THE HISTORY OF THE FREEDOM OF INFORMATION ACT'S APPARENT FAILURE TO DEFINE "RECORD," AND THE DISCONCERTING TREND OF APPLYING ELECTRONIC DISCOVERY PROTOCOLS TO THE FOIA

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I. INTRODUCTION

On July 4, 1966, President Lyndon B. Johnson signed the Freedom of Information Act ("FOIA")[1] into law, with an effective date of July 4, 1967.[2] Since then, the FOIA has been amended at least eight times,[3] most recently in 2016 with the FOIA Improvement Act of 2016.[4] When reviewing and examining the legislative histories of the FOIA and subsequent amendments made over the past fifty years, one may become confused in trying to track and understand the amendments and changes to the law, as Congress sometimes specifically amended the FOIA, or sometimes amended the FOIA via another public law.[5] All this has led to a convoluted and complex area of law, and one may conclude this complexity began at the FOIA's inception given then Attorney

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1 The Freedom of Information Act ("FOIA") was passed in 1966 and amended the Administrative Procedure Act**.** *See* Freedom of Information Act, Pub. L. No. 89–487, 80 Stat**.** 250 (1966) (codified as amended at 5 U.S.C. § 552 (2016)).

2 *See* Freedom of Information Act, Pub. L. No. 89–487, 80 STAT. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2016)).

3 *See* Freedom of Information Act, 5 U.S.C. § 552 (2016).

4 FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 STAT. 538 (to be codified at 5 U.S.C. § 552).

5 *Compare* FOIA Improvement Act of 2016, Pub. L. No. 114–185, 130 **STAT. 538,** *with* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107–306, § 1009, 116 Stat. 2383, 2443 (2002).

General Ramsey Clark's *A Memorandum for the Executive Departments and Agencies Concerning Section 3 of the Administrative Procedure Act,*[6] written to assist federal agencies with their implementation of the FOIA, was approximately thirty-four pages long[7] while the original statute was less than two pages long.

In spite of the number of times the FOIA has been amended and the fact that it has been fifty years since its enactment, one may be surprised to discover the term "record" has never been defined or cross-referenced to another statute, e.g. the Administrative Procedure Act ("APA").[8] One now may be thinking how can this be; however, this is exactly what the Washington D.C. Court of Appeals determined in *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review* ("*AILA v. EOIR*"), [9] when it wrote "[a]lthough FOIA includes a definitions section, that section provides no definition of the term 'record.'"[10]

As the FOIA does not define the term "record," it is interesting that both the National Archives and Records Administration ("NARA") and the United States Department of Justice ("DoJ") believed the FOIA did define the term "record," albeit not in the original statute.[11] NARA has posted on its website the following: "[r]ecords are defined in various statutes, including the Federal Records Act and the Freedom of Information Act."[12] While NARA does not provide the FOIA's definition of "record," it cites the

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[6] RAMSEY CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967), https://www.justice.gov/oip/attorney-generals-memorandum-public-information-section-administrative-procedure-act.

[7] Based upon printout from internet website. *See id.*

[8] *See* 5 U.S.C. § 551 (2016).

[9] Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667 (D.C. Cir. 2016).

[10] *Id.* at 678 (citations omitted).

[11] *Compare* U.S. DEP'T OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT: PROCEDURAL REQUIREMENTS 10 (2013), https://www.justice.gov/sites /default/files/oip/legacy/2014/07/23/procedural-requirements.pdf, *with Frequently Asked Questions about Records Management in General*, U.S. NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/records-mgmt/faqs/federal.html#record (last updated July 7, 2015). *See also* RAMSEY CLARK, U.S. DEP'T OF JUSTICE, *supra* note 6.

[12] *Frequently Asked Questions about Records Management in General*, U.S. NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/records-mgmt/faqs /federal.html#record (last updated July 7, 2015). '

Disposal of Records'[13] definition (encompassed within the Federal Records Act[14]) on its website:

> Records include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.[15]

While NARA cites the Disposal of Records' definition for federal records management protocols,[16] NARA also has a regulatory definition of "electronic record" which supplements its cited definition of "record." NARA defines an "electronic record" as "any information that is recorded in a form that only a computer can process and that satisfies the definition of a Federal record under the Federal Records Act. The term includes both record content and associated metadata that the agency determines is required to meet agency business needs."[17] Thus, one may conclude that by regulation, a federal agency has the discretion to determine what an agency record is, at least in terms of an electronic record's content and metadata for records management protocols.

As to the DoJ's apparent position that the FOIA defined the term "record," the *Department of Justice Guide to the Freedom of Information Act*,[18] states "[a]s a result of the 1996 amendments to the FOIA, Congress included a definition of the term 'records' in

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[13] *See* 44 U.S.C. § 3301 (2013), *amended by* 44 U.S.C. § 3301 (2014).

[14] *See* Federal Records Act of 1950, Pub. L. No. 81–754, § 511, 64 Stat. 578, 589 (codified as amended at 44 U.S.C. §§ 3101–4104 (2015)). "The [Federal Records Act] is 'a collection of statutes governing the creation, management, and disposal of records by federal agencies.'" Competitive Enter. Inst. v. Office of Sci. & Tech. & Policy, 241 F. Supp. 3d 14, 17 (D.D.C. 2017) (citing Pub. Citizens v. Carlin, 184 F.3d 900, 902 (D.C. Cir. 1999)).

[15] U.S. NAT'L ARCHIVES & RECS. ADMIN., *supra* note 11 (citing 44 U.S.C. § 3301).

[16] *See* 36 C.F.R. § 1220.18 (2017). The 2017 C.F.R. definition of "records" and the definition posted on NARA's website is the same "records" definition in 44 U.S.C. § 3301 (2013) and not the amended definition in 44 U.S.C. § 3301 (2014). *See* 44 U.S.C. § 3301 (2013); 44 U.S.C. § 3301 (2014).

[17] 36 C.F.R. § 1220.18.

[18] *See* U.S. DEP'T OF JUSTICE, *supra* note 11, at 9.

the FOIA, defining it as including 'any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format.'"[19] So it seems, given this language, the DoJ interpreted the FOIA such that it included a definition of "record."

There are two interesting facts about the issue of the FOIA's lack of a definition of "record." The first fact is that Attorney General Clark specifically identified the FOIA's failure to provide a definition of "record" in 1967.[20] Despite the FOIA's failure to provide a definition, Attorney General Clark attempted to guide federal agencies by analogizing the treatment of records under the FOIA to the National Archives' (now NARA's) treatment of official records, using the definition of records from the Records Disposal Act.[21]

The second interesting fact is that even though Congress was aware of Attorney General Clark's memorandum,[22] Congress appears to have failed to define the term "record," in subsequent amendments to the Act.[23] Even today, the courts still are citing the Federal Records Act[24] as an analogous basis for "records" for FOIA purposes and not directly addressing the issue of what are agency records.[25] Rather, the courts appear to be side-stepping the issue as seen in *AILA v. EOIR* where the court concluded the agency had determined what was a record for FOIA purposes, and directly focused on the issue of redaction of non-responsive information from the agency record.[26]

In addition to using the definition of "records" from another statute as an analogy for FOIA purposes, some courts are using Electronic Discovery ("E-Discovery") references for FOIA search

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19 *Id.* at 10.

20 *See* RAMSEY CLARK, U.S. DEP'T OF JUSTICE, *supra* note 6.

21 *See id.* (citing 44 U.S.C. § 366 (1964)).

22 *See* STAFF OF S. COMM. ON THE JUDICIARY, 93RD CONG., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 9 (Comm. Print 1974).

23 *See The Amended Definition of Record*, DEP'T OF JUST., https://www.justice.gov/oip/blog/foia-post-2008-summaries-new-decisions-july-2008 (last updated Aug. 22, 2014).

24 *See* 44 U.S.C. §§ 3101 (2016); 44 U.S.C. §§ 4104 (2016).

25 Competitive Enter. Inst. v. Office of Sci. & Tech. & Policy, 241 F. Supp. 3d 14, 17–18 (D.D.C. 2017); Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 678 (D.C. Cir. 2016).

26 *Am. Immigration Lawyers Ass'n*, 830 F. 3d at 678–79.

protocols. In *Competitive Enterprise Institute v. Office of Science & Technology & Policy*[27] ("*CEI v. OSTP*"), the FOIA request was for a government employee's work-related emails, with underlying metadata, maintained on a non-government email account.[28] OSTP interpreted the FOIA request as all emails sent to and from the non-government email account and located within OSTP.[29] As mandated by OSTP policy, the government employee was required to forward all government work-related emails from his non-government email account to his government email account.[30] For FOIA purposes, OSTP searched the government employee's email account for the emails requested.[31] The FOIA requester challenged OSTP's search.[32] The government argued the emails on the non-government server were duplicates of those that would be found on the government server and thus it was not required to produce them.[33] In agreeing with the government's position, the court rejected plaintiff's argument that the metadata would make each email unique (i.e. emails on the private server are unique from the emails on the government server).[34] In reaching this conclusion, the court relied upon *The Sedona Conference, Best Practices, Recommendations, & Principles for Addressing Electronic Document Production No. 12*.[35] The court's reasoning was that "[i]n the absence of some reason to believe that the metadata will yield an answer that the hard copy will not, production of the information in native format [] is not necessary. Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court."[36] The interesting part is that there is no indication that an argument was made that metadata was not an agency record.

In writing this article, the questions became does the FOIA, and its subsequent amendments, really fail to define "record?" If a federal agency is able to determine what is a record under the

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[27] *Competitive Enter. Inst.*, 241 F. Supp. 3d at 14.

[28] *Id.* at 18–19.

[29] *Id.* at 19.

[30] *Id.* at 22.

[31] *Id.* at 23–24.

[32] *Id.* at 19.

[33] *Competitive Enter. Inst.*, 241 F. Supp. 3d at 21.

[34] *Id.* at 23 n.4 (citing Covad Commuc'ns. Co. v. Revonet Inc., 267 F.R.D. 14, 20 (D.D.C. 2010)).

[35] JOHNATHAN M. REDGRAVE, THE SEDONA PRINCIPLES: BEST PRACTICES AND RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 104 (2004).

[36] *Competitive Enter. Inst.*, 241 F. Supp. 3d at 23–24 n.4.

FOIA and if it determines an agency record is one as defined by the Federal Records Act,[37] can it now exclude certain items from the definition of agency record for purposes of the FOIA, e.g. metadata? What should be the definition of an agency "record" under the FOIA in the digital age? Is it appropriate to reference E-Discovery protocols to the FOIA? These are some of the questions this author attempts to answer. In order to answer these questions, one must first examine the difference between records in the pre-digital world versus records in the digital world, the history of the FOIA and its various amendments, the purpose of the FOIA versus the purpose of Discovery (now E-Discovery), and the application of E-Discovery protocols to the FOIA process.

II. THE PRE-DIGITAL WORLD VERSUS THE DIGITAL WORLD

For those that have lived in both the pre-digital world and today's digital world, one can easily identify differences between the two. The Sedona Working Group on Electronic Discovery Document Production[38] ("SWG on E-Discovery") has authored guidebooks illustrating statistical differences between records created and maintained in the pre-digital world versus the digital world. For example, in 1984, personal computers were relatively new and email was simply nonexistent; however, by 2004, it was estimated that over ninety percent of all information was created in some electronic format,[39] with seventy percent of corporate records stored electronically and thirty percent of electronic information never printed to paper.[40] By 2004, there were also substantially more electronic documents than paper documents, with electronic records being created at much greater rates, thus leading to the exponential increase in the volume of electronic records.[41] An example will illustrate the increase in volume of data:

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37 44 U.S.C. § 3101 (2016).

38 The irony of citing THE SEDONA CONFERENCE is not lost on this author; however, its statistical data between electronic records and non-electronic records cannot be overlooked.

39 Redgrave, *supra* note 35, at 1.

40 *Id.* at 7.

41 *Id.*

> In 1998, the U.S. Postal Service processed approximately 1.98 billion pieces of mail. During that year, there were approximately 47 million e-mail users in the United States who sent an estimated 500 million e-mail messages per day, for a total of approximately 182.5 billion e-mail messages per year – more than 90 times as many messages as the U.S. Postal Service handled the same year.[42]

By 2008, ninety-five percent of all records were electronic records, with only five percent as non-electric records.[43] Again, an example will illustrate technology's exponential increase in terms of volume.

> [A] typical employee at a large company will write or receive at least fifty emails per day. If that company has one hundred thousand employees, the company could be sending a receiving over 1.5 billion emails annually. Similarly, a signed CD-ROM is capable of storing many thousands of pages and a hard drive can easily store the equivalent of hundreds of CD-ROMs. Back up data is measured in terabytes, and each terabyte is the equivalent of five hundred million typewritten pages.[44]

From its inception, the SWG on E-Discovery questioned whether the rules primarily developed for paper discovery would be adequate for e-discovery as "[i]t seemed doubtful . . . that the normal development of case law would yield, in a timely manner, the best practices for organizations to follow in producing electronic information."[45] In the end, the SWG on E-Discovery demonstrated a fundamental concept that paper and electronic

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[42] *Id.*

[43] *See* Shiura A. Schneindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection to Two Recent Revisions to the Federal rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 355 (2008).

[44] *Id.*

[45] THE SEDONA PRINCIPLES: SECOND EDITION BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, THE SEDONA CONFERENCE WORKING GROUP SERIES, iv (Jonathan M. Redgrave et al. eds., June 2007), https://thesedonaconference.org/download-pub/5384 (selecting "I agree to this terms. (required);" then select "Download" option).

information are different and these differences pertain to their structure, volume and content.[46]

> [T]he way in which information is created, stored and managed in electronic environments is inherently different from the paper world . . . the simple act of typing a letter on a computer involves multiple (and ever-changing) hidden steps, databases, tags, loops, and algorithms that have no paper analogue.[47]

Compare this to the pre-digital world of a typewriter. When someone typed a business letter on a type-writer, copies were not automatically generated unless carbon copy paper was used (or until one used a copy machine). Thus, there would be no metadata underlying the paper document other than (perhaps) the typewriter ribbon which was usually disposed of once fully used. If the letter was a draft, it more than likely would have been thrown away or shredded once the final letter was written and signed. The original would be mailed and a copy kept in the office's filing cabinet. Overall, vastly different from the storage of information in the digital age.

How is e-discovery different from non-electronic discovery? One way the SWG on E-Discovery answered this question was by quoting Judge Nolan from *Byers v. Illinois State Police*.[48]

> [T]he Court is not persuaded by the plaintiffs' attempt to equate traditional paper-based discovery with the discovery of email files. . . . Chief among these differences is the sheer volume of electronic information. E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail. Additionally, computers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the

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[46] *Id.* at v.

[47] *Id.*

[48] *See* Byers v. Illinois State Police, No. 99 C 8105, 2002 WL 1264004 at *1 (N.D. Ill. 2002).

> volume of documents. All of these e-mails must be scanned for both relevance and privilege.[49]

The Federal Rules of Civil Procedure have been amended twice to address unique issues associated with discovery of electronically stored information ("ESI"), in 2006 and again in 2015;[50] thus supporting the SWG on E-Discovery's concern of attempting to transfer pre-ESI discovery protocols to ESI discovery . . . it does not work.[51] All one has to do is visit its website to view its numerous writings to determine for oneself that non-ESI discovery protocols are not easily transferable to ESI.[52]

Congress passed the Electronic FOIA Amendments of 1996[53] ("E-FOIA Amendments") in order to bring the FOIA into the digital world; however, the passage of the E-FOIA Amendments appears to begin with Congress' belief that the FOIA protocols for processing paper records would be easily transferrable to processing electronic records under the FOIA.[54] As discovered with E-Discovery, this is simply not the case (at least in this author's experience). While the SWG on E-Discovery has been on the forefront in proposing changes to the Federal Rules of Civil Procedure to address discovery in the digital age, there has been, in effect, simply a status quo within the FOIA world.[55] As a result of this failure to address FOIA processes in the digital world, it is not surprising the courts are beginning to merge the two, thus

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[49] *Id*. at *10.

[50] *See* FED. R. CIV. P. 37 (noting in the advisory committee notes, the 2006 amendment states that "absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system."). *See also* FED. R. CIV. P. 37 (noting that the 2015 amendment reflects that "the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection.").

[51] THE SEDONA PRINCIPLES, *supra* note 45, at 10. ("The Federal Rules are necessarily procedural and cannot provide the level of detail found in *The Sedona Principles*.").

[52] *See Discovery,* THE SEDONA CONFERENCE, *https://thesedonaconference.org* (last visited Mar. 4, 2018).

[53] Electronic Freedom of Information Act and Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 2985 (1996).

[54] *See infra* notes 230–244 and accompanying text.

[55] Tamar Ziff, *What is FOIA? Does it Ensure Government Transparency?*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, (Sept. 28, 2017), https://www.citizensforethics.org/foia-ensure-government-transparency/ ("The FOIA is essential in establishing the American public's 'right to know' how policy is made, but until there is more infrastructure and funding to administer and enforce it, the ideal of a fully informed public remains illusory.").

leading to a disconcerting trend given that *they are not the same and each has a different purpose*.

