

**Digging for Dirt: Gathering Records, 911 Calls, and FOIA**

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Every plaintiff's lawyer knows that it is often times easier to and more advantageous to get information for your case from sources other than the defendant. Despite the restraints placed on the plaintiff's bar in the last 30 years, the Texas Rules still provide a range of mechanisms for obtaining non-party discovery. Combining the non-party discovery rules with other publicly available tools should be a routine part of working up every case.

## **I. Know the Options and Follow the Rules**

### **A. Texas Rule of Civil Procedure 205**

This Rule outlines the two general methods available to compel a non-party to respond to a discovery request. The most frequently used method is to serve a subpoena compelling: (a) an oral deposition; (b) a deposition on written questions; (c) a request for production of documents pursuant to a deposition; and (d) a request for production of documents. The other method is to get a court order under rules 196.7 or 202, for inspections and pre-suit depositions, respectively

### **B. Issuing the Subpoena to a Non-party**

Rule 176 governs the issuance of a subpoena on non-parties. A few important practice pointers are as follows: The rule prohibits subpoenaing a non-party to appear or produce documents outside of 150 miles from where the [non-party] resides or is served.” Tex. R. Civ. P. 176.3(a). *See In re Morris*, 09-17-00416-CV, 2017 WL 6210858, at \*1 (Tex. App.—Beaumont Dec. 7, 2017, no pet. h.) (denying mandamus of a non-party challenge to a subpoena that was issued 166 miles from the Court because the documents were requested to be produced in the non-party town). Attorneys authorized to practice in Texas can issue the subpoenas. Tex. R. Civ. P. 176.4(b). The subpoena and the applicable fee must be served on the non-party. Tex. R. Civ. P. 176.5(a) and Tex. Civ. Prac. & Rem. Code § 22.001 (specifying the \$10 witness fee). *See, also, Estate of Palmeros*, 06-16-00043-CV, 2017 WL 1424810, at \*3 (Tex. App.—Texarkana Apr. 19, 2017, no pet.) (noting that it is unwise to ignore a subpoena even if the \$10 appearance fee is not attached). A non-party subpoena (like all non-party discovery requests and deposition notices) must be filed with the court. Tex. R. Civ. P. 191.4(b)(1).

### **C. Obtaining Documents from Non-parties**

The most frequently used non-party discovery tool is requesting documents without requesting a deposition. Rule 205.3 authorizes the general procedure. Although there are plenty of services that will handle this process for attorneys, there are times when it is more convenient and/or economical to do it in-house. The salient points to remember on issuing a non-party request for documents are as follows: Notice must be given to the non-party as well as to all parties in the litigation at least 10 days before the “subpoena compelling production is served” and a reasonable time before the response is due. Tex.

R. Civ. P. 205.2 and 205.3 (mandating that the notice cannot be served less than 30 days before the end of the discovery period). Otherwise, a “reasonable time” is not defined in the Rules. Finally, the notice must contain: (a) the name of the non-party; (b) a reasonable time and place for production or inspection; (c) and the items sought. Tex. R. Civ. P. 205.3(b).

#### D. Deposition from Non-parties

In addition to requesting documents, taking oral depositions from non-parties is a frequently used and effective means of obtaining discovery that a defendant may not want or have the ability to provide. The key points to remember in getting non-parties to a deposition (whether oral or by written questions) are as follows: Serve the deposition notice and subpoena at the same time. Tex. R. Civ. P. 205.2. A deposition on written questions “must be served on the witness and all parties at least 20 days before the deposition is taken.” Tex. R. Civ. P. 200.1.

#### E. Motion for Entry Upon Property

A non-party can be compelled to allow access on property, although it requires a court order. The requesting party must file a motion and notice of hearing on the non-party and all parties to the litigation at least 30 days before the end of the discovery period. Tex. R. Civ. P. 196.7(a). The non-party must serve a written response to the motion to inspect within 30 days of the request of services. Tex. R. Civ. P. 196.7(c)(1). The permitted objections are set forth in Rule 196.7 and include specifying an alternative time and place. A court can only order inspection of a non-party’s property for “good cause,” which presupposes relevance. Tex. R. Civ. P. 196.7(d). In its order, the court must state the time, place, manner, conditions and scope of the inspection. Tex. R. 196.7(b).

