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The Plaintiff's Last Chance: FOIA'S Waiver Doctrine

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I. INTRODUCTION

Imagine that you and your friend are approached by an FBI agent who extends an invitation to discuss, review and take notes on the potential civil liberty, privacy and civil rights concerns of the agency's Domestic Investigations and Operations Guide. This invitation, however, is just meant for your friend. Moreover, when you later request to see the portions of the document that your friend analyzed for the FBI, the court determines that the Guide is the government's exclusive property. [1]

Or consider this, you and that same friend decide to attend a highly publicized criminal trial, but at the last minute, something comes up and you are unable to attend. That day, the government shows sensitive photographs to all those in attendance in the courtroom. Your access to viewing those photographs, unfortunately, is later foreclosed when the court determines that the photographs are the government's exclusive property.[2] Should your access, as a citizen, to confidential government documents come down to "being in the right place, at the right time?" Should there be any circumstances where the government has waived this exclusive right?

Finally, consider the following, you import merchandise into the U.S. One of your competitors has his shipment seized by the U.S. Bureau of Customs and Border Protection, on that basis that the merchandise may be potentially infringing on a U.S. trademark.[3] After hearing of his predicament, you suddenly realize that when the CBP seized his merchandise, your competitor was required to fill out a form which required him to disclose intimate aspects of his business. Further, you know that the CBP, as required by law, then sent a notice of the seizure to

[1] *See* Muslim Advocates v. U.S. Dep't of Justice, 2011 WL 5439085, Civil Action No. 09—1754 (D.C. Cir. 2011).
[2] *See* Inner City Press/Cmty on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239 (2d. Cir. 2006).
[3] *See* Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189 (9th Cir. 2011).

the trademark owner, thereby disclosing the intimate aspects of your competitor's business to a private third party. From your competitor's misfortune, you see a golden opportunity to get the competitive edge over him, so you file a FOIA request to get that form. The CBP denies your request, claiming it contains confidential information and is therefore, the government's exclusive property. On appeal, under one jurisdiction, the court affirms the denial. In another jurisdiction, however, the court reverses the denial, concluding that by giving it to the trademark owner, the government waived its confidentiality. Which decision was correct? What about if at the same time the court was affirming the denial, the trademark owner was faxing a copy of the form to you? Would your answer change in any way?

The Freedom of Information Act ("FOIA" or "Act"), codified at 5 U.S.C. § 552, "is a law that gives [the public] the right to access information from the federal government."[4] This right of access, however, is not absolute.[5] In particular, a federal agency may exercise its discretion and withhold this information "pursuant to one of the nine enumerated exemptions listed in § 552(b)."[6] In limited situations, however, the court may determine that the confidentiality the exemption seeks to protect has been waived through some prior disclosure.[7]

Given the role the FOIA is purported to play in upholding the principles of governmental transparency and accountability, the determination of waiver is particularly significant. Specifically, the finding of waiver serves as a plaintiff's last chance at obtaining the protected material in a FOIA proceeding. The standard that the court uses, therefore, is not only highly

[4] FOIA.GOV, http://www.foia.gov/ (last visited Oct. 21, 2011).
[5] *See* Freedom of Information Act, 42 U.S.C. § 522(b)(1)-(9) (1966).
[6] U.S. Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988).
[7] DEP'T OF JUSTICE, WL 3775089, FREEDOM OF INFORMATION ACT GUIDE: DISCRETIONARY DISCLOSURE AND WAIVER 1 (2004).

relevant to the plaintiff's case against the government, but serves as a platform to reinforce the principles underlying FOIA.

While "[t]here are some well-established rules for determining whether an agency has waived its right to use FOIA exemptions with regard to requested information," the federal court of appeals are not uniform in their implementation of these rules.[8] Moreover, some circuits have expressly adopted their own judicially-constructed legal doctrines in order to make a waiver determination.

Most notably, the D.C. Circuit has adopted the "public domain doctrine" for determining whether the government has waived confidentiality under FOIA.[9] Under the public domain doctrine, "the party advocating disclosure bears the initial burden of production…[and] must point to specific information in the public domain that appears to duplicate that being withheld."[10]

Additionally, the Tenth Circuit, while not expressly adopting the public domain doctrine, indicated that the doctrine is only of limited use to a plaintiff. The court held that the application of "[t]he public domain doctrine is limited and applies only when the applicable exemption can no longer serve its purpose."[11] The court determined that since "the public domain doctrine appears nowhere in the statutory text of FOIA, only the failure of an express exemption to provide any protection of the interests involved could justify its application."[12]

[8] *Id.*
[9] *See* Cotton v. Reno, 193 F.3d 550 (D.C. Cir. 1999).
[10] *Id.* at 552.
[11] Prison Legal News v. Exec. Office for U.S. Att'ys, 628 F. 3d 1243, 1253 (10th Cir. 2011).
[12] *Id.*

The Ninth Circuit, conversely, held that the public-domain doctrine "should not be the only test for government waiver."[13] The court then articulated a new formula, the "no-strings-attached" disclosure standard, for determining waiver.[14] Under the no-strings-attached standard, an agency has waived its right to claim an exemption to a FOIA request when it "freely discloses to a third party confidential information covered by a FOIA exemption without limiting the third-party's ability to further disseminate the information."[15]

This Comment will assert that having multiple standards for determining waiver does not fully capture the important goals and substantial competing values underlying FOIA. While seemingly minor relative to the breadth of subject matter in FOIA litigation, the reformation of waiver doctrine is a small, but nonetheless important step towards reclaiming the original principles of accountability and transparency. The need for consistency and uniformity in judiciary adoption of waiver analysis is especially significant in FOIA litigation because of "the potential costs of an ill-advised FOIA disclosure," the consequences of a shift in judicial deference of agency discretion,[16] and the relationship between technology and the public domain. Part II will discuss the role of FOIA and an overview of the respective positions of the circuit courts on agency waiver. Part III discusses the current legal landscape of FOIA and how the various waiver methodologies may be indicative of underlying issues within FOIA itself. Finally, Part IV will propose a substantive rule for guiding the decision-making process of the judiciary when it makes prior disclosure decisions.

[13] Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1197 (9th Cir. 2011).
[14] *Id.*
[15] *Id.* at 1198.
[16] *David E. Pozen, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 YALE L.J. 628*, 667 (2005).

