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Attorney General Opinion No. 17-IB01

February 3, 2017

VIA EMAIL

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Jessica Reyes
The News Journal
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Re: FOIA Petitions Concerning the City of Dover Dated January 13, 2016

Dear Mr. Chase and Ms. Reyes:

On January 13, 2016, the Delaware Department of Justice received your petitions seeking a determination of whether the City of Dover ("City") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with your January 5, 2016 requests for records. As discussed more fully below, we conclude that the City violated FOIA by failing to provide you with the requested record.

I. BACKGROUND

On January 5, 2016, you each submitted similar requests (hereinafter collectively referred to as the "Requests") to the City seeking a copy of the settlement agreement in the matter of *Lateef Dickerson v. City of Dover* (C.A. No. 14-1244-RGA), which was litigated in the United States District Court for the District of Delaware. On January 8, 2016, you each received an email from the City denying your respective requests on the basis that the settlement agreement was not a "public record" as defined in 29 *Del. C.* § 10002(l) and, as a result, was not subject to disclosure. The January 8, 2016 email referenced – and included as an attachment – a January 8, 2016 letter ("Response Letter") from Mr. Daniel Griffith, who was retained by Travelers' Insurance Company ("Travelers") to represent the City in the aforementioned litigation.[1] The Response Letter sets forth the factual bases and legal authorities upon which Mr. Griffith relied in forming his conclusion that the settlement agreement is not subject to disclosure under FOIA.

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[1] Response Letter at 1 ("The Requests have been forwarded to me inasmuch as I was retained by the City of Dover's liability insurance carrier, Travelers, to represent the City of Dover in the Litigation.").

On January 13, 2016, you each filed petitions with this office seeking a determination of whether the City violated FOIA by failing to provide the requested document. On January 14, 2016, we informed you that, because you requested and were denied the same information, we were treating your correspondences as a single petition (hereinafter collectively referred to as the "Petition").

Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the City to submit a written response to the Petition. On January 22, 2016, the City responded that the record sought "is not a public record within the meaning of FOIA for the reasons expressed in [the] January 8, 2016, letter."[2] The City included a copy of the Response Letter and a copy of its insurance policy with Travelers ("Insurance Policy"), which was referenced therein.

In the Response Letter, Mr. Griffith acknowledged that the settlement agreement resolved the litigation among the parties – which included the City – and that the parties agreed to keep the terms of the resolution confidential:

> The litigation was resolved among the parties and this resolution was memorialized in writing. The parties to this agreement, including the City of Dover, agreed to keep the terms of the resolution confidential. The attorneys for each party signed a Stipulation of Dismissal which was filed with the Court on December 30, 2015. On January 4, 2016, Judge Andrews of the United States District Court for the District of Delaware entered an Order granting the Stipulation of Dismissal, thereby ending the litigation.[3]

Mr. Griffith argued, however, that the information requested is not a public record because the City's legal defense was controlled by Travelers and no one from the City was involved in the settlement negotiations or ever received a copy of the settlement agreement.[4] As a result, he argued, the settlement agreement is not "owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected" by the City.[5] Mr. Griffith further argued that the City is contractually prohibited from disclosing the settlement due to a confidentiality provision contained therein.[6]

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2 Email from W. Pepper to OpenGovernment@state.de.us dated January 22, 2016.

3 Response Letter at 2.

4 *Id.* at 3.

5 *Id.*

6 *Id.* at 4.

On April 15, 2016, in response to supplemental correspondence directed to this office by Mr. Chase regarding the Petition,[7] Mr. Griffith supplemented the position set forth in the Response Letter.[8] Specifically, Mr. Griffith noted that Travelers maintained exclusive control over the underlying litigation and, as a result, exclusively negotiated, agreed to, and paid the settlement.[9] Mr. Griffith further stated that "[t]he settlement agreement was not signed by anyone from the City of Dover and, more importantly, no one from the City of Dover even *has* the settlement agreement."[10] On April 25, 2016, we requested clarification from the City regarding "the identities of those who signed the settlement agreement on behalf of the City of Dover."[11] In a May 5, 2016 correspondence, Mr. Griffith stated that "no one from (or on behalf of) the City signed the settlement agreement."[12] Mr. Griffith further explained: "[n]either the City nor Officer Webster asserted any claims against Mr. Dickerson and therefore they did not need to affirm by signature their 'release' of any claims."[13]

