IOWA PUBLIC INFORMATION BOARD

Rules Committee

MEMBERS
Joan Corbin, Pella (Government Representative, 2020-2024)
Monica McHugh, Zwingle (Public Representative, 2022-2026)
Julie Pottorff, Des Moines (Public Representative, 2020-2024)

STAFF
Erika Eckley, Executive Director
Brett Toresdahl, Deputy Director
Daniel Strawhun, Legal Counsel

The Iowa Public Information Board Rules Committee will meet on **November 21, 2023, at 1 p.m**.

Due to the distance required to be traveled and the length of the meeting, this meeting will be held virtually by conference call. The public may access the meeting via telephone using the following dial-in procedure:

Dial-in number: 877-304-9269 Conference Code: 664760#

Note: ALL phones MUST remain on mute unless you are addressing the Board. To unmute your phone, enter ##1 on your key pad

AGENDA

I. Call to Order / Introductions

II. Approve Agenda

III. Approve minutes from August 18, 2022*

IV. Public Comment

V. Discussion/Action

A. Discuss/plan review of existing rules under Executive Order 10*

B. Review advisory opinions issued since August 18, 2022, and discuss which, if any, should be adapted into proposed rules. *

C. Discuss other proposed rules not related to advisory opinions, if any.

VI. Adjourn

*Attachment

IOWA PUBLIC INFORMATION BOARD
Rules Committee Minutes

MEMBERS
Daniel Breitbarth, Des Moines (Government Representative, 2022-2026)
Joan Corbin (Government Representative, 2020-2024)
Julie Pottorff, Des Moines (Public Representative, 2020-2024)
STAFF
Margaret Johnson, Executive Director
Brett Toresdahl, Deputy Director
Hannah Fordyce, Legal Counsel

The Rules Committee met at 12:00 p.m. on August 18, 2022, in the IPIB conference room, IPIB Office, Wallace Building 3rd Floor, 502 E. 9th Street, Des Moines, IA.

Present in person were committee members Daniel Brietbarth and Julie Pottoroff. Present by telephone was committee member Joan Corbin. Margaret Johnson, IPIB executive director, was also present in person.

Visitor Susan Patterson-Plank was present in person. Visitors Matt Brick, Randy Evans, and Brenda Kruse were present by telephone.

The following discussion and actions were taken:

Call to Order / Introductions of committee members and visitors.

Approve Agenda. Motion by Breitbarth, second by Corbin. Unanimous approval.

Approve Minutes of April 21, 2022, meeting. Motion by Breitbarth, second by Corbin. Unanimous approval.

Public Comment. No comments were made.

Review and discuss comments made during the July 11, 2022, public hearing concerning ARC 6360C, amend chapters 2 and 4, adopt ch 11 (timely compliance with public records requests). Committee members reviewed the comments received on the proposed rule concerning timeliness. Motion by Breitbarth, second by Corbin, to take no further action on this rule at this time. Unanimous approval. Committee members then discussed filing to rescind rules 2.1(6) and 4.17(17A) as they are no longer appropriate and as part of the five-year review of rules. Motion by Breitbarth, second by Corbin, Unanimous approval.

Both proposals will be presented to the IPIB for review and approval.

Adjourn: Motion by Breitbarth, second by Corbin to adjourn at 12:27 p.m. Unanimous approval.

State of Iowa

Executive Department

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF IOWA

EXECUTIVE ORDER NUMBER TEN

WHEREAS, over several decades the proliferation of administrative rules and regulations at all levels of government has imposed high costs on employers, inhibited job growth, impeded private sector investment, and increased the complexity and expense of economic life;

WHEREAS, reducing this regulatory burden on Iowans will promote citizens' freedom to engage in individual, family, and business pursuits;

WHEREAS, the Iowa Administrative Code contains over 20,000 pages and 190,000 restrictive terms;

WHEREAS, a comprehensive evaluation of existing administrative rules is essential to determine the necessity and effectiveness of those rules in light of national economic headwinds facing Iowans;

WHEREAS, obsolete, ineffective, excessively burdensome, or redundant administrative rules and regulations should be repealed;

WHEREAS, rulemaking authority is derived from and limited by the authority delegated to executive agencies by the general assembly;

WHEREAS, an administrative rulemaking moratorium will permit the Administrative Rules Coordinator and executive agencies to devote resources to a comprehensive evaluation and rigorous cost–benefit analysis of existing administrative rules; and

WHEREAS, wherever possible, and without compromising the health and safety of Iowans, this review should result in the elimination or simplification of unnecessary or unduly burdensome rules and regulations.

NOW, THEREFORE, I, Kim Reynolds, Governor of the State of Iowa, by virtue of the authority vested in me by the Constitution and laws of this state, do hereby order the following:

PROCESS FOR REVIEW OF EXISTING RULES

I. Each rule chapter of the Iowa Administrative Code effective on January 1, 2023 shall be reviewed by the agency, board, or commission that promulgated the rule according to a schedule established by the Administrative Rules Coordinator (ARC) as follows:

- **A.** All rule chapters shall be reviewed and, if applicable, be promulgated as specified in this Executive Order no later than December 31, 2026;
- **B.** The agency review schedule shall be staggered across agencies. The ARC shall ensure the volume of rules that are reviewed by the agencies in any given year is such that the public can engage and provide meaningful input in any individual rulemaking; and
- **C.** The agency review schedule shall be posted on the Governor's website as well as the agency's website no later than March 1, 2023.

II. After issuing the rule report under Part III of this Executive Order, each agency must publish a notice of intended action in accordance with the provisions of the Iowa Administrative Procedure Act to repeal the existing rule chapter by the agency review date.

III. An agency wishing to renew a rule chapter beyond the agency review date must promulgate a new rulemaking in accordance with the following requirements in addition to the provisions of the Iowa Administrative Procedure Act:

A. The agency, board, or commission must perform a retrospective analysis that includes a comprehensive evaluation and rigorous cost–benefit analysis of each existing administrative rule to determine whether the benefits the rule is intended to achieve are being realized, whether those benefits justify the costs of the rule, and whether there are less restrictive alternatives to accomplish those benefits. This analysis should be guided by the statutory language giving the agency, board, or commission the authority to promulgate the rule.

i. The ARC, with the assistance of the Department of Management (DOM), shall develop a standardized process for the required retrospective analysis. Any such forms shall be posted on the website of DOM no later than March 1, 2023.

ii. Agencies, boards, and commissions should start the new rulemaking from a zero-base and not seek to reauthorize an existing rule chapter without a critical and comprehensive review. Agencies, boards, and commissions must use the retrospective analysis to guide which regulations, if any, should be re-promulgated in order to carry out the statutory language giving the agency, board, or commission the authority to promulgate the rulemaking. The agency, board, or commission shall remove obsolete, outdated, inconsistent, incompatible, redundant, or unnecessary language, including instances where rule language is duplicative of statutory language.

iii. The agency, board, or commission shall submit a rule report to the ARC by September 1 of the year of the agency review date. The rule report shall contain the retrospective analysis of the rule chapter, a list of rules the agency, board, or commission proposes to repeal and not re-promulgate, and a list of rules the agency, board, or commission proposes to re-promulgate.

