



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 29, 2010

Ms. Renee Botica
Freedom of Information Officer
Village of McCook
5000 Glencoe Ave.
McCook, Illinois 60525

PUBLIC ACCESS OPINION No. 10-004
(Request for Review 2010 PAC 10658)

FREEDOM OF INFORMATION ACT:
Settlement Agreements

Dear Ms. Botica:

This binding opinion is issued pursuant to Section 9.5(f) of the Freedom of Information Act (5 ILCS 140/9.5(f), added by Public Act 96-542, effective January 1, 2010).

Background

On March 2, 2009, Margaret Foster filed an employment discrimination action against the Village of McCook (Village), its Acting Mayor, and its Police Chief in the United States District Court for the Northern District of Illinois, Eastern Division.¹ Gregory Stephen Mathews of the law firm of Ancel, Glink, Diamond, Bush, DiCianni, & Krafthefer, P.C. entered an appearance in the action as the attorney for the Village of McCook.

On June 23, 2010, the district court entered an order dismissing the Mayor as a party pursuant to the plaintiff's notice of voluntary dismissal. Five days later, the remaining parties filed a stipulation to dismiss the action with prejudice. The stipulation recited that all matters in controversy between Ms. Foster and the Village had been "settled and compromised." On June

¹ *Margaret Foster v. Village of McCook, et al.*, Docket No. 09-cv-0325 (N.D. Ill.).

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30, 2010, the district court dismissed the action with prejudice pursuant to the stipulation to dismiss. This office takes official notice of the aforementioned district court orders and filings.² Chicago Sun-Times reporter Steve Warmbir submitted a FOIA request to the Village by e-mail dated October 4, 2010. Mr. Warmbir requested "[a] copy of any and all records reflecting the settlement or payment made to Margaret Foster and/or her attorney in the matter of federal court case 1:09-cv-1325 as well as a copy of any and all settlement agreements signed by the parties in the case." After invoking Section 3(e) of FOIA (5 ILCS 140/3(e)) to extend its response time for five additional days, the Village sent Mr. Warmbir a letter dated October 18, 2010 stating that there were "no documents responsive to your request in the Village's possession."

Mr. Warmbir then sent the Village another e-mail dated October 20, 2010 in which he stated that he would modify his FOIA request "possibly to clarify it," and stated that he believed that the Village did have the document that he had requested. He referenced the June 28, 2010 stipulation that the parties had entered into to dismiss Ms. Foster's federal court action, and noted that the stipulation began by stating, "[a]ll matters in controversy having been settled." Mr. Warmbir then stated, "under Illinois FOIA, I am asking for a copy of any and all documents or e-mails reflecting a settlement between the Village of McCook and Margaret Foster in the village's possession or in the possession of an agent of the village."

In response, the Village sent Mr. Warmbir a letter dated November 4, 2010 stating that it possessed a court order and three reports from the Village's insurance carrier that were responsive to his request, and that those documents were enclosed. The court order was the June 23, 2010 order dismissing the Mayor of McCook as a party to Foster's federal court action. The Village's letter further stated that, to the extent Mr. Warmbir sought records that are exempt from disclosure under Section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m)), his request was denied. Section 7(1)(m) exempts from disclosure "[c]ommunications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared by or compiled by or for a public body in anticipation of a criminal, civil, or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies."

Mr. Warmbir then sent the Village an e-mail dated November 5, 2010 which stated that the documents he had received from the Village did not include a copy of the settlement agreement between Ms. Foster and the Village. The e-mail stated that, if Mr. Warmbir did not receive a copy of the settlement agreement by 5:00 p.m. the following Monday (November 8, 2010), he

² See *People v. One 1999 Lexus, VIN JT8BH68X2X0018305*, 367 Ill. App. 3d 687, 690, 855 N.E.2d 194, 199 (2nd Dist. 2006) (judicial notice may be taken of court records); 5 ILCS 100/10-40 (West 2008) (codifying general principle that administrative agencies may take official notice of matters of which the circuit courts may take judicial notice).

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would proceed accordingly. On November 9, 2010, Mr. Warmbir submitted a Request for Review to the Public Access Counselor.