II. THE HISTORY OF THE ACT, WAIVER, AND THE CIRCUIT SPLIT

A. The Freedom of Information Act

In 1966, Congress passed the Freedom of Information Act in response to the ineffectual public disclosure section of the Administrative Procedures Act of 1946.[17] The Act was the first federal statute to create an enforceable right of public access to executive branch information.[18] This enforceable right was intended "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[19]

Under this Act, a federal agency is required to disclose agency records unless properly withheld pursuant to an exemption listed in § 552(b).[20] In enacting FOIA, "Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests."[21]

In 1974, following the discovery of corruption in the executive branch in the Watergate scandal, Congress amended the Act, thereby reiterating that FOIA was intended to pierce the veil of administrative secrecy. Most notably, the amendment made FOIA more user-friendly and "ensured the availability of *de novo* review by courts of FOIA appeals by specifically authorizing courts to review documents in camera to ensure proper classification."[22]

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[17] *Id.* at 628.
[18] *Id.* at 634.
[19] N.L.R.B. v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978).
[20] U.S. Dep't of Justice v. Julian, 486 U.S. 1, 8 (1988).
[21] 437 U.S. 214, 220-221 (1978).
[22] Veto Battle 30 Years Ago Set Freedom of Information Norms, The National Security Archive, 11/23/2004, http://www.gwu.edu/~nsarchive/NSAEBB/NSAEBB142/index.htm (citing *EPA v. Mink*, 410 U.S. 73 (1973)).

In a FOIA proceeding, the government has the burden of persuasion. The government has the burden of showing that one of the exemptions applies to the information denied.[23] In limited circumstances, however, an agency is foreclosed from claiming an applicable exemption.[24] In particular, an agency has waived its right to invoke the exemption if the information sought has been previously disclosed.[25]

"The inquiry into whether a specific disclosure constitutes waiver is fact specific."[26] In determining whether an agency has waived its right, a reviewing court is required to conduct "a careful analysis of the circumstances surrounding the prior disclosure, including its extent, recipient, justification, and authorization."[27]

B. Waiver Doctrine

There are some well-established rules for determining waiver. First, waiver only applies to information which has been "officially" released. "To have been officially released[,] information generally must have been disclosed under circumstances in which an authoritative government official allowed the information to be made public."[28] This means, however, that when the disclosure was "not fairly attributable to the agency—i.e., when an agency employee has made an unauthorized disclosure, a 'leak' of information," courts have found no waiver.[29]

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[23] 4 Admin. L. & Prac. § 14:25 (3d ed.

[24] *MARK J. MEAGHER & TYSON J. BAREIS*, THE FREEDOM OF INFORMATION ACT 6 (2010)

[25] THE EFFECT OF PRIOR DISCLOSURE: WAIVER OF EXEMPTIONS, FOIA Update Vol. IV, No. 2 (1983), *available at* http://www.justice.gov/oip/foia_updates /Vol_IV_2/page6.htm.

[26] Mobil Oil Corp. v. U.S. E.P.A., 879 F.2d 698, 701 (9th Cir. 1989).

[27] THE EFFECT OF PRIOR DISCLOSURE: WAIVER OF EXEMPTIONS, FOIA Update Vol. IV, No. 2 (1983), *available at* http://www.justice.gov/oip/foia_updates /Vol_IV_2/page6.htm.

[28] *Id.* (citing Myles-Pirzada v. Dep't of the Army, No. 91-1080, slip op. at 6 (D.D.C. Nov. 20, 1992); Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999)).

[29] FREEDOM OF INFORMATION ACT GUIDE, Dep't of Justice, WL 3775089, *Discretionary Disclosure and Waiver* 1 (2004).

Similarly, courts have not found a waiver "when an agency makes an entirely mistaken disclosure of information."[30] However, when the prior disclosure is the result of the agency failing "to adhere to its own policies and regulations concerning disclosure of information contained within its records systems," courts are more willing to find that a waiver has occurred.[31]

Second, courts have imposed the burden of production on the party seeking disclosure.[32] Under this burden, courts have required a FOIA plaintiff to describe the information with a degree of specificity when claiming that information has already been previously disclosed.[33] This means that "[v]oluntary disclosures, either in whole or in part, to third parties…waives FOIA exemptions only for those documents released."[34]

In the context of oral disclosure, courts have held that cases involving general or limited discussion of a subject, or sharing information with public in general terms do not result in a waiver.[35] Moreover, a FOIA plaintiff's personal knowledge of the exempt information is not a dispositive factor as to whether it was previously disclosed.[36]

Third, courts have largely upheld the applicability of a FOIA exemption when the government is able to "demonstrate a legitimate purpose for the [prior] disclosure, and is able to establish that the disclosure was made with a restriction on further dissemination."[37] In evaluating the purpose for the prior disclosure, courts will typically defer "to the necessities of

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Mobil Oil Corp. v. U.S. E.P.A., 879 F.2d 698, 701 (9th Cir. 1989).
[35] FREEDOM OF INFORMATION ACT GUIDE, Dep't of Justice, WL 3775089, *Discretionary Disclosure and Waiver* 1 (2004).
[36] *Id.*
[37] *Id.*

effective agency functioning when confronted with the issue of waiver."[38] This means that in circumstances involving substantial competing values, such as cases involving national security, law enforcement concerns, or where an individual's privacy interest is at stake, courts are more willing to find that waiver has not occurred.[39] Similarly, courts have generally not found a waiver "when an agency has been compelled to disclose a document under limited and controlled conditions."[40]

C. The Public Domain Doctrine

1. Generally

Due to informational asymmetries between the government and the public, "[t]he government has the power to keep much information secret."[41] That secrecy, however, "ends when the information enters the public domain."[42] "Once the information is in the public domain, the people have unrestricted rights of access to it."[43]

In effect, the public domain operates as a structural limit on the government's power to use secrecy over its own conduct. When information has entered the public domain, "[t]he government's interest in secrecy is outweighed by the free dissemination of the information once it is made public."[44]

Within the federal courts of appeal, only the Second and District of Columbia Circuits have explicitly adopted the public domain doctrine and applied it to waiver litigation. As a legal

[38] *Id.*
[39] *Id.*
[40] *Id.*; *Cf.* Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1199 (9th Cir. 2011) (discussed *infra*).
[41] Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 126 (2003).
[42] *Id.*
[43] *Id.*
[44] *Id.*

standard for waiver in FOIA litigation, the public domain requires "that the requester demonstrate that the withheld information has already been specifically revealed to the public and that it appears to duplicate that being withheld."[45] In effect, the public domain doctrine "limits the government's ability to assert an exemption from disclosure."[46]

The archetypal example of an agency record that might fall under the public domain doctrine is information disclosed in an open court or as a part of judicial proceedings. [47] In particular, "[t]his includes the evidence admitted at trial, the trial transcripts, the parties' briefs, and the court's orders and opinions."[48]

Furthermore, in many instances of FOIA litigation, the public domain "coincides with a physical or geographical location where the information originates—open court proceedings." [49] This is the typical form of disclosure in waiver litigation because "[c]riminal trials and most court proceedings in this country are open to the public[,] [so] any member of the public who attends such proceedings can further disseminate what information was revealed in open court."[50]

2. District of Columbia Circuit

The D.C. Circuit was the first federal court of appeals to adopt the public domain doctrine. The court, in *Cotton v. Reno*,[51] discussed the role the doctrine played in determining whether the government had waived its right to withhold agency records pursuant to a FOIA