B. The agency, board, or commission must publish a notice of intended action and hold at least two public hearings designed to maximize public participation in the rulemaking process. A copy of the retrospective analysis must be published on the agency's website prior to the public hearings.

C. Each new rule chapter finalized by the agency must reduce the overall regulatory burden, or remain neutral, as compared to the previous rule chapter.

D. All proposed amendments to an existing chapter must be contained within a single rulemaking.

PROCESS FOR NEW AND AMENDED RULES

IV. To create a more stable regulatory environment and provide businesses with certainty, there is a moratorium on rulemaking. State agencies shall not initiate, by filing a notice of intended action or an adopted and filed emergency, any new rulemaking from February 1, 2023 through the agency review date established by the ARC, unless the agency is directed by the ARC to take a rulemaking action or all of the following conditions apply and the rulemaking is precleared by the ARC:

A. The rulemaking is narrowly-tailored to achieve one or more of the following objectives:

i. To reduce or remove a regulatory burden, including reducing restrictive terms;

ii. To remove obsolete, outdated, inconsistent, incompatible, redundant, or unnecessary regulations, including instances where rule language is duplicative of statutory language;

iii. To comply with a new statutory requirement, court order, or federal mandate where no waiver is permitted;

iv. To prevent a substantiated and well-documented threat to public health, peace, or safety;

v. To reduce state spending;

vi. To repeal a rule chapter as specified in Part II of this Executive Order; or

vii. To re-promulgate a rule chapter as specified in Part III of this Executive Order.

B. The agency completes a regulatory analysis of the new or amended rulemaking containing the items listed in section 17A.4A(2) of the Iowa Code and complies with the following:

i. At least one public hearing is conducted on the regulatory analysis prior to final publication on the agency's website.

ii. A copy of the final regulatory analysis must be published on the agency's website prior to submission of the rulemaking to the ARC for preclearance.

V. Emergency rules shall be limited to those that are intended to avoid an immediate danger or are required to meet a specific deadline specified in statute, a court order, or by this Executive Order or the ARC.

IMPLEMENTATION AND INTERPRETATION

VI. This Executive Order applies to all departments, agencies, boards, or commissions that have promulgated rules contained within the Iowa Administrative Code but does not apply to statewide constitutional officers or rules promulgated under the authority of those officers.

VII. This Executive Order shall be interpreted in accordance with all applicable laws and regulations and shall not supersede any laws or regulations in place as of its effective date. If any provision of this Executive Order is found to be invalid, unenforceable, or otherwise contrary to applicable law, then the remaining provisions of this Executive Order, as applied to any person or circumstance, shall continue in full force and effect and shall not be affected by such finding of invalidity or unenforceability.

VIII. This Executive Order does not create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the State of Iowa, its departments, agencies, or political subdivisions, or its officers, employees, agents, or any other persons.

IX. This Executive Order shall apply prospectively only as of its effective date.

IN TESTIMONY WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME AND CAUSED THE GREAT SEAL OF THE STATE OF IOWA TO BE AFFIXED AT DES MOINES, IOWA THIS TENTH DAY OF JANUARY IN THE YEAR OF OUR LORD TWO THOUSAND TWENTY-THREE.

KIMBERLY K. REYNOLDS
GOVERNOR

ATTEST:

PAUL D. PATE
SECRETARY OF STATE

22AO:0003 Reasonable Fees for Producing Records Requests

Related Topics:

Advisory Opinions

22AO:0003

DATE: June 16, 2022

SUBJECT: Reasonable Fees for Producing Records Requests

This opinion is in response to legislation that was signed by the Governor on May 2, 2022 (effective July 1, 2022). Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

What are "reasonable" fees for a government body to charge to fulfill a public records request?

OPINION:

Iowa Code section 22.3 governs fees for public records. Senate File 2322 amended Section 22.3 to provide direction to government bodies regarding the fees they may charge for public records. Senate File 2322 was signed by the Governor on May 2, 2022 and is effective as of July 1, 2022.

The new language in Section 22.3, "Supervision — fees," includes:

Although fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of reasonable expenses, the lawful custodian shall make every reasonable effort to provide the public record requested at no cost other than copying costs for a record which takes less than thirty minutes to produce.

All reasonable 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 (emphasis added).

According to Iowa Code section 22.3, a person requesting a copy of a public record can be charged a fee for the record. A government body must give the estimated expense upon receipt of the request and may require payment of the fee prior to retrieving the record.

The new legislation makes it clear that those requesting public records can only be charged "reasonable" expenses, stating: "In the event expenses are necessary, such expenses shall be

reasonable and communicated to the requester upon receipt of the request (emphasis added)."

What is a "reasonable" expense? Past interpretations of reasonable expenses include the following from *Rathmann v. Board of Dirs. of Davenport Cmty. Sch. Dist.*, where the court held:

[T]he provisions of section 22.3 generally contemplate reimbursement to a lawful custodian of public records for costs incurred in retrieving public records. We find the phrase "all expenses of such work" to be especially significant and indicative of the legislature's intent that a lawful custodian has the authority to charge a fee to cover the costs of retrieving public records.

. . .

We recognize that permitting entities covered under chapter 22 to charge members of the public a fee to cover the cost of retrieving public records does, to some extent, limit public access to public records. While the legislature did not intend for chapter 22 to be a revenue measure, at the same time it did not intend for a lawful custodian to bear the burden of paying for all expenses associated with a public records request. 580 N.W.2d 773, 778–79 (Iowa 1998).

A “reasonable” cost for a public records request is determinative on the facts and circumstances of retrieving and copying the record. Fees are not meant to be a revenue stream. “Reasonable” fees for retrieving a public record are meant to only offset the cost of retrieving, reviewing, and copying the record.

Section 22.3 directs that the costs for copying a record shall be the actual cost. Section 22.3 defines actual costs as “only those reasonable expenses directly attributable to supervising the examination of and making and providing copies of public records (emphasis added).” Actual costs include the cost of examining the record and making the copy and shall not include overhead costs of the government body, such as employment benefits, maintenance, or electricity.

