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IPIB AO 2018-0006

May 17, 2018

SUBJECT: May a state agency redact a board member's personal email account and/or address from subject email communications provided in the course of fulfilling a public records request.

Laura Belin
1705 Plaza Circle
Windsor Heights, IA 50324

Dear Ms. Belin:

This opinion is in response to your Form Submission of March 9, 2018, 4:56 p.m., requesting an opinion from the Iowa Public Information Board (IPIB) pursuant to Iowa Code section 23.6 and rule 497—1.2. We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

BACKGROUND FACTS: While researching an article for Bleeding Heartland, LLC, you made a public records request that included email communications and correspondence between Iowa Ethics Campaign and Disclosure Board (IECDB) members and with the IECDB Executive Director. According to you, on February 22, 2018, the Executive Director fulfilled the request for email communications but every Ethics Board member's email account and/or address was redacted. You report that you inquired of the Executive Director under what authority, reason, or rationale the Executive Director had acted to make the redactions, stating: "I have submitted many other requests under Chapter 22, and have never seen an official email address redacted on documents provided."

The Iowa Ethics and Campaign Disclosure Board (IECDB) is a state agency consisting of six (6) board members and five (5) to (6) employees. Megan Tooker is the Executive Director of the agency. Megan Tooker is the lawful custodian of the agency.

Presently, no member of the Ethics Board is known to use or maintain a State of Iowa email account for work purposes. Consequently, any email communications among Ethics Board members and/or with other Ethics Board employees will occur by and through a personal email account maintained by the individual Board member.

On February 28, 2018, Director Tooker responded to your inquiry, and according to you, Director Tooker communicated that ideally each member of the IECDB would have their own separate and individual State of Iowa email account for work purposes. At the time of fulfilling the record request no member of the IECDB used or maintained a State of Iowa email account for work purposes. According to you, Director Tooker communicated that under the particular facts and circumstances of your recent record request, and the agency's efforts to fulfill it, the private email accounts and/or addresses would remain redacted and not be shared with you "unless that information is necessary to open the government's actions to the light of public scrutiny. ..."

Board Members

E. J. Giovannetti • Keith Luchtel • Monica McHugh • Frederick Morain • William Peard
Julie Pottorff • Suzan Stewart • Renee Twedt • Mary Unga-Sogaard

On March 6, 2018, you contacted the IPIB Executive Director to ask if it had been appropriate or permissible for the IECDB to redact the personal email addresses of board members in fulfilling a recent public records request. The Executive Director of the IPIB informed you at that time that the IPIB had received a similar informal request for information from the IECDB on February 27, 2018. On the same day and in response to your informal request for information, the Executive Director of the IPIB informed you accordingly: "I actually have a meeting on Friday [March 9, 2018] to discuss this issue. Apparently, most agencies do redact private information about board members. I will calendar your question to respond after Friday's meeting."

On March 9, 2018, you filed your *Form Submission and Petition for an Advisory Opinion*. You recounted the facts and laws as they related to the following legal question you described as follows: "Can a state agency withhold the email addresses that members of a state board or commission use to conduct state business?" You stated: "I didn't find any opinion on IPIB's website directly addressing this issue."

QUESTION: Can a state agency withhold the email addresses that members of a state board or commission use to conduct state business?

OPINION: Iowa's Open Records Act as codified at Chapter 22.1 et seq., requires government bodies and their lawful custodians to make every reasonable effort to fulfill an open records request and to respond without unreasonable delay to each request openly, accurately and completely. This includes a duty to perform a reasonable and adequate search for records that respond to a records request.

While nothing in Iowa's Open Records Law directly prohibits government body employees, agents or officials from using personal email accounts, doing so may make it difficult for the government body to search for and review the records requested.

Iowa Code § 22.1(3)(a) defines "public records" as "all records, documents, tape or other information, stored or preserved in any medium, *of or belonging to this state or any county, city, township . . .*" (emphasis added).

Iowa Code § 22.2(1) provides that "[e]very 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. *Unless otherwise provided by law*, the right to examine a public record shall include . . ." (emphasis added).

Iowa Code § 22.7(11)(a)(1) provides: "The following records shall be kept confidential, unless otherwise ordered by a court, the lawful custodian of the records, or by another person duly authorized to release such information: . . .

