THE FREEDOM OF INFORMATION ACT (FOIA) AND DISCOVERY – TWO DIFFERENT AVENUES FOR ACCESSING AGENCY RECORDS AND THE BENEFITS OF LEVERAGING E-DISCOVERY TOOLS FOR FOIA

The Freedom of Information Act (FOIA) and discovery which occurs when a party is in litigation with the government are two distinct mechanisms by which an individual may obtain records from the federal government. Although the use of these two mechanisms can sometimes overlap, they each serve a unique purpose and present agencies with different disclosure obligations. However, given the similarities in the process involved in responding to both discovery and FOIA requests, there is great potential in leveraging existing technologies used by litigators to respond to discovery requests to improve efficiencies in the FOIA. This article highlights the differences between the FOIA and discovery and discusses the potential benefits of leveraging e-discovery tools to help agencies meet the increasing demands placed on their FOIA administration.

The Difference between Discovery and the FOIA

Discovery is a device used by a party in litigation in order to obtain information from an entity or an individual (usually an opposing party) relating to the subject matter of a case. Courts have expounded that discovery serves important interests such as avoiding surprise at trial, facilitating the framing of issues for trial, and preventing delays in litigation. The central purpose of discovery is "to secure the just, speedy, and inexpensive determination of every action and proceeding." Discovery requests are generally limited only by traditional standards of relevancy, privilege and burden. Parties in litigation may seek discovery in written form through interrogatories or in oral form through depositions. Discovery may also be sought through requests for the production of documents.

The Freedom of Information Act, on the other hand, establishes a statutory right of public access to Executive Branch information in the federal government. As the Supreme Court emphasized, "[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the

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1 See, e.g., Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (holding that "discovery itself is designed to help define and clarify the issues"); United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) (declaring that the "instruments of discovery serve a useful purpose. . . . They together with pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) (noting that "[t]he pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . [C]ivil trials in the federal courts no longer need be carried on in the dark").
4 See Fed. R. Civ. P. 34.
governors accountable to the governed."\(^5\) Simply stated, the FOIA is "a means for citizens to know 'what their Government is up to'."\(^6\) In serving this important purpose, the FOIA provides any person a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records, or portions of them, are protected from disclosure by an exemption.

Unlike discovery where access is limited to only those parties involved in the litigation, under the FOIA "any person" can make a request for records. "Any person" is a broad term used in the statute that, with a few narrow exceptions, includes "[i]ndividuals, partnership[s], corporation[s], association[s], or public or private organization[s] other than an agency."\(^7\) The Supreme Court has observed that a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request."\(^8\)

Moreover, in contrast to discovery where parties must explain the relevancy of the records they are requesting to the particular proceeding, FOIA requesters have a right to request records on any topic without the need to justify or explain their reasons for making the request.\(^9\) The Supreme Court has held that a requester's basic access rights under the FOIA are neither increased nor decreased based upon the requester's particular interest in the records sought.\(^10\) However, since discovery requests are typically only limited by the question of relevancy, sometimes less information can be made available through the FOIA than would be released through discovery. While FOIA requesters can ask for records on any topic, the statute also includes nine exemptions from disclosure that protect various important interests such as national security, individual personal privacy, trade secrets and confidential business information, and certain law enforcement activities, as well as those privileges that may be asserted in response to a discovery request such as the attorney-client and attorney work-product privileges.\(^11\)

Congress specifically sought to preserve the important policies underlying the discovery privileges by including Exemption 5 in the FOIA to protect "those documents, and only those documents that are normally privileged in the civil discovery context."\(^12\) Exemption 5 provides assurances that parties cannot easily circumvent the privileges afforded in litigation simply by making a FOIA request. In a further effort to protect this interest, courts apply the civil

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\(^7\) Administrative Procedure Act, 5 U.S.C. § 551(2) (2006) (defining "person"); see also Arevalo-Franco v. INS, 889 F.2d 589, 591 (5th Cir. 1989) (holding that the meaning of "person" under FOIA is not restricted to American citizens); Stone v. Exp.-Imp. Bank, 552 F.2d 132, 136-37 (5th Cir. 1977) (declaring that the Administrative Procedure Act definition of "person" does not suggest "intention to limit [itself]... to American individuals and 'public or private' organization[s]"); O'Rourke v. DOJ, 684 F. Supp. 716, 718 (D.D.C. 1988) (concluding that requester's status as an alien did not exclude him from access to documents under the FOIA as he falls within statute's "any person").
\(^8\) Reporters Comm. for Freedom of the Press, 489 U.S. at 771.
\(^9\) See, e.g., Favish, 541 U.S. at 172 (explaining that "as a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information").
\(^12\) Sears, 421 U.S. at 149; see FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).
discovery privileges slightly differently in the FOIA context. In discovery, the use of qualified privileges may be overcome by a showing of relevance or need by an opposing party. In the FOIA context, however, the Supreme Court has held that the standard to be employed is whether the documents would "routinely be disclosed" in civil litigation. Therefore, by definition, documents for which a party would have to make a showing of need are not routinely disclosed and thus do not fall into this category. As a result, in the FOIA context there is no difference between qualified and absolute privileges, and courts do not take into account a party's need for the documents in ruling on a privilege's applicability.

