

**IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

JUDICIAL WATCH, INC.,)

Appellant,)

vs.)

Case No. 07-5158

FEDERAL BUREAU OF)
INVESTIGATION,)

Appellee.)
_____)

APPELLANT'S MOTION FOR SUMMARY REVERSAL

Appellant Judicial Watch, Inc. ("Judicial Watch"), by counsel, respectfully submits this motion for summary reversal of the District Court's May 11, 2007 order finding that Judicial Watch had not "substantially prevailed" for purposes of an award of attorney's fee and litigation expenses under the Freedom of Information Act, 5 U.S.C. § 552. As grounds therefor, Judicial Watch states as follows:

MEMORANDUM OF LAW

1. On December 8, 2006, Judicial Watch filed a verified motion seeking an award of \$12,144.68 in attorney's fees and litigation expenses in this Freedom of Information Act ("FOIA") lawsuit. Judicial Watch had requested that Appellee Federal Bureau of Investigation ("FBI") produce certain videotapes taken on September 11, 2001 at or near the Pentagon. Judicial Watch filed suit when the FBI failed to produce the requested videotapes within the time period required by law. Pursuant to stipulations and agreed orders subsequently negotiated by the parties and entered by the District Court as enforceable orders, the FBI was required to

produce the requested videotapes by dates certain. Judicial Watch thus succeeded in compelling the FBI to produce two videotapes, by dates certain, showing the impact of American Airlines Flight 77 striking the Pentagon on September 11, 2001. Copies of the parties' stipulations and minute orders entering these stipulations are attached collectively as Exhibit 1.

2. In order to obtain an award of attorney's fees and litigation expenses in a FOIA lawsuit, a requestor must demonstrate that (1) it has "substantially prevailed" and thus is eligible for an award; and (2) it is entitled to an award under a balancing of relevant factors. *Oil, Chemical and Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002).

3. In its motion, Judicial Watch argued that it had "substantially prevailed" and thus was eligible for an award of attorney's fees and litigation expenses because it succeeded in obtaining enforceable, court-ordered relief, namely, dates certain by which the FBI was required to produce the videotapes at issue. In support of its argument, Judicial Watch cited this Court's recent ruling in *Davy v. Central Intelligence Agency*, 456 F.3d 162, 165 (D.C. Cir. 2006). Plaintiff's Verified Motion for Award of Attorney's Fees and Litigation Expenses at 5-7; Plaintiff's Reply in Support of Motion for Award of Attorney's Fees and Litigation Expenses at 2-6.

4. In an order entered on May 11, 2007, the District Court disagreed. In a three-sentence ruling that took no account of this Court's ruling in *Davy*, the District Court found that Judicial Watch had not "substantially prevailed" within the meaning of FOIA:

Plaintiff relies for its argument that it is such a prevailing party on three Stipulations and Agreed Orders negotiated by the parties and signed by the Court on July 21, August 18 and November 17, 2006, respectively. The Court has carefully reviewed the Stipulations and Agreed Orders and concludes that, post-Buckhannon [Bd. & Care Home, Inc. v. West Virginia Dep't of Heath & Human

Res., 532 U.S. 598, 603 (2001)], plaintiff cannot be considered a prevailing party by virtue of those Orders. Accordingly, it is hereby ORDERED that plaintiff's Verified Motion [Docket 13] for Award of Attorney's Fees and Litigation Expenses is DENIED.

A copy of the District Court's May 11, 2007 order is attached as Exhibit 2. Because it found against Judicial Watch on the first prong of the two-part test governing awards of attorney's fees and litigation expenses, the District Court did not reach the second prong of the analysis. *Id.*

5. Summary action is warranted on an appeal where the parties' positions are so clear that expedited action is justified and the Court concludes no benefit will be gained from further briefing and argument of the issues presented. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). While Judicial Watch recognizes that the burden of establishing the appropriateness of summary action is a heavy one, it respectfully submits that the simple issue raised by this appeal satisfies even that high standard.

6. This appeal requires nothing more than a straightforward application of this Court's clear holding in *Davy* to the very simple set of facts presented by Judicial Watch's substantially similar lawsuit. In *Davy*, the parties had stipulated that the defendant agency would produce records requested under FOIA by a date certain, and the trial court had approved the parties' joint stipulation. 456 F.3d at 164. On appeal, this Court found that the trial court's memorialization of the parties' joint stipulation created a judicially enforceable order. *Id.* at 166. This Court noted that, had the agency not complied with the order, it could have been held in contempt. *Id.* As a result of the order, this Court found that the requestor had received the records he requested within a particular time frame, changing the "legal relationship between" the parties and awarding the requestor "some relief on the merits." *Id.*; see also *Edmonds v. FBI*,

417 F.3d 1319, 1321-23 (D.C. Cir. 2005) (FOIA requestor who obtained a court order granting expedited processing of her request and requiring production of responsive records by a date certain had “substantially prevailed” for purposes of an attorney fee award).

