

SCRIBBLES SQUIBS #39 (September 10, 2015)*

OBTAINING PUBLIC RECORDS QUICKLY AND INEXPENSIVELY THROUGH MASSACHUSETTS FREEDOM OF INFORMATION ACT REQUESTS (OR) TWO NEW JOBS FOR THE NFL COMMISH?

By Attorney Jonathan Sauer

I. INTRODUCTION.

This *Squib* addresses two issues: Massachusetts Freedom of Information (FOIA) requests and what to do with a football commissioner who may have overstayed his welcome.

A familiar problem for a subcontractor on a public job. The subcontractor, waiting to get paid on a requisition, contacts the general contractor, asking ‘why aren’t I getting paid?’ The general contractor tells the subcontractor that he himself hasn’t been paid yet by the owner for the subcontractor’s work. *How can the subcontractor tell if this is true?*

Or, the subcontractor might be looking to get paid on a PCO and the general contractor tells the subcontractor that he hasn’t received yet an executed change order from the owner for that work. *How can the subcontractor tell if this is true?*

Or, a general contractor is contemplating a lawsuit against a public owner and wants to see a variety of documents prior to the commencement of litigation having to do with the adequacy of the contract documents, which the general contractor feels probably already exists in various meeting minutes of building committees and/or in correspondence between the owner and the architect. This information might be critical because if certain hoped-for evidence doesn’t exist, there might not be a legally viable claim. For example, the general contractor might be looking to be paid on a major PCO but he can’t find out whether or not the architect has recommended to the owner that this should be paid. The owner might have written the architect telling him that it should be responsible for that PCO. It might be very useful to find out what communications there are among the owner, architect and engineers concerning this in advance of litigation.

How does one get this information? Here we run into our first problem

II. YOUR LAWYER GENERALLY CAN NOT GET THESE RECORDS PRIOR TO THE FILING OF A LAWSUIT OTHER THAN THROUGH A FOIA REQUEST.

Lawyers typically can get a great deal of information and documents through ‘discovery’. But, ‘discovery’ requires the pendency of an actual court case. But, what if one wishes to look at that information and those documents *before* deciding whether or not to file a litigation? It may be that if the lawyer (and his client) had access to this information and these documents prior to commencing suit, suit would not be filed. Or, additional contractual steps might be taken before a suit is filed. Or, while one form of suit might be successful, another form of suit would be unsuccessful. Or, the suit should be against *more* parties or against *fewer* parties. And, having that information and documentation is critical in terms of evaluating one’s chances in litigation and in establishing a strategy.

Other than through the threat of the taking of legal action or because many people are intimidated by lawyers, your lawyer has no more inherent ability to get information and documents than you do. In fact, you might have a *greater* ability to get information because you are not as highly regulated - or regulated at all - as lawyers are and don’t have the same strict obligation not to misrepresent oneself that a lawyer would have in, say, a telephone conversation. In fact, in looking to your lawyer for advice, s/he might say it would be very helpful to have such information and documents *before* an opinion can be given. Kind of like a chicken and an egg situation. Or, a football and a tire pump situation. Or, a football and a tire pump situation with a couple of phones thrown in. (More on footballs later.)

Having said all this, there is still the possibility of an . . .

III. INDEPENDENT ACTION FOR DISCOVERY.

There is a procedure under Rule 34 of the Massachusetts Rules of Civil Procedure which does allow for an ‘independent action (*ED. court case*) for discovery’ to obtain documents from a third party (usually not the company you intend on suing). The Rule provides as follows:

“(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.”

There is very little in the literature explaining this any further. And, this requires someone to bring a legal action with its various costs and the time periods involved. For, when one files an action, the filing fee has to be paid and then this is sent to the sheriffs for service. At some point – and the payment of various sheriffs’ fees - the party will get served with your complaint/request for production of documents. Normally, one has twenty days to answer a complaint and thirty days to answer a document request. Note, that second time period only applies to serving a *response* to a document request, not to the actual date for the production of documents.

This procedure *does* have certain advantages. For one thing, such an action doesn't have the fear factor and the antagonism that many lawsuits would ordinarily have inasmuch as you are only using court processes to look at documents, not to collect any money. As such, it is not anywhere near as adversarial as a usual lawsuit would be. And, if you are looking to get records concerning a claim against a potential adversary, that potential adversary is not an indispensable party to *this* litigation, meaning s/he may not have to get actual notice of *this* action. And, you really might need this information to determine exactly what your legal rights are and whether the filing of a litigation where you will be suing for damages is possible, at this time or at all.