The new legislation adds language that “the lawful custodian shall make every reasonable effort to provide the public record requested at no cost other than copying costs for a record which takes less than thirty minutes to produce (emphasis added).” This means that—for a record taking less than thirty minutes to produce—the government body should not pass on the costs for the lawful custodian’s time in fulfilling a record

request.

Senate File 2322 states: “Costs for legal services should only be utilized for the redaction or review of legally protected confidential information.” This legislation clarifies what legal fees can be charged to the requester. Attorneys may review records requests to determine whether the government record in question is a public record or a confidential record, to redact any possible confidential information, or to determine whether to seek an injunction to restrain examination of the record.

Finally, the legislation added that a person “may contest the reasonableness of the custodian’s expenses.” Chapter 22 can be enforced through judicial review or by filing a complaint with the Iowa Public Information Board.

BY DIRECTION AND VOTE OF THE BOARD:

Daniel Breitbarth
Joan Corbin
E.J. Giovannetti
Barry Lindahl
Joel McCrea
Monica McHugh
Julie Pottorff

Jackie Schmillen

SUBMITTED BY:

Hannah Fordyce

Legal Counsel

ISSUED ON:

July 21, 2022

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may

refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.

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22AO:0004 Timeliness of responding to record requests

Related Topics:

Advisory Opinions

22AO:0004

DATE: August 18, 2022

SUBJECT: Timeliness of responding to record requests

This opinion is in response to questions and complaints filed with the Iowa Public Information Board (IPIB) concerning initial delays in the acknowledgement of records requests by lawful custodians. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

How much time does the government body have to produce a requested record?

OPINION:

Iowa Code chapter 22 is silent as to the time for response to a records request. The time to locate a record can vary considerably depending on the specificity of the request, the number of potentially responsive documents, the age of the documents, the location of the documents, and whether

documents are stored electronically.

The large number of variable factors affecting response time makes it very difficult, and probably unwise, to establish any hard and fast objective standards. The statute was initially adopted almost fifty years ago. Today's electronic records environment adds to the complexity of this issue.

The only specific response time standard established by the statute addresses a good-faith reasonable delay incurred in order to determine whether a confidential document should be released. Iowa Code subsection 22.8(4)(d) states that a reasonable good-faith delay is not a violation of Chapter 22 if the purpose of the delay is:

"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."

While the Code states a delay under Iowa Code subsection 22.8(4)(d) shall not exceed twenty calendar days, the Iowa Supreme Court does not view this as an absolute deadline:

"Based on our review of section 22.8(4)(d), we believe it is not

intended to impose an absolute twenty-day deadline on a government entity to find and produce requested public records, no matter how voluminous the request. Rather, it imposes an outside deadline for the government entity to determine 'whether a confidential record should be available for inspection and copying to the person requesting the right to do so.' We do not think we should extrapolate section 22.8(4)(d)'s twenty-day deadline to other contexts, when the legislature chose not even to include that deadline in other portions of section 22.8(4)." Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 461 (Iowa 2013).

Horsfield involved a record request first sent to the City of Dyersville in December 2019, requesting certain public records. In April 2020, the City produced 617 pages of records. The Iowa Supreme Court found that this delay was not reasonable and that the City had violated Iowa Code chapter 22.

The Court in *Horsfield* also lists several considerations for determining if a delay is reasonable:

"Under this interpretation, practical considerations can enter into the time required for responding to an open records request, including 'the size or nature of the request.' But the records must be provided promptly, unless the size or nature of the request makes that

infeasible," Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 461 (Iowa 2013).

The Iowa Uniform Rules on Agency Procedure, Fair Information Practices, were also referenced by the Court in *Horsfield*:

Access to an open record shall be provided promptly upon request unless the size or nature of the request makes prompt access infeasible. If the size or nature of the request for access to an open record requires time for compliance, the custodian shall comply with the request as soon as feasible. (See Uniform Rule X.3(4), Fair Information Practices. See also, IPIB administrative rule 497-7.3(4(.)

According to an Iowa Attorney General Sunshine Advisory Opinion from August 2005, *"Delay is never justified simply for the convenience of the governmental body, but delay will not violate the law if it is in good faith or reasonable."*

There is no reason why a lawful custodian cannot communicate with a record requester. Communication is essential to determine what specific records are requested. Based upon the various complaints that have been filed with the IPIB, such communication can easily reduce disagreements over

timeliness, review/redaction, and completeness of the record release fulfillment.

A prompt initial acknowledgement from the lawful custodian is the best way to initiate this communication. Within the first few business days of receipt of the record request, the lawful custodian should contact the requester to acknowledge receipt of the request, provide information on possible fees, and provide a timeline for fulfillment of the record request.

The lawful custodian is expected to make additional contact in the event of a potential delay to discuss possible ways to complete the record request in a timely manner. Records should be released as they are available, unless the record requester has requested otherwise.

A government body is expected to prioritize the fulfillment of record requests by providing adequate resources, such as staff and equipment, to promptly compile and release public records. This may include the regular publication of records that are of public interest on websites.

BY DIRECTION AND VOTE OF THE BOARD:

Daniel Breitbarth

Joan Corbin

E.J. Giovannetti

Barry Lindahl

Joel McCrea

Monica McHugh

Julie Pottorff

Jackie Schmillen

SUBMITTED BY:

Margaret E. Johnson

Executive Director

ISSUED ON:

August 18, 2022

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice
may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.

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23AO:0001 Effect of Discovery Rulings on Access to Public Records

Related Topics:

Advisory Opinions

23AO:0001

SUBJECT: Effect of Discovery Rulings on Access to Public Records

This opinion is in response to a question raised with the Iowa Public Information Board (IPIB) concerning the potential for a court's discovery rulings to limit access to public records under Chapter 22. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Can a person's access to public records that are otherwise accessible under Iowa Code Chapter 22 be limited by a court's discovery rulings made in the course of litigation?

OPINION:

The short answer to the question posed in this advisory opinion is "no," access to public records otherwise accessible under

Iowa Code Chapter 22 cannot be limited by a court's discovery rulings.

The more detailed answer to the question requires a review of a recent Iowa Supreme Court opinion, *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222 (Iowa 2019), which deals with the interplay between the rules of discovery and Chapter 22 of the Iowa Code.

In *Mitchell*, the documents at issue were police investigative reports. Police investigative reports are government documents. Therefore, they are normally subject to disclosure under a chapter 22 public records request unless they are determined to be exempt from disclosure under Iowa Code section 22.7. The Plaintiff in *Mitchell* requested the investigative reports by way of a discovery request—not a Chapter 22 request. The Defendant responded by seeking a protective order from the court preventing the Plaintiff from disclosing the reports to third parties.

