THE FREEDOM OF INFORMATION ACT AND *Vaughn v. Rosen*: SOME PERSONAL COMMENTS*

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Beginning in the summer of 1969, large numbers of law students were mobilized by Ralph Nader for intensive studies of federal agencies. These projects culminated in a number of critical reports focusing on the Federal Trade Commission, the Interstate Commerce Commission, the National Air Pollution Control Administration, and the Food and Drug Administration.[1] The project participants encountered the bureaucratic roadblocks which citizens commonly face in attempting to invoke the Freedom of Information Act.[2]

My first association with a federal agency was equally fraught with obstacles. In July of 1970, I joined Ralph Nader's Public Interest Group in Washington, D.C., as an associate attorney, as Harrison Wellford was completing his study of the United States Department of Agriculture.[3] As a legal advisor to the task force and as an investigator of federal meat and poultry inspection programs, I was

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*This article was not conceived as a detailed analysis of the holding of the court of appeals in *Vaughn v. Rosen* [484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 94 S.Ct. 1564 (1974)]. Such an analysis may be found in 87 HARV. L. REV. 854 (1974). Rather, the article which follows is a personal commentary on the events which led to the litigation and the plaintiff-author's view of the effect of the litigation.

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1. These reports were published respectively as E. COX, R. FELLMETH & J. SHULTZ, NADER'S RAIDERS: REPORT ON THE FEDERAL TRADE COMMISSION (1970); R. FELLMETH, INTERSTATE COMMERCE COMMISSION (1970); J. ESPOSITO, THE VANISHING AIR (1970); J. TURNER, THE CHEMICAL FEAST (1970).

2. Freedom of Information Act, 5 U.S.C. § 552 (1970). *See generally* Forkosch, *Freedom of Information in the United States*, 20 DE PAUL L. REV. 1 (1970). Hogan, Rehnquist & Mondello, *Rights in Conflict: Reconciling Privacy with the Public's Right to Know*, 63 L. LIB. J. 551 (1970); Horton, *The Public's Right to Know*, 3 N.C. CEN. L.J. 123 (1972); Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970); Kutner, *Freedom of Information: Due Process of the Right to Know*, 18 CATH. LAW. 50 (1972); Nader, *Freedom From Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); Plesser, *Freedom of Information Act: What It Is and How to Use It*, 31 NLADA BRIEF. 369 (1973); *Symposium: The Freedom of Information Act and the Agencies*, 23 AD. L. REV. 129 (1971); *Symposium: Public Access to Information*, 68 NW. U.L. REV. 177 (1973); *Symposium: The People's Right to Know: The Spirit of Freedom of Information*, 8 TRIAL 12 (No. 2 1972).

3. H. WELLFORD, SOWING THE WIND (1971).

regaled with tale after tale of bureaucratic resistance. Methods of resistance varied from the subtle and ingenious to the blatant and forceful.[4] Mr. Wellford described the Department as one of the most resistive ever studied by a Nader group.[5] The Department's resistance was partly responsible for a landmark freedom of information case, *Wellford v. Hardin*.[6]

In a speech to the American Society for Public Administration in Washington, D.C., in October of 1970, Ralph Nader explained some of the methods of bureaucratic evasion of the Act. One of the techniques cited was "the contamination ploy" which consisted of mingling available information with information exempt under the Act and asserting that the entire file was unavailable. The "I'm-sorry-but-it's-not-here" technique was another favorite means of evading the Act. An even more effective method, cited by Mr. Nader, was to insist that data was maintained in such a manner that it could not be provided to a citizen without prohibitive administrative costs.

In the same speech, Mr. Nader also announced a study of the United States civil service system—a project which I was to direct for over a year and a half. The focus of the project became the activities of the United States Civil Service Commission.[7] Gener-

4. An example of the latter took place in the Department of Agriculture. After an unsuccessful attempt to bar student investigators from the Department's library, Department officials removed over a weekend a large number of publications from the library's shelves concerning the regulation of insecticides. Nader, *supra* note 2, at 10.

5. *See Hearings on Freedom of Information, Executive Privilege, and Secrecy in Government before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers and Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., vol. II, at 95—107 (1973) (testimony of Harrison Wellford).

6. Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971). Harrison Wellford, Executive Director of the Center for Responsive Law, requested disclosure under the Freedom of Information Act of copies of letters of warning sent by the Department of Agriculture to meat and poultry processors and of information regarding the administrative detention of meat and poultry products. The Administrator of the Consumer and Marketing Service denied the request on the grounds that the records were investigatory files and thus exempt from mandatory disclosure under 5 U.S.C. § 552(b)(7) (1970).

The court of appeals affirmed the district court's order enjoining the withholding of the information, reasoning that the letters and reports of administrative detention were written records of regulatory action already taken and were not information-gathering steps which had to be shielded under the investigatory files exemption of the Act. 444 F.2d at 24.

7. The results of the study were published as R. VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM (1974).

ally, the Commission cooperated with the study. Because of this cooperative attitude, the study groups had access to most of the Commission documents and records requested.

Among the documents which the Commission refused to provide were copies of reports containing the findings of Commission inspection teams which studied the operation of federal departments and agencies. The study group believed the Commission should make such documents available to the public. The group argued that the publication of such reports would increase the information available to Commission inspectors, and would reduce the reliance upon top management officials who had a vested interest in influencing the reports. By publishing its inspection reports, the Commission would attract academic interest in the federal personnel system and provide a basis for evaluation of the efficacy of the Commission's own program of inspection. In some instances there may be a particularly compelling ethical obligation to publicize inspection findings. If, for example, an inspection should find that enforcement of a health and safety law, such as the Federal Coal Mine Health and Safety Act of 1969,[8] was impeded by negligent or improper use of personnel, there would be a duty to bring these matters to the attention of the public and of Congress.

Commission officials feared that public access to the reports would adversely affect the influence of the Commission with agencies. The officials believed that agencies were cooperative because they knew they would not be publicly castigated. Therefore, public access to the documents would reduce the ability of the Commission to obtain information and views.[9]

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8. Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801—960 (1970).

9. In a letter of Sept. 8, 1971, to the Public Interest Research Group, Bernard Rosen, executive director of the Civil Service Commission, stated:

> The Chairman and I also appreciate your suggestions regarding the desirability of making our evaluation reports public. There are certain arguments in favor of such an approach and we have given this question serious thought from time to time within the Commission.
>
> On further reflection, however, we are convinced that such action would be counterproductive. Our experience has been that the threat of publication would have a negative effect on the acceptance and impact of our review findings. They would defeat the very constructive joint efforts we seek and have in fact obtained in the last few years to find immediate and long range solutions to problems. We believe that we stand to lose more than we would gain in terms of objectives you and we are interested in achieving if we adopt the course you propose.

Id.

These policy disagreements soon led to a legal challenge to the right of the Commission to withhold these reports from the public. While the study of the Commission was being conducted, developments around the country were affecting the future importance of the Freedom of Information Act. The Act had been interpreted in a number of significant decisions.[10] The effect of this litigation had

10. The following is a list of significant cases under the Freedom of Information Act, decided both before and after *Vaughn*, and categorized as to area or exemption in 5 U.S.C. §§ 552(b)(1)—(9) (1970).

Procedural cases: National Cable Television Ass'n v. FCC, 479 F.2d 183 (D.C. Cir. 1973)(FCC required to identify all documents used to support a proposed rule and establish which documents were exempt from disclosure under the Freedom of Information Act); Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)(where FTC's notice of rulemaking proceeding indicated reliance on "extensive staff investigation . . . accumulated experience and available studies and reports," request for disclosure of items mentioned in notice adequately identified the records to be disclosed).

Mandated disclosure under 5 U.S.C. § 552(a)(2) (1970): Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., 482 F.2d 710 (D.C. Cir. 1973); Stokes v. Brennan, 476 F.2d 699 (5th Cir. 1973)(ordering disclosure by Labor Department of materials used in training inspectors for Occupational Safety and Health Administration); Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973)(ordering disclosure by IRS of certain letter rulings, technical advice memoranda, communications, and indices relating thereto).

First exemption under section 552(b)—matters specifically required by executive order to be kept secret in the interest of national defense or foreign policy: Environmental Protection Agency v. Mink, 410 U.S. 73 (1973)(rejecting argument that section 552(b)(1) authorizes or permits *in camera* inspection of contested documents classified by executive order as top secret to determine if all such documents were properly so classified).

