Touhy Regulations: Assessing Requests and Obtaining Federal Agency Documents and Witnesses

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Panelists


- **Justin D. Heminger**, Trial Attorney, U.S. Department of Justice, Environment & Natural Resources Division, Washington, DC*

* The views expressed in this presentation are solely those of the authors, and are not necessarily those of the U.S. Department of Justice.
Five Topics Covered Today

- Introduction to *Touhy* regulations
- How federal agencies apply *Touhy* regulations
- How to prepare and respond to *Touhy* requests
- More practice tips
- Special issues
TOPIC #1: INTRODUCTION TO TOUHY REGULATIONS
What Are *Touhy* Regulations?

- Imagine a simple case: Your client is suing United Airlines and Boeing over a plane crash, and you want National Transportation Safety Board (NTSB) documents and an investigator to testify (or you’re NTSB and a request is made).

- You pick up the phone to the NTSB counsel, and she says (or if you’re agency counsel, you say) “Sorry, we have *Touhy* regulations you have to follow.”

- What does that mean? What can you do?
What Are Touhy Regulations?

If you want government documents or witnesses, and you can’t subpoena them, you need to know about and follow the Touhy regulations.

Touhy regulations are federal agency “housekeeping” regulations that specify internal agency procedures for how and when a person requesting federal documents or witnesses can obtain them. The regulations most frequently arise in civil litigation where the United States is not a party.
Today, we will discuss when documents and witnesses (“covered material”) are available by subpoena under the Federal Rules of Civil Procedure (FRCP), and when it takes a direct, *Touhy*-based request to the agency.

For each circumstance, we will present a practice-based approach to obtaining covered material by one of these routes, from the perspective of both the requester and the agency.
Why Are *Touhy* Regulations Important?

- Covered material is any type of evidence
  - Documents, electronically stored information (ESI)
  - Potential testimony related to current and former official duties
- Why we care about covered material
  - The government conducts many investigations and maintains countless records
  - Government-sourced evidence carries substantial evidentiary weight and credibility
Why Are *Touhy* Regulations Important?

- In many cases where you represent a person or company, and where the United States is not a party, if you:
  - Want a federal agency employee to testify, either as a fact or expert witness, or
  - Want a federal agency to turn over documents in its possession

- Then your access to the *best* evidence is restricted by the *Touhy* regulations
Why Are *Touhy* Regulations Important?

- What about Freedom of Information Act (FOIA) requests?
  - Potential for overlap with *Touhy* regulations
  - But FOIA requests are subject to different requirements and limitations
  - Often difficult to effectively use FOIA during civil litigation to obtain agency documents
  - No ability to obtain witness testimony through FOIA
Background on *Touhy* Regulations

- Regulations authorized by the Housekeeping Statute, 5 U.S.C. § 301, since 1789
  - The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. *This section does not authorize withholding information from the public or limiting the availability of records to the public.*
Many agencies issued internal regulations governing release of evidence (documents and witness availability)

Regulations generally upheld in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)

- Justice Frankfurter’s concurrence

History of abuse by agencies led to 1958 amendment (see language in italics on slide 10)
Background on *Touhy* Regulations

- Two key principles of the *Touhy* doctrine
  - *Touhy* regulations do not create a privilege
  - But they do protect agency employees from being judicially compelled to provide evidence where a party has failed to comply with the regulations, generally, except where the United States is a party.

- At the end of the day, the question is whether the request for evidence is enforceable against the federal agency, and if so how.
TOPIC #2: HOW FEDERAL AGENCIES APPLY TOUHY REGULATIONS
Applying *Touhy* Regulations – Basic Scenario

- Requester seeks covered materials from the agency by letter or subpoena
- The agency interposes its *Touhy* regulations to give less than an unconditional “yes” to the request
Applying *Touhy* Regulations – Key Concept

- The agency’s ability to manage a request for covered material request depends on the interplay of the FRCP and the *Touhy* regulations:
  - Is this in state or federal court?
  - Is the United States a party?
  - Are documents or witness testimony sought?
  - Are you seeking fact or expert testimony?
Applying *Touhy* Regulations – General Framework

- Before releasing evidence, or appearing to give testimony, a government employee must usually follow the agency’s *Touhy* regulations.

