January 10, 2008

TO: Freedom of Information, Open Meetings and Public Records Study Committee

FROM: Gordon O. Hendrickson, Ph.D., State Archivist

SUBJECT: Decisionmaking Agenda November 9, 2007

Thank you for the this opportunity to address your committee this morning. The relationship between public records issues as addressed in Chapter 305 and Freedom of Information as addressed in Chapter 22 is important and deserves careful consideration.

Chapter 305 establishes a records management program for the maintenance and disposition of state government records. The state records management program was first established in 1974 and the governing statute was revised in 2003. The 2003 revision sought to clarify the responsibilities of the State Records Commission, the Department of Cultural Affairs (parent of the State Archives and Records Program) and the individual state agencies. Many provisions of the previous version of the statute carried forward to the revised statute. During your deliberations, sections 305.13 and 305.15 have been referenced several times. Section 305.13 provides that records are state property and section 305.15 exempts the Department of Transportation and the agencies and institutions under the Board of Regents from the provisions of the chapter. Section 305.13 and Section 305.15 both carried forward, with only minor changes, from first adoption in 1974.

## GOVERNMENT OWNERSHIP OF RECORDS

Chapter 305.13 currently reads:

> All records 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.

Much discussion of this section in your committee deliberation has centered on the question of state government ownership of records created by state government employees and officials. The section primarily seeks to provide a framework by which government records, as defined in chapter 305, may be "mutilated, destroyed, transferred, removed, or otherwise damaged or disposed of." Chapter 305 provides that records may be destroyed only in accord with approved records series retention and disposition schedules. This section clearly asserts "records" (as defined in chapter 305) are the property of the state and that ownership of state government

records may not be transferred to another entity "except as provide by law or by rule." While not explicit in its application, this section provides the basis for state government to initiate a replevin action to return a state government record to state government ownership.

Much of the discussion on government ownership of records concerns whether or not individual employee notes, especially when jotted on legal pad or napkin, are subject to legal discovery or to public access under the provisions of chapter 22. The essential chapter 22 question is whether these notes are included in the definition of record under chapter 22. By contrast, the chapter 305 question is whether these materials are record or non-record material and when may these notes be destroyed in accordance with state law and regulation?

A basic principle of the relationship of a records management program and legal discovery, to my understanding, has always been that if a record is destroyed in accord with an established and organized records management program, that record is no longer subject to legal discovery or fair information practices (FOIA) requests. The key factor for determination is "was destruction of the record in accord with an established and organized records management program.?" Chapter 305 established the legal framework for Iowa's records management program as it applies to state government agencies. Chapter 671 of the Iowa Administrative Code sets forth legal regulations as they apply to the state's records management program. If records are destroyed in accord with the regulations of the established records management program, therefore, they will not be subject to legal discovery. Records may not be destroyed if a request for public access to record is pending even if the records series retention and disposition schedule for that records series authorizes destruction. In other words, if a request for legal discovery or for public access is in place for specific records, those records may not be destroyed until after those requirements are fulfilled.

Are employee notes and jottings records as defined in chapter 305? Section 305.2 defines "record" as:

> a document, book, paper, electronic record, photograph, sound recording, or other material, regardless of physical form or characteristics, made, produced, executed, or received pursuant to law in connection with the transaction of official business of state government. *"Record"* does not include library and museum material made or acquired and preserved solely for reference or exhibition purposes or stocks of publications and unprocessed forms.

Section 671.1(2) of the Iowa Administrative Code defines "record" as;

> a document, book, paper, electronic record, photograph, sound recording, or other material, regardless of physical form or characteristics, made, produced, executed, or received pursuant to law in connection with the transaction of official business of state government.

It defines "Non–record materials" as:

> documents and informational materials that do not meet the statutory definition of a record (Iowa Code section 305.2(9)) or that are excluded from the definition. Non–record materials include library and museum material made or acquired and preserved solely for reference or exhibition purposes, stocks of publications and unprocessed forms, and extra copies of documents made, acquired or received only for convenience or reference purposes.

