



UNITED STATES DEPARTMENT *of* JUSTICE

# Advanced FOIA Litigation



# FOIA Litigation: Course Overview

- Processing requests subject to litigation (constructive exhaustion)
  - Search and processing schedules
  - Negotiating with plaintiffs
  - Narrowing issues to be briefed
  
- Declarations & *Vaughn* Indices
  - Factual basis for Motions for Summary Judgment (MSJs)/legal “briefs”
  - May be required at other times during the case as well (scheduling matters, Reply briefs, court order)<sup>2</sup>



# FOIA Litigation: Handout Overview

- Declaration examples:
  - **Handout A:** *Protect Democracy v. DOJ*, No. 20-0172 (D.D.C.) (preliminary injunction opposition)
  - **Handout B:** *Buzzfeed v. DOJ*, No. 18-2370 (D.D.C.) (*Open America* stay)
  - **Handout C:** *Make the Road New York v. DHS et al.*, No. 18-2445 (E.D.N.Y.) (comprehensive declaration)
  - **Handout D:** *Gellman v. DHS et al.*, No. 16-0635 (D.D.C.) (responsive “records”)
  - **Handout E:** *Machado Amadis v. DOJ et al.*, No. 16-2230 (D.D.C.) (foreseeable harm and segregation)



# FOIA Litigation: Handout Overview

- *Vaughn* Index examples:
  - **Handout C:** “Document-by-Document” *Vaughn* example
  - **Handout F:** “Grouped” *Vaughn* example
  - **Handout G:** “Coded” *Vaughn* example
  - **Handout H:** “Coded” declaration example (variation of “coded” *Vaughn*)



# Processing Requests in Litigation

- You may still be processing a request when litigation ensues
- In these situations, ongoing searches and processing continue, subject to judicial review
- Joint Status Reports (JSRs) keep the court updated on searches/processing status or other issues



# Processing in Litigation: Schedules

- Search schedules
  - Establish timelines for search completion
  - May include time for agency to review search results and negotiate with plaintiff about further processing
  
- Processing or “production” schedules
  - Usually provides an end-date for processing, and may include rolling productions
  - May establish page-based processing minimums per response
  - Consultations should be accounted for in scheduling



# Processing in Litigation: Schedules

- Briefing schedules
  - Establish filing dates for MSJs, Oppositions, Replies and cross-motions
  - May provide a window for negotiations with plaintiffs in order to narrow or moot issues in dispute – thereby obviating need to brief those issues
  - Briefing schedules often will not be set until processing has been completed



## Processing in Litigation: Schedules

- In some instances, a declaration may be required to support an agency's proposed schedule:
  - Preliminary injunction motion oppositions (*see Handout A*)
  - Opposing positions filed in status reports
  - *Open America* stay motions (*see Handout B*)





## Processing in Litigation: Negotiations

- Negotiations with plaintiffs (via counsel) during processing may facilitate agency processing and/or moot issues before briefing. Possibilities include:
  - Search parameters (terms, offices/custodians, cut-off dates)
  - Scoping/responsiveness
  - Format of records produced



# Processing in Litigation: Negotiations

- Negotiations with plaintiffs once processing is completed may also narrow issues to be briefed. Common approaches include:
  - “Informal” search summaries
  - “Draft” *Vaughn* Indices
  - Answering direct questions about the agency’s process, documents, or withholdings



## Declarations & *Vaughn* Indices

- *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)
- Allow court to make a rational decision without reviewing documents at issue
- Help produce a record that will make the court's decision capable of meaningful review
- Allow plaintiff to argue the case adequately



## Declarations & *Vaughn* Indices

- Agency declarations establish the entire factual record in a case
- Many FOIA cases are won or lost on the strength of the agency's declaration
  - Courts may provide an opportunity to supplement the declaration, but are not required to do so
- *Vaughn* Indices may accompany declarations but may not always be required



# Declarations: Best Practices

- Key factors for a strong declaration:
  - Start with a robust administrative record (created during processing)
  - Made in good-faith
  - Non-conclusory
  - Clear
  - Thorough
  - Objective



# Declarations: Best Practices

- Know your audience: litigators, plaintiff, and the court
  - Don't presume knowledge of agency records systems or practices
  - Don't presume sympathy
  - Ensure declarations are clear and easy to understand



# Declarations: Best Practices

- Tailor the declaration to the issues that are being challenged:
  - Timing (for scheduling disputes)
  - Fees
  - Search
  - Responsiveness or “record” determinations
  - Withholdings/Exemptions/Foreseeable harm
  - Segregation



