).

1 disclosure under Exemption 5. (Graham Dec. ¶ 25; Def. Ex. F). Lastly, NASA found that a  
2 general request for records exchanged between NASA and Rapid Imaging relating to the X-38  
3 project exceeded the scope of Plaintiff's FOIA request. (Graham Dec. ¶ 25; Def. Ex. F).

4 **E. July 31, 2009 — Plaintiff's FOIA lawsuit against NASA**

5 On July 31, 2009, Plaintiff filed suit against NASA, arguing that the agency wrongfully  
6 withheld documents that are responsive to his FOIA request.

7 **F. November 5, 2009 — NASA's supplemental response to Plaintiff's FOIA request**

8 On August 12, 2009, the CIPL requested the field center patent attorneys with the NASA  
9 Langley Research Center, Johnson Space Center, and Dryden Flight Research Center to provide  
10 all documents related to case number I-222. (Graham Dec. ¶ 27). The field center patent  
11 attorneys gathered an additional 5,600 documents and NASA determined that those records  
12 contained information that was responsive to Plaintiff's FOIA request. (Graham Dec. ¶¶ 28-29).  
13 NASA also reviewed records in its possession from Rapid Imaging to determine whether any of  
14 those documents warranted disclosure. (Graham Dec. ¶ 30). Lastly, NASA reviewed for the  
15 second time the 227 documents that were withheld from disclosure on May 12, 2009. (Graham  
16 Dec. ¶ 31).

17 On November 5, 2009, NASA released approximately 4,000 pages of additional  
18 documents to Plaintiff. (Graham Dec. ¶ 40; Def. Ex. K). The documents withheld —  
19 approximately 1,600 pages — were determined to be protected based on the following privileges:  
20 Exemption 3 (information withheld pursuant to federal statute); Exemption 4 (trade secrets,  
21 commercial and financial information, attorney-client communications and attorney work  
22 product); Exemption 5 (deliberative process information, attorney-client communications and  
23 attorney work product); and Exemption 6 (personnel, medical or "other" files the disclosure of  
24 which would constitute a clearly unwarranted invasion of privacy). (Graham Dec. ¶¶ 31-40; Def.  
25 Ex. K).  
26  
27  
28

1           **1.       The redacted documents**

2           NASA reviewed for segregability all of the documents that were responsive to Plaintiff's  
3 FOIA request. (Graham Dec. ¶¶ 31-32). If releasable and exempt information appeared in the  
4 same document, NASA redacted the document and released it. (Graham Dec. ¶ 32). The  
5 redacted documents were marked with the applicable FOIA exemption when redacted. (Graham  
6 Dec. ¶ 32).

7           Redacted information under Exemption 6 included telephone numbers, street addresses,  
8 personal e-mail addresses and bank account information. (Graham Dec. ¶ 33). Redacted  
9 information under Exemption 5 included pre-decisional communications exchanged among  
10 NASA attorneys and between NASA attorneys and technical personnel regarding the review of  
11 case number I-222. (Graham Dec. ¶ 33). Those redactions were withheld under Exemption 5's  
12 deliberative process privilege and as attorney-client communications and attorney work product.  
13 (Graham Dec. ¶ 33). Redacted information under Exemption 4 included Optima Technology  
14 Corporation's offers of settlement, specific information regarding license fees and other financial  
15 details relating to the patents asserted in case number I-222. (Graham Dec. ¶ 34). That  
16 information was withheld under Exemption 4 as confidential or financial information received  
17 from a person. (Graham Dec. ¶ 34).

18           **2.       The documents withheld in their entirety**

19           NASA also withheld certain documents from disclosure in their entirety. A contract  
20 proposal by Rapid Imaging to NASA under the NASA Small Business Innovation Research  
21 program was withheld under Exemption 3 because two statutes — 10 U.S.C. § 2305(g) and 41  
22 U.S.C. § 253b(m)(1) — prohibited disclosure of those documents. (Graham Dec. ¶ 35).

