Memorandum

To: Legislative interim committee on Chapters 21 and 22

From: Members of the Iowa Freedom of Information Council

Date: Dec. 12, 2007

Re: Initial response to proposals made at the Nov. 9, 2007, meeting

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The following are initial thoughts in response to the legislative proposal submitted by Professor Bonfield during the Nov. 9, 2007, meeting of the Legislative Committee on Open Meetings/Public Records (the "Bonfield Proposal"). This document is by necessity preliminary, written before the release of the Committee's draft legislation to be discussed today.

I. ADMINISTRATIVE ENFORCEMENT SCHEME – IOWA PUBLIC INFORMATION BOARD

- *Overall Impressions* – Generally a very strong proposal that provides a one-stop source for information, education, interpretation, advice, and enforcement at no cost to the public, government entities, or the media.

- *Membership of the Iowa Public Information Board (p. 2)* – The Bonfield Proposal suggests a five-member Iowa Public Information Board ("Board") appointed by the Governor. No qualifications for Board members are specified. At least some Board members should have expertise in public records/public meetings law and practice. To ensure this is the case, some of the Board members should be designees of stakeholders: a member representing the media and a member representing public entities (cities/counties/school boards).

- *Election of Remedies (p. 3)* – The Bonfield Proposal's election of remedies provisions evinces a clear preference for resolving disputes through the Board: when a single dispute results in both a lawsuit in court and an action before the Board, the court is required to dismiss the suit so that the action is consolidated before the Board. However, this creates the possibility of forcing disputes to go through the Board even if a particular plaintiff prefers to seek judicial action. On the flip side, it does not look like a governmental custodian that wishes to enjoin inspection of documents under Iowa Code § 22.8 can file with the Board – it must file in court and then the matter can be sent to the Board if the person seeking access asks to remove the case to the Board within 30 days. Perhaps the custodian should be allowed to bring the action for an injunction before the Board.

- *Powers of the Board (pp. 4-6)* – The Board has broad powers. Of note:

    - **Hiring staff**. The number is not specified — perhaps more detail should be put into the bill; e.g., specify that the Board will have an executive director, that the executive director should be a lawyer (given the quasi-judicial nature

of the Board), and that the executive director may hire additional staff as authorized by law.

- **Issuing orders**. The Board can issue various types of orders after finding a violation of Chapters 21 or 22, including civil penalties equal to those in the §§ 21.6(3)(a) and 22.10(3)(b) or "any other appropriate remedies calculated to declare, terminate, or remediate any violation." The references to the specific Iowa Code sections omit significant remedies, including (but not limited to): injunctions, awards of attorney fees, and removal from office. By omitting those provisions (while citing other specific provisions), it would appear that the Board lacks the power to award attorney fees or order removal from office (despite the inclusion of the "other appropriate remedies" language). The reference should be changed to include all of the civil remedies set forth in Chapters 21 and 22, i.e., all of § 21.6(3) and all of § 22.10(3). [Note that the same issue of limited remedies occurs in section 9 of the Bonfield Proposal.]

- **Training**. The Bonfield Proposal does not mandate that the Board provide training, but merely states that the Board has the "authority" to "make training opportunities available." Perhaps the Board should be **required** to do training.

- *Filing of Complaints (p. 7)* – The Bonfield Proposal requires that any complaint to the Board be filed within 60 days of when the alleged violation occurred or the date the "complainant could have become aware of the violation with reasonable diligence." There are two problems with this. First, 60 days is a very short time frame. For example, what happens if the complainant tries but fails in an attempt to negotiate with a stonewalling public official — could the 60-day clock run out during the period when the complainant had some hope that the public official would do the right thing? Perhaps a time frame of six months would be more appropriate and realistic. Second, the Bonfield Proposal's formulation of a discovery rule exception to the 60-day period seems much stricter than the discovery rule that applies in normal civil litigation: the date a plaintiff "knows or in the exercise of reasonable care should have known both the fact of the injury and its cause." *Woodroffe v. Hasenclever*, 540 N.W.2d 45, 47 (Iowa 1995). The normal civil rule is a "**should** have known" requirement and the Bonfield Proposal's standard is "**could** have known." There is no reason for a difference, especially where the difference is likely to work against persons bringing complaints.

