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he Iowa Public

Records Law

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January 1984

REPORT OF THE GOVERNOR'S COMMITTEE ON THE IOWA PUBLIC RECORDS LAW

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INTRODUCTION

1. Creation of the Governor's Committee

On June 27, 1983 Governor Branstad created a committee to study the Iowa Public Records Law, Chapter 68A of the Code of Iowa, and to recommend to him any changes in the Iowa law on this subject that the Committee deemed appropriate. The Governor also requested that in the course of its study of the Iowa Public Records Law, the Committee also review and make recommendations with respect to the implementation of the 1979 Citizen's Privacy Task Force Report, authorized by House File 207 (1978). The Governor appointed to this Committee Arthur Earl Bonfield, Professor of Administrative Law and Constitutional Law at the University of Iowa Law School, Chair; Kathryn L. Graf, Administrative Rules Coordinator of the State of Iowa; and Forrest Kilmer, Editor of the Quad-City Times and President of the Iowa Freedom of Information Council. The Governor's Committee met seven times. In addition to doing its own research, the Committee published a notice in the Iowa Administrative Bulletin soliciting advice on the subject of its study, and wrote letters to state and local government officials soliciting their views. In the course of its work the Committee received written submissions from many persons throughout the state. The response from various interested persons was gratifying and was of great help to the Committee in the performance of its task.

2. Underlying Assumptions of This Report

The importance of a public right of access to information in the possession of government is hard to overstate. Most obvious is the point that an informed electorate is essential to effective representative government. The public can evaluate the performance of its official servants so that its members may vote intelligently in elections only if they have access to all of the information in the possession of the government that is necessary to make that judgment sensibly. In short, adequate public access to information about government operations is a prerequisite for the successful operation of our representative system.

Beyond this vital public interest in ensuring the people sufficient information to evaluate government performance is the fact that public officials are likely to be more responsive to the will of those they represent if public officials know their activities are susceptible of being monitored and observed by their principals. In addition, access by the people to information about government operations deters official misconduct. Inappropriate conduct by persons in government is less likely in the light than in the dark. Lastly, freedom of speech, a very important and

cherished right in our system, can only be meaningfully exercised when the people have access to all of the information necessary to evaluate and criticize their governments effectively.

These factors suggest that there should be a very strong presumption in favor of public access to information in the hands of government. Indeed, because of the important interests served by such public access, a Public Records Law should firmly establish the general principle that government records are open to the people. However, there should be exceptions to that general rule when it unavoidably conflicts with equally important societal values.

The point is that the need for openness in governmental affairs must be balanced against other important societal interests when the latter unavoidably conflict with the former. Among these other important interests that may clash in some situations with the public interest in easy access to government information is the public interest in government accomplishing effectively those objectives we entrust to it; the public interest in government operating efficiently, that is, at an acceptable cost; and the public interest in protecting the privacy of the purely personal affairs of individual citizens. The general case for unrestricted access to government information is irresistible only until it clashes in particular circumstances with equally important public interests like those just noted. When that clash occurs, however, some sensible accommodation between the conflicting interests must be reached. After all, while we want general public access to government information, it is unreasonable to pursue that objective unqualifiedly in situations where it would seriously interfere with the ability of our governments to accomplish other important objectives, or would cause those objectives to be accomplished only at an unacceptable cost, or would cause an invasion of personal privacy to an extent that is unwarranted by the circumstances.

This is not to say that the principle of general public access to government information should be compromised lightly or easily, or that in those situations where conflicting important values dictate its modification to some extent, that principle should be modified any more than is absolutely necessary to reconcile the conflict satisfactorily. Rather, the point is this: the public interest, that is, the interest of the community as a whole, is not in every circumstance best served by an unlimited requirement of governmental openness and the values it represents. The pursuit of other values may be deemed more important in some circumstances. As noted, these other values include the need for effective and economical government, and the need to avoid undue invasions of personal privacy.

Of course, given the very great importance of public access to government information and the significant societal values it serves, **some** decrease in governmental effectiveness, **some** increase in its cost, and **some** public exposure of information particular individuals may consider private, should not alone be sufficient to outweigh the communal interest in openness of its government. A **substantial** detriment to an **important**

countervailing interest should be required to overcome the general rule of openness.

Consequently, as noted earlier, a Public Records Law should start with a clear general principle that all government records are open to the public. Any proposed exceptions to that principle should then be evaluated with a skeptical eye. A rigorous standard should be applied to any proposed exception to the general principle embodied in a Public Records Law. That standard should restrict exceptions to those particular situations in which openness would substantially and seriously impair the public interest in governmental effectiveness or efficiency, or would unjustifiably invade personal privacy. And to the extent such an exception may, in specified circumstances, be justified on that basis, it should be permitted only if it is as narrowly, precisely, and restrictively drawn as is possible. That is, such an exception should be allowed to be no broader than absolutely necessary to vindicate in the particular situation the conflicting public interest that is as important as the public interest in openness.

Lastly, to be workable, a Public Records Law must not be too inflexible. It must provide an effective mechanism by which courts may make, from time-to-time, and where fully justified by special circumstances, exceptions to the general principle of openness, in addition to those contained in specific exemptions contained in the express language of the Public Records Law. Such a mechanism should contain a narrowly drawn and rigorous substantive standard accompanied by adequate procedural safeguards. The courts must be vested with authority to grant such exemptions from the general right of access in special circumstances because a legislature cannot foresee and embody in specific statutory language all possible situations where the public's right of access to governmental information is clearly outweighed by equally important and conflicting societal interests. On the other hand, to be worthwhile, a Public Records Law must set a meaningful and effective standard of public access to government information which is easy for everyone to ascertain and apply, and which is effectively enforceable by members of the public.

