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IOWA FREEDOM OF INFORMATION COUNCIL

IOWA OPEN MEETINGS LAW HANDBOOK

Contents

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Additional copies of the handbook may be obtained by writing to the Iowa Freedom of Information Council, 118 Meredith Hall, Drake University, Des Moines, Iowa 50311.

Introduction

Like most activities under our system of government, publishing this booklet is an article of faith: faith that public servants will comply with the letter and spirit of Iowa's new open meetings law; faith that Iowans will participate in the open meetings; faith that news reporters will inform their audiences about the discussions and actions of public agencies.

A cornerstone of our system of government is, after all, informed voters capable of self-government. And that is what the new open meetings law may help provide. In its own words, the legislation seeks to *"assure...that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people,"* and, therefore, *"Ambiguity (in the law)...should be resolved in favor of openness."*

This handbook is in two sections: On pages 6-14, you will find the text of the open meetings law, Chapter 28A of the Code of Iowa. It was passed as House File 2074 by the 1978 Legislature and signed by Gov. Robert D. Ray to take effect Jan. 1, 1979.

On pages 14-30, you will find questions and replies about the implementation of the new law. The questions are based partly on experiences with the previous law, and replies are provided in terms of the intent of the new legislation.

Not all the nuances of the new law are discussed; not all may be understood or recognized at this time. The spirit and the intent of the legislation are clear, however, and have served as guides for the Iowa Attorney General's office and others who have devoted time and energy to preparing this booklet.

They include Mark Lindholm, a research aide in the Attorney General's office who helped shape much of the content of this handbook. Assistant Attorney General Ray Sullins advised Lindholm to prepare commentary consistent with the intent of the open meetings

legislation; that is, give a broad construction to the mandate for openness and a narrow construction to the reasons for exemptions.

The material in the book, of course, does not represent "opinions" of the Attorney General's office on various segments of the law. Rather, the material is intended to provide some insight and to facilitate implementation of the law for all concerned.

Other helpful advice came from Louise Moon and Jane Wallerstedt of the Iowa League of Women Voters; Paul Kritzer, a legal counsel for the Des Moines *Register* & *Tribune*; Steve Weinberg, who was chair of the FOI Council's Open Meetings Committee; Professor Arthur Bonfield of the University of Iowa Law School; Harrison (Skip) Weber of the Iowa Daily Press Association; Rep. Donald Avenson of Oelwein; and others. Listing them here does not indicate they endorse all the interpretations in this handbook. The listing, rather, reflects our thanks to them for time and thoughts they shared.

Jim Graham, a graduate assistant to the Iowa Freedom of Information Council, helped in the design and printing of the handbook; Joe R. Patrick, assistant dean in the Drake University School of Journalism, helped edit the material; and Lois Fredregill typed the material.

All these contributions were valued in this effort to introduce the new open meetings law, a law different in many ways from its predecessor.

Most of those differences can be classified in one of three ways: (1) To clarify the letter and the spirit of the law; (2) To make it easier to bring a lawsuit for violation of the law; (3) To make it easier for public agencies to conduct business.

(1) To clarify the law

a. The new law is lengthier, primarily because it seeks to be more specific. The previous law had three somewhat general exemptions; the new

law lists 10 exemptions in an effort to be more specific and to define why meetings might be closed.

b. There also is an effort to spell out the intent of the law. In various ways, the language of the new Act tries to impress upon the reader that the intent of the Legislature was to provide for openness in the conduct of public business.

c. Requirements for public notice of meetings are more detailed. (This is discussed further on page 17.)

(2) To make it easier to bring suit

a. A plaintiff does not have to prove that a governmental body violated the law; rather, the governmental body has to demonstrate compliance with the law. (This is discussed further on page 26.)

b. Ignorance of the law is no longer a defense. A member of a governmental body is expected to be familiar with the Act.

c. If a court upholds a person's complaint against a governmental body for violating the law, that person will be reimbursed for costs and reasonable attorney's fees.

(3) To make it easier for public agencies to function

a. The new Act permits public agencies to conduct business via conference telephone calls, closed-circuit television or other electronic means under specified conditions (Section 28A.8).

b. The definition of what constitutes a meeting is more precise in this Act, freeing public servants from the risk of inadvertent violations of the law.

c. The new Act provides specific defenses for members of a governmental body to protect them if they mistakenly close a meeting illegally.

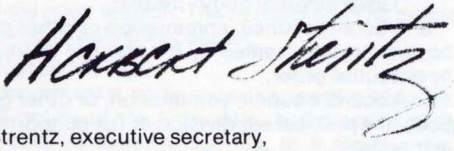
Some other changes are not easily classifiable under any of the above: The new Act provides that, in collective bargaining involving public employees, the bar-

gaining positions of the employee organization and the public employer shall be presented at the start of bargaining sessions and these sessions shall be open to the public. The law states that the employees' initial bargaining position shall be presented at the first session; the public employer's initial position at the second session.

