Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA

Justin Cox
CASA de Maryland, Inc.

Recommended Citation
Available at: 10.31641/clr130205
Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA

Acknowledgements
The author would like to thank Jennifer Bennett for helpful comments; Mike Wishnie for introducing him to the FOIA and for frequent guidance regarding its use; and the editors of the New York City Law Review for considerable editing assistance.

This article is available in City University of New York Law Review: https://academicworks.cuny.edu/clr/vol13/iss2/6
MAXIMIZING INFORMATION’S FREEDOM: 
THE NUTS, BOLTS, AND LEVERS OF FOIA

Justin Cox*

INTRODUCTION ............................................... 387

I. WHAT THE FOIA PROMISES............................ 390

II. WHAT THE FOIA DELIVERS ............................ 393

III. DRAFTING SUCCESSFUL FOIA REQUESTS ............ 399

   A. Knowing How to Ask ............................. 399

   B. Finding Information on Information ............. 402

      i. FOIA Disclosures & FOIA Logs .............. 404

      ii. Systems of Records Notices (SORNs) ....... 405

      iii. FOIA Litigation Materials .................. 406

   C. Litigating FOIA Requests: Discovery .......... 410

IV. INFORMATION FEDERALISM ............................. 412

   A. State FOI Enforcement ........................... 414

   B. Scope of Coverage ............................... 417

   C. Leveraging Vertical Federalism ................. 418

CONCLUSION: HOPE FOR CHANGE? ............................ 423

INTRODUCTION

The federal Freedom of Information Act1 ("FOIA") is the most maddeningly cumbersome law one could ever love. As written, the FOIA erects a relatively simple process for gaining access to the wealth of information possessed by the Executive Branch of the federal government. FOIA is not only an incredibly powerful resource for anyone wanting to know "what their government is up to,"2 it can also be a useful tool to uncover information vital to advocacy and litigation. Frequently, in fact, such as in certain administrative proceedings, the FOIA may be the only mechanism available for obtaining information necessary to protect one’s (or

* Liman Fellow, CASA de Maryland 2008–09; J.D., Yale Law School; B.A., Washington University in St. Louis. The author would like to thank Jennifer Bennett for helpful comments; Mike Wishnie for introducing him to the FOIA and for frequent guidance regarding its use; and the editors of the New York City Law Review for considerable editing assistance.


2 See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989) (explaining that the “core purpose” of the FOIA is informing citizens about “what their government is up to”).
one’s client’s) legal rights. But even when alternative procedures (such as discovery) are available, the FOIA can be used as an effective supplement or as a pre-litigation fact-gathering device. Beyond the litigation context, government data can be marshaled to support arguments for policy reform by demonstrating that current policies are routinely violated or are simply ineffectual. In

---

3 One example is removal (deportation) proceedings in Immigration Court. While immigration practitioners have long used the FOIA to obtain clients’ “Alien files,” some advocates have further expanded the use of FOIA in recent years to obtain records—including, for example, sworn statements by arresting officers given during internal investigations—to impeach government accounts of the circumstances surrounding their clients’ arrests. See, e.g., N.C. Aizenman, Conflicting Accounts of an ICE Raid in Md.: Officers Portray Detention of 24 Latinos Differently in Internal Probe and in Court, Wash. Post, Feb. 18, 2009, at A01; Scott Calvert, Immigration Official Told Deputy To ‘Make More Arrests,’ ICE Report Says, Balt. Sun, Feb. 19, 2009, at A1. Cf. Larry R. Fleurantin, Nowhere to Turn: Illegal Aliens Cannot Use the Freedom of Information Act as a Discovery Tool to Fight Unfair Removal Hearings, 16 CARDozo J. INT’L & COMP. L. 155 (2008) (arguing that DHS’s practice of withholding asylum interview notes, which are often used to impeach an alien’s testimony during his or her merits hearing, from the asylum applicant under FOIA Exemption (b)(5) violates the FOIA and due process).

4 While the FOIA is not intended to supplement discovery, see John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989), it also does not displace rules of discovery, see id., and it serves as an independent basis of obtaining information in the possession of the federal government, see, e.g., United States v. Murdock, 548 F.2d 599, 602 (5th Cir. 1977). Even a finding that materials are exempt under the FOIA does not affect a litigant’s right to compel disclosure of the same information through the discovery process. See Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344 (D.C. Cir. 1984) (“The FOIA acts as a ‘floor’ when discovery of government documents is sought in the course of civil litigation. Though information available under the FOIA is likely to be available through discovery, information unavailable under the FOIA is not necessarily unavailable through discovery.”). See generally ELECTRONIC PRIVACY INFORMATION CENTER, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS (Harry A. Hammitt et al. eds., 24th ed. 2008); JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE 341–46 (3d ed. 2000); George K. Chamberlin, Use of Freedom of Information Act as Substitute For, or as Means of, Supplementing Discovery Procedures Available to Litigants in Federal Civil, Criminal, or Administrative Proceedings, 57 A.L.R. FED. 903 (1982); David I. Levine, Using the Freedom of Information Act as a Discovery Device, 36 BUS. LAWYER 45 (1980); Edward A. Tomlinson, Use of the Freedom of Information Act for Discovery Purposes, 43 Md. L. Rev. 119 (1984).

5 For example, depending on how courts interpret the holdings of Ashcroft v. Iqbal, 556 U.S. ___ (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)—which may or may not impose a heightened pleading standard for certain types of claims, particularly those involving supervisory liability for civil rights’ violations—the FOIA can be an effective way of ascertaining who knew what and when.

6 Chris Lasch, for example, has suggested that the Executive Branch’s authority to issue immigration detainers, see 8 C.F.R. § 287.7(a), is not only ultra vires, see Chris Lasch, Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers, 35 WM. MITCHELL L. REV. 164 (2008), but also that the detainer’s purported authorization for holding immigrant detainees, see 8 C.F.R. § 287.7(d), is routinely violated. See, e.g., Ochoa v. Bass, 181 P.3d 727, 734 (Okla. Crim. App. 2008) (granting habeas petitions because “[o]nce the forty-eight (48) hour period granted to ICE [Immigration...
short, the government has enormous amounts of information, and obtaining it can be crucial to persuading others. The FOIA is a powerful way of gaining access.

Unfortunately, the actual administration of the FOIA can be anything but simple, and long processing delays and inadequate responses can easily frustrate requesters. This Article is directed at those who wish to better understand the FOIA and those who wish to more effectively utilize it. It highlights the discrepancy between what the FOIA promises and what it actually delivers, and suggests ways FOIA requesters can minimize that gap.

There are a number of valuable resources, both online and in print, that detail both the requirements of the FOIA and the pro-

---

& Customs Enforcement], by 8 C.F.R. § 287.7(d), for assumption of custody had lapsed without ICE taking any action on its detainers, the State no longer had authority to continue to hold Petitioners.

Data on the frequency of such violations, however, is exceedingly difficult to obtain even for a single jail facility, See, e.g., Fla. Immigrant Coal. v. Mendez, No. 09-81280-CIV, 2010 WL 4584220, *8 (S.D. Fla. Oct. 28, 2010) (granting summary judgment to a county sheriff defendant on a Monell claim under 42 U.S.C. § 1983 regarding his jail’s handling of ICE detainers because the plaintiffs only had evidence of a “handful” of individuals affected). This is a problem that could be addressed, at least in part, through the FOIA.

7 For example, in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Supreme Court held that the exclusionary rule is inapplicable in deportation (now removal) proceedings, based in part on the fact that allegations of Fourth Amendment violations were rare and the apparent efficacy of the INS’ scheme for deterring such misconduct. See id. at 1044. Nonetheless, a plurality of the Court indicated that it might reconsider “if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.” Id. at 1050. Some advocates have argued that this time has come. See Stella Burch Elias, Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza, 2008 Wis. L. Rev. 1109. Ms. Burch Elias has marshaled an impressive amount of evidence in support of this argument, but further factual support could be developed through the FOIA by, for example, requesting records related to motions to suppress, civil rights complaints filed, claims under the Federal Tort Claims Act, etc.


cess for invoking it. Therefore, this Article will only discuss the mechanics of the FOIA where necessary. Section I, by way of background, provides a brief explanation of the FOIA, as it is actually written, while Section II discusses how—and, to some extent, why—the reality of FOIA administration does not reflect the statutory mandates. Section III explores a few ways that requesters can try to mitigate those shortcomings in drafting and litigating FOIA requests by leveraging other available sources of information. Section IV discusses the FOIA’s state-law counterparts, including ways that they can be used to complement and amplify the utility of the FOIA. Finally, the Conclusion offers some hope for future improvements in government transparency.

I. What the FOIA Promises

The FOIA permits access to records\(^{10}\) of virtually every part of the federal Executive Branch, including its departments, agencies, boards, commissions, and government-controlled corporations.\(^ {11}\)

---

\(^{10}\) An agency record is essentially anything reproducible over which an agency has possession and control, no matter the format in which the record is maintained. See U.S. Dep’t of Justice v. Tax Analysts, 492 U.S. 136, 144–45 (1989). See also 5 U.S.C. § 552(f)(2)(A) (2006). See generally LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, supra note 4, at 259–78. The FOIA amendments of 2007 added to the definition of “records” those “maintained for an agency by an entity under Government contract, for the purposes of records management.” Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, § 9, 121 Stat. 2524, 2528-29 (2007) (to be codified at 5 U.S.C. § 552(f)(2)(B)) [hereinafter “OPEN Government Act of 2007”]. Physical objects that cannot be reproduced (such as soil samples) are not considered a record under the FOIA. See DOJ Guide to the FOIA, supra note 8, at 33 (“The FOIA applies to ‘records,’ not tangible, evidentiary objects.” (citation omitted)). It is also well-established that agencies are not required to create records in response to a FOIA request. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980) (“The [FOIA] does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.”).

\(^{11}\) 5 U.S.C. § 552(f)(1) (defining “agency” as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the Executive Branch of the Government (including the Executive Office of the President), or any independent regulatory agency”). Among the entities not covered by the FOIA are Congress and the federal judiciary, certain personnel and units of the Executive Office of the President. See LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, supra note 4, at 254–56. Federally-funded state agencies, state, and local governments do not fall within the FOIA’s definition of an agency. See 5 U.S.C. § 552(f)(1). Additionally, some federal entities do not, for some reason or another, fit the FOIA’s definition of an “agency” and thus are not covered by the FOIA. See, e.g., Wash. Legal Found. v. U.S. Sentencing Comm’n, 17 F.3d 1446, 1448 (D.C. Cir. 1994) (holding that the U.S. Sentencing Commission does not count as an “agency”). In Fiscal Year 2008, 77 agencies and the 15 executive departments completed annual FOIA reports, as required by 5 U.S.C. § 552(e)(1). These annual reports are available on the U.S. Department of Justice Web site. See Annual FOIA Reports
To gain access to government records, one must merely send a request letter—or, increasingly, an email—to the relevant government entity. So long as the request “reasonably describes” the information sought, the FOIA requires the agency to make a determination on the request within 20 business days. Requesters are generally responsible for the cost of searching for and copying records, but fee waivers are available to a broad class of requesters. Moreover, under 2007 amendments to the FOIA, if an agency does not abide by any of the statute’s deadlines, it cannot charge the requester search fees; in some circumstances, it cannot charge duplication fees either.

