

CHAPTER VI — REQUESTS FOR DOCUMENT PRODUCTION

A. DEFINITION AND PURPOSE

Requests for production of documents (and other items referred to as "things") are a fairly self-explanatory discovery method. Any party may serve on another a request to inspect, copy, test, sample, photograph, and measure documents (and sometimes other "things"). Get all documentary evidence having a bearing on the issues of the appeal, and when appropriate to the issues, physical evidence too. Cross-reference discovery requests made through interrogatories and requests for admissions, i.e., if you asked a question in an interrogatory, make a request for any documents which are also responsive. As with other forms of discovery, the request must be reasonably specific. A catch-all request may not capture all the issues that are at stake and the respondent cannot be compelled to interpret the request or supply information not described. In *Spates v. USPS*, 68 MSPR 9, 13 (1995), the appellant asked for "any other document relevant to this appeal." On petition for review, the appellant raised a new argument that he had been the victim of a disparate disciplinary penalty. He alleged that the agency acted in bad faith because it had a document, which it used at the hearing, that he did not receive in response to his discovery request. In *Spates*, 68 MSPR at 13, the Board dismissed his contentions, stating in pertinent part:

. . . We note that the appellant availed himself of the Board's discovery procedures, requesting various documents and information from the agency The appellant did not, however, request information relating to the alleged comparison employee or even to disparate penalties. . . . Neither did he file a motion to compel discovery on the basis that the agency failed to produce relevant evidence. Thus, the agency could not have known that he was relying on the disparate penalty defense. Further, the appellant has not explained why he could not have timely obtained the information concerning the comparison employee. Therefore, we find that he has failed to establish that he exercised due diligence or ordinary prudence in obtaining the information.

There is no established limit to the number of documents that a party may ask for, but there is no requirement that a party produce documents which have already been produced, that the party does not possess, or that are covered under a valid privilege. Arguments can also be made as to requests being unduly burdensome or irrelevant.

B. PROCEDURE

A request for documents can be combined with the same letter requesting other forms of discovery or it can be a stand alone request (See Chapter III). Start discovery in a timely manner. Document production is a priority because it helps to prepare for other methods of discovery, especially depositions, and certainly for the hearing. Questions for depositions or the hearing can be better formed if the party is aware of and has completely digested the documentary evidence first.

Samples are included below on formats for how to make separate production of document requests. The key is to make the requests specific, yet sufficiently encompassing to yield the needed information, in order to decrease the chance that the other party can escape from responding. Then, as the last document request, add a request for anything else that may be used in the case. Thought should also be given to the time period that the documents should cover (i.e., the last two to three years). Keep the requests reasonably focused on the issues that appear to be at stake in the case or that may lead to relevant evidence. Otherwise, the party may find themselves on the losing side of a judge's order not to compel discovery.

Should the party desire to make a separate request for documents, the following "instructions" can be used.

C. SAMPLES OF INSTRUCTIONS FOR PRODUCTION OF DOCUMENTS

1. Sample #1

**MERIT SYSTEMS PROTECTION BOARD
APPROPRIATE REGIONAL OFFICE**

Us,

v.

Them,

XX-0752-96-0000-I-1

APPELLANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to 5 CFR § 1201.71, *et seq.*, the appellant hereby requests that the agency produce the documents specified below. All documents are to be produced within 20 calendar days after the date of this request and must be organized and labeled in a manner which clearly indicates the particular request to which the document is responsive.

"Document" means a true copy of a true original and each identical copy (whether different from the original because of notes made on the copy or otherwise) of each writing of every kind and description (together with all worksheets, supporting documents, and other relevant material), whether inscribed by hand or mechanical, electronic, microfilm, photographic, or other means (such as recording film, tape, or other means), and including, but not limited to, affidavits, statements, correspondence, letters, memoranda, telegram messages, notes, reports, records of meetings, conferences, telephone, or other conversations or communications, studies, statistical analyses, tabulations, drawings, or graphs.