III. THE FOIA AND CIVIL DISCOVERY: UNDERSTANDING EACH ONE'S UNIQUE AND DIFFERENT PURPOSE

A. The FOIA's Purpose

When Congress passed the FOIA in 1966, the legislative history reveals that Congress was tired of federal agencies being difficult when responding to requests for government records.[56] Congress wanted to firmly establish a philosophy of full agency disclosure to any person,[57] with a presumption of release and not of withholding.[58] This presumption of release was again repeated in 1974 when Congress amended the FOIA.[59]

In support of Congress's mandate of release over non-release, a number of presidential quotes are seen in some of the legislative history[60] and one of the most often cited quotes is from President Madison, who stated, "Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring

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[56] *See* H.R. REP. NO. 89–1497, at 2422 (1966) *reprinted in* SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE JUDICIARY U.S. SENATE, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 25–26 (1974). *See also* S. REP. NO. 89-813, at 3 (1965) *reprinted in* SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE JUDICIARY U.S. SENATE, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 25 (1974).

[57] The FOIA did not define "any person" when initially enacted. However, the Intelligence Authorization Act of 2002 restricted access to intelligence community records (as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. § 401a(4)), if the FOIA requester was a government representative of a government that is not a State, territory, commonwealth, or district of the United States. *See* Pub. L. No. 107–306, 116 Stat. 2383 (codified at 5 U.S.C. § 552(a)(3)(E) (2003)).

[58] *See* H.R. REP. NO. 89-1497 (1966). *See also* S. REP. NO. 89-813 (1965).

[59] *See* COMM. ON GOV'T OPERATIONS U.S. HOUSE OF REPRESENTATIVES SUBCOMM. ON GOV'T INFO AND INDIVIDUAL RIGHTS, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, at 14 (1975).

[60] *See* FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (1974), *supra* note 56, at 72.

it, is but a prologue to a farce or a tragedy or perhaps both."[61] The courts have taken the FOIA's congressional history and mandate to heart. Some often-cited statements of the FOIA's purpose include the following:

a. "[T]o pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[62]

b. "[T]he Congressional purpose underlying FOIA was to 'contribut[e] significantly to public understanding *of the operations or activities of the government*.'"[63]

c. FOIA's fundamental policy "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."[64]

d. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[65]

The FOIA places minimum requirements upon a FOIA requester in that a FOIA requester need only reasonably describe the records requested in accordance with the agency's published regulations.[66] If the FOIA requester meets these basic requirements, the agency is to process the request and release any records requested, subject to the nine enumerated withholding exemptions.[67] Generally, the FOIA requester's status or purpose for the requested records would be immaterial to the agency's

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61 S. REP NO. 89-813, at 2–3.

62 Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

63 N.Y. Times Co. v. National Aeronautics and Space Admin., 782 F. Supp. 628, 632 (D.D.C. 1991) (citing U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989)).

64 *Id.* at 632.

65 Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (citing SUBCOMM. ON ADMIN. PRACTICE AND PROCEDURE OF THE JUDICIARY U.S. SENATE, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 37 (1974)).

66 *How do I Make a FOIA Request?*, U.S. DEP'T OF JUST., https://www.foia.gov /how-to.html (last visited Mar. 9, 2018).

67 Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 677 (D.C. Cir. 2016).

analysis of release and/or the application of the FOIA exemptions.[68] The non-examination of the FOIA requester's status or the purpose for the requested government records is consistent with the FOIA's general mandate of release and its underlying purpose.

B. Civil Discovery's Purpose

Every attorney knows that discovery is part of civil litigation. Discovery protocols are used to identify evidence and witnesses for trial, support pretrial motions and promote settlement of a case.[69]

> The various methods of discovery . . . allow the parties to establish the facts alleged in the pleadings. Discovery serves to narrow and clarify the issues and ascertain the facts that are actually in dispute and require trial. The general purpose of discovery is to remove surprise from trial preparation so that parties may obtain the evidence necessary to evaluate and resolve their dispute.[70]

The Federal Rules of Civil Procedure governing discovery include Rule 16, Rules 26 through 37 and Rule 45.[71] Some of the underlying discovery requirements include a duty to preserve documents when one reasonably anticipates litigation,[72] a duty to disclose some documents or ESI prior to receipt of a discovery request,[73] the requirement to conduct a conference as well as write a discovery plan,[74] and to provide the documents and/or ESI in the format requested by the party,[75] usually in the ESI's native or near native format although other forms may still be appropriate.[76]

While the preceding paragraph outlines some of the specific

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68 There are exceptions to this rule. *See* 5 U.S.C. § 552(b) (2012).

69 FEDERAL LITIGATION GUIDE § 9.01 (LEXIS 2017).

70 *Id.*

71 FEDERAL LITIGATION GUIDE § 24.11 (LEXIS 2017).

72 FED. R. CIV. P. 37.

73 FED. R. CIV. P. 26(a).

74 FED. R. CIV. P. 26(f).

75 FED. R. CIV. P. 34(b)(C).

76 *See* Craig Ball, *Lawyer's Guide to Forms of Production* (2014), http://www.craigball.com/Lawyers%20Guide%20to%20Forms%20of%20Production_Ver.20140512_TX.pdf (last visited May 9, 2018).

Discovery requirements, Katherine Larson has written a most concise statement as to the purpose of civil discovery. "The goal of civil discovery, similar to the rules governing sporting events, is to ensure a level playing field for all parties. No one side should possess a procedural or evidentiary advantage beyond that which is particular to the specific facts of a case. The rules of civil procedure promote reciprocity and equal access to evidence."[77] Clearly the purpose of discovery (an equal playing field to evidence) is vastly different from the purpose of the FOIA (educating the public as to the government's operations).

C. Use of FOIA to Supplement Civil Discovery

The use of FOIA to supplement civil discovery by those with some form of claim against the government is not a new pheromone. One early example is the 1970 case of *Renegotiation Board v. Bannercraft Clothing Co.*,[78] where a government contractor attempted to use FOIA in order to obtain records that were not available to it through the administrative renegotiation process.[79] The Supreme Court concluded the use of FOIA in this manner would interfere with agency proceedings, and if permitted, would open the door to using the FOIA as a discovery tool; and this was not part of the FOIA's express purpose.[80]

Another example of an attempt to use FOIA to supplement discovery is seen in *NLRB v. Robbins Tire & Rubber Co.*[81] ("*NLRB v. Robbins Tire*"), where Robbins Tire used the FOIA to try and obtain witness statements not authorized under NLRB procedures.[82] The NLRB denied the FOIA request pursuant to exemption (b)(7)(A).[83] In this case, Robbins Tire acknowledged it was seeking witness statements for discovery purposes only.[84] While the Court upheld the NLRB's withholding of the documents under exemption (b)(7)(A), it also examined Robbins Tire's

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77 Katharine Larson, *Discovery: Criminal and Civil: There's a Difference*, AM. BAR ASS'N, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/criminal-law/discovery_criminal_and_civil_theres_difference.html (last visited Sept. 5, 2017).

78 *See* Renegotiation Bd. v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974).

79 *Id*. at 26.

80 *Id.* at 24.

81 Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).

82 *Id*. at 217–18.

83 *Id.*

84 *Id.* at 242.

attempted use of FOIA as a discovery tool and rejected it.[85] The Court wrote "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. . . . FOIA was *not* intended to function as a private discovery tool."[86] In spite of this clear language, the use of FOIA as a means to supplement discovery has continued.

In 1982, in *Baldridge v. Shapiro*,[87] the Court again examined the differences between the purposes of FOIA and Discovery. While the Court concluded the FOIA requester was not entitled to the requested census statistical data under the FOIA (or Discovery), the Court also provided guidance as to the basic purpose of each.[88] The Court noted "the Federal Rules of Civil Procedure . . . encourage [the] open exchange of information b[etween] litigants in federal courts" and is "focus[ed] [on] the need for the information" while the FOIA reflects "a broad statutory grant of disclosure."[89] Discovery "provides for access to all information 'relevant to the subject matter involved in the pending action' unless the information is privileged'"[90] while "[t]he primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery."[91] In sum, while one is not to consider why a FOIA requester is asking for government records, the use of FOIA as a discovery tool is not uncommon, and just as processing duplicate records is inefficient and needlessly costly to the government,[92] so is processing FOIA requests to supplement discovery. However, as currently written, those with negotiations/claims with/against the government may also submit FOIA requests for records which also have been requested via a discovery request.

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85 *Id.*

86 *Id.* at 242 (citations omitted).

87 *See* Baldridge v. Shapiro, 455 U.S. 345 (1982).

88 *See id.* at 355–58.

89 *Id.* at 360.

90 *Id.*

91 *Id.* at n.14 (citing Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975)).

92 *See* Jett v. Fed. Bureau of Investigation, 139 F. Supp. 3d 352, 365 (D.D.C. 2015) (citing Defs. of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 10 (D.D.C. 2004)).

IV. DOES THE FOIA REALLY NOT DEFINE THE TERM "RECORD?"

This article opened with a brief discussion on *AILA v. EOIR*;[93] however, a more thorough examination of the facts must be conducted when examining the issues of record versus information and what is a record for FOIA purposes. AILA submitted a FOIA request to the DoJ (in November 2012) for various records pertaining to "complaints filed against immigration judges."[94] By April 2014, EOIR had released approximately 16,000 pages, redacting information pursuant to exemptions (b)(5) and (b)(6).[95] EOIR also redacted information that was not responsive to the FOIA request even though the redacted information was contained within a record EOIR had concluded was responsive to the FOIA request.[96] EOIR's position was that "it was under 'no obligation . . . to release information that concerned matters unrelated to [AILA]'s FOIA request because the information [wa]s outside the scope of the request.'"[97] AILA disagreed with the government's position and "filed a motion to compel production of the non-responsive [information]" contained within the responsive records.[98] Relying upon "past practice," the district court denied AILA's motion to compel, thus leading to AILA's appeal.[99] The Washington D.C. Court of Appeals noted that AILA raised "a question of first impression: if the government identifies a record as responsive to a FOIA request, can the government nonetheless redact particular information within the responsive record on the basis that the information is non-responsive?"[100] The court concluded that the only basis for withholding information from an agency record was 5 U.S.C. § 552(b), the nine enumerated exemptions; thus, the redaction of non-responsive information could not be reconciled with the FOIA.[101]

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93 Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667 (D.C. Cir. 2016).

94 *Id.* at 671.

95 *See id.* at 672.

96 *See id.*

97 *Id.* at 676.

98 Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 677 (D.C. Cir. 2016).

99 *Id.* at 676.'

100 *Id.* at 677.

101 *See id.*

The court focused on the terms "record" and "information" and examined 5 U.S.C. §§ 551–552 for definitions applicable to the FOIA, and concluded there was no statutory definition of agency "record" or "information."[102] While the FOIA statute provided some guidance as to what is a record, the court concluded the informational description was not helpful to understanding what a record was to begin with:

Although FOIA includes a definitions section, that section provides no definition of the term "record." Elsewhere, the statute describes the term "record" as 'includ[ing] any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format,' but that description provides little help in understanding what is a record in the first place.

> Under FOIA, agencies instead in effect define a "record" when they undertake the process of identifying records that are responsive to a request. . . .
> EOIR notes that email can pose special challenges because "it is not unusual for an email chain to traverse a variety of topics having no relationship to the subject of a FOIA request." We understand EOIR's concerns, but insofar as they relate to the policy choices . . . of the statute's disclosure mandate, they are best directed to Congress. . . . For our purposes, the dispositive point is that, once an agency *itself* identifies a particular document or collection of material . . . as a responsive "record," the only information the agency may redact from that record is that falling within one of the statutory exemptions.[103]

Thus, the FOIA term "record" is descriptive and presupposes the existence of an agency record, but does not tell one what is an agency record. The court was very much aware of the implications of its analysis and noted that the parties had not asked the

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[102] *See id.* at 678.

[103] Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 678–79 (D.C. Cir. 2016) (citations omitted).

question as to what is a record for FOIA purposes, and it was not going answer that question because the federal agency had determined what a record was when it identified records responsive to the FOIA request.[104]

After the *AILA* court's decision, the DoJ issued guidance to federal agencies to assist them in defining a "record" for FOIA purposes.[105] One recommendation (also suggested by the *AILA* court) was to use the Privacy Act definition of record,[106] as it is the "sister statute to the FOIA."[107] Both the DoJ and the *AILA* court limited the Privacy Act's definition of record to "any item, collection, or grouping of information."[108] However, the Privacy Act's complete "record" definition is the following:

> [A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph.[109]

If one accepts the *AILA* court's interpretation that the federal agency determines what a record is when it processes the FOIA request, the federal agency could limit the Privacy Act's definition of record to "any item, collection, or grouping of information,"[110] as suggested by the DoJ when it wrote:

> [E]ach 'item, collection, or grouping of information' on the topic of the request can be considered a distinct 'record.' This approach allows for a more fine-tuned, content-based approach to the decision, which applies irrespective of the physical attributes

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104 *See id.* at 678.

105 *See* OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, DEFINING A "RECORD" UNDER THE FOIA (2017), https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia.

106 *See id. See also* Privacy Act, 5 U.S.C. § 552a(a)(4) (2016).

107 OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, *supra* note 105.

108 Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 678 (D.C. Cir. 2016); OFFICE OF INFO. POLICY, DEP'T OF JUSTICE, *supra* note 105 (citing Privacy Act, 5 U.S.C. § 552a(a)(4) (2016)).

109 Privacy Act, 5 U.S.C. § 552a(a)(4) (2016).

110 OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, *supra* note 105 (citing Privacy Act, 5 U.S.C. § 552a(a)(4) (2016)).

> of a document. Thus, a 'record' can potentially constitute an entire document, a single page of a multipage document, or an individual paragraph of a document. Moreover, based on the subject of a particular FOIA request, an entire string of emails, a single email within a string of emails, or a paragraph within a single email could potentially constitute a 'record' for purposes of the FOI.[111]

Another DoJ recommendation was (again) to use the Federal Records Act,[112] more specifically, the Disposal of Records, which now defines "records" as:

> [I]nclude[ing] all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them; . . . the term "recorded information" includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic format.[113]

One should also be aware that the Federal Records Act, Disposal of Records, authorizes NARA's Archivist to determine that recorded information may be a record (for purposes of the Federal Records Act), and that determination is binding on federal agencies immaterial as to how that recorded information is maintained (i.e. be it physical, digital or electronic).[114] Thus, if a federal agency uses the Federal Records Act definition, is that

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111 *Id.*
112 *See* 44 U.S.C. §§ 3301–4104 (2012).
113 44 U.S.C. § 3301 (2012).
114 44 U.S.C. § 3301 (2012).

federal agency considering whether the Archivist has made any such determination, and if so, does that federal agency want to consider the Archivist's determination of a record (for record management purposes) as a record for FOIA purposes? If the federal agency does not want to consider it as a record for FOIA purposes, is the agency under an obligation to explain why it is only using a portion of the Federal Records Act definition of record? These are unknowns, but one would expect a FOIA requester to challenge the federal agency's determination of what is an agency record in such situations (e.g. if the archivist ever determines that metadata was a record for Federal Records Act purposes but the federal agency does not define or see metadata as an agency record for FOIA purposes).

If each federal agency is able to make its own determination of "record" for FOIA purposes, it is likely there will be inconsistent determinations by federal agencies as to what is a record. Is it possible that something was overlooked by the *AILA* Court in reaching its conclusion? Was the *AILA* Court too narrow in its focus and analysis of the FOIA as to whether there was a definition of "record?" In order to answer these questions, one must examine the FOIA, with its subsequent amendments and corresponding legislative histories, to determine if there is any guidance helpful to answering the questions of what are records under the FOIA and what is information under the FOIA?

A. The 1966 FOIA

As initially drafted, section 3 of the APA of 1966[115] placed the FOIA in 5 U.S.C. § 1002 (1966), with the title of *Public Information, availability*.[116] As initially passed, the FOIA gave a requester a right of access to government records, without any regard to the FOIA requester's purpose or need for the requested record.[117] It also gave the FOIA requester a right of judicial access, subject to de novo review; imposed an affirmative obligation upon federal agencies to release requested records; and limited the withholding of records under nine specific exemptions, which were

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[115] Freedom of Information Act of 1966, Pub. L. No. 89-487, 80 Stat. 250 (repealed by Pub. L. No. 90-23, 81 Stat. 54 (1967) and codified as amended at 5 U.S.C. § 552 (1966)).

[116] Pub. L. No. 89-487, 80 Stat. 250 (repealed by Pub. L. No. 90-23, 81 Stat. 54 (1967) and codified as amended at 5 U.S.C. § 552 (1966)).

