

Investigative Report

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HOUSE OF REPRESENTATIVES

**STATE OF IOWA
CITIZENS' AIDE/OMBUDSMAN**



**INVESTIGATION INTO
PACIFIC JUNCTION MAYOR
PUBLIC RECORDS COMPLAINT**

TO: Jim Lovely
Pacific Junction Mayor

FROM: William P. Angrick II
Citizens' Aide/Ombudsman

RE: Case File 0602078

Issued: March 12, 2007
Published: May 22, 2007

Role of the Ombudsman

The Office of Citizens' Aide/Ombudsman (Ombudsman) is an independent, nonpartisan, investigative agency of the Iowa General Assembly. Its powers and duties are defined in Iowa Code chapter 2C.

The Ombudsman investigates complaints against most Iowa state and local governmental agencies. The Ombudsman can investigate to determine whether agency action is unlawful, contrary to policy, unreasonable, unfair, oppressive, or otherwise objectionable. After an investigation, the Ombudsman may issue an investigative report, stating its findings and conclusions, as well as any recommendations for improving agency law, policy, or practice. Before publishing the report, the Ombudsman provides the agency the opportunity to reply, and appends the unedited reply to the report.

Complaint and Investigation

The Ombudsman received a complaint from Earl Smith, alleging that Pacific Junction Mayor Jim Lovely declined a request for a copy of a public record.

The investigation was assigned to Assistant Ombudsman Jeff Burnham. Actions taken by Mr. Burnham will be attributed to the Ombudsman in this report.

The Ombudsman spoke with Mr. Smith, Mayor Lovely and City Attorney T.J. Pattermann. The Ombudsman also analyzed Iowa Code chapter 22, "Examination of Public Records (Open Records)."

Findings and Conclusions

Mr. Smith provided the Ombudsman with a copy of an audiotape recording of Mayor Lovely's May 26, 2006 conversation with Mr. Smith. The tape includes the following exchange:

Mayor Lovely: [Y]ou want a copy of what now?

Mr. Smith: The detailed budget from the one that was published in the paper May the 3rd.

Mayor Lovely: It's immaterial now.

Mr. Smith: Are you denying me a copy of it?

Mayor Lovely: Yes.

Mr. Smith: And for what reason?

Mayor Lovely: Because that has no bearing on this year's budget at all.

Mr. Smith: It's still a public document, I'm still entitled to a copy if I request it.

Mayor Lovely: You have to contact the city attorney and have him give you directions on whether to give you a copy of it or not.

Mr. Smith: Thank you.

Mayor Lovely: You're welcome.

Iowa Code section 22.2(1) states:

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. Unless otherwise provided for by law, the right to examine a public record shall include the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record. The right to copy a public record shall include the right to make photographs or photographic copies while the public record is in the possession of the custodian of the public record. All rights under this section are in addition to the right to obtain a certified copy of a public record under section 622.46.

Iowa Code section 22.6 states:

It shall be unlawful for any person to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right to be denied or refused. Any person knowingly violating or attempting to violate any provision of this chapter where no other penalty is provided shall be guilty of a simple misdemeanor.

Mr. Smith initially contacted the Ombudsman's office about this matter on May 26. The Ombudsman called the office of City Attorney T.J. Pattermann that afternoon and left a message, explaining the complaint and asking for a return call.

As of June 1, Mr. Pattermann had not responded, so the Ombudsman called again and reached him. During the ensuing conversation, Mr. Pattermann stated that:

- He had spoken with Mayor Lovely about this matter.
- Mayor Lovely was emphatic that he did not deny Mr. Smith's request for a public record; Mayor Lovely contended he did not tell Mr. Smith that he wasn't going to honor his request.
- Mayor Lovely said he told Mr. Smith that he wanted to check with the city attorney regarding whether Mayor Lovely needed to honor Mr. Smith's request.

The Ombudsman informed Mr. Pattermann of the existence of an audiotape recording of the conversation in question. The Ombudsman then read a portion of the above-referenced transcript to Mr. Pattermann. Mr. Pattermann then asserted that the transcript was inaccurate, though his basis for making that assertion was not clear. At the end of the conversation, Mr. Pattermann agreed to recontact Mayor Lovely about this matter and then follow up with the Ombudsman.

