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IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

July 25, 2018 2018 Interim No. 3

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Tuesday, August 14, 2018
Administrative Rules Review Committee
 9:00 a.m., Room 116, Statehouse

Iowa Legislative Interim Calendar and Briefing is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at 515.281.3566.



AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Administrative Rules Review Committee

Chairperson: Senator Mark Chelgren

Vice Chairperson: Representative Dawn Pettengill

Location: Room 116, Statehouse

Date & Time: Tuesday, August 14, 2018, 9:00 a.m.

LSA Contacts: Jack Ewing, Legal Services, 515.281.6048; Amber Shanahan-Fricke, Legal Counsel, 515.725.7354.

Agenda: To be announced.

Internet Site: www.legis.iowa.gov/committees/committee?endYear=2015&groupID=705

LEGISLATIVE COUNCIL

June 25, 2018

Chairperson: Senator Jack Whitver

Vice Chairperson: Speaker Linda Upmeyer

Committees. The Legislative Council approved recommendations reported by the Service Committee of the Legislative Council and the Studies Committee of the Legislative Council, and received an annual report from the Legislative Tax Expenditure Committee. See briefings in this issue for the Service and Studies committees.

LSA Contacts: Glen Dickinson, Legislative Services Agency, 515.281.3566; Richard Johnson, Legal Services, 515.281.3566; Rachele Hjelmaas, Legal Services, 515.281.8127.

Internet Site: www.legis.iowa.gov/committees/committee?ga=87&groupID=703

SERVICE COMMITTEE OF THE LEGISLATIVE COUNCIL

June 25, 2018

Chairperson: Speaker Linda Upmeyer

Vice Chairperson: Senator Jack Whitver

Overview. The committee received information and made recommendations concerning the policies and procedures of the Legislative Council, the nonpartisan Legislative Services Agency, and the Office of Ombudsman, and modifications to the Legislative staff pay matrix which were subsequently approved by the Legislative Council.

Personnel Reports and Budgets. The Legislative Services Agency and Office of Ombudsman personnel reports were received and the committee recommended the approval of proposed promotions and agency budgets for FY 2018-2019.

LSA Contacts: Glen Dickinson, Legislative Services Agency, 515.281.3566; Richard Johnson, Legal Services, 515.281.3566; Ed Cook, Legal Services, 515.281.3994.

Internet Site: www.legis.iowa.gov/committees/committee?ga=87&groupID=662

STUDIES COMMITTEE OF THE LEGISLATIVE COUNCIL

June 25, 2018

Chairperson: Speaker Linda Upmeyer

Vice Chairperson: Senator Jack Whitver

Overview. The committee considered mandates in statute and proposals for 2018 Interim studies contained in other requests, and recommended the actions listed in this briefing.

2018 Interim Studies. Studies were authorized for the 2018 Interim with the indicated number of members to address the following topics:

Statutory Committees

- **Legislative Fiscal Committee** (Iowa Code §§2.45(2) and 2.46)

Charge: The committee is a permanent legislative committee under the Legislative Council. Duties include examining budget and expenditure matters, directing the administration of performance audits and visitations, and studying the operation of state government and making recommendations regarding reorganization to the General Assembly.

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INFORMATION REGARDING RECENT ACTIVITIES

Members: 5 Senate/5 House

Meeting Days: As approved by the Chair and Vice Chair of the Legislative Council.

- **Legislative Tax Expenditure Committee** (Iowa Code §§2.45(5) and 2.48)

Charge: The committee is a permanent legislative committee under the Legislative Council. Duties include approving annual estimates of the cost of tax expenditures by December 15 each year, and performing a scheduled review of specified tax credits so that each credit is reviewed at least every five years. The eighth scheduled review is in 2018.

Members: 5 Senate/5 House

Meeting Days: As approved by the Chair and Vice Chair of the Legislative Council.

- **Health Policy Oversight Committee** (Iowa Code §2.45(6))

Charge: The committee is a permanent legislative committee under the Legislative Council. Duties include providing continuing oversight for Medicaid managed care, ensuring effective and efficient administration of the program, addressing stakeholder concerns, monitoring programs costs and expenditures, and making recommendations to the General Assembly.