23           NASA also withheld certain records received from the NASA field centers under  
24 Exemption 5. (Graham Dec. ¶ 36). Those documents included e-mails among NASA attorneys  
25 and technical personnel discussing case number I-222. As such, they constitute pre-decisional  
26 communications within Exemption 5's deliberative process privilege. (Graham Dec. ¶ 36).  
27  
28

1 Moreover, many of those documents were either prepared by NASA attorneys or developed by  
2 NASA employees at the direction of NASA attorneys in order to evaluate the claims of patent  
3 infringement asserted against NASA in case number I-222. (Graham Dec. ¶ 36). As such, those  
4 records were created in anticipation of litigation and they constitute attorney work product or  
5 attorney-client privileged communications exempt from disclosure under Exemption 5. (Graham  
6 Dec. ¶ 36). Lastly, NASA created claim charts to assist attorneys in evaluating Plaintiff's patent  
7 infringement claim. Those claim charts constitute attorney work product that is protected under  
8 Exemption 5. (Graham Dec. ¶ 36).

9  
10 NASA also withheld certain agency records under Exemption 4 as confidential  
11 commercial or financial information received from Optima Technology Corporation. (Graham  
12 Dec. ¶ 37). Those records include offers of settlement, with specific financial terms, received  
13 from Optima — the owner of the patents asserted in case number I-222. (Graham Dec. ¶ 37).  
14 Examples of those documents are identified at lines 7 through 12 of the index. (Graham Dec. ¶  
15 37; Ex. I).

16 Exemption 4 further protects information prepared by Rapid Imaging's attorneys in  
17 anticipation of litigation and attorney-client privileged communications between Rapid Imaging  
18 and its attorneys. (Graham Dec. ¶ 37). These privileged work product documents and attorney-  
19 client communications were disclosed to NASA by Rapid Imaging to support NASA's review of  
20 the agency's potential liability for patent infringement by Rapid Imaging as a NASA contractor  
21 under case number I-222. (Graham Dec. ¶ 37). Examples of those documents are identified at  
22 lines 221 through 247 of the index. (Graham Dec. ¶ 39; Ex. I).

23 **G. January 11, 2010 — NASA provides notice to Rapid Imaging of the FOIA action**

24 NASA advised Rapid Imaging that a FOIA request for Rapid Imaging information had  
25 been received by the agency and that litigation had been commenced seeking disclosure of the  
26 Rapid Imaging documents. (Graham Dec. ¶ 39). In response to that notice, Rapid Imaging  
27 provided a basis for its objection to NASA's proposed disclosure of those records. (Graham  
28



1 Dec. ¶ 39; Ex. J). NASA made a determination to withhold the Rapid Imaging records as  
2 privileged attorney-client communications and attorney work product under Exemption 4.  
3 (Graham Dec. ¶ 36; Ex. J). NASA's notice to Rapid Imaging and the Rapid Imaging objections  
4 are not included with this motion because they include information sufficient to identify the  
5 withheld documents. (Graham Dec. ¶ 39).

#### 6 **H. NASA's good faith**

7 In responding to Plaintiff's FOIA request, NASA did not act in bad faith. (Graham Dec. ¶  
8 41). The NASA Headquarters FOIA Office maintained a significant backlog of requests in 2008  
9 and 2009. (Graham Dec. ¶ 41). The NASA Headquarters FOIA Office reported a backlog of  
10 210 FOIA requests at the end of 2008 and a backlog of 195 FOIA requests at the end of 2009.  
11 (Graham Dec. ¶ 41); *see also* NASA FOIA Report for Fiscal Year 2009 at page 17 (Graham Dec.  
12 ¶ 41; Ex. L).

### 14 ARGUMENT

#### 15 **A. Standard of review**

16 FOIA represents a balance struck by Congress "between the right of the public to know  
17 and the need of the Government to keep information in confidence." *John Doe Agency v. John*  
18 *Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA requires disclosure of agency information  
19 "consistent with a responsible balancing of competing concerns included in nine categories of  
20 documents exempted from the Act's disclosure requirements." *Halpern v. FBI*, 181 F.3d 279,  
21 284 (2<sup>nd</sup> Cir. 1999). Thus, although FOIA generally promotes disclosure, the act recognizes "that  
22 public disclosure is not always in the public interest." *Baldridge v. Shapiro*, 455 U.S. 345, 352  
23 (1982). The statutory exemptions must be construed "to have meaningful reach and application."  
24 *John Doe Agency*, 493 U.S. at 152.

