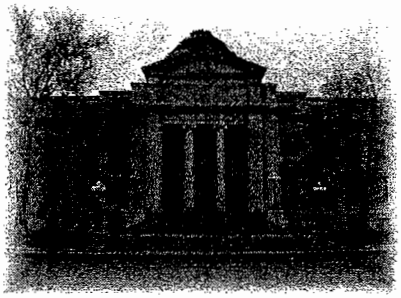

Citizens' Aide/Ombudsman Presentation

Freedom of Information Study Committee

September 6, 2007

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I believe today's interim study committee has been in the making for several years. It is the result of our collective concerns that Iowa's current laws and adherence to them need fixing.

Open meetings and open records are important in a democracy. They combine to keep government transparent, responsible and accountable. Open government instills trust and confidence. Its opposite breeds suspicion and alienation.

We are here because of a variety of events, circumstances and interests. The 2000 Freedom of Information (FOI) audit found our governments, state and local, were not doing all they could to be open. In response the Attorney General held a public records training for law enforcement agencies and initiated its Sunshine Advisories. Associations like the Iowa League of Cities, the Iowa Association of Counties and the Iowa Freedom of Information Council held training programs. The Legislative Council authorized a new position in the Ombudsman's office to respond to inquiries and complaints about public records, open meetings and privacy. In 2005 a second statewide FOI audit was conducted. Once again commitment to and compliance with Iowa's open meetings and public records law was found to be lacking across our state.

And more training was promised and delivered, yet the nature of noncompliance seemed to increase in frequency and audacity. Iowa was confronted with the practice of walking quorums, serial and rolling meetings, closed door and secret hirings, meetings sandwiched between other meetings, and many other affronts to our open government.

Both my office and the state auditor have published reports detailing tardy publication of minutes, faulty meeting agendas and other violations of Iowa's open meetings and public records laws. Additionally there was litigation, against large and small government entities, across the state. Often the litigation was commenced by citizens and organizations with limited means after they had tried other ways to resolve their concerns.

Absent a commitment to aggressively investigate and prosecute violators of Iowa's open meetings and open records law, I question whether whatever we do will accomplish much. We can refine the definitions, close the technical loop holes, and admonish those caught in violation but a stronger message must be sent. If we cannot promise to place greater effort across our state to actively prosecute violations of these laws, then I suggest borrowing from the Fair Trade Commission and permitting by legislation the discretionary judicial award of treble damages when citizens and organizations prevail in civil actions involving violations of Iowa's open meetings and public records statutes. Enhanced penalties may level the playing field and hopefully stop the bending, stretching and ignoring of our FOI laws.

The issues I am bringing to you are the product of several years of experience working with the public, FOI advocates, government officials and association staff. From January 1, 2003 to August 31, 2007 my office received 1,050 complaints and information requests and worked on 31 special projects relating to public records, open meetings, and privacy. We have substantiated or partially substantiated 95 complaints. During this time period 89 complaints were not substantiated. My office currently has 71 cases pending on FOI or privacy issues.

We have found many issues can be resolved with discussion and education. Most of Iowa's government officials and employees truly want to operate in an open and accountable way. A few do not. In some instances those few can be held accountable by investigations by my office, audits by the State Auditor, or litigation by private citizens and organizations. It would be helpful to see more prosecutions on these laws by our county attorneys and the Attorney General. However those offices have to balance the responsibility to represent the government as their client with their responsibility to prosecute. Perhaps a different structure for prosecutorial enforcement of open meetings, public records and privacy violations should be considered.

Based upon the experience of my office over the past several years I have proposed amendments to ensure the openness of Iowa government and, when needed, to protect the privacy of Iowa citizens. The General Assembly has adopted some of my recommendations and is considering others.

Where the law is clear, I believe prosecution, litigation, and reports by my office and the State Auditor should be able to protect Iowa's open government. However where the law is less clear or where there is a history of maneuvering and interpretation by officials that thwarts transparency and accountability then I think the Legislature must consider the alternatives and provide us with its clear directive. Following are issues that my office has identified that we believe are important issues for your consideration.

Section 1 – Applications for Government Employment

There has been significant debate and confusion as to what information should be available to the public regarding applications for employment with a state or local governmental agency. This can result in excluding the public from meaningful review of candidates for public employment until the process is finished. My office has fielded numerous complaints from citizens who feel wrongfully excluded from participation in this important process.

Currently, the identity and qualifications of applicants are frequently withheld from the public based on two sections of the Iowa Code. Section 21.5(1)(i) allows closing a meeting to evaluate an individual whose appointment or hiring is being considered when a) it is "necessary to prevent needless and irreparable injury to that individual's reputation" and b) the individual has requested a closed session. There is no corollary provision specific to applications in the Open Records Law; however, section 22.7(18) pertaining to confidentiality of general communications not required by law is often cited to withhold written applications from public review.

These sections should be amended to strike an appropriate balance between the public's right to know and the applicant's right to privacy. The guiding premise should be that the public has a right to know certain basic information about all applicants for public positions. This includes, at a minimum, the following: the applicant's name, city of residence, employment history and educational history. Applicants should be made aware of this requirement prior to making application.

There also needs to be one standard used to protect applicants' privacy regarding both disclosure of written application materials and discussions about the applicants. One option is to apply the existing "needless and irreparable injury" standard for a closed meeting also to the application records. In addition, the applicant should be required to request such protection in writing and state the reasons, to make it clear to the government body and enable it to determine if the criteria has been met.

This past legislative session I recommended legislation which incorporate these concepts. It was House Study Bill 38. I urge you to address the ongoing issues with employment applications and to consider the language of that bill.

Section 2 – Walking Quorums, Serial Meetings

Under Iowa Code section 21.2(2), a meeting of a governmental body must be opened to the public if a majority of that body deliberates or acts on policy-making matters.

We have seen instances where less than a majority number of members of a governmental body rotated in and out of a gathering intentionally to avoid falling within the definition of a meeting.

During the 2006 legislative session, I recommended legislation that became HF 372, to expand the definition of "meeting" in Iowa Code section 21.2 to prevent this practice. My proposed definition of "meeting" would include a series of gatherings of the members of a governmental body where there was less than a majority at each gathering, but who collectively constituted a majority of that government body.

Section 3 – Multiple-Day Meetings (Rolling Meetings)

Recently, a governmental body that met over a period of days claimed it did not have to provide separate notice for each day because it had merely adjourned and reconvened repeatedly during one long, continuous meeting. I believe this so-called "rolling meeting" subverts the notice requirements in section 21.4 of the Open Meetings Law and should be addressed within the context of that statute.

Section 4 – Retention of Closed Session Minutes and Tapes

Iowa Code section 21.5(4) states that the minutes and tapes of a closed session shall be preserved for "at least one year from the date of that meeting." A seemingly contradictory requirement in Iowa Code section 372.13(5) requires city councils to keep records of their proceedings for at least five years. I believe the term "proceedings" includes the closed sessions of city council meetings. We have encountered situations where municipal attorneys have relied on section 21.5(4) to advise governmental bodies that they may destroy the tapes after one year.

The one-year retention schedule could be particularly problematic if the closed sessions were about the purchase of real estate and the discussions extended for longer than one year.

Section 21.5(1)(j) states that closed session minutes and tapes shall be made available for examination once that purchase is complete. However, the completion of that purchase can exceed one year from the date of the closed meeting. We are aware of one attorney who has advised a school board that it can destroy closed session tapes regarding the purchase of real estate after one year, even though the purchase is not completed yet.

These practices in my opinión contravene public accountability. I believe the issue of retention period for closed session minutes and tapes should be examined to provide clearer and more consistent directives to government bodies, with considerations given to facilitating historical reviews and to providing for accountability.

Section 5 – Retention of Open-Meeting Tapes

We are also aware that some city clerks who make audio recordings of city council proceedings are destroying the recordings after they have used them to assemble their official minutes. We have found these recordings, when retained, to be extremely valuable for citizens to understand the basis for a governmental body's past actions, particularly when meeting minutes are lacking in detail.

While nothing in the Iowa Code requires governmental bodies to make audio recordings of open meetings, I believe such recordings, once they are made, become public records. In the case of cities, should those recordings also be retained, along with the written minutes, for at least five years under section 372.13(5)?

I believe it would be beneficial to clarify the retention requirements for minutes and recordings of open meetings for all governmental bodies, for the same reasons I stated for closed session records.

Section 6 – Application of Open Meetings Law to Advisory Groups

There are two important issues that need consideration:

A. What type of advisory groups should be subject to the Open Meetings Law?

Currently, the definition of "governmental body" in Iowa Code section 21.2 includes only two types of advisory groups:

- An advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues. [Iowa Code section 21.2(1)(e)]

- An advisory board, advisory commission, advisory committee, task force, or other body created by statute or executive order of this state or created by an executive order of a political subdivision of this state to develop and make recommendations on public policy issues. [Iowa Code section 21.2(1)(h)]

However there are numerous other advisory-type groups to which the law apparently does not apply. These tend to fall into two types:

- Those which are created by a governmental body, but not by either a law or an executive order, which still functions in a formal manner to develop and make recommendations to the governmental body. These may operate over a long period of time. (An example is the Iowa Department of Agriculture and Land Stewardship's Dairy Advisory Board).

- Those temporary *ad hoc* advisory groups created informally to develop and make recommendations to a governmental body on a single or small number of issues.

I believe consideration should be given to applying the Open Meetings Law to at least some of these types of advisory groups, so the public can better understand how recommendations which are adopted by a government body were formulated.

B. Should "meeting" include advisory groups' recommendation functions?

The second issue goes to the very purpose of an advisory group - to make recommendations.

A strict reading of the definition of meeting might exclude all advisory group meetings. The definition of meeting means a gathering ". . . where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties..." Advisory groups, by their definition, do not make policy but rather only make recommendations. Thus, a strict interpretation of the definition could exclude virtually all meetings of an advisory group, even those of an advisory group explicitly enumerated as a "governmental body." The Iowa Supreme Court recognized this apparent conflict in *Mason v. Vision Iowa Board*, 700 N.W.2d 349 (2005).

Consideration should be given to expanding the definition of "meeting" to include when advisory groups are meeting to "deliberate or take action on making recommendations on public policy issues."

Section 7 – Administrative Remedy for Errors and Enforcement

Iowa Code section 21.5(4) provides for a court to review the sealed minutes and tape of a closed session "in an action to enforce this chapter" if a meeting is alleged to have been improperly closed. Surprisingly, there is no legal method by which the governmental body itself may review and remedy such problems on its own.

I believe language should be added to allow a governmental body to resolve such mistakes brought to its attention. Under the current law, a governmental body must have a two-thirds majority to go into closed session. Perhaps a two-thirds majority can be required for the governmental body to release recordings of proceedings it subsequently determined to have been improperly closed.

If such a remedy is created, section 21.6(3)(a) should also be amended so that a member is not assessed damages for violations of the Open Meetings Law if there is proof the member voted to release the recording of an illegal closed session.

Section 8 – Sealed or Confidential

Iowa Code section 21.5(4) states that the closed session minutes and tape recordings "shall be sealed and shall not be public records open to public inspection." The Iowa Supreme Court in *Tausz v. Clarion-Goldfield Community School District,* 569 N.W.2d 125 (1997) said the purpose of that language is to prevent the records from being disclosed to the general public. According to an Attorney General's opinion, that section does not govern discovery requests and does not prevent absent members of the governmental body from reviewing the record. (Op.Atty.Gen., No. 01-11-01)

On occasion, the Ombudsman has requested closed session tapes if they are relevant to an investigation. Some agency attorneys question whether my office should be able to review the recordings since the law states they are "sealed." I believe the "sealing" applies to access by the public and should not prevent my office from accessing the closed session records with the authority granted under chapter 2C.

Likewise, we have also learned that some attorneys have advised their clients that members present or absent from a closed meeting are not allowed to review the meeting's recordings.

I recommend that these issues be addressed to clear up existing ambiguity and disagreements. Specifically I believe the word "sealed" should be deleted from section 21.5(4) to avoid an exercise of over-caution in this area. The closed session records can still be held as confidential, subject to appropriate access by statutory review agencies such as the Ombudsman or by members of the government body who were entitled to participate in the closed session but were otherwise absent.

Section 9 – Open Records Status of Law Enforcement Investigative Reports

There are several open records issues relating to law enforcement investigative reports. They result from ambiguities in Iowa Code section 22.7(5) which provides for the confidentiality of some information in such investigative reports. My office has encountered the following questions:

1. What is an investigative report? Does it include an incident report, an accident report, or other similar reports?

2. For information in an investigative report that is an open record, does the public right to access apply to the report itself (with confidential information redacted) or can the law enforcement agency create a new or separate report for disclosure in lieu of the original report?

3. Current law provides for open access to "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident." What information constitutes "immediate facts and circumstances?" Does a more specific definition need to be developed to provide greater guidance to both law enforcement agencies and the public as to what information is open and what is confidential?

Section 10 – Definition of "Public Records".

The definition of "public records" needs to be carefully reviewed. I would encourage you to consider the following points in that discussion:

- Iowa Code section 22.7 appears to provide the lawful custodian general discretion disclose the confidential records listed under that section. However, I believe the Legislature did not intend for that discretion to apply to some of the records, such as medical examiner reports and records. When can a lawful custodian exercise discretion? When does public interest outweigh confidentiality? When should a record be withheld to prevent further harm to others? May confidential documents be released when there would be no harm in doing so?

- What about the public nature of working papers, drafts, and unapproved minutes of a governmental body? How should those records be treated under chapter 22?

- Should the definition of "public records" be amended? Should it be more specific, given that it includes all records and information stored in any medium, of or belonging to a governmental body? How does it relate to definition of "record" in Chapter 305, the State Archives and Records Act?

Section 11 – Fair Information Practices Act

Iowa Code section 22.11 requires state agencies to have policies and procedures in place to ensure compliance with the Open Records Law. My office receives numerous complaints regarding local governments. Many local agencies have not considered what records they have in their possession, or how they intend to respond to public record requests. In many cases, this lack of coordination greatly hinders the ability of citizens to observe their governments' work. I believe section 22.12 should be amended to make the same requirements applicable to political subdivisions.

I also believe Iowa Code section 22.11 should define "personally identifiable information."

My office has also received complaints about confidential records not being made illegible or unreadable prior to being disposed. I believe Iowa Code section 22.11 should include a policy mandating that records containing personally identifiable information be properly destroyed.

In addition, the Legislature may want to consider penalties for the failure of a governmental body to take reasonable steps to ensure the security of sensitive records.

Section 12 – What is Personal Information?

A. Applicant and Current Employee Records

Iowa Code section 22.7(11) provides for the confidentiality of "personal information in confidential personnel files." This language is extremely vague. Complaints, such as those handled by my office or an agency's internal investigations, may result in employee discipline. When it is determined that a government employee erred or engaged in misconduct, most actions in response to an error, are shielded from public scrutiny.

In the 2004 legislative session I proposed language to amend section 22.11 to allow certain personnel and payroll records to be disclosed to the public upon request. In 2007 I proposed HSB 38 providing for a limited amount of information about applicants to be disclosed. Consistent with those proposals, I recommend allowing disclosure of the following information for applicants and current government employees:

1) name and compensation
2) amount of sick leave, vacation, and other leave information
3) hire date
4) work experience, educational background, and qualifications
5) disciplinary action which resulted in discharge, suspension, demotion, or loss of pay
6) other information where public interest outweighs individual confidentiality interests

B. Social Security Numbers and Unique Identifiers

Many government bodies in Iowa require individuals to provide personal information, including social security numbers, before an individual can receive a service or acquire a license. These documents are public records unless specifically identified as confidential in law and therefore are available to anyone who requests them. This information may also be available through on-line data searches created by government bodies.

Compounding the problem is that Iowa law rarely affords government bodies the authority to redact social security numbers from public records. To address this problem, my office proposed legislation during the 2007 legislative session, SSB 1223, proposing that government bodies, to the extent practicable, make reasonable efforts to redact the social security number prior to releasing the record if such redaction does not materially affect the value of the public record and is permitted by law. In addition, the bill would give individuals the option of not submitting a social security number to the government body unless submission of the social security number was essential to the provision of services by the government body or was required by law.

Unique identifiers are not limited to social security numbers. Should unique biometric data, such as a fingerprint, be a public record? In the past month, my office received a complaint that a local sheriff's department would not provide a copy of a person's fingerprints - the

code is silent on this type of record. As government bodies embrace technology another dimension is added to the public records discussion. Is a retina or iris image a public record?

Section 13 – Use of E-mail

E-mail is increasingly being used by governmental bodies to communicate, discuss and deliberate on matters of public importance. These e-mail discussions, while convenient and efficient, may violate the letter or spirit of the Open Meetings Law when they exclude the public from the witnessing a body's deliberative process. HF 372, which I mentioned earlier, attempts to address the issue of serial meetings held by electronic means.

As e-mail becomes the predominant form of communication among government officials, the Legislature may also want to consider requirements on the retention and destruction of e-mail, as well as a change to the definition of "record" as it relates to e-mail.

