

THE FAST & FURIOUS WORLD OF SECOND REQUESTS

Peter Ostrega Consilio

If the Holmes-Rahe Stress Inventory applied to organizations, even standard merger and acquisition transactions would be near the top of the scale. And the more complex the deal, or the greater the antitrust concerns, the higher the pressure. Top that with a “Request for Additional Information and Documentary Materials,” also called a “Second Request,” from the Federal Trade Commission (FTC) or the Antitrust Division of the Department of Justice (DOJ), and the stakes can start to feel incredibly high.

A Second Request comes into play for transactions that meet a minimum threshold—currently \$84.4 million—under the Hart-Scott-Rodino Antitrust Improvements Act. No matter the industry, all Second Requests share two variables that seem, at first blush, to be diametrically opposed: a potential scope of review that includes an unlimited number of documents and an exceptionally limited amount of time to produce them—sometimes as short as 30

days. The requested material can span the breadth of an organization, from financial information, business plans, pricing and competitive strategies, industry participation and research and development details all the way to manufacturing and production documentation. A failure to “substantially comply” with the request can prompt a variety of further government action that can be devastating to the success of the deal.

Ensuring that the right material is produced on deadline requires balancing the variables of time, cost and volume of data. While maintaining communication between parties and practicing end-to-end project management are essential ingredients of any production, technology is often the linchpin for success in fast and furious Second Request productions. Leveraging technology-assisted review (TAR, also called predictive coding) can pave the path for success while managing risk and keeping the deal on track.

THE GOVERNMENT HAS EMBRACED THE USE OF ADVANCED EDISCOVERY TECHNOLOGY.

Gone are the days when parties viewed TAR technology as an impenetrable “black box.” In fact, regulatory support for the technology has continued to grow as over the last few years, government agencies have repeatedly voiced their support for using tools such as TAR for identifying and reviewing documents in regulatory matters, including Second Requests.

For example, in 2014, Tracy Greer, the Antitrust Division’s Senior Litigation Counsel for eDiscovery, observed, “The use of TAR offers the promise of reducing the costs incurred by merging parties responding to Second Requests and the size of the document productions received by the Division, without undermining the ability of the Division to conduct an appropriately thorough investigation.” That said, the Antitrust Division has specific requirements for parties that employ “software or tech-

nology to identify or eliminate potentially responsive documents and information produced in response to [a] Request,” including TAR, search terms and other analytics. Specifically, producing organizations must describe, in detail, how they searched for documents. The agency’s Model Second Request requires that a party seeking to use TAR “submit a written description of the method(s) used to conduct any part of its search” and “include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision and confidence-level statistics (or an equivalent); and (c) a validation process that allows for Department review of statistically-significant samples of documents categorized as non-responsive documents by the algorithm.”

In 2015, the Federal Trade Commission also revised its Model Second Request permitting the use of TAR, asking that parties describe their collection methodologies and share “all statistical analyses” related to “the precision, recall, accuracy, validation or quality of its document production in response to [a] Request.” In short, a company representative must be able to explain the following:

- (a) how the software was utilized to identify responsive documents; (b) the process the Company utilized to identify and validate the seed set documents subject to manual review; (c) the total number of documents reviewed manually; (d) the total number of documents determined nonresponsive without manual review; (e) the process the Company used to determine and validate the accuracy of the automatic determinations of responsiveness and non-responsiveness; (f) how the Company handled exceptions (“uncategorized documents”); and (g) if the Company’s documents include foreign language documents, whether [they were] reviewed manually or by some technology-assisted method.

WHICH TECHNOLOGY IS RIGHT FOR YOU: TAR 1.0 OR TAR 2.0?

There are essentially two mainstream versions of TAR. The first, often called TAR 1.0, is a workflow whereby a knowledgeable human reviewer initially codes a subset of documents for relevancy, which are then used as training examples by the TAR software. The goal is to review a minimal subset of documents (Ex. 2,500 out of 500,000) to enable the TAR software to identify likely responsive documents. The training process is iterative and continues until training is deemed complete. Training is complete when additional training examples are no

longer improving the TAR software’s ability to distinguish between responsive and non-responsive content. To help make this decision, a set of randomly selected documents, referred to as a Control Set, is used to generate metrics that indicate whether training is complete. Once fully trained, the TAR software is capable of identifying likely responsive documents, within a statistical certainty.

In our experience, the DOJ has made the following requests of parties using TAR 1.0.

- A small team of subject-matter experts, not a large group of contract reviewers, must conduct the training rounds.
- All documents must go through TAR; no search terms can be used to cull documents beforehand.
- No review is allowed for documents predicted to be responsive and not privileged.
- The producing party must provide consistency reports that reveal any overturned decisions.
- The documents identified as responsive must achieve an 80 percent recall rate—that’s the percentage of responsive documents in the corpus—using a 95 percent confidence level and a 5 percent confidence interval.
- At the conclusion of TAR, the producing party must provide five random samples (each sample consisting of approximately 400 documents) pulled from the non-produced pile. The DOJ will then select two of these samples and code them.

Unlike TAR 1.0, where the TAR software is trained until training is no longer needed, TAR 2.0 leverages the software to prioritize responsive documents for linear review. Under TAR 2.0, an initial set of example documents (Ex. 50 documents), which may be comprised of previously coded responsive documents, are used by the software to rank the entire dataset based on relevancy. Documents ranked highly responsive are sent for human review, coded for relevancy, and are then submitted as additional training examples. This process of reviewing and training on documents the TAR software ranks as responsive continues until very few responsive documents are being reviewed.

THE BOTTOM LINE: PARTIES INTERESTED IN BENEFITING FROM THE COST SAVINGS AND EFFICIENCY CREATED BY TAR SHOULD SUGGEST USING IT FOR SECOND REQUESTS.

Both versions of TAR are cost-effective, and government support for the latest iter-

ation seems to be on the upswing. When we recently proposed TAR 2.0 in response to a Second Request, the government asked about the following items:

- the proposed methodology;
- the team who would train the TAR algorithm;
- our recall and precision targets;
- the categorization of number-heavy documents, such as spreadsheets (which typically don’t do well in TAR);
- the presence of other file types such as chats, voicemails and photos;
- the presence of foreign language content;
- the privilege review plan; and
- the availability of metrics to measure review efficacy.

These sophisticated questions show that the government understands TAR 2.0 workflows and appreciates the technology’s ability to find the most relevant documents more efficiently.

Parties using TAR instead of search terms can lower their review budgets. Producing parties need only perform manual review of potentially privileged responsive documents. But when parties use search terms to identify responsive documents, they must review each document returned as a hit for the terms. In the Second Request scenario, that can require the time-consuming, costly eyes-on review of millions of documents.

Furthermore, intelligent TAR workflows drive more efficiency in the review and production process. With the average cost of manual review hovering around \$1 per document, using TAR offers potentially tremendous cost savings. In our studies, parties that chose TAR over full linear review have saved more than 60 percent—even with the complex file types that often populate Second Reviews, including spreadsheets and presentations.

In short, TAR enables parties to deliver a fast and furious, yet accurate and cost-effective, Second Request response.



As a Managing Director at Consilio, Peter Ostrega’s focus is engagement oversight, business relationship management, and pre-litigation consulting. He works closely with in-house and outside legal counsel to help them understand the most effective processes and technologies to manage complex workflows and generate maximum quality, accuracy, cost reduction, and return on investment.