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December 18, 1998

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Dear Mr. English:

After careful consideration of your appeal, I have decided to affirm the initial action in this case. The information you requested was properly withheld pursuant to 5 U.S.C.A. § 552(b) (5) ("Exemption 5"). This provision serves to protect attorney work-product from disclosure under the Freedom of Information Act ("FOIA"). 5 U.S.C.A. § 552. Your request for a *Vaughn* Index is also denied. In my opinion, the production of such an index is not required during the administrative stage of processing FOIA requests and appeals.

The work-product privilege extends to administrative proceedings as well as civil cases. *See e.g., FTC v. Grolier*, 462 U.S. 19, 103 S.Ct. 2209 (1983); *Exxon Corp. v. Dep't of Energy*, 585 F.Supp. 690, 700 (D.D.C. 1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987). Further, the Supreme Court's decisions have made clear that Exemption 5 affords sweeping protection to work-product material. *Grolier, supra*; *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 104 S.Ct. 1488 (1984). The materials at issue constitute work-product because they were prepared in anticipation of, and in conjunction with, the underlying litigation involving your client.

Finally, your contention that the Legal Services Corporation is required to provide a *Vaughn* Index is devoid of merit. The only statutory requirement applicable to an administrative agency under FOIA is that it inform the requester of its decision to withhold, along with the underlying reasons. *Judicial Watch Inc. v. Clinton*, 880 F.Supp. 1, 11 (D.D.C. 1995), *citing*, 5 U.S.C. Sec. 552(a)(6)(A)(i). "Agencies need not provide a *Vaughn* Index until ordered by a court after the plaintiff has exhausted the administrative process." *Id.* at 11, *citing*, *SafeCard Servs., Inc. v. Sec. and Exchange Comm'n*, No. 84-3073, Slip op. at 3-5 (D.D.C. 1986), *aff'd in relevant part*, 926 F.2d 1197 (D.C.Cir.1991). The cases you cite

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regarding an agency's duty to produce a *Vaughn* Index are inapplicable to your FOIA request as presently situated. The cases cited in your appeal note the duty of an agency to justify the non-disclosure of documents under FOIA, but only after all administrative remedies have been exhausted and a suit filed. Your letter misses this subtle but important distinction. Finally, your letter implies that the Legal Services Corporation must justify the assertion of privilege to you, the requester. This is not an accurate statement of current law. If a suit is filed contesting the adequacy of an agency's disclosure, an itemization of the materials withheld serves to allow a court, not the requester, to make a "meaningful evaluation" of the applicability of any privileges. Freedom of Information Appeal, p. 3 Gregory J. English (December 1, 1998).

Judicial review of my action is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, which is where the records you seek are located.

Sincerely,



John McKay
President