[45] Mobil Oil Corp. v. U.S. E.P.A., 879 F.2d 698, 701 (9th Cir. 1989) (quoting United States Student Ass'n v. CIA, 620 F. Supp. 565 (D.D.C. 1985) (emphasis added) (internal quotation marks omitted)).
[46] Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 136 (2003); *See, e.g.*, Cotton v. Reno, 195 F.3d 550 (D.C. Cir. 1999).
[47] *Id.*
[48] *Id.*
[49] *Id.* at 124-125.
[50] *Id.*
[51] 195 F.3d 550, (D.C. Cir. 1999).

exemption. In that case, the FOIA requester sought audio recordings which the agency had played in open court.[52]

The court first stated that "under [the] public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record."[53] The court reasoned that "[t]he logic of FOIA mandates that where information requested is truly public, then enforcement of an exemption cannot fulfill its purposes."[54] Moreover, the court noted that it "must be confident that the information is truly public and that the requester receives no more than what is publicly available before [the court] find a waiver."[55] Essentially, the requested information must be *freely available*.[56]

Guided by this doctrine, the court then employed a burden-shifting inquiry in determining if the government had waived confidentiality.[57] The court noted that the government at all times has the burden of persuasion to show that information is not subject to disclosure under FOIA.[58] Once the government has satisfied this burden, the requesting party has the burden of producing evidence showing that the exempt agency records have entered the public domain, and thereby shed their Exemption protection.[59]

The court reasoned that the burden of production is on the requesting party "otherwise, the government would face the daunting task of proving a negative: that requested information

[52] 195 F.3d 550, 552(D.C. Cir. 1999).
[53] Cotton v. Reno, 195 F.3d 550, 554 (D.C. Cir. 1999).
[54] *Id.* (quoting Niagara Mohawk Power Corp. v. U.S. Dep't of Energy, 169 F.3d 16, 19 (D.C. Cir. 1999) (internal quotation marks omitted)).
[55] *Id.* at 555.
[56] Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1199 (9th Cir. 2011) (Rymer, J., dissenting) (emphasis added)).
[57] 195 F.3d 550, 554 (D.C. Cir. 1999).
[58] Inner City Press/Cmty on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 245 (2d. Cir. 2006).
[59] 195 F.3d 550, 554 (D.C. Cir. 1999).

had not been previously disclosed."[60] Similarly, the D.C. Circuit in another case "reasoned that the burden of production should fall upon the requester because the task of proving the negative—that the information has not been revealed—might require the government to undertake an exhaustive, potentially limitless search."[61]

To satisfy this burden, "the specific information sought must have already been disclosed and preserved in a permanent public record."[62] In the D.C. Circuit, the requesting party must produce evidence that demonstrates four factors to satisfy the requirements of the public domain doctrine. First, the withheld information must have been officially released. Second, the information must have entered the public domain. Third, the information must "remain a part of the public domain."[63] In particular, a previously disclosed record must have been released to the general public.[64] Moreover, "[t]hese requirements—'release' to the 'general public'—are construed narrowly."[65] The Supreme Court has further limited the application of this doctrine by requiring the information to be freely available.[66] Fourth, and finally, the party has the "burden of showing that there is a permanent public record of the *exact* portions he wishes."[67] Thus, the

[60] *Id.*
[61] FREEDOM OF INFORMATION ACT GUIDE, Dep't of Justice, WL 3775089, *Discretionary Disclosure and Waiver* 1 (2004) (quoting Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1279-82 (D.C. Cir. 1992) (internal quotation marks omitted)).
[62] Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001) (quoting Cotton v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999) (internal quotation marks omitted)).
[63] 195 F.3d 550, 554 (D.C. Cir. 1999).
[64] *MARK J. MEAGHER & TYSON J. BAREIS*, THE FREEDOM OF INFORMATION ACT 6 (2010) (citing Students Against Genocide v. Dep't of State, 257 F.3d 828 (D.C. Cir. 2001)).
[65] *Id.*
[66] 463 F.3d 239, 245 (2d. Cir. 2006) (quoting U.S. Dep't of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 764 (1989)).
[67] Cotton v. Reno, 195 F.3d 550, 554 (D.C. Cir. 1999) (quoting Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1280 (D.C. Cir. 1992)).

requesting party "must point[ ] to specific information in the public domain that appears to duplicate that being withheld."[68]

The D.C. Circuit has stated that the specificity requirement permits the court to "carefully tailor the [agency]'s disclosure duty to ensure that the [court] do[es] not jeopardize the legitimate privacy interests of innocent third parties."[69] The rationale is that by ordering disclosure, without requiring specificity as to the materials sought, "would [ignore] the injury that disclosure might cause innocent third parties."[70] The D.C. Circuit has noted, however, that requiring the FOIA plaintiff to produce a hard copy version of the requested information would be purporting to hold form over substance.[71]

Once the requesting party has satisfied his burden, the burden of production then shifts to the government. "[I]t is up to the government, if it so chooses, to rebut the plaintiff's proof by demonstrating that the specific…records identified have since been destroyed, placed under seal, or otherwise removed from the public domain."[72]

In 2001, the D.C. Circuit, in *Students Against Genocide v. Dep't of State*,[73] addressed the issue of whether the government waives confidentiality when the exempt information was officially disclosed to a third party. In that case, the FOIA plaintiff sought agency records relating to human rights violations that had been partially disclosed to foreign officials.[74]

The court held that the government had not waived confidentiality. Because the official only displayed the records to the members in attendance, had retained custody of the records, and

[68] *Id.* (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (internal quotation marks omitted)).
[69] *Id.* (quoting Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1278 (D.C. Cir. 1992) (internal quotation marks omitted)).
[70] *Id.* (quoting Davis v. U.S. Dep't of Justice, 968 F.2d 1276, 1280 (D.C. Cir. 1992)).
[71] *Id.* at 555.
[72] *Id.* at 556.
[73] 257 F.3d 828 (D.C. Cir. 2001).
[74] *Id.* at 830.

the records never left the Security Council's chambers, the court determined that the requested information was not released at all."[75] Moreover, the records were only viewed by the people in attendance, and thus, were not released to the general public.[76] The court determined, therefore, that the records did not enter the public domain.

