

# “TOO BIG TO FOIA”: HOW AGENCIES AVOID COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT

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## INTRODUCTION

Since its inception, the Freedom of Information Act (FOIA) has been both applauded and bemoaned, for what FOIA has in good intentions, it lacks in effective administration.<sup>1</sup> On the one hand, FOIA created a public right of access to information held by executive agencies.<sup>2</sup> It created the mechanism by which organizations and individuals alike can obtain information from government agencies.<sup>3</sup> It has allowed for a wide variety of government records to be made public, many of which have been significant in our history and popular culture, including: the Kennedy Assassination,<sup>4</sup> the Iran-Contra Affair,<sup>5</sup> and most recently, Hillary Clinton's emails during her time as Secretary of State.<sup>6</sup> After fifty years, FOIA has remained a viable and important

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<sup>1</sup> See Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 398 (2010) (observing that the "administration of the FOIA is seriously hampered by broad decentralization; relatively little oversight; institutional pressure to reduce backlogs; and chronic understaffing"); Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 577, 578, 582 (2009) (noting in particular that while FOIA is "indisputably powerful open government legislation," it fails to "impose affirmative responsibilities on agencies"); see also Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 88 (2012) (noting that "FOIA has been subject to criticism since its enactment").

<sup>2</sup> See Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's up to*, 11 COMM. L. & POL'Y 511, 512 (2006) (noting that FOIA created a "judicially enforceable public right of access" to government information).

<sup>3</sup> See Alan B. Morrison, *The Administrative Conference of the United States and Its Work on the Freedom of Information Act: A Look Back and a Look Forward*, 83 GEO. WASH. L. REV. 1540, 1547–48 (2015) (noting that "[i]nitially, FOIA was used by the media and nonprofit groups or, along with the Privacy Act of 1974, by individuals who sought their own records, including those held by the FBI and the CIA").

<sup>4</sup> See Bryan Bender, *What the Government Is Still Hiding About the JFK Assassination*, POLITICO (Feb. 4, 2016, 8:07 PM), <http://www.politico.com/story/2016/02/kennedy-assassination-jfk-national-archives-documents-218775>; see also *Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007); *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344 (D.C. Cir. 1983).

<sup>5</sup> See *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993); see also *Freedom of Information Act Electronic Reading Room: Iran-Contra*, CIA, <https://www.cia.gov/library/readingroom/keyword/iran-contra-0> (last visited Dec. 23, 2017).

<sup>6</sup> See *What's New: Secretary Clinton Emails*, U.S. DEP'T STATE (Dec. 4, 2017), <https://foia.state.gov/Learn/New.aspx>; see also Press Release, Karen Kaiser, General Counsel, Associated Press, *Ensuring an Informed Citizenry: Examining the Administration's Efforts to Improve Open Government* (May 6, 2015), <https://www.ap.org/press-releases/2015/ensuring-an-informed-citizenry-examining-the-administration-s-efforts-to-improve-open-government>; Sophia Jabeen Qureshi, *Center Among Leaders in Filing Freedom of Information Act Suits*, CTR. FOR PUB. INTEGRITY (Dec. 6, 2016, 5:00 AM), <https://www.publicintegrity.org/2016/12/06/20510/center-among-leaders-filing-freedom-information-act-suits> (noting that "[i]n response to [FOIA] lawsuits, federal agencies have disclosed records involving government contracts related to Iraq and Afghanistan, George W. Bush's initiative to fight AIDS in foreign countries, and audits of the Medicare Advantage program").

resource that is frequently used by advocates, organizations, and journalists to access government information.<sup>7</sup>

Despite the widespread use of this mechanism, a lack of transparency has persisted.<sup>8</sup> Backlogs and insufficient resources present significant challenges to the execution of agencies’ duties under FOIA.<sup>9</sup> The failure to update the law to keep up with modern technology and the courts’ persistent application of outdated recordkeeping standards to modern electronic databases, are even greater hindrances to the law’s purpose.<sup>10</sup>

When FOIA was first drafted in 1966, the records and data requested were on paper.<sup>11</sup> The statutory framework and subsequent case law were developed in that paper era.<sup>12</sup> Today, agencies use databases that maintain records as electronically stored information (ESI).<sup>13</sup> Despite this shift in recordkeeping methods, which was

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<sup>7</sup> See *All Things Considered: Analysis Reveals Record Number of FOIA Requests Filed Last Year*, NPR (Mar. 19, 2015, 4:57 PM) [hereinafter *Record Number*], <http://www.npr.org/2015/03/19/394099690/government-reveals-record-number-of-foia-requests-filed-last-year> (noting that review of a government report revealed that more than 700,000 FOIA requests had been made in 2014); see also Paul Fletcher, *Will Trump Play Nice If Journalists Launch FOIA Offensive Against His Administration?*, FORBES (Dec. 26, 2016, 11:33 AM), <http://www.forbes.com/sites/paulfletcher/2016/12/26/will-trump-play-nice-if-journalists-launch-foia-offensive-against-his-administration/#3a8f2b897e5c>.

<sup>8</sup> See Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1014–15 (2008); see also David Carr, *Let the Sun Shine*, N.Y. TIMES (July 23, 2007), <http://www.nytimes.com/2007/07/23/business/media/23carr.html> (describing FOIA as an “apparatus that clanks and wheezes, but rarely turns up the data”).

<sup>9</sup> See SUBCOMM. ON OVERSIGHT & ACCOUNTABILITY, FOIA ADVISORY COMM., FOIA PROGRAM REVIEW 2 (Apr. 2016), <https://www.archives.gov/files/ogis/assets/foiaac-oasc-foia-program-review-final.pdf>; see also Cox, *supra* note 1, at 398. The backlogs of FOIA requests are significant enough to pose a serious impediment all on their own. See *Data: Requests, Department of Justice, FY 2016*, FOIA.GOV, <https://www.foia.gov/data.html> (last visited Dec. 23, 2017) (showing that during the 2016 fiscal year alone, the Department of Justice received 73,103 FOIA requests, had 14,213 requests pending at the start of the fiscal year, and still had 15,462 requests pending at the end of the fiscal year).

<sup>10</sup> See *infra* Part II; see also Nikita Lalwani & Sam Winter-Levy, Op-Ed, *After 50 Years, the Freedom of Information Act Needs Updating*, L.A. TIMES (July 8, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-lalwai-winter-levy-foia-50-anniversary-20160708-snap-story.html> (“[T]he FOIA remains plagued by problems: crippling delays, hefty fees and outdated technology—not to mention expansive loopholes that federal agencies routinely exploit to deny legitimate requests.”); John Markoff, *Computers Challenge Freedom of Information Act*, N.Y. TIMES (June 18, 1989), <http://www.nytimes.com/1989/06/18/us/computers-challenge-freedom-of-information-act.html?pagewanted=1> (noting that “the Government’s expanded use of computers in the last two decades has leapfrogged laws intended for a world in which all Federal records were on paper”).

<sup>11</sup> See Markoff, *supra* note 10.

<sup>12</sup> See Daxton R. Stewart & Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL’Y 515, 517 (2016).

<sup>13</sup> See Ben Minegar, *Forging a Balanced Presumption in Favor of Metadata Disclosure Under the Freedom of Information Act*, 16 U. PITT. J. TECH. L. & POL’Y 23, 24 (2015) (“Modern federal agencies rarely create or store paper records, opting instead for efficient and flexible electronic filing systems and records (‘e-records’). Government e-records make up the ‘modern paper trail.’”); Markoff, *supra* note 10; see also FED. R. CIV. P. 34(a)(1)(A) (defining electronically

identified as taking place as early as 1970, FOIA—and courts presiding over FOIA litigation—have lagged behind.<sup>14</sup>

Despite its problems, FOIA is still heavily used and the amount of FOIA requests and FOIA-related litigation continues to grow.<sup>15</sup> Its continued importance makes identifying and resolving its problems all the more necessary.

This Note addresses only one such problem with FOIA: the undue burden rule. This judicial invention is now at the nexus of FOIA and modern technology and has yet to be addressed in scholarship.<sup>16</sup> Created to protect agencies from having to look through hundreds or thousands of paper files, it now serves as a near-unchallengeable defense by agencies to avoid compliance with requests that merely require database searches and should not be considered unreasonable.<sup>17</sup>

In order to put this issue into perspective, Part I of this Note will provide a brief explanation of the components of FOIA, as well as an overview of the FOIA request process, from the filing of the request to litigation.<sup>18</sup> Part II addresses the substantive issues at the heart of this Note. Section II.A analyzes the undue burden rule as it has developed through case law.<sup>19</sup> Section II.B looks to the intersection of undue burden and database searches.<sup>20</sup> Section II.C will examine the use and acceptance of outside ESI or data-systems experts by FOIA requesters to challenge agencies' claims of undue burden.<sup>21</sup> Section II.D will evaluate the courts' ability to consider the public interest in information when weighing an agency's undue claim.<sup>22</sup>

Following this analysis, Part III of this Note offers three solutions.

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stored information as including “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations”).

<sup>14</sup> See H.R. REP. NO. 104-795, at 11–12 (1996). It was only in 2016, for example, that FOIA was updated to require federal agencies to keep electronic records. See FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538; see also Fletcher, *supra* note 7.

<sup>15</sup> See *Record Number*, *supra* note 7; see also *Data: Requests: Department of Homeland Security: All Available Years*, FOIA.GOV, <https://www.foia.gov/data.html> (last visited Dec. 23, 2017) (showing that the Department of Homeland Security received 190,589 FOIA requests in 2012, 231,534 FOIA requests in 2013, 281,138 FOIA requests in 2015, and 325,780 FOIA requests in 2016). Unsurprisingly, there has also been a significant increase in FOIA litigation in the past nine years. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-667, FREEDOM OF INFORMATION ACT: LITIGATION COSTS FOR JUSTICE AND AGENCIES COULD NOT BE FULLY DETERMINED (Sept. 2016) [hereinafter GAO-16-667], <https://www.gao.gov/assets/680/679631.pdf> (indicating that there was a “57 percent increase” in FOIA lawsuits filed between 2006 and 2015).

<sup>16</sup> As explained *infra* Section II.A, the undue burden claim is not statutory; it has developed solely as a result of judicial lawmaking.

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See *infra* Part I.

<sup>19</sup> See *infra* Section II.A.

<sup>20</sup> See *infra* Section II.B.

<sup>21</sup> See *infra* Section II.C.

<sup>22</sup> See *infra* Section II.D.

First, courts should approach undue burden claims in a manner that recognizes the very different way that agency records are stored in the electronic age.<sup>23</sup> This would prevent agencies from successfully positioning themselves as being “too big to FOIA”<sup>24</sup> as a result of a large—but still feasible—FOIA request.<sup>25</sup> Second, this Note proposes that courts should change the standard for weighing the expert opinions provided by the FOIA requester’s outside technological or data experts.<sup>26</sup> Third, this Note suggests the adoption of a sliding scale approach, through which courts would balance the burden of production on the agency against the public interest in the information sought.<sup>27</sup> In the alternative, this Note also posits that an amendment to FOIA that legislatively imposes such a public interest balancing test would be equally effective.<sup>28</sup>

Courts’ evaluations of undue burden claims have allowed the government to drift away from the original purpose of FOIA: to promote openness and transparency.<sup>29</sup> It is only through reforms like the ones suggested in this Note that FOIA can continue to serve as an effective check on the government by its citizens in an era of digital recordkeeping and big data.<sup>30</sup> Agencies should not be “too big to FOIA” merely because they now have the ability to create and store large quantities of data.

## I. BACKGROUND

### A. *The History and Language of the Freedom of Information Act*

The concept of a law that would provide access to governmental information started percolating through Congress by 1963.<sup>31</sup> Although the Administrative Procedure Act included a public information

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<sup>23</sup> See *infra* Section III.A.

<sup>24</sup> See Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment at 15, 42, 58–59, *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enft*, 236 F. Supp. 3d 810 (S.D.N.Y. 2016) (No. 16 Civ. 387) [hereinafter Plaintiffs’ Opposition, NDLOI II]. Plaintiffs in the case were one of the first—if not the first—to use the phrase “too big to FOIA.” The phrase was later picked up by the defendant agencies and used in their briefing. See Defendants’ Reply Memorandum of Law in Support of Summary Judgment at 27, *Nat’l Day Laborer Org. Network*, 236 F. Supp. 3d 810 (No. 16 Civ. 387) [hereinafter Defendants’ Reply, NDLOI II].

<sup>25</sup> See *infra* Section III.A.

<sup>26</sup> See *infra* Section III.B.

<sup>27</sup> See *infra* Section III.C.

<sup>28</sup> See *infra* Section III.C.