The new Act also provides that a court can void action taken during an illegally closed meeting if that would be in the public interest.

The Act specifically permits cameras and recording devices to be used by the public at any open meeting and also requires that the governmental body tape-record all closed sessions.

You'll note these changes in the text of the new Chapter 28A, which begins on the next page.



Herbert Strentz, executive secretary,
Iowa Freedom of Information Council,
Dean, Drake University School of Journalism

The Iowa Open Meetings Law Chapter 28A, 1979 Iowa Code

The following law was passed by the 67th General Assembly and takes effect January 1, 1979. This is how it will appear in the Iowa Code:

28A.1 INTENT—DECLARATION OF POLICY. This Chapter seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this Chapter should be resolved in favor of openness.

28A.2 DEFINITIONS. As used in this chapter:

1. "Governmental body" means:

a. A board, council, commission or other governing body expressly created by the statutes of this state or by executive order.

b. A board, council, commission, or other governing body of a political subdivision or tax-supported district in this state.

c. A multimembered body formally and directly created by one or more boards, councils, commissions, or other governing bodies subject to paragraphs "a" and "b" of this subsection.

d. Those multimembered bodies to which the state board of regents or a president of a university has delegated the responsibility for the management and control of the intercollegiate athletic programs at the state universities.

2. "Meeting" means 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. Meetings shall not include a gathering of members of a governmental body for purely ministerial or

social purposes when there is not discussion of policy or no intent to avoid the purposes of this Chapter.

3. "Open session" means a meeting to which all members of the public have access.

28A.3 MEETINGS OF GOVERNMENTAL BODIES. Meetings of governmental bodies shall be preceded by public notice as provided in section 28A.4 and shall be held in open session unless closed sessions are expressly permitted by law. Except as provided in 28A.5 all actions and discussions at meetings of governmental bodies, whether formal or informal, shall be conducted and executed in open session.

Each governmental body shall keep minutes of all its meetings showing the date, time and place, the members present, and the action taken at each meeting. The minutes shall show the results of each vote taken and the vote of each member present shall be made public at the open session. The minutes shall be public records open to public inspection.

28A.4 PUBLIC NOTICE.

1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.

2. Notice conforming with all of the requirements of subsection one (1) of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which case as much notice as is reasonably possible shall be given. Each meeting shall be held at a place

reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to handicapped or disabled individuals.

•When it is necessary to hold a meeting on less than twenty-four hours notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the normal requirements shall be stated in the minutes.

3. A formally constituted subunit of a parent governmental body may conduct a meeting without notice as required by this section during a lawful meeting of the parent governmental body, a recess in that meeting, or immediately following that meeting, if the meeting of the subunit is publicly announced at the parent meeting and the subject of the meeting reasonably coincides with the subjects discussed or acted upon by the parent governmental body.

4. If another section of the Code requires a manner of giving specific notice of a meeting, hearing or an intent to take action by a governmental body, compliance with that section shall constitute compliance with the notice requirements of this section.

28A.5 CLOSED SESSION.

1. A governmental body may hold a closed session only by affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting. A governmental body may hold a closed session only to the extent a closed session is necessary for any of the following reasons:

a. To review or discuss records which are required or authorized by state or federal law to be kept confidential or to be kept confidential as a condition for that governmental body's possession or continued receipt of federal funds.

b. To discuss application for letters patent.

c. 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.

d. To discuss the contents of a licensing examination or whether to initiate licensee disciplinary investigations or proceedings if the governmental body is a licensing or examining board.

e. To discuss whether to conduct a hearing or to conduct hearings to suspend or expel a student, unless an open session is requested by the student or a parent or guardian of the student if the student is a minor.

f. To discuss the decision to be rendered in a contested case conducted according to the provisions of chapter 17A.

g. To avoid disclosure of specific law enforcement matters, such as current or proposed investigations, inspection or auditing techniques or schedules, which if disclosed would enable law violators to avoid detection.

h. To avoid disclosure of specific law enforcement matters, such as allowable tolerances or criteria for the selection, prosecution or settlement of cases, which if disclosed would facilitate disregard of requirements imposed by law.

i. 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 individuals's reputation and that individual requests a closed session.

j. To discuss the purchase of particular real estate only where premature disclosure could be reasonably expected to increase the price the governmental body would have to pay for that property. The minutes and the tape recording of a session closed under this paragraph shall be available for public examination when the transaction discussed is completed.

2. The vote of each member on the question of

holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes. A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.

3. Final action by any governmental body on any matter shall be taken in an open session unless some other provision of the Code expressly permits such actions to be taken in closed session.

