

## § 13.21

## 6 CFR Ch. I (1–1–10 Edition)

the Authority, any relevant and material Documents, transcripts, records, and other materials that relate to the allegations set out in the Complaint and upon which the findings and conclusions of the Investigating Official under §13.4(b) are based, unless such Documents are subject to a privilege under Federal law. Special arrangements as to confidentiality may be required by the Reviewing Official, who may also assert privilege or other related doctrines. Upon payment of fees for duplication, the Defendant may obtain copies of such Documents.

(b) Upon written request to the Reviewing Official, the Defendant also may obtain a copy of all exculpatory information in the possession of the Reviewing Official or Investigating Official relating to the allegations in the Complaint, even if it is contained in a Document that would otherwise be privileged. If the Document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the Reviewing Official as described in §13.5 is not discoverable under any circumstances.

(d) The Defendant may file a motion to compel disclosure of the Documents subject to the provisions of this section. Such a motion may only be filed following the serving of an answer pursuant to §13.9.

### § 13.21 Discovery.

(a) *In general.* (1) The following types of discovery are authorized:

- (i) Requests for production of Documents for inspection and copying;
- (ii) Requests for admissions of the authenticity of any relevant Document or of the truth of any relevant fact;
- (iii) Written interrogatories; and
- (iv) Depositions.

(2) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ will regulate the timing of discovery.

(b) *Documents defined.* (1) For the purpose of this section and §§13.22 and 13.23, the term *Documents* includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence.

(2) Nothing in this part will be interpreted to require the creation of a Document.

(c) *Motions for discovery.* (1) A party seeking discovery may file a motion. Such a motion will be accompanied by a copy of the request for production of Documents, request for admissions, or interrogatories or, in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion or a motion for protective order as provided in §13.24.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought:

- (i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;
- (ii) Is not unduly costly or burdensome;
- (iii) Will not unduly delay the proceeding; and
- (iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under §13.24.

(d) *Depositions.* (1) If a motion for deposition is granted, the ALJ will issue a subpoena for the deponent, which may require the deponent to produce Documents. The subpoena will specify the time and place at which the deposition will be held. Deposition requests for senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent showing of compelling need that cannot be met by any other means.

(2) The party seeking to depose will serve the subpoena in the manner prescribed in §13.8.

(3) The deponent may file a motion to quash the subpoena or a motion for a protective order within ten days of service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

(4) The party seeking to depose will provide for the taking of a verbatim transcript of the deposition, which it will Make available to all other parties for inspection and copying.

(e) Each party will bear its own costs of discovery.

**§ 13.22 Exchange of witness lists, Statements, and exhibits.**

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties will exchange witness lists, copies of prior Statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written Statements that the party intends to offer in lieu of live testimony in accordance with § 13.33(b). At the time the above Documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, will provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list of any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, Documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

**§ 13.23 Subpoenas for attendance at hearing.**

(a) A party wishing to procure the appearance and testimony of any Individual at the hearing may request that the ALJ issue a subpoena. Requests for witness testimony of senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent a showing of compelling need that cannot be met by any other means.

(b) A subpoena requiring the attendance and testimony of an Individual may also require the Individual to produce Documents at the hearing.

(c) A party seeking a subpoena will file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such

request will be accompanied by a proposed subpoena, which will specify and Documents to be produced and will designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena will specify the time and place at which the witness is to appear and any Documents the witness is to produce.

(e) The party seeking the subpoena will serve it in the manner prescribed in § 13.8. A subpoena on a party or upon an Individual under the control of party may be served by first class mail.

(f) A party or the Individual to whom the subpoena is directed may file a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

**§ 13.24 Protective order.**

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may Make any order that justice requires to protect a party or Person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) That the discovery may be had only through a method of discovery other than that requested;
- (4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;
- (5) That discovery be conducted with no one present except Persons designated by the ALJ;
- (6) That the contents of discovery or evidence be sealed;