

**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. DEPARTMENT OF DEFENSE, et al)	
)	
Defendants.)	
_____)	

**PLAINTIFF’S REPLY TO DEFENDANTS’ OPPOSITION
TO MOTION TO ALTER OR AMEND JUDGMENT**

One week after this Court issued summary judgment in Defendants favor, Defendants filed a Notice of Clarification (“clarification notice”) regarding the factual statements made in its supporting declaration (“Shiner Declaration”). *See* ECF No. 25. It is extraordinary for a party to issue a “clarification,” after a court has ruled, admitting that the court misapprehended the party’s factual assertions. In their opposition, Defendants concede that the Court’s decision was based on a “misimpression” about the timing of the memoranda. *See* Defendants’ Opposition to Plaintiff’s Motion to Alter or Amend Judgment (“Opp.”) at 4. ECF No. 27. Despite creating this “extraordinary circumstance” warranting the Court’s reconsideration of judgment, Defendants assert that Plaintiff’s request is “specious” and should be given “short shrift”. *Opp.* at 7. However, Defendants seven page opposition, filled with legal argument (old and new) and resembling more of a brief than a response to Plaintiff’s simple, 2-page motion, only emphasizes the need for re-briefing and full reconsideration. As stated in Plaintiff’s Motion, 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. *See* Plaintiff's Motion to Alter or Amend Judgment ("Pl. Mot.") at 4. ECF No. 26.

Contrary to Defendants' assertion, whether the court's judgment has been affected by Defendants' clarification is not for the Plaintiff to prove, but for the court to determine. Unlike Defendants, Plaintiff does not argue substantive legal issues in its motion.¹ The appropriate forum for such arguments is through re-briefing, with all of the facts clarified, as requested by Plaintiff. Neither Plaintiff nor the Court can properly assess Defendants' claims of exemption until all of the facts and circumstances surrounding the memoranda are fully disclosed. However, despite ample opportunity to do so, Defendants continue to avoid providing relevant details.²

Defendants further dismiss the "extraordinary circumstances" presented here as harmless asserting that the Court made an "alternative determination that the memoranda were also properly withheld in full pursuant to Attorney-Client and Deliberative Process privileges." *Opp.* at 1. However, because the Court determined, based on its "misimpression of the Shiner Declaration", that the Presidential Communications Privilege applied, it did not undertake a full analysis of the Deliberative Process Privilege. *See* Memorandum Opinion ("Mem. Op.") at 13. ECF No. 24. Additionally, the Attorney-Client Privilege analysis was based on the Court's erroneous "misimpression of the Shiner Declaration", as admitted by Defendants. *See Opp.* at 4. Whether that error was "harmless," as Defendants speculate (*Opp.* at 7), cannot be

¹ Defendants spend 2 pages re-arguing the presidential communications privilege as well as asserting new arguments that include the clarified fact regarding the timing of the memoranda. *See Opp.* at 4-5. This is clearly not permitted. *See 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)

² Defendants' clarification notice does not actually "clarify" anything. It provides no details about the timing of the memoranda, but only states "the Shiner Declaration did not speak to the timing of the memoranda in question." *See* Clarification Notice, ECF No. 25.

determined until Defendants provide full and complete, accurate information about the facts and circumstances surrounding the preparation of the memoranda, including, as Plaintiff asserted in its motion, the specific date(s) the memoranda were created, who reviewed or used them, how they were used, and how they may differ from any information or advice provided prior to the raid, among other questions raised by Defendants' revelation. *See* Pl. Mot. at 4.

Defendants' characterization of Plaintiff's request for further information as "ancillary details" that have no "relevance on the assertion of the Presidential Communications Privilege" (Opp. at 6) is as disingenuous as their initial disregard of the obligation to provide this court with a full, clear, and thorough explanation of the facts and circumstances surrounding the memoranda before it 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. As stated above, the Court's misapprehension of facts was so significant, Defendants raised the flag themselves. Whether the "ancillary details" Defendants are working so hard to avoid are just as significant and relevant can only be determined by providing them to Plaintiff and the Court for proper assessment.

A Rule 59(e) motion should be granted to correct a clear error, of law or fact, and prevent a manifest injustice. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (identifying "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice" as grounds for granting motion. *Citing National Trust v. Department of State*, 834 F.Supp. 453, 455 (D.D.C. 1993)) It was, in fact, Defendants, not Plaintiff, who pointed out a clear error of fact in its clarification notice admitting that the Court had a "misimpression" of facts presented in Shriner's vague declaration. Failure to grant

Plaintiff's request for reconsideration would constitute a manifest injustice. *See Firestone*, 76 F.3d at 1208.

Dated: May 16, 2017

Respectfully submitted,

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