The FOIA "Exclusions" Statute: The Government's License to Lie

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Freedom of Information Act (FOIA) requesters and their counsel know what those black boxes mean. The boxes that checker government documents provide notice that a FOIA officer has decided that the redacted material falls under one of the exemptions of 5 U.S.C. § 552(b). Along with the checkerboard documents, the government provides the requester with a specific list of the exemptions tied to each item of information withheld.[1] Without that notice, the requester would be completely in the dark and unable to assess his rights to challenge the exemption claims.

The notice-and-challenge regime has been built into FOIA litigation over the years. Courts routinely require agencies to submit a *Vaughn* index,[2] in which the government describes the withheld documents or deletions, states the particular applicable FOIA exemption, and explains why the exemption applies.[3] Over the years, summary judgment proceedings, with *Vaughn* indexes as the evidentiary basis, have become the principal procedure for resolving FOIA cases.[4]

But what would most FOIA requesters think—indeed, what would experienced counsel reading this article believe—when the government answers a FOIA letter with, "There are no records responsive to your request"? The average person would understand that *no records* means just what it says—no records. The seasoned litigator, steeped in discovery procedure, similarly would believe that the FOIA officer, after fulfilling his obligations to conduct a comprehensive search, has determined that the government possesses no information—not even information falling under the FOIA exemptions—that would come within the ambit of the request.

Buried in the FOIA statutes, however, is an obscure provision that makes a "we have no records" response entirely permissible, even when that response is totally false. The provision, 5 U.S.C. § 552(c), describes the "exclusions" to the FOIA, as distinct from the familiar concept of "exemptions" governed by § 552(b). This Reagan-era addition to the FOIA, on its face, provides the government with a license to lie. The exclusions were intended to be narrow, yet the precise parameters of the exclusions remain undefined.

Statutory Framework for FOIA Exemptions

Everyone knows that the FOIA promotes public access to government documents by establishing "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[5] Under the FOIA, an agency must disclose agency records unless the information requested is protected from disclosure by the statute itself.[6]

FOIA practitioners routinely encounter the nine FOIA exemptions, which allow agencies to withhold certain categories of information because the release would be harmful to governmental or private interests.[7] The nine exemptions include the following:

- Information properly classified in the interest of national security.
- Records "related solely to the internal personnel rules and practices of an agency."
- Information exempted from release by certain federal statutes.
- Trade secrets and commercial or financial information that could harm the competitive posture or business interests of a company.
- Opinions, conclusions, and recommendations included within interagency or intraagency memoranda or letters.
- Information that "would constitute a clearly unwarranted invasion of personal privacy" of the individuals involved.
- "[R]ecords or information compiled for law enforcement purposes," the release of which "could reasonably be expected to interfere with enforcement proceedings," to "deprive a person of a right to a fair trial or an impartial adjudication," to "constitute an unwarranted invasion of [the] personal privacy" of a third party/parties, to disclose the identity/identities of confidential sources, to "disclose techniques and procedures for law enforcement investigations or prosecutions," or "to endanger the life or physical safety of an[] individual."
- Information that is "contained in or related 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."
- "[G]eological and geophysical information and data, including maps, concerning wells."[8]

When an agency invokes an exemption, it must indicate the amount of information withheld and the exemption under which the deletion is made.[9] The only exception to this notice requirement is where that indication also would harm an interest protected by the exemption.[10] Yet even in these circumstances, the agency is required to disclose that it is withholding information.

Courts addressing the FOIA generally require that an agency provide a *Vaughn* index justifying its decision to

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withhold information from requesters so that the court may meaningfully assess the propriety of the agency's withholdings.[11] In that index, the agency is required to define its categories functionally and conduct a document-by-document review, assigning the documents to the proper exemption categories and explaining how each document or each segment of redacted text falls under the claimed exemption.[12] Where the agency provides an incomplete index, courts will grant motions to compel it to furnish greater detail.[13]

The entire rationale for this exercise is to permit the government to keep the information at issue secret until the court rules while at the same time providing enough detail to permit the FOIA plaintiff to advocate and the court to adjudicate the issues.[14]

Statutory Framework for FOIA Exclusions

In stark contrast to the statutory notice scheme for FOIA exemptions, the entire rationale behind the exclusions is to completely hide even the existence of certain information. Unlike the exemptions, the agency is not required to acknowledge that it has any records at all falling under the exclusions, to disclose the basis for withholding information requested, or to provide any accounting of the documents withheld.

