

# PUBLIC INFORMATION ISSUES

## **Introduction to the Iowa Public Information Board & HOT TOPICS**

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- I. Introduction
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- II. Background
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  - B. First board members appointed in July 2012
    - a. Nine board members appointed by governor subject to Senate confirmation
    - b. No more than three members shall represent media and no more than three represent local government
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    - d. Independent agency
    - e. Executive Director, Deputy Director and Admin. Assistant
  - C. "User-friendly approach"
    - a. Focus on outreach, service, mediation
    - b. Board wants to increase understanding of open meetings and records laws by officials and citizens
    - c. "Meet and greet" tour by IPIB chair and executive director met with support from government attorneys and officials
  
- III. Chapter 23: The board's powers and duties

- A. Processes and procedures drawn from Iowa Code Chapter 23 and Iowa Administrative Code Chapter 497 (IPIB Rules)
  - a. Extensive statutory enforcement authority
    - i. Election of remedies and stay orders (Sec. 23.5) — actions may continue to be brought under Chapters 21 and 22
  - b. Powers and duties (Sec. 23.6)
    - i. Adopt rules “to implement, enforce and interpret” open meetings law (Chapter 21) and open records law (Chapter 22)
    - ii. Issue declaratory orders or informal advice addressing Chapters 21 and 22 issues
    - iii. Receive and handle complaints based on Chapters 21 and 22
    - iv. Examine records and issue subpoenas
    - v. Issue orders enforcing Chapter 21 and Chapter 22, including applying penalties set forth in those chapters as well “imposing any other appropriate remedies calculated to declare, terminate, or remediate any violation of those chapters”
    - vi. Make training opportunities available to lawful custodians and government officials and employees
    - vii. Disseminate information to the public about their rights and how to exercise them
    - viii. Submit annual reports to governor and legislature
    - ix. Recommend legislation to governor and Legislature
  
- IV. Handling of complaints (Iowa Administrative Code 497 — Chapter 2 and Sec. 23.7-23.10)
  - A. Initial determination of jurisdiction, legal sufficiency and potential merit (Sec. 23.8)
    - a. Jurisdiction does not extend to judicial or legislative branches of state government or the governor’s office (Sec. 23.12)
    - b. Complaints must be filed within 60 days of occurrence or reasonable discovery (Sec. 23.7)
    - c. Complaint is “accepted” or “dismissed” — decision delegated to executive director subject to review by board

- d. Statutory emphasis on achieving informal and expeditious resolution (Sec. 23.9)
- e. Process becomes Code Chapter 17A contested case process following failure of informal and expeditious resolution (Sec. 23.10)
- f. The board's resolution if violation found (Sec. 23.10(b)):
  - i. Assess fines as per Sec. 21.6 or 22.10
  - ii. Void an action taken in violation of Chapter 21
  - iii. Require remedial action
  - iv. May not remove a person from office, but may institute a proceeding under Chapters 21 or 22 for removal
- g. Complaint experience thus far
  - i. Found that most can be handled informally
  - ii. Several formal complaints, two very complicated
  - ii. Complaints received concern all levels of government
  - iii. Excellent cooperation from government attorneys
  - iv. Small entities have problems understanding law
  - vi. Lots of unhappy people out there
  - vii. Web site forms used

V. Formal opinions and declaratory orders

- A. Process for issuance of formal advisory opinions set forth in Iowa Administrative Code Rules 497-1.2 and 1.3
  - a. Anyone can request — form on website
  - b. Thirty-day period after issuance of advisory opinion for request to modify or reconsider advisory opinions
  - c. Safe harbor created by advisory opinions and informal routine opinions
  - d. Opinion experience thus far
    - i. Only 4 or 5 formally requested
    - ii. Several informal requests by phone and email
      - 1. Public officials and employees seeking help
      - 2. Citizens seeking help and enforcement
- B. Declaratory orders with the force of law may be issued pursuant to Iowa Administrative Code 497 — Chapter 3
  - a. These rules adopt the uniform rules for the declaratory order process of Chapter 17A

