IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. U.S. DEPARTMENT OF DEFENSE, *et al.*, Defendants.	Civil Action No. 1:16-cv-00360 (RBW)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

Defendants United States Department of Defense ("DoD") and the Central Intelligence Agency ("CIA") (collectively "Defendants"), through undersigned counsel, oppose the Motion to Alter or Amend Judgment filed by Plaintiff Judicial Watch, Inc. ("Plaintiff"). This action arises under the Freedom of Information Act ("FOIA"), and involves five memoranda related to the raid on Osama bin Laden's compound. Plaintiff asks the Court to alter or amend its Memorandum Opinion granting Defendants' Motion for Summary Judgment and denying Plaintiff's Cross-Motion for Summary Judgment. In particular, Plaintiff contends that the subsequent Notice of Clarification filed by Defendants may call into question the Court's determination that the Government properly withheld the memoranda in their entirety pursuant to the Presidential Communications Privilege. But Plaintiff has not established the "extraordinary circumstances" necessary to warrant the Court altering or amending this conclusion. Indeed, Plaintiff has not shown and cannot show how the Court's judgment has been affected by Defendants' clarification, especially in light of the Court's alternative determination that the memoranda were also properly withheld in full pursuant to the Attorney-Client and Deliberative Process Privileges. Thus, as discussed below, the Court should deny Plaintiff's motion.

BACKGROUND

This action arises from identical FOIA requests Plaintiff submitted to the CIA and DoD on December 11, 2015. *See* Compl., Dtk. No. 1, ¶ 6. The requests sought "[a]ny and all documents, records, and/or communications concerning, regarding, or related to memoranda drafted by" various government officials addressing "options, authority, rationale, details, analysis, legal factors, policy concerns, opinions, and conclusions for the search, raid, capture, and/or killing of Osama bin Laden in 2011." *Id.* Plaintiff ultimately agreed to limit its demand to the five memoranda it specifically identified in the FOIA request. *See* Dkt. No. 9 at ¶ 4. By letter dated June 13, 2016, Defendants informed Plaintiff that they had finished processing the five responsive memoranda and that they were withholding them in their entirety pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), as well as discreet pieces of classified and statutorily protected information pursuant to FOIA Exemptions 1 and 3, 5 U.S.C. §§ 552(b)(1), and (b)(3).

On August 17, 2016, Defendants moved for summary judgment. *See* Dkt. No. 13. Defendants explained, *inter alia*, that the advice and recommendations memorialized in the five memoranda squarely fell within the protections of FOIA Exemption 5 and the Presidential Communications, Attorney-Client, and Deliberative Process privileges. *Id.* Plaintiffs opposed the Government's motion and cross-moved for summary judgment on September 28, 2016. *See* Dkt. No. 15. After Defendants opposed Plaintiff's cross-motion on October 18, 2016, *see* Dkt. No. 18, Plaintiff filed its reply memorandum. *See* Dkt. No. 22. For the first time in the reply, Plaintiff argued that the Presidential Communications Privilege was undermined because "Defendants' choice of 'memorialize' to describe the memoranda suggests that the documents were prepared after the briefing, adding further opacity to the claim of privilege." *Id.* at 4.

On March 28, 2017, the Court granted Defendants' Motion for Summary Judgment and denied Plaintiff's Cross-Motion for Summary Judgment. *See* Mem. Op., Dkt. No. 24. The Court

determined, among other things, that Defendants properly withheld the five memoranda in their entirety pursuant to FOIA Exemption 5 and the Presidential Communications, Attorney-Client, and Deliberative Process Privileges. *Id.* In doing so, the Court rejected Plaintiff's argument concerning the Presidential Communications Privilege, remarking that "defendants have clearly demonstrated that the five requested memoranda were solicited and reviewed prior to the President's decision to launch the raid on bin Laden's compound." *Id.* at 11 n.4 (citing Declaration of Antoinette B. Shiner ("Shiner Decl."), Dkt. No. 13-2, ¶¶ 7–9).