The statute does provide nine “exemptions” to disclosure, but they are mostly discretionary and are “narrowly construed.”


5 U.S.C. § 552(a)(6)(A)(i) (requiring an agency to make a “determination” in response to a FOIA request within 20 working days). In some circumstances, expedited processing is available. Id. § 552(a)(6)(E)(i). Under “unusual circumstances,” however, an agency may extend the deadline for responding by an additional ten business days. Id. § 552(a)(6)(B)(i).

Id. § 552(a)(4)(A).

See id. § 552(a)(4)(A)(iii).


5 U.S.C. §§ 552(b)(1)–(9). In addition to the exemptions, there are also three “exclusions” from the requirements of the FOIA. Id. §§ 552(c)(1)–(3). For more on exclusions, see Litigation Under the Federal Open Government Laws, supra note 4, at 335–40; DOJ Guide to the FOIA, supra note 8, at 671–83.

Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (“Congress did not design the FOIA exemptions to be mandatory bars to disclosure.”); Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (“FOIA’s exemptions simply permit, but do not require, an agency to withhold exempted information . . . .”). An exception to exemptions being discretionary is when a statute prohibits disclosure, such as the Family Educational Rights and Privacy Act. See 20 U.S.C. § 1232g (2000). See also
The presumption remains, at all times, that agency records are to be disclosed.\textsuperscript{21} Even when an agency chooses to invoke an exemption to shield information from disclosure, it may withhold only that information to which the exemption applies, providing all “reasonably segregable” portions of that record to the requester.\textsuperscript{22}

Finally, the FOIA provides that dissatisfied requesters may administratively appeal decisions denying any part of their request.\textsuperscript{23} If that does not lead to a satisfactory resolution, requesters can seek judicial review in federal district court;\textsuperscript{24} if they do so and substantially prevail,\textsuperscript{25} requesters are entitled to reimbursement of their reasonable attorneys’ fees and costs.\textsuperscript{26}


\textsuperscript{20} Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 8 (2001) (quoting FBI v. Abramson, 456 U.S. 615, 630 (1982)).

\textsuperscript{21} See, e.g., \textit{Klamath Water Users}, 532 U.S. at 7–8 (“[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”).

\textsuperscript{22} 5 U.S.C. § 552(b). Thus, for example, if only a portion of a record falls within an exemption, the agency must redact just that part and disclose the remainder. \textit{See generally} Mead Data Cent., Inc. v. Dep’t of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977) (“The focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.”).

\textsuperscript{23} 5 U.S.C. § 552(a)(6)(A)(i). Agencies have twenty business days to adjudicate administrative appeals. \textit{Id.} § 552(a)(6)(A)(ii). A requester must file an administrative appeal before proceeding to federal court—i.e., they must administratively exhaust their remedies—but if the agency has not responded to a FOIA request or an administrative appeal within the twenty-day timeframe, the requester has constructively exhausted. \textit{See id.} § 552(a)(6)(C)(i).

\textsuperscript{24} \textit{Id.} § 552(a)(4)(B). Under the FOIA, venue is proper in the U.S. district where the requester resides, where the records are located, or the District of Columbia. Because venue is always proper in the District Court of the District of Columbia, most FOIA caselaw comes out of the D.C. Circuit. In the 2008 calendar year, a little over 40% of all FOIA cases brought nationwide were filed in the District Court of the District of Columbia. \textit{See Dep’t of Justice, Annual FOIA Litigation and Compliance Report: List of FOIA Cases Received in 2008} (2009), \textit{available at} http://www.justice.gov/oip/08received.htm [hereinafter \textit{List of FOIA Cases Received in 2008}]. Although this means that judges on the District Court of the District of Columbia and the D.C. Circuit Court of Appeals have accumulated expertise on FOIA, this is not always to the benefit of those challenging an agency denial; would-be litigants are therefore encouraged to consider the full array of possible venues. \textit{See Litigation Under the Federal Open Government Laws, supra} note 4, at 359–60; Seth F. Kreimer, \textit{The Freedom of Information Act and the Ecology of Transparency}, 10 U. PA. J. CONST. L. 1011, 1049–52 (2008).

\textsuperscript{25} 5 U.S.C. § 552(a)(4)(E)(ii) (defining “substantially prevail[ ]”).

\textsuperscript{26} 5 U.S.C. § 552(a)(4)(E). In \textit{Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources}, 532 U.S. 598 (2001), the Supreme Court held that the “catalyst theory”—whereby the bringing of a lawsuit is reasonably perceived as having caused an opposing party to voluntarily change position, even though the court had not yet rendered a judgment—is not a permissible basis for the award of
In addition, agencies are not to wait for requests to make information available; the FOIA requires each agency to make certain proactive disclosures available on their websites\(^{27}\)—in particular, those records agencies should know will be of general interest to the public.\(^{28}\)

In sum, the FOIA provides extremely broad access to nearly all replicable information in the possession or control of the Executive Branch. Access is guaranteed by short deadlines for agency responses, a strong presumption of disclosure, and a private right of action subsidized by the right to reasonable attorneys’ fees for prevailing parties.

II. What the FOIA Delivers

Unfortunately, as even Congress has recognized, the realities of the FOIA do not deliver all that the statute promises.\(^{29}\) Although


\(^{28}\) 5 U.S.C. § 552(a)(2)(D) (“Each agency, in accordance with published rules, shall make available for public inspection and copying copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records”).

the purpose of this Article is not to critique the design or administration of the FOIA, maximizing the law’s utility requires an awareness of its shortcomings; therefore, I discuss a few of them in this section.

Two of the most common frustrations in using the FOIA are long processing times and insufficient responses to requests. As mentioned, agencies “shall” make a substantive determination on a FOIA request within 20 business days. In reality that deadline is frequently (and perhaps usually) missed. For example, in Fiscal Year 2008, the Department of Homeland Security (“DHS”)—which received more than one-sixth of all FOIA requests that year—reported median processing times of 87 business days for “simple” requests and 374 for “complex” ones. There are approximately 220 business days in a year, so the median complex request was pending for about a year and nine months when DHS finally processed it. Even the median request DHS granted “expedited processing” was not processed within the statutorily-mandated


31 At the end of Fiscal Year 2008, six of the fifteen federal departments had FOIA requests pending from the 1990s. The single longest-pending FOIA request had been pending since May 1, 1992; perhaps predictably, it was to the CIA. See U.S. DEP’T OF JUSTICE, OFFICE OF INFORMATION POLICY, FOIA POST, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2008 (Aug. 19, 2009), available at http://www.justice.gov/oip/foiapost/2009foiapost16.htm [hereinafter SUMMARY OF 2008 FOIA REPORTS].

32 In Fiscal Year 2008, the federal government as a whole received about 600,000 requests under the FOIA, with DHS responsible for about 109,000 of those. See id.

33 U.S. DEP’T OF HOMELESS SECURITY, 2008 ANNUAL FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES 12 [hereinafter DHS 2008 FOIA REPORT], available at http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2008.pdf. The “simple” and “complex” distinction comes from a provision of the FOIA stating that “[e]ach agency may promulgate regulations . . . providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.” 5 U.S.C. § 552(a)(6)(D)(i) (2006). Somewhat contradictorily, it also says that the creation of multitrack processing “shall not be considered to affect the requirement . . . to exercise due diligence” in meeting the deadlines for responding to requests. 5 U.S.C. § 552(a)(6)(D)(iii) (2006). There is no further statutory guidance as to the criteria for placing a request in one track or the other, though DHS’s implementing regulations suggest that “the number of pages involved” may be an additional distinguishing factor. See 6 C.F.R. § 5.5(b)(1) (2010). The Senate Report accompanying the 1996 FOIA amendments that added this provision, see Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 7, 110 Stat. 3048, 3050–51 (1996), says that “[s]imple requests are those requiring 10 days or less to process,” and states further that “[u]nder a two-track system some simple requests shall be processed ahead of more complex ones which may have been received earlier.” S. REP. NO. 104-272, at 17 (1996).

timeframe.\textsuperscript{35} Of course, some of DHS’s 19 component agencies have better processing times than others,\textsuperscript{36} but overall, over 40\% of all requests DHS processed in the 2008 fiscal year languished for more than 400 working days.\textsuperscript{37}

Perhaps just as frustrating for FOIA requesters is receiving a response that only addresses part of the request or produces far fewer records than reasonably anticipated. Agencies have the burden to conduct a reasonable search, defined loosely and somewhat circularly as a search “reasonably calculated” to uncover all documents responsive to the request.\textsuperscript{38} But FOIA responses often include no information about the search that was actually conducted, leaving requesters to speculate about the search based solely on the records they received. Like any other FOIA-related decision, the failure to conduct a reasonable search can be appealed administratively, but the delays in adjudicating appeals can be even longer than those for initial processing.\textsuperscript{39}

The reasons for these problems are numerous. Although there is hope that at least some of the reasons can be addressed in the short term,\textsuperscript{40} many are endemic to a system with twin goals—trans-

\textsuperscript{35} DHS 2008 FOIA Report, \textit{supra} note 33, at 12 (showing median processing times of 23 business days for expedited requests).

\textsuperscript{36} U.S. Citizenship & Immigration Services [hereinafter USCIS], the Federal Emergency Management Agency and the Office of the Inspector General have particularly poor response times. \textit{See id.} at 6. USCIS receives a majority of DHS FOIA requests. \textit{See id.}

\textsuperscript{37} \textit{Id.} at 13–14.

\textsuperscript{38} Truitt v. Dep’t of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (“It is elementary that an agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents.” (internal citation omitted)). \textit{See also} 5 U.S.C. § 552(a)(3)(C) (2006) (“[A]n agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency’s automated information system.”); \textit{id.} § 552(a)(3)(D) (“The term ‘search’ means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.”).

\textsuperscript{39} DHS’s median response time for administrative appeals in Fiscal Year 2008 was 539 business days. DHS 2008 FOIA Report, \textit{supra} note 33, at 10.

\textsuperscript{40} At least one of the reasons—former President George W. Bush’s policy regarding the FOIA—has been reversed by the Obama administration. On October 12, 2001, Attorney General Ashcroft issued a memorandum to all federal agencies, encouraging them, in responding to FOIA requests, to “carefully consider” all “fundamental values that are held by our society,” including “safeguarding our national security, enhancing the effectiveness of our law enforcement, protecting sensitive business information and . . . personal privacy.” Memorandum from John Ashcroft, Attorney Gen. to Heads of All Fed. Dep’ts and Agencies (Oct. 12, 2001), available at http://www.doi.gov/foia/foia.pdf. Attorney General Ashcroft assured the agencies that “the Department of Justice will defend your [FOIA] decisions unless they lack a sound legal basis . . . .” \textit{Id.} \textit{See also} Memorandum from Laura L.S. Kimberly, Acting Dir., Info.
parency and short processing times—that are frequently in conflict.

