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Getting the Facts Straight: FOIA or Subpoena?

By Jerry S. Goldman and Ethan W. Middlebrooks

Facts are integral to litigation. Cases rise and fall on their facts. Some of the biggest holders of factual information are government bodies throughout the United States — particularly the federal government. Sometimes, a litigant needs access to facts in the government’s possession, even when the government is not a party to the action. This article explores two different ways to procure information from the federal government when it is not a party to a case: the Freedom of Information Act (“FOIA”) and Rule 45 subpoenas.

FOIA

FOIA is “a broad disclosure statute which evidences a strong public policy in favor of public access to information in the possession of federal agencies.” *News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1190 (11th Cir. 2007). It requires each federal agency to automatically make available to the public certain

information set forth in the statutory text. See 5 U.S.C. § 552(a)(1)-(2). In addition, each agency, upon a request that reasonably describes the records pursuant to published procedural rules, “shall promptly” make available pertinent records to “any person.” *Id.* at § 552(a)(3). Significantly, FOIA does not require a requester to provide any reason for the request.

However, FOIA exempts from disclosure nine categories of records. 5 U.S.C. § 552(b). There are also exemptions based in the statute but derived from case law. Perhaps the best-known example is the *Glomar* response, by which an agency neither confirms nor denies the existence of certain records or information. *See, e.g., Wilner v. NSA*, 592 F.3d 60 (2d Cir. 2009)

Discovery Subpoenas

Non-party discovery subpoenas issued pursuant to Federal Rule of Civil Procedure 45 are another, often more effective means of eliciting

Jerry S. Goldman, a shareholder in the New York and Philadelphia offices of Anderson Kill, is a former prosecutor with a diverse practice serving individuals and closely held businesses throughout the United States. Mr. Goldman represents the lead client in litigation on behalf of the families of victims of the 9/11 terrorist attacks. His practice encompasses complex litigation, general business law, white collar criminal defense, estate planning along with estate and trust administration, employment law, federal and international taxation, and intellectual property. 212-278-1569 (NY) and 267-216-2795 (PA) | jgoldman@andersonkill.com

Ethan W. Middlebrooks is an attorney in Anderson Kill’s New York office, where he concentrates his practice in corporate and commercial litigation, regulated products, and insurance recovery. 212-278-1324 | emiddlebrooks@andersonkill.com

a response from a federal agency in furtherance of litigation. As an initial matter, for a subpoena on a federal agency to be effective, the subpoena must be sent from a party to a litigation that originated and remains in federal court; otherwise, the federal government has not waived its sovereign immunity. *See, e.g., Beckett v. Serpas*, No. 12-cv-1910, 2013 U.S. Dist. LEXIS 28848 (E.D. La. Mar. 4, 2013) (collecting cases). But when a subpoena is properly served, the federal government waives its immunity pursuant to the Administrative Procedures Act, 5 U.S.C. § 702.

Just because the government may be amenable to a Rule 45 subpoena, however, does not settle the matter. Where it has been considered, the federal appeals courts are split on the proper standard of review of a subpoena served on the federal government. The Fourth and Eleventh Circuits review an agency's decision under the Administrative Procedure Act's arbitrary and capricious standard, *see COMSAT Corp. v. NSF*, 190 F.3d 269 (4th Cir. 1999); *Moore v. Armour Pharm. Co.*, 927 F.2d 1194 (11th Cir. 1991), whereas the Ninth and District of Columbia Circuits utilize Rule 45's balancing of the interests favoring disclosure against those asserted against disclosure. *See Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1994); *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001). The Second Circuit initially adopted the APA standard, but later rescinded it and reserved the question for the future. *See United States EPA v G.E.*, 212 F.3d 689 (2d Cir. 2000), *amending* 197 F.3d 592 (2d Cir. 1999). The Second Circuit also later determined that a party seeking to compel the government's compliance with a subpoena must first exhaust its administrative remedies. *See Semon v. Stewart*, 374 F.3d 184 (2d Cir. 2004). Other circuit courts have not rendered a decision, and courts within those circuit courts have not been uniform in their holdings. The authors of this article are of the opinion that the Rule 45 standard of review, which favors the requester, is preferable to the APA standard, which provides greater deference to the agency.

Which Method is Better?

It is difficult to say whether FOIA or Rule 45 subpoena method is a better means of obtaining information from the government.

The answer to that question truly depends on why a litigant needs the information.

FOIA has certain advantages. It is likely less expensive than most lawsuits, even if a party must resolve a dispute with the government over the request. The requester has more freedom to seek a broad scope of information that does not have to relate to litigation. And, an FOIA request may be made at any time, so it is not bound to the timeframe of a specific litigation. Using FOIA prior to litigation may help shape litigation strategy, including whether to pursue a case, legal theories, and which facts require further discovery. FOIA may also be useful as a follow-up to a Rule 45 subpoena.

However, FOIA also has disadvantages. Despite the statute's requirement of "prompt" agency responses, FOIA responses are frequently slow. *See, e.g., Nikita Lalwani & Sam Winter-Levy*, "Freedom of Information Act is slow and creaky as it turns 50," *The Buffalo News*, (July 17, 2016), <http://buffalonews.com/2016/07/17/freedom-of-information-act-is-slow-and-creaky-as-it-turns-50/>. Thus, FOIA requests are not always particularly well-suited for use in the midst of or prior to litigation, where time is of the essence and the clock is running on statutes of limitation. Further, an agency's refusal to release some or all of a set of records often results in a lawsuit for the purpose of seeking a release under FOIA.

Rule 45 subpoenas also have advantages and disadvantages. Although there may be fewer arguable grounds for exclusion of information as compared to FOIA, a subpoena is subject to the proportionality and relevance requirements of Rule 26. It cannot be used prior to a lawsuit, and follow-up may be limited due to a court's concern for its docket. Further, subpoenas tend to draw more attention to a search for facts, which may not be a party's desire at the time it seeks that information — particularly because an adversary knows what a party is doing. Finally, while not a clear positive or negative, the venue where litigation occurs may affect the disposition of the subpoena because there is no uniform standard of review.

Which method to use? The answer is generally (pardon the expression) fact-specific. It's vital to know the pros and cons of each method and judge accordingly. ▲

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