



1-1-2019

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Recommended Citation

Margaret Kwoka, Alina Semo, Marcia Berman & Michael Bekesha, *Resolving FOIA Disputes*, 63 Vill. L. Rev. 995 (2019).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol63/iss5/10>

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2018]

RESOLVING FOIA DISPUTES

Transcript of the Fourth Panel of the 2017
Norman J. Shachoy Symposium*

MODERATOR:

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PANELISTS:

ALINA SEMO***

MARCIA BERMAN****

MICHAEL BEKESHA*****

Margaret Kwoka: Thanks so much for the introduction for all of us. I think as we've been hearing all morning there's quite a lot to say about resolving FOIA disputes and how that's going and so I know our panelists have kind of a variety of perspectives on that. We've actually decided on an order amongst us, where Alina is actually going to kick us off and so it doesn't go quite in the order of your program. But, we're hoping we would follow the thread of starting as Alina's going to address about non-litigation alternative dispute resolution mechanisms and then we'll look at litigation both from the requester and the government perspective.

Alina Semo: Good afternoon everyone. Thank you so much to the Villanova Law School, to Professor Samahon, and the editors of the Law Review in particular, everyone has been very welcoming.

For those of you who don't know me, I am Alina Semo, I was appointed by the Archivist of the United States as the Director of the Office of Government Information Services in December of 2016. So I haven't been there very long, but I was actually at the National Archives since 2014. [In] March 2014, I arrived in the Office of General Counsel to be the Director of Litigation. As you heard them say before, I've done a lot of FOIA litigation in my life. In fact, I started my FOIA career when I was in law school in the Office of Information and Privacy, that is now called the

* This is an edited transcript of a panel presentation given at the Villanova University Charles Widger School of Law on October 20, 2017 as part of the 2017 Norman J. Shachoy Symposium - Fifty Years of Operation Under the Freedom of Information Act, 1967 - 2017.

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Office of Information Policy, at the DOJ. So, I can't avoid it, somehow keeps following me.

I'm going to tell you a little bit about our office, which I think is relatively obscured to some people . . . I'm going to tell you primarily about our dispute resolution program, so we can talk about a great alternative way to resolve disputes. I do also just want to touch very briefly and give a shout out to our compliance program and a quick slide I have at the end to talk about our outreach training and collaboration efforts that we also engage in in our office.

The FOIA Ombudsman's Office was created by the 2007 Open Government Act Amendments. We opened our doors in 2009. We provide mediation services, and also compliance procedures and methods for proving FOIA compliance. So Congress gave us two very clear missions and we have tried to follow them from the very beginning. When we first opened our doors the first director, Miriam Nisbet, was surprised to see there were already requests on her desk. So the office really focused on that at the beginning and tried to help requesters go through that process. But, we have since expanded and taken on all of our missions.

. . .

I actually have the pleasure of serving on the FOIA Advisory Committee with Margaret and Michael, so we don't have to talk about that today but it's another way that we can ultimately try to resolve disputes, I think it's all directly connected. Just some quick background, there are approximately 115 federal agencies subject to FOIA, that number goes up and down depending on who you're talking to. More than three quarters of a million requests have been received. There are lots of FOIA part-time staff and lots of people who work on FOIA part-time. I also used to give a presentation that was titled "FOIA is Not a Four-Letter Word." It is really one of the most disliked things to do in everyone's portfolios. So I just want to encourage the students who are here, we need another generation of folks who are interested and excited about FOIA so I hope that you will not totally dismiss that as you think about your career plans.

I understand that the FY 2017 figures are going to show that we topped 800,000 requests this year, in the federal government; 4,263 full-time employees, as I said, and that does include the part-time people. And while you may have seen a lot of headlines about the number of issues regarding fees and requesters being charged fees, basically it's a very low figure that agencies collect in fees. Less than one-percent of the total amount of costs, so it's not a money maker, for any agency.

. . .

There's all these other opportunities to try to resolve things, but in the FOIA world, we see a lot of avoidance. Requesters come to us and say phone calls are not being returned by the agency, their emails are not being returned. Avoidance can certainly resonate with all of us, I think we

all avoid certain parts of our lives, in one way or another. So that is a common issue that we deal with.

But, let me explain a little more about our dispute resolution program. The first thing to know about our program is that we do not dictate solutions or tell agencies they can turn records over, we don't have that authority, unfortunately. Our mediation services are completely voluntary. We need both agencies and requesters to be partners in the process, so certainly either one can decline to participate at any point during the process. Most often, we act as a facilitator to help agencies and requesters better understand the issues and the other party's position. The statute specifically says our mediation services are a nonexclusive alternative to litigation. So we try to prevent litigation by explaining the FOIA process, how searches are conducted, explanation of records that have been withheld under certain exemptions. But of course there's nothing in the statute that prevents a requester from filing a law suit at any time, even through our process. A lot of times our explanations provide the requester a better understanding of the agency's response. We try to give more detailed explanations to avoid litigation. We have seen a number of times requesters telling us they now understand why information was withheld or why an agency did not locate records. The bottom line is generally once a case is in litigation we do not get involved.

