



MINUTES

Freedom of Information, Open Meetings, and Public Records Study Committee

October 19, 2007

Second Meeting

MEMBERS PRESENT:

Senator Michael Connolly, Co-chairperson
Senator Daryl Beall
Senator Jeff Danielson
Senator Mary Lundby
Senator Pat Ward

Representative Vicki Lensing, Co-chairperson
Representative Carmine Boal
Representative Elesha Gayman
Representative Bruce Hunter

MEETING IN BRIEF

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Organizational staffing provided
by: Rachele Hjelmaas, Senior
Legal Counsel, (515) 281-8127

Minutes prepared by: Ed Cook,
Senior Legal Counsel,
(515) 281-3994

- I. Procedural Business
- II. Committee Action — Proposed Legislative Bill Draft Provisions
- III. Open Meetings and Public Records Issues — Discussion
- IV. Materials Filed With the Legislative Services Agency



Freedom of Information, Open Meetings, and Public Records Study Committee

I. Procedural Business

Call to Order. The October 19, 2007, meeting of the Freedom of Information, Open Meetings, and Public Records Study Committee was called to order by Co-chairperson Connolly at 9:04 a.m. The meeting was held in the Supreme Court Chamber at the State Capitol.

Adjournment. The meeting was adjourned at 3:55 p.m.

Committee Business. The Committee approved the minutes of the September 6, 2007, meeting.

Next meeting. The third meeting of the Committee is scheduled for November 9, 2007, in the Supreme Court Chamber at the State Capitol at 9:00 a.m.

II. Committee Action — Proposed Legislative Bill Draft Provisions

The Committee agreed that the following items be included in a preliminary draft of proposed legislation on open meetings and public records issues. A proposed draft will be submitted to the Committee for consideration prior to final approval.

- Establish an independent state public information agency authorized to issue advisory opinions, issue rules, receive and investigate complaints, prosecute alleged violations, issue legally binding orders, and ensure adequate training by all public officials.
- Repeal the criminal sanction relating to public records law violations.
- Rewrite and consolidate many of the 59 confidential records exemptions in the public records law to make the exemptions generally applicable instead of agency specific and make these exemptions consistent with the 11 exemptions in the open meetings law.
- Create a qualified public records exemption relating to the identity and qualifications of an applicant for public employment.
- Clarify the scope of the current exemptions in the public records law relating to personal information in confidential personnel records.
- Create a qualified personnel records exemption for personal information about identified individuals if the disclosure of such information would constitute an undue invasion of personal privacy.
- Authorize the Supreme Court to designate by rule the court records and information that are confidential including general policy considerations to guide the court's rulemaking.
- Clarify the types of nongovernment organizations that are subject to the public records law, which types of information of such organizations that act solely to support a state or local government body are public, and who is the custodian of such information.
- Expand the discretion of courts to issue an injunction to enjoin the public inspection of government information otherwise subject to public inspection.
- Clarify and reaffirm the scope of the public availability of final settlement agreements between an agency or other government body and another entity or person.
- Provide specific timelines within which government information must be made available to the public.



- Clarify the definition of a "meeting" in the open meetings law to consider situations where a series of oral discussions or a series of e-mail exchanges each between less than a quorum of the members of a governmental body subject to the open meetings law occur.
- Establish express limits on the right of a governmental body subject to the open meetings law to recess a meeting without providing a new notice of the reconvened meeting.

III. Open Meetings and Public Records Issues — Discussion

Professor Arthur Bonfield, University of Iowa; Ms. Kathleen Richardson, Executive Secretary, Iowa Freedom of Information Council; and Mr. Michael Guidicessi, an attorney who litigates public records and open meetings law issue, addressed the Committee concerning various open meetings and public records issues for legislative consideration and decision.

A. Enforcement

1. Professor Bonfield

Two possible schemes or models exist if the Committee decides to enhance the civil enforcement of open meetings and public records issues.

One model, considered a more "soft" enforcement scheme, would be to create a single-purpose state official who would be authorized to receive and investigate complaints, issue public advisory opinions, mediate disputes, issue annual compliance reports, and ensure adequate training. However, ultimate enforcement of public records or open meetings law violations would rely on referral of complaints to an applicable prosecutor or would rely on private suits. This model would rely on persuasion and mediation.