7. Like the plaintiff in *Davy*, Judicial Watch succeeded in obtaining significant, court-ordered relief that changed the legal relationship between the parties, namely, enforceable court orders that required the FBI to produce the requested videotapes by dates certain. Had the FBI failed to produce either videotape by the court-ordered date, the FBI likewise could have faced contempt sanctions. Clearly, by bringing this action and obtaining enforceable court orders requiring the production of the requested videotapes by dates certain, Judicial Watch “substantially prevailed” in its FOIA lawsuit, just as the requestor in *Davy* had substantially prevailed in his lawsuit.

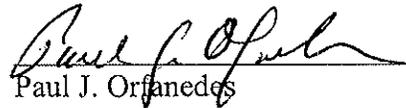
8. Because this appeal requires nothing more than the straightforward application of this Court’s clear holding in *Davy* to a very simple set of facts, summary reversal should be granted in Judicial Watch’s favor and this matter should be remanded to the District Court for consideration of the second prong of the two-part analysis required under *Oil, Chemical and Atomic Workers Int’l Union*.

WHEREFORE, Judicial Watch respectfully requests that the Court reverse the District Court’s May 11, 2007 determination that Judicial Watch had not “substantially prevailed” and remand this matter accordingly.

Dated: July 5, 2007

Respectfully submitted,

JUDICIAL WATCH, INC.

A handwritten signature in black ink, appearing to read "Paul J. Orfanedes", written over a horizontal line.

Paul J. Orfanedes

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Attorneys for Appellant

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.)	
)	
Plaintiff,)	Civil Action No. 06-1135 (PLF)
)	
v.)	
)	
FEDERAL BUREAU OF)	
INVESTIGATION,)	
)	
Defendant.)	
_____)	

STIPULATION AND AGREED ORDER

Plaintiff Judicial Watch, Inc. and Defendant Federal Bureau of Investigation, by counsel, hereby stipulate and agree as follows:

1. Currently pending before the Court is Plaintiff's application for a preliminary injunction in this Freedom of Information Act ("FOIA") lawsuit. Defendant's response to Plaintiff's application is due on or before Thursday, July 20, 2006.

2. On December 15, 2004, Plaintiff sent a FOIA request to Defendant, by facsimile and by certified U.S. mail, return receipt requested, seeking access to any and all records concerning or relating to the following subjects:

- (1) Video camera recording(s) obtained by federal official(s) and/or law enforcement from the Sheraton National Hotel in Arlington, Virginia, on or about September 11, 2001.
- (2) Video camera recording(s) obtained by any federal official(s) and/or law enforcement from a Nexcomm/Citgo gas station in the vicinity of the Pentagon on or about September 11, 2001.
- (3) Pentagon security video camera recording(s) showing Flight 77 strike and/or hit and/or crash into the Pentagon on September 11, 2001.

- (4) Closed Circuit Television (CCTV) video camera recording(s) obtained by any federal official(s) and/or law enforcement from the Virginia Department of Transportation ("VDOT") and/or the VDOT "Smart Traffic Center" on or about September 11, 2001.

Plaintiff's December 15, 2004 request also sought a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii).

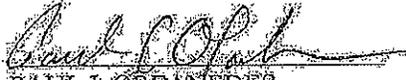
3. Defendant acknowledges that it is in possession of videotapes responsive to the second and third paragraphs of Plaintiff's FOIA request. Two (2) recordings responsive to paragraph 3 of the request were produced to Plaintiff in other litigation. Although Defendant previously suggested that it was in possession of a videotape responsive to paragraph 4 of the request, it has since determined that it in fact does not possess any such videotape.

4. Defendant has reviewed the videotape responsive to paragraph 2 of Plaintiff's request and determined that the videotape includes the images of several individuals who appear to be patrons and employees of the Nexcomm/Citgo gas station. Defendant wishes to redact the videotape in order to protect the privacy of these individuals, and Plaintiff does not object to the redaction.

5. Accordingly, Defendant shall have an additional ninety (90) days, until and including October 18, 2006, in which to complete its redaction of the Nexxcom/Citgo videotape. Upon completion of the redaction, Defendant shall produce the videotape to Plaintiff without any other redactions and without imposing search or duplication fees on Plaintiff in this case.