- b. Declaratory Order experience this far
  - i. Only one Petition which was dismissed
- C. Petitions for Rulemaking

VI. The IPIB as a resource

- A. Our approach to our duties and responsibilities starts from a belief that Iowa public officials want to obey the law
  - a. Most problems stem from a lack of knowledge of legal requirements
  - b. Board seeks to provide information and training that will enable public officials to perform their duties under Chapters 21 and 22
  - c. We are establishing and nurturing existing relationships among entities that already do training
  - d. Speaking engagements — any interested group, government or public — increase public understanding
  - e. Confidence that flows from education and training will result in better public service and citizen participation

## HOT TOPICS

### MEETINGS – IOWA CODE CHAPTER 21

It all starts here – what is a meeting?

Iowa Code section 21.2(2) defines the meaning of “meeting”.

2. “Meeting” means a **gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body** where there is **deliberation or action upon any matter within the scope of the governmental body’s policy-making duties**. Meetings shall not include a gathering of members of a governmental body **when there is no discussion of policy or no intent to avoid the purposes for purely ministerial or social purposes of this chapter**. (Emphasis added.)

When are advisory committees covered by the open meetings law?

The best approach from a legal, practical and public policy standpoint is to always consider advisory committees to be covered. It makes no difference what they are called. If they are

created by a city council or mayor “to develop and make recommendations on public policy issues,” they are covered by definition as governmental bodies. Section 21.2(2) includes this definition of a governmental body:

h. An advisory board, advisory commission, advisory committee, task force, or other body created by statute or executive order of this state or created by an executive order of a political subdivision of this state to develop and make recommendations on public policy issues.

A case can be made that an advisory committee can be created to simply gather information and not be covered by the open meetings law. But why take the risk of interpretation or “mission creep” of such a group.

**Best Practice:** Require advisory groups to comply with open meetings law.

May the public use cameras or recording devices at public meetings?

Yes, Iowa Code section 21.7 provides:

**The public may use cameras or recording devices at any open session. Nothing in this chapter shall prevent a governmental body from making and enforcing reasonable rules for the conduct of its meetings** to assure those meetings are orderly, and free from interference or interruption by spectators. (Emphasis added.)

There is no need to tolerate unreasonable intrusion on the conduct of a meeting by a spectator, regardless of whether armed with a camera or recording device.

Iowa Code section 21.8 provides for electronic meetings:

1. A governmental body may conduct a meeting by electronic means **only in circumstances where such a meeting in person is impossible or impractical and only if the governmental body complies with all of the following:**
  - a. The governmental body **provides public access** to the conversation of the meeting to the extent reasonably possible.
  - b. The governmental body complies with section 21.4 (meeting notice requirements). For the purpose of this paragraph, **the place of the meeting is the place from which the communication originates or where public access is provided** to the conversation. (Emphasis and parenthetical statement added.)

c. **Minutes are kept of the meeting.** The minutes shall include a statement explaining why a meeting in person was impossible or impractical.

2. A meeting conducted in compliance with this section shall not be considered in violation of this chapter.

3. A meeting by electronic means **may be conducted without complying with paragraph "a" of subsection 1** (public access) if conducted in accordance with all of the requirements for a **closed session** contained in section 21.5 (closed sessions). (Emphasis and parenthetical statements added.)

**Best Practice:** Avoid electronic closed meetings and try to provide public access regardless. Yes, the public will have to leave the closed meeting, but suspicion is heightened without it. If action results, it has to be taken, with some exceptions, in open session.

