INTRODUCTION

The Freedom of Information Council (IFOIC) takes this opportunity to elaborate on its positions stated on September 6, 2007. We also take this opportunity to respond formally to several points that were raised by other presenters at that meeting. We especially note that Professor Bonfield's presentation was very thought provoking and raised several issues that warrant a response.

COMPREHENSIVE RECONSIDERATION NOT NEEDED

Professor Bonfield's presentation raises many issues and proposes some solutions. Contrary to his main premise, the IFOIC is of the opinion that a wholesale rewrite of Chapters 21 and 22 is not necessary. Indeed, such a course of action would likely be counterproductive. Our understanding of the comments of the associations representing local government groups is that they believe compliance is generally good throughout the state, there are clarifications that should be made to existing law and enhanced enforcement mechanisms against "bad actors" are needed. In essence, we are in agreement on those points. We also appeared to agree that a new enforcement mechanism should be an independent entity with advisory and training responsibilities in addition to its enforcement powers.

A rewrite of both code chapters would lead to confusion and more problems than currently exist. Chapters 21 and 22, and the people governed by them, benefit from nearly three decades of interpretation and application. There have been and will be disagreements about how Chapters 21 and 22 should be interpreted and applied to specific situations. Those situations have been reduced because of the three-decade history of applying the current law. A wholesale rewrite of these laws would almost certainly increase the frequency, intensity, and cost of conflicts arising from interpretation and application of new open meetings and open records laws.

Professor Bonfield pointed out several issues that require legislative policy decisions to resolve and others that merely require a clarifying change to existing statutes.

There is not time to replace the existing body of law with a new set of statutes. The significant major public policy issues should be identified and resolved to the extent possible and legislation drafted to implement those decisions. There are also several amendments that could be made to the present statutes that do not rise to the level of public policy issues that would clarify existing law that could be included in the committee's bill draft.

DEFINITIONAL ISSUES

The current approach of defining and using the term "public record" as an all encompassing term and creating exceptions designated by a section heading as a "confidential record" is a very practical approach. The term "public record" in the current law includes all records regardless of storage medium. Profession Bonfield suggests that the term "government record" should replace the term "public record" as the over-arching definition with the term "public record" demoted to a subset of the broad term, along with the terms "confidential record" and "optional public record". We believe there are consequences to this approach that would not serve the cause of open government. By making "public record" a subset, the general presumption that all government records are open records is lost. That concept is extremely important to assure the public's access to information. Profession Bonfield is concerned about the section heading "confidential record" on the grounds that it is misleading because the custodian of a confidential record has the authority to release it. Consequently he feels that these records should be designated "optional public records" and that a new category of records be created which are absolutely secret. That point can easily be addressed by simply directing the Code editor to change the heading for section 22.7. Do we really have the time and money that

would be required to change the existing system? Agencies would be burdened with reviewing millions of records to determine their classification under the new system.

The current situation is more desirable. There are few records that should be assigned a designation that would forever bar public access absent legislative change. Yes, the case can be made and has been made for treating some records that way. Under the current statutory scheme that is done in separate Code chapters addressing specific kinds of records. For example, tax returns, child abuse reports, some health records and adoption records are tantamount to "secret" records. We submit that the General Assembly, by giving special statutory treatment to certain kinds of records over the years, has made case-by-case public policy decisions about whether to prohibit or greatly restrict access.

The point was made that all laws dealing with records should be brought into one chapter. The IFOIC believes that the public policy questions that would arise from attempting such a project would slow the process of change to the extent that it might be several years before the efforts of this committee could achieve fruition.

We take exception to Professor Bonfield's concern that the focus in the current law is on the medium upon which the information is stored. We disagree with that observation. The statute is clear and the conclusion inescapable that a "record" is not limited to a particular storage medium whether it be paper or electronic. The records law does not address all "information"; but, in combination the open records law and open meetings law do embrace all facets of "information" be it a store "record" or a word spoken in a public meeting.