<sup>29</sup> See S. REP. NO. 89-813, at 3 (1965); see also Shkabatur, *supra* note 1, at 88–90.

<sup>30</sup> See Lalwani & Winter-Levy, *supra* note 10; Stewart & Davis, *supra* note 12.

<sup>31</sup> See Halstuk & Chamberlin, *supra* note 2, at 530 (detailing the full development of the movement behind a freedom of information law).

section, Congress found it to be inadequate and sought a better way to promote transparency and ensure public access to government records.<sup>32</sup> FOIA's legislative history is replete with references to the "electorate" and the importance of an open government.<sup>33</sup> To that end, FOIA was passed and enacted into law in 1966, providing the public with a mechanism by which it could access government records and challenge the government's tendency toward secrecy.<sup>34</sup> The Supreme Court has not hesitated in affirming these goals when reviewing FOIA cases and has explained FOIA as a way for the public to stay informed about the government's activities.<sup>35</sup>

FOIA mandates the release of governmental information in three separate ways: agencies are required to release public records via the *Federal Register*,<sup>36</sup> online,<sup>37</sup> and pursuant to a proper FOIA request.<sup>38</sup> It

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<sup>32</sup> See H.R. REP. NO. 89-1497, at 5 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2422 (The Administrative Procedure Act's Public Information section was "not in any realistic sense a public information statute," and did not recognize "the basic right of any person . . . to gain access to the records of official Government actions."). Congress also acknowledged that "[t]he needs of the electorate ha[d] outpaced the laws which guarantee public access to the facts in Government." *Id.* at 12, 2429; see also Administrative Procedure Act, 5 U.S.C. § 1002 (1964) (current version at 5 U.S.C. § 552 (2012)).

<sup>33</sup> See, e.g., S. REP. NO. 89-813, at 3 ("Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information.").

<sup>34</sup> See H.R. REP. NO. 89-1497, at 1. The House Report also notes that a "democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies." *Id.* at 12; see also S. REP. NO. 89-813, at 10 ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

<sup>35</sup> See Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004) ("FOIA is often explained as a means for citizens to know 'what their Government is up to.'" (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989))); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989) ("This Court repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA."); EPA v. Mink, 410 U.S. 73, 80 (1973) ("Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.").

<sup>36</sup> See 5 U.S.C. § 552(a)(1) (2012). The statute specifically requires agencies to make public certain internal documents in the *Federal Register*, including "descriptions of its central and field organization," procedural rules, the location of forms, and "statements of general policy or interpretations of general applicability." *Id.*

<sup>37</sup> See 5 U.S.C. § 552(a)(2) (2012). The statute is equally specific with the materials that must be regularly published on agency websites, such as "final opinions, . . . statements of policy, . . . administrative staff manuals, [and] copies of all records . . . that have been released to any person." *Id.* See generally U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, INTRODUCTION 2-3 (July 24, 2013) [hereinafter DEP'T OF JUSTICE, INTRODUCTION], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/intro-july-19-2013.pdf> (explaining that "certain other types of records" are required to be "proactively disclosed . . . on agency websites").

<sup>38</sup> See 5 U.S.C. § 552(a)(3)(A) (2012) ("Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E),

is this third avenue—the FOIA request—that gives anyone the statutory right to access the records of all federal government agencies operating under the Executive Branch.<sup>39</sup>

While the rest of the statute provides for exemptions<sup>40</sup> and further instruction on the time and methods of production, the majority of the practical standards and rules surrounding FOIA compliance and production have been developed through case law instead.<sup>41</sup> Since FOIA is a federal law and applies to records from federal agencies, the large majority of precedential cases have come from either the District of Columbia District Court or Circuit Court.<sup>42</sup>

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each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.”). *See generally* DEP’T OF JUSTICE, INTRODUCTION, *supra* note 37, at 3.

<sup>39</sup> *See* Halstuk & Chamberlin, *supra* note 2, at 515 (“The law permits the general public to examine the records held by roughly seventy federal administrative and regulatory agencies and fifteen executive branch departments,” as well as “government-controlled corporations.”); *see also All Agencies*, FOIA.GOV, <https://www.foia.gov/glance.html> (last visited Dec. 26, 2017). Anyone can make a request, and the requester is not obligated to elaborate the reasons for the request or explain why the requested records should be disclosed. *See* Halstuk & Chamberlin, *supra* note 2, at 516. Furthermore, what counts as a “record” has been evaluated by both the statute and the courts, and includes, regardless of format, items such as include “reports, letters, manuals, photos, films and sound recordings.” *Id.*; *see* Freedom of Information Act, 5 U.S.C. § 552 (2012), *amended by* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048. For a comprehensive breakdown of the process for a FOIA request, *see FOIA How To*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/transparency/foia-how-to> (last visited Dec. 26, 2017).

<sup>40</sup> In order to balance the expansive public access against privacy interests, Congress also established nine statutory exemptions that cover areas of information that agencies are not obligated to produce. *See* 5 U.S.C. § 552(b)(1–9); *see also* Cox, *supra* note 1, at 391–92; Halstuk & Chamberlin, *supra* note 2, at 516. Exemption 1 applies to classified national security information; exemption 2 to “[i]nformation related solely to the internal personnel rules and practices of an agency”; exemption 3 to “[i]nformation that is prohibited from disclosure by another federal law”; exemption 4 to “[t]rade secrets or [confidential/privileged] commercial or financial information”; exemption 5 to “[p]rivileged communications within or between agencies”; exemption 6 applies to personal information; exemption 7 to law enforcement information; exemption 8 to “[i]nformation that concerns the supervision of financial institutions”; and exemption 9, to “[g]eological information on wells.” *Frequently Asked Questions: What are FOIA Exemptions?*, FOIA.GOV, <https://www.foia.gov/faq.html#exemptions> (last visited Dec. 26, 2017).

<sup>41</sup> *See infra* Part II and cases cited.

<sup>42</sup> *See* U.S. DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, LITIGATION CONSIDERATIONS 9–10 (Nov. 26, 2013) [hereinafter DEP’T OF JUSTICE, LITIGATION CONSIDERATIONS], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/litigation-considerations.pdf#p9> (explaining that a “requester can bring his or her action in the district where the requester resides, the district where the requester has his or her principle place of business, the district where the records are located, or the District of Columbia”). However,

“[w]hen a requester sues in a jurisdiction other than the District of Columbia, . . . he is obliged to allege the nexus giving rise to proper venue in that other jurisdiction. Largely due to the statutory designation of the District of Columbia as an appropriate forum for any FOIA action, the District Court for the District of Columbia and the D.C. Circuit have, over the years, decided a great many of the leading cases under the

While FOIA has been amended a number of times over the years, there are two amendments that warrant particular attention.<sup>43</sup> In 1996, Congress passed the Electronic Freedom of Information Act Amendments, which, for the first time, incorporated electronic records into FOIA.<sup>44</sup> These amendments implemented the standard for database searches, encouraging agencies to use their databases to respond to FOIA requests when feasible.<sup>45</sup> This encouragement had a stated limit: agencies were not compelled to conduct requested FOIA searches if they would adversely affect the agency's database.<sup>46</sup>

Most recently, Congress passed the FOIA Improvement Act of 2016, which included a number of reforms aimed at improving access to government records, such as requirements that agencies give requesters a minimum of ninety days to file an administrative appeal and publish electronically records that have been requested three or more times.<sup>47</sup>

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FOIA.”

*Id.* (internal citations omitted); *see also* Matlack, Inc. v. EPA, 868 F. Supp. 627, 630 (D. Del. 1994) (“The United States Court of Appeals for the District of Columbia Circuit has long been on the leading edge of interpreting the parameters of what a federal agency must disclose and may withhold consistent with the terms of FOIA.”).

<sup>43</sup> *See, e.g.*, Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524; Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1561–64.

<sup>44</sup> *See* Electronic Freedom of Information Act Amendments § 3; *see also* DEP’T OF JUSTICE, INTRODUCTION, *supra* note 37, at 8.

<sup>45</sup> *See Office of Information Policy: FOIA Update: Congress Enacts FOIA Amendments*, U.S. DEP’T JUSTICE (Jan. 1, 1996) [hereinafter *FOIA Update: Amendments*, U.S. DEP’T OF JUSTICE], <https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments> (pointing out that the amendments “promote[d] electronic database searches and encourage[d] agencies to expend new efforts in order to comply with the electronic search requirements of particular FOIA requests”).

<sup>46</sup> *See* 5 U.S.C. § 552(a)(3)(C) (2012) (“In responding . . . to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency’s automated information system.”); *see also* *FOIA Update: Amendments*, U.S. DEP’T OF JUSTICE, *supra* note 45. When FOIA requests involve large database searches, courts often consider the potential for significant interference as well as an agency’s undue burden. *See, e.g.*, Nat’l Sec. Counselors v. CIA, 898 F. Supp. 2d 233, 271 n.26 (D.D.C. 2012); *Stewart v. U.S. Dep’t of Interior*, 554 F.3d 1236, 1243–44 (10th Cir. 2009); *Am. Small Bus. League v. U.S. Small Bus. Admin.*, No. C 08-00829, 2008 WL 3977780, at \*4–5 (N.D. Cal. Aug. 26, 2008). The Electronic Freedom of Information Act Amendments also amended FOIA so that it required agencies to respond to FOIA requests in the format requested, giving—in this area at least—more deference to the requester instead of the agency. *See FOIA Update: Amendments*, U.S. DEP’T OF JUSTICE, *supra* note 45 (noting that by allowing the requester to select the form of disclosure, the amendments “overrule[d] any precedent such as *Dismukes v. Department of the Interior*, 603 F. Supp. 760, 763 (D.D.C. 1984), which [held] to the contrary”).

<sup>47</sup> *See* FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538; *see also* Aaron Mackey, *Congress Gives FOIA a Modest but Important Update for Its 50<sup>th</sup> Birthday: 2016 in Review*, ELEC. FRONTIER FOUND. (Dec. 28, 2016), <https://www.eff.org/deeplinks/2016/12/congress-gives-foia-modest-important-update-its-50th-birthday> (noting that the reform bill mandated the creation of an “[a]ll-in-[o]ne FOIA [p]ortal” and set a twenty-five year time limit on “agencies’ claims that records would disclose internal decision-making”); *Office of Information Policy: OIP Summary of the FOIA Improvement Act of 2016*, U.S. DEP’T JUSTICE, <https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016> (last updated Aug. 17,



Significantly, it codified a “presumption of disclosure.”<sup>48</sup> Previously, each president’s administration had issued its own varying directives to agencies, from encouraging the withholding of records to promoting proactive disclosure.<sup>49</sup> With this amendment, agencies must start from a position of disclosure and only withhold information if there is a foreseeable harm to an interest protected by one of the nine exemptions.<sup>50</sup> It is unclear as of yet how the presumption in favor of disclosure and other reforms will practically impact FOIA cases, but it is certainly a positive step forward.<sup>51</sup>

As it stands, the case law—particularly undue burden case law—is largely in the agency’s favor. This results from the application of outdated standards by a judiciary not well-versed in ESI.<sup>52</sup> This Note seeks to unravel and resolve the issues surrounding the undue burden claim by proposing alternative analyses for courts considering whether and when agencies’ burden arguments overcome the underlying openness and transparency goals of FOIA.<sup>53</sup>

## II. ANALYSIS

### A. *Understanding the Development of “Undue Burden” Case Law*

Since FOIA was drafted, Congress recognized that increased access to government records would create more work for government

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2016).

<sup>48</sup> President of the United States, Memorandum of January 21, 2009, 74 Fed. Reg. 4683 [hereinafter Obama FOIA Memorandum] (issued by President Obama on his first day in office); Mackey, *supra* note 47 (“FOIA now explicitly limits officials’ discretion to withhold records by requiring agencies to disclose them by default, with a couple of exceptions.”).

<sup>49</sup> See Shkabatur, *supra* note 1, at 89–90. Compare John Ashcroft, Attorney General of the United States, Memorandum for Heads of All Federal Departments and Agencies (Oct. 12, 2001), <https://www.justice.gov/archive/oip/011012.htm>, with Obama FOIA Memorandum, *supra* note 48.

<sup>50</sup> 5 U.S.C. § 552(b)(8)(A) (“An agency shall (i) withhold information under this section only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law; and (ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible . . .”).

<sup>51</sup> See Mackey, *supra* note 47.

<sup>52</sup> See *infra* Sections II.A, II.B. If an agency makes an undue burden claim that is properly supported, as it is here, courts typically defer to the agency. See *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (holding that agencies must “provide [a] sufficient explanation as to why such a search would be unreasonably burdensome”).

