

# Open Meetings, Open Records Handbook

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Iowa Freedom of Information Council

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## INTRODUCTION

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This handbook is the 13th edition of a publication designed to help keep Iowans abreast of the requirements of the state's open meetings and open records laws, Chapters 21 and 22 of the Code of Iowa. The handbook incorporates changes made in the chapters by the 2007 and 2008 Legislatures. Subsequent changes will be available in print and at the Iowa Freedom of Information Council Web site.

Generally, Chapters 21 and 22 – the so-called openness or sunshine laws – have worked well in Iowa, thanks to the efforts of concerned and informed citizens, responsible and dedicated public officials, and accurate and attentive news media.

At least three points are central to understanding how the laws work:

- Iowa law assumes that meetings and records are open. Iowans do not have to make a case to attend a governmental meeting or to see a public record. To the contrary, meetings must be open and records must be available for inspection unless the case for closure is specified in law. The Iowa Supreme Court has been adamant on this point, citing, for example, 22.8(3), which notes that most records are open to public inspection, “even though such examination may cause inconvenience or embarrassment to public officials or others.”
- The laws are relatively brief, general and written for public understanding and use. The sunshine laws of many states are longer and more complex than Iowa's. Many other laws try to anticipate almost every conceivable issue that might arise.

Iowa laws provide a general approach – that of assumed openness – and establish guidelines regarding when a meeting can be (not must be) closed and what records are confidential. The laws provide a framework to help reasonable people ensure that public business is conducted in the public eye.

- The laws provide a framework for managing business by public agencies. The provisions for posting tentative agendas, keeping minutes of meetings, and dealing with personnel issues, etc., are instructive for any organization, public or private. But the laws also provide a mechanism for an aggrieved citizen who believes a governmental agency has improperly denied access to a meeting or record.

Both laws provide for reimbursement of legal fees at the trial and appellate court levels if a citizen is successful in a lawsuit against a governmental agency for holding an illegal meeting or denying access to a record that should be open for public inspection. While providing such clout to the citizen, however, the laws also provide - under sections 21.6(3) and 22.10(3) - ample protection for public officials who rely upon legal advice in interpreting finer points of the law. It's a good balance.

A final point about management: Unfortunately, citizens and the news media do not faithfully attend meetings of public agencies. Meeting just by themselves, public officials may lapse into informal ways of handling business, a habit that will ill-serve them when major or controversial issues put them in the spotlight. It is better to adhere to open meeting law protocols at all times, so that when difficult issues arise the focus can be on the issues and not on what procedures must be followed under Chapter 21.

This handbook is published by the Iowa Freedom of Information Council, a consortium of news media associations, radio and television stations, newspapers, publishers, librarians, educators, lawyers and business leaders concerned about openness in government.

Kathleen Richardson, executive secretary of the Iowa FOI Council, supervised the updating of the booklet. Most of the text of the question-and-answer sections is the work of Herb Strentz, who was executive secretary of the

Iowa FOI Council from its founding in 1976 until his retirement in 2000. Des Moines attorneys Michael Giudicessi of Faegre & Benson and Keith Luchtel of Nyemaster, Goode, West, Hansell & O'Brien also contributed to the booklet. The offices of the Iowa Attorney General and Citizens' Aide/Ombudsman provided feedback on content.

Copies of the handbook are available at cost from the Iowa FOI Council. Contact (515) 271-2295 or [kathleen.richardson@drake.edu](mailto:kathleen.richardson@drake.edu).

Thousands of copies of this booklet have been distributed by the Iowa FOI Council since the first edition was published in 1978 to help introduce Iowans to the open meetings law that took effect Jan. 1, 1979. The third edition in 1986 included material on the Iowa public records law, as have all subsequent editions.

Over the years, the handbook has become an invaluable resource for Iowa government officials who seek to follow the letter and the spirit of the sunshine laws, and for all Iowans who want to ensure their rights to open government.

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## RULES OF THUMB: CHAPTER 21

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Adhering to several “rules of thumb” should help protect a member of a governmental body from liability for damages and from litigation under Chapter 21:

1. Become familiar with the Act’s requirements; address questions about the law to the government body’s legal counsel.
  2. Assure that the governmental body follows the Act’s requirements for notifying the public and press and for making and preserving records.
  3. Presume that meetings will be open, unless there is a clear showing of need for a closed meeting specifically authorized by the Act.
  4. Vote against the closing of a meeting unless an exemption of Chapter 21.5(1) clearly permits a closing (or another law provides an exemption to Chapter 21). Such a vote provides a sure defense against damages under Chapter 21.6(3).
  5. When voting to close a meeting:
    - a. Specify which exemption is being used to close the meeting and have this noted in the minutes.
    - b. Specify why you believe the exemption to be valid in this case.
    - c. Make sure that either two-thirds of the total membership of the body (not simply two-thirds of those present) or all of those present vote to close the session and that each person’s vote is recorded in the minutes.
  6. When in closed session:
    - a. Make sure that a tape recording and detailed minutes are kept of the discussion as required by the Act in 21.5(4).
    - b. Limit the closed session to the discussion specified when you moved to close the meeting, and reopen the meeting as soon as you have completed discussing that item.
  7. Take final action in public.
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## CHAPTER 21: OFFICIAL MEETINGS OPEN TO PUBLIC (OPEN MEETINGS)

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### 21.1 Intent - declaration of policy.

This 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.

### 21.2 Definitions.

As used in this chapter:

1. "Governmental body" means:

- a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.
- b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.
- c. A multi-membered body formally and directly created by one or more boards, councils, commissions, or other governing bodies subject to paragraphs "a" and "b" of this subsection.
- d. Those multi-membered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities.
- e. An advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues.
- f. A 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 a nonprofit corporation which is a successor to the nonprofit corporation which built the facility.
- g. A nonprofit corporation licensed to conduct gambling games pursuant to chapter 99F.
- 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.

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 for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

3. “Open session” means a meeting to which all members of the public have access.

### **21.3 Meetings of governmental bodies.**

Meetings of governmental bodies shall be preceded by public notice as provided in section 21.4 and shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in section 21.5, all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.

Each governmental body shall keep minutes of all its meetings showing the date, time and place, the members present, and the action taken at each meeting. The minutes shall show the results of each vote taken and information sufficient to indicate the vote of each member present. The vote of each member present shall be made public at the open session. The minutes shall be public records open to public inspection.

### **21.4 Public notice.**

1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.

2. a. Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which case as much notice as is reasonably possible shall be given. Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to persons with disabilities.

b. When it is necessary to hold a meeting on less than twenty-four hours’ notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the normal requirements shall be stated in the minutes.

3. A formally constituted subunit of a parent governmental body may conduct a meeting without notice as required by this section during a lawful meeting of the parent governmental body, a recess in that meeting, or immediately following that meeting, if the meeting of the subunit is publicly announced at the parent meeting and the subject of the meeting reasonably coincides with the subjects discussed or acted upon by the parent governmental body.

4. If another section of the Code requires a manner of giving specific notice of a meeting, hearing, or an intent to take action by a governmental body, compliance with that section shall constitute compliance with the notice

requirements of this section.

### **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 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. The minutes and the tape 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.
- 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 the same as defined in section 249J.3. This paragraph does not apply to the information required to be disclosed pursuant to section 347.13, subsection 14, 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 tape record all of the closed session. The detailed minutes and tape 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 tape 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 tape recording by the party seeking enforcement of this chapter. A governmental body shall keep the detailed minutes and tape recording of any closed session for a period of at least one year from the date of that meeting.

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

#### **21.6 Enforcement.**

1. The remedies provided by this section against state governmental bodies shall be in addition to those provided by section 17A.19. Any aggrieved person, taxpayer to, or citizen of, the state of Iowa, or the attorney general or county attorney, may seek judicial enforcement of the requirements of this chapter. Suits to enforce this chapter shall be brought in the district court for the county in which the governmental body has its principal place of business.

2. Once a party seeking judicial enforcement of this chapter demonstrates to the court that the body in question is subject to the requirements of this chapter and has held a closed session, the burden of going forward shall be on the body and its members to demonstrate compliance with the requirements of this chapter.

3. Upon finding by a preponderance of the evidence that a governmental body has violated any provision of this chapter, a court:

- a. Shall assess each member of the governmental body who participated in its violation damages in the

amount of not more than five hundred dollars nor less than one hundred dollars. These damages shall be paid by the court imposing it to the state of Iowa, if the body in question is a state governmental body, or to the local government involved, if the body in question is a local governmental body. A member of a governmental body found to have violated this chapter shall not be assessed such damages if that member proves that the member did any of the following:

(1) Voted against the closed session.

(2) Had good reason to believe and in good faith believed facts which, if true, would have indicated compliance with all the requirements of this chapter.

(3) Reasonably relied upon a decision of a court or a formal opinion of the attorney general or the attorney for the governmental body.

b. Shall order the payment of all costs and reasonable attorney fees in the trial and appellate courts to any party successfully establishing a violation of this chapter. The costs and fees shall be paid by those members of the governmental body who are assessed damages under paragraph “a.” If no such members exist because they have a lawful defense under that paragraph to the imposition of such damages, the costs and fees shall be paid to the successful party from the budget of the offending governmental body or its parent.

c. Shall void any action taken in violation of this chapter, if the suit for enforcement of this chapter is brought within six months of the violation and the court finds under the facts of the particular case that the public interest in the enforcement of the policy of the chapter outweighs the public interest in sustaining the validity of the action taken in the closed session. This paragraph shall not apply to an action taken regarding the issuance of bonds or other evidence of indebtedness of a governmental body if a public hearing, election or public sale has been held regarding the bonds or evidence of indebted

d. Shall issue an order removing a member of a governmental body from office if that member has engaged in a prior violation of this chapter for which damages were assessed against the member during the member’s term.

e. May issue a mandatory injunction punishable by civil contempt ordering the members of the offending governmental body to refrain for one year from any future violations of this chapter.

