

- Open Meetings (Chapter 21) and Public Records (Chapter 22)



# Open Meetings Law

## Iowa Code Chapter 21

- What groups does the open meetings law cover?
- What is a meeting?
- When and how can a closed session be held?
- What are the remedies if the law is not followed?

# Governmental Bodies

- The open meetings law requirements apply to “governmental bodies, “ defined to include:
- Boards, councils and commissions of the state or a political subdivision “expressly created by statute or executive order,
- A multi-member body formally and directly created by a covered board, council or commission,
- An advisory board, commission, taskforce or other body created by statute or executive order to develop or make recommendations on public policy issues.

# Basic Requirements of Chapter 21

- Public notice prior to meetings;
- Right of the public to attend meetings and observe
- Minutes keeping, with the vote of each member on each action recorded;
- Announced reason and vote prior to conducting a closed session;
- Tape and sealed minutes must be maintained for at least one year after a closed session

# Meetings

- The public is entitled to prior notice of all board meetings. A meeting is:
  - Any gathering in person or electronically formal or informal,
  - Of a majority of the board,
  - When there is deliberation or action on any matter within the scope of the board's authority.
- Does not include a gathering of members for purely ministerial or social purposes

# Conducting an Open Session

- An open session is a meeting in which all members of the public have access
- The public may use cameras or recording devices at any open session
- Reasonable rules of conduct may restrict interference or interruption by spectators
- An opportunity for public comment is often provided, but is not required by chapter 21.
- A public meeting is NOT a public hearing.

# Electronic or Telephonic Meetings

- May be held only in circumstances where meeting in person is impossible or impractical
- Body must:
  - Comply with public notice requirements;
  - Provide public access to the meeting;
  - Keep minutes including statement of why the meeting is being held electronically; and
  - Follow required procedures if any portion of the meeting is closed.

# Public Notice of Board Meeting

- Public Notice must be provided at least 24 hours in advance of a meeting.
- Notice must include
  - The date
  - Time
  - Place and
  - Tentative agenda
- Notice must provide sufficient information to reasonably inform the public of the topics to be discussed and action to be taken.

# Emergency Meetings

- Less than 24 hours advance notice may be given if “for good cause such notice is impossible or impractical”
- If a meeting is called on less than 24 hours notice, as much notice as is reasonably possible must be given.
- Note: if adding items to the agenda, it is better to have a justification. Avoid the appearance of trying to get around the law.

# How is Notice Provided?

- In a manner reasonably calculated to apprise the public of the time, date place and tentative agenda of each meeting.
- Minimum distribution
  - Advise the news media who have filed a request for notice with the governmental body, and
  - Post on the bulletin board accessible to the public at the principle office of the body holding the meeting.
- Additional options:
- Post agendas to website
- Email agendas to requesters

# Open Session Minutes

- Minutes of an open session shall reflect:
  - Date, time and place of the meeting.
  - Members present
  - Action taken with enough detail to show how each member voted (NO SECRET BALLOTS), and
  - Grounds for holding a closed section.
- Minutes of an open session are public record.
- Show the actions taken – a running dialog not required.

# Grounds for a Closed Session

- Review or discuss confidential records, such as college transcripts, criminal history data or substance abuse records.
- Discuss strategy with counsel about present or imminent litigation where disclosure would likely prejudice or disadvantage the position of the board in litigation.
- To discuss the decision to be rendered in a contested case conducted according to the provisions of Iowa Code Chapter 17A.

# Additional Grounds for Holding a Closed Session

- Avoid disclosure of certain law enforcement matters, such as prosecution, settlement or auditing criteria.
- Evaluate professional competency of staff or job applications when necessary to prevent needless and irreparable injury to the person's reputation and the person requests a closed session.
- To discuss the purchase of particular real estate if premature disclosure reasonably expected to increase the price the governmental body would have to pay for that property. Note the tape and minutes of this session shall be available for public examination when the transaction is completed.

# Mechanics for Holding a Closed Session

- Voting to close a session is optional
- Generally the provision of section 21.5 allow but does not require closed session.
- A Board may:
- Close only upon the affirmation vote of 2/3 members or of all members present (if less than 2/3 of board).
- Only discuss matters in closed session which are directly related to the state reason for closing the session.
- Stay on topic. Tape record and keep minutes

# Mechanics for Holding a Closed Session

- When a meeting is closed, a Board must
- Publicly announce and enter in the minutes each member's vote and the reason for holding a closed session
- Take final action in open session
- Keep detailed minutes of all discussion, persons present and action occurring in closed session.
- Tape record entire closed session. (Under Chapter 21, open sessions are not required to be taped).
- Seal and keep minutes and tape recording at least one year shield from public inspection, absent a court order for in camera review.