Two weeks elapsed and Mr. Pattermann had not followed up. So the Ombudsman called his office on June 16 and left a message, asking for a status update. Mr. Pattermann returned the call on June 19 and told the Ombudsman that:

- At some point in June, the city clerk offered to provide Mr. Smith with a copy of the item he had requested.
- Mr. Smith stated that he had already obtained a copy and declined her offer.

The Ombudsman recontacted Mr. Smith and asked whether he had declined an offer from the city clerk for the item in question. Mr. Smith said he had received no such offer, and said he still had not received the item in question.

On July 7, the Ombudsman called the City of Pacific Junction and left a message for Mayor Lovely to call the Ombudsman about this matter. Mayor Lovely returned the call on July 10. After the Ombudsman explained the nature of the complaint, Mayor Lovely stated:

I did say I was declining him a copy of that article he was asking for, until I had a chance to speak with the city attorney. That was the entire gist of the conversation.

The Ombudsman read the above-referenced transcript to Mayor Lovely over the phone. Mayor Lovely replied, "That's probably the conversation," and then asserted that the transcript was incomplete, at one point suggesting that perhaps the tape recorder was turned off before the conversation was concluded.

Mayor Lovely then stated:

I am telling you point-blank that the only intent of this office of not giving him a copy of that was until we had clear indication from the city attorney that it was proper to give him. That's the only reason a copy of it was declined at that time.

The Ombudsman then asked why Mayor Lovely specifically told Mr. Smith that the item he requested was "immaterial" and had "no bearing on this budget at all." Mayor Lovely responded:

Because that budget he was asking about, we had to turn around and re-do it. That budget he was asking for had no bearing on the budget that was published in the next week's paper. **I didn't want him comparing one to the other,** because one had nothing to do with the other.... [emphasis added]

The Ombudsman recontacted Mr. Smith and relayed the mayor's assertion that the audiotape did not contain the entire conversation in question. Mr. Smith disputed that assertion, and explained that he had not turned off his tape recorder until some time after his conversation with Mayor Lovely. Mr. Smith then submitted a copy of what he said was the entirety of what he recorded the morning of May 26. (The initial tape he submitted stopped shortly after Mayor Lovely is heard to say, "You're welcome.")

In a cover letter, dated August 4, Mr. Smith described what is on the tape:

[T]owards the end of tape, and after I left the City Hall, and even after I started the truck and I was moving down the street, and I was all by myself, I let out a curse word. If I offend you by using this word I do sincerely apologize. I bring this to your attention so that you won't have to wonder who said it or when. It is embarrassing for me to include that word in this tape, but I am including it in this tape because if I didn't I would not be sending you the whole tape as I promised.

Mayor Lovely's version of the exchange in question is condensed into the following statement he made on July 7:

I did say I was declining him a copy of that article he was asking for, until I had a chance to speak with the city attorney. That was the entire gist of the conversation.

But that was not how he responded, as evidenced by the audiotape.

The Ombudsman's analysis of Mayor Lovely's response to Mr. Smith reveals several specific concerns:

1. Mayor Lovely denied the request, as evidenced by the passage where Mr. Smith asked, "Are you denying me a copy of it?" and Mayor Lovely replied, "Yes."
2. Mayor Lovely put the burden for contacting the city attorney onto Mr. Smith – and did so only after Mr. Smith responded to the denial by asserting his right to the item. This contradicts Mayor Lovely's subsequent claim that he offered to contact the city attorney.
3. Mayor Lovely's own statements show that, in denying the request, he was motivated not by whether the item was a public record under the law, but by whether the item was relevant.

The Ombudsman has considered Mayor Lovely's contention that Mr. Smith's tape recorder may not have recorded the entirety of the May 26 conversation. But the available evidence does not support this claim. In fact, it strongly suggests that the recording Mr. Smith has presented is in fact a complete representation of the May 26 conversation in question.

Based on these findings, the Ombudsman concludes that Mayor Lovely's denial of Mr. Smith's request was contrary to the Iowa Open Records Law.