Since the FOIA applies to virtually every corner of the Executive Branch, its implementation requires a high degree of decentralization, with thousands of federal employees and contract personnel making literally millions of FOIA decisions every year. Supervising them are hundreds, if not thousands, of different individuals, all working in different agencies and locations, on different substantive subject matters, and with different interpretations of the FOIA’s requirements and different understandings of the importance of governmental transparency more generally. These conditions inevitably lead to wide variations in how requests are handled.

And unlike many other areas of the law where enforcement is broadly decentralized, only a small fraction of the millions of FOIA decisions made annually are ever scrutinized by someone with the power or authority to alter them. Indeed, only about 3% of all FOIA requests are either appealed administratively41 or litigated in federal court,42 meaning that for the remaining 97% of all FOIA requests, the initial determination is also the last one. This reality undoubtedly has consequences for the incentives and expectations

Sec. Oversight Office, to Dep’ts & Agencies (Mar. 19, 2002), available at http://www.justice.gov/archive/oip/foiapost/2002foiapost10.htm (suggesting ways to resist disclosure of “information that could be misused to harm the security of our nation and the safety of our people.”). Attorney General Holder rescinded Attorney General Ashcroft’s memo and stated that the DOJ would only defend discretionary agency decisions to deny FOIA requests if “the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions.” Attorney Gen. Memorandum for Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,878–82 (Oct. 8, 2009).

41 Note that administrative exhaustion is a requirement for filing in federal court. If the agency does not make a determination within twenty business days of receiving the request, however, the requester has constructively exhausted and may proceed immediately to federal court. See supra note 23. Processing delays and the possibility for constructive exhaustion make it unlikely that all federal FOIA cases involved an administrative appeal.

42 See List of FOIA Cases Received in 2008, supra note 24. The Attorney General is required to submit this report to Congress each year. See 5 U.S.C. § 552(c)(6). Most of these cases will likely be dismissed voluntarily once the agency eventually processes the initial request. In calendar year 2008, there were a total of 227 decisions of some kind rendered in FOIA cases, but only 108 of those involved a judgment for either party, with the remainder being dismissals; a significant number of the dismissals were stipulated. See Dep’t of Justice, 2008 Calendar Year Report on Dep’t of Justice Freedom of Info. Act Litigation Activities: List of FOIA Cases in Which a Decision Was Rendered in 2008, available at http://www.justice.gov/oip/08decisions.htm. Attorneys’ fees were only awarded in five cases, for a grand total of about $230,000. Id.
of the FOIA officers making the disclosure decisions. Further exacerbating the situation is that the same FOIA officers are under pressure to reduce the substantial backlogs of requests that have built up over the last several years. Together, these two factors—the general absence of third-party review coupled with institutional demands to not only respond timely to incoming FOIA requests, but to reduce the accumulated backlog—lead predictably to the cursory responses discussed above.

To be clear, FOIA officers are not, by any stretch, solely (or even primarily) to blame here. Not only are they negotiating various institutional pressures with ambiguous standards, but they are doing so with inadequate resources. Lofty rhetoric and statutory mandates notwithstanding, Congress’s failure to allocate sufficient resources for the administration of the FOIA is principally to blame for the long delays in processing requests. The funding that is allocated is often maldistributed, with those agencies with a relatively small domestic political constituency, such as the U.S. Citizenship and Immigration Services, receiving disproportionately little funding despite receiving a disproportionately high percentage of all FOIA requests.

43 Given these pressures, for example, FOIA officers seem more likely to err on the side of conducting a narrow search and/or disclosing only that information that clearly does not fall within a statutory exemption. Narrow searches save time, and even if agency officials conduct an egregiously narrow one, it is unlikely that the adequacy of the search will ever be reviewed. In fact, in regards to some agencies (like those involved in law enforcement or national security) or some records (like those which would be clearly embarrassing to identifiable individuals), FOIA officers are more likely to receive negative feedback for disclosing too much information than too little.

44 See Summary of 2008 FOIA Reports, supra note 31 (discussing backlogs).

45 Indeed, when the FOIA works at all, it is usually their doing. See generally Kreimer, supra note 24, at 1046–49 (discussing how “FOIA’s efficacy depends on a law-abiding civil service”).


47 Even though USCIS receives a majority of all FOIA requests received by DHS, and even though it also has the largest backlog and the longest processing times, its FOIA budget, on a per-processed-request basis, is dwarfed by nearly all other DHS components. See Summary of 2008 FOIA Reports, supra note 31. Many, if not most, FOIA requests to USCIS are on behalf of non-citizens requesting their Alien (or “A”) Files. Non-citizens must use FOIA because the Privacy Act only applies to citizens and legal permanent residents, see Privacy Act of 1974, 5 U.S.C. § 552a(2) (2000); and discovery is generally unavailable in Immigration Court, including in removal (deportation) proceedings, see supra note 3.
In summary, the administration of the FOIA is seriously hampered by broad decentralization; relatively little oversight; institutional pressure to reduce backlogs; and chronic understaffing. Add in political considerations and, at least recently, concerns (real, contrived, or exaggerated) about releasing information related to national security, and what results is a deeply flawed system.

On the other hand, someone else might look at the same facts—especially the relatively few FOIA requests that are administratively appealed and/or litigated—and conclude that agencies do a generally satisfactory job administering the FOIA. But that assessment would depend on the assumption that every inadequate agency response is administratively appealed and/or litigated, and the available evidence is to the contrary.

One way to measure the adequacy of an agency’s response is to compare its pre-litigation response to a FOIA request to its supplemental response to that same request after the agency has been sued. That comparison yields a sharp contrast, both in respect to the number of records produced and the exemptions that agencies choose to defend in court. With regards to the former, it appears common for an agency to produce several times more records after being sued for a FOIA violation than it did pre-litigation, even while averring in pre-litigation response letters that it had produced all responsive records. The story is similar with respect to

---

48 See, e.g., Jane E. Kirtley, Transparency and Accountability in a Time of Terror: The Bush Administration’s Assault on Freedom of Information, 11 COMM. L. & POL’Y 479 (2006); Seth F. Kreimer, Rays of Sunlight in a Shadow “War”: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency, 11 LEWIS & CLARK L. REV. 1141 (2007); see also DOJ Guide to the FOIA, supra note 8, at 808 (“Courts often take into account an agency’s predictive judgment with respect to potential harm, particularly in cases in which disclosure would compromise national security. Conversely, courts have consistently held that ‘a requester’s opinion disputing the risk created by disclosure is not sufficient to preclude summary judgment for the agency when the agency possessing the relevant expertise has provided sufficiently detailed affidavits.’”); id. nn.304–05 (collecting cases).

49 David Carr, Let the Sun Shine, N.Y. TIMES, July 23, 2007, at C1 (“Four decades ago, President Lyndon B. Johnson reluctantly signed the Freedom of Information Act (F.O.I.A.) into law. . . . The law held that information gathered on our behalf—paid for and owned by you and me, at least theoretically—should be ours for the asking. But it hasn’t worked out that way. While the mandate for disclosure is still there, it is overwhelmed by a Rube Goldberg apparatus that clanks and wheezes, but rarely turns up the data.”).

50 For example, in response to a 2008 FOIA request regarding a Baltimore immigration raid sent by the non-profit organization CASA de Maryland to Immigration and Customs Enforcement (“ICE”), a DHS component, ICE provided a “final response” that disclosed just four pages of responsive records. See Response Letter from ICE to FOIA Request # 2009F01A324 (Nov. 21, 2008), available at http://www.scribd.com/doc/34495971. After CASA de Maryland filed suit, see CASA de Maryland v.
exemptions, as it is not uncommon for agencies to decide, once in litigation, that they cannot carry their burden vis-à-vis certain exemptions, and therefore choose not to defend them.\textsuperscript{51}

Given the institutional pressures described above, perhaps this is not a surprising phenomenon. What it suggests, however, is that agencies use the willingness of a requester to litigate FOIA requests as a mechanism to distinguish between requests for which a cursory response is sufficient—either because the requester is satisfied with the response, or, perhaps more often, because the requester does not know the response was incomplete or cannot afford to contest it through litigation—from those that demand full compliance with the FOIA. The unfortunate lesson, then, is that unless the request is relatively narrow—and therefore easy to fulfill—litigation may be necessary to vindicate the access guaranteed by the FOIA.\textsuperscript{52}

III. DRAFTING SUCCESSFUL FOIA REQUESTS

With the shortcomings discussed above in mind, this Section outlines a few strategies for crafting FOIA requests to maximize the amount of information they will produce. This Section is primarily aimed at getting the most information out of the FOIA without having to resort to litigation, but most (if not all) of these strategies will also serve well those requesters who ultimately seek judicial review.

A. Knowing How to Ask

Of all the lessons to be drawn from the realities described in

DHS, No. 08CV3249 (D. Md. filed Dec. 3, 2008), ICE produced nearly 1700 pages of records and 17 video recordings, including many records that shed significant light on possible government misconduct related to the raid. See N.C. Aizenman, Conflicting Accounts of an ICE Raid in Maryland, Wash. Post, Feb. 18, 2009, at A1; All Things Considered: Feds Allegedly Profiled Hispanic Day Laborers, NAT’L PUB. RADIO (Jan. 29, 2009), available at http://www.npr.org/templates/story/story.php?storyId=100027476. Yale Law School Professor Michael Wishnie, who has taught three law school clinics that represent clients in submitting and litigating FOIA requests, confirms that, in his experience, this type of pre- and post-litigation disparity in FOIA responses is commonplace. Telephone Interview with Michael Wishnie, Clinical Prof. of Law, Yale Law School (July 19, 2010). Professor Wishnie also confirms that agencies, which frequently rely on paralegals to prepare FOIA responses, routinely take a “second look” at claimed exemptions with their legal counsel once litigation has begun, and on the advice of counsel often decide to disclose some records the agency had previously claimed fell under one or more exemptions. Id.\textsuperscript{51}

One might hope that the newly-created Office of Government Information Services will at least lessen the necessity of litigation—a possibility touched upon at the end of this Article. See infra notes 166–67 and accompanying text.\textsuperscript{52}
Section II, perhaps the most important is that agencies simply do not have the resources to thoroughly process most requests. Thus, even though agencies are required to search everywhere that is reasonably likely to have the records requested, that seldom happens. This is especially true with respect to ambiguous and/or broadly-written requests; what counts as a “reasonable search” in response to an ambiguous request is naturally open to interpretation. Therefore, although it may make intuitive sense to give the agency broad discretion in processing a FOIA request—after all, it should know best what records it has and how to search its record-keeping systems—the institutional pressures previously discussed suggest that agency discretion will be utilized to minimize the agency’s burden, which will usually mean a less-thorough response. For this reason, minimizing agency discretion is an important consideration when crafting FOIA requests.

