LOCAL GOVERNMENT PUBLIC RECORDS STUDY COMMITTEE PRESENTATION

The Iowa Public Information Board
And
Records Laws

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By Keith Luchtel, J.D., Executive Director
Iowa Public Information Board

Introduction

The IPIB was created by legislation enacted in 2012 (Iowa Code Chapter 23) and opened for business on July 8, 2013. The board's powers and duties relate to training, enforcement and opining on Chapters 21 (open meetings) and 22 (open records).

I will discuss issues we frequently encounter concerning Chapter 22. We welcome any inquiries you may have today or in the future.

PUBLIC RECORDS – IOWA CODE CHAPTER 22

What is a public record?

The all-inclusive definition is Iowa Code section 22.1(3):

> 3. a. As used in this chapter, **"public records" includes all records**, documents, tape, or other information, stored or preserved in any medium, **of or belonging to this state or any county, city, township, school corporation, political subdivision**, nonprofit corporation other than a fair conducting a fair event as provided in chapter 174, whose facilities or indebtedness are supported in whole or in part

with property tax revenue and which is licensed to conduct pari-mutuel wagering pursuant to chapter 99D, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

b. "Public records" also includes all records relating to the investment of public funds including but not limited to investment policies, instructions, trading orders, or contracts, whether in the custody of the public body responsible for the public funds or a fiduciary or other third party.

How long must public records be retained?

Iowa Code chapter 305 provides for the development of public records retention rules applicable to state entities. They are not applicable to local government entities. Chapter 22 does not address record retention. However, several Iowa Code Chapters have retention requirements that apply to certain records.

How long does a custodian have in which to respond to a records request?

Chapter 22 is silent as to the time for response to a records request. The time to locate a record can vary considerably depending on the specificity of the request, the number of potentially responsive documents, the age of the documents, the location of the documents and whether stored electronically. The large number of variable factors affecting response time makes it difficult, and probably unwise, to establish hard and fast objective standards. The statute was adopted more than forty years ago. Today's electronic records environment adds to the complexity of this issue.

The only specific response time standard established by the statute addresses good-faith reasonable delay incurred in order to determine whether a document is confidential. Iowa Code subsection 22.8(4) addresses good faith reasonable delay when there is a question as to whether a record is subject to release. It includes this statement of an acceptable reason for delay:

> d. To determine whether a confidential record should be available for inspection and copying to the person requesting the right to do so. A reasonable delay for this purpose shall not exceed twenty calendar days and ordinarily should not exceed ten business days.

While the Code states a delay under Iowa Code subsection 22.8(4)(d) shall not exceed twenty calendar days, the Iowa Supreme Court does not view this as an absolute deadline:

> Open Records Act provision, stating that a reasonable delay for the purpose of determining whether a confidential record should be available for inspection and copying to the person requesting the right to do so shall not exceed 20 calendar days, does not impose an absolute 20-day deadline on a government entity to find and produce requested public records, no matter how voluminous the request; rather, it imposes an outside deadline for the government entity to make the particular determination mentioned. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013).

While there is no objective test established in Iowa law, application of subjective judgments made by the Supreme Court in the *Horsfield* case resulted in overruling the trial court decision. The Supreme Court found that the City violated the Open Records Law when it did not produce 617 pages of records in approximately 70 days.

According to an Iowa Attorney General Sunshine Advisory Opinion from August 2005, "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 or reasonable."

The Court's opinion in *Horsfield* lists several considerations for determining if a delay is reasonable:

> Under this interpretation, practical considerations can enter into the time required for responding to an open records request, including "the size or nature of the request." But the records must be provided

promptly, unless the size or nature of the request makes that infeasible. 834 N.W.2d at 461.

The IPIB prosecuted a case in August, 2014, in which an administrative law judge found a 94 day delay in responding to a records request which resulted in the production 355 pages of documents constituted a knowing violation of Iowa Code section 22.2.

May the custodian of a public record advise the subject of a public record of the fact that a request has been made to inspect and copy that record prior to its release?

Section 22.7 of the Open Records Law establishes exceptions to the general rule of openness. It recognizes that there are privacy rights and business matters at stake in many instances which establish valid reasons for holding public records in a confidential status in certain situations. There are also specific provisions in other Code Chapters that may apply to overcome the general statement of openness in Chapter 22.

