



UNITED STATES DEPARTMENT *of* JUSTICE

Litigation Considerations



Threshold Considerations: Jurisdiction and Venue

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

- De novo review



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

- Answer -- 30 days from service of Complaint
- Service of Process
- Only federal agency proper party defendant



Threshold Considerations: Grounds for Dismissal

- Lack of subject-matter jurisdiction
 - Lack of personal jurisdiction*
 - Improper venue*
 - Insufficient service of process*
 - Failure to state a claim
 - Res judicata/collateral estoppel
- *waived if not raised in 1st responsive pleading**



Standard of Review

- De novo
- National Security cases
- Fee waiver issues
- Expedited processing issues
- Reverse FOIA lawsuits



Exhaustion of Administrative Remedies

- Normally a prerequisite for judicial review
- Constructive exhaustion
- Failure to pay fees
- Impact mitigated by Open America



“Open America” Stay Requirements

- Exceptional circumstances
- Exercising due diligence



Summary Judgment: Threshold Requirements

- Agency bears burden of proof to justify nondisclosure
- Only the law, not the facts, in dispute
- Duty to segregate
- Waiver of exemptions in litigation



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
- Detail agency's search



Summary Judgment: *Vaughn* Declarations

- Must describe the withheld information and detail how that withheld information falls within a claimed exemption
- Provide Vaughn Index -- either as part of declaration or as an attachment
- Address segregation.



Summary Judgment: Search Issues

Adequacy of search

- Good faith effort/methods reasonably expected to produce 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 document portion, correlating withholding to specific FOIA exemption. Descriptions of withheld records should never be conclusory
- Vaughn index not always needed



Summary Judgment: *Vaughn* Index

- Generic explanations for 7(A) documents
- Sampling
- Coded index



In Camera Inspection of Records

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



Discovery

- Extremely limited
- Premature if sought before summary judgement filings
- Interrogatories or requests for admissions vs. depositions



Attorneys Fees & Litigation Costs: Eligibility

- Requester must “substantially prevail”

- Relief through:
 - court order or enforceable agreement or consent decree or
 - voluntary change in agency’s position if complainant’s claim is not insubstantial



Attorneys Fees & Litigation Costs: Entitlement

- Public benefit derived from case
- Commercial benefit to complainant



Attorneys Fees & Litigation Costs: Entitlement

- Nature of complainant's interest in information
- Whether withholding had reasonable basis in law