

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF DEFENSE, and
CENTRAL INTELLIGENCE AGENCY,

Defendants.

1:12-cv-00049-RBW

DECLARATION OF MARK H. HERRINGTON

Pursuant to 28 U.S.C. § 1746, I, Mark H. Herrington, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Office of General Counsel (“OGC”) of the United States Department of Defense (“DoD”). OGC provides legal advice to the Secretary of Defense and other leaders within the DoD. I am responsible for, among other things, overseeing Freedom of Information Act (“FOIA”) litigation involving DoD. I have held my current position since March 2007. My duties include coordinating searches across DoD to ensure thoroughness, reasonableness, and consistency.

2. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity. Specifically, I am the OGC counsel assigned to this case.

Administrative Background

3. On August 9, 2011, Plaintiff sent a FOIA request to DoD seeking records related to meetings and communications between DoD and filmmaker Kathryn Bigelow, Mr. Mark Boal, Ms. Megan Ellison, or employees of Annapurna Pictures, concerning a planned film regarding the killing of Osama Bin Laden. See FOIA request attached hereto as Ex. A.

4. DoD acknowledged receipt of the request on August 22, 2011, and advised Plaintiff that, due to unusual circumstances, it could not process the request within 20 days. See Aug. 22, 2011 letter attached hereto as Ex. B. Plaintiff filed suit in this case on January 12, 2012. DoD completed a reasonable search and produced responsive records to Plaintiff on May 18, 2012. The release from DoD was 153 pages in length, including a 16-page transcript of a background interview with Mark Boal and Kathryn Bigelow. DoD produced additional responsive records to Plaintiff on August 24, 2012.

Purpose of this Declaration

5. The purpose of this declaration is to respond to challenges from Plaintiff regarding certain redactions taken from the records released in response to their request. Specifically, Plaintiff challenges DoD withholdings under b(3) and b(6) that appear on pages 140 and 153 of DoD's May 18, 2012 production. These two pages of the transcript are attached hereto as Ex. C.

Justification for Withholding Identifying Information About DoD Personnel Under FOIA Exemptions 3 and 6

6. Exemption 3 permits the government to withhold information that is "specifically exempted from disclosure by statute." 10 U.S.C. § 130b authorizes the withholding of "personally identifying information regarding ... any member of the armed forces assigned to

an overseas unit ... or a routinely deployable unit.” Exemption 6 permits the government to withhold information about individuals when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” DoD has a policy, which has been upheld in every court decision to date, to withhold personally identifying information of those members of DoD who are at the military rank of Colonel (O6) or below and at the rank of GS-15 or below. An exception to this rule allows the names of those personnel who routinely deal with the press or public to be released.

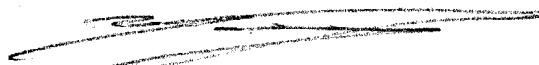
7. From information made available to me in my official capacity, and from the context of pages 140 and 153 of DoD’s May 18, 2012 production (as well as the context of the document to which those pages belong), the redactions on page 140 are, in order, (1) a first and last name of a DoD individual suggested by Mark Boal as someone he wanted to talk to; (2) a rank and last name of a different DoD individual identified by Mark Boal; (3) a last name - full name, such as “Smith, John Smith,” of a third DoD individual suggested by the Under Secretary of Defense, Mike Vickers, as someone Mark Boal could talk to; and (4) the last name of the third individual. The redaction on page 153 is the rank and last name of the third individual redacted from page 140 – i.e., the person Mike Vickers identified for Mark Boal to talk to. I have confirmed that the names of the DoD personnel mentioned on the relevant pages are of persons assigned to routinely deployable units whose military rank is Colonel (O6) or below and GS-15 or below and who do not routinely deal with the press or the public. This information therefore meets the criteria to be withheld pursuant to 10 U.S.C. § 130b and Exemption (b)(3).

8. I have further determined that this information was properly withheld under Exemption (b)(6) as its release would constitute a clearly unwarranted invasion of the personal privacy of these individuals. These individuals have a legitimate privacy interest in their

identities that would be threatened if their names were publicly disclosed, and there is no discernable public interest in having this information disclosed. Specifically, the public release of these individuals' names would not shed any light on how DoD performs its duties.

9. I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and information.

Dated this 14th day of September, 2012, in Washington, DC.



Mark H. Herrington, Esq.