- In general, where the United States is not a party to the lawsuit,
  - Litigants must comply with *Touhy* regulations before seeking to use the courts to compel disclosure from the government.
  - Courts will not order government employees to violate *Touhy* regulations.
Applying *Touhy* Regulations – Standard Features

- Written request for materials/witness
- Senior agency official determines whether and how to respond to the request
- Best interests of the agency
- Requirement of no other source
- Showing of relevance to the action
- Ban on expert testimony
- No (undue) impact on agency activities
Applying *Touhy* Regulations – Current Examples

- **NTSB**
  - 49 C.F.R. Part 837 (Production of records in legal proceedings)
  - Part 835 (Testimony of Board Employees)

- **Department of Defense (DoD)**
  - 32 C.F.R. Part 97 (Release of official information in litigation, and testimony by DoD personnel as witnesses)
Applying *Touhy* Regulations – Where Documents Are Sought

- Are the documents available by subpoena subject to FRCP, or
- Are the documents only available by direct request to the agency, subject to the agency’s housekeeping regulations?
Applying *Touhy* Regulations – Where Documents Are Sought

- Similar or parallel to FOIA
- Agency chooses which employee gives the documents to you
- Agencies sometimes will seek to narrow the scope of the requests, citing policy (time, cost, impartiality, burden)
- Accompanied by authentication or custodian? Federal Rule of Evidence 902 (evidence that is self-authenticating)
Example: Environmental Protection Agency’s (EPA) *Touhy* regulations

- A subpoena duces tecum for documents is treated as a subpoena for testimony. 40 C.F.R. § 2.405
- Response depends on whether the appropriate EPA official determines that compliance would be “clearly in the interests of EPA”
- But if the subpoena is really just a request for documents, they “will be provided or denied in accordance with” EPA’s FOIA regulations
Applying *Touhy* Regulations – Where Testimony Is Sought

- Differs from ordinary witness access
  - Limits on accessibility of witness
  - Agency counsel present at witness prep?
  - Control over who may testify
  - Control over substance of testimony
  - Possible motion *in limine*
Applying *Touhy* Regulations – Where Testimony Is Sought

- Example: EPA *Touhy* regulations
- Voluntary testimony or testimony in response to subpoena
- EPA General Counsel or designee
  - Considers supervisors’ recommendations
  - Consults with appropriate EPA official
  - Determines whether compliance with the request or subpoena would be “clearly in the interests of EPA.” 40 C.F.R. §§ 2.403, 2.404
TOPIC #3: HOW TO PREPARE AND RESPOND TO TOUHY REQUESTS
Practice Tips – the *Touhy* Request

- Basics of a *Touhy* request
  - A written request
  - What you want
  - Why you want it
  - Why no alternative will do
  - Wait for agency response
Practice Tips – the *Touhy* Request

- If you are preparing a *Touhy* request, start by putting yourself in the agency’s shoes
- Don’t treat the request as an open-ended discovery mechanism
- Don’t duplicate FOIA requests
Practice Tips – the *Touhy* Request

- When requesting witness testimony
  - Keep in mind that the witness is a government employee with associated responsibilities
  - Explain why, under the *Touhy* regulation’s standard, the agency should want the employee to testify
  - Be aware that everyone—the employee, the employee’s managers, and agency officials—will be concerned about how the employee’s testimony will reflect on the agency
  - Share as many details as possible
Practice Tips – the Touhy Request

- When requesting documents
  - Make practical and reasonable requests
  - Be specific about the documents you need
  - Negotiate parameters
  - Use narrow, agreed on search terms
  - Specify the format of production
  - ESI and metadata
Practice Tips – the *Touhy* Request

- Before seeking judicial review of a *Touhy* response or enforcement of a subpoena, seek to negotiate with agency counsel.
- Be open to negotiating and save resources.
- If litigation is necessary, judicial review of denial is either under FRCP or Administrative Procedure Act (APA).
Practice Tips – the *Touhy* Response

- If a FRCP Rule 34 (Producing Documents for Inspection) or Rule 45 (Subpoena) request, respond promptly with any objections (30-day or 14-day window)
  - Consider whether Rule 45 requirements are met
  - General standard is “undue burden.” FRCP 45(d)(3)(iv); Rule 34 “proportionality”
- If the requesting party failed to comply with the agency’s *Touhy* regulations, that may be identified as a grounds for refusing to respond
Practice Tips – the *Touhy* Response

- Follow the procedures for a *Touhy* decision
- Always Bates stamp documents provided in a *Touhy* response
- Consider asking the requester to clarify what covered materials are sought
- Where appropriate, the agency should involve DOJ counsel
  - A motion to quash the subpoena may be necessary.
Practice Tips – Keep Policy in Mind

- For disclosure: People are entitled to whatever evidence is available; where government is a party, fairness requires equal access; government is taxpayer supported; government should be open and transparent.