Recommendations

In closing, the Ombudsman makes the following recommendations:

1. Mayor Lovely should provide the item in question to Mr. Smith and apologize to Mr. Smith for not previously doing so.
2. Mayor Lovely should review Iowa Code Chapter 22 to refamiliarize himself with its requirements.
3. Mayor Lovely should review the following "Sunshine Advisories" published by the Attorney General's Office (copies appended):
 - "Golden Rules' for Public Records Requests" – August 2002 (Appendix A)
 - "Getting Access to Public Records: What is a Good Faith, Reasonable Delay?" – August 2005 (Appendix B)
 - "Which Records Are Confidential?" – January 2004 (Appendix C)
 - "Can Members of the Public Sue to Enforce Iowa's Sunshine Laws?" – May 2006 (Appendix D)
 - "Two Strikes and You're Out" – June 2005 (Appendix E)
4. In responding to future public records requests, if Mayor Lovely has any doubt as to how to respond, he should offer to contact the city attorney and then recontact the requestor as soon as reasonably possible.

Reply to Report

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May 7, 2007

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**VIA FACSIMILE AND
ORDINARY MAIL
515-242-6007**

After a complete review of your report of the Complaint, investigation, findings and conclusions, the City offers a short response.

Within the findings and conclusions, there are editorial remarks which appear to be inaccurate or inappropriate. Specifically referencing the final paragraph on page three of the Ombudsman's report indicates "Mr. Pattermann then asserted that the transcript was inaccurate, though his basis for making that assertion was not clear." In fact, the Ombudsman's office was informed the basis for believing that that transcript was inaccurate was based upon the Mayor having already contacted the City Attorney shortly after the Mayor's conversation with Mr. Smith to inquire whether the documents sought by Mr. Smith were, in fact, public records and whether the same should be produced. Ultimately, copies were offered to Mr. Smith and efforts were made to ensure that he received the same. Further, on the top of page four, the report states "two weeks elapsed and Mr. Pattermann had not followed up." It is quite clear, based upon your further recitation of the fact, that, in fact, the City Attorney had followed up with the City, just that no report was made of the same was made to the Ombudsman's office.

The Ombudsman's conclusion that "Mayor Lovely put the burden for contacting the City Attorney onto Mr. Smith and did so only after Mr. Smith responded to the denial by asserting his right to the item. This contradicts Mayor Lovely's subsequent claim that he offered to contact the City Attorney" is based purely on the typewritten words of an exchange, rather than the apparent gist/spirit of the conversation and interpretation by both parties involved. Mr. Smith apparently did not believe the burden was on him to contact the City Attorney, as he did not do so on this occasion, though he has taken the initiative to do so numerous other times. In fact, Mayor Lovely did contact the City Attorney regarding the request. The Ombudsman's office investigator was informed of this in the initial conversation with the City Attorney on June 1, 2006.

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May 7, 2007

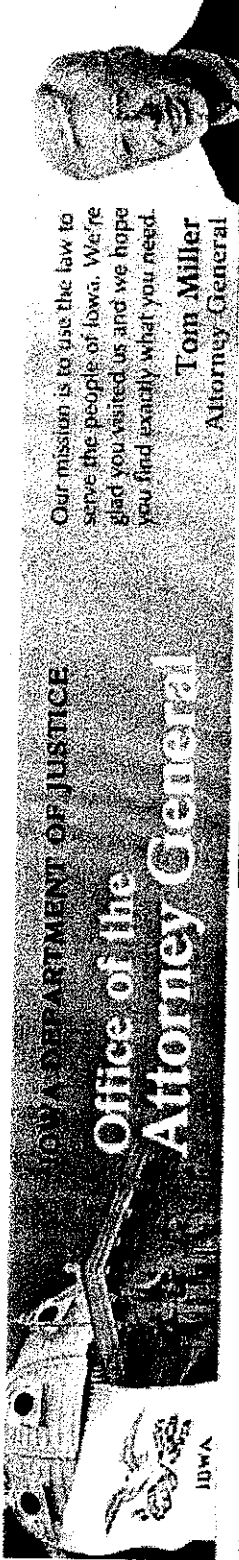
The report, and therefore apparently the investigation, appears to be an effort to prove what was said, rather than what was done. It is replete with references to what the Mayor actually did or did not say, with proper citation for how wrong the Mayor's words were, and giving rather short shrift to the Mayor having taken the steps to look into the matter and to be sure that he was following proper procedure.

