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TOEING THE LINE IN THE NINTH CIRCUIT: PROPER AGENCY JUSTIFICATION OF FOIA EXEMPTIONS CLARIFIED IN *WIENER v. FBI*

INTRODUCTION

It is, sir . . . the people's Government; made for the people; made by the people; and answerable to the people.¹

—Daniel Webster

Although deceptively simple and widely accepted, the ideal expressed by Daniel Webster has proven difficult to achieve. Our history reflects a constant struggle between the need to protect sensitive government information and the right of the people to oversee the workings of that government.² A wealth of case law and legislation has evolved that addresses the delicate process of balancing these conflicting needs.³ The Freedom of Information Act (FOIA)⁴ exemplifies one congressional attempt to provide a statutory means to resolve the problem. However, FOIA also demonstrates that a flood of litigation and varied judicial interpretation can result from a seemingly straightforward statute. Quite simply, FOIA gives the public the general right to obtain information from the government but retains protection for sensitive information by providing statutory exemptions. The apparent simplicity of FOIA's scheme is belied by the steady stream of cases involving FOIA requests which the federal courts across the country must hear and adjudicate.

This Note examines how *Wiener v. FBI*,⁵ a recent Ninth Circuit

1. 10 ANNALS OF CONG. 431 (1830) (debating Foot's Resolution, which resulted in discussion of the doctrine of nullification).

2. Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 812 (1985).

3. *Id.* at 819-27 (discussing *New York Times Co. v. United States*, 403 U.S. 713 (1971) and progeny, the Freedom of Information Act, the Classified Information Procedures Act, and the Foreign Intelligence Surveillance Act); *see also* *FCC v. League of Women Voters*, 468 U.S. 364, 382 (1984) (discussing the critical role of information in informing public debate and editorial content of broadcasts); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (reiterating the right of the public to receive suitable access to all forms of information and ideas); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (noting that speech regarding public affairs is the essence of self-government).

4. 5 U.S.C. § 552 (1988).

5. 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).

opinion involving an author's request for FBI files, gives effect to FOIA's mandate of answerability by providing a detailed road map for agency response. Without purporting to analyze or debate the relative merits of the statute in question, this Note evaluates the impact of a particular case on the area of FOIA litigation, starting with the premise that FOIA exists to serve its stated purpose — that is, to promote the disclosure of information to the public.

The Background section traces the history and intent of FOIA, its function, requirements, exemptions, and procedural use. The Background section also discusses the inception of the *Vaughn* index⁶ in the United States Court of Appeals for the District of Columbia as a means of providing adequate justification when a government agency seeks to withhold information, along with its applications prior to the *Wiener* case. A sampling of case law from various federal jurisdictions preceding *Wiener* illustrates the need for further elaboration on the *Vaughn* index requirements. The Subject Opinion section details the factual particulars and holdings of *Wiener*. The Analysis section examines how the *Wiener* court construed the *Vaughn* mandate, focusing on the way in which the opinion interpreted, expanded upon, and crystallized prior case law. The Impact and Conclusion sections discuss how *Wiener* may affect future agency responses and disclosure practices and its significance in light of FOIA's purpose. This Note concludes that FOIA's fundamental and essential purpose of allowing the public maximum access to information can be well served by universal adoption of the stringent standards for exemption justification enunciated in *Wiener*.

I. BACKGROUND

FOIA was enacted as a means for the public to gain access to information controlled by government agencies and to monitor the operations of the government, but its provisions clearly reflect the need to shield certain areas of information from disclosure.⁷ The Act provides statutory exemptions and sets out procedural require-

6. The district court in *Vaughn v. Rosen* formulated an indexing requirement under which a court could determine information properly disclosed to the public. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); see *infra* notes 53-80 and accompanying text (discussing the district court's decision in *Vaughn*).

7. See 5 U.S.C. § 552(b) (listing areas excepted from disclosure). Some matters are specifically authorized to be kept secret in the interest of national defense: matters related solely to the internal personnel rules and practices of an agency, trade secrets, and personnel and medical files. *Id.*

ments for pursuing a claim under FOIA.⁸ When an agency fails to disclose requested information, FOIA provides a remedy to the requester in the federal courts.⁹ Before the 1973 *Vaughn v. Rosen*¹⁰ decision, no uniform standards for justifying the withholding of information pursuant to FOIA exemptions existed. *Vaughn* developed a basic format for agency response which resulted in the incorporation of the *Vaughn* index as a required aspect of FOIA litigation. During the years between *Vaughn* and *Wiener*, myriad examples of judicial interpretation and application of the *Vaughn* index have issued from the federal courts. The diversity of these decisions emphasizes the need for the additional clarification provided by *Wiener*.

A. The Purpose and Spirit of FOIA

Congress enacted FOIA in 1966 to allow public access to information compiled by and pertaining to government agencies.¹¹ FOIA amended section 3 of the Administrative Procedure Act of 1946,¹² which granted disclosure requests only to a narrow category of "concerned" persons.¹³ FOIA, on the other hand, emphasized the availability of records to "any person" without regard to that person's interest.¹⁴ Under FOIA, any member of the public may request from any agency "rules, opinions, orders, records and proceedings."¹⁵ The agency must provide the requested information unless it falls within the scope of one of nine statutory exemptions set forth in subsection (b) of FOIA.¹⁶

8. *Id.* § 552(b)(4)(A)(i).

9. *Id.* § 552(b)(4)(B).

10. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

11. 5 U.S.C. § 552.

12. 5 U.S.C. § 1002 (1946).

13. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 5-6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423 ("The statutory requirement that information about routine administrative actions need be given only to 'persons properly and directly concerned' has been relied upon . . . to withhold Government information from the public.").

14. 5 U.S.C. § 552(a)(6)(C); *see also* *Mayock v. Nelson*, 938 F.2d 1006, 1008 (9th Cir. 1991) (holding that a person's relative "need" for agency documents does not alter his or her rights under FOIA); Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 765 (1967).

15. 5 U.S.C. § 552; *see also* JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS 3-7* (1992) (giving examples of records available to the public through FOIA, including: descriptions of agency organization and office addresses; statements of agency operation; rules of procedure and description of forms; final opinions made in the adjudication of cases; administrative staff manuals that affect the public).

16. 5 U.S.C. § 552(b)(1)-(9).

FOIA was designed to facilitate access, a goal reflected both in its language and its legislative history.¹⁷ The general purpose of the statute is to allow members of the public to avail themselves of their right to acquire knowledge.¹⁸ FOIA permits individuals to access information about themselves and others that has been compiled and maintained in government agency files.¹⁹ In addition to increasing the availability of information to the public, FOIA also provides the public with the opportunity to oversee the internal workings of the government and to gain information of general interest.²⁰ In effect, FOIA disclosure empowers people to obtain the "answerability" envisioned by Daniel Webster²¹ while serving the constitutional values of self-government articulated by our nation's Founders.²² FOIA's prodisclosure thrust does not ignore the need to protect certain types of information. The nine statutory exemptions to FOIA recognize the need to allow such information to remain secret.²³ Although it

17. See H.R. REP. NO. 1497, *supra* note 13, at 6, reprinted in 1966 U.S.C.C.A.N. at 2423 ("The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. [FOIA] strikes a balance considering all these interests."); see also Kristi A. Miles, *The Freedom of Information Act: Shielding Agency Deliberations from FOIA Disclosure*, 57 GEO. WASH. L. REV. 1326, 1328 (1989) (noting that the legislative intent of FOIA was to serve democratic values and the constitutional guarantees of freedom of speech and freedom of the press).

18. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."); *EPA v. Mink*, 410 U.S. 73, 80 (1973) (noting that FOIA is broadly conceived to permit access to official information previously unnecessarily shielded from public view); *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1973) (describing the basic purpose of FOIA as reflective of the general philosophy of full agency disclosure).

19. See FRANKLIN & BOUCHARD, *supra* note 15, at v.

20. See Karen A. Winchester & James W. Zirkle, *Freedom of Information and the CIA Information Act*, 21 U. RICH. L. REV. 231, 233 (1987); see also FRANKLIN & BOUCHARD, *supra* note 15, at 3-12 (noting that information is requested by three categories of requesters: the news media and educational or noncommercial scientific institutions; commercial users involved in profit-making activities; and the general public, public interest groups, and nonprofit organizations).

21. 10 ANNALS OF CONG. 431 (1830).

22. See Fein, *supra* note 2, at 805 (quoting James Madison's August 4, 1822 letter to W.T. Barry in which he observed that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives").

23. See 5 U.S.C. § 552(b)(1)-(9). The legislative history of FOIA reflects the intent to achieve a balance between the public's right to know and the need for secrecy. Congressman Moss remarked that:

[FOIA] is a moderate bill and carefully worked out. This measure is not intended to impinge upon the appropriate power of the Executive or to harass the agencies of Government. We are simply attempting to enforce a basic public right — the right to access to Government information. We have expressed an intent in the report on this bill which we hope the courts will read with great care.

112 CONG. REC. 13,642 (1966). Congresswoman Reid of Illinois commented that FOIA "contains

might appear to countervail the public interest in freedom of access, secrecy serves certain important national policy interests that the government views as vital, such as national defense, foreign policy, civilian cooperation with law enforcement authorities, and agency efficiency.²⁴ However, in order to keep the exception from devouring the rule, these exemptions are narrowly construed.²⁵

FOIA grants jurisdiction to the federal district courts and authorizes them to enjoin an agency from withholding records.²⁶ The courts are also authorized to order the production of improperly withheld records, to conduct a de novo review to determine the propriety of withholding, and to conduct an in camera examination of pertinent records to determine whether part or all of the documents may be withheld.²⁷ The burden of proof to "sustain its [denial of access]" is expressly allocated to the government agency whose records are requested.²⁸ Additionally, FOIA provides for the assessment of reasonable attorney fees and costs against the United States where a plaintiff has "substantially prevailed."²⁹ The district courts

sufficient safeguards for protecting vital defense information and other sensitive data which might in some way be detrimental to the Government or individuals if improperly released." 112 CONG. REC. 13,657 (1966). She also expressed her belief that FOIA would "establish a much-needed uniform policy of disclosure without impinging upon the rights of any citizen." *Id.*

24. See Fein, *supra* note 2, at 805-12 (discussing the historical roots of executive secrecy and the importance of protecting national policy interests); see also Judith A. Bigelow, *Meeting the Agency Burden Under the Confidential Source Exemption to the Freedom of Information Act*, 60 WASH. L. REV. 873 (1985) (pointing out that FOIA recognizes the need to encourage individuals to volunteer information to law enforcement agencies by protecting their identities); Bruce M. Stevens, Comment, *Military Aviation Mishaps: The Right to Know under the Freedom of Information Act v. The Need for Safety Privilege*, 16 W. ST. U. L. REV. 287, 293 (1988) (examining the Supreme Court's decision in *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984) which held that where confidentiality is required to ensure efficient governmental operations, privilege should exist). During the House debate, Congressman Dole pointed out that

this bill gives full recognition to the fact that the President must at times act in secret in the exercise of his constitutional duties when it exempts from availability to the public matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

112 Cong. Rec. 13,655 (1966).

25. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989) (citing *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976)).