In general, minimizing agency discretion means writing requests as specifically and precisely as possible, such that as little as possible is left to interpretation. There are two primary ways to do this. First, requests can be written to identify (by name, if possible) the exact records sought. For example, instead of asking Immigration and Customs Enforcement (“ICE”) for “all manuals of policies and procedures related to immigration detention,” a request asking for the specific manuals known to exist will get better results. But it is not likely that the requester will know all of the manuals in existence (a general problem discussed at length below). Therefore, if the goal is to get all of the manuals, the best route is probably to request “all manuals of policies and procedures, including but not limited to [the names of the manuals of which the requester is aware].” Although it is possible that the FOIA officer will simply send the specifically-named manuals, that would be the absolute minimum that the requester would expect to receive; and if that is the entirety of what ICE sends in response, the requester has increased the odds of a successful appeal.

53 See supra note 38 and accompanying text.
54 One exception to the general rule that minimizing an agency’s discretion will be detrimental to the interests of the requester is when copying and/or search fees are an issue; in that situation, a knowledgeable FOIA officer can reduce the expense to the requester without significantly sacrificing the information sought. That said, the 2007 amendments to the FOIA have diminished the likelihood that fees will be a major concern for requesters. See supra note 17 and accompanying text.
55 See Kreimer, supra note 24, at 1027 n.59 (“A precise inquiry is more likely to be correctly processed by harried civil servants at ground level; it is less subject to evasion by hostile ones, and it presents the requester with smaller costs of sorting signal from noise in the material provided.”).
Another way of trying to minimize agency discretion in processing FOIA requests is to describe the *search* requested. Since a FOIA request need only “reasonably describe” the information sought, there is no reason why requesters cannot write FOIA requests in terms of the *searches* that they would like performed, rather than to simply describe the information or particular records sought. This can be a particularly useful way to write a request if, for example, requesters know that they want all records in a particular database that mention a certain topic, but do not know the names of specific records or what format they will take. To write a request this way, keep in mind that to fulfill a request, FOIA officers generally do one or more of the following: conduct an electronic search of databases (and other digitized files); manually examine physical files; and request that individuals in other locations do one or both of the same. Therefore, if requesters know that they would want a particular database, physical file location, or office searched, they are well advised to put that in the request.

To write a request this way, keep in mind that to fulfill a request, FOIA officers generally do one or more of the following: conduct an electronic search of databases (and other digitized files); manually examine physical files; and request that individuals in other locations do one or both of the same. Therefore, if requesters know that they would want a particular database, physical file location, or office searched, they are well advised to put that in the request. For example, using the same hypothetical as above, if a requester does not know the names of any of the government’s immigration enforcement manuals, but does know where they can be accessed, the request can be written to ask for “all manuals of policies and procedures, including but not limited to those contained in [name of database or those on file in a particular office].”

In regards to electronic searches, requesters can go a step further and specify particular keywords to use. If a FOIA request does not specify particular keywords, then whoever conducts the search will try to discern appropriate keywords from the text of the request letter. Since requesters are often (though not always) in a better position to know what keywords are likely to produce relevant records, it is a good idea to include them in the request letter.

---

56 Assuming, as with any other request, that it is not “unreasonably burdensome.” *See* 5 U.S.C. § 552(a)(3)(A).
58 Thus, one could request “all records related to X contained in the following databases: . . . .”
59 *See*, e.g., Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999).
60 With the advent of electronic databases, recent cases have emphasized the need for agencies to specify “the search terms and the type of search terms” used in conducting search for records responsive to a FOIA request. Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999); *see also* Morley v. CIA, 508 F.3d 1108 (D.C. Cir. 2007) (search affidavit inadequate where it did not “identify[ ] the terms searched or explain[ ] how the search was conducted”); Dinisio v. FBI, 445 F. Supp. 2d 305, 312 (W.D.N.Y. 2006) (agency affidavit should set forth “the search terms and the type of search performed”).
Keep in mind, however, that agencies can decline to use particular terms if they would return an unreasonably large amount of non-responsive information.61

In addition to increasing the chances of a satisfactory response, a benefit of drafting a request in terms of the particular search to be performed is that when requesters receive a response, they should have more information about the search conducted. No matter how a request is written, though, there is generally a trade-off between the breadth of the request and the time it takes the agency to fulfill it. If just one piece of information in a broadly-worded request is particularly time-sensitive, it may be faster to request that information separately from the rest.62

This discussion of requesting particular records or asking that certain databases be searched presents an epistemological problem, for it seems to require, a priori, a certain amount of knowledge about the records sought or the recordkeeping systems to be searched. The next Section discusses how to acquire that knowledge.

B. Finding Information on Information

In theory, it should be relatively easy to find out the primary sources of agency records. Since 1996, the FOIA has required each agency to “prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency . . . including an index of all major information systems of the agency [and] a description of major information and record locator systems maintained by the agency.”63 But like much about the FOIA, compliance with this requirement varies

---

61 See DOJ Guide to the FOIA, supra note 8, at 77 n.205, 78 n.206 (collecting cases).
62 It may also qualify for expedited processing, which essentially puts it at the front of the line of requests to be processed. See supra note 14. But keep in mind that the FOIA permits agencies to promulgate regulations that provide for the aggregation of “clearly related” requests submitted “by the same requester, or by a group of requesters acting in concert, if the agency reasonably believes that such requests actually constitute a single request.” 5 U.S.C. § 552 (a)(6)(B)(iv) (2006).
widely. The Department of Justice, for example, appears to be in substantial compliance, as it maintains a list of major information systems, listed alphabetically\(^64\) and by component.\(^65\) This list is useful, but it could be much more so (both to requesters and to the agency), because few of the information systems’ descriptions have any data on how they are searched or the kinds of records they produce.\(^66\) But at least the DOJ posts something; many agencies have done nothing to comply with this statutory mandate.\(^67\) Moreover, since the focus of most agencies and Congress is on reducing agency backlogs, creating a list of major information systems is not high on the list of problems to be fixed.\(^68\)

So once more, FOIA requesters have to navigate around the statute’s absence of effective enforcement mechanisms. One answer is to leverage the multitude of other readily available information sources that, woven together, form what Professor Seth Kreimer has described as the “ecology” of governmental transparency.\(^69\) By researching these other sources, requesters can gain a better understanding of what information exists—and therefore what information is reachable with the FOIA—which leads to better-tailored requests and more successful FOIA litigation. I will fo-


\(^{67}\) In a 2007 study of 149 agency websites, the National Security Archive found, \textit{inter alia}, that “only 36 percent of agency sites include an identifiable list of major information systems.” Nat’l Sec. Archive, supra note 27, at 13. Of the lists that were available at that time, “many . . . [were] incomprehensible or unhelpful.” Id. at 1.

\(^{68}\) See, e.g., Gov’t Accountability Office, Freedom of Information Act: DHS Has Taken Steps to Enhance Its Program, but Opportunities Exist to Improve Efficiency and Cost-Effectiveness 3–4 (Mar. 2009) (suggesting that DHS implement five practices on an agency-wide scale, most of them related to processing requests more quickly and more cheaply), available at http://www.gao.gov/new.items/d09260.pdf.

\(^{69}\) See generally Kreimer, supra note 24 (defending the FOIA from its critics by demonstrating how it must be assessed within a broader “ecology of transparency”).
cuss here on three sources of information that exist with regard to virtually all agencies.

i. FOIA Disclosures & FOIA Logs

The first source is FOIA disclosures. Many agencies have training and reference materials describing agency databases and explaining how each is searched; 70 insofar as they are not readily available to the public, these records are themselves subject to the FOIA. Similarly, FOIA logs—a list of all requests, arranged chronologically, that an agency received during a given fiscal year—are valuable sources of information as well. The logs generally contain information about the requester; a description of the request; the date the request was received and processed; a unique tracking number; and the final disposition of the request (i.e., granted in full, denied, etc.). This information seems mundane, but is actually quite valuable. Perhaps most usefully, FOIA logs demonstrate the sheer breadth of records that are available and how requests are commonly framed. The requesters’ identities and the subjects of their requests can also be illuminating. 71 The logs also permit requesters to “piggyback” on prior requests by asking the agency to provide the same records it disclosed in response to a specific prior request made by someone else. 72 By definition, the agency has already compiled and reviewed all of the records at issue, and so disclosing them again takes little additional effort. 73 Partially for


71 For example, during the 2008 presidential campaign, the Democratic National Committee (DNC) requested from ICE all records of communication involving Republican presidential candidates John McCain and Fred Thompson. See Immigration and Customs Enforcement FOIA Log [hereinafter ICE FOIA Log] 203, 491, 625, 904 (Sept. 2007 through Nov. 2008), available at http://www.ice.gov/doclib/foia/icefoialogseptember2007tonovember2008.pdf. Although the Republican National Committee (RNC) is not listed in the ICE FOIA Log as a requester, an individual did request copies of all correspondence to and from Barack Obama and Hillary Clinton in March 2008. See id. at 537, 557. A simple Google search of that requester’s name reveals that he worked as a research analyst for the RNC when the requests were sent.

72 A piggyback request might say something like, “please provide all records disclosed in response to FOIA case number 504, which you received by your agency on November 17, 2008.” For more on sending this type of request, see Freedom of Information Center, FOIA the FOIAs, http://www.nfoic.org/foia-the-foias (last visited Nov. 8, 2010).

this reason—and also because they are frequent subjects of FOIA requests—a few agencies have begun posting their FOIA logs online,74 and some departments have instructed all component agencies to do so.75 At least one nongovernmental website maintains a collection of FOIA logs from a variety of departments and agencies.76

ii. Systems of Records Notices (SORNs)

Under the Privacy Act77 every federal agency78 that maintains a recordkeeping system79 that is searchable by an individual’s name or unique identifying number (like Social Security or alien number) must publish a notice in the Federal Register for each system of records, describing, inter alia, the types of records it has, how they are used, how long they are kept, and how to gain access to them.80 These notices—required whenever a system is created or revised81—are called “System of Records Notices,” also commonly referred to as “SORNs” or “Privacy Act Issuances.” Pursuant to the Privacy Act, every two years the Office of the Federal Register compiles and publishes all SORNs in effect.82 The most recent Compilation is posted on the Office of the Federal Register’s website and is browsable by agency.83 To be sure, a large number of agency requests are more readily identified by the agency without the need for new searches, this list [FOIA logs] may assist agencies in complying with the FOIA time limits. This should also reduce costs to agencies in preparing responses. This does not, however, relieve agencies of their obligations to conduct an adequate search for, or justify withholding of, responsive records as required by the FOIA.”).