<sup>53</sup> See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“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.”).

agencies.<sup>54</sup> Congress and the courts have responded to this concern for governmental efficiency by creating both ex ante and ex post checks on FOIA requests.<sup>55</sup> The first check is statutory: FOIA requires FOIA requests to reasonably describe the records sought.<sup>56</sup> The second—the undue burden rule—is a judicial creation modeled on the first.<sup>57</sup>

### 1. Ex Ante: The Requirement That Requests Reasonably Describe the Records Sought

In order to shield agencies from compelled compliance with vague or unclear FOIA requests, Congress requires FOIA requests to reasonably describe the records sought.<sup>58</sup> Given that government agencies are still expected to carry on with their normal course of business, courts often defer to agencies' claims that searching for, reviewing, and producing requested records would be an additional task for already overworked and underfunded agencies.<sup>59</sup>

Setting such a requirement on the request itself serves as an initial protection against overly broad requests as it calls on *requesters* to

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<sup>54</sup> See H.R. REP. NO. 89-1497, at 1 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2418 (“So that there would be no undue burden on the operations of Government agencies, reasonable access regulations may be established and fees for record searches charged as is required by present law.”); S. REP. NO. 89-813, at 42 (considering the “time and expense” necessary for agencies to comply with FOIA requirements).

<sup>55</sup> See 5 U.S.C. § 552(a)(3)(A); *Am. Fed’n of Gov’t Emps., Local 2782 v. U.S. Dep’t of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (“An agency need not honor a request that requires ‘an unreasonably burdensome search.’” (quoting *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978))).

<sup>56</sup> See 5 U.S.C. § 552(a)(3)(A); *Yeager v. Drug Enf’t Admin.*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (“The linchpin inquiry is whether the agency is able to determine ‘precisely what records [are] being requested.’”) (quoting S. REP. NO. 93-854, at 10 (1974)); *Marks v. U.S. Dep’t of Justice*, 578 F.2d 261, 263 (9th Cir. 1978) (defining a reasonable description as one that “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” (quoting H.R. REP. NO. 93-876, at 6 (1974))). *Marks* further noted that although this requirement could be used by agencies as a “loophole, . . . sweeping requests” did not require compliance. *Id.*

<sup>57</sup> See DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, PROCEDURAL REQUIREMENTS 25 (Sept. 4, 2013) [hereinafter DEP’T OF JUSTICE, PROCEDURAL REQUIREMENTS], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf#p22> (identifying the undue burden standard as a “corollary to the ‘reasonably described’ inquiry” (quoting *Nation Magazine*, 71 F.3d at 892)).

<sup>58</sup> See 5 U.S.C. § 552(a)(3)(A) (“Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records . . . shall make the records promptly available to any person.”); *Assassination Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), *aff’d*, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990).

<sup>59</sup> See *Am. Fed’n of Gov’t Emps.*, 907 F.2d at 209 (finding that agencies were under no obligation to respond to FOIA requests that would “require the agency to locate, review, redact, and arrange for [the] inspection [of] a vast quantity of material”).

carefully draft their requests.<sup>60</sup> Not only does the requirement limit the scope of the request, but it also ensures that the responding agency knows exactly what records the requester is seeking.<sup>61</sup> When requesters submit requests that are too broad and lack particularity, courts find agencies' lack of production warranted.<sup>62</sup>

The level of particularity required is not defined in the statute, so courts have determined the level of particularity required for a request that reasonably describes the records sought.<sup>63</sup> For example, a FOIA request that asks for "any and all records" will likely be found to be too broad as it does not provide agency employees with any idea of where to start their search.<sup>64</sup> Courts have found other similarly expansive phrases

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<sup>60</sup> See *Bloeser v. U.S. Dep't of Justice*, 811 F. Supp. 2d 316, 321 (D.D.C. 2011) ("Because FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters, it is the requester's responsibility to frame requests with sufficient particularity to enable the searching agency to determine precisely what records are being requested." (quoting *Assassination Archives & Research Ctr.*, 720 F. Supp. at 219 (citation omitted))); *Dale v. IRS*, 238 F. Supp. 2d 99, 105 (D.D.C. 2002) (holding that requester's failure to reasonably describe the records sought amounted to an impermissible "all-encompassing fishing expedition . . . at taxpayer expense").

<sup>61</sup> See *Assassination Archives & Research Ctr.*, 720 F. Supp. at 219; see also *Armstrong v. Bush*, 139 F.R.D. 547, 553 (D.D.C. 1991) (finding that a FOIA request is reasonable "if a professional employee of the agency familiar with the subject matter can locate the records with a 'reasonable amount of effort'" (quoting *Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce*, 632 F. Supp. 1272 (D.D.C. 1986) (citation omitted))).

<sup>62</sup> See, e.g., *Gaunce v. Burnett*, No. 85-5995, 1988 WL 63760, at \*1 (9th Cir. June 9, 1988) (finding that the FOIA request that "sought every scrap of paper wherever located within the agency" relating to the requester's "activity in the world of aviation" did not reasonably describe the records sought). Compare *Freedom Watch, Inc. v. CIA*, 895 F. Supp. 2d 221, 228-29 (D.D.C. 2012) (holding that the request for "anything relating to" multiple nations mentioned in articles did not meet the standard of specificity required in FOIA requests), with *Moore v. FBI*, 283 F. App'x 397, 399 (7th Cir. 2008) (holding that the requester's "relatively standard demand for records from the FBI's criminal investigation of him is not obviously deficient" in specificity).

<sup>63</sup> See, e.g., *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (holding that despite the request for over one million documents, the request was worded so that the DEA "knew 'precisely' which of its records had been requested and the nature of the information sought from those records;" and therefore, the agency could not avoid compliance); *Pinson v. U.S. Dep't of Justice*, 70 F. Supp. 3d 111, 121-22 (D.D.C. 2014) (finding that the request for "any and all information" with requester's name was not unduly broad); *Freedom Watch, Inc. v. Dep't of State*, 925 F. Supp. 2d 55, 61 (D.D.C. 2013) (holding that request for "all records that refer or relate to . . . [a]ny and all communications to or from President Obama" were "fatally overbroad" (alteration in original)); *Judicial Watch v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 23-28 (D.D.C. 2000) (determining that a request for records regarding the "contact" of individuals with "companies . . . doing or conducting business in any way" with China did not reasonably describe the records sought because the Requester failed to "state its request with sufficient particularity [and] declined the [agency's] repeated attempts [to] clarify the request"); see also DEP'T OF JUSTICE, PROCEDURAL REQUIREMENTS, *supra* note 57, at 22 ("The key to determining whether a request satisfies the first requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them."). But see *Doolittle v. U.S. Dep't of Justice*, 142 F. Supp. 2d 281, 285 (N.D.N.Y. 2001) (finding that requester's failure to identify, by date, the documents requested was insufficient cause for the agency's refusal to search for the documents).

<sup>64</sup> See, e.g., *Dale*, 238 F. Supp. 2d at 104-05 (finding that a FOIA request that sought "any

problematic, determining that such requests would require agencies to predict or imply the requester's intent.<sup>65</sup>

## 2. Ex Post: The Undue Burden Rule

The same concern for the continued proper functioning of government agencies that created the "reasonably describe" rule also led courts to recognize agencies' undue burden claims.<sup>66</sup> Courts have held that government agencies are excused from having to conduct unreasonably burdensome searches if they would impede an agency's ability to conduct its regular course of business.<sup>67</sup>

In contrast with the first requirement, this protective measure governs *searches*, not requests.<sup>68</sup> While searches that would be unduly burdensome are often the result of overly broad requests, it is not always the case, as there is no fixed standard for what constitutes an unduly burdensome search.<sup>69</sup> Instead, courts conduct a case-by-case application

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and *all* documents . . . that refer or relate in any way" to the requester did not provide a suitable description of the records (emphasis in original)).

<sup>65</sup> See, e.g., *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010) (holding that plaintiffs could not "rely on the argument that the CIA should have known what information Plaintiffs were seeking"); *Latham v. U.S. Dep't of Justice*, 658 F. Supp. 2d 155, 161 (D.D.C. 2009) (determining that the request for "any records . . . that pertain in any form or sort to [plaintiff]" was too broad and would impose an undue burden on the agency); *James Madison Project v. CIA*, No. 1:8-cv-1323, 2009 WL 2777961, at \*10 (E.D. Va. Aug. 31, 2009) (holding that a FOIA request for "all CIA documents pertaining to . . . [t]he indexing and organizational structure of all CIA Systems of Records subject to FOIA" was overbroad "because the term 'pertaining to' is synonymous to the term 'relating to'" and that "unfairly places the onus of nonproduction on the recipient of the request" (quoting *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 727 F. Supp. 35 36 n.2 (D. Mass. 1989))); *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003) ("[A]n agency processing a FOIA request is not required to divine a requester's intent." (citing *Kowalczyk v. U.S. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996))); *Nurse v. Sec'y of the Air Force*, 231 F. Supp. 2d 323, 330 (D.D.C. 2002) (holding that the agency was not required to comply with a FOIA request that was insufficiently specific, as "the agency is not required to exercise 'clairvoyant capabilities' to determine the nature of the plaintiff's request" (citing *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985))); see also DEP'T OF JUSTICE, PROCEDURAL REQUIREMENTS, *supra* note 57, at 24.

<sup>66</sup> See DEP'T OF JUSTICE, PROCEDURAL REQUIREMENTS, *supra* note 57, at 25.

<sup>67</sup> See, e.g., *Assassination Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989) ("[I]t 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. The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." (citing *Yeager v. Drug Enf't Admin.*, 678 F.2d 315 (D.C. Cir. 1982), *aff'd*, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990))).

<sup>68</sup> See *Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) ("An agency need not honor a request that requires 'an unreasonably burdensome search.'" (quoting *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir.1978))).

<sup>69</sup> Compare *U.S. Dep't of Health & Human Servs.*, 727 F. Supp. at 36 n.2 (finding that the request for all records "relating to" a particular subject was far too broad), with *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 889-92 (D.C. Cir. 1995) (holding that a FOIA

of the undue burden doctrine, leading to widely different results.<sup>70</sup>

Courts typically consider two factors when determining whether compliance with a request would impose an undue burden. On one hand, courts analyze the potential expansiveness of the language within the request at issue.<sup>71</sup> By honing in on the language of the FOIA request, courts also ensure that the citizenry is using the FOIA mechanism for its proper purpose: to promote transparency,<sup>72</sup> as opposed to “scavenger hunts” or exploratory missions for agency files.<sup>73</sup> It is when these FOIA requests ask for large swaths of information that courts become leery of requiring the responsive agency to devote large amounts of time and resources to search for the responsive records.<sup>74</sup>

On the other hand, courts consider—and more often than not, accept—the agency’s determination of the effort and manpower that

request that properly described the records sought would impose an unreasonable burden on the agency as it required a “search through 23 years of unindexed files”), *and* *Schrecker v. U.S. Dep’t of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) (“[T]o require an agency to hand search through millions of documents is not reasonable and therefore not necessary . . .”), *aff’d* 349 F.3d 657 (D.C. Cir. 2003).

<sup>70</sup> *See, e.g.*, *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038–39 (7th Cir. 1998) (finding that it would be an undue burden to require the agency to identify and review millions of pages, which, per the government’s estimate, would take eight work-years); *Cuban v. SEC*, 795 F. Supp. 2d 43, 48–51 (D.D.C. 2011) (holding that a manual search of “206 linear feet of cabinet space” would be an unduly burdensome search). *But see* *Nation Magazine*, 71 F.3d at 892 (determining that a search for a specific memorandum would not be unduly burdensome); *Dayton Newspapers, Inc. v. Dep’t of the Air Force*, 35 F. Supp. 2d 1033, 1034–35 (S.D. Ohio 1998) (concluding that fifty-one hours of assembly time was a “small price to pay” given FOIA’s presumption of disclosure).

<sup>71</sup> *See* *Ayuda, Inc. v. Fed. Trade Comm’n*, 70 F. Supp. 3d 247, 275 (D.D.C. 2014) (recognizing that an agency “is not required to comply with a request that is so broad as to impose an unreasonable burden upon the agency” (quoting *Am. Fed’n of Gov’t Emps., Local 2782*, 907 F.2d at 209)). Of course, this ties the undue burden determination to the “reasonably detailed” request requirement. *See supra* Section II.A.1.

<sup>72</sup> *See* *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enft Agency (NDLON I)*, 877 F. Supp. 2d 87, 93 (S.D.N.Y. 2012) (taking note that the plaintiffs in the case “did not file this lawsuit seeking information about the program solely out of curiosity or a commitment to government transparency”); *see also* *Am. Fed’n of Gov’t Emps.*, 907 F.2d at 209 (“The unreasonableness of the attendant burden is only more obvious when one realizes that it is largely unnecessary to the appellants’ purpose.”).

