No Model of Transparency

An Investigation into Two Votes by the Iowa Public Information Board

Iowa Office of Ombudsman

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December 20, 2018

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PREFACE

The Office of Ombudsman (Ombudsman) is an independent and impartial agency in the legislative branch of Iowa state government that investigates complaints against most Iowa state and local government agencies. The governor, legislators, and judges and their staffs fall outside the Ombudsman's jurisdiction. The Ombudsman's powers and duties are defined in Iowa Code chapter 2C.

In any investigation, the Ombudsman aims to determine whether an agency's actions are unlawful, contrary to policy, unreasonable, unfair, oppressive, or otherwise objectionable. The Ombudsman may make recommendations to the agency and other appropriate officials to correct a problem or to improve government policies, practices, or procedures. If the Ombudsman determines that a public official has acted in a manner warranting criminal or disciplinary proceedings, the Ombudsman may refer the matter to the appropriate authorities.

If the Ombudsman decides to publish a report of the investigative findings, conclusions, and recommendations, and the report is critical of a specific agency, the agency is given an opportunity to reply to the report, and the unedited reply is attached to the report.

Introduction

In the late summer of 2017, we were asked to investigate whether members of the Iowa Public Information Board (IPIB)[1] violated Iowa's Open Meetings Law during their considerations of a complaint against the Burlington Police Department (BPD) and the Iowa Department of Public Safety (DPS). Our complainant, Herb Strentz, alleged that IPIB board members improperly cited "litigation" as a reason for closing a portion of its August 25, 2017, meeting. After the board emerged from the closed session, Strentz argued that the vote the board took in open session was improperly vague.

In order to investigate Strentz's complaint, we reviewed the agendas, minutes, and audio recordings from four of IPIB's open-session meetings from 2017. IPIB repeatedly declined to provide us with the minutes and recordings of the closed-session portions of two of those meetings, held on July 20 and August 25. Alternatively, we interviewed board members E.J. Giovannetti, Rick Morain, and Julie Pottorff about discussions and decisions that were made in those closed-session meetings. We also reviewed other pieces of IPIB's casework. We consulted with University of Iowa Associate Dean Emeritus Arthur Bonfield, who drafted the original Open Meetings Law, and we analyzed Iowa law and case law on the issues. Lastly, we reviewed news clips detailing IPIB's actions in those meetings and in the underlying case against BPD and DPS, to better familiarize ourselves with the subject.

This report is a summary of our investigation's findings, conclusions, and recommendations.

IPIB's Actions at the August 25 Meeting

IPIB called a special, telephonic meeting on August 25, 2017, to discuss a case that had by then been a subject of significant public interest for nearly two years. The case centered on whether local and state police had a legal obligation to release the full video recordings, 911 recordings, and other records of a police shooting in Burlington that resulted in the death of a citizen named Autumn Steele.[2] IPIB had decided in October 2016 that BPD and DPS should have released the records to Steele's family and the press, and initiated an administrative enforcement action against the two police agencies.[3] IPIB appointed a special prosecutor in the case and called for a "contested case proceeding" to be heard by an administrative law judge. The proceeding was pending at the time of IPIB's August 2017 meeting.[4]

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[1] Throughout this report, we may distinguish IPIB, the agency, from IPIB board members by referencing "the board."

[2] Steele's family separately filed a federal civil lawsuit against the City of Burlington in connection with the shooting. The case was effectively settled on June 6, 2018, after which a group of media organizations asked a judge to unseal the full video recordings and other records that were attached to a pretrial motion in the case. On September 12, 2018, the judge ordered the video and other records unsealed because they were part of the court record and no longer considered sensitive in light of the settlement. The judge gave no opinion on whether Iowa's Open Records Law should require release or continued confidentiality of the police records.

[3] There has been some turnover in IPIB's board membership since this action was taken.

[4] The case was later decided by Administrative Law Judge Karen Doland on October 5, 2018. Doland ruled that BPD and DPS had violated the Open Records Law by withholding the recordings and ordered the two agencies to release them to Steele's family and the press. BPD and DPS have since appealed Doland's ruling to the IPIB board.

The precise purpose of IPIB's August meeting was not clear to anyone outside the agency. The meeting agenda merely proposed that the Burlington case be discussed privately, citing a section of the Open Meetings Law that authorizes closed sessions for matters in "litigation," or where litigation is imminent.

Prior to the start of the public meeting, with IPIB's recorder running, it was suggested by Pottorff (and, later, during the meeting, by IPIB's executive director, Margaret Johnson) that the meeting could also be closed under a second provision of the law: "to discuss the decision to be rendered in a contested case."

Both sections of law were cited by the board in a motion to close the meeting, and all seven members in attendance voted for closure. The board's attorney, Assistant Attorney General Michelle Rabe, joined the closed session. Forty-six minutes later, the board reconvened in open session and IPIB Chair Mary Ungs-Sogaard announced:

> "I would like to entertain a motion to proceed in accordance with our discussion in closed session."

The motion was moved and seconded. It was then approved unanimously without further discussion or elaboration. One person listening in on the meeting, attorney Michael Giudicessi, spoke up. "That was very informative," he said, sarcastically. "What did you decide to do?"

Pottorff responded: "Well, at this point, Mike, no decision has actually been made." Added Ungs-Sogaard: "Mike, we are in process."

"So everybody in the meeting knows what you just moved to do, but no member of the public gets to know what you just decided to do?" Giudicessi asked.

After a few stray comments by board members and members of the audience, Ungs-Sogaard tried again to answer Giudicessi's question: "Well, you know, it's something that's in litigation, and so we're in process." The meeting then adjourned.

In the next day's newspaper, a reporter for the Burlington Hawk Eye called IPIB's vote "a bizarre and confusing move."

Strentz conveyed a similar sentiment in his August 29 complaint to the Ombudsman: "The wording was so vague and ambiguous," he wrote, "that those in attendance and those with access to the minutes of the meeting are clueless as to what actions, if any, the public agency had in mind."

Strentz, who founded the Iowa Freedom of Information Council in 1975 and personally monitored legislative debates on the establishment of the Open Meetings Law in 1978, also argued that IPIB could not cite "litigation" as a reason to go into closed session since it was not directly involved in the separate civil lawsuit filed by Steele's family.

Iowa's Open Meetings Law

In our consideration of Strentz's complaint, we considered two pertinent areas of the Open Meetings Law:

Specificity in Governmental Agendas and Decisions

An opening policy statement in the Open Meetings Law, at Iowa Code section 21.1, says that the chapter "seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this chapter should be resolved in favor of openness."

Matters to be discussed at a meeting must be preceded at least 24 hours in advance by a public notice that is "reasonably calculated to apprise the public of that information," under Code sections 21.3, 21.4(1)(a), and 21.4 (2)(a).