#### F. Rule 202 Depositions

By definition, Rule 202 depositions apply only to non-parties. The Rule states,

A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either (1) to perpetuate or obtain the person’s own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit.”

*See* Tex. R. Civ. P. 202.

Attorneys have long used pre-suit depositions to investigate a variety of issues despite the fact that the Texas Supreme Court has cautioned against overusing the tool. *See In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (“Rule 202 is not a license for forced interrogations. Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule.”). Rule 202 sets out the procedure for obtaining a pre-suit deposition which, at a minimum, requires the following: (1) the petition must be verified,

(2) filed in the proper county, (3) state the reason for the petition – either that the petitioner anticipates suit or is investigating a claim, (4) set forth the subject matter of the anticipated action, (5) include the names, addresses and telephone numbers of interested persons expected or that such information cannot be ascertained, (6) include the name, address and telephone number of the deponent, the expected testimony, and the reason for obtaining the testimony, and (7) request an order authorizing the depositions. The court in which the petition is filed must have subject matter jurisdiction over the anticipated claim and personal jurisdiction over the potential defendant. *In re City of Dallas*, 501 S.W.3d 71, 74 (Tex. 2016) (orig. proceeding). The request for pre-suit deposition should generally be supported by some evidence – either by way of affidavit attached to the petition or evidence provided at the hearing.

Several Texas courts have rejected pre-suit deposition requests because petitioners failed to carry their burden to show the trial court that taking the deposition would prevent a failure or delay of justice in an anticipated suit, or that the likely benefit of allowing the deposition to investigate a potential claim or suit outweighs the burden or expense of the procedure. See *In re Hewlett Packard*, 212 S.W.3d at 363–64; *In re Hochheim Prairie Farm Mut. Ins. Ass'n*, 115 S.W.3d 793, 796 (Tex.App.-Beaumont 2003, orig. proceeding); see also *In re Contractor's Supplies, Inc.*, No. 12–09–00231–CV, 2009 WL 2488374, at \*5 (Tex.App.-Tyler Aug. 17, 2009, orig. proceeding) (mem. op.); *In re Campos*, No. 02–07–00197–CV, 2007 WL 2013057, at \*4 (Tex.App.-Fort Worth July 12, 2007, orig. proceeding [mand. denied] ) (mem. op. per curiam). “To obtain an order authorizing pre-suit depositions, the petitioner must make some effort to present the trial court with a basis for one of these required findings. *In re Reassure Am. Life Ins. Co.*, 421 S.W.3d 165, 174 (Tex. App.—Corpus Christi 2013, no pet.). Finally, pre-suit depositions are usually not permitted if the subject of the suit is subject arbitration or the pre-suit deposition infringes on a person’s right to petition, speak, or associate freely. See *In re Amarillo II Enters., LLC*, No. 07-17-00005-CV, 2017 Tex. App. LEXIS 1000, at \*5-7 (Tex. App.—Amarillo Feb. 3, 2017) (orig. proceeding) (pre-suit deposition not available if claim subject to arbitration) and *Glassdoor, Inc. v. Andra Grp., LP*, No. 05-16-00189-CV, 2017 Tex. App. LEXIS 2577, at \*21-26 (Tex. App.—Dallas Mar. 24, 2017, no pet. h.) (pre-suit deposition subject to Anti-SLAPP protections).

## **II. State and Federal Open Records Requests**

### **A. Federal Freedom of Information Act**

The Freedom of Information Act (“FOIA”) was enacted in 1967 and gives the public the right to request access to records from any public agency. Federal agencies are required to disclose information requested under FOIA unless the request falls under one of the nine exemptions. The exemptions range from information classified to protect national security to the geographic location of wells. The full list can be found at <https://www.foia.gov/faq.html#exemptions>. The exemptions are general enough that it sometimes seems like they swallow the so-called “presumption of openness.” However, for personal injury cases, FOIA is a useful tool to obtain information from federal

agencies that regulate and compile information on a variety of potential corporate defendants, such as trucking companies and product manufacturers.