<sup>73</sup> *See* *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68, 70 (D.C. Cir. 1990) (finding that agencies were not required to “agency search every record system” in the face of likely futility (citing *Meeropol v. Meese*, 790 F.2d 942, 952–53 (D.C. Cir. 1986))).

<sup>74</sup> *See* *Trentadue v. FBI*, 572 F.3d 794, 797 (10th Cir. 2009) (“Although FOIA might be read to demand that an agency provide every nonexempt requested document regardless of the cost of locating it, we doubt that Congress would have chosen to impose ‘unreasonable’ burdens on agencies in that regard.”); *Freeman v. U.S. Dep’t of Justice*, No. 90-2754, 1991 U.S. Dist. LEXIS 19214, at \*5 (D.D.C. Oct. 16, 1991) (“The FOIA does not require that the government go fishing in the ocean for fresh water fish.”). *But see* *Office of Information Policy: FOIA Update: FOIA Counselor: Questions & Answers*, U.S. DEP’T JUSTICE (Jan. 1, 1983), <https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-21> (“The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not ‘reasonably describe’ records within the meaning of 5 U.S.C. § 552(a)(3)(A).”).

would be required to comply with the request.<sup>75</sup> Courts make these evaluations by looking to the detailed explanations agencies must provide that lay out the reasons for their undue burden claims.<sup>76</sup>

Despite the fact that FOIA has a codified presumption of disclosure,<sup>77</sup> courts' deference to agencies' estimates of the time and effort required to conduct a search undermines that openness.<sup>78</sup> The presumption of good faith that these agency affidavits are given is difficult to overcome, particularly without inside knowledge.<sup>79</sup> However, it is clear that, in accepting agencies' undue burden arguments, courts aim to protect government resources.<sup>80</sup> Courts do not want federal agencies to get bogged down by massive FOIA requests and expend their resources searching for records instead of performing the usual tasks those agencies were created to accomplish.<sup>81</sup>

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<sup>75</sup> See *People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 13 (D.D.C. 2006) (requiring an agency to support its claim of undue burden by providing information such as the time and expense of a proposed search in order); see also *Nation Magazine*, 71 F.3d at 892 (holding that a FOIA request requiring the agency to "search through 23 years of unindexed files" would be an unreasonable burden); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (finding that the request for all records "relating to" a particular subject was far too broad). *But see* *Ruotolo v. Dep't of Justice, Tax Div.* 53 F.3d 4, 9–10 (2d Cir. 1995) (determining that the agency having to search through 803 files in order to comply with a request was not "unreasonably burdensome").

<sup>76</sup> See *People for Am. Way Found.*, 451 F. Supp. 2d at 13; see also *Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (declaring that the agency must be able to provide, with some specificity, an explanation as to why the search would be unduly burdensome); *infra* Section II.A.3.

<sup>77</sup> See S. REP. NO. 114-4, at 3–4, 7–8 (2016) ("The FOIA Improvement Act codifies the policy established for releasing Government information under FOIA by President Obama . . . [which] mandates that *an agency may withhold information only if it reasonably foresees a specific identifiable harm* to an interest protected by an exemption, or if disclosure is prohibited by law. This standard is commonly referred to as the 'Foreseeable Harm' standard, or the 'Presumption of Openness.'" (emphasis added)); see also Obama FOIA Memorandum, *supra* note 48.

<sup>78</sup> See *Ayuda, Inc. v. FTC*, 70 F. Supp. 3d 247, 259–60 (D.D.C. 2014) ("A court may award summary judgment in a FOIA case based *solely* upon the information provided in agency affidavits or declarations if they describe 'the justifications for nondisclosure with reasonably specific detail . . .'" (emphasis added)); Plaintiffs' Opposition, ND LON II, *supra* note 24, at 34–54.

<sup>79</sup> See *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981) (noting that "[a]gency affidavits enjoy a presumption of good faith," which will only be doubted if requester submits sufficient evidence to the contrary); *Long v. ICE*, 149 F. Supp. 3d 39, 57 (D.D.C. 2015) (holding that plaintiff's outside expert could not rebut the good faith afforded to the agency's declaration).

<sup>80</sup> See H.R. REP. No. 89-1497, at 1 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2418.

<sup>81</sup> See *Assassination Archives & Research Ctr., Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), *aff'd*, No. 89-5414, 1990 WL 123924 (D.C. Cir. Aug. 13, 1990) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors."); see also *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999).

### 3. Proving a Defense of Undue Burden

Agencies have the burden of demonstrating to the court that they have met their obligations pursuant to FOIA or providing the court with a sufficient explanation as to why compliance with a FOIA request would be unduly burdensome.<sup>82</sup> In the latter case, the explanation often entails a tally of the number of hours and the amount of manpower that would be required to search the records, or the total number of records that would have to be searched to comply with the request (or some combination of the three).<sup>83</sup> Agencies often support their undue burden argument by submitting declarations from their FOIA compliance officers or other employees who can attest to the amount of effort the agency would be required to expend in order to comply with the request.<sup>84</sup>

*Pinson v. United States Department of Justice*<sup>85</sup> most clearly lays out the minimum amount of information that agencies must provide to support their undue burden claim: the amount of time the search would require; the expense of such a search; and the number of files that would have to be searched in order to comply with the FOIA request.<sup>86</sup>

Typically, government agencies rely on declarations from their information and technology officers or other staff to support their estimates of the time it would take to produce the requested records.<sup>87</sup> These declarations are given a presumption of good faith, and as long as

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<sup>82</sup> See *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (requiring agencies to “provide [a] sufficient explanation as to why such a search would be unreasonably burdensome”); *Ayuda, Inc.*, 70 F. Supp. 3d at 259–60; see also *Pub. Citizen, Inc. v. U.S. Dep’t of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (holding that “without more specification as to why a search certain to turn up responsive documents would be unduly burdensome, [the agency’s] claim must be rejected”).

<sup>83</sup> See *Wolf v. CIA*, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (requiring agency to support its claim of undue burden by providing information such as “the time and expense of a proposed search”).

<sup>84</sup> See *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200–01 (D.C. Cir. 1991) (concluding that the SEC’s affidavits were sufficient to support the agency’s claims and granting summary judgment on behalf of the agency).

<sup>85</sup> 80 F. Supp. 3d 211 (D.D.C. 2015).

<sup>86</sup> See *id.* at 215–17. Here, the Department of Justice submitted a declaration stating that “all Civil Division files would need to be searched in order to locate documents responsive to Mr. Pinson’s request and that [s]uch a search would constitute an unreasonable and burdensome effort . . . not required under [FOIA].” *Id.* at 217 (alteration in original). The court ultimately rejected the Department’s claim, finding that the declaration did not provide an “estimate of the time required to conduct Mr. Pinson’s requested search, the cost of such a search, or the number of files that would have to be manually searched.” *Id.*; see also *Wolf*, 569 F. Supp. 2d at 9 (noting that “[c]ourts often look for a detailed explanation by the agency regarding the time and expense of a proposed search in order to assess its reasonableness” (citing *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1979))).

<sup>87</sup> See *Pinson*, 80 F. Supp. 3d at 215–16; see also *Ayuda, Inc.*, 70 F. Supp. 3d at 259–60 (“A court may award summary judgment in a FOIA case based solely upon the information provided in agency affidavits or declarations . . .”).

they provide reasonably specific detail, are uncontroverted, and are submitted in good faith, they generally serve as sufficient justification for the agency's nondisclosure.<sup>88</sup> Courts rely on these affidavits to ensure that agencies are not overburdened by FOIA requests to the point that they interfere with the agency's regular functioning.<sup>89</sup>

In general, courts have accepted agencies' estimates at face value for the explicit purpose of protecting agency resources.<sup>90</sup> For example, in *Goland v. CIA*,<sup>91</sup> the CIA submitted an affidavit written by the agency's privacy coordinator to support its claim that the search required to comply with the FOIA request would be unreasonably burdensome.<sup>92</sup> The affidavit claimed that compliance with the request

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<sup>88</sup> See *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007); *SafeCard Servs., Inc.*, 926 F.2d at 1200 (noting also that the presumption could not be "rebutted by 'purely speculative claims about the existence and discoverability of other documents'" (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981))); see also *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488–89 (2d Cir. 1999) (noting the standard for agency affidavits); *Pinson*, 80 F. Supp. 3d at 217 (observing that declarations that do not "offer [an] estimate of the time required to conduct [the] requested search, the cost of such a search, or the number of files that would have to be manually searched" will be rejected by the court).

<sup>89</sup> See *Strum v. EPA*, Nos. 91-35404, 91-35577, 1992 WL 197660, at \*1 (9th Cir. 1992) (finding that the agency was justified in denying FOIA requests that would "place an inordinate burden on agency resources" (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978))); *Office of Information Policy: FOIA Update: OIP Guidance: Determining the Scope of a FOIA Request*, U.S. DEP'T JUSTICE (Jan. 1, 1995), <https://www.justice.gov/oip/blog/foia-update-oip-guidance-determining-scope-foia-request> ("[F]or any agency that currently has a heavy backlog of pending FOIA requests, an additional consideration is the importance of its efforts to deal with that backlog and to devote its limited resources to serving its large volume of FOIA requesters as efficiently and economically as reasonably possible. The efficiency of administrative communications with FOIA requesters regarding any scope-of-request matters is especially important to such agencies."). Most agencies are currently dealing with large FOIA backlogs. See Josh Gerstein, *State Department Cites "Crushing" Burden from Freedom of Information Act*, POLITICO (Apr. 2, 2015, 4:52 PM), <http://www.politico.com/blogs/under-the-radar/2015/04/state-department-cites-crushing-burden-from-freedom-of-information-act-204948>; Sophia Murguia, *Senate Committee Considers What's Next for FOIA*, REPORTERS COMM. (July 13, 2016), <https://www.rcfp.org/browse-media-law-resources/news/senate-committee-considers-whats-next-foia>.

<sup>90</sup> See *Long v. ICE*, 149 F. Supp. 3d 39, 57 (D.D.C. 2015) ("FOIA requires courts to 'accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility . . . and reproducibility[.]'" (quoting 5 U.S.C. § 552(a)(4)(B) (alteration and emphasis in original))); *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 136 (D.D.C. 2015). Compare *Church of Scientology v. IRS*, 792 F.2d 146 (D.C. Cir. 1986) (requiring the agency to submit sufficiently specific affidavits), with *ACLU of N. Cal. v. U.S. Dep't of Justice*, No. 12-cv-04008-MEJ, 2014 WL 4954121, at \*8 (N.D. Cal. Sept. 30, 2014) (dismissing an agency's claims that responding to a FOIA request would be too burdensome), *Elec. Privacy Info. Ctr. v. U.S. Dep't of Just.*, No. 05-845, 2005 U.S. Dist. LEXIS 40318, at \*5 (D.D.C. Nov. 16, 2005) (ordering the Department of Justice to process and produce "1,500 pages every 15 calendar days," so that it would be in compliance with a FOIA request), and *Judicial Watch, Inc. v. U.S. Dep't of Energy*, 191 F. Supp. 2d 138, 140–41 (D.D.C. 2002) (ordering the Environmental Protection Agency to review over 19,000 pages of potentially responsive records and produce them within one month).

<sup>91</sup> 607 F.2d 339 (D.C. Cir. 1978).

<sup>92</sup> *Id.* at 353.



would require a page-by-page search of a large record storage space.<sup>93</sup> The District of Columbia Circuit found the officer’s affidavit to be sufficiently detailed and that the CIA would be unduly burdened if it had to conduct such a search.<sup>94</sup> The court also dismissed the plaintiff’s attempts to question the agency’s good faith.<sup>95</sup> This approach is emblematic of the traditional deference given to an agency’s determination of what would be required to conduct a search.<sup>96</sup>

While deference to an agency’s estimates of its burden is certainly the norm, some courts have been willing to exhibit a degree of skepticism in response to an agency’s estimates.<sup>97</sup> Even before the age of ESI, the Northern District of Illinois found the undue burden defense was invalid precisely because the statute already required FOIA requests to be reasonable.<sup>98</sup> The court stressed that the problem was *ex-ante*: the FOIA request did not reasonably describe the records sought.<sup>99</sup> More recently, the Northern District of California recognized the intent behind the undue burden claim—the efficiency of government agencies—but maintained that the agency could not claim an undue burden simply because it would have to conduct an expansive search.<sup>100</sup> These cases, however, are the exception.<sup>101</sup>

#### B. “Too Big to FOIA”: Undue Burden and Database Searches

As agency recordkeeping has progressed into the digital age, the

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<sup>93</sup> *Id.* (noting that the search entailed a “page-by-page search [of] 84,000 cubic feet of documents”).

