

## Iowa Public Information Board

In re the Matter of: Analisa Pearson, complainant And concerning: Des Moines Public Schools	Case Number: 14FC:0027  PROBABLE CAUSE REPORT
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**RE: Formal Complaint 14FC:0027 concerning Des Moines Public Schools. The Executive Director of the Iowa Public Information Board (IPIB) accepted the complaint on July 30, 2014, and assigned the complaint to staff for informal resolution pursuant to Iowa Code section 23.9, which was unsuccessful. Pursuant to Iowa Code section 23.10, a formal investigation was conducted and probable cause report prepared. The complaint involves withholding certain records.**

Formal complaint 14FC:0027, filed by Analisa Pearson

Analisa Pearson filed a formal complaint on April 25, 2014, alleging that Des Moines Public Schools (DMPS) violated chapter 22 of the Iowa Code by withholding public records. She requested certain records maintained on the private cell phone of an employee of DMPS. Ms. Pearson alleges the phone was used to conduct school business. This complaint was accepted by the IPIB on July 30, 2014, and returned to staff for informal resolution pursuant to Iowa Code section 23.9. DMPS, through counsel, offered to provide the requested documents, but dispute the IPIB position that government business conducted on a private electronic device generates a public record.

### Discussion

The content of the message is the key test to determine whether Chapter 22 applies to records on privately owned electronic devices. If it contains information relating to public duties of an official or employee or the government body served, it is a public record.

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

The Iowa Supreme Court, in *Linder v. Eckard*, 152 N.W.2d 833, 835 (Iowa 1967), long ago established that it is the contents of the document or communication that determines whether it is a public record: “It is the nature and purpose of the document, not the place where it is kept, which determines its status.” A public record does not lose its public status by being retained on a privately owned electronic device.

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

Comingling public communications and reports with private communications on a privately owned electronic device does create difficulty in responding to an open records request. Private communications may be withheld as not being public records. A public record on a private device may of course be afforded confidentiality under Iowa Code Section 22.7 as would any other public record. The public business communications are public records, and the custodian must review all records on a device to determine whether they are within a request for examination and copying to justify any denial of release.

In this complaint, DMPS is not alleging that any confidentiality exemptions apply as allowed by Iowa Code section 22.7. Instead, DMPS maintains its position that records of government business maintained on privately-owned electronic devices are not public records and therefore DMPS has no obligation to fulfill the requested documents.

**The denial of Analisa Pearson's record request under this theory with obvious intent to apply this theory to all similar requests serves to deny rights afforded under Iowa Code chapter 22. There is probable cause to believe that a violation of Iowa Code chapter 22 has occurred, and a continuing course of conduct denying future exercise of Chapter 22 rights is intended.**

#### IPIB Action

The IPIB has several options upon receipt of a probable cause report. According to Iowa Administrative Rule 497 - 2.2(4):

“Board action. Upon receipt and review of the staff investigative report and any recommendations, the board may:

- a. Redirect the matter for further investigation;
- b. Dismiss the matter for lack of probable cause to believe a violation has occurred;
- c. Make a determination that probable cause exists to believe a violation has occurred, but, as an exercise of administrative discretion, dismiss the matter; or
- d. Make a determination that probable cause exists to believe a violation has occurred, designate a prosecutor and direct the issuance of a statement of charges to initiate a contested case proceeding”.

Probable cause is not specifically defined in Chapters 21, 22 and 23. A different section of the Iowa Code defines probable cause as “reasonable suspicion”; it is defined in legal dictionaries as the “*apparent facts discovered through logical inquiry that would lead a reasonably intelligent and prudent*

*person to believe that an accused person has committed a crime, thereby warranting his or her prosecution, or that a cause of action has accrued, justifying a civil lawsuit.”*

Once probable cause is found by the IPIB, the IPIB can determine at a contested case proceeding that the complaint has merit and may issue “any appropriate order to ensure enforcement....” (section 23.10(3)) Court enforcement of Chapter 22 requires a finding of violation by a preponderance of the evidence, a higher burden of proof than probable cause. Practically speaking, the IPIB should review a case based upon the preponderance of the evidence standard, along with consideration of any defenses under section 23.11, such as harmless error, defenses in 22.7 (confidential records) or defenses in 22.9 (release of public records would result in a denial of federal funds).

Based upon a formal investigation of the complaint, I recommend that the IPIB find probable cause exists to believe that the Des Moines Public Schools has violated Iowa Code Chapter 22 (public records) on April 23, 2014, with respect to the denial of records requested and has exhibited intent to continue to violate Chapter 22 in the future with respect to similar requests. The IPIB should evaluate the violation and course of conduct to determine if formal prosecution is warranted. If formal prosecution is found to be warranted, informal settlement should be sought before initiation of a contested case filing.

Respectfully submitted this 9<sup>th</sup> day of October, 2014

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