


	CALL THE LAWYERS: A LAWSUIT'S BEEN FILED
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	Threshold Considerations
	<ul style="list-style-type: none"> ■ 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 (Marcia Berman (202) 514-2205)

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	Jurisdiction, Venue and Pleadings
	<ul style="list-style-type: none"> ■ Jurisdiction ■ Venue ■ Complaint ■ Answer

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	Exhaustion of Administrative Remedies
	<ul style="list-style-type: none"> ■ Adverse determination, appeal, denial ■ Deemed exhausted if agency is late (constructive exhaustion) ■ Not exhausted if records not reasonably described or fees not paid ■ But agency must expressly provide appeal rights ■ Remedy for failure to exhaust is dismissal

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	Mootness and Standard of Review
	<ul style="list-style-type: none"> ■ Moot if all issues resolved ■ De novo standard of review on withholding issues ■ Deference to agency in national security, readily reproducible, and breadth of electronic search causing interference ■ Based on administrative record for fee waiver issues

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	Discovery
	<ul style="list-style-type: none"> ■ Can take several forms ■ Usually extremely limited ■ Not appropriate on underlying substance or agency thought process ■ Question of search often appropriate ■ Issues of bad faith often resolved through discovery ■ Not appropriate if agency will cover in its <i>Vaughn</i> declaration

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Summary Judgment	
	<ul style="list-style-type: none"> ■ FOIA litigation resolved by motion ■ Agency typically files first because it has burden of proof ■ 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

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Preliminary Injunctions	
	<ul style="list-style-type: none"> ■ Rare ■ Typically pertain to failure to expedite


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<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


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	<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 – Address foreseeable harm

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	<h2>Types of <i>Vaughn</i> 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 

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	<h2>Types of <i>Vaughn</i> 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 

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Types of *Vaughn* Declarations

- 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

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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

- "Oral *Vaughn*" utilized to facilitate settlement
- Agency representative very familiar with records discusses them 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 a security clearance to review classified material
- Physical security precautions needed

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Alternative to *Vaughn* Declarations

- Often done where judge finds agency bad faith
- Neither requester nor his attorney can review *in camera* submission
- Not preferred approach because of limited public record, including for appellate courts

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Special "Vaughning" Considerations

- **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

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Special "Vaughning" Considerations

- **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)

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	Special "Vaughning" Considerations
	<p>Exemption 3</p> <ul style="list-style-type: none"> - Identify the federal statute being applied to withhold information pursuant to Exemption 3 - Explain how the statute applies to the withheld information

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	Special "Vaughning" Considerations
	<p>Exemption 4:</p> <ul style="list-style-type: none"> - Show how submitter customarily treated records as "private or secret" - Discuss how or whether agency gave assurances of how records will be kept private - Food Marketing Institute v. Argus Leader Media

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	Special "Vaughning" Considerations
	<p>■ Exemption 5</p> <ul style="list-style-type: none"> - Explain whether the communication was inter- or intra-agency (<i>Klamath</i> issues) - Deliberative process privilege <ul style="list-style-type: none"> ■ Explain why information is predecisional ■ Explain why information is deliberative ■ State that all factual information has been disclosed or explain why it has not

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	Special "Vaughning" Considerations
	<ul style="list-style-type: none"> -Attorney work product privilege <ul style="list-style-type: none"> - Identify on-going or anticipated litigation and how document pertains to it -Attorney client privilege <ul style="list-style-type: none"> - Explain how disclosure would identify confidential information provided by a client to the attorney in order to obtain legal advice -Discuss Foreseeable Harm

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	Special "Vaughning" Considerations
	<ul style="list-style-type: none"> ■ Exemption 6 <ul style="list-style-type: none"> - Describe privacy interest <ul style="list-style-type: none"> ■ 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

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	Special "Vaughning" Considerations
	<ul style="list-style-type: none"> ■ Exemption 6 (cont'd) <ul style="list-style-type: none"> - State that the agency has balanced the privacy interest and the public interest, and that the privacy interest prevails Exemption 7 (all subparts) <ul style="list-style-type: none"> - State the law enforcement purpose for which the records were created

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	Special "Vaughning" Considerations
	<p>■ Exemption 7 (cont'd)</p> <p>– (7)(A)</p> <ul style="list-style-type: none"> ■ 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

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	Special "Vaughning" Considerations
	<p>Exemption 7 (cont'd)</p> <p>–(7)(C)</p> <ul style="list-style-type: none"> ■ See Exemption 6 above <p>–(7)(D)</p> <ul style="list-style-type: none"> ■ 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

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	Special "Vaughning" Considerations
	<p>Exemption 7 (cont'd)</p> <p>(7)(D)</p> <ul style="list-style-type: none"> ■ 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

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First Party Privacy Act Access Issues

When first party requester has access rights, state which (if any) system of records the information was retrieved and if from a system of records, cite to the Federal Register or Code of Federal Regulations provision by which the agency head has exempted them from the Privacy Act's access provision

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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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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
	<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

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	Waiver of Exemptions in Litigation
	<ul style="list-style-type: none"> ■ Unable to assert new exemptions on appeal ■ Temporal limits of Exemption 7(A)

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	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

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	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

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	Additional Considerations
	<ul style="list-style-type: none"> ■ No one likes litigation: work hard to avoid, narrow issues before a lawsuit is filed ■ Keep open lines of communication with requester after litigation filed ■ Work to narrow issues for litigation – reduces exposure to attorney fees

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