In addition, the court determined that "there [was] no permanent public record of the [exempt records]" because the information sought had not been released into the public domain.[77] In making this determination, the court noted that it was "significant that [the agency official] displayed, but did not distribute, the [records] in question" in evaluating the circumstances of the disclosure.[78]

Furthermore, the government was found to have presented a legitimate reason for nondisclosure. The court found that there was "nothing unreasonable in the government's contention that it may have affirmative foreign policy reasons for sharing sensitive information with some foreign governments and not others."[79] The court based its determination on the agency's statements which claimed that this type of disclosure, as compared to public and permanent release of the documents, still enabled the enforcement of the exemption to fulfill its purposes.[80] The court reasoned that given the plausibility of the government's statements for nondisclosure, and absent a showing a bad faith, the court would accord a substantial amount of deference to the agency's proffered injury resulting from court-mandated disclosure.[81]

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[75] *Id.*
[76] *Id.*
[77] *Id.* (quoting Cotton v. Reno, 193 F.3d 550, 554 (D.C. Cir. 2011) (internal quotation marks omitted)).
[78] *Id.* at 837.
[79] *Id.*
[80] *Id.*
[81] *Id.*

The court then rejected the contention that by the agency previously disclosing the classified documents "to parties against whom the exemption was intended to provide protection: foreign governments," the disclosure "represents merely a slight variation on the theme" underlying the public domain doctrine.[82] In rejecting this argument, the court stated that the identity of the FOIA plaintiff was not relevant in determining whether waiver had occurred.[83] The court reasoned that "disclosure made to any FOIA requester is effectively a disclosure to the world at large."[84]

The court further noted that "courts lack authority to limit the dissemination of documents once they are released under FOIA, or to choose selectively among recipients."[85] The court therefore determined that it "must assume that if the requested [records] are released, they will eventually make their way to foreign governments and others who may have interests that diverge from those of the United States."[86] The court therefore held that the plaintiff failed to satisfy its burden of production under the public domain doctrine.

In a recent decision on the issue of waiver, however, the District Court in the D.C. Circuit impliedly embraced a balancing approach in addition to using the public domain doctrine.[87] Under this balancing analysis, the court looked to additional factors in determining whether waiver of confidentiality had occurred.[88] The significance of this decision is that the District Court found the public domain doctrine to be under-inclusive and presumably, an insufficient

[82] *Id.* at 836.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 836-837.
[86] *Id.* at 837.
[87] Muslim Advocates v. U.S. Dept. of Justice, CIV.A. 09-1754, 2011 WL 5439085, n. 8 (D.D.C. Nov. 10, 2011)
[88] *Id.*

test for waiver. The District Court's approach, therefore, may be indicative of the inherent weaknesses of the public domain doctrine in addressing all of the plaintiff's waiver arguments.

3. *Second Circuit*

The Second Circuit has also adopted the public domain doctrine. The court, in *Inner City Press/Cmty on the Move v. Bd. of Governors of the Fed. Reserve Sys.*,[89] weighed in on the application of the doctrine. The court first noted that an "exemption does not apply if identical information is otherwise in the public domain."[90] The court then stated that the underlying rationale of the doctrine is sound. In particular, the court noted that "if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes."[91]

In *Inner City*, the court held that the requesting party failed to satisfy its burden of production because the requesting party did not demonstrate that the withheld information is likely duplicative of that in the public filings.[92] The court, in the interest of judicial economy, then addressed the agency's argument that even if the party satisfied its burden of production, the information is still not subject to disclosure under *U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*.[93]

In *Reporters Committee*, the Supreme Court held that a rap sheet compiling a person's criminal history is not freely available and is not subject to disclosure. The agency's argument was that even if the record was in the public domain, it "is not freely available because of the logistical difficulties in locating it."[94]

[89] 463 F.3d 239, 245 (2d. Cir. 2006)
[90] *Id.* at 244.
[91] *Id.*
[92] *Id.* at 251.
[93] 489 U.S. 749, (1989).
[94] 463 F.3d 239, 252 (2d. Cir. 2006) (internal quotation marks omitted)).

The Second Circuit first noted that unlike the compilation of otherwise difficult to obtain information in *Reporters Committee*, a party seeking the agency records in this case only had to contact one government agency.[95] Further, the court noted that the information could be accessed online, free of charge and was located on only one database.[96]

The Second Circuit determined that "the information in this case remains much more freely available than in *Reporters Committee*."[97] Moreover, the court noted in footnote 15, that "[a]s technology quickly changes, information becomes more readily available to the public and the difficulties noted in *Reporters Committee*, for example, lessen significantly."[98]

The court then stated that the information sought in this case does not involve the same privacy concerns as that in *Reporters Committee*.[99] The court held that "the ready availability of [the information sought] and the policy favoring disclosure of information found in [the information sought] distinguishes this case from *Reporters Committee*."[100] The court then remanded the case to the district court for the plaintiff to have the opportunity to fulfill its burden of production.[101]

4. Tenth Circuit

The Tenth Circuit in *Prison Legal News v. Exe. Office for U.S. Att'ys*[102] declined to apply the public domain doctrine. The Tenth Circuit held that the application of the public domain doctrine would only be justified when the applicable exemption failed "to provide *any* protection

[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 252, n.15 ("The rapid change in technology is evidenced here by the fact that a text search of securities filings became available during the pendency of this matter.") (citing Appellee's Br. 58 n. 21)).
[99] *Id.* at 252.
[100] *Id.* at 245 (citing U.S. Dep't of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 764 (1989)).
[101] *Id.*
[102] 628 F.3d 1243 (10th Cir. 2011).

of the interests involved."[103] The plaintiff in the case claimed that the public domain doctrine applied because the information sought had been introduced as evidence and shown in open court to the jury and to the public audience.[104]

In addressing whether the public domain doctrine found in *Cotton v. Reno* applied, the Tenth Circuit first noted that "[t]he justification for the D.C. Circuit's [public domain doctrine] under FOIA's statutory framework is critical to understanding when the doctrine applies."[105] The court then stated that "[t]he D.C. Circuit explained that the logic of FOIA mandates that where information requested is truly public, then the enforcement of an exemption cannot fulfill its purposes."[106]

The court noted that "[o]nce the [records] in *Cotton* were played at a public trial, the purpose of the [relevant exemption] could no longer be fulfilled because the government had already revealed the intercepted information," in contravention of an otherwise governing statute.[107] Further, the court noted that "there was no argument in *Cotton* that any additional interest attached to the tape recordings."[108]

The court then determined that "the purpose of [the relevant exemption] in this case remains intact [because] the family's strong privacy interest in the [records] is distinct from information about what those images and recordings contain."[109] Since the information sought was observed "by a limited number of individuals who were present in the courtroom at the time

[103] *Id.* at 1253 (emphasis added).
[104] *Id.* at 1246.
[105] *Id.* at 1252.
[106] *Id.* at 1246 (10th Cir. 2011) (quoting Cotton v. Reno, 193 F.3d 550, 554 (D.C. Cir. 2011) (internal quotation marks omitted)).
[107] *Id.* at 1252.
[108] *Id.*
[109] *Id.*

of the trails[,] enforcement of [the relevant exemption] [could] still protect the [family's] privacy interests."[110]

The court then stated that "[t]he public domain doctrine is limited and applies only when the exemption can no longer serve its purpose."[111] The court reasoned that because "the public domain doctrine appears nowhere in the statutory text of FOIA, only the failure of an express exemption to provide *any* protection of the interests involved could justify its application."[112]

Furthermore, the court reasoned that even if it adopted the public domain doctrine, the purpose of the relevant exemption could still be served. Therefore, the doctrine would not have defeated the applicability of the exemption.[113] Thus, the Tenth Circuit found the particular exemption involved in the case to be the dispositive factor in determining whether waiver had occurred through some prior disclosure.

