



UNITED STATES DEPARTMENT *of* JUSTICE

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# Advanced FOIA Litigation



# **Making Your Case**

Key points:

- The facts are ours to establish.
- Presumption of good faith carries a burden to meet it.



# **Making Your Case**

## Five Key Factors for a Good Declaration

- Good-Faith
- Non-Conclusory
- Clear
- Thorough
- Objective



# Administrative Record

Good preparation for a potential lawsuit starts at the administrative level.

The administrative record is especially important where the following are at issue:

- Fees/Fee Waivers/Fee Categories
- Expedited processing



# Administrative Record

The importance of detailed case notes:

## ➤ Evidence/Support

- See Carson v. DOJ, No. 10-cv-56 (E.D. Tenn) (disputing Plaintiff's accounting of facts for purposes of attorneys fees).

## ➤ Staff Departures

## ➤ Memory

## ➤ Informing the Future Declarant



## Evidence/Support

### *Examples:*

- Contemporaneous notes to the file documenting withholdings, conversations, and rationale.
- Emails to requester memorializing phone conversations (copies saved to file).



“6. In accordance with the ordinary practice of OIP [GIS], [the GIS] memorialized the conversation between [the Chief of the IR Staff] and plaintiff in the form of case notes. [GIS] then added these notes to the administrative file for plaintiff's request.”

See Handout Pg. 003; Para. 6



“9. Upon completion of this conversation, on that same day, [GIS] advised [OIP Senior Counsel] of the nature of her discussion with plaintiff. Moreover, once again, in accordance with the ordinary practice of OIP[GIS], [the GIS] memorialized her conversation with plaintiff in her case notes. She then added these notes to the administrative file for plaintiffs request.”

See Handout Pg. 003; Para. 9





## Evidence/Support

*Example:*

- Emails and other correspondence to and from the requester.



“10. On January 12, 2009, plaintiff submitted a letter which further clarified the scope of his request. This letter stated that plaintiff sought ‘objective determinations’ as to whether the Attorney General is complying with his duty to prevent prohibited personnel practices. Accordingly, upon receipt of this letter, the IR Staff proceeded to process plaintiff's request in light of this additional clarification.”

See Handout Pg. 004; Para. 10



## Staff Departures

*Example:*

- Detailed case notes help to offset any issues faced if the GIS who processed the file is no longer with the agency.



# Memory

*Example:*

- Memory, especially as to details, is generally very poor.
- This is compounded by the fact that GIS personnel handle numerous requests each year.



# Informing Future Declarant

*Example:*

- The administrative record is the best location for the Declarant to determine what occurred during the processing of the request.



# Administrative Record

## Importance of Documenting your Methods:

- Decisions and Rationale
- Search Details
  - Dates, Terms, Custodians, Systems, Scope, Electronic vs. Paper



# Declaration Drafting

## *Audience:*

### ➤ Plaintiff and Litigator

- Don't presume knowledge

### ➤ Court

- Don't presume sympathy
- Ensure declarations are clear and easy to understand



# Declaration Drafting

*Purpose:*

*Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)*

- Allow court to make a rational decision without reviewing the documents
- Help produce a record that will make the Court's decision capable of meaningful review
- Allow plaintiff to argue the case adequately





# Declaration Drafting

*Purpose:*

What is being challenged?

- Timing
- Search
- Fees
- Withholdings
- Segregation



# Declaration Drafting

## *Purpose:*

- Use descriptive words to set up the argument
  - Deliberative: analysis, opinion, evaluate, recommend, consider, opine, back-and-forth, exchange, strategize, etc.
  
- Select your facts



# Structure of a Declaration

## *The Declarant*

- Must have “personal knowledge”
  - See Fed. R. Civ. P. 56(e)(1) - Personal Knowledge Standard
  - See Handout pg. 001; Para. 1 and 2.



“1) I am the Senior Counsel to the Office of Information Policy (OIP), United States Department of Justice (DOJ). In this capacity, I am responsible for supervising the handling of Freedom of Information Act (FOIA) requests processed by OIP.”

See Handout Pg. 047; Para. 1



“2) I make the statements herein based on my personal knowledge, as well as on the information that I acquired while performing my official duties.”

See Handout Pg. 048; Para.<sub>21</sub> 2



# Structure of a Declaration

## *Process*

- Describes to the Court (and Plaintiff) what was procedurally completed/done with the request once received.
  - See Handout Pgs. 011-014; Paras. 3-11



# Structure of a Declaration

## *Searches*

- Describes the what, how, when, and why of the search.
- Framework with five elements of search to discuss.



# **Structure of a Declaration**

## *Framework for Describing Searches*

1. Identify the nature and scope of all of the agency's databases and records systems, including a description of the information in those systems/files.
2. Identify which databases, records systems, indices were searched and why.





