Comments Regarding
Professor Bonfield's Open Meetings / Open Records Draft

Presented to Interim Study Committee by:
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DISCUSSION

1. Administrative Enforcement Scheme (Mary Gannon)
In the proposed legislation, a new governmental body is created, the Iowa Public Information Board (IPIB). This body is to ensure compliance with Iowa's open meetings and public records laws. While we have supported the development of an external, unbiased party to provide prompt, accurate answers to inquiries regarding the open meetings and public records laws (OML/PRL), we question whether a board is necessary. An individual who has the responsibility and authority comparable to that of the Attorney General's office would be helpful. We have concerns that by adding a whole new layer of bureaucracy the process will become cumbersome, delayed and potentially political since it has political appointees on the board.

We also question who will actually serve on the board. The proposed legislation has no qualifications for membership such as knowledge of the working of the OML/PRL, experience in the public sector, etc. It also does not require the hiring of an executive director nor list any requirements for the executive director. Considering it's this position that is key to making this new entity work, it should be mandatory and the legislature should give the board (or whomever the appointing authority may be) some guidance as to the qualifications for appointment.

We believe IPIB should be subject to Iowa Code ch. 17A with regards to all of its operations regarding rulemaking, investigations, hearings, etc. There is no reason to develop a separate set of laws within which IPIB will operate. This would also clarify that an individual must follow 17A procedures should IPIB find a complaint groundless so a governmental entity does not spend tax dollars defending a groundless suit.

Since the proposed legislation limits the amount of time by which a governmental entity can respond, IPIB should also be required to operate within those time limits if the governmental entity seeks its guidance. Therefore, since a school district has 10 days to determine whether a record should be released, if it seeks an opinion from IPIB, it should get that answer within the same 10 day period so the school district can comply with the law. Or, in the alternative, make an exception if seeking an opinion from IPIB. Also, when determining whether a document is a public or confidential record, IPIB should review it under seal the same way a court does currently.

We believe that the remedies available to IPIB must be limited to those already in the OML/PRL. This newly created entity should not have the authority to randomly select remedies not authorized by law.

The new law should also clarify that the main role of the board/individual is to provide advice to governmental entities, citizens and the media. The law should also indemnify the entities that have relied on the advice.

The proposed legislation limits the amount of time within which a complaint can be filed alleging a violation of the OML/PRL. The proposal is within 60 days from the date of the alleged violation or from the point in which the complainant could have become aware of the violation. Since the OML/PRL is currently silent on a statute of limitations, we suggest adding the same SOL to ch. 21 and 22 as well.

In the section of the proposal on mediation, we question whether the section is even needed. Parties can always seek mediation as it is already authorized in the law and is regularly used by governmental entities and private parties. Also, should the legislature decide to keep the mediation section, we request you add a provision that requires IPIB to investigate a complaint prior to it going to mediation. The Citizen's Aide Ombudsman's own data show that less than 20 percent of the OML/PRL complaints were founded last year. Governmental entities should not be required to expend tax dollars mediating or defending groundless complaints.

The proposed legislation has "Defenses in Contested Case Proceedings" in Sec. 10. We question whether this section nullifies the defenses in the current law. If not, we suggest it notwithstand those sections so all defenses are available. Also, if an opinion from IPIB will also indemnify a governmental entity that, too, should be listed as a defense.

Concerns with Proposed Process to Prosecute Violations.
There is concern that the enforcement options available to the board under the current proposal would prove to be very time consuming and costly for the state and for governmental entities who become involved in enforcement proceedings. As proposed, the board would have authority to investigate complaints and encourage mediation by the parties, and if resolution was not achieved by those means, the board would have authority to determine if a violation had occurred and to issue an order to correct the violation and/or impose sanctions. Under the current proposal, the board's determination would be a final agency action and would be appealable in administrative review proceedings under Chapter 17A, and would ultimately be reviewable in the courts. The board would have authority to represent itself in those proceedings through staff attorneys that it would employ, through attorneys in the Attorney General's office, or through private attorneys that it would retain for that purpose. The hearing and administrative review process under chapter 17A, including eventual appeal to the courts, is an exhaustive and exhausting process that can take considerable time to complete, and when combined with the involvement of a corps of new staff attorneys or private outside counsel on retainer to represent the board, presents the opportunity for much delay and for the accumulation of considerable attorneys fees at public expense. Clearly a more streamlined and expedient process, utilizing existing prosecutorial resources available to the State, would be much preferred.