Another model, considered a more "hard" enforcement scheme, would create an independent state agency, within the executive branch, that would be authorized, in addition to those items included within the soft enforcement model, to issue advisory opinions with the binding force of law, to issue rules, and to prosecute, as a contested case proceeding under the Administrative Procedure Act, violations of open meetings and public records law. While this model provides for more authority and compliance, it also is more expensive.

2. Committee Discussion

Professor Bonfield. While the "hard" enforcement model as implemented in Connecticut is expensive, establishing such a model in Iowa most likely will not be as expensive. As a legislative agency, the Citizens' Aide/Ombudsman cannot be utilized to implement the "hard" enforcement model. Law enforcement is an executive branch function.

Representative Boal. Budget concerns exist with the "hard" enforcement model, but the "soft" model relies upon enforcement by prosecutors, such as the Attorney General and local county attorneys, who represent the government bodies who may be the subject of a complaint, an inherent conflict of interest.

Senator Beall. A single-purpose official or agency is critical to ensure that citizens know who to contact if open meetings and public records issues arise.



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3. Committee Action

The Committee decided that the "hard" enforcement model be incorporated in the initial draft of the Committee's proposed legislation. The Committee agreed to establish an independent state public information agency authorized to issue advisory opinions, issue rules, receive and investigate complaints, prosecute alleged violations, issue legally binding orders, and ensure adequate training by all public officials.

B. Independent Right of Action

Both Professor Bonfield and Mr. Guidicessi agreed that providing for administrative enforcement of open meetings and public records issues through an independent state agency should not preclude a party from instituting an individual lawsuit without first presenting the complaint to the newly created independent state agency.

C. Penalties

1. Professor Bonfield

Consideration should be given to eliminating the criminal penalty for public records law violations. By providing a criminal penalty, basic statutory construction provides that the public records statute be construed narrowly, which is inconsistent with the policy to construe the statute broadly to ensure openness in government. In addition, the right to be protected from self-incrimination applies if criminal penalties may attach, making it difficult to ensure compliance. Finally, few criminal prosecutions have occurred for public records violations. Mr. Guidicessi agreed with Professor Bonfield that the criminal penalty be eliminated.

2. Committee Action

The Committee agreed to eliminate criminal penalties but to enhance the applicable civil penalties.

D. Terminology

1. Professor Bonfield

The current definitions of "public record" and "confidential record" in Code chapter 22 are confusing and misleading. Confidential records under Code section 22.7 are not entirely confidential because the law permits the courts or a custodian of such a record to release it. A possible solution to this issue would be to create four new terms to describe governmental records or information: "government record," "public record," "optional public record," and "confidential record." "Government record" would be defined to include all information stored in any medium that is owned, possessed, controlled, or in the custody of a government. "Public record" would refer to government records that are generally open for public inspection. "Optional public record" would be a government record that is considered confidential unless a court or custodian of the record decides the record can be released. Finally, "confidential record" would be records that are not disclosable to the public.



Reclassifying the records into the categories as described does not change current law but merely minimizes confusion as to how to treat government records.

2. Ms. Richardson

Ms. Richardson did not agree with this suggestion. A concern with any attempt to reclassify is that it may invite less openness. The philosophical underpinning of current law is that public records should be open and reclassifying public records as a subset of a larger government records category may minimize this philosophical conclusion. In addition, adding more categories of records may be confusing and complicated for local government officials.

3. Mr. Guidicessi

Creation of confidential records by statute that are not included in Code section 22.7 should specifically provide that the provisions of Code chapter 22 do not apply.

4. Committee Discussion

Senator Lundby. A strong presumption that government records be open should be maintained.

Senator Danielson. Privacy concerns need to be considered.

5. Committee Action

The Committee was unable to reach consensus on this issue and deferred action to a later meeting.

E. Deliberative privilege exception

1. Professor Bonfield

In order to deal with the current ambiguities in the definition of public records in Code chapter 22 and its relationship to Code section 305.13, relating to retaining state records, consideration should be given to provide that very tentative ideas, opinions, or drafts used only as part of an early and preliminary deliberative process and that are created prior to the proposal of any final recommendation be deemed optional public records or as a confidential record under Code section 22.7. Creation of this public records exception needs to be narrowly crafted to avoid loopholes but many states, as well as the federal government, have such a provision. Current law can be interpreted to make almost any note or draft written by a government official a public record subject to release. While the current weak enforcement of public records law makes this not a significant concern today, establishing an independent and costless enforcement model could create significant problems. Strong enforcement without a cleanup of the open meetings and public records law would be a disaster. In addition, some consideration should be made as to whether research designs, reports, and data should be shielded from mandatory public disclosure prior to the time the research becomes final.



