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LAW ALERT

Public Access Counselor Opines on the Release of Settlement Agreements Under FOIA

January 14, 2011

The Freedom of Information Act ("FOIA")^[1], as amended on January 1, 2010, grants the Public Access Counselor ("PAC") authority to issue binding opinions which a public body must either comply with or initiate administrative review in a court located in Cook or Sangamon counties. During 2010, the PAC issued four binding opinions. The fourth binding opinion, issued on December 29, 2010, addresses the release of settlement agreements entered into on behalf of a public body in response to a FOIA request.

The specific issues addressed by the PAC in this binding opinion were:

1. Whether a settlement agreement entered into by an insurer, without input or approval from the public body, is a public record that the public body must make available for inspection and copying in response to a FOIA request.
2. Whether a public body is required to make a settlement agreement available for inspection and copying if it does not possess the settlement agreement.

Relying upon the express language found under Section 2.20 of FOIA^[2], the PAC opined that the settlement agreement at issue is a public record that the public body must produce for inspection and copying, less any appropriate redactions.^[3] As such, the fact that a public body lacked input and approval in reaching a settlement entered on its behalf, and/or does not possess a copy of the settlement agreement, does not discharge the public body's obligations under Section 2.20 of FOIA.

Generally, please note that certain information contained within a settlement agreement may be subject to redaction prior to release by a public body. We recommend consulting with legal counsel to discuss how FOIA may impact a proposed settlement agreement and before responding to a FOIA records' request to inspect or copy an existing settlement agreement.

Also noteworthy is the sanction imposed by the PAC for the public body's decision not to identify any information contained within the settlement agreement purportedly exempt from disclosure under Sections 7 or 7.5 of FOIA, despite a request from the PAC during the review period before the binding opinion was issued.

Rather than provide the PAC with a copy of the settlement agreement entered into by the public body's insurer, or identify information contained therein subject to redaction under FOIA, the public body informed the PAC that it did not have a copy of the settlement agreement. Consequently, the PAC held that the public body *forfeited* the opportunity to claim that the settlement agreement or any portion thereof is exempt from disclosure under Sections 7 or 7.5 of FOIA. Given the potential sanctions at issue, we strongly recommend that a public body contact legal counsel prior to responding to a request for review from the PAC.

All binding opinions issued by the PAC are available via the Internet at <http://foia.ilattorneygeneral.net/bindingopinions>. If you have any questions about this binding opinion or FOIA, generally, please feel free to contact any RSNLT attorney.

Catherine R. Locallo, an associate in the firm's Chicago office prepared this *Law Alert*.

^[1] 5 ILCS 140/1 *et seq.*

[2] Section 2.20 states "[a]ll settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of the Act may be redacted." (emphasis added). 5 ILCS 140/2.20.

[3] The public body subject of the binding opinion has 35 days from December 29, 2010, to seek administrative review of the PAC's decision. To date, no complaint has been filed. See 5 ILCS 140/11.5.

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