[117] *See* Pub. L. No. 89-487, 80 Stat. 250 (repealed by Pub. L. No. 90-23, 81 Stat. 54 (1967) and codified as amended at 5 U.S.C. § 552 (1966)).

to be exception to the rule of release.[118]

The 1966 FOIA was separated into seven paragraphs which mandated what information was to be provided to the public as well as how federal agencies were to provide that information to the public.[119] Subsection (a) required certain items to be published in the Federal Register.[120] Subsection (b) required all agency opinions and orders to be made "available for public inspection and copying."[121] Subsection (c) was a general right of access to records not included in subsection (a) and (b);[122] subsection (e) listed the withholding exemptions;[123] and subsection (f) excluded the FOIA as authority to withhold records from Congress.[124] While the 1966 FOIA defined "private party,"[125] it did not have a section entitled "definitions" nor did the statute define "information" or "record" or contain any guidance of non-responsive information contained within a responsive agency record.[126]

B. The FOIA's 1967 Codification

In 1967, the FOIA was codified and amended via Public Law Number 90–23,[127] and placed in its current location of 5 U.S.C. § 552, with a new title of *Public Information; agency rules, opinions, orders, records and proceedings*.[128] Overall, one would characterize the 1967 changes as minor, in essence, more stylistic rather than substantive.[129] For example, changes were made to the title, format of the statute (e.g. changes in structure, numbering of paragraphs and sub-paragraphs), addition and

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118 Pub. L. No. 89–487, 80 Stat. 250 (repealed by Pub. L. No. 90–23, 81 STAT. 54 (1967) and codified as amended at 5 U.S.C. § 552 (1966)).

119 *See* Pub. L. No. 89–487, 80 Stat. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

120 Pub. L. No. 89–487, 80 STAT. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

121 Pub. L. No. 89–487, 80 STAT. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

122 Pub. L. No. 89–487, 80 STAT. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

123 Pub. L. No. 89–487, 80 Stat. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

124 Pub. L. No. 89–487, 80 Stat. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

125 Pub. L. No. 89–487, 80 Stat. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

126 *See* Pub. L. No. 89–487, 80 STAT. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

127 Pub. L. No. 90–23, 81 STAT. 54 (1967).

128 Pub. L. No. 90–23, 81 STAT. 54 (1967).

129 *See* H.R. REP. NO. 90–125 (1967), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, *supra* note 22, at 13–21.

deletion of words that one could characterize as "happy" to "glad" changes, and structural changes within a paragraph that clarified requirements under the statute. Like the 1966 statute, the 1967 codified FOIA did not have a section entitled "definitions," deleted the "private party" definition, and still failed to define "record" or "information."[130]

1. Attorney General Clark's Memorandum – Implementing the 1966 FOIA and Its Subsequent 1967 Codification

Attorney General Clark's memorandum provided a detailed outline of the FOIA's requirements as well as recommendations as to how federal agencies could fulfill those requirements. He acknowledged the 1967 FOIA codification changes, but also concluded the codification did not change the meaning of the original statute.[131] At the time he wrote his memorandum, the 1966 FOIA excerpt of subsection (c), right of access to agency records, read as follows: "every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place, fees . . . make such records promptly available to any person."[132] As discussed above, Attorney General Clark identified the FOIA's failure to define "record," yet still attempted to provide guidance as to what "record" definition could be used[133] as well as provide guidance as to what "identifiable records" meant.[134]

According to Attorney General Clark, for a record to be identifiable, "[a] member of the public . . . must provide a reasonably specific description of the particular record sought . . . 'records must be identifiable by the person requesting them, i.e. a reasonable description enabling the Government employee to locate the requested records.'"[135] Those familiar with the FOIA should recognize this language as it is routinely cited in cases where the adequacy of an agency's search is questioned.[136] It is also referenced in the congressional reports.[137] He added,

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130 *See* Pub. L. No. 90-23, 81 STAT. 54 (1967).

131 *See* ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 6, at 3.

132 Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C § 552 (1966)).

133 *See* Clark, *supra* note 6.

134 *See id*.

135 *Id*. (citing S. REP NO. 813, at 8).

136 *See infra* notes 274–287 and accompanying text.

137 S. REP NO. 89–813, at 8. *See* H.R. REP. NO. 89-1497, at 2426 (1966).

> The requirement is . . . not intended to impose [on] agencies an obligation to undertake to identify for someone who requests records the particular materials he wants where a reasonable description is not afforded. The burden of identification is with the member of the public who requests a record, and it seems clear that Congress did not intend to authorize 'fishing expeditions.'[138]

Again, not unexpected language to those familiar with the FOIA as it is similar to the language courts use in that federal agencies are not to be full time investigators for FOIA requesters.[139] The issue of fishing expeditions was also raised in the 1965 congressional hearings by then Comptroller General Joseph Campbell as he was concerned that requesters would use the law to conduct "fishing expeditions" into agency records looking for potential claims against the government.[140]

However, it is Attorney General Clark's next comment where one sees the beginning of the intertwinement of discovery and the FOIA, at least in terms of a FOIA's requester's obligation to identify the requested records. He wrote, "[a]gencies should keep in mind, however, 'that the standards of identification applicable to the discovery of records in court proceedings' are 'appropriate guidelines' . . . "[141] Attorney General Clark was not establishing his own standard of identification of records by the FOIA requester; he was referencing a statement annotated in the FOIA's legislative history.[142] What was the logic behind this identification requirement for a FOIA requester and why did the Senate reference court proceedings as to the requester's obligation to identify the records requested? In order to possibly answer these questions, one needs to compare proposed Senate Bill 1160 to that which ultimately passed into law, as well as the corresponding

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138 *See* Clark, *supra* note 6.

139 *See infra* notes 274–287 and accompanying text.

140 *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary: Hearing on S. 1160 and S.1336 and S.1758 and S.1879*, 89th Cong. 377–78 (1965) (statement of Joseph Campbell, Comptroller General).

141 Clark, *supra* note 6 (citing S. REP NO. 89-813, at 2).

142 *See* S. REP NO. 89-813, at 2.

legislative history. As introduced by Senator Long, Senate Bill 1160 read as follows:

> (c) AGENCY RECORDS.— . . . every agency shall . . . in accordance with published rules stating the time, place and procedure to be followed, make all its records promptly available to any person.[143]

The same excerpt passed into law read as follows:

> (c) AGENCY RECORDS.— Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in accordance with published rules stating the time, place and fees . . . make such records promptly available to any person.[144]

According to Senate Report 813,

> The purpose of this amendment is to require that requests of inspection of agency records identify the particular records requested. It is contemplated by the committee that the court proceedings would be appropriate guidelines with respect to the identification of agency records, especially as the courts would have jurisdiction to determine any allegations of improper withholding.[145]

Senate Report 813 provides little information concerning the rationale or need behind the change in the proposed bill versus that passed into law. There also appears to be confusion as to what section this amendment is referring to as Senate Report 813 references "requests for inspections" language within subsection (b) of the statute but cites subsection (c) as to application of the amendment.[146] Therefore, an examination of the congressional hearings is required.

The Senate held hearings for four days on Senate Bill 1160

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143 S. 1160, 89th Cong. (1965) (enacted). *See also* 111 CONG. REC. 2798 (daily ed. Feb. 17, 1965) (statement of Sen. Long).

144 5 U.S.C. § 1002 (1966), *amended by* 5 U.S.C. § 552 (2012).

145 S. REP NO. 89–813, at 2.

146 *See id.*

(along with other Bills amending the APA),[147] and what can be gleaned from the hearings is that many federal agencies were extremely concerned about the Senate Bill 1160 subsection (b) indexing requirement of *all* opinions and staff manuals and the subsection (c) requirement that federal agencies provide a requester *all* records unless they were exempt from release.[148] Many agencies were concerned that indexing *all* staff manuals (etc.) and responding to requests for *all* records would be extremely costly for the agency and would interfere with its daily operation.[149] Comptroller General Campbell provided the most specific discussion on a possible identification requirement when he stated "it should be made clear either in the law or its legislative history, that the agency may require in its regulations an identification of documents to be produced . . . "[150] Again, one of his concerns was that requests for "all records" would be fishing expeditions by those seeking a basis to file a claim against the government.[151]

Upon Senate passage of Senate Bill 1160, the congressional record states the records requested "must be identifiable by the person requesting them, i.e. a reasonable description enabling the Government employee to locate the requested records."[152] This same standard is also noted in House Report 1497 demonstrating that both Houses of Congress agreed that the standard of identification of records by FOIA requesters must be reasonable in that it will permit a government employee to locate the requested records.[153] The application of court proceeding guidelines to the identification of records requested appears to be only referenced in Senate Report 813.[154]

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147 S. B. 1160 was fully incorporated into S. B. 1366, sec. 3, also under consideration. *See S. 1160, S. 1336, S.1758, and S. 1879 Bills to Amend the Administrative Procedure Act, and for Other Purposes Before the Subcomm. on Admin. Practice and Procedure*, *supra* note 140.

148 *See id*. at 146–47, 198–99, 204–05, 235–36, 242–44, 292, 381–82, 405–06.

149 *Id*.

150 *See id*. at 376.

151 *See id*. at 377–78.

152 111 CONG. REC. 26,823 (1965).

153 *See* H.R. REP. NO. 89-1497, at 2426 (1966).

154 This author could find no other reference to application of court proceeding guidelines to the identification of records in House Report 1497 or in the Senate Hearings.

After approximately ten years after the FOIA was signed into law, it was written that:

> The legislative history of the Freedom of Information Act is not clear and simple, nor is the Act itself. It contains general phraseology, undefined terms, and loosely drawn provisions that have bothered the courts as well as Government officials seeking to interpret the act. Like most important legislation, the version of the freedom of information bill finally enacted into law after 11 years of effort was a compromise that involved various public interest groups, the House of Representatives, the Senate, and officials of the executive branch.[155]

This statement is equally applicable today. What is clear is that only the Senate referenced court proceeding protocols concerning the identification of records requested. Other congressional references require the requester to identify the records such that a government employee is able to locate the requested records.

2. Records Versus Information – Was There a Difference and If So, What Was the Difference?

The 1966 FOIA's title was *Public Information, availability*[156] and relates back to the APA of 1946's title of *Public Information*.[157] This is possibly the first indication of the confusion that will exist between what the terms "record" and "information" mean and the relationship between the two terms, albeit perhaps not consciously, given the information technology world was only in the minds (and few work centers) of computer programmers and scientists. The 1967 codification of the FOIA changed the title of the Act to *Public information; agency rules, opinions, orders, records, and proceedings*.[158] Again, leaving the term "information" within the title of the Act, but now identifying five categories of "information." However, in order to answer the question as to whether there is a difference between information and records, one

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155 COMM. ON THE JUDICIARY & COMM. ON GOV'T OPERATIONS, *supra* note 22, at 89.

156 Public Information, Availability, Pub. L. No. 89-497, 80 Stat. 250 (1966).

157 Administrative Procedure Act, ch. 324, 60 Stat. 238 (1946).

158 Pub. Info.; agency rules, opinions, orders, records, and proceedings, Pub. L. No. 90-23, 81 Stat. 54 (codified as amended at 5 U.S.C § 552 (1966)).

must examine the FOIA's legislative and judicial history.

In *Forsham v. Harris*,[159] the Court provided some insight as to what the definition of "records" could have meant. The Court wrote,

> The only direct reference to a definition of records in the legislative history, of which we are aware, occurred during the Senate hearings leading to the enactment of FOIA. A representative of the Interstate Commerce Commission commented that "[since] the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of functions.[160]

Attorney General Clark also examined the legislative history pertaining to the terms "records" and "information." When he concluded that an agency had no obligation to create or procure records, he did so based upon "the fact that the term 'information' in the bill, as introduced, was changed by the Senate to 'identifiable records' and by the legislative history of that change."[161] Unfortunately, he simply cited "S. Rep., 89th Cong., 2" to support his statement, with no underlying analysis.[162] However, this author agrees that the change in wording, from "information" to "identifiable records," is significant. When Senator Long first introduced Senate Bill 1160 (on February 25, 1965), excerpts of section (c), Agency Records, read as follows:

> Upon complaint, the district court of the United States . . . shall have jurisdiction to enjoin the agency from the withholding of agency records and information and to order the production of any agency records or information improperly withheld from the complainant.[163]

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159 Forsham v. Harris, 445 U.S. 169 (1980).

160 *Id.* at 184 (citing Administrative Procedure Act: Hearings on S. 1160 before the Subcommittee on Administrative Practice and Procedure of the S. Comm. on the Judiciary, 89th Cong. 244 (1965)).

161 U.S. DEP'T OF JUST., *supra* note 6, at 18.

162 *Id.*

163 110 CONG. REC. 2796–98 (daily ed. Feb. 17, 1965) (statement of Sen. Long).

The same excerpt, section (c), Agency Records, passed into law read as follows:

> Upon complaint, the district court of the United States . . . shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant.[164]

Although Attorney General Clark provided only a conclusion, with a citation to Senate Report 813, an examination of Senate Report 813 will provide some insight as to why the term "information" was deleted from section (c). As written in Senate Report 813, the change was "a technical amendment to delete the term 'information' which is included within the term 'agency records' to the extent that it is in the form of a record."[165] Why was this technical amendment necessary?

A review of the hearings on Senate Bill 1160, as initially drafted, reveal that some federal agencies had concerns with the phrase "agency records or information" in the proposed bill. The Department of Agriculture's position of the term "information" within proposed Senate Bill 1160, subsection (c), Agency Records, was the following:

> The use of the term 'information' would not seem to be appropriate. The use of such term will encourage litigation on the basis of the contentions that the provision is applicable to all information–not just written material—and that an agency must compile information requested by a member of the public, not merely produce records.[166]

The DoD General Counsel's concerns were the following:

> [S]ection 3(c) of S. 1336[167] seems to suffer from a difficulty that is similar to that found in other bills dealing with the same subject; namely the intended distinction, if any, between *record* and *information*.

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164 Public Information, Availability, Pub. L. No. 89-497, 80 Stat. 251 (1966).

165 S. REP NO. 813, at 2 (1965).

166 Subcommittee on Admin. Prac. and Proc., *supra* note 140, at 382 (citing the statement of Under Sec'y, Dept't of Agric.).

167 S. 1160 was incorporated into S. 1336, subsection 3(c).

> The fundamental legislative instruction in section 3(c) is an affirmative requirement that every agency 'make all its *records* promptly available to any person; yet in the second sentence of the same subsection district courts of the United States are given jurisdiction to enjoin the agency from withholding 'agency *records* and *information* and to order the production any agency *records* or *information* improperly withheld from the complainant.' This inconsistency provides a basis for concluding that there could be no improper withholding of *information* under the statute, since the only obligation of the agency is to makes its *records* available to any person.[168]

The Tennessee Valley Authority provided it cautionary comments via the Committee on Labor and Public Welfare.

> Subsection (c) is entitled 'Agency Records' and the requirement is that agencies make their records available to the public except as otherwise exempted. However, the remedy provided in the subsection for persons to whom disclosures have not made refers in lines 12 and 13 on page 4 to 'records or information improperly withheld.' Inclusion of the words 'or information' . . . is inconsistent with the rest of the subsection and creates ambiguity. TVA believes those words ['or information'] should be deleted in the interest of clarity.[169]

What one can surmise from the legislative history is the deletion of the term "information" from subsection (c), Agency Records, was a technicality such that "information" that is included in an "agency record" is subject to the FOIA, and that "information" that is not included in an "agency record" is not subject to the FOIA.[170] What is the difference in that information? In 1969, that distinction is unclear other than a conclusion from an examination

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168 Subcommittee on Admin. Prac. and Proc., *supra* note 140, at 416 (statement of Dep't of Def. Acting Gen. Counsel L. Niederlehner).

169 *Id.* at 497 (statement of Lister Hill, TVA).

170 S. REP. NO. 813, at 1–2 (1965).

of the federal agencies statements of concern which is their perception that agency records were paper documents or some form of a tangible physical item that already existed within the federal agency and did not need to be extracted or created from another tangible item.

3. The Court's Early Examination of What is a Record for FOIA Purposes

Nichols v. United States[171] was an early case which examined the issue of what was an agency record under the FOIA. In this case, the plaintiff had submitted a number of FOIA requests to various federal agencies for items or access to items related to President John F. Kennedy's assassination.[172] Items requested included bullet shell casings, President Kennedy's clothing, photographs, x-rays, etc.[173] When examining the FOIA requests, the court concluded that if the material sought was not a record under the Act, the FOIA requester's motion must be dismissed.[174] However, as the FOIA did not define the term 'record,' it fell upon the court to determine which requested items fell within the purview of the statute.[175] As to the Act's lack of definition of agency record, "it is unfortunate that attention was not given to this point when the law was enacted since the positive provisions of the Act are all but smothered by some nine broad and generalized statements providing for many exemptions."[176]

The *Nichols* court went through various definitions of what is a record, including the General Services Administration's (GSA's) definition of record, a *Webster's New International Dictionary* definition, a *Jones on Evidence* definition, etc.[177] In the end, the *Nichols* court did not identify which definition was controlling or whether it was some combination of various definitions; rather the court simply identified what items were records, e.g. the radiologist's written findings, and what items were not records, e.g. bullets, clothing, metal fragments, etc.[178]

In the end, one is faced with the issue of what is information and

171 Nichols v. U. S., 325 F. Supp 130 (D. Kan. 1971).
172 *Id.* at 132.
173 *Id.*
174 *Id.* at 133.
175 *See id.* at 134
176 *Nichols*, 325 F. Supp 130 at 134.
177 *See Nichols*, 325 F. Supp. at 135.
178 *See id.* at 135–37.

how is that information conveyed given that the FOIA did not define "agency record," "record," or "information." In 1966 or in the 1971 *Nichols* world, this may have been rather intuitive; however, in the digital world it is less clear.

