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LET FREEDOM RING: BROADENING FOIA'S PUBLIC DOMAIN AND THE APPLICABILITY OF THE WAIVER DOCTRINE

KAYLA BERLIN*

This Comment examines the waiver doctrine, which requires the government to reveal information it could normally withhold under an exemption of the Freedom of Information Act (“FOIA”) because the information is deemed to have already entered the public domain. The Comment begins by tracing the origin of FOIA as an improvement upon the inadequate Administrative Procedure Act. Second, the Comment discusses the competing tests used in determining when information has entered the public domain—the D.C. Circuit’s permanent public record test and the Ninth Circuit’s unlimited disclosure test—as well as their application in a case involving the film *Zero Dark Thirty*. Next, the Comment argues that the D.C. Circuit’s test frustrates the purpose of FOIA, and that the Ninth Circuit’s test offers an alternative that can allow for greater dissemination of information without unduly threatening legitimate privacy interests. The Comment closes with a recommendation that Congress should amend FOIA in order to clarify the public domain doctrine by officially adopting the Ninth Circuit’s unlimited disclosure test.

I. INTRODUCTION

Most members of the public were not in any way involved in the Iran Hostage Crisis, nor did they have any direct role in the hunt for Osama Bin Laden. The government often keeps the details of such events secret, prompting citizens to turn to the somewhat dubious source of Hollywood for answers as to how these events unfolded.¹ Is it really desirable for the

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1. See e.g., *ARGO* (GK Films, Smokehouse Pictures 2012); *ZERO DARK THIRTY*

public to glean their knowledge of some of the biggest national crises and military operations in this nation's history from films like *Argo*² and *Zero Dark Thirty*?³ Or should such information be accessible to the public?

Congress enacted the Freedom of Information Act ("FOIA")⁴ in 1966 after a decade of debate amongst various government entities regarding the disclosure of government information to the public.⁵ The act arose as a revision of Section 3 of the Administrative Procedure Act ("APA"), expanding the disclosure of federal agency records to the public.⁶ In general, FOIA allows any person to request and obtain access to federal agency records,⁷ unless the records sought are protected from disclosure by one of nine exemptions laid out in the act.⁸ Congress intended courts to construe all nine exemptions narrowly to allow for the broad dissemination of information to the public.⁹ The third exemption protects information that is specifically exempted from public disclosure by another statute.¹⁰

(Annapurna Pictures 2012).

2. *ARGO* (GK Films, Smokehouse Pictures 2012).

3. *ZERO DARK THIRTY* (Annapurna Pictures 2012).

4. 5 U.S.C. § 552 (2012).

5. *See Freedom of Information Act Guide: Introduction*, U.S. DOJ (May 2004), <http://www.justice.gov/oip/introduc.htm>.

6. *See* S. REP. NO. 89-813, at 38-40 (1965) (The Administrative Procedure Act has glaring loopholes which have resulted in its being "cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish to disclose."); *see also* H.R. REP. NO. 89-1497, at 26 (1966) (stating that FOIA is intended to revise the previous law which, because of vague language, had been falling short of its intended public disclosure goals).

7. 5 U.S.C. § 552(a) (detailing the information subject to disclosure and procedural requirements for disclosure).

8. 5 U.S.C. § 552(b) (detailing the nine exemptions to disclosure).

9. *See* S. REP. NO. 89-813, *supra* note 6, at 38 ("It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.").

10. 5 U.S.C. § 552(b)(3) (providing that information is specifically exempted from disclosure by statute as long as that statute is not discretionary or establishes specific criteria for withholding the information or refers to specific types of matters to be withheld, and specifically cites to this section if enacted after the date of the enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009]); *see also* H.R. REP. NO. 94-880, at 9 (1976) (asserting that a statute which only permits withholding, rather than requiring it, would not fall under exemption three).

This exemption is often invoked by agencies in order to properly protect classified information that relates to national defense from public disclosure.¹¹

Courts may find that an agency waived its protection under one of the FOIA exemptions using the public domain doctrine. The prevailing view of this doctrine, set out by the D.C. Circuit, is that information loses its protection once it has been preserved in a “permanent public record.”¹² However, a 2011 Ninth Circuit opinion recently departed from this view, constructing a new test that greatly restricts the power of the FOIA exemptions to prevent public disclosure of information.¹³

In *Watkins v. U.S. Bureau of Customs and Border Protection*, the court laid out a new unlimited disclosure test which allowed any disclosure to a third party, without limiting that party’s further disclosures of the information, to constitute a public disclosure of the information sufficient to waive an exemption to disclose pursuant to FOIA.¹⁴ Waiver now occurs if the information was simply disclosed to a third party and no longer requires preservation in a permanent public record.¹⁵ This test broadens the category of information that would be considered in the public domain, thus narrowing the application of the statutory exemptions to FOIA disclosure and requiring the revelation of more information to the public.¹⁶

11. See Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 136 (2003).

12. See *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“Under our public domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.”); see also *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (“The government may not rely on an otherwise valid exemption to justify withholding information that is already within the ‘public domain.’”).

13. See *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1198 (9th Cir. 2011) (explaining that “[w]hen 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.”).

14. See *id.* at 1197 (“This no-strings-attached disclosure thus voids any claim to confidentiality and constitutes a waiver of Exemption 4.”).

15. *Id.* at 1198.

16. See Patrick Lightfoot, Comment, *Waiving Goodbye to Nondisclosure Under FOIA’s Exemption 4: The Scope and Applicability of the Waiver Doctrine*, 61 CATH. U. L. REV. 807, 828-829 (2012).

This split in the circuits creates uncertainty in the judicial system, which is detrimental to the government, business, and society as a whole. If there is no specified test for determining what constitutes a public disclosure sufficient to waive a FOIA exemption, government agencies, business entities, and individuals will be less likely to reveal any confidential information at all. These individuals and entities will have no way of knowing what action they must take in order to protect themselves from inadvertently waiving a FOIA exemption, prompting them to keep all information private. This could result in a decrease in the release of information to the public, directly contrary to FOIA's purpose to "establish a general philosophy of full agency disclosure."¹⁷ This is especially problematic given the structure of the federal court system—a court in the D.C. Circuit may find that something has entered the public domain, while a court in the Ninth Circuit may reach the opposite conclusion.¹⁸

The impact of these conflicting tests is demonstrated by a recent case in the D.C. Circuit, *Judicial Watch, Inc. v. U.S. Department of Defense*.¹⁹ *Judicial Watch* examined the issue of public disclosure under Exemption 3²⁰ of FOIA.²¹ In *Judicial Watch*, the court rejected the Ninth Circuit's new test in favor of following the well-established precedent of the D.C. Circuit, holding that the disclosure of the names of a Navy SEAL and two CIA agents to the filmmakers of *Zero Dark Thirty* did not constitute a public disclosure sufficient to waive Exemption 3.²² The district court was bound by the older, restrictive precedent in the D.C. Circuit;²³ under the

17. S. REP. NO. 89-813, *supra* note 6, at 38.

18. *See generally* *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 963 F. Supp. 2d 6 (D.D.C. 2013) (discussing the different approaches used by the Ninth Circuit and the D.C. Circuit in assessing whether something has entered the public domain).

19. *See generally id.*

20. *See* Freedom of Information Act Guide: Exemption 3, U.S. DEP'T OF JUSTICE (May 2004), <http://www.justice.gov/oip/exemption3.htm> (explaining that Exemption 3 allows any information that is covered by a non-disclosure provision in another federal statute to be exempted from disclosure).

21. *See Judicial Watch*, 963 F. Supp. at 11-12.

22. *See id.* at 15-16 (arguing that withholding of information under an exemption is only "pointless" when that information has been truly made known to the public, thus all other instances of disclosure should not waive a FOIA exemption).

23. *See id.* at 12 ("This circuit has held that the government may not rely on an otherwise valid exemption to justify withholding information that is already in the 'public domain.'").