II. POSITIONS OF THE PARTIES

The gravamen of the Petition is that the requested settlement agreement is a "public record," as defined by 29 *Del. C.* § 10002(l), and no exemption applies to justify a denial of the Requests. The City posits that the requested settlement agreement is not a "public record" because it was not signed by the City, has never been seen by the City and, consequently, is not in the City's possession; thus, it is not "owned, made, used, retained, received, produced, composed, drafted, or otherwise compiled or collected" by the City.[14] The City maintains that, even if the settlement agreement is a public record, it is exempt from disclosure pursuant to a confidentiality provision contained therein.[15]

III. APPLICABLE LAW

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7 Email from R. Chase to OpenGovernment@state.de.us dated April 8, 2016.

8 Email from D. Griffith to OpenGovernment@state.de.us dated April 15, 2016.

9 *Id.*

10 *Id.*

11 Letter from K. Siegel to N. Rodriguez and D. Griffith dated April 25, 2016.

12 Letter from D. Griffith to K. Siegel dated May 5, 2016.

13 *Id.*

14 Response Letter at 2-3 (quoting 29 *Del. C.* § 10002(l)).

15 *Id.* at 4.

FOIA defines a "public record" as "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes."[16] Pursuant to 29 *Del. C.* § 10003(a), "[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body" and "[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen." FOIA places the responsibility for providing or denying access to public records on the "custodian" of the records.[17] However, "[i]f all or any portion of a FOIA request seeks records controlled by the public body but are not within its possession or cannot otherwise be fulfilled by the public body with reasonable effort from the records it possesses, then the public body shall promptly request that the relevant custodian provide the noncustodial records to the public body."[18]

IV. DISCUSSION

The usual threshold inquiry is whether the settlement agreement is a "public record," as defined by 29 *Del. C.* § 10002(l). The City has not argued in the general sense that settlement agreements are not public records. Nor has the City argued that 29 *Del. C.* § 10002(l)(6)[19] or any other provision[20] provides an independent basis to determine that all or part of the settlement

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16 29 *Del. C.* § 10002(l).

17 *See* 29 *Del. C.* § 10005(a) ("All public records shall be open to inspection and copying . . . by the custodian of the records for the appropriate public body.").

18 29 *Del. C.* § 10003(j)(1).

19 Certain settlement agreements are confidential pursuant to independent sources of law and may therefore be properly withheld by a public body. *See* 29 *Del. C.* § 10002(l)(6) (exempting "[a]ny records specifically exempted from public disclosure by statute or common law). By way of non-exhaustive example, this Office has previously noted that, absent parental consent, a settlement agreement between a student and a school district might be protected from disclosure pursuant to the Family Educational and Privacy Act ("FERPA"), the Individuals with Disabilities Education Act ("IDEA") and 14 *Del. C.* § 4111(a). *See Del. Op. Att'y Gen.* 10-IB10 (Sept. 8, 2010) ("If the [parent]s do not consent, then all records the District deems to be education records must be submitted to this office for confidential review so that we can determine which records, or parts thereof, are education records within the meaning of FERPA."). Similarly, Delaware's escheat law prohibits state officers and employees from disclosing, among other things, the terms of any settlement agreement resulting from the reporting of unclaimed property, except pursuant to a judicial order or as otherwise provided by law. *See* 12 *Del. C.* § 1193(a)(1). The City has not identified any such independent source of law that applies to this settlement agreement. As such, our determination that the instant settlement agreement is a non-exempt public record is limited to the facts of this matter.

20 *See* 29 *Del. C.* §§ 10002(l)(1)-(19) (enumerating exemptions from FOIA's definition of "public record").

agreement is exempt from such definition. Rather, the City maintains that, because the settlement agreement was not signed by the City and is not in the City's possession, the settlement agreement at issue is not "owned, made, used, retained, received, produced, composed, drafted, or otherwise compiled or collected by the City" and, as a result, does not meet the definition of "public record."[21] We confine our analysis herein to the City's arguments. For the reasons set forth below, we conclude that the settlement agreement is a public record that must be disclosed to the Petitioners.