D. No-Strings-Attached Standard

The Ninth Circuit, in *Watkins v. U.S. Bureau of Customs and Border Protection*,[114] articulated a new standard as an alternative to public domain doctrine.[115] In that case, a copyright and trademark attorney requested agency records concerning information about commercial importers.[116] The government, in responding to the request, provided him with heavily redacted documents, citing various FOIA exemptions.[117]

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[110] *Id.* at 1252-1253.
[111] *Id.*
[112] *Id.* (emphasis added).
[113] *Id.*
[114] 643 F.3d 1189 (9th Cir. 2011).
[115] *Id.* at 1197 (9th Cir. 2011).
[116] *Id.* at 1192-1193 (9th Cir. 2011).
[117] *Id.*

The FOIA litigant then claimed that the government had waived its ability to claim an exemption through prior disclosure.[118] Specifically, the FOIA requester alleged that by disclosing the information about commercial importers to affected trademark owners, pursuant to a federal statute,[119] the government waived the confidentiality of the agency records.[120]

In determining whether the government had waived confidentiality, the court first noted that the public domain doctrine, while persuasive in most cases, does not reach the concerns of confidentiality in circumstances like those presented in this case.[121] The court then distinguished this case from those that had applied the public domain on three bases.[122] First, the information sought in this case did not involve high-level criminal investigations, or matters of national security.[123] Second, the manner of prior disclosure in this case involved a scenario in which the government had already provided a no-strings-attached disclosure of the confidential information to a private third party.[124] And lastly, the court determined that because the public domain doctrine required the information to be preserved in the public record, it was limited in scope.[125]

The court reasoned that taken to its logical extreme, the public domain doctrine would still immunize the requested information even though the third party had the ability to freely disseminate that information in ways that would hypothetically compromise the purportedly sensitive information.[126]

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[118] *Id.* at 1196 (In particular, when commercial importers make entry into the U.S., they are required to disclose specific information to the C.B.P. Pursuant to 19 U.S.C. § 1526(e), the C.B.P. is then required to send "Notices of Seizure," which contain the disclosed information from the commercial importers, to trademark owners.).
[119] *See* 19 U.S.C. § 1526(e).
[120] 643 F.3d 1189, 1197 (9th Cir. 2011).
[121] *Id.* at 1197-1198.
[122] *Id.* at 1197.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 1197-1198.
[126] *Id.* at 1197.

The court then articulated a new standard for determining waiver. The court held that under the no-strings-attached disclosure standard, when an agency (1) freely discloses to a third party confidential information covered by a FOIA exemption, (2) without limiting the third-party's ability to further disseminate the information, then the agency waives the ability to claim an exemption to a FOIA request.[127]

In the dissenting opinion, however, Judge Rymer stated that the court should have adopted the public domain doctrine "for waiver embraced by the D.C. Circuit and the Second Circuit."[128] Judge Rymer first noted that "adopting this test [would] put [the court] in line with other circuits." Further, Judge Rymer stated "unlike the majority's retreat from the public domain [doctrine], it is a clear rule that can be applied without guesswork."[129]

Judge Rymer then rearticulated the public domain doctrine.[130] Under the public domain doctrine, Judge Rymer determined that the "limited disclosure to interested third-parties [was] not otherwise in the public domain or freely available."[131] Judge Rymer concluded therefore that the government did not waive confidentiality.

E. The Significance of the Multifarious Approaches

Recently, "FOIA has…been the subject of complementary criticism: not that it is unnecessary, but rather that it is ineffective."[132] In particular, it has been said that FOIA is "only as effective as courts say [it] [is], and the effectiveness of FOIA…has been undercut by [the]

[127] *Id.* at 1198.
[128] *Id.* at 1199 (Rymer, J., concurring in part, and dissenting in part).
[129] *Id.*
[130] *Id.*
[131] *Id.* (internal quotation marks omitted)).
[132] Seth F. Kreimer, *The Freedom of Information and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1014 (2008).

[variation] [in] judicial interpretation."[133] Waiver litigation is one instance of this purported ineffectiveness.

The different circuits, as noted above, have embraced and subsequently developed a variety of substantive standards in determining waiver. The D.C. and Second Circuit have adopted a four-step inquiry, the public domain doctrine, to address waiver.[134] The District Court in the D.C. Circuit, however, found the public domain doctrine to be insufficient in addressing prior disclosure of agency records.

Conversely, the Tenth Circuit has declined to adopt the public domain doctrine, and in doing so, narrowed a FOIA plaintiff's ability to use the doctrine.[135] Moreover, the Ninth Circuit has developed a two-step inquiry, the no-strings-attached disclosure standard, for determining government waiver of confidentiality under certain circumstances.[136]

III. THE NEED FOR CONSISTENCY WITH CONTEMPORARY WAIVER DOCTRINE

The judicial treatment of waiver doctrine, specifically the variety of legal tests and absence of any explicit adoption of particular factors, is indicative of underlying issues within FOIA itself. In particular, FOIA has been criticized for being removed from the legislator's original intent as a tool for the citizenry. The judiciary, as the branch entrusted for the enforcement of FOIA, is necessarily implicated within this critique.

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[133] David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1791 (2008).
[134] Cottone v. Reno, 193 F.3d 550, 552 (D.C. Cir. 1999); Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001); Inner City Press/Cmty on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 245 (2d. Cir. 2006).
[135] Prison Legal News v. Exec. Office for U.S. Att'ys, 628 F.3d 1243, 1252 (10th Cir. 2011).
[136] Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1197 (9th Cir. 2011).

In order to perform its role under FOIA, the judiciary must appear legitimate. Therefore, in the interest of accountability and transparency, the court should clearly and explicitly state their method of analysis and avoid relying on ambiguous legal jargon, such as "freely available," "permanent public record," and "public domain." Similarly, as the last chance at obtaining the classified record in FOIA litigation, the court should unequivocally state what types of factors they will be evaluating on the issue of waiver.

Moreover, given the role the executive plays in determining disclosure policy, courts should be permitted to be flexible in evaluating the government's proffered justification for the limited disclosure. This flexibility in evaluating waiver in light of the government's reason, however, must be done so explicitly in the interest of governmental transparency. In addition, courts should be accorded a certain amount of flexibility in determining waiver because of the uncertain role of technology.

A. Legislative Intent

The legislature is responsible for defining the scope of FOIA. The legislature intended for FOIA, as a request-driven statute, to impose a broad presumption of openness on the government, and made "explicit that the Act's nine limited bases for withholding information are exclusive."[137] The exemptions, therefore, serve "as a counterbalance to the Act's broad disclosure provisions."[138] The issue of prior disclosure or waiver of confidentiality, however, is absent from both the text and legislative history of the FOIA. Thus, the doctrine of confidential waiver originates from the judiciary.

