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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF WAGNER,

Appellant,

-against-

NO. 73

NYCDOE,

Respondent.

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20 Eagle Street  
Albany, New York  
September 9, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 the matter of Wagner v. New York City Department of  
3 Education.

4 MR. ARON: Good afternoon, Your Honors. If it  
5 pleases the court, my name is Joseph Aron, and I'm counsel  
6 for Jimmy Wagner, the petitioner-appellant. Before I  
7 start, I just want to thank the court for the privilege and  
8 opportunity of presenting this matter here today. Thank  
9 you very much.

10 Okay. So Mr. Wagner's FOIL - - -

11 CHIEF JUDGE WILSON: Counsel, do you wish to - -  
12 - do you wish to save any time for rebuttal?

13 MR. ARON: Oh, I'm so sorry. Yes, Your Honor.  
14 Four minutes, please.

15 CHIEF JUDGE WILSON: Yes.

16 MR. ARON: Thank you. Mr. Wagner's FOIL request  
17 was, by any measure, objective in nature. I use the word  
18 objective as opposed to subjective. The parameters were  
19 very clear: all emails between the New York City  
20 Department of Education and a specific domain, which he  
21 wrote out, for a very defined time period. I think it was  
22 thirteen months, and he listed the thirteen months.

23 Both courts below dismissed the petition finding  
24 that it wasn't reasonably described. Now, our contention  
25 is that reasonably described really has zero to do with



1 this case. 89(3) of Public Officers Law says a FOIL  
2 request has to be reasonably described. Over the years,  
3 particularly in the First Department, reasonably described  
4 was understood to be a legal fiction. It doesn't mean like  
5 we would think it means, reasonably described. You  
6 understand what documents the requester is asking for.  
7 It's a subjective metric based on the ability to search or  
8 identify documents.

9 JUDGE TROUTMAN: And then when they go forward to  
10 search for the records, what happens then?

11 MR. ARON: Right. So - - - so our contention  
12 here is that the case is really about - - - and this is  
13 what - - - the one thing we agree on, that there was an  
14 amendment in 2008 to FOIL statutorily after a case, Data  
15 Tree, that this court decided, and that amendment said that  
16 they have to exercise, employ, whatever the term is,  
17 reasonable efforts. And there's no dispute. They have to  
18 use reasonable efforts. So he made this request - - -

19 JUDGE HALLIGAN: When you say reasonable efforts,  
20 do you mean reasonable technological efforts?

21 MR. ARON: Yes, I'm - - - yes, Your Honor, I - -  
22 - that's the entire sentence, right. So the statute says  
23 reasonable technological efforts.

24 JUDGE HALLIGAN: And so if - - - and I understand  
25 there's a disagreement about this, but if the agency uses

1 reasonable technological efforts and is not able to produce  
2 the documents because the search is too broad, it times  
3 out, whatever it is, would you agree that that does not  
4 constitute a reasonable description?

5 MR. ARON: I wouldn't, Your Honor.

6 JUDGE HALLIGAN: Okay.

7 MR. ARON: I - - - I don't think it makes a  
8 difference - - -

9 JUDGE HALLIGAN: Why - - -

10 MR. ARON: Okay.

11 JUDGE HALLIGAN: Why is that, though? I'm asking  
12 you to assume that you agree - - - and I understand there's  
13 a different view here, but in a case where you agree  
14 reasonable technological efforts were exercised, consulted  
15 with IT, they took those steps, whatever it is, and there  
16 is still no records that are generated because it times  
17 out, how could that be reasonably described?

18 MR. ARON: Because I understand the definition of  
19 reasonably described, like Judge - - - Justice Scheinkman  
20 did in the 2020 Jewish Press case in the Second Department,  
21 where he said that the Department of Education was  
22 conflating burden with reasonably described.

23 JUDGE HALLIGAN: But in that - - - in that - - -

24 MR. ARON: Reasonably described means that you  
25 understand what we're asking for.



1 JUDGE HALLIGAN: Okay. But that seems to me to  
2 be sort of a theoretical point if, in fact, you can't  
3 actually locate the records using that description, and I  
4 think that that would be true in the hypothetical I'm  
5 positing.

6 MR. ARON: So I think both things could be true  
7 fundamentally. You understand what I'm asking for, and at  
8 the same time, you have no mechanism in the world to  
9 identify what it is. I don't think those are contradictory  
10 terms, and that's why I disagree, and that - - - that's not  
11 what reasonably described is.

12 JUDGE HALLIGAN: But you would say that, in any  
13 event, it's still reasonably described? So what should the  
14 agency - - -

15 MR. ARON: Absolutely, Your Honor.

16 JUDGE HALLIGAN: What would an agency do in that  
17 event if the - - -

18 MR. ARON: Right. So that's our case according  
19 to them. In other words, they're saying they just can't  
20 get it. They employed reasonable efforts, and they can't  
21 get it. Now, I agree if they really employed reasonable  
22 technological efforts, then they win. You can't get water  
23 from a stone. They tried.

24 JUDGE HALLIGAN: And that is because - - -

25 MR. ARON: They did what they should have, and



1 they came up - - - and that's because that's what the  
2 statute says. The statute says you don't have to shut down  
3 the agency and have everybody just work on Jimmy Wagner's  
4 request. You have to make reasonable - - -

5 JUDGE HALLIGAN: But it's not because the request  
6 didn't reasonably describe the records, though.

7 MR. ARON: Correct, Your Honor. It's because it  
8 requires more than reasonable efforts.

9 JUDGE HALLIGAN: And what's the off ramp - - -

10 MR. ARON: It required excessive efforts.

11 JUDGE HALLIGAN: What's the off ramp in the  
12 statute, then, to say, okay, request denied? What's - - -  
13 what's the grounds?

14 MR. ARON: We can't do it with - - -

15 JUDGE HALLIGAN: What does - - - what does the  
16 agency say?

17 MR. ARON: We can't do it with reasonable  
18 efforts. Now, the question is, what's the definition of  
19 reasonable efforts, and I have - - -

20 JUDGE GARCIA: And what happens at that point,  
21 though? Let's say they say - - - this is a hypothetical.  
22 Agency says, we - - - there's no reasonable effort we can  
23 make technologically to do this. We talked to our IT  
24 people. We can't do this. It times out. What happens?

25 MR. ARON: If they - - - it's their burden to

1 prove they can't do it with reasonable efforts. Okay? If  
2 they could prove that, they win.

3 JUDGE GARCIA: And they have to show you that a -  
4 - -

5 MR. ARON: They win. My guy goes home.

6 JUDGE GARCIA: And they say that in the agency  
7 process where they're denying your request, they have to  
8 come back to you and say, here's what we did. Here are all  
9 the searches. Here's how many emails we have. Is it - - -  
10 and they have to justify every technological step they made  
11 and send that to you?

12 MR. ARON: Okay. That's an interesting question.  
13 I don't think so. In all of the - - -

14 JUDGE GARCIA: Isn't that the real question here?

15 MR. ARON: No, Your Honor, definitely not.

16 JUDGE GARCIA: All right. So - - - but we have  
17 to make a rule. So what would the rule be at the agency  
18 level? What would they have to do?

19 MR. ARON: So this case is actually unique  
20 because their own - - -

21 JUDGE GARCIA: Okay. But what would they have to  
22 do?

23 MR. ARON: Oh, in general, you're asking me?

24 JUDGE GARCIA: Right.

25 MR. ARON: Not in this case specific. What would

1 they have to do? So - - - so this court, on three  
2 occasions, specifically in the context of FOIL, said,  
3 whenever we're looking to interpret and make a baseline  
4 rule, we look at FOIA because that's what it's modeled  
5 after. FOIA has the exact same language, reasonable - - -

6 JUDGE GARCIA: Don't leave me in suspense. What  
7 do they want?

8 MR. ARON: I'm sorry. So - - - so there, what -  
9 - - the way FOIL defines it - - - and FOIL defines it  
10 statutorily, and FOIL defines it in the case law, and this  
11 is a quote. It says that, it would significantly interfere  
12 with the operations of the agency's automated IT system.

