IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	Case No. 1:12-cv-00049-RC
v.	)	
	)	
U.S. DEPARTMENT OF DEFENSE, and	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendants U.S. Department of Defense and Central Intelligence Agency. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment and Plaintiff's Response to Defendants' Statement of Material Facts Not in Dispute and Plaintiff's Statement of Material Facts in Support of Cross-Motion for Summary Judgment.

Dated: November 12, 2012

Respectfully submitted,

/s/ Chris Fedeli
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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT; REQUEST FOR HEARING

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Plaintiff Judicial Watch, by counsel, respectfully submits this memorandum in opposition to Defendants' motion for summary judgment and in support of Plaintiff's cross-motion for summary judgment. In addition, pursuant to LCvR 7(f), Plaintiff requests an oral hearing on Defendants' motion for summary judgment and Plaintiff's cross-motion for summary judgment. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. INTRODUCTION.

This is precisely the kind of case under which FOIA disclosures should be ordered. The government is withholding certain information disclosed to filmmakers planning to make a movie about the hunt for Osama bin Laden. There is suspicion that the way these disclosures were made was improper, and constituted an effort by the Defendant agencies to influence the dramatic portrayal of government events beyond merely insuring accuracy. Indeed, certain of the disclosures are now a part of an Inspector General investigation. The public has a high interest in any information which could shed more light on the possibility of wrongdoing in the government's decisions to disclose allegedly sensitive information about the raid that killed bin Laden.

The government's brief illustrates the difference between avoiding disclosures that would be politically awkward or embarrassing on the one hand, and a legitimate exercise of FOIA exemptions on the other. For instance, in its brief, the government asserts but fails to sufficiently demonstrate that public disclosure of the names in question will harm national security or privacy interests, and common sense dictates that this is unlikely. This is because the government itself chose to share these names with Hollywood filmmakers – individuals without security clearances – who were interested in producing a realistic yet fictionalized movie about

recent events. It is doubtful that the government's interest in assisting a private venture effort to make a more realistic film about the killing of bin Laden (whatever that interest is) would have justified *any* risk to national security. The government's brief does not explain why it was necessary to create these alleged risks to national security and allegedly jeopardize the privacy of these individuals by disclosing the names to Kathryn Bigelow and Mark Boal (the "filmmakers").

In other words: the government cannot have it both ways in this case. If this information were very sensitive, it would not have been shared with the filmmakers. Since the government did share the information with the filmmakers, the court should conclude that it is necessarily *not* sensitive. Most other cases where courts have held that a selective disclosure did not constitute putting information into the public domain generally involved some disclosure for *necessary* governmental purposes – disclosures to the United Nations Security Council, to ensure law enforcement methods do not violate civil liberties, or to a jury during criminal prosecution. Assisting to make a movie about government accomplishments is a not a necessary or important governmental function. If it were, the term for it would be political propaganda.

Naturally the government may choose to assist private industry, and may even share some confidential and non-public information with industry groups without waiving FOIA exemptions. However, when the government shares confidential information selectively with *individual* industry participations, it should not enjoy the privilege of keeping that information secret from others once disclosed. That is what happened in this case.[1] The case at bar would therefore be analogous to a hypothetical case where the government shared new engine technology with Ford but not Chrysler, and then tried to exempt that information from FOIA.

[1] Exhibit 1, Declaration of Chris Fedeli ("Fedeli Decl.") at ¶ 22, Exhibit ("Exh.") U (document produced by CIA discussing decision to make greater disclosures to Boal and Bigelow than others seeking access for film projects).

There may be *reasons* why the government prefers to assist one private group instead of another, but there are rarely *legitimate reasons* for doing so.

Finally, the public's interest in learning *any* information about the historic Pakistan raid that killed Osama bin Laden is enormous. "Indeed, it makes sense that the more significant an event is to our nation – and the end of Bin Laden's reign of terror certainly ranks high – the more need the public has for full disclosure." *Judicial Watch v. Department of Defense and Central Intelligence Agency*, 857 F. Supp. 2d 44, 63 (D.D.C. 2012), *appeal pending*, Case No. 12-5137 (D.C. Cir. 2012). In addition, the public interest in information about the government's sharing of confidential information with filmmakers is bolstered by the scandal this event has caused, over which the Department of Defense Inspector General has launched an internal investigation. The public's interest therefore easily outweighs the privacy concerns that the government has cited in this instance.

II. FACTUAL BACKGROUND.

On August 6, 2011, Maureen Dowd published an article in the New York Times accusing the Obama administration of sharing sensitive information with Kathryn Bigelow and Mark Boal so that the pair could make a better film dramatizing the killing of Osama bin Laden, which would help President Obama's reelection efforts. Fedeli Decl. at ¶ 12, Exh. K. Since this revelation, the media, members of Congress, and Plaintiff have been aggressively pursuing the details of this collaboration between the government and Hollywood.