[137] David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1798 (June 2008).
[138] Seth F. Kreimer, *The Freedom of Information and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1050 (June 2008).

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Notwithstanding the absence of clear congressional intent, the Ninth Circuit case of *Mobile Oil Corp. v. U.S. E.P.A.*,[139] is instructive on the issue of legislative intent regarding waiver of confidentiality under FOIA. In this case, the court examined the relationship between waiver and the policy considerations underlying FOIA's statutory scheme.[140]

The court first noted that implying a waiver based solely on an incident of prior disclosure, "could tend to inhibit agencies from making any disclosures other than those explicitly required by law because voluntary release of documents exempt from disclosure requirements would expose other documents in the litigation to risk of disclosure."[141] The court reasoned that "[a]n agency would have an incentive to refuse to release all exempt documents if it wished to retain an exemption for any documents."[142] Thus, the court held that "readily finding waiver of confidentiality for exempt documents would tend to thwart the underlying statutory purpose, which is to implement a policy of broad disclosure of government records."[143]

The court then addressed the basic policies behind FOIA's exemption provisions. The court first noted that "[t]he policy underlying the exemption of certain categories of documents from FOIA disclosure requirements is that legitimate governmental and private interests could be harmed by release of certain types of information."[144] The court then stated that the "[c]oncerns about forced disclosure of exempt materials are lessened when the agency voluntarily has released that specific information." The court therefore concluded that in determining whether

[139] 879 F.2d 698 (9th Cir. 1989).
[140] *Id.* at 701.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* (citing FBI v. Abramson, 456 U.S. 615, 621, 72 L. Ed. 2d 376, 102 S. Ct. 2054 (1982) (internal quotation marks omitted)).

prior disclosure had resulted in waiver, "the concerns underlying the carving out of FOIA exemptions weigh heavily."[145]

The method used in judicial review should effectuate the intent of the legislature. In particular, the standard for determining waiver should be tailored to ensure the effective operation of FOIA. Moreover, the methodology should take into account the importance of governmental transparency, that exemptions are construed very narrowly, and that principles of governmental transparency necessitate agency cooperation. In viewing the issue of waiver within the context of legislative intent, therefore, the more substantially supported conclusion is that the purpose of the applicable exemption must "weigh heavily" on the court's analysis.

B. The Role of the Judiciary

The principal aim of FOIA is to the strike the balance between the government's interest in keeping certain information confidential with the public's right to a transparent governmental body.[146] The judiciary is in charge of maintaining this balance and is responsible for the enforcement of FOIA.[147] It should be noted, however, that "[t]he role of the courts is not to usurp the function of an agency chief, but to weigh the strength of his arguments against those of the litigant requesting disclosure and determine whether the former has properly exercised his authority under the relevant law."[148]

In particular, "FOIA empowers the judiciary with full power of review so as to provide a check on the exercise of executive classification authority."[149] Judicial review of FOIA appeals,

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[145] *Id.* at 702.
[146] Scott A. Faust, *National Security Information Disclosure Under the FOIA: The Need for Effective Judicial Enforcement*, 25 B.C. L. REV. 611, 612 (1984).
[147] *Id.*
[148] *Id.* at 642.
[149] *Id.* at 637.

therefore, "was explicitly sculpted to safeguard the principles of democratic self-government and good government."[150]

Because the judiciary was entrusted with balancing the public's interest in disclosure and the government's interest in confidentiality, the effectiveness of "FOIA depends heavily upon the courts' performance of their assigned role."[151] When Congress amended FOIA in 1974, it included special procedures to be used in FOIA appeal proceedings, including the requirement of public affidavits, in camera inspection, and de novo review.[152] In so authorizing these procedures, "the amendments aimed to fulfill FOIA's underlying goal of 'prevent[ing] [review] from becoming meaningless judicial sanctioning of agency discretion.'"[153] Thus, it has been stated that "[t]he efficacy of FOIA…depends in substantial measure on the rigor and skepticism with which trial judges exercise their offices."[154]

Recently, however, the judiciary has been criticized for failing to perform its role as a check on the executive branch under FOIA. In particular, courts have been viewed as being too deferential to the executive branch.[155] Because "courts give the executive branch substantial deference in its classification decisions…, combined with Congressional inaction, has left the executive branch largely unchecked in matters relating to classified information."[156]

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[150] *David E. Pozen, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 YALE L.J. 628*, 671 (2005).
[151] Scott A. Faust, *National Security Information Disclosure Under the FOIA: The Need for Effective Judicial Enforcement*, 25 B.C. L. REV. 611, 615 (1984).
[152] *Id.* at 620-621.
[153] *David E. Pozen, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 YALE L.J. 628*, 671 (2005)(quoting S. Rep. No. 89-813, at 8 (1965)).
[154] Seth F. Kreimer, *The Freedom of Information and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1050 (June 2008).
[155] *See id.*
[156] Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Classification of Information Already in the Public Domain*, 4 INFO. SOC'Y J.L. & POL'Y 479, 487 (2008).

In remedying this disruption in the balance of the public and government's competing interests, and thereby increasing their legitimacy in the eyes of the citizenry, the judiciary should assert its power to enforce the FOIA. In the context of waiver adjudication, therefore, the judiciary should explicitly adopt a uniform, comprehensive approach to better protect the public's right of access.

The waiver doctrine, however, must not be mechanically applied.[157] Instead, courts require a more adaptive standard in which to exercise their discretion in cases involving waiver. Because "rules constrain discretion, they are too inflexible and resistant to evolution over time."[158] Similarly, given "[t]he patchwork of legislative and administrative measures that have affected public disclosure throughout the years,"[159] the court should have the appearance of consistency, uniformity, and predictability when applying a method of waiver analysis. Therefore, if the standard for determining agency waiver should not be mechanically applied, and courts need to appear uniform and consistent, then the courts should explicitly adopt a balancing approach that considers a specific number of factors.

C. The Influence of the Executive

The executive branch has been entrusted with the daily administration of the FOIA. As noted above, "[FOIA] gives the public statutory rights of access to broad categories of government information unless it falls within an exemption."[160] Significantly, the classification process of governmental information has been relegated to the executive branch. In other words,

[157] Chicago Alliance for Neighborhood Safety v. City of Chicago, 348 Ill. App. 3d 188, 202 (Ill. App. Ct. 2004).
[158] Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 90 (November 1992).
[159] Robert Ratish, *Democracy's Backlog: The Electronic Freedom of Information Act Ten Years Later*, 34 RUTGERS COMPUTER & TECH. L.J. 211, 225 (2007).
[160] Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 136 (2003).

the determination of whether the requested information falls within an exemption is left to the sole discretion of the agencies.