In seeking this protective order, the Defendant argued that the documents requested by the Plaintiff were confidential and therefore exempt from disclosure under Iowa Code section 22.7(5). Under the Iowa Supreme Court's interpretation of Rule 1.504 of the Iowa Rules of Civil Procedure, a court may issue a protective order to protect confidential information upon a

showing of good cause. Iowa R. Civ. P. 1.504(1)(a)(7); *Mediacom Iowa, L.L.C. v. Inc. City of Spencer,* 682 N.W.2d 62, 67 (Iowa 2004). This interpretation of Rule 1.504 results in a two-step process courts must follow when determining whether to issue a protective order for government documents alleged to be confidential under Iowa Code section 22.7:

1. Determine whether the documents are in fact confidential under section 22.7:
    1. If the document fits within one of the categorical exemptions in section 22.7, then it is confidential;
    2. If the document does not fit within a categorical exemption, or if the exemption itself prescribes a balancing test to determine whether the document fits within it (e.g., Iowa Code § 22.7(5)), then perform the balancing test outlined in *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994) (hereinafter "*Hawkeye* balancing test") to determine confidentiality.
2. Determine whether good cause exists to issue a protective order.

In *Mitchell,* the district court followed this two-step process in deciding whether to issue the protective order for the

investigative reports. Upon applying the *Hawkeye* balancing test as prescribed by 22.7(5), the district court determined that the documents were not confidential. Accordingly, it determined that good cause did not exist to issue a protective order.

The Supreme Court affirmed the district court's ruling. In affirming the ruling, the Court began by confirming that the district court had properly determined the investigative reports were not confidential by applying the *Hawkeye* balancing test. In proceeding to the second step of the Rule 1.504 analysis, the good cause analysis, the Court stated:

The parties' arguments for and against the protective order are addressed in our review of the district court's application of the *Hawk Eye* balancing test. As set forth above, we hold the police investigative reports at issue are not exempt from public disclosure under *Hawk Eye*. A protective order limiting disclosure to third parties *would be pointless here when any member of the public could obtain the same reports through an Iowa Code chapter 22 open records request.*

Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 236 (Iowa 2019) (emphasis added).

The italicized portion of the text quoted above is important for two reasons. First, it answers the question posed in this

advisory opinion: a court's ruling on discovery issues—specifically, on protective orders—has no effect on the accessibility of otherwise accessible public records through a Chapter 22 request. That is because, as the Court notes repeatedly throughout the opinion, Chapter 22 and the rules of discovery are fundamentally distinct processes for obtaining documents and generally have no application to, or effect on, each other. *See, e.g., Mitchell*, 926 N.W.2d at 228, 236 (*stating* "In *Mediacom*, we observed, 'Iowa Code chapter 22 pertains to parties seeking access to government documents and ordinarily has no application to discovery of such information in litigation'," *and* "The public records act is generally distinct from our discovery rules.").

The reason that Chapter 22 was involved at all in *Mitchell* was because the Defendant sought the protective order based on the contention that the investigative reports were confidential information under section 22.7. This fact leads to the second important point to be gleaned from the quotation above. By stating that a protective order would be pointless given that the government documents at issue are not confidential, the Court seems to be intimating that good cause for a protective order generally does not exist when the government documents at issue are determined not to be confidential under section 22.7.

Justice Appell, in his concurrence, makes this point more explicit:

Similarly, courts considering the converse situation find an open records law persuasive but not controlling. In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 775 (3d Cir. 1994), a group of newspapers sought access to a settlement agreement made confidential by a protective order. The court said,

"[W]e hold that where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law."

Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 240 (Iowa 2019) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 775 (3d Cir. 1994)).

These statements from the *Mitchell* opinion mean that the question of whether a protective order could limit access to otherwise accessible public records under Chapter 22 is more or less entirely academic. In practice, a litigant would never be able to show good cause for the issuance of a protective order over any public record that has been determined to be non-

confidential. The non-confidential nature of the public record itself would preclude, or at the very least, create "a strong presumption against" the possibility of showing good cause. *Id.*

Whether the determination that a public record is not confidential necessarily precludes the issuance of a protective order limiting its disclosure, or instead merely creates a strong presumption against the issuance of such an order, is left somewhat unclear by the *Mitchell* opinion. The following statement by the Court, in which it emphasized the word "confidential," seems to imply that a determination of non-confidentiality precludes the issuance of a protective order: "Because litigants' access to *confidential* records may be subject to a protective order, we must decide whether the records at issue are confidential." *Mitchell*, 926 N.W.2d at 228.

However, after the Court had determined that the investigative reports were not confidential, it still proceeded to consider whether good cause had been shown—albeit briefly, and in a conclusory manner that relied on the determination that the reports were not confidential. *Mitchell*, 926 N.W.2d at 235–236. The previously quoted text of Justice Appel's concurrence makes it clear that he believed that non-confidentiality weighs heavily against, but does not necessarily preclude, the issuance of a protective order.

Regardless, the Court makes clear in *Mitchell* that if a court were to issue a protective order over a non-confidential public record, "any member of the public could obtain the same reports through an Iowa Code chapter 22 open records request," rendering the issuance of such a protective order "pointless." *Id.* at 236. Thus, a person's access to public records that are otherwise accessible under an Iowa Code Chapter 22 request cannot be limited by a court's discovery rulings made in the course of litigation. Further, a determination that a public record is non-confidential creates, at the very least, a strong presumption against issuance of a protective order over that record.

BY DIRECTION AND VOTE OF THE BOARD:

Daniel Breitbarth
Joan Corbin
E.J. Giovannetti
Barry Lindahl
Joel McCrea
Monica McHugh
Julie Pottorff
Jackie Schmillen

SUBMITTED BY:

Daniel M. Strawhun
Legal Counsel
Iowa Public Information Board

ISSUED ON:

March 3, 2023

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.

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23AO:0002 Costs for legal services

Related Topics:

Advisory Opinions

23AO:0002

DATE: March 3, 2023

SUBJECT: Costs for legal services

This opinion is in response to a question raised with the Iowa Public Information Board (IPIB) concerning the extent to which a lawful custodian may charge a requester for the cost of legal services. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Under Iowa Code section 22.3(2), to what extent may a lawful custodian charge a requester for the cost of legal services used in responding to a records request?

OPINION:

Iowa Code section 22.3 governs the fees that lawful custodians may charge when responding to records requests. On May 2, 2022, section 22.3 was amended to include the following language: "Costs for legal services should only be utilized for

the redaction or review of legally protected confidential information." Acts 2022 (89 G.A.) ch. 1039, SF 2322, § 1, eff. July 1, 2022. This amendment limits the extent to which lawful custodians may charge requesters for legal costs incurred in responding to records requests.