Second exemption—matters related solely to the internal personnel rules or practices of an agency: Stokes v. Brennan, *supra* (materials used in training inspectors for Occupational Safety and Health Administration not within exemption as they were not solely or even primarily composed of materials relating to internal personnel matters); Hawkes v. IRS, 467 F.2d 787 (6th Cir. 1972)(internal practices and policies referred to in the exemption relate only to employer-employee concerns upon which the Senate report of the Act focused); Long v. IRS, 339 F. Supp. 1266 (W.D. Wash. 1971)(exemption authorized by section 552(b)(2) was not designed to prevent premature disclosure of information pertinent to litigation with an agency).

Third exemption—matters specifically exempted from disclosure by statute: Evans v. Dep't of Transp., 446 F.2d 821 (5th Cir. 1971)(nondisclosure justified where FAA was authorized by statute to withhold information from public on objection of person whose interests would be adversely affected, unless disclosure was required in the public interest); Stretch v. Weinberger, 359 F. Supp. 702 (D.N.J. 1973)(plaintiff newspaper publisher and reporter entitled to disclosure of extended care facility survey reports utilized by HEW in Medicare reimbursement

program, notwithstanding statute providing that Secretary cannot disclose information obtained by him); Legal Aid Soc'y v. Shultz, 349 F. Supp. 771 (N.D. Cal. 1972)(prohibition of disclosure in section 709(e) of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e—8(e) (1970)], cannot be read to forbid disclosure by Treasury Department of information required of government contractors merely because the Equal Employment Opportunity Commission is allowed to see such information).

Fourth exemption—trade secrets and commercial financial information obtained from a person and privileged or confidential: Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971)(financial information submitted by corporations to FTC during course of corporate acquisition matter before Commission was within exemption and not subject to disclosure to litigants in another corporate acquisition matter); Bristol-Myers v. FTC, *supra* (bare claim of confidentiality insufficient to immunize files of government agency from scrutiny as district courts have responsibility of determining validity and extent of claim after careful consideration of documents in question); Legal Aid Soc'y v. Shultz, *supra* (ordering Department of Labor to present contested materials to court for *in camera* inspection so that court might delete any exempted portions from disclosure); Consumers Union of the United States, Inc. v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971) (to be exempt from disclosure under section 552(b)(4), the information must have been obtained from outside the government).

Fifth exemption—inter- or intra-agency memoranda or letters which would not be available by law to a party or an agency in litigation with that agency: Environmental Protection Agency v. Mink, *supra* (exemption authorized by section 552(b)(5) does not automatically require that otherwise confidential documents be made available for district court's *in camera* inspection, regardless of how little factual material they contain); Grumman Aircraft Eng'r Corp. v. Renegotiation Bd., *supra* (final agency opinions may not be withheld as inter- or intra-agency documents); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (factual information is exempted by section 552(b)(5) only if inextricably intertwined with the policy-making process); Bristol-Myers v. FTC, *supra* (exemption of agency memoranda may not be applied to purely factual reports and scientific studies).

Sixth exemption—personnel, medical, and similar files, disclosure of which would constitute a clearly unwarranted invasion of personal privacy: Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973)(exemption indicates that, while not limited to strictly medical or personnel files, "similar files" must have same characteristics of confidentiality that attach to medical or personnel files if they are to be exempted); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971)(exemption requires a court reviewing the matter de novo to balance the right of privacy of affected individuals against the right of the public to be informed).

Seventh exemption—investigatory files compiled for law enforcement purposes, except to the extent available by law to a party other than an agency: Weisberg v. Dep't of Justice, 489 F.2d 1195 (D. C. Cir. 1973)(materials compiled by FBI following assassination of President Kennedy were part of investigatory files compiled for law enforcement purposes, and therefore exempt from disclosure); Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971)(exemption should be limited specifically to files of an investigatory nature and should not be enlarged to include records of administrative action taken to enforce the law); Bristol-Myers v. FTC, *supra* (exemption

been to restrict agency interpretations concerning the scope of exemptions to the Act and to limit the ability of administrators to manipulate the substantive provisions of the Act. Moreover, public awareness of the Act was growing and there was an increased willingness to sue, if necessary, to obtain requested information. The growth of public interest groups[11] capable of providing legal manpower for such suits stimulated use of the Act. The subsequent suit against the Executive Director of the Civil Service Commission to obtain copies of the inspection reports illustrated these developments.