The statute on its face applies only to sensitive law enforcement-related records. "The [FOIA] exclusions [statute] expressly authorize[s] federal law enforcement agencies . . . to 'treat the records [requested] as not subject to the requirements of [the FOIA].'"[15] When an agency relies on one of the exclusions, it responds to the FOIA requester stating that "no records" responsive to the FOIA request exist.[16] Alternatively, the agency represents that "all responsive records" have been provided.[17]

Exclusion (c)(1) authorizes law enforcement agencies, under specified conditions, to shield the existence of records of ongoing investigations or proceedings. Specifically, to qualify for the exclusion, the following conditions must be met: (1) release of the records must be "reasonably . . . expected to interfere with enforcement proceedings"; (2) the records must relate to an "investigation or proceeding [that] involves a possible violation of criminal law"; and (3) the agency must have "reason to believe that [the investigation's subject] is not aware" of the investigation.[18]

Exclusion (c)(2) authorizes agencies to shield the existence of "informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier" when the records "are requested by a third party according to the informant's name or personal identifier, . . . unless the informant's status as an informant has been officially confirmed."[19]

Exclusion (c)(3) authorizes the Federal Bureau of Investigation (FBI) to shield the existence of records "pertaining to foreign intelligence, or counterintelligence, or international terrorism." To rely on this exclusion, the FBI must determine that the existence or nonexistence of responsive records is itself a classified fact and that it needs to employ this exclusion to prevent disclosure of the fact.[20]

The exclusions supplement the FOIA exemptions, especially Exemption 7, which protects certain "records . . . compiled for law enforcement purposes" where disclosure of the information requested would cause a specific harm enumerated under the statute.[21] Where an agency relies on Exemption 7, it must follow routine FOIA protocols, which include providing a requester with the requisite *Vaughn* index.[22] Unlike the exemptions, the FOIA exclusions statute provides for no notice that the government has invoked it and no description of the information withheld. The government is simply authorized to "treat the records as not subject to" the FOIA.[23] As a result, when an agency relies on one of these exclusions, FOIA requesters are forced to litigate blindly without the protections or procedures that allow for judicial oversight of agency determinations under the FOIA in an adversarial process.

Legislative History

The exclusions were added to the FOIA in 1986 as part of the Anti-Drug Abuse Act of 1986.[24] In passing this bill, Congress acknowledged that certain extraordinary situations require protections beyond those offered by the FOIA exemptions. However, the legislative history makes clear that Congress intended for the FOIA exclusions to apply in only very limited circumstances.

Specifically, the congressional record demonstrates that Congress and law enforcement officials were concerned that sophisticated FOIA requesters would use targeted and systematic FOIA requests to confirm ongoing investigations and ferret out active informants.[25] As Senator Orrin Hatch explained in sponsoring the legislation:

> With regard to organized crime, there is much evidence of the existence of sophisticated networks of FOIA requesters. Under the current FOIA there is a real danger which accompanies FOIA requests by organized criminal groups who have both the incentive and the resources to use the act systematically—to gather, analyze, and piece together segregated bits of information obtained from agency files. These sophisticated criminals can use the FOIA to determine whether an investigation is being conducted on him or his organization, whether there is an informant in his organization, and even who that informant might be. The release of records containing dates of documents, locations reporting investigations, the amount of material, and even the absence of information are all meaningful when compiled in the systematic manner employed by organized crime.[26]

Likewise, in supporting the measure, then-FBI Director William H. Webster wrote to Congress that this FOIA exclusion was an essential tool needed to help law enforcement fight the war on drugs.

> As I have testified before the Senate on a number of occasions, the provisions contained in the pending drug bill are long

> overdue and likely to make a substantial contribution to the success of our national battle against harmful drugs and the organized crime elements which distribute them. The Senate has unanimously approved these exact provisions in the previous Congress and I strongly encourage it to do so again.[27]

DOJ Intent for Implementation of the Exclusions

Consistent with this legislative history, U.S. Attorney General Edwin Meese in 1987 issued guidance that instructed government officers to invoke FOIA exclusions only in the "certain specified" "exceptionally sensitive circumstances" that Congress intended.[28] In the memorandum, Meese specifically acknowledged that the FOIA exclusions were extraordinary procedural mechanisms and ordered some administrative practices to mitigate the lost transparency (and oversight) created by the exclusions and to reduce the potential for their abuse.[29]

Today, official guidance on FOIA provides that "when an agency reaches the judgment that it is necessary to employ an exclusion, it should do so as a specific official determination that is reviewed carefully by appropriate supervisory agency officials."[30] Additionally, this guidance provides that "agencies should prepare in advance a uniform procedure to handle administrative appeals and court challenges that seek review of the possibility that an exclusion was employed in a given case."[31] Likewise, when a court action is filed in a case in which the agency relied upon an exclusion, the official guidance provides that the agency must seek ex parte review of the exclusion (or suspected exclusion) determination based upon an in camera court filing.[32]

Thus, the extensive set of administrative procedures developed indicate a clear intent to confine the use of these exclusions to extraordinary circumstances such as combating organized crime or international terrorism.

Government Efforts to Broaden the Exclusions in Litigation

Unlike the heavily litigated FOIA exemptions, there are relatively few cases involving an agency's explicit reliance on FOIA exclusions.[33] However, recent litigation reveals that the government has employed these exclusions well beyond their original intent.