26. 5 U.S.C. § 552(a)(4)(B).

27. *Id.*

28. *Id.*; see also H.R. REP. NO. 1497, *supra* note 13, at 9, reprinted in 1966 U.S.C.C.A.N. at 2426 (explaining that the burden of proof is placed on the agency as "the only party able to justify the withholding" when a private citizen "cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action"); *John Doe Agency*, 493 U.S. 146 (noting the statute's placement of the burden to sustain its action upon the agency).

29. 5 U.S.C. § 552(a)(4)(E). A requester has a right to appeal if the administrative appeal is

may cause disciplinary proceedings to be initiated against "agency personnel [who] acted arbitrarily or capriciously" in withholding information.³⁰ After proceedings are conducted by special counsel, FOIA expressly instructs agency authorities to "take the corrective action" recommended.³¹ Finally, FOIA provides for the district courts to hold agency employees who fail to comply with an order in contempt of court.³² The expansive nature of judicial authority under FOIA underscores the legislative intent to promote disclosure.

B. FOIA Exemptions and Requesting Procedures

Notwithstanding the clear prodisclosure spirit of FOIA, government agencies may deny requests under the statutory exemptions created under subsection (b). FOIA identifies the following nine exempt categories:

(b)(1) documents authorized to be "kept secret" by Executive Order³³ in the interest of national defense or foreign policy, and properly classified as such;³⁴

(b)(2) documents related "solely" to internal agency personnel rules and practices;³⁵

(b)(3) documents exempted from disclosure by other statutes as long as the statute either leaves no discretion to the agency, or establishes "particular criteria" for withholding or describes "particu-

denied. The requester can file an appeal in district court where the requester lives, where the documents are located, or in the District of Columbia. If the requester goes to court, the burden of justifying the withholding of documents is on the government. FRANKLIN & BOUCHARD, *supra* note 15, at 3-23.

30. 5 U.S.C. § 552(a)(4)(F).

31. *Id.*

32. *Id.* § 552(a)(4)(G).

33. An executive order is issued by the president or an administrative authority under presidential direction for the purpose of "interpreting, implementing, or giving administrative effect to a provision of the Constitution or of some law or treaty." BLACK'S LAW DICTIONARY 569 (6th ed. 1990). An executive order is published in the *Federal Register*, which gives it the effect of law. *Id.*

34. 5 U.S.C. § 552(b)(1); see *Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606 (D.C. Cir. 1985). In *Abbotts*, the plaintiff sought disclosure of information regarding security procedures at nuclear energy plants, which the Nuclear Regulatory Commission withheld under exemption (b)(1). *Id.* This provision protects from disclosure matters that are "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy . . ." 5 U.S.C. § 552(b)(1)(A). The court held that the information was properly withheld as confidential under the executive order and properly classified as such where its disclosure could allow an adversary to more effectively plan an attack on a nuclear facility. *Abbotts*, 766 F.2d at 608.

35. 5 U.S.C. § 552(b)(2); see *Davis*, *supra* note 14, at 785 (explaining several Senate committee examples of exemption (b)(2) materials such as employee parking, lunch hour, and sick leave regulations).

lar types of matters" to be withheld;³⁶

(b)(4) information classified as "trade secrets and commercial or financial information obtained from a person and privileged or confidential";³⁷

(b)(5) inter-agency or intra-agency memoranda or letters "which would not be available by law to a party other than an agency in litigation with the agency";³⁸

(b)(6) personnel, medical, and similar files, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy";³⁹

(b)(7) records compiled for law enforcement purposes, "but only to the extent that the production of such . . . records . . . could reasonably be expected to" (A) interfere with enforcement proceedings; (B) deprive a person of the right to a fair trial; (C) constitute an unwarranted invasion of privacy; (D) disclose the identity of a confidential source; (E) disclose "techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law"; or (F) endanger the life or physical safety of an individual;⁴⁰

36. 5 U.S.C. § 552(b)(3); see Winchester & Zirkle, *supra* note 20, at 250-51 (citing exemption (b)(3) and identifying the National Security Act of 1947 and section 6 of the CIA Act of 1949 as examples of other statutes exempting materials from disclosure).

37. 5 U.S.C. § 552(b)(4); see *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971) (holding that the three statutory requirements under exemption (b)(4): (1) trade secrets and commercial or financial information (2) obtained from a person (3) that is privileged or confidential, were not satisfied by "a bare list of names and addresses of employees which employers are required by law to give the board, without any express promise of confidentiality and which cannot be fairly characterized as 'trade secrets' or 'financial' or 'commercial' information").

38. 5 U.S.C. § 552(b)(5). Exemption (b)(5) has provided a particularly fertile source of litigation. One author calls (b)(5) "FOIA's most controversial and farthest reaching exemption." Miles, *supra* note 17, at 1329. She explains that although Congress intended that disclosure of documents ordinarily obtainable through civil discovery be permitted under (b)(5), the statutory language provides only a "rough guide" as to what is not considered disclosable. *Id.* (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 858 n.2 (D.C. Cir. 1980)). Supreme Court opinions have held (b)(5) to protect attorney work product and attorney-client privilege as well as the "deliberative process privilege." *Id.* (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)).

39. 5 U.S.C. § 552(b)(6). In *Getman v. NLRB*, 450 F.2d 670, 675 (D.C. Cir. 1971), the court disallowed an agency's (b)(6) withholding where the information requester asked for a list of agency employees to conduct a telephone survey. The court held that the invasion of privacy that would result from loss of anonymity and a telephone call "should be characterized as relatively minor" and that any further disclosure by the employees would be consensual. *Getman*, 450 F.2d at 675.

40. 5 U.S.C. § 552(b)(7). Because of its breadth, exemption (b)(7) has also generated a significant amount of litigation. One scholar predicted problems in interpreting this exemption "stem[ming] from the fact that investigations are often for multiple purposes, for purposes that

(b)(8) information contained in or relative to "examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions";⁴¹

(b)(9) geological and geophysical data and maps "concerning wells."⁴²

Generally, these exemptions reflect the intent of Congress to protect matters touching on national security, law enforcement investigations, and information related solely to the internal workings of government agencies.⁴³ Disclosure of information that would constitute an unwarranted invasion of the privacy of another is proscribed, and protection is given to certain trade secrets and financial institu-

change as the investigations proceed, and for purposes that are never clarified." Davis, *supra* note 14, at 800. A diverse array of documents has been held to fall within the scope of (b)(7). The United States Supreme Court addressed the issue of unwarranted invasion of privacy in *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), wherein an FBI "rap sheet" was held to fall within the scope of exemption (b)(7)(C). *See also* *King v. United States Dep't of Justice*, 830 F.2d 210, 214 (D.C. Cir. 1987) (holding that where the government maintained a file on the plaintiff's mother-in-law because it believed that she was involved in criminal activities, documents requested by the plaintiff as research for a biography were properly withheld under (b)(7)); *United Technologies Corp. v. NLRB*, 777 F.2d 90, 93 (2d Cir. 1985) (upholding a "confidential source" withholding under (b)(7) where an employee of the plaintiff provided the government with documents obtained without the plaintiff's permission, thereby acquiring a justified expectation of confidentiality); *Stein v. Department of Justice*, 662 F.2d 1245, 1260 (7th Cir. 1981) (allowing a (b)(7) withholding on the grounds that portions of the requested information contained names and other identifying data of FBI agents, informants, and others peripherally involved in intelligence operations, even though the plaintiff was requesting his own FBI records). *See generally* Richard A. Kaba, *Threshold Requirements for the FBI under Exemption 7 of the Freedom of Information Act*, 86 MICH. L. REV. 620 (1987) (discussing the history of exemption (b)(7)). The 1966 version of (b)(7) provided for a "no further inquiry rule" if a file was compiled for law enforcement purposes. *Id.* at 625-26. In 1974, the exemption was amended to allow nondisclosure only if disclosure would result in specific statutory harms, thus significantly narrowing its scope. *Id.* The 1986 version currently in force permits nondisclosure only if disclosure would lead to one of the six harms listed under (b)(7)(A) through (b)(7)(F) or if such harms could reasonably be expected to occur. *Id.* at 628. Accordingly, the current test to determine the applicability of the exemption involves two prongs. First, the files must have been compiled for law enforcement purposes, and second, disclosure must lead or reasonably be expected to lead to one of the enumerated harms. *Id.* at 630.

41. 5 U.S.C. § 552(b)(8). Legislative history indicates that exemption (b)(8) seeks to protect financial institutions "for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm." H.R. REP. NO. 1497, *supra* note 13, at 11, *reprinted in* 1966 U.S.C.C.A.N. at 2428.

42. 5 U.S.C. § 552(b)(9). Exemption (b)(9) was created when legislators learned that this kind of information was not otherwise protected by "trade secret" laws. Since oil companies must file details about oil and gas discovery with the federal government, disclosure would unfairly favor speculators. H.R. REP. NO. 1497, *supra* note 13, at 11, *reprinted in* 1966 U.S.C.C.A.N. at 2428-29.

43. 112 CONG. REC. 13,645 (1966) (statement of Congressman King of Utah).

tion administrative matters.⁴⁴ However, under FOIA, unless the information sought falls squarely within the scope of one of the nine exemptions, the presumption always favors the right of public access.⁴⁵

When seeking disclosure of information under FOIA, an individual must obtain and adhere to published procedural requirements established by the particular agency involved.⁴⁶ Additionally, the records sought must be described with reasonable particularity.⁴⁷ Upon receipt of a request, the agency has ten days to make an initial determination as to whether the information will be disclosed and to notify the requesting party of its decision.⁴⁸ When an agency determines that the information falls within the scope of one or more of FOIA's exemptions and issues a denial, the requesting party must be given the names and titles of those agency employees responsible for the action. The requesting party must also be informed of the right to appeal to the agency head.⁴⁹ The agency has twenty days to consider the appeal. If the denial is confirmed as to any portion of the requested information, the agency must advise the requesting party of the right to seek judicial review.⁵⁰

As provided by FOIA, a requesting party may challenge an agency's classification of material as exempted by filing a complaint in federal district court. As explained above, the district court conducts a *de novo* review and may examine the withheld records in camera to determine the propriety of the claimed exemptions.⁵¹ Although Congress intended the review process to expedite actions and safeguard against improper withholding instead of "add[ing] substantially to crowded court dockets,"⁵² the following discussion indicates how the courts have nonetheless been burdened with reviews comprising voluminous documentation.