Additionally, Iowa Code section 21.3 requires governmental bodies to keep minutes of all its meetings that show the "date, time and place, the members present, and the action taken at each meeting."

Closed Session Provisions

Iowa Code section 21.5(1)(c) allows a governmental body to go into closed session with a two-thirds vote of its members to "discuss strategy with counsel in matters that are presently in litigation or where litigation is imminent where its disclosure would be likely to prejudice or disadvantage the position of the governmental body in that litigation."

The word "litigation" is not defined.

Despite the law's allowance for secrecy during some sensitive discussions, section 21.5(3) stipulates that "(f)inal action by any governmental body on any matter shall be taken in an open session …"

In addition, section 21.5(6) states that "Nothing in this section requires a governmental body to hold a closed session to discuss or act on any matter."

Board Members' Explanations

After our review of IPIB's meeting minutes and audio recordings, we had one simple, primary goal: to find out what the board had actually voted on. This information would help us understand why the substance of the August 25 vote was withheld from the public.

Board members Morain and Giovannetti, in separate interviews, told us that the board had authorized Pottorff to continue her previously undisclosed efforts to broker a settlement between

the special prosecutor and the two police agencies. It was revealed during these interviews that settlement talks had first been proposed and authorized by the board in a closed session at its July 20, 2017, meeting. A settlement would have negotiated a partial release by police of the still-contested documentation. Neither board member knew what had prompted talk of a settlement.

We did not understand why it would have been harmful for the public to know that IPIB was attempting to settle the case. IPIB's settlement talks were different than, for example, a real estate negotiation, where a party's bargaining position could be compromised by revealing its target price prematurely. We asked Pottorff why the settlement talks were being kept secret. She did not provide a clear or convincing answer. We suggested to Pottorff that IPIB offer at least some information to the public to explain what it had voted on. She dismissed the suggestion and was adamant that she did not want the public to know of the talks.

Other IPIB officials suggested it was not necessary to explain the board's vote because the Open Meetings Law requires votes only when a board takes "final agency action." As stated earlier in this report, Ungs-Sogaard publicly stated that the matter was still "in process." Shortly thereafter, Johnson told The Des Moines Register that what the board had voted on was "not likely final action."

In any case, Morain told us he regretted the board's decision not to explain its vote. He said he did not understand the majority's insistence on keeping the settlement secret. Giovannetti, who was appointed to the board in January 2017, said he did not feel he was adequately briefed on the history of the Burlington case and was in a poor position to question the proposal to settle it.

IPIB's Previous Meeting on the Subject, on July 20

In advance of IPIB's July 20 meeting, an agenda advised the public that the board might move to closed session after hearing statements from both sides of the Burlington dispute. BPD and DPS had asked IPIB to overrule a decision by Administrative Law Judge Karen Doland that ordered the police agencies to identify all of the records it was withholding from Steele's family and the media. IPIB had agreed to hear the police agencies' arguments for interlocutory appeal during the meeting. The board then planned to discuss the matter in private, citing two possible grounds for closed session: "a contested case" decision and "litigation with counsel." [5]

It was at this closed-session meeting, according to three board members, that the board first gave Pottorff permission to try to negotiate a settlement between the police agencies and the records requesters.

[5] Approved board minutes do not indicate that Assistant Attorney General Michelle Rabe was present at the public portion of the meeting, which, if true, might invalidate the board's claims that it had entered lawfully into closed session "to discuss litigation with counsel." An audio recording revealed that Rabe attended the public portion of the meeting by telephone. But because IPIB has refused our request for closed-session minutes and audio recordings, we cannot independently verify that she also attended the closed session.

When the board came out of the 58-minute closed session, all seven members present voted unanimously to "accept" the police agencies' interlocutory appeal. A second motion was then made to ask the board's attorney "to draft an order as discussed in closed session." That, too, was approved without dissent or further discussion.

It was not clear to those attending the meeting what IPIB had just voted to do. The Des Moines Register apparently understood the votes to mean that IPIB had agreed to *consider* the police agencies' interlocutory appeal. The Register's Jason Clayworth wrote in his next day's story that IPIB had "granted" a "review" and that IPIB "could decide as early as Aug. 17 whether to compel (police) to abide by the order and produce the records inventory."

Pottorff, however, told us in our interview that the board's "acceptance" of the appeal meant that IPIB had decided to overrule Doland's order. She said IPIB decided then and there that it would not require the police agencies to reveal all the records they were withholding from requesters.

But Pottorff's public statements at the July 20 meeting, and those of Ungs-Sogaard, led the public to believe the appeal was yet undecided. According to a recording of the meeting, after Pottorff made a motion for IPIB to "accept" the interlocutory appeal, she explained that:

> "We are taking up the ALJ's ruling. We have jurisdiction to enter a different order, *if we so choose*." (Emphasis added.)

After Pottorff's motion passed, Ungs-Sogaard explained to the board that she would schedule a follow-up meeting for the board "to discuss this order" to be drafted by the board's attorney. Pottorff added, "We'll discuss that further in closed session when it's prepared."

The final draft of the order, which granted BPD's and DPS' interlocutory appeal, was reviewed in a subsequent closed-session meeting on August 17 and then publicly approved by a 7-1 vote. The written order was then made available to the public and press, outlining a decision that IPIB may have actually made 28 days earlier.

Later Settlement Talks Fail

After the board's two closed-door discussions on settlement talks in July and August, Pottorff called board members in advance of the September 21 meeting to inform them that IPIB's special prosecutor, Mark McCormick, had rejected the settlement proposal she had brokered, Morain told us.

In light of McCormick's response, Morain said, no settlement agreement would be presented to the full IPIB board for further discussion or a vote.

Word of IPIB's settlement talks has, to our knowledge, never been publicly disclosed.

Analysis

We were asked in this case to determine whether IPIB's board gave improper reasons for going into closed session during its August 25 meeting, and whether its vote at that meeting was impermissibly vague. Because the issues discussed at this meeting were also discussed at IPIB's July 20 meeting, our review of Strentz's complaint extended to this prior meeting as well.

Litigation as Grounds for Closed Session

We have heard many reporters and laypersons express their belief that the term "litigation" in the Open Meetings Law means "lawsuit." This interpretation leads some, like Strentz, to presume that governmental bodies may not cite the law's litigation provision as a basis to enter closed session unless a court action is under consideration or underway.

We asked Professor Bonfield, author of the Open Meetings Law, whether that was a defensible interpretation. He said such a strict interpretation of the term is "absolutely wrong" since the bulk of attorney work in the legal profession involves administrative law. We have seen legal writings that refer to administrative law as "litigation." Thus, we defer to Bonfield that governmental bodies can cite litigation as a reason to enter closed session to deliberate on administrative decisions.