Memphis Publishing Co. v. Federal Bureau of Investigation

The authors of this article recently concluded litigation in which the government cited Exclusion (c)(2) to protect the identity not of a drug informant in a current criminal enterprise but of a dead FBI informant who spied on the civil rights movement. In *Memphis Publishing Co. v. Federal Bureau of Investigation*,[34] *Commercial Appeal* reporter Marc Perrusquia sought the FBI's records on photographer Ernest Withers, who had served as a confidential informant in the 1960s and 1970s, after Withers died in 2007. Withers had been a noted photographer who had been given unique access by the movement's leaders, who trusted him. In reviewing already public FBI documents, Perrusquia noted that Withers had been designated in FBI records by the number *ME-338-R*. He knew from his work that *ME* and *R* denoted "racial informants" recruited by the FBI in Memphis to monitor civil rights organizers.

The FBI did more than decline to release the confidential informant file that Perrusquia requested. It refused to admit the existence of any informant file—or even that Withers was an informant. It was not until briefing in the litigation that the FBI cited Exclusion (c)(2) and its authorization for the government to shield all information when a FOIA request asks about the informant by name.

The briefing on whether Exclusion (c)(2) even applied to records about a deceased civil rights-era informant was rigorous. The plaintiffs argued that Exclusion (c)(2) was inapplicable because Withers was not a living informant reporting on ongoing criminal enterprises and because the statute did not apply to an investigation concluded more than forty years ago, one that did not involve a criminal enterprise. Instead, the plaintiffs argued, this lawsuit presented the "ordinary situation" that is properly considered under the FOIA exemptions for law enforcement records rather than under the extraordinary FOIA exclusion.[35]

In contrast, the FBI argued that, under its plain language, Exclusion (c)(2) was not limited to living informants or investigation of drug cartels or organized crime operations.[36] Likewise, the FBI argued that "the (c)(2) exclusion applies to informant records requested 'by a third party'—not just to informant records requested by a third party who is a member of a drug gang or other criminal organization."[37] The FBI also suggested that Exclusion (c)(2)—clearly enacted to protect the lives of informants providing information at considerable physical risk—applied because Withers's posthumous reputation would be harmed by the release of such information:

> The recent news articles alleging that Withers served as an FBI informant suggest that some individuals may view Withers or his work negatively, or that his survivors could suffer some sort of harm, if the allegations in those articles prove to be true . . . . If potential informants knew that the FBI would reveal their identities—either before or after their death—they may not be willing to assist the FBI with its investigations.[38]

The court ultimately decided that the FBI could not rely on Exclusion (c)(2) because Withers's status as a confidential informant had been "officially confirmed" through the FBI's prior releases. The judge also expressed skepticism at the FBI's reliance on the statute in the first place, noting that in this case, the agency invoked the exclusion

> not to protect a living informant, but only the deceased informant's descendents; not to protect them from danger or bodily harm, but only from the potential stigma or embarrassment, some of which has already come to pass as a result

> of previous media articles on the subject; and not to avoid revealing the informant's participation in an ongoing, legitimate criminal investigation that could be compromised, but simply to withhold information related to an unfortunate episode in our nation's history from which lessons can be learned.[39]

After ruling that the FBI must produce a *Vaughn* index of the documents being withheld, Judge Amy Berman Jackson again expressed concern about the FBI's decision to withhold historical documents pertaining to the civil rights movement and its leaders, including Dr. Martin Luther King, Jr., on the basis that such documents were "compiled for law enforcement purposes." Specifically, Judge Jackson said that the FBI's arguments, submitted in camera,

> raised the question in my mind of whether the United States of America today, under the leadership of this Administration, this Attorney General, this Department of Justice and this FBI is fully committed to the course of litigating the questions that need to be litigated to establish the availability of the exemption on the grounds set forth in the declaration.[40]

Following this, the parties entered into settlement discussions and were able to resolve the matter through an agreement. Under that agreement, the National Archives and Records Administration has begun to release documents responsive to the plaintiff's request from seventy files that had been acquired from the FBI. Although the documents will be produced over a two-year period, initial documents released have already begun to shed light on the FBI's surveillance of the civil rights movement.[41]

Pickard v. Department of Justice

The U.S. Court of Appeals for the Ninth Circuit addressed similar issues involving an agency's reliance on Exclusion (c)(2) in *Pickard v. Department of Justice*.[42] The lawsuit involved a FOIA request from an inmate at a federal correctional institution to the Drug Enforcement Administration (DEA) for information and documents pertaining to DEA informant Gordon Todd Skinner.[43]

On a motion for summary judgment, the DEA relied in part on Exclusion (c)(2) and argued that disclosure was not warranted because the plaintiff William Leonard Pickard had not presented evidence of government wrongdoing sufficient to raise the argument of disclosure for the public interest, had not presented any evidence that Skinner was deceased or had authorized Pickard to receive this information, and had not presented any evidence that the DEA had officially acknowledged Skinner as a confidential source such that his privacy interest was sufficiently diminished.[44] In response, the FOIA requester argued that Skinner's identity as a confidential informant had been officially confirmed, and, therefore, the agency could not rely on Exclusion (c)(2) to shield responsive records. The FOIA requester, Pickard, pointed out that, at his own criminal trial, multiple DEA agents testified in open court that Skinner had acted as an informant against him.

