



DEPARTMENT OF THE CORPORATION COUNSEL
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November 19, 2002

MEMO TO: Ken R. Fukuoka, Director of Council Services
F R O M: James B. Takayesu, Deputy Corporation Counsel
SUBJECT: DISCLOSURE OF PROPOSED SETTLEMENT TERMS (PAF 00-177)

This is in response to your request dated September 14, 2000, requesting our opinion on when, if ever, proposed terms of legal settlements must be publicly disclosed.

In our opinion, disclosure of settlement terms should only be made in situations where the proposed settlement terms have been agreed upon by all parties and the only act left to resolve the litigation is Council approval.

In Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw. App. 304 (1983), the Hawaii Intermediate Court of Appeals evaluated the need for attorney-client confidentiality versus the public's right to know. The Court recognized that "[t]he ability to confer freely with its counsel is so critical that even where the open meeting law did not specifically provide for such protection, one court has held that . . . the right of a public agency privately to consult legal counsel on the settlement or avoidance of litigation is an activity properly excepted from the right-to-know acts." Id. at 314.

Given the judiciary's recognition of the importance of protecting the attorney-client privilege in the context of settling litigation, we feel comfortable in advising that the terms of a proposed settlement should not be disclosed in the following circumstances:

(1) When the terms of the settlement have not been agreed upon by the parties and Council action is establishing proposed settlement authority with which the Corporation Counsel can negotiate.

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(2) When other parties to a lawsuit or similar claims remain outstanding, a negotiated settlement with one party should not be revealed. Disclosure would harm efforts to resolve the other claims or encourage the filing of similar claims against the County. This is consistent with an opinion of the Office of Information Practices, where OIP concludes that "disclosure of a settlement agreement between the State and the settling defendants, where there are similarly situated defendants that have not agreed to settlement, would give a manifestly unfair advantage in continuing settlement negotiations to those defendants with whom the State has not yet settled." OIP Opinion Letter No. 89-10.

If, however, the terms of a settlement agreement have been agreed upon, and Council approval is the final action to consummate the agreement, and provided no other parties may have similar claims or are similarly situated, then the terms of the settlement agreement may be disclosed unless such disclosure would constitute an unwarranted invasion of personal privacy.

Based on the information you provided concerning many other government entities that do disclose settlement information, we do not believe that disclosure in the limited circumstance set forth above will frustrate the County's business. It is further noted that it is this County's practice to report the settlement amounts of all claims and lawsuits in the Director of Finance's quarterly report to the County Council.

If you have any questions regarding this matter, please feel free to contact me at x7740.