

Improve FOIA and congressional request responses

Reduce time and cost, increase efficiency, and maintain consistency: Leveraging Discovery Techniques to Improve Traditional FOIA and Congressional Request Responses

Introduction

Traditionally, government agencies handle responding to Freedom of Information Act (FOIA), congressional, and litigation discovery requests as completely different processes, even when they ask for the same or similar information. This is partly due to the three distinct requests coming into the organization through different channels, the varying applicable rules, and the development over time of processes and procedures to handle the request responses.

Over the last 10+ years, technology has enabled litigation support teams to manage the vast quantity of electronically stored information (ESI) that is now standard for many types of litigation. During that time, standard processes and procedures have been developed, accepted by courts, and incorporated into the Federal Rules of Civil Procedure. The use of advanced document review and management platforms, analytics, and technology-assisted review (TAR), or predictive text, has greatly reduced the time and costs needed to process, review and produce information.

Contrastingly, the technology and processes used to prepare FOIA and congressional request responses have not advanced at a similar rate, even though the basic steps are very similar. All three responses involve identification, preservation, collection, processing, analysis, review and production of data. All could benefit from a comprehensive information governance plan.

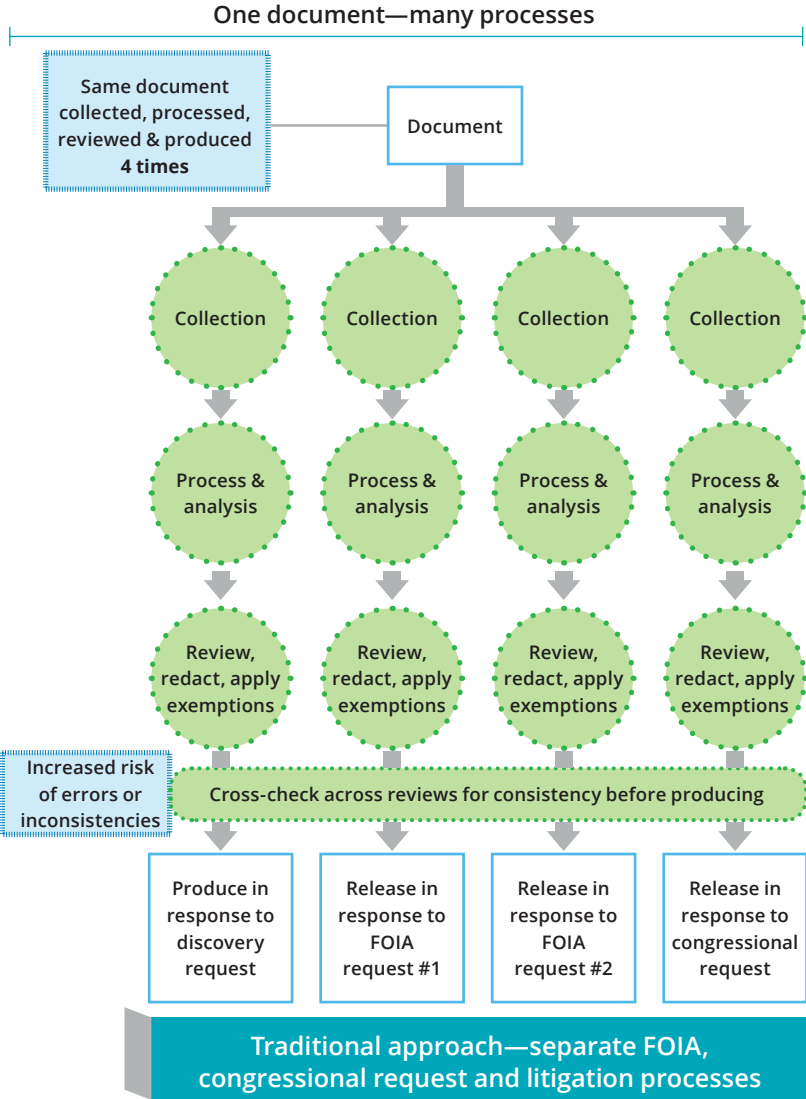
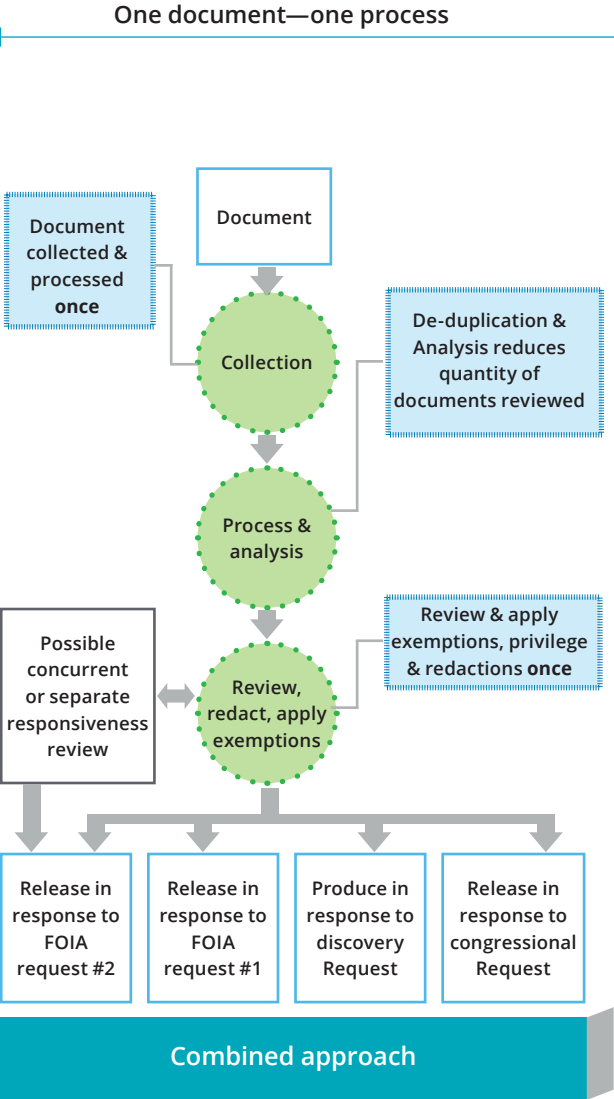
Agencies who take advantage of the improvements made in litigation discovery and apply them to FOIA and congressional response processes stand to benefit considerably in cost, efficiency, and consistency. In addition, agencies often receive FOIA requests in advance of litigation, or congressional and FOIA requests on hot topics that may become the subject of litigation. Using the same process for all requests can help agencies prepare for overlapping requests, reduce total work, and reduce the likelihood of making inconsistent releases of information.