With that said, the Open Meetings Law does not give IPIB and other governmental bodies carte-blanche authority to have private discussions on *any* legal matter. The law explicitly states that closed-session discussions on litigation matters must involve "strategy with counsel." Furthermore, those discussions can only be moved to closed session if disclosure of those discussions "would be likely to prejudice or disadvantage the position of that governmental body in that litigation."

None of the board members we spoke with has explained to us how a mere mention of a possible settlement in the Burlington case would have prejudiced or disadvantaged IPIB. In our experience, governmental bodies usually cite litigation to enter closed session when they are facing a lawsuit and want to discuss their financial and legal options without exposing themselves to further liability. In this case, it is our opinion that IPIB has no stake in this dispute that would expose the agency to any risk of liability.

Separately, we do not definitively know whether, or to what extent, the board's counsel, Rabe, provided legal advice to the board in its closed-session talks, because IPIB has refused to provide us access to recordings of the meeting. In response to our arguments for access, Rabe told the board at its September 21 public meeting that the closed sessions in July and August included "discussions amongst yourself and with me." She opined that the board properly went into closed session "to strategize" with her as legal counsel. But Morain told us that he recalled the closed-session conversations were dominated by Pottorff—not Rabe. "I don't remember Michelle giving us much advice at all, or us questioning her very much," he said.

For these reasons, without the benefit of recordings that IPIB refuses to release, we cannot independently conclude with confidence that IPIB had proper grounds to close its conversations on settlement negotiations for reasons of "litigation."

The board's second reason on August 25 for going into closed session—"to discuss the decision to be rendered in a contested case"—might have been appropriate if it had been properly executed.[6] It must be remembered, however, that the agenda for the meeting did not specify a "contested case" decision as potential grounds for closing the meeting; those grounds were verbally proposed by the board at the time of its vote, with no advance notice to the public. The agenda listed only "litigation" as the reason for the possible closed session.

We believe the last-minute addition of the second basis for entering closed session was problematic. A Sunshine Advisory issued by the Attorney General in 2004 urges precision in closed-session agendas, noting that "closed session topics must be disclosed on the agenda in advance to give the public an opportunity to assess the reason for closed session, (and) hold accountable the members who vote to close a session."

If the discussions in the August 25 closed session were revealed and were found to fall outside the boundaries of "litigation" as described in the Open Meetings Law, we are not convinced that the "contested case" basis for closure would be valid, since it was not foreshadowed on the agenda. That would mean the board entered closed session illegally.

Vague Votes

IPIB's vote on July 20 to "draft an order as discussed in closed session" and its vote on August 25 to "proceed in accordance with our discussion in closed session" were uninformative in the extreme.

Two IPIB representatives defended the vagueness of the August 25 vote by arguing that the vote did not constitute final agency action, and therefore, specificity was not required. Again, without the ability to listen to closed-session recordings that would shed light on board members' discussion and directives, we cannot take it on faith that the board did not take final action. If, for example, in the July 20 meeting on the interlocutory appeal, specific terms of the board's decision were explicitly enumerated and firmly agreed upon, Rabe's draft may have been a formality and it could be argued that the board's directives were a final action.

If, on the other hand, the board's closed-session directives were merely preliminary actions, we have to question why they were put to a vote at all. Pottorff said she suggested a vote because of the intense press interest in the subject. "I thought everybody would be fried" if no vote was called, she said during our interview. Perhaps it did not occur to Pottorff or the board that a vote without an explanation might prompt a louder outcry than if no vote had been taken at all.

[6] We say "might" because the law could be interpreted to apply only to the *final* decision in a contested-case hearing. Note that the law expressly allows closure to discuss "<u>the</u> decision," not "<u>a</u> decision."

Regardless, it is irrelevant in our view whether IPIB's two votes constituted final agency action or not. If a vote is taken, the vote should be explained. Iowa law clearly states that "the basis and rationale of governmental decisions, *as well as those decisions themselves*" should be "easily accessible to the people." The decisions IPIB made in open session on July 20 and August 25 were not easily accessible to the people. The votes also failed to specify what action was taken, in apparent violation of Iowa Code section 21.3.[7]

Professor Bonfield agreed with us that voting on a matter in open session without specifying the matter was irregular. When we shared specifics with him about IPIB's actions at its August 25 meeting, he sighed audibly and said "the only reasonable thing" to do was to offer further explanation to the public.

"If I were them, to get out of this thing, I would say (publicly) that they all voted on getting their attorney to draft something they will consider in the future," Bonfield said.

We made a similar suggestion to Pottorff on September 11, 2017. Our suggestion was rejected.

Closed-Session Minutes and Recordings

Our ability to fully evaluate the propriety of IPIB's actions was handicapped by the board's decision to withhold closed-session minutes and recordings from us. A majority of IPIB's board members cited attorney-client privilege as its reason to deny us access to the records. We showed the board that recent changes to the Open Meetings Law exempt our office from the access restrictions placed on closed-session records,[8] but to no avail. We also suggested to the board that it provide us with abbreviated recordings, removing any sections where legal advice was given. We did not receive a response to our suggestion.

IPIB's legal counsel, Rabe, acknowledged that it is not clear whether common-law attorney-client privilege trumps the Iowa Code provision granting us access to closed-session records. Pottorff correctly noted that our access to closed-session materials is triggered only if the information we seek is unavailable through other reasonable means.

We did take steps to find out what had occurred in the closed-session meetings without the benefit of the recordings. That was done through interviews of three board members who participated in the meetings. Although the board members were cooperative with us, their memories and understanding of the closed-session proceedings on July 20 and August 25 were imperfect and, in some cases, inconsistent. Morain took no notes during the meetings and acknowledged that his recollection of all the details of the closed-session meetings was spotty. Giovannetti, who was named to the board more than a year after the Burlington case was initiated, admitted he lacked a thorough knowledge of the case when he was called upon to vote

[7] We also have to ask why, if board members felt compelled on August 25 to give Pottorff permission to continue settlement negotiations, they didn't take a similar vote on July 20 to give her that permission in the first place.
[8] See Iowa Code section 21.5(5)(b)(2). Although this law gives us explicit access to closed-session records, it also requires us to maintain the confidentiality of the records. We repeatedly assured IPIB we would abide by that legal requirement.

on settlement developments. Based on those interviews, we were not convinced that our attempts to glean more precise information from other board members would be any more productive or reliable.

Because of these predictable shortcomings in board members' testimony, our review of the board's actions without closed-session records is incomplete. Simply put, when trying to reanimate the proceedings of a months-old meeting, there is no substitute for hearing a verbatim account of it.