I suggest that many employee notes, whether on napkins, slips of paper or legal pads, fail to meet the chapter 305 definition of record. The application of 305.13, therefore, authorizes the destruction of these non-record materials when the materials no longer have a useful purpose for the agency. I have included, in the recommendation section of this document, a specific recommendation to amend section 305.13 to clarify the application of that section to non-record materials.

Even though these notes probably fall within the definition of a non-record in accordance with Chapter 305 (and thus may be destroyed by the agency when they have fulfilled their purpose), they **may**, and probably do, fall within the Chapter 22 definition of record for fair information practices (FOIA) purposes. For Chapter 22 purposes, the basic question is whether or not a particular document is an agency record subject to FOIA requests. Chapter 305's distinction between record and non-record material addresses the question of when, and under which circumstances, disposition of material may take place. The use of a broad definition of record for FOIA purposes and a more narrow definition of record for records management purposes is not unusual. "In determining whether or not certain documentary materials are records, the Federal courts have developed guidance, subject to change, in deciding Freedom of Information Act (FOIA) cases. Based on current case law involving executive agencies, the meaning of 'agency records' for FOIA purposes is broader than that of 'records' under 44 U.S.C. 3301 with respect to such agencies."[1] As I understand the law, unless confidential or otherwise protected from public inspection, agency records – all material that fits the broad definition of chapter 22 – are subject to public inspection regardless of whether those materials are official records or if those materials are reference or convenience copies.

As noted above, **IF** the disposition of agency materials, whether record or non-record, occurs within the framework of an established records management program (Chapter 305), those destroyed materials are presumed by the courts no longer to be subject to requests to produce – whether for legal or for FOIA purposes.

The chapter 22 question related to these employee notes is when, if ever, employee notes that meet the chapter 22 definition of record are subject to fair information practices requests for public disclosure. Professor Bonfield's suggested definition of record (item 17 of the Proposed

[1] "Disposition of Federal Records: A Records Management Handbook," National Archives and Records Administration, 2000 Web Edition, p. 28. http://www.archives.gov/records-mgmt/pdf/dfr-2000.pdf

Decisionmaking Agenda for your November 9, 2007 meeting) and his proposed language related to "Tentative, Preliminary, Draft Material" (item 7 of the Proposed Decisionmaking Agenda for your November 9, 2007 meeting) attempt to clarify this issue. That proposed definition of record as "information of every kind, nature, and form that is stored or preserved in any medium whatsoever, including but not limited to paper, electronic, or film media," clearly includes these employee notes and as a result they would, in my opinion, be subject to public access requests made in accord with chapter 22. Whether or not those notes would be "optional public records" will depend on your decisions related to "Tentative, Preliminary, Draft Material."

If the Committee intends for chapter 22 to assert government ownership of agency records, it may be wise to include a statement to that effect in the definition section of chapter 22.

Likewise, if the Committee intends to create an exemption of some materials from public inspection within in the framework of Chapter 22 – presumably similar to the definition of non-records for chapter 305 purposes – then a provision to that effect needs to be included in chapter 22. Professor Bonfield's proposal in item 7 of the November 9, 2007 Decisionmaking Agenda is an effort to do just that. Whether or not that language actually achieves the desired goal is a legislative decision.

**It is important, indeed crucial, in my opinion, that the related, but distinct, purposes of Chapter 22 and Chapter 305 be constantly in mind when working to clarify questions of open records.**

## APPLICATION OF CHAPTER 305 TO STATE GOVERNMENT ONLY

Section 305.15 exempts the Iowa Department of Transportation and the agencies and institutions under the control of the state board of regents from the state records manual. This section requires these exempt agencies to develop and implement a records management program that is consistent with the objectives of the chapter. This exemption has been in place since the start of Iowa's records management program in 1974. These agencies are exempt, as I understand the corporate history, because they had records management programs in place when the state's program was developed and implemented.