Currently, e-mail is generally considered a public record. The content of the e-mail, however, is an important consideration in the scope of an open records request. In several cases in and outside of Iowa, the courts have struggled to define what sorts of personal e-mails on government computers should be subject to openness.

LIST OF APPENDICES

Applications for Government Employment

Ombudsman's supporting memo dated January 25, 2007, including:

1. H.S.B 38, 82nd General Assembly, (Iowa 2007).
2. Erin Jordan, "Secret Sessions May Taint New President Search, Says Open Records Advocate," *Des Moines Register*, November 19, 2006, 1A.
3. Megan Hawkins, "Secrecy Wasn't Vital, Finalist Say," *Des Moines Register,* May 25, 2006, 4B.
4. "Bias Complaints," *Des Moines Register*, November 10, 2006, 1A.
5. "Six Finalists for City Position," *Des Moines Register*, date unknown.
6. Laura Pieper, "Ankeny Officials Name Superintendent Finalists," *Des Moines Register*, December 12, 2006, 7A.

Jared Strong, "Finalists Named for New Clive Post," *Des Moines Register*, October 13, 2006, 1Z.

Ombudsman's memorandum to answer subcommittee concerns dated February 5, 2007 (presented February 20, 2007 to State Government).

Ombudsman's memorandum dated February 22, 2007 regarding the request to exclude social security numbers with complete amendments.

"Five Interviews Set for Library's Chief Job," *Des Moines Register,* April 27, 2007, 2B.

Christina Smith, "Waukee City Council Ready to Hire New Administrator; But the Panel Has Not Given the Public a Chance to Meet the Candidates," *Des Moines Register,* August 19, 2006, 2B.

Walking Quorums, Serial Meetings

H.F. 372, 81st General Assembly, (Iowa 2006).

Ombudsman's supporting memorandum to H.F. 372 regarding walking quorums.

Ombudsman's memorandum to Representatives Boal, Hutter, and Whitehead with proposed amendments and other state information (Nevada, Wisconsin, and Texas).

"An Abuse of Trust," Editorial. *Des Moines Register*, August 6, 2004, 20A.

Advisory Groups

Mason v. Vision Iowa Board, 700 N.W.2d 349, (Iowa 2005).

Definition of "Public Records"

William P. Angrick II, "Investigation into Lee County Auditor's Release of Tape Recording of Board of Supervisors' Closed Session," Ombudsman Investigative Report. March 17, 2005.

Applicant and Current Employee Records

Ombudsman's legislative proposal regarding Iowa Code section 22.11 regarding public access to specific personnel information.

Ombudsman's supporting memorandum regarding Iowa Code section 22.11 with other state information.

Social Security Numbers and Unique Identifiers

S.S.B. 1223, 82nd General Assembly (Iowa 2007).

Ombudsman's supporting memorandum regarding S.S.B. 1223 dated February 27, 2007.

S.F. 212, 82nd General Assembly (Iowa 2007).

Ombudsman's supporting memorandum regarding S.S.B. 1223 dated March 5, 2007 answering concerns brought by the Senate State Government subcommittee.

Applications
for
Government Employment

STATE OF IOWA

Telephone: (515) 281-3592
Toll Free: 1-888-426-6283
TTY: (515) 242-5065
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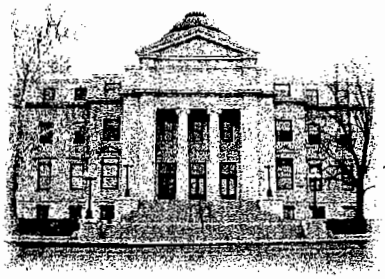
Website: http://staffweb.legis.state.ia.us/cao



WILLIAM P. ANGRICK II
CITIZENS' AIDE/OMBUDSMAN

CITIZENS' AIDE/OMBUDSMAN
OLA BABCOCK MILLER BUILDING
1112 EAST GRAND AVENUE
DES MOINES, IOWA 50319

Date: January 25, 2007
To: Members of the House State Government Subcommittee
From: William P. Angrick II, Citizens' Aide/Ombudsman
Re: **HSB 38: A Study Bill for an Act Related to the Meetings and Records Concerning Employment Applications to a Government Body**

PURPOSE

The bill would amend Iowa Code section 22.7(18) of the Open Records Law to provide that employment applications are public record, unless the applicant, candidate, or nominee requests confidentiality in writing and the government body determines confidentiality is necessary to prevent needless and irreparable injury to the individual's reputation. This bill would also require a government body to disclose certain basic information of applicants under final consideration. It would further require a government body to inform the applicant of these requirements.

In addition, the bill would amend Iowa Code section 21.5(1)(i) of the Open Meetings Law to require a government body to receive the request for closed session in writing. It also reiterates that it is up to the government body, not the individual, to decide whether it is necessary to go into a closed session to prevent needless or irreparable injury to the individual's reputation.

BACKGROUND

The Ombudsman believes government accountability should start with the hiring, nominating, and appointing process. An important consideration is how records and meetings are handled.

Complaints received by the Ombudsman and recent reports in the media constantly remind us that government often operates under a cloak of secrecy when hiring and evaluating the very people who we expect to be accountable to the public. The Ombudsman believes the hiring process of public servants requires disclosure to ensure accountability earlier in the process.

Prior to 1984, employment applications to government agencies were open to the public. In 1984 Iowa Code section 22.7(18) was added to provide that communications, not required by law, from persons outside government, are confidential to the extent the government body can reasonably believe those persons would be discouraged from making the communication if disclosed to the public. This section provides three exceptions to confidentiality: 1) the person consents to its disclosure, 2) the information in the communication can be disclosed without identifying the individual, and 3) the communication about a crime (except time, date, specific location, and immediate facts and circumstances) would endanger a person's safety or harm the investigation

Currently, government bodies are inconsistent regarding confidentiality of employment applicant information. While Iowa Code section 22.7(18) does not specifically reference employment applications, this section is what is usually cited as the legal basis for keeping employment applications confidential.

The Ombudsman also has concerns that government bodies are improperly meeting in closed sessions without first considering the need for a closed session and without a request for closed session, as required by law. Iowa Code section 21.5(1)(i) has been misread, misunderstood, and should be clarified by the legislature.

EXAMPLES

The Ombudsman is aware of a number of actions contrary to the Public Records Law and the Open Meetings Law, or the spirit of these laws.

We have received complaints of agencies going into closed session 1) without a request for closed session, or 2) after the government body influenced the applicants to sign a request for closed session, or 3) without evaluating whether "needless or irreparable injury" may result, or 4) with no evidence of a request for closed session and nothing said in closed session that would have caused injury had it been said in open session.

We are also aware of agencies 5) refusing to accept a recommendation to implement policy to require the request be in writing, or 6) interviewing applicants over the telephone and in one instance requiring police protection to avoid identification, or 7) applicants being kept confidential when the applicant had no preference for confidentiality, or 8) arbitrarily determining that applicants would be dissuaded from application if their name was disclosed prior to the final decision.

RECORDS

This bill would amend Iowa Code section 22.7(18)(d) to specifically address employment applications. Similar to the open meetings provision for considering employment applicants, the amendment would allow employment applications to be kept confidential only if the individual requests confidentiality and the government body determines confidentiality is necessary to prevent needless and irreparable injury to that individual's reputation.

However, the amendment also would require basic information about the applicants under final consideration to be disclosed. The basic information to be disclosed includes the applicant's name, educational and employment history, and city.

The bill would require the government body to notify the applicants of these requirements.

The Ombudsman believes this bill presents a reasonable balance between openness and privacy, because it allows for confidentiality of applications early in the process but requires disclosure of certain information about the finalists for a position before a selection is made.

MEETINGS

This bill would amend Iowa Code section 21.5(1)(i) to require the governmental body to receive the request for closed session in writing. It also highlights the fact that the government body is the final decision maker and must consider whether "needless and irreparable injury" will occur prior to going into a closed session.

This amendment will create more accountability by requiring documentation of the closed meeting request and a determination by the government body of the need to hold a closed session.

CONTACTS

William P. Angrick II, Ombudsman
Ruth Cooperrider, Deputy Ombudsman / Legal Counsel

House Study Bill 38

SENATE/HOUSE FILE
BY (PROPOSED CITIZENS' AIDE/OMBUDSMAN BILL)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act relating to a meeting of a governmental body concerning an individual whose appointment, hiring, performance, or discharge is being considered and a public records request concerning an applicant, candidate, or nominee being considered for employment with or appointment by a government body.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

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Section 1. Section 21.5, subsection 1, paragraph i, Code 2007, is amended to read as follows:

i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered ~~when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session~~ if both of the following apply:

(1) The individual requests a closed session in writing and states the reason for the request.

(2) The governmental body determines that a closed session is necessary to prevent needless and irreparable injury to the individual's reputation.

Sec. 2. Section 22.7, subsection 18, Code 2007, is amended by adding the following new paragraph:

NEW PARAGRAPH. d. Information contained in the communication pertaining to an applicant, candidate, or nominee being considered for employment with or appointment by a government body is a public record unless both of the following apply:

(1) The applicant, candidate, or nominee requests in writing that the information be kept confidential.

(2) The government body makes a determination that disclosure of the information will result in needless and irreparable injury to the reputation of the applicant, candidate, or nominee.

However, the government body shall disclose at least the name, city of residence, employment history, and educational history of an applicant, candidate, or nominee under final consideration.

The government body shall notify the applicant, candidate, or nominee of the requirements of this paragraph "d".

EXPLANATION

This bill relates to a meeting of a governmental body concerning an individual whose appointment, hiring, performance, or discharge is being considered and a public records request concerning an applicant, candidate, or nominee being considered for employment with or appointment by a government body.

The bill makes changes to Code chapter 21, Iowa's open meetings law. Current law allows a governmental body to hold a closed meeting to evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered at a meeting of a governmental body when necessary to prevent needless and irreparable injury to that individual's reputation and the individual requests a closed session. The bill requires an individual in this situation to request the closed meeting in writing and to state the reason for requesting a closed meeting.

The bill makes changes to Code chapter 22, Iowa's open records law. The bill provides that information contained in a communication pertaining to an applicant, candidate, or nominee being considered for employment with or appointment by a government body is a public record unless the applicant, candidate, or nominee requests in writing that the information be kept confidential and the government body makes a determination that disclosure of the information will result in needless and irreparable injury to the reputation of the applicant, candidate, or nominee. However, the government body shall disclose at least the name, city of residence, employment history, and educational history of an applicant, candidate, or nominee under final consideration and shall notify the applicant, candidate, or nominee of the requirements of the public records requirements of the bill.

Code section 21.2 defines a governmental body to include a board, council, commission or other governing body expressly created by the statutes of this state, by executive order, or of a political subdivision or tax=supported district in this state; a multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies; a multimembered body to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities; an advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues; a nonprofit corporation other than a fair conducting a fair event whose facilities or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari=mutuel wagering or a nonprofit corporation which is a successor to the nonprofit corporation which built the facility; a nonprofit corporation licensed to conduct gambling games; and an advisory board, advisory commission, advisory committee, task force, or other body created by statute or executive order of this state or created by an executive order of a political subdivision of this state to develop and make recommendations on public policy issues.

Under Code section 22.1, a government body includes this state, or any county, city, township, school corporation, political subdivision, or tax=supported district; a nonprofit corporation other than a fair conducting a fair event whose facilities or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari=mutuel wagering, or other entity of this state; or any branch, department, board, bureau, commission, council,

committee, official, or officer of any of the foregoing, or any employee delegated the responsibility for implementing the requirements of Code chapter 22.

LSB 1269DP 82

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Expert: Regents met unlawfully

Secret sessions may taint new president search, says open records advocate

By ERIN JORDAN
REGISTER IOWA CITY BUREAU

November 19, 2006

Iowa City, Ia. - The secrecy surrounding the University of Iowa's failed presidential search may color a second search for a new leader, said an Iowa expert and advocate for open government.

The Iowa Board of Regents, which voted Friday to reject four finalists and disband the presidential search, met in closed session several times in the past week without announcing each meeting, a requirement of the Iowa Open Meetings Law. Regents said the meetings were separate sessions of a closed-session meeting that started Nov. 9. Regent Bob Downer said Saturday that the board's lawyer said that meant they did not have to announce the meetings.

"I don't know if a future search will be imperiled by these violations, but it definitely will taint it," said Herb Strentz, a retired Drake University journalism professor and a founder of the Iowa Freedom of Information Council.

Secrecy has shrouded the 10-month search. The names of all candidates - even finalists - were kept private, and search committee members were required to sign confidentiality agreements so strict they couldn't tell their families their whereabouts, members said.

Iowa law gives regents discretion over presidential searches, said Gary Steinke, regents executive director. Regents have said the process must be secret because top candidates will pull out if they believe their names will be made public.

"Do you want to get the best possible person in the country or not?" Steinke said.

But at least five other states have laws or policies requiring more openness in public university presidential searches. In Florida, the entire presidential search is open, including candidates' applications, interviews and board discussions.

"Sometimes the universities have argued if they had more secrecy they could have a higher quality of applicants," said Pat Gleason, general counsel for the Florida attorney general's office. "More Floridians

Secrecy wasn't vital, finalists say

The superintendent candidates say they wouldn't have faced 'irreparable injury.'

By MEGAN HAWKINS
REGISTER STAFF WRITER

While the three finalists for Des Moines superintendent asked that their names be kept confidential early in the job search, none said the disclosure would have caused them "needless and irreparable injury" as outlined by the law.

The identities of educators who applied to be the next leader of Iowa's largest public school district were kept secret throughout the two-month search, until three finalists were named late last week.

The three finalists said this week that they appreciated confidentiality early in process, but none detailed what "irreparable injury" disclosure of their names might have caused.

Iowa law allows, but does not require, public officials to close meetings "to evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session."

Phil Roeder, school board president, said maintaining applicants' anonymity early on was key to bring in the best candidates.

He said the five semifinalists interviewed privately last week had checked a box on their applications showing they wanted the state's applicable confidentiality laws followed when the board discussed their qualifications and interviewed them.

"Quite frankly, that part of the process we'd decided as soon as last February," Roeder said.

At least one candidate, Nancy Sebring of Colorado, said it was not imperative for her to have anonymity.

"(Anonymity) wasn't so critical for me personally, but I know that the candidates in most superintendent searches prefer anonymity so I was certainly not opposed to it at all," Sebring said. "In my case ... I've talked with my supervisor here, and other cabinet members know I applied for the job, so it wasn't critical for me. I appreciated the effort that they went to, however, to provide that for any candidate that felt that was necessary."

Linda Lane, the Des Moines finalist, said requesting confidentiality is common.

"(Candidates) request that same thing any time qualifications are being discussed by the

May 25, 200
4B

Vilsack tries to end flap at U of I
Add 100,000 to military, King says
Officials may shut nursing home
'HE'S THE REAL DEAL'

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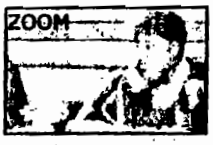
Bias Complaints

Hiring bias investigation too narrow, NAACP says

Leaders of a civil rights group, invited by the state to investigate claims of discrimination in hiring practices, are unhappy that Gov. Tom Vilsack now wants to narrow their investigation.

Official: Agency used controversial test until 2002

Iowa Workforce Development used a controversial screening test for employees seeking promotions two years longer than the agency previously acknowledged, a state official said Tuesday.



Whistle-blowers warned of lack of protection

The state ombudsman told lawmakers his office has heard from Iowa Workforce Development employees concerned about practices at the state agency but has warned them that he can't protect them if they...

Independent investigator sought in state bias probe

NAACP wants outsider's look at discrimination claims, plus tests of all state government managers, supervisors

Republicans schedule pre-election hearings on discrimination

Statehouse GOP leaders said they will hold hearings next week to investigate claims of hiring discrimination in state government - with or without participation from Democratics, who say the move is...

GOP: Let panel probe hiring bias

Republican leaders at the Iowa Statehouse called for the Legislature to immediately begin an investigation of claims of discrimination in state hiring practices.

More state bias claims uncovered

A study of discrimination claims at the Iowa Department of Transportation found employees alleging harassment and fearing retribution if they complained.

Polk pays to settle third claim of bias

The taxpayer cost to settle workplace discrimination claims against Polk County Recorder Tim Brien has reached $70,000.

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Discussion board

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Nov. 10 2006
IA

Six finalists for city position named

Clive officials have released a list of the six finalists vying for the newly created assistant city manager position. They are:

- Elizabeth Hailey, who has worked as Jefferson's city administrator for about two years.

- Nick Koktavy, an administration associate at Woodbury, Minn., for about two years.

- Melissa Mundt, who for three years has served as assistant city administrator in Gardner, Kan.

- Doug Ollendike, Clive's community development director and a city employee for nine years.

- Lisa Underhill-Schmidt, a recent Iowa State University master's degree recipient who is serving an internship with the city of Ames.

- David Strohl, business manager for Morton, Ill., for six years.

The city plans to fill the position by mid-November.

10/12/2006

Ankeny officials name superintendent finalists

LAURA PIEPER
REGISTER STAFF WRITER

December 12, 2006

STORY Add comment

The Ankeny school board has narrowed its search for a superintendent to two people.