25 The agency has the burden to justify any non-disclosure. *Dep't of Justice v. Tax Analysts*,  
26 492 U.S. 136, 143 (1989). But the FOIA requester also has a burden — he is required to show  
27 that a disclosure is in the public interest. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S.  
28

1 147, 172 (2004).

2 The government may offer affidavits to prove that documents are exempt from release.  
3 *Church of Scientology v. United States Dep't of Army*, 611 F.2d 738, 742 (9<sup>th</sup> Cir. 1980). Courts  
4 are required to give those affidavits a presumption of good faith and substantial weight. *Minier*  
5 *v. CIA*, 88 F.3d 796, 800 (9<sup>th</sup> Cir. 1996). "If the affidavits contain reasonably detailed  
6 descriptions of the documents and allege facts sufficient to establish an exemption, 'the district  
7 court need look no further.'" *Lane v. Dep't of Interior*, 523 F.2d 1128, 1135-36 (9<sup>th</sup> Cir. 2008).  
8 If, however, the court finds that the agency affidavits are "too generalized," the court may  
9 examine the disputed documents *in camera* to make a "first-hand determination of their exempt  
10 status." *Id.* at 1136.

11 FOIA cases are typically resolved on summary judgment. *Miscavige v. Internal Revenue*  
12 *Service*, 2 F.3d 366, 369 (11<sup>th</sup> Cir. 1993). Review of FOIA matters is *de novo*. *Dep't of Justice*  
13 *v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

#### 14 **B. Summary judgment standard**

15 A party is entitled to summary judgment if the evidence shows that there is no genuine  
16 issue of material fact and the moving party is entitled to judgment as a matter of law. *Matsushita*  
17 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where the record taken as a  
18 whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine  
19 issue for trial and summary judgment is appropriate. *Id.* The burden of proving the absence of a  
20 genuine issue of material fact falls on the moving party. *Anderson v. Liberty Lobby*, 477 U.S.  
21 242, 248-49 (1986). All reasonable inferences from the facts must be drawn in the light most  
22 favorable to the nonmoving party. *Id.* To demonstrate a genuine issue of material fact, the  
23 nonmoving party must do more than simply show that there is some metaphysical doubt as to the  
24 material facts. *Id.* If the evidence offered by the nonmoving party is merely colorable — or not  
25 significantly probative — summary judgment is proper. *Id.*

1 **C. Exemption 3 applies — 41 U.S.C. § 253b(m)(1) and 10 U.S.C. § 2305(g) prohibit the**  
2 **release of Rapid Imaging’s contract proposal.**

3 Exemption 3 incorporates into the FOIA certain non-disclosure provisions that are  
4 contained in other federal statutes. 5 U.S.C. § 552(b)(3). Specifically, Exemption 3 allows the  
5 withholding of information prohibited from disclosure by another federal statute. *Ibid.*

6 NASA possesses two copies of a contract proposal made by Rapid Imaging to NASA  
7 under NASA’s Small Business Innovation Research program. (Courtney Dec. ¶ 35). Two  
8 federal statutes bar the release of those documents. The first statute, 41 U.S.C. § 253b(m)(1),  
9 provides that a “proposal in the possession or control of an executive agency may not be made  
10 available to any person under [the FOIA].” The second statute, 10 U.S.C. § 2305(g), prohibits  
11 the disclosure of contractor proposals unless the proposal was incorporated by reference into the  
12 resulting contract. A review of the contract documents between NASA and Rapid Imaging  
13 shows that the proposal was not incorporated into the Rapid Imaging contract. (Graham Dec. ¶  
14 35). The proposal is thus specifically exempt from disclosure. (Graham Dec. ¶ 35). Because  
15 two federal statutes bar the release of the proposal, Exemption 3 applies to protect copies of that  
16 document. Accordingly, NASA is entitled to summary judgment on that issue.