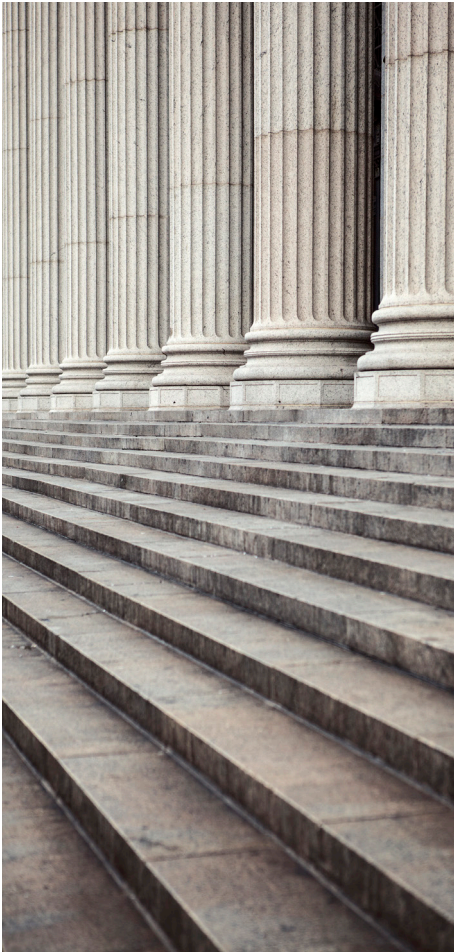
Traditional vs. Combined Approach

Using the traditional approach to respond to FOIA, congressional, and discovery requests usually means three completely separate workstreams. For each request, documents are collected, processed, analyzed, reviewed, redacted and produced. If FOIA, congressional, and discovery requests on the same topic are received at different times, a document may go through each of these phases three separate times—or more. Instead, by combining the early phases, such as collection, processing and analysis, cost and time can be significantly reduced. When documents are ready for review, the review can be adjusted to accommodate any differences in the request requirements.