13 JUDGE GARCIA: And let's say they say that. What  
14 happens?

15 MR. ARON: It's their burden to show that it  
16 does.

17 JUDGE GARCIA: After - - -

18 MR. ARON: So they would make that. And this is  
19 the difference between all the New York jurisprudence and  
20 the federal in - - -

21 JUDGE RIVERA: Just to be clear, what stage are  
22 they carrying that burden, which, I think, is, in part,  
23 what - - -

24 JUDGE GARCIA: Yes.

25 JUDGE RIVERA: - - - Judge Garcia is asking you?

1 Is that when they deny the request, or only if you file - -  
2 -

3 MR. ARON: Oh, okay. So they have the burden day  
4 one, but they don't have to show it until they get to  
5 court, meaning all the case law, the jurisprudence on FOIL  
6 says they don't have to - - -

7 JUDGE RIVERA: Right.

8 MR. ARON: - - - answer your questions or tell  
9 you anything in the administrative process, and then the  
10 case law says, oh, but once they get to court, then they  
11 have to put in affidavits, real evidence, and they have to  
12 explain and articulate what the burden was.

13 JUDGE GARCIA: I understand. So we step back a  
14 minute, and those are reasonable technological efforts at  
15 the time they do the search?

16 MR. ARON: That's correct, Your Honor. That is  
17 correct.

18 JUDGE GARCIA: Then it goes - - - you file an  
19 Article 78 - - -

20 MR. ARON: Correct.

21 JUDGE GARCIA: - - - saying that decision is  
22 arbitrary, capricious error of law, right? They come in,  
23 and they say, we did this, we ran this, they put in  
24 affidavits, and then what happens?

25 MR. ARON: Right. So this is where - - - because



1 in New York, there is no case law on this, electronic. In  
2 the FOIA, there is. All the case law in the federal law  
3 centers around adequacy of the search. That's the term of  
4 art that's used. They have to show adequacy of search.

5 With paper records, twenty-five years ago, this  
6 court said, that's not a thing, in Ratley. It was never  
7 briefed here because it's not an issue because this is not  
8 a paper case, but that was always the standard. Under the  
9 federal where we borrow the terminology from, our  
10 legislature from FOIA, with the reasonable, what it comes  
11 down to is adequacy in the search they should show.

12 JUDGE GARCIA: And you say, no, you could have  
13 done these other things?

14 MR. ARON: Yes, Your Honor.

15 JUDGE GARCIA: So now, there is a hearing on an  
16 Article 78 petition where judges have got to decide if at  
17 the time they denied this FOIL request, those things that  
18 they did were technologically reasonable, or they should  
19 have done the things you wanted them to do?

20 MR. ARON: Well, it's actually a little different  
21 because in the petition, I didn't ask the court for that.  
22 I asked the court, even, to hear a framed issue hearing,  
23 meaning not at the time, but even right now, give them the  
24 ability to bring evidence and give me the ability to bring  
25 - - -

1 JUDGE GARCIA: And the court referees that.

2 MR. ARON: I'm sorry?

3 JUDGE GARCIA: The court will referee that  
4 technological debate?

5 MR. ARON: Well, Your Honor is sort of presenting  
6 it like it's an anomaly, but that's how every case is,  
7 meaning CPLR in 409 says - - - yeah, contemplates, in a  
8 special proceeding, when you have an issue of fact. That's  
9 what CPLR 409 is. So it's not an anomaly or - - - or weird  
10 that you would have that.

11 JUDGE RIVERA: So they're going to come forward  
12 and say, we did the following - - -

13 MR. ARON: Correct.

14 JUDGE RIVERA: - - - and that's as far as we can  
15 go - - -

16 MR. ARON: Correct.

17 JUDGE RIVERA: - - - and Mr. Wagner, in this case  
18 - - -

19 MR. ARON: But - - - but - - -

20 JUDGE RIVERA: - - - could say, no, no, you could  
21 have done - - -

22 MR. ARON: More, right.

23 JUDGE RIVERA: - - - this instead, and they could  
24 say, this is why we can't.

25 MR. ARON: Right. If - - - if you could just

1           indulge me for one second to say one thing? I appreciate  
2           very much that the court is looking for an overall rule,  
3           but I think the specific facts in this case will help the  
4           court in crafting the overall rule, and when I say that, it  
5           is because in this specific case, what happened, they had a  
6           lawyer with no noted IT experience run the same search  
7           three times and get the same error message three times.

8                         Now, the issue in this specific case, when I got  
9           the case as an attorney to do a petition, I Googled the  
10          issue, and Microsoft's website says, oh, if this is the  
11          issue you have, these are three things that may - - -

12                         JUDGE RIVERA: All right. But your point is that  
13          this is what you could present in the Article 78.

14                         MR. ARON: Of - - - right. Exactly. Exactly.

15                         JUDGE RIVERA: That - - - that's your point.

16                         MR. ARON: And then - - - and we were just - - -  
17          we - - -

18                         JUDGE RIVERA: That - - - that their denial - - -

19                         MR. ARON: Correct.

20                         JUDGE RIVERA: - - - is not that they - - - as  
21          you said - - -

22                         MR. ARON: Totally - - - totally arbitrary.

23                         JUDGE RIVERA: As you said before - - -

24                         JUDGE HALLIGAN: Well, there - - - wait.

25                         JUDGE RIVERA: - - - their denial is not that I

1 don't know what you want. Their denial is - - -

2 MR. ARON: Correct.

3 JUDGE RIVERA: - - - I know what you want.

4 MR. ARON: But we don't have the technological  
5 ability.

6 JUDGE RIVERA: I - - - I don't have a way to get  
7 that.

8 MR. ARON: That's correct.

9 JUDGE RIVERA: Okay.

10 MR. ARON: Now, when - - - now - - -

11 JUDGE HALLIGAN: I - - - I thought - - - if I  
12 can?

13 MR. ARON: Okay.

14 JUDGE HALLIGAN: I thought, though, that there is  
15 also an affidavit from their IT person saying that it was  
16 not - - -

17 MR. ARON: Mr. Kumar, yes.

18 JUDGE HALLIGAN: Yes. And so what are we to make  
19 - - -

20 MR. ARON: Could I address their affidavit?

21 JUDGE RIVERA: Yeah. What are we - - -

22 MR. ARON: Their - - - their affidavit actually  
23 helps us because if you look - - -

24 JUDGE HALLIGAN: Why?

25 MR. ARON: - - - at Mr. Kumar, their whole

1 affidavit is one line. Paragraph 5. It says, I would - -  
2 - I was asked if they do a search for - - -

3 JUDGE HALLIGAN: I - - -

4 MR. ARON: - - - a million email accounts - - -

5 JUDGE HALLIGAN: Yeah.

6 MR. ARON: - - - what would happen, and I said,  
7 it would time out. Who told you to do a search with a  
8 million email accounts? The request was for emails from a  
9 one-year period. During that period, the active amount of  
10 employees they had, we show from the public record, was  
11 under 200,000. So what he's saying is because you did the  
12 request in an illogical way, the system timed out, meaning  
13 his affidavit implies that had they have thought about it -  
14 - -

15 JUDGE RIVERA: But - - - but you agree, I think,  
16 given what you've said is the way this would work, that the  
17 Article 78 - - - he could explain why they ran it this way,  
18 and they do not have the capacity to limit it to the  
19 200,000.

