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 REPLY TO DEFENDANTS' OPPOSITION[1] AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In its responsive brief, the government says it wanted to facilitate an accurate movie portrayal of the people involved in the hunt for bin Laden, but it still wishes to keep secret the identities of those individuals who will be accurately portrayed. These desires appear to be mutually exclusive. Just as Plaintiff predicted in its opening brief, within the past week the privacy of at least one of these government employees has been eroded by media outlets seeking to satisfy the overwhelming public interest in the making of this critically acclaimed and controversial film. This should have been foreseeable a year ago when the government agreed to allow filmmakers Kathryn Bigelow and Mark Boal to interview the men and women behind the search for bin Laden for a quasi-journalistic movie based on their efforts.

The government mistakenly argues that there could be no "substantive" public interest in the names of the government employees who met with the filmmakers. However, courts have routinely found that the release of even bare names under FOIA may be ordered where the

[1] Plaintiff notes that Defendants' Reply (ECF 20) was not styled as a consolidated reply and opposition to Plaintiff's Cross-Motion for Summary Judgment, nor did Defendants docket any separate opposition to Plaintiff's motion in the Court's ECF System, calling into question whether they have properly opposed Plaintiff's motion pursuant to Local Civil Rule 7(b).

public's interest is sufficient. *See Gordon v. FBI*, 388 F. Supp. 2d 1028, 1041 (N.D. Cal. 2005) (the public interest is served by disclosure of individual agency employee names because "revealing the names of government employees who are making important government policy serves FOIA's core purpose of contributing to the public's understanding of how its government operates."); *Judicial Watch v. DOJ*, 102 F. Supp. 2d 6, 17-18 (D.D.C. 2000) (allowing deletion of home addresses and telephone numbers, but ordering release of identities of individuals who wrote to the Attorney General about campaign finance or Independent Counsel issues); *Baltimore Sun v. U.S. Marshals Serv*., 131 F. Supp. 2d 725, 729-30 (D. Md. 2001) (declaring that "[a]ccess to the names and addresses [of purchasers of seized property] would enable the public to assess law enforcement agencies' exercise of the substantial power to seize property, as well as USMS's performance of its duties regarding disposal of forfeited property"), *appeal dismissed voluntarily*, No. 01-1537 (4th Cir. June 25, 2001); *Maples v. USDA*, No. F 97-5663, slip op. at 14 (E.D. Cal. Jan. 13, 1998) (finding that release of names and addresses of permit holders would show the public how the permit process works and eliminate "suspicions of favoritism in giving out permits" for use of federal lands).

Despite the government's plea that the Court not consider Plaintiff's evidence of Congressional or Inspector General investigations, or take notice of the movie itself in considering the remaining privacy interests, this Court can and should consider "all of the circumstances" surrounding the disclosures in deciding whether the public interest favors the release of personal information. *Schmidt v. U.S. Air Force*, 2007 U.S. Dist. Lexis 69584, *32 (C.D. Ill. 2007). If the public knows which names were shared with the filmmakers (and by deduction, which were not), it will shed light on how and whether the government was trying to influence the narrative of an "accurate" theatrical portrayal.

Finally, while the government's witness testified that a "widespread release" of the names would cause an "unnecessary security and counterintelligence risk," at the same time the government essentially acknowledges that it took almost no precautions in releasing the information to the filmmakers – not even requiring so much as a non-disclosure agreement. ECF 16-2, Lutz Decl. at ¶ 19; ECF 20, p. 20, Defendants Response to Plaintiff's Statement of Material Facts Not in Dispute (Defs' Response to Statement) at ¶¶ 2-4. As Plaintiff demonstrated, it is this degree of casualness with which the government disclosed these names to private citizens which casts doubt on the alleged harms that would result from their wider release. ECF 18, Plaintiff's Brief at 21. If the security concerns about the names were as great as the government claims, the names would not have been disclosed in the way they were.

I. The Government's Arguments That It Has Not Waived Exemption 3 Are Unpersuasive

Because of the unique context of these disclosures, a finding that the b3 exemption for the names has been waived under the public domain test is appropriate, *even though* the names have not yet been memorialized in public documents. In the instant case, the names in question were: released to private citizens; without substantial security measures preventing further dissemination; in conjunction with detailed interviews given for the purpose of creating an accurate portrayal of these individuals; for a movie written and directed by two of Hollywood's most acclaimed filmmakers; about the CIA's ten year hunt to catch or kill the man responsible for the September 11 terrorist attacks. If under these extraordinary circumstances the names have not been irretrievably put into the public domain by the government, the test may well be meaningless.

