

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

JUDICIAL WATCH, INC.,)
)
Plaintiff,)
)
v.)
)
DEPARTMENT OF THE NAVY)
)
Defendant.)
)

Case No. 1:12-cv-01182-RJL

PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant Department of the Navy. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Summary Judgment and Plaintiff’s Response to Defendant’s Statement of Material Facts Not in Dispute and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment.

Dated: July 11, 2013

Respectfully submitted,

/s/ Chris Fedeli
Chris Fedeli
D.C. Bar No. 472919

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(202) 646-5172

Counsel for Plaintiff

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

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 Plaintiff,)
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 v.)
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DEPARTMENT OF THE NAVY,)
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 Defendant.)
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Case No. 1:12-cv-01182-RJL

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF’S
CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, by counsel, respectfully submits this memorandum in opposition to Defendant’s motion for summary judgment and in support of Plaintiff’s cross-motion for summary judgment. Defendant has failed to release all information it is required to release under the Freedom of Information Act (FOIA), based on the facts and arguments presented by Defendant and the ruling in *Judicial Watch v. Department of Defense and Central Intelligence Agency*, No. 12-5137, 2013 U.S. App. Lexis 10143 (D.C. Cir. May 21, 2013) (“*Judicial Watch v. DoD*”).

Plaintiff only challenges only very limited redactions from Defendant’s production. Specifically, Plaintiff challenges those redactions made pursuant to Exemption 1 relating to descriptions of the actual funeral and burial of bin Laden. Plaintiff does not challenge any redactions of information about military equipment on the USS Carl Vinson, the security of the USS Carl Vinson, the condition of the ship, the locations of the ship, weapons systems on the ship, secret military tactics or protocols, or identities of the individuals involved in the burial and funeral service. Plaintiff challenges only the standalone Exemption 1 redactions in Documents

4, 8 and 9, which contain descriptive information about the actual funeral and burial. *See* Defendant's Declaration, ECF 10-1 at ¶¶ 16, 21, 22. More specifically, Plaintiff challenges only the following pieces of information as they relate to the funeral and burial:

- Document 4: “[D]etails about what is to take place and how” and “the expected timing of the operation” (ECF 10-1 at ¶ 16).
- Document 8: “[T]he timing of the burial operation” (ECF 10-1 at ¶ 21).
- Document 9: “[T]he timeline of events of the burial operation” and “information about where on the USS Carl Vinson the burial took place” (ECF 10-1 at ¶ 22).

The Navy relies on Lieutenant General Scaparrotti's declaration to support its claim that releasing that information could reasonably be expected to harm national security by: (1) providing adversaries with “information they could use to thwart future sensitive military operations”; and (2) inciting al-Qaida members into attacks on U.S. citizens. Defendant's Declaration, ECF 10-1 at ¶¶ 24-26. The first of those two justifications does not apply, as Plaintiff seeks only descriptions of the burial and funeral, and not any sensitive military information which could be used to thwart possible future military operation. Furthermore, this first justification is a mere boilerplate assertion of the exemption which lacks any specificity and could be used to exclude almost any military document from public inspection. Accordingly, this justification fails to carry Defendant's burden. *See e.g. Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

With respect to the second justification, the very limited information Plaintiff now seeks in this case cannot be withheld under the D.C. Circuit's recently announced “inciting violence” test in *Judicial Watch v. DoD*. That test is, essentially: whenever the government attempts to withhold records or information under Exemption 1 because of an alleged potential to incite

violence, the government must present evidence of a “reasonably analogous” situation in which the release of information incited violence in the past. *Judicial Watch v. DoD*, 2013 U.S. App. Lexis 10143 at *12.

The analogies Defendant offers are insufficient under the D.C. Circuit’s ruling. Comparing the release of certain factual information in government emails about a burial to a false report in Newsweek about the desecration of a Koran, which is considered by its adherents to be the verbatim word of God,¹ is not even close to the primary analogy supporting the D.C. Circuit’s ruling in *Judicial Watch v. DoD* – namely, comparing bin Laden death photos to cartoon images mocking Muhammad. *See* Defendant’s Declaration, ECF 10-1 at ¶ 26. While al-Qaida may have attempted to propagandize the burial, Defendant does not cite any example of violence resulting from those efforts. *See* Defendant’s Declaration, ECF 10-1 at ¶ 25. This may be because the Muslim world believes the funeral *was* respectful, and refuses to be misled by extremist propaganda. In any event, the necessity of conducting the global war on terror should not render the U.S. government so afraid of its own shadow that it refuses to release truthful information to the American people when required by FOIA.

Furthermore, as all the withheld information in this case is written text instead of the “extraordinary set of images” at issue in *Judicial Watch v. DoD*, the instant information is even less likely to inflame foreign populations because it does not risk offending historical Islamic proscriptions against photographs of individuals, which are still maintained by a minority of Muslims.² 2013 U.S. App. Lexis 10143 at *15. Both the limited scope and nature of this information could therefore not reasonably be expected to give al-Qaida material to use as

¹ *See* “Islam,” Wikipedia, available at <http://en.wikipedia.org/wiki/Islam> (visited July 11, 2013).