In support of the position that the settlement agreement is not a public record, the City places significant emphasis on the nature of Mr. Griffiths' practice and the fact that he has not provided a copy of the document to the City.[22] Specifically, he notes that he was retained *by Travelers* to represent the City in the litigation and, as such, the document is "maintained by [his] private law firm pursuant to [its] retention by Travelers."[23] However, it is well-settled that lack of physical possession of an existing document is not, by itself, determinative of the question of whether the document is a public record subject to disclosure.[24] Indeed, a plain reading of 29 *Del. C.* §10003(j) demonstrates that Delaware's FOIA explicitly contemplates such a scenario.[25] Thus,

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21 Response Letter at 2-3 (quoting 29 *Del. C.* § 10002(l)).

22 *Id.* at 3 ("No one from the City of Dover was involved in the negotiations which led to the resolution of the litigation. More importantly, and dispositive for purposes of this analysis, *I have not provided a copy of the Release and Settlement Agreement (memorializing the terms of the resolution) to anyone at the City of Dover.*").

23 *Id.*

24 *See Del. Op. Att'y Gen.* 07-IB05, 2007 WL 4732788 (March 20, 2007) ("Our Office has determined that FOIA may require a public body to produce records that are in the possession of a third-party in a contractual relationship with the public body."); *see also Tribune-Review Publ'g Co. v. Westmoreland County Housing Auth.*, 833 A.2d 112, 118 (Pa. 2003) ("The Housing Authority argues that it did not authorize or sign the document at issue, nor did it ever see or possess the document. However, we believe that lack of possession of an existing writing by the public entity at the time of a request pursuant to the [public records] Act is not, by itself, determinative of the question of whether the writing is a 'public record' subject to disclosure."); *Daily Gazette Co., Inc. v. Withrow*, 350 S.E.2d 738, 744 (W. Va. 1986), *superseded by statute on other grounds*, W. VA. CODE § 29B-1-7 (1992), *as recognized in Daily Gazette Co., Inc. v. W. Va. Dev. Office*, 521 S.E.2d 543, 554 n.9 (W. Va. 1999) ("We conclude that lack of possession of an existing writing by a public body at the time of a request under the State's Freedom of Information Act is not by itself determinative of the question of whether the writing is a 'public record' under *W. Va. Code*, 29B—1—2(4), as amended, which defines a 'public record' as a writing 'retained by a public body.'").

25 *See, e.g.*, 29 *Del. C.* § 10003(i) ("If the public body determines that it cannot fulfill all or any portion of [a request for email records], the public body shall promptly request that its information and technology personnel *or custodians* provide the e-mail records to the public

as we have previously noted, "[w]e believe that the Courts in Delaware would agree that when a public body has constructive possession or administrative control of records in the possession of an accountant or attorney or other private agent, those records are public records for purposes of FOIA and the public body must arrange to make those records available for inspection and copying upon request."[26] The burden rests with the public body to prove that it does not have constructive possession or administrative control over records in the possession of third party agents such as attorneys and accountants.[27]

Here, the City has failed to demonstrate that it does not have constructive possession or administrative control over the settlement agreement. We recognize that, as a technical matter, Mr. Griffith was retained by Travelers and, in that capacity, may have maintained "exclusive" control of the litigation.[28] However, as a legal matter, Mr. Griffith served as counsel to the City throughout the litigation.[29] Indeed, the City was sued by Mr. Dickerson and Travelers was contractually obligated to defend and indemnify the City.[30] While the City's direct contractual

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body") (emphasis added); 29 *Del. C.* § 10003(j) ("If all or any portion of a FOIA request seeks records controlled by the public body but are not within its possession or cannot otherwise be fulfilled by the public body with reasonable effort from the records it possesses, then the public body shall promptly request that the relevant custodian provide the noncustodial records to the public body.").

26 *Del. Op. Att'y Gen.* 07-IB05, 2007 WL 4732788, at *3.

27 *Id.*

28 *See* Response Letter at 3 ("Although I would provide periodic updates on the status of the litigation upon request to the City (which communications are protected from disclosure by the attorney-client privilege), the City's legal defense, and resolution of the litigation, was controlled by Travelers. No one from the City of Dover was involved in the negotiations which led to the resolution of the litigation."); Email from D. Griffith to OpenGovernment@state.de.us dated April 15, 2016 (citing *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1274 (Del. 2016)).

