

2016 ISFIS CONFERENCE

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OPEN MEETINGS AND PUBLIC RECORDS LEGAL UPDATE

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I. OPEN MEETINGS – IOWA CODE CHAPTER 21

Common Questions:

1. What is considered a meeting?
 - a. A meeting is a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Iowa Code section 21.2(2).
 - b. It is well-established that a meeting of the majority of members is necessary for a meeting to occur. Wedergren v. Board of Directors, 307 N.W.2d 12, 18 (Iowa 1981) (finding that any gathering, therefore, of two members of the five-member school board would not ordinarily be a meeting under chapter 21).
 - c. Activities of a board's individual members to secure information to be reported and acted upon at an open meeting ordinarily do not violate the statute. Gavin v. City of Cascade, 500 N.W.2d 729, 732 (Iowa Ct. App. 1993).
 - d. Additionally, in determining whether a meeting has occurred, the courts will consider the individual's intent in holding the gathering and/or avoiding the purpose of Chapter 21. Gavin v. City of Cascade, 500 N.W.2d 729, 732 (Iowa Ct. App. 1993).
 - e. A meeting does not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter. Iowa Code section 21.2(2).

- f. Hutchison v. Warren County, (Iowa Supreme Court No. 14-1649, March 18, 2016)

The definition of a meeting under Iowa Code section 21.2(2) extends to all in person gatherings at which there is deliberation upon any matter within the scope of the policy making duties of a school district by a majority of its members, including in person gatherings attended by a majority of the members by virtue of an agent or proxy.

The county administrator discussed reorganization plans and a written report with individual supervisors and during these discussions, the county administrator allowed individual supervisors to voice their thoughts and concerns on various topics which the county administrator then reported to the other supervisors. Using this process, the county board of supervisors reached a compromise on which positions would be eliminated. At the end of each meeting with individual supervisors, the county administrator would find out whether that supervisor was going to approve whatever aspect of the reorganization plan they had discussed at that meeting.

The Supreme Court found the county board of supervisors developed a sophisticated methodology of communicating effectively with one another about county business outside the public view by using the county administrator as a conduit because they were aware that a meeting of a quorum of the supervisors in person would trigger the requirements of the open meetings law.

The Supreme Court found that the legal equivalent of an in person gathering of a majority of the members of a board takes place whenever a majority of board members meet, whether each member attends personally or through an agent.

The open meetings law does not prohibit discussions between board members and staff to exchange ideas and gather information in order for the body to act upon an issue during an open meeting. However, the open meetings law does prohibit the majority of a board gathering in person through the use of agents or proxies to deliberate any matter within the scope of its policy-making duties outside the public view.

- g. Iowa Code Chapter 21 does not require a school district to permit citizens to speak at a public meeting. IPIB Advisory Opinion 2016-08.
- h. A school district has the authority to make and enforce reasonable rules for the conduct of its meetings to assure those meetings are orderly and free from interference or interruption by spectators. Iowa Code section 21.7.

2. When are closed sessions permitted?

- a. Closed sessions are permitted for any of the following commonly used reasons:
- i. To review or discuss records which are required or authorized by state or federal law to be kept confidential. Iowa Code section 21.5(1)(a).
 - ii. To discuss strategy with counsel in matters that are presently in litigation or where litigation is imminent where its disclosure would be likely to prejudice or disadvantage the position of the governmental body in that litigation. Iowa Code section 21.5(1)(c).
 - Counsel needs to be present either in person or by electronic means.
 - Present means either in person or by electronic means.
 - For purposes of going into closed session under Iowa Code section 21.5(1)(c), there needs to exist a prior public statement of the attorney-client relationship between the governmental body and the individual who is going to be its legal counsel. This statement can be an existing engagement letter, contract, resolution or a designation made in the minutes of a prior meeting. If there has been no prior public statement, then the governmental body should announce before going into closed session that it is going to utilize the individual as its legal counsel on the issue that is going to be discussed in closed session. If the governmental body is going to utilize an individual as its attorney and the name of that individual has already been publicly stated, then no additional announcement or designation is required. IPIB Advisory Opinion 2015-10
 - iii. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session. Iowa Code section 21.5(1)(i).
 - For a closed session to occur all of the following must occur: (1) the discussion must involve an evaluation of the professional competency of an individual; (2) the discussion must involve consideration of the appointment, hiring, performance or discharge of the individual; (3) the discussion must be such that if conducted during an open meeting it would cause needless and irreparable injury to that person's reputation; and (4) the individual must request the closed session.