17 **D. Exemption 4 applies — The records contain commercial or financial information**  
18 **from Optima Technology Corporation and Rapid Imaging and the information is**  
19 **confidential or privileged.**

20 Exemption 4 applies to “trade secrets and commercial or financial information obtained  
21 from a person which is privileged or confidential.” 5 U.S.C. § 552(b)(4). A three-part test  
22 determines the applicability of this exemption: (1) the document must contain trade secrets or  
23 commercial or financial information; (2) the document must have been obtained from a person;  
24 and (3) the document must contain information of a confidential or privileged nature. *Miller,*  
25 *Anderson, Nash, Yerke & Wiener v. Dep’t of Energy*, 499 F.Supp. 767, 770 (D. Or. 1980). The  
26 withheld information at issue here satisfies that test.

1           **1. The information is commercial.**

2           Commercial records are those that relate to a business or trade. *See, e.g., Dow Jones Co.*  
3 *v. FERC*, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (information relating to “business decisions and  
4 practices regarding the sale of power, and the operation and maintenance” of generators); *Merit*  
5 *Energy Co. v. U.S. Dep’t of the Interior*, 180 F.Supp.2d 1184, 1188 (D. Colo. 2001)  
6 (“[i]nformation regarding oil and gas leases, prices, quantities and reserves”), *appeal dismissed*,  
7 NO. 01-1347 (10<sup>th</sup> Cir. Sept. 4, 2001). Commercial records also include those “pertaining or  
8 relating to or dealing with commerce.” *Miller, Anderson, Nash, Yerke*, 499 F.Supp. at 771.

9           The withheld information qualifies as “commercial” under those standards. (Graham  
10 Dec. ¶¶ 16-17, 36-38). The documents relate to commerce and to the business or trade of Optima  
11 Technology Corporation and Rapid Imaging. (Graham Dec. ¶¶ 16-77, 36-38).

12           **2. The information was obtained from a person.**

13           The term “person” is broadly construed; the term refers to individuals and a wide range of  
14 entities, including corporations, banks, state governments, agencies of foreign governments and  
15 Native American tribes or nations, who provide information to the government. *See, e.g.,*  
16 *FlightsafetyServs. v. Dep’t of Labor*, 326 F.3d 607, 611 (5<sup>th</sup> Cir. 2003) (business establishments);  
17 *Lepelletier v. FDIC*, 977 F.Supp. 456, 459 (D.D.C. 1997) (banks); *Hustead v. Norwood*, 529 F.  
18 Supp. 323, 326 (S.D. Fla. 1981 (state government)); *Stone v. Exp.-Imp. Bank*, 552 F.2d 132, 137  
19 (5<sup>th</sup> Cir. 1977) (foreign government agency); *Flathead Joint Bd. of Control v. Dep’t of Interior*,  
20 309 F.Supp. 2d 1217, 1221 (D. Mont. 2004) (Indian tribes). Here, Optima Technology  
21 Corporation and Rapid Imaging qualify as “persons” under those authorities.

22           **3. The information is confidential or privileged.**

23           **a. The information is confidential.**

24           The withheld information is confidential in nature. Information is confidential for  
25 purposes of Exemption 4 if disclosure of the information would (1) impair the government’s  
26 ability to obtain necessary information in the future; or (2) cause substantial harm to the  
27  
28

1 competitive position of the person from whom the information was obtained. *National Parks*  
2 *and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir. 1974); *Pacific Architects and Eng'rs*  
3 *Inc. v. Dep't of State*, 906 F.2d 1345 (9<sup>th</sup> Cir. 1990).

4 Here, if NASA were to disclose the withheld information, Optima Technology  
5 Corporation and Rapid Imaging would likely refrain from turning over any information to the  
6 agency in the future for fear that the agency would again release the information. (Graham Dec.  
7 ¶ 40). Under the circumstances, the government's ability to obtain necessary information would  
8 be impaired. (Graham Dec. ¶ 40).

