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ENERGY AND ENVIRONMENTAL LAW

Settlement Negotiations and Public Disclosure Laws

BY DIANA A. SILVA

Special to the Legal

When negotiating a private settlement agreement, practitioners typically consider such negotiations to be confidential and privileged, not to be disclosed by the parties outside of the confines of the settlement discussions. In fact, most private mediation and settlement agreements contain specific confidentiality provisions, with each party expressly agreeing that the terms of the settlement are to be kept strictly confidential and not disclosed to any third party unless required by law. But, when settlement negotiations take place with a governmental agency, maintaining confidentiality both during and after settlement can be more problematic, as the content of the negotiations and documents exchanged may be subject to disclosure under the federal Freedom of Information Act (FOIA) and state "sunshine" laws, including Pennsylvania's Right-to-Know Law and New Jersey's Open Public Records Act (OPRA).

Diana A. Silva *is an attorney at the environmental, energy and land use law and litigation firm Manko, Gold, Katcher & Fox located just outside Philadelphia. She can be reached at 484-430-2347 or dsilva@mankogold.com.*

In general, Federal Rule of Evidence 408 protects settlement communications by making statements and documents exchanged during settlement negotiations inadmissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Rule 408 was intended to facilitate and promote a general public policy favoring settlements and the resolution of claims. Most states, including Pennsylvania and New Jersey, have adopted their own versions of Rule 408 that generally track the rule and prohibit the admission of evidence of parties' settlement negotiations.

While settlement materials may be prohibited from being introduced as evidence under Rule 408, those same materials may still be subject to disclosure under FOIA, the Right-to-Know Law, and OPRA. Under these public disclosure laws, most documents maintained by a government agency or department are considered "public records" subject to public review and production, unless a specific exemption or common law privilege applies to exclude or otherwise protect the document from disclosure.

FOIA

FOIA, 5 U.S.C. Section 552, applies to all federal agencies and departments, including the Environmental Protection Agency (EPA) and the Department of Justice (DOJ). Federal agencies are required to disclose any information requested under FOIA, unless one of the nine listed exemptions applies. The two FOIA exemptions that environmental practitioners

should become familiar with are: Exemption 4, which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential"; and, Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency," (e.g., which includes documents that are normally privileged in civil discovery).

Exemption 4 can be used to protect any trade secret or confidential business information that is exchanged during settlement negotiations with the EPA or the DOJ, so long as that information is provided "voluntarily" to the government, rather than compelled or required to be submitted under a regulatory program. And at least one federal district court case has read FOIA Exemption 4 broadly to encompass information exchanged during the course of settlement negotiations. In *M/A-Com Information Systems v. U.S. Department of Health and Human Services*, 656 F. Supp. 691 (D.D.C 1986), the U.S. District Court for the District of Columbia held that information provided to a federal agency by a publicly traded company during confidential settlement negotiations was protected from disclosure under Exemption 4 of FOIA. The opinion specifically noted that "it is in the public interest to encourage settlement negotiations ... and it would impair the ability of [the agency] to carry out its governmental duties if disclosure of this kind of material under FOIA were required." Despite the holding and policy articulated in the *M/A-Com* case, there is an overall lack of federal case law interpreting and applying FOIA Exemption 4 to broadly protect information exchanged during settlement negotiations with the federal government.

The applicability of FOIA Exemption 5 to settlement exchanges is potentially even more problematic. While federal courts have interpreted the exemption to encompass common law privileges that apply in the context of civil discovery (including the attorney work-product, attorney-client, and "deliberative process" privileges), the threshold requirement for the exemption is that the requested record be either an inter-agency or intra-agency document, which requires that the "source" of the record be the government agency itself. This exemption would, for example, cover the EPA's or the DOJ's internal drafts of a consent decree in an environmental enforcement action or civil penalty matter, but may not protect those documents after they are exchanged with the private attorneys representing the regulated entity during settlement negotiations, or protect the private attorneys' proposed revisions to the consent decree.

The practical effect of not having a specific exemption for settlement communications in FOIA is that the absence of such protection may have a potential chilling effect on settlement negotiations with federal agencies.

For example, in *United States v. Metropolitan St. Louis Sewer District*, 952 F.3d 1040 (8th Cir. 1991), an environmental nonprofit citizen advocacy group intervened in a Clean Water Act case that EPA brought against the St. Louis Sewer District for alleged discharges of pollution to local waterways. The citizen group filed a cross-complaint under FOIA seeking to have the EPA release drafts of the consent decree that was eventually entered to resolve the case. The U.S. Court of Appeals for the Eighth Circuit held that while internal agency drafts of a consent decree may fall under FOIA Exemption 5, that exemption was waived once the document was shared with the EPA's adversary in the case, the St. Louis Sewer District, because the document no longer would be considered an "inter-agency or intra-agency memorandum" or otherwise protected by a common law privilege. Similarly in *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739 (D.D.C. 1983), the District Court for the District of Columbia held that FOIA Exemption 5 did not protect either drafts of a consent decree that DOJ shared with the private-party defendants during settlement negotiations, or the documents prepared and submitted by the

private-party defendants to the DOJ, because when the documents were used as "tools in their negotiations," they were no longer internal agency documents subject to FOIA Exemption 5.

By contrast, other federal courts have recognized that a common law "settlement privilege" could be used to protect documents from public disclosure under FOIA Exemption 5. In *Goodyear Tire & Rubber v. Chiles Power Supply*, 332 F.3d 976 (6th Cir. 2003), a non-FOIA case, the Sixth Circuit recognized that statements made in furtherance of settlement are privileged and protected from third-party discovery, particularly in light of a "strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations."