<sup>94</sup> *Id.* Compare *id.* (“We think that [the Agency’s Information and Privacy Coordinator’s] sworn affidavits on their face are plainly adequate to demonstrate the thoroughness of the CIA’s search for responsive documents. The affidavits give detailed descriptions of the searches undertaken, and a detailed explanation of why further searches would be unreasonably burdensome.”), with *Nation Magazine v. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995) (finding in favor of plaintiffs “[b]ecause [the agency] ha[d] not submitted sufficiently detailed affidavits to allow [the court] to review the adequacy of their search”).

<sup>95</sup> See *Goland*, 607 F.2d at 353.

<sup>96</sup> See *Scudder v. CIA*, 25 F. Supp. 3d 19, 39 (D.D.C. 2014) (noting that “substantial deference is due an agency[]” as per 5 U.S.C. § 552(a)(4)(B), which “requires courts to defer to agencies’ determinations of their own technical capabilities and the burden placed on them in complying with requests for documents in specific formats”).

<sup>97</sup> See *Hall v. CIA*, 881 F. Supp. 2d 38, 53 (D.D.C. 2012); *Dayton Newspapers, Inc. v. Dep’t of the Air Force*, 35 F. Supp. 2d 1033, 1035 (S.D. Ohio 1998).

<sup>98</sup> See *Ferguson v. Kelly*, 455 F. Supp. 324, 326 (N.D. Ill. 1978) (holding that an agency’s claim that “response to a FOIA request may be time-consuming or burdensome is not a valid defense.” (citing *Wellford v. Hardin*, 315 F. Supp. 175 (D. Md. 1970), *aff’d*, 444 F.2d 21 (4th Cir. 1971))).

<sup>99</sup> See *id.*

<sup>100</sup> See *ACLU of N. Cal. v. U.S. Dep’t of Justice*, No. 12-cv-04008-MEJ, 2014 WL 4954121, at \*8 (N.D. Cal. Sept. 30, 2014) (stating that the court was “not persuaded [by the] magnitude of the search” claimed by the agency and supported by the agency’s declarations).

<sup>101</sup> See *supra* text accompanying notes 90–96.

undue burden rule has expanded to database searches as well.<sup>102</sup> As there is no clear-cut standard for what constitutes an undue burden for record searches in general,<sup>103</sup> the standard for what constitutes an undue burden in database searches is equally varied.<sup>104</sup> This variance occurs despite FOIA's mandate that agencies comply with requests for database searches unless they would cause technical problems.<sup>105</sup>

Courts, however, have not adapted their analysis to coincide with the way in which records are now kept.<sup>106</sup> Before the digitalization of records, upon receiving a request, a FOIA officer or agency employee would have to manually search through physical records—not always in one centralized location—to find the ones responsive to the FOIA request.<sup>107</sup> Now, however, the process is simplified: a FOIA compliance officer must craft search terms that will best find the appropriate files and then conduct the search on the agency database.<sup>108</sup>

Given the size of governmental agencies and the ease and quantity with which electronic records are created on a daily basis, a search on a federal agency's database can result in hundreds of thousands of records.<sup>109</sup> This means that compliance with a FOIA request, which requires the search for and review of responsive documents, is greatly

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<sup>102</sup> See, e.g., *Shapiro v. CIA*, 170 F. Supp. 3d 147, 156 (D.D.C. 2016); *ACLU of N. Cal.*, 2014 WL 4954121, at \*8–9; Defendants' Memorandum of Law in Support of Summary Judgment at 27–28, *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't*, 236 F. Supp. 3d 810 (S.D.N.Y. 2016) (No. 16 Civ. 387) [hereinafter Defendants' Memorandum, NDLOI II].

<sup>103</sup> See *supra* Section II.A.2.

<sup>104</sup> See, e.g., *Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (holding that a portion of plaintiff's requests "might identify the documents requested with sufficient precision to enable the agency to identify them," but the "requests are so broad as to impose an unreasonable burden upon the agency," since it would require "the agency to locate, review, redact, and arrange for inspection a vast quantity of material"). *But see Yeager v. DEA*, 678 F.2d 315, 322, 326 (D.C. Cir. 1982) (finding that plaintiff's request for a computerized search of over a million records was permissible).

<sup>105</sup> See 5 U.S.C. § 552(a)(3)(C) (2012) ("In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.").

<sup>106</sup> See Sam Thielman, *Justice Department "Uses Aged Computer System to Frustrate FOIA Requests"*, *GUARDIAN* (July 16, 2016, 8:00 AM), <https://www.theguardian.com/politics/2016/jul/16/justice-department-freedom-of-information-computer-system>.

<sup>107</sup> See, e.g., *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *Biberman v. FBI*, 528 F. Supp. 1118, 1122 (S.D.N.Y. 1982).

<sup>108</sup> See *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 122, 140–41 (D.D.C. 2015); *Cox, supra* note 1, at 408.

<sup>109</sup> See *NDLOI I*, 877 F. Supp. 2d 87, 94 (S.D.N.Y. 2012) (observing that the database searches revealed "tens of thousands of responsive records"); *Stewart & Davis, supra* note 12, at 529 ("As the federal government moves away from paper documents and toward full electronic record-keeping and management, . . . record[s] [are] created by [] federal agency employee[s], such as an email or a memo, or even a line entered into a database."). Even when FOIA was drafted in 1966, Congress understood that government was both vast and expanding. See S. REP. No. 89-813, at 38 (1965).

expanded.<sup>110</sup> When the Department of State explained that a search on its database would require the agency to expend over 40,000 work hours, the District of Columbia District Court agreed that compliance with the FOIA request would be unduly burdensome.<sup>111</sup> As these claims become more commonplace, agencies will continue to use the existence of these large databases as a shield—making them “too big to FOIA.”<sup>112</sup>

### C. *Plaintiff's Experts*

Given the requirement that agencies must support their claims of undue burden, agencies often provide affidavits from internal FOIA officers or data technicians.<sup>113</sup> In an attempt to counter agencies' claims that electronic databases are simply too expansive or delicate to search,<sup>114</sup> plaintiffs have turned to experts to explain, in technical terms, how data can be efficiently and safely extracted without unduly burdening the agency.<sup>115</sup>

Despite the often ample qualifications of these experts, courts tend to reject the value of their opinions based on their lack of experience with the database in question.<sup>116</sup> In *Long v. Immigration & Customs Enforcement*,<sup>117</sup> for example, the agency submitted a declaration by the chief of their IT unit that detailed the reasons for why the search and production of the requested records was not possible.<sup>118</sup> In response, the

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<sup>110</sup> *Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (noting that producing records “require[s] the agency to locate, review, redact, and arrange for inspection a vast quantity of material”).

<sup>111</sup> *See Pinson v. U.S. Dep't of State*, No. 12-01872, 2015 WL 4910190, at \*3 (D.D.C. Aug. 17, 2015) (noting that defendant agency claimed a database search would “require the [agency] to expend 44,886 hours and \$1,256,808”).

<sup>112</sup> *See, e.g., Defendants' Memorandum, NDLON II, supra* note 102, at 29 (claiming that running the requested database search would result in “millions of pages” and therefore be unduly burdensome).

<sup>113</sup> *See Ayuda, Inc. v. FTC*, 70 F. Supp. 3d 247, 259–60 (D.D.C. 2014) (“A court may award summary judgment in a FOIA case based solely upon the information provided in agency affidavits or declarations . . . .”); *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 143 (D.D.C. 2013) (noting that “[t]he CIA devotes a substantial portion of its briefing and the majority of the [FOIA Officer's] Declaration to the contention that recognizing assignments would place an undue burden on the CIA's FOIA administrators”); *Hall v. CIA*, 881 F. Supp. 2d 38, 52–53 (D.D.C. 2012).

<sup>114</sup> *See Defendants' Memorandum, NDLON II, supra* note 102, at 29 (expressing concern that “even without any errors, [the agency] anticipates that the number of queries [to its database] may slow down the response time of the system, potentially to a pace that would render the system ineffective”).

<sup>115</sup> *See, e.g., Long v. ICE*, 149 F. Supp. 3d 39, 57–58 (D.D.C. 2015); *Plaintiff's Opposition, NDLON II, supra* note 24, at 37–53.

<sup>116</sup> *See Long*, 149 F. Supp. 3d at 57–58 (noting that plaintiff's expert, “limited by his lack of first-hand experience,” could not rebut the agency's declaration).

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* at 57.

plaintiff submitted a declaration by a software expert to rebut the agency's claims.<sup>119</sup> The District of Columbia District Court found that the plaintiff's affiant, although a database expert, was unable to challenge with sufficient specificity the assertions made by the agency's declarant.<sup>120</sup>

This position is adopted by other courts in other areas of FOIA case law.<sup>121</sup> The declarations or affidavits submitted by experts on plaintiffs' behalf are routinely disregarded because these experts are not currently, nor formerly, employees of the agency and therefore have no first-hand knowledge of the databases that would be used to search for responsive files.<sup>122</sup>

On a number of limited occasions, courts have given weight to a plaintiff's declaration when they raise sufficient concerns about the accuracy and good faith of agency affidavits.<sup>123</sup> Notably, declarations submitted by plaintiffs have been most effective when the plaintiffs have first-hand knowledge of the system in question.<sup>124</sup>

Of course, the decision to admit or exclude expert testimony is within a judge's discretion.<sup>125</sup> Therefore judges could find that there is potential danger in giving weight to the testimony of outside experts

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<sup>119</sup> See *id.* at 57–58.

<sup>120</sup> See *id.* (pointing to the fact that the plaintiff's expert lacked "first-hand experience" with the agency's database and operations, and his "observations about commercial databases in general" were insufficient).

<sup>121</sup> See *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 141 n.10 (D.D.C. 2015) (finding that the "adequacy of a federal agency's search for documents in response to a FOIA request is not a topic on which [the court] needs the assistance of an expert." (citing *Hall v. CIA*, 538 F. Supp. 2d 64, 72–73 (D.D.C. 2008))).

<sup>122</sup> See *Hall*, 538 F. Supp. 2d at 72 (noting that the plaintiff's expert "cannot speak to the truth of the events he alleges to have occurred, to which he has no personal knowledge"); see also *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 161 (D.D.C. 2004) (finding that the declaration of the plaintiff's expert was insufficient and "provide[d] no factual basis capable of controverting the factual support mounted by the [agency]"). Agencies have caught on and directly challenge requesters' use of outside experts. See Defendants' Reply, *NDLON II*, *supra* note 24, at 9 (using *Bigwood* and *Hall* to support their request for the court to disregard plaintiffs' expert).

<sup>123</sup> See *Scudder v. CIA*, 25 F. Supp. 3d 19, 39–41 (D.D.C. 2014) (finding that, "[t]aken as a whole, the plaintiff's serious allegations challenging the accuracy and veracity of the defendant's declarations, have raised sufficient concern to overcome the 'substantial weight' this Court must afford the defendant's declarations" (quoting 5 U.S.C. § 552(a)(4)(B) (2012))); see also 5 U.S.C. § 552(a)(4)(B) ("In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).").

<sup>124</sup> See *TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1196 (9th Cir. 2003) (reversing the lower court's dismissal of plaintiff's declarations, as they were "sufficient to raise a factual issue," and the declarant had experience with the electronic transmission of records from the federal government).

<sup>125</sup> See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997) (acknowledging the role of trial judges as "gatekeeper[s]" of evidence who can exclude expert testimony if they find that the expert's opinion is not supported by data).

who have no first-hand experience with the databases at issue.<sup>126</sup> Many agency databases are dealing with sensitive information or are at risk of a security breach, and judges prefer to err on the side of caution, even acknowledging that they are ill-equipped to make determinations affecting complex databases and ESI.<sup>127</sup> Instead of facilitating the review and availability of government documents, the use of databases have seemed to hinder it.

#### D. *Taking the Public Interest Under Consideration*

Undue burden case law, as explained above, can be highly specific and technical. Pulling back from this in-depth analysis, however, reveals that the undue burden claim is at odds with the original intent and driving force behind FOIA: the public’s interest in its government.<sup>128</sup>

Yet for a law created with such an intent, there is only one explicit mention of public interest in the entirety of the statute: it waives processing fees when the information requested is “in the public interest.”<sup>129</sup> Although not explicitly stated, FOIA also requires the consideration of the public interest when determining whether records are subject to the two privacy exemptions.<sup>130</sup> When both those issues have been raised in litigation, courts have applied balancing tests to weigh the public interest against the other consideration at issue.<sup>131</sup>

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<sup>126</sup> See *Long v. ICE*, 149 F. Supp. 3d 39, 57–58 (D.D.C. 2015).