² *See* “Aniconism in Islam,” Wikipedia, available at http://en.wikipedia.org/wiki/Aniconism_in_Islam (visited July 9, 2013).

propaganda against the United States, nor could it reasonably compromise military operational secrets. *See* Defendant's Declaration, ECF 10-1 at ¶ 24.

Defendant has not carried its burden of demonstrating by analogy how such limited truthful information describing the burial and funeral could be distorted to raise foreign ire and lead to retaliatory attacks on American citizens or U.S. interests. In addition, no conceivable analogy is given as to why the timing of the burial ceremony, or the location of the burial ceremony on the USS Carl Vinson – be it port or stern – could be used to propagandize an offense to Islam. The only support offered for these withholdings is mere speculation by Defendant's declarant. But a "mere assertion of exemption" without "substantive reasoning and analysis" is insufficient to overcome Defendant's burden. *Ford Motor Co. v. United States Customs & Border Protect.*, 2008 U.S. Dist. Lexis 101503, 44-45 (E.D. Mich. 2008); *Dolin, Thomas, & Solomon, LLP v. United States Dep't of Labor*, 719 F. Supp. 2d 245, 249 (W.D. NY 2010) ("An agency's decision to claim one or more of the FOIA exemptions to disclosure must be substantially justified. A mere assertion of privilege is insufficient . . .").

Accordingly, the limited information described above is not subject to Exemption 1 under the D.C. Circuit's test articulated in *Judicial Watch v. DoD* or otherwise, and must be released pursuant to FOIA. The Court should therefore deny Defendant's motion for summary judgment and grant Plaintiff's cross-motion for summary judgment to the extent described herein.

Dated: July 11, 2013

Respectfully submitted,

/s/ Paul Orfanedes

Paul J. Orfanedes

D.C. Bar No. 429716

/s/ Chris Fedeli

Chris Fedeli

D.C. Bar No. 472919

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Counsel for Plaintiff

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JUDICIAL WATCH, INC.,)	
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<i>Plaintiff,</i>)	
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v.)	1:12-cv-01182-RJL
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DEPARTMENT OF THE NAVY,)	
)	
<i>Defendant.</i>)	
_____)	

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS
NOT IN DISPUTE AND PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN
SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendants’ Statement of Material Facts Not in Dispute and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

I. Plaintiff’s Response to Defendants’ Statement of Material Facts Not in Dispute.

1. Not disputed.
2. Not disputed.
3. Not disputed.
4. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *Judicial*

Watch, Inc. v. Food and Drug Admin., 449 F.3d 141, 145-146 (D.C. Cir. 2006) (“Because of its unique evidentiary configuration, the typical FOIA case distorts the traditional adversary nature of our legal system’s form of dispute resolution. When a party submits a FOIA request, it faces an asymmetrical distribution of knowledge where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request. The agency would therefore have a nearly

impregnable defensive position save for the fact that the statute places the burden on the agency to sustain its action.”) (internal citations and punctuation omitted).

5. This paragraph contains legal conclusions about classified information, which are improperly asserted in a statement of facts, and therefore require no response. With respect to the remainder of the paragraph, Plaintiff lacks sufficient knowledge to confirm or deny it. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

6. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

7. Not disputed.

8. Not disputed.

9. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

10. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

11. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

12. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

13. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

14. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

15. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

16. This paragraph contains legal conclusions about classified information, which are improperly asserted in a statement of facts, and therefore require no response.

17. Not disputed.

18. This paragraph contains legal conclusions about classified information, which are improperly asserted in a statement of facts, and therefore require no response. With respect to the remainder of the paragraph, Plaintiff lacks sufficient knowledge to confirm or deny it. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

19. The facts of what Lieutenant General Scaparrotti stated in his Declaration speak for themselves, and Plaintiffs dispute any characterization beyond that.

20. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

21. This paragraph contains legal conclusions about classified information, which are improperly asserted in a statement of facts, and therefore require no response. With respect to the remainder of the paragraph, Plaintiff lacks sufficient knowledge to confirm or deny it. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

22. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

23. Disputed, except to the extent that Plaintiff lacks sufficient knowledge to confirm or deny the headings were processed in response to the FOIA request. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

24. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d at 145-146.

II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.

1. Defendant Department of the Navy produced ten documents it claims as responsive to Plaintiff's FOIA request.

2. Certain information in these documents was redacted by the defendant as allegedly exempt pursuant to FOIA Exemption 1, 5 U.S.C. § 552(b)(1), on the grounds that its release "could reasonably be expected to harm national security" by virtue of revealing military operational secrets or by potentially "inflaming tensions among overseas populations that include al-Qaida members or sympathizers" as a result of its use by our enemies to "insinuate that the procedures utilized in the burial were an affront to Islam," "potentially leading to retaliatory attacks against the United States and its citizens at home and abroad." ECF 10-1 at ¶ 25.

Dated: July 11, 2013

Respectfully submitted,

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