4. Ignorance of the legal requirements of this chapter shall be no defense to an enforcement proceeding brought under this section. A governmental body which is in doubt about the legality of closing a particular meeting is authorized to bring suit at the expense of that governmental body in the district court of the county of the governmental body’s principal place of business to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney of the governmental body.

### **21.7 Rules of conduct at meetings.**

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.

### **21.8 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. 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.
- 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 if conducted in accordance with all of the requirements for a closed session contained in section 21.5.

#### **21.9 Employment conditions discussed.**

A meeting of a governmental body to discuss strategy in matters relating to employment conditions of employees of the governmental body who are not covered by a collective bargaining agreement under chapter 20 is exempt from this chapter. For the purpose of this section, “employment conditions” mean areas included in the scope of negotiations listed in section 20.9.

#### **21.10 Information to be provided.**

The authority which appoints members of governmental bodies shall provide the members with information about this chapter and chapter 22. The appropriate commissioner of elections shall provide that information to members of elected governmental bodies.

#### **21.11 Applicability to nonprofit corporations.**

This chapter applies to nonprofit corporations which are defined as governmental bodies subject to section 21.2, subsection 1, paragraph “f”, only when the meetings conducted by the nonprofit corporations relate to the conduct of pari-mutuel racing and wagering pursuant to chapter 99D.

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## QUESTIONS ABOUT CHAPTER 21

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**QUESTION:** Who is covered by Chapter 21?

**REPLY:** Iowa Attorney General's opinions have produced these guidelines:

1. To be covered by Chapter 21, a governmental body should be one created under statute or by executive order or be a local board, council, commission or other governmental unit exercising policy-making authority. Generally, the governmental body is one created specifically by law or executive order and not one incorporated on a discretionary basis. Consequently, a school board or city council is a governmental body covered by Chapter 21, but a non-profit organization or a quasi-public agency most likely is not even though it may receive public funds. (While receipt of public funds or tax money is not enough to make an agency subject to Chapter 21, the allocation of those funds generally is subject to Chapter 22, the public records law.) In 2006, the Legislature amended the Iowa Code to require agencies established under Chapter 28E to comply with the public meetings and records laws.

2. Committees created by the boards, councils, commissions, etc., covered by Chapter 21 also are covered by law if (a) they comprise or their meetings involve a majority of the members of the governmental body itself, or (b) they are formally and directly created and exercise some policy- or decision-making authority. Under 21.2(e) and (h), advisory bodies created by the governor, by the General Assembly, by statute or by executive order to develop and make recommendations on public policy issues are subject to Chapter 21.

3. Under 21.2(h) as passed by the Legislature in 1993, the Attorney General's Office noted "that advisory bodies created by school boards and county boards of supervisors [and other governmental agencies by executive order] to develop and make recommendations on public policy issues" are subject to the open meetings law (Tabor to Stilwill and Sarcone, 93-11-5).

Finally, two other points should be remembered with regard to government bodies and committees:

1. Even if a committee does not come under the provisions of Chapter 21, it may still hold public sessions. Closed meetings are not mandated.

2. The correspondence, minutes, records, etc., of a government body or a committee generally are subject to the provisions of Chapter 22, the open records law, even if the committee is not covered by Chapter 21.

**QUESTION:** In one sentence of Chapter 21.2, "meeting" is defined broadly to include most formal and informal gatherings of a majority of members of a governmental body. In the next sentence, however, gatherings "for purely ministerial or social purposes" are not considered to be "meetings." Why is the law's coverage limited in this way?

**REPLY:** A wide range of activities could fall within the definition of "meeting." Most of these gatherings are included in Chapter 21.2's definition of "meeting." An important exception is a gathering of less than a majority of members. If the notice, openness and record-keeping requirements of Chapter 21 were applied to such a gathering, it could limit free speech and association rights of public officials.

Chapter 21.2 does define a "meeting" of a majority of the members as excluding gatherings for purely social or ministerial purposes where there is no discussion of policy or no intent to avoid the purposes of the Act.

The definition of "meeting" permits the majority to gather for limited purposes without being subject to the requirements of the Act. A purely social gathering is placed outside the coverage of the statute to avoid a collision with the association rights of public officials under the First Amendment. Likewise, if a majority of

the members of a governmental body is simply traveling together to a meeting, conference, etc., that activity would be outside the scope of Chapter 21 so long as there was no discussion of policy and there was no intent to avoid the purposes of the Act.

A gathering of a majority of members for purely ministerial purposes is excluded from the Act's coverage because a ministerial matter by definition excludes exercising any discretion about policy matters. Clear examples are the members' signing of letters or documents whose contents have been approved in a prior, formal open meeting, or school board members attending graduation ceremonies.

Questions about "ministerial" functions and information-gathering trips by governmental bodies have been addressed in Attorney General's opinions, including Cook to Pellett and Crabb, 79-5-14, Stork to Reis, 81-2-13, and Stork to O'Kane, 81-7-4.

The last opinion notes, "... It appears that gathering for 'purely ministerial purposes' may include a situation in which members of a governmental body gather simply to receive information upon a matter within the scope of the body's policy making duties. ... We emphasize, however, that the nature of any such gathering may change if either 'deliberation' or 'action' ... occurs. A 'meeting' may develop ... if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they may exercise judgment or discretion." (Emphasis added.)

A cautionary note was sounded in 81-2-13, which said the Iowa Civil Rights Commission would be "meeting" if it assembled to hear concerns of inmates at the state penitentiary because "a governmental body charged with a statutory duty of conducting investigations" comes under Chapter 21 "when a majority of its members meet to obtain information from individuals participating in the investigation."

The law provides latitude by exempting "ministerial" and "social" functions from coverage by Chapter 21, but plainly the latitude must be drawn narrowly to be consistent with Chapter 21's mandate for openness.

**QUESTION:** What guidelines have been established for providing the "tentative agenda" and reasonable notice of public meetings called for in Chapter 21.4?

**REPLY:** This area, too, has received considerable attention from public agencies, the news media, the Attorney General's Office, and the Iowa Supreme Court in a July 1991 decision.

The standards of notice in Chapter 21.4 are the minimum requirements. For example, advising interested persons to listen to a certain radio station at a set time for information about an upcoming meeting would not constitute "reasonable notice." Further, a "tentative" agenda must include more information than simply reciting such catch-all items as "Approval of minutes; old business; new business," or by using the same agenda contents for meeting after meeting.

In its opinion in *KCOB/KLVN, Inc. v. Jasper County Bd. of Sup'rs.*, 473 N.W.2d 171 (Iowa 1991), the Iowa Supreme Court set forth several guidelines for meeting notices and tentative agendas. These included:

1. "... (T)he content of a tentative agenda notice can be subject to change. ... (A) proper construction of the notice provision in section 21.4 allows discussion and action on emergency items that are first ascertained at a meeting for which proper notice was given. ... However, if action can be reasonably deferred to a later meeting, this should be done."

2. "... The sufficiency of the detail on the tentative agenda must be viewed in the context of surrounding events." Here the Court said that the test for a tentative agenda was whether the information was reasonably sufficient to alert interested people as to the subject matter to be considered.

3. The Court said that the standard for compliance with the meeting and notice procedures should be "substantial" rather than "absolute." That is, the Court will not find a public agency to be in violation of Chapter 21 if the violation is strictly or primarily a technical one where the precise letter of the law is not followed. If a public agency acting in good faith substantially complied with the law, that will be sufficient for the Court.

4. The Court did caution, however, that "a lack of wrongful intent to violate the open meetings law cannot excuse non-compliance." The Court affirmed legislative intent that ignorance of the legal requirements of Chapter 21 is not a defense against substantive violations.

The Supreme Court revisited the issue of what constitutes an adequate agenda for a public meeting in *Barrett v. Lode*, 603 N.W.2d 766 (Iowa 1999). The Court ruled that closed sessions of meetings subject to the open meetings law must not include issues not listed on the agenda. An agenda for a public meeting must specifically state any issues the board intends to discuss in closed session, and discussing topics not noted on the agenda violates the law, even if the public could have anticipated the issues would arise.

Notice of a meeting and the tentative agenda are to be provided by the public agency involved; a news agency requesting notice does not have to pay postage or other costs to receive the notice and the tentative agenda, according to an Attorney General's opinion (Cook to Menke, 79-4-19).

A news medium or individual citizen cannot be restricted to having only the "tentative agenda" and "reasonable notice" of an upcoming public meeting. An Attorney General's opinion (Stork to McDonald, 81-8-24) makes clear that material prepared for discussion at a public meeting is a public record under Chapter 22, the law for inspection of public records. Consequently, an individual may request copies of that material in advance of the public meeting and in accord with provisions of Chapter 22. In this case, however, the individual might have to pay the costs for copying agenda material, as covered in Chapter 22.

**QUESTION:** Chapter 21 permits the closing of a meeting for any one of 12 reasons. Why?

**REPLY:** As noted in Chapter 21, at the end of the list of exemptions and discussions about the conduct of closed meetings: "Nothing in this section requires a governmental body to hold a closed session to discuss or act upon any matter." The list of exemptions, therefore, is not a list of when meetings are required to be closed; rather, the exemptions suggest under what conditions public agencies may consider whether to close a meeting. As noted in an Attorney General's opinion (Stork to O'Kane, 81-7-4), "Discussion during a closed session ... must relate directly to the specific reason announced as justification for the session."