2. Increasing Civil Penalties (David Vestal)
The current proposal would increase fines from $100 - $500 to $1,000 - $2,500.

The Legislature should retain the current fines in cases of inadvertent violations. It should increase them only for knowing or willful violations.

Increasing the fines ten-fold is not warranted. A fine of $2,500 for a first offense is out of whack with other comparable fines in the Iowa Code. For comparison, a maximum fine for a serious misdemeanor is only $1,875. For a simple misdemeanor, the maximum fine is only $625.

The message that we heard during the discussion of this issue was that "these are knowing violations." But that is not necessarily true. If you violate the law, you violate the law. There is no requirement that the violation be done "knowingly." So under the draft proposal, an innocent mistake could result in a $2,500 fine. That is disproportionate.

What we would suggest is that you keep the current fine structure in place. But then you add another layer on top. So a run-of-the-mill violation would still be $100-$500 plus attorneys fees. But if it were determined that there was indeed a "knowing" violation of the law, then you would have heightened penalties such as those in the bill.

3. Repeal of Criminal Sanctions in Chapter 22 (David Vestal)
We favor repealing the criminal fines for several reasons:
a. Criminal fines are not used currently;
b. Criminal laws have an entirely different presumption than other laws, making Chapter 22 difficult to apply; and
c. We are trying to make Chapter 21 and 22 comparable, and there never were criminal sanctions under Chapter 21.

4. Time Limits on Custodian for Responding to Record Request (David Vestal)
We applaud the Legislature for directly addressing this issue. For years there has been confusion about how long a custodian has to produce a requested record. Having a timetable like this will reduce that confusion.

So the next question is, does this specific timetable make sense? We think that it does, with one exception. On page 12, line 12, the words "because of unusual circumstances" should be deleted. The concept is that all records which are not produced immediately must be produced no later than five business days from the request, "unless there is good cause to delay further." We are concerned because there are reasons why, operating in good faith, the records may not be able to be produced within five days. Such as:

- the Xerox machine is broken and a part is on order from the warehouse in Indiana;
- the requestor is seeking a large volume of material from records that are not stored electronically;
- two employees who were familiar with the records quit last week; or
- the records request to the auditor's office was made two days before an election.

We are willing to argue whether those circumstances constitute "good cause" for the delay. We think they do. But the additional requirement in the bill draft is that these circumstances be "unusual." And they may or may not be.

If the "unusual circumstances" language is struck, it would still mean that there could be a delay beyond five days in the event of "good cause." That is enough of a safeguard to prevent abuse.

The other point on this issue is that the bill draft allows the notice to the requestor about the progress towards complying with the records request to be made in writing. Which is a good thing. Written notification memorializes the communication, and clarifies expectations. But that necessarily means that the custodian has to ask the identity of the requestor.

5. Undue Invasion of Personal Privacy (David Vestal)
If the new IPIB is created, and citizens can file an IPIB complaint at no cost, the Legislature needs to make Chapters 21 and 22 as clear and precise as possible. Otherwise the IPIB is going to be flooded with complaints seeking clarification of the law. And local government officials will be burdened with having to respond to all of those complaints.

In addition, clarity is essential because the records custodians should not be in the position of having to perform complex balancing tests to determine if a given record should be disclosed.

So this amendment should be narrowed and simplified. Just list those records that shall not be disclosed so as to avoid invasions of personal privacy. Namely:

- social security numbers
- drivers license numbers
- credit card numbers
- bank account numbers
- personal financial data including benefits and the use thereof, other than salaries.

In addition, the amendment should include a provision that there is no private right of action if any of this information is inadvertently disclosed. This would merely put in statute what is currently the common law in Iowa based on the case of *Marcus v. Young,* 538 N.W.2d 285 (Iowa 1995). The public records law is intended to promote open government, not to create a cause of action for those looking to sue the government.

7. Tentative, Preliminary, Draft Material (Terry Timmins)
In our view, the proposed open records exemption for tentative, preliminary draft material is appropriate and necessary, particularly in light of the prospect for enhanced enforcement of open records requests and the probability that that development will increase the volume and scope of such requests.

8. Government Employee Personnel Records (Terry Timmins)
In our view, the proposed clarification of the open records exemption for government employee personnel records is appropriate and necessary, particularly in light of the prospect for enhanced enforcement of open records requests and the probability that that development will increase the volume and scope of such requests.