Ninth Circuit's broader rule, the court likely would have determined that the information had entered the public domain, waiving Exemption 3.²⁴ Such a result would have been more desirable than the one reached in the case because it is consistent with the public disclosure goal of the statute and gives the public a better opportunity to learn valuable information regarding a seminal military action.²⁵

Using the context of the facts surrounding *Judicial Watch*, this Comment will explore the competing tests for determining when information has entered the public domain. Part II outlines the legislative history of the Freedom of Information Act, beginning with its precursor, the Administrative Procedure Act, and following with the evolution of FOIA. Part III first examines the divergent views of the public domain doctrine, beginning with the D.C. Circuit's prevailing view of the permanent public record test. Part III then delves into the Ninth Circuit's new unlimited disclosure test, and examines the court's application of both tests in *Judicial Watch*. Part IV discusses the impact of these disparate tests on society, and argues that the Ninth Circuit's rule better addresses the purpose of FOIA without making its reach too broad. Finally, Part V proposes a call to action, in which Congress should amend FOIA and make the Ninth Circuit's test the governing rule. If Congress refuses to amend FOIA, the Supreme Court should grant certiorari to determine whether the D.C. Circuit or the Ninth Circuit's rule should apply in cases concerning the public domain doctrine in relation to FOIA.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF THE FREEDOM OF INFORMATION ACT

A. *The Administrative Procedure Act: A Withholding Statute*

Congress adopted the Administrative Procedure Act ("APA") in 1946 in the wake of World War II as an attempt to find a balance between increasing demands from both news media and the public for greater transparency in government agencies, and President Roosevelt's desire to keep certain information confidential for national security purposes.²⁶

24. See *id.* at 15 (explaining that the court is not persuaded by *Judicial Watch*'s argument that the court adopt the Ninth Circuit's test).

25. See S. REP. NO. 89-813, *supra* note 6, at 38 ("Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.").

26. See Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing*

Though well-intentioned, the APA contained giant loopholes that government agencies regularly exploited in order to withhold any information that they did not wish to reveal.²⁷ The act allowed exemptions, for example, when the information involved required “secrecy in the public interest”²⁸ or was “required for good cause to be held confidential,”²⁹ but it did not explain the meaning of these vague terms.³⁰

In 1951, President Truman issued an executive order permitting, for the first time, non-military citizens to classify information, and thus withhold it from public disclosure under the APA; this action served to underline the APA’s inadequacies and increase the call for reform.³¹ Both the House and Senate reports which accompanied Senate Bill 1160 (“FOIA”), enacted fifteen years later, note two main deficiencies in the APA: (1) the vague language of its exemptions allowing for the act to essentially become a withholding statute, and (2) the absence of a remedy for citizens from whom the government wrongfully withholds information.³² Congress attempted to rectify these issues by amending the public information section of the APA.³³

What the Government’s Up To, 11 COMM. L. & POL’Y 511, 521 (2006) (stating that the purpose of the APA was to establish standard procedures for disclosure of information to the public among the government’s various agencies, “[a] public information provision, Section 3, was included in the APA to provide for access to ‘matters of official record’ held by government agencies.”).

27. *See id.* at 522.

28. 5 U.S.C. § 1002 (1946) (current version at 5 U.S.C § 552 (2012)).

29. *Id.*

30. *See* S. REP. NO. 89-813, at 40 (1965).

31. *See* Halstuk & Chamberlin, *supra* note 26, at 523.

32. *See* S. REP. NO. 89-813, *supra* note 30, at 40 (breaking down the vague language issues, focusing on three distinct phrases: the exception for “any function of the United States requiring secrecy in the public interest,” the limitation on the requirement that all case opinions be made public “except those required for good cause to be held confidential,” and the requirement that public records must be made available to “persons properly and directly concerned except information held for good cause found.”); H.R. REP. NO. 89-1497, at 29-32 (1966) (indirectly listing the major deficiencies of the APA by highlighting the major changes FOIA brings: it eliminates the “persons properly and directly concerned” test to determine who is allowed access to public records; it replaces vague standards for exemptions with specific categories, and it provides a remedy via an appeal in District Court).

33. *See id.* at 38 (“[T]he present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.”).

B. The Freedom of Information Act: an Improvement on the APA

Congress amended Section 3 of the APA in 1966, enacting FOIA in an attempt to meet the disclosure goals of which the APA fell short.³⁴ FOIA expanded access to public information beyond just “persons properly and directly concerned,” allowing anyone to make a request and receive information.³⁵ FOIA presumes disclosure; the government has the burden of proving that the information falls within one of nine exemptions³⁶ and thus exempt from disclosure.³⁷ The Act, “does not apply to records held by Congress, state or local governments, the courts, private individuals or private companies, including private entities under federal contracts,” the President, or any of the President’s personal staff.³⁸ The Act further provides a remedy for wronged citizens—creating a system of judicial review and allowing them to air their grievances in court.³⁹

FOIA did not, however, immediately bring about a new, open government.⁴⁰ There remained heavy bureaucratic resistance to FOIA and

34. *EPA v. Mink*, 410 U.S. 73, 79 (1973) (stating that the APA fell “far short of its disclosure goals and came to be looked upon more as a withholding statute and less of a disclosure statute,” and noting that FOIA remedied, or attempted to remedy, many of these issues).

35. *See* S. REP. NO. 89-813, *supra* note 30, at 40.

36. 5 U.S.C. § 552(b) (2012) (listing the nine exemptions: (1) information that is “properly classified,” under an Executive Order, to protect national security; (2) information “related solely to the internal personnel rules and practices of an agency;” (3) information that is “exempted from disclosure by [another federal] statute;” (4) “trade secrets and [privileged or confidential] commercial or financial information;” (5) communications within or between agencies which are protected by legal privileges; (6) “personnel and medical files and similar files” that, if disclosed, “would constitute an unwarranted invasion of personal privacy;” (7) “records or information compiled for law enforcement purposes,” if one of the six specified harms could or would result; (8) matters that are “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency” tasked with regulating or supervising financial institutions; (9) “geological and geophysical information and data . . . concerning wells.”).

37. *Judicial Watch, Inc. v. U.S. Dep’t of Def.*, 963 F. Supp. 2d 6, 11 (D.D.C. 2013); *see Halstuk & Chamberlin*, *supra* note 26, at 516.

38. *See Halstuk & Chamberlin*, *supra* note 26, at 515.

39. *See* Patrick Lightfoot, Comment, *Waiving Goodbye to Nondisclosure Under FOIA’s Exemption 4: The Scope and Applicability of the Waiver Doctrine*, 61 CATH. U. L. REV. 807, 812, 812 & n.39 (2012) (citing 5 U.S.C. § 552(a)(4)(B)).

40. *Veto Battle 30 Years Ago Set Freedom of Information Norms: Scalia, Rumsfeld, Cheney Opposed Open Government Bill, Congress Overrode President Ford’s Veto of Court*

there were several administrative issues in the operation of the Act. It became clear to Congress that FOIA only truly allowed citizens access to information after they resorted to costly litigation.⁴¹ In the aftermath of the Watergate scandal and the Nixon administration, Congress first amended FOIA in 1974,⁴² and five times thereafter.⁴³

C. Exemption 3: Other Statutory Exemptions

Exemption 3 of FOIA prevents disclosure of information otherwise protected by another statute.⁴⁴ Exemption 3 is frequently invoked by

Review, THE NATIONAL SECURITY ARCHIVE (Nov. 23, 2004)
<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/index.htm>.

41. *Id.* (“The House Subcommittee on Government information identified a number of general problems with the FOIA including: [e]xcessive delays in responding to document requests; [e]xcessive fees for searching and copying documents; [b]urdensome and costly legal remedies after exhaustion of administrative remedies; [n]ews media opting not to use the FOIA due to excessive delays and burdensome appellate procedures, and [i]nappropriate and inadequate agency regulations and policies regarding the FOIA, poor administration and recordkeeping regarding FOIA processes and a failure to inform members of the public of their rights under the FOIA.”).