For example, the Federal Motor Carrier Safety Administration (“FMCSA”) maintains a wealth of information that is useful in trucking cases. The FMCSA website provides an online tool for making FOIA requests: <https://www.fmcsa.dot.gov/foia/foia-requests>. While some FMCSA information is available online, making a proper request through FOIA typically provides additional information. A typical FOIA request in a trucking case should include the company’s OP-1 and Form MCS-150, regulatory fines, agency intervention, agency correspondence, compliance reviews and safety ratings, inspection reports, and company safety records.

There are a host of other potential federal agencies that can yield useful information in personal injury cases. If there is a federal agency involved, consider making a FOIA request early and often. There is no fee to make a request, although the agency can charge for the time to search for the records and a copying expense. Agencies are required to notify the requestor if the fees will exceed \$25.00.

#### B. Texas Public Information Act

The Texas Public Information Act (“PIA” or “Act”) is basically Texas’s FOIA. If there is a Texas governmental agency involved, then the public has a right to request access to the information. Section 552.002(a) of the Texas Government Code outlines the type of information that is available via a PIA request. In general, the Act defines “public information” as:

Information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - a. owns the information;
  - b. has a right of access to the information; or
  - c. spends or contributes public money for the purposes of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

The term “governmental body” has a specific meaning under the Act and means the following:

- (i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

- (ii) a county commissioners court in the state;
- (iii) a municipal governing body in the state;
- (iv) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;
- (v) a school district board of trustees;
- (vi) a county board of school trustees;
- (vii) (vii) a county board of education;
- (viii) the governing board of a special district;
- (ix) the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code;
- (x) a local workforce development board created under Section 2308.253;
- (xi) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and
- (xii) the party, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds.

To trigger a state governmental body's obligation to respond under the Act, a request for access must be made in writing. Tex. Gov. Code 552.301. The Code was amended in 1997 to include requests electronically. Many governmental bodies maintain webpages or PDF files that make record requests under the Act fairly simple. *See, e.g.* <http://dallascityhall.com/government/citysecretary/openrecords/Pages/default.aspx> and <http://www3.dallascityhall.com/publicdata/openrecordsrequestform.pdf>.

Like FOIA, the Texas PIA provides that a governmental body is permitted to recover costs for providing access for information. Sections 70.3(d), (e), and (i) of the Texas Administrative Code permit charging for labor, overhead, and materials for a request for copies that results in more than 50 pages. If a request requires programming, processing, or manipulating data, a governmental body can charge for that as well. 1 T.A.C. § 70.3(c), (d), (h). In the event that a charge is expected to exceed \$40.00, the governmental body will provide an itemized statement of estimated charges.

The Texas PIA contains a broad proscription on disclosing information that would be subject to the Act but is otherwise deemed “confidential by law, either constitutional, statutory, or by judicial decision.” Tex. Gov. Code 552.101. The Texas Attorney General’s office issues opinions on specific requests when confidentiality issues arise. There are several notable opinions germane to plaintiffs’ work and the type of information that is typically requested in a civil case. For example, medical records that a physician creates or maintains regarding the identity, diagnosis, evaluation, or treatment of a patient are confidential.<sup>1</sup> Communications between a patient and mental health professional and records of the identity, diagnosis, or treatment of a mental health patient created or maintained by a mental health professional are confidential.<sup>2</sup> Originating telephone numbers and addresses furnished on a call-by-call basis by a service supplier to a 911 emergency communication district are confidential.<sup>3</sup>

Section 552.108 of the PIA (called the “law enforcement” exception), generally mandates that information held by a law enforcement agency or prosecutor that deals with the investigation of a crime is confidential if it would interfere with the investigation. Under § 552.108(a)(2) and (b)(2), information relating to a criminal investigation or prosecution that ended in a result other than a conviction or deferred adjudication may be withheld. Additionally, in the event that an individual’s criminal history has been compiled by a governmental agency, that has been held to implicate that person’s Constitutional right to privacy and the information may be withheld. *See United States Dep’t. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989).