Despite the clarity of the Commission's position, I directed a formal request for the inspection reports to Bernard Rosen, Executive Director of the Civil Service Commission, on May 23, 1972. Mr. Rosen forwarded it to Gilbert Schulkind, Director of the Bureau of Personnel Management Evaluation, who denied the request by letter on June 14, 1972.[12]

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for investigatory files applicable only when prospect of enforcement proceedings is sufficiently concrete); Ditlow v. Volpe, 362 F. Supp. 1321 (D.D.C. 1973)(investigatory label applied by an agency to information is not controlling as to whether material is within exemption); Legal Aid Soc'y v. Shultz, *supra* (material already in the hands of potential parties to law enforcement proceedings was not within exemption).

Eighth exemption—information for the use of an agency responsible for the regulation or supervision of financial institutions: M.A. Shapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972)(SEC staff study not exempted in that "financial institutions" as defined by defendants under 15 U.S.C. § 79 et seq. (1970) does not include national securities exchanges or broker-dealers to which study applied).

The ninth exemption, concerning geological and geophysical data concerning wells, has not yet been the subject of litigation.

11. There is a considerable body of recent literature on lawyering in the public interest. *See, e.g.*, Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Presser, *Public Interest Litigation in the United States Court of Appeals for the District of Columbia Circuit: A Current Perspective*, 41 GEO. WASH. L. REV. 260 (1972); *Symposium: The Practice of Law in the Public Interest*, 13 ARIZ. L. REV. 797 (1971).

12. The denial repeated many of the Commission's previous statements. Gilbert Schulkind stressed the importance of maintaining the confidentiality of the reports in order to preserve the existing cooperation and candid expression of views on the part of agency managers and employees which the Commission needed to perform its evaluation function. Hence:

> [P]ublic release of our reports would undermine the whole effectiveness of our evaluations as a useful vehicle for pursuing personnel management improvements which are in the interest of Federal employees. We believe, there-

I notified Mr. Rosen on June 19 that I considered the written response "a final administrative determination of the Commission under the applicable regulations."[13] Mr. Rosen replied by letter on June 26[14] that this was an incorrect interpretation of the regulation and treated the letter as an appeal from the denial. Two months later, on August 17, Mr. Rosen notified me[15] that the appeal had been denied on the grounds that the information sought was exempt from disclosure under the second, fifth, and sixth exemptions of the Freedom of Information Act. These provisions exempt from disclosure documents related solely to the internal personnel rules and practices of an agency,[16] inter-agency memoranda,[17] and personnel, medical, and similar files, the disclosure of which would constitute a *clearly unwarranted* invasion of privacy.[18]

On August 31, 1972, a complaint was filed in the United States District Court for the District of Columbia seeking release of the requested information.[19] On December 22, 1972, the district court entered an order granting a summary judgement for Mr. Rosen and the Commissioners of the Civil Service Commission.[20] No *in camera* inspection of the documents had been conducted.

On appeal, the briefs of both parties focused upon whether or not the inspection reports were inter-agency memoranda exempted

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fore, that our position on their release is in the best interest of both the Federal Government and Federal employees.

Letter from Gilbert Schulkind to Robert Vaughn, June 14, 1972.

13. The regulations in effect at that time stated:

In the event of a difference concerning the availability of disclosure of information . . . the matter shall be referred by the head of the bureau or staff office concerned, through the Director, Office of Public Affairs, to the Executive Director. The decision of the Executive Director shall be in writing and shall state the reasons for the decision. That decision is the only administrative appeal within the Commission and the obtaining of that decision constitutes the exhaustion of the administrative remedy within the Commission.

5 C.F.R. § 294.105(b) (1972).

14. Letter from Bernard Rosen to Robert Vaughn, June 26, 1972.

15. Letter from Bernard Rosen to Robert Vaughn, Aug. 17, 1972.

16. Freedom of Information Act, 5 U.S.C. § 552(b)(2) (1970).

17. *Id.* at § 552(b)(5).