11.a. *Personal information . . . relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies.* However, the following information relating to such individuals contained in personnel records shall be public records:

(1) *The name and compensation of the individual* including any written agreement establishing compensation or any other terms of employment excluding any information otherwise excludable from public information pursuant to this section or any other applicable provision of law. . . ." (emphasis added).

None of these statutes specifically mentions "email address" or "email account."

In 1979, the Iowa Supreme Court recognized that, "[t]he . . . statutory definition of 'public records' . . . is meant to be the Sine qua non of the process of decision leading to access to public records." *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979)(quoting, *Note: Iowa's Freedom of Information Act: Everything You've Always Wanted to know About Public Records But Were Afraid to Ask*, 57 Iowa L. Rev. 1163, 1166 (1972)).

In 1988, the Iowa Supreme Court stated, "[i]n *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980), we recognized that determining

whether a document is a public record involves more than a consideration of the location of the document or analysis of property rights.” *City of Dubuque v. Dubuque Racing Assoc. Ltd.*, 420 N.W.2d 450, 452 (Iowa 1988).

“Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants.” *Id.* at 452-453 referencing *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979)(adopting the reasoning of the Oregon Supreme Court and quoting *MacEwan v. Holm* 226 Or. 27, 38, 359 P.2d 413, 418 (1961)).

In order to “facilitate public scrutiny of the conduct of public officers, the statute generally permits public access to writing held by them in their official capacities, regardless of origin.” *City of Dubuque v. Dubuque Racing Assoc. Ltd.*, 420 N.W.2d 450, 452 (Iowa 1988)(quoting *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979)); see also 66 Am.Jur.2d *Records and Recording Laws* § 19, at 354 (1973).

Generally, anywhere the fact may be found that an email communication is “of or belonging to this state or any county, city, township . . .” then the subject email communication may be concluded at law as a public record under Iowa’s Open Records Act, irrespective of what email account and/or address a subject email communication originates from. See generally *U.S. v. Story County*, Iowa 28 F.Supp.3d 861 (S.D. Iowa C. Div.) (2014)(following the guidance of the *Howard* Court and considering more than location and property rights by analyzing the content, character and nature of email communications to determine the capacity in which an email communication may have been sent or received which in turn helps the finder of fact determine if a particular email communication can be concluded to qualify as a public record).

Notwithstanding the fact that some of the subject email communications which were provided to you on February 22, 2018, may have originated from the personal email accounts and/or addresses of IECDB members, you report that Director Tooker “fulfilled” your public records request for subject email communications.

To the extent the Executive Director had to locate and then review the content, character and nature of the communications in order to make the redactions asserted, the Executive Director of the IECDB was likely in substantial compliance with Iowa law when she determined to make the email communications available to you or that the email communications qualified as “public records” under Iowa Code section 22.1(3)(a) Definitions.

Moving on from the Sine qua non, or step number one (1) of the process of decision leading to access to public records, the *Howard* Court also made it known that when applying Iowa’s Open Records Act to a given fact pattern, another “step in the statutory scheme establishes a list of express and specific limitations on the right of access.” *Id.* at 299. A “final organizational construct permits concealment of public records under certain circumstances.” *Id.* at 299.

In 1999, and in consideration of several pieces of information to be disclosed under Iowa Code section 22.2 and/or to be kept confidential under Iowa Code section 22.7(11), the Iowa Supreme Court reasoned, “unless the information is necessary to open the government’s actions to the light of public scrutiny” the information may be permitted confidentiality. *Clymer v. City of Cedar Rapids*, Iowa, 601 N.W.2d 42, 47 (Iowa 1999).

The background facts of *Clymer v. City of Cedar Rapids*, Iowa, 601 N.W.2d 42 (Iowa 1999) were as follows:

The Gazette Company requested that the City of Cedar Rapids otherwise release or turn over all information and records relating to city employees’ sick leave compensation and sick leave usage/administration during 1996.

The City of Cedar Rapids had in its employee personnel files compensation data touching and concerning name, address, birth date, gender, department, job title, hire date, bargaining unit status, base salary, and 1996 income which was broken down by codes representing fourteen (14) payment categories (such as sick leave, vacation pay, and salary, etc.) with details as to the dates and hours accrued.

