[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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

No. 15-5271

JUDICIAL WATCH, INC.

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE

Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT JUDICIAL WATCH, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28(a)(1), counsel provides the following information as to parties, rulings, and related cases:

(A) Parties and Amici

The following parties, interveners, and amici curiae appeared, or sought to appear, below:

Plaintiff: Judicial Watch, Inc.

Defendant: U.S. Department of Justice

The following parties, interveners, and amici curiae are before this Court on appeal:

Plaintiff-Appellant: Judicial Watch, Inc.

Defendant-Appellee: U.S. Department of Justice

(B) Ruling under Review

The ruling under review is the Opinion and Order of the United States District Court for the District of Columbia (Howell, J.) issued on July 31, 2015. The ruling can be found at Joint Appendix pages 25-38 and is published as *Judicial Watch, Inc. v. U.S. Department of Justice*, 2015 U.S. Dist. LEXIS 99982 (D.D.C. July 31, 2015).

(C) Related Cases

Judicial Watch, Inc. does not believe that there are any related cases within the meaning of Local R. 28(a)(1)(C).

/s/ Michael Bekesha

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GLOSSARY OF ABBREVIATIONS

Department	U.S. Department of Justice
District Court	U.S. District Court for the District of Columbia
FOIA	Freedom of Information Act
FSA	Field Service Advice Memorandum
ICM System	Interactive Case Management System
IRS	Internal Revenue Service
JA	Joint Appendix
Judicial Watch	Judicial Watch, Inc.
Opinion	Memorandum Opinion of U.S. District Judge Beryl A. Howell

JURISDICTIONAL STATEMENT

Jurisdiction in the U.S. District Court for the District of Columbia ("District Court") was pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331, and this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The appeal is timely because the District Court entered its final judgment on July 31, 2015 (Joint Appendix ("JA") 39) and pursuant to Fed. R. App. 4(a)(1)(B), a timely notice of appeal was filed on September 25, 2015. JA 40.

STATEMENT OF THE ISSUES PRESENTED

1. Under the Freedom of Information Act, may an agency properly withhold time records prepared in the ordinary course of business, not in anticipation of litigation, pursuant to the attorney work product doctrine?

2. Under the Freedom of Information Act, does an agency have an obligation to segregate responsive information not protected by the attorney work product doctrine from non-responsive information protected by the attorney work product doctrine when the records containing such information were prepared in the ordinary course of business, not in anticipation of litigation?

3. Under the Freedom of Information Act, may an agency properly withhold records detailing the number of hours spent by an agency attorney on a particular investigation pursuant to the deliberative process privilege?

4. Under the Freedom of Information Act, may an agency properly withhold records detailing the number of hours spent by an agency attorney on a particular investigation pursuant to the law enforcement exemption?

5. Under the Freedom of Information Act, may an agency properly withhold records detailing the number of hours spent by an agency attorney on a particular investigation pursuant to the privacy exemptions?

STATUTES

5 U.S.C. § 552(b):

This section does not apply to matters that are –

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings . . .

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .

STATEMENT OF THE CASE

At issue in this appeal is whether the U.S. Department of Justice ("Department") is improperly withholding records responsive to Judicial Watch's

Freedom of Information Act ("FOIA") request. Judicial Watch seeks records detailing the number of hours that Barbara Bosserman, an attorney in the Civil Rights Division, spent on a particular, high profile criminal investigation. Judicial Watch does not seek information describing the type of work Ms. Bosserman conducted. Nor does it seek information about how she spent her time. Nor does it seek Ms. Bosserman's notes about locations visited, persons consulted, staff briefings, and other case developments. Judicial Watch solely seeks information about the number of hours Ms. Bosserman expended on the criminal investigation.

Such information is prepared in the ordinary course of business, not in anticipation of litigation, and is not used in any decisionmaking processes or for law enforcement purposes. The Department is withholding the records in their entirety pursuant to the attorney work product doctrine, the deliberative process privilege, the law enforcement exemption, and the privacy exemptions. Although the Department's claims are overly broad and not supported by the evidence, the District Court found that the Department is properly withholding the records.