3. The Privacy Task Force

In 1978 the General Assembly authorized the creation of a Citizens Privacy Task Force to study the laws of this state in relation to personal privacy. In 1979 that Task Force issued a comprehensive report after significant effort by its members and after expending over $30,000 of state funds. This report appears to have been neglected. As far as we can tell, no significant legislative action has resulted from its recommendations. The Governor's Committee believes that the Privacy Task Force Report is an excellent effort and that, in general, its recommendations are sound. The Governor's Committee is of the view that it would be desirable to implement many of the recommendations of the Privacy Task Force Report as soon as possible. In general, it believes that most of those recommendations strike a fair balance between our need to protect personal privacy with respect to information about identified individuals in

the hands of government, and our need to assure public access to information about governmental operations.

4. The Nature of this Report

This Report of the Governor's Committee does **not** purport to identify and deal with all of the problems with the current Iowa laws dealing with public access to records in the possession of government, or all of the problems relating to personal privacy and government record keeping. So, this Committee has not examined every provision in the Code of Iowa dealing with access to, or the confidentiality of, records in the possession of the state. Such a comprehensive and exhaustive report would have taken a year or longer to prepare, and would have required a far greater expenditure of resources than appears justified at this time. Instead, the Governor's Committee has only attempted to identify the major and most pressing problems that have been encountered with current Chapter 68A, the Public Records Law, and also the major and most pressing problems with respect to personal privacy that have been identified by the Privacy Task Force Report. In relation to both classes of problems, the Governor's Committee has made a number of **tentative** recommendations—recommendations that it believes will withstand full legislative deliberation and public debate because they reflect a fair balance between the important competing public interests involved. Due to time constraints, the Committee has not attempted here a full justification for each of its recommendations. Subsequent public debate and legislative hearings should provide a more ample and timely forum for their full elaboration.

In preparing this report, it has become clear to the Committee that Chapter 68A needs a major overhaul. It also became clear to the Committee that major legislative initiatives with respect to the protection of personal privacy in government record keeping should be undertaken. Consequently, a full scale legislative study of such action should be undertaken as soon as possible.

RECOMMENDATIONS

Unless otherwise specified, all three members of the Governor's Committee concur with each of the following recommendations. Recommendations preceded by an asterisk (*) are roughly parallel to, but not necessarily identical in content or scope to, recommendations of the Privacy Task Force.

*1. For greater clarity and precision we recommend that the legislature redraft Chapter 68A using the term "government record" to describe all records, papers, documents, tapes, films, books, correspondence, and notes owned by the government as a matter of property law; the term "public record" to describe all government records to which members of the public have a general right of access; the term "confidential record" to describe all government records to which a statute prohibits general public assess; and the term "optional public record" to describe all government records as to which the lawful custodian has discretion to determine whether or not members of the public have a general right of access. (At the present time, Section 68A.7 lists a number of optional public records. See recommendation #7.)

The assumption of the Governor's Committee is that the overwhelming number of "government records" should be classified as "public records," that a small number of "government records" should be classified as "optional public records," and that a very small number of "government records" should be classified as "confidential records." As noted earlier, the Committee's assumption is also that those wishing to have a class of "government records" designated as anything other than "public records" should have a very heavy burden to bear.

There is confusion as to the meaning of the current Chapter 68A term "public record." Section 68A.1 defines "public records" as "records and documents of or belonging to this state . . . ." However, Section 68A.1 does not effectively define the term "public records" because the language employed in that definition is entirely circular.

Furthermore, if the current Chapter 68A term "public records" is read to include every record, paper, document, tape, film, book, correspondence, or note owned by the government as a matter of property law, it is way overbroad. Such an all inclusive definition would mean, for example, that a state licensing examination must be made available for public inspection prior to its administration; that the recorded combination to the safe in the state Treasurer's office must be made available for public inspection; that all letters written to state legislators must be made available for public inspection; that the hotel guest registry at the University of Iowa Memorial Union must be made available for public inspection; and that every rough, tentative note or draft written by every state official or employee must be made available for public inspection. Section 68A.7 does not exempt any of the above materials from the general right of public inspection created by Chapter 68A. The only defense to a request to inspect such materials if they are "public records" within the meaning of Chapter 68A, therefore, is for the government body to go to court to seek an injunction to restrain

such inspection. An injunctive remedy for this purpose is, however, expensive, uncertain, and, in the end, may be unavailable. Note that Section 68A.8 states that an injunction may not be issued by a court to restrain inspection of a "public record" within the meaning of Chapter 68A unless the government body demonstrates that public examination of the record would "clearly not be in the public interest" **and also** that such an examination of the record "would substantially and irreparably injure . . . [some] person or persons." The second requirement is apparently entirely distinct from the first and may be more difficult to establish than the first in some of the above examples.

The public interest would be better served by a clear legislative categorization of all "government records" into "public records," "confidential records," and "optional public records." This clear legislative categorization would eliminate the substantial present uncertainties caused by the circularity, hence vagueness, of the term "public record" now used in Chapter 68A; it would also facilitate clearer legislative decisions with respect to the assignment of particular government records to each category.

*2. Section 68A.2 should be amended to authorize "persons" rather than only "citizens of Iowa" to examine and copy public records. The "citizens of Iowa" restriction is probably unconstitutional and, in any case, is unjustified since many persons who are not citizens of this state are subject to its laws and, therefore, should be able to have access to the information necessary to monitor their operation.

*3. Section 68A.2 should be amended to make clear that members of the public as well as "the news media" may publish a public record. While this already appears to be the law, the current language of Section 68A.2 specifying only that "the news media may publish such records" may confuse some members of the public and chill their right to publish such materials.

4. Section 68A.2 should be amended to make clear that, to be effective, a request to inspect public records must identify the records sought by name or description in a manner that will facilitate identification by the custodian of the particular records sought.