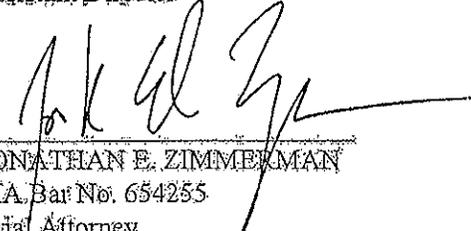
6. This action shall be stayed until October 18, 2006, unless the parties notify the Court before that date that the videotape has been produced to Plaintiff.

SO STIPULATED AND AGREED this 19th day of July, 2006.


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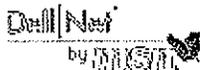

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Attorneys for Defendant

SO ORDERED.

Dated:

The Hon. Paul L. Friedman, U.S.D.J.



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District of Columbia

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Case Name: JUDICIAL WATCH INC v. FEDERAL BUREAU OF INVESTIGATION

Case Number: 1:06-cv-1135

Filer:

Document Number:

Docket Text:

MINUTE ORDER approving the stipulation and agreed order [8]. Signed by Judge Paul L. Friedman on July 21, 2006. (MA)

The following document(s) are associated with this transaction:

1:06-cv-1135 Notice will be electronically mailed to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.)	
)	
Plaintiff,)	Civil Action No. 06-1135 (PLF)
)	
v.)	
)	
FEDERAL BUREAU OF)	
INVESTIGATION,)	
)	
Defendant.)	
)	

STIPULATION AND AGREED ORDER

Plaintiff Judicial Watch, Inc., and Defendant Federal Bureau of Investigation (FBI), by counsel, hereby stipulate and agree as follows:

1. On December 15, 2004, Plaintiff sent a FOIA request to Defendant, by facsimile and by certified U.S. mail, return receipt requested, seeking access to any and all records concerning or relating to the following subjects:

- (1) Video camera recording(s) obtained by federal official(s) and/or law enforcement from the Sheraton National Hotel in Arlington, Virginia, on or about September 11, 2001.
- (2) Video camera recording(s) obtained by any federal official(s) and/or law enforcement from a Nexcomm/Citgo gas station in the vicinity of the Pentagon on or about September 11, 2001.
- (3) Pentagon security video camera recording(s) showing Flight 77 strike and/or hit and/or crash into the Pentagon on September 11, 2001.
- (4) Closed Circuit Television (CCTV) video camera recording(s) obtained by any federal official(s) and/or law enforcement from the Virginia Department of Transportation ("VDOT") and/or the VDOT "Smart Traffic Center" on or about September 11, 2001.

Plaintiff's December 15, 2004 request also sought a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii).

2. On July 19, 2006, the parties entered into a stipulation by which Defendant acknowledged that it was in possession of videotapes responsive to the second and third paragraphs of Plaintiff's December 15, 2004 request. Plaintiff and Defendant stipulated and agreed that Defendant shall have until and including October 18, 2006 in which to redact, for privacy reasons, the images of several individuals who appear in the Nexxcom/Citgo videotape responsive to paragraph 2 of Plaintiff's December 15, 2004 request and to produce this videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case. Plaintiff and Defendant further stipulated and agreed that this matter would be stayed until that date. On July 21, 2006, the Court entered a minute order approving the parties' July 19, 2006 stipulation.

5. On August 3, 2006, Plaintiff amended its Complaint in this action to include a June 29, 2006 FOIA request Plaintiff had served on Defendant seeking the following:

- (1) Video camera recording(s) obtained by federal official(s) and/or law enforcement from the Doubletree Hotel in Arlington, Virginia, showing the Pentagon and/or its environs, to include but not limited to, the impact of American Airlines Flight 77, on or about September 11, 2001.

Plaintiff's June 29, 2006 request also sought a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii).

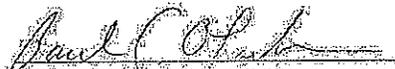
6. Defendant acknowledges that it is in possession of a videotape responsive to Plaintiff's June 29, 2006 request. Defendant has reviewed this videotape and determined that it includes the images of several individuals who appear to be patrons and employees of the

Doubletree Hotel. Defendant wishes to redact the videotape in order to protect the privacy of these individuals, and Plaintiff does not object to this redaction.

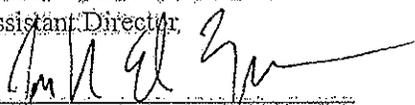
7. Accordingly, Defendant shall have until and including November 9, 2006 in which to complete its redaction of the Doubletree Hotel videotape and to produce the videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case.

8. Defendant shall continue to be obligated to produce the redacted version of the Nexxcom/Citgo videotape to Plaintiff by October 13, 2006. However, the stay of this action shall be extended until November 9, 2006, unless the parties notify the Court before that date that both videotapes have been produced to Plaintiff.

