United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 25, 2006 Decided June 2, 2006

No. 05-5256

JUDICIAL WATCH, INC.,
APPELLANT

v.

FOOD & DRUG ADMINISTRATION, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 00cv02973)

Meredith L. Di Liberto argued the cause for appellant. With her on the briefs was *Paul J. Orfanedes*.

Fred E. Haynes, Assistant U.S. Attorney, argued the cause for appellees Food & Drug Administration. With him on the brief were *Kenneth L. Wainstein*, U.S. Attorney, *Michael J. Ryan*, and *Eric M. Blumberg*, Deputy Chief Counsel, Food & Drug Administration. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Nancy L. Buc, *Kate C. Beardsley*, and *Carmen M. Shepard* were on the brief for appellees Population Council, Inc. and Danco Laboratories, LLC.

Before: SENTELLE, HENDERSON and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Judicial Watch filed an action in the District Court for the District of Columbia, seeking enforcement of its Freedom of Information Act ("FOIA") request for all documents related to the Food and Drug Administration's ("FDA") approval of the drug mifepristone. It now appeals from the District Court's grant of summary judgment in favor of the FDA. Although we affirm the District Court's decision in a number of respects, because the FDA produced an inadequately detailed *Vaughn* index, we remand for further explanation of some of the index's entries.

I. Background

In September 2000, the FDA approved the drug mifepristone, better known as RU-486, for "medical abortion" during the first 49 days of pregnancy. Shortly thereafter, Judicial Watch submitted a FOIA request seeking all mifepristone-related documents in the FDA's possession. A few months later, having not received any documents, Judicial Watch sought to enforce its request in the District Court. The FDA requested a stay, which the District Court granted. The District Court ordered the FDA to produce all responsive documents by October 15, 2001.

After searching about 250,000 pages of information, the FDA disclosed over 9,000 relevant pages to Judicial Watch on a compact disc. It withheld over 4,000 other relevant documents in their entirety and parts of almost 2,000 more. The FDA compiled and produced a 1,500-page *Vaughn* index to summarize the withholdings. *See Vaughn v. Rosen*, 484 F.2d

820 (D.C. Cir. 1973). In addition to its *Vaughn* index, the FDA filed a supporting declaration by Andrea Masciale, who supervised the FDA's search and review of documents for Judicial Watch's FOIA request. The Masciale declaration described the types of withheld information and defended the application of FOIA Exemptions 3, 4, 5, and 6 to that information. Danco Laboratories and Population Council—mifepristone's creator and manufacturer, respectively—intervened in the suit and filed two additional affidavits. The intervenors' affidavits supported the FDA's reasons for using Exemptions 4 and 6 to withhold information submitted to it during mifepristone's approval.

The FDA moved for summary judgment. Judicial Watch opposed the motion claiming the FDA performed an inadequate search, filed an inadequately detailed *Vaughn* index, and invoked several FOIA exemptions improperly. The District Court granted summary judgment for the FDA as to all matters. Judicial Watch now appeals the District Court's judgment as to the adequacy of the FDA's *Vaughn* index and the exemptions. We review de novo the District Court's grant of summary judgment. *Chappell-Johnson v. Powell*, 440 F.3d 484, 487 (D.C. Cir. 2006).

II. Adequacy of the *Vaughn* Index

Judicial Watch primarily argues that the FDA has produced an inadequately detailed *Vaughn* index. In this section, we consider—and reject—the challenge in its broadest sense, as a facial attack on the structure of the *Vaughn* index. Although we find nothing structurally wrong with the FDA's submission, we find merit in the narrower part of Judicial Watch's adequacy argument, specifically that the FDA has vaguely described some individual documents. We defer discussion of the vagueness inquiries until Section III and its subsections dealing with each

individual FOIA exemption at issue.

We also note at the outset that at oral argument Judicial Watch appeared to concede the untenable position of its challenge to the adequacy of detail regarding documents only partially withheld. The FDA argued—and we agree—that the released portion of each document satisfied its *Vaughn* burden by supplementing the corresponding *Vaughn* index entries. The released content of the documents served to illuminate the nature of the redacted material, often limited to names or addresses. Therefore, we find that the *Vaughn* index adequately described the partially withheld documents. As with the vagueness questions, we reserve until Section III our discussion of the merits of the FDA's decision to redact certain documents.

A. *Functions of the* Vaughn *Index Requirement*

Because of its unique evidentiary configuration, the typical FOIA case "distorts the traditional adversary nature of our legal system's form of dispute resolution." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987) (quoting *Vaughn*, 484 F.2d at 824). When a party submits a FOIA request, it faces an "asymmetrical distribution of knowledge" where the agency alone possesses, reviews, discloses, and withholds the subject matter of the request. *Id.* The agency would therefore have a nearly impregnable defensive position save for the fact that the statute places the burden "on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B); *see also Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) ("[T]he burden is on [the agency] to establish [its] right to withhold information from the public.").

Possessing both the burden of proof and all the evidence, the agency has the difficult obligation to justify its actions without compromising its original withholdings by disclosing

too much information. The *Vaughn* index provides a way for the defending agency to do just that. By allowing the agency to provide descriptions of withheld documents, the index gives the court and the challenging party a measure of access without exposing the withheld information. The *Vaughn* index thereby also serves three important functions that help restore a healthy adversarial process:

> [I]t forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.

Keys v. U.S. Dep't of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987) (internal quotation marks and citation omitted).

As past cases demonstrate, we focus on the functions of the *Vaughn* index, not the length of the document descriptions, as the touchstone of our analysis. *See, e.g.*, *Tax Analysts v. IRS*, 410 F.3d 715, 719-20 (D.C. Cir. 2005) (approving of *Vaughn* index with short descriptions because a combination of declarations and *in camera* review provided sufficient information for the court to review the claimed exemptions); *Coastal States Gas*, 617 F.2d at 861 (finding index with short descriptions inadequate because the supporting affidavits made "conclusory assertions of privilege"). Indeed, an agency may even submit other measures in combination with or in lieu of the index itself. *Keys*, 830 F.2d at 349 ("[I]t is the function, not the form, of the index that is important."). Among other things, the agency may submit supporting affidavits or seek *in camera* review of some or all of the documents "so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege." *Gallant v. NLRB*, 26 F.3d 168, 172-73 (D.C. Cir.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.