5. Each government body subject to Chapter 68A should, by rule, specify in detail the manner by which a person may assert his or her rights conferred by this law. This specification should include a clear identification of the officials who are authorized to act for the lawful custodian in meeting its obligations under Chapter 68A, and the exact costs that will be assessed, pursuant to Section 68A.3, on the person examining the public records.

*6. A government body should not be permitted to prevent public access to a public record by contracting with a non-government body to perform any of its duties or functions.

*7. Section 68A.7 is titled "Confidential records." However, that title is misleading because the Section explicitly provides that "the following public records shall be kept confidential, **unless otherwise ordered by a court, the lawful custodian of the records, or by another person duly authorized to release information.**" (Emphasis supplied.) Consequently, Section 68A.7 really lists "optional public records" rather than "confidential public records."

We believe, therefore, that Section 68A.7 currently authorizes, and should continue to authorize, the lawful custodian to make available for inspection by some or all members of the public, in its discretion, the records currently exempted from required disclosure by that provision. In exercising that discretion, however, we believe the custodian is bound to act in a manner consistent with the state and federal constitutions, and in a manner consistent with all other applicable legal requirements. We recognize that there is some confusion on this point. Consequently, we endorse the recommendation of the Privacy Task Force that the language of Section 68A.7 should be amended to make completely clear that the lawful custodian has such discretion with respect to the records subject to this provision. If the legislature decides that some types of records currently governed by Section 68A.7, such as the medical records of identified persons, see recommendation #10, should be confidential records rather than optional public records, the legislature should remove those records from Section 68A.7 and include them in a separate section of Chapter 68A compiling all confidential records.

*8. A definition of the term "lawful custodian" is needed for purposes of Section 68A.7 because the lawful custodian has authority, in its discretion, to make available for public inspection optional public records. Subject to the qualifications below, this definition should make clear that the "lawful custodian" for purposes of Section 68A.7 is the government body that currently has possession of the original record or a copy of the original record. Each lawful custodian should have clear authority to designate which of its personnel are authorized to release optional public records on behalf of the lawful custodian, and the specific circumstances in which they may do so. Section 68A.7 should be amended, however, to provide that "another person duly authorized" to release optional public records must be expressly empowered by a statute or agency rule to release the information in question.

Chapter 68A should also be amended to make clear that records which are confidential or optional public records in the hands of one government body do not lose that status when they are transferred to the custody of another government body. Any government body transferring such a government record to another government body should be required to advise the new custodian of the confidential or optional public record status of that record. In the case of a transfer of either the original or a copy of an optional public record by one government body to another, the originating government body should be authorized to impose limits on the

receiving body's right to disclose the contents of the original or copy to members of the public. Exceptions to this authority of the government body transferring such an optional public record to another government body should be made only for good cause. The government body first creating or otherwise obtaining possession of an optional public record is usually most knowledgeable about that particular class of optional public records. Therefore, it is usually in the best postion to determine the propriety and fairness of their disclosure to the public. So, its discretion should ordinarily control on the question of whether those optional public records should be disclosed to members of the public. Consistent with this point, data processing units and records storage and archival units should be bound by the disclosure policies with respect to optional public records of the agencies whose information or records they process or store.

*9. Section 68A.7(1) should be amended to exempt from required disclosure educational testing or other personal information about identified students in the possession of **any** government body. For example, a broadened Section 68A.7(1) would insure that when an elementary school student is given tests by an Area Education Agency to determine the causes of a learning disability, the records of those tests which are maintained by the testing agency will be exempt from required disclosure on the same basis and for the same reason that, under the current provision, the records of those tests in the hands of the student's school are exempt. The current provision appears too narrow in exempting such personal records about identified students only in the hands of "school corporation[s] or educational institution[s]." The privacy interest of the students appear to outweigh any unqualified right of public access to such information without regard to the type of government body possessing it. Consequently, records of this kind should be generally classified as optional public records.

*10. Section 68A.7(2) should be broadened to exempt from required disclosure all "mental health histories and records" of identified persons that are in the possession of **any** government body, and it should do so with respect to such records of identifiable individuals rather than just "patients." The terms "hospital records and medical records" and "patient or former patient" in current Section 68A.7(2) could be read unduly narrowly and, therefore, may not adequately protect the privacy of identified individuals who are the subject of these types of records that are in the possession of various kinds of government bodies.

Section 68A.7(2) should also be clarified to ensure that records of ambulance services rendered to identified patients in the possession of government bodies are treated as optional public records.

*11. Although unnecessary in light of recommendation #7, consideration should be given to amending Section 68A.7(2) to make clear that in the case of accidents and disasters, the names and general condition ("good,"

"fair," "critical," etc.) of the victims may be made available to the public in the discretion of the government body that is the custodian of that information.

12. Section 68.7 should be amended to make optional public records information in the hands of a government body about identified individuals that is the product of professional counseling by psychologists, social workers, or others in comparable professions. We believe that the privacy interest of the particular individuals receiving such counseling, and the need for such counselors to be able to assure the confidentiality of their services in order to do their jobs properly, ordinarily outweights the public interest in the disclosure of the information in such records.

*13. Section 68A.7(10)-(11) should be amended to delete the words "personal information in confidential personnel records," and to substitute language exempting from required disclosure all "personnel and payroll records," making them optional public records. The present language is unclear and unduly narrow and has caused confusion. In addition, "personnel and payroll records" contain information about identified government employees, the release of which would invade the privacy of the government employees without serving any important public purpose. This is true, for example, with respect to certain deductions authorized by government employees from their own salary. So, United Way deductions, deferred compensation amounts, and the amount of optional insurance purchased through a government sponsored program, by particular employees, should not be subject to required disclosure to the general public.