Let me also tell you what we don't do. We cannot tell agencies, as I said before, to release documents. We have no authority. We can't tell agencies how to process a request, certainly we can make suggestions, but very subtle suggestions. We certainly do not act as the FOIA police, I know a lot of the requesters would like for us to act that way. We do not process requests or review appeals. We also focus only on FOIA, so Privacy Act requests are outside of our scope of jurisdiction. We certainly don't dictate the resolution of a dispute and as good mediators we help facilitate the process, but we don't tell one side or the other where they should end up in the process. Despite all these limitations, requesters ask for our help because our process does work in a wide variety of instances. Not all of the issues we get called about are complex. One of our important functions as the FOIA Ombudsman, which is our other title that we like to go by, as Congress has referred to us as that, is to educate people about the FOIA and the FOIA process. Many of our simple cases call on us to address misunderstandings between requesters and agencies, or educate requesters about the way the FOIA process is intended to work. Often when we give a requester status information we try to give additional information about that particular agency's workload or backlog. I will not say that it necessarily makes them happy, requesters may still be unhappy about the delay they're experiencing. But certainly, requesters have said to us "thank you, we now understand why there's a delay in getting a response to our request."

At OGIS, we handle both simple and complex cases. Simple cases are the FOIA Ombudsman genre that I just described. We answer a lot of questions from the public about how the FOIA process works and we also provide a lot of information about the FOIA statute and what each exemption means and how to obtain information about status of requests.

And then we have complex cases. In this area we are actually serving as mediators, as neutrals, we have subject matter expertise that helps us to work with the parties to identify issues and try to develop solutions. The reasons that people file FOIA litigations are complex and diverse. I certainly can't stand up here and tell you why that is but we're personally not tracking how many lawsuits have been prevented by our mediation programs but we like to think we've at least done some service and we've avoided some litigations. We also know of cases where the parties have been able to settle parts of the dispute, narrowing the issues for litigation and saving the court from having to deal with all the issues. We have also helped mediate discussions about the use of discretionary exemptions and helped agencies coordinate their responses to a requester who has filed multiple requests across the government. In short, OGIS can work, and it does work a lot of times.

Now that you have a little bit of background to our approach to dispute resolution, let me tell you about the nuts and bolts of what we do very quickly. We have both requesters and agencies that do come to us, primarily requesters are the ones who seek our assistance. The first step in our process is to reach out to both parties in the dispute and find out what each side's position is. Our point of contact generally is the FOIA public liaison and we rely on them a great deal to help us navigate through a particular FOIA requester's process and that agency's process. Once we have all the information we need we identify problem areas and we work with parties to identify possible solutions and when we close our complex cases we write closing correspondence that we send both to the agency and the requester where we explain the facts of the case and why the resolution was reached, and if a resolution wasn't reached we also explain that as well.

The FOIA Improvement Act of 2016, I do need to really touch on that, it's very important. It has really changed our lives in a fairly dramatic fashion. The primary reason for that is that Congress added OGIS services in the statute to allow requesters to come to OGIS at any time throughout the administrative FOIA process. Before they were normally coming to us once the administrative process had been completed and before they were filing for litigation and now they can come to us at any time throughout the process. We have a lot of requesters coming to us with questions about "where do I file my request to begin with" or "I just received an initial denial from the agency, what do I do next?" So we have actually spent a lot of time trying to work through that conundrum and trying to work with

FOIA public liaisons and try to help them resolve as many disputes as possible.

...

Our case load has increased by 160% as a result of the FOIA Amendments and while we are happy to get all of that business, we don't have enough staff, so that's just another reality.

...

The DOJ and Department of Homeland Security are the most frequent subjects of the requests that are coming into us for help. We've been trying to tackle this new reality by trying to put out some more educational flyers and informational flyers.

...

We also do engage in a lot of training, we have some formal training that we provide at least twice a year. Carrie's actually our lead person on education. And we try to help FOIA professionals learn how to deal with requesters and try to help them navigate through the disputes in a more reasonable fashion.

...

Our compliance program was really not kicked off a few years ago, but we now have a very robust agency assessment methodology. We have all of our reports that are on our website. We conduct thorough reviews of an agency's management and communication practices, their use of technology, and recommendations for improvement. The process has been so far voluntary. We have done approximately twelve agencies and sub-agencies and so we have decided that that would take us about twenty-five years to get through the rest of the federal government. So we could use a little more help. We've had great cooperation from the agencies we've gone to and we've gotten lots of great feedback about the help that we've been able to offer.

Michael Bekesha: Briefly, for people that don't know, Judicial Watch is a nonprofit governmental watchdog group in Washington, D.C. We focus on the rule of law, transparency and accountability. We are probably the largest FOIA litigator, and provide job security for Marcia. So far in 2017 we've filed sixty FOIA lawsuits. I think we were averaging fifty FOIA lawsuits a year, up until this year. I've been at Judicial Watch for eight years and I think I just filed my hundredth FOIA lawsuit during that period of time. So, I have a lot of experience with litigating.

