Reproduced courtesy of Access Reports (January 30, 2013 issue) http://www.accessreports.com/

Thoughts from the Outside…

The following is one in a series of views and perspectives on FOIA and other information issues. The views expressed are those of the author.

The FOIA Amendments of 2017: Searching and Talking

By Robert Gellman

Since its passage in 1966, the Freedom of Information Act has been amended roughly every ten years. The first major amendments came in 1974, with later changes coming in 1986, 1996, and 2007. If we take this history as a guide, it is not too early to start debating the next set of major amendments. And perhaps no area could benefit more from new ideas than an agency's obligation to conduct a search for responsive records.

Certainly requesters have been unhappy with many aspects of FOIA, with complaints traditionally focused on delays, denial of fee waivers, and assorted administrative shenanigans. Repeated legislative fiddling here has had limited effect. The FOIA is a resource intensive law, and more changes to timelines for responses are not likely to produce faster results at agencies that have many requests, large backlogs, and limited staff. Further, I have said for a long time that it is not possible to legislate good administration of the law. You need some degree of good faith by all involved. Unfortunately, good faith on FOIA matters is distributed unequally among federal agencies and FOIA personnel.

I do not think all the blame for FOIA's problems falls totally on agencies, although they deserve much of the responsibility. Congress deserves blame, of course. But some problems are the result of poor requester behavior. For example, some requesters make too many requests. There was time in the past when a single requester was reportedly responsible for ten percent of the backlog at the FBI. Those requests may have been lawful, but they were an abuse of what might be called *requester discretion*. For example, requesters sometimes make requests that are too broad and that result in agency game-playing in response. It may be understandable at a human level when an agency looks for a way out of responding to a request for "all records about the Afghanistan war."

The result of poor judgments on both sides has been to make the process worse. Agencies interpret poorly framed requests narrowly to avoid work. In turn, requesters make more expansive requests. The result is a vicious circle where bad behavior on one side elicits more bad behavior on the other. Eventually the government gets a judicial decision that blesses its own bad behavior because the requester was more unreasonable. The government then uses that decision as precedent to restrict its responses to other requesters.

What we need most is something that is hard to legislate. The FOIA process would be better in most cases if the requester and the agency actually talked to each other and negotiated a

reasonable way to satisfy the requester's desires in an efficient manner. To the extent such negotiating takes place today, it does not happen nearly often enough. The Justice Department and a few other agencies have reached out to the requester community to talk about the request process, but we need more of this at an individual request level.

I do not have a general legislative solution to these problems. What I propose is a response to the *search problem* that arises more and more in reported cases. A secondary goal, however, is to elicit more cooperation and discussion between agency and requester.

The Search Problem

What is the *search problem*? As agency records have grown more electronic over the decades, one of the most important elements of responding to any FOIA request is translating a FOIA request into a computer search strategy and then applying that strategy to specific agency databases. Not surprisingly, the particulars and adequacy of an agency computer search are increasingly the subject of court decisions. Recent cases include:

1. *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, https://s3.amazonaws.com/s3.documentcloud.org/documents/481429/nys-1-2010cv03488-opinion.pdf, where Judge Shira A. Scheindlin wrote a thoughtful opinion that took note of the parallels between FOIA requests and discovery requests in civil litigation. "Nonetheless, because the fundamental goal underlying both the statutory provisions [of the FOIA] and the [discovery provisions in the] Federal Rules is the same – i.e., to facilitate the exchange of information in an expeditious and just manner – common sense dictates that parties incorporate the spirit, if not the letter, of the discovery rules in the course of FOIA litigation. Thus, attorneys should meet and confer throughout the process, and make every effort to agree as to the form in which responsive documents will ultimately be produced." Note 33.

2. *National Security Counselors v. Central Intelligence Agency*, https://s3.amazonaws.com/s3.documentcloud.org/documents/519415/dc-1-2011cv00445-opinion.pdf, where Judge Beryl A. Howell issued a monumental opinion on a host of FOIA issues, including a discussion of an agency's obligation to search electronic databases.

3. *Safety Research & Strategies, Inc. v. Department of Transportation*, https://ecf.dcd.usccourts.gov/cgi-bin/show_public_doc?2012cv0551-18, where the content and availability of search terms used by the agency was at issue, and the court held that the plaintiff was entitled to know the search terms and type of search performed. This was not new law.

My basic idea is to make search terms and strategies relevant at the administrative level. A generation ago, constructing computer searches was the domain of specialized librarians and computer database professionals. Today, almost every computer user has experience using search engines to find information. That requester experience may be useful.