Board President Denny Presnall confirmed Tuesday morning that the two finalists are Craig Fiegel, a superintendent in the Evergreen Park district in Illinois; and Matthew Wendt, an assistant superintendent in the Pittsburgh, Kan., school district.

Both candidates are currently serving in districts with about 2,000 students. The Ankeny school district has roughly 5,200 students.

"Both were outstanding candidates," Presnall said Tuesday morning. "All five (semifinalists) were outstanding. To get it down to two wasn't easy."

Meetings between finalists and various school and community groups are planned for later in the week.

One finalist will visit Wednesday, then have a second, public interview with the board at 6:45 p.m. at the district office. The second person will have the same schedule Thursday. Presnall said he was not sure yet which candidate will interview on which day.

After the final interviews, the board will hold a closed session Thursday night to decide whether to visit the two finalists' current districts. A superintendent could be named by Dec. 21.

The Ankeny position came open when superintendent Kent Mutchler resigned in June. Former Waukee superintendent Veronica Stalker is serving as interim superintendent.

2 of 2 DOCUMENTS

Des Moines Register (Iowa)

October 13, 2006 Friday

SECTION: CLIVE ZONE; Pg. 1Z

LENGTH: 611 words

HEADLINE: Finalists named for new Clive post;
Community development director among those selected from 42 applicants for assistant city manager position.

BYLINE: Strong Jared

BODY:

By JARED STRONG

REGISTER STAFF WRITER

The names of six finalists for Clive's assistant city manager position have been released.

The new administrative position, which was approved last month by the City Council, will help oversee the city's Information Technology Department and the ever-increasing number of city projects, among other duties.

City Manager Dennis Henderson said he received 42 applications for the position. He required all applicants to have a master's degree in public administration.

"It was an excellent group of applicants," he said. "There's no one individual who has an edge right now."

Doug Ollendike, Clive's community development director who has worked for the city since 1997, is among the finalists, which also includes:

- Elizabeth Hailey, who has worked as Jefferson's city administrator for about two years.

- Nick Koktavy, an administration associate for the city of Woodbury, Minn., for about two years.

- Melissa Mundt, who for three years has served as the assistant city administrator in Gardner, Kan.

- Lisa Underhill-Schmidt, a recent Iowa State University master's degree recipient who is interning with the city of Ames.

- David Strohl, the business manager for Morton, Ill., for six years.

Henderson began the hiring process in late September by e-mailing semifinalists a series of essay-style questions. From there, he whittled the list down to six, which will be interviewed later this month by Henderson and other city department heads after a tour of Clive.

Henderson hopes to offer a job to one of the applicants by mid-November. At the following City Council meeting on Nov. 16, the council is expected to approve the assistant's salary, which is recommended by Henderson to be $79,925.

Ollendike currently earns about $5,000 more than that each year, but the position would still be considered a promotion, Henderson said.

The assistant city manager is expected to start work in early January.

Henderson, who has worked as city manager for 11 years, said he has been able to put off hiring an assistant for years because of Clive's excellent department heads. Cities like Urbandale and West Des Moines have two such assistants.

Reporter Jared Strong can be reached at (515) 284-8075 or jstrong@dmreg.com.

Details

Here's a list of questions Clive City Manager Dennis Henderson sent to semifinalists who sought a position as assistant city manager:

1. With regard to your current job, what are you passionate about and why?

2. What do you consider to be the role of an assistant city manager and why do you wish to be the Clive assistant city manager?

3. If you were asked to recommend the staffing levels for each of Clive's seven departments, how would you go about developing your action plan and recommendation? Describe a staffing level issue you have addressed and its outcome.

4. What experience do you have in project management? What do you consider to be the three most important tasks in managing a project?

5. What are your five most significant accomplishments?

6. How do you define success and how do you measure up to your own definition?

7. As assistant city manager you have received multiple complaints about speeding and careless driving from residents that live on a through street (Lincoln and Northwest 103rd) that has a sharp curve of nearly 90 degrees. Numerous cars have attempted to take the corner too fast and have ended up in the front yards of the residents. One resident claims to have had 14 mailboxes destroyed in 19 years of living there. Elaborate on what you would do to check into the matter, how you would go about developing a recommendation, and what you might suggest for options to resolve the concern.

LOAD-DATE: February 15, 2007

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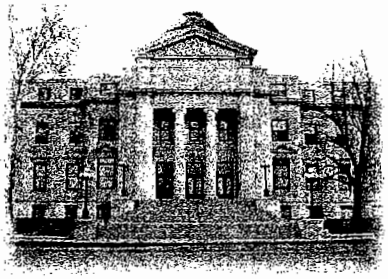

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AIDE/OMBUDSMAN

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DES MOINES, IOWA 50319

Date: February 5, 2007
To: Members of the Senate and House State Government Subcommittees
From: William P. Angrick II, Citizens' Aide/Ombudsman
Re: **HSB 38 : A Study Bill for an Act Related to the Meetings and Records Concerning Employment Applications to a Government Body**

On February 6, 2007 the House State Government subcommittee members held a meeting to discuss HSB 38.

Below are several areas of concerns which were identified by legislators and other interested participants at those meetings. In this memorandum I attempt to respond to each concern with comments and where appropriate, possible amendments to HSB 38.

Whether this bill will reduce the applicant pool for public entities, and provide a disincentive to public sector employment.

Ombudsman's Response: I have not found any objective study to support the contention this bill will preclude government bodies from finding qualified applicants for positions. Nor am I aware of any difficulty in filling positions in those states that already have similar provisions, including the neighboring states of Nebraska and Wisconsin. Certain aspects of working in the public sector are inherently different than in the private sector. I believe disclosing job applications prior to selection of important policy-making positions is a necessary component to ensuring responsive and accountable public officials in those positions. Openness will increase the likelihood of ensuring applicants submit accurate information and government bodies consider all important relevant information; in addition, it will inhibit discrimination in public sector hiring decisions.

What does "final consideration" mean?

Ombudsman's Response: I found several statutes that provide a definition for "final candidate" and reviewed a document presented by Iowa Freedom of Information Council's Executive Director Kathleen Richardson to the Senate and House State Government Committee that offered a suggestion on this issue. I am agreeable to amending the bill to limit disclosures to "~~an~~ a final applicant, candidate, or nominee ~~under final consideration~~" (see page 1, line 29) and to include this definition:

"Final applicant, candidate, or nominee" includes, whenever there are at least 3 applicants, candidates, or nominees for an office or position, each of the 3 applicants, candidates, or nominees who are considered most qualified for the office or position by a government body and whenever there are less than 3 applicants, candidates, or nominees for an office or position, each such applicant, candidate, or nominee. Whenever an appointment is to be made from a group of more than 3 applicants, candidates, or nominees the "final applicant, candidate, or nominee" also includes each applicant, candidate, or nominee in the group.

Whether the agency can make applications available 3 days or 3 hours before the final decision or even provide the records after the final decision.

Ombudsman's Response: As written, the study bill does not state when an agency has to respond to a request for applicant information. I am agreeable to amending the study bill (see page 1, line 27) to state as follows:

However, the government body shall ~~disclose~~ make available prior to the final selection for the position at least the name.....

What does "needless and irreparable injury to the individual's reputation" mean?

Ombudsman's Response: "Needless and irreparable injury" is a high standard which has existed in the context of the open meetings law regarding job applicants for years. The determination of whether this element is met will depend on the facts and circumstances of particular situations. I am not proposing a specific definition on the meaning of this element. However, I note that section 22.8, pertaining to injunctions to limit examination, states that "open examination of public records is generally in the public interest even thought such examination may cause inconvenience or embarrassment to public officials or others."

Concern that the bill should not apply to every position within government but only those of positions of trust, authority, or policy-making duties.

Ombudsman's Response: I am agreeable to amending the bill so that final applicants, nominees, or candidates for positions not covered by collective bargaining and which have a high degree of trust and have substantial discretionary authority or policy making authority must be made available for examination. These positions should include, for example, department or division heads; persons with fiduciary responsibilities; school superintendents and principals; police chiefs; city managers, and city attorneys.

Whether investigative background findings, criminal history, psychological examinations, driver's license information should be kept confidential.

Ombudsman's Response: Iowa Code section 22.7(18) refers to "communications" **made to** a government body and would not necessarily cover investigative background checks or psychological or polygraph examinations generated by a government body. Furthermore, other provisions in chapter 22 address this issue. Under Iowa Code section 22.7(9), criminal identification files of law enforcement agencies may be kept confidential, although current and prior arrests and criminal history data are open records. Section 22.7(36) allows driver's license information to be kept confidential.

In addition, section 22.7(19) allows "examinations, including but not limited to cognitive and psychological examinations for law enforcement..." to be kept confidential.

How does the bill apply to contractors, consultants, or firms who find qualified applicants for a government body, especially those which submit names from their own applicant pool?

Ombudsman's Response: I do not believe applications should be treated differently, whether they are submitted directly from the applicant or from a private employment agency. Iowa Code section 22.2(2) does not allow the government body to avoid disclosing a public record by using or contracting with a "nongovernment body."

The bill is restricted to application records of those who have been submitted to and are **being considered** by a government body; it does not allow for access to records of the entire pool of applicants held by a private employment agency. This limitation, combined with the proposed amended definition of "finalist" and the notice requirements should ensure applicants referred or submitted from private employment agencies are afforded the same protections as those applying directly to the government body.

Whether certain personal information on an application, like social security number or salary, should be kept confidential.

Ombudsman's Response: I am cognizant of the potential need to protect social security numbers from risks of identify theft and have proposed a separate bill, SSB 1223 and HSB 193, to redact social security numbers from records before they are disclosed. I do not believe it is necessary to keep salary history confidential; it may be relevant to a person's qualifications and to what salary is appropriate, if the salary is negotiable.

Additional Amendment Recommended

In addition to the additional amendments I noted above, I want to recommend one additional amendment to correct an oversight. I unintentionally omitted the requirement that an applicant must state the reason(s) for requesting that the application remain confidential, similar to the proposed requirement for requesting a closed meeting. I recommend amending page 1, line 22, to state as follows:

> 1) the applicant, candidate, or nominee requests the information be kept confidential in writing and states the reason for the request.

State Statutes Pertaining to Disclosure of Employment Application Records

Nebraska
Section 84-712.05 enumerates what records may be withheld from the public. Subsection 15 states the following:

> (15) Job application materials submitted by applicants, other than finalists, who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, job application materials means employment applications, resumes, reference letters, and school transcripts, and finalist means any applicant who is offered and who accepts an interview by a public body or its agents, representatives, or consultants for any public employment position;

Louisiana
Section 44:12.1, regarding records of applicants for public positions, states in relevant part:

> A. The name of each applicant for a public position of authority or a public position with policymaking duties, the qualifications of such an applicant related to such position, and any relevant employment history or experience of such an applicant shall be available for public inspection, examination, copying, or reproduction as provided in Part II of this Chapter.
> B.(1) No public body or agent acting on behalf of such a public body shall utilize only oral contacts and interviews of applicants considered when filling vacancies in public positions of authority or public positions with policymaking duties or use any other means to circumvent the provisions of this Section..
> (2)(a) Nothing in this Section shall prohibit oral contact prior to a person becoming an applicant or shall prohibit oral contact which may result in written documents.

New Mexico
Section 14-2-1 states in relevant part:

> A. Every person has a right to inspect public records of this state except:
> . . .
> (2) letters of reference concerning employment, licensing or permits;
> . . .
> (7) public records containing the identity of or identifying information relating to an applicant or nominee for the position of president of a public institution of higher education;
> . . .
> B. At least twenty-one days before the date of the meeting of the governing board of a public institution of higher education at which final action is taken on selection of the person for the position of president of the institution, the governing board shall give public notice of the names of the finalists being considered for the position. The board shall consider in the final selection process

at least five finalists. The required notice shall be given by publication in a newspaper of statewide circulation and in a newspaper of county-wide circulation in the county in which the institution is located. Publication shall be made once and shall occur at least twenty-one days and not more than thirty days before the described meeting.

Wisconsin

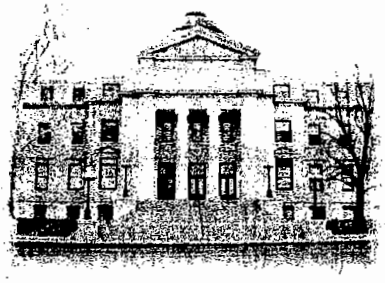
Code section 19.36(7)(a) states:

> In this section, "final candidate" means each applicant for a position who is seriously considered for appointment or whose name is certified for appointment and whose name is submitted for final consideration to an authority for appointment to any state position, except a position in the classified service, or to any local public office.
> "Final candidate" includes, whenever there are at least 5 candidates for an office or position, each of the 5 candidates who are considered most qualified for the office or position by an authority, and whenever there are less than 5 candidates for an office or position, each such candidate. Whenever an appointment is to be made from a group of more than 5 candidates, "final candidate" also includes each candidate in the group.

Code section 19.36(7)(b) states:

> Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any record related to the application that may reveal the identity of the applicant.

STATE OF IOWA



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Date: February 22, 2007
To: Members of the House State Government Subcommittee
From: William P. Angrick II, Citizens' Aide/Ombudsman
Re: **HSB 38 : A Study Bill for an Act Related to the Meetings and Records Concerning Employment Applications to a Government Body**

On February 20, 2007 the House State Government subcommittee members held a meeting to discuss HSB 38.

To further ensure protection of citizens, Representative Libby Jacobs urged the inclusion of a provision to prevent disclosure of social security numbers on employment applications. I have drafted the following amendment to page 1, line 30 of the study bill to address this issue. Included in this draft language are other recommended revisions that I presented to the subcommittee on February 20th for further amending the study bill (see memorandum submitted to the committee).

As I pointed out, another study bill (HSB 193 and SSB 1223) proposed by my office addresses redacting social security numbers from public records generally. Please be aware that few sections of the Iowa Code actually prohibit government bodies from using or releasing social security numbers which are collected by or appear on public records. The amendment proposed below should not be seen as a substitute for HSB 193 or SSB 1223.

HSB 38 with Ombudsman's Amendments

Section 1. Section 21.5, subsection 1, paragraph i, Code 2007, is amended to read as follows:

i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered ~~when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session~~ if both of the following apply:

(1) The individual requests a closed session in writing and states the reason for the request.

(2) The governmental body determines that a closed session is necessary to prevent needless and irreparable injury to the individual's reputation.

Sec. 2. Section 22.7, subsection 18, Code 2007, is amended by adding the following new paragraph:

NEW PARAGRAPH.
d. Information contained in the communication pertaining to an applicant, candidate, or nominee not covered by collective bargaining and being considered for a position of trust, supervisory, fiduciary, substantial discretionary authority, or with public policy making duties ~~employment with or appointment~~ by a government body is a public record unless both of the following apply:

(1) The applicant, candidate, or nominee requests in writing that the information be kept confidential and states the reason for the request.
(2) The government body makes a determination that disclosure of the information will result in needless and irreparable injury to the reputation of the applicant, candidate, or nominee.

However, the government body shall ~~disclose~~ make available prior to the final selection for the position at least the name, city of residence, employment history, and educational history of a final ~~an~~ applicant, candidate, or nominee under ~~final~~ consideration. The government body shall notify the applicant, candidate, or nominee of the requirements of this paragraph "d".

As used in this paragraph, "final applicant, candidate, or nominee" means whenever there are at least 3 applicants, candidates, or nominees for an office or position, each of the 3 applicants, candidates, or nominees who are considered most qualified for the office or position by a government body and whenever there are less than 3 applicants, candidates, or nominees for an office or position, each such applicant, candidate, or nominee. Whenever an appointment is to be made from a group of more than 3 applicants, candidates, or nominees the "final applicant, candidate, or nominee" also includes each applicant, candidate, or nominee in the group.

3 of 40 DOCUMENTS

Des Moines Register (Iowa)

April 7, 2007 Saturday
DM Edition

SECTION: METRO IOWA; Pg. 2B

LENGTH: 237 words

HEADLINE: Five interviews set for library's chief job

BODY:

The Des Moines Register

Des Moines library officials will conduct public interviews next week with five candidates for the director's job left vacant when Kay Runge retired in January.

The finalists will meet with members of the library staff and foundation, trustees and City Manager Rick Clark, among others.

The library board's president, Jule Thorsen, said the public can meet each of the candidates and ask them questions beginning at 5:30 p.m. Thursday in the Central Library Grand Meeting Room, 1000 Grand Ave.

The candidates are:

- Saul J. Amdursky, chief executive of Fraser Valley Regional Library, Abbotsford, British Columbia, Canada.

- Stephen P. Bero, director of Warren-Newport Public Library, Gurnee, Ill.

- Alan Mark Englebert, director of Manitowoc (Wis.) Public Library and Manitowoc-Calumet Library System.

- Ivonne Jimenez, deputy director of extension services, El Paso, Texas.

- Betsy Thompson, director of the Sioux City Public Library.

Runge's replacement will oversee the Franklin Avenue Library expansion and construction of a new library on the city's southeast side.

Runge, 59, retired nine months after the grand opening of the city's $32.3 million downtown library, which celebrates its one-year anniversary this week.