20 MR. ARON: He never explained that. He never  
21 explained that - - -

22 JUDGE RIVERA: I - - - no, I didn't - - -

23 MR. ARON: - - - and he never set a particular  
24 limit.

25 JUDGE RIVERA: That's not my point. My point was

1 just in terms of - - -

2 MR. ARON: The framework.

3 JUDGE RIVERA: - - - the procedure, that they  
4 would have the opportunity to say, we couldn't limit it to  
5 200,000.

6 MR. ARON: I agree, and that's what the Article  
7 78 is for, and that's why - - -

8 JUDGE SINGAS: And does that go to  
9 reasonableness, then? Because you can have somebody - - -  
10 you can FOIL Google, and their technological capacities are  
11 much different than any of the city departments, right? So  
12 does that - - -

13 MR. ARON: Yes.

14 JUDGE SINGAS: Where does that fall to?

15 MR. ARON: I agree. In here, in this specific  
16 case, the city's own - - - the city agrees at this point -  
17 - - we didn't know, when we drafted the petition, the city  
18 put in an affidavit they use Microsoft 365, which is - - -  
19 has an eDiscovery tool called Purview, and that was the  
20 whole function of our expert affidavit because we first  
21 learned that on the answer, that they use - - -

22 JUDGE TROUTMAN: So in the very least - - -

23 MR. ARON: - - - this software, and our expert  
24 affidavit says if you use this software, it's possible.

25 JUDGE TROUTMAN: So in the very least, there is a



1 question of fact with respect to reasonableness of their  
2 efforts?

3 MR. ARON: There is no question because we have  
4 evidence in the record that says that they could have done  
5 it. They don't have any evidence to the contrary, saying  
6 they couldn't have done it. The only evidence they say is  
7 if we do a request for a million employees - - -

8 JUDGE RIVERA: Okay. But look, isn't - - - isn't  
9 - - -

10 MR. ARON: - - - which we don't have, so then it  
11 may time out.

12 JUDGE RIVERA: - - - isn't the question before us  
13 whether or not the basis for their denial is made out as a  
14 matter of law, not whether - - - if we agreed with you that  
15 you did properly articulate and they understood the  
16 request, whether or not they could actually, then, run some  
17 kind of technological query to answer the FOIL? We're not  
18 - - - I understood that this case was not about that second  
19 prong. It's about the first stage.

20 MR. ARON: Was their actions reasonable. Was it  
21 reasonably calculated to see whether or not they had the  
22 ability to do it.

23 JUDGE RIVERA: No. No.

24 MR. ARON: Okay. That's - - -

25 JUDGE RIVERA: No. I thought you were arguing

1 that the - - - the true question is whether or not your  
2 request was sufficiently clear, that they understood the  
3 request.

4 MR. ARON: Okay.

5 JUDGE RIVERA: That that's the only question  
6 we're supposed to figure out. If you say there's more,  
7 please let me know.

8 MR. ARON: I - - - I don't think so at all. The  
9 Appellate Division and the trial court created that  
10 question. We never did. Because they dismissed the  
11 petition solely on one basis, that it wasn't reasonably  
12 described.

13 CHIEF JUDGE WILSON: Right. But isn't - - -  
14 isn't that - - -

15 MR. ARON: We came and said, that has nothing to  
16 do with analysis.

17 CHIEF JUDGE WILSON: But isn't that - - -

18 JUDGE RIVERA: That's right.

19 CHIEF JUDGE WILSON: - - - the legal issue for us  
20 to decide?

21 JUDGE RIVERA: Yes.

22 CHIEF JUDGE WILSON: That's what the - - - walk  
23 me - - -

24 MR. ARON: No, Your - - - no, Your Honor, and  
25 I'll tell you why.

1 CHIEF JUDGE WILSON: Sure.

2 MR. ARON: Because it's dominoes. If they would  
3 do a diligent search and a reasonable search, we believe  
4 they would be able to identify it. So by their own  
5 admission, once they can identify it, then it becomes  
6 reasonably described, so it's circular.

7 CHIEF JUDGE WILSON: But you're - - - you're  
8 asking us to ask - - - to make a factual determination when  
9 all that, really, has happened here - - - I thought, and I  
10 think, Judge Rivera thought, I don't know about anybody  
11 else, that the issue for us to decide was whether these  
12 were reasonably described and that that's the question of  
13 law in front of us. Whether they can - - -

14 MR. ARON: Absolutely not. And that's what our  
15 petition says. The question is - - -

16 CHIEF JUDGE WILSON: - - - whether they can or  
17 cannot - - -

18 MR. ARON: - - - did they do reasonable efforts.

19 CHIEF JUDGE WILSON: - - - actually do it seems  
20 to me a fact-laden question that we should not be the first  
21 people who decide it.

22 MR. ARON: So it's a legal question. Why is it a  
23 legal question? Because they're saying having an attorney  
24 run it three times is legally sufficient under the  
25 standard, meaning we all agree on what the standard is.

1 The standard is you have to use reasonable efforts of  
2 technological means. That's a quote from the statute. So  
3 they're saying legally, by having an RAO, an attorney, run  
4 it three times, they fulfilled their burden, so this is a  
5 legal question for this court.

6 CHIEF JUDGE WILSON: We don't know that's not  
7 true.

8 MR. ARON: I'm sorry?

9 CHIEF JUDGE WILSON: We don't know that's not  
10 true.

11 MR. ARON: You do, Your Honor.

12 CHIEF JUDGE WILSON: How?

13 MR. ARON: Because Microsoft says it, and it's in  
14 the record.

15 CHIEF JUDGE WILSON: That's a factual  
16 determination.

17 MR. ARON: No, but the factual determination goes  
18 to the law.

19 CHIEF JUDGE WILSON: Microsoft said that the  
20 Department of Education of the City of New York can  
21 actually run this?

22 MR. ARON: Microsoft said that there's a solution  
23 for the problem they have articulated.

24 JUDGE HALLIGAN: Microsoft when it - - - via a  
25 Google search?

1 MR. ARON: No, no. Microsoft on their support  
2 page. It's incorporated in the petition on their own page.

3 CHIEF JUDGE WILSON: Which you found by searching  
4 the Internet?

5 JUDGE HALLIGAN: Yeah.

6 MR. ARON: Correct. And we asked the court in  
7 the petition - - - but it's not just Microsoft. We put in  
8 an expert affidavit, which we're entitled to do. They - -  
9 - they - - -

10 JUDGE HALLIGAN: Yeah, but that - - - that, by  
11 almost its nature, is a controverted question of fact, it  
12 seems to me.

13 MR. ARON: I agree that there is an issue of  
14 fact, and that's why, in our petition, we asked for a  
15 framed issue hearing. There - - - there are two issues.  
16 One is how do you satisfy the requirement of the statute,  
17 right? The statute said they have to use reasonable  
18 efforts. So that's a legal question. At what level will -  
19 - - let's say they - - - let's say they didn't use an IT  
20 person at all, right? They say they did at some point. So  
21 does that constitute reasonable efforts? They have to deal  
22 with - - -

23 CHIEF JUDGE WILSON: But that's a fact - - -  
24 that's a - - - that's a fact question, right?

25 MR. ARON: Why is it not a legal question? Was

1 that reasonable efforts?

2 CHIEF JUDGE WILSON: Is it not a - - - is it not  
3 a fact question?

4 MR. ARON: It's applying the fact to the law.  
5 The law requires reasonable efforts.

6 CHIEF JUDGE WILSON: And so when we review  
7 applications of fact to the law, there's somebody below us  
8 who has done that in the first instance, and we're  
9 reviewing their factual determinations for legal  
10 sufficiency, right, essentially, and that hasn't happened  
11 here.