42. *Id.* (The passage of the first amendment to FOIA was difficult. The House primarily focused on making changes to the administration of the Act “rather than [making] substantive changes to the exemptions.” However, when it became clear that the Ford administration opposed many of the changes, the Senate proposed new substantive changes to exemptions 1 and 7. President Ford vetoed the bill, expressing concern over the newly amended *in camera* review and *investigatory files* exemptions. The media did not receive Ford’s veto well, as he had entered office on a campaign promising open government. Congress later overrode his veto and passed the amendments).

43. *FOIA Legislative History*, THE NATIONAL SECURITY ARCHIVE, <http://www2.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm> (last visited Oct 24, 2014) (stating that Congress revised Exemption 3 in 1976, addressed the fees charged for requesters and the scope of the public’s access to law enforcement and national security records in 1986, and limited the ability of foreign agents to request U.S. intelligence agents’ records following the terrorist attacks of September 11, 2001 in 2002); H.R. REP. NO. 104-795, at 11 (1996) (indicating that Congress updated FOIA in response to new challenges brought on by the use of electronic information technology in 1996); H.R. REP. NO. 107-592, at 27 (2002) (indicating that Congress limited the ability of foreign agents to request records of U.S. intelligence agents due to the burdensome strain on resources that has resulted as a byproduct of terrorism); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, 2524, 2527 (indicating that one of Congress’s goals was to simplify the requester process in 2007); *see generally* OPEN FOIA Act of 2009, Pub. L. No. 111-83, sec. 64, § 552(b)(3), 123 Stat. 2141, 2184 (codified as amended at 5 U.S.C. § 552(b)(3) (Supp. IV 2010)) (revising Exemption 3 in 2009).

44. *See* 5 U.S.C. § 552(b)(3) (providing that matters are “specifically exempted from disclosure” if a statute (1) “requires that the matters be withheld from the public in such a manner as to leave no [agency] discretion on the issue; or” (2) “establishes particular criteria for withholding [the information] or refers to particular types of matters to be withheld, and” (3) the

government agencies when attempting to avoid disclosing properly classified information concerning national defense.⁴⁵ For example, in *Judicial Watch*, the government sought—successfully—to withhold the names of four CIA officers and a Navy SEAL from a FOIA requester by invoking Exemption 3, even though the government had already revealed the names to a private party.⁴⁶ The government relied on two statutes: (1) 10 U.S.C. § 130(b)(a) which “authoriz[es] the Secretary of Defense to withhold ‘personally identifying information regarding . . . any member of the armed forces assigned to . . . a routinely deployable unit;’” and (2) 50 U.S.C. § 3507 which “exempt[s] the [CIA] from ‘the provisions of any . . . law which require[s] the publication or disclosure of the . . . names . . . of personnel employed by the Agency.’”⁴⁷ Like all nine FOIA exemptions, Exemption 3 is subject to waiver under the public domain doctrine.⁴⁸

III. TWO DIVERGENT VIEWS OF THE PUBLIC DOMAIN DOCTRINE

A. *The D.C. Circuit: “Preservation in a Permanent Public Record”*

Though information may fall within the realm of a FOIA exemption, the Act may still require disclosure if that exemption has been waived.⁴⁹ In *Mobil Oil Corp. v. U.S. Environmental Protection Agency*, the Ninth Circuit held that the “release of certain documents waives FOIA exemptions only for those documents released.”⁵⁰ Thus, a prior disclosure can waive a FOIA exemption for the document disclosed.⁵¹ There is a general presumption in favor of disclosure, and the burden of proving that

statute was enacted after the OPEN FOIA Act of 2009 was enacted, and “specifically cites to this paragraph”—that is, cites to § 552(b)(3)).

45. See Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 136 (2003).

46. *Judicial Watch*, 963 F. Supp. 2d at 8, 11.

47. *Id.* at 11-12 (alterations in original).

48. See Lee, *supra* note 45, at 136.

49. See *Herrick v. Garvey*, 298 F.3d 1184, 1193 (10th Cir. 2002).

50. See *Mobil Oil Corp. v. U.S. Env’tl. Prot. Agency*, 879 F.2d 698, 701 (9th Cir. 1989) (alteration in original).

51. See *id.*

an exemption applies in a particular case falls with the government agency.⁵² However, once the government agency has satisfied this burden, the burden shifts back to the party requesting the information to prove that the agency has waived its exemption via prior public disclosure.⁵³

The public domain test is the prevailing view amongst the Circuit Courts of Appeals for determining whether a prior disclosure has waived the applicability of a FOIA exemption.⁵⁴ It focuses primarily on whether the information the government agency wishes to conceal was already in the public domain when the plaintiff made his or her FOIA request.⁵⁵ The Tenth Circuit acknowledged this rule in *Herrick v. Garvey*, which held that the “[w]aiver doctrine stands for the proposition that the government cannot rely on an otherwise valid exemption [to FOIA] to justify withholding information that has been ‘officially acknowledged’ or is in the ‘public domain.’”⁵⁶

For information to be considered within the public domain, the D.C. Circuit has held that the information must have been “disclosed and preserved in a permanent public record.”⁵⁷ The logic behind the doctrine is relatively simple: if information is already publicly known, there is no purpose for the government agency to withhold it from disclosure to the

52. *See Afshar v. Dep’t of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

53. *See id.* (“These courts have made it clear that, while it is generally true that the government bears the burden of proving that its withholding of information is justified by one or more of the Act’s exemptions, 5 U.S.C. §552(a)(4)(B), a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.”).

54. *See* Patrick Lightfoot, Comment, *Waiving Goodbye to Nondisclosure Under FOIA’s Exemption 4: The Scope and Applicability of the Waiver Doctrine*, 61 CATH. U. L. REV. 807, 808 (2012).

55. *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001) (“[T]he government may not rely on an otherwise valid exemption to justify withholding information that is already within the ‘public domain.’”) (quoting *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999)); *Afshar*, 702 F.2d at 1130 (asserting that a plaintiff must point to “specific information in the public domain” in order for the waiver of an FOIA exemption to apply); *see Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (“Under our public domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.”).

56. *Herrick*, 298 F.3d at 1193 (citing the D.C. Circuit’s decision in *Davis v. U.S. Dep’t of Justice*) (internal quotation marks omitted).

57. *See Cottone*, 193 F.3d at 554; *see also Students Against Genocide*, 257 F.3d at 836.

public via an exemption.⁵⁸ However, what constitutes preservation in a public record is not entirely clear. A common law rule establishes that tapes played in open court become part of the public domain, but recordings simply provided to opposing counsel in accordance with the law and not played in open court do not constitute disclosure into the public domain.⁵⁹ The D.C. Circuit has also held that the FOIA exemptions applying to documents regarding meetings between a U.S. Ambassador and the Iraqi President were not waived by the Ambassador when he testified publicly about those meetings in two congressional hearings.⁶⁰

In *Students Against Genocide v. Department of State*, the D.C. Circuit considered the question of whether a classified spy plane and satellite photographs of the destruction wrought in Bosnia in 1995, shown by U.S. Ambassador Madeleine Albright to the United Nations Security Council, constituted public disclosure so as to waive Exemptions 1 and 3 of FOIA.⁶¹ After Ms. Albright's presentation, the Clinton administration released three of the photographs to the delegates in an attempt to "put pressure on the Bosnian Serbs to support a new peace effort being promoted among European allies and the warring parties in the Balkans."⁶² In response to a FOIA request, the government released fourteen additional photographs, but withheld the rest citing national security reasons pursuant to Exemptions 1 and 3.⁶³ The court upheld the exemptions—the public domain doctrine did not apply because the photographs had only been shown to the Security Council delegates and not released to the general public.⁶⁴ Furthermore, the court determined that the government's release

58. See *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) ("[I]f the information is publicly available, one wonders, why is it burning up counsel fees to obtain it under FOIA? But the logic of FOIA compels the result: if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes.").