The district court, however, granted the government's motion for summary judgment, "holding that Skinner's identity as a confidential informant had not been 'officially confirmed.'"[45] Specifically, the court said:

> The DEA has set forth evidence showing that there is no official acknowledgement of Skinner as an informant. . . . A search of the web, as well as of the DEA headquarters and San Francisco division offices was conducted and found no official public pronouncement regarding the status of Skinner as a confidential source.[46]

On appeal, the U.S. Court of Appeals for the Ninth Circuit disagreed.[47] The references to Skinner in the criminal trial provided an adequate basis to conclude, under Exclusion (c)(2), that his status as a confidential informant had been officially confirmed. The Ninth Circuit held that:

> [n]othing in the statute or legislative history suggests that in the context of the interests protected by the (c)(2) exclusion, "official confirmation" requires that the government issue a press release publishing the identity of a confidential informant or that the director of a federal law enforcement agency personally identify the informant. Given these definitions, the plain language of the term "official confirmation" in the context of 5 U.S.C. § 552(c)(2) leads to such a "rational common-sense result" when read to mean an intentional, public disclosure made by or at the request of a government officer acting in an authorized capacity by the agency in control of the information at issue.[48]

The Ninth Circuit further said that the undisputed evidence in this case demonstrated such a disclosure: the government, in open court, had intentionally elicited testimony from Skinner and several DEA agents regarding Skinner's activities as a confidential informant. The court stated thus:

> The government basically argues that federal law enforcement agencies should be able to develop a case for the United States Attorney, have their agents and confidential informants testify at trial in open court about the identity and activities of those confidential informants, but then refuse to confirm or deny the existence of records pertaining to that confidential informant. We cannot abide such an inconsistent and anomalous result.[49]

The court explained that the government's official confirmation of an informant's status only affected the

applicability of Exclusion (c)(2). It did not determine whether the agency had to disclose the information at issue. However, because it concluded that Exclusion (c)(2) was inapplicable, the court said that the government "must now produce a *Vaughn* index . . . , raise whatever other exemptions may be appropriate, and let the district court determine whether the contents of the records—as distinguished from the *existence*, of the officially confirmed records may be protected from disclosure under the DEA's claimed exemptions."[50]

In a concurring opinion, Judge J. Clifford Wallace went further than the majority in questioning whether an agency could rely on Exclusion (c)(2) whenever a confidential informant's status has been revealed. In particular, he challenged the U.S. Department of Justice's (DOJ) reliance on case law pertaining to "official acknowledgement" under the FOIA exemptions in the context of a FOIA exclusion:

> There is, however, no logical reason for importing the "official acknowledgement" test into the context of section 552(c)(2). As other courts have explained, "official acknowledgment," for instance, was established to protect the government from officially releasing its sensitive information. In contrast, the purpose of section 552(c)(2) is to protect a confidential informant's privacy and safety. As a practical matter, there are several reasons why a government agency would not want to acknowledge officially a fact that is widely reported. But in the section 552(c)(2) context, once a confidential informant's status has been revealed—whether through a documented press release or otherwise—the secrecy of his status is of little value to the government and he does not necessarily enjoy the same level of privacy and safety.[51]

Islamic Shura Council of Southern California v. F.B.I.

A third case, *Islamic Shura Council of Southern California v. F.B.I.*, demonstrates how the use of FOIA exclusions can cause confusion among both litigants and courts.[52] This case involved a FOIA request for documents about the FBI's surveillance of several prominent Muslim community leaders and organizations. The FOIA request specifically sought "information reflecting any [governmental] investigation or surveillance" of plaintiffs,[53] "including . . . records that document any collection of information about monitoring, surveillance, observation, questioning, interrogation, investigation and/or infiltration[.]"[54]

In response, "the FBI notified nine of the eleven plaintiffs that its search of its Central Records System did not locate documents responsive to their requests. The other two plaintiffs received four heavily redacted pages in response to their request."[55] The plaintiffs filed suit challenging the adequacy of the FBI's search. After the lawsuit was filed, the FBI conducted additional searches and released over 100 pages of heavily redacted documents.[56]

The parties filed cross-motions for summary judgment concerning the FBI's redactions, including many redactions that were based on the FBI's claims that the redacted material was "outside the scope" of the plaintiffs' request. The FBI claimed, in briefs and declarations that it submitted under oath to the court, that the documents produced were all of the records that existed about the plaintiffs and that the materials labeled *outside the scope* were "not responsive" to the plaintiffs' FOIA request.[57]