But before I start talking about the litigation process I do want to talk about OGIS and how what they do is important and helpful. Not only does Judicial Watch send FOIA requests on behalf of itself, we also represent private citizens, journalists, other individuals that may not have the resources or means to follow through in litigation. A lot of the time when they come to us and they have a problem I try to work through it. Sometimes we can't, and I refer them to OGIS and OGIS is great at getting

agencies to pick up the phone when they won't do so, getting them on the phone, figuring out the status of a FOIA request and helping the FOIA requester work their way through the process. I will say that a lot of the time the frustration for me and why Judicial Watch sues, a lot of it is because we can't get information from the government agency. We try calling, they don't answer, they don't have an answering machine that works, it can be frustrating and so we end up suing. OGIS can really prevent that and I think that's one of the things they do very well. They've been able to help Judicial Watch occasionally work through some struggles and difficulties when it came to [requesters] not understanding what the response was from the agency. But they're really helpful when it comes to your average citizen that doesn't fully understand where FOIA requests should go. Often times they send the request and they send it to the wrong place, so it's not that the agency doesn't want to respond, they just don't know they have to respond. So I think that OGIS is very great at resolving those problems early on, before litigation, before any party gets really angry.

At times when I think that OGIS, because of the way they're set up, isn't as helpful, is when you have disputes whether or not a search was sufficient, whether or not redactions are proper, because there's no binding mechanism there, it's really hard for them, even if they agree with the requester, to force the agency to do what the agency should be doing. It would be nice for OGIS to have some more teeth, it may be a good thing for Congress to think about, when thinking about FOIA reform. There are definitely pros to it. The problem with FOIA, or one of the problems with FOIA, is it automatically sets up an adversarial process. You have a requester on one side and the government on the other, the requester wants something, the government, like everybody, probably doesn't want to turn over everything, or they just can't do it in the time frame and in the ways you want them to do so. I'm a strong believer that FOIA requesters and government FOIA officers are all on the same side, everybody's here for transparency. Marcia and I are in court often opposing each other. But in the end I really believe we're on the same side, looking for transparency and we just differ sometimes in how to get there and to what extent.

The process itself is difficult from the beginning and then once you get into litigation it's even more difficult. You take that idea that you're adversarial to begin with, and then you add the courtroom into it. It shouldn't be as adversarial as it is, as we've heard from a bunch of panelists earlier today that really take that more adversarial approach. I completely understand it, I just received a response from an agency to a FOIA request I sent seven years ago. In it, they didn't even identify what the FOIA request was, they just said "here are your records on the FOIA request you sent in October of 2010" and I was like "okay great." I don't even remember what I asked for and why I asked for it. So I understand the frustration of FOIA requesters, but I think sometimes the adversarial process is taken to an extreme. I think litigation is extremely helpful for those individuals

and those entities that can pay the \$400 filing fee, have lawyers, and go into court. Because what you get is, you get a process. FOIA litigation really allows for court supervised production. It's very much, complaints filed, answers filed, the parties meet and confer and figure out "alright there are an X number of records and it's going to take X number of months to process those records." And then the parties usually agree on a schedule and the court monitors it and if the government fails to live up to their side of the agreement the court can take action, the court can call on the government and ask why that is. So it's important, FOIA litigation is extremely important to the process, it has another body, another entity getting involved and trying to mediate this very basic dispute between two parties. Also, in litigation you get more information.

Most of you probably don't know what a Vaughn Index is but people probably know what a privilege log is. In FOIA litigation if you get to the summary judgment stage, the government is required to turn over what is known as a Vaughn Index, or privilege log about what records are being withheld. What Judicial Watch has found is if the government is willing to agree, and over the past couple of years they very much are, is to have the production of records then have this privilege log being submitted to us and we're able to review what's going on. Nine times out ten, it narrows the issues and we don't need to go into this long complicated litigation with summary judgment briefing. We can just stop the issue there. I think that's important, it's important to think about that just because you enter into litigation in the FOIA context, that doesn't mean you have to go through briefing, it doesn't mean that you're going to fight over discovery, it just means you're going to have a third party involved, trying to mediate or negotiate this very basic simple dispute. Now, that's not every case. There are cases where the sides just strongly disagree whether it's about the search that's was being conducted or the withholding of information and you need the court to come in and make a decision.

There are downsides to that. One thing I would argue that the government wins more often than not. Around the office we talked about how we usually come in second because no one likes to say "lose." But, when you have two people, coming in second isn't all that exciting.

. . .

But, the other part is even when a FOIA litigant wins, when the government's motion for summary judgment is denied, the FOIA requester often doesn't walk away with the documents. The government fails to satisfy their burden, they fail to justify why something's being withheld or why they didn't conduct a search the way they should have. It's not, "FOIA requester, you win you get all the records," it's, "government try that again." And it's frustrating to seem as though you win.

I'm currently representing a client, he didn't like what the government was doing, we moved for summary judgment, the government moved for summary judgment. The court found that the government

agency failed to satisfy their burden, failed to demonstrate that the records were being properly withheld. The court said “no,” but instead of saying “all right, my client gets the records,” the court said “government try it again.” That’s frustrating for a private citizen that doesn’t understand that’s just the way that FOIA works, that it’s an imperfect tool.