STATEMENT OF FACTS

I. The Department's Investigation of the Internal Revenue Service.

In an audit released in May 2013, the Treasury Inspector General for Tax Administration found that the Internal Revenue Service ("IRS") "used inappropriate criteria that identified for review Tea Party and other organizations

applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention." Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were used to Identify Tax-Exempt Applications for Review*, Reference Number 2013-10-053, May 14, 2013. In response, the Department launched a criminal investigation into "whether IRS employees engaged in potential criminal misconduct in connection with the IRS's handling of various organizations' applications for tax-exempt status." Memorandum Opinion of U.S. District Judge Beryl A. Howell ("Opinion"), dated July 31, 2015, at 1 (JA 25). The investigation is being conducted by career attorneys in the Civil Rights Division and the Public Integrity Section of the Criminal Division. *Id*.

The Department has revealed that Barbara Bosserman, a career attorney in the Civil Rights Division, is one of the attorneys involved in conducting the investigation. *Id.* at 1-2 (JA 25-26). There remains a factual dispute as to whether Ms. Bosserman is leading the investigation or just one of several Department attorneys involved. *Id.* at 26 (JA 26). Because the District Court did not reach the issue of whether the records are properly being withheld pursuant to the privacy exemptions, it was not required to make a factual finding with respect to the dispute. *Id*.

II. Judicial Watch's FOIA Request.

On February 25, 2014, Judicial Watch submitted a FOIA request to the Department seeking access to records detailing the number of hours that Ms. Bosserman spent on the aforementioned criminal investigation. *Id*. Because the Department failed to respond to Judicial Watch's request within the statutory time frame, Judicial Watch filed suit. *Id*.

After Judicial Watch filed suit, the Department searched for records responsive to Judicial Watch's FOIA request. *Id*. The Department queried the Interactive Case Management System ("ICM System") for Ms. Bosserman's time records. *Id*. According to the evidence submitted by Defendant,

> The ICM system tracks the case-related activities of the Division's legal staff. The system functions as a tool for senior management to oversee the work of the Division and to report matter and case data at all levels of the Department to provide for accountability and analyze the Division's performance. The Division designed the ICM system to capture and report to Division managers the level of effort that attorneys and professionals dedicate to investigations and case-related tasks

Declaration of Nelson D. Hermilla ("Hermilla Decl.") at ¶ 8 (JA 14-15).

During the query of the ICM System, the Department discovered records responsive to Plaintiff's FOIA request. Opinion at 2 (JA 26). The records contain the dates that Ms. Bosserman worked, the number of hours she worked on the investigation on a given date, and the type of activities she performed. *Id*. at 3 (JA 27). In addition to this information, certain records also contain the description of

activities that Ms. Bosserman performed, including "notes about locations visited, persons consulted, staff briefings, and other case developments." *Id*. The Department subsequently informed Judicial Watch that it was withholding all responsive records in their entirety pursuant to the law enforcement and privacy exemptions. *Id*.

III. The Proceedings Below.

The Department moved for summary judgment asserting that it was properly withholding the records responsive to Judicial Watch's FOIA request. Opinion at 6 (JA 30). In addition to asserting the law enforcement and privacy exemptions, the Department also invoked the attorney work product doctrine and the deliberative process privilege to withhold the records in their entirety. *Id*. Judicial Watch opposed the motion and simultaneously cross-moved for summary judgment. *Id.* at 3 (JA 27). The District Court granted the Department's motion for summary judgment and denied Judicial Watch's cross-motion. *Id.* at 1 (JA 25). The District Court specifically found that the Department was properly withholding the time records under the attorney work product doctrine. *Id.* at 6 (JA 30). Because of this finding, the District Court did not address whether the Department was properly withholding the responsive records pursuant to the deliberative process privilege, the law enforcement exemption, and the privacy exemptions. *Id*.

SUMMARY OF THE ARGUMENT

The Department is improperly withholding the responsive time records in their entirety. The Department claims to be withholding the records under the attorney work product doctrine, the deliberative process privilege, the law enforcement exemption, and the privacy exemptions. However, the only evidence submitted by the Department demonstrates that the records were not created in anticipation of litigation, to assist any decisionmaking process, or for law enforcement purposes. The records at issue were created exclusively to allow senior management at the Department to oversee the agency's work, to report matter and case data, and to provide for accountability and analyze performance of the agency and its employees. The records therefore are being improperly withheld in their entirety. At a minimum, the Department should be required to segregate all information about the number of hours that Ms. Bosserman expended on the investigation from information that may be protected by the attorney work product doctrine, the deliberative process privilege, and the law enforcement exemption. In addition, to the extent that the privacy exemptions apply to the specific information requested by Judicial Watch, the public interest in the number of hours that Ms. Bosserman spent on the criminal investigation into alleged IRS misconduct outweighs any minimal privacy interest she may have. The District

Court's ruling therefore should be reversed, and the case should be remanded for further proceedings.

