Presentation to the Senate and House state government committees
Feb. 5 and 6, 2007

Thank you very much for allowing me to speak with you today.

My name is Kathleen Richardson, and I teach journalism and media law and ethics at Drake University.

However, the hat that I am wearing today is as executive secretary of the Iowa Freedom of Information Council. The council is a non-profit coalition of organizations that are committed to open government.

Our members include the Iowa Newspaper Association and the Iowa Broadcasters Association, but also the Iowa Library Association, the League of Women Voters of Iowa, the Iowa Civil Liberties Union, educators, lawyers, private investigators and others.

Our mission is primarily educational: We produce booklets and other materials on the open meetings and records laws, speak to civic groups, and, when asked, conduct training sessions for government officials on the laws, often in collaboration with the attorney general's office and the office of citizens' aide/ombudsman.

Probably the most popular project that we undertake is producing the *Iowa Open Meetings, Open Records Handbook,* tens of thousands of which have been distributed throughout the state, often through the county auditors offices to local officials. The 12th edition is at the printer now.

My 10 years of experience with the Council has led me to believe that most 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, as in all professions, there are always a few bad apples. Like the two supervisors in Montgomery County who, a few years ago, persisted in violating the open meetings law, even against their own attorney's advice. The newspaper and broadcast journalists in the area were forced to sue to stop the practice — eventually winning their lawsuit, after spending tens of thousands of dollars in legal fees and braving physical and economic threats from some of their neighbors.

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 accountability.

Over the past couple of weeks, I've looking through my files and consulting journalists, lawyers, government officials and citizens to see if there are any areas of the open meetings and records laws that seem to cause more problems than others. Of course, there

are as many different kinds of problems as there are communities, but several themes seem to pop up more frequently than others.

First, 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 or via phone or e-mail — even making a decision and then going into the public meeting to rubber-stamp it.

This is perhaps the biggest single complaint that I receive from citizens who call me. It 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."

A blatant example of a "walking quorum" occurred three years ago when Polk County supervisors met with members of the Des Moines City Council to nail down the details of a gambling deal that protected Prairie Meadows racetrack and casino. The government officials met behind closed doors, with the supervisors cycling in and out of the meeting to avoid having a quorum — all before the eyes of reporters and the lenses of TV cameras.

The West Des Moines City Council used the same technique in 2005 when members met individually with Wal-Mart representatives to discuss the controversial operating hours for a new store.

Another area in which government secrecy increasingly draws criticism is **in hiring of public employees**. The public records law currently allows a government body to keep the names of candidates for public jobs confidential if the agency could reasonably believe that people would be discouraged from applying if applications were open to the public. However, secrecy is not required.

In addition, in the past couple of years I've seen an explosion in the number of government bodies who are keeping all of the interviews themselves secret, even though the exception in 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.

Probably the most publicized example of this practice is the current controversy swirling around the board of regents' decision to keep details of the search for a new University of Iowa president secret — even to the point of conducting a rolling closed meeting that reportedly went on for days without the public's knowledge.

The hiring of school superintendents is largely done behind closed doors in Iowa these days. Both the Des Moines school board last year and the West Des Moines school board

in the previous year conducted much of the process of hiring their superintendents behind closed doors. The Des Moines board even posted police at the interviews to keep the public out.

The search for a city manager in Des Moines was opened up somewhat last year after the names of candidates were leaked by the press. The city was also forced by public pressure to hold the interviews with finalists in the open, though the audience was not allowed to ask questions. By comparison, when the city selected the previous city manager in 1995, the process was conducted largely in the open with a public forum.

In Waukee, however, the citizens weren't so lucky last year. The city council hired a new city administrator after conducting the entire process, including narrowing down the candidates to a final choice, behind closed doors. The new administrator turned in his resignation to his old bosses — including his start date in Waukee — even before the public vote on his appointment in Waukee.

A perennial black hole in the public records law is the exception for personal information in the **personnel records** of government officials.

The Institute for Tomorrow's Workforce, a legislatively created group, cited the personnel exception to close a meeting to discuss hiring a consultant because, one of the chairs said, there were people involved in the discussion, not animals.

In Eagle Grove, the school district used the exception to keep secret a public petition filed by residents and submitted to the school board. Even though the petition had been signed by dozens of community residents, the school district said it was "personal information" in the personnel file of the district employee who was being criticized by the petitioners, so the local newspaper couldn't get a copy.

Gov. Vilsack's office cited the personal information exception in refusing to release a written report on the involvement of state employees in the CIETC scandal. The governor quickly reversed that decision.

The definition of **what constitutes a meeting** has caused confusion — or at least invited abuse.

The board of trustees of Broadlawns, the public hospital in Polk County, held a series of off-the-books meetings last year, including one involving a plan to demolish the hospital after moving its operations to another location. The board argued that the meetings really weren't "meetings" under the law because they were purely informational. (The open meetings law says an official meeting includes *deliberation* or *action*. The trustees must not have been actually *thinking* about the stuff they heard.)

I also receive a great many calls expressing confusion about when subcommittees and advisory boards to government bodies must comply with the open meetings law. 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.

It shouldn't be that difficult.

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.

A colleague suggested the other day that government bodies should be required to post their e-mail correspondence, as public records, on a Web site that would be accessible to the public. I thought that was a kind of extreme approach to the problem of secret dealings — until an average citizen called me up a few days later and suggested the same thing. Maybe it's not so crazy after all.