12 MR. ARON: Which, I guess, is why we ask, in the  
13 petition, as a cause of action for a hearing, and the First  
14 Department said that there's no basis to have a factual  
15 hearing.

16 CHIEF JUDGE WILSON: Well, we can't give you a  
17 hearing here is my point, a factual hearing. I mean, you  
18 asked for a factual hearing.

19 MR. ARON: No, but this court could say that the  
20 First Department and the trial court erred in not granting  
21 a hearing and remand it down for a factual hearing - - -

22 CHIEF JUDGE WILSON: Well, that's - - -

23 MR. ARON: - - - based on the law.

24 CHIEF JUDGE WILSON: - - - that's quite  
25 different, I think, than what you were asking for before.

1 MR. ARON: With the reasonably described?

2 CHIEF JUDGE WILSON: Yeah.

3 MR. ARON: Right. So - - - so again, the  
4 reasonably described was a creation of the courts. If you  
5 look at our petition, an extensive memorandum of law that's  
6 in the record in front of this court, our focus was that  
7 they didn't - - - they didn't do this other thing. The  
8 First Department, because they have a different way of  
9 understanding reasonably described in the other three  
10 departments, they said, well, if they can't find it, then  
11 it's not reasonably described. We're saying it's a circle  
12 because if they would have asked an IT person or called  
13 Microsoft, for whom they're paying support, then they would  
14 have found it, and then, even according to them, it's  
15 reasonably described.

16 JUDGE GARCIA: Could we just send it back and  
17 say, please determine if this was reasonable technological  
18 efforts?

19 MR. ARON: Exactly. If their - - - them having  
20 the same lawyer run the request three times and assume that  
21 that was reasonable - - -

22 JUDGE GARCIA: No, no. We just send it back to  
23 the trial court and say, make a determination. We don't  
24 have to say you get a hearing.

25 MR. ARON: Right.

1 JUDGE GARCIA: We just say, make a determination.

2 MR. ARON: Right.

3 JUDGE RIVERA: Or we - - - we could determine  
4 that the two different inquiries were collapsed, right?  
5 That there's one inquiry about whether or not the  
6 description is sufficient as required by the law, and we  
7 may say yes - - - we may say no, but let's stay with - - -

8 MR. ARON: Right.

9 JUDGE RIVERA: - - - yes for one moment - - - and  
10 then send it back and say, now get - - - as Judge Garcia  
11 and, I think - - -

12 MR. ARON: Right. Right.

13 JUDGE RIVERA: - - - the Chief Judge had  
14 mentioned, to this next step.

15 MR. ARON: Because I could still lose on the  
16 second prong, right.

17 JUDGE RIVERA: Right?

18 MR. ARON: I agree, Your Honor.

19 JUDGE GARCIA: And then the court can decide if  
20 that court needs a hearing or doesn't need a hearing, and  
21 you can - - -

22 MR. ARON: Right. Our contention is just that  
23 it's unnecessary, but in - - - since I see the court is  
24 really concerned about the reasonable described, there is  
25 one fact, which is fascinating, which is the exact same

1 request was made to another New York City agency that uses  
2 the exact same software. That's not disputed. Okay? This  
3 exact same request was made to the New York City Department  
4 of Health and Mental Hygiene. They were able to run it.  
5 So - - -

6 JUDGE HALLIGAN: And may have a different number  
7 of email accounts.

8 MR. ARON: Right. I agree. I agree to that.  
9 But I'm saying the logic - - -

10 JUDGE HALLIGAN: So I'm not sure how it's  
11 probative.

12 MR. ARON: No, because I'm saying the logic is  
13 very perverse, that reasonably described is subjective and  
14 not objective. You can't ask a request to agency A and  
15 it's not reasonably described and make the identical  
16 request to agency B and now, miraculously, it is reasonably  
17 described.

18 JUDGE CANNATARO: But that sounds inherently  
19 factual, too. That sounds like some sort of factual  
20 argument that goes to the reasonableness of the effort and  
21 not the description - - - the adequacy - - - adequacy of  
22 the description. So you - - - it sounds like you're  
23 putting the cart before the horse.

24 MR. ARON: Well, I would say that that's what the  
25 First Department did by not using legally described as an

1 English term and use it as a - - - as a legal fiction based  
2 on any individual department's record-keeping system.  
3 Like, in the Jewish Press case, that's exactly what Judge  
4 Scheinkman said. He said that it gives an incentive to an  
5 agency not to keep things in an organized way because then,  
6 for that agency, nothing would be reasonably described  
7 because that agency is not indexed in a way that correlates  
8 with the way the requests come in.

9 JUDGE CANNATARO: I understand that argument, but  
10 I feel like we don't get an answer for that until there's  
11 been a clean determination about whether or not the request  
12 is reasonably described absent any consideration of the  
13 efforts entailed in it.

14 MR. ARON: Unless Your Honor would determine that  
15 reasonably described means like it sounds, that do they  
16 know what Mr. Wagner sought, and then you would answer that  
17 in the affirmative, and then it would go to the analysis,  
18 well, let's look at the facts and see - - -

19 JUDGE RIVERA: That that requirement of FOIL is  
20 purely descriptive.

21 MR. ARON: Correct.

22 JUDGE RIVERA: It has nothing to do with the  
23 burdens or the volume. It's just purely descriptive.

24 MR. ARON: And that's what Konigsberg implies  
25 from 1974, whatever year it was, that - - - which was the

1 last time this court took a case on reasonably described,  
2 so - - -

3 CHIEF JUDGE WILSON: Thank you, Counsel.

4 MR. DAVIES: Good afternoon, Your Honors. May it  
5 please the court. Jamison Davies on behalf of the  
6 respondent.

7 JUDGE HALLIGAN: Can you address your take on the  
8 relationship between reasonably described and reasonable  
9 technological efforts?

10 MR. DAVIES: Sure. I would say that as all of  
11 the departments have held, and this is also consistent with  
12 FOIA, that reasonably described has within it an element  
13 that the material must be locatable with a reasonable  
14 effort - - - reasonable technological effort. That's a  
15 separate - - -

16 JUDGE HALLIGAN: And why does it matter - - - why  
17 does it matter whether we treat it as, you know, two  
18 components to a single inquiry? In other words, reasonably  
19 described has embedded within it reasonable technological  
20 efforts as opposed to two distinct inquiries. Does it make  
21 a difference, really?

22 MR. DAVIES: I think it matters in two senses.  
23 One, in that the petitioner bears the burden of reasonably  
24 describing the record sought, and so that puts - - - and if  
25 - - - if the agency finds that they're not reasonably



1 described, then it has the burden of showing why, and  
2 that's, like, a threshold determination. The agency made  
3 some good-faith effort to locate - - -

4 JUDGE HALLIGAN: So what does that - - - what  
5 does that actually mean in a case like this? So they say,  
6 I want all the emails from X to Y, and you search. I  
7 realize there are aspects of, you know, the adequacy, et  
8 cetera, that are controverted. Just set that to the side,  
9 if you would. And you say, we searched, and it timed out.  
10 Okay? Is that a question of whether it's reasonably  
11 described if their dispute with you is you didn't do the  
12 search in - - - in a sufficiently efficient way?

13 MR. DAVIES: It is. I think all of the courts,  
14 both in the FOIA context and in the FOIL context, have held  
15 that there is a component of the reasonably - - -  
16 reasonably described is not just can you make sense of the  
17 request. It's - - -

18 JUDGE CANNATARO: Would you agree that you can  
19 make sense of this request? I mean, it - - - regardless of  
20 any other adjectives you want to attach to it, all emails  
21 from this domain for this period you - - - is intelligible,  
22 isn't it?