The library board will meet at 4 p.m. April 17 at the Central Library, where the new director is expected to be named. Dorothy Kelley has been interim director since Runge's departure.

LOAD-DATE: April 10, 2007

FOCUS - 1 of 1 DOCUMENT

Des Moines Register (Iowa)

August 19, 2006 Saturday

SECTION: METRO IOWA; Pg. 2B

LENGTH: 417 words

HEADLINE: Waukee City Council ready to hire new administrator;
But the panel has not given the public a chance to meet the candidates.;
METRO COMMUNITIES

BYLINE: Smith Christina

BODY:

By CHRISTINA SMITH

REGISTER STAFF WRITER

An Iowa open meetings advocate criticized the Waukee City Council for preparing to offer a contract to the Clinton city administrator when Waukee residents had no chance to meet him or two other finalists for the job.

Jeffrey Kooistra has served as city administrator in Clinton since June 1, 2001. At Monday's Waukee City Council meeting, members will discuss Kooistra and may vote to offer him the city's top administrative job.

City Council members met in closed session earlier this month to interview the three city administrator candidates. Earlier in the process, residents were invited to a meeting to talk about what to look for in a successful candidate, officials said, but only one person attended.

Kathleen Richardson, executive secretary of the Iowa Freedom of Information Council, said Friday that Waukee officials' decision to withhold information about the candidate until a contract was offered is not a good way to conduct the public's business. She said she is concerned by the amount of secrecy in the process.

"Most groups narrow (the search) down to the final two or three candidates and then hold a meeting to let the public come and meet the candidates," she said.

City Attorney Steve Brick said Kooistra has only informally been selected and council members will discuss on Monday whether to hire Kooistra after they finalize the details of a contract.

Kooistra previously served as city administrator in Boone and towns in Nebraska and Missouri.

Kooistra could not be reached for comment Friday.

Clinton Mayor LaMetta Wynn verified on Friday that Kooistra had submitted his resignation letter.

Wynn described Kooistra as a people person and knowledgeable.

"Someone will fill this position, but they won't be able to take his place," Wynn said of Kooistra. "He has done a wonderful job here."

During his time in Clinton, Kooistra has helped the city build the Mill Creek Expressway, a $13 million highway on the west side of town; and worked with Archer Daniels Midland Co., an agricultural and food processing company, on a nearly $1 billion plant expansion project.

City Councilman Isaiah McGee said Kooistra was the best candidate.

"I think (Kooistra's) record speaks for himself," McGee said. "I think he's a perfect match for where the city wants to go."

Kooistra would replace Mark Arentsen, who resigned in December. Arentsen is now the city administrator at Bondurant.

Reporter Christina Smith can be reached at (515) 699-7020 or chrsmith@dmreg.com

LOAD-DATE: August 22, 2006

Walking Quorums, Serial Meetings

House File 372 - Introduced

HOUSE FILE
BY COMMITTEE ON STATE GOVERNMENT

(SUCCESSOR TO HSB 59)

Passed House, Date _____ Passed Senate, Date
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays
Approved

A BILL FOR

An Act relating to meetings of governmental bodies.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
TLSB 1279HV 81
rh/sh/8

PAG LIN

Section 1. Section 21.2, subsection 2, Code 2005, is amended to read as follows:

2. "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy=making duties. A meeting includes a series of gatherings of members who constitute less than a majority of the members at each gathering, but who collectively constitute a majority of the members, where the series of gatherings includes deliberation or action upon any matter within the scope of the governmental body's policy=making duties. ~~Meetings~~ A meeting shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

EXPLANATION

This bill expands the definition of a meeting under the open meetings law to include serial gatherings of members of a governmental body who constitute less than a majority of the members at each gathering, but who collectively constitute a majority of the members, where the series of gatherings includes deliberation or action upon any matter within the scope of the governmental body's policy=making duties. Currently, a majority of the members of a governmental body who attend a gathering and deliberate or take action upon any matter within the scope of the governmental body's policy=making duties are subject to the requirements of Iowa's open meetings law, which requires advance public notice and public access.

LSB 1279HV 81
rh:nh/sh/8

Memorandum In Support of Legislative Proposal

To: Members of the Iowa General Assembly
From: William P. Angrick II, Citizens' Aide/Ombudsman

The purpose of this bill is to amend the definition of "meeting" under section 21.2, subsection 2, to include serial gatherings, where less than a majority of the members attend each gathering, but where the members collectively constitute a majority. Currently, a majority of the members must attend a gathering before it can be considered a meeting. The potential exists for a governmental body to hold a series of gatherings, each with less than a majority of its members, with the intent to circumvent the requirements for a meeting. The amendment would preclude that from occurring.

A number of states, including Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Kentucky, Rhode Island, Tennessee, Virginia and Wisconsin, have forbidden serial meetings through court decisions, statutory changes, or attorney general opinions. In *State ex. rel. Lynch v. Conta*, 71 Wis. 2d 662 (1976), the Wisconsin supreme court extended the requirements of the state's open meetings law to a "walking quorum," which it defined as a series of gatherings among groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. The court recognized that a walking quorum may produce a predetermined outcome and in turn render the public-held meeting a mere formality. This same rationale underlies the need for this bill.

Legislative Proposal

Amend section 21.2, subsection 2, as follows:

21.2 Definitions

2. *"Meeting"* means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. A meeting includes a series of gatherings of members, who constitute less than a majority at each gathering but who collectively constitute a majority of the members of the governmental body, when the series of gatherings are held with the intent to avoid the requirements of this chapter. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

MEMORANDUM

To: Representatives Carmine Boal, Joe Hutter, and Wesley Whitehead
From: William P. Angrick II, Citizens' Aide/Ombudsman
Reference: HF 372 amending Iowa Code section 21.2, the definition of "meeting"

I am writing to you in follow-up to the second subcommittee meeting on HF 372, in which you expressed a desire for additional information from states which have statutes, court decisions or attorney general opinions regarding "walking quorums." I have included some information pertaining to a few other states later in this memorandum.

We are concerned with the "intent" language in Amendment 1185. We believe the phrase "with the intent to conceal material facts and circumstances" adds another element of proof to require determining not only what subject was discussed but also whether the specifics of the discussion were *"material"* facts and circumstances. The phrase "material facts and circumstances" is somewhat ambiguous and may be subject to different interpretations, which has occurred in the context of access to peace officers' investigative reports. Section 22.7(5) provides for the release of "immediate facts and circumstances" surrounding a crime or incident; this has been interpreted very narrowly by some governmental bodies and very broadly by advocates for openness.

For these reasons, I am recommending to you the amendment below in lieu of Amendment 1185. I believe my recommended amendment will tighten the intent language and alleviate some of the concerns voiced by opponents to the bill. My amendment adds that the serial gatherings be prearranged and that the members participated in them with the knowledge that the intent of the serial gatherings was to circumvent the purposes of the open meetings law (i.e., by having less than a majority gather at any one time). Merely having serial or back-to-back gatherings or communications would not constitute a meeting. The members have to know that the serial gatherings are being held 1) to deliberate or act on a policy matter, and 2) with the intent to avoid compliance with the law.

Please contact me or Assistant Ombudsman Angela Dalton if you have any questions or comments.

Sincerely,

William P. Angrick II

HF 372

2. "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. A meeting includes a series of gatherings of members who constitute less than a majority of the members at each gathering, but who collectively constitute a majority of the members, where the series of gatherings includes deliberation or action upon any matter within the scope of the governmental body's policy-making duties. ~~Meetings~~ A meeting shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

Amendment 1185 reads as follows:

...A meeting includes a PREARRANGED series of gatherings of members who constitute less than a majority of the members at each gathering, but who collectively constitute a majority of the members, where the series of gatherings includes deliberation or action upon ~~any~~ THE SAME matter within the scope of the governmental body's policy-making duties WITH THE INTENT TO CONCEAL MATERIAL FACTS AND CIRCUMSTANCES. ~~Meetings~~ A meeting shall not include a gathering of members of a governmental...

CAO amendment:

...A meeting includes a PREARRANGED series of gatherings of members who constitute less than a majority of the members at each gathering, but who collectively constitute a majority of the members, where ~~the series of gatherings includes deliberation or action~~ THE MEMBERS KNOWINGLY PARTICIPATED IN THE SERIES OF GATHERINGS TO DELIBERATE OR ACT upon ~~any~~ THE SAME matter within the scope of the governmental body's policy-making duties ~~WITH THE INTENT TO CONCEAL MATERIAL FACTS AND CIRCUMSTANCES.~~ WITH THE INTENT TO AVOID THE PURPOSES OF THIS CHAPTER. ~~Meetings~~ A meeting shall not include a gathering of members of a governmental...

Nevada Statute

In 2001 the Nevada legislature changed the statute to specifically preclude serial gatherings. The language in HF 372 is similar to the Nevada statute. A "meeting" is defined under N.R.S 241.015(2) as follows:

> (a) Except as otherwise provided in paragraph (b), means:
>
> 1. The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
>
> 2. Any series of gatherings of members of a public body at which:
> (I) Less than a quorum is present at any individual gathering;
> (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
> (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.
>
> (b) Does not include a gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present:
>
> (1) Which occurs at a social function if the members do not deliberate toward a decision or take action on my matter over which the public body has supervision, control, jurisdiction or advisory power.
> (2) To receive information from the attorney employed or retained.....

Our research did not find any Nevada court cases or attorney general opinions regarding legal disputes or pertaining to the applications of this statute after its enactment in 2001.

Wisconsin

In *State ex. rel. Lynch v. Conta*, 71 Wis. 2d 662 (1976), the Wisconsin supreme court extended the requirements of the state's open meetings law to a "walking quorum," which it defined as a series of gatherings among groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. The court recognized that a walking quorum may produce a predetermined outcome and in turn render the public-held meeting a mere formality.

Although there was a subsequent change in the statute it did not alter this conclusion. See *State ex rel. Newspapers v. Showers,* 398 N.W.2d 154, 164 (1987).

Texas

In Texas the Open Meetings Law does not differ much than the State of Iowa. In *Esperanza Peace and Justice Center v. City of San Antonio,* 316 F. Supp. 2d 433 (2001), the court voided the council's action after determining a walking quorum existed when members were intentionally shuffled in and out of a closed session to discuss budgeting decisions wit the intent to avoid the Open Meetings Law.

FOCUS - 33 of 86 DOCUMENTS

Des Moines Register

August 6, 2004 Friday

SECTION: MAIN NEWS; Pg. 20A

LENGTH: 602 words

HEADLINE: The Register's Editorials;
An abuse of trust

BYLINE: ,Staff

BODY:

Sure, it's inconvenient for officials to meet in public.

But they are, after all, public officials.

There seems to be some question about what happened at a recent meeting between the Des Moines City Council and the Polk County Board of Supervisors to discuss gambling revenue sharing. Perhaps the confusion stems from the fact that members of the public and the news media were barred from the meeting.

The meeting, in which Polk County offered Des Moines a cut of Prairie Meadows gambling revenue, was attended by no more than two members of the five-member board of supervisors and three members of the seven-member city council at any one time. Do the math: One more member of each body would have triggered the state law that requires meetings to be open to the public when a majority is present.

At different points in the meeting, the lineup of supervisors varied, with board members John Mauro, Angela Connolly, Tom Hockensmith and Bob Borwnell in the room for a time but not all at once. For the city, only Des Moines Mayor Frank Cownie and city council members Archie Brooks and Mike Kiernan attended.

It would appear a conscious effort was made to "rotate" supervisors in and out to avoid the law. County officials dispute that. This much cannot be disputed: The members of the board and city council who participated in the meeting were intent on keeping the door closed to the public. How they accomplished that is irrelevant.

The most damning aspect of that effort is not so much that they worked so hard to avoid complying with what they apparently regard as a technicality of state law, but that they worked so hard to exclude the public from a very important discussion that will affect every citizen of Polk County.

The agreement worked out in that meeting has profound implications for the fate of a new gambling casino in central Iowa, the future of Prairie Meadows and the potential for Polk County to cover bond payments for the Iowa Events Center without raising property taxes. It is hard to think of an issue that has more public interest.

County supervisors might argue that -as full-time board members who arrogated to themselves management responsibilities when they fired the county manager -it is difficult to do their work in public meetings. That is true, particularly when they all have offices in close proximity and are bound to gather around the water cooler. Nor is it unusual for members of Des Moines City Council to meet in small groups to discuss public business to skirt the meetings law.

Some of that is understandable. But not for this meeting: It is one thing for county officials to chew the fat in a hallway meeting over a road-grading project, and it is one thing for two or three city council members to meet on some sewer line. But it is unacceptable for these two public bodies to meet jointly behind closed doors to discuss a vitally important issue.

These officials complain that criticism from this newspaper and other news media of secret meeting makes their job hard. They think we are being too hard on them. They say no business would be held to such a standard.

Well, that's just too bad: They signed up for a public job, not to sit on the board of directors of a private company. With that job comes a duty to be accountable to the people who elected them and who pay their salaries and who pay for the government services they manage. When those public officials meet in secret, they abuse that public trust.

It is unacceptable for these two public bodies to meet jointly behind closed doors to discuss a vitally important issue.

LOAD-DATE: September 2, 2004

Advisory Groups

700 N.W.2d 349

(Cite as: 700 N.W.2d 349)

Mason v. Vision Iowa Bd.
Iowa,2005.

Supreme Court of Iowa.
Timothy MASON, Harlan Dettman and Ronald Klienow, Appellants,
v.
VISION IOWA BOARD of the State of Iowa and its Negotiating Committee on the Marquette-McGregor Legacy Project, Appellees.
No. 04-0491.

July 15, 2005.

Background: Citizens brought action against Vision Iowa Board and its negotiating committee, alleging that committee violated open meetings law in reviewing tourism project. The District Court, Polk County, Douglas F. Staskal, J., granted defendants summary judgment. Citizens appealed.

Holdings: The Supreme Court, Ternus, J., held that:

(1) committee was not one of the statutorily specified advisory groups that was subject to the open meetings requirement, and

(2) committee, which acted in an advisory role to Board, was not required to have meetings open to public.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

Supreme Court reviews summary judgment rulings for correction of errors of law; if the record shows no genuine dispute of a material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.

[2] Appeal and Error 30 ⚿934(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases

In assessing whether summary judgment is warranted, the Supreme Court views the entire record in a light most favorable to the nonmoving party; it also indulges in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question.

[3] Judgment 228 ⚿185(6)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(6) k. Existence or Non-Existence of Fact Issue. Most Cited Cases

A genuine issue of material fact is lacking for purposes of summary judgment when a reasonable jury or judge could conclude that no evidence entitles the nonmoving party to relief.

[4] Appeal and Error 30 ⚿842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In General. Most Cited Cases

When the Supreme Court interprets the scope and meaning of statutory provisions, its review is also for correction of errors at law.

[5] Administrative Law and Procedure 15A ⚿124

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak124 k. Meetings in General. Most Cited Cases

States 360 ⚿67

360 States
360II Government and Officers
360k65 Authority and Powers of Officers and Agents, and Exercise Thereof
360k67 k. Executive Departments, Boards, or Other Bodies. Most Cited Cases
Negotiating committee of the Vision Iowa Board was not created by the governor, by the general assembly, by statute, or by executive order of the state or a political subdivision, and thus, the committee was not one of the statutorily specified advisory groups that was subject to the open meetings requirement. I.C.A. § 21.2, subd. 1, par. e.

[6] Evidence 157 ⚿48

157 Evidence
157I Judicial Notice
157k48 k. Official Proceedings and Acts. Most Cited Cases
Assertion that committee recommendations were often accepted by public bodies at face value with little discussion was not the proper subject for judicial notice for purposes of claim under the open meetings law, where such assertion was not generally known, nor was it capable of accurate and ready determination. I.C.A. § 21.3; I.C.A. Rule 5.201(a).

[7] Administrative Law and Procedure 15A ⚿ 124

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak124 k. Meetings in General. Most Cited Cases

States 360 ⚿67

360 States
360II Government and Officers
360k65 Authority and Powers of Officers and Agents, and Exercise Thereof
360k67 k. Executive Departments, Boards, or Other Bodies. Most Cited Cases
Negotiating committee of the Vision Iowa Board had nothing more than an advisory function to the Board, and thus, committee's meeting was not required to be open to the public under the open meeting law; committee did not have any policy making duties, but rather was simply charged with making recommendations to the Board regarding grants for projects. I.C.A. § 21.2, subd. 2.

Wallace L. Taylor, Cedar Rapids, for appellants.
Thomas J. Miller, Attorney General, and Mark A. Thompson, Assistant Attorney General, for appellees.
TERNUS, Justice.
The appellees, Timothy Mason, Harlan Dettman, and Ronald Klienow, brought this action against the appellants, Vision Iowa Board of the State of Iowa and its negotiating committee for the Marquette-McGregor Legacy Project, alleging the negotiating committee violated Iowa's open meetings law, Iowa Code chapter 21 (2003). The district court granted summary***351** judgment to the defendants, ruling the negotiating committee was not a " governmental body" subject to chapter 21, and even if it was a governmental body, it did not hold a " meeting" within the meaning of chapter 21. Because we agree that the meetings of the negotiating committee were not within the prohibitions of Iowa's open meetings law, we affirm the district court's dismissal of the plaintiffs' lawsuit.