ARGUMENT

I. Standard of Review.

In FOIA cases, District Court decisions are reviewed *de novo*. *Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1111-12 (D.C. Cir. 2007) (citing *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1087 (D.C. Cir. 2006)).

II. The Attorney Work Product Doctrine Does Not Apply to Records Created in the Ordinary Course of Business.

The law is clear. The attorney work product doctrine is "limited to documents prepared in contemplation of litigation." *Coastal States Gas Corporation v. U.S. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). In addition, this Court has stated, "not all work undertaken by lawyers finds protection in the work-product privilege." *In re Sealed Case*, 146 F.3d 881, 887 (D.C. Cir. 1998). The attorney work product doctrine "has no applicability to documents prepared by lawyers 'in the ordinary course of business or for other nonlitigation purposes.'" *Id*. at 887 (quoting *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v RTC*, 5 F.3d 1508, 1515 (D.C. Cir. 1993)). Further, "[w]here a document would have been created 'in substantially similar form' regardless of the litigation, work product protection is not available." *Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015).

A record can also contain material protected by the attorney work product doctrine "even though it serves multiple purposes" if "the protected material was prepared because of the prospect of litigation." *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010).

In this case, the evidence plainly demonstrates that Ms. Bosserman's time records were not created "because of the prospect of litigation." *Id*. They were prepared in the ordinary course of business. As Mr. Hermilla testified, the records were created to assist senior management in "track[ing] case-related activities of the Division's legal staff[,]" "oversee[ing] the work of the Division[,]" and "report[ing] case data at all levels of the Department to provide for accountability and analyze the Division's performance." Hermilla Decl. at ¶ 8 (JA 14-15). The records responsive to Judicial Watch's FOIA request would have been created "in substantially similar form" regardless of the criminal investigation. *Boehringer Ingelheim Pharmaceuticals*, 778 F.3d at 142. The time records were created solely for managerial oversight reasons.

Importantly, the District Court agreed. The court concluded that the records as a whole were not prepared in anticipation of litigation. Opinion at 10-13 (JA 34-37). Instead, the court concluded that some of the information contained in the records may be protected by the attorney work product doctrine. Although Plaintiff does not concede that "the portions of Ms. Bosserman's time records

detailing the locations visited, persons contacted, staff briefings, and other case developments are protected from disclosure as attorney work product" (Opinion at 13 (JA 37)), Plaintiff does not seek – nor has ever sought – such information. Plaintiff asserts that to the extent such information is protected, it may be redacted.

In short, the Department presented no evidence whatsoever that the records requested by Judicial Watch were created in anticipation of litigation. The District Court also did not make such a finding. Instead the Department argued and the court ruled that some of the information contained in the responsive records was protected by the attorney work product doctrine. Because the requested records were created in the ordinary course of business – to assist senior officials in their management responsibilities – the records do not fall within the scope of the attorney work product doctrine. The records are being improperly withheld in their entirety.

III. The Department Has an Obligation to Segregate Responsive Information Not Protected by the Attorney Work Product Doctrine.

Because the time records themselves are not protected by the attorney work product doctrine, the Department has an obligation to segregate all information not protected by the attorney work product doctrine. *See* 5 U.S.C. 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record ***after deletion of the portions which are exempt*** under this subsection." (emphasis added)). In *Tax Analysts v. Internal Revenue Service*, the

plaintiff sent a FOIA request seeking certain Field Service Advice Memoranda ("FSA") issued by the IRS's chief counsel. 117 F.3d 607, 608 (D.C. Cir. 1997). After conducting a search and review of potentially responsive records, the IRS withheld 309 FSAs pursuant to the attorney work product doctrine. *Id*. at 620. Contrary to the actions of the IRS and the ruling by the District Court, this Court ultimately determined that parts of the 309 FSAs may be withheld pursuant to the attorney work product doctrine. *Id*.