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2. Ms. Richardson

We are opposed to restricting openness in government. A concern is that establishing this exception could create a loophole for shielding documents that should otherwise be open and available to the public.

3. Mr. Guidicessi

These records should not be closed — it creates a slippery slope. Defining what records meet this exception may be confusing to local officials. For example, how does one know whether a particular document is predecisional? Finally, current law has not been a problem and changing the law is unnecessary and may have negative unintended consequences.

4. Committee Discussion

Senator Ward. Some preliminary documents should not always be available. This issue needs some examination.

Senator Danielson. Government bodies should not be required to keep every scrap of paper. Openness needs to be tempered by privacy concerns.

Co-chairperson Connolly. Is this a practical problem? Drafting a solution can create loopholes and where do you draw the line? We should examine what other states do.

5. Committee Action

The Committee was unable to reach consensus on this issue and deferred action to a later meeting. Co-chairperson Connolly suggested that an examination of what other states do should be undertaken.

F. Consistency Between Open Meetings and Public Records

1. Professor Bonfield

Should the term "information" be substituted for the term "record" in the public records law? In addition, should government information that may be withheld from public disclosure be made consistent under the open meetings and public records law?

2. Mr. Guidicessi

Using the term "information" instead of "record" has merit. However, some inconsistencies that exist between the open meetings and public records law are acceptable. While it is fine to shield personal information in a confidential personnel file, a government body that discusses this information when making personnel decisions should do so in the open.

3. Committee Action

Co-chairperson Connolly indicated that the law should be made as consistent as possible.



G. Applicants for Public Employment

1. Professor Bonfield

The issue is whether the identity and qualifications of all applicants for public positions be information available for public inspection. The argument for disclosure is that openness allows the public to inform the decision makers on the applicants and to examine whether the process is legal and fair. However, the argument against disclosure is that some good applicants will not apply if their name is revealed publicly. Some applicants believe that their standing with their current employer could be diminished if they are not selected or that their current employer may view them negatively. In fact, most states close the application process from public examination. A possible solution would be to require applicants to request anonymity and to require the government body to make a written finding on whether anonymity is necessary. Then, all finalists should be made public.

2. Ms. Richardson

Current law is not particularly open. Drawing the line can be difficult, and can be made based on the number of finalists and type of job.

3. Mr. Guidicessi

A person seeking public employment should expect openness and the law should reflect this. The appointment of judges is an open process and that process has not deterred qualified candidates.

4. Committee Discussion

Senator Ward. The public sector competes with the private sector for employees and the private sector utilizes a confidential process. The suggested solution by Professor Bonfield is reasonable.

Co-chairperson Connolly. Co-chairperson Connolly spoke with persons involved with the University of Iowa presidential search and no sitting president would apply if it was an entirely open process. A middle ground needs to be found.

Representative Gayman. At a minimum, some disclosure of the vital statistics of applicants, even without complete disclosure of the names of the persons applying, should be done.

Senator Danielson. The decision-making process, including relevant criteria and minimum qualifications, needs to be open. Civil service rules do provide for openness regarding the employment process.

5. Committee Action

The Committee agreed to include provisions governing applicants for government employment. The Committee agreed that the distinction between applicants from within and from outside government be eliminated. In addition, the Committee agreed that an applicant should not be shielded from disclosure unless the applicant requests this in writing and the government body determines that anonymity is necessary. However, once a finalists group is named, the Committee agreed that the names and qualifications of the



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finalists be disclosed. However, other information the government body might have, such as references, should be disclosed only if the information is otherwise disclosable as a public record.

H. Reorganizing and Rewriting Public Records Exemptions

1. Professor Bonfield

Many of the current 59 confidential records exemptions in Code chapter 22 are too agency and program specific and should be consolidated and rewritten.

2. Committee Discussion

Senator Lundby. Ideally, current public records exemptions should be reviewed on an ongoing basis.

3. Committee Action

The Committee agreed to attempt to rewrite and consolidate many of the 59 confidential records exemptions in the public records law to make the exemptions generally applicable instead of agency specific and make these exemptions consistent with the 11 exemptions in the open meetings law.