Closed meetings generally, Iowa Code section 21.5

21.5 Closed session.

1. A governmental body may hold a closed session only by **affirmative public vote of either two-thirds of the members of the body or all of the members present** at the meeting. A governmental body **may hold a closed session only to the extent a closed session is necessary for any of the following reasons:**

a. To review or discuss records which are required or authorized by state or federal law to be kept confidential or to be kept confidential as a condition for that governmental body's possession or continued receipt of federal funds.

b. To discuss application for letters patent.

c. 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.

d. To discuss the contents of a licensing examination or whether to initiate licensee disciplinary investigations or proceedings if the governmental body is a licensing or examining board.

e. To discuss whether to conduct a hearing or to conduct hearings to suspend or expel a student, unless an open session is requested by the student or a parent or guardian of the student if the student is a minor.

f. To discuss the decision to be rendered in a contested case conducted according to the provisions of chapter 17A.

g. To **avoid disclosure of specific law enforcement matters**, such as current or proposed investigations, inspection or auditing techniques or schedules, **which if disclosed would enable law violators to avoid detection.**

h. To **avoid disclosure of specific law enforcement matters**, such as allowable tolerances or criteria for the selection, prosecution, or settlement of cases, **which if disclosed would facilitate disregard of requirements imposed by law.**

i. To **evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered**\_when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

j. To **discuss the purchase or sale of particular real estate only where premature disclosure could be reasonably expected to increase the price the governmental body would have to pay for that property or reduce the price the governmental body would receive**\_for that property. **The minutes and the audio recording of a session closed under this paragraph shall be available for public examination when the transaction discussed is completed.**

k. To discuss information contained in records in the custody of a governmental body that are **confidential records pursuant to section 22.7, subsection 50.** (Security procedures, assessments of vulnerability, security passwords, etc.)

l. To discuss patient care quality and process improvement initiatives in a meeting of a public hospital or to discuss marketing and pricing strategies or similar proprietary information in a meeting of a public hospital, where public disclosure of such information would harm such a hospital's competitive position when no public purpose would be served by public disclosure. The minutes and the audio recording of a closed session under this paragraph shall be available for public inspection when the public disclosure would no longer harm the hospital's competitive position. For purposes of this paragraph, "public hospital" means a hospital licensed pursuant to chapter 135B and governed pursuant to chapter 145A, 226, 347, 347A, or 392. This paragraph does not apply to the information required to be disclosed pursuant to section 347.13, subsection 11, or to any discussions relating to terms or conditions of employment, including but not limited to compensation of an officer or employee or group of officers or employees.

2. **The vote of each member on the question of holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes.** A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.

3. **Final action by any governmental body on any matter shall be taken in an open session unless some other provision of the Code expressly permits such actions to be taken in closed session.**

4. **A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session, and shall also audio record all of the closed session.** The detailed minutes and audio recording of a closed session shall be sealed and shall not be public records open to public inspection. **However, upon order of the court in an action to enforce this chapter, the detailed minutes and audio recording shall be unsealed and examined by the court in camera. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding.** In determining whether any portion of the minutes or recording shall be disclosed to such a party for this purpose, **the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence** in an enforcement proceeding. After such a determination, **the court may permit inspection and use of all or portions of the detailed minutes and audio recording by the party seeking enforcement** of this chapter. A governmental body shall **keep the detailed minutes and audio 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.

5. Nothing in this section requires a governmental body to hold a closed session to discuss or act upon any matter. (Emphasis added.)

Closed meetings to discuss personnel issues 21.5(i) and 21.5 (a) & (c)

Iowa Code subsection 21.5(1)(i) sets forth the specific procedures applicable to evaluation of professional competency by a governmental body in closed session. This subsection reads:

i. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent

needless and irreparable injury to that individual's reputation and that individual requests a closed session.

For a session to be closed, **ALL** of the following must occur:

1. The discussion must involve an evaluation of the professional competency of an individual.
2. The discussion must involve consideration of the appointment, hiring, performance, or discharge of the individual.
3. The discussion must be such that if conducted during an open meeting it would cause needless and irreparable injury to that person's reputation AND
4. The individual must request the closed session.