After a hearing on the parties' cross-motions for summary judgment, the court ordered the FBI to conduct an additional search and to submit for an in camera review the documents that had been redacted or withheld. It was only at this point that the FBI revealed the existence of a large number of additional responsive documents that it had not previously revealed to the plaintiffs or the court.[58]

Although the appeals court determined, on the basis of its in camera review, that the government properly withheld most of the documents from the plaintiffs, the court expressed serious concern with the FBI's actions, which it said misled the court.[59] The district court expressed particular concern with the agency's representations that "all responsive records" had been provided when, in fact, responsive records were withheld, likely pursuant to a FOIA exclusion: "Under the policy interpreting Subsection (c), an agency can mislead a requester, but only a requester. '[T]he records in question will be treated, as far as the FOIA requester is concerned, as if they did not exist.'"[60] Furthermore, the court said that "[j]udicial review of an agency's decision to withhold information is meaningless if it is based on misinformation."[61]

The court rejected the government's claims that it was acting pursuant to its FOIA practice and policy, under which it notifies the court of the basis for its withholding of documents from a requester at the earliest practical time so as not to "tip off" the disclosure of information sensitive to national security: "The Government argues that there are times when the interests of national security require the Government to mislead the Court. The Court strongly disagrees. The Government's duty of honesty to the Court can never be excused, no matter what the circumstance."[62]

The district court's order was initially filed under seal, but the court indicated that it would unseal the order unless otherwise directed by the Ninth Circuit. On appeal, the Ninth Circuit agreed with much of the district court's analysis, noting thus:

> We thus agree with the district court that the FOIA does not permit the government to withhold information from the court. Indeed, engaging in such omissions is antithetical to FOIA's structure which presumes district court oversight. That said, poor litigation strategy by the government is not an independent basis to make public information which, based upon our review of the record, should be kept within the privacy of the agencies that oversee it.

Because the Ninth Circuit found that the sealed order issued by the

district court included certain sensitive protected information, it ordered the district court to eliminate the statements at issue before unsealing the order.

In light of the district court's opinion, the plaintiffs moved for sanctions against the FBI. The district court granted the plaintiffs' motion, sanctioning the FBI for "present[ing] false information to the Court—not negligently or without reasonable inquiry—but with the Government's full knowledge, over the course of two years in litigating this action, and after diligent factual inquiry."[63] On appeal, the Ninth Circuit reversed and vacated the district court's order imposing sanctions because the request for sanctions was untimely as it came after the FBI had already corrected its behavior.[64]

A Necessary Shift in Policy

These three cases demonstrate how the FOIA exclusions and overreaching agencies frustrate FOIA transparency objectives by limiting information available to FOIA requesters; clouding the adversarial process with in camera, ex parte filings; and complicating judicial review. And these are all cases where the FOIA requesters had the resolve and resources to challenge agency actions through prolonged litigation battles. This is atypical, especially given that, where an exclusion is invoked, the FOIA requester may have no idea that documents are being withheld and thus may never recognize the need to challenge the agency's determinations. Therefore, most of the times that agencies invoke exclusions, their actions are unchallenged and unreviewed.

In 2011, likely in response to the cases discussed in this article, DOJ submitted a proposed rule concerning its use of FOIA exclusions. This proposed regulation provided that:

> [w]hen a component applies an exclusion to exclude records from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the component utilizing the exclusion will respond to the request as if the excluded records did not exist. This response should not differ in wording from any other response given by the component.[65]

This proposed rule received considerable criticism from citizens' groups, prominent politicians, and commentators. In particular, critics argued that the proposed regulation would undercut the FOIA's goals of promoting government openness and accountability to the public by authorizing agencies to mislead requesters, that it would be counterproductive because it would thwart the ability for meaningful judicial review, and that it would undermine the government's legitimacy by making deception an explicit rule of law.[66]

In response to this criticism, DOJ responded that the proposed regulation was simply enacting the agency's FOIA practice for over twenty years. However, the proposed regulation was withdrawn, and the agency said that it would consider ways to improve transparency regarding the use of exclusions.[67]

More recently, DOJ's Office of Information Policy issued new guidance attempting to address some of the concerns raised by cases involving the FOIA exclusions.[68] Through this guidance, DOJ has implemented the following protocols: First, before an agency invokes an exclusion, it is to consult with the Office of Information Policy to "determin[e] whether [the] use of an exclusion is warranted."[69] Second, DOJ "has established a new reporting requirement that directs agencies to publicly report each year on the number of times, if any, that they invoked an exclusion. This reporting [is] required yearly, as part of each agency's Chief FOIA Officer Report."[70] Third, agency FOIA websites now

> contain a brief description of the three statutory exclusions. In that way, when a member of the public is reviewing an agency's FOIA website in anticipation of making a FOIA request, he or she will be made aware of the fact that in addition to the nine exemptions to the FOIA, there are also three narrow categories of records that can be excluded.[71]

Fourth, when an agency or agency component "that maintains criminal law enforcement records responds to a request, it [is to] notify [all] requester[s] that the FOIA excludes certain records from the requirements of the FOIA and that the agency's response addresses only those records that are subject to the FOIA."[72] DOJ notes that "[t]his new, more transparent approach will provide requesters with a clear explanation of the agency's actions and the reasoning behind the handling of requests."[73]

Conclusion

The nonbinding guidance implemented by DOJ should add some transparency to the FOIA exclusion regime. This is a welcome step.

