

Jonathan Smith

From: Jonathan Smith
Sent: Thursday, April 1, 2021 1:00 PM
To: Eric Haven; Eric Haven; Sue Wylie; Al Avery; Ed Bonser; ed bonser; Gary Casey; Gary Casey; Jason Kneisc; luginskij@villageofclarkston.org; 'ICE - Joe'
Subject: Clarkston Secrets Blog
Attachments: 20210401100533141.pdf

Hello Mayor Haven and City Council,

Yesterday afternoon the Bisio's were provided signed copies of the final Settlement Agreement and payment from the three defense parties, totaling \$160K. Susan did not waste any time attacking the City, posting the attached comments on her Clarkston Secrets blog.

I forwarded the comments to Mark Peyser this morning and then spoke with him. While there are several misleading statements in the posting, Mark only recommended that [REDACTED]. He recommended that we [REDACTED]. To save costs, he asked that I prepare a draft document and send to him for review and editing. After that, I will send it to each of you for feedback.

For your information,

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CLARKSTON SECRETS

MARCH 31, 2021 BY CLARKSTON SECRETS

The City Council Has Apparently Not Learned a Damned Thing

On Tuesday evening, March 30th, the city council held a special meeting, and one of the items on the agenda concerned settlement of my Freedom of Information Act (FOIA) lawsuit. Only six of the seven council members were present (Ed Bonser was absent). After coming out of closed session, the six city council members present voted unanimously on the following statement relating to settlement of the FOIA lawsuit:

Motion - Bisio Lawsuit Settlement Agreement

A motion is hereby made for the City Council to authorize City Manager Jonathan Smith to execute the Susan Bisio settlement agreement whereby in addition to the City paying directly the sum of \$35,000 to Ms. Susan Bisio's counsel, the Kemp Klein law firm in settlement of the total fee claim, both the City and Ms. Bisio has [sic] agreed to release each other from any and all claims they may have against the other arising out of the FOIA litigation.

In response to Chet Pardee's question, City Manager Jonathan Smith admitted that the complete settlement agreement was in front of the city council members during the closed session. This means that the council members knew that what they were representing to the public as a "settlement agreement" was false, misleading, and subject to challenge in the following ways:

1. Though the motion was titled "Bisio Lawsuit Settlement Agreement," the motion language was clearly not the settlement agreement. The city deliberately concealed the agreement from the public by not attaching it to the motion. The city council authorized Smith to sign the settlement agreement on the City of the Village of Clarkston signature line because council approved the entire agreement in closed session.

2. City Manager Jonathan Smith claimed they could not share the settlement agreement "at the present time" because not everyone had signed the agreement. That is absolutely untrue. The settlement agreement clearly meets the definition of a public record under the FOIA, and it didn't matter that not everyone had signed the document at that point.
3. The document that Smith was authorized to execute was obviously *discussed and approved* in its complete form by the six city council members who were present in a closed session, but it was not disclosed and approved by the six city council members present in open session, in violation of the Open Meetings Act (OMA). Should someone wish to file an OMA complaint, not only are the individual city council members once again subject to civil and criminal liability, but the agreement can also be set aside because it wasn't properly authorized by the city council. The city council was warned about the need to comply with the OMA by the Oakland County Prosecutor following a previous violation of the OMA. **The city council can correct the OMA violation by reenacting its decision and approving the actual settlement agreement in open session.** Absent that additional action, I'm not sure how many lawsuits it will take to force the city to comply with the OMA and the FOIA, but apparently two lawsuits are insufficient.
4. The language in the motion is an official act of the city that misrepresents that the settlement of the total fee claim was \$35,000. It was not. The total settlement of the fee claim was \$160,000 and for whatever reason, the city doesn't wish to publicly acknowledge this. You'll note that in addition to me and my law firm, Kemp Klein, the settlement agreement that I've linked below has signature lines for City Attorney Tom Ryan, Ryan's law firm, the Michigan Municipal League Liability and Property Pool (MMLLPP), and the City of the Village of Clarkston. They were all responsible parties and decided how to split the cost of the settlement among themselves. Frankly, we could not care less how they split the responsibility for payment. However, the city is misrepresenting the terms of the settlement to the public by disclosing *only* the city's portion of the settlement and claiming that it's in "settlement of the total fee claim" in my lawsuit against the City of the Village of Clarkston.
5. While it's true that the city and I released each other, the motion misrepresents what is in the agreement. There were a lot of mutual releases in the settlement agreement that you can read for yourself.

Since the city is refusing to be transparent *about a settlement agreement resulting from a transparency lawsuit*, I think that it's fair to conclude that they are deliberately

misrepresenting the settlement terms to the public for reasons that they have also not disclosed to the public.

Before the city council meeting, my attorney urged the city's attorney, Mark Peyser, to follow the OMA and attach the settlement agreement to the motion. He refused. It's not clear why Peyser would advise the city to conceal a contract – which is what a settlement agreement is – by not including it with the motion to approve it and by only disclosing select terms of that contract to the public.