Defendants subsequently filed a notice clarifying this factual assertion in the Court's Memorandum Opinion. *See* Notice of Clarification, Dkt. No. 25. Defendants made clear that the Shiner Declaration did not speak to the timing of the memoranda in question. *Id.* & Shiner Decl. ¶¶ 7–9. Rather, the Shiner Declaration only confirmed that legal advice on specific topics was requested by and provided to President Obama and his closest advisers prior to a final decision about whether to conduct the Osama bin Laden operation, and that advice was memorialized in the five memoranda at issue. *Id.* Plaintiff's Motion to Alter or Amend Judgment followed. *See* Pl.'s Mot. to Alter or Amend J., Dkt. No. 26 (hereinafter "Pl.'s Mot.").

ARGUMENT

I. Standard of Review

Plaintiff asks the Court to "alter or amend" its March 28, 2017 Memorandum Opinion and Order pursuant to Federal Rule of Civil Procedure 59(e). *See* Pl.'s Mot. This Court, however, has recognized that a Rule 59(e) motion is "disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Petrucelli v. Dep't of Justice*, 106 F. Supp. 3d 129, 133 (D.D.C. 2015) (quoting *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001)). And such a motion "need not be granted

unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Id.* (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)).

II. Plaintiff Has Not Demonstrated that Defendants' Clarification Changes the Court's Analysis of the Presidential Communications Privilege.

Plaintiff has not established, and cannot establish, the extraordinary circumstances necessary for the Court to grant its Rule 59(e) motion. *See* Pl.'s Mot. at 3-4. First and foremost, Defendants take issue with Plaintiff's characterization of the Notice of Clarification as introducing "new evidence" or a "new revelation." *Id.* The Shiner Declaration never spoke to the timing of the five memoranda in question in the first place. *See* Notice, Dkt. No. 25. And at best, the Court's misimpression of the Shiner Declaration constitutes harmless error, as Plaintiff does not explain how the timing of the memoranda has any bearing on the Court's ultimate judgment. *See Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 84 (D.D.C. 2013) (denying Rule 59(e) motion in part because arguably improper application of precedent amounted to harmless error).

Regardless of whether the memoranda were finalized before, contemporaneous with, or after the strike on Osama bin Laden's compound, the Presidential Communications Privilege protects from disclosure the communications memorialized therein. The D.C. Circuit has held that the Presidential Communications Privilege shields, as in this case, "communications . . . solicited and received" by the President and his closest advisers. *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997). And decisions by the Supreme Court and D.C. Circuit support the position that the Presidential Communications Privilege protects the communications themselves, not the vessel by which they have been memorialized. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 686, 703 (1974) (concluding that the privilege applies to President's

conversations memorialized on tape recordings); *In re Sealed Case*, 121 F.3d at 758 (explaining that "notes taken of meetings . . . at which these [White House] advisers were present" are "clearly" privileged "since these notes reflect these advisers' communications"). To conclude otherwise runs counter to common sense, as such a rule would "discourage parties, for no good reason, from memorializing in writing information that is unquestionably privileged." *Nesse v. Pittman*, 206 F.R.D. 325, 329 (D.D.C. 2002).

Other district courts have concurred with this assessment. In *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Sec.* ("*CREW*"), another member of this Court—citing D.C. Circuit precedent—observed that the Presidential Communications Privilege extends to communications "received by the President or his Office" that are "revelatory of his deliberations," as opposed to purely internal communications that do not reach the President. *CREW*, No. 06-cv-0173, 2008 WL 2872183, at *2–3 (D.D.C. July 22, 2008) (citing *Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004)). As such, the *CREW* court reasoned that the Presidential Communications Privilege protects the communication memorialized in memoranda, not the memoranda themselves, and thus, *when* the memoranda were authored has no bearing on the applicability of the privilege. *Id.* The district court in *Amnesty Int'l USA v. CIA* reached the same conclusion. 728 F. Supp. 2d 479, 522–23 (S.D.N.Y. 2010) (citing *CREW*, 2008 WL 2872183, at *3). In that case, the district court likewise concluded that the privilege extends to recommendations about detainee policies memorialized in certain CIA records. *Id.*

