IOWA FREEDOM OF INFORMATION COUNCIL



September 14, 2023

DELIVERED VIA EMAIL

Erika Eckley, Executive Director
Members, Iowa Public Information Board
Wallace State Office Building
502 E. 9th St.
Des Moines, IA 50319

*RE: Comments on proposed Chapter 23 legislation*

To Executive Director Eckley and IPIB Members:

We thank Executive Director Eckley for circulating the language for a new section in Iowa Code Chapter 23 that the Iowa Public Information Board will consider proposing to the General Assembly.

The Iowa Freedom of Information Council opposes any such amendment to Chapter 23 because it empowers the agency charged with securing public records access to exclude persons from exercising their rights. If adopted, the proposal would seriously erode Iowa Code Chapter 22, the open records act.

Further, we believe the proposal tries to address a nonexistent problem with adverse and perhaps unforeseen consequences of constitutional importance.

Lastly, we believe the proposal represents an improper expansion of the Iowa Public Information Board's authority and would create a conflict with the language, the purpose and the public's rights that Iowa Code section 22.2 spells out.

Specifically, section 22.2 (1) states, in relevant part:

> *"Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record. …"* [Emphasis added.]

And Iowa Code section 23.2 says about the IPIB:

> *"… The purpose of this chapter is to provide an*

> *alternative means by which to secure compliance with and enforcement of the requirements of chapters 21 and 22 through the provision by the Iowa public information board to all interested parties of an efficient, informal, and cost-effective process for resolving disputes."* [Emphasis added.]

**Specific objections**

The proposed amendment to the Iowa Public Information Board's enabling statute would reduce the public's rights as expressed in the public records act and would conflict with that law. "Every person" means just that — the likeable person, the disagreeable one, the gentleman next door, the kind lady down the road, the polite caller, the partisan, the friend, the foe, and, yes, even the vexatious requester. There is no asterisk in the plain language of section 22.2 (1) that spells out who can use the statute.

What a government employee believes is a vexatious person or that the IPIB adjudicates as such may in fact involve someone others see as persistent, especially if they have a common interest in the same records and information.

The Iowa FOI Council is concerned this legislation would empower government to block requests for documents from individual requesters or their organizations based on "the nature, content, language or subject matter of the requests." [See subparagraphs (3) (iv) and (3) (v) of your draft language.]

Such content-based regulation violates the First Amendment and Article I, Section 7 of the Iowa Constitution under well-established law known to the staff and members of the IPIB. And as such, the legislation under consideration by the IPIB's legislative committee presumptively is invalid. Further, the proposed legislation neither serves a compelling state interest nor uses the least restrictive alternatives.

The Iowa FOI Council also is concerned that with this proposal, the IPIB is opening the door for the first time to government deciding whether a request will be filled based not on whether a record is confidential, but on what the requester's purpose is for seeking a record.

Another concern with the proposed amendment to Chapter 23 is the legislation's ability to ban someone from exercising access rights under the Iowa open records act due to "conduct the government body alleges is placing an unreasonable burden" on the entity or that is "intended to harass" it. Considering the right of citizens to petition their government, conduct that furthers this is constitutionally protected — even if some in government find such conduct burdensome or unwelcomed.

We think the chilling effect of the proposed legislation on the right to petition government makes the proposal unwise and violative of another First Amendment freedom.

This legislation would seriously erode the public records law by allowing government to decide a requester is acting appropriately if his or her frequent requests deal with subjects the government agency is interested in disseminating, but the requester could be judged "vexatious" and barred from seeking other records for up to one year if the subject matter is something the government agency wants to hide.

Chapter 22 does not work that way. Moreover, discrimination between two persons requesting the same record or information poses equal protection concerns under the federal and state constitutions when a lawful custodian likes one requester or values the infrequency of that person's requests, yet finds another requester nettlesome or vexatious.