In addition to being three times as much work, having three separate workstreams increases the risk that sensitive information may be handled inconsistently, and may be released. While there are times when information should be handled differently in response to the different requests, many types of information, such as privileged or personally identifiable information (PII), should be redacted in all three responses. By combining the workflows, documents can be reviewed and redacted one time – not three – reducing review time and costs, while increasing efficiency and consistency of redactions.

FOIA exemptions that cover categories of information generally also protected in discovery or congressional responses could automatically be labeled by category, for example, PII labeled as Exemption 6, or privileged information labeled as Exemption 5. These differences can be handled by document tags, differing search terms on the same document set, and different production sets (containing applicable labels). Overall, utilizing advanced discovery platforms and processes, and combining workflows for FOIA, congressional and discovery responses, has the potential to reduce costs, increase efficiency, and allow for faster responses while providing a high level of quality control and consistency to protect sensitive information.





The Challenge

A large federal agency received multiple overlapping FOIA and congressional requests for an incident receiving a great deal of attention in the press and on Capitol Hill, with more requests anticipated. Using a traditional approach, agency personnel would have reviewed documents for each request separately, meaning documents relevant to multiple requests would have potentially been reviewed at least six times. Agency personnel realized the inefficiency and increased risk of inconsistent results using the traditional process. The agency reviewers wanted to reduce the number of times they had to review each document, and agency attorneys wanted to maximize consistency across exemption applications and redactions. With several requests resulting in over 152,000 documents to review, FOIA deadlines looming, and congressional committees awaiting responses, the agency needed a way to streamline the workflow and provide consistent responses to related requests with similar but slightly different wording.

The Solution

Deloitte's team of discovery professionals conferred with agency attorneys, in-house FOIA experts, congressional liaisons, and agency SMEs to create a process for efficiently comparing items collected and produced for each related request. Our professionals created an omnibus Relativity workspace for all agency personnel to use. This prevented our team from having to create multiple workspaces, allowed analytics to be leveraged for the entire collection of related requests, and gave agency personnel a single workspace to use, reducing any possible confusion among the reviewers about whether they were looking at the right documents.

Data security is one factor facing a multiple project environment that a single project workspace does not face. Each user in a multiple project workspace should have access only to the documents they have

been assigned to review, not the entire workspace. Our team brought this issue to the agency's attorneys' attention, resulting in restricting each user's access to only those documents they were tasked with reviewing.

Using existing Standard Operating Procedures (SOPs), our team applied analytics and identified over 18% of the documents as duplicative. Therefore, we were able to reduce the universe of information before the first reviewer even started looking at documents. Due to the different wording of the FOIA and congressional requests, we could not propagate non-responsive coding to remove documents entirely from the review workflow. Instead, as the documents were reviewed, we worked to consistently apply exemption coding and redactions to duplicative documents collected across multiple requests.

Since application of FOIA exemptions is uniform across FOIA responses, we could keep reviewers from having to re-code exemption designations. For example, FOIA Exemption 5 for Deliberative Process could be extended to all instances of a discussion reflecting the agency's internal decision making process. By identifying duplicate exempt documents, we were able to consistently code over 21% of exempted documents, which dramatically sped up the review process.

Our process was also able to systematically enforce consistency across multiple responses. Review teams were assembled ad hoc depending on attorney and staff availability, resulting in differing levels of subject matter expertise and familiarity with the process. Because we were able to identify and code exemptions throughout the workspace, we were able to backstop agency personnel and provide consistent coding across separate responses, even where the teams were less familiar with the issues and exemptions.

Impact

Using a single workspace allowed our discovery team to coordinate multiple agency reviewers across different offices and regions in responding to several FOIA and congressional requests. By using a single workspace for all related requests, we were able to help the agency reduce the number of withheld and redacted documents that reviewers needed to code by over 21%. Additionally, if the agency later faces litigation on similar subject matter, agency attorneys can easily see what information has already been released or withheld, the reasons why, and will have the documents quickly and easily ready for production in discovery.

Conclusion

As information requests increase in volume, agencies can benefit by streamlining their FOIA and congressional response process. Using eDiscovery tools and SOPs, agencies can respond to FOIA and congressional requests more quickly, saving time and money while meeting tight regulatory deadlines. While saving money, these tools and SOPs also create a better deliverable for the agency, with more consistent results, and more defensible, repeatable processes.

Contact

Chris Knox

Managing Director | Deloitte Advisory
Deloitte Discovery
Deloitte Transactions and
Business Analytics LLP
+1 512 498 7411
csknox@deloitte.com



Deloitte.

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