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Advisory Opinion 20AO:0006

DATE: December 17, 2020

SUBJECT: Public records laws and notes of an open meeting

RULING:

John Anderson
212 Winnebago Street
P.O. Box 450
Decorah, Iowa 52101

Sent via email to john.anderson@andersonlawdecorah.com

Mr. Anderson,

We are writing in response to your request dated November 13, 2020, 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:

Your request pertains to “whether notes taken by a city clerk during a council meeting that are used to prepare the council minutes are considered a ‘draft’ document under Iowa Code Section 22.7(65) and IPIB AO 2015-01, and therefore are considered confidential documents exempt from public records requests.”

You also provided some hypothetical facts to be applied in the advisory opinion to answer the above legal question. These facts include: an individual submits a public records request to a city for the notes taken by a city clerk during city council meetings; the notes are in regards to agenda items discussed and acted on at city council meetings; the notes are used by the city clerk to

prepare the council meeting minutes that are later published according to Iowa law; and, the notes also contain reminders for the clerk on items to follow-up on.

OPINION:

Iowa Code section 22.7(65) states:

The following 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:

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

The IPIB provided additional clarification for this subsection in an earlier advisory opinion, AO 2015-01. In that advisory opinion, the question of when a document is considered to be a draft and able to be kept confidential was posed. The IPIB provided the following criteria for determining if a document falls under the 22.7(65) exception:

- 1. The document is tentative, preliminary, draft, speculative or research material;*
- 2. The document exists in a form prior to completion of its intended purpose;*
- 3. The document exists in a form prior to the form that is ultimately submitted for use or used in the actual formulation, recommendation, adoption or execution of any official policy or action by a public official with authority to make such decisions; and*
- 4. The document must not have been submitted to or used by a public official authorized to adopt or execute official policy.*

In applying this criteria [sic], the document must truly be a draft that is not in its final form to be submitted to a public official who has authority to make decisions regarding the subject matter to which the draft applies. In addition, if the draft has been submitted to a public official authorized to adopt or execute official policy, the exception does not apply.

The purpose of the notes in question is to use them as meeting minutes, thus establishing them as a draft of the minutes. But despite this classification, the first criterion may not be satisfied if the draft is not preliminary in nature. Notes may be considered a first draft, but if the first draft is essentially the final draft because of substantially similar content, then labeling a record as a 'draft'

would only have nominal value and not be in line with the spirit and intent of the first criterion. While the notes here may qualify as a draft, additional investigation would be necessary to determine if the first criterion is truly satisfied.

The second criterion is not satisfied because it is implied that the notes taken at the meeting are essentially what is submitted to the council as minutes. Despite potential changes, such as converting the notes from handwritten to typed, the content of the record is substantially the same which points to it not existing in a prior form.

As noted above, the notes are not in a form prior to the form that is ultimately submitted to the city council for official use, thus not satisfying the third criterion.

Iowa Code section 21.3(2) states in part, "Each governmental body shall keep minutes of all its meetings..." Here, the city council is the governmental body and they are responsible for keeping minutes of their meetings, not the clerk. Despite the council having the clerk keeps 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.

The notes are both submitted to and used by a public official authorized to adopt or execute official policy as the council uses the notes/minutes for official purposes. Therefore, the fourth criterion is not satisfied.

When applying Iowa Code section 22.7(65) and the AO 2015-01 criteria, it appears that notes taken by a city clerk that are used to prepare meeting minutes do not qualify as confidential.

Among the hypothetical facts provided in the request for this advisory opinion was that the requested notes contained other material not used for the minutes (i.e. reminders for the clerk to follow-up on). Even if the extraneous content could be classified as confidential on its own, it would not preclude the release of the overall record.

A public record containing both open and confidential information is not rare. In a Sunshine Advisory issued on August 1, 2006, and updated on December 1, 2014, the Iowa Attorney General's office stated, "Public records often include both open and confidential information." The advisory further states:

Generally, if only some information is confidential under law, public officials should black out confidential information and provide access to the rest of the record. Public officials may deny access to the entire record only if the entire record is confidential under law. Officials should check the applicable laws to see whether an entire record is confidential.

If both open and confidential information is being collected in a record, public officials should consider whether the confidential information can be collected on a separate page that can be separated and withheld when the record is produced for examination and copying. Whenever confidential information is blacked out or withheld, the requester should be told that confidential information has not been produced and should be told the reason why.

As indicated in the advisory above, the best practice would be for the note-taker to keep the extraneous content in a separate record. In the case of the presented hypothetical, the clerk would keep separate the notes taken on behalf of the council and the notes for their own personal use. By keeping the two types of notes separate, records can be distinguished and records requests can be more easily responded to.

BY DIRECTION AND VOTE OF THE BOARD:

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ISSUED ON:

December 17, 2020

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.