Members: 5 Senate/5 House

Meeting Days: As approved by the Chair and Vice Chair of the Legislative Council.

Other Interim Studies

- **Mental Health and Disability Services Funding Study Committee** (2018 Iowa Acts, HF 2456, §19)

Charge: Analyze the viability of the mental health and disability services funding, including the methodology used to calculate and determine the base expenditure amount, the county budgeted amount, the regional per capita expenditure amount, the statewide per capita expenditure target amount, and the cash flow reduction amount. The committee shall submit its recommendations to the General Assembly by January 15, 2019.

Members: 5 Senate/5 House

Meeting Days: As approved by the Chair and Vice Chair of the Legislative Council.

- **Small City Clean Water Standards Compliance Study Committee** (2018 Iowa Acts, HF 2440, §16; 2018 Iowa Acts, SF 512, §25)

Charge: Identify and comprehensively review the financial and other challenges faced by small cities in complying with the various state and federal clean water standards, and to consider options for addressing those challenges. The committee shall evaluate the future effectiveness of the Wastewater and Drinking Water Treatment Financial Assistance Program and the Water Quality Financing Program, and may evaluate any other existing or proposed state programs. The committee shall seek input and may request information or assistance from public and private stakeholders and experts, including utility management organizations, the Iowa Association of Business and Industry, the Department of Natural Resources, the Iowa Finance Authority, the Department of Agriculture and Land Stewardship, the Economic Development Authority, the Iowa Chamber Alliance, the Iowa League of Cities, and the Iowa State Association of Counties. The committee shall submit its findings and recommendations to the General Assembly for consideration during the 2019 Legislative Session.

Members: 3 Senate/3 House

Meeting Days: As approved by the Chair and Vice Chair of the Legislative Council.

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LSA Contacts: Richard Nelson, Legal Services, 515.242.5822; Gus Harb, Legal Counsel, 515.281.3745

Internet Site: www.legis.iowa.gov/committees/meetings/briefingsOnMeetings

ADMINISTRATIVE RULES REVIEW COMMITTEE

July 10, 2018

Chairperson: Senator Mark Chelgren

Vice Chairperson: Representative Dawn Pettengill

Public Employment Relations Board, *Initialization of A Retention and Recertification Election*, 6/6/18 IAB, ARC 3825C, NOTICE.

Background. The proposed rule provides that the Public Employment Relations Board (PERB) shall not conduct a retention and recertification election if the employer and certified employee organization are not parties to a collective bargaining agreement. The amendment is proposed to conform subrule 5.6(1) to Iowa Code section 20.15(2)(a).

Commentary. Ms. Diana Machir and Ms. Amber DeSmet represented PERB, reviewed the rulemaking, and responded to questions from the committee. Ms. Machir indicated that the proposed rule mirrors the statute and that the amendment is being proposed in order to provide clarity.

Upon inquiry from committee members, Ms. Machir indicated that there are educational, non-public safety, collective bargaining units operating without an agreement. Ms. Machir stated she would not speculate as to why there were no agreements. Ms. Machir indicated that there is no obligation to have a collective bargaining agreement in place. The only mandatory subject of collective bargaining for non-public safety collective bargaining units is base wages. Ms. Machir speculated that the union did not feel that a contract was necessary to negotiate base wages. Committee members questioned whether a union was doing its job if it did not negotiate a contract. Absent a collective bargaining agreement, Ms. Machir stated that the union still has an obligation to fairly represent members in negotiations and all other matters and a duty to negotiate base wages. Ms. Machir indicated that under Iowa Code section 20.15, the triggering event to a retention and recertification election is prior to the expiration of the collective bargaining agreement. In response to questions from committee members, Ms. Machir indicated that the full impact of the changes to Iowa Code chapter 20 have not been seen. Committee members expressed concern that unions could keep operating without agreements. Committee members questioned whether this issue would resolve itself with time. Ms. Machir indicated that employers and certified employee organizations could come to a mutual agreement.

