



12 Strategies to Obtain Documents When an Agency Ignores a Valid Congressional Subpoena

When a federal agency ignores a valid Congressional subpoena, one strategy is to request enforcement by a court. But a court battle can take years. In the meantime, consider other ways to make it in the agency's interest to produce rather than withhold the documents. Here are 12 possible strategies, all of which are more effective if carried out on a bipartisan basis. It may also make sense to consult with House or Senate legal counsel when undertaking these strategies.

(1) Custodial Interview. Request the agency person or persons collecting, reviewing, and redacting the requested documents to appear in committee offices for an interview or deposition to explain the agency's efforts and the volume and types of documents involved. Preparing agency personnel for that meeting will require time and work. Offer to postpone the interview or deposition if a sizable number of documents are produced by a date certain.

(2) Two Hour Meeting. Request the presence of the agency general counsel, a key agency official who handles the substantive issues, the key person collecting documents, and a senior legislative liaison to meet in person in committee offices to discuss document production. Be prepared to go over the document request line by line, reviewing what has been produced, what is outstanding, why documents haven't been provided, and next steps. Bring copies of relevant correspondence or emails, and consider preparing a timeline to go over with the agency. Ask the agency to set aside 2 hours for the session. Offer to postpone the meeting if a sizeable number of documents are produced by a date certain.

(3) Document Approval. Ask the agency to prepare a document describing the universe of documents being reviewed, agency efforts to produce them, any problems, and a list of any documents being withheld as privileged. Preparing and gaining approval of this descriptive document as well as a privilege log will require time and effort. Offer to extend the time to submit them if documents are produced by a date certain.

(4) Document Surprise. If applicable, let the agency know the committee has obtained documents from third parties indicating the agency has not been forthright and complete in its document production, and the public release of which may be embarrassing for the agency. Describe the documents, but do not provide copies or disclose who produced them (and don't bluff having them if you don't). A related strategy is to describe a surprise witness with relevant information (but again, avoid bluffing). Offer to delay releasing information about the surprise documents or witness if requested documents are produced.

(5) Serial Interviews. Request a series of interviews or depositions of specified agency personnel with suggested dates over a relatively short period of time. If possible, start with the most senior executive it would be reasonable to interview. Be careful to create a list that is challenging but not unreasonable. Caution the agency that some interviews may have to be repeated once documents are produced. Since each interview will require time and work to prepare, an interview list can provide an agency liaison with a concrete reason to convince more senior personnel to start producing documents. Be careful, however, because if the list

is unreasonable on its face, the agency may feel safe in rejecting the whole strategy. Offer to suspend the serial interviews if documents are produced by a date certain.

(6) Agency Head. Set up a telephone call between the committee chair and agency head to discuss poor document production. Staff will have to prepare the agency head which will take time and may involve difficult questions. Prepare the committee chair with a timeline, key issues, and requests for next steps. A higher-pressure strategy is to request the agency head to meet in person with the committee chair. If there is no progress, an even higher-pressure tactic is to request a telephone call or meeting with a high-ranking official at another agency like OMB, DOJ, Treasury, or the White House. Another option is to request help from an organization, trade association, or group of importance to the agency head. Offer to cancel a scheduled call or meeting if documents are produced by a date certain.

(7) Teaming Up. Try to team up with another Member of Congress or committee of importance to the agency, such as an appropriations subcommittee or recognized agency expert in either the House or Senate. Explain your investigation and document production problems, and ask the Member or other body for help convincing the agency to cooperate. You may need to share any documents produced. If agreement is reached, set up a joint telephone call or in-person meeting with the agency, your committee, and the new team member. Offer to cancel the call or meeting if documents are produced by a date certain.

(8) Bargaining Chip. Examine other agency activities to find a bargaining chip. Consider holding up a nomination, delaying a reprogramming request, or blocking an appropriations line item. Options also include delaying approval of or criticizing a regulation, conducting detailed site visits, or questioning a specific agency action. Alternatively, consider offering to facilitate an agency action if documents are produced by a date certain.

(9) Public Hearing. Inform the agency that the committee will be holding a public hearing to discuss poor document production. Consider inviting or subpoenaing the agency general counsel, head of the legislative liaison office, and one or more senior agency officials to testify on a panel. Offer to cancel the hearing if documents are produced by a date certain.

(10) Other Hearings. Inform the agency that the committee chair or a committee member will be bringing up the issue of poor document production at another hearing where the agency is testifying, such as at an annual appropriations, nominations, or oversight hearing. Offer to skip the questions if documents are produced by a date certain.

(11) Going Public. Threaten or inform the agency that the committee plans to issue a press release or use social media to describe the agency's poor document production. A related strategy is to submit or deliver a floor statement about the production problems and publicize the statement. Offer to delay going public if documents are produced by a date certain.

(12) Bully Pulpit. Threaten or inform the agency that the committee chair plans to release a column or op-ed or go on a talk show to discuss the poor document production. Consider adding another Member of Congress with agency expertise. Offer to cancel the column, op-ed, or appearance if documents are produced by a date certain.

The key to all of these strategies is to increase the cost to the agency of continuing to withhold information.