Since Plaintiff commenced this FOIA litigation on January 12, 2012, the Defendants Department of Defense ("DoD") and Central Intelligence Agency ("CIA") (collectively the "government") have produced certain documents, often with redactions. Upon receiving these documents, Plaintiff Judicial Watch has only challenged the government's withholding of certain

redacted information that appeared to have been shared with the civilian filmmakers. Plaintiff has communicated this stance in correspondence and conversations between counsel. *See* Fedeli Decl. at ¶ 12, Exh. S. In order to determine which information in the record the government shared with the filmmakers and which information it did not, Judicial Watch has challenged narrow sets of specific redactions which seemed, by context, to consist of information disclosed to them. As a result of the winnowing down process, the amount of information Plaintiff now seeks the release of under FOIA is down to merely five names the government shared with the filmmakers.

During the litigation, the government has claimed exemptions for several items of information which it later disclosed. Both Defendants first produced documents in this case on May 18, 2012, following Plaintiffs' initiation of this lawsuit and this Court's adoption of a deadline for production. Thereafter, Plaintiff again informed Defendants again that it would challenge redacted information that appeared to have been shared with the civilian filmmakers and that unless those redactions were removed, the parties would need to brief the case on cross-motions for summary judgment.

On July 11, 2012, Defendant DoD made a supplemental release of information in response to Plaintiff's challenges. Specifically, DoD re-released several documents without redactions where a name had previously been blocked out. The DoD had inadvertently redacted the name of Jonathan Leven, a film executive associated with the Mark Boal project, apparently mistaking Mr. Leven for a military employee whose name would have been exempt from disclosure under FOIA.

On July 24, 2012, the Defendants informed this Court that they needed additional time to file their summary judgment brief because they had inadvertently overlooked a "4 to 5 inch

stack" of responsive documents, which they had failed to produce prior to the May 18, 2012 Court deadline. ECF 13 at ¶ 3. On August 24, 2012, Defendants produced the new set of documents from this 4 to 5 inch stack. As with the last production, Plaintiff again challenged redactions of information apparently shared with the filmmakers Kathryn Bigelow and Mark Boal.

In response to these challenges, on September 14, 2012, Defendant CIA made a supplemental production of several unredacted pages which Judicial Watch had identified as appearing to contain information shared with the filmmakers. The redactions consisted of the initials of government personnel apparently involved in the bin Laden raid who apparently met with the filmmakers, and the initials of CIA buildings to which the filmmakers were apparently given tours or access. Specifically, the unredacted versions, which the government had previously not released, contained the initials "SAD" and "IPS," which appear to refer to the Special Activities Division within the National Clandestine Service and the Imaging and Publishing Support section. Furthermore, the newly released documents revealed the initials "JB" and "PAD," which appear to refer to CIA employees whose names or initials were shared with the filmmakers.[2]

On June 13, 2012, CIA Director Leon Panetta confirmed in Senate testimony that no classified information was shared with Bigelow or Boal. *See* Fedeli Decl. at ¶ 2, Exh. A. Consistent with this testimony, the government's September 14, 2012 brief confirms that no classified information was shared with the filmmakers. Through declarations, the government has supported its claim that no classified information was shared with the filmmakers. Accordingly, Plaintiff Judicial Watch does not challenge the government's withholding of any

[2] Plaintiff notes that while FOIA gives it a right to access certain government information, it does not carry with it the right to have the government confirm what every piece of information means.

classified information or seek its release in this lawsuit. Similarly, Judicial Watch does not challenge the government's right to withhold other information under FOIA Exemptions 3 or 6 that was not shared with third-party filmmakers.

However, in those same declarations, the government confirms that some of the allegedly sensitive redacted information that Judicial Watch identified *was* shared with the filmmakers. Judicial Watch identified those redactions in emails which appeared to contain names shared with the filmmakers, and the government has now confirmed via declaration that these redacted names of government officials were shared with the filmmakers. *See* ECF 16-2, Lutz Decl. at ¶¶ 14 and 15 and Exhs. D and E; ECF 16-1, Herrington Decl. at ¶ 7 and Exh. C. Specifically, the names in question are the true first names only of four CIA operatives who were interviewed by the filmmakers (the last names were apparently never shared with the filmmakers and remain unknown to Judicial Watch), and the full name and rank disclosed to Mark Boal by Undersecretary of Defense Michael Vickers. These five partial or full true names are the only information Judicial Watch seeks, as it appears that all other recorded information the government shared with the filmmakers has already been released to Judicial Watch.[3]

On September 24, 2012, the Inspector General of the Department of Defense expanded its investigation into whether the DoD has been following policies concerning release of sensitive information to journalists and filmmakers. Fedeli Decl. at ¶¶ 9 -10, Exhs. H and I. This investigation was apparently triggered by criticism over the way the DoD decided to give non-public and allegedly sensitive information to Bigelow and Boal to the exclusion of others. Fedeli Decl. at ¶ 11, Exh. J.

[3] Judicial Watch notes that it believes its FOIA request would reach *all* other information the government shared with the filmmakers – including but not limited to the full contents of the filmmakers' interviews with the CIA operatives – *if* that information existed in recorded form. As the only remaining items of documented information not produced to Judicial Watch *and* shared with the filmmakers appears to be the five names in question, that is the information Judicial Watch now seeks in this lawsuit.