4. A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session, and shall also tape record all of the closed session. The detailed minutes and tape recording of a closed session shall be sealed and shall not be public records open to public inspection. However, upon order of the court in an action to enforce this chapter, the detailed minutes and tape recording shall be unsealed and examined by the court *in camera*. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of the chapter for use in that enforcement proceeding. In determining whether any portion of the minutes or recording shall be disclosed to such a party for this purpose, the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence in an enforcement proceeding. After such a determination, the court may permit inspection and use of all or portions of the detailed minutes and tape recording by the party seeking enforcement of this chapter. A governmental body shall keep the detailed minutes and tape recording of any closed session for a period of at least one year from the date of that meeting.

5. Nothing in this section requires a governmental body to hold a closed session to discuss or act upon any matter.

28A.6 ENFORCEMENT.

1. The remedies provided by this section against state governmental bodies shall be in addition to those provided by section 17A.19. Any aggrieved person, taxpayer to, or citizen of, the state of Iowa, or the attorney general or county attorney, may seek judicial enforcement of the requirements of this chapter. Suits to enforce this Chapter shall be brought in the district court for the county in which the governmental body has its principal place of business.

2. Once a party seeking judicial enforcement of this Chapter demonstrates to the court that the body in question is subject to the requirements of this Chapter and has held a closed session, the burden of going forward shall be on the body and its members to demonstrate compliance with the requirements of this Chapter.

3. Upon a finding by a preponderance of the evidence that a governmental body has violated any provision of this Chapter, a court:

a. Shall assess each member of the governmental body who participated in its violation damages in the amount of not more than five hundred dollars nor less than one hundred dollars. These damages shall be paid by the court imposing it to the state of Iowa, if the body in question is a state governmental body, or to the local government involved if the body in question is a local governmental body. A member of a governmental body found to have violated this Chapter shall not be assessed such damages if that member proves that he or she did any of the following:

(1) Voted against the closed session.

(2) Had good reason to believe and in good faith believed facts which, if true, would have indicated compliance with all the requirements of this Chapter.

(3) Reasonably relied upon a decision of a court or a formal opinion of the attorney general or the attorney for the governmental body.

b. Shall order the payment of all costs and reasonable attorneys fees to any party successfully

establishing a violation of this Chapter. The costs and fees shall be paid by those members of the governmental body who are assessed damages under paragraph "a" of this subsection. If no such members exist because they have a lawful defense under that paragraph to the imposition of such damages, the costs and fees shall be paid to the successful party from the budget of the offending governmental body or its parent.

c. Shall void any action taken in violation of this Chapter, if the suit for enforcement of this Chapter is brought within six months of the violation and the court finds under the facts of the particular case that the public interest in the enforcement of the policy of this Chapter outweighs the public interest in sustaining the validity of the action taken in the closed session. This paragraph shall not apply to an action taken regarding the issuance of bonds or other evidence of indebtedness of a governmental body if a public hearing, election or public sale has been held regarding the bonds or evidence of indebtedness.

d. Shall issue an order removing a member of a governmental body from office if that member has engaged in two prior violations of this Chapter for which damages were assessed against the member during his or her term.

e. May issue a mandatory injunction punishable by civil contempt ordering the members of the offending governmental body to refrain for one year from any future violations of this Chapter.

4. Ignorance of the legal requirements of this Chapter shall be no defense to an enforcement proceeding brought under this section. A governmental body which is in doubt about the legality of closing a particular meeting is authorized to bring suit at the expense of that governmental body in the district court of the county of the governmental body's principal place of business to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney for the governmental body.

28A.7 RULES OF CONDUCT AT MEETINGS. The public may use cameras or recording devices at any open session. Nothing in this Chapter shall prevent a governmental body from making and enforcing reasonable rules for the conduct of its meetings to assure those meetings are orderly, and free from interference or interruption by spectators.

28A.8 ELECTRONIC MEETINGS.

1. A governmental body may conduct a meeting by electronic means only in circumstances where such a meeting in person is impossible or impractical and only if the governmental body complies with all of the following:

a. The governmental body provides public access to the conversation of the meeting to the extent reasonably possible.

b. The governmental body complies with section 28A.4. For the purpose of this paragraph, the place of the meeting is the place from which the communication originates or where public access is provided to the conversation.

c. Minutes are kept of the meeting.

The minutes shall include a statement explaining why a meeting in person was impossible or impractical.

2. A meeting conducted in compliance with this section shall not be considered in violation of this Chapter.

3. A meeting by electronic means may be conducted without complying with paragraph 'a' of subsection one (1) if conducted in accordance with all of the requirements for a closed session contained in section 28A.5.