A. The Government's Purpose in Sharing Non-Public Information Is Relevant

The government wishes to strip the public domain waiver test of any considerations about the circumstances surrounding disclosures, and instead reduce it to a mindless algorithm. The courts in both *Students Against Genocide* and *Muslim Advocates* found the government's purpose in sharing non-public and sensitive information was relevant to whether the FOIA exemption had been waived. *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). The government argues that the sole decisional factor for the court in these cases was that the "records at issue were not disclosed to the general public." ECF 20, Gov't Reply at 8. This argument ignores the fact that both courts conducted a more thorough analysis that delved into matters beyond the simple question of whether the information had been widely published.

The government's attempt to explain away the D.C. Circuit's language in *Students* is unpersuasive. ECF 20, Gov't Reply at 8. Plaintiff has made an argument similar to the one advanced by the plaintiffs in *Students*, and a key reason the *Students* court rejected the plaintiffs' argument in that case was the government's "affirmative public policy reasons for sharing sensitive information" selectively to foreign nations. *Students Against Genocide*, 257 F. 3d at 837.[2] As explained in Plaintiff's brief, the government has no similar defense here. ECF 18, Plaintiff's Brief at 12-13.

Similarly, it strains credibility for Defendants to claim that the purpose of the disclosure in *Muslim Advocates* was not a relevant factor in the court's decision that no waiver had

[2] The *Students* court also rejected the nationality of the people who received the selective disclosures as grounds for waiver, and found the recipients of the information lacked the expert qualifications needed to glean information from it about U.S. technical reconnaissance capability. *Students Against Genocide*, 257 F. 3d at 836-837. Neither factor appears relevant here.

occurred. ECF 20, Gov't Reply at 8-9. This reading would reduce the court's extensive factual recitation to mere dicta, turning a thirteen-page opinion into one that could have been resolved in a one-sentence finding of "no permanent public record."[3] ECF 20, Gov't Reply at 13. Plaintiff explained that the government's purpose in making the disclosure was an element of the *Muslim Advocates* court's findings. ECF 18, Plaintiffs Brief at 18. A more in-depth look at the court's language indicates this reasoning is present:

> Therefore given **both** the **"circumstances of prior disclosure" –** in which a small group of civil rights and civil liberties groups were invited to FBI headquarters and given approximately two hours to review and give feedback to the FBI on the civil liberty, privacy, and civil rights concerns of the FBI's domestic investigation guidelines – **and** "the particular exemption[] claimed" – i.e., *Exemption 7(E)'s* protection of information compiled for law enforcement purposes, the Court finds that application of the public-domain doctrine is appropriate in this case.

Muslim Advocates, 833 F. Supp. 2d at 102, fn. 8 (bold emphasis added).

B. <u>The *Watkins* Waiver Test Should Be Applied</u>

The government incorrectly argues that this Court could not apply the court's reasoning in *Watkins* to the case at bar because the *Watkins* holding represents a "rejection" of the D.C. Circuit's public domain waiver test. ECF 20, Gov't Reply at 4-5. This overstates matters. The dissenting opinion of Judge Rymer notwithstanding, *Watkins* is more properly viewed as a natural extension of the standard public domain waiver test to the unique set of facts before the court in that case. Furthermore, *Watkins* only partly distinguished itself from other cases based on lack of national security concerns, contrary to the government's suggestion. ECF 20, Gov't Reply at 6-7. After discussing a string of national security FOIA cases, the *Watkins* court added:

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[3] Of course, this is not the D.C. Circuit's standard for FOIA public domain waiver cases. "[T]he D.C. Circuit has not established a uniform, inflexible rule requiring every public-domain claim to be substantiated with a hard copy simulacrum of the sought-after material. . ." *Muslim Advocates*, 833 F. Supp. 2d at 100 (internal quotations omitted).

"Moreover, none of these [national security] cases presented a scenario in which the government had already provided a no-strings-attached disclosure of the confidential information to a private third party." *Watkins v. U.S. Bureau of Customs & Border Protect.*, 643 F.3d 1189, 1197 (9th Cir. 2011). This unique distinguishing fact is similarly present in the case at bar.

