

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

CABLE NEWS NETWORK, INC.)

Plaintiff,)

v.)

FEDERAL BUREAU OF)
INVESTIGATION,)

Defendant.)

Civil Action No. 17-01167 (JEB)

GANNETT SATELLITE INFORMATION)
NETWORK, LLC, *et al.*,)

Plaintiff,)

v.)

U.S. DEPARTMENT OF JUSTICE,)

Defendant.)

Civil Action No. 17-01175 (JEB)

JUDICIAL WATCH, INC.,)

Plaintiff,)

v.)

U.S. DEPARTMENT OF JUSTICE,)

Defendant.)

Civil Action No. 17-01189 (JEB)

FREEDOM WATCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 17-1212 (JEB)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	
)	
THE DAILY CALLER NEWS)	
FOUNDATION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 17-1830 (JEB)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

PLAINTIFF JUDICIAL WATCH’S REPLY TO DEFENDANTS’ OPPOSITION TO PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc. respectfully submits this reply to Defendants’ opposition to Plaintiffs’ cross-motions for summary judgment:

MEMORANDUM OF POINTS AND AUTHORITIES

1. Defendant acknowledges that the February 14 Memo – the only record Judicial Watch seeks – was not *created* for a law enforcement purpose. Def’s Opp. at 3 and 10. Its claim that the memo was later compiled for law enforcement purposes ignores several undisputed facts. First and foremost, Judicial Watch did not ask the alleged compiler – Special Counsel Mueller – for the memo. Judicial Watch asked the originating agency and primary custodian – the FBI – for the memo. Special Counsel Mueller had not even been appointed when Judicial Watch served its FOIA request on the FBI. In addition, Defendant readily admits that the memo was

found in former Director Comey's files, not in Special Counsel Mueller's files. Def's Opp. at 6. Defendant does not even claim to have searched Special Counsel Mueller's investigatory files.

2. It is immaterial whether Special Counsel Mueller may have obtained a copy of the February 14 Memo *after* Plaintiff requested the memo from the FBI. No claim is made that the FBI compiled the memo for law enforcement purposes. If anything, Defendant's voluntary disclosure that Special Counsel Mueller subsequently obtained a copy of the memo undermines Defendant's Exemption 7(A) claim. As the D.C. Circuit recently found in a similar situation in the context of alleged grand jury material withheld under Exemption 3:

The government argues that documents subpoenaed by a grand jury are more revealing than documents merely presented to a grand jury, because they reveal the direction of the grand jury's investigation. If the documents would reveal to the requester that they had been subpoenaed, we would agree. But subpoenaed documents would not necessarily reveal a connection to a grand jury. It is possible that, had the government released the documents without invoking Exemption 3, Labow would never have known that any of the documents had been subpoenaed by a grand jury . . . Of course, if the documents are now belatedly released, it might be apparent that they had been subpoenaed by a grand jury given that the potential connection with a grand jury is now known. That fact, however, should not bar disclosure.

Labow v. U.S. Dep't of Justice, 831 F.3d 523, 529-30 (D.C. Cir. 2016). Defendant could have produced the memo to Judicial Watch without any reference to the Special Counsel or his files. If it had, Judicial Watch would not have known of any potential connection between the memo and Special Counsel Mueller's investigation.

3. Similarly, the attorney-client privilege does not authorize the withholding of a record in a client's files simply because the client gives a copy of the record to his or her attorney. By revealing that a copy of the record was turned over to the client's attorney, the client reveals the very thing the privilege is intended to protect. Here, it is Defendant's botched assertion of Exemption 7(A) that has created a connection between the February 14 Memo and

Special Counsel Mueller's investigation, not anything inherent in the memo's creation, purpose, or location in former Director Comey's non-investigatory files.

4. Judicial Watch cited *Labow* in its cross-motion. JW Mem. at 12, n.2. Defendant ignored it. The cases cited by Defendant do not address records requested from the non-investigatory files of their creators or original custodians. They only address requests for records in the investigatory files of law enforcement officials. They do not support Defendant's argument.

5. Defendant's categorical approach to its claims of exemptions also is not supported by the case law. Defendant identifies nothing about the memos showing they are the type of records "in which the balance *characteristically* tips in one direction." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1095 (D.C. Cir. 2014). The individual memos themselves are not of a single type. Former Director Comey described some of the memos, including the February 14 Memo, as somewhat formal documents memorializing his in-person meetings with the President. Stmt. at 1-2. He described others as nothing more than "emails to my chief of staff or others on some of the brief phone calls." Tr. at 93. The February 14 Memo is unique given that former Director Comey chose to leak the memo to the media, then described and quoted it at length during his Select Committee testimony. Obviously, a greater showing of harm is required when a record has been described and quoted extensively in public, as the cat is already out of the bag. The February 14 Memo cannot be grouped together in the same category as the other memos, some of which former Director Comey referenced only in passing. By failing to properly invoke a "categorical" approach and relying on broad brush assertions of harm that do not differentiate between memos, Defendant fails to prove that disclosure of the February 14 Memo in particular will harm the investigation.

6. Defendant does nothing to rebut Judicial Watch's showing that, because former Director Comey testified so extensively about the February 14 Memo, its disclosure will not harm the Special Counsel's investigation. Defendant asserts that the "precise contents" of *all* the Comey Memos have not yet been revealed. Def's Opp. at 15. But that is not true with respect to the February 14 Memo. Former Director Comey testified that he "need[ed] to remember every single word that is spoken" and was quoting the President's "exact" words to him and his carefully chosen words back to the President. Tr. at 40, 49, and 55. Obviously, former Director Comey would not have testified to the U.S. Senate about statements and material he believed were insignificant or unimportant. He testified about and quoted what he believed was most significant and most important about his February 14, 2017 meeting with the President. Defendant does not claim former Director Comey's testimony left out anything substantial or significant about the February 14 Memo in particular. It is irrelevant, at least to Judicial Watch's request for the February 14 Memo, that former Director Comey did not testify as extensively about the contents of the other memos.

7. Finally, Defendant does nothing to dispel the conclusion that former Director Comey's Select Committee testimony was authorized by Defendant or at least coordinated with Defendant in some fashion. It also refuses to state why, if former Director Comey's testimony was not authorized or coordinated, it has not taken steps to remedy that testimony, along with his removal of the memo from the FBI and leaking it to the media. Instead, Defendant coyly asserts that "such matters are committed to the discretion of the government." Def's Opp. at 17-18. By failing to state affirmatively whether former Director Comey's testimony was authorized or coordinated, Defendant only further undermines its claim that disclosure of the February 14 Memo will somehow harm Special Counsel Mueller's investigation.

Dated: December 13, 2017

Respectfully submitted,

/s/ Paul J. Orfanedes

Paul J. Orfanedes

D.C. Bar No. 429716

JUDICIAL WATCH, INC.

425 Third Street SW, Suite 800

Washington, DC 20024

(202) 646-5172

Counsel for Plaintiff Judicial Watch, Inc.