Iowa Code section 22.8 establishes a right to seek to enjoin the examination and copying of a public record. The right is for the benefit of a lawful custodian of a government record, another government body or a person who would be aggrieved or adversely affected by the examination and copying of a record.

Although Chapter 22 does not specifically impose an obligation of a custodian of a public record to advise a person who might be aggrieved or adversely affected by the request for a public record, to not do so would in most cases make the right meaningless. There is no prohibition against such a practice. If the lawful custodian does not notify the subject of the record, how would the aggrieved or adversely affected person know to seek an injunction?

There are many situations where the custodian of a record may recognize a need to inform the subject of a record of the fact that the request for examination and copying of the record has been made. The custodian may not be in a position to determine whether the documents contain trade secret information, confidential business processes or personal information that could lead to harm.

Certainly the process contemplated in section 22.8 assumes that the process will be applied in good faith. It directly speaks to that requirement in paragraph 4 which begins with the statement: "Good-faith, reasonable delay by a lawful custodian is . . . not a violation . . . ."

If an email, a report, or other document relating to government business is composed, received or stored on my personally owned electronic devise, is that a public record under Chapter 22?

Most likely, yes. If a government official or employee uses privately owned electronic devices or services, such as cell phones, computers, email accounts, smart phones, or such to conduct official government business, then the record generated is a public record.

The content of the message governs the issue. If it concerns public business relating to public duties of an official or employee, then it is a public record. Recent years have shown a rapid explosion in electronic device ownership, making it easy to start a project at work, fine tune it at home, email drafts to colleagues and others, refine it on the work computer, carry it around the world on a flash drive or store it indefinitely 'in a cloud.' Because of this ease of portability and expansion of the work site, the term "public records" no longer refers to a document in a paper file in a drawer in an office.

This issue has been addressed in Iowa in a limited manner. Iowa Code Section 22.1 includes "all records, documents, tape or other information, stored or preserved in any medium" in the definition of public records. Subsection 22.2(2) states that a governmental body cannot prevent access to a public record by contracting with a nongovernmental body (such as a cloud storage provider or service provider).

Section 22.3A addresses public records and data processing software. The cumulative effect of these statutes is that a public record does not lose its public status by being retained on a privately owned electronic device.

The Iowa Supreme Court, in a 1967, pre-email decision, addressed the idea that you must look at the contents of the document or communication to determine

whether it is a public record: "It is the nature and purpose of the document, not the place where it is kept, which determines its status", *Linder v. Eckard*, 152 N.W.2d 833, 835 (Iowa 1967).

To allow a governmental body to avoid public records disclosure by simply requiring that officers or employees use their privately owned electronic devices would be to completely thwart the transparency goals of Chapter 22.

Comingling public communications and reports with private communications on a privately owned electronic device can create difficulty in responding to an open records request. Some private communications may arguably be withheld as not being a public record or as a confidential public record under Iowa Code Section 22.7. First and foremost, however, the public business communications are public records, and the custodian must review all records on a device to determine whether they are within a request for examination and copying to justify any denial of release.

What are Preliminary Drafts 22.7(65)?

The following is a general discussion of the provisions and an interpretation of Iowa Code section 22.7(65), the so-called preliminary draft provision. The staff has examined this issue and discussed it with board members. The staff has not taken this interpretation to the board for its adoption as an "official" interpretation. All recognize that the language is complex. Parts of that language lead to subjective evaluations that likely will be influenced by specific circumstances. Until experience is obtained with its application and various nuances addressed, it is only possible to give a literal interpretation as a starting point.

Obviously, determining whether a record is a 'draft' is not as simple as marking or stamping 'draft' on the document. There is one certainty: naming a record a draft does not make it a draft.

This provision was enacted in 2012 to address the dampening of creativity that could result from submission of a novel or unusual proposal. It was urged that subordinates should be able to submit ideas without fear of ridicule and decision-

makers should not have to be concerned about creative ideas that never advance. Iowa Code section 22.7(65) states:

> Tentative, preliminary, draft, speculative, or research material, prior to its completion for the purpose for which it is intended and in a form prior to the form in which it is submitted for use or used in the actual formulation, recommendation, adoption, or execution of any official policy or action by a public official authorized to make such decisions for the governmental body or the government body. This subsection shall not apply to public records that are actually submitted for use or are used in the formulation, recommendation, adoption, or execution of any official policy or action of a governmental body or a government body by a public official authorized to adopt or execute official policy for the governmental body or the government body.