Plaintiff spends less than two pages rehashing the argument from its reply memorandum. *See* Pl.'s Reply Mem. at 3–4. But Plaintiff never explains why the privilege should extend only to information contained in memoranda that were authored prior to the operation. *Id.* Nor does

Plaintiff acknowledge *CREW* decision, let alone other relevant Supreme Court and D.C. Circuit precedent. *Id.* In short, Plaintiff has failed to satisfy its burden of demonstrating the extraordinary circumstances necessary for the Court to alter or amend its judgment.

Finally, Plaintiff asks the Court to order Defendants to provide supplemental information about the memoranda themselves.[1] *See* Pl.'s Mot. at 4. But the Shiner Declaration already affirms that the memoranda memorialize legal advice requested by and communicated to the President and his closest advisers prior to the raid on Osama bin Laden's compound. *See* Shiner Decl. ¶ 8. Plaintiff has not explained how the ancillary details about the written memoranda, as opposed to the communications contained within, have any relevance on the assertion of the Presidential Communications Privilege. *See* Pl.'s Mot. at 4. Thus, no additional information is necessary for the Court to leave undisturbed its reasoned decision granting summary judgment in the Government's favor.

III. In Any Event, the Documents are Also Protected in Their Entirety by the Attorney-Client and Presidential Communications Privileges.

Plaintiff ignores the fact that the Court also upheld the withholding of the five memoranda in their entirety pursuant to the Attorney-Client and Deliberative Process Privileges, in addition to the Presidential Communications Privilege. *See* Mem. Op. at 13–17. Instead, Plaintiff suggests that the timing of the authorship of the memoranda also has a bearing on the

[1] The procedural history in *CREW* may have instigated Plaintiff's request. In that case, the district court originally denied the defendant agency's motion for summary judgment because its initial declaration failed to establish whether the documents memorialized internal agency communications or, conversely, communications "transmitted to the President or his immediate advisers or their staff[.]" *CREW*, 2008 WL 2872183, at *2. The district court's decision prompted the defendant agency to put forth supplemental declarations with additional information about the recipients of the communications. *Id.* Here, in contrast, the Shiner declaration already confirms that the President and his closest advisors received the advice memorialized in the memoranda. *See* Shiner Decl. ¶ 8.

assertion of these privileges. *See* Pl.'s Mot. at 3–4. Unlike the timing argument made about the Presidential Communications Privilege, however, Plaintiff's briefing did not make the same argument with regard to the Attorney-Client and Deliberative Process Privileges. *See* Pl.'s Opp. and Cross-Mot. at 5–9; Pl.'s Reply Mem. at 5–7. And a "Rule 59(e) motion may not be used to raise arguments or present evidence that could have been raised prior to the entry of judgment." *GSS Grp. Ltd. v. Natl Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012). Regardless, Plaintiff has put forth absolutely no explanation for why the timing of the memoranda, as opposed to the communications memorialized therein, has any relevance on the assertion of these privileges. *See* Pl.'s Mot. at 3–4. Again, the Shiner Declaration confirms that the memoranda memorialize confidential legal advice provided by national security attorneys and shared with the President and his closest advisers during their deliberations about whether to conduct the raid on Osama bin Laden's compound. *See* Shiner Decl. ¶¶ 8, 10–11. Accordingly, the Court should give short shrift to Plaintiff's specious motion.

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CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion to Alter or Amend Judgment.

Dated: May 9, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2017, I electronically transmitted the foregoing to the clerk of court for the United States District Court for the District of Columbia using the CM/ECF filing system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF filing system.

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