There is no statutory requirement that the subject individual must be allowed into the closed session. There is also no statutory provision that would bar attendance at the invitation of the governmental body.

**While other subsections of 21.5 could be used to allow a closed meeting where there is discussion that involves a named individual who is an employee or a potential hire, a discussion that involves consideration of items one through three enumerated above must not occur in a closed meeting unless item four is also satisfied.**

Code subsection 21.5(1)(a) allows a closed session to review or discuss records which are required or authorized by state or federal law to be kept confidential. The open meetings law, Code chapter 21, does not contain a definition or listing of records that would qualify. Section 22.7 of the open records law lists 66 records or types of records authorized to be kept confidential. An example relating to your inquiry is subsection 22.7(11). It provides that 'personal information' in confidential personnel records shall be kept confidential. There is no definition of 'personal information', but there is a listing of items that may not be kept confidential.

Other statutory definitions for the term 'personal information' include name, address and statistical data (Code chapter 421A – Tax return confidentiality) and name, address, date of birth, telephone number, driver's license number, employer/employee identification numbers, bank information, genetic information, fingerprints and credit card information (Code chapters 715A and 715C of the Criminal Code, dealing with identity theft).

Certainly there could conceivably be an occasion for discussing a confidential public record involving a specifically identified employee or potential hire that would not fall under the purview of subsection 21.5(1)(i).

However, **Code subsection 21.5(1)(i) provides the exclusive process for the evaluation of the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered. The application of subsection 21.5(1)(i) cannot be avoided under the guise of a confidential record review or discussion during a closed session conducted pursuant to subsection 21.5(1)(a).**

Code subsection 21.5(1)(a) is a general provision. Application of Code section 4.7 requires that the specific provisions of Code subsection 21.5(1)(i) govern the activity specifically addressed.

Can an email exchange result in an illegal meeting? What about use of a social medium?

Email and social media afford opportunity to inadvertently create an illegal meeting. When members of a government body gather in sufficient numbers (a majority) in an Internet chat room and deliberate upon any matter within their official purview, they are in a meeting. The communication has almost the same simultaneity as an in-person meeting. Facebook-kinds of social media, are not quite as simultaneous, but could be close enough to ruled a meeting in the right circumstance. The use of the “Reply All” feature in email has a lesser degree of simultaneity, but the potential exists. Some on the enforcement side of things think that Reply All is always a violation when there is a quorum and deliberation occurs. I certainly agree if the communication has a substantial degree of simultaneity, such as would result from the use of a pre-arranged time of participation. The Supreme Court of Iowa discussed, but did not adopt, an “informal gathering” theory in the 1980 case of *Telegraph Herald v. City of Dubuque*, 297 N.W.2d 529, 534. The court observed that the theory “ignores the legislature’s apparent intent that temporal proximity exist among members of the government body.” It is a new day and a new court and we advise against such practices.

**Best Practice:** don’t set yourself up to be the test case for what constitutes adequate “temporal proximity” in the modern age of electronic communications. Also, remember that you are creating a public record transcript anytime you engage in these kinds of communications to conduct public business.

## **PUBLIC RECORDS – CHAPTER 22**

**Best Practice.** Let’s start with a tip. If you are a record requestor, communicate with the person handling your request. We sometimes get complaints the day after a request has been filed! Please call them before calling us! If you are a custodian processing a records request let the requestor know if there is likely to be delay – and be sure to quote the anticipated cost up front. And collect that cost in advance as appropriate. If there is delay that was not anticipated, let the requestor know and explain why.

What is a public record?

The all-inclusive definition is Iowa Code section 22.1(3):

3. a. As used in this chapter, **“public records” includes all records**, documents, tape, or other information, stored or preserved in any medium, **of or belonging to this state or any county, city, township, school corporation, political subdivision**, nonprofit corporation other than a fair conducting a fair event as provided in chapter 174, whose facilities or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari-mutuel wagering pursuant to chapter 99D, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.
- b. “Public records” also includes all records relating to the investment of public funds including but not limited to investment policies, instructions, trading orders, or contracts, whether in the custody of the public body responsible for the public funds or a fiduciary or other third party.