74 See, e.g., ICE FOIA Log, supra note 71.
75 See, e.g., Memo from Mary Ellen Callahan, DHS Chief FOIA Officer and Chief Privacy Officer, Regarding Proactive Disclosure and Departmental Compliance with Subsection (a)(2) of the Freedom of Information Act (FOIA) (Aug. 26, 2009) at 2, available at http://www.dhs.gov/xlibrary/assets/foia/foia_proactive_disclosure.pdf (“As Chief FOIA Officer, I direct the Department and its components to include the following categories of records on their agency websites and link them to their respective electronic reading rooms: . . . . 5. FOIA logs.”).
76 See, e.g., GovernmentAttic.org (click on “FOIA LOGS” at top of page) (last visited Nov. 8, 2010).
78 The Privacy Act defines “agency” the same as the FOIA does. See 5 U.S.C. § 552a(a)(1); see also supra note 11 (discussing the FOIA definition of “agency”).
79 See 5 U.S.C. § 552a(a) (4) (defining “record”); § 552a(a)(5) (defining “system of records”).
82 Id. § 552a(f).
83 Office of the Federal Register, Privacy Act Issuances: Browse the 2007 Compilation, http://federalregister.gov/Privacy/AGENCIES.aspx (last visited Nov. 15, 2010). Previous editions of the Compilation are available (and searchable) on the Govern-
recordkeeping systems will not have a SORN, such as those that are organized by date or event, or that do not have records on citizens or lawful permanent residents. But depending on the type of information sought, SORNs can be useful in ascertaining what recordkeeping systems exist, the kind of records each system contains, and how each is searched.

iii. FOIA Litigation Materials

By far the most useful resources for understanding agencies’ recordkeeping systems are the documents agencies file once they are forced to defend FOIA decisions in court. FOIA lawsuits are nearly always resolved on motions for summary judgment, on which the agency must carry two burdens: first, the agency must prove that any claimed exemptions were properly applied; and second, that it “conduct[ed] a search reasonably calculated to uncover all relevant documents.” In order to carry its twin burdens, agencies typically submit one or more “relatively detailed and non-conclusory” affidavits from the government official(s) personally involved in applying the exemption(s) and conducting the search(es). The affidavits’ explanations for why certain exemp-

---

84 See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a(a)(2) (defining “individual” as a “citizen of the United States or an alien lawfully admitted for permanent residence”).

85 See DOJ Guide to the FOIA, supra note 8, at 803 (“Summary judgment is the procedural vehicle by which nearly all FOIA cases are resolved . . . .”); see also Litigation Under the Federal Open Government Laws, supra note 4, at 365–68 (discussing considerations to take into account when considering the timing of filing a motion for summary judgment). For a critique of deciding virtually all FOIA cases on motions for summary judgment, see Rebecca Silver, Comment, Standard of Review in FOIA Appeals and the Misuse of Summary Judgment, 73 U. Chi. L. Rev. 731 (2006).

86 See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989) (holding that the burden of proving that withholding the records is not improper falls on the agency). If the reviewing court “find[s] either that the rationale of the particular exemption did not apply to these documents, or that the agency had failed to demonstrate the prerequisites to proper invocation of the exemption,” it may order the agency to release the records. Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 858 (D.C. Cir. 1980).

87 Truitt v. Dep’t of State, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal citations omitted); see also Oglesby v. U.S. Dep’t of Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (“[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” (internal citations omitted)).

88 SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (internal citation omitted); see also Nat’l Parks & Conservation Ass’n v. Kleppe, 547 F.2d 673, 680 (D.C. Cir. 1976) (holding that conclusory and generalized allegations are unacceptable as means of sustaining agency burden).

89 See Carney v. U.S. Dep’t of Justice, 19 F.3d 807, 812 (2d Cir. 1994) (“In order to
tions were applied have relatively little value to non-parties, as they are usually too case-specific to be of general application. In contrast, the affidavits’ descriptions of the searches performed for records responsive to the FOIA requests are a goldmine for future requesters, even those not involved in the litigation.

In regards to the search, agency affidavits in support of summary judgment must describe the electronic recordkeeping systems and physical file locations searched, as well as how they were searched.90 If electronic records (such as databases and email) were searched, agency affidavits are required to explain how the records are organized (i.e., by name, topic, date, etc.) and what search terms or keywords were used to search for responsive records.91 If the agency chose not to search in certain locations (such as field offices) or databases, it must explain why those additional searches were either impractical or unlikely to produce responsive records.92 In sum, agency affidavits in support of summary judgment must include detailed information about the recordkeeping systems to which the agency has access; how those systems are searched; and what kinds of records they contain.

In litigation, this information is necessary to permit the court to evaluate the reasonableness of an agency’s search,93 but it is also

---

90 See Steinberg v. U.S. Dep’t of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994) ("[A]gency affidavits that ‘do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requester] to challenge the procedure utilized’ are insufficient." (internal citations omitted)).

91 See Morley v. CIA, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (search affidavit inadequate where it did not "identify[ ] the terms searched or explain[ ] how the search was conducted"); Oglesby, 920 F.2d at 68 ("A reasonably detailed affidavit, setting forth the search terms and the type of search performed . . . is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.").

92 See Church of Scientology v. IRS, 792 F.2d 146, 151 (D.C. Cir. 1986) (discussing how agency affidavits should “identify the searched files and describe at least generally the structure of the agency’s file system which makes further search difficult.”), aff’d, 484 U.S. 9 (1987); see, e.g., Campbell v. U.S. Dep’t of Justice, 164 F.3d 20, 28 (D.C. Cir. 1998) ("[A]n agency ‘cannot limit its search to only one record system if there are others that are likely to turn up the information requested.’” (quoting Oglesby, 920 F.2d at 68)).

93 If an affidavit is inadequate, courts routinely order the agency to submit a more-detailed supplemental affidavit. See, e.g., Penny v. U.S. Dep’t of Justice, 662 F. Supp.2d 53, 57–58 (D.D.C. 2009); Consumer Fed’n of Am. v. USDA, 539 F. Supp. 2d 225, 228 (D.D.C. 2008); Santos v. DEA, 357 F. Supp. 2d 33, 37–38 (D.D.C. 2004). See also Weis-
of substantial value to prospective FOIA requesters. With the descriptions contained in these affidavits, requesters can draft far more precise FOIA requests, which can decrease processing time and increase the odds of receiving the information sought. Moreover, when agencies do respond to the requests, the requesters will be in a much better position to evaluate those responses. Finally, requesters who end up litigating their own requests can use agency affidavits from other cases to demonstrate that the agency’s search in the instant case was not adequate.94 Without this type of information, FOIA plaintiffs are left to speculate that more information should have been produced or that some other source of records must exist, which is insufficient to create an issue of material fact about the reasonableness of the agency’s search.95

Unfortunately, agency affidavits are not easily accessible. In fact, currently there is only one place where these affidavits are available—PACER, the federal judiciary’s system for public, electronic access to docket sheets and case filings.96 Although PACER is far from user-friendly or search-optimized,97 it has greatly en-

---

94 Imagine, for example, that an agency affidavit from a prior case stated that database X contains records of type Y. If the plaintiff in the subsequent case requested records of type Y, but the agency did not search database X, the plaintiff can use the agency affidavit from the prior case to demonstrate that the agency’s search was not adequate, as it failed to search a database it has previously identified as reasonably likely to contain the type of record requested.

95 See, e.g., Steinberg v. Dep’t of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994) (“[M]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search.” (internal citation omitted)); Concepcion v. FBI, 606 F. Supp. 2d 14, 30 (D.D.C. 2009) (“[P]laintiff’s speculation as to the existence of additional records, absent support for his allegations of agency bad faith, does not render the searches inadequate.”); Bay Area Lawyers Alliance for Nuclear Arms Control v. Dep’t of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) (“Plaintiff’s incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith.”).


97 See LoPucki, supra note 96, at 485–89 (suggesting technological reforms to PACER to achieve greater transparency).
hanced court access and opened new avenues for legal research.\footnote{98 See generally, e.g., Peter W. Martin, The New “Public Courts”: Online Access to Court Records – From Documents to Data, Particulars to Patterns, 53 VILL. L. REV. 855 (2008); Margo Schlanger & Denise Lieberman, Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse, 75 UMKC L. REV. 155, 160 (2006). A recent study suggests that only a fraction of opinions found on PACER are included in the Lexis and Westlaw databases. Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 Wis. L. Rev. 107, 108–9 (2007) (finding that only 41\% of 607 cases terminated by a grant of summary judgment were available on Lexis or Westlaw); see also Hillel Y. Levin, Making the Law: Unpublication in the District Courts, 53 VILL. L. REV. 973 (2008).} Most relevant for present purposes, it permits individuals to download (for a fee) filings from most civil cases initiated in the last several years, including agency affidavits filed in support of summary judgment motions in FOIA cases.\footnote{99 Finding these cases on PACER can be done in a couple of different ways. First, PACER permits users to search the civil cases in its “U.S. Party Case Index” by the “nature of suit.” See Frequently Asked Questions, http://www.pacer.gov/psc/hfaq.html (follow “CM/ECF” tab and search under “General,” “Case Related,” and “Access Related” sub-tabs) (last visited Nov. 16, 2010). Thus, one could search for all district court cases with the FOIA’s “nature of suit” code filed within a given timeframe and against a particular defendant agency. From there, however, each returned case would have to be examined manually to determine its relevancy, which can be both tedious and expensive. A list of these codes is available at http://www.pacer.gov/documents/natsuit.pdf (last visited Nov. 18, 2010). The code for FOIA suits is 895. \textit{Id.} at 3. When searching by defendants, keep in mind that the proper defendant in a FOIA action against an agency that is a component of an Executive-branch department is the department itself. Thus, if a FOIA suit is about a violation by Customs and Border Patrol (CBP), a component agency of the Department of Homeland Security (DHS), the named defendant should be DHS. See \textit{Litigation Under the Federal Open Government Laws, supra} note 4, at 359. The other option for finding FOIA cases is to consult the annual list published by the Department of Justice of all FOIA cases in which a decision was rendered in the preceding year. That list contains the court, docket number, and disposition of each case. Unlike the PACER search described above, this list only contains cases in which a decision was rendered. See U.S. Dep’t of Justice, \textit{List of FOIA Cases in Which a Decision Was Rendered in 2008, supra} note 42. The DOJ also publishes a monthly summary of FOIA decisions in its newsletter, FOIA Post, which is available at http://www.usdoj.gov/oip/foiapost/mainpage.htm (last visited Nov. 17, 2010). After weeding out the cases that were dismissed without a judgment being entered (which are noted in the list), the remaining cases would be likely candidates to have agency affidavits accessible through PACER.} Unfortunately, unlike with FOIA logs,\footnote{100 See \textit{supra} note 76 and accompanying text.} as of this writing, this author could not locate any organization or individual that collects and posts these affidavits online,\footnote{101 An exception is INA287.org, which has a collection of approximately 25 affidavits from FOIA cases, most from DHS component agencies. See FOIA, INA287.org, http://ina287.org/foia (last visited Nov. 18, 2010).} leaving PACER, with all its shortcomings, as the only option currently available.\footnote{102 One might try requesting the affidavits through FOIA, though it is not clear what effect the fact that the affidavits are already in the public domain would have (if
C. Litigating FOIA Requests: Discovery

There is not sufficient time or space in this Article for a thorough treatment of litigating FOIA requests, and so this subsection is confined to one often-overlooked item directly related to the previous discussion: obtaining discovery in FOIA litigation. As already discussed, most FOIA cases are resolved on summary judgment motions, in which the defendant agency submits affidavits to substantiate its claims that all exemptions have been properly applied and that it has conducted a reasonable search. Each FOIA exemption has its own standard that has been developed through legislation and case law. The requester is at a disadvantage when resisting summary judgment as to the application of the statutory exemptions, as the applicability of exemptions generally are dependent on the content of the requested records themselves—content that, by definition, has been denied to the requester. Given the informational asymmetry between the requester and the defendant agency, often the most a requester can do is to insist that the agency affidavit in support of summary judgment contain all the factual averments necessary to meet each exemption’s test. That said, even when agencies are capable of legally justifying an exemption, they sometimes fail to do so in the affidavits they submit. If any). For example, in an unpublished opinion, the Seventh Circuit affirmed a district court decision dismissing a FOIA complaint because the request asked “only [for] material that would be available in the public domain”—in this case, the Federal Register—which the court said was not covered by the FOIA. Perales v. DEA, 21 F. App’x 473, 475 (7th Cir 2001). Cf. Prows v. U.S. Dep’t of Justice No. 87CV1657-LFO, 1989 WL 39288, at *4 (D.D.C. Apr. 13, 1989) (denying a fee waiver for the reproduction of 564 pages of court records because “the release of records already in a court’s public files . . . would not ‘contribute significantly to public understanding of the operations or activities of the government.’” (quoting 5 U.S.C. § 552(a)(4)(A)(iii)).