III. SUMMARY OF ARGUMENT.

In its brief, the government attempts to justify its refusal to release that redacted information to Judicial Watch, arguing that it is not required to do so pursuant to FOIA Exemptions 3 and 6. There is no genuine dispute between the parties about what this requested information consists of – it is names[4] – or whether it would be subject to Exemptions 3 and 6 absent waiver by the government or individuals, and absent the public's interest in knowing more about these disclosures to the filmmakers.

Plaintiff's argument is simple: by sharing the names with the filmmakers without sufficient confidentiality precautions and for the purpose of the production of a fictionalized feature film, the government waived Exemption 3. Furthermore, the public's interest outweighs whatever Exemption 6 privacy interest exists, and the CIA operatives further waived their own privacy interest in their names by undertaking the meetings with the filmmakers.

IV. ARGUMENT.

1. The Names Shared with the Filmmakers Cannot Be Withheld Under Exemption 3

In this case, the government has waived FOIA Exemption 3 by disclosing the information to filmmakers. Exemption 3 permits a government agency to withhold material "specifically exempted from disclosure by certain statutes." 5 U.S.C. § 552(b)(3). In the instant case, Defendants rely on 10 U.S.C. § 130b and 50 U.S.C. § 403g. *See* Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Gov't Br."), ECF 16 at 6-7. Plaintiff does not challenge Defendants' reliance on the two sections to withhold the requested names; Plaintiff

[4] Accordingly, Plaintiff sees little need for the *in camera* review of the redacted information the government's witness has offered. ECF 16-1, Lutz Decl. at fn. 1. In light of the fact that much of the government's argument hinges on the assertion that the individuals in question will have a continued privacy interest in their names after this film is released, a viewing of *Zero Dark Thirty* after its theatrical release on December 19, 2012 may ultimately be more illuminating.

only challenges Defendants' assertion that it has *not* waived Exemption 3 by revealing the names to the filmmakers. ECF 16, Gov't Br. at 11-15.

The government has waived Exemption 3 and placed the information in the public domain for two primary reasons: 1) the government did not obtain legally sufficient assurances of confidentiality from the filmmakers; and 2) the disclosure was not made for reasons of an important *governmental* purpose. Finally, Plaintiff has met its burden by identifying with specificity where in the record the requested information is located.

A. The Government Did Not Obtain Adequate Assurances of Non-Disclosure.

The government waived its rights to claim exemptions by divulging the information to third parties. In doing so, the government demonstrated a lack of concern about the future dissemination of information that it now claims is highly sensitive. Indeed, media analysis of the documents produced in this matter indicates that a significant purpose of the disclosures to the filmmakers was to cleverly market the message that the President's ordering the Abbottabad raid was a "gutsy decision." *See* Fedeli Decl. at ¶ 8, Exh. G.

In its brief, the government asserts merely that the DoD asked the third party filmmakers not to share certain names, without stating it obtained legal assurances of secrecy or consequences for its violation. ECF 16, Gov't Br. at 4. This is insufficient to overcome waiver. *Watkins v. U.S. Bureau of Customs & Border Protect*., 643 F.3d 1189, 1198 (9th Cir. 2011) ("*Watkins*") ("when an agency freely discloses to a third party confidential information covered by a FOIA exemption without limiting the third-party's ability to further disseminate the information then the agency waives the ability to claim an exemption to a FOIA request for the disclosed information.").

This case is closely analogous to *Watkins*. In both cases, the requested information was lawfully subject to a FOIA exemption, but the government's ability to claim that exemption has been waived under the public domain test due to a disclosure to members of the public. *Watkins* at 1196 (a FOIA exemption is waived when the government "releases purportedly confidential information to the public."). In *Watkins*, the government released non-public and otherwise FOIA-exempt information about infringing trademark imports *only* to the trademark owners. *Watkins* at 1192 ("The Agency gives the [infringing import] information in the Notices of Seizure *only* to notify trademark owners upon the seizure of good bearing a counterfeit mark…") (emphasis in original). In this case, the government released non-public and otherwise FOIA-exempt names of CIA and military personnel *only* to the makers of a film about a military operation. The government has stated that the release of this information serves the purpose of assisting filmmakers to create a more accurate film. *See* Fedeli Decl. at ¶¶ 13 – 16, Exhs. L, M, N, and O (articles quoting the following individuals: CIA Spokesman Preston Golson – goal is "an accurate portrayal of the men and women of the C.I.A…."; CIA Spokeswoman Marie Harf – "Our goal is an accurate portrayal of the men and women of the CIA…"; CIA Spokeswoman Jennifer Youngblood – "Our goal is an accurate portrayal of the men and women of the CIA…"; White House Press Secretary Jay Carney – "When people... are working on articles, books, documentaries or movies that involve the president.... we do our best to accommodate them to make sure the facts are correct").

