



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

January 24, 2024

PUBLIC ACCESS OPINION 24-001
(Request for Review 2023 PAC 78717)

FREEDOM OF INFORMATION ACT:
Disclosure of Settlement Agreements

Ms. Ellen Moriarty
13841 South Twin Oaks Court
Homer Glen, Illinois 60491

The Honorable Vicki Bozen
Clerk
Homer Township
14350 West 151st Street
Homer Glen, Illinois 60491

Dear Ms. Moriarty and Ms. Bozen:

This binding opinion is issued by the Attorney General pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2022), as amended by Public Act 103-069, effective January 1, 2024). For the reasons discussed below, this office concludes that Homer Township (Township) violated the requirements of FOIA by withholding a settlement agreement responsive to Ms. Ellen Moriarty's October 2, 2023, FOIA request.

BACKGROUND

On October 2, 2023, Ms. Moriarty submitted by e-mail a FOIA request to the Township seeking "the invoices and all relevant documents that support" nine specific checks, identified by check number and amount, payable to the Township's law firm or its law firm's

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trust account.¹ On October 10, 2023, the Township e-mailed Ms. Moriarty copies of eight of the specified checks that were payable to the law firm along with redacted copies of legal invoices that corresponded to each of those checks.² The e-mail to which those records were attached did not indicate any responsive information had been redacted or withheld, nor did the Township specify the bases for its redactions. On October 24, 2023, this office received Ms. Moriarty's Request for Review challenging the Township's response. In particular, she alleged that the Township's response was incomplete because it failed to provide the relevant records for check number 45079, for \$22,950.00, which she indicated was payable to the law firm's trust fund.³ Although she expressed concern over the "erratic and convoluted" manner in which the Township provided the records to her, she did not contest the Township's redactions to the legal invoices.⁴

In an attempt to mediate this matter, on November 1, 2023, an Assistant Attorney General (AAG) in the Public Access Bureau e-mailed the Township Clerk a copy of Ms. Moriarty's Request for Review and asked if the Township Clerk had availability to discuss the matter.⁵ Alternatively, the AAG suggested that if the Township had overlooked any responsive records, the Township may wish to disclose those records to Ms. Moriarty in a supplemental response.⁶

In telephone calls on November 7, 2023, and November 9, 2023, the AAG spoke with the Township Clerk. During those calls, the Township Clerk explained that the Township had inadvertently omitted a copy of check 45079 from its response to Ms. Moriarty, but she was concerned that releasing the remaining responsive records related to the check would subject the Township to legal liability.⁷ She stated that she was unsure what FOIA exemption applied to the

¹E-mail from Ellen Moriarty to Vicki Bozen, [Clerk, Homer Township], and Steve Balich [Supervisor, Homer Township] (October 2, 2023).

²E-mail from Vicki Bozen, Homer Township Clerk, Homer Township, to Ellen [Moriarty] (October 10, 2023).

³E-mail from Ellen Moriarty to Public Access [Bureau, Office of the Attorney General] (October 24, 2023).

⁴E-mail from Ellen Moriarty to Public Access [Bureau, Office of the Attorney General] (October 24, 2023).

⁵E-mail from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to [Vicki Bozen, Clerk, Homer Township] (November 1, 2023).

⁶E-mail from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to [Vicki Bozen, Clerk, Homer Township] (November 1, 2023).

⁷Telephone call from Vicki Bozen, Clerk, Homer Township, to Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (November 7, 2023).

withheld records, but indicated that she was unwilling to disclose them without a final determination from the Public Access Counselor.⁸

On November 13, 2023, the Public Access Bureau e-mailed the Township a copy of the Request for Review⁹ and a letter¹⁰ asking it to provide, for this office's confidential review, copies of the withheld records. This office also requested that the Township provide a written answer describing its legal and factual bases for withholding the records, including the specific exemption(s) the Township is asserting to withhold the records.¹¹ On November 14, 2023, the Township provided this office with unredacted copies of check 45079 and one withheld responsive record, a settlement agreement.¹² The Township also provided a confidential explanation of its reason for withholding the settlement agreement, but it did not specify the FOIA exemption upon which the Township relied.¹³

In an additional attempt to mediate this matter, on November 20, 2023, by telephone and e-mail,¹⁴ the AAG directed the Township Clerk to section 2.20 of FOIA (5 ILCS 140/2.20 (West 2022)), which provides that "[a]ll settlement and severance 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 this Act may be redacted." The AAG stated that section 2.20 specifically identifies settlement agreements as public records open to inspection, and asked the Township to copy this office if it issued a supplemental response disclosing the withheld record.¹⁵ On November 22, 2023, the Township

⁸Telephone call from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Vicki Bozen, Clerk, Homer Township (November 9, 2023).