Still, many requesters lack knowledge about how agencies organize information resources. That is not always the case, of course. Over the years, the requester community developed vast knowledge about how the FBI organizes its records. It is possible for a requester to draw on that expertise and target a request at the resources most likely to contain the records that the requester wants. I would like to think that a precise request benefits the agency as well as the requester.

The Amendment

My proposed FOIA amendment does several things. First, it allows a requester to propose one or more *search strategies* as part of the request. I define a *search strategy* to mean "the logic, algorithm, search fields, keywords, and any other filtering criteria used to conduct a computer search for records." An agency has to use a requester-proposed search strategy or say why it did not.

Second, a requester could ask for a search of a specified *agency information resource* (defined as "any identifiable agency database, information system, or other information resources that contains records that may be the subject of a request"). An agency would have to search a requester-specified resource or say why it did not.

Third, an agency that rejects a search or resource request would have to state in writing as part of its final response the reason the agency determined that use of the requested search strategy or search of the requested resource was unworkable, not reasonably likely to produce records, or otherwise inappropriate.

Fourth, in all cases, an agency would still have to search agency information resources and use search strategies that the agency deems appropriate, just as today.

Fifth, my proposal allows (but does not require) an agency that receives a request that identifies an agency information resource or that includes a requester-proposed search strategy to contact the requester to invite adjustments that would make the search "more efficient and more likely to produce records that the requester sought." This is the part of the proposal that specifically seeks to encourage cooperation between a requester and an agency.

Sixth, an agency that conducts a computer search in response to a FOIA request would be required to disclose, as part of its response, the resources searched and the specific search strategies used.

Finally, each agency would be required to publish on its website and update every six months the name and description of each agency information resource that it routinely uses to search for records responsive to requests.

The Discussion

The full text of my proposal appears at the end of this article. Will this change to the law help? Frankly, I am not certain, but I think it is a good starting point for discussion. Agencies and requesters may have perspectives that can help refine the idea. I observe that the same issues raised here under federal law may also have relevance at the state level.

In order to stimulate debate, Harry Hammitt has graciously consented to allow me to reprint this article on the FOI-L listserv, where many requesters and others with an interest in FOIA discuss state and federal matters pertaining to open government laws. The FOI-L list is at https://listserv.syr.edu/scripts/wa.exe?A0=FOI-L, and anyone can join the list through the website.

The Text of the Amendment

The text of the proposed FOIA amendment:

Amend 5 U.S.C. § 552(f) by adding at the end the following:

> (3) "agency information resource" means any identifiable agency database, information system, or other information resource that contains records that may be the subject of a request under subsection (a)(3)(A); and
> (4) "search strategy" means the logic, algorithm, search fields, keywords, and any other filtering criteria used to conduct a computer search for records under subsection (a)(3)(A).

Amend 5 U.S.C. § 552 by adding at the end a new subsection (m):

> (m)(1) If, as part of a request under subsection (a)(3)(A), a requester identifies one or more agency information resources for the agency to search or one or more search strategies for the agency to use in complying with the request, the agency searching for the records responsive to the request must, in addition to using other agency information resources and other search strategies that the agency deems appropriate, search the identified agency information resources and must use the identified search strategies unless the agency states in writing as part of a final response to the requester the reason the agency determined that complying with the requested search of an agency information resource or use of a search strategy was unworkable, not reasonably likely to produce responsive records, or otherwise inappropriate.
> (2) When an agency receives a request under subsection (a)(3)(A) that identifies an agency information resource or search strategy, the agency may promptly contact the requester in writing, by telephone, or by electronic mail to invite the requester to consider adjustments to the identified agency information resource or search strategy that will facilitate complying with the request in a manner that the agency reasonably determines is likely to make the search more efficient and more likely to produce records that the requester sought.
> (3) When an agency conducts a computer search of an agency information resource to find records responsive to a request under subsection (a)(3)(A), the agency shall disclose to the

requester as part of its response to the request any (A) identifiable agency information resource that the agency searched; and
(B) each search strategy actually used when conducting the search of each agency information resource.
(4) An agency shall maintain on its website the name and description of each agency information resource that it routinely uses to search for records responsive to requests under subsection (a)(3)(A) unless the name or description of the agency information resource would be exempt from disclosure under subsection (b). An agency must update its list of agency information resources every six months.

Robert Gellman is a privacy and information policy consultant in Washington, D.C. He previously served for 17 years as the principal FOIA staffer on the House of Representatives Subcommittee on Government Information.