TO: Legislative interim committee on Chapters 21 and 22, Iowa open meetings and open records laws
FROM: Kathleen Richardson, on behalf of the Iowa Freedom of Information Council
DATE: Sept. 6, 2007
RE: Iowa's access laws: Problems and solutions

The Iowa Freedom of Information Council is grateful for this opportunity to comment upon the current state of open government meetings and records in Iowa.

The council is a non-profit coalition, formed in 1976. Our membership includes Iowa journalists, librarians, attorneys, educators and others committed to open government.

The members of the Council hear often from Iowans who experience difficulty in obtaining government information that is rightfully theirs under the state "sunshine" laws.

Most Iowa government officials in Iowa are people of good faith, who are trying to do their jobs to the best of their ability and to serve the public interest. However, even well-intentioned public officials can fall into the trap of seeing closed-door dealing as the most efficient way of conducting public business. They fail to see the bigger picture of how secrecy frustrates citizens and sours public faith in government.

I spoke to the House and Senate state government committees earlier this year, and at that time I discussed the most common problems that we see regarding public meetings and records in Iowa. I've handed out copies of those comments because while I'll touch on these problems again briefly, I'd like to spend most of my time today suggesting a possible institutional solution.

One common problem is the practice of so-called **"walking" or "roaming" quorums**, in which the members of a government body discuss public business OUTSIDE of the public meeting, in groups that are smaller than an official quorum, talking in person, via phone or e-mail, or passing around a memo from hand to hand — even making a decision and then going into the public meeting to rubber-stamp it.

This practice frustrates citizens who want to get involved in the decision-making process, and it also frustrates the stated intent of the public meetings law, which (according to Chapter 21) is to "assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of government decision, as well as those decisions themselves, are easily accessible to the people."

Another area in which government secrecy increasingly draws criticism is **in hiring of public employees**. Often these positions are among the most powerful and prominent in the community, yet the public records law currently allows a government body to keep the names of candidates confidential.

In addition, Iowa FOI Council members have seen an explosion in the number of government bodies who are keeping the interviews themselves secret, even though the public meetings laws says these sessions may be closed *only* when necessary to prevent "needless and irreparable harm" to an applicant's reputation AND the applicant requests closure.

A perennial black hole in the public records law is the exception for personal information in the **personnel records** of government officials. This exception is used to hide a wealth of information about public employees, including information about misconduct that the public should know.

The definition of **what constitutes a meeting**, and which government entities are covered by the open meetings law, has caused confusion and invited abuse.

For example, Iowans express confusion about when subcommittees and advisory boards to government bodies must comply with Chapter 21. The law says that advisory groups that are "formally or directly" created, or created by "executive order" to "develop and make recommendations on public policy issues" must follow the law — which requires citizens who want to attend meetings of these bodies to do legal research to find out how they were created and what their duties are, then argue with the officials or their lawyers that the law applies to them.

There are an increasing number of issues involving **electronic communication** by government officials — for example, when e-mails between members of a government could constitute a public meeting, or under what circumstances e-mails by public officials should be considered public record.

The problems that I listed above — the walking quorums, the secrecy in hiring, the black hole of government personnel records — are issues that can be addressed legislatively by changes in the open meetings and records laws, and I have also distributed some suggested amendments that address those problems.

But there are two more fundamental issues that stand in the way of ensuring truly open and accountable government in Iowa: sufficient training of government officials and employees in the access laws and the official will to enforce those laws.

Viewed charitably, some meetings and records violations by public officials may be caused by ignorance of the law. While there is more **training** being offered to public officials now than ever before — primarily by government associations such as the Iowa State Association of Counties, the Iowa Association of School Boards and the League of Cities — many employees still fall through the cracks, especially at the local level. No one is legally charged with ensuring that officials receive training in their responsibilities under the law.

But perhaps the most maddening aspect of dealing with apparent violations of the open meetings and records laws is the **lack of official will to enforce the laws, at all levels**.