In response to questions from committee members, Ms. Machir indicated that the statute requires a collective bargaining agreement to be in place to trigger a recertification and retention election, and that the rule must reflect this requirement. Committee members expressed disapproval with the rule, suggesting that unions may be exploiting a loophole to avoid the recertification process.

Committee members asked what the implications were of not having an agreement. Ms. Machir indicated that with regard to non-public safety unions, it is to the employer's benefit not to have such an agreement. Committee members stated that it was the General Assembly's intent to continue to require recertification elections on a regular basis and indicated that PERB was ignoring the intent of the General Assembly. Ms. Machir indicated that she consulted with Mr. Tim Cook, General Counsel for the Board of Regents, and attorneys for labor unions and that there was agreement that the statute requires a collective bargaining agreement be in place. Ms. Machir indicated that a contrary interpretation and rule implementation would be challenged in court and predicted that PERB would lose. Committee

members indicated that the General Assembly must have overlooked this scenario in drafting this law and will need to revisit it in the next session.

Action. No action taken.

Natural Resource Commission, *Deer Hunting by Residents and Nonresidents*, 6/6/18 IAB, ARC 3831C, FILED.

Background. The filed rules provide for deer hunting by residents and nonresidents and include season dates, bag limits, possession limits, shooting hours, areas open to hunting, licensing procedures, means and methods of take, and transportation and reporting requirements.

Commentary. Mr. Tyler Harms, Mr. Chris Ensminger, and Mr. Bruce Trautman, represented the Natural Resource Commission, reviewed the rulemaking, and responded to questions from the committee. Mr. Harms indicated that changes were made to the final rule based upon significant public comment. Specifically, the following changes were implemented and approved by the commission. A proposed six cartridge limit for firearms allowed for deer hunting was struck from the final rule. A proposed removal of handguns as an allowable method of take during the late muzzleloader season was struck from the final rule. Language defining a legal handgun for deer hunting specifically referring to shoulder stock and long barrel modifications was amended to reflect what is outlined in Iowa Code section 481A.48(5). Finally, in response to 2018 Iowa Acts, House File 631, language has been added since publication of the Notice to amend subrule 106.10(2) to allow youth deer hunting licenses and tags to remain valid, if unfilled, in all subsequent deer hunting seasons.

Upon inquiry from committee members, Mr. Harms stated that no straight wall cartridge rifles that were legal last year are illegal this year.

Mr. Scott Jones, a member of the public, appeared and requested a session delay pertaining to subparagraph 106.7(2)“c”(3) regarding the design of a pistol. Mr. Jones stated that the commission does not have authority to enact such rules. Mr. Jones indicated that the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has a definition of pistol. Mr. Jones also indicated that a state administrative rule definition of pistol would be unnecessary, redundant, and would confuse Iowa sportsmen and women because a federal definition of pistol already exists.

Contrary to Mr. Jones’ assertion that federal law defines a pistol, committee members stated they were given information that ATF does not concern itself with differentiating between long guns and handguns. Mr. Ensminger stated that the commission has requested information from ATF to help write a definition that is clear and that ATF has been unable to help. Mr. Ensminger said Department of Natural Resources is not able to address how the ATF would define pistol. Mr. Jones provided a reference to a federal statutory definition. Committee members and Mr. Jones engaged in a discussion about how the definition he provided varies from the definition provided by the commission. Some committee members indicated that a session delay was not necessary because the General Assembly had already had the opportunity to take action on the issue with gun omnibus bills the past two legislative sessions.

In response to a question from committee members, Acting Director Bruce Trautman stated that the commission’s position on a session delay of a portion of Item 10 that it is acceptable to the commission whether the ARRC chooses to delay the rule or not. Mr. Trautman stated that the commission was not going to put this description in the hunting rules and regulations book.

Committee members inquired why the commission would want a description that is in opposition to a federal description. Mr. Trautman indicated that when the description was developed, he did not believe

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INFORMATION REGARDING RECENT ACTIVITIES

it was in opposition to the ATF description. The description does not exclude firearms. Mr. Trautman indicated the commission believes it was a good attempt at describing firearms.

