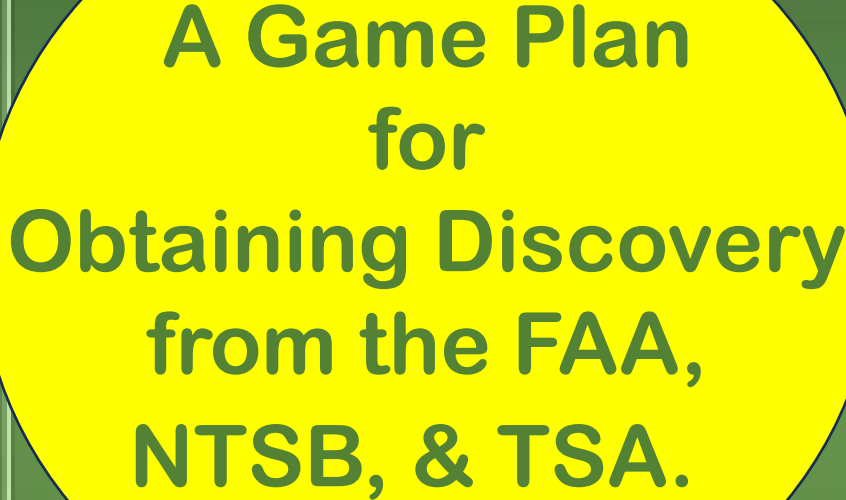


Tackling Touhy



A Game Plan
for
Obtaining Discovery
from the FAA,
NTSB, & TSA.



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A vertical column of five square images of green grass, each with a white border, positioned on the left side of the slide.

What is Touhy?

- a) A case
- b) A type of federal administrative regulation
- c) A legal doctrine
- d) A circuit split

Answer: All the Above



What is Touhy?

a) A case

United States ex rel Touhy v. Ragen,
340 U.S. 462 (1951)



Roger "The Terrible" Touhy



DOJ Order No. 3229 (1946)

All official files, documents, records and information in the offices of the Department of Justice, including the . . . Federal Bureau of Investigation Are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General

Whenever a subpoena duces tecum is served to produce any of such files, . . . The officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.



The Housekeeping Statute

5 U.S.C. § 301





What is Touhy?

b) A type of federal administrative regulation

“[A] federal agency may adopt procedures—dubbed Touhy regulations after the Supreme Court decision *United States ex rel. Touhy v. Ragen*—for responding to subpoenas and other request for testimony or documents.”

United States ex rel. Pogue v. Diabetes Treatment Ctrs. Of Am.,
474 F. Supp. 2d 75, 79 (D.D.C. 2007).



What is Touhy?

c) A legal doctrine

“[T]here is little room to doubt that the [*Touhy*] doctrine is alive and well here.”

Quezada v. Mink, No. 10-CV-00879-REB-KLM, 2010 WL 4537086, at *3 (D. Colo. Nov. 3, 2010).

What is Touhy?

c) A legal doctrine



“[*Touhy*] is part of an unbroken line of authority which [holds] that a federal employee may not be compelled to testify [or produce documents] contrary to his federal employer’s instructions under valid agency regulations.”

Smith v. Cromer, 159 F.3d 875, 879 (4th Cir. 1998).



NTSB

As a general rule, the NTSB takes the lead role during civil aviation accident or incident investigations.

So, what about the online docket?



Witness Statement

Case Number _____
Incident _____
Witness - Full Name _____
Address _____

Witness Statement

I, _____ (name), of _____ (address) was a witness to _____ (crime).

What follows is from my point of view and the facts as far as I know them.

Below, please write down the facts as clearly as you remember them. Try to be as detailed as possible, e.g. stating times, describing surroundings, describing physical characteristics of anyone you saw involved in the incident.



NTSB



49 CFR § 835



49 CFR § 837



FAA

Provides:

- Information regarding licenses and certificates for airmen and aircraft,
- Electronic copies of air traffic control tapes,
- Preliminary accident and incident notes, and
- Information about airports.

FAA



49 CFR Part 9

TSA



49 USCA § 114(r)

49 CFR § 1520.1

6 CFR § 5



What is Touhy?

d) A circuit split

- 4th & 11th Circuits: Section 706 of the APA; standard largely deferential to the agency.
- 9th & D.C. Circuit apply the “requester-friendly” Federal Rules of Civil Procedure 45 and 26, the “undue burden” standard.



What is Touhy?

d) A circuit split

- **5th circuit** reviews *Touhy* under the APA's arbitrary & capricious standard. (5 USC 706)
- The review is "searching and careful," ensuring that the agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made *Texas v. United States Environmental Protection Agency*, 91 F.4th 280 (2024).



Touhy Two-Part Tackle

1. Procedural requirements you must take to request the evidence.
2. Substantive requirements establish the burden you must meet to obtain the evidence.



How to Tackle Touhy Effectively

- Understand your audience
- WIIFM