

USING PUBLIC RECORDS REQUESTS TO BUILD YOUR PRODUCTS CASE

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Many attorneys know that public record requests serve as a useful tool for pre-suit case evaluation and developing evidence for litigation. But while it may be routine to use public records requests to obtain crash reports in accident cases or personnel records in police misconduct cases, attorneys should also consider the potential gold mine of information that public record requests can reveal for product liability cases. Some record sources may be relatively obvious—for example, the U.S. Consumer Product Safety Commission for information about consumer products or the National Highway Traffic Safety Administration for information about vehicles. But some sources may not be as apparent, especially government agencies at the state or local levels. To make the most of this tool, it's important to do an in-depth investigation to identify all potential sources of public records, and to understand the rules and procedures that apply to each source.

Examples of the Power of Public Records

Records provided by one agency may contain clues identifying other possible sources of public records. As one example, a product that caused an injury in Ohio had been inspected by an Ohio government agency before the incident. A pre-suit public records request to that agency revealed some helpful information about the Ohio inspections. But even more helpfully, the Ohio records identified other states where the same product had been used. Utilizing the public records acts of those other states to seek records from the respective agencies resulted in stacks of additional relevant inspection data. But it also identified a number of private entities who conducted recent inspections. These private entities did not enjoy the same immunities that government inspectors would. Thus, an expansive approach to public records requests not only provided helpful information relating to already-known defendants; it helped identify potential additional defendants that may not have otherwise been discovered.

Attorneys can also use public records requests to validate the completeness of an opponents' discovery responses. In one case, documents produced by a defendant product manufacturer in discovery included reports of product testing at a lab operated out of a public university. A public record request to that facility revealed additional testing that the manufacturer had not produced documents for or otherwise disclosed. That additional testing showed the product failing catastrophically under circumstances very similar to those of the incident in the lawsuit.

Considerations for Public Record Requests

The above examples show the potential benefits of a diligent investigation of public record sources. But that can be easier said than done. When researching and requesting public records, it's important to understand the rules governing the target agency. The federal government and the various states have their own open records laws and rules, and they can have significant differences. A few tips to keep in mind:

- ***What agencies have relevant records?*** There is no substitute for in-depth research to identify the various federal, state, and local agencies that may have relevant records. Understanding what agencies regulate what products or activities is critical. If the product in your case has a license from or was recalled by a certain agency, you have a starting point. The records from those agencies may reveal additional agencies worth

contacting. Online resources can also point you in the right direction. For example, the Consumer Products Safety Commission's website contains a page identifying products regulated by other agencies.¹

- ***Who can request records?*** Many states allow anyone to request access to public records. But some states, such as Tennessee, limit the right to request access to citizens of the state.² Before submitting a public records request, check the particular state's law to see who can request records. You may need to locate a citizen of the particular state willing to request the records and provide them to you.
- ***How do you identify the records you're seeking?*** Identifying the requested records in an easily understandable way is key to getting what you need. For some agencies, a broad request like "all records relating to topic xyz" may work; for others, it may not. A phone call between the requestor and the responding agency can often clarify any confusion and help the requestor submit a request that will yield the sought after records and avoid multiple rounds of back-and-forth correspondence. It's also helpful to review record retention policies for the agency, as these policies will often contain descriptions of the various categories of documents an agency maintains. Using these category descriptions to prepare your request may help the agency understand what you're seeking and lead to a more productive response.
- ***What exemptions apply?*** Every jurisdiction imposes its own definitions of what records are available to the public and which are exempt. Further, in some cases, federal law may prevent disclosure of what might otherwise meet a state's definition of a public record. When an agency objects to producing a record, it should identify the grounds for its objection. Research the exemptions and their limits, as well as the procedures to follow if you cannot resolve a disagreement. This may require going beyond the statutes to research relevant case law. Sometimes, a polite communication with the agency identifying relevant legal authority can lead the agency to reconsider an initial objection.
- ***What can the agency charge?*** Public records laws typically allow an agency to recoup its cost for making the records available.³ Request electronic copies when possible to help manage costs. If cost is a serious issue and you're geographically close to the relevant agency, consider reviewing records in person first before requesting copies.
- ***How long should it take?*** What counts as a reasonable time to respond to a request will vary depending on factors such as the number and type of records sought and the function and size of the responding agency. Here, again, a little communication with the responding agency can go a long way.

Identifying the universe of potential public records about your product and tracking down those records can work to your advantage in case evaluation and selection. It can also reveal critical information that an unknowing defendant—or an unscrupulous one—may not produce in discovery. Attorneys need to consider all potential public record sources carefully and understand the rules and procedures governing record requests of each jurisdiction and agency to maximize the chances of uncovering useful information.

¹ See <https://www.cpsc.gov/Regulations-Laws--Standards/Products-Outside-CPSCs-Jurisdiction/> (last visited September 10, 2018).

² Tenn. Code Ann. 10-7-503(2)(A).

³ See, e.g., Ohio R.C. § 149.43(B)(1).