C. The Government's Lack of Concern over Information Security Is Relevant

The government now essentially admits it took no significant steps beyond an oral request to the filmmakers not to share the allegedly sensitive information. ECF 20, p. 20, Defs' Response to Statement at ¶¶ 2-4. Lacking facts supporting its withholdings, the government tries unsuccessfully to minimize the importance of legal prohibitions on disseminating information in both *Watkins* and *McKinley*. ECF 20, Gov't Reply at 5-6 and fn. 2. However, the presence or absence of confidentiality agreements was a factor in both decisions.

The government suggests that the *McKinley* court mentioned the existence of the confidentiality agreement for no reason at all, and speculates that the lack of a confidentiality agreement would not have changed that court's decision. ECF 20, Gov't Reply at 6, fn. 2. This interpretation is strained. The fact that the *McKinley* court pointed out twice in two paragraphs that the documents in that case were disclosed "under a written confidentiality agreement" speaks for itself. *McKinley v. Board of Governors of Fed. Res. Sys.*, 849 F. Supp. 2d 47, 60 (D.D.C. 2012).

Watkins was even more explicit about the need for limits on dissemination to prevent waiver. *Watkins*, 643 F.3d at 1198. In attempting to distinguish it, the government argues that the *Watkins* court never used the words "legally binding limits" on dissemination, suggesting the court might have meant that merely "requested" restrictions would be sufficient. ECF 20, Gov't Reply at 5. Contrary to the government's suggestion, considerations of information security

measures are not unique to the Ninth Circuit. This Court has found the existence of confidentiality agreements relevant to determinations under the public domain waiver test in *McKinley* and elsewhere. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 18 (D.D.C. 2000) ("Such disclosures have been limited, and have generally been accompanied by confidentiality agreements or protective orders."). Plaintiff is not asking this Court to depart from existing precedent, but rather to apply the law in a manner befitting the facts before it.

Finally, the Defendants never explain why it was necessary for them to disclose allegedly sensitive names outside of the agencies in order to "facilitate meetings." As Plaintiff has shown, these disclosures could have been avoided without hindering the agencies' ability to facilitate meetings. ECF 18, Plaintiff's Brief at 21, fn. 11.

II. The Government Fails to Show That Exemption 6 Is Not Outweighed

The government's arguments concerning the privacy exemptions fail to offer a single new fact or source of law in rebuttal. The government asserts, without evidence, that there is limited public interest in the disclosures to the filmmakers. ECF 20, Gov't Reply at 11–12. This assertion ignores the overwhelming evidence submitted by Plaintiff demonstrating the public interest in the *Zero Dark Thirty* disclosures. ECF 18-1, Fedeli Decl. at ¶¶ 2-16.

To support this assertion, the government claims (without citation to authority) that FOIA only weighs the public's interest in "disclosure of the specific information requested," and does not consider the aggregate impact of new information. ECF 20, Gov't Reply at 11. This claim is incorrect. Rather, a requester must demonstrate the "incremental value" to the public interest of the specific information sought. *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (an inquiry regarding the public interest "should focus not on the general public interest in the

subject matter of the FOIA request, but rather on the incremental value of the specific information being withheld."). Plaintiff identified the "incremental value" of these names to not one but two subject matters that are of overwhelming public interest – the Abbottabad raid and the *Zero Dark Thirty* filmmaker disclosures.[4] ECF 18, Plaintiff's Brief at 22-23. As discussed above, the fact that the selective disclosures consist of names does not lessen the government's burden under FOIA. *See* pp. 1-2, *supra*, citing *Gordon v. FBI*, *et alia.*

The government even acknowledges that the information Plaintiff requests has incremental value when it admits that release of the names could lead to additional FOIA requests for further information. ECF 20, Gov't Reply at 14. Equally importantly, knowing the names will help shed light on whether the government's practice of what very closely resembles "embedded journalism" was intended to influence the film's narrative beyond merely ensuring

[4] The government's argument that the disclosure of bare names, especially bare first names, has a more limited public interest value cuts equally against the government's own position here. ECF 20, Gov't Reply at 11-12. It is also true there is much less of a *privacy interest* in someone's bare first name than there would be in a broader disclosure of an employee's full name, title, duties, and role.

accurate portrayals of CIA operatives.[5] Given the debates about the effectiveness of enhanced interrogation techniques the movie has spawned, the public's interest is even greater.[6]