This office issued a further inquiry letter to the Village on November 19, 2010. *See* 5 ILCS 140/9.5(b). The further inquiry letter requested that the Village do four things. First, it requested that the Village "state in writing whether a settlement agreement exists with regard to the litigation between the Village and Margaret Foster." Second it stated that, if such an agreement exists, "we ask the Village to explain in detail why it did not provide a copy of the settlement agreement to Mr. Warmbir." Third, it asked "that the Village send this office a copy of the settlement agreement." Finally, it asked that, if "the Village believes that any portions of the settlement agreement should be redacted because those portions contain information that is exempt from disclosure under Section 7 of FOIA, then it should specify those portions of the agreement and state the specific basis for its claim that those portions are exempt from disclosure."

In its December 2, 2010 response to the further inquiry letter, the Village stated that Ms. Foster's lawsuit had been referred to the Illinois Municipal League Risk Management Association, which defended the Village under the terms of an insurance policy. The Village then stated that the insurance policy empowered the Association "to defend and settle the lawsuit without additional input or approval from the Village." The Village further stated that it does not "have a copy of any settlement agreement reached by the Association, on behalf of the Village, and Ms. Foster." The Village did not enclose a copy of the settlement agreement nor did it specify any portions that should be redacted because they contain information that is exempt under Section 7 of FOIA.

On December 14, 2010, Mr. Warmbir responded in writing to the Village's response. *See* 5 ILCS 140/9.5(d). Mr. Warmbir noted that the Village had not disputed that there is a settlement agreement between Ms. Foster and the Village. Furthermore, the Village had not claimed in its response that any FOIA exemptions applied. Instead, the Village had stated that it does not possess the document, and its attorney does. The Village then sent this office a letter dated December 20, 2010 in which it responded to Mr. Warmbir. The Village stated that it had never claimed that the settlement agreement sought by Mr. Warmbir was in the possession of an attorney representing the Village. The Village reiterated that the settlement agreement was prepared by the Illinois Municipal League Risk Management Association, which defended and settled the lawsuit without the Village's input and approval.

Analysis

The issue in this matter is whether FOIA requires the Village to disclose a copy of the settlement agreement that resolved the federal court litigation between Ms. Foster and the Village. Section 2.20 of FOIA (5 ILCS 140/2.20) states that "[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 this Act may be redacted." The cardinal rule of statutory construction is to determine and effectuate the legislature's intent. *Acme Markets, Inc. v. Callanan*, 236 Ill. 2d 29, 37, 923 N.E.2d 718, 724 (2009). The best source of legislative intent is the plain and ordinary meaning of the statutory language. *Callanan*, 236 Ill. 2d at 37-38. When statutory language is plain and unambiguous, it must be applied as written without departing from the terms of the provision by reading in exceptions, limitations or conditions that conflict with the express legislative intent. *Id.* at 38.

Section 2.20 of FOIA plainly states that settlement agreements entered into by a public body or on its behalf "are public records subject to inspection and copying by the public". That clear, unambiguous statutory language must be enforced as written. Under Section 2.20, the Village must make the settlement agreement requested by Mr. Warmbir available for inspection and copying.

The Village's asserted justifications for failing to make the settlement agreement available to Mr. Warmbir for inspection and copying are unavailing. The Village asserts that the settlement agreement is not in the Village's possession. The Village further asserts that the Village's insurer, the Illinois Municipal League Risk Management Association, arranged the settlement agreement with Ms. Foster, and the Village had no input. But under the plain language of Section 2.20, "[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" subject to appropriate redactions under Section 7 (emphasis added). Under this clear, unambiguous language, the settlement agreement is a public record that must be disclosed because it was entered into on the Village's behalf, even if the Village lacked input, and even if the Village does not currently possess the document. The Village cannot avoid compliance with the clear language of FOIA by declining to maintain in its files a copy of the settlement agreement entered into on its behalf.

Aside from the plain language of Section 2.20, a contrary result would have absurd consequences that would be inconsistent with FOIA's purpose of promoting the transparency and accountability of public bodies through access to public records. 5 ILCS 140/1. Courts in other jurisdictions have observed that there is a strong public interest in disclosure of settlement agreements entered into by or on behalf of public bodies. *See, e.g., Miami Herald Publ'g Co. v. Collazo*, 329 So. 2d 333, 338 (Fla. App. 1976); *Tribune-Review Publishing Co. v. Westmoreland County Housing Authority*, 574 Pa. 661, 669-70, 833 A.2d 112, 117 (2003). As the Pennsylvania Supreme Court stated, "[t]hose interests are: 1) the public's right to know whether a public official or employee has been charged with official misconduct and 2) the financial impact upon the public of a litigation settlement that is paid either with public funds or with insurance proceeds generated by publicly financed insurance premiums" which often influence the public bodies' future insurance rates. *Tribune-Review Publishing Co.*, 833 A.2d at 117.