44. *Id.*

45. *Id.*

46. 5 U.S.C. § 552(a)(3); see Michael P. Cox, *A Walk Through Section 552 of the Administrative Procedure Act; The Freedom of Information Act; The Privacy Act; and the Government in the Sunshine Act*, 46 U. CIN. L. REV. 969, 971 (1978) (stating that the requester must describe the records as precisely as possible in accordance with the agency's published rules and regulations).

47. 5 U.S.C. § 552(a)(3).

48. *Id.* § 552(a)(6)(A)(i).

49. *Id.*

50. *Id.*

51. *Id.* § 552(a)(4)(B); see also *supra* notes 27-28 and accompanying text.

52. H.R. REP. NO. 1497, *supra* note 13, at 2, reprinted in 1966 U.S.C.C.A.N. at 2426.

C. *The Vaughn Index*

FOIA provides for the filing of complaints in the jurisdiction where the complainant resides or has a principal place of business, the jurisdiction in which the agency records are located, or in the District of Columbia.⁵³ A significant amount of FOIA litigation takes place in the United States Court of Appeals for the District of Columbia.⁵⁴ As a result, the D.C. Circuit has had ample opportunity to experience the drain on a court's resources caused by extensive in camera reviews.

In 1973, the D.C. Circuit addressed the problems that arise when agencies submit inadequate justification for nondisclosure. In *Vaughn v. Rosen*, the court took the opportunity to send an unambiguous message to agencies that broad claims of exemptions set forth in conclusory affidavits would no longer be acceptable.⁵⁵

In *Vaughn*, a law professor filed a FOIA request seeking disclosure of United States Civil Service Commission (Commission) reports generated by the Bureau of Personnel Management (Bureau).⁵⁶ The Bureau denied the request, and the director of the Civil Service Commission sustained the denial.⁵⁷ As justification, the Commission claimed FOIA exemptions under sections (b)(2) (internal agency rules and practices), (b)(5) (inter-agency or intra-agency memoranda), and (b)(6) (personnel or medical files).⁵⁸ When the plaintiff challenged the exemptions, the director of the Bureau of Personnel Management submitted an affidavit which merely identified the pertinent exceptions and asserted that the requested materials fell within their scope⁵⁹. The agency filed a motion to dismiss, or alternatively, for summary judgment. The district court granted the government's motion and the plaintiff appealed.⁶⁰

The circuit court's analysis of the government's affidavit noted that it failed to "illuminate or reveal the contents of the information sought, but rather set forth in conclusory terms the Director's opinion that the evaluations were not subject to disclosure under the

53. 5 U.S.C. § 552(a)(4)(B).

54. Miles, *supra* note 17, at 1326.

55. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

56. *Id.* at 821-22.

57. *Id.* at 822.

58. *Id.* at 821-22.

59. *Id.* at 823.

60. *Id.*

FOIA.”⁶¹ In criticizing the government’s response, the court emphasized the purpose of FOIA, which represented “an effort to permit access by the citizenry to most forms of government records,” and warned that FOIA exemptions must be construed narrowly in order to provide maximum access in conformity with the overall purpose of the Act.⁶² The court stressed that the burden of proof is on the declining agency and that the court would review the request *de novo*.⁶³ It reasoned that FOIA’s allocation of the burden of proof addressed the “anomaly” created by its prodisclosure emphasis on the one hand, and the “inevitable” fact that “the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information” on the other.⁶⁴

The court explained that the requesting party’s lack of knowledge resulted in a distortion of the traditional legal system’s form of dispute resolution, wherein the relevant facts are ordinarily more or less equally available to both sides.⁶⁵ As a result, the trier of fact must assume the responsibility of conducting an *in camera* review to determine whether the information has been properly exempted, an often burdensome process.⁶⁶ However, the court found this solution flawed in that it deemed unreasonable the expectation that “a trial judge . . . do . . . as thorough a job of illumination and characterization as would a party interested in the case.”⁶⁷ The court noted that this problem was compounded at the appellate level, where the additional burden of reviewing the lower court’s determination of the factual nature of the information accrued. This “investment of judicial energy” was, in the court’s estimation, neither justified nor permissible where “the burden ha[d] been placed specifically by statute on the government.”⁶⁸

The court criticized “the present method of resolving FOIA disputes” on the grounds that it encouraged the government to “con-

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 824.

66. *Id.* at 825. The court concluded that the withheld documents consisted of many hundreds of pages. A review of the trial court’s determination that the claimed exemptions applied would involve “committing sufficient resources to the project, but the cost in terms of judicial manpower would be immense.” *Id.*

67. *Id.*

68. *Id.*

tend that large masses of information are exempt, when in fact part of the information should be disclosed."⁶⁹ Two factors identified by the court supported this conclusion. First, it found that the government had no incentive to disclose information because it had little to lose by refusal and little to gain by disclosure.⁷⁰ Second, the fact that the burden of review fell on the court created an "innate impetus" which encouraged agencies to claim the broadest possible exemptions and to "let the court decide."⁷¹ Rejecting this unsatisfactory result, the court pointed out the need to formulate a process that would protect a party's right to obtain information and permit efficient judicial review.⁷²

The court then outlined a process that would meet these goals.⁷³ The new system created by the *Vaughn* court consisted of an indexing requirement that would oblige an agency to "correlate statements made in [its] refusal justification with the actual portions of the document."⁷⁴ The purpose of such an index would be to enable the reviewing court to decide which portions of a document could be disclosed and which could not by cross-referencing sections of a given document to the corresponding parts of the government's justification affidavit. This would allow opposing counsel to eliminate uncontroverted portions of a document and narrow the scope of judicial inquiry.⁷⁵ Although the court reserved the discretionary right to appoint a special master to assist in reviewing documents, it believed that the index system would improve the adversary testing process and relieve the trial judge of much of the burden.⁷⁶

69. *Id.* at 826.

70. The court noted:

At most . . . [government agencies would] be put to a court test stacked in their favor, the burden of which can be easily shifted to another by simply averring that the information falls under one of several unfortunately imprecise exemptions. Conversely, there is little to be *gained* by making the disclosure. Indeed, from a bureaucratic standpoint, a general policy of revelation could cause positive harm, since it could bring to light information detrimental to the agency and set a precedent for future demands for disclosure.

Id.

71. *Id.*

72. *Id.* Specifically, the court envisioned a system that would "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.*

73. *Id.* at 826-27.

74. *Id.* at 827.

75. *Id.*

76. *Id.* at 828. "A sincere policy of maximum disclosure would truncate many of the disputes

In conclusion, the court expressed the hope that the *Vaughn* decision might “sharply stimulate . . . agencies voluntarily to disclose as much information as possible and to create internal procedures that will assure that disclosable information can be easily separated from that which is exempt.”⁷⁷ The adoption of what the court termed a “sincere policy of maximum disclosure” would eliminate many disputes and properly allocate the burden for those coming before the courts.⁷⁸ The opinion emphasized the fact that FOIA was designed to allow public access to most forms of government records unless an exemption properly applied.⁷⁹ In turn, the court believed that the exemptions must be narrowly construed to provide maximum disclosure pursuant to the overall purpose of the Act.⁸⁰

Thus, the D.C. Circuit gave birth to the “*Vaughn* index” with the dual goals of decreasing and streamlining FOIA litigation. The *Vaughn* mandate has resulted in the incorporation of the *Vaughn* index in FOIA review, but it has fallen short of the maximum disclosure envisioned by the court.

D. The *Vaughn* Index Applied

After the *Vaughn* decision, the D.C. Circuit and others had ample occasion to apply the new standards with a variety of results. Federal appellate courts across the country have examined agency affidavits using the *Vaughn* index to gauge their sufficiency.⁸¹ The

that are considered by [the] court.” *Id.*

77. *Id.*

78. *Id.* The court commented that, if forced to shoulder the burden, the government might devote its “administrative ingenuity” to “lightening the load.” *Id.* As an example of such ingenuity, the court described the procedures adopted by investigative agencies to comply with disclosure provisions of the Jencks Act, 18 U.S.C. § 3500 (1970). *Vaughn*, 484 F.2d at 828 n.23. In order to meet the Act’s requirement of disclosure of information about witness testimony in criminal trials, the agencies organized their files in such a way as to allow prompt removal of those portions disclosable to defense counsel, while segregating the remaining portions. *Id.*

79. *Vaughn*, 484 F.2d at 828 n.23.

80. *Id.*

81. *See, e.g.*, *Silets v. United States Dep’t of Justice*, 945 F.2d 227 (7th Cir. 1991) (en banc) (holding that in camera review is not required where a *Vaughn* index sufficiently describes the documents and justifies the claimed exemptions), *cert. denied*, 112 S. Ct. 2991 (1992); *Johnson v. United States Dep’t of Justice*, 739 F.2d 1514, 1517 (10th Cir. 1984) (upholding the FBI’s claimed exemptions where the affidavits submitted consisted of “detailed declaration[s] specifying how the agency characterized each bit of undisclosed information and the exemptions upon which it relied”); *Coastal States Gas Corp. v. Department of Energy*, 644 F.2d 969, 972 (3d Cir. 1981) (describing the *Vaughn* index as a “procedural tool . . . to enable a district court to evaluate allegations of exemption advanced by a governmental agency, and to assure that claimed exemptions are justified under [FOIA]” and remanding the case for consideration of a revised *Vaughn*

varying degrees of stringency upon which the courts have insisted and assessments of the adequacy of *Vaughn* indices highlight the need for further judicial parameters.

1. *The D.C. Circuit — Adherence to the Vaughn Precedent in Its Home Circuit*

Although the *Vaughn* court expressed optimism with regard to future implementation of its standards, a uniform response was not forthcoming. A representative sampling of D.C. Circuit FOIA cases illustrates the absence of consistent agency response to *Vaughn* index requirements.