#### How long must public records be retained?

Iowa Code chapter 305 provides for the development of public records retention rules applicable to state entities. They are not applicable to local government entities. Chapter 22 does not address record retention. However, several Iowa Code Chapters have retention requirements that apply to certain records.

#### Electronic records and private devices

**If an email, a report, or other document is composed, received or stored on my personally owned electronic device, is that a public record under Chapter 22?**

**Most likely, yes.** If a government official or employee uses privately owned electronic devices or services, such as cell phones, computers, email accounts, smart phones, or such to conduct official government business, then the record generated is a public record.

**What governs the issue is the content of the message. If it concerns public business relating to public duties of an official or employee, then it is a public record.** Recent years have shown a rapid explosion in electronic device ownership, making it easy to start a project at work, fine tune it at home, email drafts to colleagues and others, refine it on the work computer, carry it around the world on a flash drive or store it indefinitely ‘in a cloud.’ Because of this ease of portability and expansion of the work site, the term “public records” no longer refers to a document in a paper file in a drawer in an office.

This issue has been addressed in Iowa in a limited manner. Iowa Code Section 22.1 includes “all records, documents, tape or other information, stored or preserved in any medium” in the definition of public records. Subsection 22.2(2) states that a governmental body cannot prevent access to a public record by contracting with a nongovernmental body (such as a cloud storage provider or service provider).

Section 22.3A addresses public records and data processing software. The cumulative effect of these statutes is that a public record does not lose its public status by being retained on a privately owned electronic device.

The Iowa Supreme Court, in a 1967, pre-email decision, addressed the idea that you must look at the contents of the document or communication to determine whether it is a public record: “It is the nature and purpose of the document, not the place where it is kept, which determines its status”, *Linder v. Eckard*, 152 N.W.2d 833, 835 (Iowa 1967).

**To allow a governmental body to avoid public records disclosure by simply requiring that officers or employees use their privately owned electronic devices would be to completely thwart the transparency goals of Chapter 22.**

Comingling public communications and reports with private communications on a privately owned electronic device can create difficulty in responding to an open records request. Some private communications may arguably be withheld as not being a public record or as a confidential public record under Iowa Code Section 22.7. First and foremost, however, the public business communications are public records, and the custodian must review all records on a device to determine whether they are within a request for examination and copying to justify any denial of release.

**Best Practices:** Electronic communications relating to official duties are subject to review and disclosure, even if written, drafted, communicated and/or stored on a privately purchased and owned electronic device or email service. If this practice is going to occur anyway, use of a dedicated folder or flash drive should be considered. It is an especially bad practice when public officials text each other or pass notes at a public meeting. Those messages and notes are public records and can be required to be produced.

#### Preliminary Drafts 22.7(65)

The following is a general discussion of the provisions and an interpretation of Iowa Code section 22.7(65), the so-called preliminary draft provision. The staff has examined this issue and discussed it with board members. The staff has not taken this interpretation to the board for its adoption as an “official” interpretation. All recognize that the language is complex. Parts of that language lead to subjective evaluations that likely will be influenced by specific

circumstances. Until experience is obtained with its application and various nuances addressed, it is only possible to give a literal interpretation as a starting point.

Obviously, determining whether a record is a 'draft' is not as simple as marking or stamping 'draft' on the document. There is one certainty: naming a record a draft does not make it a draft.

This provision was enacted in 2012 to address the dampening of creativity that could result from submission of a novel or unusual proposal. It was urged that subordinates should be able to submit ideas without fear of ridicule and decision-makers should not have to be concerned about creative ideas that never advance. Iowa Code section 22.7(65) states:

Tentative, preliminary, draft, speculative, or research material, prior to its completion for the purpose for which it is intended and in a form prior to the form in which it is submitted for use or used in the actual formulation, recommendation, adoption, or execution of any official policy or action by a public official authorized to make such decisions for the governmental body or the government body. This subsection shall not apply to public records that are actually submitted for use or are used in the formulation, recommendation, adoption, or execution of any official policy or action of a governmental body or a government body by a public official authorized to adopt or execute official policy for the governmental body or the government body.