A FSA is prepared by an attorney in the national office of the Office of the Chief Counsel in response to requests from field personnel. *Id*. at 609. The FSA provides legal guidance, usually with reference to a specific taxpayer, and includes a statement of issues, a conclusions section, a statement of facts, and a legal analysis section. *Id*. The analysis section is "exploratory and descriptive so that the strengths and weaknesses of a case are presented and developed candidly." *Id*. (internal citations omitted). The primary purpose of the FSA is to ensure "that field personnel apply the law correctly and uniformly." *Id*. Based on this description of the FSAs, the Court concluded that the attorney work product doctrine did not apply to all of the requested records. *Id*. at 620 ("[N]o blanket exemption applies to all of the requested FSAs."). The Court also determined, "Any part of an FSA prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product

doctrine and falls under Exemption 5." *Id*. The IRS was required to segregate from the FSAs the information prepared in anticipation of litigation from the information prepared in the ordinary course of business.

At issue in *Judicial Watch, Inc. v. U.S. Department of Justice* was nine emails between Department officials "containing discussions about whether [the Department] should file an *amicus* brief in the *Boim* litigation and what the Department's position should be if such a brief were filed." 432 F.3d 366, 367 (D.C. Cir. 2005). After reviewing the records *in camera*, this Court concluded:

> Having reviewed these documents in camera, we agree and affirm the District Court's judgment that the documents are attorney work product. We also note that the District Court never suggested that any of the documents were only partially work product. Our review of the documents confirms this. Each of the nine documents, in its entirety, is work product. There are no non-work product parts of the e-mails. In other words, there are no segregable parts. In light of these findings, we reverse the judgment of the District Court compelling the Government to provide Judicial Watch with reasonably segregable portions of each document.

Id. at 370. The Court determined that each of the emails themselves were prepared in anticipation of litigation and therefore fell within the scope of the attorney work product doctrine. The Court also held that because the records themselves were protected by the attorney work product doctrine, there was no information that could be segregated. Nonetheless, had the records not been prepared in anticipation of litigation and therefore could have also contained non-attorney

work product information, such information would have been required to be disclosed.[1]

The attorney time records at issue in the instant matter are fundamentally different than the emails at issue in *Judicial Watch*. The time records themselves were not prepared in anticipation of litigation and are not entirely protected by the attorney work product doctrine. Instead, they are records that contain some information that may be protected by the attorney work product doctrine. The time records therefore are more akin to the FSAs. Non-attorney work product information can and must be segregated from information being properly withheld.

The District Court misapplied *Tax Analysts* and *Judicial Watch*. The court stated, "Since the descriptions contained in the time records are 'fully protected as work product, segregability is not required.'" Opinion at 13 (JA 37) (*quoting Judicial Watch*, 432 F.3d at 371; *Tax Analysts*, 117 F.3d at 620). However, this

[1] In the non-FOIA context, this Court also recently differentiated between records that are entirely protected by the attorney work product doctrine and records that merely contain attorney work product information. In *Deloitte LLP*, the government sought in the civil discovery context a memorandum prepared by an independent auditor. 610 F.3d at 133. The District Court upheld Deloitte's refusal to disclose the memorandum because it was "prepared because of the prospect of litigation with the IRS." *Id.* at 134. This Court however concluded that the lower court did not have a "sufficient evidentiary foundation for its holding that the memorandum was ***purely*** work product." *Id*. at 138 (emphasis added). The case therefore was remanded so that the District Court could "examine the document *in camera* to determine whether it is ***entirely*** work product" and also to determine "whether a partial or redacted version of the document could have been disclosed." *Id*. at 139.

Court does not require segregability if the record itself is entirely protected by the attorney work product doctrine, not if part of the record is "fully protected as work product." Opinion at 13 (JA 37). Because the Court found that only the part of the time records that described "the type of activities she performed" (*Id.*) is not attorney work product, the Department should be required to redact that information and produce the responsive records with "the dates that Ms. Bosserman worked" and "the number of hours she worked on the investigation on a given date." *Id*.

IV. The Department Is Improperly Withholding the Time Records in their Entirety Pursuant to the Deliberative Process Privilege.

The deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *U.S. Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 8 (2001). Its purpose is to "protect the executive's deliberative processes — not to protect specific materials." *Dudman Communications Corporation v. Department of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). For an agency to properly withhold records under the deliberative process privilege, it must demonstrate that the records are "both 'predecisional' and 'deliberative.'" *Public Citizen, Inc. v. Office of Management and Budget*, 598 F.3d 865, 874 (D.C. Cir. 2010) (quoting *Coastal States Gas Corporation v. U.S. Department of Energy*, 617 F.2d 854, 866, (D.C.

Cir. 1980)). A document is deliberative if it "reflect[s] the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas*, 617 F.2d at 866. It is the agency's burden to demonstrate the role the records played in the decisionmaking process. *Vaughn v. Rosen*, 523 F.2d 1136, 1143-1144 (D.C. Cir. 1975) (To be deliberative, the record must be "a direct part of the deliberative process" in that it "makes recommendations or expresses opinions on legal or policy matters.").

The Department fails to demonstrate that the records detailing the number of hours spent by Ms. Bosserman are in any way related to the decisionmaking process concerning the criminal investigation into alleged IRS misconduct. The Department also cannot demonstrate that the time records played any role in the decisionmaking process. The records were created solely to assist senior management in "track[ing] case-related activities of the Division's legal staff[,]" "oversee[ing] the work of the Division[,]" and "report[ing] case data at all levels of the Department to provide for accountability and analyze the Division's performance." Hermilla Decl. at ¶ 8 (JA 14-15). To the extent that the time records contain information such as "the type of activity she performed[,]" "notes describing how time was spent[,]" and/or "accounts of the tasks as she performed them" (Hermilla Decl. at ¶ 10) (JA 15), it would be entirely appropriate for the Department to redact such information as privileged or even as non-responsive.

The Department however did not redact such information; it withheld the records in their entirety. Because the time records must be segregated and non-exempt information must be disclosed, the Department's argument that the time records are properly being withheld in their entirety pursuant to the deliberative process privilege must fail.

V. The Department Is Improperly Withholding the Time Records in Their Entirety Pursuant to the Law Enforcement Exemption.

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information" would cause one of six enumerated harms. 5 U.S.C. § 552(b)(7)(A)-(F). The Department therefore must first demonstrate that the time records were "compiled for law enforcement purposes." *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982). Specifically, the Department must describe "how and under what circumstances the [time records] were compiled." *Jefferson v. U.S. Department of Justice*, 284 F.3d 172, 176-77, (D.C. Cir. 2002). In this instance, the Department fails to provide any evidence whatsoever that the time records were compiled for law enforcement purposes. In fact, the only evidence provided by the Department suggests the opposite.

Mr. Hermilla testified, "The records being withheld under Exemption 7(A) were generated in connection with an ongoing criminal investigation into alleged misconduct by IRS officials." Hermilla Decl. at ¶ 12 (JA 16). The records were

not created for law enforcement purposes. They were created to assist senior management in "track[ing] case-related activities of the Division's legal staff[,]" "oversee[ing] the work of the Division[,]" and "report[ing] case data at all levels of the Department to provide for accountability and analyze the Division's performance." Hermilla Decl. at ¶ 8 (JA 14-15).

In *Maydak v. U.S. Department of Justice*, the plaintiff sought records located in the Inmate Central Records System, which was "the system of records routinely utilized to collect and maintain information concerning the day-to-day activities and events occurring during the confinement of an inmate." 254 F. Supp. 2d 23, 38 (D.D.C. 2003). The agency asserted that the records were protected by Exemption 7 because "'Inmates' Central Files are compiled for law enforcement purposes.'" *Id*. The District Court concluded that the defendant's conclusory statement did not "satisfy the threshold law enforcement requirement." *Id.*

The evidence submitted by the Department in the instant matter does not even rise to the level of evidence submitted in *Maydak*. The Department's lone declarant fails to even parrot the language of the exemption subsection. Simply put, there is no evidence that the time records "were compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). The law enforcement exemption does not apply to the records responsive to Judicial Watch's FOIA request.