During committee deliberations and again in Mr. Angrick's December 7, 2007 memorandum to the committee, the question of chapter 305 applicability has been raised. Indeed, chapter 305 applies only to state government and not to governmental bodies at other levels. This is a major difference between chapter 305 and chapters 21 and 22. Many states mandate retention and disposition schedules for county and municipal governments and other governmental bodies through a local government records program administered by the state archives and records agency in those states. These state programs for local government records include services to local governments that include review and evaluation of local government records series and the

development of retention schedules for those records, training and technical services to local governments on issues of records management and archival care for records, and centralized storage for local government records that no longer have administrative value as well as centralized archival services so all permanent records of local government agencies are held at the state archives.

Iowa's principle of home rule for local governments dictates against centralized mandates regarding records retention and storage.

The Department of Cultural Affairs is authorized in chapter 305 to provide training and guidance on records management and archival matters to local governmental bodies and has done so for many years. For example, in 1982 the State Archives of Iowa cooperated with the Iowa League of Municipalities in the preparation of a guidance document for retention of records created in municipalities. In 2002, the State Archives and Records Program, in conjunction with the Iowa League of Cities and the Iowa Municipal Finance Officers Association, reviewed that earlier publication and issued revised guidelines for the retention of municipal records. In 1987, the State Archives of Iowa, working in conjunction with the Iowa State Association of Counties, prepared and published guidance for retention of county government records. The revised municipal records manual is available on-line through the League of Cities and the county records manual is available in published form from the State Archives and Records Program. Throughout the twenty years I have been associated with the Iowa State Archives and Records Program, we have responded numerous times to requests for technical assistance from local governments. We provide an annual training program for municipal clerks through the City Clerk's School offered by the Iowa State University.

## TIME LIMITS ON CONFIDENTIALITY

In my testimony of September 6, 2007, I raised the issue of how long confidential records retain their confidentiality. As you know, Iowa code currently has no automatic release date for chapter 22.7 confidential records and only a very few records with confidentiality assured in other code sections have release times. The period of confidentiality is particularly an issue for records in the State Archives which are covered by confidentiality statutes (section 22.7 or elsewhere in code) and must be retained permanently.

The State Archives retains custody of and provides public access to those records determined by the State Records Commission to have permanent value.

You may recall my earlier testimony[2] in this regard. At that time I wrote: "As historians and as archivists, we must ask 'how long does a right to privacy extend?' Does the subject of a case file

[2] See "Freedom of Information, Open Meetings, and Public Records Legislative Interim Study Committee,

created in 1872 have the same right to privacy in 2007 as does the subject of a case file created in 1972? When does society's right to know become more important than the rights of the subject of a file?" I also suggested: "At present the records of attorney-client discussions in the records of Governor Samuel Kirkwood hold the same degree of confidentiality as those of Governor Tom Vilsack. Is that really the intent? Is that really in the best interest of Iowa?"

I believe it may be possible to provide for public access to many, but perhaps not all, confidential records after a given period of time.

**RECOMMENDATIONS:**

1. Amend the section 305.2 (9) definition of "record" as follows:

> "Record" means a document, book, paper, electronic record, photograph, sound recording, or other material, regardless of physical form or characteristics, made, produced, executed, or received pursuant to law in connection with the transaction of official business of state government. *"Record"* does not include library and museum material made or acquired and preserved solely for reference or exhibition purposes, ~~or~~ stocks of publications and unprocessed forms, and documents or copies of documents made, acquired or received only for convenience or reference purposes.
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> EXPLANATION: This amendment to the definition of record will assure that documents made only for convenience or reference are not defined as records subject to records retention policies. Thus, in accord with 305.13, these non-records may be destroyed when they have outlived their usefulness for the creator.

2. Amend section 305.2 by adding the following definition:

> "Non–record materials" means documents and informational materials that do not meet the statutory definition of a record (Iowa Code section 305.2(9)) or that are excluded from the definition. Non–record materials include library and museum material made or acquired and preserved solely for reference or exhibition purposes, stocks of publications and unprocessed forms, and documents or extra copies of documents made, acquired or received only for convenience or reference purposes.
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> EXPLANATION: This definition of non-record materials is included in the administrative rules for the State Records Commission. Inclusion of this definition in statutory code will clarify when materials are records subject to retention policies established by the State Records Commission and when they are non-records not subject to retention requirements.

