OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

May 9, 2014

PUBLIC ACCESS OPINION 14-004
(Request for Review 2014 PAC 27773)

FREEDOM OF INFORMATION ACT:
Disclosure of Settlement Agreements

Mr. Daniel Kelley
Reporter, *Belleville News-Democrat*
120 South Illinois Street
Belleville, Illinois 62222

Mr. Sean Murley
Assistant State's Attorney and FOIA Officer
St. Clair County
10 Public Square, 2nd Floor
Belleville, Illinois 62222

Dear Mr. Kelley and Mr. Murley:

This is a binding opinion issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2012)). For the reasons discussed below, this office concludes that St. Clair County improperly partially denied Mr. Daniel Kelley's December 30, 2013, FOIA request for copies of settlement agreements.

BACKGROUND

On December 30, 2013, Mr. Kelley, on behalf of the *Belleville News-Democrat*, submitted a FOIA request to the St. Clair County Board Chairman seeking "all of the settlement agreements involving St. Clair County from Jan. 1, 2013 to the present."[1] On January 14, 2014,

[1]Letter from Daniel Kelley, Reporter, *News-Democrat*, to Mark Kern, Chairman, St. Clair County Board (December 30, 2013).

Sean Murley, Assistant State's Attorney and FOIA Officer, responded on behalf of the Board Chairman and St. Clair County[2] and provided Mr. Kelley with copies of six documents, each entitled "Release,"[3] some of which contained redactions of private information[4] pursuant to section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013).[5] The County, however, denied Mr. Kelley's request with respect to an undisclosed number of settlement documents "containing or covered by confidentiality agreements," asserting that "parties entered into these agreements with the understanding that details of their settlements would not be disclosed."[6] In addition, the County asserted that because of the nature of the allegations, the privacy of the complaining parties should be protected, and that the documents are therefore exempt "personal information" under section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013). Mr. Kelley submitted a Request for Review, received by this office on January 28, 2014, seeking the Public Access Counselor's review of the denial of his request for documents that contained the confidentiality provisions.[7]

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[2]Letter from Sean Murley, Assistant State's Attorney and FOIA Officer, St. Clair County, to Daniel Kelley, *Belleville News Democrat* (January 14, 2014).

[3]Facsimile from Dan Kelley, *Belleville News-Democrat,* to Sarah Pratt, Public Access Counselor (January 31, 2014).

[4]Under section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2012) "private information" means:

> [u]nique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

[5]Letter from Sean Murley, Assistant State's Attorney and FOIA Officer, St. Clair County, to Daniel Kelley, *Belleville News Democrat* (January 14, 2014).

[6]Letter from Sean Murley, Assistant State's Attorney and FOIA Officer, St. Clair County, to Daniel Kelley, *Belleville News Democrat* (January 14, 2014).

[7]Letter from Daniel Kelley, Reporter, *News-Democrat*, to Sarah Pratt, Public Access Counselor (January 27, 2014).

On February 3, 2014, this office forwarded a copy of the Request for Review to St. Clair County and requested unredacted copies of all responsive documents that had been withheld, as well as any additional factual information and legal arguments in support of its assertion of section 7(1)(c).[8] This office received the County's response on February 20, 2014, which included copies of the settlement agreements it had withheld. On behalf of the County, Mr. Murley stated:

> Disclosure of these documents would be in direct violation of confidentiality agreement entered into by the parties. In addition, these cases involve sexual harassment claims that are by nature considered confidential. It is our position that disclosure of victim's names would only serve to further embarrass and humiliate the victims.[9]

The County's response letter only was forwarded to Mr. Kelley on February 21, 2014.[10] Mr. Kelley replied on February 24, 2014, reiterating his assertion that the settlement agreements are public records.[11] On March 28, 2014, this office properly extended the time to issue a binding opinion by 30 business days pursuant to section 9.5(f) of FOIA.[12]

The issues under review are: (1) can a public body withhold settlement agreements to which it is a party because the agreements include confidentiality provisions; and (2) can settlement agreements arising out of claims of sexual harassment be withheld pursuant to section 7(1)(c) of FOIA?

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[8]Letter from Sarah L. Pratt, Public Access Counselor, Chief, Public Access Bureau, Office of the Attorney General, to Sean Murley, Assistant State's Attorney, FOIA Officer (February 3, 2014).

[9]Letter from Sean Murley, Assistant State's Attorney and FOIA Officer, St. Clair County, to Sarah L. Pratt, Public Access Counselor, Chief, Public Access Bureau (February 13, 2014).

[10]Letter from Sarah L. Pratt, Public Access Counselor, Chief, Public Access Bureau, Office of the Attorney General, to Daniel Kelley (February 21, 2014).

[11]Letter from Daniel Kelley, Reporter, *News-Democrat,* to Sarah Pratt, Public Access Counselor (February 24, 2014).

[12]Letter from Sarah L. Pratt, Public Access Counselor, Chief, Public Access Bureau, Office of the Attorney General, to Daniel Kelley, Reporter, *Belleville News-Democrat*, and Sean Murley, Assistant State's Attorney, FOIA Officer St. Clair County (March 28, 2014).