I. *Statutory Framework for Vision Iowa Board.*

It is helpful at the outset to understand the structure and function of the entities sued in this action. The Vision Iowa Board (" board") administers the Vision Iowa program. *See* Iowa Code § 15F.302(1). This program was created by the legislature to " assist communities in the development of major tourism facilities" through the award of monetary grants. *Id.* In addition to administering the Vision Iowa program, the board is also responsible for establishing and administering a Community Attraction and Tourism Program (" CAT") to assist in the development of small tourism projects. *See id.* §§ 15F.202(1), .204.

The Iowa department of economic development is directed by statute to provide assistance to the board in several areas, including assistance in administrative functions and contract negotiation. *See id.* § 15F.104. Applications for financial assistance are first screened by department staff, and those applications meeting eligibility requirements are then sent to a Vision Iowa review committee or a CAT review committee. *See* Iowa Code §§ 15F.203, .304. These committees are created by statute and are composed of specified members of the board. *See id.*

§§ 15F.203(2), .304(2). The review committees make recommendations to the full board, which then decides whether to approve, defer, or deny an application. *See id.* §§ 15F.203(2), (4), .304(2), (4). When a project is approved for the Vision Iowa program, the board is authorized to " enter into an agreement with the applicant to provide financial assistance" under the program. *See id.* § 15F.304(4).

II. *Background Facts and Proceedings.*

In April 2001 the communities of McGregor, Strawberry Point, and Guttenburg submitted an application to the department seeking a grant of over $6 million. The application was considered by the CAT review committee. The review committee recommended that " the board issue a Notice of Intent to Consider Award for the Marquette-McGregor project" and consider " whether any funding should come from the Vision Iowa or CAT program." Subsequently, the board issued a Notice of Intent and appointed " a negotiating committee to determine a potential award amount and to recommend whether it should be a Vision Iowa or CAT award." [FN1] The number of board members to serve on the negotiating committee, as well as the identity of those members, was left to the discretion of the board chair.

> FN1. The total cost of the project was near the threshold amount necessary for a Vision Iowa project, so there was some question whether the project would more appropriately be funded by the Vision Iowa program rather than the CAT program. *See* Iowa Code § 15F.303(1) (establishing a $20 million minimum cost for any project funded under the Vision Iowa program).

Over the next few weeks, the chair contacted various members of the board to serve on the negotiating committee, but the bulk of the negotiating fell to the board chair and another board member. The committee reported back to the board ***352** in October 2001, recommending an award of $5 million from the Vision Iowa program with certain contingencies, including an acceptable development agreement with a golf course developer. The board approved the recommendation subject to several conditions, including a development agreement " acceptable to the Vision Iowa board." The negotiating committee was charged " with reviewing the development agreement to advise the board as to whether it was acceptable."

Significant concerns about the viability of the project were raised in the course of the negotiations with the developer, and negotiations and meetings between the negotiating committee and supporters of the project continued throughout 2002. A meeting between the committee and the project proponents was scheduled to be held just prior to the regular board meeting on January 8, 2003. An opponent of the project, Stan Thomas, attempted to attend this meeting, but was told by the board chair that the meeting was closed. Thereafter, the committee meeting was canceled.

At the board meeting held the same day, the committee reported that contract negotiations were still in progress. Extensive discussion ensued concerning the financing issues on the Marquette-McGregor project. Ultimately, one board member requested a full update at the board's February meeting and suggested that the board make a final decision on the project at its March meeting. The matter was opened for public comment, and several opponents of the project, including plaintiff Mason, expressed concerns about the feasibility of the project and the environmental effects of the project.

Immediately prior to the board's meeting on March 12, 2003, the negotiating committee met with the proponents of the project in a closed meeting. Several members of the public, including plaintiffs Dettman and Klienow, were not permitted to attend this meeting. At the subsequent board meeting, department staff reported that the negotiation team had recently met with the proponents who had provided some additional financial information. The board was informed that the committee was not ready to propose any board action. Nonetheless, the matter was again opened for public comment, and Mason addressed the board with his concerns.

At the board's meeting on April 9, 2003, the committee reported that it had not been able " to reach terms acceptable to both sides as to the hotel and golf course components [of the project or] on the financing." " Because there [was] agreement on the other components" (a trail and a streetscape), the negotiating committee " recommend[ed]" that those components be severed from the Vision Iowa project and be considered separately as a CAT project. *See* Iowa Code § 15F.303(1) (authorizing board to "

divide a proposed project into component parts"). Based upon the recommendation of the negotiating committee, the board concluded the conditions of the grant could not be met, and so the board formally withdrew its financial assistance for the project under the Vision Iowa program.

On April 1, 2003, the plaintiffs filed a petition in equity against the board and its negotiating committee alleging that the negotiating committee was a governmental body as defined in Iowa Code section 21.2(1)(*c*), and the committee's meeting on March 12, 2003 was a public meeting as defined in section 21.2(2). Because this meeting was closed to the public, the plaintiffs claimed the defendants violated section 21.3 of Iowa's open meetings law. The plaintiffs sought damages from each member of the negotiating committee, a mandatory injunction ordering the committee***353** members to refrain from future violations of chapter 21, and an award of attorneys fees.

The defendants filed a motion for summary judgment asserting: (1) the committee was not a governmental body; (2) the committee did not hold a meeting as defined in the statute; and (3) damages could not be assessed against the committee members because they were not individually named in the suit or served with an original notice. The district court granted the defendants' motion, ruling the committee was not a governmental body and did not hold a meeting within the scope of chapter 21. Having made these determinations, the court found it unnecessary to address any remaining issues.

The plaintiffs have appealed. Because we find dispositive the issue of whether the negotiating committee's meeting in March 2003 was a gathering subject to the requirements of chapter 21, we focus our discussion on that issue.

III. *Scope of Review.*

[1][2][3] The scope and standard of review of summary judgment rulings are well established. This court reviews such rulings for correction of errors of law. If the record shows no genuine dispute of a material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. In assessing whether summary judgment is warranted, we view the entire record in a light most favorable to the nonmoving party. We also indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question.
Crippen v. City of Cedar Rapids, 618 N.W.2d 562, 566 (Iowa 2000) (citations omitted). " A genuine issue of material fact is lacking when a reasonable jury or judge could conclude that no evidence entitles the nonmoving party to relief." *Keokuk Junction R.R. v. IES Indus., Inc.,* 618 N.W.2d 352, 355 (Iowa 2000).

[4] The scope of review is on legal error even where, as here, the case is in equity. *See Norwest Credit, Inc. v. City of Davenport,* 626 N.W.2d 153, 155 (Iowa 2001). Likewise, " [w]hen our review necessarily calls upon us to interpret the scope and meaning of statutory provisions, our review is also for correction of errors at law." *Id.* In both instances, this court is " ' not bound by the trial court's determinations of law.' " *Id.* (citation omitted).

IV. *Relevant Provisions of Chapter 21.*

Iowa's open meetings law " seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people." Iowa Code § 21.1. To this end, " [a]mbiguity in the construction or application of ... chapter [21] should be resolved in favor of openness." *Id.; accord Donahue v. State,* 474 N.W.2d 537, 539 (Iowa 1991).

The plaintiffs claim the defendants violated the following provision of chapter 21: " Meetings of governmental bodies shall be preceded by public notice as provided in section 21.4 and shall be held in open session unless closed sessions are expressly permitted by law." Iowa Code § 21.3; *see also id.* § 21.5(1) (listing acceptable reasons for closed session, none of which are implicated here). Not all gatherings, however, are considered " meetings" under the statute. The law specifically defines a " meeting" as
a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action ***354** upon any matter *within the scope of the governmental body's policy-making duties.*

Id. § 21.2(2) (emphasis added).

In addition to claiming the negotiating committee is not a " governmental body," the defendants assert

the committee had no " policy-making duties," and therefore, the committee's meeting was not a gathering required to be held in open session. As noted earlier, we need not determine whether the committee is a governmental body because we agree with the district court that the committee's meetings did not fall within the statutory definition of a " meeting" subject to the open-meetings requirement of section 21.3.

V. *Interpretation of Statutory Definition of " Meeting."*

A gathering of a governmental body must be open to the public only " where there is deliberation or action upon any matter within the scope of the governmental body's *policy-making* duties." Iowa Code § 21.2(2) (emphasis added); *accord Tel. Herald, Inc. v. City of Dubuque,* 297 N.W.2d 529, 533 (Iowa 1980). The fighting issue in the present case is whether the negotiating committee's deliberations and actions were in furtherance of any policy-making duty placed on the committee.

The phrase " policy-making duties" is not defined in chapter 21. Therefore, we look to the common meaning of that term in interpreting the statutory definition of " meeting." *See In re Estate of Thomann,* 649 N.W.2d 1, 4 (Iowa 2002); *see also State v. Westeen,* 591 N.W.2d 203, 208 (Iowa 1999) (stating the dictionary supplies a ready source for the " common meaning of a word"). The dictionary defines " policymaking" as " the act or process of *setting* and *directing* the course of action to be pursued by a government, business, etc." *Webster's New World College Dictionary* 1114 (4th ed.2001) (emphasis added). To set and direct a course of action is to establish and order a course of action. *Webster's Third New International Dictionary* 640, 2077 (unabr. ed.2002) (defining " direct" as " to point out, prescribe, or determine a course or procedure" and stating synonyms for " set" are " fix, settle, establish"); *see also Roget's International Thesaurus* 893.8, at 615 (5th ed.1992) (including " direct" with " govern ..., rule, control ..., order, regulate, ... guide"). In contrast, to *recommend* a course of action is merely to suggest favorably a particular plan of action. *See Webster's Third New International Dictionary* 1897 (defining " recommend" as " offer or suggest as favored by oneself").

Thus, " policy-making" is more than recommending or advising what should be done. " Policy-making" is deciding with authority a course of action. Although the plaintiffs contend there is nothing in the statutory definition " that restricts the open-meetings requirement ... to bodies that have decision-making authority," the authority to make a decision is inherent in the duty to *make* policy. *See* 1980 Op. Iowa Atty. Gen. 148, 152-53 & n. 3 (stating requirement in statutory definition of " meeting" that body exercise " policy-making duties" excludes advisory groups from open-meetings requirement).

The notion that policy-making commonly denotes something more than advice is illustrated by our prior cases applying the open meetings law. In *Donahue,* we held that an advisory board " exercises no policy-making power." 474 N.W.2d at 539. In an earlier case in which we held an entity was subject to the open-meetings requirement, this court noted that the entity at issue was " a powerful decision-making and policymaking body" and was " not a mere study or advisory group." ***355***Greene v. Athletic Council,* 251 N.W.2d 559, 561 (Iowa 1977), *superseded by statute as stated in Donahue,* 474 N.W.2d at 539.

[5] In determining that a policy-making duty entails some degree of decision-making authority, we have not overlooked the fact that in 1989 and in 1993 the legislature added certain purely advisory groups to the statutory definition of " governmental body," specifically

e. An advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues.

....

h. An advisory board, advisory commission, advisory committee, task force, or other body created by statute or executive order of this state or created by an executive order of a political subdivision of this state to develop and make recommendations on public policy issues.

Iowa Code § 21.2(1)(*e*) (enacted 1989 Iowa Acts ch. 73, § 1), (*h*) (enacted 1993 Iowa Acts ch. 25, § 1). These groups by definition " make *recommendations* on public policy issues" as opposed to *making policy.* Iowa Code § 21.1(1)(*e*), (*h*) (emphasis added). As we have already determined, only gatherings in which a governmental body establishes and directs policy are encompassed in the statutory definition of " meeting." Clearly, then, there is a conflict between the legislature's definition of " meeting" and its subsequent inclusion of advisory

groups in the definition of " governmental body."

We do not think the amendments to the statutory definition of " governmental body" can be interpreted as amendments of the statutory definition of " meeting," in effect eliminating the " policy-making duties" qualification from the latter definition. If such a modification was desired by the legislature, it was for the legislature to specify the change; it is not for the court to incorporate the change by interpretation. *See Consol. Freightways Corp. v. Nicholas,* 258 Iowa 115, 122, 137 N.W.2d 900, 905 (1965). Notwithstanding the tension in the statute, we think it is clear the legislature intended to make the delineated advisory groups subject to the open meetings requirement. Otherwise, the legislature's act of including these entities in the definition of " governmental body" would be a nullity because none of the restrictions and requirements imposed on " meetings" of a governmental body would apply. *See Jenney v. Iowa Dist. Ct.,* 456 N.W.2d 921, 923 (Iowa 1990) (stating court assumes " amendment is adopted to accomplish a purpose and was not simply futile exercise of legislative power"); Iowa Code § 4.4(2) (stating presumption that in enacting a statute, legislature intends the entire statute to be effective). Thus, the specified advisory groups would be subject to the open-meetings requirement when they deliberate or act within the scope of their duty to develop and make recommendations on public policy issues. But as to all other governmental bodies, the legislature left unchanged the definition of " meeting," including the requirement that the body act in its policy-making role.

The fact that the legislature made specified advisory groups subject to the open meetings law is of no assistance to the plaintiffs here because the negotiating committee was not created by the governor, by the general assembly, by statute, or by executive order of the state or a political subdivision of the state so as to fall within paragraphs (*e*) or (*h*) of section 21.2(1). Although the plaintiffs contend the negotiating committee was in reality a Vision Iowa review committee created by section 15F.304(2), the record does not support this contention. The undisputed facts establish that the negotiating committee did not consist of the board members***356** designated in the statute creating review committees; the negotiating committee did not review the application and make a recommendation to approve, defer, or deny the application as review committees are required by section 15F.304(3), (4) to do; and a CAT review committee had already performed these functions prior to the formation of the negotiating committee. Thus, the negotiating committee is not one of the statutorily-specified advisory groups subject to the open-meetings requirement. Consequently, we must determine whether the undisputed facts establish that the negotiating committee did not deliberate or act within the scope of any policy-making duty so that its gathering did not qualify as a " meeting" within the statutory definition of that term.

VI. *Application of Law to This Case: Did the Negotiating Committee Have a " Meeting" ?*

Examining the undisputed facts in the record, we find no support for a finding that the negotiating committee had responsibility for anything more than simply recommending or suggesting to the board what course of action to take on the Marquette-McGregor project. The July 2001 board minutes reveal that the committee was " to determine a *potential* award amount and to *recommend* whether it should be a Vision Iowa or a CAT award." (Emphasis added.) There is no evidence that authority to *set* the award amount or *decide* whether it should be made under the Vision Iowa or CAT programs was given to the committee. Later, in October 2001, the committee *recommended* an award of $5 million from the Vision Iowa program, with certain contingencies. It is undisputed that the *board* approved the recommendation and charged the negotiating committee " with reviewing the development agreement *to advise the board* as to whether it was acceptable." (Emphasis added.) Again, ultimate authority to accept or reject the development agreement was reserved to the board; the committee's duty was advisory only. Eventually, the committee reported that it had not been able to negotiate an agreement within the conditions established by the board's grant, and so the committee *recommended* only a portion of the project be funded under a CAT award. Acting on this recommendation, the *board* chose to withdraw its Vision Iowa grant. Once again, the *board* made the ultimate decision on the course of action to be taken on the project.

[6] Relying on a Florida case, the plaintiffs suggest we should take judicial notice of " the fact that committee recommendations are often accepted by public bodies at face value and with little discussion." *Bigelow v. Howze,* 291 So.2d 645, 647

(Fla.Dist.Ct.App.1974). In view of this " fact," plaintiffs argue, the negotiating committee was the de facto policy-maker on the Marquette-McGregor project. We do not think this " fact" is a proper subject for judicial notice.

The Iowa Rules of Evidence allow a court to take judicial notice of certain " adjudicative facts." Iowa R. Evid. 5.201(*a*).
A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Iowa R. Evid. 5.201(*b*). The suggestion that committee recommendations are routinely followed by public bodies is not generally known, nor is it capable of accurate and ready determination. Therefore, we cannot take judicial notice of this " fact." *See Warford v. Des Moines Metro. Transit Auth.*, 381 N.W.2d 622, 623 (Iowa 1986) ***357** (refusing to take judicial notice of intergovernmental agreement creating MTA " because it is not the type of evidence that is ' common knowledge or capable of certain verification' ").

[7] The plaintiffs also argue that the negotiating committee's failure to bring a recommendation to the board at the board's March meeting, as one board member had previously requested, " was certainly setting policy in this regard" because, as a result, the fate of the project was not decided at the March board meeting. We do not think the committee's inability to meet a deadline imposed by one board member set policy. The committee's charge was simply to make recommendations to the board. The committee had no recommendation in March, so the board took no action on the project at that time. The record shows that ultimately the committee brought a recommendation to the board, and the *board* decided to withdraw its grant. This sequence of events does not support a finding that the committee had or exercised any " policy-making duties."