# Declarations: Administrative Record

- Preparation for a good declaration starts at the administrative level
  - Ensures accuracy of information
  - Guards against memory, staff departures
  - Informs future declarant
  
- The administrative record is especially important where the following are at issue:
  - Fees/Fee waivers/Fee categories
  - Expedited processing





# Declaration Drafting: Structure

- Identify declarant
- Provide administrative history/attach relevant correspondence
- Describe search (repositories, methods, parameters)
  - If applicable, address scoping determinations and/or how records were defined
- Describe withholdings/exemptions applied and foreseeable harm
- Address efforts to segregate non-exempt information
- ***See Handout C*** (comprehensive declaration example)



# Declaration Drafting: Declarant

- Identify the Declarant
  - *See* Fed. R. Civ. P. 56(e)(1) – personal knowledge standard
  - Declarant need not have conducted the search – coordination or supervision of search suffices
  - Hearsay permissible if information is obtained in the course of declarant’s official duties
  
- *See* Handout C, paras. 1-2



# Declaration Drafting: Administrative History

- Recount administrative history
  - Describe agency's procedural actions on the request
    - from receipt through final response
  - Attach relevant correspondence as exhibits
  
- *See Handout C, paras. 3-9*



## Declaration Drafting: Searches

- Standard: “[R]easonably calculated to uncover all relevant documents requested”
  - Search is not judged by its fruits, but by the appropriateness of the methods used.
  
- Burden: Agencies must demonstrate the search was adequate, then burden shifts to the requester
  - Can be rebutted “only by showing that the agency's search was not made in good faith”



## Declaration Drafting: Searches

- Identify the nature and scope of databases and records systems available to search, including a description of the information in those systems/files
- Identify which databases, records systems, indices were searched and why (or why not, if relevant)
- Consider whether “non-traditional” records repositories need to be addressed (*e.g.*, text or voice messages)



# Declaration Drafting: Searches

- Detail search parameters used, including:
  - Keyword/search terms
  - Non-electronic search methods (*e.g.*, hand-searching)
  - Targeted or knowledge-based search methods
  - Date range of search
  - Records custodians searched
  - Cut-off date applied to search
  
- *See Handout C*, paras. 10-22



## Declaration Drafting: Searches

- Describe secondary searches or any “leads” that were followed
- Include declarant attestation that search was adequate:
  - “I aver that [the searches] were reasonably calculated to uncover all potentially responsive records and that all files identified as likely to contain relevant documents were searched.”
  - ***See Handout C***, para. 22



## Declaration Drafting: Responsiveness

- An agency's definition of a "record" and, relatedly, which records are responsive to plaintiff's request, may need to be addressed if challenged
- ***See Handout D*** (responsive "records" declaration)





# Declaration Drafting: Withholdings

- Cross-reference to *Vaughn* Index
  - ***See Handout C***, para. 24
  
- Provide high-level summary of withholdings and/or categorize withholdings into groups for clarity of discussion, if necessary
  - ***See Handout C***, paras. 23-24
  
- Address each element of all exemptions at issue
  - ***See Handout C***, paras. 25-81



# Declaration Drafting: Withholdings

- Foreseeable Harm Standard: Agencies “shall withhold information only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or if “disclosure is prohibited by law”
- Address why release of the withheld information would result in a reasonably foreseeable harm
- ***See Handout E***, paras. 21 & 26; *Machado Amadis v. U.S. Dep’t of State*, 971 F.3d. 364 (D.C. Cir. 2020).<sup>26</sup>



## Declaration Drafting: Segregation

- FOIA requires that all “reasonably segregable” non-exempt information be released
- Courts may review segregation *sua sponte*
- Explain how and why non-exempt information was segregated, or why portions could not be segregated



## Declaration Drafting: Segregation

- Highlight specific efforts to segregate, for example:
  - Was a substantial amount of information released?
  - If drafts were withheld, were final “decisions”/versions provided?
  - For Exemptions 6/7(C): were withholdings carefully drawn to only protect information that would identify an individual?
  
- ***See Handout E, paras. 22, 27 & 34.***



## *Vaughn* Indices

- Is a *Vaughn* Index required?
  