103 The gold standard on this topic is Litigation Under the Federal Open Government Laws, supra note 4, which is published approximately every two years by the Electronic Privacy Information Center (“EPIC”). For a more Government-friendly view of what the FOIA requires, see DOJ Guide to the FOIA, supra note 8.

104 See generally Litigation Under the Federal Open Government Laws, supra note 4, at 49–252 (discussing exemptions); DOJ Guide to the FOIA, supra note 8, at 141–669 (same).

105 For example, in Elliott v. U.S. Department of Agriculture, No. 06-240 (JDB), 2007 WL 1302588, at *5 (D.D.C. May 2, 2007), the agency sought to withhold blueprints under the so-called “high 2” exemption 2, 5 U.S.C. § 552(b)(2), which requires showing that the withheld information is both “predominantly internal” to the agency and that disclosing it would risk circumvention of agency statutes or regulations. See Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (discussing the “high 2” exemption). In Elliott, the court denied summary judgment because, inter alia, the declarations did not say which agency statutes or regulations would be at risk of circumvention if the blueprints were released. See 2007 WL 1302588, at *5. As is often the case, though, the agency was permitted later to renew its motion for summary
agency affidavits omit the facts necessary to meet one or more elements of an exemption’s test, the judge has the discretion to order supplemental affidavits, an in camera review, or that the agency simply disclose the information.  

As previously mentioned, requesters can use affidavits from other cases to create a disputed issue of material fact with regard to the adequacy of the agency’s search. Moreover, since the sufficiency of an agency’s search is an issue of fact, it is possible to obtain discovery on the relevant factual issues, such as the agencies’ recordkeeping systems and the specific searches that were conducted in response to the request being litigated. Depending on the subject of the FOIA request, discovery may be appropriate on what records ought to exist and where they ought to be stored, or even why the defendant agency has taken so long to process the request. Requesters should be aware, however, that courts are reluctant to permit FOIA plaintiffs to conduct discovery unless and until the agency affidavits have proven inadequate or there is a specific showing of bad faith on the part of the agency. Nonetheless,

---

106 See, e.g., Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999); Local 3, Int’l Bhd. of Elec. Workers, AFL-CIO v. NLRB, 845 F.2d 1177, 1179 (2d Cir. 1988) (“Discovery in a FOIA action is permitted in order to determine whether a complete disclosure of documents has been made and whether those withheld are exempt from disclosure.”); Giza v. Sec’y of Health, Educ. & Welfare, 628 F.2d 748, 751 (1st Cir. 1980) (“To the extent that discovery is allowed in an FOIA action, it is directed at determining whether complete disclosure has been made, e.g., whether a thorough search for documents has taken place, whether withheld items are exempt from disclosure.”); El Badrawi v. Dep’t of Homeland Sec., 583 F. Supp. 2d 285, 321–22 (D. Conn. 2008) (permitting plaintiff to depose employees of five different DHS component agencies regarding the sufficiency of their searches after the agency affidavits were inadequate); Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980) (“It is beyond question that discovery is appropriate” in a FOIA case if the government’s dispositive motion leaves a factual issue concerning the adequacy of the agency’s search); DOJ Guide to the FOIA, supra note 8, at 763 n.171 (collecting cases).

107 See, e.g., El Badrawi, 583 F. Supp. 2d at 322 (permitting plaintiff to depose the agency employee “most knowledgeable about the whereabouts of the missing . . . file.”).


109 See, e.g., Carney v. Dep’t of Justice, 19 F.3d 807, 812 (2d Cir. 1994) (“Affidavits submitted by an agency are accorded a presumption of good faith, . . . [and] accordingly, discovery relating to the agency’s search and the exemptions it claims for withholding records generally is unnecessary if the agency’s submissions are adequate on
permitting discovery is well within the district court’s discretion, and so FOIA plaintiffs should not hesitate to seek discovery from the agency—which, after all, “has an effective monopoly on the relevant information.” Absent evidence of an agency’s bad faith, the best route for a FOIA plaintiff to secure discovery on the adequacy of an agency’s search is probably by: (1) drafting relatively precise requests that name specific documents requested and/or locations to search; and (2) learning enough about the agency’s recordkeeping systems and what they should contain such that the plaintiff can demonstrate that it was unreasonable for the agency to refuse to search a specific location, or that the failure to produce a particular record is indication that the agency did not conduct a reasonable search.

IV. INFORMATION FEDERALISM

No discussion of how to leverage other sources of information to maximize the efficacy of the FOIA would be complete without at least a few words about the 51 other freedom of information (“FOI”) laws in effect in the United States: FOIA’s state-law and their face.”); *DOJ Guide to the FOIA*, supra note 8, at 810 (“Discovery is the exception, not the rule, in FOIA cases); *id.* at n.311 (providing examples of cases that demonstrate the reluctance of courts to allow discovery in FOIA cases); see also Local Civil Rule 26.2 of the District Court for the District of Columbia (exempting FOIA cases from discovery requirements, subject to the court ordering otherwise); but cf. Halpern v. FBI, 181 F.3d 279, 295 (2d Cir. 1999) (“[T]he good faith presumption that attaches to agency affidavits only applies when accompanied by reasonably detailed explanations of why material was withheld.”). For more on the presumption of good-faith presumption afforded agency affidavits, see *DOJ Guide to the FOIA*, supra note 8, at 762 n.170 (collecting cases).


112 Ray v. Turner, 587 F.2d 1187, 1218 (D.C. Cir. 1978) (explaining, in a FOIA case, that “[i]nterrogatories and depositions are especially important in a case where one party has an effective monopoly on the relevant information.”).

113 *See* Assassination Archives & Research Ctr. v. CIA, 177 F. Supp. 2d 1, 8 (D.D.C. 2001) (“[A] mere assertion of bad faith is not sufficient to overcome a motion for summary judgment.”).

114 *See supra* Section III.A.

115 *See supra* Section III.B.

116 As the D.C. Circuit put it in an oft-cited case, “[i]f, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the [Freedom of Information] Act will inevitably become nugatory.” *Church of Scientology of Washington v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). *See also* Spannaus v. CIA, 841 F. Supp. 14, 16 (D.D.C. 1993) (“If the requester produces countervailing evidence placing the sufficiency of the identification or retrieval procedures genuinely in issue, summary judgment is inappropriate.”).
District of Columbia counterparts. Although state FOI laws go by a multitude of names—the Public Records Law, the Open Records Act, and many more—in most respects they are quite similar to the federal FOIA. In addition to a shared purpose of providing access to governmental information, many state FOI laws were explicitly modeled on the federal FOIA and therefore track its provisions quite closely. Virtually all share at least the broad contours of the federal FOIA, in that records are presumed to be open to the public; subject to specific exemptions that are to be narrowly construed; with a private right of action to contest denials in state court; where, in the absence of applicable precedent from their own FOI laws, state judges will frequently look to how federal courts have construed analogous provisions of the federal FOIA.

117 Hereinafter, all references to “states” or “state FOI laws” are meant to encompass the District of Columbia and its Freedom of Information Act, D.C. Code §§ 2-531 through 2-540 (2006). Also worth noting, though well beyond the scope of this Article, is that several municipalities have enacted sunshine ordinances governing access to information held by municipal entities. See, e.g., Sunshine Ordinances, First Amendment Coalition, http://www.firstamendmentcoalition.org/category/resources/sunshine-ordinances (last visited Dec. 2, 2010) (discussing seven sunshine ordinances in California); Kate Gardiner, Sunshine Ordinance Passes, Chicagoist (Apr. 22, 2009) (discussing passage of Chicago’s Sunshine Ordinance).


122 However, a few states’ FOI laws actually predate the federal FOIA, some by a considerable margin. For example, the precursor to Arizona’s current Public Records Law was enacted in 1901, when Arizona was still a territory. See Daniel C. Barr & Amy Oliver, Open Gov’t Guide: Arizona, Reporters Comm. for Freedom of the Press (2006), available at http://www.rcfp.org/ogg/index.php?op=browse&state=AZ (follow “foreword” hyperlink).

123 See, e.g., Times Mirror Co. v. Super. Ct., 813 P.2d 240, 247 (Cal. 1991) (“The legislative history and judicial construction of the FOIA [ ] serve to illuminate the interpretation of its California counterpart.” (citation and quotation marks omitted)); Roulette v. Dep’t of Central Mgmt. Serv., 490 N.E.2d 60, 64 (Ill. App. Ct. 1986) (noting that the legislative history indicates that “case law construing the Federal statute should be used in Illinois to interpret our own FOIA.”); Police Patrol Sec. Sys. v. Prince George’s Cnty., 838 A.2d 1191, 1203 n.8 (Md. 2003) (“[T]he historical develop-
Despite generally similar goals and heritage, however, there are some significant differences between the federal FOIA and its state-law analogues (as well, of course, amongst the various state laws)—differences that can be leveraged to amplify the utility of each. A comprehensive treatment of state FOI laws is far beyond the scope of this Article, but three of the most significant differences between the FOIA and state FOI laws merit discussion.

A. State FOI Enforcement

As with the federal FOIA, state FOI laws frequently fail to deliver on what they promise. Like the FOIA, most are chronically under-enforced, and many states’ statutes provide relatively mild sanctions for noncompliance that are simply inadequate to deter violations. A related problem, seemingly more prevalent at the sub-federal level, is widespread ignorance on the part of government officials as to what the state FOI law requires. Most state and local agencies receive so few requests that they are unlikely to have even a single employee that has been fully trained on FOI. This

opment of portions of the MPIA parallel those of its federal counterpart. Under these circumstances, the interpretation of the FOIA by federal courts is persuasive."