However, Section 68A.7(10)-(11) should make clear that some information in records concerning identified government employees must be available for public inspection and, therefore, should be classified as public records. For instance, the public should be entitled to ascertain who is employed at public expense, how much they earn, when they were employed by the government body, the positions they hold or held, and their basic general qualifications for the job such as their educational degrees, their work experience and, to the extent relevant, the general state of their health. Additionally, the public has a legitimate interest in being able to ascertain disciplinary actions against government employees which result in discharge, suspension, or loss of pay, once the disciplinary action has been taken. Other provisions of the Code of Iowa should be amended to ensure their consistency with this recommendation.

*14. Section 68A.7(11) should give government employees the right to review and copy their own personnel and payroll files, and the right to seek their correction and supplementation. However, letters of evaluation about an applicant for employment with a government body or about a current employee of such a body, that were provided to the body on the express condition that they be kept confidential and after the body made an

express pledge to the informant that they would be kept confidential, should be classified as confidential records and, therefore, not be subject to inspection by the employee or the general public unless ordered otherwise by a court for good cause. In all other situations such letters of evaluation should be classified as optional public records.

*15. (A) **The following recommendation represents the views of Committee members Bonfield and Graf.**

Section 68A.7(11) should be amended to allow government employers discretion to honor **written** requests for the confidentiality of applications for **full-time** government positions. If, however, any government body chooses not to honor such written requests for confidentiality, it should be required to inform potential applicants for full-time positions with that body of its decision so that the potential applicants for those positions may act accordingly to protect their personal interests. Other applications for full-time government employment and all applications for part-time government employment should be classified as public records. However, information in such applications about the applicant that would be classified as an optional public record or confidential record if the applicant were already a government employee, or because of some other provision of law, should be so classified.

We recognize that there is a public interest in the disclosure of all applications for government employment and a public interest in their non-disclosure. Full disclosure of all such applications would allow members of the public an opportunity to review the names of all applicants for government employment, to comment on their fitness, to provide additional information about them to the hiring body, and to evaluate the performance of the hiring body in light of its final choices for such positions. On the other hand, broadly requiring the disclosure of the names of all applicants for government positions and the information contained in their applications is likely to discourage applications for such positions by a substantial number of well qualified persons.

This is particularly true with respect to applicants for important, **full-time** government jobs. Many applicants for such full-time positions fear that if their application or its contents become public, they will jeopardize their present full-time employment because their current employer may consider them unfaithful, may think less of them if they apply for another job and do not get it, or will believe they are on the verge of leaving their current job and, therefore, should not be rewarded or otherwise be given new opportunities. Potential applicants for full-time positions in government appear more likely to be deterred from applying for such positions by public disclosure of their names than potential applicants for part-time positions in government because the former would have to give up their current positions to take such government jobs while the latter would not necessarily have to do so.

Substantial evidence supports our view that many very qualified persons would be deterred from applying for important, full-time, government positions if they knew that information about their applications would

automatically be available to the general public. The persons deterred from making applications for such jobs by the public availability of this information are also likely to be among those most qualified for these positions.

In this connection it should be noted that the salaries of many important, full-time government positions are not competitive with the salaries paid equivalent jobs in the private sector. It is, therefore, already difficult to attract the most highly qualified candidates to these government jobs. Consequently, it would be unwise to further discourage applications for such positions by those highly qualified persons who will apply for such jobs only if their applications are kept confidential. It should also be noted that the most qualified persons for important government positions often do not formally apply for them; rather, they must be persuaded to allow their names to even be considered for those positions. Because important government jobs generally pay less than positions of similar responsibility in the private sector, those most qualified for such positions must be inspired to accept government jobs out of a sense of public obligation or public service, or for some other intangible benefit. We conclude, therefore, that if the most qualified persons for such government positions realize that their names will be released to the public at large if they agree to be considered for those positions, they will often decide that it is not worth jeopardizing their present employment position merely for the opportunity to talk with a government official about the possibility of a future government job.

In sum, the public at large is likely to lose more by required disclosure of all applications for full-time government employment than it would gain. This is especially true in light of the fact that even if the public is denied access to this information about some applicants for public positions, the public will not be helpless to protect its interests. The public may evaluate the actual performance of those appointed to full-time government positions, and hold the appointing officials fully responsible for their appointment decisions on the basis of their appointee's performance. On the other hand, to assure that no more is exempted from public scrutiny than is necessary to secure a fully adequate flow of highly qualified candidates for full-time government positions, applications for such employment should be exempted from required public disclosure only if the applicant specifically requests such confidentiality in writing.

We want to stress that our recommendation on this subject is based on our view that the **public interest** is best served by allowing applicants for full-time government jobs to keep their applications confidential if they specifically request such confidentiality. So, our recommendation on this subject is not based upon the assumption that the personal privacy of the applicants for full-time government positions outweighs the public interest in disclosure of such applications. While we recognize that the personal privacy interests of applicants for such positions are important, we believe that they are clearly outweighed by the public interest in assuring that only qualified persons are appointed to government

positions, and by the public interest in assuring that the people are able to evaluate effectively the performance of those government officials who actually do the hiring of government employees. However, we are convinced that the deterrence of very qualified persons from applying for important, full-time government positions would be substantial if all such applications were required to be open for public inspection, and that the people of this state would, by such a policy, inevitably deprive themselves of the services of a significant number of very highly qualified persons who could help our governments deal effectively with the serious problems facing them. That is, a significant number of these persons appear unwilling to jeopardize their present employment position to be considered for a government job they may not, in the end, be offered. We recognize that in the future this situation may change and that if it does, a different conclusion would be justified. At the present time, however, we are convinced that the actual operation of the job market for most important government positions fully supports our conclusions.

Of course, some people may believe that the cost to the public of allowing the confidentiality of such applications for full-time government employment outweighs the benefit to the public from protecting such confidentiality. They may believe that few potential applicants for full-time government employment would actually be deterred by an unqualified policy of open applications; or they may believe that even if many potential applicants are deterred by such a policy of open applications, the cost of that loss of applications is outweighed by the benefits of a full opportunity for public comment on all applicants and effective public scrutiny of the final appointment decision.

