IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 1:09-CV-2138 (RWR)
	)	
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby moves for summary judgment on its Freedom of Information Act ("FOIA") claim against Defendant Board of Governors of the Federal Reserve System ("FRS"). As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

Plaintiff is entitled to summary judgment because Defendant has failed to comply with its obligations under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). As shown below, Defendant failed to fully respond to Plaintiff's FOIA request within the 20-day time period required by law. While Defendant ultimately did respond in part to Plaintiff's request after this lawsuit was filed, it is continuing to improperly withhold some information from Plaintiff. Under the circumstances, Plaintiff respectfully submits that Defendant's Motion for summary judgment should be denied.

II. Factual Background.

This case concerns Plaintiff's efforts to obtain information about visitors to the official offices of Ben Bernanke, Chairman of the Board of Governors of the Federal Reserve, and Mr. Kevin Warsh, who sits on the board of Governors. Both of these individuals played an important role in responding to the severe economic crisis that struck the United States beginning in the fall of 2007.

In furtherance of its investigation into these matters, on September 2, 2009, Plaintiff sent Defendant, by certified U.S. mail and facsimile, a FOIA request seeking access to any and all records concerning or relating to the following topics:

1. Any and all visitors logs for meetings with Chairman Bernanke.

2. Any and all visitors logs for meeting with Kevin Warsh.

See Exhibit 1 to the Declaration of Alison M. Thro, attached to Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment ("Def. Mot.").

By letter dated September 3, 2009, Defendant acknowledged receipt of Plaintiff's FOIA request. *See* Complaint at ¶7. On October 1, 2009, Defendant sent a second letter to Plaintiff. The October 1, 2009 letter extended Defendant's time to respond to Plaintiff's request to October 16, 2009, pursuant to 5 U.S.C. § 552 (a)(6)(B)(i). *See* Complaint at ¶8. However, Plaintiff was forced to file this lawsuit when Defendant failed to respond to Plaintiff's request by November 13, 2009 and gave no indication to Plaintiff as to when it could expect to receive a substantive response.

Plaintiff finally received a substantive response from Defendant on January 21, 2010. The response consisted of 8 pages of visitor's logs for Governor Warsh and 9 pages of visitor's

logs for Chairman Bernanke. *See* Exhibit 1 – Letter from Margaret Shanks to Jenny Small and attachments. Defendant's January 21, 2010 response contained some of the information Plaintiff requested, however, the name and organization for 26 entries in the logs were redacted pursuant to FOIA exemption (b)(6). *Id.*

Following negotiations between the parties, Defendant agreed to release some additional responsive information from the logs and Defendant did so on March 23, 2010. *See* Exhibit 2. *See also* Def. Mot. at 3. Specifically, Defendant released to Plaintiff a revised version of the visitor's logs in which the "Organization" column had been unredacted with the exception of two (2) entries. *Id.* However, Defendant continued to withhold the names of 26 visitors to Messrs. Bernanke and Warsh. *See* Exhibit 2 at 1-2.

At that point, the parties reached an impasse. Defendant continues to withhold the remaining information from the visitor's logs pursuant to Exemption (b)(6). Plaintiff's position is that any privacy interest held by the individuals in the redacted portions of the logs is outweighed the public's interest in knowing precisely who had access to Messrs. Bernanke and Warsh at the height of one of the United States' worst financial crises.

III. Argument.

A. Summary Judgment Framework.

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); Fed.R.Civ.P. 56 (c). In reviewing a motion for summary judgment under FOIA, the Court must view the facts in the light most favorable to the requestor. *Weisberg v. U.S.*

Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984). For a defendant to prevail, it must "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978).

B. <u>The Freedom of Information Act and Exemptions</u>.

FOIA provides a framework of liberal disclosure for agency records and "provides that all documents are available to the public unless specifically exempted by the Act itself." *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) (footnote omitted). Exemptions from disclosure "must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act." *Id.*

Where the government asserts that a record is exempt from disclosure, "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action." 5 U.S.C. § 552 (a)(4)(B); *U.S. Department of Justice v. Landano*, 508 U.S. 165, 171 (1993). A responsive record must be disclosed except where the government meets its burden of showing that the record fits within one of the specific exemptions. *King v. U.S. Department of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987).

The most common device used by agencies to attempt to meet this burden is the *Vaughn* Index. *Vaughn*, 484 F.2d at 826-28. *Vaughn* made clear that "courts will simply no longer accept conclusory and generalized allegations of exemptions." *Id.* at 826. *Vaughn* thus requires that an agency seeking to withhold responsive records under claims of exemption must file a declaration or index that provides a "detailed justification" and "[s]pecificity, [s]eparation, and [i]ndexing" of its claimed exemptions. *Id.* at 826-27.

Where an agency attempts to meet its burden by filing a *Vaughn* Index, the index must be sufficiently detailed and divided into manageable segments. *Davin v. U.S. Department of Justice*, 60 F.3d 1043, 1065 (3d Cir. 1995); *Hayden v. NSA*, 608 F.2d 1381 (D.C. Cir. 1979); *Goland*, 607 F.2d at 364, 65. The description must enable the requestor and the court "to derive from the index a clear explanation of why each document or portion of a document withheld" should be exempt from disclosure. *Mead Data Center v. U.S. Department of the Air Force,* 566 F.2d 242, 251 (D.C. Cir. 1977). Further, the *Vaughn* Index must indicate that any reasonably segregable information has been disclosed. 5 U.S.C. §552(b); *see also Allen v. CIA,* 636 F.2d 1287, 1293 (D.C. Cir. 1980).