125 See Robert Tanner, On Sunshine Laws, Governments Talk Loudly but Stick Is Very Rarely Used, ASSOC. PRESS, Mar. 11, 2007 (“Though laws in every state say government records and meetings must be open to all, reality often falls far short: Laws are sporadically enforced, penalties for failure to comply are mild and violators almost always walk away with nothing more than a reprimand, an Associated Press survey of all 50 states has found.”), available at http://www.ap.org/FOI/foi_031107a.html.

126 A 2007 study by the Better Government Association (“BGA”) and the National Freedom of Information Coalition (“NFOIC”) graded the 50 states’ FOI statutes on five criteria related to responsiveness (response times; appeals process; expedited review; availability of attorney’s fees and costs to a prevailing party; and the availability and severity of possible sanctions against recalcitrant agencies). Thirty-eight states received an “F,” four received a “D,” six a “C”; and two states (Nebraska and New Jersey) received the highest grade given, a “B.” See BGA & NFOIC, States Failing FOI Responsiveness, BGA & NFOIC (2007), available at http://www.nfoic.org/bga. See also Results and Criteria of BGA/NFOIC Survey, BGA & NFOIC (2007), available at http://www.nfoic.org/uploads/results1.pdf (showing state-by-state results).

127 See, e.g., Records Granted Only Half the Time, OPEN REC. REPORT: SPECIAL EDITION (Ohio Coal. for Open Gov’t, Columbus, OH), Spring/Summer 2004, available at
lack of familiarity essentially requires the requester to educate public officials as to what the law requires of them.

FOI requests to state and local agencies can also involve delicate political considerations that are generally absent in the federal FOIA process. At the federal level, the number of FOIA requests agencies receive and the typical distance between the requester and the agency provide requesters a measure of anonymity. Moreover, federal FOIA officers may be completely uninvolved with the subject matter of the request; may not identify with the agency’s underlying mission; and are significantly less likely than their state-law counterparts to know the personnel in the agency’s other offices that are encompassed by the FOIA request. While this combination of factors can result in a relatively impersonal experience, it does mitigate the possibility that agencies will base their decisions on the identity of the requester, the subject matter of the request, or the possibility that the requested records might embarrass a particular person within the agency.

The situation is entirely different with regard to most agencies subject to state FOI laws. Here, the FOI process, even absent litigation, can be both personal and contentious. First, and most obviously, there is a greater likelihood that the agency personnel

http://www.ohionews.org/pdf/ocogspring2004se.pdf; Deborah Buckley, Survey: Little Regard Shown Concerning Free Information, SUNDAY ADVOC. (Baton Rouge, La.), Dec. 30, 2001, at 3A (“Of the 36 counties covered in a survey organized by The Associated Press, fewer than half fully complied”); Jim Davenport, Many Officials Dodge Survey About Public’s Right to Know: S. Carolina Effort Tests Compliance, AUGUSTA CHRON. (Ga.), Nov. 14, 2005 (“Ask many city or county officials in South Carolina about open meetings and open records, and you’re likely to be met with fear or suspicion; and in some places, officials are seemingly ignorant of the requirements of the law.”); Brendan Farrington, State’s Open Record Laws Often Violated, FLA. TIMES-UNION, Nov. 22, 2008 (reporting that a random test by the Florida Society of Newspaper Editors of 163 public agencies in 56 counties resulted in “[a]lmost 45 percent of the offices fail[ing] to comply with the [state’s FOI] law.”); Jon Sarche, Public Information Not Always Made Available, Showes Survey, PUEBLO CHIEFTAIN (Colo.), Oct. 13, 2006 (“[O]btaining records can be an intimidating and disheartening process for members of the public.”); Review: Illinois State Police Routinely Reject Requests for Public Information, ASSOC. PRESS, Apr. 23, 2007, available at http://www.ap.org/foi/foi_050507a.html (reporting that of the approximately 700 requests the state police received in 2006, 175 were granted; 146 were denied; for 81 requests, none of the requested records were located; and for the remaining (nearly 300) requests, there is no record that the state police ever responded at all); Kendal Weaver, Open Records, Closed Doors, MOBILE REG. (Ala.), June 1, 2003, at A1 (“The survey found widespread ignorance of Alabama’s open records law and related opinions, with government officials frequently saying they were unaware of statutes and legal standards. Others said members of the public rarely ask for records.”). The NFOIC maintains an incomplete list of formal and informal audits of state FOI compliance on its website. See Freedom of Information Center, Audits and Open Records Surveys, http://www.nfoic.org/audits-and-open-records-surveys (last visited July 17, 2010).
handling the FOI request will know the requester. While many state FOI laws prohibit conditioning responses on the identity of the requester,\textsuperscript{128} it would be unduly optimistic of human nature to think that the identity of the requester never affects (for better or worse) the manner in which a request is handled. At times, this can have clear advantages—if, for example, the relationship is a good one and the object of the request is uncontroversial. But for many agencies, FOI requests are perceived with suspicion or outright hostility,\textsuperscript{129} especially if the request is from particular individuals or community groups known to be opposed to some aspect of the agency’s policies. Moreover, unlike at the federal level, where the distance (physical and metaphorical) between the FOIA officers processing the request and the employees who created or maintain the responsive records to the request can be advantageous to the requester, the FOI decisionmaker at the state and/or local level often is the target of the FOI request. This lack of impartiality can create obvious hurdles for obtaining information that would be embarrassing or otherwise damaging.\textsuperscript{130}

In sum, FOI requests to state and local officials or entities can be antagonistic affairs, with officials often reacting suspiciously to what they may perceive—fairly or not—as acts of aggression, which increases the likelihood, necessity, and expense of litigation.\textsuperscript{131}


\textsuperscript{129} See Davenport, supra note 127 (discussing suspicious reactions from public officials when asked for public records); Farrington, supra note 127 (same).

\textsuperscript{130} This can partly explain why many state officials have fought to keep email from being considered public records reachable by FOI laws. See Tom Hester, Jr., States Fight to Keep Officials’ E-mail From Open-Records Inspection, Assoc. Press, Mar. 16, 2008, available at http://www.ap.org/FOI/foi_031608a.html; Peter S. Kozinetz, Access to the E-mail Records of Public Officials: Safeguarding the Public’s Right to Know, 25 COMM. LAW. 17 (2007). For a discussion of how various states have resolved the issue of whether emails are subject to their respective FOI laws, see Associated Press v. Canterbury, 688 S.E.2d 317, 325–331 (W.Va. 2009).

\textsuperscript{131} Litigating state FOI requests is similar to the federal FOIA, but there are some key differences. For example, as discussed in Section III.C, it can be difficult to obtain discovery in federal FOIA suits, but some state courts are more liberal in permitting discovery in FOI cases. See, e.g., Md. Cir. Ct. R. Civ. P. 2-411 (“Depositions – Right to Take”) (establishing that litigants may, as a matter of right, take a deposition for the purpose of discovery in all civil matters). On the other hand, and unfortunately for requesters, the provisions for attorneys’ fees in state FOI laws tend to be less generous than those provided by the federal FOIA. That said, all but seven states permit prevailing parties to recover attorneys’ fees and litigation costs in a suit to contest a denial of an FOI request under at least some circumstances. See Results and Criteria of BGA/ NFOIC Survey, supra note 126, at 1, 4–5 (comparing the attorneys’ fees provisions of the 50 states’ FOI laws). Where available, fee awards can be substantial. See, e.g., Order Granting Fees to Pls.’ Lawyers, Citizens for Sunshine v. City of Venice, No. 2008 CA
B. Scope of Coverage

Another significant difference between the federal FOIA and most state FOI laws—and one far more advantageous to requesters—is the breadth of records each makes available for public inspection. Whereas the FOIA only applies to records over which an “agency” of the Executive Branch has possession and control,\(^{132}\) most state FOI laws apply to all “public records,” usually a more expansive class. Many states classify any record on file with a public official as a “public record” obtainable through the state FOI law,\(^{133}\) (subject to any applicable exemptions, of course). Thus, while the federal FOIA explicitly does not apply to the federal courts or to Congress,\(^{134}\) some state FOI laws do apply to legislative bodies.\(^{135}\)

\(^{132}\) See generally supra notes 10–11.

\(^{133}\) A good example of this is the Indiana Public Records Act, which defines “[p]ublic record” as “any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.” IND. CODE ANN. § 5-14-3-2(n) (West 2010). Some state FOI laws attempt to carve out purely personal information from their definitions of “public records” by requiring that the requested information be connected to the public’s business. See, e.g., California Public Records Act, CAL. GOV’T CODE § 6252(e) (West 2010); R.I. Access to Pub. Records Act, R.I. GEN. LAWS § 38-2-2(4)(i) (2008).

\(^{134}\) This is apparently because when the FOIA was being debated, “Congress believed it made its deliberations and proceedings adequately subject to public observation, largely published its records, and otherwise was constitutionally authorized to engage in information restriction in certain circumstances,” and lawmakers “also were satisfied with the openness of federal court files and hearing rooms.” CONGRESSIONAL RESEARCH SERVICE, ACCESS TO GOVERNMENT INFORMATION IN THE UNITED STATES (updated Aug. 31, 2009), at 2, available at http://www.fas.org/sgp/ctss/secret/97-71.pdf.

and the state judiciary. As discussed below, the expansive scope of state FOI laws can be leveraged to gain access to information the frequently-narrower federal FOIA does not provide.

C. Leveraging Vertical Federalism

An oft-cited objective of Our Federalism is that each sovereign acts as a check upon the other. In advocating for the ratification of the Constitution, Alexander Hamilton assuaged fears concerning the distance between the people and the central government by arguing that this distance:

will be overbalanced by the effects of the vigilance of the State governments. The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people. Their disposition to apprise the community of whatever may prejudice its interests from another quarter, may be relied upon, if it were only from the rivalship of power.

Hamilton may not have had access to government information in mind, but the sentiment applies; indeed, state FOI laws can be a

---

136 Access to judicial records, unlike in most other contexts, has a clear constitutional baseline: the Supreme Court has held that the public enjoys a qualified First Amendment right "to inspect and copy judicial records" in criminal cases, Nixon v. Warner Commc’n, 435 U.S. 589, 598 (1978), and has suggested in dicta that this right extends to civil cases as well, see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980). Many states go beyond this constitutional minimum by providing access to records relating to the judiciary’s administrative functions. See, e.g., Hawaii Uniform Information Practices Act, HAW. REV. STAT. § 92F-3 (2008); Missouri Sunshine Law, MO. REV. STAT. § 610.010(4) (2009); Rhode Island Access to Public Records Act, R.I. GEN. LAWS ANN. § 38-2-2(4)(i)(T) (2008). At least one state supreme court has indicated that emails of judges, if "relate[d] to the conduct of the public’s business," are subject to disclosure. Assoc. Press v. Canterbury, 688 S.E.2d 317, 331 (W.Va. 2009).