C. The 1974 FOIA Amendments

The FOIA was next amended in 1974, and one could characterize the 1974 amendments as significant as they established "the core Freedom of Information Act still in effect today with judicial review of executive secrecy claims."[179] The 1974 amendments included the establishment of a uniform fee schedule, added the Washington D.C. Court to the list of federal courts with jurisdiction over FOIA litigations, decreased the government's pleading response time from 60 to 30 days, authorized the award of reasonable attorney fees to FOIA requesters, required agencies to respond to FOIA requests within 10 business days (20 business days for appeals), modified exemption (b)(7) to (b)(7)(A) through (b)(7)(F), required annual reports from federal agencies, and defined "agency."[180] Congress also added the requirement that federal agencies release segregable, nonexempt information from a record that also contains exempt information.[181] Finally, Congress changed the wording of a FOIA requester's level of specificity when requesting agency records. Initially, the FOIA required the FOIA requester to ask for "identifiable records;" however, the FOIA now only required the FOIA requester to "reasonably describe such records."[182] How significant is this change? Again a review of the legislative history is required.

From 1972–1974, Congress held numerous hearings and received various inputs from federal and non-federal entities regarding the effectiveness of the FOIA. This evaluation resulted in the publication of *Freedom of Information Act and Amendments of 1974 Source Book: Legislative History, Texts and Other*

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179 The Nat'l Sec. Archive, *Veto Battle 30 Years Ago Set Freedom of Information Norms*, THE NAT'L SEC. ARCHIVE (Nov. 23, 2004), https:nsarchive.gwu.edu/NSAEBB/NSAEBB142/index.htm.

180 *Compare* Pub. L. No. 93-502, 88 Stat. 1561 (1974), *with* Pub. L. No. 89,487, 80 Stat. 250 (1966).

181 *See* Pub. L. No. 93-502, 88 Stat. 1561 (1974).

182 *See* Pub. L. No. 93-502, 88 Stat. 1561 (1974).

Documents.[183] It is in this book that Congress at least considered the practical considerations of searching for computer records, albeit one might say with a level of naiveté.

> With respect to agency records maintained in computerized form, the term '*search' would include services functionally analogous to searches for records that are maintained in conventional form*. Difficulty may sometimes be encountered in drawing clear distinctions between *searches* and *other services* involved in extracting required information from computerized records systems. Nonetheless, the committee believes it desirable to encourage agencies to process requests for computerized information even if doing so involves performing services which the agencies *are not required to provide–for example, using its computer to identify records*. With reference to computerized record systems, the term 'search' would thus not be limited to standard record-finding, and in these situations charges would be permitted for services involving the use of computers needed to locate and extract the requested information.[184]

While very few individuals could have predicted the impact technology would have on the volume of records, there is an assumption that using search protocols for conventional records could be easily applied to computerized record systems, with a caveat that there would be *other services* involved in extracting required information from computerized record systems, and that it would be appropriate for a federal agency to charge for those services. Given what has occurred in the world of E-Discovery as to the transfer of paper protocols to ESI, this assumption has proven to be incorrect.

In spite of the significant changes to the FOIA in 1974, to include a specific definition of "agency," the Act still failed to define

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183 *See* COMM. ON GOV'T OPERATIONS U.S. HOUSE OF REPRESENTATIVES SUBCOMM. ON GOV'T INFO AND INDIVIDUAL RIGHTS, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (March 1975).

184 SEN. REP. 93-854, at 164 (1974), *reprinted in* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, *supra* note 59, at 164. (Emphasis Added).

"record."[185]

1. Attorney General Edward Levi's Memorandum – Implementing the 1974 FOIA Amendments

In February of 1975, then Attorney General Edward Levi issued *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act*.[186] Similar to Attorney General Clark's 1967 memorandum, Attorney General Levi analyzed the FOIA amendments and provided guidance to federal agencies. This article will focus on his comments regarding the change from "investigatory files" to "investigatory records" compiled for law enforcement, the change from requesting "identifiable records" to that of "reasonably describing" the records requested, and the requirement that federal agencies release segregable, nonexempt information from a record that also contains exempt information.[187]

a. Investigatory Files Versus Investigatory Records

The change from "investigatory files" to "investigatory records" occurred on May 30, 1974 when the Senate debated Senate Bill 2543, Amendment to the Freedom of Information Act.[188] Unfortunately, the legislative history provides light insight as to the need for this change. While there is a rather substantive discussion as to why (b)(7) needed to be amended to (b)(7)(A) through (b)(7)(F), the discussion of "files" versus "records" is brief.[189] In fact, Senator Hruska stated during the debate that:

> One of the substantive provisions considered but deleted by the committee from the bill as originally introduced was a provision changing the word 'files'

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185 *See* Pub. L. No. 93-502, 88 Stat. 1561 (1974).

186 *See* Edward H. Levi, *Attorney General's Memorandum on the 1974 Amendments to the FOIA*, THE U.S. DEP'T OF JUST. (Feb. 1975), https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia.

187 *See* 120 CONG. REC. S16,943–17,062 (daily ed. May 30, 1974).

188 *See* 120 CONG. REC. S16,943–17,062 (daily ed. May 30, 1974).

189 FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, *supra* note 59, at 164.

> in exemptions 6 and 7 to the word 'records.' By and large, the reason for this deletion was that there was no evidence that such a change was necessary.[190]

However, when Senator Hart introduced Amendment 1361, one of the proposed changes to exemption (b)(7), and ultimately accepted, it began with "[i]nvestigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . ."[191] In reviewing the Senate debates, the difference between files and records appears to be a common sense determination that a file will contain individual records.[192] It also appears that the majority of discussions of the proposed changes to exemption (b)(7) were directed more to the need to change (b)(7) because of the FOIA's impact to the FBI and its informants.[193]

What can be gleaned from the legislative history behind the need to change "investigatory files" to "investigatory records" is that it appears the courts began to interpret exemption (b)(7) such that if an individual record (or document) was maintained in an investigatory file compiled for law enforcement purposes, it was not releasable, and this was the end of the court's analysis/discussion. This was similar to the *EPA v. Mink*[194] approach to classified documents in that if a document was classified, the courts had concluded they had no authority to look behind the classification.[195] Thus, if a document was maintained in an investigatory file, the federal agency had no need to show why that particular document was exempt from release under the FOIA. The change from investigatory files to investigatory records required a federal agency to show how an individual record maintained in the investigatory file was exempt from release under the FOIA.[196]

In sum, the change from "investigatory files" to "investigatory records" was not particularly helpful in ascertaining what is a record or determining the difference between a record and information. Overall, the change is supporting the FOIA release

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190 120 CONG. REC. S16,943–17,062 (daily ed. May 30, 1974).

191 120 CONG. REC. S17,033 (daily ed. May 30, 1974).

192 120 CONG. REC. at S17,021, S17,034, S17,036 (daily ed. May 30, 1974).

193 *See supra* note 157.

194 Envtl. Prot. Agency v. Mink, 410 U.S. 73. 99–100 (1973), *superseded by* 5 U.S.C. § 552 (2012).

195 *See Mink*, 410 U.S. at 99–100.

196 *See* Levi', *supra* note 155 (citations omitted).

mandate and ensuring federal agencies comply with that mandate, at least in terms of records contained within law enforcement files.

b. Identifiable Records versus Reasonably Describe Requested Records

Although the change from "investigatory files" to "investigatory records" was not particularly helpful in determining what a record is, one must now examine the change in terminology as to the FOIA requester's level of specificity of requested records, from "identifiable records" to "reasonably describing the records." As to this change, Attorney General Levi concluded that it clarified the law as courts have understood it rather than altered the law.[197] The legislative history supports his conclusion. With this change, Congress believed that it was reflecting the intent of the original drafters of the Act, specifically the "records must be identifiable by the person requesting them, i.e. a reasonable description enabling the Government employee to locate the requested records"[198] rather than requiring "a specific title or file number . . . for the identification of documents. A 'description' of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort."[199]

Again, familiar language to those who work in FOIA, cited in *Irons v. Schuyler* [200] which in turn was cited by Congress.[201] The change in terminology was not expected to create any new problems of interpretation by the courts.[202]

In sum, the change from "identifiable records" to "reasonably describe the records requested" also was not particularly helpful in distinguishing the difference between a record and information. This change in terminology appears to be Congress again ensuring federal agencies are not being difficult in responding to FOIA requests (e.g. by requiring file names).[203] The critical question

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197 *Id*. (citations omitted).

198 FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, *supra* note 59, at 162.

199 *Id*.

200 *See* Irons v. Schulyer, 465 F.2d 608 (D.C. Cir. 1972).

201 *See* S. REP. NO. 93-854 at 162 (1974).

202 *See* S. REP. NO. 93-854 at 162 (1974).

203 *See* S. REP. NO. 93-854 at 162 (1974).

today is whether this standard can remain for electronic records?

c. Segregation of Exempt Information from Non-Exempt Information

One must now examine the requirement to segregate exempt information from non-exempt information and determine whether it will be helpful in distinguishing between what is information and what is a record. Congress added the requirement to separate exempt information from non-exempt information as Congress was concerned with federal agencies fully denying a FOIA request when only a portion of the record was exempt from release.[204] In examining this additional requirement, Attorney General Levi wrote:

> In order to apply the concept of 'reasonably segregable,' agency personnel should begin by identifying for deletion all portions of the requested document which are to be withheld in order to protect the interest covered by the exemption or exemptions involved. The remaining material (*assuming it constitute information responsive to the request*) must be released if it is at all intelligible . . . .[205] [emphasis added]

Thus, the issue of responsive versus non-responsive information within a record is initially identified, with an apparent conclusion by the DoJ that a federal agency can redact non-responsive information. Was this the correct conclusion? According to the *AILA* Court, it was not.[206] However, is this the correct decision, especially with ESI?

The purpose behind the requirement to segregate records was born from the fact that federal agencies were withholding entire documents when only a portion of a document qualified for an exemption.[207] This author is of the opinion that there was a presumption that the entire document was responsive to the FOIA request. How does this author reach this conclusion? Well, it is more from a logic and/or deductive conclusion based upon the

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204 *See* S. REP. NO. 93-854, at 209–10 (1974).

205 US. DEP'T OF JUST., *supra* note 186, at 9.

206 Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F. 3d 667, 677 (D.C. Cir. 2016).

207 *See* S. REP. NO. 93-254, at 210.

examination of the legislative history behind the requirement to segregate non-exempt information from exempt information located within the document.

First, when examining the legislative history behind this particular amendment, it is clear that Congress was concerned with agencies fully redacting a record when only a portion of that record qualified for the exemption.[208] For example, if a document contained classified information and unclassified information, the agency withheld the entire record as classified.[209] If a record contained personal identifying information, the federal agency withheld the entire record pursuant to exemption (b)(6).[210] Congress wanted federal agencies to stop playing games and using exemptions to withhold both exempt and non-exempt information of a record responsive to a FOIA request. Congress' focus was simply on the abuse of the use of exemptions to withhold otherwise non-exempt portions of an existing record.

Second, Senate Report 93–854 lends support to the conclusion that the entire document was responsive to the FOIA request. It states, "[a] new paragraph is proposed to be added to section 552(b) requirement that where only a portion of a record is determined to be exempt from the disclosure, the record must be disclosed with the exempt portion deleted."[211] However, it is the examples cited in Senate Report 93–854 which give credence to the conclusion that there was a presumption that the entire record was responsive to the FOIA request. Congress references three court cases where the courts found redacting an entire record based upon a portion of it being exempt was not within the FOIA mandate.[212] These cases are the following:

a. *Welford v. Hardin,* [213]: "It is a violation of the Act to withhold documents on the ground that parts are exempt and parts nonexempt. In that event, 'suitable deletions may be made . . . . "[214]

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208 120 CONG. REC. S17,017, S17,018–S17,019 (daily ed. May 30, 1974).
209 *See* S. REP. NO. 93–854, at 210–11.
210 *See* S. REP. NO. 93–854, at 211.
211 *Id.* at 183.
212 *Id.*
213 Wellford v. Hardin, 315 F. Supp. 768 (D.D.C. 1970).
214 *Id.* at 770.

b. *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*[215]: "The statutory history does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information."[216]

c. *Bristol Myers Co. v. FTC*[217]: "The court may well conclude that portions of the requested material are protected, and it may be that identifying details or secret matters can be deleted from a document to render it subject to disclosure."[218]

When reviewing these three cases, they simply address the issue of the overuse of an exemption to redact an entire record when potions of that record would not qualify for that exemption (or any other authorized exemption).[219] There was no discussion of responsive versus non-responsive information. Senate Report 93–854 confirms this with the following:

> This [proposed] provision would apply if, for example, there was a request for a record in a file that had been opened in the course of an investigation that had long since been closed, but which file contained the name of an informer or raw data on innocent persons or confidential investigative techniques. Section 2(b) emphasizes what is presently understood by most courts but has gone unheeded by agencies; it would not be enough for the government to refuse disclosure of the record merely because it or the file it was in contained such exempt information, since the deletion of that information would provide full protection for the purposes to be served by the exemption. Thus, the government could not refuse to disclose the requested records merely because it finds in those records some portions which may be exempt.[220]

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215 Gruman Aircraft Engineering Corp. v. The Renegotiation Bd., 425 F. 2d 578 (D.C. Cir. 1970)

216 *Id.* at 580.

217 Bristol–Myers Co. v. Fed. Trade Comm'n, 424 F. 2d 935 (D.C. Cir. 1970).

218 *Id.* at 938–39.

219 S. REP. NO. 93-854, at 219.

220 *Id.* at 184.

Again, the legislative history reveals Congress was solely focused on agencies redacting an entire document when only a portion of it was exempt. There was no discussion as to whether the entire document was (or was not) was responsive to the FOIA request.

The logic perspective is that if a record contains information that was not requested under the FOIA, the agency should have no legal obligation to review that information under the FOIA. The federal agency should have the ability to segregate it from the information contained within the record which is responsive to the FOIA request. Granted, the *AILA* Court rejected this argument;[221] however this may have been because EOIR took it to the extreme and redacted single words and single sentences (within paragraphs which were released).[222] Just as the courts have found duplicates do not have to be reviewed based upon inefficiencies and waste of government resources[223] (but not explicitly or implicitly authorized in the FOIA), reviewing information that has not been requested is inefficient and wasteful of government resources and personnel, especially when only a small part of the "record" is responsive to the request, e.g. a single page out of a thirty-five page Power Point presentation, or two emails strings, which themselves are not exact duplicates, but contain duplicate, individual emails in each email string. These inefficiencies and waste of government resources is compounded when that information is classified.

2. The Court's Continued Examination of What is a Record for FOIA Purposes

In spite of the extensive changes and number of hearings as to how effective the FOIA was, the 1974 amendments contained no definition of "record." The FOIA's failure to provide a definition for "record" was again identified in *Save the Dolphins v. Department*

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221 Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 677–78 (D.C. Cir. 2016).

222 *See id.* at 679.

223 *See* Jett v. Fed. Bureau of Investigation, 139 F. Supp. 3d 352, 365 (D.D.C. 2015) (citing Defs. of Wildlife v. U.S. Dep't of the Interior, 314 F. Supp. 2d 1, 10 (D.D.C. 2004)).

of Commerce.[224] Although the court cited *Nichols v. United States*,[225] it concluded the *Nichols* opinion was not helpful.[226] In analyzing the question of what is a record under the FOIA, the *Save the Dolphins* court, like the *Nichols* court, cited the GSA definition of records at the time.[227] In addition, the *Save the Dolphins* court cited the Federal Records Act definition of "record" which included "books, papers, maps, photographs or other documentary materials, regardless of physical form. . . ."[228] The court focused on the FOIA's purpose, which was "to make available to the public 'information' in the possession of government agencies. The term "records" in common parlance includes various means of storing information for future reference. There does not appear to be any good reason for limiting 'records' as used in the Act to written documents."[229] While the court concluded the FOIA's purpose was to release "information" versus a record, document or some type of tangible item (and the government should release as much information as possible), the court then appears to have applied a common sense or logical approach to its conclusion that a record should not be limited to a written document, but includes the tangible item of film.[230] However, can this logical conclusion/extension be applied to digital information? In other words, is digital information tangible? In addition, what about the break out of individual units of information from the ESI?

An example from today's digital world may prove helpful. Using the thirty-five page Power Point presentation as the example, consider that only page twenty-seven is responsive to the FOIA request. Should an agency employee have to review the other thirty-four pages for a FOIA release determination? The answer could be that the federal agency only process that one page that is responsive to the FOIA request (at least in the digital age) and the other thirty-four pages should not be reviewed under the FOIA as they were not requested under the FOIA. It is easy to separate out

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224 Save the Dolphins v. Dep't of Commerce, 404 F. Supp. 407, 410 (N.D. Cal. 1975).

225 Nichols v. U. S., 325 F. Supp. 130 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir. 1972).

226 *See Save the Dolphins*, 404 F. Supp. at 410.

227 *See id.* at 411 (citing 41 C.F.R. § 105–60.104(a) (1968)); *Nichols*, 325 F. Supp. 130 at 134 (citing 41 C.F.R. § 105–60.104(a) (1968)).