Notwithstanding the differences between these two mechanisms, the access afforded by the FOIA can often be duplicative of that which is available through discovery. Nevertheless, attempts are often made by parties in litigation to use the FOIA in place of, or in addition to, discovery. Under present law there is no statutory prohibition to the use of FOIA as a discovery tool. The Supreme Court has held that a requester's rights are not diminished by his or her status as a litigant. However, there are also several Supreme Court admonitions for restraint, as well as multiple other decisions where courts have declared that "while documents obtained through FOIA requests may ultimately prove helpful in litigation by permitting a citizen to more precisely target his discovery requests, FOIA is not intended to be a substitute for discovery."

The attempted uses of the FOIA as a discovery tool by parties in litigation with the government can create several problems for government attorneys. For example, government attorneys often do not realize that an opponent has exercised duplicative access to information under the FOIA, which may take litigants by surprise during the course of the proceeding. This of course defeats a core purpose of the discovery provisions. Additionally, if they are not aware, government attorneys may be hindered by the release of information under the FOIA that might prevent the later assertion of a privilege.

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13 See, e.g., Grolier, 462 U.S. at 27 (discussing circumstances under which attorney work-product privilege may be overcome in civil discovery).
15 See Grolier, 462 U.S. at 28 (explaining that "[i]t is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be sufficient to override the privilege but that does not remove the documents from the category of the normally privileged.").
16 See id.; Sears, 421 U.S. at 149; see also, Martin, 819 F.2d at 1184 (holding that "the needs of a particular plaintiff are not relevant to the exemption's applicability").
17 Sears, 421 U.S. at 143 n.10.
Because of the problems that can be created by the use of the FOIA as a discovery tool, it is very important that agency personnel processing FOIA requests and government attorneys carefully coordinate their efforts. Attorneys should inform agency personnel who maintain the records that a related matter is in litigation and of the significance of the records to the litigation. The FOIA processors then will be able to advise the attorney of any FOIA requests that have been made for the records and what material is being considered for release. Similarly, where broad access to material is granted in discovery, subsequent assertions of FOIA exemptions for the material is usually not possible, so it is important to inform FOIA offices of discovery releases.

Making the Case for Leveraging E-discovery Tools for FOIA

Despite the different obligations agencies have under the FOIA and in discovery, the process involved in searching for and reviewing responsive records prior to disclosure is relatively similar. In both instances the agency must first conduct a search and compile all of the records that are responsive to the request. Often this will result in the locating of a very large amount of records that must then be de-duplicated before the agency can actually review the documents for disclosure. As discussed above, in discovery this review generally only involves a consideration of whether the records are relevant to the proceedings. The FOIA, on the other hand, requires a more intensive review to determine if the agency should protect various interests covered by the statute's nine exemptions. For both the FOIA and discovery, agencies are often required to perform these tasks under short time constraints. However, the increasing numbers of FOIA requests received by agencies every year presents additional challenges for FOIA professionals. The number of requests received by agencies has increased every year since Fiscal Year 2009, with agencies receiving a record high 651,254 requests in Fiscal Year 2012 alone.

Across the government, one of the most common delays reported by FOIA professionals in processing requests is the time that is needed to search for, de-duplicate, and conduct the initial responsiveness review of records, much of which is done by hand or using off-the-shelf software with limited capabilities for advanced document review and redaction. All of these steps must take place before a FOIA professional can even begin to review records for the application of FOIA exemptions. In order to meet the demands of discovery, litigators utilize sophisticated technological tools to make the process of searching for, de-duplicating, and conducting initial reviews of records more efficient. As the public demand for FOIA continues to increase, the need to find similar efficiencies in FOIA by automating these time-consuming tasks has become even more important.

Recognizing this need and the potential impact of improving this area of FOIA administration, in April 2012 the Department of Justice announced the development of a digital-FOIA pilot program that would seek to leverage existing e-discovery tools used by Department litigators to process FOIA requests.20 As discussed in the Department's Open Government Plan, the Department's Office of Information Policy (OIP) and Civil Division joined together in this endeavor with support from the Justice Management Division. OIP serves a unique role in FOIA

as both the lead FOIA policy office for the government and as a processing and implementation office within the Department of Justice. Combining these roles, OIP worked with the Civil Division during the pilot to assess the potential savings in time and costs that could be realized if e-discovery resources were utilized to process FOIA requests.