- *Enforcement (pp. 8-9)* – The Bonfield Proposal is unclear about the effect of a dismissal by the Board. While it is clear that a final board order after a Chapter 17A contested case proceeding is appealable in district court, the Bonfield Proposal is silent about the effect of a dismissal.

II. INCREASING CIVIL PENALTIES

- The Iowa FOI Council supports the proposal to raise the penalties in light of inflation and the proposed repeal of criminal penalties.

III. REPEAL OF CRIMINAL PENALTIES

- The Council supports this proposal, in light of the historical failure of county attorneys to bring criminal cases.

IV. TIME LIMITS ON RESPONDING TO REQUESTS

- The Council supports this proposal.

- A concern is the final clause in the second sentence of the first paragraph: "unless there is good cause to delay further because of unusual circumstances." The draft is unclear whether this delay beyond five days is for (a) a time to produce the records or (b) a time for the custodian simply to respond stating when the records will be produced. The sentence should be rewritten as follows: "If it is not feasible in the ordinary course of business to permit inspection or copying of the public record at the time of the request, the custodian shall immediately notify the requestor as to when such inspection or copying may take place. The time designated for such copying or inspection shall be no later than five business days from the time of the request unless there is good cause to delay due to unusual circumstances."

V. UNDUE INVASION OF PERSONAL PRIVACY

- The Council is opposed to this proposal.

VI. PRIVACY AND COURT RECORDS

- The Council is opposed to this proposal.

VII. TENTATIVE, PRELIMINARY, DRAFT MATERIAL

- The Council is opposed to this proposal.

- Professor Bonfield sees links between Chapter 305 and Chapter 22. If that is the case, it should be noted that Iowa Code § 305.13 requires that all "records" (a term broadly enough defined to include tentative, preliminary, draft material) "made or received by or under the authority of or coming into the custody, control, or possession of public officials of this state in the course of their public duties are the property of the state and shall not be mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of, in whole or in part, except as provided by law or by rule." This seems to show a clear legislative intent that even tentative, preliminary, draft material has value and provides insight into the functioning of public bodies.

VIII. PERSONNEL RECORDS

- The Council supports this proposal.

- We would suggest adding the word "reprimand" before the word "discharge" on the final line of proposed subsection 11(e) – very last line on page 17.

IX. JOB APPLICATIONS

- The interim committee voted to require the release of the final five (rather than three) finalists. However, there is still opportunity to avoid the requirements of the law by having more than five "finalists" for any job, thus requiring no disclosure of anyone.

- A possible solution: Require disclosure of all names under consideration by a specified number of days (e.g., five business days) prior to a final decision on the hire.

X. INJUNCTIONS

- The Council does **NOT** support the proposal to rewrite the standards under which a public body can obtain an injunction against disclosing information. The result of the proposal would be to make it easier for public bodies to get an injunction. Currently, a public body must show **BOTH** that disclosure is not in the public interest **AND** disclosure would substantially and irreparably injure a person or persons.

- The Bonfield Proposal changes that two-part requirement substantially. Instead of showing both prongs, the proposal would allow an injunction to be issued if **EITHER** disclosure would, on balance, harm the public interest **OR** disclosure would substantially and irreparably injure a person. This would make it easier for government bodies to obtain injunctions. The current law is better.

- If these new tests are retained, Council members would change the proposed balancing tests to favor disclosure. Thus, in proposed paragraph a, insert the word "substantially" before the word "outweighs" at the beginning of line 10 on page 19. Also rewrite proposed paragraph b to read: "That the examination would substantially and irreparably injure a person because it would invade the personal privacy of the identified subject of the record and the harm to that person would substantially outweigh the public interest in disclosure."

