

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	
)	Civil Action No. 14-cv-1511 (ABJ)
v.)	
)	
U.S. DEPARTMENT OF STATE,)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO DEFENDANT’S MOTION FOR RECONSIDERATION
AND TO ALTER JUDGMENT**

Plaintiff, by counsel, respectfully submits this memorandum of points and authorities in opposition to Defendant’s Motion for Reconsideration and to Alter Judgment.

1. It is not at all clear that Defendant’s failure to make an Exemption 1 claim over the two versions of the email obtained from Secretary Clinton’s unofficial, non-secure server was the result of “pure human error.” *See Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Justice*, Case No. 16-5138, slip. op. at 6 (D.C. Cir. April 21, 2017). The version of the email apparently obtained from an official, secure server was largely withheld under Exemption 1. The only material difference in the emails is the sources – Secretary Clinton’s unofficial server or the official server.

2. All three versions were produced to Plaintiff or identified to Plaintiff as being available on Defendant’s website by letter dated June 3, 2015. *See* Declaration of Paul J. Orfanedes (“PJO Decl.”), attached hereto as Exhibit 1, at ¶ 2. According to Defendant, the versions of the email from Secretary Clinton’s unofficial server had been reviewed at least twice by that point – in response to a request from Congress and in response to a request from another

FOIA requester. *See* Declaration of Eric F. Stein, attached to Defendant's motion, at para. 11. The fact that the emails were reviewed at least twice undermines any claim that the failure to invoke Exemption 1 was inadvertent.

3. In addition, two FBI 302s released by the FBI following its investigation into Secretary Clinton's email practices show a contemporaneous effort by Defendant to avoid designating emails from Secretary Clinton's unofficial server as classified. If so, Defendant's actions were deliberate, not a mistake.

4. According to a July 30, 2015 interview of an FBI Records Management Division employee, Undersecretary of State for Management Patrick Kennedy pressured the FBI to change a classified Clinton email to unclassified and even offered the FBI a "quid pro quo" for doing so:

Shortly thereafter, [redacted] received a call from [redacted] of the International Operations Division (IOD) of the FBI, who "pressured" him to change the classified email to unclassified. [Redacted] indicated he had been contacted by PATRICK KENNEDY, Undersecretary of State, who had asked his assistance in altering the email's classification in exchange for a "quid pro quo." [Redacted] advised that, in exchange for marking the email unclassified, STATE would reciprocate by allowing the FBI to place more Agents in countries where they presently are forbidden.

* * *

[Redacted] was then present during a conference call involving KENNEDY and [FBI Counterterrorism Assistant Director Michael] STEINBACH in which KENNEDY continued to pressure the FBI to change the classified markings on the email to unclassified. STEINBACH refused to do so. Prior to ending the conversation, KENNEDY asked whether the FBI or STATE would conduct the public statements on the matter. STEINBACH advised KENNEDY that the FBI would not comment publicly on the matter. The conference call ended and, according to [redacted], the Associated Press (AP) published the story within the hour. Former Secretary of State CLINTON appeared in front of the press shortly thereafter to deny having sent classified emails on her private email server.

See FD-302 dated July 30, 2015, attached to PJO Decl. as Exhibit B, at pp. 2 and 3. This same employee “believes STATE has an agenda which involves minimizing the classified nature of the CLINTON emails in order to protect STATE interests and those of CLINTON.” *Id.* at p. 3.

5. Even more directly on point is an August 18, 2015 FBI interview of an employee in Defendant’s Office of Information Programs and Services. According to the employee, Defendant’s Office of Legal Counsel interfered with the FOIA processing of email from Secretary Clinton’s server, instructing reviewers to use Exemption 5 instead of Exemption 1:

[Redacted] believed there was interference with the formal FOIA review process. Specifically, STATE’s Near East Affairs Bureau upgraded several of CLINTON’s emails to a classified level with a B(1) release exemption . [Redacted], along with [redacted] attorney, Office of Legal Counsel, called STATE’s Near East Affairs Bureau and told them they could use a B(5) exemption on a upgraded email to protect it instead of the B(1) exemption. However, the use of the B(5) exemption, which is usually used for executive privilege-related information, was incorrect as the information actually was classified and related to national security, which would be a B(1) exemption.

See FD-302 dated August 18, 2015, attached to PJO Decl. as Exhibit C, at p. 3. This appears to mirror exactly what happened here. Despite at least two separate reviews of the versions of the email produced from Secretary Clinton’s unofficial server, Defendant invoked Exemption 5 instead of Exemption 1. Defendant’s failure to invoke Exemption 1 appears to be deliberate, not “pure human error.”

6. An agency’s deliberate withholding of a FOIA claim, either to gain a tactical advantage or, as appears to be the case here, to protect the agency’s interests and those of its former head, is “a motive undoubtedly inconsistent with FOIA’s broad remedial purpose.” *August v. Federal Bureau of Investigation*, 328 F.3d 697, 700 (D.C. Cir. 2003). It “counsels denying the Government’s request.” *Id.* In the alternative, the Court should authorize discovery into the reasons behind Defendant’s failure to invoke Exemption 1 over the two versions of the

email from Secretary Clinton's unofficial, non-secure server and whether Defendant deliberately avoided or tried to minimize classifying emails from the Secretary's server, before it rules on Defendant's motion.

Dated: May 1, 2017

Respectfully submitted,

/s/Paul J. Orfanedes

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