

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 11-0349 (RJL)  
 )  
 UNITED STATES AIR FORCE )  
 )  
 Defendant. )  
 )  
 \_\_\_\_\_ )

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Plaintiff Judicial Watch, Inc. (“Judicial Watch”), by counsel, respectfully submits this opposition to Defendant United States Air Force’s (“USAF”) Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted. As grounds therefor, Judicial Watch states as follows:

**MEMORANDUM OF LAW**

**I. Introduction.**

On November 9, 2010, Plaintiff sent a FOIA request to Defendant, seeking information about the travel of former Senate Majority Leader Harry Reid. Specifically, Plaintiff sought access to the following:

1. All mission taskings for Senate Majority Leader Harry Reid’s travel;
2. All records of costs of operating military aircraft for Majority Leader Harry Reid’s travel.
3. All passenger manifests (DD-2131) for Majority Leader Harry Reid (including both domestic and international travel).
4. All travel reports for Majority Leader Harry Reid.

The time frame for the request was from January 2007 to the present. *See* Complaint at ¶5.

Pursuant to 5 U.S.C. § 552(a)(6)(A) Defendant was required to respond to Plaintiff's request within 20 business days of receiving it, or by December 22, 2010. However, Plaintiff received no substantive response to its request by that date and therefore filed this lawsuit on February 10, 2011 to force compliance with the FOIA.

After filing the complaint, Plaintiff promptly effected service of process on Defendant. *See* Declaration of Cristina Rotaru, attached to Plaintiff's Notice of Filing Proof of Service, Docket No. 4, at ¶¶5-7. Specifically, Defendant was served with the summons and complaint in this matter on February 15, 2011. *Id.* At ¶7.

Curiously, on the very day that Plaintiff served its Complaint on Defendant, Plaintiff finally received a response from Defendant. *See* attached affidavit of John Althen ("Althen Aff.") at ¶6. Defendant's response came in the form of an e-mail sent to Plaintiff's generic e-mail address, [info@judicialwatch.org](mailto:info@judicialwatch.org). *Id.* Because this e-mail address is only checked once per day, Plaintiff did not become aware of the e-mail until February 16, 2011. *Id.* In any event, attached to Defendant's February 15, 2011 e-mail was a letter purportedly dated January 11, 2011 in which Defendant stated that it had found no records responsive to Plaintiff's November 9, 2010 FOIA request. *Id.* Plaintiff has a regularly updated filing system for processing incoming responses to its FOIA requests, yet it has no record of receiving Defendant's purported no response letter of January 11, 2011 prior to February 16, 2011. *Id.* at ¶7

Defendant's February 15, 2011 e-mail and the attached letter was unusual for several additional reasons. First, Plaintiff does not ordinarily receive e-mail copies of responses to FOIA requests one month after the original has been sent by mail. *Id.* at ¶8. Second, neither the

February 15, 2011 e-mail nor the letter attached to it stated that Defendant's no document response letter had been mailed to Plaintiff previously. *Id.* Third, the e-mail address of the original FOIA requester, Ms. Tegan Millspaw, was included in Plaintiff's November 9, 2010 FOIA request, so there was no need for Defendant to send its response to Judicial Watch's generic e-mail address. *Id.*

Defendant subsequently filed its motion to dismiss on March 17, 2011.

## **II. Argument.**

### **A. Standards Governing Rule 12(b)(6) Motion to Dismiss**

The standard of review for a motion to dismiss for failure to state a claim upon which relief can be granted is well settled. The motion must be decided solely based on the allegations in the Plaintiff's complaint. *See* Fed.R.Civ.P. 12(d). The court does not decide disputed issues of fact; instead, it must assume that all material facts in the plaintiff's complaint are true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). Not only must the court accept the plaintiff's allegations as true, but it also must accept as true all reasonable factual inferences drawn from Plaintiff's allegations. *See Kowal v. MCI Comm'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir 1994); *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). Thus, factual allegations in briefs or memoranda of law generally may not be considered when deciding a Rule 12(b)(6) motion, particularly when the facts they contain contradict those alleged in the complaint. *Henthorn v. Dept. of Navy*, 29 F.3d 682, 688. (D.C. Cir. 1994).