29 *See* Response Letter at 1 ("The Requests have been forwarded to me inasmuch as I was retained by the City of Dover's liability insurance carrier, Travelers, *to represent the City of Dover in the Litigation.*" (emphasis added)); Answer, *Lateef Dickerson v. City of Dover*, C.A. No. 14-1244-RGA, D.I. 24 (signed by Mr. Griffith as the City's counsel); Stipulation of Dismissal, *Lateef Dickerson v. City of Dover*, C.A. No. 14-1244-RGA, D.I. 262 (same).

30 *See Enrique v. State Farm Mutual Automobile Insurance Co.*, 142 A.3d 506, 511 (Del. 2016) ("An insurance policy is a contract between the insurer and the insured."); Insurance Policy at §§ I(1)(a) (providing that Travelers "will pay those sums that *the [City] becomes legally obligated to pay* as damages because of 'bodily injury,' 'property damage' or 'personal injury' to which this insurance policy applies"), I(1)(b) (indicating that coverage is provided only if "the 'bodily injury,' 'property damage' or 'personal injury' is caused by a 'wrongful act' committed by [the City] or on [the City's] behalf while conducting 'law enforcement activities or operations'" within the coverage territory and during the policy period)(emphasis added), I(1)(a) (providing

relationship was with Travelers and it was Travelers, rather than the City, who retained Mr. Griffith, Mr. Griffith operated on behalf of both Travelers and the City.[31] Thus, even if no one *from* the City was engaged in the negotiations or signed the settlement agreement *per se*, we believe that Mr. Griffith nonetheless acted on behalf of Travelers *and* the City in negotiating the terms of the settlement.[32]

To be clear, it is of little consequence that "no one from (or on behalf of) the City *signed* the settlement agreement."[33] Mr. Griffith states that this is because neither the City nor Officer Webster asserted any counterclaims against Mr. Dickerson and, as a result, were not required to affirm by signature their release of any claims.[34] However, in its Response Letter, the City states that "[t]he litigation was resolved among the parties," "this resolution was memorialized in writing" and "[t]he parties to this agreement, *including the City of Dover*, agreed to keep the terms of the resolution confidential."[35] Additionally, we note that the Insurance Policy defines "an agreed settlement" as "a settlement and release of liability signed by us, *by the insured*, and by the claimant or the claimant's legal representative."[36] Thus, while we express no opinion regarding the validity of the settlement agreement under the terms of the Insurance Policy or otherwise if it was signed by only one party, we presume based upon this record that Mr. Griffith – in his capacity as counsel to Travelers *and* the City – or some other individual executed *or otherwise assented to* the terms of the settlement agreement on behalf of the City. Moreover, we are not persuaded that the question of whether a settlement agreement involving a public body is a public record should

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that Travelers "will have the right *and duty to defend the [City]* against any claim or 'suit' seeking those damages")(emphasis added).

31 *See Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 1995 WL 411805, at *5 (Del. Super. Mar. 17, 1995) ("In the insured-insurer relationship, counsel characteristically is retained and paid by the carrier to defend the insured and, consequently, operates on behalf of two clients.") (citing *Baker v. CAN Ins. Co.*, 123 F.R.D. 322, 326 (D. Mont. 1988)). We also note that the express terms of the Insurance Policy require the consent of the insured for any settlement. *See* Insurance Policy at § V(3) (defining "an agreed settlement" as "a settlement and release of liability signed by us, *by the insured*, and by the claimant or the claimant's legal representative") (emphasis added); *cf. Corrado Bros., Inc. v. Twin City Fire Ins. Co.*, 562 A.2d 1188, 1191-92 (Del. 1989) (no fiduciary relationship where terms of contract between insurer and insured do not require insured's consent or participation).

32 *See Tribune-Review*, 833 A.2d at 119-20 (insurer acted as public body's agent in negotiating and signing settlement agreement even where public body objected to the settlement).

33 *See* Letter from D. Griffith to K. Siegel dated May 5, 2016 (emphasis added).