The 67th General Assembly also made the following changes in the law when it passed the new open meetings legislation:

Section 20.17, subsection three, Code 1977 is amended to read as follows:

"3. Negotiating sessions, strategy meetings of

public employers or employee organizations, mediation and the deliberative process of arbitrators shall be exempt from the provisions of 28A. However, the employee organization shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of chapter 28A of the Code. Hearings conducted by arbitrators shall be open to the public."

Section 813.2, rule three, subsection four, paragraph j., Code 1977 Supplement, is amended by adding the following new subparagraph:

"(4) The detailed minutes and tape recordings sealed pursuant to section six of this Act."

This Act is effective January 1, 1979.

SOME QUESTIONS ABOUT THE LAW, AND SOME ANSWERS

As noted in the introduction, not all the nuances and subtleties of the new open meetings law may be recognized, much less addressed, at this time. On the following pages, however, are replies to some questions which have been raised and which seem logical to consider in a handbook such as this.

QUESTION: In August 1978, the Iowa Supreme Court found part of the old open meetings law to be unconstitutional; that part dealt with criminal penalties for individual participation in an illegally closed meeting. Will the new Act suffer from the same defect?

REPLY: The new Act remedies the constitutional defects of the old Act in at least two ways: First, the meaning of participation in an illegally closed meeting

is better understood; second, the new Act does not include criminal penalties.

In its August decision, the Iowa Supreme Court took note of the defenses which the new Act provides to public servants. While members of a governmental body may be assessed damages for violation of the Act, the court noted that the new Act "excepts (from damages) those members who prove they voted against the closed session, or who had a good faith belief or reasonably relied upon an attorney's opinion or judicial decision that the meeting was legal."

Accordingly, it might be more accurate to say that the new Act forbids unjustified participation in illegally *closing* a meeting and does not forbid participation in the meeting itself. A person who votes against closing a meeting could and probably should remain at the closed session.

As noted above, enforcement measures of the new Act are civil, not criminal. The due process requirements for fair warnings about civil wrongs is considerably less strict than that for criminal offenses. Thus, the new Act's definition of participation in illegally closing a meeting is more likely to survive constitutional scrutiny than it would if criminal penalties were involved.

QUESTION: Who is covered by the Act?

REPLY: This is answered fairly explicitly in Section 28A.2. But it may be helpful to remember that the Act doesn't apply only to public officials serving elective or appointive terms on a continuing governmental body. Certainly, the Act applies to a school board. But, for example, it also would apply to a citizens committee appointed by the board to make recommendations on the closing of schools. Such a committee is covered by the open meetings law even if no elected board member is on the committee. The Act would also cover a two-member committee of a governmental body.

QUESTION: In one sentence of Section 28A.2,

"meeting" is defined broadly to include most formal or informal gatherings of a majority of members of a governmental body. In the next sentence, however, gatherings "for purely ministerial or social purposes . . ." are not considered to be "meetings." Why is the new Act's coverage limited this way?

REPLY: A problem with any open meetings law is specifying what gatherings of governmental bodies generally must be open to the public. There is probably no painless way to handle this problem, so the new Act tries to minimize the thorns which openness encounters.

A wide range of activities could fall within the definition of "meeting," from a formal voting session for final action, to a chance encounter of two members whose chatting may touch upon the governmental body's official business. The lion's share of this range of gatherings is included in Section 28A.2's definition of "meeting." An important exception is a gathering of less than a majority of members. If the notice, openness and record-keeping requirements of the new Act were applied to such a gathering, it probably would limit the free speech and associational rights of public officials.

A discerning or critical reader of the Act will note that Section 28A.2 technically enables members to debate an issue privately in pairs (if the governmental agency has at least four members), reach consensus and then meet formally merely to vote on the matter. It's doubtful any legislation would remedy such a problem without creating others, and it is clear that this technicality is contrary to the intent of the law.

Section 28A.2 does define a "meeting" of a majority of the members as excluding gatherings for purely social or ministerial purposes *where there is no discussion of policy or no intent to avoid the purposes of the Act.*

The definition of "meeting" permits the majority to gather for limited purposes without being subject to the requirements of the Act. A purely social gathering

is placed outside the coverage of the statute to avoid a collision with the associational rights of public officials under the First Amendment. This concern is not merely theoretical. A majority of members of a local governmental body is likely to move in the same social circles and occasionally attend the same social event.

Obviously, a social gathering could result in discussion of official policy by a majority of members. This potential for violation of the Act can be avoided by public officials if they are alert to such dangers, or — that failing — if they fear that a participant may disclose an illegal discussion.

A gathering of a majority of members for purely ministerial purposes is excluded from the Act's coverage because a ministerial matter by definition excludes exercising any discretion about policy matters. Accordingly, a gathering for ministerial purposes must be preceded by a policy decision by the governmental body — a decision that is to be implemented in some way without a need for judgment. A clear example is the members' signing of letters or documents whose contents have been approved in a prior, legal meeting.

