

CHAPTER 21

OFFICIAL MEETINGS OPEN TO PUBLIC

(OPEN MEETINGS)

21.1 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.

21.2 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.

e. An advisory board, advisory commission, or task force created by the governor or the general assembly to develop and make recommendations on public policy issues.

f. A nonprofit corporation other than a fair conducting a fair event as provided in chapter 174, whose facilities

or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari-mutuel wagering pursuant to chapter 99D or a nonprofit corporation which is a successor to the nonprofit corporation which built the facility.

g. A nonprofit corporation licensed to conduct gambling games pursuant to chapter 99F.

h. An advisory board, advisory commission, advisory committee, task force, or other body created by statute or executive order of this state or created by an executive order of a political subdivision of this state to develop and make recommendations on public policy issues.

i. The governing body of a drainage or levee district as provided in chapter 468, including a board as defined in section 468.3, regardless of how the district is organized.

j. An advisory board, advisory commission, advisory committee, task force, or other body created by an entity organized under chapter 28E, or by the administrator or joint board specified in a chapter 28E agreement, to develop and make recommendations on public policy issues.

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 no 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.

21.3 Meetings of governmental bodies.

Meetings of governmental bodies shall be preceded by public notice as provided in section 21.4 and shall be

held in open session unless closed sessions are expressly permitted by law. Except as provided in section 21.5, 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 information sufficient to indicate the vote of each member present. The vote of each member present shall be made public at the open session. The minutes shall be public records open to public inspection.

21.4 Public notice.

1. Except as provided in subsection 3, a governmental body shall give notice of the time, date, and place of each meeting including a reconvened meeting of the governmental body, and the tentative agenda of the meeting, 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. *a.* Notice conforming with all of the requirements of subsection 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 persons with disabilities.

b. 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. Subsection 1 does not apply to any of the following:

a. A meeting reconvened within four hours of the start of its recess, where an announcement of the time, date, and place of the reconvened meeting is made at the original meeting in open session and recorded in the minutes of the meeting and there is no change in the agenda.

b. A meeting held by a formally constituted subunit of a parent governmental body during a lawful meeting of the parent governmental body or during a recess in that meeting of up to four hours, or a meeting of that subunit immediately following the meeting of the parent governmental body, if the meeting of that subunit is publicly announced in open session 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.

21.5 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 individual's reputation and that individual requests a closed session.

j. To discuss the purchase or sale 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 or reduce the price the governmental body would receive for that property. The minutes and the audio recording of a session closed under this paragraph shall be available for public examination when the transaction discussed is completed.

k. To discuss information contained in records in the custody of a governmental body that are confidential records pursuant to section 22.7, subsection 50.

l. To discuss patient care quality and process improvement initiatives in a meeting of a public hospital or to discuss marketing and pricing strategies or similar proprietary information in a meeting of a public hospital, where public disclosure of such information would harm such a hospital's competitive position when no public purpose would be served by public disclosure. The minutes and the audio recording of a closed session under this paragraph shall be available for public inspection when the public disclosure would no longer harm the hospital's competitive position. For purposes of this paragraph, "*public hospital*" means a hospital licensed pursuant to chapter 135B and governed pursuant to chapter 145A, 226, 347, 347A, or 392. This paragraph does not apply to the information required to be disclosed pursuant to section 347.13, subsection 11, or to any discussions relating to terms or conditions of employment, including but not limited to compensation of an officer or employee or group of officers or employees.

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 audio record all of the closed session. The detailed minutes and audio 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 audio 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 this 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 audio recording by the party seeking enforcement of this chapter. A governmental body shall keep the detailed minutes and audio recording of any closed session for a period of at least one year from the date of that meeting, except as otherwise required by law.

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

21.6 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 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 and not less than one hundred dollars. However, if a member of a governmental body knowingly participated in such a violation, damages shall be in the amount of not more than two thousand five hundred dollars and not less than one thousand 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 the member 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, a formal opinion of the Iowa public information board, the attorney general, or the attorney for the governmental body, given in writing, or as memorialized in the minutes of the meeting at which a formal oral opinion was given, or an advisory opinion of the Iowa public information board, the attorney general, or the attorney for the governmental body, given in writing.

b. Shall order the payment of all costs and reasonable attorney fees in the trial and appellate courts 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*”. 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 a prior violation of this chapter for which damages were assessed against the member during the member’s 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 of the governmental body.

