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A GUIDE

Using U.S. Courts to Obtain
Information for Foreign Legal Cases

FOREIGN LEGAL ASSISTANCE ACTIONS UNDER 28 U.S.C. § 1782

This guide was produced by EarthRights International.

EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.”

We specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns, and have offices in Southeast Asia, the United States and Peru.

For more information about our cases and Foreign Legal Assistance actions, please contact our office in Washington, D.C.

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3. PARTIES

- Are you a participant in the foreign case, with the ability to introduce evidence?
 - › The request must be made by an “interested person.” This doesn’t need to be a party to the foreign case, but it is easiest to obtain assistance if you have the ability to introduce evidence in the foreign case.
- Is the person who holds the evidence NOT a participant in the foreign case?
 - › U.S. courts can grant legal assistance to obtain evidence from individuals and corporations who are participants in the foreign case, but it may be easiest to obtain evidence from others who are not direct participants.



Checklist for Foreign Legal Assistance

This checklist briefly summarizes the key requirements for a Foreign Legal Assistance action.

If your case meets these requirements and would benefit from a FLA request, please contact EarthRights International at INFOUSA@EARTHRIGHTS.ORG for further discussion.

1. PURPOSE

- Does an individual or corporation in the United States have evidence that would help your case? Is the evidence located in the United States?
 - › Evidence can include documents and testimony, and needs to be intended to assist a legal case. Courts may allow discovery of documents located outside the United States, but it is easier to obtain documents within the U.S. Testimony can only be obtained from witnesses in the U.S.
- Could the evidence be used in the foreign case?
 - › A court is more likely to grant the request if you can show that the evidence would be accepted by the foreign court or tribunal.

2. FOREIGN CASE

- Is a legal case ongoing in another country? If not, is there an investigation that may lead to a case?
 - › The evidence must be useful for some foreign legal proceeding – it is simplest if this is an ongoing case, but cases at other stages, including investigation, may also qualify for legal assistance.
- Is the case in a court or a similar tribunal?
 - › U.S. courts will generally provide assistance to cases in foreign courts. Other kinds of tribunals and processes may also qualify, especially if they may result in binding decision.

Foreign Legal Assistance Actions

Corporations or individuals in the United States sometimes have information that is useful or necessary to a case in a court or tribunal outside the United States. The U.S. Foreign Legal Assistance (the FLA) Statute, 28 U.S.C. § 1782 (also known as “Section 1782”), allows those with an interest in the case to obtain that information.

A FLA action is a request to a federal court in the United States. It asks the court to help a foreign court, or a participant in a foreign legal case, obtain information which can be used in a legal case in another country.

The process of obtaining such information is known as “discovery.” The foreign legal case can be either ongoing or under preparation. The discovery can be in the form of testimony, documents, or physical evidence.

While this assistance is often granted, the U.S. court is not required to comply with FLA request. This means that even if all the legal requirements for the request are met, the judge may still reject it.



How a FLA action may be used

Section 1782, the Foreign Legal Assistance Statute (the FLA), allows an “INTERESTED PERSON” to request information belonging to a U.S. person or company if the information will be helpful in a foreign or international LEGAL PROCEEDING.

The FLA can be an especially powerful tool because although most countries have some form of discovery or information disclosure in lawsuits, the types and amounts of information that can be obtained and the procedures for obtaining it are different from country to country. It can often be difficult to use a foreign court system to obtain evidence located in the United States, but a FLA request can be made directly to a U.S. court.

Courts granting FLA requests usually follow the same rules and procedures for discovery as they do for U.S. domestic cases, which allow a broad range of discovery of information. Applicants can ask for documents or evidence that is likely to be relevant to their legal action. They can request information even if they do not know exactly what the content of this information is, and even if they do not know whether the evidence exists or not.

An **INTERESTED PERSON** is anyone with a reasonable interest in obtaining the information.

The person requesting information does not need to be a party to the foreign proceeding, they only need to have a “reasonable interest in obtaining the assistance.”

To learn more, see PAGE 10.

There is no clear rule on what a “**PROCEEDING**” can be, but examples include “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies.”

HOW MUCH DOES IT COST TO FILE A FLA REQUEST?

There are three kinds of costs that may be associated with a FLA request.

First, anyone who files a case in federal court must pay a filing fee, which is often around US\$400. (Sometimes there are other fees as well.) But if you are poor, you can apply to have the fees waived. This is called *IN FORMA PAUPERIS*.