But although this added internal policy may help guard against further abuses of the FOIA exclusions in many cases, it is important to note that policy guidance like this is not binding on the administration or on future administrations as a matter of law. As the cases discussed in this article demonstrate, agencies are willing to push to extend the reach of the FOIA exclusions, even under less than compelling circumstances.

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FOIA practitioners, transparency advocates, and members of Congress should continue to look beyond this policy guidance and monitor the actual behavior of the agencies in responding to requests. In particular, all watchdogs should keep a close eye on the litigation positions taken by the agencies when defending FOIA

actions to determine whether additional protections are needed.

Endnotes

1. *See* 5 U.S.C. § 552(b).

2. The index derives its name from the seminal case *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

3. *See, e.g.*, Schoenman v. F.B.I., 604 F. Supp. 2d 174, 196 (D.D.C. 2009).

4. *See, e.g.*, Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008) ("'Generally, FOIA cases should be handled on motions for summary judgment, once the documents at issue are properly identified.'" (quoting Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993))); Moore v. Bush, 601 F. Supp. 2d 6, 12 (D.D.C. 2009) ("FOIA cases are typically and appropriately decided on motions for summary judgment."); Barnard v. DHS, 598 F. Supp. 2d 1, 8 (D.D.C. 2009) (noting that "summary judgment may be granted on the basis of the agency's accompanying affidavits or declarations if they describe 'the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith'" (quoting Military Audit Project v. Casey, 656 F. 2d 724, 738 (D.C. Cir. 1981))).

5. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975) (citing S. Rep. No. 89-813, at 3 (1965)).

6. 5 U.S.C. § 552; Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988).

7. *See* 5 U.S.C. § 552(b).

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* Vaughn v. Rosen, 484 F.2d 820, 827–28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

12. Bevis v. U.S. Dep't of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986).

13. *See, e.g.*, Schoenman v. FBI, 604 F. Supp. 2d 174, 194–95 (D.D.C. 2009) (granting motion to compel a complete *Vaughn* index where agency's prior submissions were inadequate); Keeper of the Mountains Found. v. Dep't of Justice, No. 2:06-00098, 2006 WL 16666262 (S.D. W. Va. June 14, 2006) (granting motion to compel *Vaughn* index before summary judgment briefing to "facilitate a narrowing of the issues" before the court); *see also* Reno Newspapers, Inc. v. U.S. Parole Comm'n, No. 3:09-683, 2011 WL 1233477, at *4 (D. Nev. Mar. 29, 2011) (agency ordered to file amended *Vaughn* index when its initial submission was deficient).

14. *See* Wiener v. FBI, 943 F.2d 972, 978 (9th Cir. 1991) ("Ordinarily, rules of discovery give each party access to the evidence upon which the court will rely in resolving the dispute between them. In a FOIA case, however, because the issue is whether one party will disclose documents to the other, only the party opposing disclosure will have access to all of the facts . . . . The purpose of the index is to 'afford the FOIA requestor' a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding."); Ely v. FBI, 781 F.2d 1487, 1494 (11th Cir. 1986) (noting that a *Vaughn* index provides the court with the factual basis necessary to determine whether the claimed exemptions apply as a matter of law, rather than giving blanket deference to the government).

15. Department of Justice Guide to the Freedom of Information Act 1 (2013) (quoting 5 U.S.C. § 552(c)), *available at* http://www.justice.gov/oip/foia-guide13/exclusions.pdf.

16. Memorandum from the Attorney General on the 1986 Amendments to the Freedom of Information Act (December 1987), http://www.justice.gov/oip/86agmemo.htm; Dep't of Justice, Freedom of Information Guide 671 (2013). ("The application of one of the three record exclusions . . . results in a response to the FOIA requester stating that no records responsive to his FOIA Request exist.").

17. Memorandum from the Attorney General, *supra* note 16; Dep't of Justice, *supra* note 16.

18. 5 U.S.C. § 552(c)(1).

19. 5 U.S.C. § 552(c)(2).

20. 5 U.S.C. § 552(c)(3); *see* also Islamic Shura Council of S. Cal. v. F.B.I., 779 F. Supp. 2d 1114, 1123 (C.D. Cal. 2011) ("Subsection (c) thus applies in the rare circumstance in which identifying the basis for withholding information or even disclosing the existence of a record could itself compromise an ongoing criminal investigation, the identity of a confidential informant, or classified foreign intelligence or international terrorism information. In this limited context, the FOIA authorizes an agency to withhold information from a requester without disclosing its basis for doing so." (internal citations omitted)).