BREADTH OF PUBLIC RECORD DEFINITION

Yes, the definition of a public record is broad and all encompassing under the current law. And, yes, one can conjure up all kinds of potential problems that could result from that breadth. Yes, school exams, safe combinations and alas, legislator's notes, could be construed to

fall within the definition of a "public record" in the current law. Nearly 30 years experience with the current law has not to our knowledge produced any such incidents. Perhaps the grounds for injunctive relief stated in section 22.8 should be reviewed to insure that the proper standards are established should actual issues arise. That section is available to address situations where it would be contrary to the public interest to release a particular record.

We share the professor's consternation concerning the Attorney General's conclusion that a retired university administrator using university resources, the university records system and a university secretary to transcribe his thought on public issues affecting the university is not producing "public records". The legal gymnastics behind such a conclusion would seem to be of Olympic proportion. In fact, Professor Bonfield himself notes that the "Attorney General's office on this issue seems in error under the **existing** language of § 22.1(3)." (Emphasis added). The Attorney General's advice should serve as a warning to those who would attempt by definition to stray from the concept that all records are open and instead attempt to state which "government" records are indeed "public" records. It also shows that even ostensibly clear legislative dictates can elude public officials occasionally.

We note the professor's discussion of the *Gannon* case. That case, as have several other Supreme Court decisions, resulted in amendment to the existing statutes to address unforeseen controversies. This case illustrates the concept that no matter what is done, unforeseen controversies do arise and that many of the supposed problems Professor Bonfield identifies are not related to flaws with the statutes, but with erroneous judicial interpretation of what he sees as the clear intent of the law. The public will be better served if resultant legislation seeking to remedy such controversies proceeds from an established base supposition that openness is the desired condition and a fully informed public the desired result.

TENTATIVE OR PRELIMINARY IDEAS

The professor raises the issue of whether tentative and preliminary ideas or opinions should be subject to disclosure. Before deciding they are not, contemplate the role of notes taken at meetings of the Continental Congress or the Constitutional Convention in debating issues central to the development of this nation. The issues come down to where the line is to be drawn, if drawn at all. We submit the public policy question is whether drawing lines leads to more mischief than not drawing them. Consider, for example, the fact that it is common now for public officials to refuse comment on an issue because it is a "personnel matter" as though the fact that personnel records may be kept confidential somehow applies to discussing any event that could cast a shadow on a public official or employee. It does not require much reflection to conjure up potential misuse of any line that gets drawn. Any shelter you create will soon become crowded with uninvited habitants.

As a practical matter, we would all be better served if only relevant information is retained and available. Obviously, relevance is not something that can be determined when a record is created. Preliminary thoughts or drafts could have great relevance at some time in the future. Most such records will likely have no relevance and never be requested. Very preliminary musings likely never make it into a file or an archive. If they do, it is an indication the creator thought there was relevance that merited preservation. The public's knowledge and understanding of a policy's evolution could be valuable and provide assistance in interpreting and applying the final policy statement.

CONSISTENCY BETWEEN OPEN RECORD AND OPEN MEETING LAWS

Professor Bonfield suggests there needs to be consistency between the open records law and the open meetings law as they relate to information that may be withheld. There may be situations where deliberation occurs concerning an issue addressed by a record during which the

record itself is not disclosed or discussed. The professor's concern with inconsistencies seems driven more from a concern about intellectual tidiness than real world shortcomings. There are reasons for inconsistencies. In fact, Professor Bonfield identifies some of them on page 12 of his article. We submit that records are non-perishable and exist in a tangible medium. Meetings consist of verbal utterances that are perishable and do not usually exist in a tangible medium. Regardless of whether the different character of the information justifies the inconsistencies that exist, there is not a significant problem as a result. A great deal of caution needs to be exercised in order to ensure one is not created.

EMPLOYMENT PROCESS

We agree with Professor Bonfield that a clear legislative decision is needed about employment applications and the public employment process. He points out the dichotomy between a person applying from a position from outside of government as opposed to an applicant from inside government. Public employees are afforded several levels of protection that prohibit retaliation or discrimination. Those protections may not be available to outside applicants. Different treatment of these classes of applicants is not without justification. The FOIC has made suggestions in this area that we have provided and continue to urge. See attached Exhibit A.