18. *Id.* at § 552(b)(6).

19. Vaughn v. Rosen, Civil No. 73-1039 (D.D.C., filed Aug. 31, 1972), *rev'd*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 1564 (1974).

20. As the court of appeals characterized this order:

The trial court below granted appellee's motion for summary judgment without giving any reasons for its action. We do not, therefore, know why the District Court found the documents to be exempt from disclosure.

Vaughn v. Rosen, 484 F.2d 820, 822 n.2 (D.C. Cir. 1973).

from the Act.[21] However, during oral argument, the court of appeals expressed concern about the inability of the plaintiff to challenge, without access to the documents, the government's contention that the documents did indeed fall under one of the exemptions of the Act.

On August 20, 1973, the court of appeals decided *Vaughn v. Rosen*,[22] an opinion characterized by one public interest attorney as "one of the two or three most important freedom of information cases ever decided."[23] The court of appeals established sweeping guidelines which a government agency must follow in denying requested information under the Act. The court concluded that

> the present method of resolving Freedom of Information Act disputes actually *encourages* the Government to contend that large masses of information are exempt . . . .
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> . . . .
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> It is vital that some process be formulated that will (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.[24]

The guidelines require detailed justification to insure that courts will no longer accept conclusory and generalized allegations of exemptions.[25] In addition, the government agency is to specify in detail which portions of the document are disclosable and which are allegedly exempt.[26] The court suggested that this requirement might be achieved by developing a system of itemizing and indexing that would correlate statements made in the government's justification for refusal with the actual portions of the document.[27] Further, the court authorized the appointment of special masters to assist the trial judge in the burden of examining and evaluating voluminous documents.[28]

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21. Brief for Plaintiff at 8—15, Brief for Defendant at 10—18, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

22. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 94 S. Ct. 1564 (1974).

23. Telephone interview with Ronald Plesser, Director of the Freedom of Information Clearinghouse, Washington, D.C., April 23, 1974.

24. 484 F.2d at 826.

25. *Id.*, *citing* Environmental Protection Agency v. Mink, 410 U.S. 73, 93 (1973).

26. 484 F.2d at 827.

27. *Id.*

28. *Id.* at 828.

The court recognized that the procedural requirements which it had established might impose a substantial burden on an agency seeking to avoid disclosure. However, the court pointed out the practical resolution to this problem:

> [T]he current approach places the burden on the party seeking disclosure, in clear contravention of the statutory mandate. Our decision here may sharply stimulate what must be, in the final analysis, the simplest and most effective solution—for 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. A sincere policy of maximum disclosure would truncate many of the disputes that are considered by this court. And if the remaining burden is mostly thrust on the Government, administrative ingenuity will be devoted to lightening the load.[29]

The effect of the court of appeals ruling can be ascertained by examination of the application of the standard on remand to the district court.[30] The court of appeals' guidelines required detailed justifications of the exemptions under which requested information had been withheld. Justifications were to be related to indexed portions of the documents to provide both the court and opposing counsel a basis upon which to evaluate the government's claims.

In *Vaughn* approximately 2,448 documents were involved, filling 17 standard-size, five-drawer filing cabinets in the Civil Service Commission.[31] On the basis of limited indexing, a Commission official estimated that indexing all of the documents according to the court of appeals' guidelines would require 4.93 man years of work and cost the government $96,176.40.[32] Instead of indexing all of the reports, the Commission chose nine reports which it deemed representative of the requested documents. From these documents were deleted any references which would identify individuals or particu-

29. *Id.* (footnote omitted).

30. On March 19, 1974, the Supreme Court denied a writ of certiorari in the case [94 S. Ct. 1564 (1974)], and the case file was turned over to Judge Pratt of the United States District Court for the District of Columbia, pursuant to the court of appeals' order. 484 F.2d at 828. Preliminary motions dealing with application of the court of appeals' guidelines have already been heard, but a final disposition of the case has not yet been made.

31. Defendant's Memorandum of Points and Authorities on Motion on Remand, Vaughn v. Rosen, Civil No. 73-1039 (D.D.C., remanded March 19, 1974) (affidavit of John J. Lafferty, Deputy Director, Bureau of Personnel Management Evaluation, Civil Service Commission).