Like the Village, the county housing authority in *Tribune-Review Publishing Co.* attempted to justify nondisclosure of a settlement agreement by arguing that it did not possess a copy of the agreement. *Id.* In rejecting this argument, the court stated that, under the housing authority's logic, "any public entity could thwart disclosure required by the Act by having an attorney or an insurer's attorney prepare every writing that the public entity wishes to keep confidential." *Id.* at 118. This would be an absurd result that is inconsistent with FOIA's purpose of promoting the transparency and accountability of public bodies through access to public records. 5 ILCS 140/1. The relevant statutory provisions should be construed so as to avoid the absurd results suggested by the Village. See *Burger v. Lutheran Gen'l Hospital*, 198 Ill. 2d 21, 59, 759 N.E.2d 533, 555 (2001).

As noted above, Section 2.20 provides that "information exempt from disclosure under section 7 of this Act may be redacted" from settlement agreements before public bodies disclose them to FOIA requesters. In its further inquiry letter of November 19, 2010, this office asked the Village to send it a copy of the settlement agreement and to specify any portions that should be redacted under Section 7. The Village failed to do so, and it has thereby forfeited the opportunity to claim that the agreement or any portion thereof is exempt from disclosure.³

Although the Village has not raised any Section 7 exemptions, we note that it is possible that the settlement agreement contains private information about Ms. Foster, such as her social security number. Ms. Foster should not suffer the consequences of the Village's failure to abide by the directives in this office's further inquiry letter. Accordingly, the Village may redact from the settlement agreement any private information of Ms. Foster that is exempt under Section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b)), including her social security number, and her home address.

Findings and Conclusions

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds that:

³ In responding to Mr. Warmbir's FOIA request, the Village appeared to claim that the settlement agreement was exempt under Section 7(1)(m) of FOIA (5 ILCS 140/7(1)(m)), but it has made no such contention in response to his Request for Review. Furthermore, any such assertion would be unavailing. Section 7(1)(m) exempts from disclosure "[c]ommunications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared by or compiled by or for a public body in anticipation of a criminal, civil, or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies." The Village contends that the settlement agreement was reached without any input from the Village so it cannot possibly constitute a communication between the Village and its attorney. Further, the Village has made no showing that the settlement agreement was prepared by or for the Village in anticipation of the Foster litigation.

- 1). Mr. Warmbir's Request for Review was timely filed and otherwise complies with Section 9.5 of FOIA (5 ILCS 140/9.5). Therefore, the Attorney General may properly issue a binding opinion with respect to the disclosure of the record in issue.
- 2). The Village has not produced to Mr. Warmbir for inspection or copying the requested settlement agreement entered into by the Village or on the Village's behalf with Ms. Margaret Foster with regard to the litigation in case number 09-CV-1325 filed by Ms. Foster in the United States District Court for the Northern District of Illinois, Eastern Division.
- 3). The Village has, as a matter of law, denied Mr. Warmbir's FOIA requests by failing to furnish the settlement agreement within the response period set forth in Section 3(d) of FOIA (5 ILCS 140/3(d)).
- 4). The settlement agreement requested by Mr. Warmbir is a public record that the Village is required to produce to Mr. Warmbir for inspection and copying under Section 2.20 of FOIA (5 ILCS 140/2.20).
- 5) Before producing the settlement agreement for inspection and copying by Mr. Warmbir, the Village may redact any private information of Ms. Margaret Foster that is exempt from disclosure under Section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b)).

In conclusion, it is the opinion of the Attorney General that the Village has, in violation of the requirements of the Freedom of Information Act, improperly denied Mr. Warmbir's request for access to and/or a copy of the settlement agreement between the Village and Ms. Margaret Foster with regard to the litigation in case number 09-CV-1325 filed by Ms. Foster in the United States District Court for the Northern District of Illinois, Eastern Division. Accordingly, the Village is directed to take immediate and appropriate action to comply with this opinion by furnishing the settlement agreement to Mr. Warmbir. The Village may redact any private information of Ms. Margaret Foster that is exempt from disclosure under Section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b)).

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.* An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Mr. Steve Warmbir as defendants. See 5 ILCS 140/11.5.

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Sincerely,

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