But, this still takes a lot of time and has a lot of expense. And, in my practice, I have never actually seen one of these things filed. Unless my experience is in some fashion unique, this suggests that this is a procedure that is infrequently used.

Enter the world of filing 'Freedom of Information Requests'.

IV. MASSACHUSETTS FREEDOM OF INFORMATION ACT.

This is a procedure that has comparatively little cost associated with it and which does not take a long time. However, the procedure set forth by statute should be followed fairly closely. This statute provides, in pertinent part, as follows:

M.G.L.A. 66 § 10

§ 10. Public inspection and copies of records; presumption; exceptions

“(a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search . . .

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to insure compliance with the provisions of this section. . .

(c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies. . . .”

There are a number of exemptions to this statute but most of them deal with things such as not providing the home address of police officers and other similar information not generally relevant to a civil (non-criminal) request and case.

Here are the issues generally involved with such a request:

1. This deals only with records kept by some Massachusetts public entity. So, you can only use this procedure to get records that are publicly kept and which are public records. This will not work as to private records. (E.g. sending a request to a fast food chain asking for all employee complaints filed against it in Massachusetts in the last ten years.)
2. The request to look at these public records has to be sent to a person who is the custodian of that record. I have not been able to find any clear, comprehensive definition of the word 'custodian'. If I were looking for a record concerning the construction of a high school in a town, I might address the request to the town administrator with copies of the letter to the town clerk, to the superintendent of schools and to town counsel.
3. You identify specifically what records you want to see. The custodian is required to allow you to see such records that are not subject to a statutory exemption.
4. You may have to pay two different types of fees here and probably up front. The first fee is to pay for the cost of an employee to research and retrieve the records. The second fee is for the actual cost of making copies. The first fee is usually quite a bit more than the second fee. Sometimes I have had to pay as much as several hundred dollars to see documents. Sometimes I have had to pay as little as thirty dollars. Not all public entities will charge you for research time. Approaching the custodian with respect may be a factor in whether or not you get charged for search time. Either charge might be a bargain, particularly if you need this information and these documents to decide on your next step.
5. The custodian of the record has at least ten days to produce such records from the date the custodian has actually received your request.
6. Send the request certified mail, return receipt requested or by some form of overnight mail producing a receipt. Neither is required by statute. (The statute only says: 'Such request may be delivered in hand to the office of the custodian or mailed via first class mail.') However, this is a somewhat unusual and infrequent thing for many people receiving such requests and you want to be able to both establish the date of the custodian's receipt of the request and try and identify a specific individual you can make subsequent inquiry of as to when your copies will be ready. Further, delivery in such a manner helps to increase the formality of the request, which may help you throughout the process of getting these documents, particularly where the parties in charge of processing that request and providing documents are not exactly sure as to what they are supposed to do (which may often be the case).
7. Although the custodian only has ten days to respond to the request, the greater amount of time you give the custodian to find, organize and copy these documents, the more likely you may be able to convince the custodian to just make the copies and mail them to you, which is certainly less bother for both of you than your simply showing up at a public office waving a copy of your letter with proof of delivery in one hand and a check in the other.

V. AN EXAMPLE OF SUCH A LETTER.

Here's a rough sample of what such a letter might look like. My understanding, through my buddy Earl, is that this mayor is a recent political appointee for an unpaid part-time position, who is quite likely interested in more permanent employment. More on that later. Caution: Earl's statements are less likely to bear relation to reality after he has been up on the hill, doing you know what. (Hint: fermented mash is often involved) It was news to me that this guy was involved with Massachusetts politics. Then again, anyone messing with Number Twelve is probably messing with local politics:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

September 10, 2015

The Honorable Roger Goodell
Mayor
City of Lost Another One
41 Unpleasant Street
Lost Another One, MA 011111

RE: **Request to review records pursuant to C. 66, s. 10 of the General Laws**

Dear Mayor Goodell:

I represent Earnest Electrical Corporation (EEC).