23 MR. DAVIES: Yes. There's no dispute that it's  
24 an intelligible request that they - - -

25 JUDGE HALLIGAN: So is it also their burden to

1 tell you how you should run the search? What work does the  
2 burden shifting that you're identifying do in this  
3 circumstance?

4 MR. DAVIES: So I think what - - - what work it  
5 does and what happened here and what's supposed to happen  
6 with FOIL is that in the event - - - and this is true in  
7 the regulations as well. I'd point to 21 NYCRR 1401.2.  
8 The idea is that if the request is not reasonably described  
9 because it doesn't match up with how the agency can search  
10 or how the agency - - -

11 JUDGE HALLIGAN: Yeah.

12 MR. DAVIES: - - - indexes their files, they go  
13 back to the requester and say, can you narrow, clarify,  
14 amend your request. We tried to do that twice. There was  
15 an - - - a complete refusal. You know, we gave suggestions  
16 - - -

17 JUDGE HALLIGAN: And so suppose, at that point,  
18 they gave you the equivalent of the - - - I think it's - -  
19 - it's Barak affidavit. Would you, then, have an  
20 obligation to try that and see what result it engendered?

21 MR. DAVIES: I - - - I'm not - - - two points on  
22 that. First, I think, there might - - - there may be some  
23 obligation - - - I wouldn't say there's a categorical  
24 obligation to just - - - to try whatever a requester  
25 suggests, but if it is a reasonable effort, I think it is.

1 But I would point out that - - -

2 JUDGE TROUTMAN: Is it their obligation to show  
3 you how you can, in fact, find what they want?

4 MR. DAVIES: I'm sorry?

5 JUDGE TROUTMAN: Is it their obligation to show  
6 you how to obtain what they're requesting?

7 MR. DAVIES: It's their obligation to reasonably  
8 describe the documents, and that, as the case law has  
9 found, has a component of what they're asking for and a  
10 component of what the agency - - -

11 JUDGE RIVERA: We haven't said that, right?

12 MR. DAVIES: It hasn't been said by this court,  
13 no, but they - - -

14 JUDGE RIVERA: Right. Right. So we could - - -  
15 we - - - I understand your argument. Persuasive. The - - -  
16 - but the court could - - - and I just want to ask you if  
17 you think it would somehow be contrary to the text of FOIL  
18 or the legislative intent of these provisions if we decided  
19 that, you know, reasonably described, common understanding,  
20 plain text means it's just descriptive.

21 MR. DAVIES: I think it would be - - -

22 JUDGE RIVERA: Just descriptive.

23 MR. DAVIES: I - - -

24 JUDGE RIVERA: And then you can say, okay, I know  
25 what you want, but I can't find that for whatever reason.

1 I can't run it on the system we have, a platform doesn't  
2 work that way, and that's a different matter because you've  
3 already agreed these are different burdens.

4 MR. DAVIES: Yeah. I think it would be contrary  
5 to both the text and legislative intent for two reasons.  
6 One, as this court has held before, you look to FOIA, and  
7 the legislative history, which we cite in our brief of  
8 FOIA, says that the reasonably described piece of FOIA,  
9 which is similar to the reasonably describe piece here,  
10 involves a reasonable effort - - -

11 JUDGE RIVERA: But we do that when we need help,  
12 not when the language is clear on its face, right?

13 MR. DAVIES: Corr - - - I think that's - - - you  
14 mean if this court always looks at the legislative intent?  
15 I mean, I think that's a component of it. And this court,  
16 in *Konigsberg*, cited the federal cases of *Marks* and the  
17 *National Cable Association*, which those federal cases  
18 incorporated that same provision, which is that the  
19 reasonable effort is a component of what is reasonably  
20 described under FOIL. If I could just return to - - -

21 JUDGE HALLIGAN: I think you had a second reason  
22 as well.

23 MR. DAVIES: Yes. The - - - oh, the sec - - -  
24 there was the legislative history and the following of FOIA  
25 and the case law that the court cites.

1 JUDGE HALLIGAN: So what - - - what I'm - - -

2 JUDGE RIVERA: What - - - I'm sorry. What's the  
3 legislative history?

4 MR. DAVIES: It's the - - - it's the HR report  
5 that describes the legislative history of FOIA, which talks  
6 about the - - -

7 JUDGE RIVERA: Oh, no, no, no. I thought you  
8 meant legislative history of FOIL.

9 MR. DAVIES: No, no. I'm sorry.

10 JUDGE HALLIGAN: What I'm struggling with is  
11 this. Let's assume there's a request that is clear on its  
12 face, I want all emails between person X and anyone in your  
13 agency. Okay? And you have - - - I'm not suggesting this  
14 is what the record says here, but let's assume you have a  
15 FOIL officer who runs a search that, on its face, is highly  
16 unlikely to generate any response and, instead, going to  
17 time out. Okay? I'm not conversant enough to say exactly  
18 what that would be, but the search can't really be  
19 construed as anywhere near reasonable technological  
20 efforts. Does that mean you've succeeded on reasonably  
21 described? What happens next to test - - - where do we  
22 test the proposition of whether your technological efforts  
23 are reasonable?

24 MR. DAVIES: I think where it's tested is in the  
25 Article 78 - - - well, there's two - - - two potential

1 ways. One is if the requester responds, you know, and you  
2 would give them options as to how we could change the  
3 search, which we did here, and, you know, they work with  
4 the agency, as FOIL contemplates and as the regulations  
5 contemplate, or it could be tested in court, and we put in,  
6 you know, our affidavit saying, you know, based on our own  
7 systems and this effort, we - - -

8 JUDGE HALLIGAN: But it's tested as part of a  
9 discrete inquiry separate from reasonable description. So  
10 you would, then - - - you would, then, defend saying we've  
11 - - - you didn't reasonably describe, or would you defend  
12 saying you reasonably described, but we exercised  
13 reasonable technological efforts, and nothing came up?

14 MR. DAVIES: I apologize if I'm not being clear.  
15 I would - - - I think the reasonable technological efforts  
16 is a component of reasonably described.

17 JUDGE GARCIA: Can I ask it this way - - -

18 JUDGE RIVERA: But that - - - that's hard to  
19 understand. No, because it's his description, not yours.  
20 It's his description. And then the efforts are the efforts  
21 of the agency.

22 MR. DAVIES: The efforts are the efforts of the  
23 agency. I think it's - - - I think it helps to  
24 conceptualize it - - - to think of it as there's basically  
25 two stages. One is reasonably described, which is can I

1 get the universe of documents that I need to review and  
2 then see if there are - - - you know, if they need to be  
3 turned over, if there are exemptions, if there's redactions  
4 it maybe needed. That's the review process. That's where  
5 the burden and voluminous objections come in. But whether  
6 I can create that initial universe of documents with the  
7 systems I have is the reason we describe - - -

8 JUDGE GARCIA: Can I - - - can I ask you this?  
9 In this case, the fact that, it seems, the Supreme Court  
10 calls it reasonable efforts, the Appellate Division calls  
11 it reasonably described, does it make a difference as to  
12 what they were applying and what they were concluding as to  
13 what they labeled it?

14 MR. DAVIES: I think it makes a difference only  
15 in the sense that the reasonably described is a threshold  
16 issue where - - - in which the petitioner bears the burden.

17 JUDGE GARCIA: But would it change anything here  
18 depending on what they called it? So did one of the courts  
19 below mislabel this in a way that affects the ruling?

20 MR. DAVIES: I don't think it would. I think the  
21 - - - I think what the rules should be and what is  
22 consistent with FOIA is that a reasonably described request  
23 requests documents that the agency can locate with  
24 reasonable efforts.

25 JUDGE CANNATARO: I'm still having trouble

1 grasping it because you got your request. You ran your  
2 search. It failed. It timed out. And your response was,  
3 it's not reasonably described, and now, I understand you to  
4 be saying that response is informed by the failure of your  
5 staff to - - - you know, to successfully execute the  
6 search.

