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How to Obtain Discovery from Federal Government Agencies

Chris Callanan outlines the methods to obtain discovery from federal government agencies and suggests ways to deal with the substantive and procedural hurdles involved in obtaining discovery from federal agencies.

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As the sixth anniversary of the September 11, 2001 terrorist attacks passes, the first of several civil lawsuits arising out of the attacks is set for trial later this month. The presiding judge, Alvin K. Hellerstein, ordered the parties to prepare six cases for separate and early trials on damages only in an effort to move all of the cases toward resolution. All sides agree there is much left to discover about liability in the cases, largely because much of the relevant information is held by various federal agencies who are empowered to withhold the information from civil litigants. While the 9/11 litigation involves an extreme combination of federal agencies and sensitive information, the need for discovery from federal agencies is typical in aviation litigation. This article addresses the procedural requirements to obtain discovery from federal government agencies that are not parties to civil litigation as well as the impediments that block access to such information.

The principal methods of discovery are written requests pursuant to the Freedom of Information Act (FOIA) and Federal Rule 45 subpoenae for records or testimony. The FOIA, codified at 5 USC §552, enables any person to obtain federal agency records or information by making a written request reasonably describing the material sought. 5 USC §552(a)(3)(A). The request must follow the published requirements relating to the time, place, applicable fees and procedure for such requests. *Id*. The Act obligates the agency to make the requested records available "promptly" so long as no exemption applies. *Id*. The statute creates nine categories of exempt material protected from disclosure: classified information (national security information concerning the national defense or foreign policy); internal matters (internal personnel rules and practices of the agency); information protected by other statutes; business or trade information; privileged information (most commonly the deliberative process, attorney work product and attorney-client); personal privacy (e.g., medical, personnel files); law enforcement records; bank records; and geological and geophysical information or data. 5 USC 552(a)(6)(B).

The FOIA together with The Federal Housekeeping Act 5 USC § 302 require each federal agency to create and publish regulations for the conduct of agency business including the retention and dissemination of agency material and information. These can be commonly found online. For example, the FAA requirements can be found at http://www.faa.gov/foia/foia_request/index.cfm. The Department of Justice, on its website has a helpful link to other agencies FOIA request pages at: http://www.usdoj.gov/oip/other_age.htm .

The FOIA mandates that within twenty business days of receiving a FOIA request, the responding agency must determine whether it plans to comply with the request and to communicate that determination to the requesting person. 5 USC §552(6)(A)(i-ii). Only "unusual circumstances" permit an extension of the twenty day response requirement. 5 USC §552(a)(6)(B)(i-iii). The Act defines "unusual circumstances" as the need to collect records from facilities in different locations or the need to consult with another agency in making the determination about response. *Id*. Agency determination typically rests on

the applicability of a statutory exemption.

In the event that a governmental agency fails to respond to a FOIA request or refuses to provide information, the FOIA authorizes the requesting individual to file a complaint to enjoin the agency from withholding records. 5 USC 552(a)(4)(B). The complaint may be filed in the United States District Court where the requesting party resides, has a principal place of business, where the agency records are located or in the District of Columbia. *Id*. The defendant federal agency must answer the complaint within thirty days of service unless the court otherwise extends the time for "good cause." *Id*. The Court reviews the issue de novo and may examine the contents of the agency records *in camera* in order to determine whether any of the statutory exemptions apply. *Id.*

Parties seeking to compel a response can request that the Court order the agency to file a *Vaughn* index – a detailed affidavit itemizing each withheld record --a reference to *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir. 1987). In the *Vaughn* case Robert Vaughn, a law professor researching the Civil Service Commission challenged the agency's affidavit, which claimed in conclusory fashion that all of the requested material was exempt from disclosure. The Court sided with Professor Vaughn stating that the FOIA was conceived to permit access to the citizenry so that claims of exemption should be narrowly construed and the agency claiming exemption should meet its burden to establish the basis. *Id.* at 823. As a result, the Court required the agency to demonstrate the basis for the claimed exemption through detailed affidavits or oral testimony. *Id.* at 827. The Court indicated that this could include a requirement that the agency produce a specific index matching the specific documents or portions thereof with the specific claimed exemptions. Similar to a privilege log under Rule 26, a *Vaughn* index permits the parties and the Court to determine with specificity the applicability or non-applicability of a claimed exemption.

Although the FOIA empowers "persons" not necessarily litigants, nothing prohibits its use by a litigant. A FOIA request provides a litigant with a quick and inexpensive method to obtain documents or material. While a FOIA request cannot compel testimony and its statutory exemptions prevent access to certain information, a FOIA response (or even objection) can identify sources of additional material or testimony to be pursued by a Federal Rule 45 subpoena. Rule 45 provides litigants with a tool to command a non-party to appear and testify at a deposition or for the purpose of production, inspection, copying, testing or sampling documents or tangible things. The Federal Rules set a broad scope for discovery that in theory avoids the pitfalls of FOIA exemptions, but hurdles remain.

