

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

BEN C. LIPSCOMB,
City Attorney for the City of Rogers, Arkansas

PLAINTIFF

V.

NO. 14-5338

C. GREG HINES, Mayor of the City of
Rogers, Arkansas, et al.

DEFENDANTS

ORDER

On January 23, 2015, the above parties will be participating in a settlement conference regarding a lawsuit filed by Plaintiff on November 5, 2014. (Doc. 1). For the reasons set forth in Defendant's memorandum, which is attached to this Order, the Court is closing the settlement conference to the public.

If the media wishes to object to closing settlement conferences in the future, they may file a timely motion and brief the Court on the legal authority supporting their position.

IT IS SO ORDERED this 23rd day of January, 2015.

/s/ Erin L. Setser

HON. ERIN L. SETSER
UNITED STATES MAGISTRATE JUDGE

MEMORANDUM

To: Magistrate Judge Erin L. Setser
From: Municipal Legal Defense Program
Date: January 23, 2015
Re: Settlement Conference and the Arkansas Freedom of Information Act

Introduction

Often, the cities and towns of Arkansas are afforded the opportunity to settle lawsuits prior to trial during a settlement conference led by the Magistrate Judges of both the Western and Eastern Districts of Arkansas. This opportunity is appreciated, and more importantly, the opportunity to resolve a case without the need for a trial is beneficial to not only to the cities and towns of Arkansas but to all parties involved.

There is of course an additional dynamic of a settlement conference involving a public entity – specifically, navigating through the dictates of the Arkansas FOIA law, while also ensuring communications made during these conferences are confidential. Without question, Arkansas’s FOIA law is a valuable tool to ensure openness. However, the Magistrate Judges of the Western District have acknowledged that allowing “public access to settlement conference negotiations would in effect render a settlement conference useless because parties would not openly evaluate their case with the court.” *Order to Close Settlement to the Public*, Case 2:11-cv-02170-RTD, Document No. 22. This is an absolutely correct assessment and is supported by both logic and law.

As Judge Marschewski noted in the above cited Order:

The Court acknowledges the liberal interpretation of FOIA in allowing access to all governing body meetings; however, keeping in mind that fostering settlement of any case or controversy is an Article III function, we must balance countervailing factors against the presumption of public access to settlement conference negotiations. “A settlement conference is an opportunity for the

parties, with the court acting as an impartial mediator, to have frank discussion about the value of avoiding a trial.” *U.S. v. Glens Falls Newspaper*, 160 F.3d 853, 858 (2 Cir. 1998) (citations omitted). During these discussions the parties are often called upon to evaluate both the strengths and weaknesses of their respective cases. Parties participating in a settlement conference would be reluctant to make any concessions or openly discuss all avenues of settlement if they could expect that their statements during negotiations or their settlement proposals would be published at large to the public.

In the holding above, Judge Marschewski has precisely articulated the reasons settlement conferences, as a whole, should be kept confidential; Arkansas and federal law agrees.

Arkansas Law Provides That Settlement Negotiations Are Private and Not Bound by FOIA Law

Arkansas law provides that communications made during the course of an alternative dispute resolution proceeding, such as a mediation, are to be confidential. Ark. Code Ann. § 16-7-206 (a). Specifically, Arkansas Code Annotated § 16-7-206 (a) provides that

communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process . . . is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding.

Of course, subsection (a) of Ark. Code Ann. § 16-7-206 provides an exception when the law conflicts with another; however, the FOIA and § 16-7-206 do not conflict. (*emphasis added*).

Not only does the FOIA not conflict with § 16-7-206(a), but the FOIA yields to it. The FOIA states that “. . . all meetings, formal or informal . . . shall be public meetings . . . except as otherwise provided by law.” Here, that other provision of the law is Ark. Code Ann. § 16-7-206(a)—a communication made during “a dispute resolution process . . . is confidential and is not subject to disclosure.” (*emphasis added*). And, the FOIA contains no language indicating that settlement conferences are “public meetings;” in fact, the Arkansas Attorney General has opined that a settlement conference is not a “meeting” for purposes of the FOIA. *Ark. Op. Atty.*

Gen. No. 94-131. Considering no conflict exists between the FOIA and § 16-7-206, Arkansas law supports keeping court-ordered settlement conferences confidential.¹

Even assuming the FOIA conflicts with § 16-7-206, the Arkansas Legislature has provided that a court may determine “whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court.” *Ark. Code Ann.* § 16-7-206(c).

The Supremacy Clause Allows Federal Judges to Close Settlement Conferences

Further, per the Supremacy Clause, the district courts have authority to close a settlement conference. The Eighth Circuit has addressed the argument that state FOI law somehow prohibits a federal court from ordering a settlement conference be held in closed session. In *In re Kansas City Star Co.*, the Eighth Circuit made short work of just such an argument:

the Star claimed at oral argument that if a state governmental body appeared as a party at a settlement conference ordered by a federal district court, such a conference could not be closed without violating the Act. We reject this argument. The Supreme Court has unequivocally stated that a “state-law prohibition against compliance with [a federal] district court's decree cannot survive the command of the Supremacy Clause.

In re Kansas City Star Co., 73 F.3d 191, 195, (8th Cir. 1996) (citing *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958))).

Thus, even if an argument could be made that Arkansas FOIA law mandates a settlement conference be open to the public, the Supremacy Clause allows the district court to close the

¹ Federal law is organized in a similar fashion. The law starts with disclosure requirements, but that requirement does not apply to those “specifically exempted from disclosure by statute.” 5 U.S.C.A. § 552 (b) (3) (referred to by courts as “Exemption 3”). Case law indicates that “only explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.” *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979). And, Federal courts have found that mediation is covered under the exemption due to 28 U.S.C. § 652 (d). *Yelder v. U.S. Dep't of Def.*, 577 F. Supp. 2d 342, 347 (D.D.C. 2008) (finding the use of Exemption 3 appropriate for a letter to a mediator setting out the Government's position because it was “[c]learly, such a confidential communication [that] qualifies as a confidential dispute resolution communication under 28 U.S.C. § 652(d).”).

conference, regardless. With that said, there is no need for any trumping of state law considering state law provides for the confidentiality settlement conferences require.

Conclusion

For all the reasons set forth in Judge Marschewski's Order, and supported by Arkansas law, a court order maintaining the privacy of such an important proceeding is necessary. Otherwise, "[p]arties participating in a settlement conference would be reluctant to make any concessions or openly discuss all avenues of settlement if they could expect that their statements during negotiations or their settlement proposals would be published at large to the public." *Order to Close Settlement to the Public*, Case 2:11-cv-02170-RTD, Document No. 22. As such, Magistrate Judges' orders closing settlement conferences to the public is proper under the law and necessary to accomplish the purpose of these settlement conferences.