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Lawyers Using FOI Act, Which Is Faster Than Discovery, To Help Win Cases

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Lawyers are using the Freedom of Information Act as a litigation tool in criminal and employment law matters.

The practice of requesting public records directly from an arresting agency or opponent in a civil case is catching on as a way to prevail, lawyers say. They are being used more in criminal defense work, municipal cases and employment matters where the employer is a public entity.

For one thing, accessing records is a fast way to uncover new information in a case. The materials also help lawyers to cross-reference what is provided to them in the discovery process, to check for discrepancies or inconsistent statements.

"Prosecutors will tell you we have an open file, go look in the file," says New Haven criminal defense and civil rights lawyer Kevin Smith. "But when you look at the file, there may not be much in it."

Often, he says, "there is maybe a police report, a supplemental report, maybe a warrant. That's never everything." In actuality, there are lots of records created by the cops whenever an arrest is made. "If you just relied on their open file policy, you might only get a quarter to a half of what might be available to you," Smith said.

So he makes an FOI request directly to the police. "Some of that material can be extremely helpful and can change the nature of the case," he said. For instance, Smith has found new names of witnesses in supplemental reports that were released to him under FOI. Those names didn't make it to the police report.

Smith presented a seminar to the Connecticut Criminal Defense Lawyers' Association last November in Middletown. He explained that the purpose of the information request is not relevant, and did not depend on the status or motive of the applicant, according to a 2000 state Supreme Court decision.

Smith also discussed how telling information can be gleaned from the CAD or Computer Automated Dispatch records. These are generated along with the 911 recordings, and show to the hundredth of a second when significant events occurred, such as an officer's arrival on the scene.

Details of the CAD record can be compared with an officer's incident report to determine accuracy and veracity, said Smith.

"The officer will have one version of it. You can take a look at the CAD and find out if it looks like they're lying or not. Quite often that can entirely change the complexion of a case."

Bloomfield lawyer Aaron Romano is another criminal defense lawyer who makes regular use of FOIA to aid his defense work, sometimes obtaining police dash camera footage.

"You can also get manuals for protocols from different state agencies, such as the crime lab accreditation report. You can ask for lab protocols and the investigation into those protocols and of the lab. The inspectors really questioned their ability to process DNA evidence, specifically," said Romano.

Another government manual that Romano says can be valuable is the training protocols for police drug sniffing dogs. "The U.S. Supreme Court, in the case of Florida. v. Harris, just authorized police dog drug sniffing in a case that came down today," he noted on Feb. 19. "You want the jury to know about the accuracy of the sniff. This is not a science, it is a dog. Look at the dog's history. Eight, nine times the dog may have alerted and there is nothing there," Romano noted.

'Quicker Than Discovery'

Public records are also being used more by employment lawyers.

Murtha Cullina labor and employment lawyer Michael C. Harrington says the FOI can be used to gather useful information more quickly and inexpensively than discovery, so long as the request is complied with.

"In many cases what you're looking for is clearly not an exempt document. It's a great avenue for discovery," said Harrington, who represents management.

"You might use it yourself as a defendant," he said. For example, he said, take an individual who has worked in a variety of different places. "As a defendant's lawyer trying to defend against a claim from an employee or a [job] applicant, I might want to see what experiences the individual has had in prior places of [public] employment. The law has moved toward production, even of an individual's personnel file."

For public employees, he said, it's a two part test in Perkins v. FOIA, a 1993 state Supreme Court decision. "The two factors are, would production of that document be an undue invasion of privacy. The other factor is whether there is there a legitimate interest in release of the records.

Early on there were some cases that protected some personnel evaluations, but now the law has developed so that the evaluation of an individual who's a public employee is normally available.

Harrington said FOI "discovery" has some advantage over normal litigation discovery. Information can be gathered without filing suit. It need not necessarily alert the litigation target, either. A FOIA request can be made at any time. "Discovery, on the other hand, has to wait until litigation commences," he noted.

Conversely, "You may be in a federal case where the period for the party to produce documents is closed." In addition, said Harrington, "There may be a time when you don't want your opponent to know what you're asking for, so you make your FOIA request of whomever."

Harrington said he considers the FOI process to be accessible to pro-se applicants, and generally fair. There is a bias toward open records at the Freedom of Information Commission, but that's a feature of the statute itself.

"You don't need a law degree to use it," he added. "You can search the website, and the commission and its information director Tom Hennick do a good job of trying to educate. He's constantly on the road.

"I think it's a fairly friendly party for all parties to get results." However, Harrington said, "If you are someone trying not to have a document produced, you should have your arguments set out clearly."

He noted that at least one state has recently decided to limit the use of FOI to people who can prove they are state residents. Connecticut, he said, is unlikely to emulate that move.

Even more serious restrictions on the FOI act may be in the works. Harrington said the most controversial new issue is Gov. Malloy's proposals to further collapse the FOIA commission structure. "I don't know what his motivations are, but that's the hot topic of the day for FOIA, the fight to try to maintain its staffing." •



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