7 But you have the other side saying there are  
8 other things you could have done. There is another way you  
9 could have done it where it wouldn't have failed, and that,  
10 to me, seems purely related to the reasonableness of the  
11 effort and totally disconnected from the adequacy of the  
12 description. So I'm just not understanding how you can  
13 join reasonableness and technologically adequate or  
14 reasonable.

15 MR. DAVIES: Yeah. I think - - - a couple of  
16 responses on that. First, I think that's how the case law,  
17 in general, both in the state courts and the federal  
18 courts, have interpreted the reasonably described  
19 requirement, but also, I think, it goes to the point where  
20 they come on reply in supreme court and say, you could have  
21 done it this way.

22 But actually, if you look to their expert's  
23 affidavit, even there, he narrows the request. He says,  
24 you should eliminate inactive accounts. That changes the  
25 request. He didn't limit his request to active accounts in

1 the initial FOIL request.

2 And there's good reason to think, you know, an  
3 email could have been sent to someone who was on leave, who  
4 hadn't logged in recently. The - - - if you look at the  
5 actual script his expert included, it was to go by someone  
6 who had logged in when - - -

7 JUDGE CANNATARO: So they changed the request at  
8 the expert affidavit stage?

9 MR. DAVIES: Correct. Correct. And we - - - the  
10 agency is not at liberty to - - - if - - - when he  
11 continues to insist on not amending his request after we go  
12 back to him and say, you know, can you narrow it by - - -

13 JUDGE RIVERA: No, but see, this is why I'm  
14 having difficulty, again, with your argument. Put aside  
15 the federal standard may be as you have articulated it, and  
16 maybe other state courts have - - - lower courts in our  
17 state have articulated it in the same way. You're saying  
18 that his description, his burden is defined by what you do,  
19 and that does not make sense to me.

20 MR. DAVIES: It's - - -

21 JUDGE RIVERA: You're saying - - - you actually  
22 are literally saying you do not know if he has reasonably  
23 described it until you try and find it.

24 MR. DAVIES: I think that's right because FOIA  
25 doesn't impose an obligation on an agency to organize its



1 documents in any particular way. And the cases even go - -  
2 -

3 JUDGE RIVERA: No, but that is - - - I'm not  
4 arguing that point. That strikes me as a different  
5 question. The only question is whether or not he's given  
6 you a description that you can comprehend, right? Whether  
7 or not you can actually find these documents and turn it  
8 over to him with, right, reasonable, diligent technological  
9 efforts strikes me as a different question. I don't - - -  
10 it's very odd to hear the argument be that his burden rises  
11 and falls with what you do to define whether or not he's  
12 met his burden as opposed to your burden being met by what  
13 you do.

14 MR. DAVIES: Well, I - - - no, I think that's  
15 right in the - - - and that's consistent with the way the  
16 cases have come out. It says that he has the burden to  
17 have an initially reasonably described request, and the  
18 agency, if it's going to deny on the reasonably described  
19 basis, has the burden of showing why it can't locate that  
20 universe of documents based on what he has asked for.

21 JUDGE RIVERA: I guess I'm not being clear. But  
22 - - - but what you're saying is not that you haven't met  
23 your burden. That he hasn't met his burden. That's what  
24 you're saying. When you say it's not reasonably described,  
25 he has failed in some way as opposed to, yes, I understand

1 exactly what he wants. It's clear. It's reasonably  
2 described. Satisfied what you call the threshold burden,  
3 right? And now, we're following through to try and respond  
4 given our duties and obligations under FOIL. And you can  
5 make your arguments. We've tried, and we are unable to  
6 respond to this request. That's not a failure of his  
7 description. That's just you're not able to do it.

8 MR. DAVIES: I mean, whether or not you - - - I  
9 guess, how it's labeled, the fundamental point is that the  
10 request must be such that the agency can - - - you know,  
11 the Committee on Open Government says you don't have to  
12 undertake - - -

13 JUDGE GARCIA: Let me go back to my question.

14 MR. DAVIES: Yes.

15 JUDGE GARCIA: No matter how it's labeled, is it  
16 your position here today that you'd have no burden to show  
17 that you made reasonable technological efforts to locate  
18 this material?

19 MR. DAVIES: No. We - - - he had - - - sorry.

20 JUDGE GARCIA: Their burden is reasonably  
21 describe it. If they came in and said, we'd like some  
22 documents, you know, you didn't reasonably describe that,  
23 and we're - - - we're kind of done, right? They describe  
24 something. You understand what they want. Now, as I  
25 understand what you're saying, the burden shifts to you to

1 show reasonable technological efforts to locate that. So  
2 whether we call that part of it reasonably described or  
3 reasonable technological efforts, it's your burden to do  
4 that.

5 MR. DAVIES: I think - - - I would think - - - I  
6 would say that's right on us. We have to come back if  
7 we're going to deny it on that basis, and as we did - - -

8 JUDGE HALLIGAN: So if you - - - so the email - -  
9 - the request for the email seems to me clear enough on its  
10 face. All emails between DOE with the dates from the  
11 following domain. So if you simply came back and said, we  
12 can't find it without any explanation about searches timing  
13 out or search parameters, would you agree that that would  
14 not be sufficient to meet your burden because you need to  
15 explain why your technological efforts were reasonable?

16 MR. DAVIES: Yeah, I think that's right. I think  
17 - - - and that's what we did. We came in with affidavits  
18 from the records officer. And I would just - - -

19 JUDGE SINGAS: Can I ask something just along  
20 those lines? So what happens after? Because you started a  
21 couple of times, and you haven't been able to finish. So  
22 when you go back and say, look, we can't find it using  
23 this, but we're asking you to help us out, narrow your  
24 search a little bit, use another term, give us some  
25 guidance, and they refuse to do that - - - which I think

1           they did?

2                       MR. DAVIES:   Twice.

3                       JUDGE SINGAS:   Right.   So what happens then?  
4           Does that go to the reasonably described, in your opinion?  
5           What's your argument there?

6                       MR. DAVIES:   Are you asking if their refusal goes  
7           to the - - -

8                       JUDGE SINGAS:   Yeah, their - - -

9                       MR. DAVIES:   - - - reasonably described?  I - - -  
10          I think it's related in the sense that we have given them  
11          the reasons why we found that the - - - the request was not  
12          sufficiently described, and it gives them an opportunity -  
13          - - and this is what the regulations also contemplate.  
14          That it says that the agency should work with the requester  
15          to help them understand how the systems work such that they  
16          can tailor a reasonably described request.  I'd point,  
17          again, to those regulations.  I think that's contemplated  
18          by the statute.

19                      JUDGE SINGAS:   So those efforts go to reasonably  
20          described.

21                      MR. DAVIES:   I think that's right, yes.

22                      JUDGE SINGAS:   And so - - -

23                      JUDGE CANNATARO:   And isn't that, really, the  
24          crux of the dispute here?  You're saying the efforts - - -  
25          his failure to cooperate with you to modify the search to

1 make it more susceptible of success goes to the  
2 reasonableness of the description, and he's basically  
3 arguing, no, that goes to the reasonableness of the  
4 technological effort.

5 MR. DAVIES: I would - - - I wouldn't say it  
6 necessarily goes - - - our offers go to the reasonableness  
7 of the description. We - - - our letter says, this is not  
8 reasonably described as it is. Here are some ways that you  
9 could do it. And just to point out, he could still submit  
10 - - -

11 JUDGE SINGAS: Okay. So if they come back - - -

12 JUDGE RIVERA: So if your ways are different  
13 searches, there - - - it's a different request. I don't  
14 think - - - well, you could have the iterative process.  
15 Certainly, we want to encourage that so we don't have the  
16 litigation. But - - - but if he refuses, all you got to do  
17 is deny, and a court can decide whether or not he  
18 reasonably described it, and then you go back and say, this  
19 is why, even though he's reasonably described it, I know  
20 what it is. We cannot run this. And that's where you can,  
21 then, have the dispute resolved in - - - by a judge as to  
22 whether or not you've done that, right?