- Variations of *Vaughn* Indices:
  - Narrative (*i.e.*, a declaration by itself)
  - Document-by-Document
  - Categorical or Grouped
  - Coded



# Vaughn Indices: Examples

## B. DOJ OIP, March 29, 2019 Interim Release, Records Released in Part

Document ID	Date <sup>3</sup>	Record Sender/Recipient/Subject	Description of Withheld Material	Exemption	Pages
0.7.17107.5183	8/16/2017	<b>From:</b> Danielle Cutrona (OAG) <b>To:</b> Devin O'Malley (PAO) <b>Subject:</b> Re: daca question	<i>Deliberative Discussions Regarding a Response to a Press Inquiry</i>  <i>Personal Contact Information</i>	5 -- Deliberative Process Privilege  6	2 (in part)
0.7.17107.11385	8/26/2017	<b>From:</b> Jody Hunt (OAG) <b>To:</b> Danielle Cutrona (OAG) <b>Subject:</b>	<i>Deliberative Discussions Regarding the Drafting Process</i>	5 -- Deliberative Process Privilege  Attorney Work-Product Privilege	1 (in part)
0.7.17107.11388	8/27/2017	<b>From:</b> Jody Hunt (OAG) <b>To:</b> Danielle Cutrona (OAG) <b>Subject:</b> RE:	<i>Deliberative Discussions Regarding the Drafting Process</i>	5 -- Deliberative Process Privilege  Attorney Work-Product Privilege	1 (in part)
0.7.17107.14246	9/4/2017	<b>From:</b> Ian Prior (PAO) <b>To:</b> Danielle Cutrona (OAG) <b>CC:</b> Sarah Jean Flores (PAO)	<i>Deliberative Discussions Regarding the Selection of Press Surrogates</i>	5 -- Deliberative Process Privilege	1 (in part)

➤ “Document-by-Document” *See Handout C*



## *Vaughn* Indices: Examples

<b>Group Number</b>	<b>Date</b>	<b>Description</b>	<b>Privilege</b>	<b>Pages</b>
1	Varied dates in 2002 but mostly undated	Unsigned drafts, many with handwritten notations, the final in full mostly undated versions of which were also processed and provided to plaintiff: consist of draft letters to Congress, draft transmittal memorandum, drafts of the final and interim reports to Congress on classified leaks, and draft memoranda regarding the Interagency Task Force.	Deliberative process in full	264
	Varied dates in 2002 but mostly undated	Unsigned, incomplete, drafts, many with handwritten notations, but of which no final versions were in full mostly undated located, consisting of draft remarks, portions of memoranda, and analysis of issues involving leaks	Deliberative process in full	71

➤ “Grouped” *See Handout F*



## Vaughn Indices: Examples

(b)(6) & (b)(7)(C)		<b><u>CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY AND UNWARRANTED INVASION OF PERSONAL PRIVACY</u></b>
	-1	Names and/or Identifying Information of FBI Special Agents and Support Personnel
	-2	Names and/or Identifying Information of Third Parties who Provided Information to the FBI [Cited at times in conjunction with (b)(7)(D)-3 and (b)(7)(D)-5]
	-3	Names and/or Identifying Information Concerning Foreign and Local Law Enforcement Personnel
	-4	Names and or/ Identifying Information of Third Parties of Investigative Interest
	-5	Names and/or Identifying Information of Third Parties Merely Mentioned

➤ “Coded” *See Handout G*





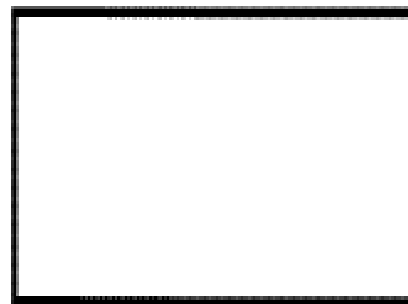
# Vaughn Indices: Examples

SAC, Detroit

Director, ~~FBI~~

6/23/65

1 -  
1 -  
1 -



b6 -1  
b7C -1

CARL OGELSBY  
SECURITY MATTER - SDS

b6 -4  
b7C -4



SECURITY MATTER - SDS

*[Handwritten signature]*



# Vaughn Indices: Examples

EXEMPTIONS AND CODED CATEGORIES	CATEGORY DESCRIPTION
<u>Exemption (b)(3)</u>	Information protected by statute
(b)(3)-1	<i>Federal grand jury information, prohibited from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure</i>
(b)(3)-2	<i>Intelligence sources and methods, prohibited from disclosure by the National Security Act of 1947, 50 U.S.C. § 3024(i)(1)</i>
<u>Exemption (b)(5)</u>	Information withheld pursuant to the deliberative process privilege
(b)(5)-1	<i>Deliberations about application of law to specific factual scenarios</i>
(b)(5)-2	<i>Deliberations about charging decisions not to prosecute</i>

➤ “Coded Declaration” *See Handout H*



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Questions?