Small cities, such as Pacific Junction, have very limited resources, and therefore, can only afford to hire a city attorney from an area law firm to work on an as-needed and as-can-be-afforded basis. There are always more projects than there are funds available. Cities are often at a loss for qualified individuals who are willing and able to devote the amount of time, energy and effort into serving their city as mayor or councilperson, in what amounts to be a volunteer position. Mr. Smith's Complaint, and the Ombudsman's office's extensive investigation, in order to point out what Mayor Lovely said, as opposed to what Mayor Lovely did, has resulted in a drain on the limited financial and personnel resources of a small town such as Pacific Junction. The City of Pacific Junction is a small town with only a part-time clerk. Mr. Smith needs to realize that records requests cannot always be complied with immediately and that the Citizens' Aide/Ombudsman's office is not a sword to be wielded to extract written reports and explanations from City officials, as Mr. Smith has demanded and threatened to do on several occasions. Rather, the Ombudsman's office is a taxpayer-funded shield to protect citizens of the State of Iowa and ensure that records requests made by the citizens for public documents be complied with in a reasonable fashion. Resources would be better spent by discussing such technical disputes with the City officials (as Mayor and City Attorney) and relying on the Ombudsman's office only after such efforts are fruitless.



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Sunshine Advisory Bulletin

A Bulletin on Iowa Open Meetings and Public Records Laws
By Attorney General Tom Miller -- August 2002

"Golden Rules" for Public Records Requests

When a person requests access to a public record, questions may arise: Does the requester have to explain a reason for the request? Does the person have to show identification to get access to the record? Do public officials have to give a reason to deny access to a record?

Here are "Golden Rules" to help public officials respond to requests for access to public records -- and to explain the legal rights of persons requesting access:

Rule 1: The reason a requester wants the record is irrelevant. (So, officials should not ask.)

Records which are open to public examination must be produced no matter what the reason for the request. The public can examine and copy a record just because it's there!

Rule 2: The identity of the requester usually is irrelevant. (Officials should not ask for identification, unless there is a lawful reason to do so.)

Members of the public usually should not be required to identify themselves in order to get access to public records. However, if a record is only open to certain people for limited purposes (for example, motor vehicle accident records), then the lawful custodian may need to ask for additional information to assure the record is only provided to those entitled to see it.

Rule 3: Public records may not be withheld without legal authority.

Iowa's public policy is simple: Every person has the right to examine and copy public records, and officials' failure to provide access to public records can result in civil or criminal penalties. Before access to a record is denied, public officials must have a valid legal reason for denying access to the record. Public officials may consult with their legal counsel if necessary.

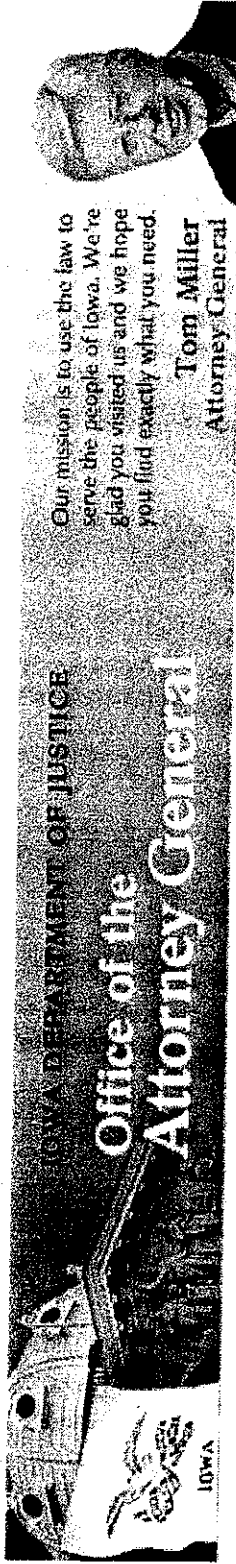
Iowa Code Ch. 22 spells out the rights and obligations of getting and giving access to

public records. Officials managing public records should follow the Golden Rules: Don't ask irrelevant questions, and don't deny access without legal authority. Citizens who have inquiries or complaints about public records or open meetings may call the Iowa Citizens' Aide/Ombudsman Office - toll-free at 888-IA-OMBUD (888-426-6283.)

