CALL THE LAWYERS: A LAWSUIT'S BEEN FILED

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Threshold Considerations

- How does the FOIA Officer learn that the agency has been sued
- Importance of date US Attorney served with complaint
- Who represents the agency in court
- What part does the agency general counsel's office play
- Litigation advice from Main Justice (Elizabeth Shapiro (202) 514-5302)

Jurisdiction, Venue and Pleadings

- Jurisdiction
- Venue
- Complaint
- Answer
Exhaustion of Administrative Remedies
- Adverse determination, appeal, denial
- Deemed exhausted if agency is late
- Not exhausted if records not reasonably described or fees not paid
- Remedy for failure to exhaust is dismissal

Mootness and Standard of Review
- Moot if all issues resolved
- De novo standard of review on almost all withholding issues
- Deference to agency in national security, readily reproducible, and electronic search causing interference
- Based on administrative record for fee waiver issues

Discovery
- Can take several forms
- Usually extremely limited
- Not appropriate on underlying substance of agency thought process
- Question of search often appropriate
- Not appropriate if agency will cover in its Vaughn declaration
Summary Judgment

- FOIA litigation resolved by motion
- No disputed facts, only question of how the law applies to facts
- No live testimony, submission of sworn statements
- *Vaughn* affidavits or *Vaughn* declarations

Vaughn Declarations

Contents:
- Identify declarant
- State the number of records/pages being withheld and the number of pages released in full or in part
- Set forth procedural history of request, including relevant correspondence
- Describe the search for responsive records

Vaughn Declarations

The *Vaughn* Index
- Describe records or portions of records withheld
- Identify each exemption claimed
- Connect each item withheld with the exemption asserted
- Demonstrate that all required elements of each exemption are satisfied
**Types of Vaughn Declarations**

Traditional *Vaughn* declaration
- Useful when there are relatively few documents at issue

*Coded* declarations
- Useful for high-volume, multiple-exemption cases
- Two parts:
  - Assigns an exemption code to each category of withheld information, for example (b)(7)(C)-1 for names of FBI Special Agents, (b)(7)(C)-2 for subject of an FBI investigation
  - Attach copies of redacted records with appropriate code marked next to each deletion
- Privacy Act implications

Categorical or generic declaration
- Most frequently used in Exemption 7(A) cases
- Assigns a functional category to each type of record involved and describes how disclosure would harm on-going law enforcement proceedings
- Also can be used in some types of Exemption 6 and 7(C) cases
Types of Vaughn Declarations

- "Glomar" denial declaration
  - Used only when an agency cannot confirm or deny the existence of records because it would reveal an exempt fact
  - "Records withheld" section of declaration explains only what abstract fact would be disclosed if agency confirmed that there were or were not records
  - Used most often for targeted requests involving Exemptions 1, 6 or 7C

- "Vaughning" only a sample of records
  - Used with a very large number of documents
  - Requester and/or court must agree to using this type of declaration
  - Sample by full document rather than by page
  - If court disapproves of application of exemptions, may need to reprocess all records

In Camera Declaration

- Ex parte – written only for judge
- Agency must still describe publicly as much as possible
- Most frequently used in Exemption 1 cases
**Alternative to Vaughn Declarations**

- "Oral Vaughn" utilized to facilitate settlement
- Agency representative very familiar with records discusses them with and bases for withholding with requester without disclosing exempt information
- Because this is informal, the discussion is not transcribed or taped

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**Alternative to Vaughn Declarations**

- FOIA expressly authorizes in-camera inspection of records
- Judge does not need security clearance to review classified material
- Physical security precautions needed
- Often done where judge finds agency bad faith
- Neither requester nor his attorney can review in-camera submission

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**Special “Vaughning” Problems**

- **Exemption 1**
  - "Foreign government information"— identify country, if possible
  - "Intelligence activities, sources or methods"
    - If possible, state whether an activity, a source or a method is at issue
    - If possible, state general nature of the activity, source or method
**Special “Vaughning” Problems**

**Exemption 1 (cont’d)**
- "Foreign relations": if possible, identify the nation and/or relationship between nations that could be impaired
- Always state what national security harm would result from disclosure, except for foreign government information (harm is presumed)

**Exemption 3**
- Identify the federal statute being applied to withheld information pursuant to Exemption 3
- Explain how the statute applies to the withheld information

**Exemption 4:**
- When agency is relying on substantial competitive harm argument, try to include declaration from submitter explaining how competitors would use information at issue to disadvantage
- Make clear that agency considered submitter’s views on substantial competitive harm, but made independent decision
Special “Vaughning” Problems

Exemption 5
- Explain whether the communication was inter- or intra-agency (Klamath issues)
- Deliberative process privilege
  - Explain why information is predecisional
  - Explain why information is deliberative
  - State that all factual information has been disclosed or explain why it has not

Special “Vaughning” Problems

Attorney work product privilege
- Identify ongoing or anticipated litigation and how document pertains to it

Attorney client privilege
- Explain how disclosure would identify confidential information provided by a client to the attorney in order to obtain legal advice

Special “Vaughning” Problems

Exemption 6
- Describe privacy interest
  - Whose interest is involved and how is this personal information
  - Describe any particular harm from disclosure
  - If information is old, address whether subject is still living
- Discuss whether there is any legitimate public interest, and assign it a magnitude
Special “Vaughning” Problems

- **Exemption 6 (cont’d)**
  - State that the agency has balanced the privacy interest and the public interest, and that the privacy interest prevails

- **Exemption 7 (all subparts)**
  - State the law enforcement purpose for which the records were created

Special “Vaughning” Problems

- **Exemption 7 (cont’d)**
  - (7)(A)
    - State that all categories of information which could not reasonably be expected to interfere with law enforcement proceedings have been disclosed
    - Describe the information withheld in functional categories
    - Explain how disclosure of each functional category could reasonably be expected to cause an identifiable harm

Special “Vaughning” Problems

- **Exemption 7 (cont’d)**
  - (7)(C)
    - See Exemption 6 above
  - (7)(D)
    - If not criminal/national security investigation, state that only information that could reasonably be expected to identify the confidential source has been withheld
    - If a criminal/national security investigation, describe investigation without revealing source provided or identifying information
Special “Vaughning” Problems

Exemption 7 (cont’d)
(7)(D)
- State whether the confidential source was given an express or implied promise of confidentiality
- If dealing with implied promise of confidentiality, state the circumstances giving rise to the implied promise

Duty to Segregate

- Declaration must specifically state that agency has disclosed all reasonably segregable non-exempt information
- If possible, give examples of the agency's efforts to disclose segregable non-exempt information
- If possible, describe any non-exempt information that was not disclosed

Waiver of Exemptions in Litigation

- Because judicial review is de novo, exemptions may be asserted in litigation even though they were not previously relied upon in the administrative stage of processing the request
- All exemptions must be asserted in the agency's Vaughn declaration
Waiver of Exemptions in Litigation

- District courts very reticent to permit assertion of new exemption after adverse decision.
- Unlikely that agency will be permitted to assert a new exemption on remand after a court of appeals rules that the agency's first asserted exemption inapplicable.
- Exemption 7(A) problems.

Attorney Fees

A. Eligibility
- Requester must have representational relationship with an attorney.
- Requester will have "substantially prevailed" only if it has obtained a judicially sanctioned "alteration of the legal relationship of the parties" or
- A voluntary change in the position of the agency.

B. Entitlement
- Court will consider the:
  - Public benefit.
  - Commercial benefit to requester.
  - The nature of the requester's interest in the records sought.
  - Whether the agency's withholding had a reasonable basis in law.