The *Vaughn* court stressed the importance of the adversary testing process as a primary function of the index. A properly indexed justification would allow the requesting party to argue against the agency's claim of exemption.⁸² *Mead Data Central v. United States Department of the Air Force* provides an example of a *Vaughn* index that was found sufficiently detailed to accomplish this purpose.⁸³ In *Mead Data Central*, the plaintiff company sought disclosure of information regarding a licensing agreement between the Air Force and a legal publisher for the use of copyrighted material.⁸⁴ The circuit court examined affidavits submitted by the Air Force as justification for a section (b)(5) exemption (inter-agency or intra-agency memoranda) in response to the request.⁸⁵ The court found the withheld documents properly indexed with clear descriptions of source, subject matter, and corresponding justifications for exemption.⁸⁶ In fact, the court favorably contrasted the Air Force affidavits with the "broad, sweeping generalized claims . . . covering voluminous information" that provoked the *Vaughn* remand.⁸⁷

index fully explaining all claimed exemptions); *Irons v. Bell*, 596 F.2d 468, 471 (1st Cir. 1979) (rejecting an affidavit purporting to support a (b)(7) law enforcement purposes exemption where the requesting party sought the contents of his own FBI files and describing the declarations contained in the FBI's affidavit as "self-serving" and as failing to "illustrate even an ephemeral possibility of enforcement of federal laws"); see also *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). In *Rose*, a New York University law student made the FOIA request as part of his research for a law review article. *Id.* at 354-55. The court refused to grant a blanket exemption for case summaries corresponding to Air Force ethics hearings under exemption (b)(2) for internal rules and practices of an agency. *Id.* at 369.

82. *Vaughn*, 484 F.2d at 828.

83. 566 F.2d 242 (D.C. Cir. 1977).

84. *Id.* at 248.

85. *Id.*

86. *Id.* at 252.

87. *Id.* at 251-52. The court commented that in contrast to the hundreds of pages at issue in

The *Vaughn* court also addressed the need to narrowly construe FOIA exemptions.⁸⁸ Focusing on narrow construction in *Playboy Enterprises, Inc. v. Department of Justice*,⁸⁹ the circuit court refused to allow an agency to broaden the section (b)(5) exemption to include more material than actually fell within its scope.⁹⁰ *Playboy Enterprises* sought disclosure of an FBI report prepared by the agency's internal Office of Professional Responsibility pertaining to an informant alleged to have committed crimes during the period of his undercover activities with the Ku Klux Klan.⁹¹ The FBI contended that the entire report was protected by the internal agency memoranda exemption.⁹² Although the complete report was not reviewed, the district court refused to protect the document in its entirety.⁹³ After selecting certain data for deletion, the district court instructed the FBI to disclose the remainder of the report.⁹⁴ In reviewing the FBI's appeal, the circuit court focused on the "deliberative process" portion of the exemption, which protects documents containing advice, recommendations, and conclusions forming part of an agency's decisionmaking process.⁹⁵ The court emphasized that only those portions of a document actually containing advice, conclusions, and recommendations may be exempted under the deliberative process privilege, while purely factual material must be disclosed. The court refused to accept the FBI's argument that facts chosen by a report's author reflect the "choice, weighing and analysis" that result in their inclusion.⁹⁶ Although the court ultimately ordered the district court to modify the scope of the disclosure order, the opinion emphasized *Vaughn's* goal of separating disclosable from protected materials.⁹⁷

Vaughn, the material requested here consisted of less than thirty pages and that the index described the nature of the documents with sufficient clarity to enable the requesting party to argue against the exemption claims. *Id.*

88. *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

89. 677 F.2d 931 (D.C. Cir. 1982).

90. *Id.* at 935.

91. *Id.* at 933.

92. *Id.*

93. *Id.* at 934.

94. *Id.*

95. *Id.* at 935. Similarly, in *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 132, 150 (1975), the Court explained congressional intent with regard to protection of the deliberative processes leading to agency policy formulation and governmental decisions.

96. *Playboy Enters.*, 677 F.2d at 935 (citing Brief for Appellant at 25, *Playboy Enters.* (No. 81-1605)).

97. *Id.*

The *Vaughn* court also sought to remedy the lack of detail in agency justifications.⁹⁸ In accord with the *Vaughn* index requirements, the circuit court flatly rejected an agency's attempt to avoid providing a detailed affidavit in *King v. United States Department of Justice*.⁹⁹ There, the FBI denied King's request for her deceased mother-in-law's file, relying on the section (b)(1) exemption for secret materials pursuant to an executive order and a section (b)(7) law enforcement purposes exemption.¹⁰⁰ Instead of producing a *Vaughn* index conforming to the court's mandate, the agency submitted copies of released documents with a code system denoting deletions.¹⁰¹ The court succinctly described the proffered code system as, "in a word, inadequate" and reiterated the *Vaughn* requirements.¹⁰²

These decisions suggest that even in the jurisdiction of its origin, agencies' understandings of the proper nature and extent of a *Vaughn* index vary significantly. While some agencies have chosen to respond in the spirit encouraged by the *Vaughn* court, others have minimized, modified, or even substantially ignored the *Vaughn* index requirements.

2. *The Ninth Circuit — Understanding and Following Vaughn in the Pre-Wiener Years*

In the years between the announcement of the *Vaughn* rule and the hearing of the *Wiener* case, the Ninth Circuit also adopted the *Vaughn* index for FOIA review. Several decisions preceding *Wiener* indicate how the circuit construed the requirements of *Vaughn* within the framework of its own prior FOIA decisions.

98. *Vaughn v. Rosen*, 484 F.2d 820, 826, (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The court remarked that lack of adequate justification was "the most obvious and the most easily remedied flaw in current procedures." *Id.*

99. 830 F.2d 210 (D.C. Cir. 1987).

100. *Id.* at 212.

101. *Id.* at 219-20. The court described the code system in which each withheld portion of a document was marked with a four-character code. *Id.* The first two characters identified the exemption, such as (b)(1), authorizing withholding pursuant to executive order; the third referred to the category of the executive order under which an exemption was construed; and the last character cross-referenced deletions to statements contained in a "code-catalogue" provided by the agency. *Id.*

102. *Id.* at 223-24. The court remarked that if *Vaughn* had failed to explicitly require a withholding agency to describe each withheld document and discuss the consequences envisioned from its disclosure, "[the] requirement . . . [was] unmistakably implicit in the principles supporting [the] decision in that case, as . . . [the court's] subsequent decisions have made very clear." *Id.* at 224.

In *Binion v. United States Department of Justice*,¹⁰³ the court considered a dispute involving section (b)(5) and section (b)(7) exemptions for deliberative process and law enforcement purposes, respectively.¹⁰⁴ Binion requested his FBI file contents, which included communications between that agency and the United States pardon attorney, as well as investigative information.¹⁰⁵ The court held that the affidavit submitted for the deliberative process exemption complied with *Vaughn* and could not be more specific without "reveal[ing] that which the agency wishes to conceal."¹⁰⁶ The court noted that the legal sufficiency of the agency affidavit was a question of law and that since the degree of detail was sufficient and no factual information was severable, *Vaughn* standards had been met.¹⁰⁷ With regard to the law enforcement records claim, the court reiterated a standard articulated three years earlier, requiring that a law enforcement agency establish only a "rational nexus" between its enforcement duties and the withheld document.¹⁰⁸ The court determined that information compiled by the FBI in the course of investigating Binion's application for presidential pardon of a tax offense satisfied the rational nexus test.¹⁰⁹ Having found this rational nexus to exist, the court noted that requiring the FBI to reveal the confidential sources involved in pardon investigations would deter citizens from future cooperation.¹¹⁰ In turn, the lack of cooperation would interfere with the flow of information on which the president must rely in making a decision to grant or deny a pardon.¹¹¹

103. 695 F.2d 1189 (9th Cir. 1983).

104. *Id.* at 1193.

105. *Id.* at 1190.

106. *Id.* at 1193.

107. *Id.*

108. *Id.* at 1194 (quoting *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 748 (9th Cir. 1979)).

109. *Id.* It is useful to recall that the current statutory test for determining whether a file is properly exempted under the law enforcement purposes exemption involves two prongs. See 5 U.S.C. § 552(b)(7) (1988). The file must have been compiled for law enforcement purposes and disclosure must lead, or be reasonably expected to lead, to one of six statutory harms. *Id.* However, while FOIA provides explicit guidelines for the second prong, the statute does not define the term "law enforcement purposes." *Binion*, 695 F.2d at 1194. The *Binion* court noted that the Ninth Circuit developed its own standard in *Church of Scientology* holding that "an agency with a clear law enforcement mandate . . . need establish only a 'rational nexus' between its law enforcement duties and the document for which Exemption 7 is claimed." *Id.* (citing *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 748 (9th Cir. 1979)).

110. *Binion*, 695 F.2d at 1194.

111. *Id.* at 1194. Exemption (b)(7)(D) is one of the six statutory harms from which law en-

Shortly after *Binion*, the Ninth Circuit heard *Doyle v. FBI*, another case involving an individual's request for his own file.¹¹² In *Doyle*, the District Court for the Southern District of California found public affidavits submitted by the FBI overly vague and conclusory.¹¹³ When Doyle filed a motion for in camera inspection, the FBI submitted in camera affidavits.¹¹⁴ The district court granted the agency's motion for summary judgment based on these affidavits.¹¹⁵ On appeal, the circuit court reiterated *Vaughn's* rejection of "conclusory and generalized allegations" as justification for exemptions.¹¹⁶ However, the court again acknowledged that the government need not provide so much detail as to compromise the secrecy of the information.¹¹⁷ Accordingly, the in camera affidavits met *Vaughn* index standards and the district court's ruling was affirmed.¹¹⁸

In *National Wildlife Federation v. United States Forest Service*,¹¹⁹ the circuit court considered a withholding under the section (b)(5) deliberative process exemption.¹²⁰ In response to the plaintiff's FOIA request, the Forest Service claimed that working drafts pertaining to a national forest plan were exempt as part of the agency's decisionmaking process.¹²¹ The court interpreted *Vaughn* and similar cases to suggest that in order to qualify for the section (b)(5) deliberative process exemption, documents must form part of the agency give-and-take upon which ultimate decisions rely, including recommendations, opinions, proposals, and suggestions.¹²² However, it concluded that the documents need not actually contain law or policy recommendations in order to qualify for the exemption.¹²³ Instead, the court found that factual material forming part of disputed documents must be analyzed to determine the extent to which

forcement records are protected (i.e., the disclosure of a confidential source). See 5 U.S.C. § 552(b).

112. 722 F.2d 554, 555 (9th Cir. 1983).

113. *Id.* at 556-57.

114. *Id.* at 555.

115. *Id.*

116. *Id.* (citing *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 742 (9th Cir. 1979)).

117. *Id.* at 556.

118. *Id.* at 555-57.

119. 861 F.2d 1114 (9th Cir. 1988).

120. *Id.*

121. *Id.* at 1115.

122. *Id.* at 1118-19.