In both *Watkins* and the instant case, the government did not impose legal restrictions on how the information could be used by the third party who received it. *Watkins* at 1197 (after receiving the non-public information, the trademark owner "can freely disseminate the Notice to his attorneys, business affiliates, trade organizations, the importer's competitors…."). In the

present case, the government has provided no evidence that the filmmakers are under any legal constraints that would prevent them from disclosing the requested information (first names of CIA officers and name of a military official) to their attorneys, business affiliates, or other third parties. The only evidence the government supplies is that they asked the filmmakers not to use real names of these individuals in the movie. *See* ECF 16, Gov't Br. at 4. This does not constitute a sufficient safeguard of the release of non-public information to overcome waiver. As the *Watkins* court observed, such a broad interpretation of the public domain doctrine would allow the government to continue to claim the exemption even if the filmmakers "opened up the phonebook and faxed a copy" of the non-public names to every movie producer in Hollywood. *Watkins* at 1197. Accordingly, "[w]hile the public domain test will be persuasive in most cases, it does not reach the concerns of confidentiality" when the government has disclosed information without limits on the third party's ability to further disseminate it.[5] *Id.*

Even though the government "did not authorize" the filmmakers to reveal the names, and "told" Mark Boal not to do so, it does not appear the government has taken any legally significant steps to protect the names. ECF 16, Gov't Br. at 4; ECF 16-2, Lutz Decl. at ¶ 12. For instance, the government, in its briefs and declarations, provides no evidence that the filmmakers signed a non-disclosure agreement[6] or any other contract with the government that would prohibit the filmmakers from sharing the names privately with friends or colleagues at their own discretion. Similarly, the government offers no evidence that either Boal or Bigelow underwent

[5] The fact that *Watkins* dealt with the public domain doctrine in an Exemption 4 claim instead of Exemption 3 is not relevant to the legal principle at issue, as the DC Circuit has noted elsewhere. *See Muslim Advocates v. DOJ*, 833 F. Supp. 2d 92 at 102, fn 8 (D.D.C. 2011) ("[T]he DC Circuit has never limited application of the public-domain doctrine to cases involving national security, but instead has applied it in several non-national security contexts.").

[6] Instead, the filmmakers requested that CIA employees sign release agreements as a precondition to talking to Bigelow and Boal, to protect the *filmmakers* from defamation suits. *See* Fedeli Decl. at ¶ 21 Exh. T.

a background check or received a security clearance prior to giving them non-public and (allegedly) sensitive information about undercover CIA operatives and military personnel.

The presence of a written confidentiality instrument is a legally significant fact in determinations of whether the government has waived FOIA exemptions by disclosing information. *See McKinley v. Board of Governors of Fed. Res. Sys.*, 849 F. Supp. 2d 47, 60 (D.D.C. 2012) (the government argued disclosure of certain information shared with Congress "does not waive the Board's FOIA Exemptions because the records were provided to the FCIC *under a written confidentiality agreement that did not authorize public disclosure*") (emphasis added). In *McKinley*, the fact that the disclosure was made in violation of a "written confidentiality agreement" that was later breached formed a key part of the holding that the FOIA exemption had not been waived. 849 F. Supp. at 60. Also importantly, and as addressed more thoroughly in Section B. immediately below, the *McKinley* court went on to hold that finding waiver in that case would "frustrate public policy encouraging broad congressional access to governmental information…." *Id.* (internal citations and punctuation omitted). No similar public policy of ensuring governmental promotion of "accurate filmmaking" exists or is at stake here.

The court should follow the *Watkins* holding here by finding that merely asking a filmmaker not to use names in a movie 1) is not legally binding and 2) does not prevent the filmmakers from sharing the true names with a host of other third parties (attorneys, business affiliates, members of the MPAA, *etc*.). Combined with the very public nature of a major motion picture based on actual people and events, the requested information should be deemed irretrievably in the public domain and the government must release it pursuant to Plaintiff's FOIA request. *See Niagara Mohawk Power Corp. v. United States Dep't of Energy*, 169 F.3d

16, 19, (D.C. Cir. 1999) (if the "information is already in the public domain" that fact will "give victory to" FOIA plaintiffs); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("To the extent that any data requested under FOIA are in the public domain, the [government] is unable to make any claim to confidentiality…").

B. Filmmaking Is Not an Important Governmental Purpose.

The government further argues that the public domain test allows it to withhold the information precisely *because* it was only shared selectively with the filmmakers. ECF 16, Gov't Br. at pp. 14-15. For this argument, the government relies chiefly on *Muslim Advocates v. DOJ*, 833 F. Supp. 2d 92 (D.D.C. 2011), *Students Against Genocide v. Dep't. of State*, 257 F.3d 828 (D.C. Cir. 2001), and *Prison Legal News v. Exec. Office for U.S. Attorneys*, 628 F.3d 1243 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 473 (2011). ECF 16, Gov't Br. at pp. 14-15. However, a closer examination of these decisions demonstrates the weakness of the government's argument that selective disclosure on its own necessarily shields information from FOIA.

A key part of the court's reasoning in *Students Against Genocide* was the finding that the government had legitimate foreign policy reasons supporting its decision to show surveillance photographs of Serbian war crimes to some foreign diplomats, but not to others:

> [W]e find nothing unreasonable in the government's contention that it may have affirmative foreign policy reasons for sharing sensitive information with some foreign governments and not others. As in this case, the government may well decide that its foreign policy objectives – here, the garnering of support for opposition to ongoing genocide – require disclosing information to member countries of the United Nations Security Council that may be in a position to assist the United States in its efforts, yet at the same time requiring protecting that information from disclosure to other countries that may actively oppose those policies.