EXHIBIT A

11-F-1374



**Judicial
Watch**
*Because no one
is above the law!*

August 9, 2011

VIA CERTIFIED MAIL & FACSIMILE

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155

Re: Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc. hereby requests that the Department of Defense produce the following within twenty (20) business days:

1. Any and all records of communication between any officer, official or employee of the Department of Defense and Ms. Kathryn Bigelow, the director of an upcoming film regarding the killing of Osama bin Laden tentatively titled, "Killing bin Laden."
2. Any and all records of communication between any officer, official or employee of the Department of Defense and Mr. Mark Boal, the writer of the aforementioned film.
3. Any and all records of communication between any officer, official or employee of the Department of Defense and Ms. Megan Ellison and/or any other officer or employee of Annapurna Pictures, the financiers of the film.
4. Any and all records concerning, regarding or related to the upcoming film regarding the killing of Osama bin Laden, including all related records of communication between any officer, official or employee of the Department of Defense and any other individual, entity or government agency.

The time frame for this request is January 1, 2011 through August 9, 2011.

We call your attention to President Obama's January 21, 2009 Memorandum

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concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA...The presumption of disclosure should be applied to all decisions involving FOIA.¹

The memo further provides that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

For purposes of this request, the term "record" shall mean: (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, facsimiles, papers, forms, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail; (3) any audio, aural, visual, or video records, recordings, or representations of any kind; (4) any graphic materials and data compilations from which information can be obtained; and (5) any materials using other means of preserving thought or expression.

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. *Cf. National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989)(defining news media within FOIA context). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. *See, e.g., Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the

¹ Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

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operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § (a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

Department of Defense

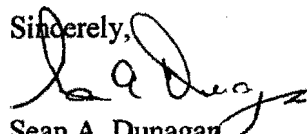
August 9, 2011

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In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately at 202-646-5172 or sdunagan@judicialwatch.org. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,



Sean A. Dunagan
Senior Investigator
Judicial Watch

EXHIBIT B



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

AUG 22 2011

Ref: 11-F-1374

Mr. Sean A. Dunagan
Judicial Watch
425 Third St. SW
Suite 800
Washington, DC 20024

Dear Mr. Dunagan:

This is an interim response to your August 9, 2011, Freedom of Information Act (FOIA) request for records pertaining to communications between any officer, official or employee of the Department of Defense and Ms. Kathryn Bigelow, Mr. Mark Boal, Ms. Megan Ellison, any officer or employee of Annapurna Pictures. Also any records concerning the upcoming film regarding the killing of Osama bin Laden, including all related records of communication between any officer, official or employee of the Department of Defense and any other individual, entity or government agency. You have requested records from January 1, 2011 through August 9, 2011. Your request was received on August 18, 2011 and assigned FOIA case number 11-F-1374.

Regarding your request, I am interpreting that part of the request that asks for records of communication between the Department of Defense and Ms Bigelow, Mr. Boal, Ms Ellison and officers or employee of Annapurna Pictures as asking for records concerning the subject of an upcoming film regarding the killing of Osama bin laden tentatively titled, "Killing bin Laden". As you are no doubt aware, this Office is responsible for responding to requests for records held by the Office of the Secretary of Defense (OSD) and the Joint Staff and, therefore, we are only able to answer your request as it pertains to those entitles and not for the entire Department of Defense. I understand that you have additionally submitted this request directly to the Department of the Navy.

You have also requested a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii) as a member of the news media. In support of this request you state that the disclosure of this information will contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives in the news media would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public. You state that "Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose." An Internet search

revealed that Judicial Watch is a conservative, non-partisan educational foundation that promotes transparency, accountability and integrity in government, politics and the law and that you fulfill your educational mission through litigation, investigations, and public outreach. These activities do not demonstrate that the primary activity of Judicial Watch is publishing or disseminating information. I do not find that you would qualify as a representative of the news media, although you have demonstrated the ability to disseminate information in support of your investigative, legal and judicial activities.

I have determined that you should be placed in the "other" category for fee purposes as you have indicated that you do not seek access to these records for commercial purposes. As you know, the "other" fee category affords you two hours of search time and 100 pages of duplication free of charge. You have agreed to pay fees in the amount of \$350 in the event that your request for a waiver of search and duplication costs is denied.

Concerning your request for a fee waiver on the basis that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Your request for a waiver of fees is granted but only as it applies to a search of records held by the Office of the Secretary of Defense.

At this time, we are unable to make a release determination on your request within the 20-day statutory time period as there are unusual circumstances which impact our ability to quickly process your request. These unusual circumstances are: (a) the need to search for and collect records from several offices geographically separated from this Office and (b) the need to consult with one or more agencies or DoD components having a substantial interest in either the determination or the subject matter of the records. For these reasons, your request has been placed in our complex processing queue and it will be worked in the order the request was received. As a matter of information, our current administrative workload is approximately 1,300 open requests. I apologize for the anticipated delay in responding to your request; your continued patience is appreciated.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, ATTN: Mr. James Hogan, 1155 Defense Pentagon, Washington, D.C. 20101-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 11-F-1374, and should be clearly marked "Freedom of Information Act Appeal".