123. *Id.* at 1118.

it is inextricably intertwined with the process of policy formulation.¹²⁴ Facts found to be "process-oriented" would be properly exempted.¹²⁵ After reviewing the documents at issue, the court found that they formed part of the predecisional process and therefore fell within the scope of the claimed exemption.¹²⁶

Generally, the pre-*Wiener* opinions of the Ninth Circuit reveal a patient, tolerant approach to FOIA litigation. The cases reflect what appears to be a sincere effort to comply with the letter and spirit of FOIA, while still allowing proper degrees of latitude and deference to government agencies. The circuit court adopted the *Vaughn* requirements but did not appear to curtail its own careful construction of FOIA provisions, nor did it exhibit a tendency to quickly reject the *Vaughn* index as inadequate. Against this background of tolerance, the stern flavor of the *Wiener* opinion stands out in sharp contrast.

II. *WIENER v. FBI*¹²⁷: THE NINTH CIRCUIT'S STRICTER REQUIREMENTS AND CLEARER MANDATE

I'm a representative of the human race. I'm speaking for us all.¹²⁸

—John Lennon

A. *Facts*

Jonathan M. Wiener is a Professor of History at the University of California at Irvine.¹²⁹ In 1981, during the course of his research for a book about the late ex-Beatle John Lennon, he filed FOIA requests with the FBI.¹³⁰ Wiener sought disclosure of agency records pertaining to an investigation of Lennon conducted during the late 1960s and early 1970s.¹³¹ Wiener requested information from four

124. *Id.* at 1119.

125. *Id.*

126. *Id.* at 1123 (denying the plaintiff access to the Forest Service's internal documents).

127. 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).

128. JON WIENER, *COME TOGETHER: JOHN LENNON IN HIS TIME* 95 (University of Ill. Press 1991) (1984).

129. Appellant's Opening Brief at 4, *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991) (No. 88-5867). The appellant's brief provides Professor Wiener's biographical history. He is a graduate of Princeton and Harvard Universities and has lectured extensively. *Id.* at 4 n.1. Professor Wiener is the author of two books, including the Lennon book, as well as 18 published articles. *Id.*

130. *Wiener v. FBI*, 943 F.2d 972 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).

131. *Id.* at 977. The court mentioned that Wiener wanted this information in order to support his theory that the FBI investigation of Lennon illustrated how executive agencies were utilized to

FBI offices.¹³² The FBI disclosed portions of the information but withheld the remainder, citing FOIA exemptions.¹³³ Although Wiener filed internal agency appeals, the initial decisions were generally affirmed.¹³⁴

In 1983, Wiener filed a complaint in the United States District Court for the Central District of California seeking injunctive relief against the FBI as provided by statute.¹³⁵ Wiener also filed a motion to compel the FBI to prepare an adequate *Vaughn* index.¹³⁶ The FBI responded by producing the affidavits of two agents in support of the claimed exemptions, along with a brief in opposition to Wiener's motion.¹³⁷ The district court ordered in camera production of further justification explaining each exemption in detail.¹³⁸ In response, the agency provided additional declarations from the two FBI agents, as well as an affidavit from a CIA agent.¹³⁹ After counsel for Wiener moved for an order mandating disclosure of the in camera documents or, alternatively, preparation of a new *Vaughn*

suppress political dissent. See also WIENER, *supra* note 128, at xv-xvi. Wiener commented in his book that rock music "could become a potent political force . . . when . . . linked to real political organizing." *Id.* at xvi. The book theorized that President Nixon feared that this potential force could jeopardize his reelection in 1972. *Id.* at 285; see also Appellant's Opening Brief at 5, *Wiener* (No. 88-5867). The brief notes that Wiener's research regarding Lennon formed part of "a broader study of the political and social movements of the period and the changes they created." *Id.*

132. Appellant's Opening Brief at 5. Wiener mailed letters to the Washington, New York, Detroit, and Los Angeles offices. *Id.* at 6.

133. *Id.* at 5-6. The Washington office denied the bulk of Wiener's request, sending him a form letter indicating three exemptions under which 199 pages were withheld. The New York office withheld twenty-three pages pursuant to four exemptions. The Detroit office provided some documents with deletions but completely withheld others. The Los Angeles office initially withheld records but subsequently released a limited portion. *Id.* at 6. Ultimately, the FBI relied on three exemptions: (b)(1) — documents classified pursuant to Executive Order; (b)(3) — withholding authorized by another statute; and (b)(7)(C) — documents related to law enforcement. *Wiener*, 943 F.2d at 977.

134. Appellant's Opening Brief at 5-6.

135. *Id.*

136. *Id.* at 6-7. The motion was filed following an exchange of correspondence in which Wiener provided the FBI with a copy of the proposed motion, including his interpretation of what a proper *Vaughn* index would contain. *Id.* The FBI responded with copies of agents' declarations and exhibits "purporting to describe in accordance with *Vaughn* the materials withheld and the exemptions from disclosure asserted." *Id.* at 7. Wiener sent the agency a letter describing his objections to the FBI declarations and identifying the specific exemptions that he challenged. *Id.*

137. *Id.* at 7.

138. *Id.*

139. *Id.* at 7-8.

index, the court ordered a briefing schedule to address the issues.¹⁴⁰ Subsequently, both sides submitted briefs, and two years passed.¹⁴¹

After a long wait, Wiener's attorneys wrote a letter to the district court in an effort to determine whether a decision on the pending motion would be forthcoming.¹⁴² In 1987, the FBI moved for summary judgment.¹⁴³ In response, Wiener filed a cross-motion for summary judgment. After review, the court granted the FBI's motion, holding that the "affidavits and declarations carr[ied] the government's burden of proof to show that the FOIA exemptions were properly applied."¹⁴⁴ Wiener appealed to the United States Court of Appeals for the Ninth Circuit on three grounds: (1) that the FBI's affidavits were inadequate; (2) that the district court erred (a) in accepting the agency's broad explanations without demanding greater specificity, and (b) in failing to review the documents to determine the segregability of any disclosable information; and (3) that the district court erred in granting summary judgment where there remained triable issues of fact regarding the propriety of the claimed exemptions.¹⁴⁵ The Ninth Circuit considered only the first two issues set forth in Wiener's appeal. Since the court reversed and remanded the case to the court below, there was no need to reach the issue of summary judgment.

B. Holdings

A panel of three circuit judges held: (1) that the FBI's affidavits were insufficient because they lacked detail and specificity and, they failed to provide the requester with a basis on which to contest withholdings;¹⁴⁶ (2) that the district court erred in (a) failing to demonstrate that a careful de novo review was conducted as required by FOIA; (b) failing to demonstrate that the government's burden of proof to show the propriety of the claimed exemptions had been met; and (c) failing to make specific findings on the issue of segregability.¹⁴⁷

140. *Id.* at 8.

141. *Id.*

142. *Id.*

143. *Id.* at 9.

144. *Id.*

145. *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).

146. *Id.* at 979.

147. *Id.* at 978-79.

C. *The Court's Application of Vaughn*

1. *The FBI's General Failure to Comply with Vaughn*

Before proceeding to an in-depth analysis, the court criticized the FBI's affidavits in general terms, characterizing the agency's responses as "boilerplate" language drawn from a "'master' response" routinely used to answer FOIA requests.¹⁴⁸ The court remarked on the FBI's obvious failure even to attempt to "tailor" the explanations to the individual documents withheld.¹⁴⁹ For instance, John Lennon's name did not appear on the agency's original *Vaughn* index.¹⁵⁰ The court stated that these explanations were precisely the sort previously rejected by the D.C. Circuit as clearly "inadequate."¹⁵¹ The *Vaughn* index lacked specificity, and the FBI failed to disclose all it could.¹⁵² The court admonished the FBI and reminded it that the *Vaughn* index was meant to assist the FOIA process.¹⁵³

2. *The Step-by-Step Critique*

The court did not end its inquiry with these general criticisms of the agency's failure to properly index. Instead, the court proceeded to scrutinize each claimed exemption,¹⁵⁴ to identify the shortcomings of the *Vaughn* index justification,¹⁵⁵ and to provide concrete examples of how a proper response could have been framed.¹⁵⁶ The court clearly stated that the issue before it was not whether the classifications were proper, nor was the court compelled to consider underlying policy considerations for or against disclosure. Rather, the issue to be decided by the *Wiener* court was simply whether the

148. *Id.* at 978.

149. *Id.* at 978-79.

150. *Id.* at 979.

151. *Id.* (citing *King v. United States Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987)).

152. *Id.* The court noted that "[s]pecificity is the defining requirement of the *Vaughn* index." *Id.* (quoting *King v. United States Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987)).

153. *Id.*

The FBI must bear in mind that the purpose of the index is not merely to inform the requester of the agency's conclusion that a particular document is exempt from disclosure under one or more of the statutory exemptions, but to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest.

Id. at 979.

154. *Id.* at 979-88.

155. *Id.*

156. *Id.* at 987.

plaintiff had been provided sufficient information to contest the classifications claimed by the government.¹⁵⁷ The methodology employed by the court to determine this paramount question reveals a discernible test consisting of three prongs.

In each point-by-point analysis, the court first identified the claimed exemption and defined its statutory scope and requirements (nature and scope prong).¹⁵⁸ Next, the court opined how much information, at a minimum, would be necessary to allow Wiener to intelligently contest the FBI's classification (minimum required information prong).¹⁵⁹ Finally, from its standpoint of *in camera* privacy to the actual contents of the documents, the court specifically indicated which missing information, if any, could have been revealed by the agency (exemplary information prong).¹⁶⁰ If, however, the court was satisfied with the information provided under the second prong, the third prong was not invoked.¹⁶¹ Through this process, the *Wiener* court demonstrated exactly how the *Vaughn* index should be used in order to serve the purposes for which it was developed. In most of the instances where the court applied the test, the FBI fell short of compliance.

a. Documents classified pursuant to executive order for national security: Exemption (b)(1)

The FBI's first claim of exemption relied on an Executive Order entitled "National Security Information," which was issued in 1982 by President Reagan.¹⁶² In the first prong in which the nature and scope of the exemption are noted, the court acknowledged that substantial weight should be given to an agency's decision to classify documents.¹⁶³ However, the court emphasized that FOIA permits challenges to those decisions subject to mandatory review by the district court, where the burden of proof to sustain exemptions falls on the government.¹⁶⁴

157. *Id.* at 980.

158. *Id.* at 979-88.

159. *Id.*

160. *Id.*

161. *Id.*

162. Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (prescribing a "uniform system for classifying, declassifying, and safeguarding national security information" and providing that information should "not be classified under [it] unless its disclosure reasonably could be expected to cause damage to the national security").

163. *Wiener*, 943 F.2d at 980.