We note in passing that some have suggested that the openness issue only relates to "key" positions. We submit that openness is important for all levels of employment. Applicants for lower level positions may need even more protection that openness provides from favoritism and discrimination. The public should be able to determine how their public servants discharge employment responsibilities at all levels.

CLEAN-UP OF CURRENT EXEMPTIONS

We agree with Professor Bonfield that many of the current exemptions from the public records law should be reexamined and in some instances consolidated and clarified. Most of these exemptions were, as the Professor notes, added on an ad hoc basis.

One particularly vexing item is the exemption for personnel records. This exemption is an original provision from 1979. We have urged clarification for several years. The public increasingly encounters a trend that records pertaining in any way to the performance of a government employee are be hidden in the employees "personnel record". We continue to urge changes to the personnel records exemption. See Exhibit A.

Professor Bonfield raises the issue of social security numbers. There is, of course, always the tension between the public's right of access to information and individual privacy concerns. Obtaining and retaining information is not cost free. If it is decided that some information collection by government should be maintained in some kind of secret file or filing system, the costs will go up significantly and liabilities will be increased. We believe that a significant aspect of the problem rarely gets attention: government entities tend to collect and retain too much information. For example, does the court system really need to have a full bank account number appear on filed documents in a dissolution of marriage case? How much personal information is really required to open a water account that usually requires a deposit to protect against nonpayment?

When government decides that information is required to be collected and maintained, it is in the public interest that it be open and accessible. Only then will citizens be able to determine the kind of information and files that are being kept on them.

Some government information is significant and necessary to carry on ordinary commerce. Can Mary Smith give me clear title when I buy her house? How do I determine

whether this Mary is not the Mary that owes back taxes or has several judgments against her? Is this the Mary Smith who has been indicted? The records necessary to commercial transactions need to contain sufficient information to allow the public to determine which individual is actually the subject of the record. There is a disturbing trend for some advocates to urge removal of all "personally identifying information" from public records. If they succeed, why keep the record in the first place? If the information cannot be tied to a particular individual what purpose does it serve? A balance has to be struck.

ADDITIONAL EXEMPTIONS FROM MANDATORY DISCLOSURE

As implied above, the IFOIC is against creating a new exemption to protect against "undue invasion of personal privacy". Such a vague and ill-defined proposition would lend itself to abuse. Even well intended records custodians would likely become overly cautious and restrict access to information that you intend be public. When does invasion of personal privacy become **undue** invasion of personal privacy?

We are not aware of a problem under the current law relating to state licensing personal information or a problem with excessive disclosure of information to the subject of that information. Our resistance to pursuing these kinds of issues should not be construed to mean that these areas are problem free. But the IFOIC is concerned that significant and identified problems may not be addressed if the effort is diluted to address every potential issue. There are limited resources available, the most valuable of which is time. Those resources should be allocated to addressing actual problems.

EXAMINATION OF EXISTING JUDICIAL AUTHORITY TO RESTRAIN THE EXAMINATION OF GOVERNMENT INFORMATION

Professor Bonfield correctly points out that the present judicial authority to restrain examination of a record is conditioned upon two findings: that the examination clearly would not be in the public interest and that the examination would substantially and irreparably injure

any person or persons. The Professor suggests that only one of these grounds be required for an injunction. We disagree. Take the example of the safe combination: its release would not be in the public interest and the public ("any person or persons") would suffer irreparable injury. He also suggests creation of a new ground: records that are not "government records". The Professor's suggestion appears to address an issue that could arise if his suggested new definitions are adopted. We oppose the introduction of new definitions and grounds for injunctive relief that almost certainly will lead to future interpretation and controversy.

LIMIT THE SCOPE OF A RECORD CUSTODIAN'S DISCRETION TO RELEASE CONFIDENTIAL INFORMATION

Professor Bonfield points out that under the current statute the custodian of a record has discretion to release a "confidential record" under section 22.7. He suggests that subjects of confidential records be given notice and the opportunity to seek an injunction to bar release as an explicit statutory right. It is also suggested that Chapter 22 contain a listing in a separate section of all records that are currently made secret in various other chapters of the Code. These suggestions are very problematic.