I have previously cited the situation in Riverdale, Iowa, as an unfortunate case study in what is wrong with enforcement of the public meetings and records laws in Iowa.

Three years ago, some of the residents of Riverdale, a town of about 500 in eastern Iowa, started having concerns about the conduct of city affairs, especially the operation and finances of the volunteer fire department.

They requested public records about the fire department from city officials, both verbally and in writing. Their requests were either ignored or rejected.

They asked the city attorney for help. That went nowhere.

They worked with someone in the state ombudsman's office, who called the mayor to intercede on their behalf. They still didn't get the records they wanted.

They approached the sheriff, who agreed that city officials were clearly in violation of the public records law, but they never heard back from him.

They repeatedly asked the Scott County attorney to step in to enforce the law and to investigate apparent financial improprieties. To no avail.

In March 2005, a year after they started asking for public records that they were clearly entitled to, two Riverdale residents filed a lawsuit against city officials in an attempt to force them to comply with the law.

Marie Randol of Riverdale wrote to the county attorney:

"For a year and half, citizens have been requesting public records. The law states a definite time in which, upon request, public record information requested is to be sent to the requesting party(ies). Well, a year and a half later, citizens are still waiting for public record information. . . . .

"No one shows concern for violation of the law. While the above information may not equate to a murder or rape, there is still evidence of law breaking that has and continues to take place because there is no one telling them any different and they are allowed to conduct business in the same old way."

In 2006, Randol repeatedly wrote to Gov. Vilsack, Lt. Gov. Pederson and Attorney General Miller. The attorney general's office suggested she call the ombudsman. The governor's office suggested she contact the city or county attorney. Eventually, the governor's office recommended that Randol hire a private attorney. To which she responded incredulously:

"If a City violates Iowa Code it's up to an individual to bring suit against the violator(s) on behalf of the state? Doesn't that seem strange to you to have private citizens defend State Code? I was under the impression that laws made by the State were enforced by the State. . . . ."

Last October, the plaintiffs finally WON their public records lawsuit against the city of Riverdale. The judge ruled that city officials were well aware of their obligations but still failed to comply with the law. The plaintiffs' legal bills topped $30,000, which ended up being paid by the citizens of Riverdale.

Iowans are telling us that they literally have no one to turn to when they are stonewalled by officials over attempts to obtain access to government information. Those citizens who persevere often have no recourse but to spend thousands of dollars of their own money to enforce their rights under the law. It's a sad state of affairs.

So, in addition to several legislative changes that would address the most common access problems, the members of the Iowa Freedom of Information Council suggest that Iowa follow the lead of other states that have acted to make government more responsive to citizen concerns about accessibility. These states have created independent **access counselors** who conduct training for public officials, answer questions about access issues from both officials and citizens, and attempt to resolve complaints short of litigation through mediation and informal opinions.

In 1999, I conducted research into the various models of state access counselors and I've brought copies of that report today, along with a national report completed just last week that provides updated information about many of the same offices.

Both reports provide detailed information on the different ways that states have addressed the problem of citizen access to government information; 23 states have enacted some sort of mediation process for open meetings and records issues. I will touch on three models that I think provide the most guidance for Iowa:

Connecticut's Freedom of Information Commission, created in 1975, is the largest FOI agency in the nation and the one with the most statutory power. The commission's five members are appointed by the governor and confirmed by the legislature; there is an executive secretary and general counsel with 18 staff members. It posts operating expenses of $1.7 million.

In addition to an informal mediation process to resolve complaints, the Connecticut FOI commission has an quasi-judicial process. The commission renders advisory opinions, investigates grievances, holds hearings, administers oaths, and subpoenas witnesses and documents. The commission's findings are legally binding. It can order officials to attend FOI training, nullify actions taken at an illegal meeting, order production of documents and impose civil penalties for both violations and for frivolous claims.

The Connecticut commission formally disposes of 600 to 700 complaints a year, along with issuing a varying number of advisory opinions.