164. *Id.*

The FBI based many of its national security withholdings on the conclusion that release of information would damage national security by leading to the disclosure of a confidential source.¹⁶⁵ Certain information had been classified by the agency pursuant to the Executive Order as "confidential source."¹⁶⁶ In applying the minimum required information prong, the court pointed out that notwithstanding such classification, the agency must provide the requester with enough information to determine whether the source was truly a confidential one; why disclosure would lead to the source's exposure; and how disclosure of the source could reasonably be expected to cause damage to the national security, notwithstanding "confidential source" classification.¹⁶⁷ Instead, the FBI simply grouped eight categories of withheld information under the rubric of "confidential source" and indicated generally that disclosure could harm the national security.¹⁶⁸

Moving on to the exemplary information prong, the court rejected this broad assertion and identified six specific harms that the FBI could have described: (1) termination of the source; (2) discontinuation of the source's services; (3) exposure of other intelligence activities; (4) modification or cancellation of future intelligence activities; (5) the risk that hostile entities could evaluate intelligence sources directed against them, with the attendant risk of counter-measures; and (6) the chilling effect on the overall "climate of cooperativeness" among intelligence sources unwilling to risk exposure.¹⁶⁹ The court concluded that in order to satisfy the minimum information requirement, not only should the FBI have enumerated these harms, but the index should also have described withheld documents, identified what information contained therein would expose the confidential sources, and explained how disclosure could harm national security.¹⁷⁰

The FBI also withheld information pursuant to the Executive Or-

165. *Id.*

166. *Id.* (citing Exec. Order No. 12,356, 3 C.F.R. 166 (1983)).

167. *Id.*

168. *Id.* at 980 n.12. The categories listed by the FBI were: 1) names and codenames; 2) information which reveals the character or degree of source coverage or penetration; 3) detailed information pertaining to or provided by an intelligence source; 4) dates furnished by an intelligence source; 5) instructions for the dissemination of information; 6) the date or place of a contact between a source and the government; 7) the identity of an intelligence source's government contact; and 8) information about subsidiary investigations such as background checks. *Id.*

169. *Id.* at 980-81.

170. *Id.* at 981.

der on the grounds that it concerned “intelligence activities . . . or . . . methods,”¹⁷¹ without identifying any specific harm that could result from disclosure. The court offered succinct criticism of this justification. It decided that the FBI’s “generalized, theoretical discussion” was “simply too broad to be of any use to Wiener, the district court or this court.”¹⁷²

A claimed exemption under the Executive Order for information regarding “foreign relations or . . . activities”¹⁷³ received identical treatment. The FBI asserted that disclosure would somehow lead to military retaliation against the United States.¹⁷⁴ Here, the court simply observed that no attempt was made by the FBI to show how this claim of “seemingly far-fetched harms” had “any relevance” to the withheld documents.¹⁷⁵

b. Withholding authorized by another statute: Exemption (b)(3)

The FBI relied on four statutes purporting to authorize withholding. The agency withheld records relating to visa applications, tax returns, and CIA-related information.¹⁷⁶ The court analyzed each one in turn.

i. Visa applications

In applying the nature and scope prong, the court noted that the agency justified withholdings classified under “visa applications” by citing federal immigration law.¹⁷⁷ However, to support the conten-

171. *Id.* at 980 (citing Exec. Order No. 12,356, 3 C.F.R. 166 (1983)).

172. *Id.* at 981. The affidavit corresponding to this claim actually identified several ways in which harm to national security could theoretically result from disclosure of intelligence activities. For example, the government listed the danger of revealing the existence of an intelligence operation and its particular scope or thrust, and the risk of revealing data used to acquire and process intelligence information or the manner in which such data is acquired. *Id.* This could then lead to the risk that hostile entities might be able to assess the government’s intelligence collection capabilities, thus compromising current and future operations. *Id.* However, the court found that these explanations did not satisfactorily answer several questions which it posed (i.e., how and why a twenty-year-old investigation could realistically be expected to compromise a current operation; how the specific investigation of John Lennon could relate to current operations; and whether the methods used to investigate John Lennon are still in use today, thus justifying the continued secrecy surrounding his investigation). *Id.* at 981 n.15. Clearly, the answers to these questions would be necessary to satisfy the minimum information standard used by the court. *Id.*

173. *Id.* at 982; *see also* Exec. Order No. 12,356, 3 C.F.R. 166 (1983).

174. *Wiener*, 943 F.2d at 982.

175. *Id.*

176. *Id.* at 982-83.

177. *Id.* at 982. The FBI relied on 8 U.S.C. § 1202(f) (1988), which classifies visa application records as “confidential.” *Wiener*, 943 F.2d at 982.

tion that requested information fell within the scope of the statute, the FBI simply quoted language from the law.¹⁷⁸ On the minimum required information prong, the court questioned how a requester could challenge this determination without a description of the withheld documents.¹⁷⁹ Under the third prong, an exemplary illustration of what sort of description would assist the requester, the court suggested that the FBI could have indicated "that the withheld records concerned a foreign citizen's request for a temporary waiver of certain visa requirements, and included the investigating official's recommended disposition of the request."¹⁸⁰ In this manner, the requester would be apprised of the nature of the documents, but no breach of confidentiality would result.¹⁸¹

ii. Tax returns

The FBI next turned to the Internal Revenue Code to justify a claim of exemption for tax return information.¹⁸² With regard to nature and scope, the court remarked that the statutory definition of tax return information was "long and complex" enough to allow "reasonable people to differ as to its interpretation."¹⁸³ Here again, the requester must be given a description of the information sufficient to allow a challenge to the agency's understanding of the statute.¹⁸⁴ Ordinarily, the mere assertion that tax return information was withheld will not suffice.¹⁸⁵ However, in this instance, the court determined that the exemption was properly claimed.¹⁸⁶ Portions of the document which had been previously released suggested the identity of an individual whose privacy interests are protected by the statute.¹⁸⁷ Therefore, disclosure of the exact nature of the tax return information would compromise the confidentiality mandated by the applicable statute.¹⁸⁸ Accordingly, the court concluded that the FBI disclosed all that it could, satisfying the third prong analysis of how

178. *Wiener*, 943 F.2d at 982.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*; see 26 U.S.C. § 6103 (1988) (regarding confidentiality and disclosure of returns and return information).

183. *Wiener*, 943 F.2d at 982.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

much information can properly be revealed.¹⁸⁹

iii. CIA information

Finally, the FBI relied on two statutes pertaining to CIA information to withhold certain documents.¹⁹⁰ In its nature and scope analysis, the court duly noted that both statutes specifically exempt information from disclosure under FOIA.¹⁹¹ To support the claimed exemption, the agency submitted the affidavit of CIA Agent Dube.¹⁹² The Dube affidavit provided sufficient information to justify all but one of the withholdings.¹⁹³

Two withholdings consisting of codenames fell within the scope of a statutory exemption for the names of CIA agents.¹⁹⁴ Another piece of withheld information revealed the location of a CIA installation abroad.¹⁹⁵ The Dube affidavit sufficiently indicated how disclosure of the location of a foreign intelligence facility could lead to the termination of the host nation's relationship with the CIA.¹⁹⁶ This information satisfied the minimum information prong and eliminated the need to provide sample information on the third prong. However, the affidavit failed to properly explain one deletion which allegedly could lead to identification of a source.¹⁹⁷ The allegation was unsupported by a discussion of the facts and reasoning on which it was based, and therefore failed to provide Wiener with the information necessary to challenge the conclusion.¹⁹⁸ In this in-

189. *Id.* at 983.

190. *Id.* at 985. These two statutes were the Civil Disobedience Act of 1968, 18 U.S.C. § 231 (1988), and the Anti-Riot Act, 18 U.S.C. § 210 (1988). *See also* 50 U.S.C. § 403(d)(3) (1988) (making the director of the CIA responsible for protecting intelligence sources and methods from unauthorized disclosure); 50 U.S.C. § 403(g) (1988) (exempting the CIA from the provisions of other disclosure laws requiring the release of information regarding CIA personnel).

191. *Wiener*, 943 F.2d at 983.

192. *Id.* The court distinguished the Dube affidavit from the FBI's own affidavits in terms of adequacy. *Id.* at 983 n.17.

193. *Id.* at 983.

194. *Id.*

195. *Id.*

196. *Id.* The court also noted that this exemption differs from the (b)(1) exemption in that an agency relying on 50 U.S.C. § 403(d)(3) (1988) need not show that disclosure will harm national security. However, the Dube affidavit was detailed enough to serve as an adequate *Vaughn* index for the (b)(1) exemption as well as for the (b)(3) claim because it indicated the nature of the information to be the location of a CIA facility and that the harm likely to result to the national security from revealing the information was closure of the facility. *Id.* at 983 n.18.

197. *Id.* at 983.

198. *Id.* & n.19 (rejecting the Fifth Circuit's holding in *Knight v. CIA*, 872 F.2d 660 (5th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990), that a good faith determination by the CIA regarding

stance, the court indicated that such facts and reasoning would be necessary to meet the minimum information test, but failed to provide an example of the type of information that would suffice.

c. Records compiled for law enforcement purposes: Exemption (b)(7)

The FBI also claimed section (b)(7) exemptions under the invasion of privacy section and the identity of a confidential source section.¹⁹⁹

i. Privacy

In analyzing the nature and scope of the privacy exemption, the *Wiener* court turned to a Supreme Court holding that "a document is properly withheld under Exemption [(b)(7)(c)] if the public interest in disclosure is outweighed by the individual privacy interests that would suffer from disclosure."²⁰⁰ Accordingly, the agency must provide the requester with enough information to challenge the determination that the balance favors nondisclosure.²⁰¹ Using this standard as the second prong for minimum information, the court focused on two particular documents withheld pursuant to the (b)(7)(C) privacy exemption.²⁰² The court then turned to the third prong by demonstrating how the agency could have given more information.

With regard to the first document, the FBI could have revealed that it contained reports gleaned from third-party informants regarding protest activities planned for the 1972 Republican National Convention.²⁰³ The document also discussed the possibility that Lennon would organize fund-raising concerts.²⁰⁴ Had he received this information, Wiener could have argued that no information beyond the names of the individuals involved actually implicated privacy concerns.²⁰⁵

the withholding of a document is unreviewable and finding *Knight* inconsistent with FOIA's statutory allocation of the burden of proof on the government).

199. *Id.* at 983-84, 986.