### **B. Defendant Has Failed To Demonstrate that This Case should Be Dismissed.**

Defendant's motion is based entirely on the Declaration of Theodore C. Martin, a FOIA Disclosure Officer for the U.S. Air Force. While the factual allegations contained in Mr. Martin's declaration might be relevant to a motion to dismiss on jurisdictional grounds pursuant to Rule

12(b)(1), Defendant's has moved to dismiss pursuant to Rule 12(b)(6). Therefore, at this point in the instant litigation, Plaintiff respectfully submits that the Court should disregard Mr. Martin's claims that Defendant substantively responded to Plaintiff's FOIA request prior to the filing of this lawsuit. Because Defendant has not otherwise shown that Plaintiff's complaint fails to state a claim upon which relief can be granted, Defendant's motion must be denied.

If the Court is inclined view Defendant's motion as a Rule 12(b)(1) motion to dismiss or as a motion for summary judgment pursuant Rule 12(d), Plaintiff respectfully submits that it has demonstrated that a genuine issue of material fact exists. Defendant's motion should be denied on these alternate grounds as well.

**III. Conclusion.**

For all of the above reasons, Plaintiff respectfully requests that Defendant's motion to dismiss be denied.

Dated: March 31, 2011

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Jason B. Aldrich  
D.C. Bar No. 495488  
Paul J. Orfanedes  
D.C. Bar No. 429716  
Suite 800  
425 Third Street, S.W.  
Washington, DC 20024  
(202) 646-5172

*Attorneys for Plaintiff*

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**AFFIDAVIT OF JOHN ALTHEN**

John Althen, being duly sworn, hereby states as follows:

1. My name is John Althen. I am over eighteen years of age, of sound mind, and am fully competent to make this affidavit. I also have personal knowledge of the factual statements contained herein.

2. Judicial Watch, Inc. is a non-profit organization headquartered in Washington, D.C. I currently am employed by Judicial Watch, Inc. and work in the Department of Investigations and Research. I have served in this capacity at Judicial Watch, Inc. since September 2009 and in the course of carrying out my duties and responsibilities have made and received responses to dozens of Freedom of Information Act ("FOIA") requests.

3. One of my regular duties and responsibilities is to make a record of FOIA correspondence received from federal agencies. Whenever I receive a response to a Judicial Watch FOIA request, I promptly log it into the Judicial Watch FOIA database which was designed specifically for that purpose. This database, among other things, contains the date of the FOIA request, a brief description of the subject matter of the FOIA request, the agency or agencies to which the FOIA request was sent, the date on correspondence sent by responding agencies, the

date the correspondence was received, and a brief description of the documents produced, if any.

4. I am familiar with Plaintiff's November 9, 2010 FOIA request to Defendant United States Air Force, and I understand that it is the subject matter of the above-captioned litigation.

5. Defendant was required to respond to Judicial Watch's November 9, 2010, FOIA request by December 22, 2010. However, Plaintiff did not receive a response of any kind by that date.

6. On February 15, 2011, the date that service of process was effected on Defendant in this case, Plaintiff received an e-mail from Defendant at its generic e-mail address [info@judicialwatch.org](mailto:info@judicialwatch.org). This generic address is checked only once per day and I did not become aware of Defendant's February 15, 2011 e-mail until the morning of February 16, 2011. Attached to Defendant's February 15, 2011 e-mail was a letter from Defendant purportedly sent on January 11, 2011 stating that no documents responsive to Plaintiff's November 9, 2010 FOIA request had been located.

7. I have no recollection of receiving Defendant's no document response letter prior to February 16, 2011, and there is no record in Judicial Watch's database that Defendant's January 11, 2011 no records response was received by Judicial Watch prior to February 15, 2011.

8. I found Defendant's February 15, 2011 e-mail and the attached letter to be unusual for several reasons. First, in my experience, federal agencies do not gratuitously e-mail copies of responses to FOIA requests one month after the original has been sent by mail. Second, neither the February 15, 2011 e-mail or the letter attached to it state that Defendant's no document response letter had been mailed previously. Third, the e-mail address of the original FOIA requester, Ms. Tegan Millspaw, was included in Plaintiff's November 9, 2010 FOIA request, so

there was no need for Defendant to send its response to Judicial Watch's generic e-mail address.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 31, 2011 in Washington, D.C.

  
\_\_\_\_\_  
John Althen

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**PROPOSED ORDER**

Upon consideration of Defendant's Motion to Dismiss, Plaintiff's opposition thereto, and the entire record herein, it is on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, hereby ORDERED that:

1. Defendant's motion is denied.

\_\_\_\_\_  
Richard J. Leon  
UNITED STATES DISTRICT JUDGE