137 See Younger v. Harris, 401 U.S. 37, 44 (1971) (“‘Our Federalism’ . . . does not mean blind deference to ‘States’ Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”).

useful way to monitor the activities of the federal government (and vice-versa).

Under some circumstances—particularly in situations involving a high degree of federal-state cooperation, such as with law enforcement—certain records may be subject to both the federal FOIA and the applicable state FOI law. Usually this is because the records fall within the definition of both statutes; examples would include records that a federal agency created and then sent to state or local government agencies (or vice-versa), and records of communications between the two maintained by both agencies (such as email messages). As federal-state and federal-local cooperation has increased in recent years the question of when state and/or local agencies must disclose records created or disseminated by a federal agency has arisen with increasing frequency.

When this issue has materialized, it is typically the federal agency objecting to the state or local agency’s release of “federal” information under the state FOI law. These objections take a number of forms—everything from “informal persuasion” to intervening in state FOI litigation and the promulgation of “emergency” regulations. Federal agencies have also acted proactively

---

139 See Jennifer Bennett, Should Police Be More Like Doctors?: The Lessons of Medical Informed Consent for National Security Partnerships at 3 (“[A]s federal agencies have increasingly sought to involve state and local law enforcement in efforts to protect national security and enforce immigration law, they have also sought ways to shield these collaborative endeavors from state and local laws regulating information disclosure.”) (unpublished) (on file with author). This is not to suggest, however, that state and localities do not also take the lead in arguing that federal law prohibits the disclosure of information that they do not wish to disclose. See, e.g., County of Santa Clara v. Superior Court, 170 Cal. App. 4th 1301, 1318 (Cal. App. Ct. 2009) (holding that the Critical Infrastructure Information Act, 6 U.S.C. § 133(a)(1), did not prohibit the county government’s disclosure of information that it had submitted to the federal government); cf. Bennett, supra, at nn.13, 95–96 and accompanying text. The Santa Clara case ultimately resulted in an agreement whereby the County agreed to pay $500,000 in attorneys’ fees to the successful plaintiff. See Woolfolk, supra note 131.

140 See id. at 3–4.


142 See Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508, 19509 (Apr. 22, 2002) (codified at 8 C.F.R. § 236.6); A.C.L.U. of N.J. v. County of Hudson, N.J., 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002) (holding that 8 C.F.R. § 236.6 — an emergency regulation promulgated by Attorney General John Ashcroft in direct response to the lower court’s ruling in Hudson that counties holding detainees for the former Immigration and Naturalization Service were required under state law to disclose information about those detainees — preempted the state FOI law, such that the counties were prohibited from releasing the requested information); but cf. Comm’r, Dep’t of Corr., 2009 WL 4852114, at *3 (holding that the regulation does not apply to infor-
to shield certain information from state FOI laws, most typically by inserting provisions into their contracts with state and local governments that purport to exempt certain records from state open records laws.

These types of efforts by federal agencies are of dubious legality. There is no authority for the general proposition that a document created by a federal agency or containing “federal” information retains its “federal” character no matter where it is disseminated—or even that there is such a thing as a “federal” record or “federal” information.143 Nonetheless, federal agencies frequently succeed in persuading state and local officials to deny requests for records that the federal agency, for whatever reason, does not want released under state law.144 Often, this is enough to end the matter, either because requesters are not aware that this is a potential state FOI violation, or because even if they do, their only recourse is to file a lawsuit—an expensive and time-consuming process that they understandably do not wish to undertake.

Nonetheless, when determined requesters have filed suit, they have had successes. State and local defendant agencies in these lawsuits often try to defend nondisclosure by arguing that the state FOI law either permits or mandates withholding the records. One seemingly common argument is that the state FOI law somehow incorporates the federal FOIA exemptions, such that the record can (or must) be denied on the basis of a particular federal FOIA exemption even where the state FOI law does not contain a compa-

143 Moreover, there are good reasons for being suspicious of federal attempts to curtail states’ efforts to inform their citizens of the extent and nature of state-federal cooperation on matters of public concern. See generally Bennett, supra note 139 (arguing that the principles behind medical disclosure rules, although not perfectly analogous, could be extended to evaluate when and how much information to disclose about cooperation between the federal government and its state and/or local counterparts).

144 This is not to say that the federal agency does not want the information released at all; after all, the federal FOIA will typically apply to make at least some of the same information accessible. More likely, the federal agency simply wants to control of the process by requiring requesters to go through the federal FOIA.
rable exemption.\textsuperscript{145} For example, the Connecticut Freedom of Information Act provides that "unless otherwise prohibited by state or federal law," all public records shall be disclosed, subject to a few discretionary exemptions.\textsuperscript{146} In an effort to resist disclosure of records sent to it by a federal agency, the Connecticut State Police argued that the "unless otherwise prohibited by state or federal law" language incorporated the exemptions of the federal FOIA.\textsuperscript{147} The problem with this argument, however, is that the federal FOIA exemptions do not prohibit the disclosure of anything; instead, they are purely discretionary.\textsuperscript{148} On this basis, the Connecticut Freedom of Information Commission rejected the argument,\textsuperscript{149} and its decision was affirmed on appeal.\textsuperscript{150}

Similarly, in Maryland, a county sheriff participating in a local immigration enforcement program\textsuperscript{151} run pursuant to an agreement with the federal Immigration and Customs Enforcement ("ICE") refused to disclose records related to the program that were in his possession by arguing that the records belonged to the federal government.\textsuperscript{152} Only after the requesting community group filed suit\textsuperscript{153} did the sheriff relent, ultimately disclosing more than

\textsuperscript{145} See, e.g., Danaher v. Freedom of Info. Comm’n, No. CVHHB0840160678, 2008 WL 4308212, at *2 (Conn. Super. Ct. Sept. 5, 2008) (rejecting this argument and holding that Congress did not design the federal act exemptions to be mandatory bars to disclosure); Letter from Andrew J. Murray, Supervising Cnty. Att’y, Anne Arundel Cnty., Md., to MPIA requester CASA de Maryland, at 2 (Apr. 29, 2009) (stating that Md. Code Ann., State Gov’t § 10-615(2) (West 2010)—which requires records’ custodians to deny requests under the Maryland Public Information Act for public records when disclosure is prohibited by, inter alia, “federal statute or a regulation that is issued under the statute and has the force of law”—requires denial of a requested record because it allegedly would not be available under the federal FOIA), available at http://www.scribd.com/doc/34514608.

\textsuperscript{146} CONN. GEN. STAT. § 1-210(a) (2009).

\textsuperscript{147} See Danaher, 2008 WL 4308212 at *2–3.

\textsuperscript{148} See supra note 19 and accompanying text; see also DOJ Guide to the FOIA, supra note 8, at 685–709 (discussing discretionary agency disclosures).


\textsuperscript{150} See Danaher, 2008 WL 4308212.

\textsuperscript{151} See 8 U.S.C. § 1357(g); CHRISTINA RODRIGUEZ ET AL., Migration Policy Institute, A Program in Flux: New Priorities and Implementation Challenges for 287(g) (March 2010), http://www.migrationpolicy.org/pubs/287g-March2010.pdf (discussing the program’s development).


2000 pages of records.154

A few months later, perhaps in reaction to similar records’ requests in other states,155 ICE drafted new Memoranda of Agreement (“MOA”) for agencies to sign.156 The new MOA contains a provision, not present in the prior agreements, stating that:

Information obtained or developed as a result of this MOA is under the control of ICE and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations, and executive orders. Insofar as any documents created by the [local law enforcement agency] contain information developed or obtained as a result of this MOA, such documents shall not be considered public records.157

Although this provision has yet to be challenged under a state FOI law, state courts consistently reject similar attempts to contract around state FOI laws,158 and it is difficult to imagine why they would not do so here as well.159

154 See, e.g., 287(g) Training Materials, INA287.org, http://ina287.org/287g/287g-training-materials.

155 See, e.g., Robert Boyer, Sheriff Working on 287(g) Request, TIMES-NEWS (Burlington, N.C.), Mar. 28, 2009 (discussing how the Alamance County Sheriff’s Office was “consulting with federal officials for clarification on the ACLU requests [under the state FOI law] . . . to determine what they are allowed to release.”), available at http://www.thetimesnews.com/news/sheriff-23776-information-aclu.html (last visited Nov. 11, 2010).


159 See, e.g., RODRIGUEZ, supra note 151, at 2 (noting how this provision “potentially conflict[s] with state and local public records laws and undermine[s] transparency.”).
Attempts by federal agencies to prevent states and localities from disclosing information are also of questionable legitimacy. When the federal government wishes to prohibit the disclosure of certain information, there is an established procedure: Congress passes a law. In Fiscal Year 2008, federal agencies relied on roughly 160 different statutory provisions to deny FOIA requests either in part or in full, and these same provisions are properly used by states and localities to deny state FOI requests as well.

CONCLUSION: HOPE FOR CHANGE?

The purpose of the foregoing discussion has been to assist FOIA requesters in obtaining the maximum amount of information possible out of a transparency mechanism that suffers serious flaws. In so doing, this Article, quite unintentionally, has taken a tone that will likely strike some as pessimistic. Nonetheless, there are reasons to hope that the situation will improve.

Anecdotal evidence suggests that transparency improved in the early years of the Obama administration. Nonetheless, it remains to be seen how far President Obama is willing to go in fulfilling his pledge of a ushering in a new era of governmental

See also Travis Loller, ICE Wants to Limit Public Info About Detainees, knoxnews.com (Sept. 7, 2009), http://www.knoxnews.com/news/2009/sep/07/ice-wants-to-limit-public-info-about-detainees/ (“A Tennessee sheriff is balking at renewing his department’s participation in a program that lets local authorities enforce federal immigration laws because new rules could keep secret basic information about who’s being detained.”); Travis Loller, Nashville Sheriff Signs Agreement With Immigration, timesfreepress.com (Oct. 9, 2009), http://www.timesfreepress.com/news/2009/oct/09/nashville-sheriff-signs-agreement-immigration/ (“Nashville Sheriff Daron Hall’s office has agreed to coordinate the release of information with the Immigration and Customs Enforcement office. If the federal agency wants to keep certain documents secret it must show proof of a federal law or regulation or executive order authorizing that withholding. . . . Hall had said he would not sign the document as it was and wanted the guidelines for release of documents to conform with Tennessee law.”).

160 See Bennett, supra note 139.


transparency, particularly following the high-profile (and highly-embarrassing) publication of previously-confidential diplomatic cables by WikiLeaks.

A potentially exciting development for open-government proponents is the creation of the new Office of Government Information Services (OGIS) within the National Archives and Records Administration. This office, congressionally mandated by the 2007 OPEN Government Act, is tasked with serving as a liaison between agencies and FOIA requesters, particularly when FOIA disputes arise. Here again, it is too early to determine what effect, if any, the OGIS will have on the administration of the FOIA. Nonetheless, it does provide some hope that the gap between the FOIA’s promise and its reality can be narrowed in the coming years.


