

Discovery Issues in Federal Agency Litigation: Navigating Privileges, Work Product, FOIA and More

Mastering Application of Discovery Concepts and Unique Rules for Litigation With Government Agencies

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Agency Litigation:
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Outline

- Overview of discovery challenges
- FOIA Exemptions
 - Deliberative process
 - Privacy
 - Law enforcement
 - Challenging exemptions under FOIA
- Privileges
 - Attorney-client
 - Work product
 - FRE 502 considerations
- E-discovery Issues

Overview of Discovery Challenges

- The government may have a significant headstart on discovery through investigation processes
- The “government” is big
- The government has unique grounds for withholding otherwise discoverable material
- There may be special circumstances regarding the government’s and parties’ assertion of privilege claims
- The government’s e-discovery capabilities and incentives vary significantly

FOIA Exemptions

FOIA Exemptions/Privileges for Government

- Exemptions (5 U.S.C. § 552(b))
 - Classified documents/national security;
 - Related solely to the internal personnel rules and practices of an agency;
 - Specifically exempted from disclosure by statute;
 - Trade secrets and commercial or financial information obtained from a person and privileged or confidential;
 - Deliberative process and attorney client privilege (inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency);
 - Personal privacy;
 - Law enforcement purposes;
 - Bank examination privilege--Regulation or supervision of financial institutions;
 - Geological and geophysical information and data, including maps, concerning wells

Deliberative Process

- Deliberative Process (5 U.S.C. § 552(b)(5))
 - Protects from disclosure documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated
 - Intended to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them with the government
 - To qualify for the deliberative process privilege, the document must be “pre-decisional” and deliberative”
 - “pre-decisional” means it was prepared in order to assist an agency decision-maker in arriving at the decision
 - Document must be related to a specific decision facing the agency

Deliberative Process

- Deliberative Process (5 U.S.C. § 552(b)(5))
 - “deliberative” means it is actually related to the process by which policies are formulated
 - Formed an essential link in a specified consultative process;
 - Reflects the personal opinions of the writer rather than the policy of the agency; and
 - If released, would inaccurately reflect or prematurely disclose the views of the agency
 - Privilege does not extend to:
 - “purely factual material”
 - Documents later adopted or incorporated into a final agency opinion
 - Pre-decisional document can lose its status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public

Privacy

- Privacy ((5 U.S.C. § 552(b)(6))
 - Protects from disclosure of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”
 - Purpose is to protect individuals from the injury or embarrassment that can result from the unnecessary disclosure of personal information
 - Interpreted broadly to include any detailed Government records on an individual which can be identified as applying to that individual
 - If “substantial privacy interests” would be compromised, no disclosure
 - If no substantial privacy interest compromised, balancing test
 - Potential harm to privacy interests
 - Public interest in disclosure of the requested information
 - Requesting party bears the burden establishing public disclosure outweighs privacy interests
 - Law enforcement exemption 7(C) also contains privacy exemption for law enforcement matters
 - Government often asserts that names, addresses, phone numbers, and email addresses of government employees (federal and state) fall within this exemption
 - Result is emails with all email addresses and signatory lines redacted
 - Third-parties’ information also withheld
 - Problem challenging deliberative process and attorney-client privileges if do not know who sent or received a document

Law Enforcement

- Law enforcement (5 U.S.C. § 552(b)(7))
 - (A) could reasonably be expected to interfere with enforcement proceedings,
 - (B) would deprive a person of a right to a fair trial or an impartial adjudication,
 - (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
 - (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
 - (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
 - (F) could reasonably be expected to endanger the life or physical safety of any individual

Challenging Exemptions under FOIA

- Challenging Assertions of Exemptions
 - Request Vaughn Index
 - Similar to privilege log, government agency must log and describe information that it is withholding because of exemptions
 - Can challenge government's lack of detail on descriptions
 - » Must have sufficient detail so requesting party understands what is being withheld so requesting party has basis to challenge appropriateness of exemption
 - Target/Prioritize documents for Vaughns to documents that are most important to requesting party
 - Limiting the number of documents subject to Vaughns expedites process and helps argument that requesting party is reasonable
 - Similar prioritization when challenging adequacy of descriptions and/or appropriateness of exemptions