9  
10 **b. The information is privileged.**

11 **1. Attorney-client privilege**

12 As noted, certain withheld documents contain direct communications made in confidence  
13 from Rapid Imaging to its legal counsel for the purpose of obtaining legal advice and legal  
14 services. (Graham Dec. ¶¶ 37-38). The withheld documents also consist of draft documents that  
15 embody information communicated in confidence by Rapid Imaging to its counsel. (Graham  
16 Dec. ¶¶ 37). Those documents are protected as attorney-client privileged communications under  
17 Exemption 4. *See Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1492 (9<sup>th</sup> Cir.  
18 1989) (describing elements of attorney-client privilege); *Miller, Anderson*, 499 F.Supp. at 771  
19 (holding that legal memorandum prepared for utility company by its attorney qualified as legal  
20 advice protectible under Exemption 4 as subject to attorney-client privilege).

21 **2. Work product privilege**

22 The withheld records also include documents prepared in anticipation of litigation.  
23 (Graham Dec. ¶¶ 17, 36-38). The work product doctrine recognizes that it is essential that a  
24 lawyer work with a certain degree of privacy — free from unnecessary intrusion by opposing  
25 parties and their counsel. Proper preparation of a client's case demands that he assemble  
26 information, sift what he considers to be the relevant facts, prepare his legal theories and plan his  
27 strategy without undue and needless interference. *See Hickman v. Taylor*, 329 U.S. 495, 511  
28

1 (1947) (protecting witness statements taken by counsel “with an eye toward litigation” after a  
2 claim had arisen but before litigation had begun); *Upjohn Co v. United States*, 449 U.S. 383  
3 (1981) (holding that work-product doctrine applied to information gathered by in-house counsel  
4 long before any legal proceedings were threatened). The work-product doctrine applies to  
5 materials prepared by a non-lawyer representative as well as to materials prepared by a party  
6 itself. *Admiral*, 881 F.2d at 1494; *see also* Fed. R. Civ. Pr. 26(b)(3). Documents prepared by  
7 Rapid Imaging’s counsel in anticipation of litigation are thus protected by Exemption 4. *See*  
8 *Indian Law Res. Ctr. v. Dep’t of Interior*, 477 F.Supp. 144, 148 (D.D.C. 1979) (“The vouchers  
9 reveal strategies developed by *Hopi* counsel in anticipation of preventing or preparing for legal  
10 action to safeguard tribal interests. Such communications are entitled to protection as attorney  
11 work product.”).

### 13 3. Common Interest privilege

14 While it is generally true that privileged information loses its privilege when disclosed to  
15 a third party, the privilege is maintained when that third party shares a common interest in a legal  
16 matter. *See Waller v. Financial Corp. America*, 828 F.2d 579, 583 (9<sup>th</sup> Cir. 1987) (“Under the  
17 joint defense privilege, ‘communications by a client to his own lawyer remain privileged when  
18 the lawyer subsequently shares them with co-defendants for purposes of a common defense.’”);  
19 *Center for Biological Diversity v. Office of Mgmt. and Budget*, 2009 WL 1246690 (N.D.Cal.)  
20 (“Courts have extended the attorney-client privilege to multiple parties who share a common  
21 interest in a legal matter.”). Documents shared under these circumstances are exempt from  
22 disclosure under Exemption 4. *Miller, Anderson* at 771.