Even if the records were compiled for law enforcement purposes and not for managerial oversight reasons, the Department fails to provide any evidence whatsoever that the release of the time records "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Judicial Watch solely seeks records detailing the number of hours that Ms. Bosserman spent on the criminal investigation into alleged IRS misconduct. It does not seek "the type of activity she performed[,]" or "notes describing how time was spent[,]" or "accounts of the tasks as she performed them." Hermilla Decl. at ¶ 10 (JA 15). Yet Mr. Hermilla does not even testify as to how the release of the number of hours that Ms. Bosserman spent on the investigation could reasonably be expected to interfere with the investigation. In addition, if the release of information such as "the type of activity she performed[,]" "notes describing how time was spent[,]" and/or "accounts of the tasks as she performed them" (Hermilla Decl. at ¶ 10) (JA 15) could reasonably be expected to interfere with the investigation, the Department should redact such information as privileged or even as non-responsive. The Department is improperly withholding the time records in their entirety pursuant to the law enforcement exemption.

VI. The Department Is Improperly Withholding the Time Records in Their Entirety Pursuant to the Privacy Exemptions.

As demonstrated above, the Department has failed to provide any evidence whatsoever that the time records "were compiled for law enforcement purposes."

Nonetheless, to the extent that the records fall within the scope of Exemption 7, Defendant fails to demonstrate that the release of the records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." U.S.C. § 552(b)(7)(C). Because the analyses under Exemptions 6 and 7(C) are very similar, Judicial Watch will address them as one and will simply refer to them as the "privacy exemptions." Under the privacy exemptions, an agency may only withhold responsive records if an individual's privacy interest outweighs the public's interest in disclosure. *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 893 (D.C. Cir. 1995).

Mr. Hermilla testified that the release of the time records

> would disclose information about [Ms. Bosserman's] work performance that may result in added scrutiny and unwarranted public assessment regarding the performance of her duties. The additional exposure would make [Ms. Bosserman] vulnerable to annoyance and even harassment in both her private and professional lives. It could also invite speculation about more personal matters such as medical or family leave.

Hermilla Decl. at ¶ 18 (JA 17-18). Judicial Watch is only seeking records detailing the number of hours that Ms. Bosserman spent on the criminal investigation into alleged IRS misconduct. It is not seeking records detailing the total numbers of hours that Ms. Bosserman has worked, an itemization of the various projects on which Ms. Bosserman has worked, or records detailing when Ms. Bosserman has taken leave. Simply put, the fears identified by the Department are unfounded. If

anything, the additional scrutiny and unwarranted public assessment are a direct result of the Department's confirmation that Ms. Bosserman is involved in the criminal investigation. Opinion at 2 (JA 26); *see also* Hermilla Decl. at ¶ 4 (JA 13).

In addition, to the extent that Ms. Bosserman has a privacy interest in the number of hours she spent on the criminal investigation into alleged IRS misconduct, the public interest outweighs her privacy interest. *Nation Magazine*, 71 F.3d at 893. According to the Committee on Oversight and Government Reform of the U.S. House of Representatives, Ms. Bosserman "is leading the [Department of Justice] investigation." *See* January 8, 2014 Letter from Congressman Issa to Attorney General Holder. If this is in fact true, the public has an obvious interest in the number of hours Ms. Bosserman has expended on the criminal investigation into alleged IRS misconduct. Such information would shed light on Defendant's handling of the investigation. For all of these reasons, the privacy exemptions do not apply to the time records at issue in this case.[2]

[2] As with the other claims, to the extent Ms. Bosserman has some privacy interest in information such as "the type of activity she performed[,]" "notes describing how time was spent[,]" and/or "accounts of the tasks as she performed them" (Hermilla Decl. at ¶ 10) (JA 15), the Department can redact such information as privileged or even as non-responsive.

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully requests that this Court reverse the District Court's order granting the Department's motion for summary judgment and denying Judicial Watch's cross-motion for summary judgment and remand for further proceedings.

Dated: February 16, 2016

Respectfully submitted,

/s/ Michael Bekesha
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief, excluding exempted portions, contains 4913 words (using Microsoft Word 2010), and has been prepared in a proportional Times New Roman, 14-point font.

/s/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I filed via the CM/ECF system the foregoing **BRIEF OF APPELLANT JUDICIAL WATCH, INC.** with the Clerk of the Court. Participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

I also certify that I caused eight copies to be delivered to the Clerk of Court via hand delivery.

/s/ Michael Bekesha