⁹E-mail from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to [Vicki Bozen, Clerk, Homer Township] (November 13, 2023).

¹⁰Letter from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to The Honorable Vicki Bozen, Clerk, Homer Township (November 13, 2023).

¹¹Letter from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to The Honorable Vicki Bozen, Clerk, Homer Township (November 13, 2023), at 1-2.

¹²E-mail from Clerk Vicki Bozen, Homer Township Clerk, Homer Township, to Victoria [Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 14, 2023).

¹³E-mail from Clerk Vicki Bozen, Homer Township Clerk, Homer Township, to Victoria [Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 14, 2023).

¹⁴E-mail from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to [Vicki] Bozen, [Clerk, Homer Township] (November 20, 2023) (quoting 5 ILCS 140/2.20 (West 2022)).

¹⁵E-mail from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to [Vicki] Bozen, [Clerk, Homer Township] (November 20, 2023).

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Clerk informed this office that she would not disclose the settlement agreement to Ms. Moriarty.¹⁶

On November 29, 2023, the Township provided by e-mail a non-confidential written answer to this office's November 13, 2023, letter.¹⁷ On November 30, 2023, this office forwarded the Township's answer to Ms. Moriarty.¹⁸ She did not reply. In a December 6, 2023, telephone call with the AAG who forwarded the letter, Ms. Moriarty confirmed that receipt of a copy of the settlement agreement would resolve her Request for Review.¹⁹ Accordingly, the scope of this opinion is limited to whether the settlement agreement is subject to disclosure.

On December 18, 2023, this office extended the time for issuing a binding opinion by 30 business days, to February 8, 2024, pursuant to section 9.5(f) of FOIA.²⁰

ANALYSIS

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2022). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2022)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." The exemptions from disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2022)), as amended by Public Acts 103-154, effective June 30, 2023; 103-462, effective August 4, 2023; 103-446, effective August 4, 2023) are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

As noted above, section 2.20 of FOIA expressly provides that "[a]ll settlement agreements entered into by or on behalf of a public body are public records subject to inspection

¹⁶E-mail from Clerk Vicki Bozen, Homer Township Clerk, Homer Township, to Victoria [Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 22, 2023).

¹⁷E-mail from Clerk Vicki Bozen, Homer Township Clerk, Homer Township, to Victoria [Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 29, 2023).

¹⁸Letter from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ellen Moriarty (November 30, 2023).

¹⁹Telephone call from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ellen Moriarty (December 6, 2023).

²⁰Letter from Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Ellen Moriarty and The Honorable Vicki Bozen, Clerk, Homer Township (December 18, 2023).

and copying by the public, provided that information exempt from disclosure under Section 7 of [FOIA] may be redacted." The Illinois Supreme Court has found that "section 2.20 [of FOIA] was intended as a clarification that settlement agreements are public records[.]" *Rushton v. Dep't of Corrections*, 2019 IL 124552, ¶ 20. There, the Court held that a State agency was required to disclose a settlement agreement between its contracted medical provider and the estate of a decedent, but remanded the case for consideration of whether portions of the records could be redacted under exemptions in section 7 of FOIA. *Rushton*, 2019 IL 124552, ¶ 41.

