



## NFOIC White Paper

### Beast or Burden: Nuisance, vexatious, or burdensome public records requests

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As a government official, if someone asked you to search 84,000 cubic feet of paper documents, would you do it? Perhaps the more appropriate question is, could you?

This herculean task, while not impossible, would still take too long and be too costly for a government agency to respond to. The second circuit court of appeals ruled so back in 1995. Requests like these are typically considered unduly burdensome, too voluminous or too great of a nuisance to complete. Federal case law has set forth [guidelines](#) on what kinds of Freedom of Information Act (FOIA) requests are unduly burdensome. Among the factors considered when determining the burden on an agency are 1) the ease with which the records can be searched — whether they are indexed, catalogued, digitized or physical, 2) the scope and specificity of the request, and 3) the sheer number of documents requested.

But state laws are less clear on what “unduly burdensome” really means regarding their own open record laws. Consider this Wisconsin statute regarding the proper specificity for record requests:

“A request ... is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request.” Wis. Stat. § 19.35(1)(h)

There aren’t any guidelines on making the request specific enough, and these Wisconsin regulations are typical of many other states. Aside from general requirements that the requests be limited in topic and temporal scope, requestors are left without instruction on just how large or wide a request is permissible, or “sufficient,” under the statute. Other states do not fare much better. Michigan’s Freedom of Information Act does not provide specifics, but differs in using more lenient language:

“[U]pon providing a public body’s FOIA [Freedom of Information Act] coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.” MCL 15.233 (1)

There are two types of requests that can be considered unduly burdensome, and the trick to a successful FOIA request is avoiding a classification into either of the two. The first is a request that is unduly burdensome because the request is vague or asks for an unreasonable amount of records. The second category is unduly burdensome because the individual or an organization makes a request too frequently or is doing so to harass the agency.



## **Vague or unreasonable**

The [National Freedom of Information Coalition](#) (NFOIC) often hears from its state FOI coalition members about their state and local governments' concerns about certain types of public record requests. Those requests that solicit a large amount of records are often either denied or charged a large fee because the request was not specific enough. The cost for the state agency to trawl through the extensive area of the search is too large and ultimately results in the requestor shouldering that burden. But what kinds of requests are too vague or unreasonable differs from request to request and is seemingly subjective. Take one request from Florida for example.

In 2015, Jason Parsley, executive editor of the South Florida Gay News, made a request to the Broward County Sheriff's office. He asked the office to search all email accounts for emails containing derogatory words for gays. His request was limited to one year's worth of emails, but the Sheriff's Office told Parsley that the cost of such a search would be \$399,000. The office did not have the capability to search all accounts at once, and further told Parsley the request would take four years to complete.

"If we have it, we have to provide it," Broward County Sheriff's Lt. Eric Caldwell said to [the Associated Press](#). "The reason this cost so much is that this person had a very vague request."

Parsley may not have even had the opportunity to get the emails at all in other states where the requestor cannot be charged for the labor associated with fulfilling the request. But rather than flatly denying the request based on cost, Florida law allows the agency to charge fees for personnel labor cost pursuant to [Fla. Stat. § 119.07 \(4\)\(d\)](#). Parsley ultimately gave up on getting the records.

In California in 2015, an Associated Press (AP) reporter requested that the state's Department of Motor Vehicles produce the number of suspended driver's licenses by ZIP code. The department's estimate for the cost of fulfilling such a request, totaling costs for labor, database search, and copying were \$19,950.

After submitting much more a narrowly tailored request, the AP was given a new estimate of \$377 for a copy of a statistical report which likely did not contain the breakdown they were looking for.

The issue here was that the AP's request was unreasonable because it asked for records which were not in existence.

To succeed against a vagueness or reasonableness challenge to an open records request, the NFOIC advises requestors to search as narrowly as possible and not to ask for statistics or trends which the responding agency does not keep records of. If necessary, requestors should make a few narrow requests rather than one which is at greater risk of being overbroad.

## **Harassing or too frequent requests**

Lenient open record laws can unfortunately invite misuse and abuse by individuals seeking to bury a public agency under a mountain of paperwork and put a strain on their budgets. State legislatures have debated what the best method is for defining and appropriately responding to requests that are 1) unduly burdensome, 2) harassing, or 3) "vexatious," a term used to describe repeated filings of frivolous requests intended to annoy the responding agency. While all three are distinct categories, some states consolidate them because defining



and distinguishing them by statute can be difficult. A look into state legislative committee notes demonstrate the problem for legislators.