Students Against Genocide, 257 F. 3d at 837.

Turning to the present case, the government has articulated no similar policy reasons why it should share names of CIA and military personnel with some moviemakers but not others.

Similarly, in *Muslim Advocates*, the court noted that the FBI had showed draft portions of its Domestic Investigations and Operations Guide (DIOG) to organizations dedicated to protecting the civil rights of American Arabs, Muslims, and Sikhs. *See Muslim Advocates*, 833 F. Supp. 2d at 96. This disclosure was made for the important purpose of getting feedback from these civil rights organizations on how well the FBI's draft operations procedures complied with the Fourth Amendment rights of U.S. citizens. Indeed, the preamble to the DIOG explained this purpose with a statement by FBI Director Robert Mueller: "[T]he FBI must fully comply with all laws and regulations, including those designed to protect civil liberties and privacy. . ." *Muslim Advocates*, 833 F. Supp. 2d at 95. The court found that a disclosure to civil rights groups, for the purpose of getting feedback on the FBI's own civil rights concerns, justified selective release of the information such that FOIA would not apply. *Muslim Advocates*, 833 F. Supp. 2d at 102, fn. 8. Again, this is a far weightier purpose than that of insuring the accuracy of Hollywood films that the government has claimed in this case. Fedeli Decl. at ¶¶ 13 – 16, Exhs. L, M, N, and O.

Finally, in *Prison Legal News*, it was necessary for the government to disclose the information in question (gruesome murder scene video and photographs) for the legitimate purpose of prosecuting a criminal case at trial where the death penalty was sought. 628 F.3d at 1246. In that case, although the information was disclosed to a jury, the government was allowed to withhold the information from a FOIA request regardless. *Prison Legal News*, 628 F. 3d at 1252-1253. There could be no question that the criminal trial prosecution in *Prison Legal News* gave rise to a necessary, limited disclosure for an important government purpose.

The government's argument in this case would greatly weaken FOIA disclosure by allowing the government to selectively disclose information to whomever the government wishes for virtually any reason. The cases Defendants cite all support limits to the public disclosure of documents for valid reasons in the public interest. The government's interest in the quality of Hollywood films is not such a compelling public value as to warrant an exception to the broad requirement to disclose records and information to the American people.

C. Plaintiff Has Carried Its Burden.

Finally, Plaintiff has identified the precise emails that contain the information it wishes to obtain, and the government has conceded this very information was shared with the third party filmmakers. ECF 16, Gov't Br. at 13-14; ECF 16-1, Herrington Decl. at ¶ 7; ECF 16-2, Lutz Decl. at ¶ 15. Plaintiff contends that this act of sharing information with third party filmmakers constitutes putting the information into the public domain. Accordingly, plaintiff has carried its initial burden of proof under the public domain doctrine. *North v. Department of Justice*, 658 F.Supp. 2d 163, 173 (D.D.C. 2009) ("Under this public domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record. However, the plaintiff in such instances bears the initial burden of pointing to specific information in the public domain that appears to duplicate what is being withheld.") (internal quotations omitted); *See also Callaway v. U.S. Dep't of Treasury*, 824 F.Supp.2d 153, 164-165 (D.C. Cir. 2009) ("Plaintiff meets his initial burden by pointing to specific information in the public domain that appears to duplicate that being withheld. . . Prior disclosure of similar information does not suffice; instead, the specific information sought by the plaintiff must already be in the public domain.") (internal citations and quotations omitted). It is sufficient that this information is contained in government emails which demonstrate disclosure

to the filmmakers. *See Muslim Advocates*, 833 F. Supp. 2d at 100 (the public domain test does not require a "hard copy simulacrum of the sought-after material").

2. The Names Shared with the Filmmakers Cannot Be Withheld Under Exemption 6

In this case, all Exemption 6 privacy interests that the government claims exempt the names from FOIA are outweighed by the enormous public interest in both the *Zero Dark Thirty* disclosures incident and in the Abbottabad raid that killed bin Laden. Furthermore, four of the five individuals whose names are at issue (the CIA operatives) have waived any privacy interest they could have by voluntarily sharing their true names with filmmakers for the purpose of helping Boal and Bigelow make a movie about their accomplishments. Contrary to what the government argues, the public interest in this information is extremely high, and the privacy interest in the information is extremely low. ECF 16, Gov't Br. at 10-11.

In its declaration, the government claims that keeping the names secret is "extremely important" to the government's functioning, that release of the names would create an "unnecessary security and counterintelligence risk," and that "releasing even just the first names of these officers presents an unnecessary and unacceptable risk." ECF 16-2, Lutz Decl., ¶ 19. This declaration, however, does not contain supporting facts for claim. As discussed above in Section IV.1.A., the declaration does not aver that the government obtained any legal assurances from the filmmakers to prevent further dissemination. *Supra* at pp. 8-11. Nor does the declaration stipulate that the filmmakers had obtained security clearances, or that they were employed as CIA contractors such that the disclosure of confidential information would have been appropriate. The declaration also fails to demonstrate whether the factual or personal details of the interviews between the CIA operatives and the filmmakers were used in the

screenplay or in character details for the film *Zero Dark Thirty* – a highly relevant fact in determining whether the CIA agent names are now irretrievably "in the public domain."