9. Job Applications for Government Employees (Shannon Strickler)
Governmental bodies continually compete with the private-sector for competent, qualified employees. We have concerns regarding any policy that may create a dis-incentive for applying for government employment. Under the current regulatory framework, government bodies struggle to get the best and brightest, especially when public salaries are often less than the private sector offers. We believe that this proposal, creating yet another dis-incentive to public employment, will have a chilling effect on government employment applications causing less people to apply for positions and ultimately decreasing the quality of the state's workforce and leadership.

Justified or not, it is very common for employees to have concerns about their reputation and standing in their current position if the members of the community or their supervisors learn that they are looking and applying for a new job. Granted, some community members or supervisors do not see it as an issue as they may want that person gone or they may see it as a chance to grow in a new job. But often, there is a vocal contingent of a community or someone within the supervisory structure who views the application as a betrayal thereby impacting the employee's reputation in the community and their ability to work effectively should the employee not get the new job. The risk for this adverse outcome will create a chilling effect on applications for public employment if the final applicants must be made public, especially for positions that have comparable equivalents in the private sector.

A reduction in the application pool hurts all of Iowa's governmental bodies but will especially impact positions that are difficult to recruit currently. Iowa already faces recruiting challenges due to the fact that the state cannot offer year-round sunshine, mountains, or oceans. If this proposal were to pass and create yet another dis-incentive for employment in the Iowa public sector, it will likely become very challenging to find qualified applicants for public positions that are already hard to find skilled applicants or that directly compete with the private sector.

11. Final Settlements (Terry Timmins)
Section 22.13 requires governmental entities to prepare a summary of any settlement, and to file the summary with the governmental body and make it available for public inspection. The draft proposal would amend this provision to require that the summary include a statement of facts agreed upon and those in dispute. Cases are often settled because there are significant disputes as to whether there is a factual basis for specific allegations or for specific defenses. If the parties to a settlement are not in agreement as to which facts are disputed and which are undisputed, requiring one or both of them to publicly outline the disputed and undisputed facts may make settlement more difficult to achieve. Our view is that a settlement agreement should speak for itself, and that the governmental parties should not be required to separately attempt to outline their differences. Requiring the filing of a summary of the settlement, including disputed and undisputed facts, could in those circumstances operate to impede settlement. This creates an unnecessary administrative burden on local government officials.

12. Applications of Public Records Laws to Non-Governmental Bodies (Mary Gannon)
This proposed provision would make records in the possession of government contractors public records to the extent those records are "part of the execution or performance of…" that contract. We have concerns about the broad scope of this provision. What records of the contractor are part of the execution of performance of the contract ? Will it include records relating to the employees who are actually performing that contract, and what if any exemption would apply to protect the personnel records of the contractors employees? To what extent will this provision require such contractors to act as a public records custodians, and respond to public records requests ? The concern is that the prospect of contractors having to respond to records requests, and the lack of protection for contractor personnel records, will have a chilling effect on the ability of governmental entities to procure contract proposals and to partner with nongovernmental entities of all types.

13. Identical Exemptions for Chapter 21 and 22 (Terry Timmins)
In our view, the proposal to exempt from public disclosure "records containing information that would permit a governmental body to hold a closed session" is appropriate and necessary, particularly in light of the prospect for enhanced enforcement of open records requests and the probability that that development will increase the volume and scope of such requests. However, this proposal doesn't go far enough. In our view, "documents and records which are developed and provided to a governmental body to aid in a closed session discussion of a matter" should also be exempt from public records disclosure.

14. E-mail Meetings (Terry Timmins)
The proposed amendment to Section 21.2(2) attempts to describe the circumstances under which electronic communications will not be deemed to constitute a "meeting". For that reason, local government officials charged with observing the requirements of this provision will likely find it difficult to interpret and apply this provision. The provision would be easier to understand and apply if it laid out the circumstances under which electronic communications will be considered a meeting, and the requirements that will apply if local government officials meet by electronic means.

Also, Section 21.2 is a definitional provision, with subsection 2 being the definition of "meeting". Since the proposed amendment recognizes a new category of meeting (i.e. a meeting resulting from e-mail or other forms of electronic communications between members of a governmental body), and then imposes requirements if such a meeting occurs, it is suggested that this issue not be addressed in a definitional provision, where it is more likely to be "buried" and go unnoticed.