QUESTION: The Act requires most governmental bodies to send meeting notices and tentative agendas to "news media who have filed a request for notice . . ." What will constitute filing such a request?

REPLY: The intent of public notice, of course, is to help assure that citizens are aware of meetings in the first place, so that they may attend. The notice requirements also provide that the news media shall be informed so that citizens unable to attend meetings in person might have some access to news accounts of the meetings. The Act does not spell out what constitutes filing a request for notice. Presumably, an oral request may be sufficient; many governmental bodies may prefer the request to be in writing, which clearly is their prerogative. A newspaper or broadcast station should also provide the governmental body with the phone numbers to call for notice of emergency meetings.

It might be expected that governmental bodies, as a matter of course, would send notices to newspapers and radio and television stations which regularly cover news of the community — even if they don't formally request such notice.

The new law permits governmental bodies to send public notices to whomever they wish. The new law does not mean that the mailing lists of governmental bodies become outdated when the new law takes effect. The law does provide that meeting notices shall be provided when requested. Presumably, from time to time, a governmental body may wish to update its mailing list to see if news media who have requested public notices of meetings wish to continue receiving them.

QUESTION: Section 28A.5 permits the closing of a meeting for any one of 10 reasons. Are there dangers that these exceptions will erode the Act's mandate for openness?

REPLY: Those dangers can be minimized. There is considerable reason to believe that the courts will generally uphold openness over pressures for exceptions.

The Iowa Supreme Court recently said open meetings statutes "should be accorded a liberal construction favorable to the public" when statutory requirements are enforced by civil sanctions. The new Act avoids criminal sanctions and specifies

> "Ambiguity in the construction or application of this Act should be resolved in favor of openness." Section 28A.1.

The above provision seems to be a clear message that the 10 exemptions from openness should be interpreted *narrowly,* in favor of public access. The Iowa Supreme Court has clearly voiced its approval of such a policy of liberal interpretation in behalf of the public. Thus, the Act's specified preference for openness should be reflected in judicial interpretations of the exemptions.

Further, as noted in Section 28A.5, at the end of the list of exemptions and discussions about the conduct of closed meetings: *"Nothing in this section requires a governmental body to hold a closed session to discuss or act upon any matter."* The list of exemptions, therefore is not a list of when meetings are *required* to be closed; rather, the exemptions suggest under what conditions public agencies may consider whether to close a meeting.

Exemptions (a) through (j) of Section 28A.5 embody a legislative effort to harmonize openness with a number of countervailing interests. Each exemption is discussed below:

> *"(a) To review or discuss records which are required or authorized by state or federal law to be kept confidential or to be kept confidential as a condition for that governmental body's possession or continued receipt of federal funds."*

This exemption is intended to harmonize the new Act with existing laws on the confidentiality of certain records. If a governmental body lacked authority under the new Act to discuss confidential records in closed session, the content of such records could never be lawfully discussed by a governmental body. Discussion open to the public would violate the law recognizing the confidentiality of a record; discussion closed to the public would violate the new Act if it lacked Section 28A.5 (1a).

Examples of laws for the confidentiality of certain records include the Buckley Amendment (making confidentiality of student records a condition for federal funding) and Section 68A.7 of the Iowa Code (providing for the confidentiality of specified public records).

> *"(b) To discuss applications for letters patent."*

Letters patent are legal documents in which the government conveys a right to an individual, typically

to make and sell a new invention or to take title to a tract of land previously owned by the government.

Discussion of an application for a patent of invention by appropriate agencies frequently would call for a closed session. Openness would expose the applicant's creative efforts to competitors for the patent. Discussion of an application for a patent of land would seldom, if ever, present a similar need for a closed session. In fact, openness would help assure that a sale of government-owned land was in the public interest.

> *"(c) 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."*

Two conditions must be met before a meeting may be closed under this exemption: (1) The litigation must be in progress or be "imminent," not merely probable or likely at some future date, and (2) the disclosure of litigation strategy would be likely to prejudice or disadvantage the governmental body's case.

When the new open meetings bill was debated in the Legislature, it was suggested that "imminent" be defined as figuratively meaning, "You're on your way to the courthouse." That comment underlined the narrow interpretation intended for this exemption.

The exemption, however, does permit a governmental body to meet *with its counsel* in closed session to discuss litigation — under the conditions specified — to help provide effective litigation in behalf of the public interest.

> *"(d) To discuss the contents of a licensing examination or whether to initiate licensee disciplinary investigations or proceedings if the governmental body is a licensing or examining board."*

This exemption may be supported by needs for nondisclosure. The purpose of a licensing examination

) make and sell a new invention or to take title to a act of land previously owned by the government.