More than 50 years ago, the U.S. District Court for the Southern District of Iowa held the Iowa open records act did not permit lawful custodians to discriminate among public records requesters. The court stated in *Quad-City Community News Service, Inc. v. Jebens,* 334 F. Supp. 8, 4-15 (S.D. Iowa 1971):

> *The Court finds nothing in the statute to indicate that any one class of citizens is to be granted privileges over any other class. The defendants' practice of making available investigative records to that class of citizens who are employed by newspapers or the broadcast industry while not permitting access to other citizens is simply unsupported by the language of the statute.*

The court further held such discrimination violated the Equal Protection Clause, stating the plaintiff in the case "is entitled to the same right of access as other citizens." *Id, at 16*

The fact that a governmental body is facing more requests for public records, from one person or a group of them, may concern the Iowa Public Information Board, but the proposed creation of authority for the IPIB to discipline disfavored requesters does not resolve that.

Further, one reason for the generalized increase in requests for public records is not surprising and merits IPIB encouragement, not interference.

At a time when some government officials do not answer questions from reporters, journalists have responded by submitting more requests for government documents. If officials decline to respond to questions, which they too often choose to do, then the only recourse to gain information about an issue facing government, about some controversy or about a decision government has made is to seek records that illuminate these subjects. When questions arise from those records, it is not unusual for there to be follow-up requests for other records, especially when government officials choose not to respond to those follow-up questions.

That hardly is "vexatious." Indeed, when the Iowa Legislature wrote the public records statute, lawmakers made their intent clear in section 22.8 (3):

> *"In actions brought under this section 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."* [Emphasis added.]

A "Sunshine Advisory" issued by the Iowa Attorney General's Office on August 1, 2002 said the first Golden Rule for public records requests is: *"The reason a requester wants the record is irrelevant. So, officials*

*should not ask. Records which are open to public examination must be produced no matter what the reason for the request. The public can examine and copy a record just because it's there."*

The Kentucky Supreme Court, in *Commonwealth v. Chestnut,* 250 S.W.3d 655 (Ky. 2008), provided important guidance I believe the IPIB should keep in mind as it considers this legislative proposal. That court wrote, "The obvious fact that complying with an open records request will consume both time and manpower is, standing alone, not sufficiently clear and convincing evidence of an unreasonable burden."

**Iowa law already provides adequate, less restrictive solutions**

Iowa's public records law and relevant case law already provide government with a range of options for dealing with the perceived problems that frequent or voluminous requests create.

For example:

- "Fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of expenses to be incurred in fulfilling the request …" *Section 22.3 (1)*

- "The lawful custodian may adopt and enforce reasonable rules regarding the examination and copying of the records and the protection of the records against damage and disorganization." *Ib*

- An Iowa Public Information Board advisory opinion on August 13, 2014, citing the 2013 Iowa Supreme Court's decision in *Horsfield Materials Inc. v. City of Dyersville*, said government has a reasonable time to fill requests when the size or nature of the requests makes prompt fulfillment infeasible.

- A lawful custodian who is a defendant in a Chapter 22 access case may defend against a delay in producing responsive records by demonstrating relevant factors such as "(1) how promptly the defendant acknowledged the plaintiff's requests and follow-up inquiries, (2) whether the defendant assured the plaintiff of the defendant's intent to provide the requested records, (3) whether the defendant explained why requested records weren't immediately available (e.g., what searches needed to be performed or what other obstacles needed to be overcome), (4) whether the defendant produced records as they became available (sometimes called 'rolling production'), (5) whether the defendant updated the plaintiff on efforts to obtain and produce records, and (6) whether the defendant provided information about when records could be expected." *Belin v. Reynolds,* 989 N.W.2d 166, 175 (Iowa 2023.

**Conclusions**

Taken together, government already has the tools to deal with the problem the proposed Chapter 23 change assumes to exist.

Lawful custodians may require advance payment, either partial or in full, before retrieving and producing public records. Those reasonable fees already can include marginal costs for the hourly wages of the employee who retrieves and copies those documents, as well as the reasonable cost of photocopies or PDFs.

While some states require government bodies to fulfill requests for records within a specified number of days, the *Horsfield* and *Belin* decisions instruct that Iowa governments' lawful custodians are not constricted by a fixed response timeframe and need only respond as quickly as is feasible.

Considering all of the factors discussed above, the Iowa FOI Council encourages the Iowa Public Information Board to shelve this legislative proposal as an unwarranted and unwise erosion of 50 years' of citizen access to government records — and the accountability of our government that comes with that unrestricted access.

Respectfully,

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