However, for the reasons noted above, we disagree with the conclusions just noted. Instead, we believe that the people of Iowa will be best served if government employers are authorized, in their discretion, to honor requests for confidentiality by applicants for full-time government positions. We also believe that if any government body chooses to do otherwise, it should be required to inform potential applicants for full-time positions with that body of its decision so that potential applicants for those positions may act accordingly to protect their personal interests.

It has been suggested that a fair compromise might be to require the disclosure only of the applications of the finalists for each particular government position, rather than all of the applications. The identity of those less qualified for the position who do not become finalists could be kept confidential under this suggested solution, while those most qualified who become finalists could not. We find this solution unacceptable. The finalists for a position are the most qualified applicants and, therefore, the particular class of persons we should want most to encourage to apply. Yet, this proposal would have the opposite effect because it would deter applications for full-time government positions from the most highly qualified persons because they would know that as soon as they become finalists for a position they may not in the end be offered, their applications must be disclosed to the general public.

(B) **The following recommendation represents the view of Committee member Kilmer.**

Chapter 68A should be amended to specifically make public records the applications of all finalists considered for appointment by governmental agencies and officials to public positions, even if the employing agency had promised confidentiality to the applicant.

This amendment is offered as a compromise to those who would release the names of **all** of the applicants and those who would release **only** the name of the person selected.

If democracy is to function from a presumption of openness and not on the pernicious foundations of speculation and fear, then it must be a "compelling reason" to keep any governmental function a secret. That "compelling reason" does not exist here for reasons to be explained later in this recommendation.

We acknowledge that democracy is a risky business. But to the extent we seek to eliminate the risks, we eliminate the degree of democracy we enjoy. So it is wiser to have the robust and risky public debate encouraged by so many of our esteemed jurists, past and present, and other leaders in our democratic society than to retreat behind closed doors in timidity. The public's right to know must be supported in the most difficult of cases or it will only erode.

My recommendation of a compromise is offered in the acknowledgement that there is a genuine concern that open applications will deter some of the more qualified candidates from making their services available. However, it is folly to think that, when a person is under consideration for employment, the current employer will not become aware of that candidacy. Most of them would confide in someone back in the local community once they reached the finalist stage in the interviewing process for the new position. And the current employer often finds out anyway when the appointing authority begins to check on the candidate's qualifications.

Once everybody got used to openness, it would become an accepted way to do business, and candidates would not feel they are compromising their current positions by applying for a new one.

The release of finalists' names would permit the public to scrutinize candidates' qualifications before the decision is made. It is somewhat comparable to the role of the state senate considering the governor's appointments, except that the senate considers only the nominee. The release of finalists' names would permit the public to monitor a possible oversight that would permit an unqualified person to be considered.

The release of names of finalists should apply to all government positions, both full-time and part-time and should reach down into the lower ranks. Although it can be presumed that the public's interest is directed only at the "top," or "important," governmental positions, who is to make that definition?

Giving candidates the option of keeping their names confidential could create an air of suspicion among the public that could be even more

embarrassing to the chosen candidate once the appointment is made.

The argument that Iowa is hampered by a low pay scale in attracting top candidates and that no unnecessary barriers should be placed in the state's way because of that, should not be a matter of consideration here. We are talking about open government and not inadequacies in pay. That problem should be handled by the proper agency or agencies.

I can find no evidence, except for isolated cases, that openness in applications for governmental positions has resulted in a dearth of candidates. In fact, it is quite the opposite. We must remember that mostly we are talking about **professional** government workers who lead somewhat of a nomad-type life and are always looking for an opportunity to better themselves, be it in an adjacent state or across the country. It is totally unrealistic for present employers to think they will be able to keep them from moving on.

And it must also be remembered that by "government employees," we are including those on the state, county, city, and township levels. The law cannot be broken down for each category. It must be all-inclusive. And the experiences of a few at the state level do not reflect those at lower levels of government employment.

Letters requesting appointment to governmental positions also must be considered as applications.

I cannot be a part of any recommendation that could even appear potentially dangerous or potentially contrary to the public interest by being hidden in secrecy.

*16. Members of the public should have a right to ascertain the following information about all government licensees: their name and address; the terms and conditions of their licenses; their basic general qualifications for the license; any disciplinary action taken against them after that action occurs. In the interest of protecting personal privacy, however, Section 68A.7 should expressly exempt from required public disclosure other records concerning identified licensees. Such a Section 68A.7 exemption would allow the agency to release that information in situations where it reasonably believes the public interest would be served by that disclosure. Section 68A.7 should also prohibit government bodies from selling, solely as a means of making money for the government, information in optional public records with respect to identified licensees that is exempt from required public disclosure. The licensees' interest in personal privacy appears to outweigh the government's revenue interest in this situation.

*17. At least until the action to which they relate becomes final, preliminary or tentative government records, and working papers or investigative documents prepared or collected by government officials in the course of the performance of their governmental duties, and correspondence by one public official to another public official and by citizens to public officials, should be exempted under Section 68A.7 from required public disclosure. That is, government records of this kind should be classified as optional public records. Subjecting government records of

this type to the broad disclosure requirements of Chapter 68A would unduly interfere with the daily internal operations of government bodies, would chill full and frank tentative written analysis of problems by government employees and full and frank citizen communications to government officials, and, therefore, would generally not serve the public interest.

18. Section 68A.7 should be amended to exempt from required disclosure law enforcement information exempt from required disclosure under the Iowa Administrative Procedure Act by Section 17A.3(1)(c) and 17A.2(7)(f). (See also Section 28A.5(g) of the Open Meetings Law for a similar exemption.) It is currently unclear whether this exemption from the Iowa Administrative Procedure Act effectively exempts such information from the disclosure requirements of Chapter 68A. In any case, it clearly does not do so with respect to such information in the hands of government bodies that are not "agencies" within the meaning of Chapter 17A, because the latter bodies are not subject to that Chapter of the Code of Iowa. Required disclosure of this information is not in the public interest because it would enable law violators to avoid detection, facilitate disregard of requirements imposed by law, or give an improper advantage to persons who are in an adverse position to the government.