Finally, a section of the Texas Occupations Code outlines the procedures required for making a public records requests for police, body-worn cameras. To obtain body camera footage, the following must be requested in writing: (1) the date and approximate time of the recording; (2) the specific location where the recording occurred; and (3) the name of one or more persons known to be a subject of the record.”<sup>4</sup> Camera footage that was made in a private place will not be released until the subject of the recording, or the subject’s representative, provides authorization for the release.<sup>5</sup>

### **III. Practice Pointers**

#### **A. Requesting Records under FOIA and Texas PIA**

As soon as possible, send out FOIA and/or Texas PIA requests. A lawsuit does not need to be on file. For example, to obtain police records related to a wreck, simply address a letter to the Open Records Department at the police department and title the letter an Open Records Request. Provide as much information as possible in the Subject line:

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<sup>1</sup> Open Records Decision No. 681 at 16– 17 (2004)

<sup>2</sup> Health & Safety Code § 611.002

<sup>3</sup> Open Records Decision No. 649 (1996)

<sup>4</sup> Tex. Occ. Code § 1701.661(a)

<sup>5</sup> Tex. Occ. Code § 1701.661(f)

Re: Open Records Request  
Case# XXXXXXXX  
DOA: February 15, 2018  
Location: 700 Block of Orleans Street, New Orleans, LA  
Drivers: Unit One – John Doe. Unit Two – Jane Doe.  
Vehicles: Honda Accord TXPL XXXXXX and Dodge Ram TXPL XXXX

Request a broad array of documents such as: Accident Report, Peace Officer's investigation report, diagrams or maps of the scene; copies of all witness statements; a digital copy of the 911 call recording and any transcript; any dash cam or other video recordings; accident investigation notes, measurements, diagrams or photographs and digital copies of all photographs taken.

Attach a business records affidavit to the request. Although the department is under no obligation to execute the request, many will do so if it is convenient and the form is provided.

B. Send Preservation Letters to Non-parties Soon

Until they are issued a subpoena, non-parties likely have no duty to preserve evidence. There is no independent cause of action for spoliation of evidence. *McIntyre v. Wilson*, 50 S.W.3d 674, 685 (Tex. App.—Dallas 2001, pet. denied). However, there is no harm in sending a courteous letter to non-parties asking them to preserve evidence. As soon as possible, send a preservation letter to the police department, tow company, insurance company, Texas Department of Transportation and any non-party that could potentially have relevant evidence. More often than not, the non-party will keep the evidence if they know it is needed. Remember that most video surveillance systems loop every 30 days and record over older images. Thus, important video can be forever lost if not retrieved before 30 days after it was recorded.

C. Get It Admitted

Getting information from non-parties is half the battle. Making it admissible is the other half. Assuming relevance, the two biggest hurdles are usually authenticity and hearsay issues. When a non-party responds to a properly issued subpoena, the “non-party's production of a document authenticates the document for use against the non-party to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.” Tex. R. Civ. P. 176.6(c). For records obtained from FOIA or Texas PIA requests, assuming a witness does not separately authenticate them, then evidence Rule 901(7) is useful. Tex. R. Evid. 901(7) (giving the example that public records can be authenticated by evidence that (a) a document was recorded or filed in a public office as authorized by law or (b) a purported public record or statement is from the office where items of this kind are kept). The most frequently used route to prove up non-party documents is through a deposition on written questions, where both authenticity and hearsay can be dealt with through the business record exception. Tex. R.

Evid. 803(6). Texas Rule of Evidence 803(7), is also a helpful tool in getting past a hearsay objections for public records. *See 1001 McKinney Ltd. v. Credit Suisse First Boston Mortg. Capital*, 192 S.W.3d 20, 27–28 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (noting that Rule 803(8) does not require a formal predicate to be laid through a witness, but the offered document must be shown to satisfy the requirements of the rule).

Digging for dirt from third parties can be a frustratingly tedious process where needless obstacles are often encountered, however, the evidence obtained from these third parties can be the difference in the amount of justice obtained for your deserving clients.