21.7 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.

21.8 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 21.4. 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 1 if conducted in accordance with all of the requirements for a closed session contained in section 21.5.

21.9 Employment conditions discussed.

A meeting of a governmental body to discuss strategy in matters relating to employment conditions of employees of the governmental body who are not covered by a collective bargaining agreement under chapter 20 is exempt from this chapter. For the purpose of this section, “*employment conditions*” mean areas included in the scope of negotiations listed in section 20.9.

21.10 Information to be provided.

The authority which appoints members of governmental bodies shall provide the members with information about this chapter and chapter 22. The appropriate commissioner of elections shall provide that information to members of elected governmental bodies.

21.11 Applicability to nonprofit corporations.

This chapter applies to nonprofit corporations which are defined as governmental bodies subject to section 21.2, subsection 1, paragraph “f”, only when the meetings conducted by the nonprofit corporations relate to the conduct of pari-mutuel racing and wagering pursuant to chapter 99D.

QUESTIONS ABOUT CHAPTER 21

QUESTION: Who is covered by Chapter 21?

REPLY: This can be a confusing area of the law, especially as regards committees, task forces or other sub-units of governmental bodies, and the answer sometimes requires an analysis of how the body was created and what its charge is. Iowa Attorney General's opinions, Iowa Supreme Court cases and advice from the Iowa Public Information Board have produced these guidelines:

1. A governmental body is covered by Chapter 21 if it was created by statute or by executive order, or if it is a local board, council, commission or other governmental unit exercising policy-making authority. Consequently, a school board or city council is a governmental body covered by Chapter 21, but a nonprofit organization or a quasi-public agency most likely is not even though it may receive public funds. (However, records related to the allocation of those funds generally are available from the donating government body under Chapter 22, the public records law.) In recent years, the Legislature amended the Iowa Code to require agencies established under Chapter 28E and also the Iowa Association of School Boards to comply with the open meetings and records laws.

2. Committees created by the boards, councils, commissions, etc., covered by Chapter 21 also are covered by law if (a) they comprise or their meetings involve a majority of the members of the parent governmental body itself, or (b) they are formally and directly created by the governmental body and exercise some policy- or decision-making authority. (The Iowa Supreme Court has said that policy-making "is more than recommending or advising what should be done. Policy-making is

deciding with authority a course of action.” Mason v. Vision Iowa Board, 700 N.W.2d 349 (Iowa 2005)) In addition, under 21.2(e) and (h), advisory bodies created by the governor, by the General Assembly, by statute or by executive order to develop and make recommendations on public policy issues are subject to Chapter 21.

The Iowa Public Information Board has said that for local government, an “executive order” would mean creation by formal action of the governing body.

Finally, two other points should be remembered with regard to government bodies and committees:

1. Even if a committee does not come under the provisions of Chapter 21, it may still hold public sessions. **Closed meetings are not mandated.**

2. The correspondence, minutes, records, etc., of a government body or a committee generally are subject to the provisions of Chapter 22, the open records law, even if the committee is not covered by Chapter 21.

QUESTION: In one sentence of Chapter 21.2, “meeting” is defined broadly to include most formal and 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 law’s coverage limited in this way?

REPLY: A wide range of activities could fall within the definition of “meeting.” Most of these gatherings are included in Chapter 21.2’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 Chapter 21 were applied to such a gathering, it could limit free speech and association rights of public officials.

Chapter 21.2 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 association rights of public officials under the First Amendment. Likewise, if a majority of the members of a governmental body is simply traveling together to a meeting, conference, etc., that activity would be outside the scope of Chapter 21 so long as there was no discussion of policy and there was no intent to avoid the purposes of the Act.

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. Clear examples are the members’ signing of letters or documents whose contents have been approved in a prior, formal open meeting, or school board members attending graduation ceremonies.