I would note that the city was not required to take Peyser's advice and could have decided to attach the settlement agreement to the motion on its own. Similar advice from Ryan – that public records don't "become" public records unless and until the lawyer deems it so – caused the FOIA lawsuit they are now settling. You'd think one of the six council members present, two of whom are attorneys, would have spoken up about this rather than following along like sheep. Apparently, that was not the case.

I want to be crystal clear about something. I have ZERO interest in trying to blow up the settlement agreement and do not plan to file an OMA complaint in court or with the Sheriff, because I would like the settlement agreement to remain unchallenged. If I did not agree to the terms of the settlement agreement, I would simply have refused to sign it. (Contrary to what the city claimed in motions and responses that it filed in Oakland County Circuit Court, our judge could not force me to sign an agreement containing material terms that I did not agree to in 30 days – or in 30 years – and if the judge tried to do something like that, he would be overturned on appeal). But in concealing information from the public for some undisclosed reason, the city created a huge opening for *someone else* to try to invalidate the agreement – and that was incredibly stupid. Not only that, it also demonstrates a complete lack of self-awareness regarding what the entire litigation was about – **which was hiding information from the public that the public is entitled to see.** This needs to stop now.

Now let's reveal what the city is trying to keep secret.

A copy of the fully signed settlement agreement is linked here: 20210331 – Fully signed settlement agreement. Please note that a signature on one signature page is the same as if everyone sat down in the same room and signed at the same time and is called signing in "counterpart." On the morning of March 30th, my attorney forwarded a copy of the agreement signed by Kemp Klein and me. Ryan signed for himself and his law firm on March 30th. The MMLLPP and Smith (for Clarkston) signed on March 31st.

A copy of the check that Kerr, Russell and Weber paid to my attorney's firm is linked here: 20210331 - Kerr Russell. (Please note that I've removed the firm's banking information from the check before posting it publicly.) Kerr, Russell and Weber is James Tamm's law firm. James Tamm is the lawyer assigned to represent Clarkston in the FOIA lawsuit by the MMLLPP.

You'll notice that the Kerr, Russell and Weber check is written in the amount of \$70,000. Clarkston and Ryan's malpractice insurer each sent their payments to Kerr, Russell and Weber (but Kerr, Russell and Weber is not making any financial contribution to the settlement). Since you know that the city contributed \$35,000 to the settlement, you can do the math and figure out that Ryan's insurer contributed an equal portion to the settlement on Ryan's behalf as compensation for Ryan's bad conduct relating to the FOIA lawsuit (\$35,000).

A copy of the check from the MMLLPP to Kemp Klein in the amount of \$90,000 is linked here: 20210331 - MMLLPP. (Please note that I've removed the MMLLPP's banking information from the check before posting it publicly.) As you will recall, Ryan failed to tell the city council that the MMLLPP had objected to paying any of my attorney's fees. Apparently, the MMLLPP decided to compromise and pay a little over half of the total negotiated settlement amount under Clarkston's MMLLPP insurance policy.

$\$90,000$ (MMLLPP) + $\$35,000$ (Clarkston) + $\$35,000$ (Ryan) = $\$160,000$, which is the total amount of the settlement.

It doesn't matter that we are agreeing to an order to dismiss the lawsuit. I can tell you from personal experience that someone outside of the city can move to intervene in a closed case. In the case that I'm familiar with, the individual filed a motion to intervene because he objected to part of a final order that required the settlement to be kept confidential. Even though the case had been dismissed on stipulation of the parties years before, the judge reopened the case, modified the order to remove the confidentiality requirement, and the settlement agreement was thereafter released under FOIA.

I would be remiss if I didn't add that if you needed additional evidence that the city hasn't learned anything from the lawsuit, take a look at Paragraph C under the "Recitals" section of the settlement agreement. **Everyone in the world knows that I won my FOIA lawsuit in the Michigan Supreme Court**, yet the city simply could not bring itself to admit that ("Plaintiff contends she is the prevailing party in the Lawsuit under the Freedom of Information Act. The City contests that"). Um, OK. 🙄🙄🙄

It's not hard to be transparent. You just have to want to do it. Apparently, the city has learned absolutely nothing from the last five years of litigation and intends to continue to hide things from the public – even if it means that the settlement agreement they claimed to have wanted so badly could be set aside by anyone who wants to do so – unless they properly authorize its execution in a reenactment in an open meeting.

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🔍 **CLOSED SESSION, FREEDOM OF INFORMATION ACT (FOIA) LAWSUIT, OPEN MEETINGS ACT (OMA)**

1 comments

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Cory Johnston

March 31, 2021

In addition to what appears to be a clear violation of Michigan's Open Meetings Act, while settling a violation of Michigan's Freedom of Information Act, it appears the city council and administration also violated

the city charter if they approved the city manager signing the settlement agreement, or contract. Section 12.1 of the charter clearly states that all contracts "...shall be signed on behalf of the City by the Mayor and the Clerk." But as usual, the city cares little about state law, city charter, ordinance or resolution.

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