19. Section 68A.7(5) should be amended to make optional public records investigative reports by law enforcement officials generally, including law enforcement officials charged with regulatory and licensing functions. The current provision makes only "peace officers investigative reports" optional public records. However, any such broadened Section 68A.7(5) should continue to include the existing proviso that "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential . . . except . . . ." The policy justification for the current provision would justify its extension to investigative reports by all law enforcement officials because investigations by all of those officials may focus on persons who are found in the end to have acted entirely lawfully, and the disclosure of such reports may unnecessarily injure the reputation or privacy of identified individuals without any substantial public benefit.

20. Section 68A.7(7) should be amended to provide that property appraisal information may be kept confidential by a government body seeking to purchase or sell the property to which the appraisal pertains until the time when that government body actually enters into a binding contract for the purchase or sale of the property in question. Persons selling property to, or buying property from, a government body should not be in a superior bargaining position to the government body because of the Public Records Law. That would be the result if a private seller or purchaser had a right, before entering into a contract with a government body, to all of the information in the possession of that body about the value of the property in question. After all, a government body does not

have a right to similar information in the possession of the private seller or purchaser.

21. Section 68A.7 should be amended to make optional public records information respecting archeological sites to the extent that government officials could reasonably believe that the release of such information would be likely to result in unlawful trespass on the site or injury to property on or adjacent to the site.

22. To the extent they are not already required by statute to be confidential records, Section 68A.7 should be amended to make optional public records all government records identifying particular individuals who have applied for, are receiving, or who have received, a grant or benefit from a government body based on the financial need of the recipient individual. The interest in personal privacy of the individuals involved in such transactions would seem to outweigh any public interest in the required disclosure of the identities of those individuals.

23. Section 68A.7(4) should be amended to make optional public records government records that are the work product prepared by other persons for attorneys who are representing a government body in litigation or in relation to any claim made by or against the government body. The current provision is too narrow because it exempts from required disclosure only the work product of the attorney himself or herself. With respect to such litigation or claims, a private person should not have the right to appropriate without charge any work product of their government body adversary or to obtain an unfair advantage at public expense over their government body adversary.

24. Section 68A.7(5) should be amended to make government records of communications to police, fire, and other law enforcement officials, by members of the public, optional public records. If such communications were treated as public records, many members of the public might be discouraged from making complaints or furnishing information to those officials because of a fear of reprisals from others if their identities were disclosed. However, the optional public record status of such records should be subject to the same qualification as is currently contained in that provision for peace officers' investigative reports.

25. Section 68A.7 should be amended to exempt government records from required disclosure to the extent that a government body may hold a closed meeting to discuss their contents under authority of one of the provisions of Section 28A.5(1) of the Open Meetings Law. Current law is not clear that government records are exempt from required disclosure under Chapter 68A solely on that basis. It would obviously be foolish to allow a government body to hold a closed meeting to discuss the contents of particular records in accordance with an express exception to the Open Meetings Law, and to require the disclosure of those same records under the Public Records Law.

26. Section 68A.7(6) should be amended to make optional public records the following: information, not just "reports," submitted voluntarily or involuntarily by persons outside of government to government bodies, to the extent that the release of that information would give an **undue** advantage, not just "advantage," to competitors of the persons submitting the information. The additional requirement in current Section 68A.7(6) that to be classified as optional public records the availability of such information must "serve no public purpose" should also be omitted. The government body receiving such information initially should, instead, be authorized to determine whether any information of this kind at issue should be released because the need of the public for access to the information for public purposes clearly outweighs the loss to the persons submitting the information to the government body from such public disclosure. That is, the damage done to persons or entities by the availability to members of the public of information about their operations that would give undue advantage to their competitors must be balanced against the nature and extent of the public purpose served by making such information available for public inspection. Chapter 68A should not be turned into a vehicle for one person or entity to invade the business privacy of another person or entity for reasons wholly unrelated to the public purposes of Chapter 68A.

27. Section 68A.7 should be amended to make optional public records, data, designs, or information, other than financial or administrative, produced or collected by or for the employees of government bodies in the course of, or in preparation for, a study or research on scholarly issues, where such data, designs, or information have not been publicly released, published, copyrighted, or patented. Neither the employee nor the government body for which the employee works should be deprived of the fruits of their efforts by others who wish to appropriate them for their own benefit without just compensation.

28. Section 68A.7 should be amended to specify that completed forms verifying an individual's eligibility to purchase alcoholic beverages are optional public records. The privacy of the individuals completing such forms generally appears to outweigh any public interest in their required disclosure.

29. Section 68A.7 should be amended to make optional public records all examinations by government bodies that have not yet been administered or that have been administered and that are likely to be used again in whole or in part. The disclosure of such examinations would obviously defeat their intended purpose.

30. Section 68A.8 should be amended to allow a court to issue an injunction to restrain the examination of a particular public record or a particular optional public record solely on the ground that "such examination would clearly not be in the public interest." The current provision appears to require that such an examination must, in addition to

satisfying that standard, also be demonstrated to be likely to "substantially and irreparably injure any person or persons" to justify an injunction. This is undesirable because there are likely to be situations in which the examination of a particular public record or optional public record would be very harmful to the public at large without, in addition, substantially and irreparably injuring a particular identifiable person or persons.

In addition, Section 68A.8 should be amended to allow a court to issue an injunction to restrain inspection of a particular public record or a particular optional public record solely on the ground that the inspection would "substantially and irreparably invade the privacy of the subject of that record, and that the harm to that person from such disclosure is not outweighed by the public interest in its disclosure."

