INTERPLAY OF DISCOVERY AND THE FREEDOM OF INFORMATION ACT



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PURPOSE

FOIA

- Promote full disclosure of government records.

  GTE Sylvania, Inc.v. Consumers Union, 444 U.S. 375, 385 (1980).

- Records paid for by citizens.

Discovery

- Provide parties with information (documents and testimony) that may be used to support its claims or defenses.

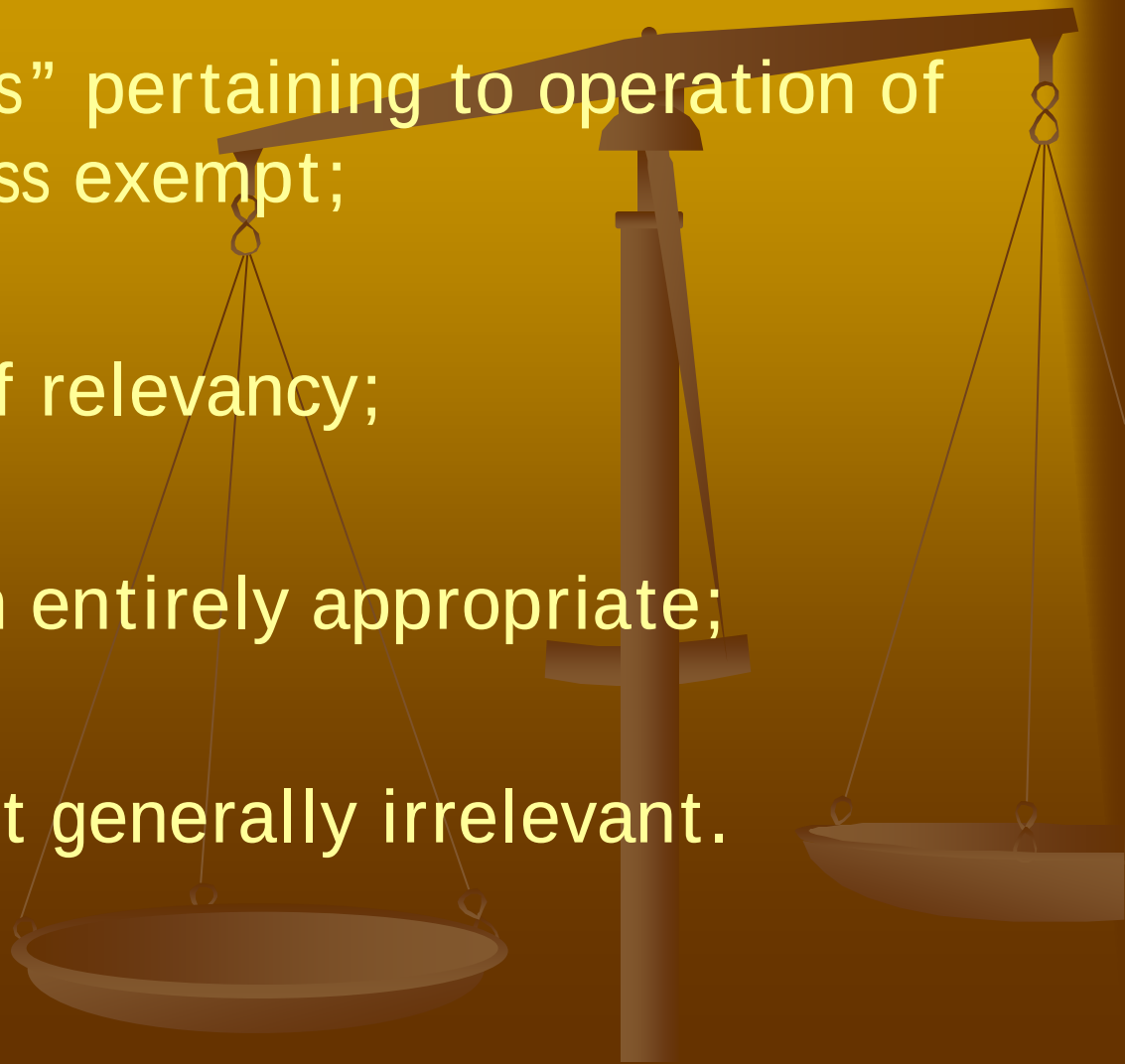
  Fed. R. Civ. P. 26



SCOPE:

FOIA

- All “public records” pertaining to operation of government, unless exempt;
- No requirement of relevancy;
- Fishing expedition entirely appropriate;
- Purpose of request generally irrelevant.