- IPIB Advisory Opinion 14FO:0002 – Iowa Code section 21.5(1)(i) provides the exclusive process for the evaluation of the professional competency of an individual whose appointment, hiring, performance or discharge is being considered. The application of section 21.5(1)(i) cannot be avoided under the guise of a confidential record review or discussion during a closed session conducted pursuant to section 21.5(1)(a).

3. Requirements of entering a closed session:

- a. The reason for entering the closed session must be stated publically and recorded in the minutes.
- b. There must be a public roll call vote whether to enter a closed session.
- c. The vote must be of 2/3 of the members of the board or all of the members present at the meeting.
- d. The vote must be required in the minutes.
- e. Detailed minutes need to be taken that record what occurred in closed session.
- f. Only the topic for which a closed session is entered into can be discussed.
- g. No final action can be taken during a closed session.

4. Who may attend a closed session?

- IPIB Advisory Opinion 2015-03 – Iowa Code section 21.5 is silent as to who may be invited to attend a closed session. It is at the discretion of the governing body as to who it may invite to attend.

II. OPEN RECORDS – IOWA CODE CHAPTER 22

1. Common Questions:

What are considered public records?

Public records are all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to any school district. Iowa Code section 22.1(3)(a).

- IPIB Advisory Opinion 2015-08 - A document that is discussed and made viewable to the public at a public meeting makes the document a public record that shall not be treated as confidential under Iowa Code section 22.7. This does not apply if a confidential record is only discussed or referenced at a public meeting.

2. Who is the custodian of a public record?

Iowa Code section 22.1(2) defines the term lawful custodian as: the government body currently in physical possession of the public record. The custodian of a public record in the physical possession of persons outside a government body is the government body owning that record. The records relating to the investment of public funds are the property of the public body responsible for the public funds. Each government body shall delegate to particular officials or employees of that government body the responsibility for implementing the requirements of this chapter and shall publicly announce the particular officials or employees to whom responsibility for implementing the requirements of this chapter has been delegated.

3. What type of access needs to be provided?

- a. A school district has to provide an individual the ability to examine the information without charge. Iowa Code section 22.2.
- b. A school district has to allow the individual to make copies of the information or to pay for the public entity to copy the information. Iowa Code section 22.2.
- c. A school district may charge the individual for all expenses of the examination and copying. The amount charged can include the following:
 - The reasonable fee for the services of the lawful custodian or the custodian's authorized designee in supervising the examination and copying of the records. Iowa Code section 22.3(2).
 - The reasonable fee shall not exceed the actual cost of providing the service.
 - Actual costs shall include only those expenses directly attributable to supervising the examination of and making and providing copies of public records.
 - Actual costs shall not include charges for ordinary expenses or costs such as employment benefits, depreciation, maintenance, electricity, or insurance associated with the administration of the office of the lawful custodian. Iowa Code section 22.3(2).

- d. A school district can put into place policies and procedures regarding the request for review and/or copying of public records.

4. Is any information exempt from disclosure?

Iowa Code Section 22.7 sets out a list of over sixty types of records that 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. The following are some of the most applicable public records that are considered confidential and are not to be released:

- a. Student Records – Iowa Code section 22.7(1) – Personal information in records regarding a student, prospective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records.
- b. Attorney Work Product – Iowa Code section 22.7(4) – Records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body.
- c. Personnel Records – Iowa Code section 22.7(11) – Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies.

Except that the following information contained in personnel records are public records that can be released:

- The name and compensation of the individual including any written agreement establishing compensation or any other terms of employment excluding any information otherwise excludable from public information pursuant to this section or any other applicable provision of law.
- The dates the individual was employed by the government body.
- The positions the individual holds or has held with the government body.
- The educational institutions attended by the individual, including any diplomas and degrees earned, and the names of the individual's previous employers, positions previously held, and dates of previous employment.