In any case where an injunction against disclosure of a public record or an optional public record is sought, the person seeking the injunction should be required to demonstrate to the court the justification for its issuance by "clear and convincing evidence."

Section 68A.8 should also be amended to expressly allow a court to issue an injunction to restrain the examination of a narrowly drawn class of government records where all members of the class can be shown to be justifiably exemptable from such required disclosure under the standard provided in that provision. At the current time it is unclear whether Section 68A.8 authorizes an injunction only to restrain a particular specified record or also authorizes an injunction to restrain the examination of narrowly drawn classes of records.

*31. The Privacy Task Force recommended that Section 68A.8 be amended to allow the subject of a public record or optional public record to bring an action for an injunction to enjoin disclosure of that record. We believe Section 68A.8 already permits such an action by the subject of such a record. However, because we agree that the subject of such a record should have this right, and that there is some confusion on this point, we believe that the current law should be clarified to assure this result.

*32. So that the subject of an optional public record may effectively exercise the right to seek an injunction under Section 68A.8 preventing its disclosure, Section 68A.7 should be amended to require that, except in instances where there is good cause not to do so, government bodies be required to make a reasonable effort to notify the identifiable subject of an optional public record of its intended release.

33. Section 68A.8 should be amended to authorize reasonable delay by the custodian of a government record in permitting the examination or copying of such a record to the extent necessary for the custodian to seek legal advice from the lawyer for that government body as to whether the record in question is a public record, an optional public record, or a confidential record; or for the custodian to determine whether it should seek an injunction restraining inspection of the record in question. At the

present time such a reasonable delay appears to be authorized by Section 68A.8 only for the purpose of actually seeking such an injunction.

*34. When a person sues a government body to secure compliance with Chapter 68A and demonstrates to the satisfaction of a court that the body violated this law, the prevailing party should be able to recover all of the legal expenses of that action, including reasonable attorney's fees, subject to limitations and defenses similar to those contained in Section 28A.6(3)(a-b) of the Open Meetings Law. Because of the specific limitations and defenses it contains, the provision for reimbursement of all legal expenses in cases where the Open Meetings Law has been violated does not appear to have been misused or to have caused undesirable consequences; and the reasons for recommending a provision for reimbursement of all legal expenses in cases where a member of the public establishes a violation of Chapter 68A are identical to those that justified the inclusion of such a provision in Chapter 28A.

35. Grand juries should be authorized on their own to initiate prosecutions under Chapter 68A. This recommendation is not intended to disturb the authority of prosecutors to do so, or the existing penalties for violation of Chapter 68A.

*36. Suitable penalties should be provided for the **unauthorized** release by any government employee to the public of information contained in confidential records or optional public records. Suitable penalties should also be established for former government employees who release to the public information of this type that was obtained by them during the course of their government employment.

37. A listing of all classes of confidential government records should be added to Chapter 68A so that a catalogue of all such records is collected in one place in the Code of Iowa.

38. Information tendered to a government body by a person who obtained an express pledge from the recipient body that the information in question would be kept confidential, and at a time when the law allowed the body to honor such a pledge, should remain confidential even if changes in the law subsequently make the documents containing such information public records.

*39. Section 68A.9 should be amended to require state level agencies to adopt as a rule, subject to Chapter 17A rule-making procedures, their determination of what provisions of Chapter 68A must be waived in each particular situation to prevent the loss of federal funds. Chapter 17A rule-making procedures would allow effective review by the public, the General Assembly, the Attorney General, and the Governor, to determine if the acceptance of the particular federal funds at issue is worth the suspension of Iowa standards regarding public access to government records.

*40. A Fair Information Practices Act dealing with information in the hands of Iowa government bodies that pertain to **identifiable** persons

should be added to the Code of Iowa. Because the need for and use of information about identifiable persons by government bodies varies widely, a Fair Information Practices Act should concern itself with how such information is gathered and handled, that is, with procedures, rather than with the particular types of information about identified individuals that may be gathered by government bodies. The Fair Information Practices Act, therefore, should give each person a right to have information about that person in the hands of government bodies treated according to a fair and accessible set of procedures.

*41. A Fair Information Practices Act should specify that a government body may gather only such information about identifiable persons as is necessary, useful, or helpful to fulfill a public purpose. We believe a government body should be allowed to gather information it reasonably believes may be useful or helpful to make a decision even if the information is not ultimately relied on by that body.

*42. A Fair Information Practices Act should be required to be implemented by state government bodies through the use of Chapter 17A rule-making proceedings. Local government bodies should be required to use rule-making proceedings that are similar to those contained in Chapter 17A to implement such a law at the local level. Local government entities might, for instance, publish their rules to implement a Fair Information Practices Act in local newspapers rather than in the Iowa Administrative Bulletin. The use of rule-making procedures to implement a Fair Information Practices Act would permit the variations between government bodies in the implementation of such an Act that are necessary in light of their differing missions and responsibilitites. It would also allow the various government bodies implementing such an Act to respond relatively quickly and flexibly to changing needs and technology.

*43. A Fair Information Practices Act should specify that every government body creating, maintaining, using, or disseminating information about identifiable persons must take reasonable precautions to assure the reliability of that information, and must take reasonable precautions to prevent the misuse of that information.

*44. While the information about identifiable persons in some state or local government record keeping systems should be kept confidential, a Fair Information Practices Act should specify that the existence of every such system should be a matter of public information. For this purpose procedures should be established for the recording and registration of each such data bank in a central repository open for public inspection.

*45. Procedures and controls to govern the process of matching information about identifiable persons from various government data banks need to be established in the Fair Information Practices Act.

*46. The Fair Information Practices Act should require every government body maintaining records which contain information about identifiable

persons to establish clear and accessible procedures governing access to those records.