34 *Id.*

35 Response Letter at 2 (emphasis added).

36 Insurance Policy at § V(3) (emphasis added).

hinge on the existence of the public body's counterclaims. Indeed, the fact that the public body is either unable or unwilling to assert counterclaims in a suit against it might suggest a weakened litigation position. It would defy logic for a settlement agreement to obtain greater protection from public disclosure under such circumstances and we believe any such interpretation to be inconsistent with the purpose of FOIA.

Finally, we note that the Insurance Policy includes a "wrongful act" deductible of $25,000 over and above any premiums paid by the City,[37] which the City is obligated to reimburse.[38] Pursuant to Article IV, Section 45 of the City of Dover's Code of Ordinances, "[n]o claim against the city shall be paid except on an order on [sic] the controller/treasurer, signed by the city manager, and approved and countersigned by the mayor." Importantly, "[t]he city manager *shall* examine all payrolls, bills *and other claims and demands against the city* and shall issue no warrant for payment, unless he/she finds that the claim is proper and in proper form and correctly computed."[39] While we express no legal opinion regarding the City's adherence to its own laws in connection with the settlement agreement, it is clear that the City had a right – if not an obligation – to receive and review the settlement agreement in order to justify payment of or reimbursement to Travelers for any deductible associated with the litigation.[40] At the very least, we believe that the City was legally entitled to a copy of the settlement agreement and the City has failed to persuade us otherwise.[41] The fact that the City may have failed to exercise that right does not change our analysis.[42]

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[37] We note – without deciding – that Travelers' payment of a settlement amount may also result in an increase in future premiums for the City. *See Corrado Bros., Inc. v. win City Fire Ins. Co.*, 562 A.2d 1188, 1192 ("The settlement may . . . prejudice the interests of the insured to the extent that settlement may result in an increase in premiums …").

[38] *Id.* at Declarations Page (providing for wrongful act deductible of $25,000 for each wrongful act, a wrongful act limit of $1,000,000 and an aggregate limit of $3,000,000); *id.* at § IV(5) ("If we settle a claim or 'suit' for damages, or pay a judgment for damages awarded in a 'suit', that are subject to a deductible, we may pay any part or all of the deductible amount. You will promptly reimburse us for such part of the deductible amount as we have paid.").

[39] *Id.* (emphasis added).

[40] *See Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127, 1133 (Ind. Ct. App. 2005) (citing statutory provision requiring public authority to demand and review claims before issuing payment, and to retain copies of documents concerning claims).

[41] *See Tribune-Review*, 833 A.2d at 118 (public body has control over production of settlement agreement because it is entitled to a copy and could either authorize its insurer to make the document available or require it to provide copies to the public body).

[42] Of course, we recognize that Travelers might have waived or otherwise declined to collect a deductible in this instance. However, such a distinction would be of little consequence, as our analysis is based on the record before us, to include the express terms of the Insurance Policy, which defines the contractual relationship between the parties, and the City's Code of Ordinances.

On this record, the City has failed to demonstrate that it does not have constructive possession or administrative control over the settlement agreement. As such, even if we accept as true the City's representation that the settlement agreement was not, in and of itself, "owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected by" the City,[43] we nonetheless conclude that the document is a public record by virtue of the City's constructive possession or administrative control thereof.

We next turn to the argument that the confidentiality provision in the settlement agreement has the legal effect of protecting it from disclosure pursuant to FOIA. This office has previously determined that "a confidentiality provision in a settlement agreement cannot preclude disclosure under the state public records law."[44] This is so because "[a] public entity cannot enter into enforceable promises of confidentiality regarding public records."[45] Indeed, exempting a document from the definition of public record merely because its creator has deemed it

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[43] Response Letter at 2-3. We note that the settlement agreement was *used* by the City to resolve its own litigation with Mr. Dickerson and release it from liability. *See* Response Letter at 3 ("The litigation was resolved among the parties and this resolution was memorialized in writing. . . .The attorneys for each party signed a Stipulation of Dismissal which was filed with the Court on December 30, 2015. On January 4, 2016, Judge Andrews of the United States District Court for the District of Delaware entered an Order granting the Stipulation of Dismissal, thereby ending the litigation."); *see also* Status Report, *Lateef Dickerson v. City of Dover*, C.A. No. 14-1244-RGA, Docket Item ("D.I.") 260 ("The parties have agreed upon a resolution of this matter, and counsel are working on having the necessary documents obtained and signed. They anticipate being able to file a stipulation of dismissal with prejudice by January 8, 2016.").

