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June 18, 2020

Christopher J. Curran
City of Bettendorf
1609 State Street
Bettendorf, Iowa 52722

Sent via email to ccurran@bettendorf.org

Mr. Curran,

We are writing in response to your letter dated May 11, 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 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.

BACKGROUND:

The City of Bettendorf (City) has been engaged in litigation with Dr. Allen Diercks (Requester) concerning the release of billing records for legal work. This matter has previously been addressed by the Iowa Court of Appeals in *Diercks v. City of Bettendorf* and subsequently in the Iowa District Court for Scott County.¹ Following the Iowa District Court ruling, the City is currently working on a records request for legal invoices from the Iowa Community Assurance Pool (ICAP), a local government risk pool the City belongs to. The City is also working with the law firm of Smith, Mills & Schrock to have the documents reviewed for attorney-client privilege and for attorney work product.

On May 4, 2020, the City provided a partial response to the Requester informing him that the City is working to obtain and review the requested records. The City indicated to the Requester that there is no explicit deadline for production and that it further reserved the right to charge the Requester for fees it incurred from the firm conducting the review for privilege. Counsel for the Requester responded to the City on May 8, 2020, disagreeing with its assertions regarding response time and charging of fees.

¹ *Diercks v. City of Bettendorf*, 929 N.W.2d 273 (Iowa Ct.App. 2019)

On May 11, 2020, the City requested an advisory opinion from the Iowa Public Information Board on the following issues:

QUESTIONS POSED:

- I. Is there an explicit time in which the City must produce the requested records to the Requester?
- II. Is the City allowed to charge the Requester for the amount billed to the City for outside counsel to conduct a review of the requested billing statements for attorney-client privilege and work product, and preparation of a privilege log as the custodian's authorized designee under Iowa Code § 22.3?²
- III. Is the City allowed to withhold release of the documents until the Requester pays such actual costs charged to the City?
- IV. Is the City allowed to withhold billing fee statements for ongoing matters currently pending before a court as wholly confidential?

OPINION:

I.

Is there an explicit time in which the City must produce the requested records to the Requester?

Various cases have yielded different answers about what lengths of time have been reasonable or unreasonable for production of records. In *Horsfield Materials, Inc. v. City of Dyersville*, the Iowa Supreme Court found that a 70-day delay in production of records was unreasonable.³ The Court additionally held that the 20-day time limit referenced in Iowa Code § 22.8(4)(d) is not a blanket rule.⁴ Rather, it is limited to the circumstance in which the custodian needs to determine whether an otherwise confidential record should be made available to a person who claims the right to view it.⁵

Additionally, for the matter *In re Brock*⁶, the Iowa Public Information Board found that under the circumstances of that case, a 94-day delay in production was not reasonable.⁷ Neither *Horsfield* nor *Brock* set an outside limit. Both decisions were based on circumstances unique to their own specific cases. The same was true when the Iowa Court of Appeals found in *Wings v. Dunlap* that

² The City indicated that the attorney who performed the work described in the billing statements would be the one reviewing for privilege.

³ *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 462 (Iowa 2013). The City of Dyersville did not produce any documents until after Horsfield went to court. When Horsfield's attorney emailed the City asking for a status update on February 12, no response was received until March 25.

⁴ *Id.* at 460.

⁵ *Id.*

⁶ 14FO:0004, Iowa Public Information Board, ipib.iowa.gov/node/368

⁷ The records custodian did not release records until after the IPIB filed a contested case proceeding. No reason for the delay was provided to the record requestor.

a delay in production was reasonable because there was substantial compliance and good faith efforts to produce the requested public records.⁸

Ultimately, Chapter 22 is silent as to the time allowed for producing requested public records. As noted in one of our earlier advisory opinions:

“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 variables affecting response time makes it very difficult, and probably unwise, to establish any hard and fast objective standards.”⁹

With the advent of today’s electronic records environment, this issue has evolved and gained even more complexity compared to when the statute was adopted more than forty years ago. As aptly noted by the Iowa Court of Appeals in *Wings*, “Chapter 22 cannot be interpreted and applied in a vacuum.”¹⁰

Despite the evolution of record keeping in recent decades, the longstanding administrative interpretation of Chapter 22 stands and remains that:

“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.”¹¹

In keeping with precedent, we find that there is no explicit deadline for production of records. However, we wish to emphasize that this determination is not an excuse for entities to delay production when they could otherwise produce the requested records in a timely manner. The facts of each separate request will determine whether the time taken to produce records was a “good-faith reasonable delay...”¹²

II.

Is the City allowed to charge the Requester for the amount billed to the City for outside counsel to conduct a review of the requested billing statements for attorney-client privilege and work product, and preparation of a privilege log as the custodian’s authorized designee under Iowa Code § 22.3?