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This exemption may be supported by needs for nondisclosure. The purpose of a licensing examination

would be defeated if its contents became public knowledge prematurely. The exemption also provides that discussion of possible disciplinary investigations or proceedings may be closed to avoid harm to reputations, since disciplinary action may be found unwarranted. Exemption (d) does not condition the closing of a meeting upon certain findings, e.g., needless and irreparable injury to reputation.

> *"(e) To discuss whether to conduct a hearing or to conduct hearings to suspend or expel a student, unless an open session is requested by the student or a parent or guardian of the student if the student is a minor."*

This exemption permits a closed session at two stages of disciplinary action against a student. The first stage, deciding whether to conduct a hearing, may be closed at the discretion of the governmental body. The second stage, the hearing itself, also may be closed unless the student or the parent or guardian, if the student is under 18, requests an open session. The student has no right to demand a closed hearing under this exemption. It simply permits the governmental body to avoid foreseeable and unfair injuries to a student's reputation throughout disciplinary action, unless the student requests openness at the second stage.

Because disciplinary actions may involve student records otherwise considered private, the Iowa Association of School Boards is recommending that a board obtain, from the student or guardian who wants an open session, a written request and permission for disclosure of the records.

Before beginning sessions covered under either this exemption or exemption (i), the governmental body probably should contact the individuals involved and apprise them of their rights to request either an open session under this exemption, or a closed session under (i).

"(f) To discuss the decision to be rendered in a contested case conducted according to the provisions of Chapter 17A of the Code (the Administrative Procedures Act)."

This exemption is rather unambiguous, and applies only to state agencies. A contested case under Chapter 17A is quite similar to a court trial. It is presided over and decided by one or more hearing officers (similar to judges) for disputes about rates, prices, licenses and the like. A contested case involves an evidentiary hearing in public (a streamlined trial) concerning particular legal rights of one or more parties and an order determining those legal rights. When a contested case has been heard by more than one hearing officer, they may in closed session discuss the alternative dispositions and shape the order from the law and the evidence as judges. Public access to the evidentiary hearing and the resulting written order are assumed to be a sufficient amount of sunshine for the public interest.

"(g) To avoid disclosure of specific law enforcement matters, such as current or proposed investigations, inspection or auditing techniques or schedules, which if disclosed would enable law violators to avoid detection."

"(h) To avoid disclosure of specific law enforcement matters, such as allowable tolerances or criteria for the selection, prosecution or settlement of cases, which if disclosed would facilitate disregard of requirements imposed by law."

The public is interested in effective and efficient enforcement of the law. Persons who want to violate a law might do so with reduced fear of prosecution if they know prosecution tolerances, investigative schedules or investigative techniques. When such specific law enforcement matters are to be discussed by a governmental body, the public in general may be excluded if nondisclosure to potential violators is to be assured.

"(i) 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."

The thrust of this exemption is to permit public agencies to protect individual reputations and not to allow closed sessions for each and every discussion of "personnel" matters. Its scope is wide and includes any evaluation of an individual's professional competence occasioned by consideration of that individual's appointment, hiring, performance or discharge. The potential breadth is largely offset by the two conditions which must be met before a particular meeting may be closed under this exemption: (1) the individual involved must request a closed session, and (2) there must be a reasonable basis to believe the individual's reputation would be *injured irreparably and needlessly* unless the meeting is closed.

If the individual involved informs a public agency that his or her reputation would be needlessly and irreparably damaged in an open hearing, it is unlikely and inconsistent with the intent of this exemption that the person would have to demonstrate publicly what the damages might be to the reputation.

Consequently, a public agency generally might vote to go into a closed session if it receives such a request from the individual concerned and if it has no reason to suspect that the request is not legitimate and not consistent with the spirit of this exemption. The agency, however, should return to public session if it becomes clear that fears of needless and irreparable damage to the individual's reputation were groundless or overstated or that the request for a closed session was motivated by reasons other than those provided by this exemption.

It should be noted that this exemption provides no right for the person who is the subject of discussion to

attend the session closed at his or her request; nor does it forbid his or her attendance. The governmental body apparently has discretion here.

In time, the courts may have to fashion a limited meaning for "needless and irreparable injury" to provide a workable exemption protecting an individual's professional reputation from clear and substantial risks of injury without opening a sizable loophole in the mandate for openness.

> *"(j) To discuss the purchase of particular real estate only where premature disclosure could be-reasonably expected to increase the price the governmental body would have to pay for that property. The minutes and tape recording of a session closed under this paragraph shall be available for public examination when the transaction discussed is completed."*

A meeting may be closed under exemption (j) only when public discussion of the possible purchase of particular real estate could be reasonably expected to increase the price demanded for that property. The exemption does not permit the meeting to be closed for *sale* of real estate.

The public interest which this exemption is supposed to serve is that of thrift or economy in public expenditures. The exemption, of course, does not allow closed sessions for discussion of real estate in general.