The amendment states that a lawful custodian may only charge for the time an attorney spends redacting or reviewing legally protected confidential information. Consequently, a lawful custodian should not charge for an attorney's preliminary review of records to determine whether the records contain confidential information.

Prior to the enactment of this amendment, Iowa Code section 22.3 contained no mention of legal costs or the extent to which a requester may be charged for them. Under that prior version of the statute, the Iowa Court of Appeals held that a lawful custodian could charge a requester for legal services used in determining whether the records requested contained confidential information. *See Hackman v. Kolbet for New Hampton Mun. Light Plant*, 906 N.W.2d 206 (Table), 2017 WL 3065168, *2–3. The enactment of SF 2322, which specifically addresses which legal costs may be charged to a requester, overruled the portion of *Hackman* that addressed this issue.

The critical phrase that leads to the conclusion that a lawful custodian may only charge for the time an attorney spends redacting or reviewing legally protected confidential information is “review of legally protected confidential information.” "Review of" legally protected confidential information implies that the information under review has already been determined to be legally protected and confidential.

Furthermore, because of the language of limitation used in the statute (“Costs for legal services *should only be utilized for* . . .”), it is clear that no costs for legal services except for those specified in the statute should be charged to the requester.

Therefore, under the plain meaning of the statute, a lawful custodian should not charge a requester for legal services used to determine whether the records requested contain confidential information. A lawful custodian is of course free to utilize whatever legal services it deems necessary when responding to a records request. However, the lawful custodian should only charge the requester for the time an attorney spends actually redacting or reviewing confidential information—not time spent identifying whether confidential information does or does not exist.

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ISSUED ON:

March 3, 2023

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23AO:0003: Confidentiality of Police Investigative Files

Related Topics:

Advisory Opinions

23AO:0003

DATE: August 17, 2023

SUBJECT: Confidentiality of Police Investigative Files

RULING:

This opinion concerns the confidentiality of information contained in peace officer investigative reports under chapter 22. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Under Iowa Code § 22.7(5), what information in police investigative reports is protected from disclosure and to what extent?

OPINION:

Iowa Code § 22.7(5) provides confidentiality for certain information contained in police investigative reports, making that information exempt from disclosure when requested under chapter 22. Given the frequency of complaints to the Iowa Public Information involving information withheld under

§ 22.7(5), the Board has requested this advisory opinion explaining the scope of the protection provided by the statute.

The full text of § 22.7(5) is copied below:

Peace officers' investigative reports, privileged records or information specified in section 80G.2, 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.

This section specifies three general categories of information that are protected from disclosure: 1) peace officers' investigative reports; 2) privileged records or information

specified in section 80G.2; and 3) specific portions of law enforcement agencies' electronic mail and telephone billing records that are part of an ongoing investigation. This advisory opinion deals only with the first category of protected information, "peace officers' investigative reports."

What information is considered to be part of an investigative report?

The Iowa Public Information Board interprets peace officers' investigative reports to include all of the information gathered by officers as part of an investigation into a crime or incident. For example, in *Klein v. Iowa Public Information Board*, a police officer responding to a 911 call about a domestic assault accidentally shot and killed one of the participants. *Klein v. Iowa Public information Board*, 968 N.W.2d 220, 222. The family of the victim submitted a public records request to the Iowa Division of Criminal Investigation, the Burlington Police Department, and the Des Moines County Attorney, seeking the release of information related to the shooting. *Id.* Among the information sought to be obtained was the 911 call, body camera video, and dash camera video from the incident. *Id.* The custodians of these records refused to release them, prompting the family to file a complaint with IPIB. The complaint proceeded to a contested case, in which the Board ruled that

the 911 call, body camera video, and dash camera video were part of the peace officers' investigative reports and thus were confidential records under § 22.7(5).**[1]**

Lab reports taken in connection with a criminal investigation constitute a part of a peace officers' investigative report. *AFSCME v. Iowa Dep't of Pub. Safety*, 434 N.W.2d 401, 403 (Iowa 1988). The Court of Appeals, in an unpublished case, *Neer v. State*, held that video recording, use of force reports, and pursuit reports related to an officer's encounter with an individual in relation to an arrest were part of the investigative report. *Neer v. State*, 798 N.W.2d 349, 349 (Iowa Ct. App. 2011) (Iowa App. Feb. 23, 2011). "To require an item-by-item assessment of everything within a criminal investigation file would, for all practical purposes, eliminate the investigative report exemption." *Id*.

Qualified Privilege of Confidentiality

The confidentiality afforded to police investigative reports under 22.7(5) is a qualified, rather than categorical, privilege. *See Mitchell v. City of Cedar Rapids,* 926 N.W.2d 222, 232–234 (Iowa 2019). This means that a record claimed to be confidential on the basis that it is part of a police investigative report cannot be determined to be confidential based on a mere showing of that fact alone. *See id.* Stated differently, demonstrating that a

particular record is part of a police investigative report is a necessary, but not sufficient, condition to an ultimate determination that the record is in fact confidential under § 22.7(5).**[2]**

In addition to demonstrating that the record in question is part of an investigative report, "[a]n official claiming the privilege must satisfy a three-part test: (1) a public officer is being examined, (2) the communication [to the officer] was made in official confidence, and (3) the public interest would suffer by disclosure." *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 232 (Iowa 2019) (*citing Hawk Eye v. Jackson,* 521 N.W.2d 750, 752 (Iowa 1994)).**[3]**

While the balancing test "remains the controlling precedent for disputes over access to police investigative reports" (*id.* at 234), the application of the test involves interpretive nuances that originate from the Court's treatment of § 22.7(5) and § 622.11 as "essentially the same" statutory provisions. *Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994); *State* ex rel. *Shanahan v. Iowa Dist. Ct. for Iowa Cnty.*, 356 N.W.2d 523, 528 (Iowa 1984).

First, the reference to examination of a public officer in part one of the test does not limit its application to only testimonial contexts. *State* ex rel. *Shanahan*, 356 N.W.2d 523, 528 (Iowa 1984). Rather, "the privilege targets and protects the communication

itself, including any written report of the communication, and not just oral examination of the public officer." *Id.* In practice, this means that the request for a record that is determined to be part of a police investigative report satisfies part one of the test, as "the privilege may be invoked at any stage of proceedings where confidential communications would otherwise be disclosed, not just when a witness is testifying." *Id.*

Part two of the test concerns whether the information sought to be obtained and made public was communicated to the officer "in official confidence." Both civilians and other peace officers may communicate information in official confidence; therefore, whether the information comes from a civilian or an officer is not itself a determinative factor. *See id.* The Court has held that reports to officers regarding a motor vehicle accident are not made in "official confidence" because motor vehicle accident reports under Iowa statutes are not confidential. *Shannon by Shannon v. Hansen,* 469 N.W. 2d 412, 415 (Iowa 1991); *see also Grocers Wholesale Coop, Inc. v. Nussberger Trucking Co.*, 192 NW2d 753, 753 (Iowa 1971); Iowa Code § 321.271.