23 Rapid Imaging provided the withheld documents to NASA in connection with their  
24 common interest of defending against patent infringement claims. (Graham Dec. ¶¶ 16-17). All  
25 attorney-client communications and work-product information shared by Rapid Imaging relating  
26 to these claims is thus protected by the common interest privilege. As a result, the documents are  
27 exempt from disclosure under Exemption 4.  
28

1 **E. Exemption 5 applies — The information is protected by the deliberative process,**  
2 **work-product and attorney-client privileges.**

3 The deliberative process privilege of Exemption 5 is designed to “prevent injury to the  
4 quality of agency decisions.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The  
5 privilege protects the “decision making processes of government agencies” and encourages frank  
6 and uninhibited communication among government officials in the course of creating public  
7 policy. *NLRB*, 421 U.S. at 149-51. Specifically, Exemption 5 protects from disclosure “inter-  
8 agency or intra-agency memorandums or letters which would not be available by law to a party  
9 other than the agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The exemption  
10 shields those documents that are normally privileged in the civil discovery context. *Lahr v. Nat’l*  
11 *Transportation Safety Board*, 569 F.3d 964, 979 (9<sup>th</sup> Cir. 2009).

12 Exemption 5 is commonly understood to include documents subject to the attorney-client  
13 privilege and attorney work-product doctrine. *NLRB*, 421 U.S. at 132; *FTC v. Grolier, Inc.*, 462  
14 U.S. 19 (1983). Although Exemption 5 generally applies only to documents created by the  
15 federal government, courts have recognized that it also applies to documents created by private  
16 third parties when shared with the government in the furtherance of common legal interests. *See*,  
17 *e.g., Hanson v. Agency for Int’l Dev.*, 372 F.3d 286 (4<sup>th</sup> Cir. 2004); *Hunton & Williams, LLP v.*  
18 *Dep’t of Justice*, 2008 WL 906783 (E.D. Va. 2008).

19 Here, Exemption 5 protects drafts of NASA’s response to Plaintiff’s patent infringement  
20 claim and drafts of letters prepared by NASA attorneys. *See Donham v. U.S. Forest Service*,  
21 2008 WL 2157167 at 5 (S.D. Ill.) (finding draft documents to be “precisely the kind of  
22 documents that Exemption 5 and the deliberative process privilege seek to protect from  
23 disclosure”); *Gerstein v. CIA*, No. 06-4643, 2008 WL 4415080 at 16 (N.D. Cal) (protecting draft  
24 letters). Exemption 5 also protects e-mails, memos and comments exchanged among NASA  
25 attorneys and technical personnel regarding Plaintiff’s patent infringement claims. *See Buckner*  
26 *v. IRS*, 25 F. Supp. 2d 893, 900 (N.D. Ind. 1998) (protecting “documents that are  
27  
28

1 communications among attorneys” where IRS personnel and attorneys were involved in  
2 bankruptcy proceedings against requester); *Judicial Watch, Inc. v. Dep’t of Commerce*, 337 F.  
3 Supp. 2d 146, 174 (D.D.C. 2004) (applying privilege to documents written by agency attorneys  
4 to superiors describing advice given to clients within agency). The exemption further protects  
5 claims charts that NASA created to assist attorneys in evaluating Plaintiff’s patent infringement  
6 claim. (Graham Dec. ¶ 36).<sup>3/</sup>

7 Lastly, Exemption 5 protects attorney-client communications between Rapid Imaging and  
8 its attorneys and the work product of Rapid Imaging’s attorneys. (Graham Dec. ¶¶ 25, 36).  
9 Those documents were provided to NASA to assist the agency in defending against Plaintiff’s  
10 patent infringement claim. (Graham Dec. ¶¶ 16-17). Because NASA and Rapid Imaging shared  
11 a common interest in defending against Plaintiff’s patent infringement claims, the documents are  
12 protected under the common interest privilege. (Graham Dec. ¶ 16).<sup>4/</sup>

14 **F. Exemption 6 applies — The information is contained in personnel, medical or**  
15 **“similar” files the disclosure of which would constitute a clearly unwarranted**  
16 **invasion of privacy.**

17 Exemption 6 protects information in personnel, medical and “similar” files when the  
18 disclosure of such information “would constitute a clearly unwarranted invasion of personal  
19 privacy.” 5 U.S.C. § 552(b)(6). To warrant protection under Exemption 6, information must  
20 first meet the threshold requirement of being located in personnel, medical or “similar” files. *Id.*  
21 Once that threshold is met, the focus of the inquiry turns to whether disclosure of the information  
22 would constitute a clearly unwarranted invasion of privacy. *Id.* At this stage of the analysis, it  
23 must be ascertained if a protected privacy interest exists that would be threatened by disclosure.