In a related argument, the plaintiffs also rely on the fact the agenda for the board's March 2003 meeting included an update on the Marquette-McGregor project; yet, they contend, the project was not discussed because it was taken off the agenda by the negotiating committee. In response, the defendants claim the board minutes show the project was discussed at that meeting; there was simply no recommendation made by the negotiating committee as had been anticipated.[FN2]

> FN2. The board minutes state in reference to the Marquette-McGregor project:
> [Department staff] reported that a negotiation team met today with project proponents. [He] reported that no action was taken and there was nothing to propose or put forward by the negotiation team committee at this point and that there was no action that needed to be taken.
> ....
> [A board member] commented on proponents' and opponents' presence and asked if the project would be discussed. [The board chair] responded that there were no real issues on this project to discuss at this time. [The board member] asked for an update on the project. [The chair] responded that [there] were discussions with project representatives prior to the Board meeting, however, there was nothing to bring to the Board at this time.
> Tim Mason approached the Board, requesting the opportunity to give testimony for the public record. [The chair] opened public comment.
> [The board minutes contain a nearly three-page summary of the public comments on this project, which also includes statements, questions, and responses by various board members.]

We do not think any factual dispute regarding whether or not the project was " discussed" at the board's March meeting is material to a determination of whether the negotiating committee had a " meeting" within the meaning of Iowa's open meetings law. Therefore, this dispute does not preclude summary judgment. *See Fin. Mktg. Servs., Inc. v. Hawkeye Bank & Trust*, 588 N.W.2d 450, 455-56 (Iowa 1999). Even if we accept as a fact that the negotiating committee was responsible for a failure by the board to discuss the project in March, again, this fact is not material to whether a " meeting" of the committee took place prior to the board's March meeting. The committee's failure to make a recommendation in March, thereby leaving the board with nothing to consider, does not demonstrate the committee had any authority to set or direct board policy. There is nothing in the record to show the

board could not have considered the project in March had it been willing to forgo a recommendation from its negotiating committee and a review of the recent financial information provided by the project supporters.***358** The board minutes show that board members were free to ask questions about the project or to make comments concerning it, and several members did so during the course of the board's March meeting.

Finally, the plaintiffs contend that prior to the board's March meeting, the committee met " with project proponents to manipulate a way to make this project go in spite of the objections from members of the public." The plaintiffs support this conclusion with a memo prepared by one of the proponents in which the proponent states that the proponents " should request a meeting prior to [the board's] regularly scheduled meeting to provide [an] update, so that we don't have to discuss this in front of the world." The plaintiffs claim " [t]his is exactly the kind of activity by a public body that needs to be conducted in the light of public scrutiny."

Initially, we note it is somewhat of a leap to conclude that the proponents' desire to discuss their financial difficulties in private indicated an intent to manipulate the process. Nonetheless, even if we accept the plaintiffs' assertion that those discussions should be conducted in public, this court is constrained by the terms of the open meetings law. As we have noted in the past,

It was ... for the legislature to set [the] parameters [of the open meetings law.] In doing so it assumed responsibility for weighing the law's stated purpose against situations when the demands of efficient administration require a measure of confidentiality. We might or might not set some boundaries differently. Our clear responsibility is nevertheless to apply the ones established by the legislative branch of government.

Donahue, 474 N.W.2d at 539. Chapter 21 clearly reaches only those meetings at which the governmental body deliberates or acts in a " policy-making" role. Because there are no facts in the record to support a finding that the negotiating committee had anything more than an advisory function, its March 2003 meeting was not required to be open to the public.

VII. *Summary.*

The district court correctly ruled the undisputed facts establish as a matter of law that the negotiating committee did not have any policy-making duties. Therefore, its meetings were not subject to the open meetings law. Accordingly, we affirm the district court's summary judgment ruling in favor of the defendants.

AFFIRMED.

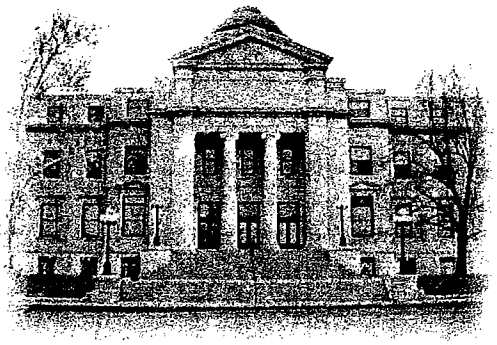
Iowa,2005.
Mason v. Vision Iowa Bd.
700 N.W.2d 349

END OF DOCUMENT

Definition of "Public Records"

Investigative Report 05-01

STATE OF IOWA
CITIZENS' AIDE/OMBUDSMAN



INVESTIGATION INTO LEE COUNTY AUDITOR'S RELEASE OF TAPE RECORDING OF BOARD OF SUPERVISORS' CLOSED SESSION

TO: Anne Pedersen
Lee County Auditor

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

RE: Case File 0401081

Issued: March 17, 2005

Released: April 25, 2005

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.

Complaint and Investigation

The Ombudsman received a complaint alleging Anne Pedersen, the Lee County Auditor (Auditor), had released a cassette tape recording of a Lee County Board of Supervisors' (Board) closed session to *The Hawk Eye* newspaper reporter Matt LeBlanc, in violation of Iowa law.

The Ombudsman issued notice of investigation to the Auditor on May 14, 2004. The investigation was assigned to Assistant Citizens' Aide/Ombudsman Barbara Van Allen.

The Ombudsman interviewed the Auditor and Board members and examined records provided by them, including a cassette tape recording of the Board's September 2, 2003 closed session. The Ombudsman also reviewed relevant Iowa law, including statutes and court decisions, and the Attorney General's opinions and "Sunshine Advisory" bulletins.

Findings

On or about March 2, 2004, reporter Matt LeBlanc (reporter) sent a fax to County Attorney Mike Short (County Attorney) requesting all of his correspondence with the Board from January 1, 2003 to February 1, 2004. On that date, the County Attorney informed Board Chairman Robert Woodruff (Board Chairman) about the reporter's request and his intention to release his correspondence under the belief that the documents are not privileged.

On March 3, 2004 the Board Chairman sent an e-mail to the County Attorney questioning his legal opinion about releasing documents to the public relating to the discussions during and surrounding the September 2, 2003 closed session.

On March 4, 2004 the County Attorney sent an e-mail to the Board Chairman to notify him that he has further reviewed the matter and now believes his legal opinion letters, sought by the reporter, are protected by the attorney-client privilege. He states "if either the board or Anne wished to release those letters, they would be free to do so, but I will not."

The request by the reporter to the County Attorney was not for a specific legal opinion letter; nor did he request at that time any closed session tape recording.

In response to the Ombudsman inquiry, the Auditor recounted the following:

> Matt LeBlanc originally requested the *documents* from Lee County Attorney Mike Short. When Short refused his request due to attorney/client privilege, Matt LeBlanc made a verbal request for the opinion and the recording of the closed session to me on or about March 4, 2004. I spoke to Mike Short and he advised I could waive my attorney/client relationship and release his legal opinion *and also the tape of the recording of the closed session* due to the meeting being illegal and the tape not being protected. (Emphasis added.)

The Auditor purchased blank cassette tapes on March 6 and copied the recording of the September 2, 2003 closed session, after unsealing an envelope containing the recording of the closed session.

On the morning of March 8, the Auditor e-mailed the County Attorney a message stating:

> On Thursday, March 4, 2004, we spoke regarding the closed session the Board held on September 2, 2003. You indicated to me that your written opinion dated October 7, 2003, on this matter would not be released to Matt LeBlanc of the Hawkeye due to your attorney/client relationship with Bob Woodruff. Because the October 7th letter was also addressed to me, you advised me that I could waive my attorney/client relationship and release the letter to Matt LeBlanc. You also advised me that the tape of the recording of the closed session was not protected due to your legal opinion that it was improperly held. Because I am the custodian of the Board's records, you advised me that it is my decision whether or not to make the tape public.

The Auditor received an immediate reply e-mail from the County Attorney stating "this is an accurate reflection of our conversation."

Also on the morning of March 8, the Auditor released the legal opinion and the copied recording to the reporter. The Auditor required him to prepare a written request for documents in her office. The Auditor told the Ombudsman that the reporter gave her a specific request for "a copy of the written opinion of Mike Short on October 7, 2003 and/or a cassette tape of the September 2, 2003 meeting."

The Auditor did not make the Board aware of the March 4, 2004 conversation between herself and the County Attorney concerning whether she could release her copy of the County Attorney's October 7, 2003 legal opinion and the September 2, 2003 closed session tape. The Auditor did not inform the Board of the reporter's verbal or written request for these records nor her intention to release them. The Auditor explained to the Ombudsman, "I did not notify the Board of Supervisors of my intent to release these items due to our adversarial relationship."

The reporter did not make any request to the Board for the legal opinion and tape recording. The Board Chairman learned of the release of these records when the reporter contacted him on the evening of March 10, 2004. The Board Chairman sent the reporter an e-mail that evening, trying to persuade him to "get all the facts" before releasing any information about the discussions related to or on the September 2, 2003 closed session.

The Board Chairman told the Ombudsman that, had the reporter contacted the Board for the legal opinion and tape recording, the reporter would have been referred to Iowa Code Section 21.5 (4) and advised to pursue enforcement of Chapter 21 by petitioning the district court.

Analysis and Conclusion

The Ombudsman's investigation focused on whether the Auditor's release of the Board's closed session tape recording violated Iowa's Open Meetings Law, in particular Iowa Code section 21.5, subsection 4, which states:

> A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session, and shall also tape record all of the closed session. The detailed minutes and tape recording of a closed session shall be sealed and shall not be public records open to public inspection. However, upon order of the court in an action to enforce this chapter, the detailed minutes and tape recording shall be unsealed and examined by the court in camera. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding. In determining whether any portion of the minutes or recording shall be disclosed to such a party for this purpose, the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence in an enforcement proceeding. After such a determination, the court may permit inspection and use of all or portions of the detailed minutes and tape recording by the party seeking enforcement of this chapter. A governmental body shall keep the detailed minutes and tape recording of any closed session for a period of at least one year from the date of that meeting.

In the case of *Telegraph Herald, Inc. v. City of Dubuque,* 297 N.W. 2d 529 (Iowa 1980), the Iowa Supreme Court held the tape recordings of illegally closed executive sessions of a city council did not constitute public records open to public inspection. The court noted the specific limitations in the statute against release of closed session records and said these limitations "militate strongly against a release of the tapes to the general public." The Court declined a newspaper's request to impose a sanction that would declare the tapes to be open for public inspection. The Court noted that there are specific sanctions available in section 21.6 for violations of the open meetings law, including voiding any action taken at an illegally closed meeting.

There is no administrative remedy or sanction in Iowa Code chapter 21 authorizing a governmental body to unilaterally release tapes of a closed session, even if the meeting was closed illegally. Considering the language of section 21.5 and the decision in the *Telegraph Herald* case, the Ombudsman believes the proper remedy is to petition the court for release. Proceeding in this manner would afford any aggrieved persons the opportunity to challenge or dispute the release of the records of a closed session or any portions of such records.

This case also presents an issue of whether the Auditor is the lawful custodian of the Board's closed session records. We determine the lawful custodian of those records is the Board.

Section 21.5(4) requires a governmental body to "keep" minutes of a closed session and to tape record all of the closed session. In this case, the Board is the governmental body and the minutes and tape recording are the records of the Board. Section 331.303(2) expressly requires the Board to "[m]aintain its records in accordance with chapter 22," the public records law. Section 22.1(2) states that the "lawful custodian" is "the government body currently in physical possession of the public record," but adds that the "custodian of a public record in the physical possession of persons outside a government body is the government body owning that record." Therefore, the Board is the lawful custodian of its closed session records, as well as the minutes of all its meetings under section 21.3.

My determination is consistent with an opinion of the Iowa Attorney General which concluded a county board of supervisors is the lawful custodian of the records books that it is required to keep under section 331.303, even though the records are maintained in the physical possession of the Auditor under section 331.504(2). The opinion found the auditor merely acts as the "agent" of the board of supervisors. 1992 Op. Att'y Gen. 167.

Furthermore, it is up to the lawful custodian to "ultimately decide whether the records are open to public inspection." See, 1993 Op. Att'y Gen. 46. It was up to the Board to decide what to do with the closed session records. In situations when the Auditor is uncertain or has concerns about the release of the Board's records, the Ombudsman believes the Auditor has an implicit responsibility as an agent of the Board to inform and discuss the matter with the Board. In this incident, when the reporter requested the closed session records, and the Auditor was uncertain about their release, the Auditor should have directed the reporter to make the request to the Board or to notify or confer with the Board regarding the request.

In defense of her actions, the Auditor said she relied on the advice of the County Attorney. As to liability for violation of the open meetings law, section 21.6(4) states that: "Ignorance of the legal requirements of this chapter shall be no defense to an enforcement proceeding brought under this section. A governmental body which is in doubt about the legality of closing a particular meeting is authorized to bring suit. . . to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney for the governmental body." It is questionable whether the conversation the Auditor had with the County Attorney on March 4, 2004 and the e-mail exchanges between the two of them on March 8, 2004 constituted a formal legal opinion by the County Attorney on whether the Auditor could unseal, copy and release a copy of the September 2, 2004 closed session recording. Furthermore, even though an individual public official who reasonably relied on the opinion of the attorney for the governmental body

may be shielded from liability for monetary damages, attorney fees and costs, the governmental body can still be held accountable for the fees and costs if a violation is proven. *See, August 2004 Attorney General "Sunshine Advisory – But My Lawyer Said This Was Legal."*

The Ombudsman concludes that the Auditor's release of the Board's closed session tape recording violated section 21.5(4) of Iowa's Open Meetings Law. Given that the Board is the legal custodian of the record and the Auditor was uncertain about its release, the Ombudsman believes the Auditor had the implicit responsibility to refer the request for the Board's closed session tape recording to the Board or to notify or confer with the Board about the request.

LEE COUNTY AUDITOR

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April 11, 2005

Mr. William P. Angrick II
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Re: Case File 0401081 – Written Reply

Dear Mr. Angrick:

Your investigative findings state a public official is responsible if they relied on a County Attorney's legal advice that turns out to be in error. As a public official, the County Attorney is my attorney and I must rely on his legal advice. You question whether the County Attorney's advice was a formal legal opinion. If the County Attorney had to write "a formal legal opinion" for every question he receives, it would take months to get an answer. The result would be to greatly slow down the process of County government.

You cite the case of Telegraph Herald, Inc. v. City of Dubuque as follows: *"the Ombudsman **believes** the proper remedy is to petition the court for release"*. In an interview with The Hawk Eye, Burlington, Iowa, on June 30, 2004, you are quoted as follows (article attached):

> "that Short's opinion and Pedersen's release of the tape is without precedent in Iowa".

In an article published in The Hawk Eye, on July 8, 2004, David Vestal, Deputy Director and legal counsel for the Iowa State Association of Counties was quoted as follows (article attached):

> Vestal, speaking hypothetically, said an opinion by County Attorney Mike Short calling the closed meeting "improper" might have been the only permission needed to release the tape. He said later that only the state Supreme Court could determine whether the tape's release to area media outlets was legal.
>
> "There's no legal precedent for deciding a precedent such as this," Vestal said. "In the first 25 years of the open meetings laws, there were, roughly, 50 attorney

general's opinions. In the last four years, there hasn't been any, and I think that's a shame."

"I don't think that the natural result is (that) there's no other way it can be disclosed," said Vestal, adding that Dunagan should not assume that only a judge can unseal a closed-session document.

"If the county attorney, who is the auditor's lawyer, determines that it (a meeting) was not a properly constituted closed session, there would be no legal basis to refuse to disclose the contents of the tape recording," Vestal said.

With due respect to your office and position, I believe there remains considerable confusion and difference of legal ***beliefs*** regarding the legality of releasing a tape recording of an illegal closed session.

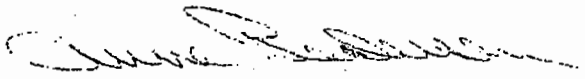
Referring back to the Hawk Eye article published on June 3, 2004, it states

"Also, the ombudsman's office could examine the legality of the meeting itself."

I am disappointed your investigation did not pursue this violation of the open meetings laws. By addressing only my actions and not the actions of the Lee County Board of Supervisors, it appears mine were more serious than theirs. My actions were based on legal advice and, therefore, a sincere intention to comply with Iowa Code Chapter 21. The Lee County Board of Supervisors' actions were based on an attempt to circumvent Iowa Code Chapter 21.

The Lee County Board of Supervisors was repeatedly criticized by the press with several allegations of working outside of the law. I was not willing to join in the same alleged type of activities or being painted with the same brush. The County Attorney determined the closed session on September 2, 2003, was an illegal act and advised the tape recording was therefore not protected. Being given the choice between open government and the allegation of a cover up, I followed the spirit of Chapter 21 and the advice of the County Attorney – openness.

Respectfully submitted,



Anne Pedersen

Publication:	Hawk Eye	**Category:**	Local News
Pub. Date:	6/3/04	**Written By:**	Matt LeBlanc
Pub. Page:	2A	**Created:**	10:02:28 AM on 6/10/04

Ombusdman investigates tape

By MATTHEW LeBLANC
mleblanc@thehawkeye.com

FORT MADISON — The state ombudsman's office is investigating allegations that Lee County Auditor Anne Pedersen illegally released copies of a 2003 closed session Board of Supervisors meeting to local media in March.