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 2012). Section 3(a) of FOIA (5 ILCS 140/3(a) (West 2012)) provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." The exemptions from disclosure contained in section 7 of FOIA (5 ILCS 140/7 (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013) are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 2.02 of FOIA

Unquestionably, settlement agreements are public records under FOIA. Section 2.20 of FOIA (5 ILCS 140/2.20 (West 2012)) expressly provides 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 [FOIA] may be redacted." The County asserts, however, that disclosure of the requested settlement agreements would violate the confidentiality provisions contained in the agreements entered into by the parties.

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 intended to severely limit, if not to prohibit altogether, the practice of public bodies incorporating restrictions in settlement agreements in order to avoid being required to disclose the terms of the settlements under FOIA. During House debate on Senate Bill 189, the comments of Speaker Madigan, one of the bill's House sponsors, and Representative Black provide guidance on the issue of whether public bodies may withhold settlement agreements in response to a FOIA request:

> 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[.]
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> * * *
>
> 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. * * * [H]ow much

> did it cost? Well, we don't have to tell you that. We 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 be told what you settled the case for. If I understand what you're saying, that settlement would now by FOIable.
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> 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.

Similarly, the following exchange between Representative Tryon and Speaker Madigan reiterated that the purpose of section 2.20 is to mandate the release of settlement agreements, subject only to appropriate redactions:

> Tryon: 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?
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> Madigan: The answer is that [it 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.
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> * * *
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> Tryon: 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 be nondisclosed [sic] as well?
>
> Madigan: Again, it's subject to FOIA, but let me add that ***the intent of the Bill is not to look with favor upon governments entering into sealed records and sealed agreements in court. I mean, that's part of what we're trying to do here. We're trying to open things up***.
>
> Tryon: Okay.
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> Madigan: ***And we certainly [ought] not to be encouraging governments to enter into agreements like that.*** (Emphasis added.) Remarks of Rep. Tryon and Rep. Madigan, May 27, 2009, House Debate on Senate Bill No. 189, at 109-111.

Illinois appellate courts have not specifically addressed the enforceability of confidentiality restrictions in settlement agreements since the enactment of section 2.20 of FOIA, but courts of other jurisdictions have held that the disclosure requirements of open records laws are paramount. *See State ex. rel. Findlay Publishing Company v. Hancock County Board of Commissioners*, 80 Ohio St.3d 134, 137, 684 N.E.2d 1222, 1225 (Ohio 1997) ("A public entity cannot enter into enforceable promises of confidentiality regarding public records"); *Anchorage School District v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989) ("a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential. Under Alaska law, a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes"); *Tribune-Review Publishing Co. v. Westmoreland County Housing Authority*, 574 Pa. 661, 675, 833 A.2d 120, (Pa. 2003) ("the confidentiality clause contained in this agreement is void as against public policy to the extent that it conflicts with the text and purpose of the [Open Records] Act. A public entity may not enter into enforceable promises of confidentiality regarding public records"). Moreover, Illinois courts have accepted the general principle that a contract provision that violates a statute contravenes public policy and is unenforceable. *Fosler v. Midwest Care II, Inc.*, 398 Ill. App. 3d 563, 571 (2nd Dist. 2009); *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill.2d 52, 57 (2004), alluding to *Schumann–Heink v. Folsom*, 328 Ill. 321, 330 (1927). Indeed, prior to the enactment of section 2.20, this principle was applied by Illinois courts in ordering the disclosure of settlement agreements that contained confidentiality restrictions. *See Centralia Press Ltd. v. City of Mt. Vernon*, 1996 WL

787414 (Ill. Cir. 1996);[13] *see also Carbondale Convention Center, Inc. v. City of Carbondale*, 245 Ill. App. 3d 474 (5th Dist. 1993).

Under section 2.20 of FOIA, a settlement agreement is a public record subject to disclosure, although specific information may be redacted therefrom pursuant to section 7 of FOIA. Because the confidentiality provisions in the settlement agreements in question are inconsistent with the requirements of section 2.20 of FOIA and contravene public policy as set forth in FOIA, they are unenforceable as written.

Section 7(1)(c) of FOIA

The County also asserted that the settlement agreements are exempt from disclosure under section 7(1)(c) of FOIA, which exempts from inspection and copying "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." An "unwarranted invasion of personal privacy" is defined as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." 5 ILCS 140/7(1)(c) (West 2012), as amended by Public Acts 98-463, effective August 16, 2013; 98-578, effective August 27, 2013).