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 and the League of Cities — many officials still fall through the cracks, especially at the local level. While Chapter 21 requires that information be provided to government officials, no one is legally charged with ensuring that officials receive training in their responsibilities under the law.

The ombudsman's office released reports in December that found open meetings violations in both Luther and Randolph. Both reports cited government officials' ignorance of the law and recommended training to ensure that the violations wouldn't continue.

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**.

The Wapello County attorney last year filed civil charges against a cemetery board for open meetings violations, but that is exceedingly rare.

Part of the problem may be the relative insignificance of the penalties. If I'm found guilty of violating the open meetings or records law, I could be slapped with a fine of as little as $100.
A friend pointed out that you can get into more trouble growing your grass too long in Iowa than you can for conducting an illegal meeting or hiding public records.

For a year or more, I've been corresponding with several people from Riverdale, Iowa. (They could probably tell you EXACTLY how long, because they document EVERYTHING, I've discovered.) When I found out that I was going to be testifying here

today, I contacted them to get more information about their case. I think they wore out both my fax machine and theirs over the weekend.

What happened to the citizens of Riverdale is, unfortunately for them, a case study in what is wrong with enforcement of the public meetings and records laws in Iowa — or, more appropriately, it highlights the *lack* of enforcement of the law.

I want to emphasize that in many ways their story is typical of those of other Iowans who call me with public meetings and records complaints — though most people usually give up before going as far as the folks of Riverdale, who are a particularly tenacious bunch, as you'll see.

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 did exactly what I recommend people do in such situations.

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, but the ombudsman has no enforcement powers. 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.

At about the same time, another citizen was successfully suing the city for violations of the public meetings law. The citizens who were pressing for access to city proceedings were belittled and even physically threatened at city council meetings.

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.

The citizens of Riverdale also contacted the state auditor's office with their concerns about city finances. The auditor looked into their concerns, recommended that the county attorney investigate, but then took over the investigation itself.

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. They are continually seeking out the information on their own because of lack of cooperation by city officials. . . .

“All findings are documented by receipts or depositions. Yet 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. These are serious questions and concerns about how a City government is being run that I feel deserve answers, yet no one seems to be listening.”

The county attorney responded that his office “does not have in its employ, investigators. These specific complaints which you have might better be taken to the state auditor.”

In 2006, Randol repeatedly wrote 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. Prosecutions of Iowa Code Violations were pursued by the State. If you leave the prosecutions for violations up to individuals there may be no need to have laws written in the first place. . . .

“I guess what I’m asking is, What is the attorney general’s job if not to defend the laws written by the state.”

The people of Riverdale also contacted Sen. Grassley, Rep. Nussle, county supervisors, and state legislators.

Last October, they 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.

In 2005, the Iowa Legislature amended the open meetings and records laws to allow removal from office of any official who has violated the law twice. Other sections of the Iowa Code also allow for removal of officials from office. The citizens of Riverdale are now trying to get someone to talk to them about enforcing THOSE sections of code.

Tammie Picton, one of the plaintiffs in the lawsuit, has described what she and her fellow citizens went through as the bureaucratic version of "kick the can," with no one assuming responsibility for enforcing the law. She summarized the three-year ordeal in a series of letters and
e-mails last week:

" 'Accountability' seemed to be the biggest challenge and still is to this day. . . . I was amazed to learn when speaking to certain [agencies] it was as if I always somehow got a 'new employee on their first day' mentality. . . The auditor's office seemed to be the only accountable source. We met with them, they listened to and reviewed our information and proceeded to contact the county attorney with their opinion and concerns. Again, as you can read, it was the biggest disappointment yet.

"I believe this is what has allowed it to drag on for almost three years. It was not addressed at the local level and kept contained. . . . I asked the attorney general's office, Who is the county attorney's boss? Who does he answer to? Everyone has a boss? I was told, the voters. . . .

"[Perhaps if elected or paid officials] know they will pay for not addressing issues, or for choosing what laws they do and don't want to enforce, rather than following the law as it's written, you might see a turnaround. . . .

"Can you ask the committee these questions for me:

"Who forces cities to hand over public records? Why did we have to invest our money and time to enforce state laws?

"Whose job is it to remove officials from office who are habitual in their violation of state law?"

Tammie concluded with the following:

"Thanks for your help and dialogue over the past year. As a taxpayer of this state, I have no regrets of you. You, ma'am, do your job, along with the auditors. As for some others, shame on them."

I hope you were listening carefully to that last statement. It is truly astounding. While it's nice to be appreciated, and I enjoy helping out, I am not a public official. I am not paid with taxpayer dollars to serve the public. I haven't taken an oath of office to enforce the law. I am just a fellow citizen, sitting in my office in Des Moines, talking to Iowans who say they literally have no one else to turn to when they are stonewalled by their local officials. It's a sad state of affairs.

The legislative intent is clear that there should be a presumption of openness in the conduct of government affairs, yet too many officials see their responsibility as trying to keep as much information as possible secret.

Chapters 21 and 22 are the “operating manual” for running Iowa government, yet too many officials are not following it.

The scandal-ridden CIETC is the poster child for why transparency and accountability in government is so essential.

Selective changes in the open meetings and records laws would clarify and strengthen them.

Training in the law must be ensured for all government officials.

And pressure should be put on county attorneys and the attorney general’s office to enforce the laws.

Thank you very much for your time.