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Date: December 7, 2007

To: Members of the Freedom of Information, Open Meetings, and Public Records Study Committee

From: William P. Angrick II, Ombudsman

Re: Comments regarding Professor Bonfield's "Proposed Decision-making Agenda" dated November 9, 2007

Professor Arthur Bonfield has presented considerable material to the Freedom of Information, Open Meetings, and Public Records Study Committee (hereinafter referred to as the "FOI Study Committee"). It is not necessary to address each of the topics addressed in his November 9, 2007 document. Rather, the following is a brief discussion of those items which the Ombudsman's Office believes need further consideration. The section numbers and topic headings indicated below correspond with the numbering and headings used by Professor Bonfield.

At the outset, it should be noted that the Ombudsman's Office has a unique perspective on these issues. The perspective is reflective of the large number of public information and public meeting investigations that the Ombudsman's Office has handled over the years. In addition Assistant Ombudsman Kristie Hirschman recently traveled to Connecticut and visited with Colleen Murphy, Executive Director and General Counsel of Connecticut Freedom of Information Commission, and Eric Turner, Managing Director and Associate General Counsel of the Commission, about some of these issues.

Section 1—Administrative Enforcement Scheme

The Iowa Code provides numerous examples of investigatory agencies with varying enforcement mechanisms and structures. A good example of an investigatory agency with flexibility to handle or initiate complaints is the Ethics and Campaign Disclosure Board created in Iowa Code chapter 68B.

It is difficult to predict the types and number of cases the Board will be asked to address. As a result, flexibility in the process from the beginning is highly desirable to permit the

Board to develop procedures and processes responsive to the needs, to allow for greater efficiencies, to keep the caseload manageable, and to provide effective enforcement. Flexibility will allow the agency to make the determination case-by-case based upon staffing and responses to inquiries.

The following are some issues the FOI Study Committee should consider in determining how to structure a potential new Iowa Public Information Board (hereinafter "Board").

- Should the Board have the ability to initiate an investigation "on its own motion" or is the Board limited to investigating only written complaints it receives? As currently written, it appears that the Board is limited to investigating only upon receipt of a written complaint.

- Should the Board have a mechanism to receive anonymous complaints? Similarly, should the Board have the ability to receive a complaint from a known complainant but have the ability and discretion to keep the identity of the complainant confidential for specified reasons? For example, the Ombudsman's Office often hears from individuals who are hesitant to file or pursue a complaint for fear an adverse or retaliatory action will result from it.

- Are employees of the Board covered by the merit system or are they exempt from the system? The current language is silent on this issue.

- Should the Board be mandated to comply with both the requirements of political affiliation balance required in Iowa Code section 69.16 and the gender balance required in Iowa Code section 69.16A? Current language only addresses political balance.

- How should mediation be conducted? By the Board staff (as it is carried out by the Connecticut Freedom of Information Commission and the Iowa Civil Rights Commission) or by an outside disinterested party as authorized for the Iowa Dental Board in Iowa Code section 153.33(1), or should the Board have the discretion to utilize either option as resources and circumstances dictate?

- Should all cases automatically be offered mediation or should the Board have the ability to decline complaints that are legally insufficient or lack merit, trivial, or are matters that have been previously investigated? As currently written, the Board does not appear to have discretion whether to expend the time and resources to pursue mediation.

- Should the Board's staff have the ability to conduct a preliminary investigation prior to mediation and determine if mediation is appropriate or necessary under the facts and circumstances? In the Ombudsman's Office's experience, many complaints can be resolved with one or two communications to the parties involved. Should investigators have the ability

to resolve, to the satisfaction of the Executive Director and approval by the Board, a complaint prior to mediation or the contested case proceedings?

- Can and should the Board have the ability to void an action taken in violation of the open meeting provisions of Iowa Code chapter 21 similar to the authority given to a court in section 21.6(3)(c) for an action filed in court within six months of the violation? The language is currently silent about this authority. If the Board does not have such authority, an aggrieved person might lose the ability to have an action declared to be void by the court if the aggrieved person files with the Board and it takes the Board more than six months to reach a decision.

- Can and should the Board have the ability to remove a member of the governmental body for repeat violations of Iowa Code chapter 21 or chapter 22, similar to the authority given to a court in section 21.6(3)(d) and section 22.10(3)(d), respectively? The current language is silent on this authority.

- In regards to the removal of a member of a governmental body for second violations of the open meeting or public records law, do violations found by the Board count towards a finding of a second violation and thus bring the removal provision into play? Current language is silent on how repeat violations are tracked or applied by the Board and the courts.

  Also related to the removal remedy, does one set of circumstances involving multiple violations (i.e. no notice of a meeting, action taken in closed session, no tape recording of a closed session) constitute one violation or more than one violation? The current statutory language is unclear about this issue.