3. Amend section 305.2 by adding the following definition:

> *"Office of record"* means the agency in which a record, as defined in Iowa Code section 305.2, is created, produced, executed or received in connection with official business of that agency. The office of record is responsible for maintenance and disposition of records in accordance with approved records series retention and disposition schedules.
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> EXPLANATION: Retention policies apply to official records, not to reference copies of records. Providing a definition of "Office of Record" in the governing statute will help clarify which agency is responsible for retention of records.

4. Amend section 22.7, unnumbered introductory paragraph as follows:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information, until they are twenty years past the date of creation unless provided otherwise elsewhere in code:
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> EXPLANATION: As discussed in earlier testimony and earlier in this statement, the State Archives of Iowa has little if any guidance on how long confidentiality provisions, whether termed "confidential records" or "optional public records," apply to a record. It seems reasonable to assume that some records are sensitive or "confidential" for a limited period of time. Records commonly identified as "attorney-client records" or "deliberative process" records may be sensitive or confidential only for the period associated with a particular case or with the development of a particular policy document. State statute explicitly identifies some records are explicitly identified as confidential record for their entire life cycle or for a specific period of time.

5. Consider amending section 305.13 as follows:

> ~~All records 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.~~ (a) Records, as defined in section 305.2, created or received in the performance of duty are deemed to be public property.
> (b) The destruction of records shall occur only through the operation of an approved records series retention and disposition schedule. Records shall not be placed in the custody of private individuals or institutions or semiprivate organizations unless authorized by retention schedules.
> (c) Records, as defined in section 305.2, 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.
(d) Non-record materials, as defined in section 305.2, shall be destroyed or disposed of when no longer needed in accordance with policies adopted by the agency.

EXPLANATION:

The proposed revision of this section is designed to clarify the component parts of the section. Records created in the performance of duty are indeed public property. It clarifies that these records may only be destroyed through use of an approved records series retention and disposition schedule and that custody of government records can be transferred to non-government entities only in accord with an approved records retention and disposition schedule. Finally, this amendment would clarify that disposition (destruction or otherwise) of non-record materials is a responsibility of the agency, not the State Records Commission or the State Archives and Records Program.

6. Consider amending section 305.10 adding the following new paragraphs:

k. Provide policies and procedures for the destruction or disposition of non-record materials as defined in section 305.2.

l. Maintain legal custody of all records created by, in the possession of, or under the control of, any non-governmental body or person that are a part of the execution or performance of the duties imposed upon such a body or person by contract with the agency whereby the non-governmental body or person performs a function of the agency.

EXPLANATION:

The first of these amendments is designed to clarify the agency's responsibility to provide guidance to employees regarding the destruction or disposition of non-records materials. It is modeled on directives of the National Archives and Records Administration. Within the framework of federal regulations, federal agencies are required to manage non-record materials and may do so without additional oversight from the National Archives and Records Administration. Within the framework of the proposed definition of "Non-Record Materials" such items as information copies of correspondence or other documents on which no administrative action is recorded or taken; routing slips and transmittal sheets that add no information to that contained in the transmitted material; tickler, follow-up or suspense copies of correspondence, provided they are extra copies of the originals; duplicate copies of documents maintained in the same file; extra copies of printed materials; catalogs, trade journals, and other publications received from other government agencies, commercial firms, or private institutions that require no action and are not part of a case on which action is taken

would be considered non-record material to be disposed of in accordance with agency directives.

The second paragraph carries the provisions of decision item 12 from the November 9, 2007 decisonmaking agenda to the State Archives and Records Act to clarify that the provisions of Chapter 305 apply to records created or maintained by non-governmental bodies when those bodies are under contract with an agency to perform governmental functions.