Experience has shown that under current law custodians of records have exercised their judgment and notified subjects of records when considering release of a record of which they are a subject. If anything, custodians have been overly sensitive about giving subjects of confidential records the opportunity to seek an injunction. If a statutory right is created or restraints on discretion are adopted, new barriers to access will have been created and access will certainly be delayed. One record could generate notices to numerous subjects of the record, many of whom may be unlocatable.

To remove from other chapters of the Code provisions creating secret records and place them in Chapter 22 would be a very difficult. To do so would require a greatly expanded definition section in Chapter 22 in order to provide the necessary context. The reverse might be

the better approach if this subject is to be addressed at all. That is, a section in Chapter 22 could be adopted that would then could be adopted by reference in the various chapters that do create secret records. The IFOIC doesn't endorse that solution either; but, if this idea is pursued that would be the lesser of the two evils.

ENSURE THAT RECORDS DO NOT LOSE THEIR CONFIDENTIAL STATUS WHEN TRANSFERRED AMONG AGENCIES

The IFOIC is unaware of any problem relating to the confidential status of a record not being transferred from one agency to another. It is the character of the record that determines its confidentiality under current law, not the identity of the custodian.

Final settlement agreements should be available for public inspection. Professor Bonfield has identified a problem that needs to be addressed: secret settlements of claims brought against government. We agree with the Professor's analysis and conclusion that there are no grounds currently for keeping settlement agreements confidential. A government entity should not be able to cover up malfeasance by hiding the basis for settling a third party claim through the use of a confidential settlement agreement. It is bad law and bad public policy. If explicit statutory language is required to end this practice, it certainly should not contain an exception for invasion of personal privacy or trade secrets. Do we want secret settlements of sexual harassment cases, for example? Those exceptions in the context of the Iowa Administrative Procedure Act have justifications that do not exist outside the scope of that act. The public always has a right to know of when and how much of its money is spent as a consequence of wrongdoing by its public employees.

Another issue has achieved prominence recently: secret contracts affecting regent's institutions. Perhaps a requirement needs to be added to Chapter 22:

"Written agreements to which a government body is a party or from which a government body derives benefit as an intended third party beneficiary shall be filed with the government body and available to the public."

A TIMELINE SHOULD BE ESTABLISHED FOR MAKING AVAILABLE GOVERNMENT RECORDS

We join with Professor Bonfield in urging that more specific time deadlines be imposed on custodians of records for release of records and for a response to a request for records. Increased clarity would assist both those who request records and record custodians by avoiding disputes over timeliness.

IMPOSING REQUIREMENTS SPECIFYING THE PRECISION WITH WHICH INFORMATION MUST BE REQUESTED IS PROBLEMATIC

Any attempt to impose a standard for precision or clarity in information requests will only lead to reduced access as custodians are given the authority to evaluate a request in terms of its specificity and clarity prior to honoring it. We are certain there are instances where requests for information are vague and difficult to fulfill. We assume some good faith "negotiation" of the terms of the request ensues between the custodian and the requestor.

OPEN CONFIDENTIAL RECORDS AFTER EXPIRATION OF A SPECIFIED TIME PERIOD

Professor Bonfield's recommendation that there be a general provision that confidential records be available to the public after the expiration of a period of years should be considered.

DEFINITION OF "GOVERNMENTAL BODY" SHOULD BE AMENDED

The issue of whether an advisory body is subject to the open meetings law has generated years of controversy and litigation. The state of the law is very unclear as to what constitutes a "policy-making" body subject to the open meetings law distinguished from a "advisory body" which its not. It seems obvious to us that the advisory committee provision of Section 21.2(1)(h) should be revised. Governmental bodies should not be able to avoid public scrutiny and

participation by referring issues to a committee that does not operate pursuant to the open meetings law.

Professor Bonfield also makes the point that the recent amendment to Chapter 28E to subject 28E entities to the open meetings law should be expanded to cover other governmental joint ventures that have formed outside of Chapter 28E. We concur.

The IFOIC also addresses several related issues in Exhibit A.