Exemptions (a) through (l) of Chapter 21.5 embody a legislative effort to address countervailing interests. Several key exemptions are discussed below.

"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."

Problems might arise if a governmental body lacked discretion under Chapter 21 to discuss confidential

records in closed session. Discussion open to the public could violate the law allowing the confidentiality of a record; discussion closed to the public would violate the open meetings law without this exemption.

Examples of laws allowing for the confidentiality of certain records include the Family Educational Rights and Privacy Act of 1974 (making confidentiality of student records a condition for federal funding) and Chapter 22.7 of the Iowa Code allowing (but not mandating) the confidentiality of specified public records. In effect, each time Chapter 22.7 is amended to provide confidentiality for a government record, a new exemption for closing a public meeting may likewise be created.

In 2007, lawmakers amended Chapter 21.5 to explicitly allow a closed session to discuss records kept confidential under Chapter 22.7, subsection 50, which involves information about government emergency preparedness and security procedures.

In 2008, the Legislature further linked the open meetings and records laws by adding Chapter 22.7, subsection 61, which permits a government body to keep confidential “information in a record that would permit [the] governmental body . . . to hold a closed session . . . in order to avoid public disclosure of that information.” However, non-confidential information in the record shall be released to the public. The confidentiality provision expires after the government body takes final action on the matter or in 90 days, unless the agency can prove that final action was not possible within that period.

“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.”

Certain conditions must be met before a meeting may be closed under this exemption: (1) The litigation must be in progress or be “imminent,” not merely possible or likely at some future date, (2) if the litigation is “imminent,” the disclosure of strategy would likely prejudice or disadvantage the governmental body’s case, and (3) legal counsel should be present.

“e. To discuss whether to conduct a hearing or to conduct a hearing 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.”

This exemption permits a closed session at two stages of disciplinary action against a student. The first stage, deciding whether to conduct a hearing, may be closed at the discretion of the governmental body. The second stage, the hearing itself, also may be closed unless the student or the parent or guardian, if the student is under 18, requests an open session. (The student, parent or guardian has no right to demand a closed hearing under this exemption.) The final action of the school board must be taken in open meeting, but to protect the confidentiality of the student, the motion to expel or suspend the student should not identify the student by name.

In *Schumacher v. Lisbon School Board*, 582 N.W.2d 183 (Iowa 1998), the Iowa Supreme Court ruled that the Lisbon board had violated the open meetings law when it held a closed hearing (at the request of a school aide) to consider disciplining a high school student, even though the parents of the student had asked for a public hearing.

Because disciplinary actions may involve student records otherwise considered private, the Iowa Association of School Boards recommends that a board obtain, from the student, parent or guardian who wants an open session, a written request and permission for disclosure of the records.

“f. To discuss the decision to be rendered in a contested case conducted according to the provisions of Chapter 17A [The Administrative Procedure Act].”

This exemption is rather unambiguous, and applies only to state agencies. A contested case under Chapter 17A is similar to a court trial. It is presided over and decided by one or more hearing officers (similar to judges) for disputes about rates, prices, licenses and the like.

“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.”

The public is interested in effective and efficient enforcement of the law. Persons who want to violate a law might do so with reduced fear of prosecution if they know what the prosecution tolerances, investigative schedules or investigative techniques are.

“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.”

This exemption permits public agencies to protect individual reputations but does not allow closed sessions for each and every discussion of “personnel” matters. Its scope is wide and includes any evaluation of an individual’s professional competence occasioned by consideration of that individual’s appointment, hiring, performance or discharge. It would, of course, be unreasonable and inconsistent with the intent of Chapter 21 to apply this exemption to evaluations of corporate or business “entities.” Such entities, which do not have personal privacy interests at stake, cannot require a closed meeting for discussion of their qualifications.

The potential breadth of this exemption is somewhat offset by the two conditions that must be met before a meeting may be closed under this exemption: (1) the individual involved must request a closed session, and (2) there must be reasonable basis to believe the individual’s reputation would be injured irreparably and needlessly unless the meeting is closed. (The construction here may allow irreparable injury if that is unavoidable in serving the public interest.)

The exemption provides no right for the person who is the subject of discussion to attend the session closed by request; nor does it forbid such attendance. In *Feller v. Scott County Civil Service Commission*, 435 N.W.2d 387 (Iowa 1988), the Iowa Court of Appeals limited a public agency’s discretion in deciding whether to honor a request for a closed session. The Court ruled that there could be basis for a lawsuit if a public agency denied a request for a closed session in arbitrary and capricious fashion.

“j. To discuss the purchase 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. The minutes and tape recording of a session closed under this paragraph shall be available for public examination when the transaction discussed is completed.”

A meeting may be closed under exemption (j) only when public discussion of the possible purchase of particular real estate could be reasonably expected to increase the price demanded of that property. The public interest that this exemption is intended to serve is that of thrift or economy in public

expenditures. The exemption does not allow the meeting to be closed for sale of real estate and does not allow closed sessions for discussion of real estate in general.

If a session is closed under this exemption, the records of that closed meeting must be made available for public examination when the transaction is completed or canceled.

Under Chapter 21.5(4) the minutes and tape recording of any closed session must be kept at least one year. If more than a year should elapse between a meeting closed under Chapter 21.5(1)(j) and the completion of the real-estate transaction, the record of that closed session should be kept for a reasonable time after the completion of the transaction so it can be available for public examination.

“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 2008, the Legislature amended Chapter 21 to allow the boards of public hospitals to hold closed sessions under some circumstances.

However, the closed meetings are allowed only when (1) public disclosure would harm the hospital’s competitive position, and (2) no public purpose would be served by public disclosure. When public disclosure would no longer harm the hospital’s position, the minutes and recording of the closed session shall be made available to the public.

This provision does not apply to discussions of employment conditions or employee compensation.

**QUESTION:** Does any provision of the Code of Iowa permit a final action to be taken in closed session?

**REPLY:** Chapter 21 requires final actions to be taken in open sessions. (For example, if the discharge of an employee is discussed in closed session, the vote to discharge the employee must take place in open session.) Chapter 21.5(3), however, does say that a final action by an agency may be taken in a closed meeting if expressly permitted by some other provision of the Code.

**QUESTION:** What other sections of the Code permit meetings of governmental bodies to be closed?

**REPLY:** Such exemptions to Chapter 21 include at least these:

Chapter 20.17(3) exempts negotiating sessions, strategy meetings of public employers or employee organizations, mediation and the deliberative process of arbitrators in the collective-bargaining process for public employees. (The initial two sessions shall be open to the public, however.)

Chapter 279.15 exempts hearings to discuss with a teacher a superintendent’s recommendation to terminate a contract with that teacher.

Chapter 279.24 exempts a conference between a school board and a probationary administrator to discuss reasons for a proposed termination of contract.

Confusion results in the first few months of each year when some school-board sessions are closed under Chapter 279 and citizens and reporters do not realize that Chapter 21 does not apply in cases exempted under Chapter 279.

Chapter 602.2103 exempts hearings by the Commission of Judicial Qualification when it considers the retirement, discipline or removal of a judge.

**QUESTION:** Chapter 21.6(2) notes: “Once a party seeking judicial enforcement of this chapter demonstrates to the court that the body in question is subject to the requirements of this chapter and has held a closed session, the burden of going forward shall be on the body and its members to demonstrate compliance with the requirements of this chapter.” What is meant by the “burden of going forward” and why should that burden be on the governmental body?

**REPLY:** This subsection provides for a shift in the burden of going forward in an action to enforce the requirements of the Act. Ordinarily in litigation, the burden is on the complaining party (the plaintiff) to show that a requirement of a law has been violated. Chapter 21.6(2) provides an exception to that general rule. Whenever the plaintiff can show that (1) the defendants are members of a governmental body subject to the requirements of the Act and (2) the defendants have held a closed meeting, the burden of going forward shifts to the defendants. The governmental body and its members must show by a preponderance of the evidence that the requirements of Chapter 21 were followed.

The shift in the burden to governmental bodies and their members is fundamental to the intent of the open-meetings law. Evidence of compliance with the requirements for closing a meeting is largely in the possession of the governmental body and its members. They are in a much better position to prove compliance than a typical plaintiff is to prove non-compliance. Also, placing the major burden on a party that has closed a meeting is in harmony with the express purpose of the Act: to maximize public access to governmental decision-making. Those who curtail public access by closing meetings are rightly assigned the duty of defending the legality of such closure.

**QUESTION:** Chapter 21.6(3)(b) provides “payment of all costs and reasonable attorney fees in the trial and appellate courts to any party successfully establishing a violation of this chapter.” How has the provision worked in practice?

**REPLY:** The provision has worked well, not so much in monetary terms but in terms of encouraging public agencies to be responsive to Chapter 21. In a handful of cases, public agencies have had to reimburse litigants for legal expenses. But in most instances, lawsuits have not had to be filed because a public agency corrected its policies or justified them under Chapter 21.

It must be noted, however, that reimbursement of costs is made only in successful cases. So a person charging a public body with 10 violations of the law may be reimbursed for only a portion of the costs if successful in only a few of the 10 charges made. Consequently, litigation against an agency for violating Chapter 21 should not become a shopping list of potential or imagined violations.

The defenses provided against individual liability for violation of Chapter 21 (21.6) have protected public officials from having to pay complainants’ legal fees out of their own pockets.