*47. The Fair Information Practices Act should give the subject of information about identifiable persons in the files of a government body the right to ascertain the contents of that information, except to the extent that it is determined otherwise by statute, or it can be shown by the government body that the release of some or all of that information, or the entire class of information of which it is a part, would frustrate the accomplishment of an important public purpose.

*48. Subject to recommendation #47, the Fair Information Practices Act should provide some means by which an individual can have information about that identifiable person in a record of a government body corrected, amended, or supplemented.

*49. The Fair Information Practices Act should provide that the subjects of information about identified persons in the hands of government bodies that was obtained for specified purposes, should be able to prevent the information from being used or made available for other purposes. This provision should not apply to information sought by public officials for criminal law enforcement purposes and information sought by public health officials for public health purposes, or the governor in the performance of any constitutionally mandated responsibilities of that office. Other situations may also have to be excluded from this provision for good cause.

*50. The Fair Information Practices Act should provide that an individual submitting information to a government body about himself or herself in a form that permits the source to be identified by the recipient body, should be able to ascertain the use that will be made of the information in question, the identity of any other bodies or persons that may be furnished the information, whether the information is provided on a voluntary or mandatory basis, and the consequences of any failure to provide the information.

51. Some government official should become the focal point for complaints about the operation of the Public Records Law, and any Fair Information Practices Act. Although beyond the scope of this report, that same official should, logically, also become the focal point for complaints about the operation of the Open Meetings Law. That official should make an annual report to the legislature on problems arising with the text of those laws or their administration.

52. Intensive programs of education for persons subject to the provisions of Chapter 68A, Chapter 28A, and any Fair Information Practices Act enacted by the General Assembly, should be undertaken as a means of ensuring that they fully understand the scope of those laws and the duties they impose.

APPENDIX

The Iowa Public Records Law

Chapter 68A, 1983 Code of Iowa

68A.1 Public records defined. Wherever used in this chapter, "public records" includes all records and documents of or belonging to this state or any county, city, township, school corporation, political subdivision, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.

68A.2 Citizen's right to examine. Every citizen of Iowa shall have the right to examine all public records and to copy such records, and the news media may publish such records, unless some other provision of the Code expressly limits such right or requires such records to be kept secret or confidential. The right to copy records shall include the right to make photographs or photographic copies while the records are in the possession of the lawful custodian of the records. All rights under this section are in addition to the right to obtain certified copies of records under section 622.46.

68A.3 Supervision. Such examination and copying shall be done under the supervision of the lawful custodian of the records or his authorized deputy. The lawful custodian may adopt and enforce reasonable rules regarding such work and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. All expenses of such work 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 his authorized deputy in supervising the records during such work. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provided any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee. The fee for the copying service as determined by the lawful custodian shall not exceed the cost of providing the service.

68A.4 Hours when available. The rights of citizens under this chapter may be exercised at any time during the customary office hours of the lawful custodian of the records. However, if the lawful custodian does not have customary office hours of at least thirty hours per week, such right may be exercised at any time from nine o'clock a.m. to noon and from one o'clock p.m. to four o'clock p.m. Monday through Friday, excluding legal holidays, unless the citizen exercising such right and the lawful custodian agree on a different time.

68A.5 Enforcement of rights. The provisions of this chapter and all rights of citizens under this chapter may be enforced by mandamus or

injunction, whether or not any other remedy is also available. In the alternative, rights under this chapter also may be enforced by an action for judicial review according to the provisions of the Iowa administrative procedure Act, if the records involved are records of an "agency" as defined in that Act.

68A.6 Penalty. It shall be unlawful for any person to deny or refuse any citizen of Iowa any right under this chapter, or to cause any such right to be denied or refused. Any person knowingly violating or attempting to violate any provision of this chapter where no other penalty is provided shall be guilty of a simple misdemeanor.

68A.7 Confidential records. The following public 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 information:

1. Personal information in records regarding a student, prospective student, or former student of the school corporation or educational institution maintaining such records.
2. Hospital records and medical records of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient.
3. Trade secrets which are recognized and protected as such by law.
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.
5. Peace officers' investigative reports, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual.
6. Reports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose.
7. Appraisals or appraisal information concerning the purchase of real or personal property for public purposes, prior to public announcement of a project.
8. Iowa development commission information on an industrial prospect with which the commission is currently negotiating.
9. Criminal identification files of law enforcement agencies. However, records of current and prior arrests shall be public records.
10. Personal information in confidential personnel records of the military department of the state.
11. Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.
12. Financial statements submitted to the Iowa state commerce commission pursuant to chapter 542 or chapter 543, by or on behalf of a

licensed grain dealer or warehouseman or by an applicant for a grain dealer license or warehouse license.

13. The records of a library which, by themselves or when examined with other public records, would reveal the identity of the library patron checking out or requesting an item from the library.

14. The material of a library, museum or archive which has been contributed by a private person to the extent of any limitation that is a condition of the contribution.

15. Information concerning the procedures to be used to control disturbances at adult correctional institutions. Such information shall also be exempt from public inspection under section 17A.3. As used in this subsection disturbance means a riot or a condition that can reasonably be expected to cause a riot.

16. Information in a report to the state department of health, to a local board of health, or to a local health department, which identifies a person infected with a reportable disease.

68A.8 Injunction to restrain examination. In accordance with the rules of civil procedure the district court may grant an injunction restraining the examination (including copying) of a specific public record, if the petition supported by affidavit shows and if the court finds that such examination would clearly not be in the public interest and would substantially and irreparably injure any person or persons. The district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others. Such injunction shall be subject to the rules of civil procedure except that the court in its discretion may waive bond. Reasonalbe delay by any person in permitting the examination of a record in order to seek an injunction under this section is not a violation of this chapter, if such person believes in good faith that he is entitled to an injunction restraining the examination of such record.

68A.9 Denial of federal funds. If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.