59. See *Cottone*, 193 F.3d at 554-56 ("[A] constitutionally compelled disclosure to a single party simply does not enter the public domain.").

60. See *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 199 (D.C. Cir. 1993).

61. *Students Against Genocide*, 257 F.3d at 830, 833.

62. *Id.* at 830 (quoting Barbara Crossette, *U.S. Seeks to Prove Mass Killings*, N.Y. TIMES, Aug. 11, 1995, at A3).

63. *Students Against Genocide*, 257 F.3d at 834.

64. See *id.* at 836 ("The photographs in question here plainly do not fall within that doctrine. They were not released to the general public; only the Security Council delegates saw them. In fact, they were not 'released' at all . . . there is no 'permanent public record' of the photographs.").

of some of the photographs into the public domain did not mean that there remained no justifiable reason to withhold the rest.⁶⁵

While the D.C. Circuit determined that limited disclosure to delegates at the U.N. did not constitute waiver,⁶⁶ they have found that disclosure in a public courtroom does waive a FOIA exemption in *Cottone v. Reno*.⁶⁷ There, the D.C. Circuit denied application of an exemption to a FOIA requester.⁶⁸ In *Cottone*, during a criminal trial, the government played in open court surreptitiously recorded telephone conversations, as well as conversations recorded via a wire during face-to-face interactions with the defendant.⁶⁹ The court reporter noted in the trial transcript that the tapes “had been played for the court and jury,” and further indicated the specific “date and time that the conversation had been recorded,” and the “unique identification number assigned to that tape at trial.”⁷⁰ The government never made a motion to place the tapes under seal, either during trial or afterwards.⁷¹ The FBI redacted the tapes prior to handing them over to Cottone pursuant to his request, prompting Cottone to bring suit.⁷² In holding that the tapes did not fall under the proposed exemption, the court deferred to the established common-law right to inspection and copying of judicial records as providing the basis for determining that once played in court and received into evidence, audio tapes have entered the public domain.⁷³

65. In fact, the court seems to take the opposite view—the government’s release of some of the photographs bolsters the court’s belief in its good faith reasons for withholding the rest of them. *See id.* at 835 (“The fact that some ‘information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations’ . . . particularly because the government did release numerous photographs, we see no reason to question its good faith in withholding the remaining photographs on national security grounds.”) (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990)).

66. *See Students Against Genocide*, 257 F.3d at 836.

67. *Cottone*, 193 F.3d at 552.

68. *Id.* at 556.

69. *Id.* at 552.

70. *Id.*

71. *Id.* at 553.

72. *Id.*

73. *See Cottone*, 193 F.3d at 554 (“[O]ur decisions construing the venerable common-law right to inspect and copy judicial records make it clear that audio tapes enter the public domain once played and received into evidence.”).

The court also placed an affirmative obligation on the government to remove the tapes from the public domain, via destruction or placing them under seal, in order to avoid waiver.⁷⁴ Furthermore, it clarified its decision in *Davis v. U.S. Department of Justice* that “to satisfy the burden of production in public-domain cases, the FOIA requester may have to produce a ‘hard copy’ version of what he requests,”⁷⁵ but this does not mean that the requester must substantiate every public domain claim with a hard copy duplicate of the requested material.⁷⁶ Essentially, the permanent public record test requires that the information be set down in some tangible, public way.⁷⁷ The test broadens the power of the FOIA exemptions, allowing many instances of information revealed to the public (such as through testimony in open court) to remain exempt from disclosure under the act.⁷⁸

*B. The Ninth Circuit’s Departure from
the Established Permanent Public Record Test:
The New Unlimited Disclosure Test*

In *Watkins v. U.S. Bureau of Customs and Border Protection*,⁷⁹ the Ninth Circuit departed from the well-established D.C. Circuit rule for determining public domain via disclosure in a permanent public record—permanent public record and instead adopted a new, narrower approach to applying the FOIA exemptions, specifically Exemption 4 (protecting financial and commercial information).⁸⁰

74. *See id.* (“[U]ntil destroyed or placed under seal, tapes played in open court and admitted into evidence—no less than the court reporter’s transcript, the parties’ briefs, and the judge’s orders and opinions—remain a part of the public domain.”).

75. *Davis v. U.S. Dep’t of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (involving a FOIA request made by an author for tape recordings developed by the FBI as part of a large criminal investigation. Neither party was able to establish exactly which of the tapes, and which portions of their contents, had actually been played in the courtroom, thus the court determined that the requester had failed to meet its burden of “pointing to specific information in the public domain.”).

76. *Cottone*, 193 F.3d at 555.

77. *See id.*

78. *See id.*

79. *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1198 (9th Cir. 2011).

80. *See* 5 U.S.C. §552(b)(4) (2012) (Exemption 4 exempts information that concerns business trade secrets or other confidential commercial or financial information).

1. The Factual Underpinning of Watkins

In *Watkins*, a copyright and trademark attorney brought a FOIA action, seeking to have the Bureau of Customs and Border Protection (“CBP”) release notices of seizure of infringing merchandise imported in various sea ports.⁸¹ Commercial importers provide information on these notices of seizure including the port of entry, the type of merchandise being imported, the quantity of merchandise, and the name and address of the exporter and importer.⁸² The government’s policy in keeping this information confidential rests on the rationale that confidentiality will encourage importers to give accurate information.⁸³ The government, therefore, only uses this information to notify trademark owners when they have seized goods that use counterfeit marks infringing upon a registered trademark.⁸⁴ In response to *Watkins*’ FOIA request, the government disclosed heavily redacted notices of seizure, citing several exemptions.⁸⁵ *Watkins* then filed suit to obtain the unredacted notices, arguing that the CBP’s act of sending the notices to trademark owners constituted a public disclosure, thus waiving the Financial and Commercial Information Exemption.⁸⁶ The District Court held that while the notices fell under Exemption 4, confidentiality had not been waived by CBP’s release of the notices to affected trademark owners because CBP had a statutory obligation to make such disclosures to those third parties.⁸⁷

81. *Watkins*, 643 F.3d at 1192.

82. *See id.* (“The Notices of Seizure include the following information: (1) the date the merchandise was imported; (2) the port of entry; (3) description of the merchandise; (4) quantity of the merchandise; (5) country of origin of the merchandise; (6) name and address of the exporter; (7) name and address of the importer; and (8) the name and address of the manufacturer.”).

83. *Id.*

84. *Id.*

85. *Id.* at 1193.

86. *See id.*

87. *See Watkins*, 643 F.3d at 1193 (“[T]he Agency’s release of the Notices to affected trademark holders did not waive Exemption 4. The Agency was statutorily obligated to provide such ‘limited disclosure[s] to interested third parties.’”).

2. Abandoning the Permanent Public Record: The Unlimited Disclosure Test

The Court of Appeals reversed the District Court's decision, holding that CBP had in fact waived its right to rely on Exemption 4 because the notices were already in the public domain.⁸⁸ The Ninth Circuit stated that when CBP discloses these notices to the affected trademark owners, it does not place any limits on how the trademark owner may use the information found in the notice.⁸⁹ The court then went on to reason that this “no-strings-attached” disclosure voided any claim that CBP could make of confidentiality and constituted a waiver of Exemption 4.⁹⁰

The court acknowledged the permanent public record test articulated by the D.C. Circuit as the prevailing rule on the issue, but argued that “it should not be the *only* test for government waiver.”⁹¹ In expressing the desire for a different rule, the court drew a distinction between the nature of the cases which have applied the D.C. Circuit's public domain test—often situations involving criminal prosecutions or national security concerns⁹²—and the facts of this case involving trademark infringement.⁹³ The court reasoned that the concerns which underlined the government's interest in keeping the requested information confidential in those cases—i.e. national security and public safety—did not have any relevance in this situation.⁹⁴ Furthermore, none of the cases applying the permanent public record permanent public record test involved the government making a “no-

88. *Id.* at 1196.