SO STIPULATED AND AGREED this 14th day of August, 2006.


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Email: jonathan.zimmerman@usdoj.gov

Attorneys for Defendant

SO ORDERED.

Dated:

The Hon. Paul L. Friedman, U.S.D.J.



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Case Number: 1:06-cv-1135

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MINUTE ORDER approving stipulation and agreed order [10]. Signed by Judge Paul L. Friedman on August 18, 2006. (MA)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.)	
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Plaintiff,)	Civil Action No. 06-1135 (PLF)
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STIPULATION AND AGREED ORDER

Plaintiff Judicial Watch, Inc., and Defendant Federal Bureau of Investigation (FBI), by counsel, hereby stipulate and agree as follows:

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- (3) Pentagon security video camera recording(s) showing Flight 77 strike and/or hit and/or crash into the Pentagon on September 11, 2001.
- (4) Closed Circuit Television (CCTV) video camera recording(s) obtained by any federal official(s) and/or law enforcement from the Virginia Department of Transportation ("VDOT") and/or the VDOT "Smart Traffic Center" on or about September 11, 2001.

Plaintiff's December 15, 2004 request also sought a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii).

2. On July 19, 2006, the parties entered into a stipulation by which Defendant acknowledged that it was in possession of videotapes responsive to the second and third paragraphs of Plaintiff's December 15, 2004 request. Plaintiff and Defendant stipulated and agreed that Defendant shall have until and including October 18, 2006 in which to redact, for privacy reasons, the images of several individuals who appear in the Nexxcom/Citgo videotape responsive to paragraph 2 of Plaintiff's December 15, 2004 request and to produce this videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case. Plaintiff and Defendant further stipulated and agreed that this matter would be stayed until that date. On July 21, 2006, the Court entered a minute order approving the parties' July 19, 2006 stipulation.

5. On August 3, 2006, Plaintiff amended its Complaint in this action to include a June 29, 2006 FOIA request Plaintiff had served on Defendant seeking the following:

- (1) Video camera recording(s) obtained by federal official(s) and/or law enforcement from the Doubletree Hotel in Arlington, Virginia, showing the Pentagon and/or its environs, to include but not limited to, the impact of American Airlines Flight 77, on or about September 11, 2001.

Plaintiff's June 29, 2006 request also sought a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii).

6. Defendant acknowledged that it is in possession of a videotape responsive to Plaintiff's June 29, 2006 request, but following review of this videotape determined that it

includes the images of several individuals who appear to be patrons and employees of the Doubletree Hotel.

7. On August 14, 2006, the parties agreed and stipulated that Defendant shall have until and including November 9, 2006 in which to complete its redaction of the Doubletree Hotel videotape and to produce the videotape to Plaintiff without any other redactions and without imposing any search or duplication fees on Plaintiff in this case.

8. Defendant produced to Plaintiff the Citgo/Nexcomm gas station videotape on September 13, 2006. While Defendant has been actively engaged in the redaction of the Doubletree Hotel videotape since August 14, 2006, Defendant requires additional time in order to complete the redactions and produce that videotape to Plaintiff.

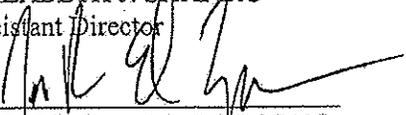
9. Accordingly the parties request that the Court extend the stay of this action until December 22, 2006, unless the parties notify the Court before that date that the Doubletree Hotel videotape, the only remaining record to be produced in this case, has been produced to Plaintiff.

SO STIPULATED AND AGREED this 8th day of November, 2006.


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Attorneys for Defendant

SO ORDERED.

Dated:

The Hon. Paul L. Friedman, U.S.D.J.



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Case Number: 1:06-cv-1135

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Document Number:

Docket Text:

MINUTE ORDER granting the stipulation and agreed order [11]. Signed by Judge Paul L. Friedman on November 16, 2006. (MA)

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EXHIBIT 2

ORDERED that plaintiff's Verified Motion [Docket 13] for Award of Attorney's Fees and Litigation Expenses is DENIED.

SO ORDERED.

/s/ _____
PAUL L. FRIEDMAN
United States District Judge

DATE: May 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2007 a true and correct copy of the foregoing APPELLANT'S MOTION FOR SUMMARY REVERSAL was served, via first class U.S. mail, postage prepaid, on the following:

Michael E. Robinson
Leonard Schaitman
Civil Division -- Appellate Staff
U.S. DEPARTMENT OF JUSTICE
Room 7539
950 Pennsylvania Avenue, N.W.
Washington, DC 20530



David R. Rothstein