SCOPE:

Discovery

U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974), requires that the party issuing a subpoena *duces tecum* must show:

- (1) That the material sought is **evidentiary and relevant**;
- (2) The material sought is **not otherwise reasonably procurable** by the exercise of due diligence in advance of trial;
- (3) That the requesting party **cannot properly prepare for trial** without such production and the failure to obtain the materials sought may tend to unreasonably delay the trial; and
- (4) The application is made in good faith and is **not intended as a general "fishing expedition."** (Emphasis supplied).

SCOPE:

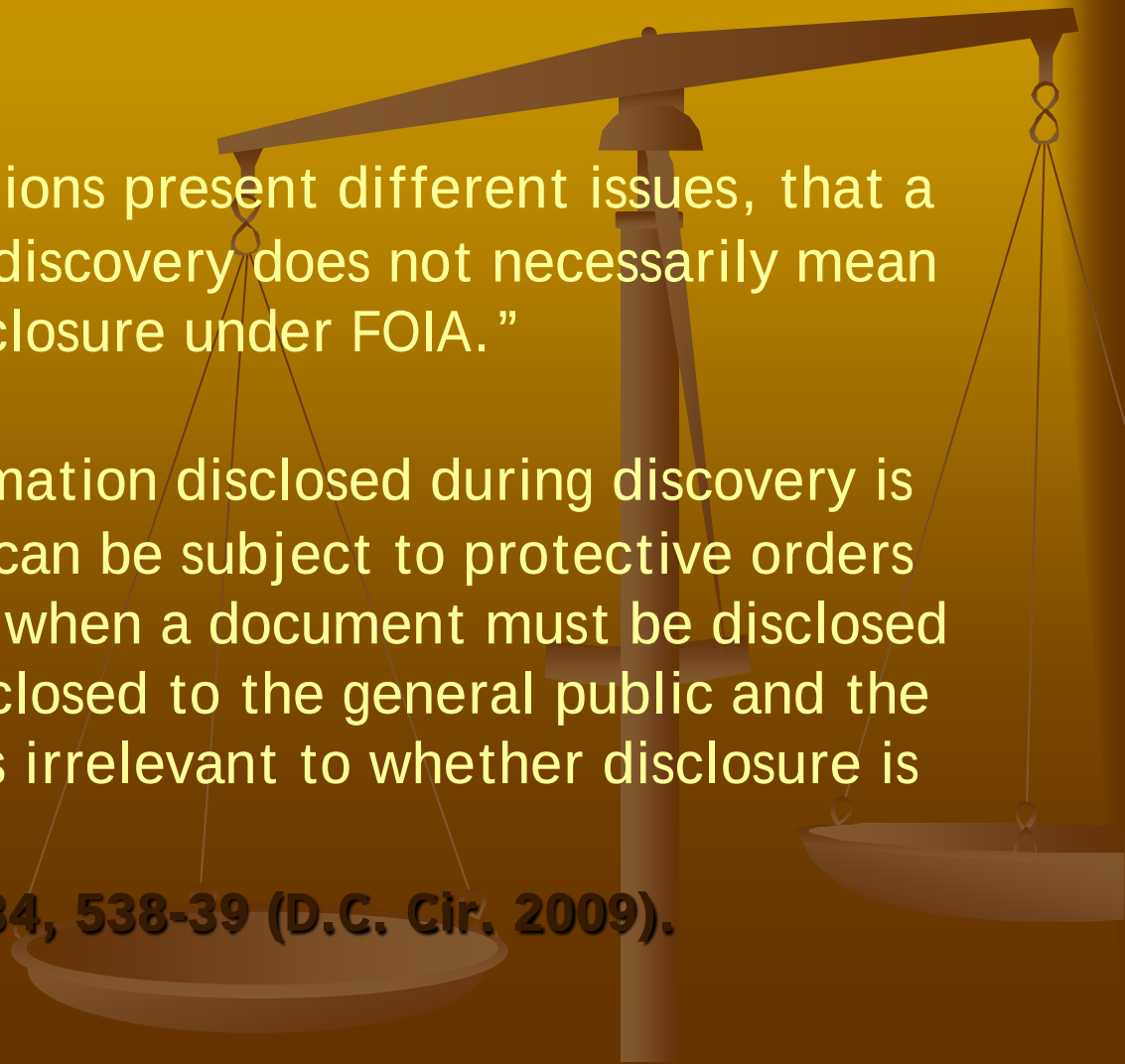
FOIA vs. DISCOVERY

"The FOIA disclosure regime, however, is distinct from civil discovery."

"Because these considerations present different issues, that a document is exempt from discovery does not necessarily mean it will be exempt from disclosure under FOIA."

"Additionally, while information disclosed during discovery is limited to the parties and can be subject to protective orders against further disclosure, when a document must be disclosed under FOIA, it must be disclosed to the general public and the identity of the requester is irrelevant to whether disclosure is required."

Stonehill v. IRS, 558 F.3d 534, 538-39 (D.C. Cir. 2009).



