

## CPLR 3102(f): Disclosure Not Available When State Is Non-Party Witness

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terms when deciding disclosure motions and will deny them only where the information sought is *totally* useless, irrelevant or immaterial.

*CPLR 3102(f): Disclosure not available when state is non-party witness.*

Prior to the enactment of the CPLR disclosure was not available against the state in any court.<sup>102</sup> With the enactment of the CPLR, disclosure against the state became available, first, in the Court of Claims by order of that court,<sup>103</sup> and subsequently, by court order, in any action in which the state was properly a party.<sup>104</sup> This liberal trend in favor of private litigants has, to some extent, remedied an unjust situation which previously existed.<sup>105</sup>

CPLR 3102(f) presently provides that "[i]n an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person, except that it may be obtained only by order of the court in which the action is pending. . . ." In *Butironi v. Putnam County Civil Service Comm'n*,<sup>106</sup> plaintiff sought disclosure against the state as a non-party witness. The court held that disclosure under 3102(f) was not available in such circumstances. Hopefully, a second liberalization process will begin with respect to disclosure against the state in actions where it is a non-party witness.

*CPLR 3120(b): Court disallows non-party's disclosure expenses temporarily.*

CPLR 3120(b) provides for the discretionary allowance of costs and for the defrayal of expenses of a non-party who is ordered to make disclosure. In a recent case, *In re Stauderman's Will*,<sup>107</sup> the surrogate's court, Nassau County, disallowed a non-

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<sup>102</sup> *Schmiedel v. State*, 14 App. Div. 2d 33, 217 N.Y.S.2d 110 (4th Dep't 1961); *Carey v. Standard Brands*, 12 App. Div. 2d 233, 210 N.Y.S.2d 849 (3d Dep't 1961).

<sup>103</sup> *Di Santo v. State*, 22 App. Div. 2d 289, 254 N.Y.S.2d 965 (3d Dep't 1964).

<sup>104</sup> *State v. Master Plumbers Ass'n*, 47 Misc. 2d 187, 262 N.Y.S.2d 323 (Sup. Ct. Onondaga County 1965). *But see* *State v. Boar's Head Provisions Co.*, 46 Misc. 2d 759, 260 N.Y.S.2d 418 (Sup. Ct. New York County 1965) (neither state nor its officers subject to pre-trial examination).

<sup>105</sup> 7B MCKINNEY'S CPLR 3102, *supp. commentary* 60 (1967). Under prior law the state, while itself immune from disclosure, could obtain disclosure from the opposing party.

<sup>106</sup> 29 App. Div. 2d 474, 288 N.Y.S.2d 734 (2d Dep't 1968).

<sup>107</sup> 56 Misc. 2d 580, 289 N.Y.S.2d 703 (Surr. Ct. Nassau County 1968).