The journalists were up here before and one thing that they didn’t specifically say but they talked about is it’s an imperfect tool. A lot of times journalists are just looking for an answer to a question, the government doesn’t want to provide that answer, so they can’t work through the normal public affairs person, and so they send a FOIA request. It’s trying to figure out what the FOIA request would be really to get an answer to that question and FOIA litigation doesn’t allow you to get to that point. It doesn’t really allow for the parties to take a step back and say “all my client really wants is for you to answer this one question, can you tell us how many employees are working in this office, can you tell us how expensive or how much money is being spent?” Instead you have to ask for all records that may identify the number of employees working in that office. So, dispute resolution would be an easy solution to that if it was some type of mechanism that was binding, that had a little bit more teeth than what OGIS has now. But, FOIA litigation to us is necessary, it’s important, and it makes sure that Marcia stays employed.

Marcia Berman: Hi everyone, thank you for having me. I am an Assistant Director in the Federal Programs Branch of the Civil Division at DOJ. I should give my little disclaimer first that I’m just speaking from my own opinions and experience and not on behalf of the government and not stating any policy of the DOJ. I am a supervisor of government information type cases that are handled at Main Justice, as opposed to the U.S. Attorney’s Offices. For FOIA cases what that usually means is FOIA cases that involve particularly sensitive documents or novel legal issues or for some reason or another that are very important to an agency or the administration. We go pluck those cases out of the U.S. Attorney’s Offices and handle them personally at Main Justice in Federal Programs.

So, our office has a lot of expertise, for good or for bad, litigating FOIA cases in district court. I should clarify that too—we just handle them in district court, once they’re on appeal then Civil Appellate would take over the case at that point, although we’re still very involved. So, I think from that experience I can make a number of observations, a lot of this has been touched on already today, but this is kind of from the vantage point of what I see in district court in FOIA litigation over the past few years.

As everyone has noted today, there’s just been an explosion of FOIA requests and FOIA litigation. I think the statistics have already been provided that it’s about three quarters of a million FOIA requests received in FY year 2016 and that’s compared to about 600,000 in FY 2010. So, it really is a pretty large increase.

Another statistic that I found kind of shocking when I heard it was that FOIA lawsuits now make up about forty percent of the docket in the District Court of D.C. That's a lot and judges are not really thrilled about that. They're getting a lot of FOIA cases, and as Michael said, in a lot of them it really is just about judicial supervision of an agency producing records and complying with the FOIA request, it may not involve a lot of really interesting legal issues and the court is just kind of pushing the case along. But unfortunately, for good or for bad that's the way it's become.

Just some observations about what the explosion is kind of due to—as was mentioned I think the first panelist this morning, there's definitely been a huge increase in the number of lawsuits by advocacy groups, which of course Michael is part of one of them. But I think it's important to note that it's really on both sides of the political aisle that we're seeing this. FOIA has really become . . . a political weapon that's being used. It's not always to get the documents, a lot of times there's some other goal that's involved. We are seeing some new organizations that have come into existence since the election and they are definitely filing a lot of FOIA lawsuits for FOIA requests. We see them using that litigation as a way to generate support for their new organizations and to fundraise. So, it's not always to get the documents. But those lawsuits by the advocacy groups and the lawsuits by the media, including the new media, really do take up a lot of the resources and time of the agencies. It's often to the detriment of the FOIA requester who just wants his immigration records. One of the things that we've definitely seen aside from just the increased number of lawsuits brought by the advocacy groups and brought by the new media is oftentimes . . . you will see really, really broad requests. So instead of someone who is just making a very narrow request for a certain kind of document that they want, we'll see very broad requests.

Mr. Leopold referred this morning to his request for all of Hillary Clinton's emails and you may think that's a broad request, but what his request actually was for, was for every document from the office of the secretary for the four years that Clinton was Secretary of State. So that wasn't just emails, it was every document from the entire office which includes many more people than the secretary.

. . .

So it was a really, really broad request. And when he said earlier this morning "I tend to ask for everything," he does, that was accurate. And he's sort of right that FOIA doesn't really limit what you ask for, but it does require that you ask for something that people can find without too much burden. There's lots of good caselaw that says that FOIA doesn't require agencies to become research assistants. There is a burden that's on the requester to frame the request in a good way that enables people to know where to search and to know what they're looking for and also to do so without a huge amount of burden. We really see a lot of these requests that are super, super broad to begin with and I think it comes from a place

of not wanting to restrict what you're asking for because you're afraid if you make it too narrow you're going to miss something, and I definitely appreciate that. But from the agency standpoint, it's just a huge amount of work and it can, particularly with electronic records, it can produce a huge volume of records that the agency then has to process when in fact the requester may be interested in a very small slice of that huge pie. Of course, it can take the agency a long time to do that and then that frustrates the requester because they're getting a small number of records each month and it's going to take years and years. It frustrates the courts because they think they're supervising a case for eighteen years.

...

We often have in litigation is basically a big giant negotiation between the requester, the government and the court to narrow it and get the number of documents down to something reasonable that the government can process in a reasonable amount of time.

Just a couple of other things I wanted to talk about and then I just wanted to give some tips for getting records more quickly both in and out of litigation. I think another thing that we've seen with the new media requester is a proliferation of those types of requests, and again a broadening of the requests' topics, due to the fact they usually don't have to pay for the results. And that's because there's, as people have been talking about this morning, a fee waiver provision that allows media requesters to get their documents for free. It used to be a narrow category of requesters, and now it basically extends to anybody with a blog, Facebook account, it's [about having the ability to disseminate the information to] the public. We see a lot of very broad requests by people in that situation.

