

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
)	
Plaintiff,)	Civil Action No. 1:16-cv-00360 (RBW)
)	
v.)	
)	
U.S. DEP'T OF DEFENSE, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

Plaintiff, by counsel and pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, respectfully moves for reconsideration of the Court's March 28, 2017 Memorandum Opinion (ECF No. 24) and Order (ECF No. 23) granting Defendants' motion for summary judgment and denying Plaintiff's cross-motion for summary judgment. The undersigned has conferred with opposing counsel pursuant to Local Rule 7(m), and based on that communication, Plaintiff understands that Defendants oppose this motion.

STATEMENT OF POINTS AND AUTHORITIES

I. Introduction.

The Court's finding that the five memoranda requested by Plaintiff under the Freedom of Information Act ("FOIA") are exempt from disclosure was based on a misapprehension of the declarations Defendants submitted in support of their summary judgment motion. This misapprehension was so significant that Defendants found it necessary to issue a correction after the Court's ruling. *See* Notice of Clarification (ECF No. 25), filed April 4, 2017. Had this correction been made before the Court's ruling, and had Defendants provided complete and accurate information about the memoranda in their declarations, it is likely that the Court would

have reached a different outcome. As a result, reconsideration, additional information, and re-briefing are necessary to correct this error.

II. Factual Background.

In its Memorandum Opinion, the Court found that “the defendants have met their burden because the five memoranda were solicited and reviewed by former President Obama and his national security team charged with assessing whether the raid on bin Laden’s compound should be conducted.” *See* Opinion at 10. In reaching this conclusion, the Court rejected Plaintiff’s reading of Defendants’ declarations, which was that the memoranda were prepared after the fact and merely memorialized the justifications for the raid. *Id.* at 11, n.4. Defendants’ subsequent clarification confirms that Plaintiff’s reading was correct:

To clarify, the Shiner Declaration *did not speak to the timing* of the memoranda in question. Rather, the Shiner Declaration only confirmed that legal advice on specific topics was requested by and provided to President Obama and his closest advisors prior to a final decision about whether to conduct the operation, and that advice was *memorialized* in the five memoranda at issue.

See Notice of Clarification at 1 (internal citations omitted) (emphasis added). Defendants’ clarification plainly implies that the memoranda were not “solicited and reviewed prior to the President’s decision,” but were prepared after the fact, as Plaintiff had argued.

III. Argument.

A. Standard for Relief Under Rule 59(e).

Rule 59(e) motions are discretionary and may be granted where the Court finds an “intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (quoting *National Trust v. Department of State*, 834 F. Supp. 453, 455 (D.D.C. 1993)).

The Court is not required to consider new legal arguments or mere restatements of old facts and

arguments. *Dist. of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010); *State of New York v. United States*, 880 F. Supp. 37, 39 (D.D.C. 1995). However, the Court can and should correct errors to “preserve the integrity of the final judgment.” *Turkmani v. Republic of Bolivia*, 273 F. Supp.2d 45, 50 (D.D.C. 2002); *see also Alston v. District of Columbia*, 770 F. Supp.2d 289, 296 (D.D.C. 2011); *Harvey v. District of Columbia*, 949 F. Supp. 878, 879 (D.D.C. 1996).

B. Re-briefing and Reconsideration is Warranted.

Defendant’s clarification constitutes newly discovered evidence and evinces a clear error of fact that needs to be corrected to prevent manifest injustice and preserve the integrity of the final judgment. Plaintiff had argued that Defendants’ use of the word “memorialize” to describe the memoranda indicated that the memoranda were prepared after the fact, but the Court rejected these arguments:

The plaintiff further contends that the defendants’ use of the word “memorialize” to describe the memoranda suggests that the documents were prepared after the briefing, adding further opacity to the claim of privilege. Pl.’s Reply at 4. This argument is [] unpersuasive as the 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. See Defs.’ Motion., Ex., A (Shiner Decl.) ¶¶ 7-9.

Opinion at 11, n.4. Defendants’ clarification plainly implies that the memoranda were not “solicited and reviewed prior to the President’s decision to launch the raid.” If this were not the case, then Defendants would not have felt the need to issue a clarification after the Court issued its ruling. The Court’s ruling therefore requires reconsideration.

The role played by a record in the administrative process is crucial to determining whether the record is properly subject to a claim of exemption under FOIA. *See, e.g., Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (addressing the deliberative process privilege under FOIA Exemption 5). Defendants’ vague and ambiguous

declarations caused this Court to misapprehend the true factual circumstances surrounding the creation and use of the memoranda. Defendants' subsequent clarification confirms this fact, but also meticulously avoids identifying the specific date(s) the memoranda were created, who reviewed or used them, how they were used, or how they may differ from any information or advice provided prior to the raid, among a host of other factual questions raised by Defendants' new revelation. More information and a thorough explanation of the facts and circumstances surrounding the memoranda are required before the Court can make a proper determination of whether FOIA requires the memoranda to be released or whether they are properly subject to one or more claims of exemption. Once Defendants have provided Plaintiff and the Court with this full and complete, unambiguous information, the parties should be afforded the opportunity to re-brief Defendants' claims of exemption.

IV. Conclusion.

For the foregoing reasons, Plaintiff respectfully requests that the Court reconsider its March 28, 2017 Memorandum Opinion and Order, require Defendants to provide full and complete, unambiguous information about the creation and use of the memoranda and all other pertinent facts about the memoranda, and allow the parties to re-brief the withholding of the memoranda once Defendants provide this additional information.

Dated: April 25, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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