In contrast, the Court has indicated that "reports or memorandum [shared between officers] . . . solely for purposes of a police internal review of the incident" are likely made in official confidence. *Mitchell*, 926 N.W.2d 222, 235 (Iowa 2019).

However, the Court has also noted that although officer-to-officer communications "might initially be made in confidence, there is still an expectation that the communicating officer might be expected to testify in a public proceeding especially if it involves something the officer personally witnessed," and "[t]he same can be said of civilian witnesses."

Part three of the test requires the weighing of the public interest in disclosure against the potential harm that such disclosure may cause. *Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994). Factors that weigh in favor of confidentiality include the use of confidential informants; the presence of named, but innocent suspects; and the presence of "hearsay, rumor, or libelous comment" in the investigation materials. *Id.* Additionally, the ongoing nature of an investigation weighs in favor of confidentiality. *Id.* Nondisclosure allows law enforcement to test out findings and theories about cases under investigation; it also works to ensure that the overall investigation is not jeopardized before its conclusion. *Id.*

When the investigation involves matters of public interest and debate, such as when a police shooting or cover-up of improper police behavior are involved, such factors weigh in favor of disclosure. For example, in *Hawk Eye*, concerns regarding leniency or a cover up in regards to disciplining police officers

involved in potential misconduct were matters of great public concern that the Court cited in requiring disclosure. *Id.*

In *Mitchell,* the Court held that investigative reports involving allegations of a white police officer's excessive use of force against an African-american motorist were "issues of great public concern" that outweighed the potential harm that might result from such disclosure. *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 233 (Iowa 2019). *See also Williams v. City of Burlington*, 516 F.Supp.3d 851, 877 (S.D. Iowa 2021) (following Mitchell by releasing police investigation documents for similar reasons but excluding any reports prepared by the city for internal review or discipline).

Additionally, when factors weighing in favor of confidentiality are absent, the Court considers this absence to weigh in favor of disclosure. *Hawk Eye*, 521 N.W.2d at 753.

Information that is generally not protected, even if occurring within otherwise protected investigative reports

The statute also states that the following information is generally *not* protected, even if it occurs within one of the three categories of protected information: the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident. However, if the disclosure of the date, time,

location, and immediate facts and circumstances of a crime would seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual, then the information may be kept confidential. *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 233 (Iowa 2019).

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ISSUED ON:

August 17, 2023

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

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[1] Although the Iowa Supreme Court did not review the Board's determination of this legal issue in its opinion, the case still serves as an example of the Board's stance.

[2] In contrast, a *categorical* privilege of confidentiality requires only that the party who wishes to avail itself of the protection against disclosure demonstrate that the record at issue fits within the category of information protected under the statute. *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 233–234 (Iowa

2019). Section 22.7(11), which protects "personal information in confidential personnel records," is an example of such a categorical privilege. *Id.* at 233.

[3] This test originates from *State* ex rel. *Shanahan v. Iowa Dist. Court*, 365 N.W.2d 523, 528 (Iowa 1984).

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23AO:0004: Confidentiality of Documents in Personnel Investigation

Related Topics:

Advisory Opinions

23AO:0004

Date: August 17, 2023

SUBJECT: Confidentiality of Documents in Personnel Investigation

This opinion is in response to a question raised with the Iowa Public Information Board (IPIB) concerning the confidentiality of certain personnel records under Chapter 22. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Is a document collected during a personnel investigation of a public official containing the internet browsing history that was conducted on a private computer, a confidential record under Iowa Code 22.7(11)(a)?

OPINION:

The question in this matter is whether a document collected during a personal investigation of an employee is confidential under Iowa Code § 22.7(11). Section 22.7(11)(a) states that

"[p]ersonal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies" is confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information.

The confidentiality afforded under § 22.7(11) is categorical. *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 234 (Iowa 2019) (stating that § 22.7(11) offers categorical protection from disclosure, in contrast with the qualified protection afforded under § 22.7(5)). This means that if the information requested fits into the category of information protected by the statute, then that information is confidential, and no further inquiry is required. *ACLU v. Atlantic Community School District*, 818 N.W.2d 231, 235 (Iowa 2012). The category of information protected under § 22.7(11) is "personal information in confidential personnel records." *Id.* at 233.

The court has previously defined what types of documents fit within the category of "personal information in confidential personnel records." For example, in *Des Moines Independent Community School District v. Des Moines Register & Tribune*, the court held that investigative files related to concerns about a school principal contained in an employee's personnel file were

essentially performance evaluations, which are confidential under § 22.7(11). 487 N.W.2d 666, 670 (Iowa 1992). In *ACLU v. Atlantic Community School District*, the court stated that disciplinary records and information regarding discipline in employee files "are nothing more than in-house job performance records or information." 818 N.W.2d at 235. Records and information regarding disciplinary measures were, therefore, categorically exempt under Iowa Code § 22.7(11)(a) as they fit within the category of "personal information in confidential personnel records." *Id.*

Here, the documents at issue were developed as part of an internal investigation of an employee's work performance conducted by a government entity's human resources and outside legal counsel. The investigation showed that the internet browsing history was inadvertently transferred to the work device when the device was connected to a private internet router. At no point was the employee found to have violated policy, nor were they disciplined.

The court has repeatedly held that records related to an employee's job performance are considered "personal information in confidential personnel records" and are therefore protected under § 22.7(11). In analyzing confidentiality under § 22.7(11), the court has not held or

otherwise indicated that this section protects only "negative" job performance information or information that ultimately leads to employee discipline. Under the court's interpretation of "personal information in confidential personnel records," any records in the personnel file of the employee related to job performance are protected from disclosure under § 22.7(11), which would include positive or exculpatory performance records.

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23AO:0005: Limits on electronic records requests

Related Topics:

Advisory Opinions

23AO:0005

Date: September 21, 2023

SUBJECT: Limits on electronic records requests

This opinion is in response to a policy question raised with the Iowa Public Information Board (IPIB) concerning the cybersecurity protections and Chapter 22. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

What limits can government entities place on electronic records requests to address cyber security concerns?