- The Bonfield Proposal further adds an entirely new third basis for granting an injunction: the record is not a "public record" under the new definitional scheme in the Bonfield Proposal (more on that below) or that the record is exempt under section 22.7 and the disclosure is arbitrary and capricious. Professor Bonfield says this is necessary to avoid a sweetheart deal where a government body discloses records to some members of the public but not others. Such selective disclosure should be avoided. However, the solution is not less disclosure, but more disclosure. Thus, rather than keeping anyone from having the information, any information disclosed to one member of the public should be available to other members of the public. The Council would thus delete the new paragraph "c".

XI. FINAL SETTLEMENTS

- The Council supports the proposal.

XII. APPLICATION OF PUBLIC RECORDS LAWS TO NON-GOVERNMENT BODIES

- The Council supports the proposal.

XIII. IDENTICAL EXEMPTIONS

- The Council fails to understand either this specific new exemption to Chapter 22 or Professor Bonfield's general concern with making sure there are identical exemptions in Chapters 21 and 22.

- The chapters deal with different issues and therefore there are reasons for some different exemptions. This proposed exemption would seem to make otherwise open records secret if they are used during a closed meeting. This is a bad idea and runs counter to other areas such as evidentiary privileges where, for instance, a document does not become attorney-client privileged simply because it was reviewed by an attorney. It is the underlying nature of the document itself — not its potential use in a closed meeting — that should determine whether it is exempt from disclosure.

XIV. E-MAIL MEETINGS

- This is an admirable change, but drafted too narrowly to apply only to e-mail.

- The Council would suggest re-writing the section to broaden it so that it applies to **all** forms of communication as follows: "Communications by one or more members of a governmental body or by its chief executive officer sent to a majority of its members, or a series of such communications each sent only to a minority of its members but that in aggregate is sent to a majority of its members and that would otherwise constitute a meeting, concerning a particular matter within the scope of the body's policymaking duties constitute a 'meeting' unless:

  a. the communications are exempted from disclosure by some provision of section 22.7 or another statute or

  b. copies are made available for public inspection at the next regular meeting of the body."

XV. WALKING QUORUMS

- The Council supports the proposal.

- One minor suggestion: add the words "of a quorum" after the word "majority" in the middle of line 9 on page 24. This would address the situation where there is communication among less than an absolute majority of the governmental body, but among enough members so that those involved can take official action at a meeting.

XVI. RECONVENED MEETINGS NOTICE

- The Council supports the proposal.

XVII. CHANGE IN CHAPTER 22 DEFINITIONS

- The Bonfield Proposal envisions a rather sweeping change in the definition of "public record" by creating four distinct categories of "records" meant to show varying levels of access.

- Professor Bonfield does point out that there is some inconsistent use of the term "government record" in current law. We have attached a separate document highlighting the use of that term in Chapter 22. This could be remedied by simply deleting "government" and replacing it with "public" in those places where the term is used.

- As to the specific proposal, we reiterate our prior comments on this issue:

    - 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

TO: Legislative interim committee on Chapters 21 and 22, Iowa open meetings and open records laws
FROM: Kathleen Richardson, on behalf of the Iowa Freedom of Information Council
DATE: Dec. 12, 2007
RE: Reactions to proposed legislation

The Iowa Freedom of Information Council would first like to thank the members of the committee, the staff of the Legislative Services Agency, and especially Professor Arthur Bonfield of the University of Iowa law school, for the tremendous of amount of time and energy that they've put into this months-long examination of the Iowa open meetings and records laws. We'd also like to thank the government associations —the Iowa League of Cities, the Iowa State Association of Counties and the Iowa Association of School Boards — for the spirit of cooperation that they have shown throughout this process.

While we sometimes may disagree on the solutions to the problems of open government that we face in Iowa, it is clear that we are all united in our aspirations for a government that is accessible, accountable, fair and responsive to the needs of all Iowans. We are very proud to have been invited to participate in this bipartisan collaboration.