In its written response to this office, the Township does not contend that any portion of the settlement agreement is exempt pursuant to a specific exemption in FOIA. Rather, the Township stated that it withheld the settlement agreement in its entirety because of the agreement's "Mutual Non-Disparagement" clause.²¹ The Township described the clause as stating "that any party that disparages the other can be liable for damages of \$15,000 or actual damages whichever is greater."²² The Township argued that if it disclosed the settlement agreement, "it could cause harm to either party for a multitude of reasons. One reason would be the posting of this on social media and possible negative comments which could tarnish the business name and ultimately, we could be held liable for."²³

The legislative history of Senate Bill 189 (which, as Public Act 96-542, effective January 1, 2010, added section 2.20 to FOIA) reflects that the General Assembly did not intend to permit public bodies to incorporate non-disclosure agreements or other restrictions in settlement agreements to avoid disclosing the terms of the settlements in response to FOIA requests. The comments of Representative Madigan, one of the House sponsors of Senate Bill 189, and Representative Black are particularly illuminating:

Black: Okay, settlement agreements entered into, and this has long been a bone of contention, a school district, a city, a township, a county, whatever[.]

* * *

They reach an agreement on a lawsuit. They don't go to court. They settle for an amount of money, and this [has] often driven the taxpayer as well as the media gatekeepers crazy. Well, that did... how much did it cost? Well, we don't have to tell you that. We

²¹E-mail from Vicki Bozen, Homer Township Clerk, Homer Township, to Victoria [Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 29, 2023).

²²E-mail from Vicki Bozen, Homer Township Clerk, Homer Township, to Victoria [Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 29, 2023).

²³E-mail from Vicki Bozen, Homer Township Clerk, Homer Township, to Victoria [Frazier, Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 29, 2023).

can't tell you that because part of the agreement was that neither side would disclose what we paid, but yet the taxpayer says, well, you paid them, literally, even though you have an insurance policy, you paid them with my tax money. What do you mean I can't tell... I can't be told what you settled the case for? If I understand what you're saying, that settlement would now be FOIable.

Madigan: The answer is yes. Remarks of Rep. Black and Rep. Madigan, May 27, 2009, House Debate on Senate Bill No. 189, at 104-105.

In addition, this colloquy between Representative Tryon and Representative Madigan reiterated that the purpose of section 2.20 is to mandate the release of settlement agreements, subject only to permissible redactions:

Tyron: Speaker Madigan[,] having been a former county board chairman, we were faced many times with FOIA requests and sometimes difficult FOIA requests and one of the things that was awful difficult was in the cases of settlements of court cases. In the settlement of a court case, there were times where the plaintiff was requesting that there be * * * nondisclosure. It could have been a sexual harassment case; it could have been certain types of cases where there was a need to disclose the names of the individuals maybe even the amount of the settlement. If the court approves a settlement agreement that, as part of that settlement agreement, has nondisclosure, is that FOIAable?

Madigan: The answer is that [is] a public record that would be subject to FOIA, but please understand that you do have exceptions in the statutes such as privacy, deliberative process.

Tyron: So that doesn't...

Madigan: Let me also add, you can do redactions.

Tyron: Okay.

Madigan: You can do redactions.

Tyron: So, * * * if part of the settlement was negotiated and part of the negotiation of the settlement [was] approved by a court and in one specific case I'm thinking of was a Federal Court and the

amount was nondisclosable. Would that still be nondisclosed as well?

Madigan: Again, it's subject to FOIA, but let me add that the intent of this Bill is not to look with favor upon governments entering into sealed records and sealed agreements of court. I mean, that's part of what we're trying to do here. We're trying to open things up.

Tryon: Okay.

Madigan: And we certainly would not want to be encouraging governments to enter into agreements like that.

Tryon: Okay. And certainly, in cases of privacy then you're saying that the exception would apply possibly to names and that type of thing?

Madigan: The answer is yes. Remarks of Rep. Madigan and Rep. Tryon, May 27, 2009, House Debate on Senate Bill No. 189 at 109-111.

In accordance with the plain language of section 2.20 and this legislative history, the Attorney General has issued binding opinions clarifying that confidentiality provisions within settlement agreements do not supersede FOIA's requirement to disclose those agreements to the public. Ill. Att'y Gen. Pub. Acc. Op. No. 14-004, issued May 9, 2014, at 9-10 ("Because confidentiality provisions in settlement agreements entered into by public bodies are contrary to the specific language of section 2.20 and the legislative intent underlying that section, this office finds that the confidentiality provisions in the settlement agreements are not enforceable[.]"); *see* Ill. Gen. Pub. Acc. Op. No. 15-004, issued June 17, 2015, at 4 (finding that a confidentiality provision did not authorize a city to withhold a settlement agreement requested under FOIA).