OPINION:

Cyber security importance

Governmental entities have increasingly become the targets of cyber security attacks in recent years. *See, e.g.* U.S. Department of Homeland Security Cybersecurity and Infrastructure Security Agency, PROTECTING OUR FUTURE: PARTNERING TO SAFEGUARD K–12 ORGANIZATIONS FROM CYBERSECURITY THREATS, January 2023,

https://www.cisa.gov/sites/default/files/2023-01/K-12report_FINAL_V2_508c_0.pdf (last accessed August 31, 2023) ("Increasingly, school or school district systems have been breached, with data deleted, misused, or even held for ransom. This trend has continued throughout 2022, and leaders across the K–12 community are coming to recognize that no school, district, or organization is immune from cyber intrusions."). With the frequency and sophistication of attacks continuing to rise, it is imperative that governmental entities remain vigilant in assessing and remediating vulnerabilities in their networks, computer systems, and processes.

Criminals often breach an organization's cyber security through the use of malicious email links and attachments. U.S. Department of Homeland Security, Malware Tip Card, https://www.cisa.gov/sites/default/files/publications/Malware_1.pdf (last accessed August 31, 2023) ("When in doubt, throw it out: Links in emails and online posts are often the way criminals compromise your computer. If it looks suspicious, even if you know the source, it's best to delete it."). The ubiquity and frequency of email communication makes it a particularly effective and vulnerable point of access for cyber attackers to exploit.

Under chapter 22 of the Iowa Code, governmental entities must be responsive to requests for public records. These requests may be made "in person . . . , in writing, by telephone, or by electronic means." Iowa Code § 22.4. The vast majority of public records requests today are submitted electronically, via email.

Despite the apparent tension between governmental entities' need to protect against cyber-attacks while remaining accessible and responsive to public records requests, best practices and policies exist that, if utilized, will allow government entities of all sizes to safely respond to electronic records requests. The purpose of this advisory opinion is to assist government entities in implementing these practices and policies, which include placing reasonable restrictions on electronic records requests under Iowa Code chapter 22. Additionally, this opinion seeks to educate the public on best practices to better communicate electronic records requests.

Public Records Requests

Under Iowa Code § 22.4(2), individuals may request records "[i]n writing, by telephone, or by electronic means." In addition, individuals may request records in person during the customary hours the government entity is open and available.

By their nature, requests made in person, by telephone, or in writing have built in protections for government entities. An individual can make a request in person when the government is regularly open for business. A telephone call can be answered during regular hours or a message can be left on voice mail. The number of ways a request can be made electronically, however, continues to expand and can create hidden risks to government entities' computer systems that do not exist in the other delivery mechanisms. The level of risk in accepting electronic communications from unknown and potentially anonymous sources is too great to require that government entities be forced to do so without limitation.

While Iowa Code chapter 22 does not allow government entities to require that individuals make records requests through one communication method versus another, government entities are allowed to place reasonable restrictions on how electronic records requests are received to ensure electronic messages are free from malware or other cyber security risks. Placing reasonable restrictions on the form of an electronic request still allows requesters the option of making requests through any desired communication method under the statute. No entity can prohibit individuals from making a request in person, through writing, by telephone, or by electronic means.

Records Request Best Practices

In whatever format a records request is made, it is important to ensure that the request is made clearly and as concisely as possible. The request should clearly state that records are being sought. It should include the type of document sought, including any information that can help to better identify the records, such as the name of the individual or group involved in creating the document; the date it was presented or created; and any other identifying information that will help the custodian to properly identify and locate the document. Broad requests can be time-consuming and expensive--the more specific the request is, the more likely the records can be located quickly and efficiently.

In some instances, requesters may have only limited knowledge of the types of records the government entity has and may not be able to describe precisely the records they seek. The records custodian should appropriately assist a requester to clarify their request when feasible. In general, there is no requirement that the requester give the reason for a request or identify themselves, however, providing some information about the reason for the request can be helpful in identifying the record or if the actual costs of compiling a broad request are a concern,

the information could assist in appropriately limiting the scope of the request.

While there is not a requirement under Iowa Code chapter 22 to post public records on a website, providing access to public documents, such as minutes, budgets, agendas, ordinances, etc. that are frequently requested or useful can reduce the burden on both the government entity and the requester. Iowa Code § 22.3(1) encourages government entities "to provide the public record requested at no cost other than copying costs for a record which takes less than thirty minutes to produce."

Upon receipt of a request for a copy of a public record, the lawful custodian should promptly acknowledge the request. (Promptly means using reasonable, good-faith efforts to respond taking into account the circumstances as they exist at the time the request was received.) The custodian should provide an approximate date by which an estimate for any reasonable expenses and the release of a copy of the public record or a response to the request will be provided. The custodian should also continue to communicate with the requester and inform them of any expected delay.

Email Requests, Generally

Electronic requests sent through email to the records custodian should include the specific request within the body of the email. There is no reason a request needs to be sent in an attachment or through a link. The email request provides written notice of the request and also includes the date and time when it was sent, so there is a documented record of the request. Including links or attachments to email increases the risk that the message may be automatically routed to a "spam" folder or quarantine filters to address cyber security and phishing concerns. Requesters should provide the request in a format that enables the government entity to receive and respond to the request.

Government entities should request the sender resubmit the request in the body of the email if requests are received that have attachments or other extraneous information. Like all requests, government entities should provide acknowledgement of the request and responses regarding the records and fees.

Request Portals and online forms

Some government entities have developed or are considering developing an online portal that allows records requests to quickly and easily be submitted and sent to the appropriate records custodian.

"[O]nline public record requests portals can save time and money and increase efficiency and responsiveness to request, process and disseminate public records." National Freedom of Information Coalition, *Portal to Compliance: A Qualitative Analysis of Online Public Record Request Services in Major U.S. Cities,* September 2019, https://www.nfoic.org/wp-content/uploads/pages/2019-09/NFOIC%20Portal%20to%20Compliance.pdf (last accessed 08/30/2023).

Online forms that generate an email to the custodian of a government entity are slightly less sophisticated than an online portal, but just as effective at allowing individuals to contact a government entity quickly and easily to make an electronic, written records request.

Providing a portal or online request form is an appropriate and safe way to allow for electronic requests to be submitted. It will be important that the portal or form system provide requesters a copy of their request including when and to whom it was submitted. Acknowledgment of the request and other appropriate follow up information and documents should be provided as well. If a records request is such that fees are charged, communication about how the fees can be paid,

including whether they can be handled through the portal, should be clearly communicated.