89. *See id.* at 1197 (explaining that the trademark owner “can freely disseminate the Notice to his attorneys, business affiliates, trade organizations, the importer's competitors, or the media in a way that would compromise the purportedly sensitive information about an offending importer's trade operations.”).

90. *Id.*

91. *Id.*

92. The court refers to *Cottone v. Reno*, discussed above, as well as *Fitzgibbon v. C.I.A.* and *Afshar v. Department of State*, cases involving the disclosure of various CIA documents and the location of a CIA station, and the disclosure of CIA and FBI investigation documents, respectively. *See Watkins*, 643 F.3d at 1197.

93. *See id.*

94. *Id.* (“Most cases applying the public domain test have grappled with requests for sensitive information involving high level criminal investigations or matters of national security . . . [i]n such cases, the presumption in favor of disclosure must yield to overriding concerns for public safety and national security—concerns not relevant to the case at bar.”).

strings-attached” disclosure of the protected information to a private third party.⁹⁵

The court then articulated its new test for determining when information has been released into the public domain, so as to constitute a waiver of a FOIA exemption: “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.”⁹⁶

The court admitted that the D.C. Circuit’s public domain test is appropriate in most cases, and tailored its holding to the facts in *Watkins* and to similar situations.⁹⁷ In doing so, the court argued that when taken to the extreme with the facts presented here, the current public domain test would produce absurd results, protecting the information under Exemption 4 even if the CBP had disclosed it to every person who would possibly want to know it.⁹⁸

C. Judicial Watch’s Analysis and Application of the Competing Public Domain Tests

1. Background Factual Information Concerning Zero Dark Thirty and the FOIA Request

Zero Dark Thirty revolves around a CIA officer’s obsessive search to find and ultimately kill Osama Bin Laden after the terrorist attacks on September 11, 2001.⁹⁹ In making the film, the filmmakers (director

95. Here the court specifically points to *Students Against Genocide v. Department of State*, arguing that it is the closest analog to the facts in this case, but is still distinguishable. The court argues that in *Students Against Genocide*, the government’s procedure specifically prevented the U.N. Security Council members from learning highly classified information about U.S. reconnaissance systems—the government displayed the pictures, but did not distribute or turn them over to the members of the Council for further inspection. *See id.*

96. *Id.* at 1198.

97. *See id.* at 1197-98 (“While the public domain test will be persuasive in most cases, it does not reach the concerns of confidentiality in circumstances like those presented in this case.”).

98. *See Watkins*, at 1197 (“Taken to its logical extreme, the ‘public domain’ test would still shield commercial information under Exemption 4 even if CBP or an aggrieved trademark owner opened up the phonebook and faxed a copy of the seizure notice to every importer in the region, provided the disclosures were not preserved in some public record.”).

99. ZERO DARK THIRTY (Annapurna Pictures 2012).

Kathryn Bigelow and writer Mark Boal) met with four officers from the Central Intelligence Agency (“CIA”) and one Navy SEAL, all of whom had been involved in planning the raid which led to Osama Bin Laden’s death in Pakistan in May 2011.¹⁰⁰ The filmmakers were given the full name of the Navy SEAL, but only the first names of the CIA officers.¹⁰¹ Bigelow and Boal met with these officers to obtain classified information concerning the search and raid for use in creating the film.¹⁰²

Judicial Watch, a non-profit organization, made a FOIA request for all records of the CIA’s and the Department of Defense’s communications with the filmmakers.¹⁰³ The Department of Defense produced one hundred fifty three pages of records and the CIA turned over sixty seven documents in response to the request.¹⁰⁴ One document produced by the Department of Defense was a sixteen-page transcript of an interview conducted with Bigelow and Boal.¹⁰⁵ At five places in the transcript, the names of three members of the Department of Defense were redacted.¹⁰⁶ In one exchange with Boal, the Under Secretary of Defense for Intelligence, Michael Vickers, asked Boal not to reveal the name of one of the officers with whom he consulted because he “shouldn’t be talking out of school.”¹⁰⁷

Documents produced by the CIA contained emails in which the first names of the CIA officers that met with the filmmakers were redacted.¹⁰⁸ The CIA explained in a declaration that it instructed the officers to only give the filmmakers their first names, and to its knowledge that was all the

100. *Judicial Watch, Inc. v. U.S. Dep’t of Def.*, 963 F. Supp. 2d 6, 7-8 (D.D.C. 2013).

101. *Id.* at 8.

102. *Id.* at 7.

103. *Id.* at 8.

104. *Id.*

105. *Id.* at 8-9.

106. *Judicial Watch*, 963 F. Supp. 2d at 9.

107. *See id.* (statement of Michael Vickers from the interview transcript) (“[T]he 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.”).

108. *Id.*

officers revealed of their names.¹⁰⁹ Judicial Watch filed suit to challenge the government's withholding of these names, which ordinarily are exempt from disclosure under Exemption 3, arguing that in revealing the names to the filmmakers, the government disclosed them in the public domain, thus waiving the exemption.¹¹⁰

2. Rejecting the Unlimited Disclosure Rule Set Forth in *Watkins*

Judicial Watch argued that the government made “no-strings-attached disclosure[s]” of the names and encouraged the court to adopt the *Watkins* test, which would give the filmmakers the ability to further disseminate the information to the public and introduce the information into the public domain.¹¹¹ The court questioned whether such an assertion was even accurate, citing Vickers's request to Boal that he “not reveal his name in any way.”¹¹² Regardless, the court held that the exemption still applied because Judicial Watch did not point to any specific information already in the public domain identical to that which the government wanted to withhold.¹¹³ Judicial Watch then argued that the information was revealed for film production, an unimportant purpose; therefore, the government placed the information in the public domain.¹¹⁴ The court unequivocally rejected this argument, both as being contrary to the law in the D.C. Circuit, and as a misstatement of the holdings of the cases upon which the theory relies.¹¹⁵

109. *Id.* (statement from the CIA's declaration) (“[W]hen the meetings with the filmmakers took place at the CIA Headquarters, the guidance provided to the officers who were . . . in sensitive positions was that they should provide the filmmakers with their true first names only.”).

110. *Id.* at 11-12.

111. *Id.* at 15.

112. *Judicial Watch*, 963 F. Supp. 2d at 15. (suggesting that such an assertion may not constitute a no-strings-attached disclosure because of Vicker's request that Boal “not reveal his name in any way”).

113. The court also acknowledged that “[i]f the filmmakers had publicized the names that they learned and the government now seeks to withhold, this would be a much harder case” *Id.* 15-16.

114. *Judicial Watch* puts forward this argument as a logical continuation of decisions in which courts have held that official disclosures do not place information in the public domain when they are made for an important government purpose. *See id.* at 16.

115. *Judicial Watch* argued that *Students Against Genocide v. Department of State*, 257 F.3d 828 (D.C. Cir. 2001) and *Muslim Advocates v. U.S. Department of Justice*, 833 F. Supp. 2d

3. Affirming the Permanent Public Record Test

In declining to apply the unlimited disclosure rule set forth in *Watkins*, the court in *Judicial Watch* instead reaffirmed the D.C. Circuit’s permanent public record permanent public record test.¹¹⁶ The court reasoned that the purpose of the public domain doctrine, exemplified in the permanent public record permanent public record test, did not apply in this instance because the logical underpinning of the doctrine was inapplicable to the facts of this case.¹¹⁷ *Judicial Watch* wanted the government to release the names because it had no other way of learning them.¹¹⁸ This is directly contrary to the purpose of the public domain doctrine, which the court argued is to prevent the government from withholding information that is already public knowledge.¹¹⁹ The court acknowledged that there is some flexibility in the public domain doctrine, asserting that there is no “uniform, inflexible rule requiring every public-domain claim to be substantiated with a hard copy simulacrum of the sought-after material.”¹²⁰ Citing *Cottone v. Reno*, the court noted that “information is in the public domain for the purposes of a FOIA request if some other source of law provides a right to access the information,” though this holding is very limited.¹²¹

The court also considered a slight broadening of the public domain doctrine found in *Students Against Genocide*, which seems to suggest that

92 (D.D.C. 2011) added a “‘governmental purpose’ element to the public domain doctrine,” but the court determined that “[n]either of these cases [stood] for the proposition that disclosures made for an insufficiently important governmental purpose necessarily put information into the public domain.” *Id.* at 16-17.