32. *Id.*

lar agency installations. The documents were then indexed, illustrating why particular portions were exempt. The Commission submitted these documents to the court as complying with the court of appeals' guidelines. Although only nine of the documents were indexed, they were accepted by the plaintiff. As representative documents they provided the factual basis for arguing the applicability of the exemptions envisioned by the court of appeals' guidelines. Because many of the documents followed a similar format, representative documents were acceptable. Although the cost of indexing these representative documents, according to the responsible Commission official, was $353.89,[33] the decision of the court of appeals remains a sound one.

The basic policy of the Act is that governmental information ought to be public information.[34] Only limited exceptions are made to this basic policy. This policy gives effect to the interest which a democratic society has in an informed citizenry. Especially when public respect for government institutions is low, every attempt should be made to insure that government officials cannot maintain the aura of governmental inviolability and shield the incompetence and corruption which exist in administrative agencies. The toleration of such activity ultimately leads to the destruction of public faith in those institutions.

On the other hand, access to information is not a disinfectant which will automatically cleanse infected parts of the body politic. Information may be manipulated and distorted by an agency's foes as well as its advocates. However, access to information provides the best possibility that corruption will be discovered. Information does not insure a vigilant citizenry willing to fight to preserve democratic institutions, but it does make such action possible. Without free access to governmental information, citizens battered by wave after wave of "inoperative statements" soon become deaf to words spoken honestly and sincerely.

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33. *Id.*

34. The House Committee on Government Operations, in reporting the legislation to the floor, stated:

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. 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 of privacy and his right to confide in his Government. [The Freedom of Information Act] strikes a balance considering all these interests.

H.R. REP. No. 1497, 89th Cong., 2d Sess. 6 (1966).

As the courts gradually limit the more extravagant agency interpretations of the scope of exemptions, the processes which create incentives to withhold information must also be examined. The decision of the court of appeals in *Vaughn v. Rosen* is a courageous step in that direction.

The same willingness to insure that the policies and purposes of the Act are implemented must be applied by the courts and by Congress to other problems which will arise under the Act. Among the foreseeable problems is the adaptation of the Act to computer storage of data. As government agencies come to rely upon computers for the storage of information, hard data files will be replaced by computer printouts. The ability of a citizen to obtain desired information will rest heavily upon whether the computer has been programmed to retrieve the data, and to retrieve it in the manner in which the citizen requests it.

A recent effort by the National Taxpayers Union to obtain information from the Civil Service Commission illustrates the obstacles which a citizen may face in attempting to converse with an agency's computer.[35] The organization sought to learn the number of military retirees who had been assigned to supergrade (GS 16—18) positions in the federal government. The Commission responded, "Most of the information you need can be provided by our Central Personnel Data File."[36] The Commission, however, also reported that because the information "is not available 'on the shelf,' it will be necessary for us to make special computer runs to satisfy your request. These runs are performed on a cost reimbursement basis. Before we begin the requested work, we need the enclosed agreement (S136) signed and returned to us."[37] The estimated cost of these runs was $1,526.00.

Although the Freedom of Information Act makes provision for fees for the administrative costs of gathering and collecting information,[38] the costs of computer runs for even routine information of this sort eliminates all but the wealthy from access to information under the Act.[39]

35. *See* letter from William S. Taylor, Research Director, National Taxpayers Union, to Joseph Damico, Director of the Bureau of Executive Manpower, Civil Service Commission, January, 1974.

36. Letter from G.D. Bearden, Director, Bureau of Manpower Information Systems, Civil Service Commission, to William S. Taylor, Jan. 18, 1974.

37. *Id.*

38. 5 U.S.C. § 552(a)(3) (1970).