State Ombudsman William Angrick said Wednesday that his staff has begun reviewing information — including news reports and interviews with county officials — surrounding the case.

"First, we want to see if we have a problem," Angrick said. "Right now, all I have is a question."

Pedersen released the tape March 8, along with a letter from Lee County Attorney Mike Short calling the meeting "improper," following a request for the information by The Hawk Eye under Iowa's open meetings laws. The information was subsequently released to other media outlets in Lee County.

Angrick's office will examine whether the release of the information was legal, but the investigation could also determine the accuracy of an opinion by Short saying that the tape of the meeting could be released. Also, the ombudsman's office could examine the legality of the meeting itself.

The investigation is currently in "very preliminary" stages, Angrick said, and no decisions have been made. There is no timeline for the probe's completion.

Supervisors held a closed session meeting Sept. 2, 2003, citing a section of Iowa law allowing closed meetings "to evaluate the professional competency" and "appointment, hiring, performance or discharge" of county employees. Short later stated in a letter to Pedersen and Supervisors Chairman Bob Woodruff that because the meeting's focus was not on the evaluation of an employee, the meeting was improperly closed.

During the meeting, the board members and Pedersen discussed transferring the position of budget director from the auditor's office to the board of supervisors.

In an e–mail to Pedersen after the request for the information was made, Short indicated the tape could be released because the meeting was not lawful.

Still, the ombudsman's office may determine whether Short's interpretation of the law is accurate. Under state law, only a court challenge can secure the release of a closed session tape. At issue is whether Short's opinion that the meeting was not legally held circumvents the need for a challenge in district court.

"I don't want to close the door as to where we might go" with the investigation, Angrick said, adding that Short's opinion and Pedersen's release of the tape is without precedent in Iowa.

"It has been my experience that the people who are seeking the information go to court," he said.

The state Citizens' Aide/Ombudsman is an independent agency under the Iowa Legislature charged with hearing and investigating allegations surrounding state, county and city governments. The agency cannot enforce legal determinations, but can issue reports critical of officials who may have violated laws.

Reports, however, are rarely published. Out of more than 4,000 allegations received annually by the agency, only about two reports are written. However, Angrick said media attention and public interest in a specific case could bring about a report.

Angrick said Pedersen has cooperated with questions posed by investigators and "has submitted a significant amount of information on this."

Two assistant ombudsmen will conduct the investigation. It remains to be seen whether a report will be published.

The issue of the release of the closed session meeting tape was referred to the ombudsman's office from the state Ethics and Campaign Disclosure Board, which received similar allegations from an anonymous caller some time in March or April. The ethics board declined to investigate the matter, saying the release of the tape did not violate the state's campaign laws.

Tape release discussed

Publication:	Hawk Eye	**Category:**	Local News
Pub. Date:	7/8/04	**Written By:**	Transporter
Pub. Page:	1A	**Created:**	3:08:10 PM on 7/15/04

By MATTHEW LeBLANC

mleblanc@thehawkeye.com

Despite arguments from some county officials to the contrary, the release of a cassette tape of a closed-session meeting of the Lee County Board of Supervisors might have been legal, according to an attorney for a consortium of Iowa counties.

David Vestal, deputy director and legal counsel for the Iowa State Association of Counties, addressed the issue of the release by Lee County Auditor Anne Pedersen of a closed session tape during a session Wednesday for area public officials to review Iowa's open meetings and open records laws.

Vestal, speaking hypothetically, said an opinion by County Attorney Mike Short calling the closed meeting "improper" might have been the only permission needed to release the tape. He said later that only the state Supreme Court could determine whether the tape's release to area media outlets was legal.

Even if it was released illegally, there is no prescribed penalty for the offense, Vestal said.

"There's no legal precedent for deciding a precedent such as this," Vestal said. "In the first 25 years of the open meetings laws, there were, roughly, 50 attorney general's opinions. In the last four years, there hasn't been any, and I think that's a shame."

Vestal said the state attorney general's office has stopped producing opinions due to budget contraints. Attorney general opinions are not legal rulings.

Pedersen released the tape of the September 2003 meeting in March after The Hawk Eye requested it under state open records laws. Lee County Attorney Mike Short, in a 10-page letter addressed to the Board of Supervisors in October, called improper a closed meeting called by the Board of Supervisors to discuss personnel issues.

Instead, during the meeting the board discussed a policy issue of transferring the county's budget director position from the auditor's office to under the supervisor's budget.

For months, some county officials have maintained that the release of the tape was illegal under Iowa law, which states that tape recordings of closed-session meetings can be unsealed only "upon order of the court."

Dan Dunagan, a county supervisor who was part of the 2003 meeting, questioned whether the tape should have been distributed to the media based solely on the opinion of the county attorney.

"Can a county attorney and/or a county auditor override a judge's decision?" Dunagan asked.

"I don't think that the natural result is (that) there's no other way it can be disclosed," said Vestal, adding that Dunagan should not assume that only a judge can unseal a closed-session document.

Vestal's comments mark the first legal observation on the closed-session meeting since portions of the tape were published in The Hawk Eye. Short has been quiet on the issue since, even refusing to release his October letter to supervisors or the media, citing attorney/client privilege.

"If the county attorney, who is the auditor's lawyer, determines that it (a meeting) was not a properly constituted closed session, there would be no legal basis to refuse to disclose the contents of the tape recording," Vestal said.

During the 2003 closed session called "to evaluate the professional competency of an individual," supervisors barred the public and reporters from the meeting.

In Short's letter, however, he states that since the employee was not an employee under the Board of Supervisors' control, the meeting was improper.

"The board of supervisors had no authority to 'evaluate the professional competency' of the budget director," Short wrote, moving on to a second section of the law concerning personnel discussions. "The budget director's 'appointment, hiring, performance or discharge' was not properly considered by the board of supervisors."

Dunagan, who was present at the Wednesday gathering at the Port of Burlington, said he was not satisfied by Vestal's response. He argued that the confidence of county employees in the board would wither because discussions about county personnel could potentially become public under such opinions.

"He didn't go deep enough," Dunagan said. "It's still an attorney's opinion. Should that (opinion) justify a person's reputation being harmed? Of course it shouldn't."

However, nothing on the tape speaks directly to the competency or job performance of the budget director.

Steve Cirinna, a Montrose resident whose wife, Celeste Cirinna, ran against Pedersen in a June 8 primary election for the auditor post, also questioned the opinion. Steve Cirinna is Lee County's emergency management coordinator.

Pedersen, who also was present at the session, said she was "pleased" with Vestal's remarks.

Ombudsman's Comments to Lee County Auditor's Reply

In her Reply, the Lee County Auditor seems to focus on her reliance on the advice of the County Attorney in defending her action to release the closed session tape recording. This misses a key issue and finding in the Ombudsman's report. The Ombudsman acknowledges the Auditor, as a public official, can seek and may rely on the formal legal opinion of the County Attorney regarding the release of the Auditor's public records. However, the Board of Supervisors is the "legal custodian" of the tape recording involved, and it was ultimately up to the Board to decide how to respond to the reporter's request and whether to seek the advice of the County Attorney.

The Auditor also claims "there remains considerable confusion and difference of legal ***beliefs*** regarding the legality of releasing a tape recording of an illegal closed session." As stated in the report, "[c]onsidering the language of section 21.5 and the decision in the *Telegraph Herald* case, the Ombudsman believes the proper remedy is to petition the court for release." The Auditor indicates the Ombudsman expressed a contradictory viewpoint earlier in a June 3, 2004 story in *The Hawk Eye*; the newspaper reported the Ombudsman had said that "Short's opinion and Pedersen's release of the tape is without precedent in Iowa." However, the Ombudsman was not referring to *legal* precedent, but rather his office's experience with complaints of this nature. This is evident from the ensuing quote by the Ombudsman in the newspaper story stating, "It has been my experience that the people who are seeking the information go to court." That statement is consistent with the Ombudsman's subsequent conclusion in this report.

In support of her claim, the Auditor also referenced statements made in a July 8, 2004 *The Hawk Eye* article by David Vestal, General Counsel to the Iowa State Association of Counties. The Ombudsman does not know exactly what Mr. Vestal stated at that time or the context in which he made those statements. The Ombudsman can confirm that Mr. Vestal, in a September 30, 2004 ICN Training entitled "Public Records 101" and sponsored by the Iowa Attorney General, referenced the 1992 Attorney General Opinion discussed in this report and stated the following:

> If the County Auditor is not the custodian of the Board of Supervisors records, then all decisions about releasing documents would have to be made by the County Board of Supervisors and not the Auditor.

In response to a question about an Auditor releasing a tape recording of a Board of Supervisor's closed session, Mr. Vestal said:

> Well, we've said the custodian of these records is technically the Board of Supervisors, so they would have to approve any release of those tapes, it would be up to them, if, unless the County Auditor has been designated as the custodian.

These statements by Mr. Vestal are consistent with the Ombudsman's analysis and conclusion.

The Auditor expressed disappointment that the Ombudsman did not investigate the Board's closed session, which the County Attorney determined to have been improperly closed. The Ombudsman did not receive a complaint on that issue and therefore did not make it a part of this investigation. That issue does not affect the Ombudsman's conclusion in this report.

Applicant
and
Current Employee
Records

SENATE/HOUSE FILE _____
BY (PROPOSED CITIZENS' AIDE/
OMBUDSMAN BILL)

Passed Senate, Date _____ Passed House, Date _____
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays _____
Approved _____

A BILL FOR

An Act to permit the public inspection and copying of certain information containing personnel and payroll records pertaining to government officers, officials, and employees.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

TLSB 1201DP 79
rh/pj/5

S.F. _____ H.F. _____

Section 1. Section 22.7, subsection 10, Code 2001, is amended by striking the subsection.

Sec. 2. Section 22.7, subsection 11, Code 2001, is amended to read as follows:

11. Personal information in confidential personnel and payroll records of ~~public bodies including but not limited to cities, boards of supervisors and school districts~~ government bodies that pertain to individuals who are officials, officers, or employees of the government bodies. However, the following information, pertaining to an individual who is an official, officer, or employee of a government body, contained in confidential personnel and payroll records shall not be confidential:

a. The name and compensation paid to the individual.

b. The individual's sick leave, vacation, and other leave information.

c. The date the individual was employed by the government body.

d. The positions the individual holds or has held with the government body.

e. The individual's qualifications for the position that the individual holds or has held, including, but not limited to, educational background and work experience.

f. Any disciplinary action taken against the individual that resulted in the individual's discharge, suspension, demotion, or loss of pay.

g. Other information for which the legal custodian of the information makes a determination that the public's interest in access outweighs the individual's interest in confidentiality.

Sec. 3. IMPLEMENTATION OF ACT. Section 25B.2, subsection 3, shall not apply to this Act.

EXPLANATION

This bill alters the confidentiality provisions in the public records chapter for personnel and payroll records

pertaining to officials, officers, and employees of government bodies. The confidentiality provision pertaining to personal information in confidential records of the military division of the department of public defense is stricken in the bill. The confidentiality provision pertaining to personnel records of other public bodies is expanded to include both personnel and payroll records pertaining to officials, officers, and employees of government bodies, but certain specific information within those confidential records is designated as nonconfidential.

The information designated as nonconfidential includes the name and compensation paid to the individual to whom the record pertains; the date of employment; positions held; the individual's qualifications; any disciplinary action taken which resulted in the individual's discharge, suspension, demotion, or loss of pay; and any other information for which the legal custodian of the information determines that the public's interest in access outweighs the individual's interest in confidentiality.

The bill may include a state mandate as defined in Code section 25B.3.

This bill makes inapplicable Code section 25B.2, subsection 3, which would relieve a political subdivision from complying with a state mandate if funding for the cost of the state mandate is not provided or specified. Therefore, political subdivisions are required to comply with any state mandate included in this bill.

MEMORANDUM IN SUPPORT OF LEGISLATIVE PROPOSAL
2004 LEGISLATIVE SESSION

To: Members of the Iowa General Assembly
From: William P. Angrick II, Citizens' Aide/Ombudsman

The purpose of this bill is to provide that certain personnel and payroll records of employees of a government body are public records subject to examination.

The bill deletes the confidentiality provision pertaining to personal information in personnel records of the military division of the department of public defense. It also changes the exception pertaining to personnel records of other government employees.

Under the bill, certain information in personnel and payroll records of officials, officers or employees of a government body shall not be confidential. This information includes the following: employees' names and compensation; vacation, sick leave, and other leave taken by the employee; date of employment; positions held with the government body; qualifications, including educational background and work experience; disciplinary actions which resulted in discharge, suspension, demotion, or loss of pay; and other information in which the public's interest in access outweighs the individual's interest in confidentiality, as determined by the legal custodian of the records.

A 1999 Iowa Supreme Court case, *Clymer v. City of Cedar Rapids, 601 N.W.2d 42 (1999)*, held that information concerning an individual employee's compensation and usage for sick leave, vacation, and other leave information is subject to the disclosure under Iowa Code chapter 22. This bill in part comports with that ruling.

Currently, even when it is determined that a government employee erred or engaged in misconduct, most actions in response to that error or misconduct are shielded from public scrutiny because the employing agencies withhold disclosing them on the basis they are confidential personal personnel information. The public has an interest in knowing how its government responds to erroneous, negligent, wrongful or inappropriate actions, or inactions by its employees. Public knowledge of those responses could help to instill or improve public confidence in government. Public scrutiny of those responses would enhance government responsibility, accountability and responsiveness.

Public Record Laws Pertaining to Personnel Records

Federal law: 5 U.S.C. Sec. 552, As Amended by Public Law No. 104-231, 110 Stat. 2422

Exempts from public disclosure:

> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

Arkansas Code: 25-19-105

(b) It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter:

(12) Personnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy;

(c)(1) Notwithstanding subdivision (b)(12) of this section, all employee evaluation or job performance records, including preliminary notes and other materials, shall be open to public inspection only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.

To: Dennis Prouty, Director
Legislative Services Agency
From: William P. Angrick II
Re: 2004 Legislative Proposals
Date: November 26, 2003

I am submitting the following legislative proposals which were previously submitted in 2001.

(1) Proposal to expand the public accommodation protections of the Iowa Civil Rights Act to include correctional facilities.
(2) Proposal to permit the public inspection and copying of certain personnel records pertaining to government officers, officials, and employees.

I have enclosed the 2001 bill drafts, as well as a memorandum in support of each proposal.

Please contact me or Deputy Ombudsman Ruth Cooperrider if you have any questions.

Thank you.

Social Security Numbers
And
Unique Identifiers

Senate Study Bill 1223

SENATE/HOUSE FILE
BY (PROPOSED CITIZENS' AIDE/
OMBUDSMAN BILL)

Passed Senate, Date _____ Passed House, Date
Vote: Ayes _____ Nays _____ Vote: Ayes _____ Nays
Approved

A BILL FOR

An Act relating to the privacy of social security numbers and other personal information in public records and providing remedies.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:
TLSB 1281DP 82
eg/cf/24

PAG LIN

1 1 Section 1. NEW SECTION. 22.21 SOCIAL SECURITY NUMBERS IN
1 2 PUBLIC RECORDS.
1 3 1. To the greatest extent feasible, a government body
1 4 shall not disclose a person's social security number unless
1 5 the disclosure is authorized by law.
1 6 2. A government body shall make reasonable efforts to
1 7 exclude social security numbers from public records, as
1 8 follows:
1 9 a. Exclude social security numbers on licenses, permits,
1 10 and other documents that may be readily observed by the
1 11 public.
1 12 b. Give individuals the option not to submit a social
1 13 security number to the government body.
1 14 c. Any other efforts to prevent social security numbers
1 15 from being included in public records and to protect such
1 16 numbers from disclosure.
1 17 3. If a public record contains a social security number,
1 18 the government body shall determine a method to redact the
1 19 social security number prior to releasing the record if such
1 20 redaction does not materially affect the value of the public
1 21 record and is permitted by law. The redaction of a social
1 22 security number from a public record shall not delay public
1 23 access to the public record except for the time required to
1 24 perform the actual redaction. As used in this section,
1 25 "redact" means to render the social security number unreadable
1 26 or truncated so that no more than the last four digits of the
1 27 social security number may be accessed as part of the record.
1 28 4. This section shall not prohibit a government body from
1 29 lawfully obtaining a person's social security number.
1 30 5. A government body that solicits information containing
1 31 a person's social security number or that is the lawful
1 32 custodian of public records containing social security numbers
1 33 shall, if subject to chapter 17A, adopt rules or, if a
1 34 political subdivision or other public body, adopt guidelines
1 35 to administer the use and disclosure of social security
2 1 numbers consistent with this section.
2 2 Sec. 2. NEW SECTION. 22.22 PERSONAL INFORMATION ==

BREACH OF SECURITY == NOTICE.