And then of course the fee-shifting provision. The fact that you can get attorneys' fees for bringing a FOIA case then leads to a lot of people suing to get the records because it makes it less costly for them to initiate the litigation and to pursue the litigation.

Another thing that's kind of a unique thing about FOIA cases I think is that, in your typical civil litigation you have costs on both sides, the check on your asking for the world from the other side in discovery is that they can ask for it from you. It's really very one sided in FOIA cases. We have lots of cases where the government has every reason to believe that the requesters no longer interested in the records and we approach them and they say "no keep them coming" and it's because there's no cost to them for it. They might as well just keep getting the records and they're not necessarily thinking about what are the best uses of government resources.

All of this really does lead to a lot of what people have been talking about today—overwhelmed, over-worked FOIA offices, lots of backlogs in FOIA offices, and that pushes everything into court leading to this proliferation of cases. I think it results overall in less transparency for people who are not institutional requesters, who just want to get their records.

...

FOIA has a first-in first-out concept to it, where the agency works on the first request it gets and then processes those and moves on. But once you get into court, those cases really just, as a practical matter, get moved to the top.

...

Here's the thing, they get moved to the top, but they still have to compete with all the other cases that got moved to the top, and everyone's in litigation. None of this is good for transparency. And then of course the delays translate into attorneys' fees and that takes away more money from the agencies. Another kind of special feature of FOIA cases is that when attorneys' fees are awarded or paid out in FOIA lawsuits, it comes from the agencies' budgets.

...

That money can come out of very [boyish] resources that caused the problem to begin with, the FOIA requesters to have to go to court because they weren't getting their documents. It's all very circular.

A few tips for getting records more quickly—both in and out of litigation—in contrast to the Leopold request for all of the documents from the secretary of state, write a narrow request. Try to make it as targeted as possible. Don't ask for everything but the kitchen sink, don't ask for every email in a certain person's inbox just because it's something the agency can physically do, can push a button and find all of those emails, it's still going to take a really long time to process them and get them to the people.

Another thing people don't fully understand—the exemptions—when agencies have to process documents to make sure that they're protecting information pursuant to these exemptions, it's actually a really time-consuming activity. For people who have never done FOIA work it's really hard to understand and appreciate how much time it takes and the effort that's involved. Often times there's interagency consultation and that can take more time. The [narrower] the request is, the better in terms of your getting documents more quickly.

Similarly, try not to ask for information that you know is going to be exempt. Don't ask for information you know is going to be classified. You're not going to get it. And it's just going to take everybody a long time to review it and prove to the court it's classified. But if it's classified it's very unlikely that you're going to ever get it.

Same thing for documents that are deliberative in nature. Where you're asking for something before a decision, the back and forth deliberations of an agency, before a decision has been made. That's the typical kind of pre-decisional, deliberative material that exemption five protects. So again, it's not likely that you're going to get that.

Similarly, information about an ongoing law enforcement investigation. You're very unlikely to get that. Mr. Leopold talked this morning

about a situation where the FBI “Glomar-ed”, which means the FBI refused to admit or deny whether it had records, for the Russia investigation into the election. What he didn’t mention was that request was made last year, before the FBI acknowledged that investigation. After the FBI acknowledged the investigation, it rescinded its Glomar response. Again, it was still able to claim that rightly so that the records are part of an ongoing investigation and so it’s protected by exemption seven.

So there’s definitely certain categories of information that are difficult under the statute. Another tip would be—do your research. Don’t ask for documents that are public. If you can get them on your own, you should.

Once when you get into court be reasonable in terms of what you’re asking for. Recognize that the agency has these other competing demands, both in terms of other requests that are not in litigation and all the cases that are in litigation. You’re correct that your request is important but other people’s requests are important too and the agency has to balance all this. It’s very difficult for a court to say “well, yes this case is in front of me, but I’m going to bump all the other cases that my colleagues have by requiring this one to have priority.”

. . .

Again, once you’re in court be reasonable about scheduling. Don’t file a motion for a preliminary injunction when it’s really just a matter of talking with the government attorney to come up with a schedule that the agency can meet. You may think you’re getting a big win if you get a really, really aggressive schedule, but if the agency can’t do it and doesn’t have the resources we’re just going to move for an extension of time when that time comes because if we can’t do it, we can’t do it. So it’s in everyone’s interest to try to come up with something that’s reasonable that you can live with and the agency can live with and do that without lots of motion practice that may never really go anywhere.

One other point—Michael talked about Vaughn Indexes and draft Vaughn Indexes, which really of course, can be helpful to requesters. Another thing to really look at are the documents that we’ve produced. A lot of times when there are redactions of documents you can still tell from the information that we’ve produced in the documents a lot about the type of information that’s been withheld. And that gives you a lot of clues to decide “do I really care about this challenge or not.” Judicial Watch is really good about doing that, but plenty of other groups just are not. We recognize that you get more information in a Vaughn Index but that takes the agency a lot of time to draft and if you can look at the documents themselves and learn a lot we encourage you to do that.

