

## David Pritzker

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**From:** Philip J. Harter <phil@pjharter.com>  
**Sent:** Sunday, April 06, 2014 11:21 AM  
**To:** John M. Kamensky; amorrisson@acus.gov  
**Cc:** David Pritzker  
**Subject:** FOIA ADR Project

I have been thinking about the FOIA Project and the comments we received on Friday. Since I am unclear whether I will be able to be on the call tomorrow, I thought I would send out a proposal for your consideration.

I have very little practical experience with FOIA. As a result, I called several friends who do and who are on both sides of the issue – agency and frequent requester. There seemed to be a general concurrence with the report that agencies win a significant number of the judicial appeals. There also seems to be a feeling that courts defer too broadly to the agencies' determinations. Given that, agencies have little incentive to engage in ADR to resolve issues they are likely to win. Doing so consumes only time and expense. If this is in fact the case, and everything I've seen and heard points to its being so, if we do not address the underlying problem this project is an exercise of whistling past the graveyard.

I therefore propose that we include a new, substantive paragraph which appears warranted in the law, the report, and my conversations and which would significantly change the dynamics of the process. It would make the potential of mediation far more attractive.

I propose a paragraph something like:

For three reasons, courts should not defer to the determination an agency makes to withhold agency records.

1. FOIA explicitly provides "the court shall determine the matter de novo." 5 U.S.C. §552(a)(4)(B).
2. FOIA is administered by many agencies and hence deference to one is inappropriate.
3. The agency has an inherent conflict of interest when deciding whether it is obligated to yield records it prefers to remain confidential.

We would be recommending to the courts that they approach the dispute with a clean slate, free of bias. That can be a strong push towards resolving issues punctually through mediation.

Thanks for your consideration.