21. 5 U.S.C. § 552(b).

22. *See* Benavides v. Drug Enforcement Agency, 968 F.2d 1243, 1246 (D.C. Cir. 1992) ("[W]e conclude that when an informant's status has been officially confirmed, the requirements of FOIA govern, and the agency must acknowledge the existence of any records it holds.").

23. See 5 U.S.C. § 552(c).

24. Pub. L. No. 99-570.

25. 132 Cong. Rec. S13965-02 (statement of Sen. Orrin Hatch). Specifically, Exclusion (c)(1) was designed to protect against the disclosure of records that would tip off the subject of a law enforcement investigation. Exclusion (c)(2) was intended to shield records from disclosure only when targets of organized crime investigations use the FOIA to identify informants within their organizations. And Exclusion (c)(3) was designed to ensure that the law's new provisions apply with equal force to records concerning foreign counterintelligence and terrorism that have been classified.

26. *Id.* Congress had ample, and chilling, evidence to support these concerns. During the floor debate on Exclusion (c)(2), Senator Hatch introduced the following testimony from a drug kingpin in an earlier hearing:

> Mr. NUNN. Turning to the Freedom of Information Act, what was your motivation in filing FOIA requests on your own behalf?
>
> Mr. BOWDACH. To try to identify the informants that revealed information to the agencies.
>
> * * *
>
> Mr. NUNN. Why did you want to get their names?
>
> Mr. BOWDACH. To know who they were, to take care of business later on.
>
> Mr. NUNN. To take care of business later on? You mean by that to murder them?
>
> Mr. BOWDACH. Yes sir.

27. 132 Cong. Rec. S13965-02 (statement of Sen. Orrin Hatch submitting director's letter into the *Congressional Record*); *see also* S. Rep. No. 98-221) (noting that the amendment addressed concerns raised by the FBI that informants could be compromised if pieces of information from FOIA responses were compiled by those with personal knowledge of a criminal enterprise); 132 Cong. Rec. S13965-02 (statement of Sen. Patrick Leahy) ("The language of our amendment addresses the problem which was the concern of the original proposal, the

use of FOIA by sophisticated criminal enterprises to learn about ongoing criminal investigations. But, it is narrower and more acceptable to legitimate users of FOIA, especially the news media."); 132 Cong. Rec. S14270-01 (statement of Sen. Dan Quayle) ("The intent of this provision was to prevent targets of organized crime investigations from using the disclosure provisions of FOIA to find out if they were under investigation and to protect the identity of informants.").

28. *See* Memorandum from the Attorney General, *supra* note 16.

29. *Id.*

30. Dep't of Justice, *supra* note 16, at 680–83.

31. *Id.*

32. *Id.*; *see, e.g.*, Light v. Dep't of Justice, Civ. A. 12-1660-RMC, 2013 WL 3742496 (D.D.C. July 17, 2013) (noting that, in request for information pertaining to Occupy Wall Street movement, defendants submitted in camera declaration in accordance with its stated policy and that if a FOIA exclusion was employed, its use was justified); Mobley v. CIA, 924 F. Supp. 2d 24 (D.D.C. Feb. 7, 2013) (pursuant to DOJ policy, government presented an ex parte in camera submission for court review of the possible invocation of a § 552(c) exclusion).

33. This is not surprising given the fact that the exclusions were designed to avoid having an agency tip off requesters about the existence of responsive records. Accordingly, the cases where an agency relied on an exclusion may, in many cases, have actually been litigated as adequacy-of-the-search cases. Memorandum from the Attorney General, *supra* note 16. *See, e.g.*, Clemente v. F.B.I., 741 F. Supp. 2d 64, 79 (D.D.C. 2010) (case challenging adequacy of the search involving request for informant records).

34. Memphis Publ'g Co. v. Fed. Bureau of Investigation, 879 F. Supp. 2d 1 (D.D.C. Jan. 31, 2012).

35. *See id.* (Plaintiffs' Motion to Compel Vaughn Index for Ernest Withers' Confidential Informant File and Motion for In Camera Review of the File (Dkt. No. 18)).

36. *See id.* (Defendant's Opposition to Plaintiffs' Motion to Compel Vaughn Index for Ernest Withers' Confidential Informant File and Motion for In Camera Review of the File (Dkt. No. 23)).

37. *Id.*

38. *Id.* The FBI also submitted briefing suggesting that judicial review of an agency's reliance on a statutory exclusion was limited to determining whether the alleged "informant records maintained by a criminal law enforcement agency" were "requested by a third party according to the informant's name or personal identifier," and whether the "informant's status as an informant has [not] been officially confirmed." 5 U.S.C. § 552(c)(2). If these statutory criteria are satisfied, the FBI is entitled to rely on the (c)(2) exclusion provision of the FOIA. The discretion of the agency to invoke the exclusion once these statutory criteria are satisfied is not reviewable. *See id.* (Defendant's Postargument Memorandum (Dkt. No. 28)).