Questions about “ministerial” functions and information-gathering trips by governmental bodies have been addressed in Attorney General’s opinions, including Cook to Pellett and Crabb, 79-5-14, Stork to Reis, 81-2-13, and Stork to O’Kane, 81-7-4.

The last opinion notes, “... It appears that gathering for ‘purely ministerial purposes’ may include a situation in which members of a governmental body gather simply to receive information upon a matter within the scope of the body’s policy-making duties. ... We emphasize, however, that the nature of any such gathering may change if either ‘deliberation’ or ‘action’ ... occurs. A ‘meeting’ may develop ... if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they may exercise judgment or discretion.” (Emphasis added.)

In Dooley v. Johnson County Bd. of Sup’rs. (2008

WL 5234382), the Iowa Court of Appeals ruled that the board did not violate the open meetings law when members met privately with a consulting company to review a preliminary draft of a report, asked questions and elicited clarification. However, the Court noted, “Gathering for this purpose appears dangerously close to ‘deliberation.’ Even absent any intention to deliberate, such discussions could arise effortlessly. We believe the board’s decision to review the draft in this fashion was a poor one.”

The law provides latitude by exempting “ministerial” and “social” functions from coverage by Chapter 21, but the latitude must be drawn narrowly to be consistent with Chapter 21’s mandate for openness.

QUESTION: What guidelines have been established for providing the “tentative agenda” and reasonable notice of public meetings called for in Chapter 21.4?

REPLY: This area, too, has received considerable attention from public agencies, the news media, the Attorney General’s Office, and the Iowa Supreme Court in a July 1991 decision.

The standards of notice in Chapter 21.4 are the minimum requirements. For example, advising interested persons to listen to a certain radio station at a set time for information about an upcoming meeting would not constitute “reasonable notice.” Further, a “tentative” agenda must include more information than simply reciting such catch-all items as “Approval of minutes; old business; new business,” or by using the same agenda contents for meeting after meeting.

In its opinion in KCOB/KLVN, Inc. v. Jasper County Bd. of Sup’rs., 473 N.W.2d 171 (Iowa 1991), the Iowa Supreme Court set forth several guidelines for meeting notices and tentative agendas. These included:

1. “... (T)he content of a tentative agenda notice can be subject to change. ... (A) proper construction of the

notice provision in section 21.4 allows discussion and action on emergency items that are first ascertained at a meeting for which proper notice was given. ... However, if action can be reasonably deferred to a later meeting, this should be done.” In other words, if action can be delayed for at least 24 hours to allow for legal notice, it should be.

2. “... The sufficiency of the detail on the tentative agenda must be viewed in the context of surrounding events.” Here the Court said that the test for a tentative agenda was whether the information was reasonably sufficient to alert interested people as to the subject matter to be considered. (For example, in Vandaele v. Board of Education (2002 WL 575666), the Iowa Court of Appeals ruled that a brief item on a school board agenda was sufficient, citing evidence that the superintendent had discussed the issue in newspapers and that the meeting was well publicized.)

3. The Court said that the standard for compliance with the meeting and notice procedures should be “substantial” rather than “absolute.” That is, the Court will not find a public agency to be in violation of Chapter 21 if the violation is strictly or primarily a technical one where the precise letter of the law is not followed. If a public agency acting in good faith substantially complied with the law, that will be sufficient for the Court.

4. The Court did caution, however, that “a lack of wrongful intent to violate the open meetings law cannot excuse non-compliance.” The Court affirmed legislative intent that ignorance of the legal requirements of Chapter 21 is not a defense against substantive violations.

The Supreme Court revisited the issue of what constitutes an adequate agenda for a public meeting in Barrett v. Lode, 603 N.W.2d 766 (Iowa 1999). The Court ruled that closed sessions of meetings subject to the open meetings law must not include issues not listed

on the agenda. An agenda for a public meeting must specifically state any issues the board intends to discuss in closed session, and discussing topics not noted on the agenda violates the law, even if the public could have anticipated the issues would arise.

Notice of a meeting and the tentative agenda are to be provided by the governmental body involved; a news agency requesting notice does not have to pay postage or other costs to receive the notice and the tentative agenda, according to an Attorney General's opinion (Cook to Menke, 79-4-19).