There also needs to be some differentiation between an "electronic meeting", as used in this new provision wherein a meeting results from electronic communications between members of the body, and a "meeting conducted by electronic means", as contemplated by Section 21.8, wherein the body decides to hold a meeting by electronic means (e.g. conference call) because it is impractical or impossible for the body to meet in person.

Given the similarity of subject matter, it is further suggested that "electronic meetings" and "meetings conducted by electronic means" both be covered in the same Section. Section 21.8 would appear to be the appropriate place to do that.

Finally, it is recommended that Section 21.8 be further expanded to permit a governmental body to adopt a procedural rule allowing individual members of the body to "participate in a meeting by electronic means". In some of our smaller communities, it has been difficult to populate governing bodies and to keep them populated, and when vacancies occur it often becomes difficult to achieve a quorum for a meeting and conduct necessary business. Allowing individual members to participate by electronic means when they find it impractical or impossible to attend a meeting in person will ease the pressure in those circumstances and allow the governing body to continue functioning when vacancies occur.

15. Walking Quorums (Terry Timmins)
The proposed amendment to Section 21.2(2) would amend the definition of "meeting" to include "the calculated use of a series of communications, each between less than a majority of the members of a governmental body or their personal intermediaries, that is intended to reach and does in fact reach a majority of the members of the body and is intended to discuss and develop a collective final agreement of a majority outside of a meeting with respect to specific action to be taken by the majority at a meeting."

We have a number of serious concerns with the interpretation and application of this provision:

a. Suppose that just one member of the body – the proponent - is going from member to member, one at a time, without an organized effort along with other members, to enlist support for some proposal.

(1) Does it then become a violation if the proponent eventually succeeds in getting a majority of the body to agree with him or her on that proposal ?
(2) Does it become a violation if the proponent gets a majority of the other members to agree with him or her over the course of a week ? What if it takes the proponent a month or a year to get other members lined up ?
(3) Does it make any difference if one or more of the other members are not aware that the proponent is also contacting other members of the body ?
(4) Shouldn't there have to be involvement by more than one member, seeking to obtain support for a proposal outside of a meeting, in order for there to be a violation ?

b. What is the "calculated use of a series of communications" ? And what is it that the calculated series of communications must be intended to do in order to constitute a violation ?

c. What degree of "commitment" is required of each member in order for it to constitute a "collective final agreement" ? At what point in the following continuum does a

"collective final agreement" occur ? When a majority of the members tell the proponent or proponents:

(1) I'll consider the proposal;
(2) I like the proposal;
(3) I agree with the proposal; or
(4) I agree with the proposal and I promise to vote for it when it comes up.

What if a majority respond that they agree with the proposal, but less than a majority promise to vote for the proposal ?

d. Who would be considered to be a "personal intermediary" of a member of the body, and how does a person become a personal intermediary on behalf of a member of the body ?

(1) Does a member of the body have to enlist that person with explicit instructions to secure the promise other members to vote for a particular proposal?
(2) Suppose a private proponent of some proposal approaches a member of the body seeking support for that proposal, and that member asks that person how the other members of the body view that proposal. If, without being asked, that person starts making the rounds of the other members to merely solicit their views, does that make the person the "personal intermediary" of the member who wanted to know how the other members view the proposal ?
(3) Suppose the other members of the body don't know that the person making the rounds to talk to them is doing so on behalf of another member or members of the body. Is that a violation ?
(4) Is it a violation if less than a majority of the body is knowingly involved in soliciting views and giving views on such a proposal ?
(5) Is it a violation if less than a majority of the body is knowingly involved in soliciting commitments and giving commitments to vote for such a proposal ?
(6) Is it a violation if the intent is solicit the views or the commitment of less than a majority of the body ?

17. Change in Open Records Definitions (Terry Timmins)

It has been proposed that the definitional framework of the Open Records Law, found in Section 22.2 of the Code, be altered substantially to include definitions for the terms "record", "government record", "public record", "confidential record" and "optional public records". We understand that these changes in the definitional framework of Chapter 22 could clarify the intent of the Open Records Law and make it easier to understand and apply. However, while we are cautiously supportive of such clarification, we also have to point out that implementing these new definitions would require fundamental changes in other Sections of Chapter 22, particularly Section 22.7 which now addresses "confidential records".

In order to properly implement this change in the definitional framework of the Open Records Law, it would at a minimum be necessary to review each and every exemption listed in Section 22.7 to determine whether it falls into the new "confidential record" category or into the new "optional public record" category.

