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October 3, 2013

Beth Townsend, Executive Director
Iowa Civil Rights Commission
400 E. 14th Street
Des Moines, IA 50319

Attn: Don Grove, Supervisor

RE: REQUEST FOR ADVISORY OPINION
August 1, 2013

Dear Director Townsend:

This advisory opinion is in response to your request of August 1, 2013. In that correspondence you asked for an opinion as to two issues:

1. Whether the Iowa Civil Rights Commission is required under Iowa Code Section 22.13 to prepare and provide "a brief summary of the resolution of the dispute" when the settlement was reached by the parties to a civil rights complaint filed with the Iowa Civil Rights Commission under Iowa Code Chapter 216 and the Iowa Civil Rights Commission signs the agreement?
2. Whether the Iowa Civil Rights Commission is required under Iowa Code Section 22.13 to prepare and provide "a brief summary of the resolution of the dispute" when the settlement was reached on a complaint or enforcement action filed by the Commission against an employer, housing provider, or other covered person or entity under Iowa Code Chapter 216?

On August 15, 2013, the Iowa Public Information Board (IPIB) issued an advisory opinion which is now withdrawn and superseded by this opinion which is based upon new information provided by the Iowa Civil Rights Commission (ICRC), including that relating to the contractual and fiscal relationship between the ICRC and the Equal Employment Opportunity Commission (EEOC) as well as the historical development of federal and state statutory relationships..

QUESTION 1

On September 6, 2013, you filed a request for reconsideration with supportive brief. It appears that the first question noted above is more accurately stated as follows:

Whether the Iowa Civil Rights Commission is required under Iowa Code Section 22.13 to prepare and provide a "brief summary of the resolution of the dispute" when *a conciliation agreement is*

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reached by the parties to a civil rights complaint filed with the Iowa Civil Rights Commission under Iowa Code Chapter 216 and the Iowa Civil rights commission signs the agreement?

A copy of the EEOC/FEPA Model Worksharing Agreement between the federal government (Equal Employment Opportunity Commission) and the State of Iowa (Iowa Civil Rights Commission, aka FEPA) was included with the reconsideration brief. That document *requires* the Iowa Civil Rights Commission to keep certain information confidential, including conciliation agreements. Violations of confidentiality would lead to loss of federal funding and possible fines and imprisonment. Therefore, any agreement entered into under the terms of this contract would fall under the protective provisions of Iowa Code Section 22.9, (applying the interpretation of the Iowa Supreme Court in *Press-Citizen Company, Inc. v. University of Iowa*, 817 N.W.2d 480 (Iowa 2012)), which provide:

If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency or this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.

The question then narrows to whether the limited number of disputes filed with the ICRC (within the purview of Iowa law, but not federal law) that are **not** included within the jurisdiction of the contractual agreement with the EEOC and are **not** covered by Iowa Code Section 216.15A (housing complaints) can be kept confidential or must be released in whole or part as required by Section 22.13.

Various Iowa Code Sections provide guidance on this matter. A review of those sections is necessary to address your questions.

The Iowa Civil Rights Commission is subject to Chapter 22, the open records statute, as a government body by definition. See Iowa Code Section 22.1. Consequently the records generated by the ICRC are “public records” defined in Section 22.1(3) unless otherwise excluded.

Section 22.2 provides, in part, that “Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record.”

Iowa Code Section 22.13 states:

When a government body reaches a final, binding, written settlement agreement that resolves a legal dispute claiming monetary damages, equitable relief, or a violation of a rule or statute, the government body shall, upon request and to the extent allowed under applicable law, prepare a brief summary of the resolution of the dispute indicating the identity of the parties involved, the nature of the dispute, and the terms of the settlement, including any payments made by or on behalf of the government body and any actions to be taken by the government body. A government body is not required to prepare a summary if the settlement agreement includes the information required to be included in the summary. The settlement agreement and any required summary shall be a public record.

