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Description of document: US Department of Justice (DOJ) Office of Information Policy (OIP) Training Slides for FOIA Litigation Considerations (undated)

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Chief, Initial Request Staff  
Office of Information Policy  
Department of Justice  
6th Floor  
441 G Street, NW  
Washington, DC 20530  
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**U.S. Department of Justice**  
Office of Information Policy  
*Sixth Floor*  
*441 G Street, NW*  
*Washington, DC 20530-0001*

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Telephone: (202) 514-3642

March 17, 2021

Re: FOIA-2021-00833  
DRH:SLE

This responds to your Freedom of Information Act (FOIA) request dated February 28, 2021, and received in this Office on March 1, 2021, for copies of various Freedom of Information Act training slides.

Please be advised that the training slides and handouts for Advanced Litigation Considerations and Exemption 5 can be found on our website at <https://www.justice.gov/oip/training> under the heading "OIP Training Material." In addition, the training slides for AI in FOIA Overview can be found at <https://www.justice.gov/oip/page/file/1334911/download>.

With regards to the portion of your request seeking the training slides for Litigation Considerations, please be advised a search has been conducted in this Office, and twenty-three pages have been located that contain records responsive to your request. I have determined that this material is appropriate for release without excision, and copies are enclosed.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552 (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448.

If you are not satisfied with this Office's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically submitted within ninety days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas R. Hibbard", with a small "DR" monogram at the end.

Douglas R. Hibbard  
Chief, Initial Request Staff



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
  
- 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
- Proper Party Defendant -- Federal Agency



## 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 1<sup>st</sup> responsive**

**pleading**





## Standard of Review

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



## 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
- 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 and apply foreseeable harm standard
- 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 & foreseeable harm





## 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



## 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 affidavits



## Discovery

- Extremely Rare
- 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?



## 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