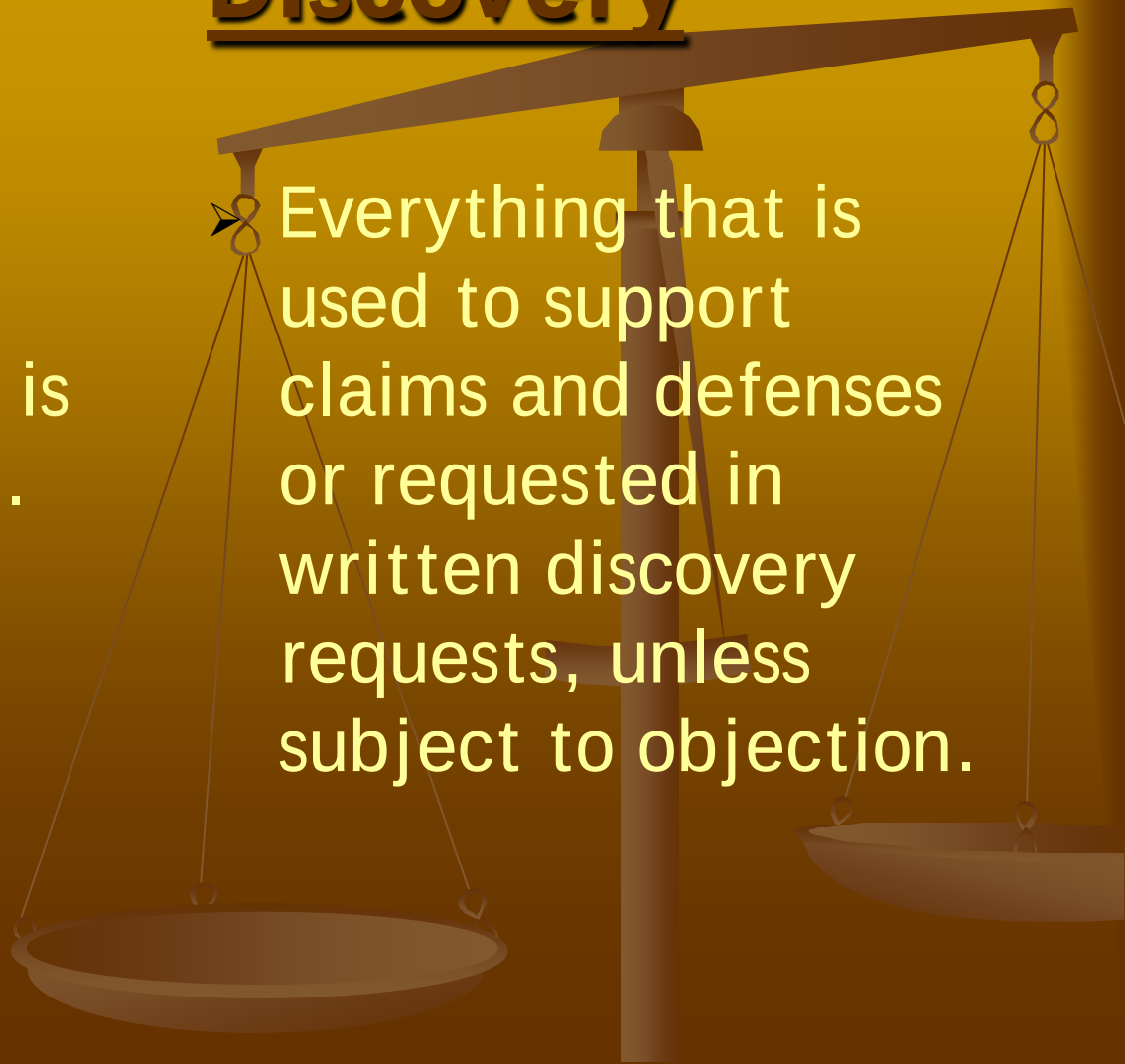
PRODUCTION

FOIA

- Everything that is requested, unless what is requested is otherwise exempt.

Discovery

- Everything that is used to support claims and defenses or requested in written discovery requests, unless subject to objection.



PRODUCTION

FOIA

- Burden solely on public body.
- No need for requester to be reasonable unless there is a cost provision for search time.

Discovery

- Burden on both litigants.
- Need for parties to work cooperatively.



PRODUCTION

FOIA

- Limited to documents.
- Generally no explanation necessary. **Charles v. Armed Forces Medical Examiner, 730 F. Supp. 2d 205 (D.D.C. 2010)**

Discovery

- May inquire as to meaning of documents in depositions.



PRODUCTION:

RESPONSE TIME

FOIA

- Response times vary from state to state.
- May be shorter response period than those mandated in discovery.

DISCOVERY

- Discovery provision generally mandates a response 30 days after receipt of a written request.



PRODUCTION:

CONTINUING OBLIGATION



FOIA

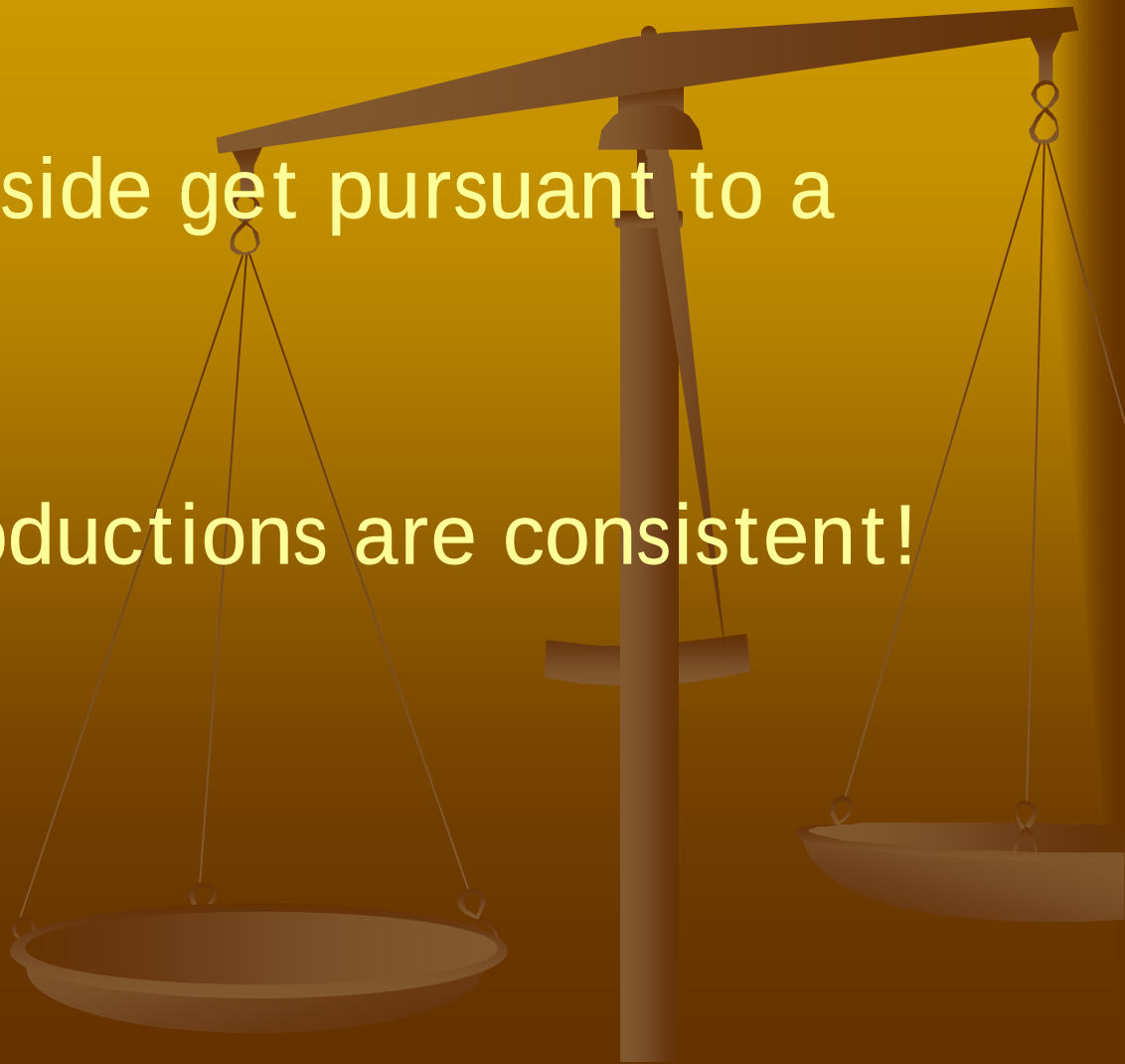
- NO.

DISCOVERY

- YES.

FOIA:

Challenge for Litigators

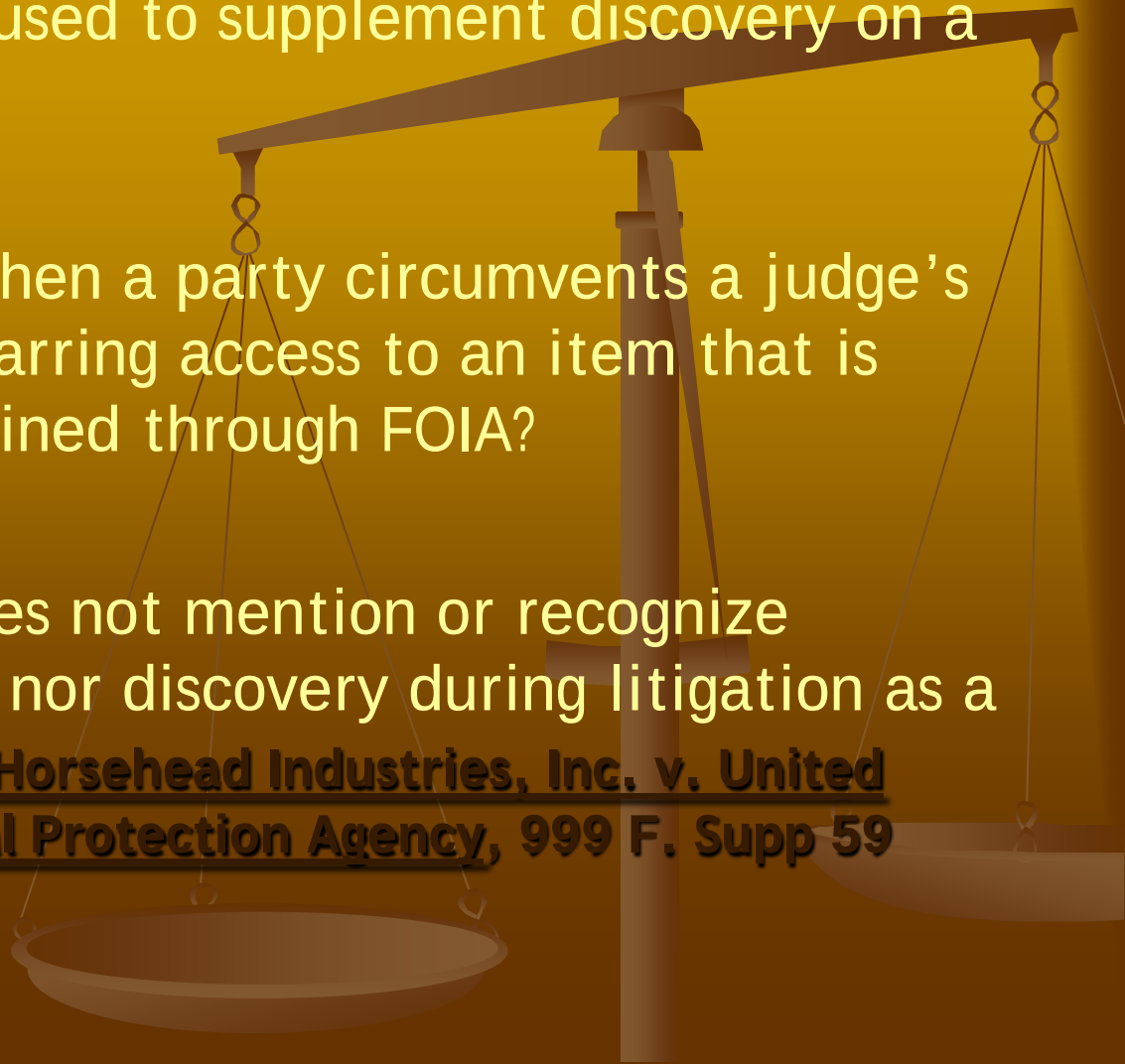


- What did other side get pursuant to a FOIA request ?
- Must ensure productions are consistent!

FOIA:

Challenge for Litigators

- FOIA requests being used to supplement discovery on a case:
  - What do you do when a party circumvents a judge's discovery ruling barring access to an item that is requested or obtained through FOIA?
  - FOIA generally does not mention or recognize pending litigation nor discovery during litigation as a valid exemption. **Horsehead Industries, Inc. v. United States Environmental Protection Agency, 999 F. Supp 59 (D.D.C. 1998).**



Can FOIA be used as a Reason Not to Produce?

- Some courts turn to FOIA statute for guidance on discovery requests.

- Courts may sometimes weigh the purpose of the exemption with the need for the documents in discovery to determine if the documents must be produced.

In Re Marriage of Daniels, 240 Ill. App. 3d 314 (1st Dist. 1992).

PROTECTIVE ORDERS

- May be entered in litigation cases.
- Does it protect against a FOIA request for the same information? **GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 100 S. Ct. 1194 (1980). Commonwealth v. Fremont Investment, 459 Mass 209 (2011).**