Furthermore, creating a new category of public records which is unqualifiedly "confidential" creates new challenges and potential liabilities for governmental entities and the custodians of their records which must be addressed. Under current Section 22.7, all confidential public records therein listed "shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian…, or by another person duly authorized to release such information". Thus, although the "shall" language creates an unqualified expectation of confidentiality, that expectation is largely negated by the "otherwise ordered" language. The records listed in that Section are confidential – unless otherwise ordered. Currently, if a governmental records custodian releases a "confidential record", perhaps negligently and without regard to the adverse consequences for persons who would be impacted by release of that record, the "otherwise ordered" language would insulate the custodian from any liability to those persons. It may be that this provision was drafted to obtain that end.

However, if a new category of public record is created which is unqualifiedly confidential and which must be kept confidential (e.g. social security numbers, employee addresses, employee insurance information), what will protect the governmental body and the records custodian if the custodian negligently releases that information? It should be kept in mind that public records are often tended over by clerical employees who may not be aware of the presence or significance of confidential information in a particular record. Oftentimes, that information will be buried in other information which is not confidential and which the custodian will be under a deadline to release, particularly if we assume the "shot clock" approach to release of public records is also adopted in this legislation.

Clearly, if the Legislature is going to make certain public records unqualifiedly confidential, but yet expect governmental entities to quickly respond to records requests, it also needs to provide protection to governmental entities when their custodians negligently fail to delete confidential information when responding to those requests.

Additional Proposed Amendments to Open Records Exemptions (Terry Timmins)
In light of the prospect for enhanced enforcement of open records requests and the probability that that development will increase the volume and scope of such requests, additional open records exemptions should be established, and certain existing exemptions should be clarified and/or made consistent with other existing exemptions.

a. Appraisals or appraisal information. We support the view that Section 22.7 should be amended to coincide with Chapter 6B of the Code with respect to governmental acquisition of private property. Section 22.7 (7) should be amended to provide that appraisals or appraisal information are confidential until the governmental entity makes an offer to purchase the property.

b. Bid tabulations and proposal evaluations. Section 22.7 should be amended to provide an additional exemption to make confidential bid tabulations and proposal evaluation reports which are created by staff for consideration by the governmental body, until such time as staff makes its recommendation to the governmental body as to the lowest responsible, responsive bid or as to the best proposal.

c. Information on a commercial or industrial prospect. Section 22.7 (8) of the open records law currently makes confidential Iowa Department of Economic Development (IDED) information on an industrial prospect with which the department is currently negotiating. We support the view that this confidentiality exemption should be extended to other governmental entities, that may be working with the IDED on commercial or industrial prospects, and that have the same or similar information in their possession relating to negotiations with such prospects.

Other Issues (David Vestal)

a. Ombudsman

One benefit of the creation of IPIB is that it gives aggrieved persons a specific place to go. A place where they know their concerns will be taken seriously. But it undermines that if there are multiple state agencies investigating public records or open meetings complaints. That would create confusion about responsibilities and lines of authority.

For this reason, there should be a provision in the bill that clarifies that once the IPIB is created, the State Ombudsman has no residual authority regarding Open Meetings and Public Records issues.

b. Commercial Use

The draft bill should allow local governments to charge for the copies of records to be used for commercial purposes. If it is an individual or a genealogist or a newspaper is seeking a record there would be no charge. But if it is a business that wants to profit from repackaging the information, let the local government charge a commercially reasonable rate for the documents and save money for taxpayers. Some states, like California, Arizona and Kentucky, allow this already.

For instance, if the Glock handgun company contacts the sheriff's office and wants the names of all the people in the county with permits to carry concealed weapons, so they can send them an advertising flier, the sheriff should be able to charge Glock for that information. The taxpayers paid to create that list, and they should have the right to get some of that money back.

c. Archives

There has been considerable confusion about Iowa Code section 305.13, regarding the State Archives, and its interplay with Chapter 22. Iowa Code section 305.2(9), the definition of "record" in the State Archives statute, should be amended by adding the following clarifying sentence: ""Record" does not include records of any political subdivision."

d. Deferred Effective Date

If the Legislature enacts the amendments to Chapter 21 and 22 contemplated by Professor Bonfield's draft, governmental entities and the organizations that serve and represent them will need a considerable amount of time to conduct training on the changes in the law so that those governmental entities can operate in compliance with the many new

requirements. For that reason, we would suggest that the effective date of that legislation be deferred until January 2010.