39. Legislation to amend the Freedom of Information Act, passed recently by the

Of course, government agencies have a legitimate interest in improving their data storage and the computerizing of files which were the original source of the information. However, the purposes of the Freedom of Information Act and the decision in *Vaughn v. Rosen* establish the framework in which the problem of computerized records should be solved. Judicial interpretation of the Act in these situations must apply the underlying policy of the Act—that governmental information is public information. *Vaughn v. Rosen* suggests the approaches which a court might consider.[40] The burden remains upon the government to justify procedures which tend to restrict the availability of information under the Act. This burden may affect the manner in which initial computer programs are writ-

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Senate, recognized the necessity of insuring the reasonableness of fees charged under the Act. H.R. 12471, 93d Cong., 2d Sess. § (b)(2) (1974) (originally passed by the Senate as S. 2543 on May 30, 1974). The Office of Management and Budget would promulgate regulations specifying a uniform schedule applicable to all agencies. Such fees would be limited to reasonable standard charges for document search and duplication and provide recovery of only the direct costs of such search and duplication.

The language of the Senate report accompanying the amendments also reflects an attempt to provide for charges involved in obtaining computerized information which is not readily available:

> With respect to agency records maintained in computerized form, the term "search" would include services functionally analogous to searches for records that are maintained in conventional form. Difficulties may sometimes be encountered in drawing clear distinctions between searches and other services involved in extracting requested information from computerized record systems. Nonetheless, the committee believes it desirable to encourage agencies to process requests for computerized information even if doing so involves performing services which the agencies are not required to provide—for example, using its computer to identify records. With reference to computerized record systems, the term "search" would thus not be limited to standard record-finding, and in these situations charges would be permitted for services involving the use of computers needed to locate and extract the requested information.

S. REP. No. 854, 93d Cong., 2d Sess. 12 (1974).

The House of Representatives' counterpart to this legislation [H.R. 12471, 93d Cong., 2d Sess. (1974)], was passed by the House on March 14, 1974. It did not specifically provide for user fees. However, the committee report on the bill noted that

> . . . user fees are applicable to requests for information and may be assessed for production of copies and time spent by agency employees in search of requested information. Agency regulations currently provide for such fees, and this legislation does not change the status of those existing provisions.

H.R. REP. No. 876, 93d Cong., 2d Sess. 9 (1974).

40. *See* text accompanying notes 23—29 *supra*.

ten, the willingness of an agency to seek the least expensive method of retrieving such information, and, in many instances, the agency's estimate of costs (including factors such as available but unused computer time).

The solutions will not be easy and, as demonstrated by the decision in *Vaughn v. Rosen*, the burdens placed upon government agencies will be great. However, the purposes underlying the Act and the practical effect of such requirements on agency practices justify such action. The Freedom of Information Act has not met even the modest expectations of many of its advocates, due largely to the ingenuity of agency employees in avoiding the Act. *Vaughn v. Rosen* seeks to channel that ingenuity into realization rather than avoidance of the purposes of the Act.

The *Vaughn* decision represents a recognition of the built-in incentives to withhold information which exist in federal agencies. A view of the public as outsiders,[41] together with a natural desire to protect the agency's activities from scrutiny, can induce an agency employee to withhold information which falls clearly within the Act. When the requested information could embarrass the employee, his superiors or his agency, or when the information is sought by a troublesome critic of the agency, the incentives to force a citizen into lengthy and expensive litigation will become practically irresistible.

One method of equalizing the incentives to insure that agency employees will act in good faith would be legislative provision for administrative sanctions. Such sanctions could be applied when a federal district court finds that information had been withheld in bad faith or without a reasonable basis in law. If appropriate, a bifurcated hearing might be held to determine whether the imposition of administrative sanctions is justified. The first part of the hearing would determine whether the information was exempt from disclosure under the Act. The second part would determine whether the employee had withheld the information in bad faith.

The administrative sanctions need not be severe. Suspensions from duty from five to 30 days, with attendant loss of pay, might be appropriate. Such sanctions are routinely applied to federal em-

41. Peter Blau describes how employees' antagonistic attitudes toward their superiors are diverted by redirecting that antagonism as a group against outsiders and frustrating attempts by the public to obtain information without the cost of litigation. Thus, it is informal intra-agency social interaction, rather than strict regulation, which hinders public access, according to Blau. P. BLAU, BUREAUCRACY IN MODERN SOCIETY 50 (1956).

ployees for minor infractions, such as tardiness or abusive language or conduct, and these sanctions are now imposed without an opportunity for a hearing.[42]