23 MR. DAVIES: Yeah, I think that's right. I think  
24 that's where we are now.

25 JUDGE RIVERA: But it - - - it's not that you

1 didn't reasonably describe it, go back to the board and  
2 clarify - - - there's nothing to clarify.

3 MR. DAVIES: I - - -

4 JUDGE RIVERA: He could change his request. That  
5 is true. And maybe he's willing to do that and you're  
6 willing to accept it without a new FOIL request, but he's  
7 not clarifying anything because you conceded it is clear.  
8 You know what it is. You tried to run it. You can't run  
9 it if you don't know what he's asking for.

10 MR. DAVIES: I think this goes to, you know, sort  
11 of the fundamental point that we've been discussing - - -

12 JUDGE RIVERA: Yeah.

13 MR. DAVIES: - - - which is that the cases and  
14 the law have all had a component of - - -

15 JUDGE RIVERA: Yeah.

16 MR. DAVIES: - - - reasonably describe that is  
17 beyond what just the plain words of that mean. You know, I  
18 would just point out - - - you know, if you want to take a  
19 look at the federal cases, we found one in response to what  
20 he's - - - the federal cases he cited. Brody v. United  
21 States, where it was a - - - a similar thing, where they  
22 asked for any emails between any FBI agents and one  
23 particular email address. They said that was going to  
24 require searching 73,000 accounts. That was held not be  
25 reasonably described.

1 JUDGE CANNATARO: And you think that's a good  
2 rule? That's not a conflation of two separate principles,  
3 and that should be the law, that there should always be  
4 this underlying consideration that takes place in the  
5 rubric of reasonably described?

6 MR. DAVIES: I would say if it was me, I would  
7 have, perhaps, written the language differently if I was  
8 writing the statute myself, but I think the way the statute  
9 is set up, it's, you know, two steps. Reasonably described  
10 is are you able to figure out the universe of documents?  
11 Is it filed in such a way?

12 And - - - and even the cases going back a long  
13 time, say, if it's not indexed in the way that the person  
14 is asking for, if they're asking for something by a  
15 particular station house, but it's actually indexed by  
16 subject matter, that's not reasonably described. So I  
17 think this is very consistent with the law and history of  
18 FOIL.

19 JUDGE CANNATARO: But this isn't an indexing  
20 problem, right? I mean, you have - - - you have Microsoft  
21 365. It keeps records of all the emails. It was just a  
22 massive, massive search that timed out. But you knew  
23 exactly where to find everything, didn't you?

24 MR. DAVIES: I think - - - that is right. I  
25 think the point I'm trying to make is that reasonably

1 described has always had this aspect of more than just can  
2 you understand what the request says on its face.

3 JUDGE CANNATARO: I know. I'm - - -

4 JUDGE HALLIGAN: Is it - - -

5 JUDGE CANNATARO: - - - I'm just wondering if  
6 that's the right articulation of the law.

7 MR. DAVIES: I think - - - given how this court  
8 and courts have interpreted it throughout, you know, I  
9 think it would be a very significant upending, would make  
10 in inconsistent with FOIA, as this court has not done in  
11 the past, to - - - to change that - - - you know, if the  
12 legislator wanted to amend it to make that more clear, I -  
13 - - I think that would be okay, but I think it would be a  
14 wholesale reworking of the law to make that rule now.

15 JUDGE HALLIGAN: I take it Mr. Kumar's affidavit  
16 is your - - - your response in terms of the reasonable  
17 technological efforts. Yes?

18 MR. DAVIES: It's both the Kumar affidavit and  
19 the Macadangdang affidavit.

20 JUDGE HALLIGAN: Okay. Is it clear from the  
21 Kumar affidavit that the consultation was done  
22 contemporaneously from the search? To me, it was not clear  
23 whether he was asked after the fact as opposed to asked  
24 during the course of the search whether there was something  
25 different that could be done.

1 MR. DAVIES: I think he - - - it's the way it's  
2 written, but if you look at the Macadangdang affidavit, she  
3 specifically affirms that she consulted with multiple IT  
4 professionals while trying to run this search to try to  
5 figure out how to make it work, and that informed the  
6 response to Mr. Wagner as to how they could come back and  
7 give us a search that we would actually be able to run. So  
8 there is - - - he was the one who put in that particular  
9 affidavit, but she affirms that she spoke with multiple  
10 people.

11 And the DOE has five full-time FOIL people. It's  
12 not as though they're unversed in discovery software. This  
13 is what they do. Five full-time FOIL lawyers and three  
14 paralegals do it all day, every day. We get thousands of  
15 requests. So they understand, you know, the discovery - -  
16 - eDiscovery platforms.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. DAVIES: Thank you.

19 MR. ARON: Just to respond to a couple of the  
20 points made and what, I think, is really the court's  
21 question that Your Honors started with that you're sort of  
22 grappling with with - - - with making a rule.

23 So I think one of the questions were about if - -  
24 - if it was offered at an earlier stage. So I think it's  
25 not even, really, a hypothetical, but one fact pattern to

1 think about when crafting a rule is this is what we do  
2 regularly is FOIL - - - nowadays, most FOIL requests are  
3 for electronic records. So we make a FOIL request to an  
4 agency for electronic records, and in the FOIL request, we  
5 say, well, if you have trouble identifying and extracting  
6 with it, we have an IT person, and we'd like to have a  
7 phone call and collaborate to understand what software you  
8 use - - -

9 JUDGE CANNATARO: Is that - - - is that what  
10 happened here?

11 MR. ARON: No, that's not what happened here, but  
12 in terms of crafting a rule, meaning with this whole  
13 reasonably described where Your Honors started, they could  
14 say, from the get-go, fly a kite, it's not reasonably  
15 described, and we don't know how to do it. So the  
16 requester can say, but I have an IT person who will tell  
17 you, you use Microsoft 365, I'll email you a script, plug  
18 it in.

19 According to them, the beginning and the end of  
20 the analysis is if the attorney, who's the record access  
21 officer, has the competency to do it. If the RAO doesn't  
22 have the competency, the requester could have a nice day.  
23 Whereas, in terms of making a rule and - - - like my  
24 adversary mentioned, with all the regs on FOIL, with  
25 collaborating, yeah, I think it's a very unfair process - -

1 -

2 JUDGE RIVERA: Okay. If I - - - I - - - I - - -

3 MR. ARON: - - - without collaboration.

4 JUDGE RIVERA: I'm a little confused, now,  
5 whether or not you have adopted his rule, but you just  
6 disagreed that they've satisfied their burden, or if - - -  
7 what I thought was your argument in your briefing, perhaps  
8 I misunderstood, that these are two separate burdens.  
9 You've satisfied yours, and you think that's plain on its  
10 face, and for them to collapse the burdens is - - - is the  
11 legal matter, and that's problematic. So I just want to  
12 clarify, are you now adopting their rule?