More important, the reimbursement provision has helped citizens and public agencies work out many questions promptly and amicably.

**QUESTION:** Can a governmental body covered by Chapter 21 take a secret ballot?

**REPLY:** No. Chapter 21.3 states, “The minutes shall show the results of each vote taken and information sufficient to indicate the vote of each member present. The vote of each member present shall be made public at the open session. The minutes shall be public records open to public inspection.”

It would be acceptable to record a vote as unanimous in the minutes of a meeting, or passed with only [name] dissenting, so long as the members present are noted in the minutes. However, in other cases the “yes” and “no” votes should be reported for each member of a public agency and if an agency is voting whether to go into a closed session it may be prudent to record the vote of each member.

In a Mitchell County District Court case on this issue, *McKinley vs. the St. Ansgar City Council*, a city council contended that a secret ballot was merely “preferential.” The secret vote narrowed a field of candidates to five who were then approved unanimously by the council members. But a judge ruled that the procedure violated Chapter 21.3.

Sometimes a public agency might be tempted to seek secret ballots on particularly sensitive and controversial matters, but it is precisely on such matters that the votes of individual members should be recorded. For one thing, citizens are entitled to know how their representatives voted; for another, such controversial items are most likely to lead to litigation if there is a possible violation of Chapter 21.

Further, Section 380.4 of the Code of Iowa requires a city council member’s vote to be recorded on any ordinance, amendment or resolution, and 362.2(19) defines “recorded vote” as “a record, roll call vote.”

**QUESTION:** What steps should a private citizen take at a meeting of a governmental body when it is suggested that the body go into closed session, apparently for reasons not legal under Chapter 21 or other sections of the Iowa Code?

**REPLY:** These steps seem reasonable:

1. Although you may not be assured access to the floor, seek an opportunity to voice concerns: “I’d appreciate it if you would specify exactly which exemption is being used to close the meeting. I question your legal grounds for closing the session.”
2. Recognize that the goal should be to keep the meeting legally open and not to punish a governmental body for illegally closing a session. Consequently, you should, if given the opportunity, explain why you feel the meeting should remain open and what requirements of closing may not have been met by the public body.
3. If the meeting is closed, and you remain concerned that it was closed illegally, you can consider legal action. Ask the county attorney to look into the matter. Enlist the support of the local newspaper or broadcast station. Consult a private attorney to evaluate your case. All you need to demonstrate to the court is that (a) the public body is covered by the open meetings law and (b) a closed meeting was held. The burden of going forward shifts to the public agency to demonstrate compliance with the law.
4. Remember, if you are right that the meeting was illegally closed, you will be reimbursed for all costs and reasonable legal fees. Remember, too, however, that this provision of the law should not be an invitation to protest all closed sessions because the law does provide for exemptions to the mandate for openness.

**QUESTION:** To what extent do members of a governmental body share with their attorney responsibility for compliance with the open meetings law? Chapter 21.6(3) does provide the members with a defense if they “reasonably relied” upon the attorney’s opinion.

**REPLY:** According to Chapter 21.6(4), members of a governmental body cannot claim their ignorance of its requirements as a defense. Yet, the law also recognizes that opinions of the attorney for the governmental body will be an important source of information about the Act’s requirements.

In *Grell v. Building Appeals Board*, 1999 WL 1255744 (Iowa Ct. App. 1999), the Iowa Court of Appeals held that members of the Coralville Building Appeals Board did not reasonably rely on the oral advice of counsel to close a session, where the members did not thereafter follow the mandated procedures for closing a session and did not tape record the session after closing. The Court left unresolved whether oral advice of counsel would constitute a “formal opinion” under Chapter 21. The Court focused instead on the attempt by board members to “shift responsibilities by blaming the City Attorney” in order to avoid civil penalties, which the Court viewed as exacerbating actions that were “clearly contrary to the objectives of the Open Meetings Law.”

A governmental body would be ill-advised to move into a closed session if counsel said, “The legality of the closing under consideration is unclear, but I see no reason why the meeting must stay open.” Reliance on that opinion would probably fail as a defense in court. The remarks are unmindful of the Act’s fundamental preference for openness.

**QUESTION:** Does a person who wants to speak at a meeting of a governmental agency have the legal right to do so?

**REPLY:** No. While the open meetings act provides no mandate that a public agency must provide meeting time to any citizen with something to say, due process and democratic principles will dictate that a public body should hear those affected by proposed actions. Typically, many public agencies set aside time for a “public forum” or an “open forum,” but they are under no mandate under Chapter 21 to do so. Even when discussing a controversial item on its agenda, the public agency understandably does not have to provide time to each person at the meeting.

**QUESTION:** If a majority of the members of a board are communicating online at the same time, would that constitute a public meeting?

**REPLY:** Yes. The provisions for electronic meetings under 21.8 apply as well to telephone and online conferences. So if the majority of the members of a public agency hold an online conference, they should follow the same guidelines that would apply to a telephone conference call. Provisions in Chapters 21 or 22 can reasonably accommodate use of laptop computers, e-mail and online conferences by public officials.

Regarding electronic communication: Citizens become frustrated when they feel they are being shut out of the decision-making process by public officials they suspect are conducting government business and striking deals via e-mail outside of the public eye. Some government bodies have maintained the flexibility of electronic communication while ensuring government transparency by posting officials’ e-mails online for public access under the public records law. Proposed legislation that would prohibit “walking quorums” — serial communication among individual members of a government body, either in person or electronically, with the intent to skirt the open meetings law — has been the topic of much discussion at the Statehouse in recent years.

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## RULES OF THUMB CHAPTER 22

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### For public servants:

1. Become familiar with the Act's requirements. If you have questions about the application of the Act to records in your possession or under your control, address those questions to your legal counsel.
2. Assure that the Act's requirements that public records be available for inspection and copying are satisfied.
3. Presume that all government records are open to public inspection and copying, unless they fall within the definitions of the confidential records found in Section 22.7 of the Act or other sections of the Code that provide confidentiality.
4. When denying access to any government record specify what section of the Code provides confidentiality.

### For citizens seeking access to government records:

1. Identify as specifically as possible the record(s) you seek to inspect and/or copy.
  2. If your request for access involves voluminous records, understand that some reasonable delay may be involved before the lawful custodian of the record(s) can provide all of the records requested and a suitable place where you may examine them.
  3. If you anticipate that your request for access to records will be denied, you may want to make that request in writing, addressed to the lawful custodian of the record(s) sought, and request that the lawful custodian issue a written denial of access. In this way, you will create documentary evidence that your request for a government record was denied, and you will avoid confusion about whether the lawful custodian was delaying in order to seek an injunction against examination as allowed under Section 22.8 of the Act.
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## CHAPTER 22: EXAMINATION OF PUBLIC RECORDS (OPEN RECORDS)

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### 22.1 Definitions.

1. The term “government body” means this state, or any county, city, township, school corporation, political subdivision, tax-supported district, 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 other entity of this state, or any branch, department, board, bureau, commission, council, committee, official, or officer, of any of the foregoing or any employee delegated the responsibility for implementing the requirements of this chapter.

2. The term “lawful custodian” means the government body currently in physical possession of the public record. The custodian of a public record in the physical possession of persons outside a government body is the government body owning that record. The records relating to the investment of public funds are the property of the public body responsible for the public funds. Each government body shall delegate to particular officials or employees of that government body the responsibility for implementing the requirements of this chapter and shall publicly announce the particular officials or employees to whom responsibility for implementing the requirements of this chapter has been delegated. “Lawful custodian” does not mean an automated data processing unit of a public body if the data processing unit holds the records solely as the agent of another public body, nor does it mean a unit which holds the records of other public bodies solely for storage.

3. 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.

“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.

### 22.2 Right to examine public records - exceptions.

1. Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate

a public record or the information contained in a public record. Unless otherwise provided for by law, the right to examine a public record shall include the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record. The right to copy a public record shall include the right to make photographs or photographic copies while the public record is in the possession of the custodian of the record. All rights under this section are in addition to the right to obtain a certified copy of a public record under section 622.46.

2. A government body shall not prevent the examination or copying of a public record by contracting with a non-government body to perform any of its duties or functions.

3. However, notwithstanding subsections 1 and 2, a government body is not required to permit access to or use of the following:

a. A geographic computer data base by any person except upon terms and conditions acceptable to the governing body. The governing body shall establish reasonable rates and procedures for retrieval of specified records, which are not confidential records, stored in the data base upon the request of any person.

b. Data processing software developed by the government body, as provided in section 22.3A.

### **22.3 Supervision.**

1. The examination and copying of public records shall be done under the supervision of the lawful custodian of the records or the custodian's authorized designee. The lawful custodian shall not require the physical presence of a person requesting or receiving a copy of a public record and shall fulfill requests for a copy of a public record received in writing, by telephone, or by electronic means. Fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of expenses to be incurred in fulfilling the request and such estimated expenses shall be communicated to the requester upon receipt of the request. The lawful custodian may adopt and enforce reasonable rules regarding the examination and copying of the records and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for the examination and copying of the records, but if it is impracticable to do the examination and copying of the records in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for the examination and copying.

2. All expenses of the examination and copying shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or the custodian's authorized designee in supervising the examination and copying of the records. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provide any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee. The fee for the copying service as determined by the lawful custodian shall not exceed the actual cost of providing the service. Actual costs shall include only those expenses directly attributable to supervising the examination of and making and providing copies of public records. Actual costs shall not include charges for ordinary expenses or costs such as employment benefits, depreciation, maintenance, electricity, or insurance associated with the administration of the office of the lawful custodian.