[44] *Del. Op. Att'y Gen.* 02-IB24, 2002 WL 31867898, at *4-5 (Oct. 1, 2002).

[45] *Id.* (citing *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Comm'rs*,684 N.E.2d 1222, 1225 (Ohio 1997)); *Del. Op. Att'y Gen.* 04-IB11, 2004 WL 1147054, at *1 (May 4, 2004) ("To the extent there may be a confidentiality clause in the agreement, we have previously determined that a public body 'cannot enter into enforceable promises of confidentiality regarding public records'") (quoting *Del. Op. Att'y Gen.* 02-IB24, 2002 WL 31867898, at *4-5); *see also City of Helen v. White County News*, 1996 WL 787416, at *2 (Ga. Oct. 7, 1996) (noting that a non-disclosure provision in a settlement agreement is "invalid and void as against the public policy . . . ."); *The Tribune Co. v. Hardee Mem'l Hosp.*, 1991 WL 235921, at *1 (Fla. Cir. Ct. Aug. 26, 1991) (stating that "[a]n agency simply cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements"); *Anchorage Sch. Dist. v. Anchorage Daily News*, 779 P.2d 1191, 1193 (Alaska 1989) (stating that "a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential."); *Ill. Op. Att'y Gen.* 14-004, 2014 WL 4407565 (May 9, 2014) (concluding that confidentiality provisions in settlement agreements are unenforceable as inconsistent with FOIA and against public policy).

"confidential" "would subvert FOIA's purpose of making government accountable."[46] As such, the City's alternative argument that the settlement agreement is shielded from public disclosure by virtue of a confidentiality provision fails.

While we recognize that Delaware's FOIA may not be identical to the public records provisions of other jurisdictions, we nonetheless note that courts in other jurisdictions faced with similar facts have reached the same result. For example, in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005), the Court of Appeals of Indiana held that an agreement created by the attorney appointed by a public body's insurance company, memorializing the terms and conditions of a settlement of a civil rights lawsuit brought by a former employee against the public body, was a public record under Indiana's public records statute.[47] The court noted that the retained counsel represented the public body and not the insurance company during the settlement negotiations: "the settlement agreement was created and accepted, and released [the public body] from liability during the course of Retained [ ] Counsel's representation of the public authority, and was, in effect, the culmination of that representation."[48] The court reasoned that, to accept the argument that retained counsel was a private individual, "public scrutiny of most, if not all, settlement agreements involving public authorities would be barred" and "[t]his result would effectively close the openness mandated by Indiana's public records law."[49] The court also addressed the public body's argument that it was not in possession of any settlement agreement, noting that "the treasurer could not have paid those funds absent submission of a properly processed claim" and the public body was under a statutory duty to keep a copy of the settlement agreement.[50] Importantly, the court concluded: "The fact that [the public body] never signed or received a copy of the settlement agreement is immaterial; delegating the responsibilities of creating, receiving, and retaining the settlement agreement to outside counsel does not thereby remove the document from the statute's definition of public document."[51] Finally, the court noted that the settlement of the lawsuit "obviously involved the expenditure of public money—either directly or indirectly" and "[t]axpayers of a community have the right to know how and why their

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46 *Del. Op. Att'y Gen.* 08-IB12, 2008 WL 4573037, at *2 (Sept. 16, 2008).

47 The Indiana statute defined "public record" as "any writing, paper, report, study, map, photography, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics." I.C. §5-14-3-2(m). This, we believe, is an even more narrow definition of "public record" than the definition contained in 29 *Del. C.* §10002(l).

48 *Knightstown Banner*, 838 N.E.2d at 1132.

49 *Id.* at 1133.

50 *Id.* at 1132.