Other committee members indicated that this issue did not come up during the previous legislative session and perhaps it should be addressed during a future legislative session and then the rule could potentially be changed. Mr. Trautman agreed this should be addressed during session. Mr. Trautman reiterated it will not be placed into the hunting rules and regulations book.

Mr. Jones indicated that he did not believe that the commission had the authority to define a pistol.

Upon inquiry, Mr. Trautman stated that the feedback he received is that the pistol description does not include a hammerless revolver or a pistol grip that sticks straight down or comes back. Mr. Trautman stated that now he sees that the description could have been more descriptive.

Mr. Trautman reiterated that it is the commission's legal opinion and the conservation officers' opinion that no firearms that meet the definition of a handgun or a pistol are being excluded. He stated that he agrees the rule causes confusion and that is why it is being left out of the hunting rules and regulations book. Committee members suggested that the commission put an educational statement on its website. Mr. Trautman stated he is making efforts to educate, work with stakeholders, and ensure that his conservation officers have a full understanding of the laws in this instance. Furthermore, conservation officers are willing to meet with sportsmen who have questions regarding whether their firearms are allowable.

Action. No action taken.

Next Meeting. The next committee meeting will be held in Room 116, Statehouse, on Tuesday, August 14, 2018, beginning at 9:00 a.m.

LSA Staff: Jack Ewing, Legal Counsel, 515.281.6048; Amber Shanahan-Fricke, Legal Counsel, 515.725.7354

Internet Site: www.legis.iowa.gov/committees/committee?endYear=2018&groupID=705

LEGAL UPDATES

Purpose. *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

SEARCH AND SEIZURE AND THE FOURTH AMENDMENT

Filed by the United States Supreme Court

June 22, 2018

Carpenter v. United States

No. 16-402

www.supremecourt.gov/opinions/17pdf/16-402_h315.pdf

Factual Background and Prior Proceedings. The police arrested four persons for robbing Radio Shacks and T-Mobile stores in Detroit, Michigan. One of the arrested persons confessed that up to fifteen persons were accomplices in nine different store robberies in Michigan and Ohio and provided the Federal Bureau of Investigation (FBI) with the cell phone numbers of some of the accomplices. The FBI reviewed these cell phone records to identify additional cell phone numbers that had been called around the time of the robberies. Based upon the cell phone records provided by one of the arrested persons, prosecutors sought court orders under the federal Stored Communications Act to obtain cell phone location records for the petitioner Timothy Carpenter (Carpenter). The prosecution did not pursue a search warrant for Carpenter's cell phone location records but rather relied upon the framework established under the federal Stored Communications Act to obtain his records. The Stored Communications Act permits the Government to compel the disclosure of cell phone location records from cell phone carriers when it offers specific and articulable facts showing that there are reasonable grounds to believe the cell phone location records sought are relevant and material to an ongoing criminal investigation. A federal magistrate issued two court orders directing Carpenter's cell phone carriers to disclose his cell phone location records that provided physical location points of his cell phones based on his incoming and outgoing calls during the four-month period when the robberies occurred.

Prior to trial, Carpenter moved to suppress the Government's seizure of his cell phone location records arguing that such a seizure violated the Fourth Amendment of the United States Constitution (Fourth Amendment) because the Government obtained the records without a search warrant supported by probable cause. The United States District Court for the Eastern District of Michigan denied the motion, and the prosecution provided evidence at trial that Carpenter's phone was near four of the robbery locations at the time the robberies occurred. Carpenter was subsequently convicted of robbery and federal firearms violations and sentenced to prison. The Court of Appeals for the Sixth Circuit (Court of Appeals) affirmed Carpenter's conviction, finding Carpenter lacked a reasonable expectation of privacy in his cell phone location records because he had shared such information with his cell phone carrier. Carpenter appealed to the Supreme Court of the United States (Court).

Issue. Whether a cell phone user who voluntarily conveys cell phone data to the user's cell phone carrier has a reasonable expectation of privacy with respect to the user's cell phone location records under the Fourth Amendment.