### **22.3A Access to data processing software.**

1. As used in this section:

- a. "Access" means the instruction of, communication with, storage of data in, or retrieval of data from a computer.
- b. "Computer" means an electronic device which performs logical, arithmetical, and memory functions by manipulations of electronic or magnetic impulses, and includes all input, output, processing, storage, and communication facilities which are connected or related to the computer, including a computer network. As used in this paragraph, "computer" includes any central processing unit, front-end processing unit, miniprocessor, or microprocessor, and related peripheral equipment such as data storage devices, document scanners, data entry terminal controllers, and data terminal equipment and systems for computer networks.
- c. "Computer network" means a set of related, remotely connected devices and communication facilities including two or more computers with capability to transmit data among them through communication facilities.
- d. "Data" means a representation of information, knowledge, facts, concepts, or instructions that has been prepared or is being prepared in a formalized manner and has been processed, or is intended to be processed, in a computer. Data may be stored in any form, including but not limited to a printout, magnetic storage media, disk, compact disc, punched card, or as memory of a computer.
- e. "Data processing software" means an ordered set of instructions or statements that, when executed by a computer, causes the computer to process data, and includes any program or set of programs, procedures, or routines used to employ and control capabilities of computer hardware. As used in this paragraph, "data processing software" includes but is not limited to an operating system, compiler, assembler, utility, library resource, maintenance routine, application, or computer networking program.

2. A government body may provide, restrict, or prohibit access to data processing software developed by the government body, regardless of whether the data processing software is separated or combined with a public record. A government body shall establish policies and procedures to provide access to public records which are combined with its data processing software. A public record shall not be withheld from the public because it is combined with data processing software. A government body shall not acquire any electronic data processing system for the storage, manipulation, or retrieval of public records that would impair the government body's ability to permit the examination of a public record and the copying of a public record in either written or electronic form. If it is necessary to separate a public record from data processing software in order to permit the examination or copying of the public record, the government body shall bear the cost of separation of the public record from the data processing software. The electronic public record shall be made available in a format useable with commonly available data processing or database management software. The cost chargeable to a person receiving a public record separated from data processing software under this subsection shall not be in excess of the charge under this chapter unless the person receiving the public record requests that the public record be specially processed. A government body may establish payment rates and procedures required to provide access to data processing software, regardless of whether the data processing software is separated from or combined with a public record. Proceeds from payments may be considered repayment receipts, as defined in section 8.2. The payment amount shall be calculated as follows:

- a. The amount charged for access to a public record shall be not more than that required to recover direct publication costs, including but not limited to editing, compilation, and media production costs, incurred by the government body in developing the data processing software, and preparing the data processing software for transfer to the person. The amount shall be in addition to any other fee required to be paid under this chapter for the examination and copying of a public record. If a person accesses a public record stored in an electronic format that does not require formatting, editing, or compiling to access the public record, the

charge for providing the accessed public record shall not exceed the reasonable cost of accessing that public record. The government body shall, if requested, provide documentation which explains and justifies the amount charged. This paragraph shall not apply to any publication for which a price has been established pursuant to another section, including 2A.5.

b. If access to the data processing software is provided to a person for a purpose other than provided in paragraph “a”, the amount may be established according to the discretion of the government body, and may be based upon competitive market considerations as determined by the government body.

3. A government body is granted and may apply for and receive any legal protection necessary to secure a right to or an interest in data processing software developed by the government body, including but not limited to federal copyright, patent, and trademark protections, and any trade secret protection available under chapter 550. The government body may enter into agreements for the sale or distribution of its data processing software, including marketing and licensing agreements. The government body may impose conditions upon the use of the data processing software that is otherwise consistent with state and federal law.

#### **22.4 Hours when available.**

The rights of persons under this chapter may be exercised at any time during the customary office hours of the lawful custodian of the records. However, if the lawful custodian does not have customary office hours of at least thirty hours per week, such right may be exercised at any time from nine o’clock a.m. to noon and from one o’clock p.m. to four o’clock p.m. Monday through Friday, excluding legal holidays, unless the person exercising such right and the lawful custodian agree on a different time.

#### **22.5 Enforcement of rights.**

The provisions of this chapter and all rights of persons under this chapter may be enforced by mandamus or injunction, whether or not any other remedy is also available. In the alternative, rights under this chapter also may be enforced by an action for judicial review according to the provisions of the Iowa administrative procedure Act, chapter 17A, if the records involved are records of an “agency” as defined in that Act.

#### **22.6 Penalty.**

It shall be unlawful for any person to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right to be denied or refused. Any person knowingly violating or attempting to violate any provision of this chapter where no other penalty is provided shall be guilty of a simple misdemeanor.

#### **22.7 Confidential records.**

The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:

*[Editor’s Note: The following list is not exhaustive. Other sections of the Code also may provide for confidentiality. The Iowa Supreme Court has emphasized that the lawful custodian has the discretion to release a record otherwise considered confidential under this section when the public good requires disclosure.]*

1. Personal information in records regarding a student, prospective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such

records. This subsection shall not be construed to prohibit a postsecondary education institution from disclosing to a parent or guardian information regarding a violation of a federal, state, or local law, or institutional rule or policy governing the use or possession of alcohol or a controlled substance if the child is under the age of twenty-one years and the institution determines that the student committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance regardless of whether that information is contained in the student's education records.

2. Hospital records, medical records, and professional counselor records of the condition, diagnosis, care, or treatment of a patient or former patient or a counselee or former counselee, including outpatient. However, confidential communications between a crime victim and the victim's counselor are not subject to disclosure except as provided in section 915.20A. However, the Iowa department of public health shall adopt rules which provide for the sharing of information among agencies and providers concerning the maternal and child health program including but not limited to the statewide child immunization information system, while maintaining an individual's confidentiality.

3. Trade secrets which are recognized and protected as such by law.

4. Records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body.

5. Peace officers' investigative reports, and specific portions of electronic mail and telephone billing records of law enforcement agencies if that information is part of an ongoing investigation, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual. Specific portions of electronic mail and telephone billing records may only be kept confidential under this subsection if the length of time prescribed for commencement of prosecution or the finding of an indictment or information under the statute of limitations applicable to the crime that is under investigation has not expired.

6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.

7. Appraisals or appraisal information concerning the purchase of real or personal property for public purposes, prior to public announcement of a project.

8. Iowa department of economic development information on an industrial prospect with which the department is currently negotiating.

9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests and criminal history data shall be public records.

10. Personal information in confidential personnel records of the military division of the department of public defense of the state.

11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.

12. Financial statements submitted to the department of agriculture and land stewardship pursuant to chapter 203 or chapter 203C, by or on behalf of a licensed grain dealer or warehouse operator or by an applicant for a grain dealer license or warehouse license.
13. The records of a library which, by themselves or when examined with other public records, would reveal the identity of the library patron checking out or requesting an item or information from the library. The records shall be released to a criminal or juvenile justice agency only pursuant to an investigation of a particular person or organization suspected of committing a known crime. The records shall be released only upon a judicial determination that a rational connection exists between the requested release of information and a legitimate end and that the need for the information is cogent and compelling.
14. The material of a library, museum or archive which has been contributed by a private person to the extent of any limitation that is a condition of the contribution.
15. Information concerning the procedures to be used to control disturbances at adult correctional institutions. Such information shall also be exempt from public inspection under section 17A.3. As used in this subsection disturbance means a riot or a condition that can reasonably be expected to cause a riot.
16. Information in a report to the Iowa department of public health, to a local board of health, or to a local health department, which identifies a person infected with a reportable disease.
17. Records of identity of owners of public bonds or obligations maintained as provided in section 76.10 or by the issuer of the public bonds or obligations. However, the issuer of the public bonds or obligations and a state or federal agency shall have the right of access to the records.
18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. As used in this subsection, “persons outside of government” does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:
  - a. The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.
  - b. Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity of the person outside of government making it or enabling others to ascertain the identity of that person.
  - c. Information contained in the communication is a public record to the extent that it indicates the date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except to the extent that its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person. In any action challenging the failure of the lawful custodian to disclose any particular information of the kind enumerated in this paragraph, the burden of proof is on the lawful custodian to demonstrate that the disclosure of that information would jeopardize such an investigation or would pose such a clear and present danger.