The principle hurdle is the *Touhy* doctrine which prevents subordinate agency officers from responding to subpoenae and its corresponding *Touhy* regulations which empower each agency to determine the permissible scope of its own response. The doctrine derives from *United States ex rel. Touhy v. Ragen*, 340 US 462 (1951). In the *Touhy* decision, the Supreme Court upheld an Order issued by the Attorney General that all official files, documents, records and information within the Department

of Justice were to be regarded as confidential and that no officer or employee could allow disclosure of such information except in the discretion of the Attorney General or assistants acting for him. *Id.* at 468. The Court upheld the Attorney General's Order and his basis for doing so found in the then applicable statute -- 5 USC § 22 (now the Housekeeping Statute 5 USC § 301) -- empowering the head of each federal agency or department to prescribe regulations, not inconsistent with the law, for the government of the department, the conduct of its officers and clerks, the distribution and performance of its business and the custody, use, and preservation of the records, papers, and property appertaining to it.

The *Touhy* Court reasoned that: "when one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenae duces tecum will be willingly obeyed or challenged is obvious." *Id.* at 468. The regulation upheld by the Supreme Court in the *Touhy* decision defers authority to each agency to set the rules to which it must conform. This deference arises out of the need for each federal agency to control its own operations and to conserve its resources. Generally, Courts favor an agency's need for secrecy over the public's right to know. This deference creates a major impediment to discovery. Often, in refusing to comply with subpoenae, federal agencies support their objection by citing the burden on limited agency resources and the problems inherent in involving a governmental agency in a partisan dispute.

These factors can make it very difficult to successfully obtain complete, substantive responses from federal agencies. Recognizing this, Congress added language to the Housekeeping statute purporting to limit the right of each agency to create its own rules "does not authorize withholding information from the public or limiting the availability of records to the public." Even the FOIA itself was enacted in part as a response to the restrictive practices of agencies responding to subpoenae. However, neither change has fully overcome the difficulties inherent in obtaining discovery from federal agencies. As a result of *Touhy* all subpoenas must be directed to the head of the particular agency and the agency itself, in large part, decides the rules under which it must respond.

A Rule 45 subpoena to a government agency operates as does any other Rule 45 subpoena in terms of the technical requirements for proper service and response. A litigant's options to challenge an agency's response to a Rule 45 subpoena depend upon venue. A majority of circuits, including the Second, Third and Fourth Circuits, hold that challenges to agency responses must follow the Administrative Procedures Act (APA.) Under principles of sovereign immunity, the United States cannot be made a party to an action without a direct waiver of that immunity. However, the APA provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action … is entitled to judicial review thereof." 5 USCA § 702. The Act permits an action in a federal court seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an

official capacity or under color of legal authority. *Id*. This can mean a separate lawsuit solely for the purpose of compelling a response. The agency action must be final; there can be no other alternative to challenge the action. 5 USCA § 704. Upon judicial review, the agency decision making is presumed valid unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. 5 USC §706. This is an extremely high standard for a challenging party considering the recognized deference to the government's right to control its own affairs, the need to conserve government resources, and the government's fundamental aversion to potentially taking sides in civil litigation.

A minority of circuits, including the Ninth Circuit and the D.C. Circuit, hold that the Federal Rules themselves govern the challenge to an agency's response. Therefore, a dispute about the sufficiency of a response plays out as it would among private litigants. The issuer of the subpoena may move to compel a response (or further response) under Fed. R. Civ. P. 37 and the recipient may to move for a protective order under Fed. R. Civ. P. 26(c). Although a litigant seeking to compel production or responding to a motion for protective order need not show the agency to be acting arbitrarily or capriciously, the litigant will have to overcome the recognized authority for federal agencies to regulate their own affairs and to define the scope of a proper response. These realities limit one's prospects for success.

A litigant seeking discovery from a federal agency must appreciate that the endeavor will require effort, time, expense and ultimately, may not succeed. Understanding the technical requirements of requests increases one's chances of success, either in achieving a Court-ordered production or in negotiations with the agency. For example, using FOIA requests in combination with Rule 45 subpoenae can be effective. A well-crafted FOIA request for specific information should quickly and inexpensively provide some documents or through a *Vaughn* index, at least an itemization of other potentially available information. By understanding specifically what exists one has a better chance to craft a subpoena that withstands an agency's objection or that results in a favorable resolution with the agency. One should always expect a federal agency to object to producing information. The litigant who fully understands the applicable procedures can more effectively test those objections and is more likely to obtain the most information possible.