However, it is **the New York Committee on Open Government**, begun in 1974, that is the agency most often cited as the model for other state access offices that have been created since then. The agency, which is located in the New York Department of State, includes an 11-member committee of government officials and members of the public, but the day-to-day work is done by an executive director and a staff of three.

The longtime, well-respected director, Robert Freeman, provides both oral and written legal opinions. While his opinions carry no legal weight, over the years the agency has developed enough credibility that the opinions are often cited by judges.

The committee also makes an annual report to the Legislature, summarizing its work and making recommendations for changes in the law.

The New York committee fields more than 6,000 telephone inquiries annually and issues about 900 formal opinions. Because of the relative informality of the New York system, it is more cost-effective than the more judicial Connecticut model. It has a budget of approximately $350,000.

A more recent addition to the club, **Indiana's office of Public Access Counselor,** was created in 1999 after a public records "access audit" by Indiana journalists found widespread problems with compliance. The counselor is appointed by the governor for a four-year term; it is an independent office in the executive branch, with a budget of approximately $150,000 and a staff of two.

Like Freeman in New York, the Indiana access counselor provides both informal oral advice and more formal written opinions, and intervenes with agencies in attempts to resolve disputes. Indiana law provides incentives for people to use the access counselor: If a plaintiff has not contacted the agency before filing suit, she can lose reimbursement of attorney's fees.

All three agencies conduct training for government officials and hold workshops for the public, provide speakers and publish educational literature. All say that the vast majority of their inquiries come from citizens and government officials. In addition, most complaints received by all three offices are responded to and resolved informally.

While each state is unique, in terms of freedom of information needs and political climate, several common themes emerge that are germane to any discussion of access mediation in Iowa:

Having one person in state government who is responsible for dealing with issues involving open government serves both the public and government officials well — by conducting training, answering questions, and settling disputes short of litigation.

To be successful, any access office must be seen as neutral, independent and non-partisan. Citizens must feel they can receive a fair deal and government agencies must respect the counselor and be confident she doesn't have a political agenda. In contrast, the Attorney General's office, as the counsel for state government agencies, has a built in conflict of interest involving access problems with state agencies.

The access counselor's mandate must be narrow enough and he must have enough resources, in both time and money, to do the job well. Putting an FOI counselor in an independent office allows him to focus solely on issues of involving open meetings and records.

An access counselor can defuse access issues quickly and efficiently, with a minimum of red tape. The Indiana Public Access Counselor, for example, is required to respond with written opinions to formal complaints within 30 days.

A public access counselor helps relieve other government officials from the burden of dealing with contentious FOI issues. The counselor can provide free, quick legal advice to both citizens and government entities at all levels.

By focusing on mediation, an access counselor can encourage communication within communities. Litigation over open meetings and records issues can tear towns apart. I've heard from both sides in the Riverdale situation and the divisions in that community are very sad.

Access counselors can potentially all parties involved in access complaints thousands of dollars in attorney time and legal fees. For example, in just the past few months, Iowa has seen high-profile litigation involving the state Board of Regents, the Central Iowa Employment and Training Consortium, the Des Moines school district, the Iowa Board of Medical Examiners, the Institute for Tomorrow's Workforce and the Davis County Hospital.

In conclusion, the thousands of calls that flood the offices of the nation's access counselors attest to the need for a place where a state's public officials can take their questions and citizens can take their grievances in the confidence they will be addressed quickly and fairly.

A streamlined process for dealing with access issues is a resource for both government and the public; by funneling all inquiries to one office, problems areas and issues can be identified more easily. As government grows bigger and more complicated, its information issues also become more complex and require special attention and expertise.

The idea of voluntary mediation resonates in an era of groaning court dockets.

As one of the plaintiffs in the Riverdale case commented:

"These are serious questions and concerns about how a city government is being run that I believe deserve answers, yet no one seems to be listening."

Thank you for listening.