As the federal case law is still evolving on these issues, practitioners should remain cautious when they exchange any information or documents with either the EPA or the DOJ during settlement negotiations because such exchanges may be subject to public disclosure under FOIA.

PENNSYLVANIA'S RIGHT-TO-KNOW LAW

Pennsylvania's Right-to-Know Law, 65 P.S. Section 67.01 et seq., generally provides that all documents in possession of a Pennsylvania state or local agency or department, which includes the Pennsylvania Department of Environmental Protection (PADEP), are presumed to be a "public record" and subject to disclosure. But, the term public record is defined to specifically exclude documents that are: exempt from disclosure under Section 708 of the act; protected by an applicable privilege; or exempt from disclosure by any other federal or state law, regulation, judicial order, or decree. Also, like FOIA, the Right-to-Know Law protects a document that "constitutes or reveals a trade secret or confidential proprietary information," and Section 707(b) of the act contains specific notification provisions if a public request is submitted that would encompass documents that contain trade secrets.

The Right-to-Know Law defines "privilege" as including the attorney-client privilege, the work-product doctrine, the doctor-patient privilege, the speech and debate privilege, and also, any "other privilege recognized by a court interpreting the laws of [the Commonwealth of Pennsylvania]." In *City of Pittsburgh v. Silver*, 50 A.3d 296 (Pa. Commw. Ct. 2012), the Commonwealth Court expressly held that communications and documents exchanged during settlement negotiations are not subject to disclosure under the Right-to-Know Law. The Commonwealth Court based its decision on Pennsylvania's general policy of favoring settlements, stating that "allowing anyone to make ongoing requests under the [Right-to-Know Law] concerning all correspondence regarding settlement impermissibly intrudes into the conduct of litigation because it would lessen the frank exchange of information between the parties thereby adversely affecting the ability for litigation to settle." The Commonwealth Court further held that allowing disclosure of settlement negotiations would also run afoul of an attorney's ethical duties under Pennsylvania Rule of Professional Conduct 1.6 to maintain attorney-client confidentiality and not disclose information regarding representation of the client.

However, once a settlement has been struck and an agreement is set in stone, the final settlement agreement is subject to disclosure under the Right-to-Know Law, and Pennsylvania courts will generally consider any confidentiality provisions contained in the agreement to be unenforceable. When the Right-to-Know Law was rewritten in 2008, it embodied Pennsylvania case law on this issue, and the statute now includes a specific exception to exemption number 17 in Section 708 of the act, which expressly allows the disclosure of an executed settlement agreement, unless the agreement is deemed confidential by a court order.

Therefore, unlike negotiations regarding a settlement agreement with the EPA or the DOJ, if a regulated entity facing an enforcement or civil penalty action engages in settlement negotiations with the PADEP, the information and documents exchanged during the settlement process will not be subject to public disclosure. However, once the settlement agreement is executed, absent a

confidentiality order, the final settlement agreement will be subject to public disclosure under the Right-to-Know Law.

NEW JERSEY'S OPEN PUBLIC RECORDS ACT

Like Pennsylvania, New Jersey grants public access to all "government records" under OPRA, N.J.S.A. 47:1A-1 et seq., which includes all documents received by a New Jersey state or local agency or department during "the course of ... its official business." OPRA similarly excludes from the definition of a government record all documents or information deemed confidential, including specifically "trade secrets and proprietary commercial or financial information obtained from any source," any records that fall within the attorney-client privilege, and information deemed confidential pursuant to a court order. Further, OPRA specifically states that it does not abrogate any exemptions from public disclosure that exist pursuant to any other New Jersey statute, regulation, legislative resolution, executive order, or that exists in the New Jersey Rules of Court, or any federal law, regulation, or order.

The New Jersey Department of Environmental Protection (NJDEP) has expressly codified a specific exemption from OPRA for documents and information exchanged as part of a settlement proceeding. Section 7:1D-3.2(a)1 of the New Jersey Administrative Code provides that all "records relating to mediation proceedings conducted by or on behalf of the [NJDEP]" "shall not be deemed to be government records subject to public access pursuant to OPRA." The exception to this general protection for information and documents exchanged during settlement includes, not surprisingly, the final settlement agreement that results from the mediation, as well as any documents that existed in the NJDEP's possession before the mediation occurred and that would have otherwise been "government records" subject to disclosure under OPRA.

PRACTICAL CONSIDERATIONS

While Pennsylvania and New Jersey have adopted protections for information and documents exchanged during settlement negotiations, either expressly in relevant statutory and regulatory language or through interpretive case law, FOIA and federal case law thereunder remain unsettled on the issue. The practical effect of not having a specific exemption for settlement communications in FOIA is that the absence of such protection may have a potential chilling effect on settlement negotiations with federal agencies. If a private party's settlement posture, as shown in draft settlement agreements or other materials exchanged with the EPA, is subject to a FOIA request—both EPA and the private party may not be as willing to engage in the "frank exchange" of information, which may impact the parties' ultimate ability to settle. Without a specific FOIA exemption for settlement communications, the general policy of encouraging prompt and early settlement of the government's claims may also be undermined.

Attorneys representing clients in the regulated community that are facing a governmental enforcement or civil penalty action, or that are negotiating the terms of a consent decree or other settlement agreement with the federal government, must therefore carefully consider what information to provide or exchange with a governmental agency during settlement negotiations, and should inform clients that, absent a court order, materials provided in the context of settlement negotiations may be subject to public disclosure. •

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