In light of the government's expressed desire to keep the names confidential, the foregoing indicates the government should not have permitted the confidential information to pass to the hands of private citizens in the first place, and at a minimum should not have done so without the protection of so much as a nondisclosure agreement. Indeed, according to public reports, the Inspector General of the Department of Defense has now launched an inquiry into how the government decided to share these names with the filmmakers and whether any laws were violated in the process. Fedeli Decl. at ¶¶ 9 – 11, Exhs. H, I, and J. The public interest now requires that the names be disclosed so that whatever harms that have been done can be more fully learned, in order to better prevent such mistakes in the future.

A. The Public Interest Outweighs the Privacy Concerns Alleged for Each of the Names

"[U]under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Multi AG Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008), *quoting Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002). Indeed, FOIA's "presumption favoring disclosure . . . is at its zenith under Exemption 6." *Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1057 (D.C. Cir. 2009).

When Exemption 6 is claimed, the Court must first assess whether the third party has more than a *de minimis* privacy interest in the requested material. *See Citizens for Responsibility and Ethics v. Dep't of Justice*, 840 F. Supp. 2d 226, 231 (D.D.C. 2012), *quoting ACLU v. Dep't of Justice*, 655 F.3d 1, 12 (D.C. Cir. 2011)). If such an interest exists, the court must then determine whether the third party's privacy interest is outweighed by the public interest in the

disclosure. *Id.* In *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989), the Supreme Court observed that the extent of the public interest in disclosure under FOIA is tied to how well release of the information will "shed[] light on an agency's performance of its statutory duties."

In this case, release of the names will shed additional light on the government's decision to share non-public information with the filmmakers. Specifically, disclosure of who was selected for interviews with the filmmakers chronicling the raid will potentially shed more light on how the government decided who should inform the details of the cinematic portrayal of the Abbottabad raid. Once the names of those disclosed become public, the media and the public can investigate and draw whatever inferences may follow from knowing the government's choice of personnel appointments for this filmmaking detail.

The public interest in these decisions and events is no trifling affair or passing fancy. The CIA's own emails produced in this case show there was internal friction and confusion over a perceived favoritism for granting access to Hollywood visitors. *See* Fedeli Decl. at ¶¶ 5, 22, Exhs. D and U. This has led to widespread speculation that the government acted improperly in selectively disclosing information to Kathryn Bigelow and Mark Boal, along with calls for a broader investigation. Fedeli Decl. at ¶¶ 3 - 8, Exhs. B, C, D, E, F, and G. The Inspector General of the Department of Defense has announced an inquiry into how the military shares information with the public about sensitive operations in light of the *Zero Dark Thirty* disclosures and other selective information sharing. Fedeli Decl. at ¶¶ 9 – 11, Exhs. H, I, and J.

In light of the foregoing, this case resembles FOIA cases *Chang v. Department of the Navy*, 314 F.Supp.2d 35 (D.D.C. 2004) and *Schmidt v. U.S. Air Force*, 2007 U.S. Dist. Lexis 69584 (C.D. Ill. 2007). In *Schmidt*, the court found that although an Air Force officer had a

privacy interest in keeping information about his discipline confidential, the competing public interest in accountability over a friendly-fire incident outweighed that privacy interest. *Schmidt,* 2007 U.S. Dist. Lexis 69584, * 31-32. The court stated:

> …Schmidt had a privacy interest in keeping the information about his discipline confidential. … However, the competing public interest in disclosure clearly outweighs Schmidt's privacy interest. It is undisputed that the friendly-fire incident garnered significant public and media attention. …The release of Schmidt's reprimand gave the public, in the United States and around the world, insight into the way in which the United States government was holding its pilot accountable. Thus, considering all of the circumstances, the disclosures at issue were clearly warranted.

Id. This Court has similarly held that "the public interest in whether public servants carry out their duties in an efficient and law-abiding manner outweighs an officer's privacy interest..." *Chang*, 314 F. Supp. 2d at 44. Public and media interest in the government's questionable practice of selectively sharing non-public information with the filmmakers in this case is enormous, with scores of media accounts covering the subject. This is partly due to the general public and media interest in Osama bin Laden's death (*see Judicial Watch v. Department of Defense and Central Intelligence Agency*, 857 F. Supp. at 63), but it is also due to the interest in how the government will hold its agencies accountable for the questionable practices this event shed a light on. *See* Fedeli Decl. at ¶¶ 3 - 11, Exhs. B through J.

Furthermore, the privacy interest in these names at this point is minimal. The government claims that, after sharing all or part of the names with Hollywood executives making a film, the individuals in question still have a strong privacy interest in not having anyone know even parts of their names or their involvement in the Pakistan raid. ECF 16, Gov't Br. at 11. This argument is unpersuasive. Four of the individuals in question voluntarily sat down for face-to-face interviews with the movie makers to discuss their roles in the Pakistan raid. Whatever desire for privacy they once had will be hard to keep once characters based on them are

portrayed by actors in the film *Zero Dark Thirty*, which is scheduled for nationwide theatrical release on December 19, 2012, just in time for the holiday movie-going season, and is already generating Oscar buzz.[7] The alleged risk to invasion of their privacy from release of their first names only to the public is both undemonstrated and unlikely. Similarly, any privacy invasion from disclosure of the name of the person who Undersecretary of Defense Michael Vickers gave to Hollywood screenwriter Mark Boal is outweighed by the public interest.

