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Hon. Leevin Taitano Camacho
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July 20, 2020

OPINION MEMORANDUM

TO: Public Auditor, Office of Public Accountability

FROM: Attorney General

SUBJECT: Application of the Freedom of Information Act or Sunshine Law to Settlement Agreements (Ref: OPA 20-0143)

This opinion is provided in response to your April 15, 2020 letter requesting legal guidance on the application of the Sunshine Reform Act or Freedom of Information Act to settlement agreements.

QUESTION AND SHORT ANSWER

Whether settlement agreements in finally adjudicated cases entered into by the Port Authority of Guam (“PAG”) shall be open for public inspection under Guam’s Freedom of Information Act (“FOIA”) when there is pending litigation in related matters. The answer is yes, unless a separate express exemption under 5 GCA § 10108 applies.

DISCUSSION

Statutes are interpreted “in light of their terms and legislative intent. Absent clear legislative intent to the contrary, the plain meaning prevails.” *People v. Quintanilla*, 2020 Guam 8 ¶ 13 (internal citations omitted). “The plain meaning rule for statutory interpretation provides that ‘if the language of a statute is clear and there is no ambiguity, then there is no need to “interpret” the language by resorting to the legislative history or other extrinsic aids.’ ” *Macris Guam Memorial Hospital Authority*, 2008 Guam 6 ¶ 20 n. 2 (quoting *People v. Angoco*, 1998 Guam 10 ¶ 5); accord, *In re A.B. Won Pat Int’l Airport Auth.*, 2019 Guam 6 ¶ 45.

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Guam's FOIA, the Sunshine Reform Act of 1999 ("Sunshine Law"), is found at 5 GCA §10101, et seq. It provides in part,

- (a) Every person has the right to inspect and take a copy of any public document on Guam, except as otherwise expressly prohibited in law, and except as provided in §10108 of this Chapter.
- (b) Public records are open to inspection at all times during the office hours of the agency and every person has a right to inspect any public record, except as hereafter provided. Any segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.
- (c) Except with respect to public records exempt from disclosure by express provisions of the law, each agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person, upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable. Upon request, an exact copy shall be provided, unless impracticable to do so.

5 GCA §10103. Thus, public records must be made available for inspection and copy unless an exception for disclosure is provided in 5 GCA §10108.

The first question is whether settlement agreements are public records. If there was any ambiguity before, P.L. 32-076 (Bill No. 133-32 (COR)) signed into law November 27, 2013, was intended to resolve it. The legislative Findings and Intent are instructive:

Legislative Findings and Intent. *I Liheslaturan Guahan* advocates for an open and transparent government and desires to enhance accountability in public departments, agencies, branches, and corporations.

Currently, there is no provision in statute requiring open and transparent settlements for civil action suits or other disputes concerning public departments, agencies, branches, corporations and funds. Without such a statute to allow for the public to review the

government's actions in all settlements, the government will never truly be open and accountable.

I Liheslaturan Guahan finds that good public policy allows all settlements [to be] accessible for public review. Full disclosure of decisions made by elected or appointed public officials, on behalf of the government of Guam, with individuals, private businesses or other governments provides for review and scrutiny of such decisions. By enacting a policy establishing full disclosure, public officials and the government of Guam are more accountable in aligning settlements with the public's interest, as well as building a climate of public trust.

Therefore, *I Liheslaturan Guahan* intends to prohibit the sealing of settlements concerning public departments, agencies, branches, corporations and funds by adding and amending current laws relative to the procedures for filing claims and actions to ensure that settlement of claims on behalf of the government of Guam shall be open to public review.

P.L. 32-076 § 1. Guam law now expressly defines public records as including “any out-of-court settlement records.” 5 GCA §10102(d). It is clear that settlement agreements are public records. Thus, the critical question is whether any of the limitations in 5 GCA §10108 apply to the settlement agreements requested.

Section 10108 lists a number of exceptions to the rule that public records must be made available for inspection and copying. Among those exceptions are records “pertaining to pending litigation to which the agency is a party, until the pending litigation has been finally adjudicated or otherwise settled.” 5 GCA §10108(a). The government agency opposing disclosure has the burden of establishing that one or more of the exceptions apply in a particular case. *County of Los Angeles v. Superior Court (Alexrad)* 82 Cal. Ct. App. 4th 819, 825, 98 Cal. Rptr.2d 564, 568 (2000).

Here, you advise that while your office was conducting a performance audit of an agency’s “settlements and pending litigations on back wages and retroactive pay for several individuals terminated from [the agency, the agency’s manager] expressed his concerns over the negative inferences made by the public because [the agency] was keeping the settlement amounts of adjudicated claims confidential.” It was suggested that the disclosure of one or more settlement agreements of adjudicated claims might influence the agency’s ability to favorably settle similar or related claims that had not yet been fully adjudicated or otherwise resolved by settlement.

The Legislature has made a policy decision that creates a presumption for the disclosure of settlement agreements in finally adjudicated cases. Public Law 32-076 amended the definition of public records in FOIA to expressly include “any out-of-court settlement records.” 5 GCA §10102(d). Furthermore, the stated purpose of P.L. 32-076 was to require the disclosure of settlement agreements so that “public officials and the government of Guam are more accountable in aligning settlements with the public's interest, as well as building a climate of public trust.” Based on the plain language of the Sunshine Law and its legislative intent, a settlement agreement in a matter that has been finally adjudicated cannot be withheld under the pending litigation exception simply because it could potentially affect settlement discussions in other on-going matters.

We do not have the benefit of reviewing the settlement agreements to discern whether they contain information that would fall under other exceptions in 5 GCA §10108. We would note, though, that in a situation where a settlement agreement contained provisions that might be exempted under 5 GCA § 10108, those specific portions may be redacted.

You have also inquired whether sections 10102(d) and 10113 of 5 GCA Chapter 10 – or any other provisions of P.L. 32-076 – are applicable to the settlements that resulted from awards rendered by Civil Service Commission (“CSC”) as opposed to litigation before the courts of Guam. We perceive no difference between settlement agreements entered into as a result of awards by the CSC or as a consequence of pending or threatened litigation in the courts. For purposes of deciding whether they are public records subject to disclosure under FOIA or the Sunshine Law, they are the same.

CONCLUSION

We discern no ambiguity in the law. Unless an express exemption under 5 GCA §10108 applies, out-of-court settlement agreements before the courts or the CSC are public records subject to inspection.

We trust we have sufficiently addressed your inquiry. For further information concerning this matter, please use the reference number shown above.



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