On its behalf, I hereby respectfully request pursuant to the Massachusetts Freedom of Information Act, M.G.L. C. 66, section 10 that you permit me to inspect and to examine the following public records. Unless otherwise agreed to, I will be at City Hall on Friday morning, October 2, 2015 at 10 am to examine such documents. This is what I wish to see:

*(Put in here what you want to see. For a subcontractor looking for payment on a requisition or for change order work, you might wish to see: copies of all general contractor requisitions to the Town; copies of all payments by the Town to the general contractor; copies of all executed change orders between the Town and the general contractor; copies of all pending change orders (not reduced to change order) involving your trade; all documents evidencing remaining monies that have not yet paid under the general contract; all documents evidencing any deficiencies in the performance of EEC. You might wish to see other documents and things.** Be sure to clearly identify the general contractor and project and always send your request to a certain named individual.)*

In the alternative, or if you prefer, I would accept copies of these records if they are mailed to me within two weeks of the date of your receipt of this letter. I will pay all reasonable postage and copying costs and a reasonable fee relating to the Town's research as to

identifying and assembling these records. I will send you my check in advance of the release of these records once you advise me of the amount required.

Should you determine that some portion of the documents requested is exempt from disclosure, I request that you release any reasonably segregable portion of the documents which are not exempt. I reserve my rights to appeal any such decision, whether administratively or in court. Where such documentation requests are documents having to do with public work, it would seem all such requested documents are public records not subject to any recognized Massachusetts privilege. If you determine that a requested document, or any portion of a requested document, is exempt from disclosure, please advise me in writing as to each such document of the applicable statutory exemption and explain why it applies to the requested record.

Please contact me if you have any questions regarding this request.

Thank you for your attention.

Very Truly Yours,

Jonathan Sauer

JS/hs

cc: Put here the names of the people who should get a copy of this. For a town, other than a town administrator or manager, I would generally include the town clerk. If you are looking for documents pertaining to a school, I'd generally include the superintendent of schools. Generally speaking, I would also add in town counsel. Many of the names of those holding these offices can be found by going to the town's website.***

VI. CONCLUSION.

This is a reasonably quick procedure that often can be completed within three weeks or less. While this particular example was within the context of a subcontractor – general contractor matter, this procedure could be used within the context of a general contractor – owner matter. And, since this procedure is not part of any legal case and, therefore, is not strictly speaking ‘discovery’, you don’t have to give any notice to any potential adversary of your request. Meaning, for a subcontractor looking for general contractor records that a town might have in its possession, the general contractor does not have to be sent a copy of this FOIA request.

YOGOPATS

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* A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses." **While not strictly required, you might ask the Mayor if he has any TB-signed footballs that you might look at, feel, squeeze and, uh, test. For an optimum result, be sure to specifically identify as to each such desired football all atmospherically-applicable elements. 'Atmosphere' should be specifically delineated: (e. g. 'Earth atmosphere', 'Martian atmosphere', 'New Jersey atmosphere'.) Inasmuch as different air pressures exist at different latitudes at different times of the year, referencing continents and the inclusive date periods is desirable, if not necessary. Do not allow any telephones relevant to these issues to be destroyed. Producing them might be, uh, helpful. Or, not. After all, why else would they call these phones 'disposable'. Things that are disposable are supposed to be gotten rid of at some point. Got a problem going 'green' fella? *** The following is optional only, not legally required and should never be used by anyone who thinks that that 'football' is, in actuality, soccer, a sport not at all good for the head and a cheerful producer of disagreeable results such as riots, various acts of war, insurrection and other mayhem and stadium collapses. Further, soccer cannot be considered to be a manly game like football is. If it were, then one would not be required to play it *in short pants*. Men, when was the last time you played any game dressed in short pants? In any event, this is what you might add to that letter:

P. S. So *sorry* to hear about your recent deflationary experience. I understand that this sometime happens to footballs, as well. However distasteful, this was probably better than losing air or *whatever* from other functional equipment generally requiring inflation, the event of which might not be conducive to the establishment or maintenance at a high level of certain social relationships. Unfortunately, we have some inside information suggesting that your franchise tag may be rather suddenly withdrawn. With extreme prejudice. And, with no Golden Parachute. Not to fear, though. Having looked through our extensive virtual rolodex, we feel that we may have found a suitable position for you next summer at Fenway Park as a Sanitation Room Engineer/Manager I – MENS. If it were me, though, I'd try to take *all* of my vacation days and sick days and personal days and any other days I could think of during the months of July and August *only*. These are, for whatever reason, particularly difficult months for the practice of this necessary, if somewhat humble, profession. The compensation package will include discounts on *Fenway Franks*. Please note that while this is a *trainee* position, Fenway Park generally promotes from within. You see? This didn't turn out *all* that badly. It just goes to show you that All's Wells that ends Wells.

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