Summary

Iowa Code § 22.4(2) requires that individuals have the option to submit requests in person, by telephone, in writing, and by electronic means. Government entities have the ability to put reasonable restrictions on how electronic requests are received. These restrictions should be uniformly enforced. Individuals requesting records need to follow the restrictions or choose another method of communicating their request. Information should be provided for how and to whom individuals can submit their request if they choose to not utilize the electronic methods as outlined.

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ISSUED ON:

September 21, 2023

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.

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23AO:0006: Who is the lawful custodian when there are multiple levels of political subdivisions involved?

Related Topics:

Advisory Opinions

Advisory Opinion 23AO:0006

DATE: September 21, 2023

SUBJECT: Who is the lawful custodian when there are multiple levels of political subdivisions involved?

RULING:

This opinion is in response to a question filed with the Iowa Public Information Board (IPIB) concerning chapter 22 of the Iowa Code. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Whether a county can be considered the lawful custodian of all records, including employment records, of the sheriff's office within that county.

OPINION:

You asked whether a county can be considered the lawful custodian of all records, including employment records, of the sheriff's office within that county. In essence, you are asking

whether under chapter 22, a political subdivision of the state can be considered to be the lawful custodian of all records held by a smaller political subdivision within it.

To answer this question, we must begin with the definition of a lawful custodian under chapter 22: "'Lawful custodian'" means the government body currently in physical possession of the public record." Iowa Code § 22.1(2).

Chapter 22 defines "government body" in the following way:

"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 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."*

Iowa Code § 22.1(1) (emphasis added).

"Counties are political subdivisions of the state." *State ex rel. Iowa Emp. Sec. Comm'n v. Des Moines Cnty.*, 260 Iowa 341, 346, 149 N.W.2d 288, 291 (1967). A political subdivision of a county is a

"legally identifiable political instrumentality" whose "purpose is to aid in the governmental functions of the county." Id. The sheriff's office is therefore a political subdivision of the county in which it is located.

Because a sheriff's office is a political subdivision of the county in which it is located, it is also a "government body" under the definition provided in § 22.1(1). As stated earlier, a lawful custodian is defined as the "government body currently in physical possession of the public record." Because the sheriff's office is a government body, it is the lawful custodian of all records in its physical possession, including employment records—not the county.

BY DIRECTION AND VOTE OF THE BOARD:

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SUBMITTED BY:

Daniel M. Strawhun

Legal Counsel

Iowa Public Information Board

ISSUED ON:

September 21, 2023

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.

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23AO:0007: Editing meeting minutes before publishing.

Related Topics:

Advisory Opinions

Advisory Opinion 23AO:0007

DATE: September 21, 2023

SUBJECT: Editing meeting minutes before publishing.

Matthew Byrne
Via email [redacted]

Mr. Byrne,

We are writing in response to your request dated July 19, 2023, requesting an advisory opinion from the Iowa Public Information Board (IPIB) pursuant to Iowa Code chapter 23 and Iowa Administrative Code rule 497-1.3.

We note at the outset that the IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22 and 23, as well as rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Is it normal for an elected County Supervisor to review and personally edit the meeting minutes before publishing?

OPINION:

Iowa Code § 21.3 requires that "[e]ach 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."

In this case, the Auditor or their delegate acts as a clerk to the Board of Supervisors and prepares the minutes on behalf of the Board. It is the Board's responsibility to ensure the minutes comply with the statutory requirements under Iowa Code chapters 21 and 331.**[1]** The members of the Board of Supervisors should review the minutes to ensure they reflect the actions taken by the Board, including the complete text of the motions, resolutions, amendments, and ordinances adopted as required under Iowa Code § 331.504.

It would be advisable for a County Supervisor to review the minutes for accuracy and to provide potential edits. Then, it would be the responsibility of the Board to ensure any inaccuracies are revised and the official minutes are approved as amended by the Board.**[2]**

Your request, however, included additional details. You state that it was discovered that there were discrepancies in the minutes between what actually occurred versus what the Supervisor wanted to include in the minutes as evidenced by the audio/video recording. When asked about one of the items, the Supervisor stated he was putting in what he meant

to say rather than what occurred. The other Supervisors voted to amend the minutes to remove the inaccurate edits.

If it is determined that minutes are inaccurate or have been edited incorrectly, it is the responsibility of the Board or Council to amend or restore the minutes to be accurate as occurred in this situation. Minutes, above all, need to be factually accurate. They are not, however, a transcript of the proceedings. The Auditor, City Clerk, or Board Secretary tasked with drafting the minutes for the Board or Council cannot take down every word that is spoken. As a best practice, the Iowa League of Cities recommends providing the legally required content in the minutes and enough additional information to be of historical and functional value without being too lengthy. It recommends providing a factual accounting that ensures that editorial remarks are omitted.

Choosing which comments to include or exclude or how comments are phrased, whether intentional or not, is editorializing the minutes. This creates minutes that are not objective and factual and instead causes issues of misunderstanding and inaccuracies. By avoiding editorial comments and focusing only on the actions taken, motions and resolutions passed, and enough factual information about

reports and issues to provide context, the minutes have historical and functional value.

Minutes are the public record of a governmental body's activities and decisions. Their usage should be to document the official actions of a governmental body. This means they should contain the legally required information as well as enough information in context to ensure understanding of the actions and topics covered by the Board or Council. Minutes should not include partial commentary or editorial additions. Including these items in minutes causes unnecessary issues such as the one addressed in this opinion in which a Supervisor feels compelled to revise the minutes to address quotes or commentary.

Minutes should include facts rather than opinions, rumor, preference, or innuendo. Minutes are a public record of a governmental body. They should reflect the propriety and objectivity of the governmental body itself.

[1] "When comparing the duties of a county board of supervisors and a county auditor, it is clear that the board of supervisors has the responsibility to actually manage the record books described in section 331.303(1). In fact, section 331.303(2) expressly requires the county board of supervisors to manage its records in compliance with Code chapter 22. In

comparison, a county auditor merely acts as a board of supervisors' agent to make sure that the board's proceedings are recorded in an accurate and correct manner. Iowa Code section 331.504(1) (1991)." 1992 Iowa Op. Atty. Gen. 167 (Iowa A.G.), 1992 WL 470371

[2] "Iowa Code section 21.3(2) states in part, 'Each governmental body shall keep minutes of all its meetings. . . .'" "Despite the council having the clerk keeps [sic] minutes in its stead, the delegation does not nullify the council's status as the official preparer of the minutes. It may appear that the clerk is keeping notes/minutes, but from a legal perspective pursuant to Iowa Code section 21.3(2) it is actually the council keeping notes/minutes, even though they are acting through the clerk." Iowa Public Information Board 20AO:0006, December 16, 2020.

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Executive Director

Iowa Public Information Board

ISSUED ON:

September 21, 2023

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