"Sunshine Advisory" bulletins are designed to give information on Iowa's public records and open meetings laws - our "Sunshine Laws." Local officials should obtain legal advice from their counsel, such as the city or county attorney

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Sunshine Advisory Bulletin

A Bulletin on Iowa Open Meetings and Public Records Laws
By Attorney General Tom Miller -- August 2005

Getting Access to Public Records: What is a Good Faith, Reasonable Delay?

Governmental bodies that administer the Public Records Law often must make significant decisions about legal issues when responding to public records requests. Requesters may be asked to agree to wait for access to public records, especially if the request is very large. Without agreement, how long can government take to make decisions before permitting examination and copying -- or denying the request?

By statute, delay in permitting examination and copying of public records "shall not exceed" 20 calendar days and ordinarily "should not exceed" 10 business days. Iowa Code sec. 22.8(4)(d). Delay is never justified simply for the convenience of the governmental body, but delay will not violate the law if it is in good faith, reasonable and for one of the reasons for delay set out by statute:

To seek an injunction under Iowa Code section 22.8. Even if the records are not confidential, there may be reasons to obtain an injunction if the evidence shows that "examination would clearly not be in the public interest" and would "substantially and irreparably injure any person or persons." Iowa Code sec. 22.8(1)(a)-(b). Time may be required to go into court and seek an order prohibiting release.

To determine whether the lawful custodian is entitled to, or should, seek an injunction. Before going into court, the lawful custodian may need time to evaluate whether the evidence would support an injunction. This decision very likely would involve consultation with legal counsel.

To determine whether the record is a public record, or is a confidential record. Application of the laws shielding records as confidential can be complex. Some records may contain both open and confidential information. The confidential information may have to be blacked out. Time may be needed to sort out the application of the law and prepare records for release.

To determine whether a confidential record should be made available to the requester. Some records are available to certain people, but kept confidential from others. See, e.g., Iowa Code 321.271 (accident reports available to identified persons). Time may be needed to determine whether the

requester is a person entitled to access to the record under the law.

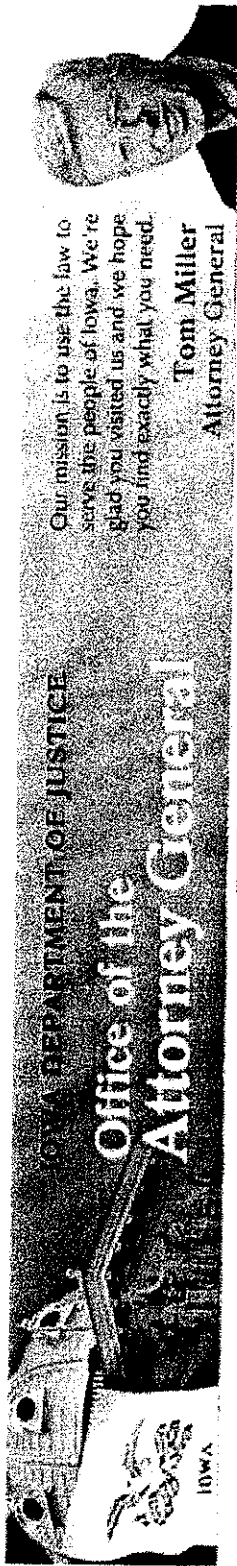
Remember: Time is of the essence in responding to public records requests. In order to assure compliance with the statute, any delay should be for a reason authorized by law. If timely compliance is not possible, government officials should talk with the requester. Without agreement, examination and copying - to the extent authorized by law -- should be allowed within the statutory time limits.

Citizens who have inquiries or complaints about public records or open meetings may call the Iowa Citizens' Aide/Ombudsman Office -- toll-free at 888-IA-OMBUD (888-426-6283.)

"Sunshine Advisory" bulletins provide information on Iowa's public records and open meetings laws -- our "Sunshine Laws." The bulletins are a resource for public officials and citizens. Local officials should obtain legal advice from their counsel, such as the city or county attorney.

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Sunshine Advisory Bulletin

A Bulletin on Iowa Open Meetings and Public Records Laws
By Attorney General Tom Miller -- January 2004

Which Records Are Confidential?