Second, if you are requesting *DEPOSITIONS*, you will need to pay a small fee to the person giving testimony, as well as pay for an official court reporter to administer the oath and transcribe the deposition. The court reporter can cost more than a thousand dollars per day, so be careful when requesting depositions.

Third, it is possible that you will need to pay for the costs of searching for, copying, and sending any documents or other forms of evidence. Normally, the person who has the documents would pay for these costs. However, in a few cases, courts have required the requesters to split the costs, or pay all of the costs. Other courts have required the requesters to pay a *BOND* beforehand.

The court will almost always tell you beforehand if it is going to require you to pay these costs, and if you have already established *in forma pauperis* status, then most courts will be less likely to make you pay costs, especially if you are seeking information from a wealthy corporation or individual.

Someone who is granted **IN FORMA PAUPERIS** status does not have to pay court fees.

To seek this status, you need to submit an application that shows that you have little income or property.

In a **DEPOSITION**, a person gives testimony, under oath, in a recorded proceeding outside of court.

A **BOND** is an amount of money to cover the costs of searching and copying.



ARE THERE GEOGRAPHIC LIMITATIONS ON WHERE THE DOCUMENTS OR TESTIMONY MAY BE LOCATED?

There may be geographical limitations on obtaining information, but the rules depend on whether or you are seeking documents and other physical evidence or if you are seeking oral testimony.

For documents, courts have differed on whether you can use a FLA request to obtain information located outside the U.S. – for example, documents maintained by a foreign office or subsidiary. Some courts have required companies to provide documents located outside the U.S., especially if the documents are controlled by someone in the U.S., but others have not.

If you are seeking testimony from a specific person, however, you should file the request in the district where the person lives. You can only require the person to travel 100 miles to take a deposition, but the deposition can be arranged at any location; it does not need to be in the same city as the courthouse.

LIMITATIONS

While FLA actions are potentially very useful tools for obtaining information, there are some limitations on their availability.

Requests for assistance are not very common, so there is not a lot of case law, or precedent, to give clear answers on questions involved in making these requests.

Different courts in the U.S. also have varying opinions on how to use the FLA, so the rules that apply in a FLA action are not always the same throughout the United States.

In addition, different judges may have different opinions as well. The rules for granting the request give judges a very high level of discretion. So even if you meet all of the legal requirements, a judge may still decide not to grant the application for foreign legal assistance. If the judge denies a FLA request, the person making the request may appeal. However, the appellate court will only reverse the previous decision if it finds that the judge made a serious error, such as applying the wrong legal standard to evaluate the request.



THE STATUTORY TEXT

THE FULL TEXT OF THE FLA STATUTE, FROM THE U.S. FEDERAL CODE.

28 U.S.C. § 1782

Assistance to foreign and international tribunals
and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

WHAT KIND OF INFORMATION CAN I OBTAIN THROUGH A FLA ACTION?

The statute itself mentions discovery of testimony and documents – this includes DEPOSITIONS and DOCUMENT REQUESTS. Courts have discretion to order other forms of evidence and information. Some courts have allowed physical evidence such as blood samples.

The FLA allows the U.S. court to either follow the rules of the foreign court in determining what information to order and how it will be produced, or to follow the ordinary rules that apply in federal court cases – the Federal Rules of Civil Procedure. These rules allow several other ways to gather information, including INTERROGATORIES.

In a **DEPOSITION**, a person gives testimony, under oath, in a recorded proceeding outside of court.

DOCUMENT REQUESTS can be used to get particular documents or other records (including digital files and audio and video recordings).

HOW LONG WILL THE PROCESS TAKE?

This will vary depending on a number of things. If the person with the information does not object to the request, it may take as little as a few months to actually gather the information. If there is a fight in the court, however, it may take months or even years before any information is produced.

Since there is no strict timeline for a judge to decide whether to grant or deny a request, it could take months for a judge to issue a decision. So it is best to make the request well in advance of when the information will be needed.

INTERROGATORIES are written questions that must be answered under oath.



CAN THE PARTY THAT I AM SEEKING INFORMATION FROM ASK FOR INFORMATION FROM ME?

Maybe. Some courts have ruled that the person requesting the information also has to provide information on a reciprocal basis, but others have rejected this.