19. Examinations, including but not limited to cognitive and psychological examinations for law enforcement officer candidates administered by or on behalf of a governmental body, to the extent that their disclosure could reasonably be believed by the custodian to interfere with the accomplishment of the objectives for which they are administered.
  20. Information concerning the nature and location of any archaeological resource or site if, in the opinion of the state archaeologist, disclosure of the information will result in unreasonable risk of damage to or loss of the resource or site where the resource is located. This subsection shall not be construed to interfere with the responsibilities of the federal government or the state historic preservation officer pertaining to access, disclosure, and use of archaeological site records.
  21. Information concerning the nature and location of any ecologically sensitive resource or site if, in the opinion of the director of the department of natural resources after consultation with the state ecologist, disclosure of the information will result in unreasonable risk of damage to or loss of the resource or site where the resource is located. This subsection shall not be construed to interfere with the responsibilities of the federal government or the director of the department of natural resources and the state ecologist pertaining to access, disclosure, and use of the ecologically sensitive site records.
- [Editor's Note: Exemptions 22 and 23 provide some confidentiality to the Iowa Insurance Commissioner and to the Iowa Life and Health Insurance Guaranty Association in dealing with questions about the solvency, liquidation or rehabilitation of insurance businesses. Some records in 508C.13 become public upon court order or when the proceedings are completed.]*
22. *[See Editor's Note above.]* Reports or recommendations of the Iowa insurance guaranty association filed or made pursuant to section 515B.10, subsection 1, paragraph "a," subparagraph (2).
  23. *[See Editor's Note above.]* Information or reports collected or submitted pursuant to section 508C.12, subsections 3 and 5, and section 508C.13, subsection 2, except to the extent that release is permitted under those sections.
  24. Records of purchases of alcoholic liquor from the alcoholic beverages division of the department of commerce which would reveal purchases made by an individual class "E" liquor control licensee. However, the records may be revealed for law enforcement purposes or for the collection of payments due the division pursuant to section 123.24.
  25. Financial information, which if released would give advantage to competitors and serve no public purpose, relating to commercial operations conducted or intended to be conducted by a person submitting records containing the information to the department of agriculture and land stewardship for the purpose of obtaining assistance in business planning.
  26. Applications, investigation reports, and case records of persons applying for county general assistance pursuant to section 25227. Marketing and advertising budget and strategy of a nonprofit corporation which is subject to this chapter. However, this exemption does not apply to salaries or benefits of employees who are employed by the nonprofit corporation to handle the marketing and advertising responsibilities.
  28. The information contained in records of the centralized employee registry created in chapter 252G, except to the extent that disclosure is authorized pursuant to chapter 252G.
  29. Records and information obtained or held by independent special counsel during the course of an investigation

conducted pursuant to section 68B.31A. Information that is disclosed to a legislative ethics committee subsequent to a determination of probable cause by independent special counsel and made pursuant to section 68B.31 is not a confidential record unless otherwise provided by law.

30. Information contained in a declaration of paternity completed and filed with the state registrar of vital statistics pursuant to section 144.12A, except to the extent that the information may be provided to persons in accordance with section 144.12A.

31. Memoranda, work products, and case files of a mediator and all other confidential communications in the possession of a mediator, as provided in chapters 86 and 216. Information in these confidential communications is subject to disclosure only as provided in sections 86.44 and 216.15B, notwithstanding any other contrary provision of this chapter.

32. Social security numbers of the owners of unclaimed property reported to the treasurer of state pursuant to section 556.11, subsection 2, included on claim forms filed with the treasurer of state pursuant to section 556.19, included in outdated warrant reports received by the treasurer of state pursuant to section 556.2C, or stored in record systems maintained by the treasurer of state for purposes of administering chapter 556, or social security numbers of payees included on state warrants included in records systems maintained by the department of administrative services for the purpose of documenting and tracking outdated warrants pursuant to section 556.2C.

33. Data processing software, as defined in section 22.3A, which is developed by a government body.

34. A record required under the Iowa financial transaction reporting Act listed in section 529.2, subsection 9.

35. Records of the Iowa department of public health pertaining to participants in the gambling treatment program except as otherwise provided in this chapter.

36. Records of a law enforcement agency or the state department of transportation regarding the issuance of a driver's license under section 321.189A.

37. Mediation communications as defined in section 679C.102, except written mediation agreements that resulted from a mediation which are signed on behalf of a governing body. However, confidentiality of mediation communications resulting from mediation conducted pursuant to chapter 216 shall be governed by chapter 216.

38. a. Records containing information that would disclose, or might lead to the disclosure of, private keys used in an electronic signature or other similar technologies as provided in chapter 554D.

b. Records which if disclosed might jeopardize the security of an electronic transaction pursuant to chapter 554D.

39. Information revealing the identity of a packer or a person who sells livestock to a packer as reported to the department of agriculture and land stewardship pursuant to section 202A.2.

40. The portion of a record request that contains an internet protocol number which identifies the computer from which a person requests a record, whether the person using such computer makes the request through the lowAccess network or directly to a lawful custodian. However, such record may be released with the express written consent of the person requesting the record.

41. Medical examiner records and reports, including preliminary reports, investigative reports, and autopsy

reports. However, medical examiner records and reports shall be released to a law enforcement agency that is investigating the death, upon the request of the law enforcement agency, and autopsy reports shall be released to the decedent's immediate next of kin upon the request of the decedent's immediate next of kin unless disclosure to the decedent's immediate next of kin would jeopardize an investigation or pose a clear and present danger to the public safety or the safety of an individual. Information regarding the cause and manner of death shall not be kept confidential under this subsection unless disclosure would jeopardize an investigation or pose a clear and present danger to the public safety or the safety of an individual.

42. Information obtained by the commissioner of insurance in the course of an investigation as provided in section 523C.23.

43. Information obtained by the commissioner of insurance pursuant to section 502.607.

44. Information provided to the court and state public defender pursuant to section 13B.4, subsection 5; section 814.11, subsection 7; or section 815.10, subsection 5.

45. The critical asset protection plan or any part of the plan prepared pursuant to section 29C.8 and any information held by the homeland security and emergency management division that was supplied to the division by a public or private agency or organization and used in the development of the critical asset protection plan to include, but not be limited to, surveys, lists, maps, or photographs. However, the administrator shall make the list of assets available for examination by any person. A person wishing to examine the list of assets shall make a written request to the administrator on a form approved by the administrator. The list of assets may be viewed at the division's offices during normal working hours. The list of assets shall not be copied in any manner. Communications and asset information not required by law, rule, or procedure that are provided to the administrator by persons outside of government and for which the administrator has signed a nondisclosure agreement are exempt from public disclosures. The homeland security and emergency management division may provide all or part of the critical asset plan to federal, state, or local governmental agencies which have emergency planning or response functions if the administrator is satisfied that the need to know and intended use are reasonable. An agency receiving critical asset protection plan information from the division shall not disseminate the information without prior approval of the administrator.

46. Military personnel records recorded by the county recorder pursuant to section 331.608.

47. A report regarding interest held in agricultural land required to be filed pursuant to chapter 10B.

48. Sex offender registry records under chapter 692A, except as provided in section 692A.13.

49. Confidential information, as defined in section 86.45, subsection 1, filed with the workers' compensation commissioner.

50. Information concerning security procedures or emergency preparedness information developed and maintained by a government body for the protection of governmental employees, visitors to the government body, persons in the care, custody, or under the control of the government body, or property under the jurisdiction of the government body, if disclosure could reasonably be expected to jeopardize such employees, visitors, persons, or property.

- a. Such information includes but is not limited to information directly related to vulnerability assessments; information contained in records relating to security measures such as security and response plans, security

codes and combinations, passwords, restricted area passes, keys, and security or response procedures; emergency response protocols; and information contained in records that if disclosed would significantly increase the vulnerability of critical physical systems or infrastructures of a government body to attack.

b. This subsection shall only apply to information held by a government body that has adopted a rule or policy identifying the specific records or class of records to which this subsection applies and which is contained in such a record.

51. The information contained in the information program established in section 124.551, except to the extent that disclosure is authorized pursuant to section 124.553.

52. a. The following records relating to a charitable donation made to a foundation acting solely for the support of an institution governed by the state board of regents, to a foundation acting solely for the support of an institution governed by chapter 260C, to a private foundation as defined in section 509 of the Internal Revenue Code organized for the support of a government body, or to an endow Iowa qualified community foundation, as defined in section 15E.303, organized for the support of a government body:

(1) Portions of records that disclose a donor's or prospective donor's personal, financial, estate planning, or gift planning matters.

(2) Records received from a donor or prospective donor regarding such donor's prospective gift or pledge.

(3) Records containing information about a donor or a prospective donor in regard to the appropriateness of the solicitation and dollar amount of the gift or pledge.

(4) Portions of records that identify a prospective donor and that provide information on the appropriateness of the solicitation, the form of the gift or dollar amount requested by the solicitor, and the name of the solicitor.

(5) Portions of records disclosing the identity of a donor or prospective donor, including the specific form of gift or pledge that could identify a donor or prospective donor, directly or indirectly, when such donor has requested anonymity in connection with the gift or pledge. This subparagraph does not apply to a gift or pledge from a publicly held business corporation.

b. The confidential records described in paragraph "a", subparagraphs (1) through (5), shall not be construed to make confidential those portions of records disclosing any of the following:

(1) The amount and date of the donation.

(2) Any donor-designated use or purpose of the donation.

(3) Any other donor-imposed restrictions on the use of the donation.

(4) When a pledge or donation is made expressly conditioned on receipt by the donor, or any person related to the donor by blood or marriage within the third degree of consanguinity, of any privilege, benefit, employment, program admission, or other special consideration from the government body, a description of any and all such consideration offered or given in exchange for the pledge or donation.

c. Except as provided in paragraphs “a” and “b”, portions of records relating to the receipt, holding, and disbursement of gifts made for the benefit of regents institutions and made through foundations established for support of regents institutions, including but not limited to written fund-raising policies and documents evidencing fund-raising practices, shall be subject to this chapter.

d. This subsection does not apply to a report filed with the ethics and campaign disclosure board pursuant to section 8.7.

53. Information obtained and prepared by the commissioner of insurance pursuant to section 507.14.

54. Information obtained and prepared by the commissioner of insurance pursuant to section 507E.5.

55. An intelligence assessment and intelligence data under chapter 692, except as provided in section 692.8A.

56. Individually identifiable client information contained in the records of the state database created as a homeless management information system pursuant to standards developed by the United States department of housing and urban development and utilized by the Iowa department of economic development.

57. The following information contained in the records of any governmental body relating to any form of housing assistance:

a. An applicant’s social security number.

b. An applicant’s personal financial history.

c. An applicant’s personal medical history or records.

d. An applicant’s current residential address when the applicant has been granted or has made application for a civil or criminal restraining order for the personal protection of the applicant or a member of the applicant’s household.