1. As used in this section:

a. "Breach of security" means the unauthorized access to or acquisition of personal information that compromises the security, confidentiality, or integrity of such personal information. The unauthorized disclosure of personal information subsequent to a good faith, authorized access or acquisition of personal information constitutes a breach of security.

b. "Personal information" means a person's first name or first initial and last name in combination with any one or more of the following data elements that relate to the person if neither the name nor the data elements are encrypted, redacted, or otherwise altered by any method or technology in such a manner that the name or data elements are unreadable:

(1) Social security number.

(2) Driver's license number or other unique identification number created or collected by a government body.

(3) Account number, credit card number, or debit card number, in combination with any required security code, access code, or password that would permit access to a person's financial account.

(4) Unique electronic identifier or routing code, in combination with any required security code, access code, or password.

(5) Unique biometric data, such as a fingerprint, voice print, retina or iris image, or other unique physical representation.

2. When the government body that collects, maintains, or possesses a public record containing personal information has reason to believe that a breach of security may occur or has occurred, the government body shall promptly investigate to determine whether personal information has been or may be used for an unauthorized purpose. If the government body finds that such use has occurred or is likely to occur, the government body shall give notice of the breach of security to each affected person pursuant to this section. Notice shall be made as soon as possible, consistent with the legitimate needs of law enforcement as provided in subsection 3.

3. If requested by a law enforcement agency, the government body shall delay giving notice if notice may impede a criminal investigation or jeopardize national security. The request by a law enforcement agency shall be in writing or documented in writing by the government body. The written request shall include the name of the law enforcement officer making the request and the name of the officer's law enforcement agency that is engaged in the investigation. After the law enforcement agency notifies the government body that notice of the breach of security will no longer impede investigation or national security, the government body shall give notice to the affected persons without unreasonable delay.

4. The notice shall include, in a clear and conspicuous manner, the following:

a. The incident causing the breach of security.

b. The type of personal information compromised by the breach of security.

c. The acts taken by the government body to remedy the breach of security.

d. If available, a telephone number that the person may call for further information and assistance.

e. A statement advising the person to vigilantly review account statements and monitor the person's credit report.

5. The government body shall provide notice using one of the following methods:

a. Written notice to the last available address of record.

b. Electronic mail notice, if the recipient has agreed to receive communications electronically and the notice complies with chapter 554D and 15 U.S.C. } 7001.

c. Telephonic notice, if contact is made directly with the affected person.

d. Substitute notice, if the government body determines that the cost of providing notice under paragraphs "a" through "c" exceeds twenty=five thousand dollars, the number of persons to be notified exceeds fifty thousand, or the government body does not have sufficient contact information needed to provide notice under paragraphs "a" through "c", as follows:

(1) Electronic mail notice.

(2) Conspicuous notice posted on the government body's website, if available.

(3) Notification to major statewide media.

6. Notwithstanding the notice requirements of this section, a government body that has developed its own notification procedures for a breach of security and timely complies with such procedures is deemed to be in compliance with this section.

Sec. 3. NEW SECTION. 22.23 REMEDIES FOR PRIVACY VIOLATIONS.

1. Any person who is injured by a violation of section 22.21 or 22.22 may institute a civil action to recover actual damages, court costs, interest, and attorney fees and to seek judicial enforcement of the requirements of section 22.21 or 22.22 in an action brought against the government body and any other persons who would be appropriate defendants under the circumstances. The attorney general or any county attorney may seek judicial enforcement of section 22.21 or 22.22. Suits shall be brought in the district court for the county in which the government body has its principal place of business.

2. The rights and remedies available under this section are cumulative to any other rights and remedies available by law.

Sec. 4. Sections 22.3A, subsection 2, unnumbered paragraph 1; 22.3A, subsection 2, paragraph "a"; 22.7, subsections 27, 31, and 35; section 22.7, subsection 52, paragraph "g"; 22.8, subsections 3 and 4; and 22.10; Code 2007, are amended by striking from the applicable section, subsection, or paragraph the word "chapter" and inserting in lieu thereof the following: "subchapter".

Sec. 5. CODE EDITOR DIRECTIVE. The Code editor shall establish the following subchapters in chapter 22:

1. Subchapter I, entitled "definitions", shall be comprised of section 22.1.

2. Subchapter II, entitled "access to public records", shall be comprised of sections 22.2 through 22.14.

3. Subchapter III, entitled "privacy", shall be comprised of sections 22.21 through 22.23.

EXPLANATION

This bill amends the "Open Records Act", Code chapter 22, as follows:

1. New Code section 22.21. While government bodies may lawfully obtain a person's social security number, the bill specifically directs government bodies not to disclose a person's social security number and to take steps to exclude social security numbers from public records. For social security numbers contained in public records, the bill

requires the government body to redact such numbers prior to the public's access to that record. The bill further directs the government body to adopt rules or guidelines, as appropriate, to administer the use and disclosure of social security numbers.

2. New Code section 22.22. The bill provides that if the security of personal information, as defined, is breached by the unauthorized access to or acquisition of such information, the government body shall investigate the breach to determine whether personal information has been or may be used for an unauthorized purpose. If such use has occurred or is likely to occur, the government body is required to give notice, consistent with law enforcement needs, to each affected person. The bill outlines the information required in the notice and the methods for accomplishing notice. A government body that has its own notice procedures may use such procedures in lieu of the bill's notice requirement.

3. New Code section 22.23. The bill provides remedies to enforce the requirements of and provide redress for violations of Code sections 22.21 and 22.22, above. Existing enforcement and penalty provisions in Code sections 22.5 and 22.6, respectively, will also apply to redress violations of Code sections 22.21 and 22.22.

4. The bill includes a Code editor directive to create subchapters in Code chapter 22.

The following Code sections are amended by striking from the applicable section, subsection, or paragraph the word "chapter" and inserting in lieu thereof the word "subchapter":

1. Code section 22.3A, subsection 2, concerning access and fees for access to public records which are combined with a government body's data processing software.

2. Code section 22.7, subsections 27, 31, 35, and subsection 52, paragraph "g", identifying various public records that are to be kept confidential.

3. Code section 22.8, subsections 3 and 4, pertaining to actions to restrain the examination of a public record and grounds for reasonable delay by a lawful custodian in permitting access to a public record.

4. Code section 22.10 pertaining to civil enforcement actions when a lawful custodian has refused to give access to public records in violation of the open records Act.

"Chapter" is the appropriate word in the following Code sections as such Code sections would apply to the entire chapter:

1. Code section 22.4 concerning the office hours of the lawful custodian of public records.

2. Code section 22.9 providing that if federal funds or services would be denied because of a provision of Code chapter 22, the provision must be suspended only to the extent necessary.

LSB 1281DP 82
eg:sc/cf/24.2

STATE OF IOWA

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WILLIAM P. ANGRICK II
CITIZENS' AIDE/OMBUDSMAN

CITIZENS' AIDE/OMBUDSMAN
OLA BABCOCK MILLER BUILDING
1112 EAST GRAND AVENUE
DES MOINES, IOWA 50319

Date: February 27, 2007
To: Members of the Senate State Government Subcommittee
From: William P. Angrick II, Citizens' Aide/Ombudsman
RE: SSB 1223: A Study Bill for an Act Relating to the Privacy of Social Security Numbers and Other Personal Information in Public Records and Providing Remedies

PURPOSE

The purpose of this bill is to minimize the fraudulent use of social security numbers by giving government bodies the authority to redact social security numbers from public records. The bill also requires government bodies to provide notice of a breach of security to the affected person(s) in situations where illegal use of the personal information has or may occur.

BACKGROUND

Social security numbers on public records

An inherent conflict exists between an individual's access to public records and their right to privacy. According to Beth Givens, the director of the Privacy Rights Clearinghouse, a nonprofit consumer information and advocacy organization, "One of the most challenging public policy issues of our time is the balancing act between access to public records and personal privacy - the difficulty of accommodating both personal privacy interests and the public interest of transparent government."

Many government bodies in Iowa require individuals to provide personal information, including social security numbers, before an individual can receive a service or acquire a license. These documents are public records unless specifically identified as confidential in law and therefore available to anyone simply for the asking.

Technology adds another dynamic to the availability of public records. On-line database searches, implemented for the convenience of citizens, businesses and government bodies, allow anyone with computer access to view and print public records, some of which contain social security numbers and other personal information.

Ironically, while the Iowa Attorney General's website advises citizens to protect their social security number to avoid identity theft, few sections of the Iowa Code prohibit government bodies from using or releasing social security numbers on public records. Compounding the problem is that Iowa law rarely affords government bodies the authority to redact social security numbers from public records.

This bill would address these problems by prohibiting government bodies from disclosing a person's social security number unless authorized by law. In addition, the bill would require government bodies to make reasonable efforts to exclude and redact social security numbers from public records.

Security breaches

Government bodies in Iowa are not immune to security breaches. According to the Privacy Rights Clearinghouse[1], there were at least three incidents during the past two years of unauthorized access to social security numbers in records maintained by Iowa government bodies.

- December 25, 2005 Iowa State University
  Hacking. Credit card information and social security numbers.

- February 18, 2006 University of Northern Iowa
  Hacking. Laptop computer holding W-2 forms of student employees and faculty was illegally accessed.

- July 14, 2006 University of Iowa
  Laptop computer containing personal information of current and former MBA students was stolen. Data files included social security numbers and some contact information.

On August 4, 2006, the Des Moines Register reported that an international computer hacker targeted a state server providing electronic services to the public, such as campground registrations. And as recently as February 15, 2007, the Des Moines Register reported that the Iowa Department of Education said a hacker had gained access to up to 600 General Educational Development (GED) records contained in a protected department Web application containing names, addresses, dates of birth and social security numbers of people who obtained GEDs in Iowa between 1965 and 2002. These are security breaches that were publicized. We do not know, however, how many times unauthorized access to social security numbers went unreported because government bodies in Iowa are not required to report security breaches to affected person(s).

This bill would require government bodies to conduct a prompt investigation when the government body has reason to believe a breach of security involving personal information has or may occur and provide notice to the affected person(s). The bill delineates the method and content of the notice and provides remedies to enforce the requirements of - and provide redress for violations of - the notice requirements.

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[1] http://www.privacyrights.org/ar/ChronDataBreaches.htm accessed January 27, 2007)

Senate File 212 - Enrolled

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SENATE FILE 212

AN ACT

RELATING TO COUNTY OFFICES, BY PROTECTING CERTAIN IDENTITY INFORMATION CONTAINED IN DOCUMENTS RECORDED WITH THE COUNTY RECORDER AND BY INCREASING SALARY LIMITS FOR CERTAIN DEPUTY OFFICERS AND PROVIDING AN APPLICABILITY DATE.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. Section 331.606A, Code 2007, is amended by striking the section and inserting in lieu thereof the following:

331.606A DOCUMENT CONTENT == PERSONALLY IDENTIFIABLE INFORMATION.

1. DEFINITIONS.

a. "Personally identifiable information" means one or more of the following specific unique identifiers when combined with an individual's name:

(1) Social security number.

(2) Checking, savings, or share account number, credit, debit, or charge card number.

b. "Preparer" means the person or entity who creates, drafts, edits, revises, or last changes the documents that are recorded with the recorder.

c. "Redact" or "redaction" means the process of removing personally identifiable information from documents.

2. INCLUSION OF PERSONALLY IDENTIFIABLE INFORMATION. The preparer of a document shall not include an individual's personally identifiable information in a document that is prepared and presented for recording in the office of the recorder. This subsection shall not apply to documents that were executed by an individual prior to July 1, 2007. Unless provided otherwise by law, all documents described by this section are subject to inspection and copying by the public.

3. REDACTION ON A RECORDER'S INTERNET WEBSITE. If a document that includes an individual's personally identifiable information was recorded with the recorder and is available on the recorder's internet website, the individual may request that the recorder redact such information from the website. The recorder shall establish a procedure by which individuals may request that such personally identifiable information be redacted from the internet record available on the recorder's internet website, at no fee to the requesting individual. The recorder shall comply with an individual's request to redact personally identifiable information.

4. LIABILITY OF PREPARER. A preparer who, in violation of subsection 2, enters personally identifiable information in a document that is prepared and presented for recording is liable to the individual whose personally identifiable information appears in the recorded public document for actual damages of up to five hundred dollars for each act of recording.

5. APPLICABILITY. This section shall not apply to a preparer of a state or federal tax lien, a military separation or discharge record, or a death certificate that is prepared for recording in the office of county recorder. If a military

separation or discharge record or a death certificate is recorded in the office of the county recorder, the military separation or discharge record or the death certificate shall not be accessible through the internet.

Sec. 2. Section 331.904, subsection 1, Code 2007, is amended to read as follows:

1. The annual base salary of the first and second deputy officer of the office of auditor, treasurer, and recorder, the deputy in charge of the motor vehicle registration and title division, and the deputy in charge of driver's license issuance shall each be an amount not to exceed ~~eighty~~ eighty-five percent of the annual salary of the deputy's principal officer. In offices where more than two deputies are required, the annual base salary of each additional deputy shall be ~~paid~~ an amount not to exceed ~~seventy-five~~ eighty percent of the principal officer's salary. The amount of the annual base salary of each deputy shall be certified by the principal officer to the board and, if a deputy's annual base salary does not exceed the limitations specified in this subsection, the board shall certify the annual base salary to the auditor. The board shall not certify a deputy's annual base salary which exceeds the limitations of this subsection.

As used in this subsection, "base salary" means the basic compensation excluding overtime pay, longevity pay, shift differential pay, or other supplement pay and fringe benefits.

Sec. 3. APPLICABILITY DATE. This Act applies to county budgets for the fiscal year beginning July 1, 2008, and all subsequent fiscal years.

JOHN P. KIBBIE
President of the Senate

PATRICK J. MURPHY
Speaker of the House

I hereby certify that this bill originated in the Senate and is known as Senate File 212, Eighty-second General Assembly.

MICHAEL E. MARSHALL
Secretary of the Senate

Approved _____, 2007

CHESTER J. CULVER
Governor

STATE OF IOWA

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To: Senate State Government Subcommittee
Senators Frank Wood (Chair), Jerry Behn, and Jack Kibbie
From: William P. Angrick II, Citizens' Aide/Ombudsman
Date: March 5, 2007
Re: SSB 1223: A Study Bill for an Act Relating to the Privacy of Social Security Numbers and Other Personal Information in Public Records and Providing Remedies

On February 27, 2007 the Senate State Government subcommittee members held a meeting to discuss SSB 1223. I appreciate the input of the subcommittee members and attendees regarding potential problems with SSB 1223 and I offer the following amendments to address the oral and written comments I have received. I also shared these proposed amendments with those in attendance at the subcommittee meeting. The Department of Public Safety and Iowa Workforce Development have responded that these amendments address their concerns.

1. *Whether individuals should be given the option to not submit their social security number.* This is problematic for government bodies that collect social security numbers for identification purposes. The following amendment is offered to address this concern.

   Section 1. Section 22.21, subsection 2, paragraph b, Code 2007, is amended to read as follows:

   b. Give individuals the option not to submit a social security number to the government body unless submission of the social security number is essential to the provision of services by the government body or is required by law .

   Section 1. Section 22.21, subsection 4, Code 2007, would be deleted.

   ~~4. This section shall not prohibit a government body from lawfully obtaining a person's social security number.~~

2. *County recorders would be required to review all records in their possession, not just public records requests, and redact social security numbers.* County recorders have a unique situation in that they allow the public, such as abstract companies and

genealogists, to browse through many of their records. For this reason, county recorders believe SSB 1223 will require county recorders to review all their records and redact social security numbers. The following amendment would provide government bodies the authority to redact social security numbers but would not make redaction mandatory.

Section 1. Section 22.21, subsection 3, Code 2007, is amended to read:

3. If a public record contains a social security number, the government body shall ~~determine a method to~~ ,to the extent practicable, make reasonable efforts to redact the social security number prior to releasing the record if such redaction does not materially affect the value of the public record and is permitted by law.

3. *The need for language clarifying the actual operation of biometric authentication systems.* The following amendment is offered to address this concern.

Section 2. Section 22.22, subsection 1, paragraph b, subparagraph 5, Code 2007, is amended to read:

(5) Unique biometric data, such as a fingerprint, voice print, retina or iris image, or other unique physical representation or digital representation of the obtained biometric.

4. *Allowing remedies for persons injured by a violation of section 22.21 or 22.22 potentially makes government bodies a target for litigation.* I propose removing the remedies for privacy violations from SSB 1223 to address this concern.

Section 3. Section 22.23, subsections 1 and 2, Code 2007, is deleted in its entirety:

~~1. Any person who is injured by a violation of section 22.21 or 22.22 may institute a civil action to recover actual damages, court costs, interest, and attorney fees and to seek judicial enforcement of the requirements of section 22.21 or 22.22 in an action brought against the government body and any other persons who would be appropriate defendants under the circumstances. The attorney general or any county attorney may seek judicial enforcement of section 22.21 or 22.22. Suits shall be brought in the district court for the county in which the government body has its principal place of business.~~
~~2. The rights and remedies available under this section are cumulative to any other rights and remedies available by law.~~

Section 5. Section 22.23, subsection 3, Code 2007, is amended to read:

3. Subchapter III, entitled "privacy", shall be comprised of sections 22.21 through ~~22.23~~ 22.22.