



Recommendation 83-4

The Use of the Freedom of Information Act for Discovery Purposes

(Adopted December 16, 1983)

The Freedom of Information Act (FOIA) and discovery provide separate mechanisms for obtaining the disclosure of Government documents. Any person may invoke at any time the release provisions of the FOIA by requesting an agency to disclose any reasonably described agency records. A requester's need for the records and his purpose in making the request normally do not affect the right to obtain disclosure. The agency must release the records unless they fall within one of the nine exemptions specified in the Act. On the other hand, a person may obtain the disclosure of Government documents through discovery only if he is a party to a judicial or administrative proceeding and if the procedural rules governing the proceeding include provisions for discovery. If both these conditions are satisfied, the party may normally obtain from the Government through discovery unprivileged documents relevant to the subject matter of the pending proceeding.

The separate disclosure mechanisms established by the FOIA and by discovery serve different purposes. Congress' fundamental objective in enacting the FOIA was to permit the public to inform itself about the operations of the Government. All members of the public are beneficiaries of the Act because Congress' goal was a better informed citizenry. A requester's rights under the Act are therefore neither diminished nor enhanced by his status as a party to litigation or by his litigation-generated need for the requested records. Discovery, on the other hand, serves as a device for narrowing and clarifying the issues to be resolved in litigation and for ascertaining the facts, or information as to the existence or whereabouts of facts, relevant to those issues. In the discovery context, a party's litigation-generated need for documents does affect the access available to him and may result in the disclosure to him of documents not available to the public at large.

Discovery does in fact provide parties to litigation with the more reliable mechanism for obtaining from the Government the information which they need to prepare for trial or hearing. Parties to litigation nevertheless sometimes use the FOIA for discovery purposes because they hope to obtain the release of additional agency records for use in litigation, or to obtain the release of records at an earlier time. Limitations on the availability of discovery explain these uses of the FOIA. Discovery is a pretrial procedure designed to permit the parties



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to a proceeding to prepare for trial or, if possible, to resolve the controversy without a trial. It is not designed to provide the parties with the level of access to Government documents furnished to the general public by the FOIA; and even the most generous rules of discovery do not always provide the parties with that level of access.

There are several limitations on the Government's disclosure obligations in the discovery context that account for use of the FOIA as a supplemental discovery device. First, discovery is normally available to the parties only after a proceeding has begun and then only for a short period of time before trial or hearing. Second, it may be used only to obtain documents that are relevant, or that may lead to information that is relevant, to the pending action. Recent reform efforts have sought to keep civil discovery in the federal courts within reasonable bounds by emphasizing that the purpose of discovery is not the disclosure of information but the simplification of the matters in dispute. More specifically, the 1980 and 1983 amendments to the discovery rules in the Federal Rules of Civil Procedure seek to prevent "overdiscovery" by increasing the trial judge's supervisory role. Less generous discovery is available in criminal proceedings than in civil actions; and, in some administrative adjudications, no formal discovery is available at all.

The Conference believes that the use of the FOIA for discovery purposes is a matter of valid concern to the Government because that use, unlike other uses of the FOIA, may disadvantage the Government's position in litigation in several ways. First, a party in litigation with the Government may obtain the release of agency records without the knowledge of Government counsel and then seek to use those records to surprise Government counsel at trial or hearing. Second, a party in litigation with the Government may disrupt the Government counsel's trial preparation by seeking, perhaps on the eve of the trial or hearing, the release under the FOIA of records in the Government's litigation files. In these cases, the Government counsel must divert attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records. Under the FOIA, unlike in discovery, the Government does not enjoy the protection of a cut-off date after which no further requests can be made. Third, a party in litigation with the Government may request production of the same documents under the FOIA and in discovery, thus necessitating duplicative searches and releases. In these cases, the Government's primary concern is not the extra burden imposed on the agency's public information office in processing the party's FOIA request, but the burden imposed on counsel representing the Government to protect himself from duplicative effort and to keep himself informed of the Government documents obtained by opposing parties.



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Some recent proposals to amend the FOIA address the problem by temporarily denying the use of the FOIA to a party to a pending administrative or judicial proceeding where the agency records in question may be requested from the Government through discovery.¹ The Conference declines to take a position on these proposals, but prefers to endorse a relatively modest change in the law because the evidence is inconclusive that a substantial burden to the Government is caused by use of the FOIA for discovery purposes and because the proposals raise significant concerns of coverage (i.e., applicability to proceedings where discovery is limited) and enforceability.

If the FOIA does remain fully available to a party in civil litigation with the Government, the potential disadvantages to the Government will be at least partially alleviated by requiring the party to notify Government counsel of all FOIA requests made by or on behalf of the party for the purpose of obtaining information for use in that litigation. Through notice of these FOIA requests, Government counsel will be able to learn what records the agency is releasing in response to the requests. This should eliminate any danger of surprise at trial or hearing. Also, a simple inquiry to the other side or to the agency FOIA office at the inception of discovery can determine whether the party made any prior FOIA requests that relate to the litigation. Advance notice of a party's FOIA requests may also permit Government counsel to coordinate FOIA and discovery searches for the same records and to avoid duplicative searches. Counsel will therefore be in a stronger position to protect his litigation files, although he may still need to divert his attention from trial preparation in order to assist the agency's public information office in resisting the disclosure of exempt records.

Finally, courts have recognized that the FOIA should not be used to delay judicial or administrative proceedings.² The Conference believes that parties to litigation should not be able to use the FOIA to delay ongoing litigation in any fashion. Congress, or the courts and the administrative agencies through exercise of their rulemaking or decisional powers, may properly provide that pendency of a FOIA request, or of proceedings related to such a request, should not affect the progress of litigation to which the requested information may arguably pertain.

¹ See, e.g., S. 774, 98th Cong., 1st Sess. (1983).

² See, e.g., the "DeLorean case," *United States v. United States District Court, Central District of California*, 717 F. 2d 478 (9th Cir. 1983).



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Recommendation

1. Congress should amend the Freedom of Information Act (FOIA) to require a party to a judicial action or to an administrative adjudication or formal rulemaking proceeding, to which the Government is also a party, to notify counsel for the Government promptly of any FOIA requests made by the party, by his counsel, or by some other person acting on the party's behalf, during the pendency of the proceeding for the purpose of securing the release of agency records that may be relevant to the proceeding.

2. Congress should also provide that, if a party does not comply with this notice requirement, the court or agency conducting the proceeding may preclude the party from offering in the proceeding any agency records released in response to the request.

Citations:

48 FR 57463 (December 30, 1983)

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