Michael Bekesha: Generally, I agree with Marcia on those tips. I try to be as reasonable as possible when in court, I try to narrow my requests when possible. Which includes even when I’m interested in a topic because it

was in the newspaper, attaching that article to the FOIA request so the person in the FOIA office knows what I'm talking about.

However, I have to say sometimes that's not possible. If you're a journalist or working for an advocacy group, sometimes you don't know what's out there, sometimes you can't be specific, and you just need to send those broad requests because you don't know what type of records there are, what types of records were created, where those records may be located. So that's when you—I'm not going to say go on a fishing expedition—but you send a little [broader] of a request. I think there's value in broad requests at times. But also be cognizant of what you're looking for. [Directed at Marcia] We probably disagree on what could be a broad request. I could ask for any and all emails of a particular employee but I may want to limit that to a two-year period. The government is probably still going to think that's a broad request, but to me I'm probably looking for something specific to that employee during that time period and you just can't narrow it because if you narrow it sometimes you miss out on what you're really looking for. But it's also working with the agency because especially once you're in litigation, you take that broad request and then maybe narrow it down, then maybe have that conversation and say "actually this employee . . . was only on that project for a six month period so can we narrow the request from two years to six months." It's tough to do but that's why sometimes going broader, earlier is helpful.

The other thing is, the government has a lot of FOIA requests to respond to, I don't think anybody disputes that FOIA employees are overworked and that they have a lot on their plate. But, FOIA requesters, especially organizations like Judicial Watch, believe that the government could probably do more, use more technology, maybe reallocate some resources I know we disagree on that. We're seeing that agencies want to produce or process, review 300-pages a month, that seems low to me. Anybody that does general civil discovery, civil litigation would think that's a really low number. I've been in court where a judge has said she's reviewed that number of pages in an afternoon when she was in private practice. Of course, next time I cited that to her, she still disagreed with me and allowed the government to process 500-pages a month. That's also frustrating when you have either a small or large request, when even in litigation, you're looking at 300-pages a month of processing, maybe 500-pages a month, and that just drags everything out.

Margaret Kwoka: So one of the themes that's come out for everyone is the delay and timing issues of getting a response, the various causes of that, including broad requests, requests from requesters who may not even be still interested in records, everything from that to the sheer number of requests and then also just the nature of dispute resolution is not quick. So in addition to whatever delay requesters may have experienced at the agency level, once they exercise that right to some sort of dispute resolution it can take a long time even to make that process happen. So vis-à-vis

that set of problems, I was wondering if each of you might name one or two things in your dispute resolution context that you think could be changed to improve how dispute resolution can play out, in particular in terms of time and efficiency.

Alina Semo: I actually have a couple of thoughts—one I'm going to share in my Director of OGIS capacity and one I'm just going to go back to my prior years of litigation.

As an observation . . . the FOIA Improvement Act of 2016 has really drastically changed our landscape in terms of where we are in the process and has really resulted in a lot of confusion. So if I had my magic wand I would take that away. It's really caused FOIA public liaisons to not understand what their role is and requesters are confused about when to come to OGIS versus when to deal with the FOIA public liaison, deal with the agency directly, so that's one wish.

. . .

Also . . . Before I became the director of OGIS . . . I worked in federal programs for almost nine years and litigated some FOIA cases and then I was at the FBI. I have to tell you the most successful resolutions to FOIA litigations that I have had in my career have been those in which we end up going to mediation in the context of the lawsuit. This is just my personal opinion, I would love to see mandatory mediation in FOIA litigation. I know a lot people believe that it doesn't work . . . But I can cite back to several cases that I worked on personally where mediation ended up being very successful and gave the parties, both parties, what they really needed and what they really wanted. They would not have gotten if they were just going forward in litigation and briefing summary judgment and relying on the judge to give you a final decision, which may or may not be favorable.

Marcia Berman: If I had the magic wand, I think I would probably start off by revising the statute to give agencies more time to respond to requests. I think the twenty days is just a joke. It was back when the statute was enacted and it certainly is today. Now, that would help alleviate some of the litigation burden. But I would probably want to couple it with more resources at the agencies so that they could, not just have fewer cases end up in litigation but really be able to work through some of those backlogs and have more resources to process FOIA. These are hard outcomes to come by because everybody wants more resources for everything.

The other idea I heard today . . . was the clawback idea, which I think is really appealing if it could be done, not sure how realistic it is. If you could have some kind of assurance that you could *claw back* information that gets out . . . It's done wonders for civil discovery in terms of speeding up privileged review and simplifying privileged review. It's a more complex process under FOIA, than privileged review is, to review documents for national security information and other kinds of privileged informa-

tion. But I got to think that if that could be workable that could really help.

Michael Bekesha: I don't think clawback would work at all. Working for a transparency group, if we get a record we're going to put it on our website, we're going to release it. Now there is that exception when it comes to law enforcement, if it's names and it's classified information that's going to put somebody at risk, we're going to think about it a lot harder. But, I just don't think the clawbacks going to work. We've had instances where we've received a record and then the government has asked for it back, sometimes we say yes, more often we say no. And I think that's just the way of how it works.