116. *See id.* at 16.

117. *See Judicial Watch*, 963 F. Supp. 2d at 12 (“Because the public domain doctrine is a doctrine of futility, triggered only when it would serve no purpose to enforce any exemption, it is of almost no use to a plaintiff attempting to learn something that it does not already know.”).

118. *Id.* at 13 (“*Judicial Watch* does not know—and, outside of this suit, apparently has no way of learning—the names of these individuals. That fact is strong evidence that those names are not in the public domain.”).

119. *See id.* at 12.

120. *Id.* at 13.

121. *See Judicial Watch*, 963 F. Supp. 2d at 13 (“[A] FOIA requester who seeks information he does not possess can still meet ‘his ‘burden of showing that there is permanent public record of the *exact* [information] he wishes’” . . . by pointing to his right of access to the very information being withheld.”) (emphasis added).

the logic behind the public domain doctrine may not require such a formal insistence on having the information preserved in a permanent public record.¹²² However, the court found that neither case offered any real help to Judicial Watch's argument because it had not found any non-FOIA right to access the names at issue, thus failing to meet *Cottone's* limited holding.¹²³ Furthermore, coming to any other holding under *Students Against Genocide* would require the court to adopt the Ninth's Circuit's unlimited disclosure test, which it rejected.¹²⁴

The court then went on to hold in favor of the government, granting its motion for summary judgment on the grounds that Judicial Watch did not sustain its burden of proof under the permanent public disclosure test because it failed to point to "specific information in the public domain," which "duplicates that being withheld."¹²⁵

IV. THE SOCIETAL IMPACT OF COMPETING "PUBLIC DOMAIN" RULES

A. An Amorphous and Unworkable Permanent Public Record Test

At first glance, the permanent public record permanent public record test may seem like the most logical approach to determining what information has entered the public domain.¹²⁶ However, upon further inspection, the test reveals weaknesses as applied to certain situations involving confidentiality, as seen in *Judicial Watch* and *Watkins*.¹²⁷ The permanent public record permanent public record test's vague, restrictive standard frustrates the primary purpose of FOIA and prevents the public

122. *See id.* 14-15 (stating that *Students Against Genocide* suggests that the principle motivating doctrine—"where information requested 'is truly public . . . enforcement of an exemption cannot fulfill its purposes'" —may have implications beyond the simple rule that the government must release information that has been "'disclosed and preserved in a permanent public record'") (citations omitted).

123. *Id.* at 15.

124. *See id.*

125. *See id.* at 17.

126. *See* *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 963 F. Supp. 2d 6, 12 (D.D.C. 2013) ("[F]or the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a permanent public record.'") (quoting *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999)).

127. *See id.* at 15; *see generally* *Watkins v. U.S. Bureau of Customs & Border Prot.*, 643 F.3d 1189 (9th Cir. 2011).

from obtaining valuable information.¹²⁸

1. The Test's Unclear Standard Is Unduly Restrictive

FOIA's main purpose is to promote the dissemination of information to the public, unless some policy or overriding concern calls for information to remain secret.¹²⁹ The main strength of the permanent public record permanent public record test is that it promotes the disclosure of information while still protecting certain government and business privacy interests.¹³⁰ The test allows for a rather broad application of the nine exemptions outlined in FOIA and provides greater protection to government agencies seeking to withhold information from the public, while still allowing for the waiver of some of those protections.¹³¹ Broader protection will promote both business and government interests, as both parties will be more likely to disclose confidential information to third parties (which at times is necessary in order for the government or business to function properly) if they know that such a disclosure does not automatically activate a waiver of a FOIA exemption.¹³²

The permanent public disclosure test also supports another, more significant, government interest: national security. In the thirteen years

128. See Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 512 (2006) (discussing the primary purpose of FOIA).

129. See S. REP. NO. 89-813, at 38 (1965).

130. In creating FOIA, the legislature recognized that the benefits of keeping the public informed could run directly contrary to other societal goals and public policies that require confidentiality to maximize effectiveness. See Halstuk & Chamberlin, *supra* note 128, at 516 ("A 1965 Senate report observed that tensions among such competing values are characteristic of a democratic society and must be resolved by a balancing of interests: 'At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files.'") (quoting S. REP. NO. 89-813, at 3).

131. See Patrick Lightfoot, Comment, *Waiving Goodbye to Nondisclosure Under FOIA's Exemption 4: The Scope and Applicability of the Waiver Doctrine*, 61 CATH. U. L. REV. 807, 828-29 (2012).

132. See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878 (D.C. Cir. 1992) (expressing concern over the way in which a lack of confidentiality could impair the government's ability to perform its duties, stating: "[u]nless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials[,] and the ability of the Government to make intelligent, well informed decisions will be impaired.") (alteration in original).

since the September 11, 2001, terrorist attacks and national security have remained a prominent issue in the government, the media, and among the general population.¹³³ The federal government enacted the Patriot Act in 2001, which gave the government several new avenues by which to fight terrorism and had the effect of eroding citizens' privacy rights, while enhancing the government's ability to keep its actions secret.¹³⁴ Edward Lee notes many examples of this increased government secrecy in his article, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*:

Under the Patriot Act, the government also has (4) more expansive powers to conduct FISA searches and surveillance of individuals in the United States, which are authorized and executed in secret. Other areas of enhanced secrecy involve denying the public access to information: the government has (5) ordered agencies and libraries to remove from government Web sites information that was once publicly available, (6) instructed government employees to scrutinize Freedom of Information Act requests with greater stringency, abandoning the prior Administration's presumption of openness, and (7) asked researchers and scientists not to publish findings that might possibly be used by terrorists in an attack against the United States, a request acceded to by the top scientific journals.¹³⁵

Such legislation raises unique legal as well as ethical issues. What constraints, if any, can and should be placed on the government's ability to withhold information from the public? Does the "end" of national security justify any "means" of achieving it? From an ethical standpoint, there is no obvious answer. Most people would probably agree that there is a certain

133. See generally *The Zero Dark Thirty File: Lifting the Government's Shroud over the Mission that Killed Osama bin Laden*, THE NAT'L SEC. ARCHIVE (Jan. 17, 2013), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB410/>.

134. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 278 (2001).

135. Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 121-22 (2003).

line that the government should not cross; however, where exactly that line between personal liberty and government power should be drawn is not at all apparent.

Conversely, from a legal perspective the answer is a bit clearer. As Lee notes, beyond the scope of FOIA and national security concerns, “[c]ourts have long recognized the concept of the public domain as a restraint on the government’s power to use secrecy.”¹³⁶ For example, in *Cox Broadcasting Corp. v. Cohn*, the Cox broadcasting company identified a rape victim during television coverage of the victim’s alleged rapists.¹³⁷ Cox had obtained the name from the indictments—public records—and thus available to the public for inspection.¹³⁸ The rape victim’s father then brought a damages action against Cox, under a Georgia statute that criminalized the broadcasting of a rape victim’s name, claiming that Cox had violated his right to privacy.¹³⁹ The Court held that Cox could not be held civilly liable because the First Amendment forbids such an imposition of liability based on information revealed in open court or public records.¹⁴⁰ *Cox* and the cases that followed established a bright-line rule that “information revealed in open court” receives First Amendment protection.¹⁴¹ Such information essentially enters the public domain and can no longer be held in secret.¹⁴² Applying the D.C. Circuit’s test to a situation like *Cox* would be relatively straightforward and yield the same result.¹⁴³ The public domain doctrine culled from the cases following *Cox* essentially confines the public domain doctrine to the physical location from which the information originates—the public court records.¹⁴⁴

136. *Id.* at 123.

137. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 473-74 (1975).

138. *Id.* at 472.

139. *Id.* at 474.

140. *See id.* at 495.

141. Lee, *supra* note 135, at 124.

142. *Id.* (“Once material enters the public domain, the government is not free to restrain its dissemination, whether through intellectual property law or government secrecy.”).

143. *See Cottone*, 193 F.3d at 551 (holding that wiretapped recordings introduced into evidence and played in open court had been entered into the public domain, waiving any FOIA exemption to their disclosure).

144. Lee, *supra* note 135, at 124.

Such a restriction makes application of the public domain doctrine in First Amendment cases much simpler than its application in FOIA cases.¹⁴⁵ Under the rule in a FOIA action, information does not enter the public domain unless it is preserved in a “permanent public record.”¹⁴⁶ This can include indictments and other public court records, as seen in *Cox*, but it is not limited to such records.¹⁴⁷ And herein lies the primary weakness of the test: there is no set definition as to what constitutes a “permanent public record.” As discussed in Part II, section A, case law has found recordings played in open court to be preserved in a permanent public record,¹⁴⁸ but not recordings simply given to opposing counsel in court,¹⁴⁹ nor photographs displayed in a meeting with foreign leaders,¹⁵⁰ nor public testimony before congressional committees.¹⁵¹ The rule seems to require some sort of written, physical recording of the information,¹⁵² but if that is the case, what is the timeframe during which it must be recorded? Must it be immediately recorded when the information is transmitted, or can there be some sort of lag time? In *Public Citizen v. Department of State*, the court questioned that if the latter is allowed, is the information deemed to have entered the public domain at the moment of transference, or at the moment of recording?¹⁵³

Additionally, the test raises the question of exactly how public a recording must be in order to qualify as the information entering the public domain. The ambiguous standard needlessly breeds uncertainty and inefficiency in the court system. Even if the court were to delineate a clearer definition of “permanent public record,” with constant advances in technology and the changing nature of businesses and the way in which people communicate, there would likely never emerge a true bright-line

145. See *Cottone*, 193 F.3d at 554.

146. *Id.*

147. See, e.g., *id.* at 555.

148. *Id.* at 556.

149. *Id.*

150. *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 836 (D.C. Cir. 2001).

151. *Pub. Citizen v. Dep’t of State*, 11 F.3d 198, 199 (D.C. Cir. 1993).

152. See *Lee*, *supra* note 135, at 124.

153. See generally *Pub. Citizen*, 11 F.3d 198.

rule beyond the well-established “revealed in open court” rule. Thus, even with further clarification from the courts, the D.C. Circuit’s standard will always remain somewhat ambiguous and difficult to administer.

2. The Ambiguity of the Test Frustrates the Purpose of the Public Domain Doctrine

Furthermore, the permanent public record test could potentially allow for information that has already entered the public domain to remain exempt under FOIA simply because it was not affixed in a permanent public record.¹⁵⁴ Theoretically, certain information could be shielded by an exemption, even if the government broadcast the information to the general public, simply because it was not affixed in some public record.¹⁵⁵ Such an outcome would be absurd and completely contrary to the purpose of the public domain doctrine’s role in waiving a FOIA exemption—if information is already publicly known, there is no sense in withholding it from disclosure.¹⁵⁶

Finally, the permanent public record test is much more restrictive than the Ninth Circuit’s new test, and thus limits the amount of information disclosed to the public. FOIA’s primary purpose is full disclosure of information to the public.¹⁵⁷ This purpose is hindered and frustrated by a test that could allow documents and other sources, the content of which are already known by the public, to be withheld from the public via a statutory loophole.

154. *See Watkins*, 643 F.3d at 1197.

155. *See id.* (“Taken to its logical extreme, the ‘public domain’ test would still shield commercial information under Exemption 4 even if CBP or an aggrieved trademark owner opened up the phonebook and faxed a copy of the seizure notice to every importer in the region, provided the disclosures were not preserved in some public record.”).

156. *See Niagara Mohawk Power Corp. v. U.S. Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999) (“[I]f the information is publicly available, one wonders, why is it burning up counsel fees to obtain it under FOIA? But the logic of FOIA compels the result: if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes.”).

157. Halstuk & Chamberlin, *supra* note 128, at 537.

*B. The Unlimited Disclosure Test Offers an Alternative
with Less Ambiguity and Better Practical Application*

1. The Unlimited Disclosure Test Better Serves the Purposes of FOIA

The test set forth in *Watkins* has a broader application than the permanent public record test. Because the rule requires that the individual disclosing the information take some action to prevent its further dissemination, essentially any disclosure to a third party would operate as a release of information into the public domain.¹⁵⁸ The test assumes that any such disclosure has entered the public domain.¹⁵⁹ This shifts the burden of proving that an exemption has been waived from the party making the FOIA request (who must prove that a disclosure is preserved in a permanent public record) to the party disclosing the information (who must prove that they took some measure to prevent its further disclosure). While this marks a significant change from the existing law surrounding the waiver doctrine,¹⁶⁰ such a shift is desirable because it promotes full disclosure of information to the public, the core principle underlying FOIA.¹⁶¹

2. The Unlimited Disclosure Test Is Easily Administrable
and the Government's Privacy Is Easily Protectable
Through the Use of Non-Disclosure Agreements

The Ninth Circuit's test states that, "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."¹⁶² Only information that the disclosing party fails to protect in some way enters the public domain upon disclosure. Opponents of this test argue that it is too broad and would

158. *Watkins*, 643 F.3d at 1198.

159. *See id.* at 1196.

160. *See* Lightfoot, *supra* note 131, at 828-29 ("[T]he court's holding broadened the waiver doctrine by significantly departing from prevailing law. The bulk of the court's reasoning focused on the *potential* for further disclosure by a third party, rather than *actual* disclosure in the public domain.") (emphasis in original).

161. Halstuk & Chamberlin, *supra* note 128, at 515.

162. *Watkins*, 643 F.3d at 1198 (emphasis added).

allow for the disclosure of too much confidential information, which would disrupt business practices and the performance of government functions.¹⁶³

However, this potentially detrimental effect can be easily avoided or mitigated by the implementation of non-disclosure agreements.¹⁶⁴ A non-disclosure agreement (“NDA”) is relatively simple to implement and cost-effective.¹⁶⁵ NDAs are commonly used in business to protect confidential information, such as trade secrets, from reaching competitors.¹⁶⁶ As detailed above in Part II, section B, the information sought to be withheld in *Watkins* fell under Exemption 4, which exempts business information such as trade secrets and other confidential commercial or financial information.¹⁶⁷ Such information is precisely the kind that NDAs are generally designed to protect and for which are generally used in the regular course of business.¹⁶⁸

Though NDAs are generally found in the business world,¹⁶⁹ there is no apparent reason why the government could not utilize them to prevent further disclosure of information they have disclosed to a third party but do not wish to have enter the public domain. In this way, the broad effect of the unlimited disclosure test is mitigated so as to prevent the government from having to reveal too much confidential or potentially compromising information.

Furthermore, the use of NDAs makes the test easily administrable.¹⁷⁰

163. See Lightfoot, *supra* note 131, at 834 (“If the *Watkins* holding stands, the concerns voiced by the court in *Critical Mass* regarding the continued availability and reliability of useful information may come to fruition. Individuals who provide commercial information to the government, will be less willing to do so, and if compelled to do so, will provide less reliable information for fear that any government disclosure of the information—even a limited one—will subject the information to FOIA disclosure.”).