228 *Save the Dolphins*, 404 F. Supp. at 411 (citing 44 U.S.C. § 3301 (1970)).

229 *Id.* (citation omitted).

230 *Id.*

that one page. Whether one says it is a record by itself or using a common sense approach that the government should not have to review and process the non-responsive information, the result is the same; however, the second approach seems more consistent with the law and the first approach could lead to federal agencies abusing this discretion (or playing games) as to what is an agency record for purposes of FOIA.

Ultimately the 1974 amendments and legislative history do not provide any additional guidance on the issue of what is information, what is a record, and the difference between the two, and/or what one did with information that was or was not contained in a record.[231] At this point in time, it appears to this author that Congress used the terms information and records almost interchangeably, and this is more evident with the amendment of "segreable" information from a record responsive to a FOIA request. However, in the digital world, documents can be modified to create a record that is fully responsive to a FOIA request. Thus leading to this question: while under the FOIA, there is no obligation to create a record, can you remove the non-responsive information from a digital document and still be in compliance with the FOIA? According to the *AILA* court, one can be if the agency identifies the newly created item as a record.[232]

D. The 1976 FOIA Amendments

Congress next amended the FOIA in 1976 pursuant to the Government in the Sunshine Act, which required federal agencies to conduct open meetings within the parameters of the statute.[233] It also amended the standard for withholding records pursuant to 5 U.S.C. § 552(b)(3).[234] The 1966 FOIA stated that exemption

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[231] *See* EDWARD H. LEVI, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE 1974 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT (1975), https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia.

[232] Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 677–79 (D.C. Cir. 2016).

[233] *See* Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976).

[234] *See* Government in the Sunshine Act, Pub. L. No. 94-409, § 552(b)(3) 90 Stat. 1241, 1241–42 (1976).

(e)(3)[235] shall not be applicable to matters that are "specifically exempted from disclosure by statute."[236] The interpretation of exemption (e)(3) as first written was that it encompassed approximately 100 statutes, identified by the Administrative Conference of the United States, which restricted public access to government records (e.g. statute prohibited disclosure, disclosure only if authorized by law, etc.).[237]

The 1976 FOIA exemption (b)(3) authorized withholding of matters when:

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[238]

The legislative history reveals that 5 U.S.C. 552 § (b)(3) was amended to overrule *Administrator, FAA v. Robertson*[239] which recognized the Federal Aviation Act of 1958 as a (b)(3) statute.[240] Under the Act, the FAA Administrator had permissive authority to determine whether information should be released to the public, and Congress was concerned with the potential abuse by federal agencies of this permissive standard and their ability to circumvent the FOIA.[241]

Within ten years of the initial passage of the FOIA, Congress

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235 Reformatted to (b)(3). *See* Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (1967).

236 Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

237 *See* H.R. REP. NO. 89-1497, at 31 (1966). *See also* RAMSEY CLARK, U.S. DEP'T OF JUSTICE, *supra* note 6.

238 Freedom of Information Act, 5 U.S.C. § 552(b)(3) (1976), *amended by* OPEN FOIA Act of 2009, Pub. L. No. 111–83, § 564, 123 Stat. 2142, 2184.

239 Adm'r, Fed. Aviation Admin. v. Robertson, 422 U.S. 255 (1975), *superseded by statute*, Government in the Sunshine Act, Pub. L. No. 94–409, 90 Stat. 1241 (1976). *See also* STAFF OF SENATE COMM. ON GOV'T OPERATIONS & STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 94TH CONG., GOVERNMENT IN THE SUNSHINE ACT, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 690 (Joint Comm. Print 1976) [hereinafter SUNSHINE ACT SOURCE BOOK].

240 *See Adm'r, Fed. Aviation Admin*, 422 U.S. 255 at 260, 266–68.

241 *See id.* at 259; SUNSHINE ACT SOURCE BOOK, *supra* note 239, at 19, 636, 667, 690.

amended the FOIA to overrule two U.S. Supreme Court cases;[242] however, in spite of two Attorney General Memorandums and various judicial opinions identifying the dilemma federal agencies and courts faced because of the FOIA's failure to define "record," Congress still did not amend the FOIA to include a definition of "record."[243]

E. The 1986 FOIA Amendments

In 1986, the FOIA was amended pursuant to the Freedom of Information Reform Act of 1986[244] via the Anti-Drug Abuse Act of 1986.[245] The 1986 amendments significantly re-wrote the FOIA paragraph pertaining to fees and lowered the balancing test required under exemption (b)(7) (e.g. changing "would interfere with enforcement proceedings" to "could reasonably be expected to interfere with enforcement proceedings").[246] It also added a new subsection (c), Exclusions, which allowed designated agencies to deny the existence of records when certain conditions were met (e.g. was not publicly known).[247]

For purposes of this article, the examination shall be on the legislative history of Congress' addition of the word "information" to exemption (b)(7) such that it now reads as follows: "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . ."[248] As with the last amendment to (b)(7),[249] the FOIA Reform Act[250] was a floor amendment to the Anti-Drug

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242 *See* H.R. REP. NO. 94-880, pt. 1, at 9–10 (1976), *reprinted in* SUNSHINE ACT SOURCE BOOK, *supra* note 239, at 520–21; OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA UPDATE: FOIA SUPREME COURT HISTORY (1985), https://www.justice.gov/oip/blog/foia-update-foia-supreme-court-history.

243 *See* Freedom of Information Act, 5 U.S.C. § 552 (1976).

244 Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801–1804, 100 Stat. 3207, 48–50 (1986).

245 Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801–1804, 100 Stat. 3207, 48–50 (1986).

246 *See* ATTORNEY GENERAL'S MEMORANDUM ON THE 1986 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT, at 5 (1987), https://www.justice.gov/archive/oip/86agmemo.htm.

247 *See id*.

248 5 U.S.C. § 552(b)(7) (2016).

249 *See supra* notes 158–166 and accompanying text.

250 Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801–1804, 100 Stat. 3207, 48–50 (1986).

Abuse Act of 1986 so the legislative history is somewhat limited; however, one may obtain some information from the congressional record which is helpful in understanding why the exemption (b)(7) words changed.[251] Both the Senate and the House of Representatives were concerned about sophisticated FOIA requesters using the FOIA to obtain law enforcement information from non-investigatory records in order to deduce names of informants and counterintelligence information.[252] Congress wanted to ensure that records or information compiled for law enforcement purposes would be protected whether it was maintained in investigatory or non-investigatory records,[253] thus clearly supporting the U.S. Supreme Court's decision in *FBI v. Abramson.*[254]

In *Abramson*, the Court had to determine whether information originally compiled in records for law enforcement purposes and protected by exemption (b)(7)(A) through (F) would have continued FOIA exemption protection when that information is summarized and made part of a new document not created for law enforcement purposes?[255] In answering this question, the Court examined the terms "documents," "records," "matters," and "information" under the Act and in the legislative history. The Court wrote:

> FOIA contains no definition of the term 'record.' Throughout the legislative history of the 1974 amendments, Representatives and Senators used interchangeably such terms as 'documents,' 'records,' 'matters,' and 'information.' Furthermore, in determining whether information in a requested record should be released, the Act consistently focuses on the nature of the information and the effects of disclosure.[256]

The Court ultimately concluded the information did not lose its protection simply by being summarized and placed in a non-law

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[251] ATTORNEY GENERAL'S MEMORANDUM ON THE 1986 AMENDMENTS TO THE FREEDOM OF INFORMATION ACT, *supra* note 246.

[252] *See* 132 CONG. REC. H9465 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness); S14,252 (daily ed. Sept. 30, 1986) (statement of Sen. Denton); S14,038–S14,040 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch).

[253] *See* 132 CONG. REC. H9466 (1986).

[254] Fed. Bureau of Investigation v. Abramson, 456 U.S. 615 (1982).

[255] *Id.* at 623.

[256] *Id.* at 626.

enforcement record.[257] For the new non-law enforcement record, the Court believed the statutory language could be reasonably construed to protect the information; the redaction of the information more accurately reflected Congress' intent, was more consistent with the structure of the Act, and more adequately served the purposes of the statute.[258]

In Justice Blackmun's dissent, he directly addressed the issue of "information" versus "records" and the Court's conclusion. He wrote "the Court [has] declare[d] that '[once]' it is established that *information* was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such *information* would lead to one of the listed harms [in Exemption 7], the *information* is exempt." [259] He went on to say that the Court was substituting the word "information" for "records" although the Court has previously ruled in *Forsham v. Harris* [260] that "the Freedom of Information Act deals with 'agency records,' not information in the abstract."[261]

Given Justice Blackmun's dissent, one must now compare the two cases, *Abramson* and *Forsham*, and it is important to note that the FBI possessed the information and records in dispute in *Abramson*;[262] but in *Forsham*, the federal agency had neither the information nor the records, although the federal agency had the ability to obtain the data and records, and the FOIA requester wanted the Court to compel the federal agency to obtain the data and records from a third party.[263] Thus, *Forsham* dealt with information in the abstract. The *Forsham* Court ultimately concluded the FOIA did not require the agency to obtain the data and records.[264] The *Forsham* Court also concluded this was consistent with its decision in *NLRB v. Sears, Roebuck & Co.*[265]

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257 *Id.* at 631–32.

258 *Id.* at 625.

259 Fed. Bureau of Investigation. v. Abramson, 456 U.S. 615, 632 (Blackmun, J., dissenting).

260 Forsham v. Harris, 445 U.S. 169 (1980).

261 *Abramson*, 456 U.S. at 623 (citing Forsham v. Harris, 445 U.S. 169, 185 (1980)).

262 *Id.* at 623.

263 Forsham v. Harris, 445 U.S. 169, 173 (1980).

264 *See id.* at 185–86.

265 Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 161–62 (1975).

when it determined that the agency was not required to create records.[266] This would again be dealing with information in the abstract in that it did not currently exist in a document/record. However, the *Abramson* court was not dealing with information in the abstract. The FBI had both the information and the records, albeit in non-law enforcement records and law enforcement records. It was illogical for information to lose its protection because it was transferred to a different type of record (to non-law enforcement records) and could not have been what Congress intended.[267]

In amending (b)(7) in 1986, Congress wanted to make clear that exemption (b)(7) applied to both records and information, as well as to affirm the U.S. Supreme Court's interpretation of the Act in *FBI v. Abramson*.[268] An example from the legislative history will demonstrate the issue facing federal agencies with the language of exemption (b)(7) prior to the 1986 amendment. "[I]f a record contains informant identities and is not an investigatory record, but a summary of recent successes in drug cases submitted to the Drug Policy Board, it must be disclosed [under the FOIA]."[269] Overall, the legislative history reveals the release of informant information was becoming problematic for federal law enforcement agencies as sophisticated FOIA requesters were requesting non-investigatory records that might contain investigatory information, and then using that information to deduce law enforcement information such as names of informants, whether an investigation into them/organized crime was being conducted, etc.[270] The requirement that the information be contained in a law enforcement investigatory type of record (versus a non-investigatory record) was basically "form over substance" (and needed to be changed).[271]

In sum, the change of the (b)(7) language from "investigatory

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[266] *See id.*

[267] *See Abramson*, 456 U.S. at 623, 628.

[268] *See* OFFICE OF INFO. POLICY, U.S. DEP'T OF JUSTICE, FOIA GUIDE, 2004 EDITION: EXEMPTION 7 (2014), https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7.

[269] 132 CONG. REC. S14,039 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch).

[270] *See* 132 CONG. REC. H9466 (daily ed. Oct. 8, 1986) (statement of Rep. Kindness); 132 CONG. REC. S14,252 (daily ed. Sept. 30, 1986) (statement of Sen. Denton); 132 CONG. REC. S14,038–S14,040 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch).

[271] 132 CONG. REC. S14,038–14,039 (daily ed. Sept. 27, 1986) (statement of Sen. Hatch).

records" to "records or information" was not particularly helpful in determining the difference between information and record (other than information in the abstract). However, what may prove helpful is the Court's conclusion that Congress used the terms "records," "information," "matters," and "documents" interchangeably,[272] although the interchangeable use is both positive and negative. In the negative, the FOIA remains unclear and the courts will have to apply a logic review as to what Congress intended (as was done in *FBI v. Abramson*). The positive is that at least there is some indication that they may be approximately equivalent to each other, at least when the federal agency has both the information and the record. Regarding what is information that is not contained in a record (e.g. metadata), no insight appears to be provided.

F. The 1996 FOIA Amendments

In 1996, Congress again amended the FOIA in an attempt to address the issue of electronic records through the E-FOIA Amendments.[273] Some of the amendments made included providing the requesters the records in their requested format (if readily reproducible), defining the term "search" ("to review, manually or by automated means, agency records for the purpose of locating . . . records . . . responsive to [the FOIA] request"), and requiring a court to "accord substantial weight to an [agency's affidavit] concerning the agency's . . . technical feasibility. . . . " in providing the documents in the requested format.[274] Congress also expanded the definition of agency to "include[] any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . or any independent . . . agency."[275] Another change was the addition of 5 U.S.C § 552(f)(2)

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[272] *See Abramson*, 456 U.S. at 626.

[273] *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, 110 STAT. 3048 (CODIFIED AS AMENDED AT 5 U.S.C. § 552 (1996)).

[274] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, sec. 5, § 552(a)(3)(B), (D), sec. 6, § 552(a)(4)(B), 110 STAT. 3048, 3050 (CODIFIED AS AMENDED AT 5 U.S.C. § 552 (1996)).

[275] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, sec. 3, § 552(f)(1), 110 STAT. 3048, 3049 (CODIFIED AS AMENDED AT 5 U.S.C. § 552 (1996)).

which stated the term "'record' and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format."[276] This of course was the section the *AILA* court reviewed and found not to be helpful in defining "agency record."[277] One must now examine the E-FOIA Amendments' legislative history to determine if it can provide any additional insight into the definition of "record," or what Congress intended the term "agency record" to be.

In examining the E-FOIA Amendments' legislative history, it is interesting to note that Senate Bill 1090 actually included the following definition of record:

> [T]he term 'record' means all books, papers, maps, photographs, machine-readable materials, or other information or documentary materials, regardless of physical form or characteristics, but does not include –
> (A) library and museum material acquired or received and preserved solely for reference or exhibition purposes;
> (B) extra copies of documents preserved solely for convenience of reference;
> (C) stocks of publications and of processed documents; or
> (D) computer software which is obtained by an agency under a licensing agreement prohibiting its replication or distribution.[278]

The Senate's explanation for drafting the cited definition is not conclusive although the Senate did acknowledge the FOIA failed to provide a definition of "record," albeit the Act defined "agency."[279] The Senate also acknowledged:

> [T]he FOIA is not an independent basis for requiring agencies to maintain records or information; other

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[276] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, sec. 3, § 552(f)(2), 110 STAT. 3048, 3049 (CODIFIED AS AMENDED AT 5 U.S.C. § 552 (1996)).

[277] *See* Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 678–79 (D.C. Cir. 2016) (citations omitted).

[278] S. REP. NO. 104–272, at 4 (1996).

[279] *Id.* at 19.

> statutes and regulations establish such requirements.
> . . . .
> This [proposed] definition is a modified version of the definition of "record" in the Federal Records Act ("FRA"). The new [proposed] definition in the FOIA is not necessarily tied to any definition of "record" that is used for purposes of other statutes, including the Federal Records Act.[280]

Why did the Senate take a modified version of the definition in the Federal Records Act? Unfortunately, Senate Report 104–272 does not answer this question.

The House of Representatives took another position on the term "record," with House Bill 3802 reading as follows: "'record' and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format."[281] The House's language ultimately became law.[282] When comparing the proposed Senate language to the House of Representative's language, it is clear there is a significant difference between the two. Therefore, an examination of House Report 104–795 must be conducted in an attempt to understand why the House's language ultimately passed.[283]

House Report 104–795, "Explanation of the Bill" provides some insight into the meaning of "agency records." The House of Representatives recognized, "the FOIA usually uses the term 'record,' but other terms are also used occasionally, including 'information' and 'matter.' The terms are . . . interchangeable. . . . [M]atter not previously subject to [the] FOIA when maintained in a non-electronic format is not made subject to FOIA by this bill."[284]

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[280] *Id.*

[281] H.R. 3802, 104th Cong. (as passed by House on Sept. 17, 1996). *See also* H.R. 3802, 104th Cong. (as agreed to or passed by both House and Senate, Jan. 3, 1996).

[282] *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, sec. 3, § 552(f)(2), 110 **STAT.** 3048**,** 3049 (CODIFIED AS AMENDED AT 5 U.S.C. § 552 (1996)).

[283] *See* Freedom of Information Act, 5 U.S.C. § 552 (1996).

[284] H.R. REP. NO. 104-795, at 19 (1996).

Other notable comments include "[n]o matter how it is preserved, information that passes the threshold test of being an agency record, remains a record,"[285] and "[t]his provision . . . does not broaden the concept of agency record."[286] If one accepts these propositions, then the issue between ESI and agency record can become more narrowly focused. Questions one may begin to ask include (but are not limited to) whether the ESI can be printed or downloaded to a video or disc without some form of conversion (e.g. algorithm or formula) required to obtain the underlying ESI, e.g. metadata concerning changes made to a document? Where is the ESI stored? On an agency server? A division shared drive? On back up tapes, emergency or otherwise, which generally are not routinely accessible to the average agency employee?