If it is claimed that a document has already been provided to the appellant or his agents:

- (1) identify the document by title and date;
- (2) identify the person(s) who has/have custody or control of the document, or to whom it was given; and
- (3) identify when the document was provided to the person(s) named in (2), above.

Responses to any request to identify any record, document, or writing shall include identification as to:

- (1) the date the same was dated or otherwise prepared;
- (2) the name, address, and title of the person preparing same;
- (3) the name, address, and title of the person for and/or to whom copies of the same were furnished or otherwise forwarded;
- (4) the name, address, location, and title of all persons to whom copies of the same were furnished or otherwise forwarded;
- (5) the title and/or other identifying designation given same; and

- (6) the name, address, location, and title of the person or persons having possession, custody, or control of the same at the present time, and the specific file and/or document locator number.

If any document responsive to any of the following requests for production of documents is being withheld based on any claim of privilege, identify each claim and correlate your response with the specific discovery request, with all the information requested below:

- (1) its date;
- (2) its authors(s);
- (3) the business address and title of its author(s);
- (4) its recipient(s) and their addresses;
- (5) the number of pages;
- (6) the subject matter of the document(s);
- (7) the legal basis upon which privilege is claimed;

When responding to the request for production of documents, please certify that all responses to the requests are genuine, accurate, complete, and truthful.

2. Sample #2

The foregoing sample letter, if fully complied with, makes for very burdensome discovery responses. Even though it asks the respondent to identify all sorts of information, this is not typically what happens, and it is unlikely the MSPB judge would order a party to fully respond if it has otherwise provided the documents responsive to the request. However, the format is helpful to file with either *pro se* appellants or otherwise inexperienced representatives, because it gives guidance on the subject matter to be covered. The inexperienced representative will have a harder time claiming he or she misunderstood what discovery entailed at a later date if the appellant is given such explicit instructions with the request.

When dealing with counsel who regularly engages in practice before the Board, the more elaborate format above may not be needed. Below is a simpler format.

**MERIT SYSTEMS PROTECTION BOARD
APPROPRIATE REGIONAL OFFICE**

Us,

v.

Them,

XX-0752-96-0000-I-1

AGENCY'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to the regulations of the Merit Systems Protection Board, you are required to produce the following documents at the office of the undersigned no later than close of business April 22, 200__.

When responding to the request for production of documents, please certify that all responses to the requests are genuine, accurate, complete, and truthful.

D. SAMPLES OF SPECIFIC REQUESTS

The types of document requests can be endless. For ideas, refer back to the sample interrogatories, and couple those with some of the samples below. To show the format for both focused and general requests, a few samples are provided. Some are worded from an appellant's view, others from an agency standpoint; all are interchangeable.

1. Follow-up to Interrogatories

Some parties make a document request to correspond with each interrogatory. This could be a good idea, as it requires the other party to better organize the responses, and will make it difficult to avoid a specific response. Examples of these requests are:

1. Please furnish copies of any and all documents upon which you relied in answering Interrogatory 1 above.
2. Please furnish copies of any and all documents upon which you relied in answering Interrogatory 2 above.
3. Please furnish copies of any and all documents upon which you relied in answering Interrogatory 3 above.

2. General Close-out Requests

1. Any and all other documents, whether or not specifically referred to in the answers to the requests for admissions in Section I, and the interrogatories in Section II, which will otherwise be utilized in any fashion in connection with this case.
2. Produce true copies of any audio or video recordings, tapes, photographs, or other electronic recordings which will be used in any form in connection with this case.

OR

1. Please produce copies of any and all documents or things that you identified, or that relate or refer to your answers to the agency's First Set of Interrogatories, identifying the specific interrogatory or interrogatories to which each such document or thing relates or refers.
2. Please provide copies of any other documents you will use in connection with the case.

3. Appellant to Agency

Please provide:

1. A complete copy of appellant's Official Personnel Folder.