Sincerely,

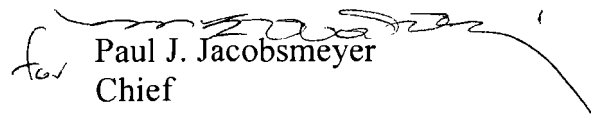

Paul J. Jacobsmeyer
Chief

EXHIBIT C

**Transcript from background interview with Marl Boal and Katherine Bigelow
(15 Jul 2011)**

Mike Vickers – MV
Phil Strub – PS

Mark Boal – MB
Bob Mehal – BM

Katherine Bigelow – KB

MB – Katherine is going to somehow figure out how to turn my disorganized screenplay into a terrific movie – and a great recreation of the events

So since we last talked, just to catch you up, to speak, on what I have been doing. I took your guidance and spoke to the WH and had a good meeting with Brennan and McDonough and plan to follow up with them; and they were forward leaning and interested in sharing their point of view; command and control; so that was great, so thank you.

I met with Acting Director Morrell today at Langley and continued to talk to various people in the IC.

MV- This was a follow-up? You've met with him before – correct?

MB- Yes correct; this was a follow-up.

MB – So intel stuff is going great and pretty well along on that, before I talked with you; but let's say between 2nd and 3^d base on that. The WH stuff, I think is in good shape as well, so the last leg of the stool is obviously DoD. So that's what, hopefully we can talk about some of that here, but I wanted to give you sort of inside baseball.

One of the things we had talked about was eventually I will be going, hopefully going, down to SOCOM and talking to somebody down there – maybe McRaven or whoever-still on the horizon.

MV- I have some news for you on that front. So, and have you talked to Sec Panetta – as the Director, though.

MB- Yes.

MV- I know he is very interested in supporting.

MB- We're going to have dinner at some point, but I didn't want to interrupt - travel plan to Afghanistan.

BM- Part of that discussion was from the last movie.

MV- I'm sorry, what?

BM- Part of those discussions, were in reference to the movie they were planning on making.

talk directly, because it's just a bad, their just concerned as commanders of the force and they're telling them all the time -- don't you dare talk to anybody, that it's just a bad example if it gets out -- even with all sorts of restrictions and everything.

MB- Uh-huh.

MB- I'll take [REDACTED] or someone like that.

MV- Well the basic idea is they'll make a guy available who was involved from the beginning as a planner; a SEAL Team 6 Operator and Commander.

MB- Are you talking about [REDACTED]

MV- A guy name [REDACTED] And so, he basically can probably give you everything you would want or would get from Adm Olson or Adm McRaven.

MB- That's dynamite - by the way.

KB- That's incredible.

MB- This is me happy.

MV- And so, he'll speak for operators and he'll speak for senior military commanders, because their all the same tribe and everything, and so you should get most of what you need from him. Now, again the reason Adm Olson and Adm McRaven didn't want to talk is this command conflict of interest. And then with [REDACTED] the only thing we ask is that you not reveal his name in any way as a consultant, because again, it's the same thing, he shouldn't be talking out of school, this at least, this gives him one step removed and he knows what he can and can't say, but this way at least he can be as open as he can with you and it ought to meet your needs and give you lots of color.

KB- Fabulous

MB- That's dynamite.

MV- So we'll put you in touch with him or have him get in touch with you - at the end of this meeting. And whatever your schedule is we'll make that work, I just haven't had a chance to talk with him.

KB- Is he located in the Washington DC area?

DOD 140

MV – A very intense period.

MB – Yah; well thank you for taking the time.

MV – Well again, with some of this, provided you don't drop bombs, it's repeatable and so that's what attracted some people to it. So I could fly over....

MB – But why would you pull them back in the middle of the flight? What are you going to find out on midnight on Sunday?

MV – Because, the period that you might be there, the limited window, he may not be available and so in that sense you could try again, but on the other hand, once you drop that bomb you don't get to try it again. And then even if you hit him you don't know that you have strategic success and so that is ultimately the problem.

MV – So should I have [REDACTED] reach out to you or?

MB – I'll call him, however you want to play it. I take your guidance...and very grateful.

MV – And what's your schedule look like?

KB – We leave early Wednesday morning and go back to Los Angeles but we could come back or ...

MV – Because I am going off to Afghanistan/Pakistan on Sunday.

MV – So we'll try to arrange it, if he's here, before Wednesday; and if not we'll at least establish a mechanism to where you guys can work it out.

MB – Okay; thank you, have a good weekend.

KB – So wonderful meeting you.

DOD 153