200. *Id.* at 984 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* The court was perplexed by the FBI's withholding of the information regarding Len-

Without compromising privacy, the court stated that the FBI could have described the second document as pertaining to meetings among certain activists.²⁰⁶ The withheld information dealt with "contests over the leadership" of the groups, reported on their personal hygiene habits, and mentioned "even the peculiar behaviors of their pets."²⁰⁷ Lennon's name did not appear in the document until the last paragraph, and then only to indicate that he would perform at a benefit, provided that his appearance was not announced in advance.²⁰⁸ Instead of providing a description similar to the foregoing, the FBI withheld the entire document on the ground that it related to a third party.²⁰⁹ The court rejected the government's categorical contention that an individual's privacy interest in his "rap sheet" always outweighs the public's interest in disclosure.²¹⁰ The court eschewed this "per se exempt[ion]" argument and held that ultimate conclusions must be supported by a fact-specific balancing process.²¹¹

The court also addressed the FBI's failure to specify precisely what law enforcement purposes led to its investigation of Lennon.²¹² The agency cited two "broad criminal statutes, prohibiting a wide variety of conduct" to explain why Lennon became the subject of an investigation.²¹³ The court reasoned that, without more information about the specific conduct of which Lennon was suspected, Wiener would be hard pressed to argue that the claimed law enforcement purposes might have been pretextual.²¹⁴

Interestingly, the court praised two justification statements that Wiener did not appeal. The court found that they exemplified the proper degree of *Vaughn* index specificity.²¹⁵ In one instance, four documents were withheld pursuant to the confidential source exemp-

non's concerts in view of the fact that the same information was previously disclosed in a cover memo released to Wiener. *Id.* at 984 n.21.

206. *Id.* at 984.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 985.

211. *Id.*

212. *Id.*

213. *Id.* at 985-86.

214. *Id.* The court referred to an earlier decision requiring an agency to establish a "rational nexus" between its law enforcement duties and the document for which Exemption 7 is claimed." *Id.* at 985 (quoting *Binion v. United States Dep't of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983)).

215. *Id.* at 984 n.23.

tion because they documented an investigation arising from a citizen's complaint to his congressman about the famous nude photograph of Lennon and Yoko Ono on an album cover.²¹⁶ The FBI claimed that the release of these records could compromise the citizen's privacy interests.²¹⁷ This justification allowed Wiener the opportunity to argue that on balance, the citizen's privacy interest was outweighed by other interests.²¹⁸

ii. Confidential source

Turning to the section (b)(7)(D) confidential source exemption, the court criticized the FBI's failure to classify the "purported grant" of confidentiality as express or implied.²¹⁹ If the agency expressly granted confidentiality to an informant, such a promise would be "virtually unassailable."²²⁰ If, however, the grant was merely implied, the court would have to review the question as one of fact. Under the court's test, the minimum information requirement would differ depending on whether confidentiality was express or implied.²²¹ Unless the grant was express, the purported informant must have reasonably inferred a grant of confidentiality from the specific circumstances, which would have to be explained in the affidavit.²²² The FBI also failed to explain how it concluded that the informants would not have provided information absent an implied grant of confidentiality.²²³ The court concluded that the requester must have this information in order to argue against the claimed exemption, and that the district court must have sufficient facts to inform a judgment on the merits.²²⁴

Once again, the court specified which facts and circumstances could have been disclosed in order to properly inform the requester

216. *Id.*

217. *Id.*

218. *Id.* The other example involved an FBI investigation of an individual alleged to have threatened the Lennon family. The FBI reasoned that disclosure of the document's details would lead to publicity of which the individual would probably become aware and which could conceivably cause him to resume his threatening behavior towards the Lennons or other celebrities. *Id.* This reasoning was detailed enough to allow Wiener to controvert the argument had he chosen to appeal that particular withholding. *Id.*

219. *Id.* at 986.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 986-87.

224. *Id.* at 987.

and the court.²²⁵ The FBI could have revealed that in the course of Lennon's deportation hearing, his attorney alleged that Lennon had been offered a teaching position at New York University.²²⁶ The FBI corroborated this information by contacting an NYU official who confirmed the offer.²²⁷ The court reasoned that the information could have been revealed without naming the NYU official, thereby protecting his identity as a source.²²⁸

The repeated application of this three-prong analysis clearly demonstrates the court's notion of how the FBI could have achieved a satisfactory level of disclosure without revealing "that which the agency wishes to conceal."²²⁹

3. *The district court's errors*

The court below received sharp criticism. According to the appellate court, the lower court's findings amounted to no more than a "list" of the government's affidavits and "the conclusory statement" that the government had met its burden of proving proper application of FOIA exemptions.²³⁰ The court held these findings insufficient to allow an appellate determination of which exemptions applied to each document and what "relevant, undisputed" facts supported the nondisclosure. On remand, the district court was instructed to review "an adequate *Vaughn* index" and set forth detailed reasons for each determination it might make.²³¹

The circuit judges characterized the district court's failure to rule on the issue of segregability as reversible error.²³² Reminding the court below that FOIA compels that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt . . .," the court ordered specific findings on segregability.²³³

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* The tone of the court's opinion conveys a sense of perplexity at the FBI's unwillingness to reveal what appears to be innocuous information.

229. *Binion v. United States Dep't of Justice*, 695 F.2d 1189, 1193 (D.C. Cir. 1983).

230. *Wiener*, 943 F.2d at 988.

231. *Id.*

232. *Id.*

233. *Id.* ("The court on remand must make a specific finding that no information contained in each document or substantial portion of a document withheld is segregable.")

D. Current Status — Wiener on Remand

The panel reversed and remanded the case, retaining jurisdiction over all subsequent appeals.²³⁴ The FBI petitioned for rehearing en banc, which was denied in December of 1991.²³⁵ In June of 1992, the United States Supreme Court denied the FBI's petition for a writ of certiorari.²³⁶ The case will now proceed on remand in the district court, where the FBI will be obliged to produce a *Vaughn* index that complies with the circuit court's specifications. If the district court finds that the proffered justifications fail to meet the statutory requirements, the FBI will be forced to disclose the disputed information. In addition, Wiener may be eligible to receive fees and costs under FOIA.²³⁷

III. ANALYSIS: FUTURE IMPLICATIONS AND UNANSWERED QUESTIONS

The denial of certiorari by the United States Supreme Court validates the *Wiener* case and has the effect of closing the door on any further delays in that particular matter. For the agency, this means that a new *Vaughn* index will have to be prepared in strict accordance with the road map provided by the Ninth Circuit. In a broader sense, the effect of the Supreme Court's action will be to compel similar *Vaughn* indices in future FOIA litigation in the Ninth Circuit. The case may now serve as authority for other federal jurisdictions as well. After the hearing on remand, *Wiener* will take its logical place as the next building block after *Vaughn* in the realm of FOIA litigation.

234. *Id.* at 989.

235. *See Wiener v. FBI*, 951 F.2d 1073, 1073 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992). There, the court rejected the FBI's contention that the *Wiener* decision conflicted with *Silets v. United States Department of Justice*, 945 F.2d 227 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2991 (1992). *Wiener*, 951 F.2d at 1073. The Seventh Circuit held in *Silets* that in camera review in FOIA litigation is discretionary and need not be performed where a *Vaughn* index is adequate. *Silets*, 945 F.2d at 229; *see also Wiener*, 951 F.2d at 1073. In denying a rehearing, the *Wiener* court noted that its opinion does not disagree with *Silets* precisely because the FBI's *Vaughn* index was found inadequate. *Id.* In a telephone interview, Attorney Dan Marmalefsky, co-counsel for the plaintiff, stated that he anticipated that if his petition for rehearing was denied, the FBI would apply to the United States Supreme Court for a writ of certiorari. Telephone Interview with Dan Marmalefsky, co-counsel for the plaintiff (Sept. 6, 1991). The FBI's subsequent petition for a writ has since been denied in *FBI v. Wiener*, 112 S. Ct. 3013 (1992).

236. *FBI v. Wiener*, 112 S. Ct. 3013 (1992).

237. *See* 5 U.S.C. § 552(a)(4)(e) (1988).

A. *Wiener Signals Tougher Standards for Ninth Circuit FOIA Review*

The Ninth Circuit's pre-*Wiener* opinions suggest a tolerant, moderate approach to FOIA review.²³⁸ However, in *Wiener*, the court took a hard line, applied a strict level of scrutiny, and refused to accept weak justifications for withholding. This posture summarily rejects government affidavits that wink at the requirements set forth in *Vaughn*. The court emphasized that its function in reviewing a *Vaughn* index is not to dispute the merits of the classification or to challenge the applicability of an exemption.²³⁹ Instead, the court's responsibility is to ensure that the index itself provides the information necessary to allow the adversarial process to operate.²⁴⁰ Unless agencies are forced to supply an adequate *Vaughn* index, the court will continue to shoulder the burden of sorting out reams of documents in camera. It was this burden that *Vaughn* sought to remedy, as well as an effort to give effect to the intent of FOIA. *Wiener* serves as a reminder to agencies that FOIA favors disclosure, that the burden to justify a refusal to disclose rests with the government, and that *Vaughn* established minimum standards for proper indexing of such justifications. This reminder takes the form of a detailed analysis explaining what was wrong with the pre-*Wiener* status quo and how it is to be corrected.

The court's criticism discernibly sharpened at each stage of its analysis. At the first stage, the court conveyed disapproval in its terse description of the FBI's *Vaughn* index. The index consisted of "redacted copies of documents partially withheld and blacked out copies of documents withheld in their entirety, with one or more hand-written four digit codes . . . next to each withheld portion" followed by the explanation "in general terms [of] why each category of information should be withheld."²⁴¹ The court clearly found the agency's response, which barely paid lip-service to *Vaughn* and FOIA requirements, to be wholly inadequate. This kind of justification will no longer suffice. The opinion emphasized that the courts must not accept any attempt by government agencies to foist the task of meeting the burden of showing why information should not

238. See *supra* notes 103-26 and accompanying text (discussing the Ninth Circuit's construction of the *Vaughn* index prior to the *Wiener* decision).

239. *Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).

240. *Id.*

241. *Id.* at 978.

be disclosed onto the judicial system. This was, after all, the essence of *Vaughn's* holding.²⁴²

In setting forth its criticism of the way the justifications were submitted, the opinion called the FBI's explanations boilerplate and pointed to the agency's use of the same master response to many FOIA requests.²⁴³ The court referred to the agency's practice of claiming several possible exemptions in the alternative as an "obvious obstacle to effective advocacy," one of the evils *Vaughn* sought to rectify.²⁴⁴

Repeatedly, and at length, the court provided examples of precisely how the FBI could have properly complied with FOIA, leaving an almost unavoidable inference that the agency simply did not wish to cooperate, preferring instead to "let the court decide."²⁴⁵ The FBI was dryly admonished to keep the *Vaughn* index's purpose of promoting intelligent advocacy in mind on remand.²⁴⁶ By making the effort to provide such detailed examples in this one matter, the court established standards that will oblige all agencies to make the same effort in all subsequent cases.