Challenging Exemptions under FOIA

- Challenging Assertions of Exemptions
 - Summary Judgment Motions
 - Depositions unlikely—rely on affidavits
 - Affidavits submitted by government agency are accorded a presumption of good faith
 - As long as affidavits supply facts indicating that the agency conducted a thorough search and give reasonably detailed explanations why any withheld documents fall within an exemption, the agency will sustain its burden
 - Government agency’s decision that the information is exempt from disclosure receives no deference (*de novo* review)
 - To overcome presumption, need to demonstrate by reference to specific documents and specific requests
 - Prioritization is key to overcoming presumption—court unlikely to believe that all information withheld is not subject to exemption
 - Often need in-camera review to make determination, so less is more
 - Use samples if large number of documents
 - If court sees that government is over-reaching in its designations of exemptions, credibility undermined for other challenged exemptions

Privileges

Attorney Client Privilege

- Government attorney must be acting in legal capacity; if acting as regulator or administrator, communications are not privileged
 - *Texas Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867 (1st Cir. 1995)

Attorney Work Product

- Protects information created “in anticipation of litigation”
- Existence of regulatory or administrative proceeding, alone, typically does not meet requirement
- Thus, possibility that regulatory decision would be challenged in court does not qualify to shield documents relating to regulatory process
 - *E.g., Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980)

FRE 502 Considerations

- 502(a) protects against subject matter waiver except where disclosure is made in federal proceeding or to federal agency and:
 - (1) is intentional;
 - (2) disclosed and undisclosed information concern the same subject matter; and
 - (3) they ought in fairness to be considered together
- 502(d) extends non-waiver protections to other state and federal proceedings – but only if entered as an order by a federal court
 - Even if you have a pre-litigation non-waiver agreement with the government, make sure to get the agreement entered as a court order

E-Discovery

Government's Duty to Preserve

- Generally the same standard: “reasonable anticipation of litigation”
- Preservation trigger:
 - Litigation was “reasonably foreseeable” when government received letter from defense counsel rejecting settlement offer (*U.S. v. Community Health Systems, Inc. et al.*, 2012 WL 5387069 (D.N.M. 2012))

Spoliation by Government

- Government can be sanctioned for spoliation:
 - *U.S. v. Community Health Systems, Inc. et al.*, (litigation hold “woefully inadequate” and defendants were prejudiced thereby)
- But same standards apply:
 - *SEC v. Mercury Interactive LLC*, 2012 WL 3277165 (N.D. Cal. Aug. 9 2012) (SEC not sanctioned for deleting over 5 million pages of ESI where defendants did not show sufficient prejudice)

Government's Duty to Cooperate

- *EEOC v. The Original Honeybaked Ham Co. of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. 2013)
 - sanctions imposed where EEOC was “negligent in its discovery obligation, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the” court
- *SEC v. Collins & Aikman Corp.*, 2009 WL 94311 (S.D.N.Y. 2009)
 - dispute over search terms
 - “When a government agency initiates litigation, it must be prepared to follow the same discovery rules that govern private parties...”
- *Aguilar v. Immigration & Customs Enforcement Division*, 255 F.R.D. 250 (S.D.N.Y. 2008)
 - dispute over production of metadata

Duty of Competence – A Cautionary Tale

- *In re Fannie Mae Sec. Litig.*, 552 F.3d 814 (D.C. Cir. 2009)
 - OFHEO receives broad third party subpoena
 - Following dispute regarding search of backup tapes, parties enter into stipulated order agreeing that defendants have sole discretion to specify search terms
 - Defendants submitted over 400 search terms which hit 660,000 documents
 - OFHEO spend over \$6 million (9% of its budget) and missed final production deadline
 - Court found that OFHEO abandoned any burden argument by agreeing to stipulated order; found OFHEO in contempt and ordered production of deliberative process privileged documents not logged by final production deadline

E-Discovery Issues Under FOIA

- Does FRCP and relevant case law regarding e-discovery apply to FOIA requests?
 - Government has taken position that FRCP does not apply even if litigation commences
 - Concept of meet and confer after administrative request is not fully recognized by government
 - *E.g.*, Format of Production (5 U.S.C. § 552(a)(3)(B))
 - “In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.”
 - Key issue is clearly requesting format of production in initial request
 - the records will be provided in a format that is searchable,
 - families maintained between email parents and attachments
 - De-lineation of records
 - Not clear if any recourse if not in initial request
 - Agency may start search and processing prior to any “meet and confer”

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