51 *Id.* at 1133.

money is spent."[52] The court expressly declined to "allow a public authority to thwart disclosure required by [Indiana's public records law] by having an attorney or an insurer's attorney prepare every writing that the public authority wishes to keep confidential."[53]

In *Tribune-Review Publishing Co. v. Westmoreland County Housing Authority*, 833 A.2d 112 (Pa. 2003), the Supreme Court of Pennsylvania considered whether a settlement agreement between a former Westmoreland County Housing Authority employee and the Housing Authority's liability insurance carrier in a civil rights action was a public record under Pennsylvania's then-existing public records law, the Right-to-Know Act of 1957.[54] There, the insurer retained exclusive control of the defense, brokered a settlement, declined to collect an applicable deductible, and did not provide a copy of the settlement agreement to the Housing Authority.[55] Following settlement and dismissal of the suit, the Tribune Review Publishing Company requested that documents related to the settlement be made available for inspection. In denying the request, the Housing Authority argued that the documents were: "(1) governed by a confidentiality agreement; (2) in the possession and control of [the Insurer]; (3) did not involve the expenditure of public funds; and (4) were not 'public records' under the [Commonwealth of Pennsylvania's Right-to-Know] Act."[56] The Supreme Court of Pennsylvania affirmed the lower courts' findings that the settlement agreement sought was a public record, notwithstanding the fact that the insurer provided a defense and indemnification for a type of claim not covered by the contract and declined to collect the applicable deductible.[57]

In reaching its conclusion, the *Tribune-Review* court rejected a narrow reading of the definition of "public record" and reasoned that the definition applied to a wide range of documents containing "information relating to disbursement of public funds *or* an action of an agency that fixes the rights or obligations of individuals."[58] The court reasoned that the settlement agreement

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52 *Id.* at 1134.

53 *Id.*

54 The Pennsylvania statute defined "public record" as follows: "Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons . . . ." *See Tribune-Review Publ'g Co. v. Westmoreland County Housing Auth.*, 795 A.2d 1094, 1096 (Pa. Commw. Ct. 2002) (citing 65 PA. CONS. STAT. §66.1(2) (1971)).

55 *Tribune-Review,* 833 A.2d at 114.

56 *Id.* at 114-15.

57 *Id.* at 120-21.

58 *Id.* at 116.

was a public record because it involved conduct of the agency in its official capacity and "contain[ed] information related to the administration of the business of the public."[59] The court also concluded that the question of whether a document is in the possession of a public entity hinges on whether it is "subject to the control" of the public entity.[60] The court noted that the test is not one of physical possession, but whether the "party has a legal right to custody or control of the document in question."[61] While the Housing Authority may not have had actual possession of the document, it had control over its production and was entitled to a copy of the agreement.[62] The court agreed with a lower court's determination that "a public entity may not evade disclosure of records under its control by showing lack of actual possession of the records."[63]

Finally, the *Tribune-Review* court joined several other states in rejecting the argument that the confidentiality clause shielded the settlement from disclosure, reasoning that such a provision runs "contrary to a freedom of information statute."[64] The court noted that, despite the potential that disclosure might chill future attempts to resolve disputes, such "risk must yield to the public's right to know."[65]

V. CONCLUSION

Having determined that the City has constructive possession of or administrative control over the settlement agreement, and that the confidentiality agreement does not bar disclosure, we conclude that the City violated FOIA by denying the Requests. In order to remediate the aforementioned violation, the City should provide – or, pursuant to 29 *Del. C.* § 10003(j)(1),

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59 *Id.* at 116-17.

60 *Id.* at 118.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id* at 119; *see also Findlay,* 684 N.E.2d at 1225 (confidentiality provision does not preclude disclosure of settlement agreement and the fact that public body no longer was in possession of the document did not relieve the public body of its duty to disclose).

65 *Tribune-Review*, 833 A.2d at 119.

request its insurer to provide – each of you with the Release and Settlement Agreement.[66] We ask that the City provide the document(s) within fifteen business days of this determination.[67]

Very truly yours,

Michelle E. Whalen
Deputy Attorney General

Approved:

Aaron R. Goldstein, State Solicitor

cc: LaKresha Roberts, Chief Deputy Attorney General (via email)
Jennifer Noel, Deputy Attorney General (via email)
Nicholas H. Rodriguez, Esq. (via email)
Daniel A. Griffith, Esq. (via email)

66 We note that the City's May 5, 2016 correspondence identifies the record as a Release and Settlement Agreement and believe this to be the record responsive to the Requests.

67 *See* 29 *Del. C.* § 10003(h)(1) ("The public body shall respond to a FOIA request as soon as possible, but in any event within fifteen days after the receipt thereof . . . .").