Finally, Plaintiff wishes to reiterate that the information it seeks about names disclosed to the filmmakers is extremely limited. Plaintiff seeks only the first names of the individuals who met with the filmmakers, and the name shared with Mr. Boal. Plaintiff does not seek any other identifying information, code names, addresses, etc. Any intrusion into the privacy of these individuals would therefore be extremely limited, and clearly outweighed by the intense public interest and media attention that has been given to the *Zero Dark Thirty* disclosures and the Pakistan raid over the past year. Therefore, the names of the individuals should be released to Plaintiff.

B. The CIA Operatives Waived Their Privacy Interest in Their First Names

While the government may waive its right to an exemption when its own interests are at stake, it cannot waive an individual's privacy interests under FOIA by unilaterally publicizing information about that person. *Sherman v. United States Dep't of the Army*, 244 F.3d 357, 363-64 (5th Cir. 2001); *see also Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763-765 (1989) (privacy interest belongs to individual, not agency holding information pertaining to individual). The privacy interest inherent in Exemption 6 "belongs to the individual, not the agency holding the information." *Id.*

[7] *See* Fedeli Decl. at ¶ 17, Exh. P.

With respect to waiver, in the context of Exemption 6 for personal privacy, the waiver must be made by the individuals in question, not by the government. *See e.g. Showing Animals Respect & Kindness v. Dep't of the Interior*, 730 F.Supp.2d 180, 192-194 (D.D.C. 2010) ("*Showing Animals Respect*"). Moreover, while the question of whether the information has been placed in the public domain is relevant, it is not dispositive of whether the privacy interest has been waived by the individuals. *Id.*

The four operatives appear to have waived their privacy interest. Consider the release agreement the filmmakers sent to the government for the CIA operatives to sign. Fedeli Decl. at ¶ 21, Exh. T. It states, in part:

> I do hereby grant you... the right to portray, represent, impersonate and depict me (i.e., depict a character based in part, or in whole, on the information I provide or events that happened to me, but you will not use any actual image or photograph of me), by any actor(s) which you may select...

Id. At a minimum, this shows that the parties contemplated that these CIA interviews would be about developing dramatic characters for portrayal in *Zero Dark Thirty*, not for mere general background information. Once the film is released, it is hard to imagine that anyone believes these individuals' names are likely to remain a secret for long once their actions or likenesses are portrayed by Hollywood actors.[8] The government offers no evidence indicating the operatives took steps to ensure the information would remain private. *See supra* at pp. 16 – 19. Moreover, by participating in an interview with filmmakers, they voluntarily shared information they had to know would eventually be associated with characters in a major motion picture. As the Supreme Court has stated, "unless the invasion of privacy is clearly unwarranted, the public interest in

[8] Indeed, such media speculation started over two months before the film's scheduled release. *See* Fedeli Decl. at ¶ 18, Exh. Q.

disclosure must prevail." *U.S. Dept. of State v. Ray*, 502 U.S. 164, 177 (1991) (internal citations omitted).

According to press reports, at least three leading actors in the film portray CIA operatives.[9] One of the CIA operatives is reportedly being played by Oscar-nominee Jessica Chastain,[10] who became a breakout star in 2011 for a string of supporting roles in critically acclaimed films such as Terrence Malick's *The Tree of Life*. Even if the characters in Z*ero Dark Thirty* are composites, it is easy to predict that the people on whom they were partly based will become known in certain circles. By voluntarily partaking in the interviews with the filmmakers, the CIA employees waived a certain amount of privacy. The government has presented no evidence suggesting the operatives were required to do the interviews with Kathryn Bigelow and Mark Boal. Since the Exemption 6 privacy interest in question belongs to the CIA employees, not the government, on the facts before the court the government employees have waived that interest. *Joseph W. Diemert, Jr. and Assocs. Co., LPA v. FAA*, 218 F. App'x 479, 482 (6th Cir. 2007) ("[C]ourts have concluded that where personal privacy interests are implicated, the individual who owns such interest may validly waive it.").[11]

V. CONCLUSION.

As the government has stated, it routinely provides information to filmmakers who request it for the purpose of ensuring artists who wish to portray government functions and historical events accurately may do so. Fedeli Decl. at ¶ 16, Exh. O. While that may normally

[9] Fedeli Decl. at ¶ 19, Exh. R.

[10] *Id.*

[11] It bears noting that the CIA employees in question appear to have voluntarily given their first names to people they knew were about to make a movie about their exploits. If either the employees or the government had an interest in their first names remaining unknown, Plaintiff wonders why they could not have made up or used any name imaginable *other* than their true first names, asking the filmmakers to address them as sir or ma'am, or Joe or Jane, or Mr. Smith or Ms. Jones – or why the government would not have ordered its employees to use randomized pseudonyms for the interviews.

be a perfectly harmless endeavor, when the government goes from simple information sharing to selectively providing non-public information to some filmmakers while refusing to release it generally, this once harmless activity crosses a line of appearance. The act no longer appears to be mere informational assistance to a constituent American industry; rather, it begins to look like the government is co-opting private industry by giving special information access in an attempt to influence the portrayal of events and obtain favorable big screen treatment. The perniciousness of such practices, and the importance that they never be permitted *even the appearance* of occurring, justifies a ruling in favor of Plaintiff in this case.