---

24 <sup>3/</sup> Plaintiff argues that documents created after 2004 are post-decisional. Plaintiff is  
25 mistaken. The patent infringement claim was denied on March 19, 2009. (Graham Dec. ¶ 7).  
26 Thus, that is the determinative date for post-decisional documents.

27 <sup>4/</sup> Plaintiff’s reliance on *Dep’t of Interior and Bureau of Indian Affairs v. Klamath Water*  
28 *Users Protective Ass’n*, 532 U.S. 1 (2001) is misplaced. That case does not address the grounds  
for non-disclosure discussed above.



1 *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). If no  
2 privacy interest is found, further analysis is unnecessary and the information at issue must be  
3 disclosed. *Ibid.*

4 If a privacy interest is found to exist, the public interest in disclosure, if any, must be  
5 weighed against the privacy interest in non-disclosure. *See Associated Press v. DOD*, 554 F.3d  
6 274, 291 (2d Cir. 2009) (“Only where a privacy interest is implicated does the public interest for  
7 which the information will serve become relevant and require a balancing of the competing  
8 interests.”); *NARA v. Favish*, 541 U.S. 157, 171 (2004) (“The term ‘unwarranted’ requires us to  
9 balance the family’s privacy interest against the public interest in disclosure.”). If no public  
10 interest exists, the information must be protected because “something, even a modest privacy  
11 interest, outweighs nothing every time[.]” *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879  
12 F.2d 873, 879 (D.C. Cir. 1989).

13 Here, NASA redacted identifying private information such as names, addresses and social  
14 security numbers contained within the documents. (Graham Dec. ¶¶ 32-33). Plaintiff has not  
15 identified any public interest that would justify disclosing that personal information.  
16 Accordingly, NASA is entitled to summary judgment on that issue.

17 **G. NASA released all reasonably segregable information to Plaintiff.**

18 NASA reviewed each requested document individually for segregability of non-exempt  
19 information. (Graham Dec. ¶¶ 31-34). The agency then released all segregable non-exempt  
20 information to Plaintiff. (Graham Dec. ¶¶ 31-34). The declaration addressing the issue of  
21 segregability is entitled to substantial weight and a presumption of good faith. *See Minier*, 88  
22 F.3d at 800. The level of detail provided throughout the index further confirms that NASA  
23 carefully reviewed the requested documents and considered the possibility of redacting rather  
24 than withholding. In sum, both the declaration and the index included with this motion  
25 demonstrate that all reasonably segregable non-exempt information has been disclosed to  
26 Plaintiff. Under the circumstances, NASA is entitled to summary judgment.  
27  
28

**CONCLUSION**

For the reasons argued above, this Court should enter an order granting summary judgment in favor of NASA.<sup>5/</sup>

Respectfully submitted,

DANIEL G. BOGDEN  
United States Attorney

/s/ Holly A. Vance  
HOLLY A. VANCE  
Assistant United States Attorney

---

<sup>5/</sup> Plaintiff also appears to argue for an award of attorney fees and costs. Any such request is premature. Accordingly, Defendant will respond to such a request at the conclusion of this case if and when Plaintiff files a motion seeking fees and costs.

**CERTIFICATE OF SERVICE**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

JED MARGOLIN,

Plaintiff,

v.

NATIONAL AERONAUTICS  
AND SPACE ADMINISTRATION.

Defendant.

)  
) Case No. 3:09-CV-00421-LRH-VPC  
)  
)  
)  
)  
)  
)  
)  
)

The undersigned hereby certifies that service of the foregoing **“OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT”** has been made by electronic notification through the Court's electronic filing system or, as appropriate, by sending a copy by first-class mail to the following addressee(s) on September 7, 2010:

Addressee:  
  
JED MARGOLIN  
1981 Empire Road  
Reno, NV 89521-7430

/s/ Holly A. Vance