# Open Meetings – Enforcement

- Violations can be enforced by any aggrieved person, taxpayer to Iowa, citizen of Iowa, Attorney General, or county attorney.
- Ignorance of the law is not a defense, but reliance on advice of counsel is a defense.
- Burden on the board to demonstrate compliance.
- Remedies include individual assessment of damages (\$100-500) and attorney fees against each board member involved in the violation.

# What Defenses are Available?

- IGNORANCE OF THE LAW IS NO EXCUSE, but you may avoid personal liability for damages if you:
- Voted against the violation.
- Refused to participate in the violation.
- Engaged in reasonable efforts to resist or prevent the violation.
- Had good reason to believe and in good faith believed facts which if true, would have indicated compliance with the law.

# Iowa Public Records Law

## – Code Chapter 22

- What records are open, confidential?
- How should my office prepare for and manage public requests to review or copy records?
- What may I charge?
- What happens if I violate the law
- What records are “public, open confidential?”
- Where can I get help if I am unsure?

# What is a Public Record

- Of or belonging to this state or any county, city township, school corporation, political subdivision....
- Or any branch, department, board, bureau, commission, council or committee or any of the forgoing.
- All records documents, tape or other information, stored or preserved in any medium.

# Public Records may be in any form

- Paper
- Audio or video tape
- Computer tape or computer readable medium
- Including:
  - Agenda materials for an open meeting
  - Contracts
  - E-mails

# Location and Origin of the record are NOT controlling

- Public records do not lose their character as public records merely because they are stored in a private facility.
- A government body may not contract for performance of its duties or function in order to avoid disclosure of a public record
- Chapter 22 reaches documents held by public officials in their official capacity, regardless of origin.

# Are all public records open for public inspection and copying?

- No.
- Open records – Under chapter 22, all public records are available to any person for examination or copying and any use, unless designated by law as confidential.
- Optional confidential records - Code 22.7 lists 61 categories of records which may be treated as confidential unless ordered released by a court, the lawful custodian, or another authorized person.
- These records subject to release at the discretion of the custodian.

Confidential Records – Several other provision of state and federal law identify records which must be kept confidential, examples include:

- Criminal intelligence data (Iowa Code chapter 692)
- HIV test results (Iowa Code section 141.23)
- Mental health and hospitalization records (Iowa Code chapter 229)
- Criminal pre-sentence investigation (Iowa Code Section 901.4)
- Tax return information (Iowa Code Section 422.20)
- Student records (FERPA)
- Some Social Security numbers (Federal Privacy act)

# Can everyone have access to my public records?

- Every person has the right to examine copy and publish or otherwise disseminate all OPEN public records. This includes
  - The right to examine without charge
  - The right to photograph or make copies
  - The right to publish or otherwise disseminate a public record or the information in the record.

# Access to Confidential Records

- Confidential records, which are not available for public inspection, must be made available to members of governing bodies who have need to the information in the records in order to perform their duties. These individuals may not further disclose confidential records or information.
- Limited access open records may only be disclosed as allowed by the controlling statute.
  - DOT accident reports – to limited persons
  - List of registered voters – for limited use.
  - Personnel files – available to employees

# When can people come to the office to examine and copy public records?

- Public records may be examined any time during your office hours. If your office is not open at least 30 hours per week:
- The rights may be exercised at any time between 9:00 a.m. – 12:00 noon and 1:00 p.m. – 4:00 p.m.
- Monday through Friday
- Except legal holidays.

# Who responds to requests for public records?

- The “lawful custodian,” usually the government body currently in possession of the records, is responsible for managing public records.
- Each government body shall delegate to particular officials or employees of that governmental body the responsibility for implementing [chapter 22].
- The contact person shall be announced to the public.

# Understand the Law

The public records contact person should:

- Know what public records are maintained in the office.
- Know which of the records are open and which are confidential or may contain confidential information
- Know how they are going to respond when someone asks to see or receive a copy of a particular public record.

# How do I manage access to public records?

- Do not relinquish control of the records.
- Provide a place for examination and copying
- Provide a reasonable number of copies.
- Move to a separate location if necessary.

# Can I require a person who requests a public record to identify himself?

- You can ask them to identify themselves but it is not necessary for them to do so.
- Identification can only be required under limited circumstances, when access to the record is restricted by statute to certain classes of persons (e.g.: DOT accident reports.)
- When a statute limits access the agency should ask about the identity of the person in order to avoid disclosing records to those who are not authorized by statute to have access.

# Can I require a request for a public record to be in writing?

- Generally not. The public has the right to come to a government office in person and orally ask to examine or receive a copy of an open public record.
- But you may not require physical presence of the person requesting a copy of a record. Chapter 22 requires the custodian of a public records to “fulfill requests for a copy of a public record received in writing, by phone or by electronic means (i.e.: e-mail or fax).