I. Personal Information in Confidential Personnel Records

1. Professor Bonfield

The exemption from mandatory public disclosure for personal information in confidential personnel records should be redrafted to clarify its scope. A possible solution would be to exempt all information about a particular identified government employee except the person's name, salary, when they were employed, the government positions they hold and held, their general qualifications for the job, and any disciplinary action involving discharge, suspension, or loss of pay once appropriate procedures have been exhausted and the disciplinary action has been taken.

2. Ms. Richardson

We agree with this suggested solution.

3. Committee Action

The Committee agreed to include a provision in the proposed draft incorporating the suggested solution from Professor Bonfield.

J. Undue Invasion of Personal Privacy

1. Professor Bonfield

Consideration should be given to establishing a qualified exception from mandatory disclosure for personal information about identified persons if disclosure would lead to an undue invasion of privacy. Societal values have changed and we now place a greater emphasis on personal privacy. Creating a general rule that attempts to weigh the balance between the public interest and an individual's privacy is more preferable than creating a list



of exceptions since any list would not be exhaustive and one cannot anticipate in advance all possible privacy concerns as to any particular information. Most government agencies will conduct the balancing in good faith. Merely restricting the government's collection of personal information will not solve all privacy concerns and in some instances, the government needs to collect information that should not be released.

2. Ms. Richardson

Creating a general exception relating to an undue invasion of privacy has the potential for creating a loophole and puts a burden on records custodians in balancing the public's right to know with personal privacy. A better solution would be to prohibit the government from collecting such personal information that would create an undue invasion of privacy.

3. Mr. Guidicessi

A better solution would be to specifically identify those records that create an undue invasion of personal privacy instead of creating a general rule on privacy.

4. Committee Discussion

Senator Danielson. The ability to engage in data mining should not be permitted.

Representative Gayman. Data mining of personal information and the ability of for-profit companies to access personal information should not be permitted.

5. Committee Action

The Committee agreed to include a provision in the proposed draft incorporating an exception from disclosure based upon an undue invasion of personal privacy.

K. Court Records

1. Professor Bonfield

Should the courts be given the authority to shield certain records from disclosure and should this authority be extended beyond electronic files and records to all files and records? Based upon separation of powers, one could argue that the courts have the inherent authority to adopt rules on this issue without being granted the authority in legislation.

2. Mr. Guidicessi

Restricting access to electronic files but allowing inspection of records at the courthouse may be valid to allow a certain level of openness while restricting data mining efforts.

3. Committee Action

The Committee agreed to consider a proposal by the judicial branch to grant the judicial branch authority to shield certain electronic files and records.

L. Nongovernmental Entities

1. Professor Bonfield

The extent to which certain nongovernmental entities and private foundations should be subject to public records requirements needs consideration. Issues exist as to what type of



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nongovernmental entities should be covered, what types of information held by these entities should be public, if any, and who is the custodian of the records created by the private body.

2. Mr. Guidicessi

Clarity on this issue is needed given government's increasing reliance on private entities to conduct public business. One possible rule in determining which private entities should be subject to the public records law would be to ask whether the private entity would exist but for the public entity.

3. Committee Action

The Committee agreed that this issue should be addressed and should be considered in further discussions.

M. Injunctions

1. Professor Bonfield

Consideration should be given to broadening the authority of courts to enjoin the public inspection of government information by providing that a court may so enjoin if such examination would not be in the public interest, the examination would substantially and irreparably invade the privacy of the subject of the record and harm to that person is not outweighed by the public interest in disclosure, or the record is not a government record. Current law makes granting an injunction difficult and a safety valve is needed to prevent the disclosure of information in which the harm to a person is not outweighed by the public right to openness. One possible compromise would be to add an alternative basis to existing law for granting an injunction relative to a determination of whether the disclosure would be an undue invasion of personal privacy.

2. Mr. Guidicessi

Current requirements for issuing an injunction are fine since efforts to prohibit disclosure of public records should have to meet a high hurdle. In many cases, it is not the records custodian but a private party that attempts to enjoin disclosure of information.

3. Committee Action

The Committee directed Professor Bonfield and Mr. Guidicessi to try and develop a compromise, similar to what was suggested by Professor Bonfield, and to include that in the proposed draft of legislation.

N. Prior Notice

1. Professor Bonfield

Should the custodian of confidential information under the public records statute notify subjects of the information if the information will be released? To limit the impact of this possible rule, one could require notification to only individuals and not corporations. Without some notice requirement, the ability to seek an injunction would be severely constrained.