13 MR. ARON: No, not at all. I agree with  
14 everything Your Honor said. That was our presentation.  
15 I'm saying - - -

16 JUDGE RIVERA: Okay.

17 MR. ARON: - - - if you would give credence to  
18 what my adversary is saying, so then, what you'll do is  
19 you'll tell someone, from the get-go - - - and by the way,  
20 FOIL, in 89(3), the last three sentences, it contemplates  
21 using a third party. It says, if the agency doesn't have  
22 the resources, then it was talking - - - it's a little bit  
23 hard to understand if it's talking about electronic records  
24 or just paper, but if the agency isn't able to do it  
25 because they don't have the bandwidth, so they should give

1 the opportunity to the requester to pay. So why should  
2 this be any different? That's the exact same thing. So  
3 then, there should be a dialogue for the requester to say,  
4 okay, what database do you use, I'll have my IT person - -  
5 -

6 JUDGE CANNATARO: And is that the only way it can  
7 be - - -

8 MR. ARON: I'm sorry?

9 JUDGE CANNATARO: Is there something inherently  
10 wrong with - - - with them coming back, after they get the  
11 request, and they say, we deemed your request not  
12 reasonably described because it's impossible for us to do,  
13 and then they say, let's - - - let's limit it in some way  
14 in order to make it easier for us to do it, that's an  
15 unacceptable alternative?

16 MR. ARON: So in this specific case, yes, because  
17 - - - for the exact reason that - - - that Judge Rivera  
18 seemed to allude to in her questioning, which is it's a  
19 different request fundamentally. Narrowing the request is  
20 exactly what it is, narrowing. Mr. Wagner didn't want  
21 limited to certain custodians. He wanted all  
22 communications from that domain to this domain. So the  
23 only question is, is it doable.

24 JUDGE CANNATARO: But it's more subtle than that  
25 because - - - because you came in and said, we don't need

1           you to search - - - you know, at some point, you said, we  
2           don't need you to search one million email accounts. You  
3           can discard, you know, inactive employees. So there's at  
4           least a notion in there that you were willing to limit it  
5           in a way that might get the search executed.

6                     MR. ARON: Your Honor, that wasn't limited. That  
7           was the request on its face. When you ask, I want all  
8           communications that your employees had yesterday, don't  
9           look for communications from employees that left in 1995,  
10          it's impossible that they sent an email yesterday, implicit  
11          in Mr. Wagner's request is to - - -

12                    JUDGE RIVERA: You mean ignore the date field  
13          that you gave him?

14                    MR. ARON: Of course. Implicit in his request is  
15          to look only at accounts that were active in that time.  
16          Why are you looking at 800,000 people that left between  
17          1995? Of course, you have no responsive documents there.

18                    JUDGE CANNATARO: And you have no obligation to  
19          work with them to - - -

20                    MR. ARON: Well, that's implicit. That - - -

21                    JUDGE CANNATARO: - - - to make them understand  
22          that.

23                    MR. ARON: An - - - if it's implicit on its face  
24          - - - this goes back to the reasonably describe, meaning  
25          Mr. Wagner's request, on its face, is it clear from that

1 request that he doesn't want to look at email accounts of  
2 people that were terminated or quit in 1995.

3 JUDGE TROUTMAN: But is it unreasonable - - -

4 MR. ARON: I think the answer is, yes, it's clear  
5 because he asked for one year.

6 JUDGE TROUTMAN: Counsel, is it unreasonable to  
7 seek clarification that - - - whether they misread or  
8 misunderstood - - -

9 MR. ARON: No, it's extremely reasonable.  
10 Absolutely.

11 JUDGE TROUTMAN: Wait. Can I finish? That they  
12 misunderstood what you were asking for and simply ask you  
13 to clarify or refine? Is - - - what is wrong with that?

14 MR. ARON: That's the way it should be, right?  
15 That's - - - that's - - - in our estimation, that's the  
16 only thing they did right here is that they reached out,  
17 but the way they reached out was they said, okay, this  
18 request we can't accommodate. If you want to make a more  
19 narrow request for certain custodians, that we'll try  
20 again, meaning we don't want to give up on the first  
21 request - - -

22 JUDGE RIVERA: Now, I - - - I - - -

23 MR. ARON: - - - because the law requires that  
24 you could do it with reasonable effort.

25 JUDGE RIVERA: - - - I assume that nothing under

1 FOIL would prohibit or prevent, in any way, bar you from  
2 saying, okay, I'll take that, and then just draft another  
3 FOIL request, so if you want to fight that, go - - -

4 MR. ARON: That's exactly what Justice Bluth said  
5 in her decision. She said, now, you have a script, make  
6 another one, so that's good. So that is exactly - - - we  
7 think - - - no, no, I'm - - - I'm saying I want to address  
8 that point - - -

9 JUDGE RIVERA: I understand.

10 MR. ARON: - - - because we think Justice Bluth -  
11 - -

12 JUDGE RIVERA: And he seemed to nod his head, so  
13 I think you're both on the same page.

14 MR. ARON: No, we thought Justice Bluth  
15 misunderstood the point of the affidavit and the appellate  
16 court. The point wasn't that, here, we have a script for  
17 you.

18 JUDGE RIVERA: Okay.

19 MR. ARON: The point was that it could be done  
20 with reasonable effort. We're not - - - like he said when  
21 he got up, we modified our request. There is no such thing  
22 - - -

23 JUDGE RIVERA: No, no, this is not about the  
24 reasonable effort. This is just - - -

25 MR. ARON: Right.

1 JUDGE RIVERA: - - - if they made a suggestion of  
2 one way that they could run the request, you certainly  
3 could have said, you know, it's going to take me a long  
4 time to reveal those emails anyway, I'll take it, let's do  
5 that, and then have filed another request.

6 MR. ARON: But they never - - - they never  
7 offered that. That was never an offer.

8 JUDGE CANNATARO: That's sort of implicit in it -  
9 - - if you limited it in some way that didn't give you  
10 everything you wanted. And it sounds to me like that might  
11 not be happening here because it was just a fundamental  
12 misunderstanding about the universe of what you were asking  
13 them to look through, but if you had limited it, all you  
14 would have to do, then, is submit another request. They  
15 don't have to tell you that, do they?

16 MR. ARON: I'm not sure I understand, Your Honor.

17 JUDGE CANNATARO: If they didn't give you every  
18 single thing - - - like, if they only gave you, you know,  
19 half the emails for the correct period because of some  
20 limitation, you could have, then, put in a request for the  
21 other half of the emails.

22 MR. ARON: That's - - - yeah, there's nothing  
23 stopping - - - well, actually, that's not really true  
24 because the agencies - - - not that the DOE would ever do  
25 such a thing, but there is a lot of case law, and agencies

1 say it's like this concept of res judicata and collateral  
2 estoppel. If you made a request, and you got, like Your  
3 Honor is saying, half of it, you can never make that  
4 request again. And there's case law on that, and as an  
5 attorney, I've dealt with that. So it's not - - -

6 JUDGE RIVERA: Although you could have said, I'll  
7 accept that, but I'm - - - I continue to dispute - - -

8 MR. ARON: I reserve my right to make - - -

9 JUDGE RIVERA: - - - the rest in the same action,  
10 correct?

11 JUDGE CANNATARO: Yeah.

12 MR. ARON: In the same action, but it's not so  
13 obvious that you could just concurrently make another one  
14 because if an agency would want to be difficult - - -

15 JUDGE RIVERA: Fair enough.

16 MR. ARON: - - - not that they would, obviously,  
17 they could say, oh, you already made the request, and if  
18 you felt like you got half, you had an administrative  
19 remedy followed by an Article 78, yada-yada-ya, and now,  
20 you're res judicata, you're collateral estoppel, and you  
21 can't make that request again.

22 JUDGE CANNATARO: That actually happens?

23 MR. ARON: That does, Your Honor.

24 CHIEF JUDGE WILSON: Thank you, Counsel.

25 MR. ARON: Thank you, Your Honors.



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C E R T I F I C A T I O N

I, Donna Gould, certify that the foregoing transcript of proceedings in the Court of Appeals of Wagner v. NYCDOE, No. 73 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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