# How specifically must a person describe records he or she is requesting?

- The request must reasonably describe the records. A description is reasonable if it allows the person, familiar with the records to locate the record with a reasonable amount of effort.
- E.g.: a request for Board minutes may be for a particular day or time or for any number of days or times without stating a particular issue or action item.

Can I ask a person to produce a subpoena before I provide copies of open public records?

- No – you can not require a subpoena for the public to exercise the right to examine and copy open records.
- But you may receive a subpoena if the records are sought in connection with a court case.

# How do I handle a large request?

- Respond promptly attempt to clarify the scope of the request.
- Provide feedback to the requestor regarding:
  - The estimated cost of fulfilling the request
  - The time that you will need to compile the records
- You may be able to negotiate with the requestor to narrow the scope of the request or allow additional time to provide copies of records.

# How much may I charge?

- You are allowed to recover your expenses for supervising and for copying:
- Charge a reasonable fee for supervising records and for copies
- Do not charge more than the actual cost of supervising and copying
- Apply fees uniformly to everyone.

# Calculating fees

- All expenses of the work shall be paid by the person desiring to examine or copy the record
- The fee may include:
  - A reasonable charge for time spent supervising examination of the records;
  - a reasonable charge for time spent retrieving records
- The actual cost of providing a copy;
- the actual cost of providing a place for examination of the records.

# Fee Limitations

- The fee for the copying service determined by the lawful custodian shall not exceed the cost of providing the service
- The fee may not include fixed or overhead costs such as:
  - Depreciation
  - Equipment maintenance
  - Electricity
  - Insurance
- You may not recover the costs associated with creating records as a part of day-to-day governmental functions.

# May I require payment before preparing copies?

- Yes
- Fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of expenses incurred in fulfilling the request and
- Estimated expenses shall be communicated to the requester upon receipt of the request.

# What if I do not have the information in the form requested?

- Chapter 22 does not require you to create or make records
- People sometimes ask for a record you do not routinely generate.
- If you have the requested information within open public records in your office, offer the requestor an opportunity to examine the records.

# What if I am unsure whether the record is confidential?

- Take time to decide whether to allow access. Consult with your counsel, if necessary
- Section 22.8 allows a “good faith, reasonable delay” to determine the record is confidential.
  - Usually do not take more than 10 business days.
  - Never take more than 20 calendar days.
- Examine the contents of the document
- Do not rely on the name of the document

# What happens if I violate the law?

- A judicial action to enforce the public records law may be initiated by :
  - Any aggrieved person
  - A taxpayer to the State of Iowa
  - The Attorney General
  - A county attorney

# Upon finding a violation a court shall:

- Issue an injunction ordering violators to comply.
- Assess damages between \$100-500
- Order payment of costs and attorney fees
- Issue an order removing from office any person who has had one prior violations for which damages were assessed.
- In addition a court may:
  - Find a person guilty of a simple misdemeanor for a known violation
  - Order a person to refrain for one year from future violations.

# Defenses?

- Essentially the same as in the open meetings enforcement action. No personal damages if:
- You voted against the action or refused to participate.
- Engaged in reasonable efforts to resist or prevent the violation.
- Had good reason to believe facts which if true, would have indicated compliance; or
- Reasonably relied on the decision of a court or an opinion of the Attorney General or attorney for the governmental body.

# Emergency Management and Homeland Security concerns

- “Information concerning security procedures or emergency preparedness information developed and maintained by a governmental body for the protection of governmental employees, visitors to the governmental body or property under the jurisdiction of the government body, if disclosure could reasonably be expected to jeopardize such employees, visitors or property.”
- Including vulnerability assessments, records related to security measures – such as security and response plans security codes and combinations, passwords, restricted area passes, keys and security or response protocols
- If the governmental body has adopted a rule or policy identifying specific records or classes of records to which this exception applies.

# Three Guiding Principles

- When handling public records requests
- WHY the requestor wants the record is almost always irrelevant!
- Public records cannot be withheld without cited legal authority
- There is always time to ask for legal advice if you don't know whether a record can be provided.
- NOTE: For LEPC's (whose members have been appointed by the IERC), the Iowa Attorney General is the legal counsel.

# QUESTIONS?

- This presentation was intended to provide an overview of the Open Meetings and Public Records laws. It is not intended to provide legal guidance or advice.
- Resources:
  - HSEMD Liaison
  - Iowa Attorney General
  - Iowa Citizen Aide/Ombudsman Office
  - Iowa Freedom of Information Council
  - Iowa Code Chapters 21 and 22