District Court Holds Agencies Must Get Vaughn Index Right First Time or Turn Over Records

By Diana Huffman
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A U.S. District Court judge in Delaware may have provided Freedom of Information Act (FOIA) plaintiffs with a potent new weapon for forcing obstinate government agencies either to release documents or to fully explain in a timely manner why the material is exempt from release.

Judge Murray M. Schwartz refused to consider the Department of Energy's (DOE) untimely filed revised *Vaughn* index. He struck the revised index from the record and ordered disclosure of documents because the original index did not justify the withholding (*Coastal States Gas Corp. v. DOE*, No. 79-197, June 30). Just last week Schwartz denied the government's motion for reconsideration and a stay.

Agencies involved in FOIA litigation are required to file a *Vaughn* index (named for the case establishing the procedure, *Vaughn v. Rosen*, 484 F.2d 820, (D.C. Cir 1973)) that lists all documents withheld and the exemption justifying the decision not to disclose.

The D.C. Circuit earlier this year in *Coastal States Gas Corp. v. DOE*, No. 79-2181 (Feb. 15), had ordered the agency to produce documents sought in a separate FOIA case because DOE's *Vaughn* index was not adequate to support withholding. No revised index had been submitted. (*See Legal Times, Feb. 25, 1980, p. 23.*)

Only One Chance

However, Judge Schwartz' ruling is believed to be the first time a court specifically has told an agency that it has only one chance to get its *Vaughn* index right. FOIA lawyers say the court's refusal to give DOE more than one chance may force DOE and other agencies to take the *Vaughn* index requirement more seriously rather than risk forced disclosure of documents.

Even the government, which has not decided whether to appeal the case, admits that the decision, if upheld and adopted by other courts, would have significant ramifications.

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"Court after court has allowed the government to revise an index, frequently ordering them to do so. That's why we were so surprised by the ruling," said one government lawyer.

Coastal States, which is represented by Fulbright & Jaworski, is seeking the documents for use in a compliance proceeding brought by DOE. DOE had filed a *Vaughn* index in July 1979 that the court called inadequate.

The agency promised at that time to file a more detailed index, but it did not do so until Feb. 27, 1980, the day before a hearing on the plaintiff's motion for partial judgment.

The government cited a series of district court cases in which federal agencies have been permitted to revise a deficient *Vaughn* index. Schwartz, however, said that "in light of DOE's long-standing knowledge of the *Vaughn* index requirement and its importance, and the clear congressional policy in favor of expeditious handling of FOIA cases, this Court has no intention of having this case added to the DOE's string citation of cases permitting second, third and even fourth 'bites at the apple' in FOIA litigation."

Schwartz said that the *Vaughn* index requirement was designed to help both courts and the requester determine whether the government was properly withholding documents. He said the index was critical to the enforcement of FOIA and that DOE's actions in the case indicated the importance of the *Vaughn* requirement is not being recognized.

"Agencies such as DOE apparently believe they need not immediately comply with the well-established procedure for asserting exemptions, but may instead revise and correct their indices until they 'get it right,'" Schwartz wrote.

The judge also said that DOE's action and "its dilatory attitude toward the litigation, as expressed in its repeated offers and unfulfilled promises to revise its index of withheld documents, are exactly what Congress intended to eliminate with the 1974 Amendments to FOIA. Permitting the DOE to rely upon its latest eleventh-hour effort to delay these proceedings would make a mockery of the legislation."

Finally, the judge said that he would not resort to *in camera* review of the withheld documents because that would shift the burden of justifying the agency action to the courts, and would only encourage agencies to force the court, rather than the government, to sift through documents to determine what is exempt.

Fulbright and Jaworksi's J. Todd Shields, who argued the case for Coastal States, believes Schwartz' ruling is a major breakthrough in the judicial administration of FOIA that could breathe new life into the *Vaughn* requirement.

"*Vaughn* was a landmark case, but Judge Schwartz has taken it one step further," Shields said. "He said that we all know that the *Vaughn* index is a salutary way of conducting FOIA proceedings, and now we are telling you what will happen if the agency doesn't file an adequate and proper index in a timely manner. He is saying we will order disclosure.

"I am sure the government was taken aback and will try to eradicate what they must consider a bad precedent," Shields added.

An Open Door

Although the government was surprised by the ruling, one government attorney said the door had been opened to such a decision by the D.C. Circuit's ruling last February in the other Coastal States FOIA case. "The D.C. Circuit didn't do it in the same way since no revised index was filed," the lawyer said. "But even though the court made clear that index was inadequate, it didn't remand and tell the district court to order a better index. It just ordered disclosure."

Mark Lynch, a lawyer at the Center for National Security Studies and a FOIA specialist, sees the Delaware case as part of a trend that started at the appeals court level. "The circuit courts have been saying that the government has got to carry its burden of proof in FOIA cases or the plaintiff will win," Lynch said. "The circuit courts and now the Delaware district court have said that even though the documents may be exempt, if the government fiddles around it will lose anyway. In the past, the appeals courts have sent FOIA cases back to the district courts telling them to be tougher with the government, and it is encouraging to see a district court finally crack down."

The government thinks it is unfair to prohibit revised indices. "We don't always know what is an adequate index," one government lawyer noted. "The index rejected in Delaware would have been sufficient in a lot of courts."

While Lynch concedes that a revised index might be necessary if new documents are uncovered, he believes that in the past agencies have been given "unlimited bites of the apple" in FOIA cases, and that Schwartz felt it simply had gotten out of hand.

One government lawyer speculated, however, that Schwartz was merely expressing a general frustration with DOE. "There have been and still are a lot of energy cases before that court, and this is not the first time the court has gotten exasperated with DOE," the lawyer said. "I don't think the situation was as bad in this case as the judge indicated. I think he was just lashing out a bit."

A second decision issued the same day by Schwartz involving another FOIA request by Coastal States may also be helpful to FOIA plaintiffs. In *Coastal Corp. v. DOE*, No. 80-8 (D. Del. June 30), the judge approved a model order compelling production of a *Vaughn* index.

Shields said that the order approved by Schwartz was basically what the plaintiff had sought and was synthesized from most of the appellate court decisions detailing what should be in the index.

However, Shields said that Schwartz' model order included two features not provided for in most of the earlier appellate orders. One was the requirement that the index disclose the methodology and extent of the agency's search for records. The second was that the index must be sworn to by the agency employee most knowledgeable about its preparation and content.