164. Non-disclosure agreements are “contracts entered into by two or more parties in which some or all of the parties agree that certain types of information that pass from one party to the other or that are created by one of the parties will remain confidential.” David V. Radack, *Understanding Confidentiality Agreements*, J. MIN., METALS, AND MATERIALS SOC’Y, May 1994, at 68.

165. See *id.*

166. See *id.*

167. See 5 U.S.C. § 552(b)(4) (2012).

168. See Radack, *supra* note 164, at 68.

169. See *id.*

170. See *id.*

Unlike the “permanent public disclosure” test, the use of NDAs would create a clear bright-line distinction between which disclosures have entered the public domain and which have not. Rather than courts trying to parse the meaning of “permanent” or trying to figure out what exactly constitutes a public record, they would simply have to look at the facts of the case and see if the disclosing party used an NDA or not.¹⁷¹ If they did use an NDA, then they did not make an unlimited disclosure to a third party and such disclosure does not constitute a waiver of any applicable exemption. If they did not use an NDA, then their disclosure constitutes a waiver of any FOIA exemption that may apply.

Of course, regardless of an NDA, an individual might choose to publicly reveal the information, such as on the Internet. In such instances, the NDA would no longer prevent the waiver of any exemptions and a FOIA request for the information would be granted because the information has definitively entered the public domain. However, this would be the result under the prevailing D.C. Circuit rule as well, and the implementation of NDAs provides potential remedies in such situations. The use of NDAs in conjunction with the Ninth Circuit’s rule will not always prevent information that the government wishes to keep secret from entering the public domain.¹⁷² Nonetheless, using NDAs allows the government the option of filing a breach of contract claim in response to an individual violating the NDA, giving them the possibility to recover damages.¹⁷³ Furthermore, the threat of litigation would serve as a deterrent to anyone considering breaking the NDA and publicly disclosing the information.¹⁷⁴

Additionally, the court could infer from the party’s failure to use an NDA that the information it is seeking to withhold is not very important and thus not worthy of heightened protection.¹⁷⁵ Though the court in *Judicial Watch* rejected this argument,¹⁷⁶ it is worth exploring. The

171. *See id.*

172. *See Watkins*, 643 F.3d at 1196.

173. *See Radack*, *supra* note 164, at 68.

174. *See id.*

175. *See id.*

176. The court stated that under the law of D.C. Circuit, only specific information preserved in a permanent public record is within the public domain. This does not include an undocumented disclosure “made for an unimportant reason.” *Judicial Watch, Inc.*, 963 F. Supp. 2d at 16.

purpose of the FOIA exemptions is to protect certain interests—government, business, individual privacy—which are equally as important as the public’s interest in full disclosure.¹⁷⁷ They are discretionary, not mandatory, and are meant to be narrowly construed.¹⁷⁸ Information that falls under these exemptions is thus equally as important as the supreme interest in public disclosure underlying FOIA.¹⁷⁹ It is logical to infer then that the government would not freely disclose such information and if it did, would naturally take some sort of measure to ensure that the information would not be disseminated beyond the person or persons who were the intended recipient(s). Hence, the implementation of an NDA seems to be the most logical and rational approach to best protect such important, sensitive information, which is ultimately the goal of the exemptions in the first place.

3. Application to *Judicial Watch*

Turning to the facts in *Judicial Watch*, the government made an unlimited disclosure of sensitive information to two filmmakers.¹⁸⁰ This disclosure could have very simply been limited by the use of an NDA. However, the government did not take material action to protect the information from being further disseminated, only asking that the filmmakers not tell anyone.¹⁸¹ This seems like a particularly nonsensical move on the government’s part, given that part of the filmmakers’ job is doing press about their film in which they discuss the process of making the film and their research. At any point in time, the filmmakers could have easily revealed the names of the government agents to a large, public audience. Under the permanent public record test followed by the court, theoretically, the filmmakers could have told the names to anyone and everyone they knew and avoided waiving any FOIA exemptions as long as they did not record the names in some public way.

This all seems to lead to a rather absurd result, one which gives the government an unnecessary safety net protecting information that they did not deem important enough to bother trying to protect in the first place.

177. See Halstuk & Chamberlin, *supra* note 128, at 516.

178. See *id.*

179. See *id.*

180. See *Judicial Watch*, 963 F. Supp. 2d at 9.

181. *Id.*

Such a government interest surely cannot be deemed equal to that of the public's desire to know as much as they can about one of the most monumental military operations in modern memory.¹⁸² Citing national security concerns, the government has declined to provide a definitive account of how Osama bin Laden was killed.¹⁸³ This has led the public to turn to unofficial sources, such as *Zero Dark Thirty*, to determine what exactly happened.¹⁸⁴ While such a result might hold up under the technicalities of FOIA, it does not make much sense in light of the underlying purposes of the act. The public should not have to rely on a dramatized version of events produced by Hollywood as its source of information on such a historical event.

V. CALL TO ACTION

Splits in the law between circuits, while beneficial for ambitious law students, are detrimental to the operation of the judicial system as a whole. When there is no clear rule of law, the public and the government have no understanding as to what actions they must take, or avoid, in order to prevent a disclosure of information to a third party from entering the public domain. This uncertainty could ultimately frustrate the purported main advantage of the prevailing permanent public record test. People will be less likely to reveal confidential information because they do not know their rights, and business and government practices will be hindered. The lack of a clear rule also makes FOIA that much more difficult for courts to administer, causing protracted litigation and a waste of limited judicial resources.

Congress should amend FOIA to reaffirm the public domain doctrine, namely that an agency waives any exemption under FOIA if it makes a disclosure to a third party without limiting that third party's ability to further disclose the information. Congress has already amended FOIA

182. See *The Zero Dark Thirty File: Lifting the Government's Shroud Over the Mission that Killed Osama bin Laden*, NAT'L SECURITY ARCHIVE (Jan. 17, 2013) <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB410/>.

183. *Id.*

184. See US PATRIOT ACT *supra* note 134, ("As often happens when the government declines on secrecy grounds to provide an authoritative account of a controversial event, leaked, unauthorized and untrustworthy versions rush to fill the void. In this extraordinary case, a Hollywood motion picture, with apparent White House, CIA, and Pentagon blessing and despite its historical inaccuracies, is now the closest thing to the official story behind the pursuit of bin Laden.").

numerous times¹⁸⁵ and is in a good position to determine a prevailing test governing the public domain. Congress has the ability to conduct hearings with various government agencies to determine any concerns they may have regarding an amendment and can research the efficacy of NDAs and other issues concerning the public domain.¹⁸⁶ The Legislature is best able to clarify and improve its own statutes.

Alternatively, the Supreme Court should grant certiorari on *Judicial Watch* and determine that the Ninth Circuit's test should be the rule for determining whether a disclosure has entered the public domain. As outlined in the above section, the Ninth Circuit's rule better serves the purpose of full disclosure underlying FOIA, and the potential problem of excess disclosure can be easily mitigated by using NDAs.

VI. CONCLUSION

The Freedom of Information Act works to promote the dissemination of information to the public.¹⁸⁷ In order to best accomplish this goal, it is crucial that there be uniformity amongst the lower courts regarding certain doctrines underlying the act. Inconsistent application of the waiver doctrine, due to competing tests for determining when information enters the public domain, cripples the effect of FOIA and greatly frustrates its ability to accomplish its primary purpose.

Though the Ninth Circuit's unlimited disclosure test is a large departure from the prevailing permanent public record test, it offers the better framework for determining when a disclosure has constituted a waiver of a FOIA exemption. The Ninth Circuit's test offers broad dissemination of information while still providing plenty of opportunity for the government, businesses, and individuals to protect their own interests. It is ultimately a test that best serves the primary purpose of FOIA while still implementing safeguards to prevent the disclosure of information from becoming detrimentally broad.

185. *FOIA Legislative History*, THE NATIONAL SECURITY ARCHIVE, <http://www2.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm> (last visited Oct 24, 2014).

186. *See generally* S. REP. NO. 89-813 (1965).

187. *See id.* at 38.