A court may be more likely to require reciprocal discovery if the other party is participating in the foreign proceeding (and therefore has a similar need for the information), and if the other party could not use the FLA to obtain the information from the requesting party (for example, if the requesting party is not found in the United States).

WHAT SHOULD THE REQUEST LOOK LIKE? HOW DO I ENSURE THE COURT ACCEPTS IT?

There is no standard form or template for FLA actions, but EarthRights International can provide examples of such requests. Each district court has its own rules about formatted documents, so it is a good idea to research the local rules for the court where you plan to file the request.

IF I FILE THE REQUEST PROPERLY, AM I GUARANTEED TO GET IT?

No. The final decision is left to the discretion of the judge. Even if all the requirements are met, the judge can still deny or limit the request.

As discussed above, you can appeal a denial, but appeals are difficult because district court judges are given a lot of discretion on FLA requests.

ARE THERE ANY PENALTIES IF THE REQUEST IS DENIED?

Maybe. If a request for assistance is denied, the court may require you to pay the costs of the other side, but we have not seen cases where this has actually happened. It is unlikely that a requester who has little money will be required to pay the other side's costs.

Frequently Asked Questions

DOES IT MATTER WHERE I FILE?

Yes. Under Section 1782, a court only has jurisdiction to consider a FLA action if it is filed where the person from whom information is sought “RESIDES” or is “FOUND.”

Since multiple courts may be able to grant a request over the same person or company, applicants may need to consider which is the best forum for lodging a request. A court may reject a request if the party has already filed a similar request in a different court.

An individual person “resides” where his/her principal home is, and is “found” wherever he/she is physically present when officially notified of the request.

Companies generally “reside” or are “found” where they are incorporated or where their headquarters are located, and also where they conduct significant business.

AT WHAT STAGE OF THE CASE CAN I REQUEST ASSISTANCE?

The foreign legal case can be at any stage in which the information might be useful; it does not need to be ongoing, or even imminent.

The FLA mentions “criminal investigations conducted before formal accusation,” and the Supreme Court has also stated that the case does not need to have been filed already, only that it is within “reasonable contemplation.”

It may be possible to get information through the FLA before the legal action is even filed, when doing a fact-finding investigation that may lead to a legal case.

Courts have also granted requests for information to use in proceedings to enforce judgments after trial, as well as active investigations, trials and appellate proceedings.

CASE I



Plaintiffs in a Nigerian lawsuit against Chevron's Nigerian subsidiary used a FLA petition to request evidence from Chevron Corp. in the United States, including environmental impact assessments and other evidence of the harmful environmental and health effects of gas flaring.

GAS FLARING destroys crops by contaminating the surrounding air and soil. Health impacts include skin rashes and respiratory infections, as well as increased risk for asthma and cancer.

The villagers dismissed the FLA request after reaching a confidential settlement. While the terms of the settlement are confidential, the plaintiffs are pleased with the outcome.

ERI believes that this may be the first case in which a public interest group has used a Foreign Legal Assistance request to assist communities in obtaining information from an American multinational.

PHOTO CC BY KEN DOERR

More information about this case is available at WWW.EARTHRIGHTS.ORG/LEGAL/FOREIGN-LEGAL-ASSISTANCE

The Supreme Court decided that a company that submitted a complaint to the European Commission regarding anti-competitive behavior was an “interested person,” because the company could submit evidence in the Commission’s investigation, and could appeal any decision of the Commission in court.

It may be more difficult to show that the person requesting the information is an “interested person” if he or she is not a party in the foreign proceeding.

Some courts have said that the requester must have an “active role” that goes beyond “monitoring the progress of litigation and receiving updates from parties to the litigation.”

DO I NEED TO TRY TO OBTAIN THE INFORMATION IN THE FOREIGN COURT FIRST?

Courts in FLA actions have suggested that there is no requirement to ask for the information in the foreign court before applying to a U.S. court. In fact, U.S. courts have often allowed discovery of information that cannot be obtained through the foreign discovery procedures.

If the information would be easy to obtain through the foreign court, however, the U.S. court may be less likely to grant the FLA request. A U.S. court will be more likely to grant the request if the foreign tribunal will accept the information gathered.

CAN FOREIGN PROSECUTORS USE FLA DIRECTLY?

In most cases, probably yes.

Many countries have Mutual Legal Assistance Treaties (MLATs) with the United States that address obtaining discovery. Unless the MLAT specifically says that its procedures are the exclusive way for the other country to obtain evidence from the United States, prosecutors can typically use the FLA directly instead of, or in addition to, the procedures of the treaty.