This exemption has limited application restricted to a specific class of public records that meet all of the following criteria:

1. They are tentative, preliminary, draft, speculative or research material;

2. They exist in a form prior to completion for their intended purpose;

3. They exist in a form prior to the form of the record that is submitted or used in the actual formulation, recommendation, adoption or execution of any official policy or action by a public official with authority to make such decisions; and

4. They must not have been submitted to or used by a public official authorized to adopt or execute official policy.

Who is a decision maker? The determining factor under the exemption is whether the public official is authorized to make or execute the official policy for the government body related to the subject matter of the draft record. This will vary under the circumstances. There may be more than one decision-maker of the same rank in government body. A decision-maker need not be a high level public official. There are probably more low level decision-makers in a

government organization than high-level decision-makers. The operation of government involves numerous decisions made at all levels. Under the terms of the exemption, the decision-maker need not even actually make decisions since the exemption also refers to public officials who have authority to execute official policy. The sharing of draft materials with the public official who merely has the power to execute the public policy would terminate the confidentiality of an otherwise exempt draft document.

Material outside the scope of the exemption cannot be identified until a final decision is made or product produced unless the material has been submitted to a decision maker. Until one of the disqualifying events occurs, prospectively covered material is confidential. Once a disqualifying event occurs the material can be examined to see whether is remains confidential through application of paragraphs 1 through 3 above. Disqualifying events include submission of the material for use by a public official authorized to adopt or execute official policy (see paragraph 4 above) or actually used in the actual formulation of official policy or action (see paragraph 3 above).

A simple test is to examine the draft material and compare its contents to the contents of the final product. If an idea in the final draft appears in the potential tentative draft, the exemption is lost.

Another test is to determine when the draft material reached the hands of a decision maker or person who will execute the policy. In some entities that may be the person at the next desk or office. In others entities it may be a person the creator or preparer of the draft material has never personally met. The smaller the government entity, the less likely it is that the exemption would apply. In many small government entities, the decision maker or executive authority is only one step removed from the person preparing the draft material.

Are employment applications confidential records?

In *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988), the Iowa Supreme Court held that government bodies can make job applications confidential under 22.7(18), if the body could reasonably believe that those

persons would be discouraged from applying if applications were public. Section 22.7(18) states:

> 18**. Communications not required** by law, rule, procedure, or contract **that are made to a government body or to any of its employees by identified persons outside of government**, to **the extent that the government body** receiving those communications from such persons outside of government **could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination**. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:
>
> a. **The communication is a public record to the extent that the person outside of government making that communication consents** to its treatment as a public record.
>
> b. **Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity** of the person outside of government making it or enabling others to ascertain the identity of that person.
>
> c. **Information contained in the communication is a public record to the extent that it indicates the date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except** to the extent that its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person. In any action challenging the failure of the lawful custodian to disclose any particular information of the kind enumerated in this paragraph, **the burden of proof is on the lawful custodian to demonstrate that the**

disclosure of that information would jeopardize such an investigation or would pose such a clear and present danger.

What about personnel files?

Code subsection 22.7(11) specifies what information in the otherwise confidential personnel records of government officials, officers or employees must be considered public record:

The name and compensation of the individual, including any written agreement establishing terms of employment; pay and things of value conferred for services rendered; casualty, disability, life or health insurance benefits; other health or wellness benefits; vacation, holiday or sick leave; severance payments; retirement benefits; deferred compensation.

The time period the individual was employed by the government body.

The positions the person holds or held.

Resume information to include educational institutions attended and degrees conferred as well as the names of previous employers, positions held and dates of employment.

If a person is discharged for disciplinary reasons, this fact becomes public information once all appellate and contract remedies are exhausted.

And what about settlements!?

Settlements are governed by Code section 22.13. It states:

22.13 Settlements — government bodies.

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.**

CONCLUSION

Thank you for the opportunity to present.

I want to emphasize that you should not hesitate to contact us whenever you have a question concerning open meetings or open records. And please do refer constituents who may have questions in these areas.

Contact Information:

Keith Luchtel, Executive Director
515-725-1781
Keith.luchtel@iowa.gov

Margaret Johnson, Deputy Director
515-725-1781
Margaret.Johnson@iowa.gov

Website:

www.ipib.iowa.gov