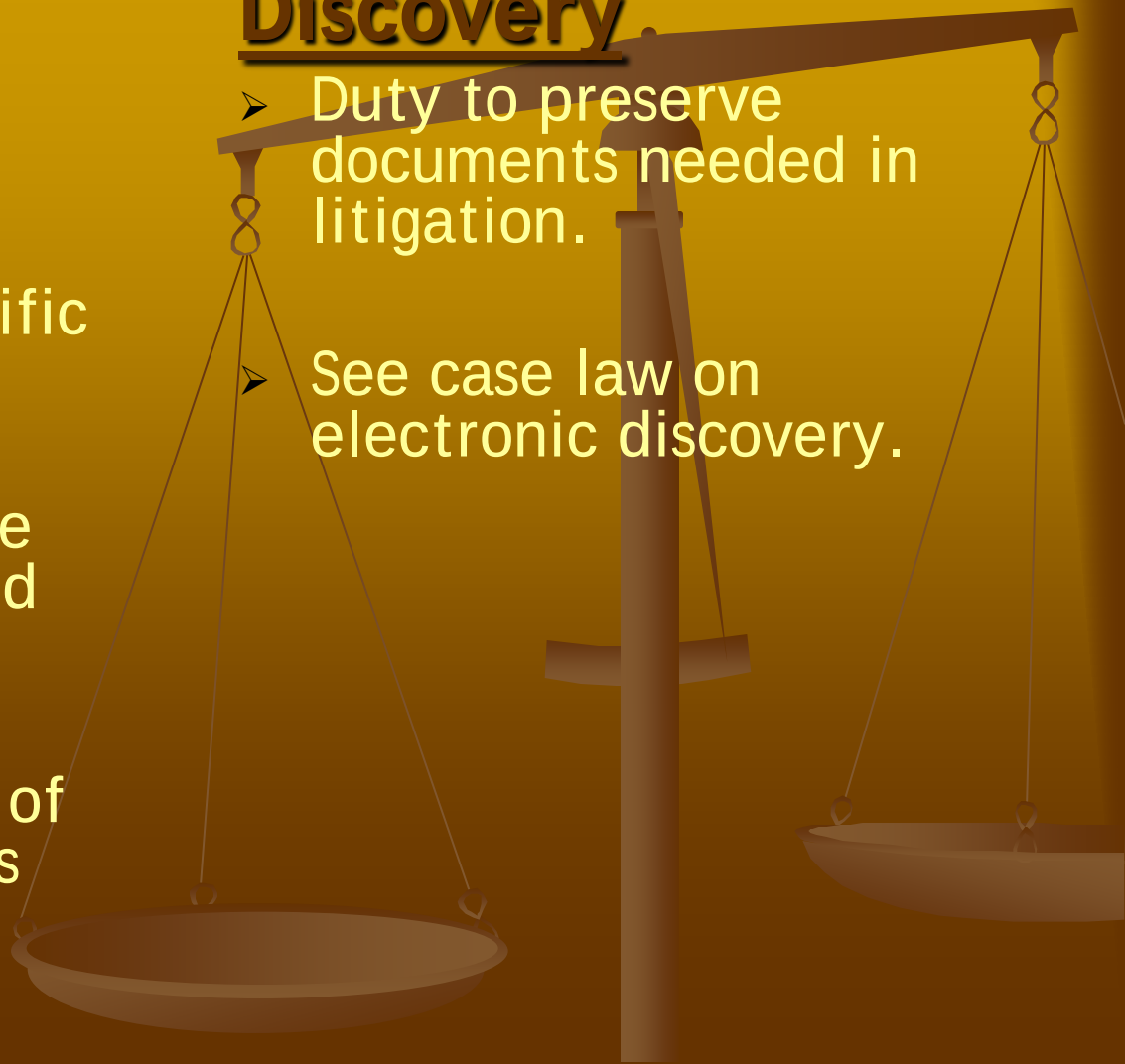
PRESERVATION REQUIREMENTS

FOIA

- Is there a duty to preserve documents?
- Must there be a specific request to preserve?
- Must the requester be informed of a planned disposal?
- Challenging in terms of electronic documents

Discovery

- Duty to preserve documents needed in litigation.
- See case law on electronic discovery.



SEARCH COSTS AND FEES

FOIA

- Approximately half the States and Federal Government allow for costs to search and produce documents pursuant to a FOIA request.

Discovery

- Unless extraordinary costs, generally not allowed for search of paper documents. **Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).**

- ESI treated differently by federal courts. **Zubulake v. UBS Warburg, 216 F.R.D. 280 (S.D.N.Y. 2003).**