Because the withheld record is a settlement agreement between the Township and another party, it is a public record subject to disclosure. The Township's sole basis for withholding the record is a mutual nondisparagement clause, the language of which does not expressly or implicitly prohibit disclosure of the agreement itself. Black's Law Dictionary defines "nondisparagement clause" in relevant part as "[a] contractual provision prohibiting the parties from publicly communicating anything negative about each other." Black's Law Dictionary 315 (11th ed. 2019). It appears that the Township's position is that disclosure of the settlement agreement pursuant to FOIA would necessarily be a "negative" communication about the other party and/or that disclosure of the record could lead to others disparaging the other party, which the Township believes would expose it to potential liability. The Township's

interpretation of the nondisparagement clause is strained, but even if the clause could be construed to impose a constructive duty of confidentiality on the parties, such confidentiality clauses pertaining to settlement agreements are not enforceable. If public bodies could use nondisparagement clauses to circumvent the disclosure requirements of section 2.20 of FOIA, the purpose of that provision would be defeated. *See People v. Latona*, 184 Ill. 2d 260, 269 (1998) ("[T]his court has a duty to avoid a construction of [a] statute that would defeat the statute's purpose or yield an absurd or unjust result."). Accordingly, the Township violated the requirements of FOIA by withholding the responsive settlement agreement based on a mutual nondisparagement clause.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the information submitted, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On October 2, 2023, Ms. Ellen Moriarty submitted a FOIA request to Homer Township seeking "the invoices and all relevant documents that support" nine specific checks payable to the Township's law firm or its trust fund.

2) On October 10, 2023, the Township provided Ms. Moriarty with responsive records for eight of the checks, but did not provide any records for check 45079.

3) On October 24, 2023, Ms. Moriarty filed a Request for Review with the Public Access Counselor alleging that the Township's response was incomplete. The Request for Review was timely filed and otherwise complies with the requirements of section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2022)), as amended by Public Act 103-069, effective January 1, 2024).

4) On November 13, 2023, the Public Access Bureau forwarded a copy of the Request for Review to the Township along with a letter requesting copies of the unredacted records for this office's confidential review and a written answer specifying the FOIA exemption(s) under which it was withheld, and a factual and legal basis for the applicability of any such exemption. On November 14, 2023, the Township provided the requested records and a confidential written answer.

5) On November 20, 2023, an AAG suggested, based on section 2.20 of FOIA, that the Township consider providing the settlement agreement to Ms. Moriarty. On November 22, 2023, the Township declined to do so.

6) On November 29, 2023, the Township provided a non-confidential version of its answer to this office. On November 30, 2023, the Public Access Bureau forwarded that answer to Ms. Moriarty. Ms. Moriarty did not reply to that answer, but in a December 6, 2023,

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telephone call with the AAG who forwarded the letter, she confirmed that receipt of a copy of the settlement agreement would resolve her Request for Review.

7) On December 18, 2023, the Public Access Bureau extended the time in which to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 2.20 of FOIA specifically provides that all settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public.

9) The responsive record is a settlement agreement entered into by the Township. The settlement agreement does not contain a provision prohibiting disclosure. Even if it did, such provision would be unenforceable because it would defeat the purpose of section 2.20 of FOIA.

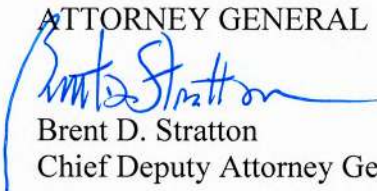
Therefore, it is the opinion of the Attorney General that Homer Township has violated FOIA by withholding the settlement agreement responsive to Ms. Ellen Moriarty's October 2, 2023, Freedom of Information Act request. Accordingly, the Township is hereby directed to take immediate and appropriate action to comply with this opinion by providing Ms. Moriarty a copy of the settlement agreement.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2022). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review with the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Ms. Ellen Moriarty as defendants. *See* 5 ILCS 140/11.5 (West 2022).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By:


Brent D. Stratton
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 24-001) upon:

Ms. Ellen Moriarty
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el.n.moriarty@gmail.com

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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Chicago, Illinois on January 24, 2024.



Steve Silverman
Bureau Chief

Steve Silverman
Bureau Chief
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