

## APPEALS, LITIGATION and WORKING WITH THE GENERAL COUNSEL

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Ryan Mulvey, Americans for Prosperity Foundation  
Gunita Singh, Reporters Committee for Freedom of the Press  
Ginger Quintero-McCall, Demand Progress  
Karen Finnegan Meyers, Koniag Government Services

*Special thanks to Dick Huff for original slide creation*



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## ADMINISTRATIVE APPEALS

- Provide agencies with opportunity to review its initial action and take corrective action, if necessary.
- Provide requesters with opportunity to challenge agency's action before going to court.
- Can appeal any adverse determination: denial of records, "no records" response, denials of fee waivers and expedited processing.
- **Time limits:** requesters given minimum of 90 days to file an appeal; agencies given 20 working days after receipt to adjudicate appeals.

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## ADMINISTRATIVE APPEALS TIPS

- Make and Preserve Notes When Conducting Searches and Processing Records
  - Keep record of search terms used and time frame searched
- Handle it in a Timely Manner

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## Litigation Initial Considerations

- 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?
- What part do FOIA professionals play?

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## Jurisdiction, Venue and Pleadings

- Jurisdiction
- Venue
- Complaint
- Answer

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## Exhaustion of Administrative Remedies

- Requester must file a proper FOIA request and administrative appeal prior to seeking relief in the courts.
- Deemed exhausted if agency is late
- Not exhausted if records not reasonably described or fees not paid
- Remedy for failure to exhaust is dismissal of lawsuit without prejudice

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## 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

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## Discovery

- What is discovery?
- In FOIA cases, usually extremely limited.
- Question of search often appropriate.
- Not appropriate if agency will cover in its *Vaughn* declaration.

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## 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.

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## *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 in detail

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## *Vaughn* Index

- The *Vaughn* Index
  - Describe in detail the information withheld
  - Identify each exemption claimed
  - Connect each item withheld with the exemption asserted
  - Demonstrate that all required elements of each exemption are satisfied

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## Types of *Vaughn* Declarations

### Traditional *Vaughn* declaration

- Document-by-document, page-by-page, line-by-line description of withheld information
- Useful when there are relatively few documents at issue



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## Types of *Vaughn* Declarations

- “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



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## Types of *Vaughn* Declarations

- Categorical or generic declaration
  - 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

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## 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

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## Types of *Vaughn* Declarations

- "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



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## 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



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## Alternative to *Vaughn* Declarations

- FOIA expressly authorizes *in camera* 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 her attorney can review *in camera* submission

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## 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

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## Foreseeable Harm

- **FOIA Improvements Act of 2016: 5 U.S.C. § 552(a)(8):**
- Agencies "shall withhold information . . . only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law."
- Agencies shall "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible."
- Agencies shall "take reasonable steps necessary to segregate and release nonexempt information."
- Theoretically applies to all non discretionary exemptions, but usually applied to Exemption 5

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## Foreseeable Harm

- What not to do:
  - **Reporter's Committee: Don't use boilerplate**
    - Declaration submitted by the FBI's FOIA chief in a different case in 2009 was almost identical to the one submitted in this case, even after the change in the law in 2016
    - Agency's declarations were "scanty," "cookie-cutter," and "perfunctory"
  - **Roseberg: Don't rely on generalized harms**
    - Don't just say that release would harm candor, discussion, etc.
  - **Judicial Watch: Don't treat withholding as though no foreseeable harm test has been added - not business as usual**

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## Foreseeable Harm

- What to do:
  - Rosenberg: Categories are okay, but don't make them overly broad
  - Reporter's Committee: Focus on security, confidentiality, harm to specific investigations
  - **Reporter's Committee: Provide a concrete demonstration of:**
    - **why disclosure of the particular type of material at issue will,**
    - **in the specific context of the agency action at issue,**
    - **actually impede those same agency deliberations going forward.**

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## 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

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## 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

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## 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

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## Attorney Fees

- 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

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