Dated: November 12, 2012

Respectfully submitted,

/s/ Chris Fedeli

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., *Plaintiff,* v. U.S. DEPARTMENT OF DEFENSE, and CENTRAL INTELLIGENCE AGENCY, *Defendants.*	)	Case No. 1:12-cv-00049-RC

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendants' Statement of Material Facts Not in Dispute and Plaintiff's Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

I. Plaintiff's Response to Defendants' Statement of Material Facts Not in Dispute.

A. General Objections

As an initial matter, Plaintiff objects that Defendants U.S. Department of Defense and Central Intelligence Agency's (collectively "Defendants") statement does not comply with Local Civil Rule 7(h)(1). The failure to comply with the requirement to file a proper statement of material facts in "making or opposing a motion for summary judgment may be fatal to the delinquent party's position." *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773 (D.C. Cir. 1980); *see also Adagio Investment Holding Ltd. v. Federal Deposit Insurance Corp.*, 338 F. Supp.2d 71, 75 (D.D.C. 2004); *Smith Property Holdings, 4411 Connecticut L.L.C. v. U.S.*, 311 F.

Supp. 2d 69, 78 (D.D.C. 2004); *Robertson v. American Airlines*, 239 F. Supp.2d 5, 8-9 (D.D.C. 2002). Defendants' statement of material facts contains an improper mix of fact and legal conclusions and therefore fails to "assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record . . ." *Robertson*, 239 F. Supp. 2d at 9 (citations omitted).

B. Particular Responses

1. Not disputed.

2. Not disputed.

3. Plaintiff does not dispute this paragraph, with the exception of the use of the word "minimal" to characterize the redactions, which is subjective and constitutes opinion rather than fact.

4. Plaintiff does not dispute this paragraph, with the exception of the use of the word "minimal" to characterize the redactions, which is subjective and constitutes opinion rather than fact.

5. Not disputed.

6. Plaintiff disputes this paragraph, as it constitutes a conclusion inadequately supported by the single fact cited.

7. Not disputed.

8. Not disputed.

9. Plaintiff lacks sufficient knowledge to confirm or deny whether Defendants provided such instructions to the CIA officers. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

disputes that Defendants searched components that were most likely to have responsive records. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the "asymmetrical distribution of knowledge" between a FOIA requester and an agency in FOIA cases).

10. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

11. This paragraph contains legal conclusions about classified information, which are improperly asserted in a statement of facts, and therefore require no response. With respect to the remainder of the paragraph, Plaintiff lacks sufficient knowledge to confirm or deny it. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

12. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

13. This paragraph contains legal conclusions about classified information, which are improperly asserted in a statement of facts, and therefore require no response. With respect to the remainder of the paragraph, Plaintiff lacks sufficient knowledge to confirm or deny it. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

14. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

15. Disputed, except to the extent that Plaintiff lacks sufficient knowledge to confirm or deny the particular roles played by the individuals whose names have been redacted from the documents and whether they are undercover. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases). In addition, this paragraph contains legal conclusions about privacy interests of individuals whose names were shared with filmmakers. These legal conclusions are improperly asserted in a statement of facts, and therefore require no response.

16. Plaintiff does not dispute that the public is now aware that there were meetings between the filmmakers and CIA and DoD employees as a result of both the documents Defendants produced to Judicial Watch and the statements made in the Defendants' Motion for Summary Judgment. Plaintiff disputes the remainder of this paragraph, except for the legal conclusions about the public's interest in disclosure of the information in question, which require no response.

17. Plaintiff lacks sufficient knowledge to confirm or deny this paragraph. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir. 2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

18. Plaintiff lacks sufficient knowledge to confirm or deny what the CIA and DoD communicated to the filmmakers beyond what is identified in the documents, which speak for themselves. *See Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145 (D.C. Cir.

2006) (noting the asymmetrical distribution of knowledge between a FOIA requester and an agency in FOIA cases).

19. Not disputed.

II. Plaintiff's Statement of Material Facts Not in Dispute in Support of Cross-Motion for Summary Judgment.

1. Defendant CIA and its employees provided true first names of four CIA operatives to the filmmakers Kathryn Bigelow and Mark Boal, and Defendant Department of Defense provided the full name and rank of a military official to Mark Boal.

2. Defendants have not asserted that either Kathryn Bigelow or Mark Boal is employed by the CIA or the Department of Defense in any capacity.

3. Defendants have not asserted that either Kathryn or Mark Boal have been given security clearances to receive non-public information about military or covert operations.

4. Defendants have not asserted that either Kathryn Bigelow or Mark Boal executed agreements barring further disclosure of the names subject to penalties.

Dated: November 12, 2012

Respectfully submitted,

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