A news medium or individual citizen cannot be restricted to having only the "tentative agenda" and "reasonable notice" of an upcoming public meeting. An Attorney General's opinion (Stork to McDonald, 81-8-24) makes clear that material prepared for discussion at a public meeting is a public record under Chapter 22, the law for inspection of public records. Consequently, an individual may request copies of that material in advance of the public meeting and in accord with provisions of Chapter 22. In this case, however, the individual might have to pay the costs for copying agenda material, as covered in Chapter 22.

QUESTION: Chapter 21 permits the closing of a meeting for any one of 12 reasons. Why?

REPLY: As noted in Chapter 21, 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. As noted in an Attorney General's opinion (Stork to O'Kane, 81-7-4), "Discussion during a closed session ... must relate directly to the specific reason

announced as justification for the session.”

Exemptions (a) through (l) of Chapter 21.5 embody a legislative effort to address countervailing interests. Several key exemptions are 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.”

Problems might arise if a governmental body lacked discretion under Chapter 21 to discuss confidential records in closed session. Discussion open to the public could violate the law allowing the confidentiality of a record; discussion closed to the public would violate the open meetings law without this exemption.

Examples of laws allowing for the confidentiality of certain records include the Family Educational Rights and Privacy Act of 1974 (making confidentiality of student records a condition for federal funding) and Chapter 22.7 of the Iowa Code allowing (but not mandating) the confidentiality of specified public records. In effect, each time Chapter 22.7 is amended to provide confidentiality for a government record, a new exemption for closing a public meeting may likewise be created.

In 2007, lawmakers amended Chapter 21.5 to explicitly allow a closed session to discuss records kept confidential under Chapter 22.7, subsection 50, which involves information about government emergency preparedness and security procedures.

In 2008, the Legislature further linked the open meetings and records laws by adding a subsection to Chapter 22.7 that permits a government body to keep confidential “information in a record that would permit a governmental body . . . to hold a closed session . . . in order to avoid public disclosure of that information.” However, non-confidential information in the record

shall be released to the public. The confidentiality provision expires after the government body takes final action on the matter or in 90 days, unless the agency can prove that final action was not possible within that period.

“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.”

Certain 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 possible or likely at some future date, (2) if the litigation is “imminent,” the disclosure of strategy would likely prejudice or disadvantage the governmental body’s case, and (3) legal counsel should be present. In Tausz v. Clarion-Goldfield Community School District, 569 N.W.2d 125 (Iowa 1997), the Supreme Court emphasized that attorney-client privilege does not extend to all communications between government agencies or officials and their attorneys, and must be examined on a case-by-case basis.

“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, parent or guardian has no right to demand a closed hearing under this exemption.) The final action of the school board must be taken in open meeting, but to protect the

confidentiality of the student, the motion to expel or suspend the student should not identify the student by name.

In Schumacher v. Lisbon School Board, 582 N.W.2d 183 (Iowa 1998), the Iowa Supreme Court ruled that the Lisbon board had violated the open meetings law when it held a closed hearing (at the request of a school aide) to consider disciplining a high school student, even though the parents of the student had asked for a public hearing.

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

“f. To discuss the decision to be rendered in a contested case conducted according to the provisions of Chapter 17A [The Administrative Procedure Act].”

This exemption is rather unambiguous, and applies only to state agencies. A contested case under Chapter 17A is 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.

“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 what the prosecution tolerances, investigative schedules or investigative techniques are.

“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.”

This exemption permits public agencies to protect individual reputations but does not 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. It would, of course, be unreasonable and inconsistent with the intent of Chapter 21 to apply this exemption to evaluations of corporate or business “entities.” Such entities, which do not have personal privacy interests at stake, cannot require a closed meeting for discussion of their qualifications.

The potential breadth of this exemption is somewhat offset by the two conditions that must be met before a meeting may be closed under this exemption: (1) the individual involved must request a closed session, and (2) there must be reasonable basis to believe the individual’s reputation would be injured irreparably **and** needlessly unless the meeting is closed. (The construction here may allow irreparable injury if that is unavoidable in serving the public interest.)

