

The State of South Carolina



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The Honorable Glenn F. McConnell
Member, South Carolina Senate
610 Gressette Senate Office Building
Columbia, South Carolina 29202

Dear Senator McConnell:

You have asked the opinion of this Office whether out-of-court settlement documents for a lawsuit wherein public funds have been expended by a government agency are "public records" subject to disclosure pursuant to the Freedom of Information Act.¹ We advise that ordinarily these documents are disclosable.

In construing the State's Freedom of Information Act this Office has been guided by the General Assembly's express findings and intent:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

Section 30-4-15. In light of this mandate, the Office of the

¹ Section 30-4-10, et seq., South Carolina Code of Laws (1987 Cum.Supp.).

Attorney General has strongly encouraged that the Act must be interpreted to effectuate its goal of disclosure. See, Op. Atty. Gen. (July 16, 1987).

Settlement documents that are maintained by a public agency generally come within the expansive statutory definition of "public records" provided in Section 30-4-20(c); thus, generally these documents are subject to disclosure pursuant to Section 30-4-30(a) unless the information contained in the settlement documents is specifically exempted from disclosure by one of the exceptions prescribed in Section 30-4-40(a). For example, some settlement documents may contain information that is specifically exempted from disclosure by a statute or law [Section 30-4-40(a)(4)] such as information that identifies a party to the settlement as a mental health patient² or information of a personal nature where the public disclosure thereof would constitute an unreasonable invasion of personal privacy. Section 30-4-40(a)(2). Of course, the specific statutory exemptions to disclosure should be narrowly construed in order to give full effect to the general remedial purpose of disclosure. News and Observer v. Interim Board of Education for Wake County, 29 N.C. App. 37, 223 S.E.2d 580 (1976); Op. Atty. Gen., (July 16, 1987).³ Moreover, if the settlement documents combine information that is not exempt from disclosure with information that is exempt, the public custodian must separate the exempt and non-exempt material and make the non-exempt material available to the public. Section 30-4-40(b).

We advise that we have located no South Carolina decisional law that resolves your question; however, the case law in other jurisdictions uniformly supports the conclusion that settlement documents are generally public records. In Register Division of Freedom Newspapers v. County of Orange, 158 Cal.App. 3d 893 (1984) the Court held that settlement documents entered into

² See Section 44-23-1090 of the South Carolina Code.

³ Section 30-4-70(a)(2) provides that a public body may hold a closed meeting to discuss settlement of legal claims. Even assuming this provision applies to disclosure of public records, see, Cooper v. Bales, 268 S.C. 270, 233 S.E.2d 306 (1977), although the literal language of the Act instructs that this application is limited to meetings, the provision would not provide a categorical exemption for finalized settlement documents. Mindful of the narrow construction accorded exemptions to public disclosure, we believe that Section 30-4-70(a)(2) applies only to discussions of proposed settlements of ongoing disputes where premature disclosure of a public entity's settlement position or strategy in an adversarial matter would injure its ability to effectively negotiate.

between a claimant and the county involving a settlement of a personal injury claim were public documents subject to disclosure pursuant to the California Freedom of Information Act. The County asserted several arguments in support of confidentiality based upon specific exemptions provided in the California disclosure law. The Court rejected application of the specific exemptions to the settlement documents and ultimately concluded that the public interest and the general policy of disclosure clearly outweighed the arguments in favor of confidentiality supported by contentions that disclosure would have an adverse financial impact on the county since it would encourage frivolous lawsuits. The Court further held that the county's agreement to maintain the confidentiality of the settlement records was unenforceable as violative of the Freedom of Information Act.

In Daily Gazette Company v. Withrow, 350 S.E.2d 738 (W.Va. 1986) the Court reached a similar conclusion finding that the public body could not agree to seal the settlement records of a civil rights action against the County Sheriff since the failure to disclose the documents was in conflict with the State's Freedom of Information Act. See, also, News and Observer v. Wake County Hospital, 284 S.E.2d 542 (N.C. Ct.App. 1981); pet.den. 291 S.E.2d 151 (1982); cert.den. 459 U.S. 803, wherein it is noted that the public has a right to know the terms of a settlement made by public agencies if public funds are involved. Additional authorities are noted at 27 A.L.R. 4680, § 16, ANNO.: WHAT ARE "RECORDS" OF AGENCY WHICH MUST BE MADE AVAILABLE UNDER STATE FREEDOM OF INFORMATION ACT?

I caution that a different analysis is required if the settlement documents are court records or are sealed by court order. This Office has concluded that the Freedom of Information Act applies to non-judicial records maintained by a court⁴ and probably applies to judicial records maintained by the Court; nonetheless, we have expressed some reservation concerning the application of the Freedom of Information Act to judicial records.⁵ However, on the other hand, we have recognized that at common law there existed a general right to inspect and copy judicial records and documents although public access was not absolute and "[e]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." Nixon v. Warner Communications, 435 U.S. 589, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978). Moreover, the decision whether to seal judicial records is ordinarily one left to the sound discretion of the trial court. Nixon v. Warner, 98 S.Ct. at 1312. While the South Carolina courts have not definitively resolved the questions related to the closing of judicial records, the State

⁴ Op. Atty. Gen. No. 83-83 (November 2, 1983).

⁵ Op. Atty. Gen., Id. at 136.

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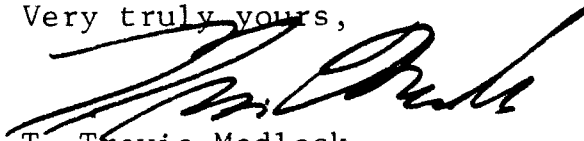
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Supreme Court's decisions in Steinle v. Lollis, 279 S.C. 375, 307 S.E.2d 230 (1983) and State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981) are particularly instructive in this context. The State Supreme Court in Lollis concluded that public access to judicial proceedings "is not absolute but subject to a proper balancing of competing interest," 307 S.E.2d, at 231. The Court further instructed that the exclusion of the public and the press from judicial proceedings is a "drastic measure" calling for a careful weighing of the interests affected, and the judge should exercise sound judicial discretion supported by express findings. We believe it is likely that the courts of this state will apply similar considerations in determining whether judicial records should be closed to the public.

Accordingly, we conclude that out-of-court settlement records maintained by a public agency, where the settlement involves the expenditure of public monies, are ordinarily "public records" as that term is statutorily defined in the Freedom of Information Act. Thus, these documents are generally disclosable to the public unless the information contained in the documents is exempted from disclosure by one of the specific statutory exceptions provided in the Act. We further advise that judicial records that contain settlement information are generally accessible by the public as well; however, a court has an inherent authority to seal the records in an appropriate case.

Very truly yours,



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