Another E-FOIA Amendment which may provide insight into what is an "agency record" for FOIA purposes is the addition of 5 U.S.C § 552(g). Specifically, 5 U.S.C. § 552(g)(3) requires federal agencies to provide a handbook informing the public of the process one is to follow "for obtaining various types and categories of public information from the agency" under the FOIA (and Chapter 35 of Title 44 (Federal Information Policy)).[287] Is it possible the E-FOIA Amendments authorized a federal agency to designate the categories of public information as agency records via this handbook requirement, i.e. identifying what a record is when published in the handbook? Again, looking at the legislative history, House Bill 3802 included the addition of section (g), although Senate Bill 1090 had no corresponding proposed requirement that an agency prepare a handbook.[288]

According to House Report 104–795, section (g) would require an agency to "explain in clear and simple language, the types of records that can be obtained from the agency through FOIA requests. . . ."[289] Thus, it appears the E-FOIA Amendments, specifically 5 U.S.C. § 552(g)(3), authorized a federal agency to determine what an agency record was in 1996.

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285 *Id.* at 20.

286 *Id.*

287 Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, sec. 11, § 552(g)(3), 110 STAT. 3048, 3054 (CODIFIED AS AMENDED AT 5 U.S.C. § 552 (1996)).

288 *See* H.R. 3802, 104th Cong. (1996); S. REP. NO. 104–272, at 4 (1996).

289 H.R. REP. NO. 104-795, at 30 (1996)

G. The 2002 FOIA Amendments

Congress again amended the FOIA in 2002 pursuant to the Intelligence Authorization Act of Fiscal Year 2003.[290] This amendment limited access to intelligence records from specific FOIA requesters. Thus, if a FOIA requester is a foreign government or a foreign government representative, and the request is for records originating from a federal agency that is part of the intelligence community (or an intelligence community element (as statutorily defined)), the federal agency shall not make the records available to that particular FOIA requester.[291] Like the 1976 FOIA amendment, the 2002 amendment was narrowly focused.

H. The 2007 FOIA Amendments

Congress next amended the FOIA via the Open Government Act of 2007.[292] The amendments included changes to the definition of news media, when a court may award attorney fees (i.e. when the FOIA requester substantially prevails), clarification of the start of the 20-day processing time for agencies, establishment of Chief FOIA Officers and FOIA Public Liaison Officers, establishment of agency tracking systems, additional requirements for agency annual reports, and establishment of the Office of Government Information Services (at NARA).[293]

The 2007 FOIA amendments also modified the term "record" to include "any information 'maintained for an agency by an entity under Government contract, for the purposes of record management.'"[294] The DoJ again understood the FOIA to have a definition's section when it wrote, in its October 17, 2007, *FOIA Post, Congress Passes Amendments to the FOIA*, "[s]ection 9

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290 Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002).

291 Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002) (referring to Sec. 312).

292 OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007).

293 OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (2007) (referring to Sec. 3, Sec. 4, Sec. 6, and Sec. 10).

294 *FOIA Post (2008): Congress Passes Amendments to the FOIA*, THE UNITED STATES DEP'T OF JUST. (Oct. 17, 2007), https://www.justice.gov/oip/blog/foia-post-2008-congress-passes-amendments-foia.

amends 5 U.S.C. § 552(f), the definitions provision of the FOIA, by including in the definition of 'record' any information 'maintained for an agency by an entity under Government contract, for the purposes of records management.'"[295] As to the purpose behind this change, both House Report 110-45 and Senate Report 110-59 demonstrate that Congress wanted to "clarify" that even when government records were maintained by a federal contractor (pursuant to a government contract for recordkeeping functions), those records were still subject to the FOIA, irrespective of the records location as to within a federal agency or outside a federal agency.[296]

I. The 2009 FOIA Amendments

Congress again amended the FOIA pursuant to the Department of Homeland Security Appropriations Act of 2010, section 564, the OPEN FOIA Act of 2009.[297] Amendments included an additional requirement to records withheld under 5 U.S.C. § (b)(3), exemption by statute. Exemption (b)(3) now requires a withholding statute, enacted after the effective date of the OPEN FOIA Act of 2009, to specifically cite the OPEN FOIA Act of 2009 exemption paragraph before an agency may withhold the record pursuant to (b)(3).[298]

J. The 2016 FOIA Amendments

The FOIA Improvement Act of 2016[299] is the most recent change to the FOIA. One amendment is the "Rule of 3" requirement which requires a federal agency to make available for public inspection, in an electronic format (online), any record that has been requested three or more times.[300] Other changes include prohibiting federal agencies' use of exemption (b)(5), Deliberative Process Privilege, as authority to withhold records twenty-five years or older as well as requiring federal agencies to articulate a reasonable, foreseeable harm to the interest protected by an exemption (unless disclosure is prohibited by law or otherwise exempt from disclosure under

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295 *Id*.

296 *See* H.R. REP NO. 110-45, at 7 (2007). *See also* S. REP. NO. 110-59, at 7 (2007).

297 OPEN FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat. 2184 (2009).

298 OPEN FOIA Act of 2009, Pub. L. No. 111-83, 123 Stat. 2184 (2009).

299 FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

300 FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016). *See also* S. REP. NO. 114–4, at 7 (2015).

exemption (b)(3)).[301] Other changes include additional requirements to agency FOIA response letters and agency reports as well as new/additional duties for FOIA Officers, etc.[302] One interesting amendment of the FOIA Improvement Act of 2016 was an amendment to 44 U.S.C. § 3102 (one of the statutes encompassed within the Federal Records Act) which now requires federal agencies to establish "procedures for identifying records of general interest or use to the public that are appropriate for public disclosure, and for posting such records in a publicly accessible electronic format."[303] Again, the FOIA is linked to the Federal Records Act, albeit not for a "records" definition. Unfortunately, Senate Report 114–4 is silent as to the need for this amendment other than it is consistent with the transparency Congress wants to see from the federal government.[304]

V. CIVIL DISCOVERY REQUESTS COMPARED TO (SOME) FOIA REQUESTS

In 2006, the Federal Rules of Civil Procedure were amended to specifically address discovery of ESI.[305] They were again amended approximately ten years later, in December, 2015.[306] One significant reason behind the 2015 amendments was the cost corporations were facing related to preservation of ESI and search requirements under the 2006 Rules.[307] One interesting facet of the Federal Rules of Civil Procedure is that there is not a precise definition for ESI.[308] One reason Rule 34 is applicable to ESI stored in any medium and not limited to a definition is so that it can encompass future changes and developments in computer technology.[309]

Although ESI is not precisely defined, it is not uncommon to see

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301 FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).
302 FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).
303 44 U.S.C. § 3102(2) (2018).
304 *See* S. REP. NO. 114-4, at 11 (2015).
305 *See* FED. R. CIV. P. 34.
306 *See* FED. R. CIV. P. 34.
307 *The Sedona Principles: Second Edition, Best Practices Recommendations & Principles or Addressing Electronic Document Production*, *supra* note 39 at p iv. *See also* CRAIG BALL, *Cases and Materials E-DISCOVERY and Digital Evidence,* GEO. UNIV. LAW CTR. E-DISCOVERY TRAINING ACAD. ED., at 24-25 (Spring 2014).
308 Ball, *supra* note 307, at 24–25.
309 *Id.*

a "document" definition in discovery requests. An excerpt of a "document" definition in a typical discovery request could read as follows:

> Document' or 'documents' means all written, typed, or printed matters, and all magnetic, electronic or other records or documentation of any kind or description (including, without limitation, letters, correspondence, telegrams, memoranda, notes, records, minutes, contacts, agreements, records, or notifications of telephone or personal conversations, conferences, inter-office communications, E-mail, microfilm, bulletins, circulars, pamphlets, photographs, facsimiles, invoices, tape recordings, computer printouts and work sheets), or reproduced, and all compilations of data from which information can be obtained, and any and all writings or recordings of data from which information can be obtained, and any and all writings or recordings of any type or nature . . . .[310]

One should now compare this typical discovery "document" definition to a routine FOIA request from two organizations. The first example is an October 2, 2014, Judicial Watch Inc. ("Judicial Watch") FOIA request to the Department of Defense ("DoD") for:

> 1. Any and all records regarding the policies or procedures for the evacuation of Department of Defense personnel . . . from Africa in the event that any such individual contracts or is suspected of contracting the Ebola virus.
> 2. Any and all records of communication between any official or employee of the Department of Defense and any official or employee of the Department of State regarding, concerning, or related to the planned or proposed use of aircraft owned and operated by Phoenix Air, LLC for the purpose of evacuating or transporting any person infected with the Ebola virus.[311]

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310 *Id.* at 369.

311 Letter from Sean Dunagan, Judicial Watch, to Office of Freedom of Info., (OCT. 2, 2014), http://www.judicialwatch.org/wp-content/uploads/2014/10/DOD-Ebola-FOIA-2864.pdf.

Judicial Watch then defines "record" for the agency as follows:

> (1) any written, printed, or typed material of any kind, including without limitation all correspondence, memoranda, notes, messages, letters, cards, facsimiles, papers, forms, telephone messages, diaries, schedules, calendars, chronological data, minutes, books, reports, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; (2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail or e-mail; (3) any audio, aural, visual, or video records, recordings, or representations of any kind; (4) any graphic materials and data compilations from which information can be obtained; and (5) any materials using other means of preserving thought or expression.[312]

One should immediately see the open-ended similarity between Judicial Watch's "record" definition and the discovery request's "document" definition. However, Judicial Watch is not the only organization which submits open-ended FOIA requests.

On April 23, 2009, the American Civil Liberties Union ("ACLU") submitted an 18-page FOIA request for "records pertaining to the detention and treatment of prisoners held at the Bagram Theater Internment Facility . . . ."[313] to four federal agencies (CIA, DoD, DoJ and DoS).[314] ACLU FOIA requests generally follow a similarly structured format. The FOIA request usually begins with citations to the FOIA and the federal agencies' implementing regulations.[315]

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312 *Id.* at 1–2.

313 Letter from Melissa Goodman, Am. Civil Liberties Union Found., to Office of Info. Programs and Serv.s at 2 (April 23, 2009), https://www.aclu.org/files/pdfs/safefree/bagramfoia.pdf.

314 *Id.* at 1.

315 *See, e.g.*, Dunagan, *supra* note 311, at 1.

It then continues with various number of pages citing newspaper references, case law, etc. that relate to the topic of the requested records.[316] It then continues with a various number of pages concerning the need for expedited FOIA processing, the basis for a fee waiver, and how it expects to receive all the information within the ten day time frame for expedited processing.[317] The ACLU's list of requested records generally begins with "All records . . . including memoranda, correspondence, procedures, policies, directives, guidance, etc. . . . " for *XYZ*."[318] For this particular FOIA request there are eighteen paragraphs and subparagraphs for requested records, with a beginning date range of September 11, 2001, pertaining to detention, treatment and transfer of those detained at the Bagram Facility.[319]

Another ACLU example is a July 15, 2016, twelve page FOIA request submitted to nine federal agencies for records pertaining to "parallel construction."[320] What is interesting about this particular FOIA request is ACLU's request that the federal agencies provide, if possible, the responsive records in their native file format; however, if that is not possible, in an electronic, "text-searchable, static-image format (PDF), [Portable Document Format] in the best image quality in the agency's possession . . . in separate, Bates-stamped files."[321] An interesting, discovery-type FOIA request.

By using the ACLU and Judicial Watch FOIA requests as examples, this author does not mean to diminish the purpose and need for the FOIA, or these organizations pursuit of ensuring an accountable government. There is a need for FOIA and a need for these organizations. This author also does not want to imply they are the only entities that submit open-ended FOIA requests and/or define "records" for an agency.[322] However, these types of FOIA requests are basically pseudo-discovery requests. These examples are provided to demonstrate how FOIA requesters are interpreting the FOIA as Discovery for the government, without any underlying

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316 *See id.* at 2.

317 *See id.*

318 Goodman, *supra* note 313, at 4.

319 *Id.* at 4–6.

320 Letter from Brett Kaufman, Am. Civil Liberties Union, Found., to Various Government Agencies (July 15, 2016), https://www.aclu.org/sites/default/files/field_document/parallel_construction_foia_request.pdf.

321 *Id.* at *5*.

322 *See* Freedom Watch Inc. v. Cent. Intelligence Agency, 895 F. Supp. 2d 221, 223 (D.D.C. 2012).

cause of action. Thus, validating the federal agencies concerns for requests for "all records." Some courts are also beginning to apply discovery protocols to evaluate a federal agency's compliance with the FOIA.[323] However, the FOIA and discovery are different. They have different purposes and have different search standards, and they should be kept separate.

VI. THE HISTORY BEHIND THE INTERSECTION OF FOIA AND DISCOVERY

The FOIA imposes minimal requirements upon a FOIA requester as it only requires the requester to reasonably describe the records requested and to comply with the agency's published rules as to time, place, fees and procedures.[324] A FOIA requester has "reasonably described" the requested records if the description enables an agency employee, familiar with the subject area, to locate the record with a reasonable amount of effort.[325] Thus, there is a direct correlation between the FOIA request and the agency's search. As stated in *Assassination Archives & Research Center v. CIA*,[326] "it is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested."[327] The FOIA does not articulate an agency's search requirements or indicate how an agency is to conduct an adequate search. Legislative history provided some guidance in that an agency employee, familiar with the subject, should be able to locate the requested records with a reasonable amount of effort; however, reasonable amount of effort is also not adequately explained in legislative history.[328] Thus, as one would expect, both the

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[323] *See* Urban Air Initiative, Inc. V. Evtl. Prot. Agency 271 F. Supp. 3d 241, 253 (D.D.C. 2017).

[324] 5 U.S.C. § 552(3)(A) (2000).

[325] Marks v. U. S. Dep't of Justice 578 F.2d 261, 263 (9th Cir. 1978). *See Freedom Watch*, 895 F. Supp. 2d at 228.

[326] Assassination Archives & Research Ctr., Inc. v. Cent. Intelligence Agency 720 F. Supp. 217 (1989), *modified* 'Assassination Archives & Research Ctr., Inc. v. Cent. Intelligence Agency 1990 U.S. App. LEXIS 27799 (D.C.C. 1990).

[327] *Id.* (citing Yeager v. DEA, 678 F.2d 315 (D.C. Cir. 1982)).

[328] STAFF OF S. COMM. ON THE JUDICIARY, H.R. COMM. ON GOV'T OP, 94TH CONG., REP. ON FREEDOM OF INFO. ACT AND AMEND. OF 1974 533 (Comm. Print 1975).

adequacy of a FOIA requester's description of requested records and the adequacy of an agency's search has been subject to litigation which in turn has led to the requirements being established via case law.[329]

A. When Does A FOIA Request Reasonably Describe the Requested Records?

In examining cases addressing the adequacy of a FOIA request, one sees a common theme "that [the] FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters."[330] The critical question with a FOIA request is whether an agency can determine, with some degree of precision, what records are requested.[331]

In *Fonda v. CIA*,[332] the Plaintiff wanted the CIA "to search for all documents which [1] are filed under her name but do not mention her name or [2] 'concern her' but do not mention her name."[333] The court concluded the FOIA request was too open-ended, with no criteria as to what "concerned her."[334] Therefore, the request did not meet the FOIA's requirements of a reasonable description.[335] When reviewing this case, one sees that the court examined the CIA's interpretation of Plaintiff's initial FOIA request (documents which mentioned her name), reviewed the agency's search, reviewed the Plaintiff's expectation for a broader search (records that "concern" her), and then concluded, with little analysis, that this expanded request was too broad and thus unreasonable.[336]

Mason v. Calloway[337] is another case where the FOIA request was for "all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs . . . , including, but not limited to, the files of [various government offices]."[338] The court

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329 *See, e.g.*, *Freedom Watch*, 895 F. Supp. 2d at 228–29

330 Dale v. Internal Revenue Serv., F. Supp. 99, 104 n.238 (D.D.C. 2002) (quoting Assassination Archives & Research Ctr., Inc. v. Cent. Intelligence Agency, 720 F. Supp. 217, 219 (D.D.C. 1989)).

331 *See Assassination Archives & Research Ctr.*, 720 F. Supp. at 219.

332 Fonda v. Cent. Intelligence Agency, 434 F. Supp. 498 (D.D.C. 1977).

333 *Id.* at 501.

