

**Practice Tip: Submit an OPRA Request for the Permit File**

*by Robert Incollingo*

Extra-contractual remedies such as bond claims, liens and statutory trusts allow attorneys to recover for clients outside the ordinary avenues of the law, where personal responsibility by fault or breach is the normal threshold to a cause of action. The experienced construction litigator always investigates a new case to see if the pleadings can include claims for extra-contractual remedies. The ordinary avenue to a remedy is discovery, and having framed the case, a discovery plan is a good next step, but sometimes a halting one. Discovery requests made pursuant to the Rules of Court will provide information on which to evaluate and prove a construction claim, but they slow the process, meet resistance, and vary in results. In formulating discovery as in pleadings, practitioners should not limit themselves to the ordinary avenues of approach. This is the thing to know: In construction litigation there is a fast track to discovery outside the rules.

Consider that the parties concerned with a construction project include not only the owner, the contractor, the subs, the suppliers, and the workers, but often sureties, lenders, and the government. Only in the least consequential jobs will the government be absent from the cast of those concerned with the correct progress of the work. Government not only makes the rules on what is or is not correct progress of the work, but it also dispassionately banks related records that will help prove the case. Discovery requests to private parties must proceed according to the Rules of Court, but discovery from the government may be sought at the state level by request under the Open Public Records Act (OPRA),<sup>1</sup> and at the federal level under the Freedom of Information Act (FOIA).<sup>2</sup>

It can be smart preliminary strategy to make an OPRA request for relevant documents to the owner on a public job, or for the project permit file to the municipality in which a private job is located, before filing suit. Sometimes the municipality has a request form available online; otherwise, a generic sample official OPRA records request form may be downloaded from the Government Records Council website.<sup>3</sup> There is a box to check on the form for also requesting the documents under common law, a reference to N.J.S.A. 47:1A-8, which construes OPRA as a statutory continuation not limiting the common law right of access to a government record.

The OPRA request will provide access to non-exempt public records by inspection, examination, or copying. For a residential project, the best way to go is to email a request for scanned copies of the contents of the construction office permit file to the designated custodian of records for the town where the improved property is located, and confirm the email with a phone call. While the request must be clear, don't narrow its language to rule out getting informative zoning and planning office records, if they exist.

Check the town's website or call the clerk to see how to address the request, and be ready to advance for costs if a reply by hard copy is desired, although an email reply will probably be free. The request to the township should ask for something like:

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All records regarding construction at 239 Address Road, Blenheim, owned by Joe and Donna Client, coming into existence within the last two years,<sup>4</sup> including but not limited to the inside and outside of the construction permit file itself. Requesting party is attorney for the owner in planned litigation.

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Be sure to specifically ask for the inside and outside of the ‘jacket’ for the file in the request. Technically known as Form UCC-F100—Construction Permit Application, it includes important information—such as whether (on the record, anyway) the owner will personally perform or supervise the work, or has personally prepared the submitted drawings.

In the experience of the author, intentional omissions of material fact by contractors regularly attend owner certifications on the permit application, and are a rich source of consumer fraud liability. Usually, the fraud flows from a simple evasion of the home improvement contractor registration requirement; at other times, from avoidance of the plan review and release process that would otherwise require a New Jersey registered architect or a New Jersey licensed engineer to attest that the project drawings submitted were developed under his or her supervision. The home improvement practices regulation, which makes it illegal to “[m]isrepresent or mislead the buyer into believing that no obligation will be incurred because of the signing of any document...”<sup>5</sup> practically locks in a *per se* violation of the Consumer Fraud Act (CFA) where a consumer has been coozied by a contractor into signing the permit application.

The permit file offers a trove of valuable information with which to kick start the case, such as contact information for the principal contractor, the ‘responsible person in charge once work has begun,’ the ‘owner in fee,’ and the architect, although these spaces are many times left blank or are filled in wrong. Sometimes they contain information that was false to begin with or that has become outdated, for example where an electrician signed on the UCC-F120 Electrical Subcode Technical Section form but was never mobilized by the general contractor, whose own unlicensed workmen have since performed the electrical work, and even passed inspection under the original permit. Probing may reveal a subcontractor ‘lending’ its license under a corrupt relationship with the remodeler.

In addition to the file jacket and paper scraps in all colors and shapes, the permit file will include one or more official forms, filled in to varying degrees. Note well the UCC-F110 Building Subcode Technical Section form, front and center toward the bottom where the contractor or owner has written the estimated cost of building work. The cost of a building permit is calculated as a percentage of the contract price, so there is an incentive for devotees of situational ethics to under-report the estimated value of the project. To counter this, some towns ask the applicant for backup cost data produced either by the architect or engineer of record, or by a recognized estimating firm, or by the actual contract signed by the owner and the contractor, all good information as well.

For the most part, though, the contract price regularly dwarfs the estimated cost of the work on the permit. When the signed contract has preceded the permit application, the cost discrepancy is a fine tool to hip pocket for use to good effect as at trial, to impeach the veracity of the proponent. The rule is: Trust nothing at face value in the permit file, but verify everything before using it, especially the block and lot noted for the improved property should a construction lien be considered.

Although there are alternative paths to challenge denial of a request in court or at the administrative level (N.J.S.A. 47:1A-6), denial is unheard of where residential construction records are sought. Remember to advance the case early with public record requests.

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## Endnotes

1. N.J.S.A. 47:1A-1 *et seq.*
2. 5 U.S.C. § 552.
3. <http://www.nj.gov/grc/public/request/>.
4. If the client is a contractor, don't limit the scope of the request in time. Ask for the permit file as far back as available to make the case for lack of owner attention to known pre-existing defects, or problems caused by others working on the same building. By contrast, a newer permit may be used to highlight causation problems, such as where a subsequent hvac installation on the roof may work to excuse a roofer for alleged leaks.
5. N.J.A.C. 13:45A-16.2 6.iv.