We will not rehash all of the legal arguments we previously made in support of our need for IPIB's recordings, or of the board's discretion to share the recordings with us. We initially assumed the board, being especially cognizant of the value of government transparency, would give us the records necessary to complete our investigation. When the board balked, we issued a subpoena and put our arguments in writing, believing that would provide members the basis they needed to reverse their decision.[9] Instead, two members of the board, Pottorff and Keith Luchtel, wrote a joint memo that took a defensive posture on the issue.[10]

The memo, read for the first time and ratified by the board at its November 16 meeting, relied on an Iowa Supreme Court decision that concerned closed-session negotiations in a civil lawsuit filed against a school district.[11] That lawsuit carried financial implications for the school district that was sued in the case. We, however, are not a private litigant, nor are we seeking financial damages from IPIB. Ours is a regulatory action which seeks only to correct any missteps that may have been committed by IPIB. That is an important distinction. And it is one that at least one board member seemed to understand.

"If we did it right, the validation (from the Ombudsman) would help the appearance of this board," Morain told the board at its September 21 meeting. "If we did it wrong, I'd like to know what we did wrong. I think it's helpful to this board to have that neutral examination."

Morain cast one of two "no" votes on a board motion to deny the Ombudsman's request for its closed-session records.

We remain unconvinced that IPIB has the legal authority to deny us the ability to hear its closed-session recordings and settle Strentz's complaint. The Legislature gave us express access to closed-session records in direct response to the Attorney General's advice that the state's secretive licensing boards can withhold such records from us.[12]

Nevertheless, we have decided not to make our arguments in court at this time, due to the commitment of time and resources a lawsuit would require. It makes little sense for us to spend years to resolve an argument that could be easily settled with a few moments of self-awareness

[9] See Attachment A.
[10] See Attachment B.
[11] See *Tausz v. Clarion-Goldfield Comm. Sch. Dist*., 569 N.W.2d 125 (1979).
[12] *A System Unaccountable: A Special Report on Iowa's Professional Licensing Boards*, February 28, 2017, at 2-3, *available at* https://www.legis.iowa.gov/docs/publications/OSR/854006.pdf.

and reflection on the part of IPIB's board members. A long court fight would not give Strentz and others the speedy satisfaction they desire, but would only add to their frustration about a government that purports to act in their interests.

We believe we can make some findings in this complaint without the closed-session records.

Findings and Conclusions

It is obvious to us, based on the letter of the Open Meetings Law and input from the academic who wrote it, that IPIB violated Iowa Code sections 21.1 and 21.3 when its members failed to specify what they had voted on after emerging from closed sessions on July 20 and August 25, 2017. The decisions the board made on those dates were not easily accessible to the people, as required by law. It is clear that both votes caused confusion among members of the press and public who attended. Any attempts by IPIB officials to justify their uninformative votes are tone-deaf and fly in the face of transparency.

Iowa citizens look to IPIB, more than any other state agency, to reflect the highest ideals of the Open Meetings Law. That means always erring on the side of openness and never hunting for loopholes to skirt the spirit of the law. If IPIB had tried to see this issue from the public's perspective, it could not have overlooked the absurdity of its two "public" votes.

IPIB's vague pronouncements are even more confounding when one tries to imagine what harm would have resulted if word of its settlement talks had gotten out. We suppose it is possible that some pressure might have been brought to bear on IPIB, BPD, and DPS by third parties with an interest in the case. But exposing ideas to the light of day and inviting debate among the public is the very reason we have an Open Meetings Law. That is the price of democracy, and it should not be viewed as a hindrance.

IPIB's protectionist stance in this case also extended to our request for its closed-session records. Our only aim in asking for IPIB's closed-session recordings was to see whether the board had erred when it closed its meetings to the public. IPIB's staff sometimes calls upon other government agencies to do the same. Nevertheless, in entertaining our request, one board member warned of the precedent it might set.

"If we go down this path," Luchtel said, "I guess anytime they want to come and listen to a tape, they just do that."

Indeed, that is the role of the Ombudsman, or any official watchdog: to investigate allegations of government wrongdoing through an analysis of agencies' records and statements. By his opposition to our oversight, Luchtel undermines the authority of his own regulatory agency—and reneges on its repeated promises of openness. In every year since its formation in 2012, IPIB has issued this statement to the public:

It is the goal of the board to be the state's most transparent state agency.

IPIB's handling of this matter has been anything but a model of transparency. When IPIB resists others' efforts to fully evaluate its actions, even despite assurances of confidentiality, it sends the signal to other governmental agencies that they may do the same. Its hypocrisy is contagious and damages the credibility of all government.

We do not know with certainty whether IPIB legitimately entered closed sessions for "litigation" purposes on July 20 and August 25, because we were not given access to recordings that were vital to our consideration of that question. However, we think it was improper for IPIB to add a second reason for closure at the August 25 meeting without advance notice to the public.

In summary, we conclude that IPIB's board violated at least two of the laws they are charged with enforcing. We substantiate Strentz's complaint that IPIB acted contrary to Iowa Code sections 21.1 and 21.3 when it took a vote on August 25 without explaining what it had voted on. We also substantiate a self-initiated complaint for the same violations at IPIB's July 20 meeting. Given what we know, it is indeterminate whether IPIB acted contrary to law when it entered into closed session at its August 25 meeting.

Recommendations

In order to rectify this substantiated complaint, the Ombudsman recommends that IPIB:

- Issue a statement at a public meeting to explain what it voted on after emerging from closed sessions at its July 20 and August 25, 2017, meetings. Any potential problems that might have arisen from the disclosure of the settlement talks would now appear to be moot since the settlement was rejected by the special prosecutor.

- Issue a statement at a public meeting that expresses regret for its failure to explain those two votes at the time the votes occurred, and acknowledge that those votes violated the Open Meetings Law.

- Issue a statement at a public meeting acknowledging that its attempt to cite "a contested case" decision as a basis for entering closed session on August 25 was improper since it was not included on its agenda at least 24 hours in advance of the meeting.

- Reconsider the Ombudsman's request to release recordings and minutes of its closed-session meetings on July 20 and August 25, 2017, with the understanding that the Ombudsman will maintain the confidentiality of the records.

Attachment A

STATE OF IOWA

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November 2, 2017

Iowa Public Information Board
Wallace Building, Third Floor
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Sent via email: IPIB@iowa.gov

Subject: Subpoena

Dear Members of the Iowa Public Information Board:

Last month you met to discuss my office's request for the records of your closed-session meetings on July 20 and August 25, 2017. During that discussion, you voted not to provide the records because the records captured discussions you believe are protected by attorney-client privilege. You decided in an open meeting on September 21 not to waive that privilege.

I am enclosing a subpoena for these closed-session records. It is my position that you have misapplied the attorney-client privilege in this case. The Iowa Legislature has granted the Ombudsman authority to access closed-session records under chapter 21 without exception. Specifically, no exception to the Ombudsman's authority is delineated under section 21.5(5)(b)(2) when a governmental body enters closed session under section 21.5(1)(c) or when it otherwise discusses matters with legal counsel under chapter 21.