For me, the delay is less in the dispute resolution, in the litigation, it's more in the processing of the FOIA request. So, changing the time limit, I never thought would be a bad idea. I really think that for FOIA reform to really happen you really have to blow up the statute, start new. What is in place now doesn't work and it's probably not going to work with cosmetic fixes. So, more resources. I think everybody agrees more resources, more use of technology, being able to process electronic records. A lot of records these days are emails. A lot of what I have interest in, what my clients have interest in, are federal government employee emails. So getting a way to process those in a lot quicker fashion. There are a lot more emails today than there was even five years ago, ten years ago, so let's get that stuff processed faster and that's going to cut out a lot of delays. I know that's easier said than done but that's really where the fix needs to happen.

Alina Semo: I just wanted to comment on the clawback—I've personally clawed back in my career and I have to tell you that it's a different calculus, as Marcia said, in the FOIA context than it is in civil discovery, where I've also clawed back. In civil discovery you're producing under protective order and you have that mechanism that allows you to, it's a safe space really, that's really what it comes down to, it's a safe space which you can produce documents and if you do make an error and you release a privileged document, you could discuss it. In the FOIA world it's very different. The only times I've personally worked on clawback cases are those when it's national security. So classified information has been released and there's a calculus that you go through by the way in that clawback process because by clawing it back you actually draw more attention to it and so then you think "well, maybe we should leave it alone if it just kind of disappears," from an agency perspective I'm speaking, "if it disappears in a mound of a hundred thousand pages then maybe it won't get as much attention." So I think it's a double-edged sword, but I think it is very different in the FOIA context than it is in civil discovery.

Margaret Kwoka: As a follow-up to this conversation, one of the things, particularly in the litigation context, FOIA litigation in some ways is different from some other types of litigation in part because there's an inherent information asymmetry. So unlike other civil litigation where we use discovery to kind of even the playing field, in FOIA litigation since the entire dispute is about records that one side can't or hasn't seen, then there is an inherent asymmetry. So, courts have developed what I think some, including me, view as somewhat specialized procedures for FOIA cases, including . . . Vaughn Indexes, the outsized use of in-camera review at ex parte hearings, and also the norm of resolution of all cases, or almost all cases, at the summary judgment phase. I'm wondering if each of you might offer a view about whether those specialized procedures advantage one side or the other, whether they adequately protect the interests of the government and the requesters.

Michael Bekesha: I think there's good and bad to all of them. The Vaughn Index is extremely helpful for FOIA requesters to further understand how many records are out there, what types of records there are, what information is being withheld. So I think that's a plus to the FOIA requester but the downside to that is it prevents additional information from being released ex parte. Anytime in-camera review happens I think it always favors the government, government may disagree on that, but usually we're fighting for in-camera review and then we get it and we're very disappointed in the end. That's just the way it goes.

And then summary judgment, I don't know, there really aren't that many factual issues that are in dispute. They're pretty simple so on the legal issues, summary judgment seems appropriate. But sometimes the government does a great job of telling the court that there are no factual disputes and everything can be resolved on summary judgment to avoid discovery and that usually happens. But I think sometimes that it hurts the plaintiff, the FOIA requester, a little bit, that everybody's always just thinking we're going to resolve this in summary judgment. It leaves for less and less, unusual circumstances where discovery is important. But sometimes you may not need full discovery but there are a few questions that a FOIA requester really wants to know. The process of the setup doesn't allow it.

A great example we have is Judicial Watch sued the Treasury Department for some records of Hillary Clinton, for emails of her communications with the Treasury Department, and it was broader that we didn't identify who at Treasury, but more senior level folks. Treasury identified a few individuals that they wanted to search, they searched it and there were no responsive records. And Judicial Watch had a simple question, they wanted to know was it possible for the government to globally search email accounts at the Department of Treasury. Because the idea was thinking if you can globally search, as a lot of large corporations can, you can enter in "Clintonemail.com," run the search, and that's what you have. We don't know if they have that capability, but we want to know because we thought

it would be reasonable for them to conduct that search, and if possible if they don't have that capability, it would be reasonable for them to do what they did, which was identify about five employees and search those emails. So we asked the question and the court said "well we're going to resolve this on summary judgment," the court thought the search was sufficient, so we never got that question answered. We're now appealing that to the D.C. Circuit and our real focus is, shouldn't the government be required to identify what technology it has so that we as the FOIA requester can know whether or not what the government did was reasonable. I just don't think the process is set up that way to answer some of those questions.

Marcia Berman: We see a lot of frustration by judges and requesters over the notion that's just very bedrock to FOIA, it's about asking for records, not answering questions. All I can say is if it were about answering questions you might need a lot more resources devoted to it. But it's just the way the statute's written currently.

The one-sidedness . . . I think that it's kind of inherent in the nature of FOIA that the government has the records and that's what the requester is seeking and if you give away that information in the course of justifying your withholdings, then you've given away the information. So, I think it's something that agencies struggle with all the time in writing Vaughn Indexes, to be able to describe the information enough to justify the exemption without revealing the privileged information. I'm not sure there's a solution to it given just the essence of FOIA, the government has the information and the plaintiff wants it.