C. Defendant Is Improperly Withholding Information Pursuant to Exemption 6.

In order for an agency to withhold information under Exemption 6 properly, the agency must demonstrate that the information is both a personnel, medical, or similar file, and that the disclosure of the information would constitute a clearly unwarranted invasion of privacy. FOIA's Exemption 6 authorizes agencies to withhold from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See U.S. Dep't of Justice v. Reporter's Committee For Freedom of the Press*, 489 U.S. 749, 755 (1989); 5 U.S.C. § 552(b)(6).[1] It is undeniably the agency's burden to make these demonstrations. *Id.* In addition, "similar files" are defined to include any "Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of*

[1] The D.C. Circuit has also made it necessary for Defendant to demonstrate the "causal relationship between the disclosure and the threatened invasion of privacy." *National Ass'n of Ret. Federal Employees v. Horner*, 978 F.2d 873, 878 (D.C. Cir. 1989). Defendant has provided no such demonstration here.

State v. Washington Post Co., 456 U.S. 595, 601 (1982). These are the only types of records to which Exemption 6 applies. Finally, if the privacy interests in the information at issue are *de minimis*, the disclosure does not amount to a "clearly unwarranted invasion of personal privacy." *Ripskis v. Dep't of Housing and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Once it has been established that the information at issue comes from personnel, medical, or similar files, the Court must balance the privacy interests of an individual against the public's interest in disclosure. *See Judicial Watch v. FDA*, 449 F.3d 141 (D.C. Cir. 2006).

1. The Privacy Interests at Issue Here Are *De Minimis*.

In this case, Plaintiff does not dispute that the information redacted from the visitor's logs by Defendant comes from government files. Therefore, the first step in determining whether Exemption 6 applies is "whether their disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest. If no significant privacy interest is implicated, FOIA demands disclosure." *National Ass'n of Ret. Federal Employees v. Horner*, 978 F.2d 873, 874 (D.C. Cir. 1989).

The privacy interests at issue here are minimal to non-existent. Plaintiff seeks *only* the mere *names* of the individuals who visited Messrs. Bernanke and Warsh. Plaintiff has no interest in, and did not request, addresses, phone numbers, or other information about these individuals that could indeed be intrusive. Plaintiff notes that the meetings in question took place on taxpayer funded, government property, and they presumably took place during business hours.[2] It is absurd to claim that these individuals have *any* privacy interest greater than that held by the

[2] Plaintiff cannot be sure of the precise time that the meetings with Messrs. Bernanke and Warsh took place since there are no time stamps, only a date, included in the visitor's logs.

individuals whose names Defendant did release, however belatedly, merely because Defendant asserts the meetings were of a "personal" nature.

2. The Public's Interest in the Requested Information Outweighs Any Privacy Interest of the Individuals Named in the Visitor's Logs.

The U.S. Supreme Court has held that the question of whether an invasion of privacy is warranted goes directly to "the nature of the requested document and its relationship to the 'basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *U.S. Dep't of Justice v. Reporter's Committee For Freedom*, 489 U.S. 749, 772 (1989). In other words, the public interest in the withheld information is directly linked to the determination of whether the privacy invasion is warranted. *See Horowitz v. Peace Corps.*, 428 F.3d 271, 278 (D.C. Cir. 2005).

In this case, even if Messrs. Bernanke and Warsh's "personal" visitors do have some privacy interest in keeping the bare fact of their visits to a government agency during business hours secret, the requested information should still be released. Plaintiff respectfully submits that these visitor's minimal privacy interest is greatly outweighed by the public's interest in full disclosure about the activities of powerful government officials during one of the greatest economic disasters in United States history. Plaintiff further notes that, for only 5 of the 26 entries on Mr. Bernanke's log and for none on Mr. Warsh's log does Defendant assert that the visitors were family members. In other words, the other 21 individuals could have been anyone, meeting high level government officials for what, at the moment, are completely unknown purposes. Plaintiff respectfully submits that more transparency is required in this case given the

magnitude of the financial crisis, and the importance of the positions held by Messrs. Bernanke and Warsh.

IV. Conclusion.

For all the foregoing reasons, Defendant's Motion for Summary Judgment should be denied and Plaintiff respectfully submits that Defendant should be ordered to turn over the remaining information responsive to Plaintiff's September 2, 2009 FOIA request immediately.

Respectfully submitted,

JUDICIAL WATCH, INC.

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

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 1:09-CV-2138 (RWR)
	)	
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE AND DISPUTE FILED IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc. ("Judicial Watch"), by counsel and pursuant to LCvR 56.1, submits the following Statement of Material Facts as to Which There is a Genuine Issue and Dispute:

1. Plaintiff denies that any documents are being properly withheld by Defendant pursuant to 5 U.S.C. §552(b)(6). The documents at issue are not properly being withheld pursuant to Freedom of Information Act ("FOIA") Exemption (b)(6) because, as demonstrated in more detail in Plaintiff's Opposition To Defendant's Motion for Summary Judgment, Defendant has failed to carry its burden of showing that release of the requested information would constitute a clearly unwarranted invasion of personal privacy.

As to Defendant's statements, Plaintiff responds as follows:

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Disputed to the extent that Defendant did not release all of the information that Plaintiff was entitled to under the FOIA in Defendant's January 21, 2010 production.

6. Undisputed.

7. Undisputed.

8. Plaintiff disputes that Defendant's March 23, 2010 revised *Vaughn* Index adequately justified Defendant's withholding decisions.

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/_____

Jason Aldrich
D.C. Bar No. 495488
Paul J. Orfanedes
D.C. Bar No. 429716
425 Third St., SW
Suite 800
Washington, DC 20024
(202) 646-5172

Attorneys for Plaintiff