- Should there be mandated training of public officials provided by or approved by the Board? If so, should the type and amount of mandated training be specified? Who should receive the training - - voting members, administrators or directors, support staff, legal advisors, etc.? Current language empowers the Board to provide training to "all custodians, governmental bodies, and other persons subject to the requirements of chapter 21 and 22." However, there is no mandate for these persons to obtain training. The Ombudsman's Office has often found there is a lack of knowledge about these laws or understanding about their application by public officials. Furthermore, it is not clear who is exactly subject to receive the training. For example, do the terms "governmental bodies" or "other persons" encompass all employees of a governmental body? Finally, since reliance on legal advice is a defense to liability for damages upon a finding of a violation, attorneys or legal advisors for governmental bodies should be included in any training requirement.

- What should be done with civil penalties collected by the Board? Should they be retained by the Board to defray costs or go to the state general fund? There is no consistency on this issue in state government. Some enforcement

agencies retain civil penalties and others remit them to the state general fund. It may be useful to the agency to be able to retain the fees; however, it can also give the impression to a person against whom enforcement is being done that the imposition of civil penalties is motivated by budgetary concerns.

Section 5—Undue Invasion of Personal Privacy

People have varying expectations and definitions of privacy. This proposed exemption gives the government body the authority to determine what constitutes "an unwarranted or undue invasion of personal privacy." The Ombudsman's Office offers the following points of discussion regarding this section:

- Is the "unwarranted or undue invasion of personal privacy" exemption too broad and subjective? What specific information is this language intended to protect and prevent the release of? Would it create too much leeway for government bodies to deny access and as a result generate many complaints to the Board? Is there sufficient guidance to avert unreasonable or inconsistent decisions by governmental bodies? Should this exemption be limited to situations involving the release of personal identifying information that facilitates identity theft and criminal activity?

- The term "material" is used three times, but it is not defined and currently is not a term of reference in section 22.7. That statute uses the terms "record," "portion of record" and "information." Should one or more of these terms be used in lieu of "material?"

- Lines 12-16 offer examples of "material" to be excluded from public inspection. The list is not all inclusive and therefore gives the government body the discretion to determine what information can be released. The Ombudsman's Office is proposing security breach legislation incorporating a definition for "personal information" commonly used in security breach legislation enacted in 39 other states. The Ombudsman's Office believes the following similar definition can be used in this exemption to provide more guidance on what information should not be disclosed:

> "Personal identifiable information," as used in this subsection, 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:
> (a) Social security number.
> (b) Driver's license number or other unique identification number created or collected by a government body.

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

- The Ombudsman's Office recommends amending line 15 to read "...salaries and benefits of public officials..."

- It is unclear which records the following phrase in lines 20-21 encompasses – "...or information with respect to the performance by public employees or officials of their duties."

Section 7—Tentative, Preliminary, Draft Material

The proposed exemption for tentative, preliminary, draft, speculative, or research material is perhaps the most problematic proposal under consideration. The Ombudsman's Office does not have a single firm position on the idea. We understand, appreciate and see aspects both in favor and opposition on adding this exemption. The proposal is extremely broad and its impact upon the operation of Iowa government could be significant. If we truly believe that mold grows where the sun is not allowed to shine, then we must keep in mind that mold propagates from tiny spores. We are uncertain about the degree of real problems that would warrant adding this exemption and the types and number of complaints that may result from its application if the exemption is enacted.

Is the language sufficiently clear to provide guidance to government bodies regarding its implementation? Does requiring that the material be both "prior to its final completion for the purpose for which it is intended" **and** "prior to its submission for use" create too high a bar for allowing access? Would the substitution of "or" achieve the purpose better? And in a larger sense should the public not be able to know what good or bad ideas were considered regardless of which idea is ultimately put forward for final consideration? If a government body or official speculates something that may not be acceptable to the governed, is there not value for that information to be known sooner than later? Additionally it is often through a process of open scrutiny and deliberation that many preliminary ideas, programs and decisions become refined and improved.

Are we aware of government bodies being adversely impacted because of requests for public records including handwritten notes on scraps of paper? While theorization of this as a consequence of our current definition of public record is possible, the Ombudsman's Office is unaware of any requests that have caused undue hardship on a government body. The government body can recover the actual costs in responding to a request.

The Ombudsman's Office is aware that there are similar exemptions in open records laws at the federal level and also in some other states. The United States Department of Justice's Freedom of Information Act Guide (http://www.usdoj.gov/oip/foia_guide07.htm) discusses at length the legislative and judicial bases for keeping certain agency deliberative information exempt from premature public disclosure (see Exemption 5).

The Ombudsman's Office has learned that at least in Connecticut, its Freedom of Information Commission has looked at the deliberative process privilege on a case-by-case basis and has been relatively conservative in allowing its application.

However, the Ombudsman's Office remains concerned that this idea has the potential to significantly change the landscape of open government in Iowa. If it is to be added as an exemption, the definitions and standards must be carefully drafted and critically considered. If that cannot be achieved now, the Ombudsman's Office recommends this particular provision be taken out of the legislative proposal and studied further.