Most public records are available for examination and copying -- but some are confidential under law. Where are the laws on confidentiality found?

At first it sounds contradictory, but some "public records" in Iowa are confidential by law and are not available for public examination and copying. (Example: your income tax return.) Government offices maintain many types of public records. Some are open for public examination and copying, some must be kept confidential under the law, and some may be kept confidential in the discretion of the lawful custodian. How do you know whether public records are open or confidential?

Openness is the rule, and confidentiality is the exception. Here are the three types of exceptions that make public records confidential under Iowa law and court decisions:

- **Discretionary exceptions under Chapter 22.** Iowa section 22.7 currently lists 47 categories of records which "shall be kept confidential, unless otherwise ordered" by the lawful custodian, or by others authorized to release information. Many of these records commonly are kept confidential, but could be released in the discretion of public officials or employees.
- **Mandatory exceptions under other statutes.** In addition to the list in Iowa Code section 22.7, other statutes outside Chapter 22 may mandate that records be kept confidential -- for example, income tax return information under section 422.20, or pre-sentence investigative reports under section 901.4.
- **Privilege or professional duty to maintain confidentiality.** Still other records may be confidential under a "privilege" or professional confidence recognized by the courts -- for example, attorney-client privilege.

Remember: Openness is the rule and confidentiality is the exception. Public officials and employees may keep records confidential only if authorized by law. If access is refused,

people may ask for an explanation, and officials would be well-advised to explain the legal authority that makes a public record confidential.

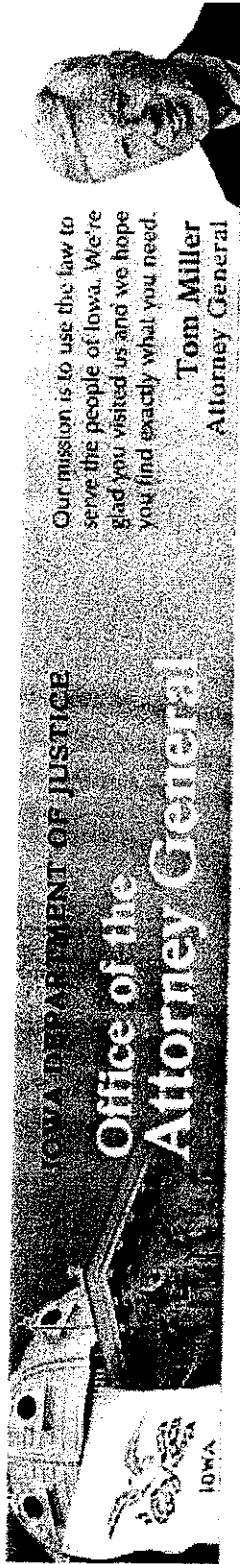
Previous Sunshine Advisory Bulletin discussing confidential public records.

Citizens who have inquiries or complaints may call the Iowa Citizens' Aide/Ombudsman Office -- toll-free at 888-IA-OMBUD (888-426-6283.)

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Sunshine Advisory Bulletin

A Bulletin on Iowa Open Meetings and Public Records Laws
By Attorney General Tom Miller -- May 2006

Can Members of the Public Sue to Enforce Iowa's Sunshine Laws? Yes - the law arms the public with remedies.

Iowa's Open Meetings and Public Records laws (Iowa Code ch. 21 and 22) are truly the "People's Laws" - meaning that by statute a broad range of people are granted authority to go to court to seek enforcement of Iowa's "Sunshine Laws."

Members of the public can sue governmental officials and governmental bodies to enforce Iowa's Sunshine Laws when they have a good faith basis to believe the law has been violated, and if they are one or more of the following:

1. A citizen of the state of Iowa.
2. A person who pays taxes of any type to the state of Iowa.
3. A person individually aggrieved by a violation of Iowa's Sunshine Laws, such as a person wrongfully denied access to a public record or an open meeting.

People who retain legal counsel to sue a governmental body under Iowa's Open Meetings laws, or sue the lawful custodian of a public record under Iowa's Public Records laws, are entitled to an award of costs and attorney fees if they are successful in establishing a violation of the law. (Iowa Code sec. 21.6 (3)(b) and 22.10(3)(c)).