An advisory opinion issued by the Iowa Public Information Board on Feb. 20, 2014, confirmed that the individual being evaluated must request the closed session.

The exemption provides no right for the person who is the subject of discussion to attend the session closed by request; nor does it forbid such attendance.

In Feller v. Scott County Civil Service Commission,

435 N.W.2d 387 (Iowa 1988), the Iowa Court of Appeals limited a public agency's discretion in deciding whether to honor a request for a closed session. The Court ruled that there could be basis for a lawsuit if a public agency denied a request for a closed session in arbitrary and capricious fashion.

“j. To discuss the purchase or sale 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 or reduce the price the governmental body would receive for that property. The minutes and the audio 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 or sale of particular real estate could be reasonably expected to increase the price demanded of that property or decrease the amount the government would receive in a sale.

The economic public interest that this exemption is intended to serve is clear. The exemption does not allow closed sessions for discussion of real estate in general.

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 or canceled.

Under Chapter 21.5(4) the minutes and recording of any closed session must be kept at least one year. If more than a year should elapse between a meeting closed under Chapter 21.5(1)(j) 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.

“l. To discuss patient care quality and process improvement initiatives in a meeting of a public hospital

or to discuss marketing and pricing strategies or similar proprietary information. . . .”

In 2008, the Legislature amended Chapter 21 to allow the boards of public hospitals to hold closed sessions under some circumstances. However, the closed meetings are allowed only when (1) public disclosure would harm the hospital’s competitive position, and (2) no public purpose would be served by public disclosure. When public disclosure would no longer harm the hospital’s position, the minutes and recording of the closed session shall be made available to the public. This provision does **not** apply to discussions of employment conditions or employee compensation.

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

REPLY: Chapter 21 requires final actions to be taken in open sessions. (For example, if the discharge of an employee is discussed in closed session, the vote to discharge the employee must take place in open session.) Chapter 21.5(3), however, does say that a final action by an agency may be taken in a closed meeting if expressly permitted by some other provision of the Code.

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

REPLY: Such exemptions to Chapter 21 include at least these:

Chapter 20.17(3) exempts negotiating sessions, strategy meetings of public employers, mediation and the deliberative process of arbitrators in the collective-bargaining process for public employees. (The first two sessions, in which the two sides present their initial bargaining positions, shall be open to the public, however.)

Chapter 279.15 exempts school board hearings to discuss with a teacher a superintendent’s

recommendation to terminate a contract with that teacher.

Chapter 602.2103 exempts hearings by the Commission of Judicial Qualification when it considers the retirement, discipline or removal of a judge. But if the commission applies to the Supreme Court to remove or discipline a judicial officer or an employee of the judicial branch, those records are public documents.

QUESTION: Chapter 21.6(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 going forward in an action to enforce the requirements of the Act. Ordinarily in litigation, the burden is on the complaining party (the plaintiff) to show that a requirement of a law has been violated. Chapter 21.6(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 going forward shifts to the defendants. The governmental body and its members must show by a preponderance of the evidence that the requirements of Chapter 21 were followed.

The shift in the burden to governmental bodies and their members is fundamental to the intent of the 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 non-compliance. Also,

placing the major burden on a party that has 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 such closure.

QUESTION: Can a governmental body covered by Chapter 21 take a secret ballot?

REPLY: No. Chapter 21.3 states, “The minutes shall show the results of each vote taken and information sufficient to indicate the vote of each member present. The vote of each member present shall be made public at the open session. The minutes shall be public records open to public inspection.”

It would be acceptable to record a vote as unanimous in the minutes of a meeting, or passed with only [name] dissenting, so long as the members present are noted in the minutes. However, in other cases the “yes” and “no” votes should be reported for each member of a public agency and if an agency is voting whether to go into a closed session it may be prudent to record the vote of each member.

In a Mitchell County District Court case on this issue, McKinley v. the St. Ansgar City Council, a city council contended that a secret ballot was merely “preferential.” The secret vote narrowed a field of candidates to five who were then approved unanimously by the council members. But a judge ruled that the procedure violated Chapter 21.3.