Finally, the circuit court's treatment of the district court was only slightly less harsh. The lower court's findings were deemed "conclusory."²⁴⁷ A clear message was conveyed that on remand, nothing less than sufficient detail will be acceptable.²⁴⁸ Although the *Vaughn* court must have considered its own message unambiguous, government agencies have continued to submit justifications rife with inconsistency and indolence. Under *Wiener*, little doubt remains. The court's detailed examples flesh out *Vaughn's* basic guidelines, leaving little or almost no question as to what constitutes a proper justification for refusing to disclose information under a FOIA exemption. An agency response which fails to meet the three-prong test established by *Wiener* simply fails to comply with *Vaughn* and with FOIA's purpose, and therefore is unacceptable. In *Wiener*, one circuit has announced its rejection of deficient justifica-

242. See *Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

243. *Wiener*, 943 F.2d at 978-79.

244. *Id.* at 979.

245. *Vaughn*, 484 F.2d at 826.

246. *Wiener*, 943 F.2d at 979.

247. *Id.* at 988.

248. *Id.*

tion on the part of the government and of casual judicial oversight of the process.

B. Wiener's Theory

At this writing, one aspect of the *Wiener* case remains unexamined — the remaining issues of triable fact. As indicated above, the Ninth Circuit declined to rule on the question of summary judgment.²⁴⁹ Wiener's contentions consisted primarily of allegations that the FBI failed to justify its law enforcement (b)(7) exemptions.²⁵⁰ He challenged the agency's claim that the Lennon file was in fact compiled for law enforcement purposes within the meaning of the exemption.²⁵¹ Now that the FBI has been directed to enlarge the scope of its response, Wiener may be able to argue this point from a position of greater strength. Additionally, Wiener disputed the sincerity of the FBI's claims pursuant to Executive Order under the (b)(1) exemption. He suggested that the actual reason for the agency's Executive Order withholdings was to avoid executive embarrassment, a purpose expressly forbidden by the Order.²⁵² To support his allegation, Wiener offered certain documents which he was able to obtain from the FBI. The documents included a memo from FBI Director Hoover expressing his concern that Lennon might not be deported back to England before the 1972 Republican Convention; a memo from Acting FBI Director Gray suggesting that a narcotics arrest would provide a basis for Lennon's immediate deportation and indicating the weakness of the INS's case for deportation at that time; and a memo to a United States Senator suggesting the strategic termination of Lennon's visa as a "counter-measure" against antiwar and anti-administration protest groups.²⁵³ The Ninth Circuit ruled that without an adequate *Vaughn* index, these

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* Section 1.6(a) of Executive Order 12,356 provides that "[i]n no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security." Exec. Order No. 12,356, 3 C.F.R. 166, 170 (1983).

253. *Wiener*, 943 F.2d at 988; see also Appellant's Reply Brief at 14-15, *Wiener* (No. 88-5867) (contending that the FBI monitored John Lennon not because of its belief that he might participate in unlawful activities, but as a means of facilitating the reelection of Richard Nixon). Wiener suggests that "it is government conduct of this type that led to the passage of the Freedom of Information Act." *Id.* at 15.

contentions could not be properly addressed.²⁵⁴ However, given the court's newly evident intolerance for pretextual, weak, or bad faith agency justifications, Wiener's allegations are likely to receive serious consideration on remand. The *Wiener* court demonstrated a clear determination to honor the spirit of FOIA and to put teeth into the *Vaughn* requirements. If the agency fails to come up with a justification that satisfies the new test, the court may simply order that the information be released.

Wiener's story provides a good example of the kind of scenario FOIA was meant to address. As a citizen and a scholar, Wiener sought to avail himself of his statutorily created right to access public information. When his request did not yield full disclosure, he pursued his statutory remedy and filed suit. Under *Vaughn*, the agency had the obligation to produce an index which explained and correlated its refusals and purported justifications. After significant delay, the proffered index grossly failed to meet *Vaughn* standards. Nevertheless, the district court failed to enforce the *Vaughn* mandate. Wiener turned to the court of appeals where the issues received the kind of scrutiny for which FOIA provides. In the face of noncompliance, the court was obliged to take a didactic approach to the problem. Three decades after the enactment of FOIA, perhaps *Wiener* will help produce the intended result — that when information is requested, agencies are either to disclose the information or specifically show why they should not.

V. IMPACT — TOUGHER REQUIREMENTS MAY LEAD TO A REDUCTION IN FOIA LITIGATION

Wiener signals the Ninth Circuit's renewed commitment to the spirit of FOIA. In order to give effect to FOIA's intent, this court has recognized the need to tighten *Vaughn* index requirements and decrease the degree of deference traditionally accorded to government agencies.

FOIA was conceived in an attempt to facilitate access. Legislative history and judicial interpretation support FOIA's proposition that the government should indeed be answerable to the people.²⁵⁵ Many legislators, jurists, and scholars agree that democratic values are well served by a policy allowing citizens to monitor the workings of

254. *Wiener*, 943 F.2d at 988.

255. See *supra* notes 11-32 and accompanying text (discussing the purpose and spirit of FOIA).

their government.²⁵⁶ The Watergate scandal, the Iran-Contra hearings, and the recent confirmation hearings of Justice Clarence Thomas serve as vivid examples of how dramatically the nation reacts to withheld information that is suddenly and reluctantly revealed. While recognizing the inevitability of shrouding certain information in secrecy to protect national security, financial interests, and privacy concerns, FOIA balances these interests with the countervailing interest in promoting maximum disclosure. Judicial review gives effect to FOIA's intent.

Despite the desirability of disclosure, FOIA has not been easily interpreted. When the first version of FOIA was enacted in 1966, at least one scholar foresaw difficulties in its interpretation, a prediction borne out by subsequent litigation.²⁵⁷ When faced with FOIA reviews, courts were besieged with virtually unmanageable quantities of documents submitted by agencies claiming exemptions. In order to rule on the propriety of these claims, detailed and time-consuming in camera examinations were required. Government agencies had no guidelines for proper justification, leaving the bulk of the burden on the reviewing courts.

The *Vaughn* court fought back against this tide of burdensome lawsuits. *Vaughn* provided a framework for adequate government affidavit submission and articulated one circuit's firm policy to refuse to shoulder the government's responsibilities. The court returned the burden of proof to agencies, where FOIA's enactors intended that it belong. The legislators, believing that disclosure should be the rule, allocated to the agencies the burden of evaluating and categorizing information prior to reaching a decision about revealing it. The agencies were also to bear the burden of justifying an unfavorable decision. *Vaughn* forced the agencies to accept these burdens and refused to allow them to shirk their statutory responsibilities. A strong policy emerged from the *Vaughn* decision — the D.C. Circuit would not aid and abet agencies in avoiding or undermining the intent of FOIA.

All other circuits have willingly adopted the *Vaughn* index. However, practice showed that while *Vaughn* provided a skeletal blueprint, it failed to clarify with specificity how an exemption

256. See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974); H.R. REP. NO. 1497, *supra* note 13, at 12, *reprinted in* 1966 U.S.C.C.A.N. at 2429; Miles, *supra* note 17.

257. See *Davis*, *supra* note 14, at 765.

should be properly documented in order to allow informed advocacy and judicial review. An idea was articulated and a method identified, but clear guidance was still lacking.

Wiener fills in the details that the *Vaughn* blueprint lacked. *Wiener* provides an intricate road map to *Vaughn* indexing, complete with negative and positive examples and extended analysis. While *Vaughn* signaled the end of the era of conclusory affidavits, *Wiener* goes on to remove the residual ambiguities left by the former decision. *Wiener* puts agencies on notice that any nondisclosure must be supported by a detailed justification. The justification must provide sufficient information to allow the requester to challenge agency decisions. This means that the agency must reveal everything short of the actual information which, in good faith, it believes to be exempt.

If the courts begin to treat *Wiener* as the next logical step after *Vaughn*, the way in which FOIA disclosure is approached will undergo substantial changes. Under the *Wiener* guidelines, withholding can never be a more convenient alternative. In the past, an agency could save time and resources by denying a request and relying on the courts to uphold conclusory justifications. Under *Wiener*, this will no longer be tolerated. The Ninth Circuit has signaled its refusal to accept blanket claims of exemption. If government agencies choose to follow *Wiener* guidelines in good faith, the quantity of FOIA litigation could be significantly reduced. Borderline requests may be less likely to receive denials in light of the extensive justifications that *Wiener* requires. The degree of detail required to justify an exemption under *Wiener* translates into significant expenditures of time and effort for the government. Accordingly, unless agency officials identify compelling reasons for withholding information, the justification process may simply be too burdensome in all but the most genuinely disputed cases. Agencies contemplating less than good faith responses might reconsider and heed *Wiener's* warning not to hide behind statutory exemptions in order to shield information that might embarrass the government. In any event, requesters, agencies, and courts will know how to proceed to satisfy *Vaughn* requirements and what to expect from proper de novo judicial review. The net effect of *Wiener* should be to promote disclosure, and to expedite and reduce litigation. Such a result benefits both requesters and agencies alike — by allowing the former to promptly obtain the information sought, and by reducing the number of denials that the latter will deem worth pursuing, thus decreasing their FOIA re-

lated workloads. All of this serves to effectuate the simple purpose of FOIA — to allow the public to receive information compiled by its government.

CONCLUSION

Despite FOIA's laudable goal of making access to information the rule rather than the exception, it has proved to be a fertile source of litigation. Burdens have been imposed on all parties. Requesters often must file suit to compel disclosure. Agencies must sift through voluminous documentation, defend their determinations, and bear the burden of proving the applicability of claimed exemptions. District courts must devote time and energy to conducting de novo reviews and frequent hearings on remand. Appellate courts must review, interpret, and analyze the lower courts' findings. Obviously, all of these endeavors require the expenditure of public and private resources.

If agencies made a practice of voluntarily responding in the spirit of disclosure mandated by FOIA, much of this litigation might be avoided. However, realism demands the recognition of good faith differences of opinion as to the scope and meaning of FOIA exemptions. When those differences arise, the courts must intervene. That intervention would be greatly facilitated by diligent adherence to *Vaughn* requirements, which have now been restated and sharpened by *Wiener*. Adequate *Vaughn* indexing at the initial district court level of review could expedite and limit litigation. Other circuits may find the case a useful guide and utilize it to promote a higher degree of compliance. In this way, uniform standards could be adopted on a national level. Now that the United States Supreme Court has declined to review *Wiener*, these standards have effectively become law, and most doubt as to proper agency response in both form and substance has been removed.

If *Wiener* becomes the new standard, perhaps the vision expressed by Congress upon enactment of FOIA in 1966 will be more substantially fulfilled. Our government's duty to be answerable to the people will be reaffirmed.

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