"Because of this discretion, disclosure policies can differ from agency to agency and even within constituent sections of a single agency."[161] Moreover, changing political events, such as the transitional nature of presidential administrations or unforeseen national incidents, "can have a substantial effect on an agency's discretion when creating its disclosure policy."[162] Therefore, the substantive and procedural elements of the Act are susceptible to political manipulation by the current administration.

Pursuant to an Executive Order, a presidential memorandum on FOIA implementation provides the policy position regarding disclosure for that current administration.[163] Further, the president then directs the Attorney General to issue new guidelines governing the FOIA to the heads of the executive departments and agencies.[164] The Attorney General's power over agency discretion flows from the Department of Justice's almost exclusive authority to represent the United States, its agencies, and its officers in FOIA litigation. As a result, the Department of Justice is ultimately charged with defending any agency decision to withhold information.[165] In effect, the Attorney General's guidelines "influence[ ] the policy on disclosure, resulting in modifications to the way government agencies handle requests."[166]

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[161] Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Classification of Information Already in the Public Domain*, 4 INFO. SOC'Y J.L. & POL'Y 479, 492 (2008).
[162] *Id.*
[163] Peter M. Shane, *The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World*, 56 N.Y.L. SCH. L. REV. 27, 41 (2011/2012).
[164] *Id.*
[165] Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Classification of Information Already in the Public Domain*, 4 INFO. SOC'Y J.L. & POL'Y 479, 492 (2008).
[166] Robert Ratish, *Democracy's Backlog: The Electronic Freedom of Information Act Ten Years Later*, 34 RUTGERS COMPUTER & TECH. L.J. 211, 225 (2007).

THE PLAINTIFF'S LAST CHANCE: FOIA'S WAIVER DOCTRINE

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The relationship between political accountability and disclosure policies can be seen during the transitionary periods from the Clinton Administration to the Bush Administration, and from the Bush Administration to the Obama Administration. Under the Clinton Administration, FOIA was seen as a vital part of democracy,[167] "[t]he presumption was disclosure and agencies were encouraged…to release information."[168] Further, Attorney General Janet Reno's memorandum stated that the DOJ would defend an asserted "FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."[169]

Conversely, under the Bush Administration, agencies were advised to fully consider any countervailing interests before making any discretionary disclosure under FOIA after the September 11th terrorists attack.[170] Notably, Attorney General John Ashcroft's memorandum recognized that while the DOJ and the Bush Administration were committed to complying with FOIA, they were equally committed to protecting other fundamental values, specifically safeguarding national security.[171] The memorandum also indicated that the DOJ would defend an agency's decision as long as the classification rested on a "sound legal basis."[172]

In a notable shift from the Bush Administration, President Barack Obama held that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."[173]

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[167] Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Classification of Information Already in the Public Domain*, 4 INFO. SOC'Y J.L. & POL'Y 479, 493 (2008).
[168] PATRICE MCDERMOTT, WHO NEEDS TO KNOW? THE STATE OF PUBLIC ACCESS TO FEDERAL GOVERNMENT INFORMATION 69 (2007).
[169] Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Classification of Information Already in the Public Domain*, 4 INFO. SOC'Y J.L. & POL'Y 479, 494 (2008).
[170] Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to Heads of All Fed. Dep'ts and Agencies (Oct. 10, 2001).
[171] *Id.*
[172] *Id.*
[173] President Barack Obama, Memo. for All the Heads of Exec. Dep'ts and Agencies Concerning FOIA, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

President Barack Obama also stated in his memorandum that "FOIA…is the most prominent expression of a…national commitment to ensuring an open Government."[174] Further, he stressed that "[a] democracy requires accountability, and accountability requires transparency."[175] Attorney General Eric H. Holder, Jr. also stated that "the [DOJ] will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."[176]

While the current administration favors disclosure, if the courts fail to recognize the susceptibility of the executive's disclosure policy, it risks leaving "the public's right of access to government information inadequately protected."[177] Furthermore, it is imperative to the effectiveness of FOIA, that "[p]eople perceive the Court as making principled decisions, not political compromises."[178]

Based on the role speculativeness plays "in the nature of the FOIA judge's task,"[179] the more substantially supported conclusion is that the court should take a sliding-scale approach, with complete judicial deference to the government's proffered reason that no waiver had occurred on one side, and no judicial deference on the other. The judiciary's role, therefore, will be to draw lines along the continuum based on an explicit number of factors.

Given the uncertainty of a current administration's discretionary disclosure policy, and the potential risk to the public's interest, this proposed solution better complies with FOIA. The

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[174] *Id.*
[175] *Id.*
[176] Eric Holder, Jr., Att'y Gen. of Dep't of Justice, to Heads of Exec. Departments and Agencies (Mar. 19, 2009).
[177] Scott A. Faust, *National Security Information Disclosure Under the FOIA: The Need for Effective Judicial Enforcement*, 25 B.C. L. REV. 611, 613 (1984).
[178] Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 90 (November 1992) (citing Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992) (opinion of O'Connor, Kennedy, Souter, J.J.) (internal quotation marks omitted)).
[179] *David E. Pozen, The Mosaic Theory, National Security, and the Freedom of Information Act, 115 YALE L.J. 628*, 665 (2005).

scale may be triggered during circumstances of excessive classification or times of national emergencies.

D. The Uncertain Role of Technology

The role that technology will play in waiver litigation is not clear at this time. For instance, "the Internet facilitates virtually perfect copying and nearly instantaneous transmission of material around the world."[180] Moreover, "information that is posted online is at one publicly available to millions of people on the Net."[181] Further, the "crawling, indexing and serving processes of search engines" now enable Internet users to enter a search query and immediately obtain a list of the most relevant pages.[182]

The circumstances of prior disclosure will have to be viewed in light of technological innovations. For example, the Internet will play a greater role in determining the public nature of the information and whether it is "freely available." Furthermore, the extent of dissemination must be analyzed in relation to the expansive nature of the Internet.

Similarly, the lack of uniformity in adjudicating confidentiality waiver is of great significance when viewed in relationship to the Internet. Citizens need to be able to rely on a standard that allows the public domain, by dispersing power through public rights of access, to effectively function as restraint against government power.[183] "Withholding information vests unchecked control in the executive, creates a credibility gap between government and the

[180] Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 169 (2003).
[181] *Id.*
[182] http://www.google.com/about/corporate/company/tech.html
[183] Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 137-138 (2003).

governed, and provides the Government with an opportunity to use 'leaks' to disclose only as much information as it deems useful."[184]

Because FOIA enables the executive to continue "block[ing] legal means for the public to obtain information about government activities, especially concerning national security, a new model for transparency emerged: Wikileaks."[185] Thus, "[i]n an environment where legally approved avenue to information about the government have been closed off, it's no wonder that efforts like Wikileaks would emerge."[186] More significantly, "[r]egardless of what happens to [the head of Wikileaks], a world where fewer FOIA requests are granted is a world with more Wikileaks."[187]

Therefore, in determining waiver in today's technologically-evolving landscape, the more substantially supported conclusion is that courts should explicitly evaluate the nature and extent of the prior disclosure. This will necessarily entail analyzing the practical effects of the prior disclosure as well as the hypothesized effects.