I want to impress upon you that you are doing governmental work. I understand that the Board has a recognized attorney-client relationship with its legal counsel, but privileged communications are significantly limited when you, as a Board, hold a meeting with your attorney in closed session under chapter 21. Even where the Iowa Supreme Court has recognized an attorney-client privilege in communications between a governmental body and its attorney, it cautioned that the privilege should not be applied blindly and should be made on a case-by-case basis. See *Tausz v. Clarion-Goldfield Community School Dist.*, 569 N.W.2d 125 (Iowa 1997). And when it is a governmental agency seeking the records of another governmental agency pursuant to an investigation, as my office is doing, the courts will closely scrutinize the claimed privilege. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), citing Restatement (Third) of the Law Governing Lawyers § 74 cmt. b ("More particularized rules may

be necessary where one agency of government claims the privilege in resisting a demand for information by another.").

You should be under no illusion that your closed-session communications with your legal counsel benefit from absolute confidentiality. By law, closed sessions are required to be audio recorded and minutes must be created. The only logical purpose of these requirements is the anticipation that those records could be reviewed by an outside party. If the Legislature wished to grant governmental bodies absolute confidentiality in their communications with attorneys, the Legislature could have provided an exception to the record-keeping requirement under section 21.5(1)(c).

The closed-session records we have requested are necessary for my office to complete its investigation. The Iowa Legislature found it necessary for my office to have access to these records in order for us to do our work. It is inappropriate for you to raise the attorney-client privilege to deny my office access to records it clearly has a right to obtain under the law.

I assure you that I will maintain the confidentiality of the closed-session records in my office's possession, as required under sections 2C.9(4) and 21.5(5)(b)(2). Some members have expressed concern that my office's records are available to the general assembly, a standing committee of the general assembly, or the governor's office. Please let me clarify: Those entities have access to my office's records and files, but not to confidential files they would not otherwise have access to. As codified in our administrative rules, the general assembly, a standing committee of the general assembly and the governor do <u>not</u> have access to confidential information provided by other agencies:

> **141—3.10(2C,22) Disclosure without consent of subject.**
>
> . . .
>
> **3.10(2) Confidential records.** To the extent allowed by law, the agency may disclose confidential records without the consent of the subject of a confidential record. Following are instances where the agency may disclose confidential information without consent of the subject:
>
> . . .
>
> c. Disclosure of any records, upon request, to the general assembly, any standing committee of the general assembly, or the governor, under Iowa Code section 2C.8, <u>except that confidential information provided by other agencies shall not be disclosed</u>. (Emphasis added.)

The Ombudsman and the Iowa Department of Human Services have been operating under this same interpretation of our statutory language without concern for 30 years. The records that DHS routinely provides my office include highly confidential child welfare records. We have not had any conflicts arise between my office and the general assembly or the Governor's office attempting to access those records since our office was created.

I would also point out that it is through the Board's own actions the content of its closed session has become the subject of my office's investigation. The Board has thereby impliedly waived the attorney-client privilege. An implied waiver occurs when a litigant has placed in issue a

communication which goes to the heart of the claim in controversy. 81 Am. Jur. 2d *Witnesses* § 329; See also *Squealer Feeds v. Pickering*, 530 N.W.2d 678 (Iowa 1995) (abrogated on other grounds). Board members individually and as a whole have described to my office in varying degrees of detail the discussions that took place in closed session. Even the Board's legal counsel, Assistant Attorney General Michelle Rabe, justified the Board's actions on September 21 by describing in open session why the Board entered closed session and her role in the closed session.

An attorney-client privilege may be waived by conduct "making it unfair for a client to invoke the privilege." *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633 (Iowa 2004). The closed session is the central issue of my office's investigation and the Board has disclosed at least some of the content of those meetings to my office already. The only way my office can verify statements made by Board officials, and evaluate the complaint we have received, would be to review the closed-session records. See *Union County, IA v. Piper Jaffray & Co.*, Inc., 248 F.R.D. 217, 220 (S.D.Iowa 2008). It would be unfair for the Board to keep secret objective evidence that my office needs to complete its investigation.

The Board has chosen to retain evidence that is necessary for my office to conduct a thorough investigation. My office has the legal authority to access the closed-session records, and the public purpose of the records' confidentiality referenced in chapter 21 will be maintained even after disclosure to my office. Any attorney-client privilege that may apply has been waived through the actions and statements of board officials.

Sincerely,

Kristie Hirschman
Ombudsman

KH/AT/jbc
Enclosure: Subpoena Duces Tecum

cc: Margaret Johnson, IPIB Executive Director

1703410a

IOWA OFFICE OF OMBUDSMAN

IN THE MATTER OF IOWA OFFICE OF OMBUDSMAN INVESTIGATION REGARDING THE IOWA PUBLIC INFORMATION BOARD	)	**CASE NO. SUBPOENA NO. 17-13**
	)	**SUBPOENA TO PRODUCE, BOOKS, DOCUMENTS, ELECTRONICALLY STORE INFORMATION, OR TANGIBLE THINGS OR TO PERMIT INSPECTION OF PREMISES**

To: Iowa Public Information Board
c/o Margaret Johnson
502 East 9th Street
Des Moines, IA 50319

YOU ARE COMMANDED, pursuant to Iowa Code section 2C.9(5), to produce at the Office of Ombudsman, 1112 E. Grand Ave., Des Moines, Iowa, no later than the 30th day of November, 2017, the following books, documents, electronically stored information, or tangible things, and permit their inspection, copying, testing, or sampling of the material:

- Audio recordings of the Board's closed-session meetings on July 20, 2017, and August 25, 2017
- Minutes of the Board's closed-session meetings on July 20, 2017, and August 25, 2017

Records produced in compliance with this subpoena which are confidential by law shall be kept confidential except as provided by law, a court order, or the legal custodial or other person authorized to release such information.

NOTE: Failure to comply with this subpoena may subject you to further proceedings against you in the District Court.

Date: 11/2/2017

Kristie Hirschman

Kristie Hirschman, Ombudsman

Attachment B

502 East 9th Street
Des Moines, Iowa 50319
www.ipib.iowa.gov

Margaret Johnson, JD
Executive Director
(515) 725-1783
margaret.johnson@iowa.gov

November 16, 2017

Kristie Hirschman
Ombudsman
Ola Babcock Miller Building
1112 East Grand Avenue
Des Moines, Iowa 50319

Dear Ms. Hirschman:

At a meeting of the Iowa Public Information Board on September 21, 2017, the Board voted seven to two to deny the request by your office for access to closed session tapes and minutes from meetings held on July 20 and August 25, 2017, because these materials are confidential and subject to attorney-client privilege. The closed sessions concern a pending contested case, In the Matter of: Burlington Police Department and the Department of Public Safety, Division of Criminal Investigation, 15FC 0030 and 15FC 0034. The sessions were closed to discuss with the Board's legal counsel the legal issues involved as well as the decision to be rendered in this case pursuant to Iowa Code Section 21.5, paragraphs 1(c) and (f) of the Open Meetings Law. You have now mailed the Board a subpoena demanding compliance by November 30, 2017. The Board is writing to reaffirm the decision to deny access to the closed session tapes and minutes and to respond to the issues raised in your letter.