Section 9—Job Applications for Government Employment

The Ombudsman's Office is in agreement with the concept that the identities and qualifications of finalists for a position should be open for inspection. However, the definition of finalist is problematic. The language proposed by Professor Bonfield establishes a numerical criterion of "three or less." The Committee discussion indicated a desire to use the language "five or less." However, this change would not eliminate the problem that results from language that appears to set a ceiling on the number of finalists. Does this mean that, if the governmental body has four or more finalists (using Professor Bonfield's language) or six or more finalists (using the Committee's language), their information would not have to be made public since the number exceeds the established number requiring disclosure? Does it really matter how many finalists there are?

One way to address this problem is to remove a specified number from the definition and define finalist as "all" applicants under final consideration for a position. The following is a potential substitute language beginning on page18, line 11 under section 9:

> For purposes of this subsection, "finalist" means an ~~individual~~ applicant, candidate, or nominee who is ~~one of three or fewer applicants~~ under final consideration for a public employment position. If there are three or less applicants, candidates, or nominees for the particular position, all of the individuals shall be considered finalists for purposes of this subsection. The identities and qualifications of the finalists must be made available for public inspection at least three business days prior to the final decision.

Another approach would be to define "finalist" in terms of "at least" a specified number, unless there are fewer than that number. For example, a "finalist" could mean "at least"

three applicants under final consideration, but if there are three or less applicants, all of them would be considered to be finalists.

Section 15—Walking Quorums

The Ombudsman's Office is in agreement with the concepts of this section. However, the Ombudsman's Office believes that on page 24, line 10, the word "agreement" should be replaced with the word "decision." This change would clarify that the intent is not for all the members to be in agreement on the actual decision or vote, but to arrive at a decision how to proceed on a specific action to be taken at a meeting.

Section 17—Change in Definitions

The Ombudsman's Office generally agrees with the proposed changes to define records in various forms under chapter 22. In conjunction with these changes, the Ombudsman's Office recommends that the Committee review the current exemptions to determine whether all of the exemptions should automatically be relabeled "optional public records." The Ombudsman's Office believes there are some exemptions under section 22.7 that may have been meant to be kept confidential or should be kept confidential and not subject to discretionary release.

Records Retention Issues

The Ombudsman's Office strongly believes a number of issues related to the retention of records need to be addressed and recommends that the Committee also review them. Whether and how long records are retained impact whether they are available for public access under Iowa Code chapter 22. These issues will require also reviewing Iowa Code 305, the "State Archives and Records Act," and other statutory provisions

- Currently, how records are defined is different between Iowa Code chapter 22 and chapter 305. Should they be consistent or the same? If so the Ombudsman's Office believes it would be timely to also amend Iowa Code chapter 305 to avoid conflict and confusion.

- Iowa Code chapter 305 only applies to state agencies; it does not apply to other government bodies that are covered by Iowa Code chapter 22, nor are there similar statutory requirements for these government bodies to develop policies, standards, and guidelines for the storage, retention, and disposition of records. Iowa Code section 372.13(5) does address the retention of records and documents by a city. There are no corollary provisions regarding the retention of records by county boards of supervisors, schools districts, or other governmental bodies. As a result, there is a lack of guidance for these government bodies regarding which records should be retained or how long they should be retained.

The Ombudsman's Office recommends that the FOI Study Committee require **all** governmental bodies to develop policies, standards, and guidelines related to the storage, retention, and disposition or records. In addition, the Ombudsman's Office recommends the Committee consider whether certain types of records maintained by some governmental bodies should have statutorily mandated retention periods.

- Iowa Code section 21.5(4) requires governmental bodies to retain detailed minutes and tapes from a closed meeting for at least one (1) year. However, Iowa Code section 372.13(5) specifically requires a city to maintain records for at least five (5) years. This provision does not differentiate between records of open meetings and records of closed meetings. The Ombudsman's Office is aware that some cities are only retaining the closed session minutes and tapes for one (1) year and then destroying them. While such action may be in conformity with section 21.5(4), the Ombudsman's Office believes this practice is a violation of section 372.13(5).

  To clarify which retention statute is controlling, the Ombudsman's Office recommends that the last sentence in Iowa Code section 21.5(4) be amended to read as follows:

  > 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, except as otherwise required by law.

- Should tapes of an open meeting of a government body be allowed to be destroyed after completion of the written minutes for the meeting? While the destruction of the open session tapes is not prohibited by law, the practice can give an appearance that officials are hiding something. Furthermore, if concerns regarding the accuracy of the minutes are raised, there is no longer a record of what actually transpired at the meeting. The minutes of a meeting are typically a very condensed version of what occurred. Iowa law requires only that the minutes record the time, date, place, members present, and actions taken at the meeting. Consideration should be given to whether open session tapes should be retained along with the written minutes.