# **Structure of a Declaration**

## *Framework for Describing Searches*

3. Identify the search terms used, if electronic, or what other methods were used if non-electronic.



“26) [T]he unclassified e-mails for the identified records custodians were searched [] the electronic search and review system []. The initial search parameters used were the date range [] and the broad search term ‘CIA.’”



27) “In conducting the secondary search of the broader universe of documents, OIP used a ‘common concept’ search method to effectively identify records relevant to the request. A ‘common concept’ search is a more advanced method than common keyword searches and is particularly helpful in conducting complex searches that do not lend themselves to simple keyword searches.”



# **Structure of a Declaration**

## *Framework for Describing Searches*

4. Specify when the search was conducted.
5. Sometimes it's important to identify which databases or indices were not searched and give the reasons why.
  - El Badwari v. DHS, et al., 583 F.Supp.2d 285, (D. Conn. 2008).



# Structure of a Declaration

## *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.



# Structure of a Declaration

## *Searches*

- 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.”



# Structure of a Declaration

## *Segregation*

- FOIA requires all “reasonably segregable” portions of a record be provided after redactions are made.
- Courts may review *sua sponte*.



# Structure of a Declaration

## *Segregation*

- Explain how and why portions were segregated, or why portions could not be segregated.





“39) DOJ deliberations on these documents cannot be effectively or reasonably segregated from the draft correspondence, and thus the documents have been withheld in full. Accordingly, they are protected in full pursuant to the deliberative process privilege. Where available, the final versions of these drafts have been provided to plaintiffs.”

See Handout Pg. 062-063; Para. 39



“[OIP] withheld from release pursuant to the deliberative process privilege of Exemption 5 only that information which would reveal the Department’s pre-decisional decisionmaking process. OIP conducted a line-by-line review of these documents and determined that some non-exempt information in them could be segregated for release.”

See Handout Pg. 040; Para. 61



“[OIP] withheld from release, on the basis of deliberative process privilege of Exemption 5, only that information which would reveal the Department’s pre-decisional decisionmaking process. In some instances as noted, [other FOIA exemptions] provide independent and overlapping protection of information in these documents. OIP conducted a line-by-line review of these documents [and] released any portions thereof that were not protected by an applicable FOIA exemption.”



“In each instance where information was withheld from plaintiffs pursuant to Exemptions 6 and 7(C), OIP determined that the individuals’ privacy interests were not outweighed by the FOIA public interest in disclosure of that information. Every effort has been made to release all segregable information to plaintiffs without invading the privacy interests of individuals . . . [w]here possible only the names and contact information of individuals were protected.”

See Handout Pg. 076; Para. 69



“Because OIP only withheld the identities of individual law enforcement agents pursuant to Exemption 7(F), no non-exempt information was withheld pursuant to this exemption and thus further segregation was not possible.”

See Handout Pg. 078; Para. 75  
37



# Vaughn Index

Is a Vaughn Index required?

Variations of Vaughn Indices

- Narrative
- Document by Document
- Coded
- Categorical or Grouped



# Vaughn Index Example

Group Number	Date	Description	Privilege	Pages
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 Approach”** *See* Handout pgs. 094-097



# Vaughn Index Example

Group	Document Numbers		Date	Description	Exemption	Pgs.
1(a)	SD-18 SD-23 SD-24		10/15/09 through 10/16/09	E-mail messages between David Ogden and Stuart Delery discussing issues raised by a meeting between U.S. and EU representatives on HLCG information sharing principles.	<u>Exemption 5</u> Deliberative process privilege	2
1(b)	NLI-14 NLI-23 NLI-25 NLI-48 NLI-68 NLI-69	NLI-70 NLI-71 TB-672 SD-1 SD-15	7/22/09 through 10/23/09	E-mail messages among Nancy Libin, Melanie Pustay, Thomas Burrows, and Bruce Swartz, in which senior officials seek and receive advice, and discuss questions, developments, and potential ramifications, with respect to the HLCG deliberations.	<u>Exemption 5</u> Deliberative process privilege	11





# Vaughn Index Example

(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



# Vaughn Index Example

SAC, Detroit

Director, FBI

6/23/65

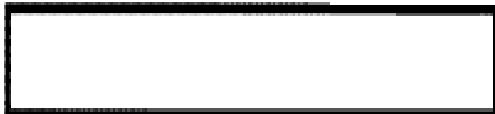
1 -  
1 -  
1 -



b6 -1  
b7C -1

CARL OGELSBY  
SECURITY MATTER - SDS

b6 -4  
b7C -4



SECURITY MATTER - SDS

*[Handwritten signature]*



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Questions?