- Limited disclosure: agencies should manage dissemination in a centralized way; provision of evidence in private cases could raise impartiality concerns; litigation is a resource diversion from agency mission.
Practice Tips – Keep Policy in Mind

- The continuum of views lies between these extremes:
  - View #1: Agencies have promulgated regulations that act as a barrier to litigants’ access to government evidence
  - View #2: Agencies interpose the regulations for legitimate policy reasons
- But the regulations do not create a privilege
Practice Tips – Handling Sensitive Materials

- Agencies can always withhold materials that are privileged, classified, or otherwise immune from disclosure
  - *Touhy* regulations not needed
  - Rule 26(b)(5)
  - Rule 45(d)(a)(iii)
- *Touhy* regulations are an improper basis to make claims that information is privileged
  - *Touhy* regulations do not empower agency heads to make privilege determinations
TOPIC #4: MORE PRACTICE TIPS – JUDICIAL REVIEW OF TOUHY DECISIONS
Practice Tips

- Apply the key analytical matrix to figure out the best approach to obtaining covered materials and predicting outcomes (below):
  - Is the United States a party?
  - Is the case in federal or state court?
  - If in federal court, what circuit?
  - Is a *Touhy* request needed?
  - If yes, follow the agency’s *Touhy* regulations
Practice Tips – Deciding How to Obtain the Evidence

- If U.S. is a party to federal court litigation, you can probably bypass the agency’s *Touhy* regulations and use the FRCP.
- If U.S is *not* a party to federal court litigation, or if you are in state court, then the safest course is to follow the agency’s *Touhy* regulations.
  - But there is a circuit split on whether you can or must proceed by a *Touhy* request or subpoena.
Practice Tips – Where United States is Not a Party

- If the United States is not a party
  - In some federal circuits, you have to comply with *Touhy* and then proceed under the APA. *COMSAT Corp. v. Nat’l Science Foundation*, 190 F.3d 269 (4th Cir. 1999); *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194 (11th Cir. 1991)
  - In other circuits, you may be able to proceed directly to enforce a third-party subpoena. *Watts v. SEC*, 482 F.3d 501 (D.C. Cir. 2007); *Exxon Shipping Co. U.S. Dep’t of Interior*, 34 F.3d 774 (9th Cir. 1994)
Practice Tips – APA Review of Agency’s Touhy Decision

- If the requester has no enforceable subpoena, judicial review of withholding of material is under the APA:
  - An agency’s denial under *Touhy* regulations may be treated as final agency action
  - An independent APA lawsuit may be required to challenge the agency’s *Touhy* decision
  - APA’s deferential standard of review applies
  - Based on administrative record
Practice Tips – Valid Subpoena

- If valid and enforceable Rule 34 request or subpoena, the general standard of review under the Federal Rules likely applies.
- FRCP is said to “trump” the *Touhy* regulations.
- The Federal Rules still provide limits on what a court will compel an agency to produce. Proportionality, FRCP 45(d)(3)(A).
Practice Tips

- Whether judicial review is under FRCP or APA does not ultimately determine whether you can obtain the covered materials.
  - *Solomon v. Nassau County*, 274 F.R.D. 455 (E.D.N.Y. 2011) (granting government’s motion to quash subpoena under both APA and FRCP 45 standards)
TOPIC #5: SPECIAL ISSUES
Special Issues

- Do *Touhy* regulations extend to testimony by former agency employees?
  - Some federal agencies’ *Touhy* regulations specifically extend to former employees.
  - But see 18 U.S.C. § 207
Special Issues

- Sixth Amendment
  - Constitutional right of accused to confront witnesses and to have compulsory process for obtaining witnesses in his favor
  - Follow *Touhy* regulations because the FRCP does not apply in criminal cases
  - Review of denials subject to APA
Special Issues

- Whistleblower testimony
  - No employee retaliation for testifying
  - Possibly supersedes requirement that written request be submitted
  - Might overrule ban on voluntary, expert testimony by employee
Special Issues

- Ethics in Government Act (Criminal)
  - Former employees advised to seek advice of counsel
Resources

- References and narrative provided in separate document
Questions
The End

- Robert H. Foster
  - rfoster@ix.netcom.com
- Justin Heminger
  - justin.heminger@usdoj.gov