In Virginia's Rights and Remedies subcommittee for example, legislators fumbled to grasp at the harassment category. "[It is] possible to fix the identical and repeated requests, but ... a solution for harassing requests [is] unlikely," [one legislator commented in 2010](#).

State laws differ on the flexibility they allow state agencies to deny record requests for being vexatious or harassing. Michigan provides free access to public records, but to discourage abuse of the free provision, the state has implemented charging a fee for unduly burdensome requests.

In Colorado, repeated requests for the same records can be charged at no higher a rate than the original request.

In Connecticut, the state may deny administrative appeal of a request that abuses the state's FOI Act and can even force the bad actor to [pay up to \\$1,000 in costs for the appeal and attorney's fees](#).

Colleen Murphy of the Connecticut Freedom of Information Coalition weighed in on that seemingly high fine imposed on bad actors.

"It should be noted that the standard to determine whether a fine ought to be imposed is extremely high and intentionally so. The FOI Commission must first find that someone took an appeal frivolously, without reasonable grounds and solely for the purpose of harassing the agency from which the appeal has been taken. And, to afford due process, the person must be provided an opportunity to be heard at a hearing before a fine is assessed. In the over forty-year history of the Commission, only a handful of individuals have faced the threat of a fine and only one or two have actually been fined. The provision strikes a good balance, insofar as it operates to chill only the most abusive of claimants," Murphy wrote in an email to NFOIC.

In Illinois, an unduly burdensome request must be denied in writing, specifying the reasoning behind the burdensome classification and how it would burden the agency.

In Kansas and Kentucky, the state can refuse access to records if the request presents an unreasonable burden to produce or if the record custodian believes that repeated requests were intended to disrupt essential functions. The only difference between the two states is in Kansas a refusal must be sustained by a preponderance of the evidence of a burden, whereas in Kentucky a refusal must be sustained by clear and convincing evidence.

Tennessee and Texas laws are very protective of government agencies. Tennessee requestors can be [charged additional fees for multiple and frequent requests](#). In Texas, multiple requests of the same records will return only a certification that the records have already been provided.

One recent development in Texas law provides a great example of the delicate balancing act between burdening government on the one hand and flatly denying requestors on the other. The new Texas law adopted last session allows any state governmental body to establish a limit on personnel time spent providing free record requests from an individual requestor. The statutory minimums are 36 personnel hours for a year-long period and 15 hours for a one-month period.



Once the individual meets or exceeds that limit, the government can reply to any new request instead with a total cost estimate for completing the request. This keeps the balance between an everyday person's ability to submit multiple short requests and the government's ability to deny individuals who are burdening the agency with too many requests.

The best part? The law does not apply to journalists, who need to make use of open records to break stories and shed light on government.

Kelley Shannon, executive director of the Texas Freedom of Information Foundation, worked with Rep. Trent Ashby on the bill. She said the new law was a good thing for both government and citizens.

"In certain pockets of the state there have been problems with burdensome and harassing requests, but this is the exception, not the rule," Shannon said. Discussing how best to regulate those problematic requestors, Shannon added, "Regulations should be based not on what someone's motive is, but about the behavior. We felt the bill was about that behavior, and that it was fair to everybody."

But in the balancing act, Shannon made it clear that the needle "needs to lean toward the requestor and the public's right to know."

H.B. 3107 is now incorporated into Texas' open government code under Title 5, Section 552.275.

### **Costs incurred by state agencies**

Last year, Oklahoma Attorney General Mike Hunter [considered creating an office for negotiating overbroad requests](#) when the agency and the requestor could not agree on how strictly to narrow scope of the requests. Hunter sought the help of legal interns to spend their summer fulfilling open record requests. Ultimately, the office was never established.

Public officials like Hunter, who must deal with the presumptively burdensome requests, are nevertheless mandated to address them. Hunter expressed his views on the record requests he thought were a nuisance, saying they are a "weaponized tool," especially when the state's 'blue skies' laws are abused by out of state parties requesting vast swaths of records.

One example from Florida provides a case study of high costs from harassing requests intended to spur litigation and drive up legal fees. In the town of Gulf Stream, Florida — a town of fewer than 1,000 residents. Gulfstream was [inundated with 42 separate public records lawsuits](#) and spent more than 4,000 hours processing public records requests between 2013 and 2015. Struggling under both the workload and lawsuits, the town budgeted \$1 million for legal fees, cut into its hurricane reserve fund, and raised property taxes.