The government says it is "pure conjecture" that the characters in the movie will be based on the government employees interviewed and that their identities will become known in such a way that virtually eliminates their remaining privacy interests. ECF 20, Gov't Reply at 13. First, the government's own brief partly contradicts itself on this point. Specifically, the government admits that the purpose of its disclosures to the filmmakers was "to ensure an accurate portrayal" of "people involved in the raid." ECF 20, Gov't Reply at 9. Nowhere did the government present countervailing evidence suggesting the filmmakers have dishonored those wishes. Secondly, Plaintiff's assertion was not conjecture at the time of Plaintiff's Motion, and it is even less so now. Plaintiff relied on documents produced in this FOIA litigation, as well as media reports deemed accurate as evidence, for its well-grounded predictions. ECF 18-1, Fedeli Decl. at ¶¶ 5, 8, 13, 18-19. Since Defendants filed their Reply, pre-release publicity from the filmmakers themselves confirms that the characters in *Zero Dark Thirty* are at least partly based

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[5] Peter Maass, *Don't Trust 'Zero Dark Thirty,'* The Atlantic, Dec. 13, 2012, available at http://www.theatlantic.com/entertainment/archive/2012/12/the-real-problem-with-zero-dark-thirty/266253/ ("The fundamental problem is that our government has again gotten away with offering privileged access to carefully selected individuals and getting a flattering story in return. Embeds, officially begun during the invasion of Iraq, are deeply troubling because not every journalist or filmmaker can get these coveted invitations. . . That's the reason the embed or special invitation exists; the government does its best to keep journalists, even friendly ones, away from disgruntled officials who have unflattering stories to tell . . .").

[6] *Id.* ("That is one reason, I think, the film presents torture as effective—the CIA is ground zero of that unholy belief. If Boal and Bigelow had embedded at the FBI, whose agents have been critical of torture, their film would probably have a different message about waterboarding . . ."); *See also* Howard Kurtz, *CIA's most famous operative is a secret star*, CNN, Dec. 13, 2012, available at http://www.cnn.com/2012/12/13/opinion/kurtz-cia-star/index.html ("Bigelow made this film with the help of officials at the Pentagon, CIA and White House who provided her with extraordinary access. . . When a director gets that kind of official help, it raises troubling questions about the objectivity of those rendering the instant history.").

on accurate portrayals of the government employees interviewed.[7] Also in the past week, a Washington Post journalist effectively pursued and reported personal details about one of the operatives upon whom a character in the movie was based.[8] Plaintiff informed the Court that this elimination of personal privacy would very likely occur based on available evidence over a month ago. ECF 18, Plaintiff's Brief at 20 and fn. 8. Given the facts, anyone looking objectively at this case could have predicted the same.

Finally, the government oddly suggests the Court should not watch or take notice of the film *Zero Dark Thirty*. ECF 20, Gov't Reply at 13, fn. 5. Plaintiff believes it has already well established that the film relies on personal details from the government employee interviews for its character portrayals, which undermines any remaining privacy interests. ECF 18-1, Fedeli Decl. at ¶¶ 8, 15, 18-19, 21; *see also* fns. 7 and 8, *infra*. If the Court needs to further evaluate Plaintiff's evidentiary claims, judicial notice of the film would be appropriate.

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[7] Martha Raddatz and Ely Brown, *'Zero Dark Thirty': Bin Laden Manhunt Film Based on Controversial Firsthand Accounts: 'Nightline' Exclusive*, ABC News, Nov. 26, 2012, available at http://abcnews.go.com/Entertainment/dark-thirty-osama-bin-laden-manhunt-film-based/story?id=17812787 ("Both Bigelow and Boal felt a responsibility to accurately portray the lives of the people who normally work in the shadows, their efforts rarely known to the outside world. While some of the dialog is word for word real, based on interviews with the young CIA officer and others, some of the dialog is dramatized and the decade-long narrative of events condensed.").

[8] Greg Miller, *In 'Zero Dark Thirty,' she's the hero; in real life, CIA agent's career is more complicated*, Washington Post, Dec. 10, 2012, available at http://www.washingtonpost.com/world/national-security/in-zero-dark-thirty-shes-the-hero-in-real-life-cia-agents-career-is-more-complicated/2012/12/10/cedc227e-42dd-11e2-9648-a2c323a991d6_print.html.

Conclusion

The Court should conclude that the government has waived its right to keep these names secret because of the circumstances of the government's disclosures, the security interests must necessarily be relatively minor based on those circumstances, and whatever limited privacy interest remains is outweighed by the incremental public interest value in publication. Plaintiff therefore respectfully requests the Court grant its Cross-Motion for Summary Judgment and Deny Defendants' Motion for Summary Judgment.

Dated: December 17, 2012

Respectfully submitted,

/s/ Chris Fedeli
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