Earlier this year, the Department concluded its pilot and presented the results to both agencies and the public. As discussed more fully below, the results of the pilot were very promising, indicating great potential in using these digital tools to decrease the number of searches an agency must conduct when responding to a request, to improve search times, and to decrease the time spent on de-duplication. Through the use of these digital tools, FOIA professionals processing requests are able to spend more time on the substantive review of records located for release and on processing more cases overall.

The Current System for Processing Requests

Currently, OIP uses a very labor-intensive, primarily manual process when reviewing records to determine whether they are responsive to a request, to separate out duplicates, and to organize the records so that they can be reviewed for releasability. OIP FOIA professionals use some off-the-shelf software during this process, but these tools provide limited capabilities for advanced document review and redaction. Upon receiving a request, OIP's FOIA professionals must first conduct a search for any responsive records by identifying the custodians who may maintain the records. The FOIA professional must then conduct a search for those records in each individual custodian's workspace or wait for the custodian to conduct the search and provide the responsive records for review. Once the search is completed, the professional has to then review each of the documents that were located for responsiveness and duplication. Electronic records such as e-mails are printed out, reviewed by hand, and then scanned into a document review system with little capability to de-duplicate, and no capability for conducting refined or targeted searches of the overall universe of records. In addition to being immensely time-consuming, this constant process of printing and scanning records does not allow for the files to be reviewed in their native formats. After de-duplicating and conducting an initial review of the records, the FOIA professional is finally ready to examine the remaining documents to determine the applicability of FOIA exemptions, and if appropriate, to prepare the records for release.

The E-discovery Pilot

In keeping with President Obama's Open Government Initiative, as well as the President's Memorandum on the FOIA and the United States National Action Plan's call to harness technological resources in the administration of the FOIA, the Department of Justice conducted its digital-FOIA pilot program to look for a cost-effective way to improve the efficiency of OIP's and other government agencies' FOIA administration. The pilot program leveraged the Civil Division's existing e-discovery infrastructure to take advantage of the software's ability to conduct precise searches, de-duplicate records, and sort and organize the records electronically in advance of their review by a FOIA professional. The pilot was designed to compare and contrast the processing of requests using these digital tools and the conventional methods currently used by OIP and other agencies.
OIP selected four test cases to conduct the pilot. Two requests were selected to be processed applying the conventional methods currently used by OIP, and two other requests of similar size and scope were chosen to be processed using the e-discovery tools. For each approach, one of the requests involved a small number of custodians with records to be searched and another involved a large number. While the e-discovery resources were utilized for the searching, de-duplicating, and initial review of two of these requests, OIP's FOIA professionals were still involved during all aspects of this process by providing the list of custodians, relevant search terms, and date ranges to be searched.

For the cases processed using the e-discovery tools, electronic records were collected with the support of the Justice Management Division, all of which were captured in their native formats without the need to print any records. Using the tools, these records were then automatically de-duplicated, processed for review, and searched through and filtered by date range. After these automated steps were completed, the relevant records were provided to OIP FOIA professionals in an e-discovery platform so that they could be reviewed for the applicability of exemptions.

Results of the Pilot

At the conclusion of the pilot, the data was analyzed with extremely positive results. Most impressive was the speed and accuracy with which the digital approach collected, searched, and de-duplicated records. For the cases using the e-discovery tools, 4.7 million documents were initially collected. Through automatic de-duplication, we were able to remove 1.1 million of these documents in approximately three and half hours even before the application of search terms or date ranges. Once date ranges and search terms were applied, only 3,859 documents remained to be reviewed by OIP FOIA professionals for these requests.

Two of the requests used in the pilot, one for each approach, had a similar number of individuals identified whose records needed to be searched. Using these two requests as a comparison, the pilot had the following findings:

- **Decreased number of times that a search term had to be run** – Using conventional methods, each search term had to be individually run for each custodian; using the digital approach, the records of multiple custodians could be searched with multiple terms at one time.
- **Improved search time** – The digital approach was able to complete a search for records in less than an hour, compared with conventional methods that required multiple work days to complete the search.
- **Decreased time spent on de-duplication** – Conventional methods required FOIA specialists to sort through records to locate multiple copies of the same record by hand, whereas digital tools allowed for this process to be automated, which drastically reduced the time required on this necessary aspect of FOIA processing.

The use of digital tools to automate and execute both searches and de-duplication of records significantly improved the speed of these procedures. When compared with
conventional methods, the use of these tools will allow FOIA professionals to spend more time on the substantive review of records located for release and on the processing of more requests overall.

Both the President and the Attorney General have called on agencies to implement the use of advanced technologies in the administration of the FOIA and to disclose information in a timely manner. The Department's pilot program illustrates the fundamental benefits that using digital tools in the processing of FOIA requests provides through gains in efficiency, accuracy, and timeliness.