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[13]The circuit court's order in *Centralia Press Ltd.* stated:

> [T]he non-disclosure provisions of the [settlement] agreement were specifically negotiated for and were an intricate part of the consideration received by the parties reciting that confidentiality was important and material to the terms of the agreement.
>
> ***Such agreement did not, nor could it, circumvent the Freedom of Information Act. Parties to a lawsuit, whether they be private citizens or governmental agencies, cannot, by their agreement, negate the application of a law passed by the General Assembly. As such, the non-disclosure terms of the agreement in and of themselves do not preclude this court from considering whether or not the information requested should be disclosed.***
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> However, the parties should have known or at least considered the application of the FOIA to suits involving public entities. Had the settlement agreement referred to the Act and recited facts supporting the assertion that disclosure would constitute an unwarranted invasion of personal privacy, the ruling in this case most likely would have been different, i.e., a finding that the City had met its burden and disclosure would not have been ordered. (Emphasis added.) *Centralia Press Ltd. v. City of Mt. Vernon*, 1996 WL 787414 (Ill. Cir. 1996).

The County did not specifically cite this provision in its response to the Request for Review, but it cited section 7(1)(c) in the denial of Mr. Kelley's FOIA request and continues to assert that disclosure would result in an unwarranted invasion of personal privacy. Consequently, we will address 7(1)(c)'s applicability to resolve any potential issue.

The County has asserted that because the settlement agreements resolve allegations of sexual harassment, the complainants' names should not be disclosed because doing so "would only serve to further embarrass and humiliate the victims."[14] The County did not, however, redact the complainants' names and then provide the redacted settlement agreements to the requester, but instead withheld the documents in their entireties. This office's confidential review of the withheld documents disclosed that they do not include references to the specific allegations underlying the complaints that led to the settlements, the disclosure of which could potentially be embarrassing to the complainants, as the County notes. To the contrary, the County has asserted that the settlement agreements should be withheld to keep confidential the fact that the complainants have made allegations of sexual harassment.

The County has not provided legal support for its assertion that the release of the settlement agreements would result in an unwarranted invasion of the personal privacy of the complainants. Moreover, the settlement agreements contain terms and conditions relating to the payment of funds by or on behalf of the County to the complainants in exchange for their release of alleged or potential claims against the County and a County employee. Article VIII, section 1(c) of the Illinois Constitution of 1970 provides that "records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." The constitutional right to information regarding the use of public funds is incorporated into the provisions of FOIA, as well. *See* 5 ILCS 140/2.5 (West 2012)) ("[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public."). The public has a right to know the purposes for which public funds are expended, including the identity of those who receive the funds. Even assuming, *arguendo*, that the disclosure of these documents would constitute an invasion of the complainants' privacy, in view of the countervailing interest of the public in information concerning the use of public funds, the invasion of privacy would not be "unwarranted."

The County has not identified a personal privacy interest in the disclosure of these documents that would outweigh the public's interest in information concerning the payment of public funds by or on behalf of the County to settle these complaints. Accordingly, the County

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[14]Letter from Sean Murley, Assistant State's Attorney and FOIA Officer, St. Clair County, to Sarah L. Pratt, Public Access Counselor, Chief, Public Access Bureau (February 13, 2014).

has not sustained its burden of demonstrating that the settlement agreements are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

FINDINGS AND CONCLUSIONS

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

1) On December 30, 2013, Mr. Daniel Kelley, on behalf of the *Belleville News-Democrat*, submitted a FOIA request to St. Clair County seeking "all of the settlement agreements involving St. Clair County from Jan. 1, 2013 to the present."

2) On January 14, 2014, the County provided Mr. Kelley with a number of responsive records, but withheld other settlement agreements, asserting that disclosing those records would violate confidentiality provisions contained therein. The County further asserted that disclosure of the settlement agreements would violate section 7(1)(c) of FOIA.

3) On January 27, 2014, Mr. Kelley submitted a Request for Review that was received by the Public Access Counselor on January 28, 2014. The Request for Review was timely and otherwise complies with section 9.5(a) of FOIA (5 ILCS 140/9.5(a) (West 2012)).

4) On February 3, 2014,the Public Access Bureau forwarded a copy of the Request for Review to the County and requested copies of all responsive documents that were withheld, as well as factual and legal arguments in support of its assertion of section 7(1)(c).

5) By letter dated February 13, 2014, and received on February 20, 2014, the County furnished to this office copies of the settlement agreements it withheld and asserted that disclosure of the records would violate the confidentiality provisions contained in the agreements and "only serve to further embarrass and humiliate the victims."

6) On March 28, 2014, the Public Access Counselor extended the time to issue a binding opinion by 30 business days, to May 9, 2014. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) 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. 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 and, therefore, the County is not precluded from releasing the settlement agreements to Mr. Kelley.

8) Further, the County has failed to meet its burden of demonstrating that the settlement agreements are exempt from disclosure pursuant to section 7(1)(c) of FOIA.

Therefore, it is the opinion of the Attorney General that the County has improperly denied the *Belleville News-Democrat's* Freedom of Information Act request in violation of the requirements of the Act. Accordingly, the County is directed to take immediate and appropriate action to comply with this opinion by disclosing the requested settlement agreements to the *Belleville News-Democrat,* subject only to permissible redactions of private information under section 7(1)(b) of FOIA.

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 2012). 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. Daniel Kelley as defendants. *See* 5 ILCS 140/11.5 (West 2012).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
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