It is settled that attorney-client privilege applies to government officials and may be claimed to deny access to closed session tapes and minutes when the session is closed to confer with counsel about pending litigation. Tausz v. Clarion-Goldfield Comm. Sch. Dist., 569 N.W.2d 125, 127-28 (1997) ("[A] governmental body may be a client for purposes of invoking the privilege. . . [W]e deem it appropriate to recognize an attorney-client privilege with respect to some communications between public agencies or public officials and their lawyers"). A governmental body may seek advice of counsel on matters that fall under several of the various grounds for closing a session under Iowa Code chapter 21; however, section 21.5(1)*c*, applicable here, is the only statutory ground for closure that expressly recognizes the need to discuss strategy with counsel about pending litigation as the sole basis needed to close a session. With the underlying contested case still pending, the need for confidentiality implicates the deliberative privilege as well. *See* Citizens' Aide Ombudsman v. Edwards, 825 N.W.2d 8 (2012) ("The mental process privilege is a corollary to the deliberative process privilege that protects uncommunicated motivations for a policy or decision."), *quoting from*, Thomas v. Cate, 715 F.Supp. 2d 1012, 1024 (E.D. Cal. 2010).

Although you assert that the Iowa Legislature granted the Ombudsman authority to access closed session tapes and minutes "without exception," the Board believes you overstate your right of access. Iowa Code chapter 2C itself includes language that expressly denies the Ombudsman access to attorney work product and communications that are confidential under attorney-client privilege. With respect to the Ombudsman's powers section 2C.9 states that the Ombudsman may. . . "[r]equest and receive from each agency assistance and information as necessary in the performance of the duties of the office" and "may examine any and all records and documents of any agency unless its custodian demonstrates that the examination would violate federal law or result in the denial of federal funds to

the agency." But "*[t]his subsection does not permit the examination of records or access to hearings and proceedings which are the work product of an attorney under section 22.7, subsection 4, or which are privileged communications under section 622.10.*" Iowa Code section 2C.9(4) (emphasis added). Any later enacted legislative authority for the Ombudsman to access closed session tapes and minutes must be read in light of this general limitation.

The Board does not contend that closed session tapes and minutes are absolutely confidential and can never be disclosed for any purpose. From 1971 the Open Meetings Law has provided for *in camera* review by a court to determine whether closed session tapes and minutes should be disclosed to parties in an enforcement action under Chapter 21. In 2015 the General Assembly enacted a statute to provide the Ombudsman access to closed session tapes and minutes without *in camera* review; however, access is only permitted "when such examination is relevant to an investigation under chapter 2C *and the information sought is not available through other reasonable means*." Iowa Code section 21.5b(2) (emphasis added). While pursuing the current investigation your staff has talked directly to at least three members of the Board. To our knowledge, no board member contacted by your staff has refused to answer your questions. In addition, the Board's attorney acknowledged her representation of the Board and presence in the closed sessions at issue and stated in open session that no violation of Chapter 21 has occurred. The Board believes you have available sufficient information through "other reasonable means" for you to conclude your investigation without the need to access the closed session tapes and minutes.

The Board does not agree that any individual discussions between board members and your staff constituted a waiver of attorney-client privilege that now entitles the Ombudsman to access the closed session tapes and minutes. Although it true that attorney-client privilege can be waived, no individual board member has the authority to waive attorney-client privilege for the entire Board. *See* Interfaith Housing Delaware, Inc. v. Town of Georgetown et al., *841 F. Supp. 1393, 1399-40 (D. Del. 1994)*("Because Tyndall was merely one of the members of Georgetown's Town Council, the Court is not convinced that a reasonably prudent person would assume Tyndall had the authority to waive the privilege."). Accordingly, it is the vote of the full Board on September 21, 2017, that determined whether the Board would waive attorney-client privilege and allow access to the closed session tapes and minutes.

Continued confidentiality of the deliberations of the Board with their legal counsel is especially important because the pending contested case has not yet been decided. At the September 21 meeting board members raised concerns that your statutes do not support your assurance that confidential materials obtained in the course of your investigation will not be disclosed. While your rules purport to deny elected state officials access to any confidential materials provided to your office, your enabling act expressly states that "the general assembly, any standing committee of the general assembly or the governor *may require disclosure of any matter and shall have complete access* to the records and files of the ombudsman." Iowa Code section 2C.8 (emphasis added). This language appears to be at odds with your rule.

It is the Board's intention to cooperate with this investigation and additional board members may be willing to answer further questions if you believe this is necessary. Indeed, the Iowa Supreme Court in Tausz specifically noted that denial of access to closed session tapes and minutes "did not provide a legal impediment" to making inquiry of individual board members on a disputed issue. Tausz, at 129. Should the Ombudsman persist in the view that individual board member discussions with your office effectively waive attorney-client privilege for the entire Board, the likely result would be to curtail the willingness of individual board members to provide you with any further information.

The Board has not been provided with a copy or a summary of any complaint made against it or a statement of any facts that would support a finding that any law has been violated. Based on conversations with your investigator it

is the Board's understanding that your investigation relates only to the wording of the open meeting motion passed following the adjournment of the closed session on August 25.

The Board must preserve its right to seek legal counsel, and Board members must feel free to discuss legal matters confidentially with legal counsel in a closed session as expressly authorized by law. Consequently, the Board must stand by its vote to decline to waive attorney-client privilege and respectfully state its unwillingness to comply with your subpoena.

On Behalf of the Iowa Public Information Board:

Mary L. Ungs-Sogaard
Chair, Iowa Public Information Board

IPIB's Reply

IPIB
Iowa Public Information Board

502 East 9th Street
Des Moines, Iowa 50319
www.ipib.iowa.gov

Margaret Johnson, JD
Executive Director
(515) 725-1783
margaret.johnson@iowa.gov

November 29, 2018

Kristie Hirschman, Ombudsman
Office of Ombudsman
1112 East Grand Avenue
Des Moines, Iowa 50319

Dear Ms. Hirschman:

The Iowa Public Information Board is writing in response to your proposed draft report which takes issue with our refusal to provide access to closed session tapes related to a pending contested case. The closed session discussions are subject to attorney-client privilege which we have declined to waive. Your own statute, Iowa Code section 2C.9, expressly "does not permit the examination of records or access to hearings and proceedings which are the work product of an attorney . . . or which are privileged communications. . . ." Despite this statutory limitation on your authority you have pursued the tapes of privileged discussions to investigate compliance with the Open Meetings Law, even though the tapes are completely unnecessary to resolution of the issues you have raised and even though Professor Arthur Bonfield agrees that no violations of the Open Meetings Law have occurred. We recap our arguments for the benefit of those who may read your report.