This exemption has limited application restricted to a specific class of public records that meet all of the following criteria:

1. They are tentative, preliminary, draft, speculative or research material;
2. They exist in a form prior to completion for their intended purpose;
3. They exist in a form prior to the form of the record that is submitted or used in the actual formulation, recommendation, adoption or execution of any official policy or action by a public official with authority to make such decisions; and
4. They must not have been submitted to or used by a public official authorized to adopt or execute official policy.
5. The applicability of paragraphs 1 through 3 rendering material confidential cannot be finally determined until there is a final decision made by a decision maker as contemplated by paragraph 3. Confidentiality is lost immediately when disqualified under paragraph 4

The first sentence of the quoted language establishes the affirmative qualifications that must be met in order to qualify as a “draft.” The second portion states specific disqualifications that apply in stated circumstances. Taken together these qualifications and disqualifications establish the four criteria stated above.

The first criterion is obvious. The exemption only applies to draft material. The second criterion provides that only certain draft material is eligible for the exemption. It has to be material in a form different from and preliminary to the form of the completed product. The third criterion requires that an exempt record must exist in a form prior to the creation of the record submitted for use or used as an actual public policy statement promulgated by a public official with authority to make decisions related to the subject matter of the record. Finally, an exempt record must avoid having been submitted to or used by a public official with authority to make or execute official policy even it does not appear in the final draft. Or restated: an otherwise exempt record loses its exempt status merely by having been submitted to or used by a public official authorized to adopt or execute official policy. Even if the decision-maker rejects the submitted draft material or alters it to the extent that the submitted draft material becomes unrecognizable, the submitted record (draft material) is no longer exempt once it has been passed to the decision-maker.

Who is a decision maker? The determining factor under the exemption is whether the public official is authorized to make or execute the official policy for the government body related to the subject matter of the draft record. This will vary under the circumstances. There may be more than one decision-maker of the same rank in an organization such as a city council or school board. A decision-maker need not be a high level public official. There are probably more low level decision-makers in a government organization than high-level decision-makers. The operation of government involves numerous decisions made at all levels. Under the terms of the exemption, the decision-maker need not even actually make decisions since the exemption also refers to public officials who have authority to execute official policy. The sharing of draft materials with the public official who merely has the power to execute the public policy would terminate the confidentiality of an otherwise exempt draft document.

Material outside the scope of the exemption cannot be identified until a final decision is made or product produced unless the material has been submitted to a decision maker. Until one of the disqualifying events occurs, prospectively covered material is confidential. Once a disqualifying event occurs the material can be examined to see whether it remains confidential through application of paragraphs 1 through 3 above. Disqualifying events include submission of the material for use by a public official authorized to adopt or execute official policy (see paragraph 4 above) or actually used in the actual formulation of official policy or action (see paragraph 3 above).

A simple test is to examine the draft material and compare its contents to the contents of the final product. If an idea in the final draft appears in the potential tentative draft, the exemption is lost.

Another test is to determine when the draft material reached the hands of a decision maker or person who will execute the policy. In some entities that may be the person at the next desk or office. In others entities it may be a person the creator or preparer of the draft material has never personally met. The smaller the government entity, the less likely it is that the exemption would apply. In many small government entities, the decision maker or executive authority is only one step removed from the person preparing the draft material.

**Please visit our Website:** [www.ipib.iowa.gov](http://www.ipib.iowa.gov) for the text of Chapters 21 – 23, copies of rulings and opinions, our power point training material and our forms.

THANK YOU FOR YOUR TIME AND ATTENTION!

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