LEGAL UPDATES

Analysis. The Court held in a 5-4 decision that the acquisition of Carpenter’s cell phone location records constituted an illegal search because a search warrant was not first obtained as required by the Fourth Amendment, which provides the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The classification of cell phone location records maintained by a third party (cell phone carriers) does not fit neatly under existing privacy case law. The Court stated that requests for cell phone location records are at the intersection of two lines of case law, both of which provide the current understanding of a person’s privacy interests at stake under the Fourth Amendment. The first set of cases address a person’s expectation of privacy, and the second set of cases address instances where a person voluntarily turns over the person’s information to a third party (the “third-party doctrine”). Generally, the Court has held that a person has no legitimate expectation of privacy in information voluntarily turned over by the person to third parties. However, in this case, the Court is confronted with a new phenomenon whereby a person’s cell phone location records held or maintained by a third-party cell phone carrier provide information about a person’s past movements through the use of recorded cell signals and such information is detailed, encyclopedic, and effortlessly compiled. The Court stated a person does not surrender all Fourth Amendment protections when entering the public sphere. A person’s cell phone location records over the course of a four-month period provides an all-encompassing record of the person’s past movements, revealing an intimate window into the person’s life. According to the Government’s argument, essentially every person carrying a cell phone has effectively been tailed every movement of every day allowing police access to this surveillance information without regard to the constraints of the Fourth Amendment. Thus, the Court concluded it must take into account more sophisticated systems of gathering information that are already in use or in development, and the fact that such information is gathered by a third party does not make it less deserving of Fourth Amendment protection.

Holding. The Court held the Government’s acquisition of cell phone location records were a search under the Fourth Amendment and a search warrant is required in order for the government to retrieve such information. The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with the opinion.

Dissent by Justice Kennedy, Joined by Justices Thomas and Alito. Justice Kennedy’s dissent emphasized that the new rule the majority opinion formulates puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases. The Court has previously held that people have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. Business customers like Carpenter do not own, possess, control, or use the records, and for that reason have no reasonable expectation that the records cannot be disclosed pursuant to the lawful compulsory process outlined under the federal Stored Communications Act. The majority opinion decouples the Fourth Amendment doctrine from property-based concepts that have long grounded the analytic framework of Fourth Amendment cases, and draws an unprincipled and unworkable line between cell phone location records and financial and other telephonic records.

Dissent by Justice Thomas. Justice Thomas wrote that because the Fourth Amendment guarantees the right of people to be secure from unreasonable searches of their persons, houses, papers, and effects, obtaining the cell phone location records of Carpenter’s cell phone carrier was not a search of Carpenter’s property. Carpenter did not create, maintain, or own the cell phone location records. Whether the Fourth Amendment rights are too broad or too narrow, this Court has no authority to unilaterally alter the document the founding generation approved.

LEGAL UPDATES

Dissent by Justices Alito and Thomas. Justices Alito and Thomas emphasized that new technology relating to personal privacy should concern the Court but the Court's decision guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices. First, the Court ignores the basic distinction between an actual search pursuant to a court order merely requiring a party to look through its own records and produce specified documents. The court orders in this case are the equivalent of subpoenas for documents. A search intrudes on personal privacy far more deeply, and requires probable cause, while a court order to produce records is not personally intrusive. Second, the Court's majority decision allows a defendant to object to the search of a third party's property. By departing dramatically from the fundamental principles of the Fourth Amendment, the Court destabilizes long-established Fourth Amendment doctrine.

Dissent by Justice Gorsuch. The Fourth Amendment protects the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. The Court need only ask if a house, paper, or effect was the person's under the law. Nothing else is necessary to trigger Fourth Amendment protections. Judges should decide cases based on democratically legitimate sources. A Fourth Amendment decision based on this principle carves out significant room for legislative participation in the Fourth Amendment context. If Carpenter had pursued this case under existing federal statutory law, it is entirely possible Carpenter's cell phone location information could have been kept confidential because federal statutory law generally prohibits a cell phone carrier from disclosing a customer's cell phone location information without the customer's consent.

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