Last fall your office requested access to closed session minutes and tapes from meetings held on July 20 and August 25, 2017, concerning a pending contested case, In the Matter of: Burlington Police Department and the Department of Public Safety, Division of Criminal Investigation, 15FC 0030 and 15FC 0043. At a meeting of the Iowa Public Information Board on September 21, 2017, the Board voted seven to two to deny the request by your office for access to closed session tapes because these materials are confidential and subject to attorney-client privilege. The sessions were closed to discuss with the Board's legal counsel the legal issues involved as well as the decision to be rendered in this case pursuant to Iowa Code Section 21.5, paragraphs 1(c) and (f) of the Open Meetings Law. Following the vote by the board your office issued a subpoena demanding compliance by November 30, 2017. At that time the Board wrote to reaffirm its decision and explain the legal basis for its refusal to comply.

Although your office is authorized to enforce a subpoena in court under Iowa Code section 2C.9(5) where a neutral decision maker could decide the issue you raise, you chose not to do so. Now, nearly nine months later, you have prepared a report critical of the Board and provided the Board this opportunity to reply until November 30, 2018, as required by Iowa Code section 2C.15. We continue to assert attorney-client privilege and find nothing in your report that persuades the Board to alter this decision.

The report is prepared in response to a written complaint asserting two points: first, that the sessions were closed illegally because an administrative hearing does not qualify as "litigation" for purposes of applying Iowa Code section 21.5(1)(c); and, second, that a motion made in open session at the conclusion of the closed session on August 25, 2017, did not adequately explain what further action the Board would be taking upon the advice of counsel. Neither issue requires access to the Board's closed session tapes for resolution.

As to the first point, your own report states that Ombudsman's investigator sought the advice of Professor emeritus Arthur Bonfield of the University of Iowa Law School on whether the term "litigation" is limited to court proceedings and does not include administrative actions. In Professor Bonfield's opinion the term "litigation" does apply to administrative hearings. We point out that the Ombudsman's own rules recognize this. Rule 3.12 (2), entitled "*Litigation files*" provides that "[t]he litigation files contain information regarding litigation or anticipated litigation, which includes judicial and administrative proceedings."

In addition, the Board amplified the grounds for closing by verbally including Iowa Code section 21.5(1)(f) as a reason for going into closed session. This subsection provides for a closed session to "discuss the decision to be rendered in a contested case." In an attempt to undercut this ground for closing you assert that a verbal motion violates the notice and agenda requirements of Iowa Code section 21.3 because this ground was not printed in the tentative agenda *and* this subsection applies only to "the" decision to be rendered and not to a preliminary decision. You cite no authority for this technical construction of the law. The only statutory requirement for such specificity is contained in Iowa Code subsection 21.5(2) pertaining to the procedure for going into closed session. The notice and agenda clearly apprised the public that a closed session would be held to discuss the pending contested case and lawful reasons both in writing and verbal were given prior to closing. A member of the Board has also consulted with Professor Bonfield who concurs in this conclusion.

As to the second point, it is undisputed that no final action was taken on August 25, 2018. Accordingly, the Board could have returned to open session and said nothing at all. But, as a courtesy to people who had been waiting, the Board simply made a motion indicating the Board would be proceeding with the legal strategy discussed in closed session. Immediately upon adjournment, the Board chair responded to audience inquiries that no final action was taken on the matter and that the matter was still in process. An investigator later contacted three members of the Board seeking to ascertain what occurred in the closed session. All three were forthcoming and advised that legal strategy and possibilities for settlement were discussed. In conversation with one Board member the need for access to the closed session tape was justified as necessary to gather information to advise the Board on how the motion could have been phrased. There is no need to waive attorney-client privilege and provide access to the discussion to advise the Board about a motion that need never have been made.

The Board is troubled by a report harshly criticizing the Board for asserting attorney-client privilege. The report seems to doubt that attorney-client privilege even applies in this circumstance. The Iowa Supreme Court has expressly recognized that attorney-client privilege applies to government officials and may be claimed to deny access to closed session tapes and minutes when the session is closed to confer with counsel about pending litigation. Tausz v. Clarion-Goldfield Comm. Sch. Dist., 569 N.W.2d 125, 127-28 (1997) ("[A] governmental body may be a client for purposes of invoking the privilege. . . [W]e deem it appropriate to recognize an attorney-client privilege with respect to some communications between public agencies or public officials and their lawyers").

Although the Ombudsman does not seem to believe settlement discussions warrant confidentiality, few, if any, attorneys would discuss potential settlement terms in open session. The report conveniently omits the fact that counsel for the Board appeared by telephone at the open meeting on September 21, 2017, which was attended by the Ombudsman's staff. In open session the Board's attorney acknowledged her representation of the Board and participation in the closed sessions and stated that no violation of Chapter 21 occurred. Most significantly, she plainly stated that the closed sessions were indeed privileged and it was up to the Board to decide whether to waive that privilege. The Board, therefore, has acted in a manner consistent with Iowa Supreme Court precedent and in accordance with advice of legal counsel.

Nothing in the Ombudsman's statutes or rules supports any right to access discussions that are subject to attorney-client privilege absent a waiver. The Ombudsman's statutes and rules acknowledge that records may be subject to attorney-client privilege. The grant of powers to the Ombudsman contained in Iowa Code section 2C.9 limits access to these privileged records by stating: "This subsection does not permit the examination of records or access to hearings and proceedings which are the work product of an attorney under section 22.7, subsection 4, or which are privileged communications under section 622.10." Further, rule 3.11(2)(d) states that records subject to attorney-client privilege are confidential. Accordingly, the Ombudsman has no authority to demand closed session tapes that are subject to attorney-client privilege. Indeed, the statutes extend special status to the attorney-client privilege by excluding privileged records from the reach of the Ombudsman's examination. This special status afforded the attorney-client privilege is not only recognized in the Ombudsman's own statutes and rules but is found throughout the law. Attorney work product is confidential under Iowa Code sections 22.7 (4) and 622.11, Iowa Rule of Civil Procedure 122(2), Federal Rule of Civil Procedure 26(b)(3), and case law. Attorney-client communications are confidential under Iowa Code sections 622.10 and 622.11, the rules of evidence, the Code of Professional Responsibility, and case law.