Alina Semo: I actually want to pick up on that theme and say a lot of the requesters that come to us are very frustrated that they cannot get a Vaughn Index and the administrative stage and they just don't understand why so we spend time trying to educate everyone as to why that's not going to happen and don't expect it because you're not going to get it.

Michael Bekesha: However when requesters do get it at the administrative stage, and I've had that instance, it is extremely helpful.

Alina Semo: I'm neither confirming nor denying that. I also just wanted to tell you a quick war story because Margaret asked that question and I did prepare the story but it's actually happened and I was there, in front of Judge Koehler Catelli in D.C., who sometimes is government-friendly, sometimes not. At this point in my career I was at the FBI and we had stayed up all night to prepare an in-camera, ex parte declaration on a set of classified records and the plaintiff was represented by law students from a law clinic and they were very, very upset when the government submitted this in-camera ex parte declaration and they said "we don't understand Your Honor, we don't understand why we can't see any of the information underneath the redactions," so they just kept pleading with her, "can you

let us please look at the documents, can we at least just see the declaration.” And so the judge was very patient with them, she let them argue and then she paused and looked at them and said, in a very kind sort of maternal kind of tone, “I understand you’re frustrated, I understand you’re unhappy that you are unable to see the documents or see the in-camera ex parte declaration, but I have to assure you that that’s why I’m here. I’m here because my responsibility is to look at the filings, I have to look at the underlying documents if I need to, that’s my option and if I have to I also have to also make sure the government is not over-protecting the information. So, I’m going to be your eyes, and I’m going to make sure that everything is legally defensible, and the reasonable decisions have been made. So, you have to trust in me, and you have to trust in the process.” So those words really resonated with me

Question: I have received documents that contain things that should’ve been redacted, I thought it was my responsibility and I wasn’t going to share it. But I didn’t share that fact with the agency, because my assumption was that it would get some poor lawyer in trouble. I’m just curious, for a requester that receives something he shouldn’t or pieces of it that should not have slipped through, do you tell the agency?

Marcia Berman: I think it’s oftentimes not clear. I’m not sure what your information, or the information in your situation was, but I imagine it wouldn’t often be crystal clear to the requester whether or not they’ve gotten something they shouldn’t have gotten. So I would think in that situation, it would be helpful to contact the agency and make sure it’s something you can use. Certainly, my view, is that if it’s something that was a mistake, then it’s great to not share that with the public.

Audience Response: That’s the rational approach, but I just know that FOIA offices are human, and screwing up when you’re a review person is not necessarily something that you’re going to get a gold star for.

Marcia Berman: I don’t know that anyone would be penalized for it. I think there is a big recognition that particularly now when these offices are understaffed and overworked, mistakes happen. They just do. That’s a consequence of this.

Audience Response: I have seen FOIA heads, eased out and dismissed as a result of releasing information that was legally required to be released but embarrassed the agency. So I guess I’m a bit more concerned about harming people that are trying to a good job

Question: I received records from an agency that did not have redactions, draft redactions, so I clearly knew that this was stuff that the agency did not intend to fully release. It was a pdf with draft redactions on it. We chatted about it internally, I wrote the agency very politely and said “did

you send this in error? Seems like this might have been intended for good government editing and transparency” . . . and of course the agency had a heart attack, and said, “Yes indeed and please destroy it! Here is the actual production.” And we did that and it was fine. Sometimes from the qualitative perspective people make mistakes.

Michael Bekesha: It’s always fun, because you can see, especially if it’s large productions, you’ll have email chains and a body of one email will be redacted and then you’ll see it twenty pages later and that email isn’t redacted. That’s always fun to try and get under to see what the decision making was. You also had examples probably five or six years ago when the government started using Adobe to redact information and they did it by just putting boxes over text, so if you did a Control + A and highlighted all the text, you could copy it into Word and see what was under there. That was kind of fun too. But that is why, from my perspective, that’s why a clawback will never work because I’m going to think it’s fun, I’m going to like the information I see and I’m probably not going to want to turn it over unless it’s information that is going to get somebody murdered.

Marcia Berman: Unless we ask really, really nicely.

Michael Bekesha: Sometimes that works.

Question: My question deals with the 2016 Amendment which says that documents shouldn’t be withheld unless there is a reasonably foreseeable harm. I’m wondering, is that being litigated at all and having any effect on production . . . ?

Michael Bekesha: I don’t think I’ve litigated that point. I saw, I have one case that has been around for quite some time. We’re re-briefing it and the government talked about how they went through that process. I don’t think it’s going to make much of a difference. Because the courts are going to say, “We don’t know what that means, we always thought there was a presumption of openness.” So nothing is going to change in their views. I don’t know if your [referring to Marcia Berman] perspective is different but I never thought that was all that great of an amendment.

Marcia Berman: I think that all the exemptions themselves have harm standards incorporated into them. So I think it’s not very difficult to say that something that’s withheld pursuant to an exemption because of the harm that would be caused if it were disclosed, that you meet the standard just because of the harm that is built into the exemptions.

Michael Bekesha: Which means, it’s just going to be something nice the agencies are going to be able to say and look a little bit better.

Margaret Kwoka: And on that hopeful note, I think our time is up. Thanks very much to our panelists.