Iowa Code § 22.3(2) states that “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.”

In an advisory bulletin issued by the Iowa Attorney General’s Office on April 1, 2005 (later updated on December 1, 2014), additional clarification and guidance was provided on how charges for

⁸ *Wings v. Dunlap*, 527 N.W.2d 407, 410-411 (Iowa Ct.App. 1994)

⁹ 14FO:0004, Iowa Public Information Board, ipib.iowa.gov/node/368

¹⁰ *Wings v. Dunlap*, 527 N.W.2d 407, 410 (Iowa Ct.App. 1994)

¹¹ Iowa Uniform Rules on Agency Procedure, X.3(4), www.legis.iowa.gov/DOCS/Rules/Current/UniformRules.pdf

¹² Iowa Code § 22.8(4)

production of public records should be handled.¹³ These included: (i) not issuing charges merely for examining a public record, as charges are limited to the cost of retrieving records, making copies, or supervising records; (ii) not charging more than the actual cost of producing/providing the materials and excluding other ordinary expenses such as electricity, copy machine maintenance, etc.; (iii) all expenses for the work done in providing access to records shall be paid by the requester and may include a reasonable fee for supervision. These expenses and fees may include time spent retrieving, copying, and supervising the records.

Expenses and fees for personnel are based on their hourly wage and the hours actually spent on the matter, and exclude other ordinary expenses such as health insurance, etc. Fees cannot exceed the actual cost. To keep costs down, officials should assign lower-paid staff as appropriate to retrieve, copy, or supervise records.

The Iowa Supreme Court elaborated on this issue in *Rathmann v. Board of Directors*, and stated in part:

“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. Thus, access to public records does not necessarily mean ‘free’ access. 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.”¹⁴

The Court further rejected the interpretation that the language in Chapter 22 was only intended to cover the costs of supervising or copying the documents.¹⁵ The request at issue in *Rathmann* concerned a large subset of documents, making the associated fees reasonable considering the work put into the production effort.

Therefore, so long as the charges comply with the aforementioned guidelines, the City may pass the expenses incurred along to the Requester.

III.

Is the City allowed to withhold release of the documents until the Requester pays such actual costs charged to the City?

Iowa Code § 22.3(1) states in relevant part, “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.”

¹³ Iowa Department of Justice, Office of the Attorney General. (2005, April 1). Charges Under the Public Records Law: Impose Only Actual Costs! Retrieved May 19, 2020, from www.iowaattorneygeneral.gov/about-us/sunshine-advisories/charges-under-the-public-records-law-impose-only-actual-costs

¹⁴ *Rathmann v. Board of Directors*, 580 N.W.2d 773, 778-779 (Iowa 1998)

¹⁵ *Id* at 779.

The City may withhold requested records until the Requester pays the actual costs incurred by the City in producing said records. Pursuant to Iowa Code § 22.3(1), an estimate of the costs shall be communicated to the Requester at the time of their request.

IV.

Is the City allowed to withhold billing fee statements for ongoing matters currently pending before a court as wholly confidential?

Iowa Code § 22.7(4) states that “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” are confidential unless release of the record is ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information.

On remand from the Iowa Court of Appeals, the Iowa District Court for Scott County examined whether attorney billing records were privileged in *Diercks v. City of Bettendorf*.¹⁶ As noted in the opinion, this issue has not been extensively litigated in Iowa, with only one prior case being cited to the Court. In *National Surety Corp. v. Dustex Corp.*, the U.S. District Court for the Northern District of Iowa examined the same question. Although the U.S. District Court found no relevant Iowa law on point, it did state “an overwhelming majority of cases from other jurisdictions hold that an attorney’s billing records and invoices are protected by the attorney-client privilege only to the extent they contain confidential information.”¹⁷ The Court further stated that the defendant could not “rely on a blanket claim of privilege in refusing to produce [the attorney’s] billings and invoices.”¹⁸

The Iowa District Court in *Diercks* did not distinguish between billing records for ongoing litigation and billing records for closed matters. Reviewing, clarifying, or overturning a district court decision is not a power or duty granted to the IPIB by Iowa Code § 23.6. Therefore, the IPIB does not issue an opinion on this question.

¹⁶ *Diercks v. City of Bettendorf*, Case No. EQCE129375 (Iowa District Court, Scott County 2020)

¹⁷ *National Surety Corp. v. Dustex Corp.*, 2014 WL 46541, *4 (N.D. Iowa 2014)

¹⁸ *Id.*

BY DIRECTION AND VOTE OF THE BOARD:

Julie Pottorff, Chair
Joan Corbin
E.J. Giovannetti
Keith Luchtel
Monica McHugh
Rick Morain
Suzan Stewart

SUBMITTED BY:

Zachary S. Goodrich, J.D.
Legal Counsel

ISSUED ON:

June 18, 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.