334 *Id.*

335 *Id.*

336 *Id.*

337 Mason v. Callaway, 554 F.2d 129 (4th Cir. 1977).

338 *Id.* at 131.

concluded the FOIA request did not reasonably describe the requested records, and it "typifie[d] the lack of specificity that Congress sought to preclude in the requirement of *5 U.S.C. § 552(a)(3)* that records sought be reasonably described."[339] Similar to the *Fonda* Court, the *Mason* Court's analysis was brief, with the court examining the FOIA request and then, with one or two concise analytical statements focusing on the words of the request, concluding the request was insufficient.[340]

The courts continued to conclude FOIA requests were unreasonable when they asked for all records that concerned the FOIA requester and/or for any and all documents, memoranda, tape recordings, notes and other materials.[341] A more recent case involving an open-ended FOIA request is *Freedom Watch Inc. v. CIA*[342] where the request was so open-ended, the court actually listed all 49 paragraphs of the specific records requested.[343] By duplicating the list, it appears the court was trying to make a point of the request's unreasonableness. The paragraphs usually began with a request for "any and all information that refers or relates to [*XYZ*] "[344] followed with a reference to a newspaper article.[345] The court concluded that an agency is not required to honor a FOIA request that is virtually incomprehensible and is "so broad as to impose an unreasonable burden upon the agency."[346] Why? Because "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters."[347] "It is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonable

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339 *Id.*

340 *Id.*

341 *See, e.g.*, Dale v. Internal Revenue Serv., 238 F. Supp. 2d 99 (D.D.C. 2002); Hunt v. Commodity Futures Trading Comm'n, 484 F. Supp. 47 (D.D.C. 1979); Marks v. U. S. (Dep't of Justice), 578 F.2d 261 (9th Cir. 1978).

342 Freedom Watch Inc. v. Cent. Intelligence Agency, 895 F. Supp. 2d 221 (D.D.C. 2012).

343 *Id*. at 223.

344 *Id*. at 223–26.

345 *Id*.

346 Freedom Watch Inc. v. Cent. Intelligence Agency, 895 F. Supp. 2d 221, 229 (D.D.C. 2012)
(quoting Am. Fed'n of Gov't Employees, Local 2782 v. U. S. Dep't of Commerce, 907 F.2d 203, 209 (D.C. Cir. 1990)).

347 *Id.* at 228 (quoting Assassination Archives & Research Ctr., Inc. v. Cent. Intelligence Agency, 720 F. Supp. 217, 219 (D.D.C. 1989)).

burdensome, and to enable the searching agency to determine precisely what records are being requested."[348]

One may say that *Freedom Watch* is an extreme case; however, open-ended FOIA requests have become the norm rather than the exception.[349] One also may be thinking the above cases are a small percentage of the total FOIA requests processed by federal agencies. Again, this is generally not the case in today's FOIA world, especially from the more prolific FOIA requesters who are submitting FOIA requests for "any and all documents, memoranda, tape recordings, notes and other materials . . . " to multiple federal agencies, at the same time.

Finally, some may be thinking that unless FOIA requests are open-ended, federal agencies will read the requests so narrowly that records that otherwise should be released are not. Given the FOIA's past history and the need for some of its amendments, this concern is reasonable.[350] However, FOIA has been the law of the land for fifty years, and agencies understand the importance of it. In addition, if FOIA requesters believe federal agencies are too narrowly interpreting their requests, the judicial avenue of redress is still available. Case law clearly supports FOIA requesters and Congress' intent of open access to government records.[351] Case law also supports the liberal reading of FOIA requests as evident by *Dunaway v. Webster*.[352] The *Dunaway* Court noted an agency is under an obligation to release records that fall within the scope of the FOIA request, and the federal agency should err on the side of liberally construing the FOIA request, with a caveat.

> [T]he agency is under no obligation to release an entire document simply because the name of a person or organization which is the subject of the request is mentioned in the document. In fact, any other approach could work to the detriment of person making the request since an agency could inundate the requester with mounds of documents of dubious relevancy, not only making it harder to

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348 *Id.* at 229.

349 David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1100 (2017).

350 *See id.* at 1099.

351 *See* Wellford v. Harden, 315 F. Supp. 768, 770 (D.D.C. 1970); Grumman Aircraft Eng'g Corp. v. Renegotiation Bd., 425 F.2d 578 (D.C. Cir. 1970); Bristol Myers Co. v. Fed. Trade Comm'n, 424 F.2d 935 (D.C. Cir. 1970); Am. Mail Line v. Gulick, 411 F.2d 696 (D.C. Cir. 1969).

352 Dunaway v. Webster, 519 F. Supp. 1059 (N.D. Cal. 1981).

> pick out the material which was truly the object of the request, but also potentially making the costs of receipt of the documents prohibitively expensive.[353]

As some FOIA requesters are now asking that electronic records be provided in their native format or be word searchable,[354] there is validity to the "mound of documents" comment. It is becoming prohibitively expensive if search terms bring up thousands and thousands of electronic documents because of the use of search terms and/or because that one search term is found in a ten page document. If the documents are classified, the time and costs increase substantially due to classification reviews or other security management protocols. If a FOIA requester is asking for ESI in its native format[355] or be word searchable, one should be asking whether the FOIA request has been tailored to "reasonably describe" the records requested**.**

This author is not advocating that FOIA requesters have to cite a file number, file name, or a system of record name as this would be the polar extreme from open-ended FOIA requests and too narrow. Where an appropriate range could be established was probably easier to determine in the non-ESI world. But in the ESI world, it is imperative for FOIA purposes that records requested be more defined, not only in terms of topic, but location and date ranges.

B. When Does An Agency Conduct an Appropriate Search?

The FOIA provides little guidance as to what is a reasonable search, much less any guidance as to searching for computer records versus non-computer records. In fact, it appears most guidance came from legislative history or case law. *Goland v. CIA*,[356] an often-cited case concerning the adequacy of an agency's search, outlines the standard as to when an agency conducts an adequate search. In analogizing agency's search efforts to other

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353 *Id.* at 1083.

354 *See supra* note 267, and accompanying text.

355 Ball, *supra* note 76, at 31 ("Native format requires production in the same format in which the information was customarily created, used and stored by [the agency].").

356 Goland v. Cent. Intelligence Agency, 607 F.2d. 339 (D.C. Cir. 1978), *modified,* Goland v. Cent. Intelligence Agency, 607 F.2d. 339 (D.C. Cir. 1979).

agency requirements for summary judgment based upon affidavits, the *Goland* Court wrote "these affidavits are equally trustworthy when they aver that all documents have been produced or are unidentifiable as when they aver that identified documents are exempt. The agency's affidavits, naturally, must be 'relatively detailed' and nonconclusory and must be submitted in good faith."[357] If these requirements are met, a court may award summary judgment based upon the affidavits alone.[358]

Oglesby v. Dep't. of Army[359] further articulated the details an agency should include in its affidavit in order to obtain a summary judgment. The affidavit must establish the agency's search was conducted in good faith, using methods which were reasonably expected to produce the information.[360] The agency affidavit must indicate which files were searched and reflect a systematic approach to locating the document requested so that the FOIA requester may be able to challenge the procedures.[361] A federal agency should identify the search method used, the type of search performed, the search terms used, and averring that all files likely to contain responsive records were searched.[362] While there is no requirement an agency search every record systems, a search is not presumed unreasonable simply because it fails to produce relevant material.[363] However, an agency cannot limit its search to one record system if there are other systems that are likely to turn up the requested records.[364] Thus, an agency should explain why one system or systems were selected to be searched and explain why no other record system is likely to produce responsive information.[365]

While the cases involving records searches generally have followed the development of technology, there was the 1981 case of *Yeager v. DEA*,[366] an early case dealing with computer records. The *Yeager* Court, citing legislative history, noted:

> [While] Congress was aware of problems that could

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357 *Goland*, 697 F.2d at 352.
358 *Id.*
359 Oglesby v. U. S. Dep't. of Army, 920 F.2d 57 (D.C. Cir. 1990).
360 *Id.* at 68.
361 *Id.*
362 *See id.*
363 *Id.*
364 *Id.*
365 *Oglesby*, 920 F.2d at 68.
366 Yeager v. Drug Enf't Agency, 678 F.2d 315, 321 (D.C. Cir. 1982).

> arise in the application of the FOIA to computer-based records, the Act itself makes no distinction between records maintained in manual and computer storage systems . . . computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form are still 'records' for FOIA purposes.[367]

Although accessing computer records may involve a different process than locating and retrieving manually-stored records, "these differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA."[368] The problem is (as realized with E-Discovery), electronic record and paper record storage and search protocols are different, and *Yeager*, relying upon the *Freedom of Information Act and Amendments of 1974, Source Book: Legislative History, Texts and Other Documents*,[369] also made the assumptions that FOIA paper record protocols would automatically or easily transfer to ESI FOIA protocols.[370] The reality is that they do not (just as they did not with E-Discovery).

With the exception of *Yeager v. DEA*, most of the early cases addressing the adequacy of agency searches do not even mention computer records, and the standard of an adequate search appears to be consistently applied though the 1990s, at least with language required in agency affidavits.[371] *Nation Magazine v. U.S. Customs Service*[372] summarizes the requirements into a concise paragraph.

> To win summary judgment on the adequacy of a search, the agency must demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.' The agency must make 'a good faith effort to conduct a

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367 *Id.* (citing Long v. Internal Revenue Serv., 596 F.2d 362 (9th Cir. 1979)).

368 *Id.*

369 COMM. ON GOV'T OPERATIONS & COMM. ON THE JUDICIARY, *supra* note 60.

370 *Yeager*, 678 F.2d at n.16.

371 *See* Judicial Watch Inc. v. Export-Import Bank, 108 F. Supp. 2d 19, 25–26 (D.D.C. 2000).

372 Nation Magazine, Washington Bureau v. U.S. Customs Serv., 71 F.3d 885 (D.C. Cir. 1995).

> search for the requested records, using methods which can be reasonably expected to produce the information requested,' and it 'cannot limit its search to only one record system if there are others that are likely to turn up the information requested.' To show reasonableness at the summary judgment phase, an agency must set forth sufficient information in its affidavits for a court to determine if the search was adequate. The affidavits must be 'reasonably detailed . . . , setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched.' Conclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment. [An] affidavit asserting that agency official 'has conducted a review of [agency] files which would contain [responsive] information' without describing approach to search or identifying files searched, is insufficiently detailed to permit summary judgment.[373]

The *Nation Magazine C*ourt then provided recommendations as to how an agency may conduct an adequate search to include the identification of the number of electronic record systems, the number of systems of records, and the method of record/file keeping,[374] thereby expanding the requirements needed in agency affidavits. Thus, the shift to discovery requirements begins. Again, the basic court language articulating the standard remained the same, but one begins to see the courts requiring slightly more from federal agencies in meeting that reasonableness standard and those requirements appear to be coming from the world of discovery.

While a clear demarcation line is difficult to establish, one sees another shift in *Physicians for Human Rights v. DoD*.[375] Again, the court cites the standard language but with a slight modification. The court wrote, the "agency's submissions will be relied upon if they are found to be 'relatively detailed, nonconclusory, and submitted in good faith.' Courts generally

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373 *Id.* at 890.

374 *Id.* at 891.

375 Physicians for Human Rights v. U.S. Dep't of Def., 675 F. Supp. 2d 149 (D.D.C. 2009).

expect affidavits to describe, at minimum, the search methods employed and the files targeted."[376] However, with the words "at minimum," courts can require more from a federal agency. The court did push back in applying some E-Discovery protocols. For example, the court did not require the agency to use the FOIA requester's proposed search terms,[377] stating "there is no bright-line rule requiring agencies to use the search terms proposed"[378] as federal agencies have "discretion in crafting lists of search terms that they believed to be reasonably tailored to uncover documents responsive to the FOIA request."[379] Where the search terms are reasonably calculated to lead to responsive documents, the court should not quibble or micro manage an agency's search.[380] Thus, one does not have to use an abbreviated name if one uses the full name or a shortened name, nor does one need to use the legal case number if one uses a named party to the case.[381]

In 2012, one sees a significant change in the standard of an adequate search in *National Day Laborer Organizing Network v. ICE* [382] ("*NDLON v. ICE*"). Although Judge Shira Scheindlin referenced a twenty-one-page FOIA request,[383] when one includes the FOIA request's referenced attachments, the FOIA request was actually fifty pages.[384] In reading Judge Scheindlin's opinion, one can conclude that she considered "discovery" and "FOIA" as co-equals given her citations were primarily E-Discovery references (e.g. Sedona Conference E-Discovery references or E-Discovery case law).[385] The Plaintiffs even hired an E-Discovery expert to

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376 *Id.* at 158 (citing Ferranti v. Bureau of Alcohol Tobacco and Firearms, 177 F. Supp. 2d 41, 47 (D.D.C. 2001)).

377 *See id.* at 163–64.

378 *Id.* at 164.

379 *Id*.

380 *See id.*

381 *See* Agility Pub. Warehousing Co. v. Nat'l Sec'y Agency, 113 F. Supp. 3d 313, 339 (D.D.C. 2015).

382 Nat'l Day Laborer Org. Network. v. U.S. Immigration and Customs Agency. 877 F. Supp. 2d 87 (S.D.N.Y. 2012).

383 *Id*. at 94.

384 National Day Laborer Organizing Network et al., *Freedom of Information Act Request*, Center for Constitutional Rights https://ccrjustice.org/sites/default/files/assets/FOIA%20Request%20-%20ICE%202.3.10%20-FINAL.pdf (last visited Apr. 10, 2018).

385 *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d. at 108–09 (citing the Sedona Principles when referencing differences between Boolean searches and FOIA discovery).

analyze the government's searches.[386] While Judge Scheindlin acknowledged "search obligations under [the] FOIA are not identical to those under the Federal Rules of Procedure,"[387] she, in effect, applied the requisite E-Discovery obligations to FOIA through her analysis as to what is a reasonable, adequate search by the federal agencies. Examples include her detailed analysis of the email database searches,[388] questioning the trustworthiness of custodians searching their own records,[389] and addressing the failure to use some search terms,[390] the failure to test the efficiency of the search terms,[391] and the limitations of the use of search terms.[392] She wrote, "[t]he parties will need to agree on search terms and protocols – and, if necessary, testing to evaluate and refine those terms. If they wish to and are able to, then they may agree on predictive coding techniques and other more innovative ways to search."[393] Anyone familiar with E-Discovery should see the direct correlation between issues associated with E-Discovery and her application of these same issues to the FOIA. Although Judge Scheindlin acknowledged E-Discovery and FOIA standards are not the same,[394] by requiring the same protocols and identifying issues related to a proper E-Discovery search and then applying them to a FOIA search, for all practical purposes, she has made them equal.

In 2017, NDLON again filed suit against ICE[395] for its failure to comply with the FOIA. In this case, NDLON's initial FOIA request was for various records pertaining to the Priority Enhancement Program, and was thirty-seven pages, including referenced attachments.[396] Judge Katherine Forrest outlined the standard for

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386 *Id*. at 110.

387 *Id*. at 109 n.110.

388 *Id*. at 107.

389 *Id*. at 108.

390 *Id*. at 110.

391 Nat'l Day Laborer Org. Network. v. U.S. Immigration and Customs Agency, 877 F. Supp. 2d 87, 110–11 (S.D.N.Y. 2012).

392 *Id.* at 111.

393 *Id.*

394 *Id.* at 109 n.110.

395 Nat'l Day Laborer Org. Network v. U. S. Immigration and Customs Agency, 2017 U.S. Dist. LEXIS 66429 (S.D.N.Y. 2017).

396 Judge Forrest referenced the *initial March 5, 2015, FOIA request. While NDLON amended the FOIA request on April 14, 2016, it still identified eight categories of documents requested in its initial request. See* Nat'l Day Laborer Org. Network v. U.S. Immigration and Customs Agency, 2017 U.S. Dist. Lexis 66429, at 4. *See also* UNCOVER THE TRUTH ABOUT PEP COMM, https://sites.google.com/a/truthaboutpep.com/uncoverthetruth (last visited Apr. 9, 2018).

adequate searches by federal agencies in terms of conducting a reasonable, good faith search using methods which could reasonably be expected to produce the records requested.

> [A] 'satisfactory agency affidavit should, at a minimum, describe in reasonable detail the scope and method by which the search was conducted' and should 'describe at least generally the structure of the agency's file system which makes further search efforts difficult.' The agency affidavit must also set forth the search terms used and 'establish that they searched all custodians who were reasonably likely to possess responsive documents.'
> 'An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed . . . ; there is no need for the agency to supply affidavits from each individual who participated in the actual search.'[397]

NDLON used various arguments raised in its prior litigation with ICE to include arguing the agency's improper use of generic search terms, as well as the agency's lack of (or insufficient) information about the email system, the software used to manage agency records, and how the agency conducted the searches.[398] Although Judge Forrest rejected Plaintiff's arguments, she did not explicitly reject Judge Scheindlin's prior opinion when concluding the federal agencies had conducted adequate searches.[399]

Another example of a FOIA requester relying upon Judge Scheindlin's opinion is *Bigwood v. United States Department of Defense*,[400] where the Plaintiff argued for application of those same protocols (articulated in her opinion) when it challenged the agency's search.[401] Plaintiff argued the agency "did not provide all of the search terms used;" "failed to identify the connectors and Boolean operat[ion]s used" in the search; "used compound phrases" to search; failed to "identify the systems, software, and personnel

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397 *Nat'l Day Laborer Org. Network*, 2017 U.S. Dist. Lexis 66429, at 11 (citations omitted).

398 *Id*.

399 *Id*. at 41.