Administrative sanctions would help to insure a balancing of incentives. While far from Draconian and while providing protections presently unavailable to employees in an administrative setting, they would act to guarantee, as does the *Vaughn* case, that the purposes of the Freedom of Information Act will be fulfilled. Such suspensions are calibrated sanctions, varying in monetary severity depending upon the salary level and responsibility of an employee.[43]

The existence of sanctions will not destroy the effectiveness of government service but rather will insure that laws are administered according to their public purpose. Sanctions for improper denial of public information are not inconsistent with a modern and complex administrative system. In Sweden failure to provide non-secret documents may be a violation of one of two criminal statutes.[44] One statute requires an intentional misuse of position. The other does

42. The Commission may only review the merits in cases of suspensions for less than 30 days involving alleged discrimination—on the basis of race, sex, color, religion, national origin, politics, marital status, or physical handicap—or lack of adequate time between advance notice and suspension. In the remainder of cases, only the procedural aspects may be reviewed by the Commission. 5 C.F.R. §§ 752.301, 752.304 (1974).

43. An amendment to the Freedom of Information Act passed by the Senate would provide a statutory scheme for imposing sanctions:

> Whenever records are ordered by the court to be made available under this section, the court shall on motion by the complainant find whether the withholding of such records was without reasonable basis in law and which Federal officer or employee was responsible for the withholding. Before such findings are made, any officers or employees named in the complainant's motion shall be personally served a copy of such motion and shall have 20 days in which to respond thereto, and shall be afforded an opportunity to be heard by the court. If such findings are made, the court shall, upon consideration of the recommendation of the agency, direct that an appropriate official of the agency which employs such responsible officer or official suspend such officer or employee without pay for a period of not more than 60 days or take other appropriate disciplinary or corrective action against him.

H.R. 12471, 93d Cong., 2d Sess. § (b)(2) (1974) [originally passed by the Senate as S. 2543, on May 30, 1974].

The House version of this legislation did not provide for any sanctions to be taken against individual government employees for wrongfully withholding information. H.R. 12471, 93d Cong., 2d Sess. (1974).

44. BRB 20:1 (chapter 20, section 1 of *Brottsbalken*, the Swedish criminal code) provides:

> A civil servant who, by act or omission, misuses his position, to the detri-

not require such intent but bases liability on neglect, poor judgement or lack of skill. Although criminal in nature and arguably more severe than the administrative sanctions recommended in this article, the Swedish laws, which have existed for more than one hundred years, do not appear to have crippled the administration of that country.[45]

Comments about bureaucracy and about the weather often illustrate the same attitudes toward both: ubiquitous yet unnoticed; important yet trivial; continuously recognized yet rarely examined; often troublesome yet uncontrollable. From a personal viewpoint, *Vaughn v. Rosen* is an important decision because of the court's recognition of the realities of administrative practice. It embodies a method of thought which should enable judges, legislators, and attorneys to use the tools of the judicial system to shape and mold the administrative process.

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ment of the public or some private person, shall, if not guilty of embezzlement or other violation of trust or any other crime, be sentenced for misuse of office to suspension or dismissal; if the circumstances require it, he shall be sentenced to prison for no more than two years. In slight cases, he shall be sentenced only to a fine. If the crime is especially serious, he shall be sentenced to dismissal and imprisonment for no more than six years.

Id.

BRB 20:4 provides:

A civil servant who, out of neglect, poor judgment, or lack of skill, ignores what is required of him by law, regulation or other ordinance, special directive, or the nature of his responsibilities, shall, if not guilty of misuse of office or some other crime, be sentenced for error in office to a fine or suspension. If the crime is especially serious, he shall be sentenced to suspension or dismissal; if the circumstances require it, he shall also be sentenced to imprisonment for no more than one year.

Id.

See generally Anderson, *Public Access to Government Files in Sweden*, 21 AM J. COMP. L. 419 (1973).

The author wishes to thank Richard Neuman, a student at the Washington College of Law, for his translation of the Swedish material.

45. A number of states have enacted freedom of information laws which provide penalties, including removal from office, for government employees who wrongfully withhold public information. *See* S. REP. No. 854, 93d Cong., 2d Sess., app. at 63—64 (1974).

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