We are overwhelmingly pleased with the work of this committee thus far. The proposed legislation would go far in both clarifying areas of the open meetings and records laws that are currently muddy and in making government more accountable to the public. While we have concerns about specific sections of Professor Bonfield's proposals, and we have addressed those concerns in the attached memorandum, we also have broad areas of agreement:

- Requiring that some information in the personnel records of government bodies be open to the public carefully balances the legitimate privacy interests of government officials and employees with the equally legitimate interests of citizens in job information about their public servants. *(Proposal 8, page 17 of Professor Bonfield's Nov. 9 agenda)*

- Making public the names of finalists for government employment again balances individuals' privacy concerns with the public interest in ensuring that government hiring is fair and responsible. *(Proposal 9, page 18)*

- Mandating that the facts of settlement agreements involving government entities are public record makes abundant common sense. Such transparency and accountability is long overdue. *(Proposal 11, page 20)*

- Clarifying the time frame in which records custodians must respond to requests would clear up the confusion that exists under the current law. *(Proposal 4, page 12.)*

- Curbing "walking quorums" and their e-mail equivalents by shining sunlight into these secret discussions of public policy by government officials brings the Iowa public meetings law into the electronic age. *(Proposals 14 and 15, pages 23-24)*

In addition, creation of an independent agency that would answer questions involving the open meetings and records laws, investigate and mediate complaints, coordinate training and enforce the law would go a long way to solving all of the problems that we have discussed at these hearings this year. If one thing has become apparent it is that no one is consistently enforcing the access laws in Iowa. An Iowa Public Information Board would be an invaluable resource for both citizens and government officials. *(Proposal 1, page 1)*

These are all legislative changes that the Iowa FOI Council has long supported.

However, there are several proposals that have been presented to this committee that the Council cannot support:

- Changing the definitions of government records does not clarify the present law, but merely creates more opportunity for confusion and more work for record custodians. In addition, making "public records" a subset of "government records" would not serve the cause of open government. The general presumption, which currently exists, that all government records are open records — unless they fall under a specific exception in the law — would be lost under such a system. *(Proposal 17, page 27)*

- The two proposals to allow government to withhold information that "if disclosed would constitute an unwarranted or undue invasion of privacy" threatens to undo many of the advances toward transparency that the committee is considering. These proposals seems to be motivated by the same fear of identity theft that inspired the Iowa judiciary earlier this year to consider redacting personally identifiable information from court records. The Court has since rejected that approach, and we encourage the Legislature to do likewise. There is no evidence to support the fear that public records are a significant source of identity theft. Federal studies have found that identity theft is most likely to be committed by victims' relatives and acquaintances who misuse financial information. Allowing government officials the discretion to refuse to release information that they fear may harm vaguely defined "personal privacy interests" creates a potential "black hole" in the public records law at the same time the Legislature is attempting to close loopholes. *(Proposals 5 and 6, pages 14-15)*

- Another area that gives rise to grave concern is the proposal to allow government to withhold "tentative, preliminary, draft, speculative or research material." This proposal runs directly counter to the sentiment toward transparency at *all* stages of the development of public policy expressed in the proposed curbs on "walking quorums" and e-mail meetings. *(Proposal 7, page 16)*

> One surprising argument, expressed during the last hearing, for allowing draft documents to be kept secret is that “costless access” to government information is somehow dangerous. If you make government information easier to obtain, the argument goes, you open the floodgates to frivolous records requests. Public records, it seems, are like meth: One hit and Iowans will run amok, snatching notepads from legislators’ bedside tables and building public-records labs in their garages. This argument is a red herring and insulting to the intelligence of the people of this state.

We are all sitting around this table because we believe that government transparency makes our democracy stronger, that Iowans have a right to accessible government, and that we haven’t been doing as much as we can as a state to ensure that right. We’ve all seen the recent scandals, such as CIETC, that resulted at least in part from a lack of openness and accountability in government. Let’s trust the vast majority of Iowans who take democracy seriously.