400 Bigwood v. U.S. Dep't of Def., 132 F. Supp. 3d 124 (D.D.C. 2015).

401 *See id.* at 140–43.

involved in the search;" and failed to locate specific documents the agency should have located.[402]

The *Bigwood* court rejected Plaintiff's arguments and found the specific requirements outlined in Judge Scheindlin's opinion exceeded the "'reasonableness' standard followed in th[e] [D.C.] Circuit."[403] The court first noted that a FOIA requester cannot dictate the search terms used as it is the federal agency who has the discretion to develop the search terms to locate the records, and it is within the federal agency's discretion to develop a list of search terms it believes will locate the responsive records.[404] The court also stated that it would not micromanage a federal agency's search when the terms are reasonable, nor should the court second guess the agency's search when the search terms are reasonable.[405]

As to Plaintiff's argument that the agency failed to provide information on the connectors and Boolean operations used, the court simply stated the "FOIA does not demand this degree of detail"[406] and the absence of Boolean connectors does not make a federal agency's search insufficient.[407]

Regarding Plaintiff's argument that the federal agency failed to provide information about the systems and software it uses as well as the names of the personnel who conducted the search, the court again rejected these arguments as the D.C. Circuit does not require the federal agency to "provide 'information [about] the . . . databases or indices searched.'"[408] Finally, as to Plaintiff's request for the names of the personnel who conducted the searches, the court saw this as a "frivolous" claim and one that "raise[d] significant privacy issues," and potentially exposed the personnel to harassment.[409]

Throughout the *Bigwood* opinion, the court repeatedly emphasized its review was based upon a standard of reasonableness, and the critical issue for the court was whether the agency had made "'a good faith effort to conduct a search for

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402 *Id.* at 140.

403 *Id.* at 142.

404 *See id.* at 140 (citing Agility Pub. Warehousing Co. v. NSA, 113 F. Supp. 3d 313 (D.D.C. 2015)).

405 *See id.* (citation omitted).

406 Bigwood v. U. S. Dep't of Def., 132 F. Supp. 3d 124, 142 (D.D.C. 2015) (citation omitted).

407 *See id.* (citing Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, 467 F. Supp. 2d 40, 50 (D.D.C. 2006)).

408 *Id.* (citing Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n, 467 F. Supp. 2d 40, 50 (D.D.C. 2006)).

409 *Id.* at 142–43 (citations omitted).

the requested records, using methods which can be reasonably expected to produce the information requested. . . . '"[410] To demonstrate this compliance, the agency's "affidavits 'must . . . set [ ] forth the search terms and the type of search performed, and aver [ ] that all files likely to contain responsive materials (if such records exist) were searched.'"[411]

However, the door of applying E-Discovery protocols to the FOIA has been opened and their application to the FOIA process can be seen in other cases. For example, in *Leopold v. NSA*,[412] the court ordered the agency to conduct a search of departed attorney email accounts using an E-Discovery tool.[413] What perhaps can distinguish *Leopold v. NSA*, from *Bigwood v. United States Department of Defense*, is the NSA opened this door when it stated the departed staff's emails could be searched with the E-Discovery tool, thus allowing the court to order the agency to use it.[414] However, it was the court's recommendations as to further actions between the FOIA requester and the agency which brings the E-Discovery protocols into the FOIA process. For example, the court was hopeful the parties could come to a reasonable date range for the search, narrow the search to only departed attorneys, etc.[415]

> [T]he court note[d] the distinctions between *NDLON* and the instant case, and while it is cognizant of the risk of forcing OLC [Office of Legal Counsel] to sift through significant numbers of "false hits," the burden of the email search to be conducted here can nonetheless certainly be minimized by well-crafted search terms and reasonable limitations on dates and custodians.[416]

The court also applied other E-Discovery protocols when it ordered the parties:

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410 *Id.* at 135 (citing Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990)).

411 *Id.* (citing Nations Magazine v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995)).

412 Leopold v. Nat'l Sec. Agency, 196 F. Supp. 3d 67 (D.D.C. 2016).

413 *See id.* at 76.

414 *See id.* at 74.

415 *See id.* at 75–76.

416 *Id.* at 75.

> to meet and confer to jointly devise the search terms to be used this search, and to attempt to narrow the search – such as, for example, by devising date and custodian limitations – so as to lessen OLC's burden in conducting it. . . . [T]o file with the court a joint proposed scheduling order setting forth their agreed-upon search plan and parameters. . . . [417]

While one may argue this is simply the court's case management of the FOIA litigation, because the court's terminology and requirements so closely resemble E-Discovery requirements, one may conclude it has again shifted the pendulum closer to requiring the application of E-Discovery protocols to the FOIA process.

VII. HOW SHOULD THE FOIA DEFINE "AGENCY RECORD?"

The fifty-year failure to define "record" has led the courts to continually struggle with what is an agency record under the FOIA. In the pre-digital world, a record was intuitive and courts could simply list possible definitions of "record," compare it to what was requested under the FOIA, and then simply list what was and was not a record for FOIA purposes as was done in *Assassination Archives & Research Center, Inc. v. CIA*.[418] However, in the digital world, "records" have taken on a completely new composition and form, and the difference between information and records is less clear. Thus, the digital world has completely changed the discussion of when information is a record and when information is not a record. The *AILA* court sidestepped this issue in its analysis of record versus information when the court concluded the agency had already determined what the records were when it had responded to the FOIA requester.[419]

Earlier in this article, the question as to whether the *AILA* court analyzed the record definition issue correctly was posed. In attempting to answer this question, an examination of the FOIA, with its subsequent amendments and corresponding legislative history, was conducted. Based upon this examination, along with the purpose behind the changes to discovery protocols, one could

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[417] *Id.* at 76.

[418] *See* Assassination Archives & Research Ctr., Inc. v. Cent. Intelligence Agency, 720 F. Supp. 217, 220–23 ((D.D.C. 1989).

[419] *See* Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, 830 F.3d 667, 678 (D.C. Cir. 2016).

conclude the following:

a. The Administrative Procedure Act, 5 U.S.C. § 551, does not define "record."[420]
b. Congress did not define an agency record in the 1966 FOIA or its 1967 codification. Nor did Congress define "record" in 1976, 1986, 2002, 2007, 2009 or 2016.[421]
c. The *AILA* Court concluded the FOIA, and its subsequent amendments did not define agency "record."[422]
d. As identified in *FBI v. Abramson*, Congress used the terms "documents," "matters," "records" and "information" interchangeably .[423]
e. The legislative history revealed congressional assumptions that transferring FOIA pre-digital protocols to the FOIA digital world would be easy, and as revealed in the E-Discovery arena, this is simply not the case.[424]

The above list does not include the 1996 E-FOIA Amendments as an example of Congress's failure to define agency record. Thus, leading to the question as to whether it is possible the term "record" was defined in 1996, albeit not explicitly. Is it possible that Congress defined "record" with the addition of 5 U.S.C. § 552(g)? As discussed above, 5 U.S.C. § 552(g) required the head of each agency to prepare a guide which informed a requester of the process of obtaining records and information from the agency. But of particular interest is 5 U.S.C. 552(g)(3) which included a requirement that a federal agency publish a handbook as to how one may obtain various types and categories of public information from the agency pursuant to Chapter 35 of Title 44 and under the FOIA.[425] Thus, did Congress leave the determination as to what an agency record is to the individual federal agency in 1996? If so,

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420 *See* 5 U.S.C. § 551 (2016). *See also id.*

421 *See* Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (Supp. III 1968). *See also* Freedom of Information Act 5 U.S.C. § 552 (2016); Freedom of Information Act 5 U.S.C. § 552 (2009); Freedom of Information Act 5 U.S.C. § 552 (2007); Freedom of Information Act 5 U.S.C. § 552(2) (2002); Freedom of Information Act 5 U.S.C. § 552 (Supp. IV 1987); Freedom of Information Act 5 U.S.C. § 552 (1976).

422 *See Am. Immigration Lawyers Ass'n*, 830 F.3d at 678.

423 Fed. Bureau of Investigation v. Abramson, 456 U.S. 615, 626 (1982).

424 H.R. REP. NO. 104-795, at 19 (1996).

425 *See supra* notes 287–289, with accompany text.

the *AILA's* Court's decision that the agency determines what is a record for FOIA purposes is correct albeit reached through a different analysis. However, if each individual agency is authorized to make its own determination as to what is a record for FOIA purposes, there will be inconsistencies between the federal agencies. The *DoD Freedom of Information Act Handbook*[426] defines a record as follows:

> [T]he product(s) of data compilation, such as all books, papers, maps, and photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in DoD possession and control at the time the FOIA request is made.[427]

One should immediately see the similarities to NARA's record definition.[428]

Both the *AILA* Court and the DoJ suggested using the Privacy Act's[429] definition of record as guidance or the definition of records under the Federal Records Act.[430] However, if the FOIA allows the agency to define the term "record" for FOIA purposes, a federal agency should not be limited to definitions within existing statutes, especially given the above expansion of E-Discovery protocols to the FOIA process. Federal agencies must properly define "record" such that they can comply with the purpose and mandate of the FOIA in the digital age. This is not easy task. In terms of trying to arrive at the best definition of a record for FOIA purposes, perhaps it may be helpful to identify what should not be a record for FOIA purposes.

First and foremost, metadata should be excluded from the definition of record. Metadata is routinely defined as "data about

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426 *DoD Freedom of Information Act Handbook*, DOD OPEN GOVERNMENT, http://open.defense.gov/Transparecy/FOIA/FOIA-Handbook/#record. (last visited Apr. 10, 2018).

427 *Id.*

428 *See supra* notes 13–17, with accompanying text.

429 5 U.S.C. § 552(a) (2016).

430 *See supra* notes 104–109, with accompanying text.

data."[431] It could be the date and time a document was changed or it could be the underlying changes within the document.[432] Prior to computers, metadata would have been discarded. It would have been thrown away, shredded or otherwise disposed of. What the agency kept was a copy of the final, signed document or final record. In addition, metadata is ever changing (and can even change with the simple opening and closing of an electronic document). Given this, there are two arguments as to why metadata should be excluded from the definition of record.

The first argument is that it was never intended to be an agency record. One must again examine the legislative history behind the explanation of the term "record" passed via the 1996 E-FOIA Amendments. This history revealed that if the information was not previously subject to the FOIA in a non-electronic format, it was not subject to the FOIA in an electronic format.[433] Thus, Congress never intended metadata to be subject to the FOIA in the electronic world as it would not have been subject to the FOIA in the pre-electronic world. Remember the typewriter example. The second argument is that because metadata is temporary and ever changing, metadata is almost by definition, draft information kept somewhere within the digital devices. As such, it is highly doubtful that the average government employee familiar with the topic of the requested records is aware of the extent of the metadata, much less how to locate it and extract it. Thus, in terms of time and use of government resources, trying to search for metadata, review it and then redact it, would be infinitely compounded and unreasonable. Finally, there is a potential consequence to the release of metadata, and that is the loss of information. If metadata is going to be released, the result could be a loss of created information and records as the level of detail may simply no longer be included in documents (however they are defined).

The next item which should be excluded from the definition of agency record for FOIA purposes is duplicate documents and information. While case law has addressed this matter to the benefit of federal agencies (as it would be a waste of government

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[431] MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/metadata (last visited Oct. 23, 2017).

[432] *What is Metadata?*, HARVARD LAW SCHOOL, https://hls.harvard.edu/dept/its/what-is-metadata (last visited Apr. 15, 2018).

[433] *See supra* notes 284–286, with accompanying text.

resources), the FOIA should clearly eliminate duplicates as records for FOIA purposes.[434] Duplication should also include duplicate information within documents or ESI. For example, there may be an overlap of emails responsive to a FOIA request but they are slightly different because someone did not reply to the latest email on a particular subject. The agency should not have to waste time or resources in reviewing the same information (email) within different email strings.

The third item to be excluded from agency record for FOIA purposes should be backup and emergency backup tapes of ESI. By definition, accessing the ESI on backup and emergency backup tapes is unreasonable as an employee familiar with the subject matter requested is not knowledgeable nor will have access to the ESI stored on either the backup tapes or the emergency backup tapes.

Fourth, email strings should not be considered one record, rather, at minimum, each individual email should be considered a record. Thus, if an email string contains five emails, then the email string should be considered to be five individual records. Could this be further separated into paragraphs? This is what DoJ suggested in terms of dealing with non-responsive information; however, the fifth recommendation would avoid the need to further breakdown individual emails (or other ESI) into sub-components.

Fifth, non-responsive information should be excluded from the definition of a record for FOIA purposes. Again, if the information has not been requested, the agency should not have to expend resources to review information that has not been requested under the FOIA. This again is analogous to the exclusion of duplicate records recognized by courts although not explicitly or implicitly addressed in the FOIA.

Sixth, government employee's personal records should be excluded from the definition of agency record as one is not conducting agency business. For example, emails or phone messages between a spouse and the government employee concerning one's vacation plans or one's children, etc.[435]

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[434] *See* Jett v. Fed. Bureau of Investigation, 139 F. Supp. 3d 352, 364–65 (D.D.C. 2015).

[435] *See* CHAIRMAN OF THE JOINT CHIEF OF STAFF MANUAL ("CJCSM") 5760.01A, JOINT STAFF AND COMBATANT COMMAND RECORDS MANAGEMENT MANUAL: VOL I–PROCEDURES, at B–6 (2008).

VIII. RECOMMENDATIONS

Federal agencies need to hold FOIA requesters to standards established by case law as to providing a "reasonable description" of the records requested and that standard is a government employee familiar with the topic is able to locate the records, with reasonable effort.[436]

a. If the FOIA requester has to provide pages of references to supplement its description, the FOIA requester has not met the standard of reasonably describing the records requested. A government employee should not have to read the underlying references to determine what is being requested.

b. Agency regulations need to clearly state that FOIA requests for "any and all records/ESI for *XYZ* topics" are not proper FOIA requests and will be denied as the request fails to reasonably describe the requested records. One now must be thinking (again) this article is advocating that FOIA requesters have to cite the file number of the requested record; however, this would be inaccurate. However, FOIA requesters have to structure their request so that agencies can properly and reasonably determine where the requested records can be located and what offices have the requested records as opposed to all of DoD.

c. FOIA requests for ESI to be provided in its native format, word searchable, and/or Bates-stamped should be declined. In requesting documents in their native format, metadata could be exposed. Some word-searchable PDF documents can be modified.[437] Overall, agencies are concerned with document integrity because an agency wants to ensure the ESI cannot be changed. This includes the protection of redacted information, i.e., one must not be able to "unredact" the redacted information. In addition, one must not be able to delete information from the records provided to the FOIA requester. Finally, the fact that requesters are now asking for word searchable documents lends credence to the courts concern that agencies can overwhelm FOIA requesters with the sheer volume of records when the FOIA requests do not reasonably describe the requested records.[438]

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436 *See* S. REP NO. 813, at 8 (1965).

437 Benjamin Sotelo, *The Emergence of PDFs as the New Standard for E-Documents*, L.A. LAW. 54, 56 (2002).

438 *See* Dunaway v. Weber, 519 F. Supp. 1059, 1069 (N.D. Cal. 1981).

Thus, if the FOIA requester wants word searchable documents or ESI in its native format, one must ask whether the FOIA requester has reasonably described the requested records. More than likely the requester has not.

d. If a FOIA requester fails to respond (i.e. completely ignores the request) to a federal agency's request for additional information within 20 business days, the agency should be able to close out the FOIA request based upon insufficient information.

e. The FOIA must not be used as a means to supplement discovery. If a federal agency is required to process requests for records/information under both avenues, the result is a duplication of work by the federal agency. If a FOIA requester is seeking the same records being sought (or limited) by discovery, the FOIA request should not be considered a proper request. Of course, this will require statutory changes. The FOIA should not be available once a complaint is filed (be it administrative or judicial). One caveat, the FOIA requester should have an opportunity to explain the difference between the documents requested through Discovery and the FOIA.

f. When agencies release government records pursuant to the FOIA, a watermark, "Approved for Release," should be placed on each individual, flattened PDF[439] page.

IX. CONCLUSION

This article began with a general statement that the FOIA's past fifty years has led to a convoluted and complex area of law and this complexity began at the FOIA's inception. It is rather amusing that in 1975, Congress observed the following in its legislative history: "From the beginning, the Act has been a compromise between interest groups, House of Representatives, the Senate, and officials of the executive branch which has resulted in general phrases, undefined terms and provisions that have been left up to the courts and agency officials to interpret."[440] Given the FOIA has been amended numerous times in the last fifty years, with various compromises between competing groups, the FOIA's complexity has increased almost exponentially. However, perhaps the most significant change which has increased FOIA's complexity is the

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439 FLATTEN DOCUMENT, http://www.nuance.com/products/help/NuancePDF/en_US/Flatten_Document.htm (last visited July 27, 2017).

440 *See* FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS, *supra* note 59, at 89.

change in technology and the advent of ESI. While Congress believed it was bringing the FOIA and federal agencies into the digital world, that has not been the case given the assumptions made by Congress (and perhaps some agencies) that FOIA paper protocols would easily transfer to an electronic FOIA world. Federal agencies have an opportunity to examine and define records in the digital age of FOIA. They must take the opportunity and not abuse it when framing what is a record in the digital age of FOIA, keeping in mind, the goal and mandate of FOIA.