- The fact that the individual was discharged as the result of a final disciplinary action upon the exhaustion of all applicable contractual, legal, and statutory remedies.

d. Application Materials – Iowa Code section 22.7(18) – Application materials are confidential as long as:

- (1) the communication is not required by law, rule, procedure, or contract;
- (2) the communication is from identified persons outside of government; and
- (3) the school district could reasonably believe that those persons would be discouraged from making the communications to the school district if they were available for general public examination subject to three exceptions:

- (1) the candidate consents to public disclosure concerning their candidacy;
- (2) information which may be disclosed without identifying its source; and
- (3) information surrounding the occurrence of a crime.

City of Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895 (Iowa 1988); Des Moines Register and Tribune Company v. State Board of Regents and Douglas Creamer, (Polk County District Court 1992).

e. Settlements – Iowa Code section 22.13 – Settlement agreements and summaries of written settlement agreements are public records, provided the settlement is final, binding and written and resolves a legal dispute claiming monetary damages, equitable relief, or a violation of a rule or statute.

5. Does it matter where the record is stored?

IPIB case, In Re the Matter of Analisa Pearson, and concerning Des Moines Public Schools, Ms. Pearson alleged that a school employee's private cell phone was used to conduct school business. IPIB ultimately decided, in its Probable Cause Report, that any information on the private cell phone that contains information relating to public duties of an official or employee or the government body served is a public record. To permit a government 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. A policy of a government body that allows its officers and employees to use personal electronic devices for the conduct of public business assumes the risk that extra expense may have to be incurred to process and separate public business from private business on those devices. That additional cost should not be borne by citizens exercising their rights under Chapter 22.

6. How long does a school district have to respond to an open records request?

Section 22.8(4)(d) states that a good faith reasonable delay to determine whether confidential records should be made available for inspection and copying shall not exceed twenty calendar days and ordinarily should not exceed ten business days. This is not an absolute deadline, but rather an outside deadline for a school district to determine whether a confidential record should be available for inspection and copying to the person requesting the right to do so. The determination of whether the time in response to a records request is unreasonable requires a subjective judgment, not an objective one. There can be no hard and fast rule applied to every request. IPIB Advisory Opinion 14FO:0004.

III. IOWA PUBLIC INFORMATION BOARD

1. The Iowa Public Information Board (IPIB) was created in 2012 to provide an alternative means by which to secure compliance with and enforcement of the requirements of the Iowa open meetings and public records law to all interested parties.
2. How does IPIB fit into the scheme of open meetings/public records violations?
 - a. An individual or entity can seek enforcement of Iowa's open meetings and public records law by doing one of the following:
 - b. Filing a request for judicial review (under Iowa Code section 17A.19).
 - c. Filing suit for judicial enforcement of Iowa's open meetings law (under Iowa Code section 21.6)
 - d. Filing suit for judicial enforcement of Iowa's public records law (under Iowa Code section 22.10); or
 - e. Filing a complaint with the Iowa Public Information Board.
3. Procedure for a complaint filed with IPIB:
 - a. An individual/entity must file a complaint within sixty (60) days from the time the alleged violation occurred or the complainant could have become aware of the violation with reasonable diligence. The complaint is a public record.
 - b. An individual/entity must follow IPIB's rules and regulations regarding the filing of complaints.
 - c. IPIB determines whether the complaint is within its jurisdiction, is legally sufficient and could have merit.

- d. IPIB works with the parties to reach an informal, expeditious resolution of the complaint or, if this does not work, offer the parties mediation.
 - e. If the parties do not reach an agreement, IPIB shall initiate a formal investigation concerning the facts and circumstances set forth in the complaint.
 - f. If IPIB finds there is probable cause to believe there has been a violation of Iowa's public meetings and open records law, it issues a written order and begins a contested case proceeding. At the end of the contested case proceeding, IPIB shall vote regarding whether a violation has occurred.
 - g. A school district may defend against a proceeding on the ground that, if the violation occurred, it was only harmless error or that clear and convincing evidence demonstrated that grounds existed to justify an injunction against disclosure.
 - h. If a violation has occurred, IPIB issues an order requiring or prohibiting action and providing a remedy, if necessary.
4. What powers does IPIB have?
- a. Can adopt rules regarding Iowa's open meeting and public records law.
 - b. Can issue declaratory orders with the force of law and provide informal advice regarding Iowa's open meeting and public records law.
 - c. Can examine a record that is the subject of a complaint, even if that record is considered to be confidential.
 - d. Can, after appropriate board proceedings, issue orders with the force of law regarding a record that is the subject of a complaint.
 - e. Can offer training and disseminate information regarding open meetings and public records.