<sup>127</sup> See *Levinthal v. Fed. Election Comm’n*, 219 F. Supp. 3d 1, 12 (D.D.C. 2016) (noting that “[j]udges are not cyber specialists, and it would be the height of judicial irresponsibility for a court to blithely disregard . . . a claimed risk’ of a cyber-attack or a security breach” (quoting *Long*, 149 F. Supp. 3d at 53) (alteration in original)). *But see* *Coldiron v. U.S. Dep’t of Justice*, 310 F. Supp. 2d 44, 49 (D.D.C. 2004) (noting that the deference given to agency affidavits “is not equivalent to acquiescence,” and even declarations invoking national security must provide a basis for the FOIA requester to contest, and the court to decide, the validity of the withholding.” (citing *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998))).

<sup>128</sup> See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); H.R. REP. NO. 89-1497, at 1 (1966), as reprinted in 1966 U.S.C.C.A.N. 2418, 2418.

<sup>129</sup> 5 U.S.C. § 552(a)(4)(A)(iii) (2012) (“Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” (emphasis added)).

<sup>130</sup> See 5 U.S.C. §§ 552(b)(6), (b)(7)(C); see also DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 6, 1–2 (Jan. 10, 2014) [hereinafter DEP’T OF JUSTICE, EXEMPTION 6], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf#p43> (noting that exemption 6 and 7(c), which protect privacy interests, require the court to consider the public interest in disclosure).

<sup>131</sup> See, e.g., *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (balancing the public interest in disclosure of documents against privacy interests, pursuant to FOIA Exemption 7(C)); *VoteHemp, Inc. v. Drug Enf’t Admin.*, 237 F. Supp. 2d 55 (D.D.C. 2002) (balancing the commercial and public interest interests of the requesters to determine whether a public interest fee waiver applied).

When determining if a requester is eligible for a fee waiver, a court must determine whether disclosing the records requested would contribute to the goal of open government, and whether the requester has a commercial interest in the disclosure.<sup>132</sup> If the requester does have a commercial interest, courts will weigh it against the public interest in the information sought.<sup>133</sup>

The balancing required for privacy interests is more common, as it must always occur when evaluating the propriety of one of the privacy exemptions.<sup>134</sup> The statutory language itself requires balancing, leaving room for courts to consider factors on a case-by-case basis.<sup>135</sup> When an agency is called upon to justify its withholding of records pursuant to a privacy exemption—either Exemption 6 or 7(C)<sup>136</sup>—courts weigh the privacy interests protected by the exemptions against the public’s interest in disclosure.<sup>137</sup>

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<sup>132</sup> See *VoteHemp, Inc.*, 237 F. Supp. 2d at 58–59 (explaining that courts must “assess whether ‘the disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government,’ and whether [the requester] does ‘not have a commercial interest in the disclosure of the information sought.’” (quoting 5 U.S.C. § 552(a)(4)(A)(iii))). See generally DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, FEES AND FEE WAIVERS 22–43 (Aug. 23, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf#p22>.

<sup>133</sup> See *Research Air, Inc. v. Kempthorne*, 589 F. Supp. 2d 1, 10 (D.D.C. 2008) (holding that because there was nothing to suggest that the records requested “would contribute to the public understanding of government,” a fee waiver was inappropriate); *Office of Information Policy: FOIA Update: New Fee Waiver Policy Guidance*, U.S. DEP’T OF JUSTICE (Jan. 1, 1987), <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance> (noting that if a commercial interest is identified, courts must conduct a “balancing of the requester’s commercial interest against the public interest in disclosure”).

<sup>134</sup> See 5 U.S.C. §§ 552(b)(6), (b)(7)(C) (protecting the disclosure of records that “would constitute a clearly unwarranted invasion of personal privacy [and] could reasonably be expected to constitute an unwarranted invasion of privacy”). Exemption 6 protects individuals’ personal information in “personnel, medical and similar files. . . . [While] [e]xemption 7(C) “protects private information in law enforcement records.” Halstuk & Chamberlin, *supra* note 2, at 513 n.10 (internal citation omitted); see DEP’T OF JUSTICE, DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT, EXEMPTION 7(C) 1–2 (Dec. 9, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption7c.pdf>.

<sup>135</sup> See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (“The term ‘unwarranted’ requires us to balance the . . . privacy interest against the public interest in disclosure.” (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989))); see also *Schonberger v. Nat’l Transp. Safety Bd.*, 508 F. Supp. 941, 944 (D.D.C. 1981) (“To satisfy exemption six under the second facet of the test, a case-by-case balancing approach must be applied to determine whether the public’s interest in disclosure outweighs the individual’s interest in privacy.”); DEP’T OF JUSTICE, EXEMPTION 6, *supra* note 130, at 1–2.

<sup>136</sup> See 5 U.S.C. §§ 552(b)(6), (b)(7)(C). Although the two exemptions are different, courts often find discussions of either exemption apposite to each other. See *Associated Press v. U.S. Dep’t of Def.*, 554 F.3d 274, 286 (2d Cir. 2009) (“Although [the cited case], addressed the applicability of Exemption 6 to the information sought through FOIA, its discussion of the approach for applying FOIA’s privacy exemptions is apposite here.”).

<sup>137</sup> See *Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (“Finally, we balance the competing interests to determine whether the invasion of privacy is clearly unwarranted.”); *Parker v. Dep’t of Justice*, 214 F. Supp. 3d 79, 86 (D.D.C.

Before this balancing actually takes place, the reviewing court must identify the individual privacy and public interests in the records.<sup>138</sup> Once a privacy interest has been identified, such as personal identifying information,<sup>139</sup> courts then determine whether the public interest in disclosure advances the open government goals of FOIA.<sup>140</sup> The Supreme Court has applied a two-step balancing process with regard to Exemption 7(C).<sup>141</sup> First, it considers whether there is a significant public interest in the information; then it considers whether the disclosure of the records will further that public interest.<sup>142</sup> The same

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2016) (balancing the privacy interests implicated in the requested documents against the information that would be revealed were the redacted portions to be removed); Cox, *supra* note 1, at 391–92 (explaining that the FOIA exemptions are discretionary and noting that there is a presumption in favor of disclosure). Note that it must be a genuine public interest that is to be balanced against the privacy interest. See *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982) (“The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery” (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975))); see also *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir. 1981) (“Plaintiff states in his brief that he is pursuing this litigation hoping to obtain evidence sufficient to mount a collateral attack on his kidnapping conviction . . . . The court, however, cannot allow the plaintiff’s personal interest to enter into the weighing or balancing process.”).

<sup>138</sup> See *Associated Press*, 554 F.3d at 291 (“Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests.” (quoting *Fed. Labor Relations Auth. v. Dep’t of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992))). The Department of Justice’s *Guide to the Freedom of Information Act* outlines the four-step process courts apply to determine whether the application of the exemption is proper. Courts must: (1) identify the nature of the information at issue (whether it is, for example, a personnel file); (2) determine whether there is a significant privacy interest in that information; (3) determine the public interest in the information being considered for disclosure; and, (4) balance the privacy interests against the public interest. See DEP’T OF JUSTICE, EXEMPTION 6, *supra* note 130, at 1–2.

<sup>139</sup> See *Consumers’ Checkbook v. U.S. Dep’t of Health & Human Servs.*, 554 F.3d 1046, 1050 (D.C. Cir. 2009) (“If a substantial privacy interest is at stake, then we must balance the privacy interest in nondisclosure against the public interest.” (citing *Nat’l Ass’n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989))); DEP’T OF JUSTICE, EXEMPTION 6, *supra* note 130, at 10 (noting that personally identifying information can include “a person’s name, address, image, computer user ID, phone number, date of birth, criminal history, medical history, and social security number”).

<sup>140</sup> See *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (noting that the information must contribute towards “the basic purpose of the Freedom of Information Act, [which is] to open agency action to the light of public scrutiny” (internal quotations omitted)); *People for the Am. Way Found. v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 304 (D.D.C. 2007) (“[T]o assess the public interest, the Court must examine ‘the nature of the requested document and its relationship to the basic purpose of [FOIA] to open agency action to the light of public scrutiny.’” (quoting *Judicial Watch of Fla., Inc. v. U.S. Dep’t of Justice*, 102 F. Supp. 2d 6, 17 (D.D.C. 2000)) (alteration in original)).

<sup>141</sup> See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

<sup>142</sup> *Id.* (“Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise the invasion of privacy is unwarranted.”).

balancing takes place with regard to Exemption 6.<sup>143</sup> When doing this balancing, the Supreme Court, and lower courts, often reflect back to the intended purpose of FOIA, which is to facilitate the transparency of government agencies.<sup>144</sup>

Here, the balancing of privacy and public interests results in a greater variety of outcomes than in undue burden cases.<sup>145</sup> There are times when courts have found that the public interest in the records at issue is greater than the invasion of privacy it necessitates. Other times courts have upheld the application of the exemption as an adequate protection of privacy interests.<sup>146</sup>

It is worth noting that outside of the realm of FOIA case law, courts have taken the public interest into consideration. The Supreme Court has considered public interest as a factor when deciding First Amendment cases,<sup>147</sup> evaluating the actions of corporations,<sup>148</sup> and weighing appropriateness of injunctive relief,<sup>149</sup> to name a few.

Taken together, FOIA's legislative history and courts' willingness to consider public interest in other areas of FOIA law leave a question as

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<sup>143</sup> See *Rose*, 425 U.S. at 353 (noting that Exemption 6 requires "a balancing of public and private interests").

<sup>144</sup> See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772 (1989) (stating that the "purpose of the [FOIA] was] 'to open agency action to the light of public scrutiny'" (quoting *Rose*, 425 U.S. at 372)); see also *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 260 (D.C. Cir. 1982) (noting that "[i]n performing [the] balance, [the court] must keep in mind Congress's 'dominant objective' to provide full disclosure of agency records" (quoting *Rose*, 425 U.S. at 361)).

<sup>145</sup> See *supra* Sections II.A, II.B. Compare *Lardner v. U.S. Dep't of Justice*, 398 F. App'x 609, 610-11 (D.C. Cir. 2010) (finding that the public interest in the list of names of those whose pardon applications were denied outweighed the privacy interests), with *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1124-26 (D.C. Cir. 2004) (finding that pardon applications were protected under Exemption 6, since they include information about crimes the pardon applicants committed).

<sup>146</sup> See, e.g., *U.S. Dep't of State v. Ray*, 502 U.S. 164, 171, 178-79 (1991) (reversing the lower courts' decisions after finding that "[m]ere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy"); *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 286-87, 290-91 (2d Cir. 2009) (finding that "the privacy interest in protecting . . . individuals from any retaliatory action that might result from a renewed interest in their aborted attempts to emigrate must be given great weight," and ultimately overbore the public interest concerns (quoting *Ray*, 502 U.S. at 176-77)); *Rural Hous. All. v. U.S. Dep't of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (holding that materials containing information such as "marital status, legitimacy of children, identity of fathers of children, medical condition[s], welfare payments, alcoholic consumption, family fights, [and] reputation . . . involve[] sufficiently intimate details" to be protected).

<sup>147</sup> See, e.g., *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (noting that attempts to restrict important liberties such as freedom of speech or freedom of assembly must be justified by an important public interest).

<sup>148</sup> See, e.g., *Am. Airlines, Inc. v. N. Am. Airlines, Inc.*, 351 U.S. 79 (1956) (considering whether there was sufficient public interest in the name change of an airline to warrant placing the airline under the jurisdiction of the Civil Aeronautics Board).

<sup>149</sup> See, e.g., *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (finding that taking the public interest into consideration is appropriate when determining if preliminary injunctive relief should be granted).



to whether courts should apply such a balancing in an area of law that was created specifically *in the public interest*?

### III. PROPOSAL

FOIA gives individuals and organizations alike an avenue by which they can hold the federal government accountable and gain insight into otherwise secret government programs. However, as previously indicated, there are some significant problems with the way in which the FOIA case law has developed, particularly in its approach to the disclosure of ESI.<sup>150</sup> This Note seeks to propose new approaches that move past the rules and standards that are a poor fit for today's recordkeeping practices and instead balance the goals of FOIA and limited agency resources.