IV. THE NEED FOR REFORMATION OF WAIVER DOCTRINE & PROPOSED SOLUTION

In order to be more responsive to changing circumstances, such as differing administrative disclosure policies or the increasing role technology plays in the public domain context, the courts should explicitly adopt a multi-factored balancing test when determining whether an agency was waived confidentiality. The factors the court should explicitly adopt are (1) the applicable exemption at issue; (2) the nature of the disclosure; and (3) the extent of the disclosure, taking into consideration the actual and hypothetical effects of that disclosure. The

[184] Scott A. Faust, *National Security Information Disclosure Under the FOIA: The Need for Effective Judicial Enforcement*, 25 B.C. L. Rev. 611, 638 (1984).
[185] Katherine Mangu-Ward, *From FOIA to Wikileaks*, REASON MAGAZINE (March 2011), http://reason.com/archives/2011/01/23/from-foia-to-wikileaks.
[186] *Id.*
[187] *Id.*

court should also adopt a sliding-scale approach upon which the government's argument for nondisclosure will be assessed in light of the current Administration's discretionary disclosure policy and any other extenuating circumstances.

This proposed waiver standard is more in line with the legislature's envisioned role that the judiciary would ensure "the effective operation of FOIA."[188] Since "[t]he overriding policy of the FOIA is to disclose whenever possible and to withhold only when necessary," the court can better effectuate legislative intent by explicitly taking into account the purpose of the exemption in its analysis.[189] As noted above, explicitly evaluating the purpose of the applicable exemption has already been supported by the Tenth Circuit in *Prison Legal News v. Exec. Office for U.S. Att'ys*.[190]

Furthermore, as noted in the Ninth Circuit case of *Mobile Oil Corp. v. U.S. E.P.A.*,[191] the court must properly address the issue of waiver without adversely impacting the agency's conduct regarding discretionary disclosure. The concern in holding that an agency has waived confidentiality is that the agency will be less likely to disclose any information in the future. Therefore, it is imperative that the court evaluate whether the interests covered by the exemption are still able to be protected. This evaluation better captures the intent of the legislature in enacting FOIA to strike the balance between the public's interest in disclosure and the government's interest in protecting certain sensitive records.

In addition, by explicitly evaluating the nature and extent of the disclosure, the court will better address the rationale underlying the public domain. The public domain serves as a

[188] Scott A. Faust, *National Security Information Disclosure Under the FOIA: The Need for Effective Judicial Enforcement*, 25 B.C. L. REV. 611, 628 (1984).
[189] *Id.* at 622.
[190] 628 F.3d 1243 (10th Cir. 2011).
[191] 879 F.2d 698 (9th Cir. 1989).

structural restraint against the government.[192] Complementary to the rationale underlying FOIA, the public domain serves as a check on governmental abuses that can occur with the concentration of power by dispersing power to control information ultimately and equally among the people.[193] Whether requested information constitutes a "public thing," however, is not easily discernible.

Furthermore, the extent of the role that technology will play in determining whether something is "freely available" is unknown at this time. This point was noted by the Second Circuit in referenced in *Inner City Press/Cmty on the Move v. Bd. of Governors of the Fed. Reserve Sys.* [194] The courts, by explicitly taking into account these factors, will remain flexible to changing technologies, and ultimately result in more pragmatic outcomes.

Therefore, in weighing the nature of the disclosure, the courts should look to the circumstances of its disclosure and the form of the disclosure. Similarly, in weighing the extent of the disclosure, the courts should look to the actual and hypothetical dissemination of the information. This approach is supported by Ninth Circuit's hypothetical analysis in *Watkins v. U.S. Bureau of Customs and Border Protection*.[195] Further, while contrary to D.C. Circuit's explicit ruling in *Cottone v. Reno,*[196] it is in line with court's articulated rationale for the public domain doctrine.[197]

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[192] Edward Lee, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 164 (2003).
[193] *Id.*
[194] 463 F.3d 239, 252, n.15 (2d. Cir. 2006) (As technology quickly changes, information becomes more readily available to the public and the difficulties noted in Reporters Committee, for example, lessen significantly. The rapid change in technology is evidenced here by the fact that a text search of securities filings became available during the pendency of this matter. Appellee's Br. 58 n. 21.).
[195] Watkins v. U.S. Bureau of Customs and Border Protection, 643 F.3d 1189, 1197-1198 (9th Cir. 2011).
[196] 193 F.3d 550 (D.C. Cir. 1999).
[197] *See* Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001); *See also,* Amanda Fitzsimmons, *National Security or Unnecessary Secrecy? Restricting Exemption 1 to Prohibit Classification of Information Already in the Public Domain*, 4 INFO. SOC'Y J.L. & POL'Y 479, 552 (2008).

Moreover, this approach will most likely result in fairer outcomes. For instance, under the public domain doctrine, the courts were required to determine whether information was "freely available" and "permanently" in the public domain. Such line-drawing may result in arbitrary outcomes, making illusory the doctrine's promise of certainty and predictably. [198] In particular, this approach will better enable the judiciary to respond to countervailing concerns which may be present due to recent circumstances, such as different Administrations or national security concerns.

These interests, however, must be viewed through a critical lens, with the court picking a point on a spectrum. While a balancing or sliding-scale approach has been previously articulated in wavier case law, it has not been explicitly adopted by all the circuits. In explicitly adopting this method of analysis, the judiciary will "make visible and accountable the inevitable weighing process that rules obscure."[199]

VI. CONCLUSION

Waiver analysis under FOIA is necessarily fact-specific. A balancing or sliding-scale approach, implicitly supported by case law, requires judges to consider all the facts, the context, and determine from the whole picture whether the government has waived confidentiality. By explicitly adopting this approach, however, courts will add an element of predictability and uniformity that had previously been absent under waiver analysis. Moreover, this approach best facilitates the drawing out the commonalities and differences in the approaches taken by the D.C., Second, Ninth, and Tenth Circuits. This method of analysis also is the most responsive to the number of competing values underlying FOIA litigation. In particular, the court must

[198] Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 90 (November 1992).
[199] *Id.* at 67.

explicitly take into account (1) the purpose of the exemption, (2) the nature of the disclosure, and (3) the extent of the disclosure. This flexible, balancing or sliding-scale analysis, guided by three factors, works as a substantive compromise between "the right of the citizenry to know what the Government is doing, and the legitimate but limited need for secrecy to maintain effective operation of the Government."[200]

[200] JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE, Vol. I, at 3 (3d. ed. 2011) (citing Milner v. U.S. Dep't of Navy, 575 F.3d 959 (9th Cir. 2009)).