Sometimes a public agency might be tempted to seek secret ballots on particularly sensitive and controversial matters, but it is precisely on such matters that the votes of individual members should be recorded. For one thing, citizens are entitled to know how their representatives voted; for another, such controversial items are most likely to lead to litigation if there is a possible violation of Chapter 21.

Further, Section 380.4 of the Code of Iowa requires a city council member's vote to be recorded on any ordinance, amendment or resolution, and 362.2(19) defines "recorded vote" as "a record, roll call vote."

QUESTION: What steps should a private citizen take at a meeting of a governmental body when it is suggested that the body go into closed session, apparently for reasons not legal under Chapter 21 or other sections of the Iowa Code?

REPLY: These steps seem reasonable:

1. Although you may not be assured access to the floor, seek an opportunity to voice concerns: "I'd appreciate it if you would specify exactly which exemption is being used to close the meeting. I question your legal grounds for closing the session."

2. Recognize that the goal should be to keep the meeting legally open and not 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 to look into the matter. Enlist the support of the local newspaper or broadcast station. Consult a private attorney to evaluate your case. 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 going forward 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 legal fees. Remember, too, however, that this provision of the law should not be an invitation to protest all closed sessions because the law does provide for exemptions to the mandate for openness.

In addition, the Iowa Public Information Board staff is available to answer questions and provide advice about the legality of a governmental action, attempt to resolve disputes, and act to enforce the law.

QUESTION: To what extent do members of a governmental body share with their attorney responsibility for compliance with the open meetings law? Chapter 21.6(3) does provide the members with a defense if they “reasonably relied” upon the attorney’s opinion.

REPLY: According to Chapter 21.6(4), 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.

In Grell v. Building Appeals Board (1999 WL 1255744), the Iowa Court of Appeals held that members of the Coralville Building Appeals Board did not reasonably rely on the oral advice of counsel to close a session, where the members did not thereafter follow the mandated procedures for closing a session and did not tape record the session after closing. The Court left unresolved whether oral advice of counsel would constitute a “formal opinion” under Chapter 21. The Court focused instead on the attempt by board members to “shift responsibilities by blaming the City Attorney” in order to avoid civil penalties, which the Court viewed as exacerbating actions that were “clearly contrary to the objectives of the Open Meetings Law.”

A governmental body would be ill-advised to move into a closed session if 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 would probably fail as a defense in court. The remarks are unmindful of the Act’s fundamental preference for openness.

QUESTION: Does a person who wants to speak at a meeting of a governmental agency have the legal right to do so?

REPLY: No. While the open meetings act provides no mandate that a public agency must provide meeting time to any citizen with something to say, due process and democratic principles will dictate that a public body should hear those affected by proposed actions. Typically, many public agencies set aside time for a “public forum” or an “open forum,” but they are under no mandate under Chapter 21 to do so. Even when discussing a controversial item on its agenda, the public agency does not have to provide time to each person at the meeting.

QUESTION: If a majority of the members of a board are communicating online at the same time, would that constitute a public meeting?

REPLY: Yes. The provisions for electronic meetings under 21.8 apply as well to telephone and online conferences. So if the majority of the members of a governmental body hold an online conference, via email or social media, they should follow the same guidelines that would apply to a telephone conference call. Provisions in Chapters 21 and 22 can reasonably accommodate use of laptop computers, email and online conferences by public officials.

Keep in mind the Legislature’s mandate that “the basis and rationale of governmental decisions, as well as those decisions themselves,” should be accessible to the people. Members of governmental bodies should be cautious about discussing public business among themselves extensively outside of public meetings. Citizens become frustrated when they feel they are being shut out of the decision-making process by public officials they suspect are conducting government business and striking deals outside of the public eye.

Some government bodies have maintained the flexibility of electronic communication while ensuring government transparency by posting officials' emails online for public access under the public records law. Proposed legislation that would prohibit "walking quorums" — serial communication among individual members of a government body, either in person or electronically, with the intent to skirt the open meetings law — has been the topic of much discussion at the Statehouse in recent years.