39. *Id.* at 14.

40. *See* Transcript of Proceedings from Aug. 28, 2012, Memphis Publ'g Co. v. Fed. Bureau of Investigation (2012) (Dkt. No. 67).

41. Marc Perrusquia, *Withers Secretly Gave FBI Photos of Martin Luther King's Staff, Spied on Memphis Movement: Records Released to Newspaper as Part of Settlement with FBI*, Commercial Appeal, Mar. 30, 2013, *available at* http://www.commercialappeal.com/news/2013/mar/30/ernest-withers-spied-fbi-photos-martin-luther-king; Marc Perrusquia, *Newly Released Files Document FBI's Interest in Mid-South Nation of Islam*, Commercial Appeal, July 7, 2013, *available at* http://www.commercialappeal.com/news/2013/jul/07/newly-released-files-document-fbis-interest-in.

42. Pickard v. Dep't of Justice, 653 F.3d 782 (9th Cir. 2011).

43. *Id.*

44. *See id.* (Defendant's Supplemental Brief in Support of Defendant's Motion for Summary Judgment (Dkt. No. 68)).

45. *Id.* at 785.

46. Pickard v. Dep't of Justice, Civ. Action No. 3:06-cv-00185-CRB (N.D. Cal.) (Dkt. No. 108).

47. *Pickard*, 653 F.3d 782.

48. *Id.* at 787–88.

49. *Id.*

50. *Id.* at 788 (emphasis in original).

51. *Id.* at 789.

52. Islamic Shura Council of S. Cal. v. F.B.I., 635 F.3d 1160 (9th Cir. 2011).

53. *Id.* at 1162. Plaintiffs are the following six organizations and five citizens in Southern California: Islamic Shura Council of Southern California, Council on American Islamic Relations–California (CAIR), Islamic Center of San Gabriel Valley, Islamic Center of Hawthorne, West Coast Islamic Center, Human Assistance and Development International, Inc., Dr. Muzammil Siddiqi, Shakeel Syed, Hussam Ayloush, Mohammed Abdul Aleem, and Rafe Husain.

54. Islamic Shura Council of S. Cal. v. F.B.I., 779 F. Supp. 2d 1114, 1118 (C.D. Cal. 2011).

55. *Islamic Shura Council of S. Cal.*, 635 F.3d at 1162.

56. *Islamic Shura Council of S. Cal.*, 779 F. Supp. 2d at 1118.

57. *Id.*

58. *Id.*

59. Islamic Shura Council of S. Cal. v. F.B.I., 635 F.3d 1160, 1163 (9th Cir. 2011).

60. *Islamic Shura Council of S. Cal.*, 779 F. Supp. 2d at 1124–25.

61. *Id.* at 1123.

62. *Id.* at 1125.

63. *Islamic Shura Council of S. Cal.*, 278 F.R.D. 538, 545 (C.D. Cal. 2011).

64. *Islamic Shura Council of S. Cal.*, Case No. 12-55305, 2013 WL 3992123 (9th Cir. July 31, 2013).

65. 76 Fed. Reg. 15236, 15239 (Mar. 21, 2011).

66. *See* Jennifer LaFleur, *Government Could Hide Existence of Records Under FOIA Rule Proposal*, ProPublica (Oct. 24, 2011), http://www.propublica.org/article/government-could-hide-existence-of-records-under-foia-rule-proposal; Freedom of Information Act Regulations, Regulations.gov, http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=10;po=10;D=DOJ-OAG-2011-0005 (last visited Jan. 19, 2014); Comment to Proposed Rule from American Civil Liberties Union, Citizens for Responsibility and Ethics in Washington (CREW), and OpenTheGovernment.org to Office of Info. Pol'y, U.S. Dep't of Justice (Oct. 19, 2011), *available at* http://www.openthegovernment.org/sites/default/files/FOIA%20552c%20Comment%20-%2010-19-11%20-%20FINAL.pdf; Comment of Senator Patrick Leahy on the Justice Department's Decision to Withdraw a Proposed Rule to Revise Freedom of Information Act Regulations (Nov. 3, 2011), *available at* http://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-on-the-justice-departments-decision-to-withdraw-a-proposed-rule-to-revise-freedom-of-information-act-regulations.

67. *See* Terry Frieden, *Justice Department Drops Proposed FOIA Rule to Deny Existence of Documents* CNN.com (Nov. 3, 2011), http://www.cnn.com/2011/11/03/us/justice-foia-denial.

68. Office of Info. Policy, Dep't of Justice, Guidance on Implementing FOIA's Statutory Exclusion Provisions (Sept. 2012), *available at* http://www.justice.gov/oip/foiapost/2012foiapost9.html.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*