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Extern! Extern! Read All About Them!

Law schools want to place them, law students seek the opportunity, and local government law offices can benefit.



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LISTSERV

By: BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

There Are Fifty Unique FOIA Statutes in This Great Country of Ours

One of the more recent listserve discussions regarding the Freedom of Information Act and its relationship to Discovery in litigation brought to light the many differences in FOIA among our fifty wonderful states. The original question posted was "Why Use a FOIA request instead of Discovery?" There was quite an array of answers. One state effectively allows the use of FOIA to skirt Discovery rules. One contributor said it could even be used to circumvent a Scheduling Order in litigation in their state.

Others felt Discovery and/or Subpoena fetched more information than a FOIA request because of their state's exemptions in FOIA. Timetables were different for answering and a violation in one place was common practice in another. The conclusion was there are unique items in each state FOIA rules that make for interesting discussion.

Here at home in South Carolina we are no exception to that conclusion. One of our unique provisions in the South Carolina State Code provides a mechanism for challenging overly burdensome requests:

> **SECTION 304110.** Hearings regarding disclosure; appropriate relief; civil fine for violation.
>
> (A)A public body may file a reques for hearing with the circuit court to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper requests, or where it has received a request but it is unable to make a good faith determination as to whether the information is exempt from disclosure.

We have not had to file such an action, and I am presently unable to find a case where such an action was instituted. I find two reasons for this. First, many Councils are reluctant to "file action" against a member of the public for making a FOIA request. Never mind that it is a Declaratory Judgment action and there are no punitive measures sought. The public will see it as "legal action against a citizen who made a FOIA request."

Second, the South Carolina Code allows fees to be charged for costs of research and copying in response to a FOIA request. If the City deems a request overly burdensome as suggested in the Code, another way to potentially avoid litigation is to respond with a fee schedule. If the request is truly overbroad and overly burdensome, there is a good chance the cost for research and copying will follow suit. Some requestors then choose not to pursue their request because of the costs. The South Carolina Code provides as follows:

> "**SECTION 30430.** Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice; records to be available when requestor appears in person….
>
> (B)The public body may establish and collect fees as provided for in this section. The public body may establish and collect reasonable fees not to exceed the actual cost of the search, retrieval, and redaction of records. The public body shall develop a fee schedule to be posted online. The fee for the search, retrieval, or redaction of records shall not exceed the prorated hourly salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skill and training to perform the request. Fees charged by a public body must be uniform for copies of the same record or document and may not exceed the prevailing commercial rate for the producing of copies. Copy charges may not apply to records that are transmitted in an electronic format. If records are not in electronic format and the public body agrees to produce them in electronic format, the public body may charge for the staff time required to transfer the documents to electronic format…. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. A deposit not to exceed twentyfive percent of the total reasonably anticipated cost for reproduction of the records may be required prior to the public body searching for or making copies of records."

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We once received what (in our judgment) was an overly burdensome request. The conservative cost of responding was over $13,000 using the above guidelines. A note was sent to the requestor in accordance with the statute, and the requestor was given the choice of submitting the payment or submitting a revised request. The requestor chose neither.

Another subject discussed on the listserve FOIA thread was the use of FOIA in litigation. Some states use it routinely. Others, like South Carolina, do not. In fact, such a practice is not permitted according to state law. The pertinent Code section portions include:

> **"SECTION 30440.** Matters exempt from disclosure.
> (3) Records, video or audio recordings, or other information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:
>
> (A) would interfere with a prospective law enforcement proceeding;
> (B) would deprive a person of a right to a fair trial or an impartial adjudication;
> (C) would constitute an unreasonable invasion of personal privacy;

A State Court of Appeals decision (*Pope v. Wilson*, Appellate Case No. 2016-001708 Opinion No. Op. 5657) has interpreted this statute:

The court noted the holdings of the United States Supreme Court in *John Doe Agency v. John Doe Corp.* , 493 U.S. 146, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989) and *NLRB v. Robbins Tire and Rubber Co.* , 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) : "In construing the federal FOIA, the United States Supreme Court has held that the FOIA does not supplement or displace the *applicable* rules of discovery." *Robinson* , 305 S.C. at 476, 409 S.E.2d at 409 (*emphasis added*). The court cited *Robbins Tire* regarding the federal FOIA exemption for certain law enforcement records: "An exemption to disclosure based on 'interference with enforcement proceedings' has been construed to exempt disclosure of any information that would give a party litigant greater access to the government›s opposing case." *Id.* at 476, 409 S.E.2d at 409."

A third unique provision in the South Carolina FOIA deals with employment searches, such as one recently conducted in a nearby municipality looking for a new City Manager. The local city attorney there essentially concluded the State FOIA law "decreed how you will conduct your search." A pertinent code section provides:

> **"SECTION 30440.** Matters exempt from disclosure.
> (a) A public body may but is not required to exempt from disclosure the following information:
>
> (13) All materials, regardless of form, gathered by a public body during a search to fill an employment position, except that materials relating to not fewer than the final three applicants under consideration for a position must be made available for public inspection and copying. In addition to making available for public inspection and copying the materials described in this item, the public body must disclose, upon request, the number of applicants considered for a position. For the purpose of this item "materials relating to not fewer than the final three applicants" do not include an applicant's income tax returns, medical records, social security number, or information otherwise exempt from disclosure by this section."

My colleague essentially concluded that the FOIA required his city to trim the list to a final three, and then choose from that group. There are those who suggested the choice be made from a larger group, say five for example, to get around that provision. However, this is a "no-no" according to the South Carolina Supreme Court which has ruled that if the candidate is selected from a final list of five, then the appliable materials must be released for **all five** candidates. My colleague took note of this, and the city took his advice in narrowing the list to three candidates before making a selection.

One can argue about the "good or bad" nature of these rules, or the fact that candidates for a public job need to be aware of such rules if they are to contend for such a position. But many find these "directions" intrusive into their local job searches.

While I have discussed here only three, there are other unique "wrinkles" in our state FOIA, as I am sure there are everywhere. The topic could fill a bookshelf, with the differences making for good discussion around the Water Cooler.

***

I cannot end without congratulating the IMLA Staff for another successful conference after my recent return from the Annual Conference in LaQuinta, California. Once again, I found the seminars I attended to be first rate and informative. This one was not in the middle of a big city as is typical, but it was out in the desert at the beautiful LaQuinta Resort. I found the area very beautiful, but it also reminded me how different things can be when one travels.

I put gas in the car at home the night before I left. It cost a whopping $3.09 per gallon, totaling about $43 to fill up my Ford Escape. Fast forward to California where I was given a Dodge Ram pickup instead of the compact car I reserved. After a few trips here and there, and a wonderful trip to Joshua Tree State Park with Randy and Debra VanVleck, Lori Lein and Amanda Stanly, I went to fill the truck before returning it. Wow was I in for a surprise!

My debit card has a hold limit of $150 for gasoline purchases. It has never been a problem. However, I wondered if it would be when I pulled up to the pump in LaQuinta and found the price to be $6.29 per gallon! Sure enough it wasn't, as the pump stopped at $150 without a complete fill-up. I couldn't help but think "and their potholes are just as big as ours!" (Sarcasm font deploted). However, what a beautiful state I was reminded I was in when visiting California. This old country boy wasn't used to it, but sure enjoyed it. I was able to pick limes right off the tree outside my window!

***

A colleague tells the story of a man who tried to get out of paying his bill at a restaurant because he had been drinking, which altered his dimished mental capacity. He claimed his mental capacity negated his capacity to enter into a binding contract when presented with his credit card receipt for signature. Sometimes fact is stranger than fiction.

The prosecution rests, your honor… ML