#### A. *Avoiding the “Too Big to FOIA” Problem*

Unless remedied, allowing agencies to claim that compliance with a FOIA request would be unduly burdensome simply because of the setup of their databases and the nature of modern recordkeeping will allow them to wrap themselves in a shroud of secrecy. The trend of successful undue burden claims by agencies does not bode well for federal government transparency.<sup>151</sup> While courts insist that there is a presumption of disclosure, they are unwilling to require agencies to go to great lengths to comply with FOIA requests.<sup>152</sup>

To counter the growing inability of FOIA to pierce the veil of government secrecy, courts should adopt a less deferential approach to undue burden claims in light of how records are now kept.<sup>153</sup> When an

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<sup>150</sup> See *supra* Sections II.A, II.B.

<sup>151</sup> See *supra* Sections II.A, II.B.

<sup>152</sup> See *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 891 (D.C. Cir. 1995) (“[T]here are some limits on what an agency must do to satisfy its FOIA obligations.”).

<sup>153</sup> It has also been suggested, by scholars and practitioners alike, that the adoption of civil discovery or e-discovery methods would also remedy the information imbalance between agencies and requesters, and lead to more favorable outcomes for plaintiffs in FOIA cases. See Natnael Moges, *Big Brother Has Big Shoulders: Defining Privacy in the Face of E-Discovery Expansion and FOIA Reform*, 17 PUB. INT. L. REP. 155, 156 (2012); Cox, *supra* note 1, at 410–12; see also Melanie Ann Pustay, Dir., Office of Info. Policy, U.S. Dep’t of Justice, Georgetown Law CLE: E-Discovery for Federal Government Practitioners: The Freedom of Information Act (FOIA) and eDiscovery (June 25, 2014), [http://www.law.georgetown.edu/cle/materials/eDiscoveryforFedPractitioners/CourseMaterials/foiaediscovery/1TheFreedomofInformationAct\(FOIA\)andeDiscovery.pdf](http://www.law.georgetown.edu/cle/materials/eDiscoveryforFedPractitioners/CourseMaterials/foiaediscovery/1TheFreedomofInformationAct(FOIA)andeDiscovery.pdf). Unfortunately, these efforts have been met with limited success. See *Welby, Brady & Greenblatt, LLP v. U.S. Dep’t of Health & Human Servs.*, No. 15-cv-195, 2016 WL 1718263, at \*3 (S.D.N.Y. Apr. 27, 2016) (explaining that discovery is “disfavored in FOIA lawsuits”). *But see ND LON I*, 877 F. Supp. 2d 87, 108 n.110 (S.D.N.Y. 2012) (noting that “much of the logic behind the increasingly well-developed caselaw on e-discovery searches is

individual or not-for-profit organization submits a FOIA request for records relating to a government program<sup>154</sup> or government policies,<sup>155</sup> the resulting search for responsive documents has the potential to produce thousands of records.<sup>156</sup> Instead of merely accepting an agency's undue burden claim, courts should make a real effort to evaluate the legitimacy of the agency's claim in light of the agency's stated search methods, the nature of the records sought, and the availability of alternative search methodologies.<sup>157</sup> This is not to say that all agencies' claims of undue burden are to be disregarded; rather, the proposal would serve to balance the playing field and reduce the opportunities for unnecessary and premature claims of undue burden.

While undue burden case law is well developed, it shows a significant lack of awareness for modern recordkeeping and communication methods.<sup>158</sup> Before the widespread use of electronic recordkeeping, if an organization like the American Civil Liberties Union wanted the communication records within the CIA or FBI relating to a specific topic, the responsive records would be limited to paper records.<sup>159</sup> Now, when an organization submits a request, communication records alone can amount to hundreds of thousands of pages.<sup>160</sup> This is the digital age; online communication is everywhere and has a tremendous effect on the amount of records that an agency produces and, consequently, can be asked to disclose.<sup>161</sup>

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instructive in the FOIA search context because it educates litigants and courts about the types of searches that are or are not likely to uncover all responsive documents"). Having been explored by others, this is not a solution that this Note posits.

<sup>154</sup> See *NDLON I*, 877 F. Supp. 2d at 93-94 (plaintiffs sought records relating to the Department of Homeland Security's Secure Communities Program, a federal immigration enforcement program).

<sup>155</sup> See *ACLU v. CIA*, 109 F. Supp. 3d 220, 225-26 (D.D.C. 2015) (plaintiffs sought records regarding the CIA's use of unmanned drones).

<sup>156</sup> See *NDLON I*, 877 F. Supp. 2d at 94 (noting that "[t]he defendants' searches involved hundreds of employees and thousands of hours and resulted in the production of tens of thousands of responsive records").

<sup>157</sup> See Plaintiffs' Opposition, *NDLON II*, *supra* note 24, at 42.

<sup>158</sup> Even so, FOIA itself was enacted with the knowledge that government was vast. "[T]he very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain that 'popular information' . . . . But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure." S. REP. NO. 89-813, at 3 (1965).

<sup>159</sup> See S. REP. NO. 104-272, at 5 (1996) ("The FOIA was created at a time when agency records were predominantly produced on paper."); Minegar, *supra* note 13, at 24.

<sup>160</sup> See, e.g., Defendants' Memorandum, *NDLON II*, *supra* note 102, at 30-32.

<sup>161</sup> See Minegar, *supra* note 13, at 24 (noting that "[s]ince FOIA's enactment, however, technology has seen unprecedented innovation. Modern federal agencies rarely create or store paper records, opting instead for efficient and flexible electronic filing systems and records ("e-records"). Government e-records make up the modern paper trail" (internal quotations omitted)).

Of course, the concern with reduced deference to agencies is clear: if courts apply a less deferential standard to agencies' undue burden claims, then the obvious danger is that agencies will then be forced to comply with FOIA requests that *are* unduly burdensome. It is not difficult to imagine the slow pace of government were agencies compelled to comply with FOIA requests that would require thousands of hours of labor.<sup>162</sup>

Understandably, there will inevitably be some FOIA requests that are too burdensome for the agency.<sup>163</sup> It is possible that even with a more careful review, a case like *Ayuda, Inc. v. Federal Trade Commission*<sup>164</sup> will still result in the agency's favor: spending some 8000 hours reviewing millions of documents may simply be too burdensome.<sup>165</sup> Yet a court must be allowed to carefully examine that claim before acquiescing. Without such careful review, it is extremely difficult to distinguish valid undue burden claims from unsupported ones, and it leaves the public without a way to push back against the government's tendency to keep its records private.<sup>166</sup>

It can further be argued that concerns with regard to undue deference to agencies is mitigated by the fact that they are required to support their claims in good faith.<sup>167</sup> However, while agencies are presumed to be acting in good faith, that presumption is not absolute.<sup>168</sup> Just as the presumption is rebutted when an agency has failed to show a complete and/or adequate search, so too can an agency's good faith be revoked when their claims of undue burden are insufficiently supported. This proposal does not suggest abandoning the presumption of good faith; it instead suggests that courts should review with greater care whether an agency has met their obligations under FOIA.<sup>169</sup>

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<sup>162</sup> See, e.g., Defendants' Memorandum, ND LON II, *supra* note 102, at 30–32.

<sup>163</sup> See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (agreeing that the request at issue was overbroad, as it “place[d] the onus of non-production on the recipient of the request and not . . . upon the person who drafted such a sloppy request”); see also *Morrison*, *supra* note 3, at 1541 (noting that there is “agreement that there are some government records that should not be made public and that compliance with some requests would impose inordinate burdens on federal officials”).

<sup>164</sup> 70 F. Supp. 3d 247 (D.D.C. 2014).

<sup>165</sup> *Id.* at 275.

<sup>166</sup> See *Morrison*, *supra* note 3, at 1547 (observing that “the [government's] incentives run in the opposite direction [of disclosure]”).

<sup>167</sup> See *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999).

<sup>168</sup> See *Exxon Corp. v. FTC*, 466 F. Supp. 1088, 1094 (D.D.C. 1978), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980) (noting that the presumption of good faith can be revoked “where the agency's response raises serious doubts”).

<sup>169</sup> See *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983) (noting, also, that “the agency bears the burden of showing that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester” (citing *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980))); see also *Mo. Coal. for the Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1209 (8th Cir. 2008) (noting that “[i]n a FOIA case, summary judgment is available to a defendant agency where ‘the agency

Combating the rise of agencies that are “too big to FOIA,” can be done through the equitable exertion of power by the district courts. District courts have historically wielded a great deal of enforcement power.<sup>170</sup> In FOIA cases, the court’s enforcement can involve mandating that the agency seek ameliorative methods to the burdensome search. Similar to the issues regarding adequacy of the search, agencies should also be required to attempt alternate methods to cull the information requested that would be less burdensome on the agency.<sup>171</sup> When it comes to search adequacy, agency affidavits must be detailed, as they must describe which recordkeeping systems (electronic or otherwise) and detail the search.<sup>172</sup>

### B. *Outside Experts*

There is a fundamental information imbalance between the government and the public. It is uncontroverted that the agencies have all their information: they know how their systems operate; they know the location of their records; and they interact with other government agencies.<sup>173</sup> Individuals and organizations submit FOIA requests to gain information that only the government has.<sup>174</sup> Therefore, it is at odds with the purpose of FOIA that courts have either refused to accept, or have given substantially lesser weight to, supporting testimonial materials by outside experts.<sup>175</sup> If an outside expert’s affidavit meets the

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proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.” (quoting *Miller v. U.S. Dep’t of State*, 779 F.2d 1378 (8th Cir. 1985))).

<sup>170</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (reaffirming the “scope of a district court’s equitable powers,” and their capability “for breadth and flexibility . . . in equitable remedies”); *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008) (recognizing that district courts have “considerable discretion in granting injunctive relief and in tailoring [their] injunctive relief”).

<sup>171</sup> See *Cox*, *supra* note 1, at 406–07 (noting that, “[i]n sum, agency affidavits in support of summary judgment must include detailed information about the recordkeeping systems to which the agency has access; how those systems are searched; and what kinds of records they contain”).

<sup>172</sup> *Id.* (These affidavits must “describe the electronic recordkeeping systems and physical file locations searched, as well as how they were searched. If electronic records (such as databases and email) were searched, agency affidavits are required to explain how the records are organized (i.e., by name, topic, date, etc.) and what search terms or keywords were used to search for responsive records. If the agency chose not to search in certain locations (such as field offices) or databases, it must explain why those additional searches were either impractical or unlikely to produce responsive records.” (internal citations omitted)).

<sup>173</sup> See *Oglesby v. U.S. Dep’t of the Army*, 79 F.3d 1172, 1178–79 (D.C. Cir. 1996) (acknowledging that “FOIA challenges necessarily involve situations in which one party (the government) has sole access to the relevant information”).

<sup>174</sup> *Id.*

<sup>175</sup> See, e.g., *Long v. ICE*, 149 F. Supp. 3d 39, 57–58 (D.D.C. 2015).

same requirements that are laid out for the government’s affidavits<sup>176</sup> and can speak with a reasonable degree of expertise as to standard or similar databases or document review methods, then it stands to reason that the court should give them proper weight.<sup>177</sup>

The consistent rejection of outside expert opinions has given agencies the ability to exploit the information imbalance and has allowed claims of undue burden to go unchallenged and unquestioned because agencies are under a presumption of good faith.<sup>178</sup> The impossible standard that courts have created should be moderated: declarations from experts who have related but no first-hand knowledge should not be summarily dismissed.<sup>179</sup> Not only would this further the purpose of FOIA, but it would itself comport with evidentiary standards.<sup>180</sup>

Although the outside expert in *Long v. Immigration & Customs Enforcement*<sup>181</sup> had not worked on the Immigration and Custom Enforcement’s (ICE) database, the database information he presented to the court could still be used to determine the sufficiency of ICE’s undue burden claims.<sup>182</sup> Similarly, the information provided by the plaintiffs’ expert in *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement*,<sup>183</sup> regarding the stability of agency databases and the methods by which agencies could run less burdensome searches, should still be relevant in the court’s decision-making process.<sup>184</sup> As long as the requester’s expert has the proper qualifications, there is no evidentiary bar to the inclusion of their testimony.<sup>185</sup>

Conversely, someone without first-hand experience working with a certain database or operating system of the government agency will never be able to speak with the same degree of knowledge and detail about these systems as the agency’s own in-house information and

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<sup>176</sup> See *Church of Scientology Int’l v. IRS*, 845 F. Supp. 714, 718 (C.D. Cal. 1993) (holding that “[s]ummary judgment may be granted solely on the basis of these agency affidavits if they are clear, specific, and reasonably detailed, and describe the withheld information in a factual and nonconclusory manner” (citing *DiViaio v. Kelley*, 571 F.2d 538, 543 (10th Cir. 1978))).

<sup>177</sup> See, e.g., *TPS, Inc. v. U.S. Dep’t of Def.*, 330 F.3d 1191, 1196–97 (9th Cir. 2003).