ARE THERE ANY LIMITS ON OBTAINING INFORMATION THROUGH A FLA ACTION?

In general, you can try to obtain any information that is relevant to the foreign legal case, but there are limits.

The U.S. court may reject a request if the foreign court is not likely to accept the information requested, and might ask the foreign court if it will accept it.

The U.S. court might also deny or limit requests that are too burdensome or intrusive – that is, if they ask for too many documents, or information that is too difficult or too expensive to obtain, or information that is personal or sensitive.

The U.S. court will also deny requests for information that is privileged, such as communications between a lawyer and his or her client. This also applies to foreign legal privileges, although the court may require “authoritative proof” that disclosing the information would violate a foreign privilege.

The court will deny requests if the judge thinks they are designed to harass the person who has the information.

WHO CAN FILE A FLA REQUEST? WHO IS AN “INTERESTED PERSON”?

The FLA allows requests from foreign courts themselves as well as anyone who is an “interested person” in a foreign case.

The term “interested person” is not limited to parties in the foreign legal case, such as a plaintiff or prosecutor. An interested person can be anyone with a reasonable interest in obtaining the information. This may include people who initiate an investigation, or anyone who has a right to submit information in a legal case – for example, in many countries, victims of crimes can submit evidence in criminal cases.

CAN I USE THE INFORMATION OBTAINED FOR PURPOSES OTHER THAN THE FOREIGN PROCEEDING?

Unless the parties agree or the court orders that the information can only be used for the foreign case, the information obtained can be used for any purpose. However, the court may deny a request if it thinks that the information is being sought for another purpose, or it may grant the request but place conditions on how the information can be used.

WHAT KINDS OF SOURCES CAN I GET INFORMATION FROM?

Under U.S. procedures, any corporation or person, and possibly a governmental official – but not a government agency – that may have relevant information may be available for a FLA request. There are, however, some special considerations.

First, a U.S. court may be less willing to grant a request against a person or corporation that is already a participant in the foreign legal case, because the foreign court itself could order that person to disclose the information. In the Chevron case mentioned on the previous page, the foreign legal action was against Chevron Nigeria, but the request was directed to Chevron Corporation, the parent company in the United States, which was not subject to the authority of the Nigerian courts.

Second, courts will generally require corporations to produce information that is in the hands of another corporation that it owns – a subsidiary – if the parent corporation effectively controls the subsidiary. But some courts may place limits on providing information located outside the United States.

Additionally, foreign diplomats in the United States, and international organizations such as the United Nations, may have immunity from FLA actions.

CASE II



The leaders of three Maasai villages in Tanzania filed a FLA request against Thomson Safaris, the American affiliate of a safari company that allegedly participated in land-grabbing and violence against their communities. The Maasai successfully obtained documents and testimony to assist with their lawsuit against the safari company in Tanzanian court.

PHOTO: MAASAI MEN OF SUKENYA VILLAGE
CREDIT: MINORITY RIGHTS GROUP

More information about this case is available at WWW.EARTHRIGHTS.ORG/LEGAL/FOREIGN-LEGAL-ASSISTANCE

WHAT KINDS OF FOREIGN LEGAL CASES ARE COVERED BY SECTION 1782?

There is no clear rule on what kinds of foreign legal cases may be supported through a FLA action, and some courts disagree.

All U.S. courts should agree that cases include:

- > ordinary court cases;
- > criminal investigations by magistrates, before a criminal case has been filed (in legal systems where judges investigate and arrange for prosecutions of crimes);
- > ADMINISTRATIVE TRIBUNALS, and
- > cases in international courts, such as the International Court of Justice or regional court systems.

Some U.S. courts may disagree on whether cases include:

- > ARBITRATION TRIBUNALS;
- > governmental proceedings that do not result in adjudication of cases (such as an investigating commission of a foreign legislature or executive agency), and
- > other methods of alternative dispute resolution, such as conciliation and mediation.

Courts have not yet considered whether cases include:

- > cases in national or regional human rights commissions, and
- > other cases that may result in a decision, but the decision is not legally binding.

ADMINISTRATIVE TRIBUNALS are courts run by government agencies, and typically consider government actions and benefits (such as immigration, patent, or social security proceedings).

In **ARBITRATION TRIBUNALS**, participants agree to have their case decided by private arbitrators rather than a court.