Further, because of the many ways in which speculators or investors can learn of pending real estate purchases by public agencies, there are other avenues available to public agencies to assure that taxpayers do not have to pay exorbitant prices for land.

If prices of land desired by public agencies become unreasonably high, the public agency has the right of eminent domain and may secure land at reasonable prices through that process, time-consuming though it may be.

If a session is closed under this exemption, the records of that closed meeting must be made available for public examination when the transaction is completed.

Under Section 28A.5 (4) the minutes and tape recording of any closed session must be kept at least one year. If more than a year should elapse between a meeting closed under Section 28A.5 (1j) and the completion of the real estate transaction, the record of that closed session should be kept for a reasonable time after the completion of the transaction so it can be available for public examination.

QUESTION: Does any provision of the Code of Iowa permit a final action to be taken in closed session?

REPLY: The new Act requires final actions to be taken in open sessions. (For example, if the discharge of an employee is discussed in closed session, a vote to discharge the employee must take place in open session.) Section 28A.5 (3), however, does say that a final action by a governmental body may be taken in a closed meeting if expressly permitted by some other provision of the Code. Such provisions might be discovered through exhaustive research of the Code, but our search revealed none. If a future Legislature chooses to permit a particular type of final action to be taken in closed session, Section 28A.5 (3) will link the new provision to the Act as an exemption.

QUESTION: What other sections of the Code permit meetings of governmental bodies to be closed?

REPLY: Such exemptions to openness are found in at least four areas:

Section 20.17 (3) exempts negotiating sessions, strategy meetings of public employers or employee organizations, mediation and the deliberative process of arbitrators in the collective bargaining process for public employees. (Although, as noted on pages 4 and 5, the initial sessions shall be open to the public.)

Section 279.15 exempts hearings to discuss with a

teacher a superintendent's recommendation to terminate a contract with that teacher.

Section 279.24 exempts a conference between a school board and a probationary administrator to discuss reasons for a proposed termination of contract.

Section 605.18 exempts hearings by the Commission on Judicial Qualification when they consider the retirement, discipline or removal of a judge.

QUESTION: Section 28A.6 (2) notes:

"Once a party seeking judicial enforcement of this Chapter demonstrates to the court that the body in question is subject to the requirements of this Chapter and has held a closed session, the burden of going forward shall be on the body and its members to demonstrate compliance with the requirements of this Chapter."

What is meant by the "burden of going forward" and why should that burden be on the governmental body?

REPLY: This subsection provides for a shift in the burden of proof in an action to enforce the requirements of the Act. Ordinarily in litigation, the burden is on the complaining party (the plaintiff) to produce evidence showing that a requirement of a law has been violated. Section 28A.6 (2), provides an exception to that general rule. Whenever the plaintiff can show that (1) the defendants are members of a governmental body subject to the requirements of the Act and (2) the defendants have held a closed meeting, the burden of proof shifts to the defendant. The governmental body and its members must show by a preponderance of the evidence that the requirements of the Act were followed.

The shift in the burden of proof to governmental bodies and their members is fundamental to the intent of the new open meetings law. Evidence of compliance with the requirements for closing a meeting is largely

in the possession of the governmental body and its members. They are in a much better position to prove compliance than a typical plaintiff is to prove noncompliance. Also, placing the major burden of proof on those parties who have closed a meeting is in harmony with the express purpose of the Act: to maximize public access to governmental decision-making. Those who curtail public access by closing meetings are rightly assigned the duty of defending the legality of that curtailment.

QUESTION: Section 28A.6 (3) provides for the assessment of damages against public officials who illegally vote to close meetings. Will this discourage citizens from serving as members of governmental bodies?

REPLY: If many individuals who could productively serve state or local government are discouraged from becoming (or remaining) members of governmental bodies because of fear of personal liability for damages, the cost of openness under the Act could be high. Such discouragement is unlikely, however.

The danger of personal liability for damages can be puffed up by an incomplete reading of the Act. The Act does place increased responsibility upon a public agency to demonstrate that an illegally closed session has not been held, and the Act does state that, under certain conditions, a public servant might be liable for paying part of the costs of successful litigation against his or her agency.

However, though the new Act has several such "teeth," its provisions protect the moderately vigilant individual from its "bite." The defenses provided to public servants limit the likelihood of damages being assessed against them.

In such cases, the "teeth" will imperil members who ignore or disregard the Act's requirements. In the short range, that consequence is necessary and desirable; the Act's requirements must be learned and

observed by members of governmental bodies. In the long range, open meetings legislation should be an unfolding experiment and a growing education in open government, showing more people how government can work in the open.

Rules of Thumb

Adherence to several "rules of thumb" should protect a member of a governmental body from liability for damages and from vexing litigation:

(1) Become familiar with the Act's requirements; address questions about the requirements to the governmental body's legal counsel.