58. Information filed with the commissioner of insurance pursuant to sections 523A.204 and 523A.502A.

59. The information provided in any report, record, claim, or other document submitted to the treasurer of state pursuant to chapter 556 concerning unclaimed or abandoned property, except the name and last known address of each person appearing to be entitled to unclaimed or abandoned property paid or delivered to the treasurer of state pursuant to that chapter.

60. Information possessed by the office of energy independence, the Iowa power fund board, or the due diligence committee associated with the office and the board, relating to a prospective applicant with which the office, board, or committee is currently negotiating, or an award recipient, shall only be released as provided in section 469.6, subsection 6.

61. Information in a record that would permit a governmental body subject to chapter 21 to hold a closed session pursuant to section 21.5 in order to avoid public disclosure of that information, until such time as final action is taken on the subject matter of that information. Any portion of such a record not subject to this subsection, or not otherwise confidential, shall be made available to the public. After the governmental body has taken final action on the subject matter pertaining to the information in that record, this subsection shall no longer apply.

This subsection shall not apply more than ninety days after a record is known to exist by the governmental body, unless it is not possible for the governmental body to take final action within ninety days. The burden shall be on the governmental body to prove that final action was not possible within the ninety-day period.

#### 22.8 Injunction to restrain examination.

1. The district court may grant an injunction restraining the examination, including copying, of a specific public record or a narrowly drawn class of public records. A hearing shall be held on a request for injunction upon reasonable notice as determined by the court to persons requesting access to the record which is the subject of the request for injunction. It shall be the duty of the lawful custodian and any other person seeking an injunction to ensure compliance with the notice requirement. Such an injunction may be issued only if the petition supported by affidavit shows and if the court finds both of the following:

- a. That the examination would clearly not be in the public interest.
- b. That the examination would substantially and irreparably injure any person or persons.

2. An injunction shall be subject to the rules of civil procedure except that the court in its discretion may waive bond.

3. In actions brought under this section the district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others. A court may issue an injunction restraining examination of a public record or a narrowly drawn class of such records, only if the person seeking the injunction demonstrates by clear and convincing evidence that this section authorizes its issuance. An injunction restraining the examination of a narrowly drawn class of public records may be issued only if such an injunction would be justified under this section for every member within the class of records involved if each of those members were considered separately.

4. Good-faith, reasonable delay by a lawful custodian in permitting the examination and copying of a government record is not a violation of this chapter if the purpose of the delay is any of the following:

- a. To seek an injunction under this section.
- b. To determine whether the lawful custodian is entitled to seek such an injunction or should seek such an injunction.
- c. To determine whether the government record in question is a public record, or confidential record.
- d. To determine whether a confidential record should be available for inspection and copying to the person requesting the right to do so. A reasonable delay for this purpose shall not exceed twenty calendar days and ordinarily should not exceed ten business days.
- e. Actions for injunctions under this section may be brought by the lawful custodian of a government record, or by another government body or person who would be aggrieved or adversely affected by the examination or copying of such a record.
- f. The rights and remedies provided by this section are in addition to any rights and remedies provided by

section 17A.19.

#### 22.9 Denial of federal funds - rules.

If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.

An agency within the meaning of section 17A.2, subsection 1, shall adopt as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services or information.

#### 22.10 Civil enforcement.

1. The rights and remedies provided by this section are in addition to any rights and remedies provided by section 17A.19. Any aggrieved person, any taxpayer to or citizen of the state of Iowa, or the attorney general or any county attorney, may seek judicial enforcement of the requirements of this chapter in an action brought against the lawful custodian and any other persons who would be appropriate defendants under the circumstances. Suits to enforce this chapter shall be brought in the district court for the county in which the lawful custodian has its principal place of business.

2. Once a party seeking judicial enforcement of this chapter demonstrates to the court that the defendant is subject to the requirements of this chapter, that the records in question are government records, and that the defendant refused to make those government records available for examination and copying by the plaintiff, the burden of going forward shall be on the defendant to demonstrate compliance with the requirements of this chapter.

3. Upon a finding by a preponderance of the evidence that a lawful custodian has violated any provision of this chapter, a court:

a. Shall issue an injunction punishable by civil contempt ordering the offending lawful custodian and other appropriate persons to comply with the requirements of this chapter in the case before it and, if appropriate, may order the lawful custodian and other appropriate persons to refrain for one year from any future violations of this chapter.

b. Shall assess the persons who participated in its violation damages in the amount of not more than five hundred dollars nor less than one hundred dollars. These damages shall be paid by the court imposing them to the state of Iowa if the body in question is a state government body, or to the local government involved if the body in question is a local government body. A person found to have violated this chapter shall not be assessed such damages if that person proves that the person either voted against the action violating this chapter, refused to participate in the action violating this chapter, or engaged in reasonable efforts under the circumstances to resist or prevent the action in violation of this chapter; had good reason to believe and in good faith believed facts which, if true, would have indicated compliance with the requirements of this chapter; or reasonably relied upon a decision of a court or an opinion of the attorney general or the attorney for the government body.

c. Shall order the payment of all costs and reasonable attorney fees, including appellate attorney fees, to any plaintiff

successfully establishing a violation of this chapter in the action brought under this section. The costs and fees shall be paid by the particular persons who were assessed damages under paragraph “b” of this subsection. If no such persons exist because they have a lawful defense under that paragraph to the imposition of such damages, the costs and fees shall be paid to the successful plaintiff from the budget of the offending government body or its parents. Shall issue an order removing a person from office if that person has engaged in a prior violation of this chapter for which damages were assessed against the person during the person’s term.

4. Ignorance of the legal requirements of this chapter is not a defense to an enforcement proceeding brought under this section. A lawful custodian or its designee in doubt about the legality of allowing the examination or copying or refusing to allow the examination or copying of a government record is authorized to bring suit at the expense of that government body in the district court of the county of the lawful custodian’s principal place of business, or to seek an opinion of the attorney general or the attorney for the lawful custodian, to ascertain the legality of any such action.

5. Judicial enforcement under this section does not preclude a criminal prosecution under section 22.6 or any other applicable criminal provision.

#### **22.11 Fair information practices.**

This section may be cited as the “Iowa Fair Information Practices Act.” It is the intent of this section to require that the information policies of state agencies are clearly defined and subject to public review and comment.

1. Each state agency as defined in chapter 17A shall adopt rules which provide the following:

- a. The nature and extent of the personally identifiable information collected by the agency, the legal authority for the collection of that information, and a description of the means of storage.
- b. A description of which of its records are public records, which are confidential records, and which are partially public and partially confidential records and the legal authority for the confidentiality of the records. The description shall indicate whether the records contain personally identifiable information.
- c. The procedure for providing the public with access to public records.
- d. The procedures for allowing a person to review a government record about that person and have additions, dissents, or objections entered in that record unless the review is prohibited by statute.
- e. The procedures by which the subject of a confidential record may have a copy of that record released to a named third party.
- f. The procedures by which the agency shall notify persons supplying information requested by the agency of the use that will be made of the information, which persons outside of the agency might routinely be provided this information, which parts of the information requested are required and which are optional and the consequences of failing to provide the information requested.
- g. Whether a data processing system matches, collates, or permits the comparison of personally identifiable information in one record system with personally identifiable information in another record system.

2. A state agency shall not use any personally identifiable information after July 1, 1988, unless it is in a record

system described by the rules required by this section.

#### **22.12 Political subdivisions.**

A political subdivision or public body which is not a state agency as defined in chapter 17A is not required to adopt policies to implement section 22.11. However, if a public body chooses to adopt policies to implement section 22.11 the policies must be adopted by the elected governing body of the political subdivision of which the public body is a part. The elected governing body must give reasonable notice, make the proposed policy available for public inspection and allow full opportunity for the public to comment before adopting the policy. If the public body is established pursuant to an agreement under chapter 28E, the policy must be adopted by a majority of the public agencies party to the agreement. These policies shall be kept in the office of the county auditor if adopted by the board of supervisors, the city clerk if adopted by a city, and the chief administrative officer of the public body if adopted by some other elected governing body.

#### **22.13 Settlements - governmental bodies.**

A written summary of the terms of settlement, including amounts of payments made to or through a claimant, or other disposition of any claim for damages made against a governmental body or against an employee, officer, or agent of a governmental body, by an insurer pursuant to a contract of liability insurance issued to the governmental body, shall be filed with the governmental body and shall be a public record.

#### **22.14 Public funds investment records in custody of third parties.**

1. The records of investment transactions made by or on behalf of a public body are public records and are the property of the public body whether in the custody of the public body or in the custody of a fiduciary or other third party.

2. If such records of public investment transactions are in the custody of a fiduciary or other third party, the public body shall obtain from the fiduciary or other third party records requested pursuant to section 22.2. 3. If a fiduciary or other third party with custody of public investment transactions records fails to produce public records within a reasonable period of time as requested by the public body, the public body shall make no new investments with or through the fiduciary or other third party and shall not renew existing investments upon their maturity with or through the fiduciary or other third party. The fiduciary or other third party shall be liable for

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the penalties imposed under section 22.6 due to the acts or omissions of the fiduciary or other third party and any other remedies available under statute, common law, or contract.

## QUESTIONS ABOUT CHAPTER 22

**QUESTION:** (1) Does a request for a record have to be in person? (2) Must it be made in writing?

**REPLY:** (1) The custodian cannot require the physical presence of the person requesting the public record. (2) In addition, a change in Chapter 22.3 in 2006 requires record custodians to respond to requests made in writing, by telephone or by electronic means. The spoken request is sufficient, so long as you reasonably identify the record sought. A written request might be helpful in a complex matter or one involving litigation. (See Sample FOI Request Letter.

