



UNITED STATES DEPARTMENT *of* JUSTICE

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# Litigation Considerations



# Threshold Considerations: Jurisdiction and Venue

- Jurisdiction: U.S. District Courts
  - Improperly withheld agency records



# Threshold Considerations: Jurisdiction and Venue

- Venue -- four possible venues, including the universal venue (the District of Columbia)
- Statute of limitations -- six years



## Threshold Considerations: Pleadings

- Complaint -- service of process
- Answer -- 30 days from service of Complaint
- Proper Party Defendant -- federal agency



## Threshold Considerations: Grounds for Dismissal

- Lack of subject-matter jurisdiction
- Improper venue\*
- Insufficient service of process\*
- Failure to state a claim
- Res judicata/collateral estoppel

**\* waived if not raised in 1<sup>st</sup> responsive pleading**



## Standard of Review

- De novo -- default standard in FOIA cases
- National security cases -- agency deference
- Fee waiver issues -- limited to administrative record
- Expedited processing issues -- deference on agency-created standards
- Reverse FOIA lawsuits -- Administrative Procedures Act (“arbitrary & capricious”) <sup>6</sup>



## Knowledge Check

- How many days to respond to a FOIA Complaint?
  - a. 30
  - b. 45
  - c. 60
  - d. 90
  
- If requester sues DOJ under FOIA and names as defendants the FBI, FBI Director, and a BOP Warden, what should happen to the FOIA claims against the named individuals?



## Exhaustion of Administrative Remedies

- Normally a prerequisite for judicial review
- Constructive exhaustion -- when agency does not meet FOIA's time limits
- Failure to pay fees or comply with agency regulations
- Impact mitigated by Open America stay of proceedings or scheduling agreements





# “Open America” Stay Requirements

- Exceptional circumstances
- Exercising due diligence



## Scheduling & Negotiations

- In a FOIA case, the parties usually do not formally meet-and-confer like they do in most other civil litigation
- Processing schedules – either through mutual agreement or via court order
- Negotiations may reduce the need to brief some issues before the court



## Summary Judgment: Threshold Requirements

- Agency bears burden of proof to justify nondisclosure
- Only the law, not the facts, in dispute
- Duty to segregate and apply foreseeable harm standard
- Waiver of exemptions if not asserted timely



## Summary Judgment: *Vaughn* Declarations

- Narrative presentation of administrative record (request processing and agency determinations), with or without an index
- Factual; relatively detailed; nonconclusory; non-argumentative; made in good faith
- Tailored to matters at issue in litigation



## Summary Judgment: *Vaughn* Declarations

- Identify declarant
- Discuss procedural history of request and attach correspondence
- Describe agency's search in detail
- Describe withheld information and explain why exemption(s) applies
- Address segregation & foreseeable harm
- Provide Vaughn Index -- either as part of declaration or as an attachment



## Summary Judgment: Search Issues

### Adequacy of search

- Good faith effort/methods reasonably expected to locate records requested
- Proof by detailed, nonconclusory declaration explaining scope/method of search



## Summary Judgment: *Vaughn* Index

- Itemized index or narrative description of each withheld document or redaction, correlating withholding to specific FOIA exemption.
- Vaughn index not always needed



## *Vaughn* Index Formats

- Generic explanations -- e.g., for 7(A) documents
- Sampling -- for large volumes of records
- Various formats available -- document-by-document, coded, grouped





## Knowledge Check

- Why is a Vaughn Declaration needed in FOIA litigation?



## *In Camera* Inspection of Records

- Discretion of judge -- exception, not rule
- No access by requester's counsel or experts
- *In camera* declarations



## Discovery

- Extremely rare in FOIA cases
- Premature if sought before summary judgment filings
- Parties' meet-and-confer more informal in FOIA context than other civil litigation.  
(deviation from Fed. R. Civ. P. 26)



## Knowledge Check

- Which of the following are common in a FOIA case?
  - a. Depositions
  - b. *In Camera* Inspection of Records
  - c. Declarations
  - d. Interrogatories
  
- What is the standard that an agency must meet to demonstrate an adequate search?



## Attorney Fees & Litigation Costs: Eligibility

- Requester must “substantially prevail”
  
- Relief through:
  - court order, enforceable agreement or consent decree or
  - voluntary change in agency’s position if complainant’s claim is not insubstantial



## Attorney Fees & Litigation Costs: Entitlement

- Public benefit derived from case
- Commercial benefit to complainant
- Nature of complainant's interest in information
- Whether withholding had reasonable basis in law



# Questions?