(2) Assure that someone is satisfying the Act's requirements for notifying the public and press, and for making and preserving records.

(3) Presume that all meetings should be open, unless there is a clear showing of a need for a closed meeting.

(4) Vote against the closing of a meeting unless an exemption of Section 28A.5 (1) clearly permits a closing. Such a vote provides a sure defense against damages under Section 28A.6[3a (1)].

(5) When voting for closing a meeting:
   a. Specify which exemption is being used to close the meeting and have this noted in the minutes.
   b. Specify why you believe the exemption to be valid in this case.
   c. Make sure that two-thirds of the members do vote to close the session, and that the vote is recorded in the minutes.
   d. When in closed session make sure that a tape recording and detailed minutes are kept of the discussion as required by the Act.

e. Limit the closed session to the discussion specified when you moved to close the meeting, and reopen the meeting as soon as you have completed discussing that item.

QUESTION: What steps should a private citizen take if he or she is at a meeting of a governmental body and it is suggested that the body go into closed session, apparently for reasons not legal under the Act or other sections of the Code?

REPLY: These steps seem reasonable:

(1) When the issue of closing a meeting is raised, seek an opportunity to voice your concerns: "Mr. Mayor, I'd appreciate it if the council would specify exactly what exemption you wish to use to close the meeting. I question your legal grounds for closing the session."

(2) Recognize that your goal should be to keep the meeting legally open and not to hope to punish a governmental body for illegally closing a session. Consequently, you should, if given the opportunity, explain why you feel the meeting should remain open and what requirements of closing may not have been met by the public body.

(3) If the meeting is closed, and you remain concerned that it was closed illegally, you can consider legal action. Ask the county attorney or a private attorney (or perhaps your local newspaper or broadcast station) whether your concerns are legitimate and, if it appears they are or that they may be, ask the attorney to forward your concern to the District Court. All you need to demonstrate to the court is that (a) the public body is covered by the open meetings law and (b) a closed meeting was held. The burden of proof, as you know, then shifts to the public agency to demonstrate compliance with the law.

(4) Remember, if you are right, that the meeting was illegally closed, you will be reimbursed for all costs and reasonable attorney's fees. Remember, too, however, that this provision of the law should not be an invitation to protest all closed sessions since, after all, the law does provide for exemptions to the mandate for openness.

QUESTION: To what extent do members of a governmental body share with their attorney responsibility for compliance with the open meetings law? Section 28A.6 (3) does provide the members with a defense against damages if they "reasonably relied" upon the attorney's opinion.

REPLY: According to Section 28A.6 (4) of the new Act, members of a governmental body cannot claim their ignorance of its requirements as a defense. Yet, the law also recognizes that opinions of the attorney for the governmental body will be an important source of information about the Act's requirements.

Counsel for a governmental body has a special duty to become thoroughly acquainted with the requirements of the new Act. An attorney is subject to disciplinary action upon a finding that he or she handled a legal matter without adequate preparation (Disciplinary Rule 6-101 (A) (2) of the Iowa Code of Professional Responsibility.) Requests for an opinion about the legality of a closed session generally should be addressed to the attorney in advance of the meeting. Requests for an impromptu opinion should be resisted unless the attorney is well-versed in the provisions of the Act and the facts of the case at hand and is highly confident in his or her opinion.

A governmental body would be ill-advised to move into a closed session if a counsel said: "The legality of the closing under consideration is unclear, but I see no reason why the meeting must stay open."

Reliance on that opinion probably would fail as a defense in court. The remarks are unmindful of the Act's fundamental preference for openness.

At some point, the member's duty to know the requirements of the Act means that he or she cannot unreasonably accept advice of the attorney for the governmental body or pressure the attorney to find a reason to close a meeting.

So there is shared responsibility to comply with the law; just as there is shared responsibility by others, including private citizens and the news media, to achieve the end intended by the new law: *"that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people."*

If this handbook is useful toward achieving that end, it will have served its purpose.

Appendix

Members of the Legislature's Joint State Government Subcommittee on the Open Meetings Law, 1977

Senator E. Kevin Kelly, co-chair
Representative Donald Avenson, co-chair
Senator Minnette Doderer
Senator Lowell Junkins
Representative Norman Jesse
Representative Nancy Shimanek

Chairs of the Open Meetings Committee of the Iowa Freedom of Information Council

Steve Weinberg, 1977-1978
John Epperheimer, 1978-

Sustaining members of the Iowa FOI Council

Iowa Broadcasters Association
Iowa Daily Press Association
Iowa Press Assoccation
Iowa Radio Network
Burlington Hawk Eye
Cedar Rapids Gazette Company
Cedar Rapids Television Company
Des Moines Register and Tribune Company
Meredith Corporation
Palmer Broadcasting Company
Quad City Times
WMT Stations

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