**QUESTION:** (1) Can I see letters written by a public official? (2) What if the letters contain confidential information?

**REPLY:** (1) Yes, so long as the letter deals with the discharge of public duties. For example, correspondence from a school superintendent to school board members about items on next week's agenda should be open to public inspection. (2) If such correspondence contains information that is confidential by law, the remaining portion of the correspondence should be provided. That rule applies to other public records, too. Mere inclusion of some information that is confidential by law does not make an entire record confidential.

**QUESTION:** Suppose the record requested is not in the office of the governmental agency, but in the hands of a private company. Can I still get the record?

**REPLY:** Yes. Under Chapter 22.2(2), "A governmental body shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions." In *KMEG Television, Inc. v. Board of Regents*, 440 N.W.2d 382 (Iowa 1989), the Iowa Supreme Court invoked a two-part test to interpret 22.2(2). First, the requesting party must prove the agency has delegated a duty to the private firm. Second, to avoid penalty, the governmental body must prove that such delegation was NOT for the purpose of preventing access to the record.

**QUESTION:** I want the record right now. How much time does the public agency have to produce a requested record?

**REPLY:** Typically, Iowa agencies provide access to records as soon as they can, and most record requests are routine. If there is a question as to whether the information requested is confidential, Chapter 22.8(4) provides for "good-faith, reasonable delay by a lawful custodian" in permitting examination of the record. In most cases, such delay should not exceed 10 business days, according to the Code.

**QUESTION:** How soon does a public agency have to provide access to its minutes?

**REPLY:** The minutes should be available for public inspection as soon as they are prepared. An agency cannot delay access, pending formal approval or distribution to members.

**QUESTION:** What police and sheriff's records are open to the public and press?

**REPLY:** The question is a crucial one, vital to the nature of a free society, because access to law-enforcement records is one of the rights that set a democracy apart from the totalitarian state. There must be no secret arrests in our society, no unaccountable actions by those exercising police powers.

Access to law-enforcement records is spelled out in detail in an Attorney General's opinion, Weeg to Holt, 82-10-3. That opinion interprets Chapter 22.7(5), which provides public access to "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident."

The opinion notes that a news reporter or citizen does not have to know about a crime or incident to obtain information about it. The request could be a general one, to review the public record of police activities during the past 24 hours: "A citizen may request [Chapter 22.7(5)] information for a particular day or time, or for any number of days or times. The request is not required to specify the particular criminal incident for which the information is requested."

Generally, the opinion calls for routine access to all "date, time, specific location and immediate facts and circumstances" information, and the record custodian carries "the burden of establishing facts necessary to withhold public records. . . ."

**QUESTION:** Are computerized records treated the same as public records on paper?

**REPLY:** Yes, Iowa defines public records (22.1) to include "all records, documents, tape, or other information, stored or preserved in any medium . . .," a definition that plainly includes electronic data. Further, Section 22.3A addresses several issues regarding access to data processing software and public records.

A wide range of studies are under way by governmental and private groups across the nation to address some of the difficult and subtle questions raised by having more records on computers. So far, court decisions and common sense suggest the following:

1. A government agency cannot force a requester to take or pay for a computerized record in a prohibitive or expensive format.
2. Simply because information could be available via a government computer does not make the information a public record. Government agencies do not have to create data through cross tabulations or selective analysis of data. They could do so if the requester is willing to pay for the staff time.
3. The record custodian should be the agency that generated the record in the first place and not the computer processor or administrative unit that oversees computer services for a public agency.
4. In Iowa, the law provides no distinction between a citizen's right to access information stored on paper or stored electronically. But that may change over the next several years as public agencies, the news media, private businesses and individual citizens address the reports and studies now under way.

**QUESTION:** Are job applications public records?

**REPLY:** The Iowa Supreme Court ruled in April 1988 that under a 1984 amendment to Chapter 22 public agencies can make job applications confidential.

In *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988), a five-member panel of the Iowa Supreme Court ruled that such confidentiality is provided for in subsection 18 of 22.7.

The Court ruled that job applications might be made confidential if the person so requests or if the public agency "could reasonably believe that those persons would be discouraged" from applying if applications were available for public inspection.

While subsection 18 does not provide confidentiality for communications required by law, rule or procedure, the Court stated that job applications were not required as part of the hiring process since the job applicant is applying voluntarily.

In an August 1992 decision, *Des Moines Register and Tribune Company v. State Board of Regents and Douglas Cramer*, Polk County Judge Arthur Gamble ruled that a private firm that had conducted a presidential search for Iowa State University was wrong in keeping secret the names of candidates who had no objections to disclosure.

To summarize, a communication to a government body can be kept confidential under 22.7(18) only if all of the following exist:

- (1) The communication is not required by law, rule, procedure, or contract.
- (2) It is from identified persons outside of government.
- (3) The government body could reasonably believe those persons would be discouraged from communicating with government if the information was made public.

Nevertheless, the information can still be released if the person communicating with government consents to its release or if it can be released without identifying the person.

In addition, a communication regarding an illegal act can be kept confidential if disclosing it would jeopardize a continuing investigation or pose a clear and present danger to the safety of an individual.

**QUESTION:** There is little or no direct reference in Chapter 22 regarding information about juveniles. What guidelines are available for accessing information about juveniles involved with law enforcement agencies?

**REPLY:** While Iowa statutes permit many juvenile court records and proceedings to be kept secret, the Iowa General Assembly in 1995 and 1997 passed legislation making it clear that complaints against juvenile offenders must be made public, as must the identity of the youthful offender. These legislative changes carve out complaints in juvenile court from the general secrecy provisions of the juvenile justice statute and grant both court and law enforcement officials authority to release the complaint and identity information.

Specifically, Iowa Code section 232.19(4) states, "Information pertaining to a child who is at least ten years of age and who is taken into custody for a delinquent act which would be a public offense is a public record and is not confidential under section 232.147."

Section 232.147 is the general confidentiality provision of the juvenile justice statute. Under that provision, official juvenile records are public records, but access to such records can be limited, typically, to court officials, parties in the juvenile case and their attorneys, and agency officials.

Information that is confidential includes child in need of assistance and termination of parental rights cases, and juvenile delinquency cases sealed by the court.

Under the First Amendment, a news reporter (or any citizen, for that matter) could not be prohibited from or punished for publishing or sharing information about a juvenile, including identification, that was obtained legally - for example, by talking with family or friends of that person or by observing the incident firsthand.

(A word of caution here: The fact that a juvenile willingly provides personal information and consents to its publication may not provide legal protection for an invasion of privacy lawsuit, for example, since a juvenile is not of legal age to give consent.)

Court hearings and trials are open to the public unless required closed by law or court order. Juvenile court proceedings are open unless the court determines that the danger of harm to the child outweighs the public benefit of open proceedings.

Proceedings that can be closed include child in need of assistance and termination of parental rights hearings; juvenile delinquency hearings, and hearings on child custody and adoption.

**QUESTION:** To what extent are records relating to public employees available for public inspection?

**REPLY:** Exemption 22.7(11) by its terms shields only “personal information in confidential personnel records” from disclosure. In the case *Des Moines Independent Community School District Public Records v. Des Moines Register & Tribune Co.*, 487 N.W.2d 666 (Iowa 1992), this exemption was analyzed by the Court with mixed results.

The Court first stated that a settlement agreement under which public funds were paid to a former school principal must be disclosed even though the agreement related to a personnel matter and its express terms called for confidentiality. However, the Court gave wide latitude to the trial court’s interpretation of exemption 22.7(11). The Supreme Court affirmed the lower court determination that information gathered by an in-house investigative committee in connection with complaints of racism and sexism was contained in “job-performance” documents that the Legislature intended to remain secret.

The Supreme Court thereby, in this case, upheld the trial court’s interpretation that “personal information in confidential records” was not limited to “personal” data and could be extended to records not contained in a personnel file. This approval of the apparent extension of 22.7(11) to “job performance” information may be used by government agencies to keep many aspects of job performance and evaluation information secret unless the General Assembly takes action to narrow this interpretation of the exemption. The case, however, does nothing to affect long-standing standards of public access to salary information, and other records not directly related to job evaluation.

In *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999), the Supreme Court further addressed what personal information about a public employee is a matter of public record. The Court ruled that the public should have access to information concerning a public employee’s sick leave benefits – including pay, dates taken and hours accrued. (It is likely, however, that additional information about an employee’s medical condition, including the reason for using sick leave, remains “personal information.”) Other payroll information that a governmental body may release includes the employee’s full name, department, job title, hire date, bargaining unit, and complete and detailed information about monetary compensation. However, the employee’s gender, home address and birth date are personal and may be kept confidential.

**QUESTION:** (1) Are e-mail messages and other electronic communications public records? (2) If so, how long must they be kept?

**REPLY:** (1) The definition of public records under 22.1(3) is broad enough to encompass e-mail messages and other electronic correspondence. (2) State Records Commission policies govern the maintenance and retention of state agency records. In addition, various sections of the Iowa Code address other public

records. For example, Chapter 372.13(5) contains requirements for retention of some city records, such as council minutes, ordinances and resolutions. Local government bodies are encouraged to adopt their own records retention policies and to follow them consistently. Deleting a typical e-mail message under such a policy should pose no legal problems. However, if the message remains retrievable or recoverable (such as from a hard drive) then the government body would be obliged to provide it upon request, though the requester can be charged a reasonable fee for retrieval. Print-outs of e-mail messages should be stored as other correspondence is.

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