The answer to the treatment of conciliation agreements of the remaining limited group of cases to which the federal statutes do not apply depends on whether there is other “applicable law” which serves to suspend compliance with Section 22.13 or whether “conciliation agreements” are not the same as “settlements” as used in this section. We will assume for the purpose of our analysis that “conciliation agreements” (sometimes referred to as “predetermination settlement agreements”) are the same as “settlements” as that term is used in Section 22.13.

Chapter 216 of the Iowa Code governs the ICRC. Section 216.15 outlines the law and procedure concerning a complaint and investigation undertaken by the ICRC. Specifically, Subsection 216.15(5) states:

“The members of the commission and its staff *shall not disclose* the filing of a complaint, the information gathered during the investigation, or the endeavors to eliminate such discriminatory or unfair practice by *mediation*, conference, conciliation, and persuasion, *unless such disclosure is made in connection with the conduct of such investigation.*” (Emphasis added.)

Note that Section 216.15A (housing discrimination) specifically addresses mediation agreements availability to the public and protection of the mediation process when that process is not complete and the information should be protected in a subsequent process. This opinion is not intended to affect cases under Section 216.15A.

The provisions of Chapter 216 and the structure of the chapter itself indicate that the special confidentiality provisions contained in Subsection 216.15(5) apply to the preliminary phase of the complaint process where mediation, conference, conciliation and persuasion is the specified process for reaching conclusion. There is a definite shift in approach beginning with Subsection 6 of Section 216.15. It takes into account that the informal process has not been successful. There is recognition that the battle is joined and that different rules (Chapter 17A) apply. We do not find any special provisions governing settlements that would lead to their being confidential that would apply to Chapter 17A and litigation proceedings. (See Section 17A.3.)

We return to the specific issue affecting a limited number of cases raised by the first question: Whether the conciliation agreements (predetermination settlement agreements) reached by the parties prior to the formal filing of a statement of charges by the ICRC are within the scope of the grant of confidentiality stated in Subsection 216.5(5) and consequently exempt under the “to the extent allowed under applicable law” clause in Section 22.13

In support of the ICRC position that Subsection 216.15(5) does apply, the ICRC cites *Parker v. EEOC*, 534 F.2d 977 (D.C.Cir. 1976). In that case, the Court ruled predetermination settlement agreements and conciliation agreements were exempted from disclosure under the Federal Freedom of Information Act (FOIA) even though not specifically addressed by the statute. Iowa Code Chapter 22 is substantially the same as the FOIA examined in *Parker*. Given that the purpose of all applicable statutes, state and federal, is substantially similar and intended to produce the same result, we conclude that the Iowa Supreme Court would be guided by the *Parker* decision. Under the rationale of *Parker*, ICRC predetermination and conciliation agreements would not be subject to Section 22.13, as they would be protected by application of the *Parker* decision.

As to the revised first question, we find that the described conciliation agreement may be kept confidential within the parameters discussed above.

The second paragraph of Section 22.9, concerning denial of federal funding, requires an agency to adopt a rule outlining the particular provisions of Chapter 22 that must be waived under this section. The ICRC should ensure an appropriate rule is put in place.

QUESTION 2

The second question appears to address the limited situations when the informal conciliation process is unsuccessful and a statement of charges is filed by the ICRC, which would then be governed by Chapter 17A. At that time, orders generated would be public records and dispositive settlements would be covered by Section 22.13. (See Section 17A.3.)

Pursuant to Iowa Administrative Code Section 497—1.3, this Opinion has been reviewed, approved and its issuance directed by action of the Iowa Public Information Board on October 3, 2013. Opinions issued pursuant to Section 497—1.3 are subject to modification or reconsideration within 30 days of issuance as provided in Subsection 497—1.3(3) and are not effective until 30 days have passed and any timely request for modification or reconsideration has been acted upon.

Sincerely,

A handwritten signature in black ink, appearing to read 'KL', with a long horizontal flourish extending to the right.

Keith Luchtel
Executive Director
On behalf of the
IOWA PUBLIC INFORMATION BOARD