

# FOIA Takes Confidentiality Out of Settlement Agreements

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One issue that frequently arises during settlement negotiations is whether or not any agreement reached should be confidential.

Proponents of confidential settlements assert that they prevent “copycat” lawsuits, ensure fair negotiations in future cases, protect the reputation of parties paying a contested claim, and give privacy to the recipients of a large settlement. Opponents of such agreements maintain that they prevent a true understanding of the value of cases, have potential tax consequences, decrease accountability for a wrongdoer, and hinder future litigation by limiting access to information and witnesses. Often, a confidentiality clause in a settlement agreement results in a higher settlement.

All of these considerations are rendered largely academic when the paying party is a municipality, thanks to the Freedom of Information Act (FOIA). Enacted in 1976, this “sunshine” law ensures governmental transparency and openness by requiring municipalities to produce public records for inspection. And Michigan courts have determined that this includes settlement agreements.

In *Heritage Newspapers, Inc. v. City of Dearborn*, the plaintiff newspaper made a FOIA request for several items, including settlement agreements from four recently settled lawsuits. The city refused to provide them, arguing that they were exempt under the privacy exemption, protected by the attorney-client privilege, and sealed by court order.

The trial court held that the documents were not exempt under FOIA. With regard to the privacy exemption, the court stated that “there exists no custom, more, or ordinary view of the community that would, in the court’s opinion, warrant a finding that agreements entered into by a public body to settle damage claims against it, including the amounts of public funds to be expended as assented to by the public body, constitute information of a personal nature.”

The court also concluded that the “scope of the attorney-client privilege is narrow” and that the very nature of settlement agreements is that they are disclosed to third parties, including the opposing party, and therefore the attorney-client privilege did not apply. The court noted that, despite the fact that the judges overseeing the settled lawsuits admonished the parties not to divulge the settlements, the

judicial orders entered in the case did not expressly state that the agreements were sealed. As such, no FOIA exemption was applicable and the settlement agreements were ordered to be produced.

The possibility left open in *Heritage Newspapers* that a settlement agreement might be exempt if a protective order was entered was essentially foreclosed in the unpublished case of *Huron Restoration, Inc. v. Board of Control of Eastern Michigan University*, in which the appellate court ruled that the plaintiff was entitled under FOIA to inspect a settlement agreement resolving several lawsuits. In its opinion, the appellate court noted that “[t]here is no specific FOIA exemption for settlement agreements” and further concluded that a “public institution cannot prevent disclosure by contracting away the public’s rights under the FOIA.” The court explained:

Although there are sound public policy reasons for maintaining the confidentiality of private settlement agreements, there is no precedent to support defendant’s argument that those policy considerations outweigh the similarly strong public policy in favor of FOIA disclosures.

The Michigan Supreme Court subsequently confirmed these lower court rulings in *Detroit Free Press, Inc. v. City of Detroit*, when it denied leave to appeal and found that the lower court did not err in ruling that a settlement agreement was a public record subject to FOIA. The Supreme Court, like the appellate court, has stated that “there is no FOIA exemption for settlement agreements” and “a public body may not contract away its obligations under FOIA.”

Confidentiality clauses in municipal settlement agreements may provide some level of protection, particularly in cases of low public interest, but disclosure cannot be precluded if the settlement agreements are requested under FOIA. This limitation should be understood and considered by municipalities when making the determination whether or not to settle a particular case.

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