

Predictability of Outcomes in Discovery Disputes at CBCA Improves During its First Ten Years

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CBCA Turns Ten

- 2017 is CBCA's Decennial Anniversary
- Set Out To Identify Trends
 - Notable recent increase in number of published decisions containing substantial discussions of discovery issues
 - 24 published decisions opining on discovery issues
 - More than half of those published since 2014
- Published Article in BCA Bar Journal
 - Trend aids outcome predictability and efficiency
 - Discusses three decisions that pit statutory requirements related to disclosure/production against bounds of discovery

Kepa Servs., Inc. v. Dep't of Veterans Affairs (Feb. 2015)

- Discovery Dispute
 - Kepa sought several agency employees' employment files
 - VA contended that information was protected by Privacy Act
- Principle: Privacy Act cannot be used to shield relevant information from disclosure in litigation
 - Privacy Act does not create an evidentiary privilege
 - Disclosure in litigation is routine use
 - Information requested must be relevant to case
- Conclusion: Kepa failed to show relevance of employment files to contract dispute

Kepa Servs., Inc. v. Dep't of Veterans Affairs (Apr. 2015)

- Discovery Dispute
 - Kepa asked Board to stop or limit VA OIG audit
 - VA asserted IG Act as one basis for audit
- Principle: Without a subpoena, IG Act cannot be used to sidestep discovery rules
 - Act's plain language requires response to audit request only by subpoena
 - Rules of Professional Responsibility require contact through attorney
- Conclusion: Response to audit letters not required

Golden Key Grp. v. Dep't of Veterans Affairs (Mar. 2016)

- Discovery Dispute
 - VA asserted several privileges to protect certain documents in appeal record
 - Golden Key contended previous disclosure under FOIA negated right to protect subject documents
- Principle: Prior disclosure under FOIA waives ability to protect documents during litigation
 - Attorney-client, investigative files/law enforcement, and deliberative process privileges are waived when documents previously disclosed under FOIA
- Conclusion: Agency's request for protection denied

Takeaways

- Trend aids predictability of outcomes in discovery disputes
 - Increases Efficiency
- Three decisions should provide a relatively high degree of outcome predictability in similar cases because of rigid statutory requirements at issue
- Hopeful that CBCA will continue trend of publishing meaningful discovery-related decisions

Questions or Comments?



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