Depending on the circumstances of the violation, the court could issue an injunction to require compliance with the law in the future, void action taken wrongfully in a closed session, assess damages against the violator, or remove a second-time offender from office. (See Iowa Code sec. 21.6 and 22.10).

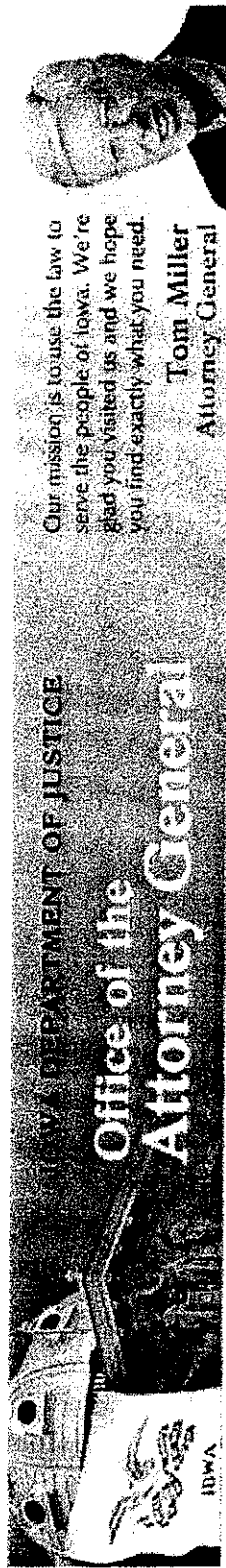
Remember: Sunshine Laws can be enforced in court by all citizens of Iowa, all persons who pay taxes to Iowa, and all other persons who are harmed by government's failure to comply with the law. In every sense of the word, Sunshine Laws are the "People's Laws."

Citizens who have inquiries or complaints about public records or open meetings may call the Iowa Citizens' Aide/Ombudsman Office -- toll-free at 888-IA-OMBUD (888-426-6283.)

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Appendix E

Two Strikes and You're Out!

Courts can remove public officials from office on the second violation of sunshine laws

Courts in Iowa can literally oust an official from office for violating "sunshine laws." (See Iowa Code sec. 21.6(3)(d) and 22.10(3)(d)). In fact, as of July 1, courts "shall" remove from office any public official on the second violation for which monetary damages are assessed.

Prior to July 1, 2005, removal from office was reserved for the most egregious repeat offender -- an official could only be removed from office on the third violation for which monetary damages were assessed against the official in office. (See Dec. 2003 Sunshine Advisory -- "What is the Cost for Noncompliance? Monetary costs for violating Iowa's sunshine laws can be imposed on individual officials or drain the budget of a governmental body.") So, penalties increase substantially as of July 1 for a "second strike."

In summary, penalties for violating sunshine laws the second time include the following:

Removal from Office: Upon finding that a government body has violated the Open Meetings Law, or that a lawful custodian has violated the Public Records Law, a court shall remove the person from office if that person has engaged in one prior violation for which damages were assessed during the person's term. Iowa Code secs. 21.6(3)(d), 22.10(3)(d), as amended by House File 772 (2005).

Injunction and Civil Contempt: Upon finding that a government body has violated the Open Meetings Law, or upon finding that a lawful custodian has violated the Public Records Law, a court may issue an injunction punishable by civil contempt ordering members to refrain from future violations for one year. Iowa Code secs. 21.6(3)(e) and 22.10(3)(a). If a second violation occurs while the injunction is in place, the official could be held in civil contempt. This can mean additional damages, or even jail time. See Iowa Code sec. 665.4.

Remember: Persons who are elected or appointed to serve Iowans have a duty to comply with Iowa's sunshine laws. Responsible public officials don't "strike out!"

Citizens who have inquiries or complaints about public records or open meetings may call the Iowa Citizens' Aide/Ombudsman Office -- toll-free at 888-IA-OMBUD (888-426-6283.)

"Sunshine Advisory" bulletins provide information on Iowa's public records and open meetings laws -- our "Sunshine Laws." The bulletins are a resource for public officials and citizens. Local officials should obtain legal advice from their counsel, such as the city or county attorney.

Iowa Attorney General's Office: Hoover Building, Des Moines, Iowa 50319.

On the Web: www.iowaAttorneyGeneral.org.