2. Mr. Guidicessi

If the custodian has the discretion to release this information, the custodian should not be required to notify individuals prior to release. No person should have the expectation that information under the confidential records provision of the public records statute will never be released.

3. Committee Action

The Committee took no action on this issue.

O. Disclosure Status

1. Professor Bonfield

Should Code chapter 22 be amended to ensure that government records not lose their disclosure status when they are transferred to the custody of another official, agency, institution, or person?

2. Committee Action

The Committee decided to forego discussion of this item until a later time.

P. Final Settlement Agreements

1. Professor Bonfield

Iowa public records law and the Iowa Administrative Procedures Act allow the release of final settlement agreements. However, many state agencies desire to keep these agreements secret. Should government agencies be allowed to delete personal identifying information prior to release of these agreements?

2. Mr. Guidicessi

Government agencies should not be allowed to delete personal identifying information.

3. Committee Action

The Committee agreed that the law should be clarified to ensure that all final settlement agreements be made available to the public.

Q. Timelines for Records Request Compliance

1. Professor Bonfield

Some specificity as to timelines for compliance may be beneficial to eliminate concerns that agencies are unduly tardy in releasing public information. The timelines need to be based on what action the agency will need to do to comply.

2. Mr. Guidicessi

The public should be granted immediate access to public information and the establishment of timelines could allow public entities to delay compliance until the time limit established. The law should emphasize that immediate access to public information should be granted with any delay limited to determining if the information should be released.



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3. Committee Action

The Committee agreed to provide specific timelines within which government information must be made available to the public.

R. Walking Quorums

1. Professor Bonfield

The practice of evading open meetings requirements by conducting a series of in-person or telephonic conversations with less than a quorum of the members of the body should be stopped. However, crafting legislation to stop this practice is difficult without restricting the ability of members of a body to discuss information and ideas. One possible solution would be to require members of a body to state on the record the reasons for a particular vote.

2. Committee Discussion

Senator Beall. We need to stop this practice but still allow members of a government body to communicate on issues.

Representative Boal. Drafting legislation preventing this practice is difficult since it is hard to distinguish between legitimate communication between members of a body and a walking quorum.

3. Committee Action

The Committee agreed that preventing walking quorums should be included in proposed legislation. However, the Committee did not agree to requiring members of a body to state the reasons for a particular vote on the record.

S. Electronic Mail Meetings

1. Professor Bonfield

Current law does not adequately deal with when e-mail communications between a quorum of the members of a government body is subject to open meetings requirements. Are the current public records requirements sufficient to allow inspection of these e-mails without a specific open meetings provision? It is hard to deal with bad faith chain e-mails. Board of Regents policy relative to this is to post on a Website, or otherwise make available, e-mails exchanged by more than a quorum of the body prior to a decision being made relative to the subject matter of the e-mails.

2. Committee Discussion

Senator Danielson. What should be done about text messages amongst members of a government body?

3. Committee Action

The Committee agreed to consider establishing a policy similar to the Board of Regents policy by requiring posting of relevant e-mail messages by a quorum of the government body prior to action by the government body.



T. Recessed Meetings

The Committee agreed to draft proposed legislation establishing express limits on the right of a governmental body subject to the open meetings law to recess a meeting without providing a new notice of the reconvened meeting.

IV. Materials Filed With the Legislative Services Agency

The following materials listed were distributed at or in connection with the meeting and are filed with the Legislative Services Agency. The materials may be accessed from the <Additional Information> link on the Committee's Internet Webpage:

<http://www.legis.state.ia.us/aspx/Committees/Committee.aspx?id=216>.

1. Iowa Freedom of Information Council (IFOIC) - Comments on Electronic Court Records (April 23, 2007).
2. Iowa Supreme Court, Statement to Committee.
3. Kathleen Richardson, IFOIC, Comments on September 6, 2007 Meeting.
4. Kathleen Richardson, IFOIC, Suggested Changes to Iowa's Open Meetings and Public Records Laws.
5. University of Iowa Law Professor Arthur Bonfield - Proposed Policymaking Framework.
6. William Angrick, Citizens' Aide/Ombudsman Comments and Proposal.
7. William Angrick, Citizens' Aide/Ombudsman, Investigative Report (7-13-07).
8. Iowa Hospital Association - Policy Proposals.

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