In other states, the costs of fulfilling open record requests is similarly high. A Washington State Auditor's study, for example, revealed the state and local governments together spent more than \$60 million in one year to fulfill 285,000 requests, with an additional cost of more than \$10 million in legal fees. A tiny percent of that cost, lower than 1 percent, was recovered by the state's statute requiring a charge of 15 cents per photocopied page of paper records.

Since Washington's open records law was instituted in a time before electronic records, the statute's method of fee recovery was outdated, not accounting for the time and cost of producing records like emails, which are now more frequently requested than paper records.



Last year, Washington instituted a new measure, H.B. 1594 (now incorporated as [Wash. Rev. Code Chapter 303 \(2017\)](#)) which made a common-sense move toward requiring training for records officers dealing with electronic documents. The law requires establishes a consultation program to provide information for developing best practices for local agencies having trouble complying with records requests. It also provides funds to conduct a study to assess the feasibility of implementing a statewide open records portal.

This last point is important for future cost-cutting efforts, especially now as records are increasingly electronic, and requestors in the general public have new personal preferences and expectations about how they get information and how they share information.

### **Technology may provide a wealth of solutions**

Sohara Monaghan, Senior Performance Auditor in the Office of the Washington State Auditor, helped frame cost in the context of person-hours. Speaking of the financial burden on local and state governments, she said “their greatest expense is the staff time needed to search, review, redact and prepare public records.” Washington law at that time did not allow for recovery of paid staff’s time from the requestor.

Open public records portals are being adopted by more states as a cost-saving measure, but at the same time, the portals are making the process of obtaining records easier on both the requestor and the responding agency. Third party services, like Logikcull, Alfresco and Smarsh for example, offer digital services that incorporate automation to organize a host of public records and make them searchable. The automated programs help alleviate the staff time cost problem. The city of Evanston, Ill. adopted a similar software to handle public records requests. Michelle Masoncup, deputy city attorney of Evanston, said the software’s communication and notification features “add to efficiency and accountability and communication between the city and the requestor,” [in an interview with GCN.com](#).

Pam Greenberg, a senior fellow of the National Conference of State Legislatures, [counsels that](#) “[o]n the horizon, artificial intelligence holds promise as a way to comb through and categorize records already online, and to create conveniences like automatic email alerts when new information becomes available.”

### **Takeaway Lessons**

To sum up a few guidelines for journalists, organizations and individuals who submit FOIA requests, some factors considered in determining whether a request is unduly burdensome are as follows: 1) the burden imposed on the agency weighed against the public interest of the disclosure, 2) how importantly the information requested serves the public interest, and 3) the responding agency’s ability to show with specificity how fulfilling the request would be a burden on its operations. In November 2016, a Public Access Counselor (PAC) of the Illinois Attorney General decided that a request for 50 emails between a city official and a private consulting firm was not unduly burdensome for those same reasons.

A new Connecticut law [passed this year](#) may also provide some guidance as to avoiding a classification as a vexatious request. The law allows the state to deny a repeat requestor based on 1) the number of requests filed, 2) the scope of the requests, 3) the nature and subject matter of the requests, 4) the nature of communications between the requestor and the agency, and 5) a pattern of FOIA abuse or interference.

Unduly burdensome, vexatious, and harassing are all categories that vary in definition from state to state. While automation and artificial intelligence may provide a future long-term solution, more information on state laws and best practices can be found at [www.NFOIC.org](http://www.NFOIC.org).



Additional information on open government laws for the states mentioned here, and information about their state FOI coalitions, can be found at the links below.

- Colorado: <https://www.nfoic.org/organizations/state-foi-resource/colorado-foi-resources>
- Connecticut: <https://www.nfoic.org/organizations/state-foi-resource/connecticut-foi-resources>
- Florida: <https://www.nfoic.org/organizations/state-foi-resource/florida-foi-resources>
- Illinois: <https://www.nfoic.org/organizations/state-foi-resource/illinois-foi-resources>
- Kansas: <https://www.nfoic.org/organizations/state-foi-resource/kansas-foi-resources>
- Kentucky: <https://www.nfoic.org/organizations/state-foi-resource/kentucky-foi-resources>
- Oklahoma: <https://www.nfoic.org/organizations/state-foi-resource/oklahoma-foi-resources>
- Tennessee: <https://www.nfoic.org/organizations/state-foi-resource/tennessee-foi-resources>
- Texas: <https://www.nfoic.org/organizations/state-foi-resource/texas-foi-resources>
- Washington: <https://www.nfoic.org/organizations/state-foi-resource/washington-foi-resources>

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