THE DEFINITION OF "MEETING" NEEDS TO BE AMENDED

There have been various instances where public bodies have exploited ambiguities and gaps in the definition of the term "meeting" as used in the open meetings law. Bodies have been known to avoid application of the law by circulating draft decisions among governing body members, conducting meetings of less than a quorum of the governing body members, using emails to deliberate and decide issues outside the public view, and otherwise go to great lengths to avoid doing the public's business in public. The IFOIC has made recommendations in this area. Please see Exhibit A. We are the first to admit that our suggestions could be improved upon and don't address some of the recent evasive tactics employed. This is an area where ordinary communications and conveniences can easily lead to exclusion of the public in the deliberative process--even when officials involved are otherwise conscientious with the public interest at heart. Unfortunately there seems to be a real lack of courage when it comes to deliberating controversial issues publicly. This affliction seems to affect public officials at all levels and without regard to motivation. Granted that most public officials serve with the highest of motives; but, the prevailing legal environment is pure license to those whose motives who are not so well grounded. We admit, as does Professor Bonfield, that it is probably impossible to completely eliminate opportunities to sidestep doing the public's business in public. But we

ought to at least send the message that this mode of doing business is not condoned and make it as difficult as possible.

We think there has to be a better solution that merely requiring that a person publicly state their reasons for a vote. Such a requirement would fail to provide meaningful information to the public. Public officials would quickly adapt by providing a rote comment with each vote taken that it was to "further the best interests of the public" or some other equally vacuous statement.

We strongly agree with Professor Bonfield that the law needs to be changed to address the tactic of avoiding giving public notice of a meeting by recessing the meeting to a different day (and location) instead of adjourning it.

THE ENFORCEMENT MECHANISMS SHOULD BE STRENGTHENED

The enforcement efforts by city attorneys, county attorneys and the attorney general's office can be best described as appalling. The attorney general shies away from enforcement to avoid appearing as someone heavy handed out of Des Moines interfering in a local dispute. He feels conflicted. Local attorneys charged with law enforcement responsibilities appear paralyzed, probably because of their close association and dependence upon the violators.

The IFOIC has suggested creation of a new enforcement mechanism as previously presented. An independent entity should be created that is charged with the responsibility for rendering interpretive opinions on these issues, taking enforcement actions; conducting compliance investigations and conducting compliance training and developing educational materials.

Professor Bonfield recommends elimination of the criminal sanctions that exist in the open records law. He notes that public prosecutors will almost never prosecute violators anyway. That does not seem a good reason to eliminate the criminal sanction. Apparently

public prosecutors are loath to do anything at all in this area. Clearly a position in state government needs to be created charged with the responsibility for enforcement of these statutes.

IFOIC RECOMMENDATIONS FOR USE OF AVAILABLE RESOURCES

The most critical resource affecting these issues is TIME! The committee simply does not have enough of that precious resource to spend any of it in academic exercises. The General Assembly will not have time for that during its 2008 regular session. There are some very real issues that have practical impact on Iowans that need to be addressed. Engaging in debates over theoretical or potential problems will not resolve them. They are, however, practical problems that can be addressed in the context of the existing statutes.

1. Establish a public access counselor position with enforcement and education responsibilities. The IFOIC is unaware of anyone who has expressed opposition to this idea. Indeed testimony from some of the public body groups indicated support.

2. Make the clarification to section 22.2(1)(h) to replace the words "executive order" with verbiage that makes clear that an advisory body created by local government is covered, be it by a council, board of supervisors, school board, Mayor, Chairman, President or other actor with official capacity to create an advisory committee.

3. Address the definition of "meeting" to ensure that the public has the ability to participate fully:

a. Eliminate the "presentation of information only" loophole (See Exhibit A);

b. Address the walking quorum issue (See Exhibit A); and,

c. Address the issue of circumventing public participation in debate and deliberation through the use of circulation of written draft decision-making documents.

4. Address the issue of secret employment applications and interviews (See Exhibit A).

5. Strengthen the presumption of openness that applies to the open records law by requiring strict construction of exemptions (See Exhibit A).

6. Limit and clarify exactly what information may be kept confidential in a personnel record (See Exhibit A).

Upon completion of these items, the committee will have earned the right to spend some time engaging in stimulating academic debate of esoteric issues.

In conclusion, the IFOIC on behalf of its members thanks the committee for it time, effort and dedication.

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