


	<p>APPEALS, LITIGATION and WORKING WITH THE GENERAL COUNSEL</p> <p>Richard Huff Jaret Fishman Ryan Mulvey</p> 
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	<p>APPEAL TIPS</p> <ul style="list-style-type: none">■ Make and preserve notes when conducting searches and processing records■ Handle it in a timely manner
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	<p>Litigation Threshold Considerations</p> <ul style="list-style-type: none">■ How does the FOIA Officer learn that the agency has been sued?■ 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)
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	Jurisdiction, Venue and Pleadings
	<ul style="list-style-type: none">■ Jurisdiction<ul style="list-style-type: none">– <i>Cause of Action Inst. v. IRS</i>, No. 16-2354, 2019 WL 3225751 (D.D.C. July 17, 2019)■ Venue■ Complaint■ Answer

	Exhaustion of Administrative Remedies
	<ul style="list-style-type: none">■ 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 without prejudice


	Mootness and Standard of Review
	<ul style="list-style-type: none">■ Moot if all issues resolved■ <i>De novo</i> 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
	<ul style="list-style-type: none">■ Usually extremely limited■ Question of search often appropriate■ Not appropriate if agency will cover in its <i>Vaughn</i> declaration

	Summary Judgment
	<ul style="list-style-type: none">■ FOIA litigation resolved by motion■ No disputed facts, only question of how the law applies to facts■ No live testimony; submission of sworn statements■ <i>Vaughn</i> affidavits or <i>Vaughn</i> declarations

	<i>Vaughn</i> Declarations
	<ul style="list-style-type: none">■ Contents:<ul style="list-style-type: none">– 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

	<h2>Vaughn Declarations</h2>
	<ul style="list-style-type: none">■ The <i>Vaughn</i> Index<ul style="list-style-type: none">– 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

	<h2>Types of Vaughn Declarations</h2>
	<p>Traditional <i>Vaughn</i> declaration</p> <ul style="list-style-type: none">– Document-by-document, page-by-page, line-by-line description of withheld information– Useful when there are relatively few documents at issue 


	<h2>Types of Vaughn Declarations</h2>
	<ul style="list-style-type: none">■ “Coded” declarations<ul style="list-style-type: none">– Useful for high-volume, multiple-exemption cases– Two parts:<ul style="list-style-type: none">■ 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<ul style="list-style-type: none">– Privacy Act implications 

	<h3>Types of <i>Vaughn</i> Declarations</h3>
	<ul style="list-style-type: none">■ Categorical or generic declaration<ul style="list-style-type: none">– Most frequently used in Exemption 7(A) cases (Bevis Declaration)– 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

	<h3>Types of <i>Vaughn</i> Declarations</h3>
	<ul style="list-style-type: none">■ “Glomar” denial declaration<ul style="list-style-type: none">– 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

	<h3>Types of <i>Vaughn</i> Declarations</h3>
	<ul style="list-style-type: none">■ “Vaughning” only a sample of records<ul style="list-style-type: none">– 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



	<h3><i>In Camera</i> Declaration</h3>
	<ul style="list-style-type: none">■ <i>Ex parte</i> – written only for judge■ Agency must still describe publicly as much as possible■ Most frequently used in Exemption 1 cases 

	<h3>Alternative to <i>Vaughn</i> Declarations</h3>
	<ul style="list-style-type: none">■ FOIA expressly authorizes <i>in camera</i> inspection of records■ Judge does not need a 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 <i>in camera</i> submission

	<h3>Duty to Segregate</h3>
	<ul style="list-style-type: none">■ 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

	Foreseeable Harm
	<ul style="list-style-type: none">■ Must demonstrate that foreseeable harm analysis was conducted■ Requirement added by Congress in the 2016 FOIA Improvement Act■ Courts are still working out the impact of the new standard

	Waiver of Exemptions in Litigation
	<ul style="list-style-type: none">■ Because judicial review is <i>de novo</i>, 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 <i>Vaughn</i> declaration

	Waiver of Exemptions in Litigation
	<ul style="list-style-type: none">■ 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
	<ul style="list-style-type: none">■ A. Eligibility<ul style="list-style-type: none">– 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

	Attorney Fees
	<ul style="list-style-type: none">■ B. Entitlement<ul style="list-style-type: none">– Court will consider the:<ul style="list-style-type: none">■ 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
