

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

JUDICIAL WATCH, INC.)	
)	
Plaintiff,)	Civil Action No. 1:16-cv-00449 (KBJ)
)	
v.)	
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
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**PLAINTIFF’S REPLY IN SUPPORT OF ITS
CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this reply in support of its Cross-Motion for Summary Judgment. As grounds thereof, Plaintiff states as follows:

I. The requested records are an exception to the “operational files exemption.”

In its cross-motion, Plaintiff argued that Defendant must search for and review records responsive to Plaintiff’s FOIA request¹ because the requested records satisfy the “special activity” exception to the “operational files exemption.” The “special activity” exception applies to records concerning a specific covert action that has been publicly disclosed or acknowledged.² See Defendant’s Combined Opposition to Plaintiff’s Cross-Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment (“Def’s Opposition”) at 9-10; *see also Sullivan v. Central Intelligence Agency*, 992 F.2d 1249, 1253 (1st Cir. 1993). In response, Defendant argues that the “special activity” exception does not apply to the records requested by

¹ Contrary to Defendant’s assertion, Plaintiff does not ask Defendant to create an index. Plaintiff simply requests that if such an index exists, Defendant produce it under FOIA.

² Plaintiff does not agree that the “special activity” exception applies only to covert actions. Neither the plain language of the statute nor any case of this Circuit even suggests that the definition of “special activity” is limited to “covert action.” However, because the raid of bin Laden’s compound was, in fact, a covert action, the Court does not need to address the issue.

Plaintiff because “neither the CIA nor any other component of the Executive Branch has acknowledged the existence of any covert action in connection with the raid.” Def’s Opp. at 10. In support of that assertion, Defendant submitted a supplemental declaration, which stated, “none of the U.S. Government’s official acknowledgements even suggest the existence of a ‘special activity’ contemplated under Section 701(c)(2) of the National Security Act much less indicate the declassification of a covert action operation.” Declaration of Antoinette B. Shiner (dated September 9, 2016) at ¶ 12.

However, two days after the raid, then-Director Leon Panetta stated:

Since this was what’s called a “title 50” operation, which is a covert operation, and it comes directly from the president of the United States who made the decision to conduct this operation in a covert way, that direction goes to me. And then, I am, you know, the person who then commands the mission.

CIA Chief Panetta: Obama Made ‘Gutsy’ Decision on Bin Laden Raid, PBS, May 3, 2011, http://www.pbs.org/newshour/bb/terrorism-jan-june11-panetta_05-03/. In other words, in direct contradiction to Ms. Shiner’s testimony, the CIA director himself specifically indicated that the raid was a covert action. Plaintiff’s FOIA request unequivocally relates to a specific and acknowledged covert action. Under the “special activity” exception, Defendant must search for and review records responsive to Plaintiff’s FOIA request. 50 U.S.C. § 3141(c)(2).

II. Defendant once again has failed to satisfy its burden of demonstrating that the requested records are being properly withheld under the “operational files exemption.”

Again, Defendant “tells.” It does not “show.” *Institute for Policy Studies v. United States Central Intelligence Agency*, 124 F. Supp. 3d 1, 4 (D.D.C. 2015), on reconsideration, No. CV 06-960 (RCL), 2016 WL 354871 (D.D.C. Jan. 28, 2016). The supplemental declaration from Antoinette Shiner submitted by Defendant merely states, “I can affirm, however, that

exempted operational files likely to contain the records requested by plaintiff currently perform the functions set forth in 50 U.S.C. § 3141(b) because these files are files of the Directorate of Operations that document the conduct of foreign intelligence operations.” Declaration of Antoinette B. Shiner (dated September 9, 2016) at ¶ 10. Like the first declaration, this declaration does nothing more than assert that the requested records are properly categorized as an operational file, without providing any justification.³

Defendant fails to provide any evidence whatsoever that the raid was a “foreign intelligence operation.” According to Defendant’s own website, the operation was “a U.S. military raid.” Central Intelligence Agency, *The Operation that killed bin Laden*, May 4, 2011, <https://www.cia.gov/news-information/featured-story-archive/2011-featured-story-archive/the-operation-that-killed-bin-laden.html>. Similarly, then-Director Panetta described the raid as a “military operation.” See *CIA Chief Panetta: Obama Made ‘Gutsy’ Decision on Bin Laden Raid*, PBS, May 3, 2011, http://www.pbs.org/newshour/bb/terrorism-jan-june11-panetta_05-03/ (“But having said that, I have to tell you that the real commander was Adm. McRaven because he was on site, and he was actually in charge of the military operation that went in and got bin Laden.”). Defendant simply has failed to demonstrate that the requested records were collected during a “foreign intelligence operation.”

Defendant also fails to demonstrate that the files that contain the requested records are

³ Defendant complains that Plaintiff’s challenge did not become apparent until Plaintiff filed its opposition brief. As Plaintiff’s counsel informed Defendant’s counsel during the parties’ meet and confer discussions, Plaintiff did not receive Defendant’s December 14, 2015 letter. Had Plaintiff received it, it would have filed an administrative appeal as required by law. Because it did not receive the letter, it did not know Defendant had denied Plaintiff’s FOIA request and therefore could not plead such in its Complaint. When Defendant was made aware of this issue, Defendant’s counsel stated, “I am also attaching the December 14, 2015 letter sent to Judicial Watch concerning the FOIA request in this case. Though Judicial Watch did not administratively appeal the CIA’s response, the CIA is willing to proceed with this litigation without further administrative procedures.” Defendant’s complaint is baseless.

“operational files.”⁴ Operational files are “only those files concerning intelligence sources and methods.” H.R. Rep. 98-726, 20-21, 98th Cong., 2d Sess. (1984). In other words, they “concern the intelligence process as distinguished from the intelligence product.” *Id.* Plaintiff seeks materials collected during a U.S. military operation. Plaintiff does not seek any records about the intelligence operations leading up to the raid. The requested records therefore are not contained in operational files. Defendant fails to provide any evidence whatsoever that the requested records are located within files that “concern the intelligence process,” reveal the “identities of and contact with human intelligence sources,” outline the “methods used to collect intelligence,” or speak to the “administration and management of sensitive...activities.” *Id.*

III. Conclusion.

For the reasons stated above and in Plaintiff’s cross-motion, Plaintiff respectfully requests that Plaintiff’s Cross-Motion for Summary Judgment be granted and that Defendant promptly produce all records responsive to Plaintiff’s FOIA request.

Dated: September 12, 2016

Respectfully submitted,

/s/ Michael Bekesha
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⁴ Defendant does not challenge Plaintiff’s demonstration that the requested records themselves are not operational files. Plaintiff therefore incorporates its arguments from its opening brief with respect to the basic fact that the pornographic materials as well as an index of the materials are not an operational file as defined by law.