<sup>178</sup> See *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994) (affidavits submitted by an agency are “accorded a presumption of good faith” (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991))).

<sup>179</sup> See *Long*, 149 F. Supp. 3d at 57–58 (The unreasonable implication being that only former agency technology officers can be effective plaintiffs’ witnesses).

<sup>180</sup> See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (recognizing that “an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation” (citing *FED. R. EVID. 702, 703*)).

<sup>181</sup> 149 F. Supp. 3d 39.

<sup>182</sup> *Id.* at 57.

<sup>183</sup> 236 F. Supp. 3d 810 (S.D.N.Y. 2016).

<sup>184</sup> See Plaintiffs’ Opposition, *NDLON II*, *supra* note 24, at 37.

<sup>185</sup> See *FED. R. EVID. 702* (noting that witnesses may be deemed experts “by knowledge, skill, experience, training, or education”).

technology officers.<sup>186</sup> While first-hand experience is not required, judges have the discretion to exclude the testimony of an alternate expert.<sup>187</sup> A judge may find that an individual who has not had first-hand experience with the data system in question is not even qualified to testify as an expert.<sup>188</sup>

Even when courts are willing to consider alternate expert opinions, it leaves open the question of how courts are to determine when and how much outside experience is enough to make an expert's opinion acceptable.<sup>189</sup> This may also be due to the courts' own lack of inherent ESI knowledge and leaves them vulnerable to accepting bad information.<sup>190</sup>

However, this does not signify that the outside expert can provide *no* insight as to the government's technological systems.<sup>191</sup> Giving weight to declarations and affidavits submitted by plaintiffs' experts will help establish a greater balance between the requestor and the responding agency.<sup>192</sup>

### C. *Public Interest Sliding Scale*

In conjunction with, or separate from, the other proposals in this Note, courts should adopt a public interest sliding scale so that they may balance the burden of production on the agency against the public interest in the information requested. Such a test does not yet exist within federal or state case law.<sup>193</sup> However, there are other balancing tests in Supreme Court case law—and they already exist within the FOIA context, in reference to certain exemptions and to the speed of production.<sup>194</sup>

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<sup>186</sup> See, e.g., Plaintiffs' Opposition, *NDLON II*, *supra* note 24, at 37.

<sup>187</sup> See FED. R. EVID. 703 ("An expert may base an opinion on facts or *data in the case that the expert has been made aware of or personally observed.*") (emphasis added); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

<sup>188</sup> *Gen. Elec. Co. v. Joiner*, 522 U.S. at 142.

<sup>189</sup> See *TPS, Inc. v. U.S. Dep't of Def.*, 330 F.3d 1191, 1196–97 (9th Cir. 2003).

<sup>190</sup> See *Levinthal v. Fed. Election Comm'n*, 219 F. Supp. 3d 1, 6–7 (D.D.C. 2016).

<sup>191</sup> *Id.* at 7.

<sup>192</sup> See, e.g., *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172 (D.C. Cir. 1996) (relying exclusively on government affidavits); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807 (2d Cir. 1994) (same).

<sup>193</sup> Such a rule could be adopted by the Supreme Court if the proper case arose. The issue squarely before the Court would have to be whether a federal agency, only claiming undue burden as the reason for non-disclosure, could be permitted to refrain from fully searching for the requested records, despite the public interest and importance of the requested documents. A case like *NDLON II* is a good example of a case that could lead to the establishment of such a rule. See Plaintiffs' Opposition, *NDLON II*, *supra* note 24, at 59–60 (asking the court to consider adopting a public interest sliding scale, taking into account the complete lack of public information about the extent, practice, and application of a far-reaching federal immigration enforcement program).

<sup>194</sup> See *Antonelli v. FBI*, 721 F.2d 615, 619 (7th Cir. 1983) (acknowledging "[t]he FBI would

Just as is done in the FOIA exemption context, courts should evaluate an agency’s undue burden claim but also take into consideration the public importance of the records requested.<sup>195</sup> As with exemptions, the agency must clearly articulate and support its claim of undue burden.<sup>196</sup> It is worth noting that outcomes of challenges to claimed FOIA exemptions are not as one-sided as those in undue burden cases—perhaps precisely because exemption cases take the public’s interest under consideration.<sup>197</sup>

Of course, the balancing that is done with regard to exemptions is statutorily mandated: courts must determine what qualifies as “unwarranted.”<sup>198</sup> However, even though the undue burden rule is a judicial invention, the word “undue” leaves space for the judicial implementation of a balancing test. Just as courts engage in an evaluation of what is unwarranted, so can they determine what constitutes undue.<sup>199</sup>

Alternatively, a public interest sliding scale could be incorporated into the existing FOIA statute. Given that many of the rules and standards for FOIA have developed from case law, having the public interest sliding scale embedded in the language of the statute would not only indicate the importance of this balancing test but would also ensure that the test is applied more equally across the country.<sup>200</sup>

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have had a greater burden [justifying the claimed exemptions] if [the Plaintiff] had identified some public interest to be served by disclosing the information”); *see also* *ACLU v. U.S. Dep’t of Justice*, 321 F. Supp. 2d 24, 29, 30 (D.D.C. 2004) (taking into account the “ongoing debate regarding the renewal and/or amendment of the Patriot Act” in determining the proper speed of the production of responsive records).

<sup>195</sup> *See* DEP’T OF JUSTICE, EXEMPTION 6, *supra* note 130, at 43–44; *see also* *Boyd v. Crim. Div. of the U.S. Dep’t of Justice*, 475 F.3d 381, 387 (D.C. Cir. 2007) (“In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) ‘show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake,’ and (2) ‘show the information is likely to advance that interest.’” (quoting *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004))); *see also* *Martin v. Dep’t of Justice*, 488 F.3d 446, 458 (D.C. Cir. 2007).

<sup>196</sup> *See* *Morley v. CIA*, 508 F.3d 1108, 1128 (D.C. Cir. 2007) (“Despite its burden to show that withholding is necessary, the CIA has failed even to articulate the privacy interest in the records, let alone demonstrate that such privacy interests meet the standard for an agency’s withholding under Exemption 6.”); *see also* *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151–52 (D.C. Cir. 2006) (holding that the FDA failed “to provide an adequate explanation” for certain of its claimed exemptions).

<sup>197</sup> *Compare* *Diemert, Jr. & Assocs. v. FAA*, 218 F. App’x 479, 482 (6th Cir. 2007) (finding the public interest insufficient to counter the privacy interest), *with* *Morley*, 508 F.3d at 1128.

<sup>198</sup> *See* 5 U.S.C. § 552(b)(6) (2012) (Disclosure of records that “would constitute a clearly unwarranted invasion of personal privacy” is not required.).

<sup>199</sup> *See, e.g.,* *Carpenter v. U.S. Dep’t of Justice*, 470 F.3d 434, 440 (1st Cir. 2006) (“Because there is a valid privacy interest, the requested documents will only be revealed where ‘the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake.’” (quoting *Favish*, 541 U.S. at 172)).

<sup>200</sup> Language could be incorporated under 5 U.S.C. § 552(a)(4), which laid out the balancing test, as such: In responding under this paragraph to a request for records, an agency shall, in good faith, make a determination as to whether complying with the search would result in an

One countervailing consideration of instituting such a test would be the increase of litigation. Given that there is already a hefty backlog of FOIA requests, compelling agencies to produce records even if they are in the public interest will only slow down the process for other FOIA requesters.<sup>201</sup> While the implementation of such a test could certainly reduce the amount of cases that are easily dismissed, courts could weigh a variety of public interests differently.<sup>202</sup>

Regardless of whether the public interest balancing test is incorporated through case law or into the statutory text, it is essential for the function of good government and transparent federal agencies.<sup>203</sup> The incorporation of a consideration of the public interest against an agency's undue burden claim would have truly monumental effects, just as the current unwillingness to consider the public interest has led to increased secrecy in the government's programs and operations. Individuals and advocates alike are stymied by courts' willingness to accept agencies' undue burden claims without question or thought, further insulating them from much-needed public review.

#### CONCLUSION

FOIA was established to foster transparency and to create the mechanism by which an ordinary citizen could ask their government what it was "up to."<sup>204</sup> It is an essential part of the system of laws in the United States and serves many purposes.<sup>205</sup>

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undue burden for the agency, causing a significant interference with the distribution of labor, or with the agency's records search or database systems. A court of proper jurisdiction may balance the agency's claim of an undue burden against a proper showing of important public interest.

<sup>201</sup> See SUBCOMM. ON OVERSIGHT & ACCOUNTABILITY, FOIA ADVISORY COMM., *supra* note 9, at 2. It is possible that the result would be similar to the backlog experienced by the State Department after it prioritized the search and review of Hillary Clinton's emails in 2016. See Josh Gerstein, *Amid Clinton Email Mess, State Department FOIA Backlog Surges*, POLITICO (June 29, 2016, 11:16 AM), <http://www.politico.com/blogs/under-the-radar/2016/06/state-department-foia-backlog-surges-224934>.

<sup>202</sup> For example, government programs affecting a large portion of the country could be given greater priority than those relating to historical events that still have national importance.

<sup>203</sup> See Obama FOIA Memorandum, *supra* note 48.

<sup>204</sup> *Favish*, 541 U.S. at 162 ("[T]he FOIA request is 'in complete conformity with the statutory purpose that the public know what its government is up to.'" (quoting *Favish*, 217 F.3d 1168, 1172-73 (9th Cir. 2000))).

<sup>205</sup> President Lyndon B. Johnson, upon signing FOIA in 1966, remarked:

"[FOIA] springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the [United States] permits. No one should be able to pull curtains of secrecy around [federal government] decisions which can be revealed without injury to the public interest."

See Minegar, *supra* note 13, at 23-24 (citing President Lyndon B. Johnson, Statement by the President upon Signing the "Freedom of Information Act" (July 4, 1966)); see also Obama



Courts are applying old, ill-fitting rules like the undue burden exemption, because they are failing to grapple with and understand the new recordkeeping reality. As such, they have served to hinder the goal of open government that FOIA was meant to encourage.<sup>206</sup> Instead of alleviating the information imbalance between the government and the public—FOIA’s original purpose—case law has developed in a way that makes this imbalance more or less insurmountable: agencies can insulate themselves as “too big to FOIA”; courts typically reject the opinions of outside experts; and there is no policy that permits the consideration of the public’s interest in the information requested.<sup>207</sup> Essentially, courts have left the fox guarding the hen house.

There are solutions that would allow courts to usher in a new era of openness and transparency and aid in the common interest of government accountability.<sup>208</sup> Courts could reevaluate the undue burden argument in light of modern recordkeeping methods, with an understanding that requests are much more likely to encompass an increased number of records. Courts can also re-determine the way in which they weigh the affidavits of outside testimony from relevant experts, rather than dismissing them because they lack first-hand experience. Lastly, FOIA should be amended to include, or courts should apply, a public interest sliding scale, whereby the burden of production on the agency is weighed against the public importance of disclosure of the records at issue.

These proposals, individually or taken together, could remedy the incoherence of FOIA’s undue burden exception. FOIA has played an important role in society thus far, allowing secretive government programs to come to light, and the legal community should continue to push for greater opportunities for transparency.<sup>209</sup> The disclosure of

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FOIA Memorandum, *supra* note 48 (highlighting the importance of the FOIA and calling upon agencies to “adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government”). This “presumption of openness” has since been incorporated into the FOIA. See FOIA Improvement Act of 2016, Pub. L. No. 114-85, 130 Stat. 538; see also Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (“[T]he Freedom of Information Act has led to the disclosure of waste, fraud, abuse, and wrongdoing in the Federal Government”); *supra* Section I.A.

<sup>206</sup> See GAO-16-667, *supra* note 15 (finding that of the 1,672 FOIA lawsuits that were resolved between 2009 and 2014, only 112 of those lawsuits resulted in a victory for the plaintiff).

<sup>207</sup> See *supra* Section II.D.

<sup>208</sup> See Obama FOIA Memorandum, *supra* note 48 (“A democracy requires accountability, and accountability requires transparency.”).

<sup>209</sup> See *NDLON v. ICE—Documents Show Projected Growth in Immigration Detention Due to Secure Communities*, UNCOVER TRUTH (July 16, 2012), <http://uncoverthetruth.org/foia-documents/ndlon-v-ice-documents-show-projected-growth-in-immigration-detention-due-to-secure-communities> (providing the materials released as a result of the *NDLON v. ICE* FOIA litigation).

records relating to government policies and programs that affect large portions of the country's population is important, and methods to ensure that they come to light should be implemented.