Nothing in Iowa Code sections 21.5(5)b(1)-(2) addressing the Ombudsman's access to closed session tapes abrogates these attorney-client protections. To the contrary, the protection specifically mandated in Iowa Code section 2C.9 is reinforced by specific reference. The Ombudsman chose to disregard this right explicitly recognized in its own enabling statute and self-adopted governing rules and served a subpoena on the Board who had asserted attorney-client privilege. Although Iowa Code section 21.5(5)b(1)-(2) does provide for access to closed session tapes, the grant of authority is limited to only those situations "when such examination is relevant to an investigation under chapter 2C *and the information sought is not available through other reasonable means*." Iowa Code section 21.5(5)b(2) (emphasis added). The Board believes you have available sufficient information through "other reasonable means" for you to conclude your investigation without the need to access the closed session tapes and minutes.

This complaint arises out of a misunderstanding of the law and resulting confusion. It should have been dismissed with an appropriate explanation to the complainant. Instead a report, petulantly misnamed, is presented with incorrect conclusions and recommendations. Accordingly, the Board responds to the specific recommendations contained in your report as follows:

- The first recommendation calls upon the Board to explain publicly the vote that was taken upon adjourning the closed session on August 25, 2017. This was already done immediately upon adjournment. No further action is necessary. This conclusion is reasonable to Professor Bonfield who was unaware that a public explanation already had been given when he met with the Ombudsman's Office.

- The second recommendation calls for acknowledgment by the Board of a violation of the Open Meetings Law which did not occur, an opinion shared by independent counsel for the Board and by Professor Bonfield.

- The third recommendation calls for acknowledgment that citation of a contested case decision pursuant to Code subsection 21.5(1)(f) in the motion to go into closed session violated the agenda requirements of Section 21.3. This would perpetuate an incorrect interpretation of Sections 21.3 and 21.5, an opinion shared by Professor Bonfield.

- The fourth recommendation essentially calls upon the Board to reconsider its lawfully based refusal to comply with the Ombudsman's subpoena as stated to the Ombudsman on November 16, 2017.

In order to serve the public, the Board must feel free to discuss legal matters confidentially with legal counsel in a closed session as expressly authorized by law. Consequently, the Board must exercise its rights to wholly reject the findings, conclusions and recommendations contained in the report pursuant to Code Sections 2C.15 through 2C.17.

Sincerely,

Mary L. Ungs-Sogaard
Chair, Iowa Public Information Board

IPIB Board Member Rick Morain's Reply

This document is in response to recommendations made to the Iowa Public Information Board ("the Board") in the Iowa Ombudsman's September 19, 2018, document, "No Model of Transparency: An Investigation into Two Baffling Votes by the Iowa Public Information Board."

The Ombudsman's document makes four recommendations for the Board to consider, following the Ombudsman's finding that substantiates a complaint to her office from complainant Herb Strentz. This response considers each of the recommendations separately.

1) The Ombudsman recommends that the Board, at a public meeting, explain what it voted on after emerging from closed sessions at its July 20 and August 25, 2017, meetings. The Ombudsman, relying on statements made separately to her by several Board members, states that in the closed sessions the Board agreed to have one of its members engage in possible settlement talks between the Board's special prosecutor on the one hand and the Burlington Police Department (BPD) and the Iowa Division of Criminal Investigation (DCI) on the other. The Board in October 2016 had found probable cause that the latter two agencies were in violation of the Iowa Open Records Law by failing to produce certain records regarding a fatal police shooting case in the city of Burlington.

   With regard to this recommendation, this response acknowledges that there is no logical reason not to state publicly that in the two closed sessions, the Board attempted to empower a Board member to seek a settlement between the Board's prosecutor and the BPD and DCI. Those efforts failed after the Board's special prosecutor refused to agree to a settlement.

2) The Ombudsman recommends that the Board issue a statement in a public meeting expressing regret for its failure to explain those two votes at the time they occurred, and acknowledge that the votes violated the Iowa Open Meetings Law.

   With regard to this recommendation, this response acknowledges that, although keeping the attempt at a settlement confidential was thought by the Board to be necessary at the time in order to achieve its success and was therefore done in good faith, in hindsight that appears to be less than desirable when matched up against the requirements of Iowa's Open Meetings Law.

3) The Ombudsman recommends that the Board issue a statement in a public meeting acknowledging that its attempt to cite a "contested case" decision as an additional basis for entering a closed session on August 25 was improper since that basis was not included on its agenda more than 24 hours prior to the meeting.

   With regard to this recommendation, this response acknowledges that this basis for entering a closed session should have been included in the agenda published more than 24 hours prior to the August 25 Board meeting. However, the other reason for going closed that was cited in the Board's agenda---to discuss "litigation"---was a

proper and legitimate reason, since administrative law matters are considered to be "litigation" under the Open Meetings Law and the Board was already involved in administrative law matters on the Burlington case.

4) The Ombudsman recommends that the Board reconsider her request to release to her the recordings and minutes of its closed-session meetings on July 20 and August 25, 2017, trusting her pledge that she will maintain those records' confidentiality.

   With regard to this recommendation, this response, without agreeing to the premise that the Ombudsman's request overrides the primacy of the attorney-client privilege, advocates voluntarily waiving that privilege in order to avoid possible lengthy and costly court proceedings threatened by the Ombudsman's subpoena for the closed session minutes and recordings.

   Dated: November 29, 2018

   Signed by Iowa Public Information Board Member Frederick G. Morain

Ombudsman's Response

IPIB completely misses the point of our recommendations and report.

The IPIB board's reply primarily addresses the legal disagreement between our offices regarding access to closed-session records. While we certainly mentioned this impasse, airing an inter-agency dispute was not the purpose of our report.

IPIB also accused us of omitting facts in our report that were, in fact, in the report.

The response disappointingly focuses almost entirely on what the Board *can* do under the narrowest interpretations of the law rather than considering what it *should* do to promote government transparency and accountability.

Iowa law states that "the basis and rationale of government decisions, *as well as those decisions themselves*" should be "easily accessible to the people." When IPIB's board twice cast votes in the summer of 2017 without explaining what it had voted on, its decisions were clearly not easily accessible to the people. More could have been done – and should have been done – to keep the public apprised.

In our discussions with two board members about our report findings, Keith Luchtel acknowledged there was confusion about the board's actions.

"This (report) is replete with people that didn't understand this, and didn't understand that. I don't think we have responsibility for that," Luchtel told us. "If they want to get involved in something, and they don't understand it, why, that's not our problem."

But it is the board's problem. When given the opportunity to admit its errors and be transparent, all but one member of the board defended its missteps and secrecy, without explaining why such secrecy was necessary. The board missed a golden opportunity to live up to its goal of being "the state's most transparent state agency."