In summary, all parties agreed the public was entitled to know the name of city employees plus general information concerning their departmental assignment, salary, and annual compensation. At issue was the more particularized data and information, and whether or not that data and information should be found and concluded to be confidential and exempt from disclosure under Iowa Code section 22.7(11).

The Iowa Supreme Court reported that it could find “no cases directly addressing the disclosure of a public employee’s address, birth date, or gender in the context of a search for information about public employment leave practices.” *Id.* at 47.

With regard to applying Iowa Code section 22.7(11) to any given fact pattern the Iowa Supreme Court cautioned:

1. “[R]eliance on precedent involving different factual scenarios provides only limited assistance.” *Id.* at 45; *See also DeLaMater v. Marion Civ. Serv. Commn.*, 554 N.W.2d 875, 879 (Iowa 1996)(analyzing and acknowledging the limited assistance provided by precedents involving different factual scenarios).
2. “Significantly, neither the term ‘personal information’ nor the phrase ‘confidential personnel records’ is defined by statute.” *Id.* at 44.
3. Nevertheless, “[t]he issue is whether the information falls within an exemption from Chapter 22’s general rule of disclosure.” *Id.* at 47.

With regard to applying Iowa Code section 22.7(11) to the facts and personal information at issue in *Clymer*, the Iowa Supreme Court reasoned:

1. If “such information does not serve the core purpose of the freedom of information statutes – to enlighten the public about operation or activities of the government” then the personal information may be withheld and not disclosed for public dissemination. *Id.* at 47.
2. If on the other hand, “the information is necessary to open the government’s actions to the light of public scrutiny” then the information may not be withheld. *Id.* at 47.

In consideration of the confidentiality of personal information relating to individuals who are officials, officers, or employees of a government body, the *Clymer* Court found and concluded the following under Iowa Code section 22.7(11):

- a. With regard for personal information relating to the individual’s home address, birth date, and/or gender, the Court found that it was “not convinced that disclosure of addresses, gender or birth dates advances the general purpose of the open records law or the particular examination proposed here by the media – to open to public scrutiny the use of sick leave and vacation pay by public employees in 1996.” *Id.* at 48. Therefore, the Court concluded “the district court correctly limited access to personal information such as address, gender and birth date, ...” *Id.* at 44.
- b. With regard for personal information relating to the individual’s name, the Court found that “[i]t is conceivably impractical for the public to decipher from an aggregate pool of sick leave and other leave information whether an individual is misusing or abusing benefits.” *Id.* at 47. The Court concluded “the compensation allocated to -and used by- individual public employees, whether for salary, sick leave or vacation, is a matter of legitimate concern to the public.” *Id.* at 48. The Court further concluded, “the public’s interest . . . cannot be satisfied by the district court’s limited disclosure in aggregate form without tying it to an individual’s name.” *Id.* at 48.

The IPIB has not received or reviewed any of the email communications that were provided to you. Similar to the reasoning shared by the Iowa Supreme Court in *Clymer* and depending on the content, character and nature of

those email communications, it may be found that public knowledge or disclosure of a board member's personal email account and/or address does not serve the core purpose of Iowa's Open Records Act, and/or does not enlighten the public about operation or activities of the government. Likewise (depending on the content, character and nature of those email communications), it may be found that a redaction of a board member's email address and/or account obscures the name of the public official or employee in connection with their official functions to such an extent that you cannot be satisfied without tying a particular email communication to an individual's name.

If the redaction of an IECDB member's personal email address and/or account from a particular email communication makes it impractical or impossible to decipher, deduce or determine the names of those board members who are communicating on behalf of the IECDB, then the Executive Director as the lawful custodian should consider making that information known to a records requestor on a case by case basis.

You reported to the IPIB that on February 22, 2018, the Executive Director fulfilled your request for email communications. Without addressing the content, character and nature of the emails received, you indicated that you were able to identify and determine the names of the communicants when you informed the IPIB: "documents were provided with board members' e-mail addresses blacked out."

On April 5, 2018, Director Tooker informed the IPIB in writing:

1. ". . . anyone wishing to send correspondence to Board members may do so by sending a message to the Board's office via mail, fax or email. We have a general email address at ethicsboard@iowa.gov. Ethics Board members are part of a governing body and their official duties and official actions are performed at board meetings. Nothing in the list of the Ethics Board's duties in section 68B.32A requires or provides an expectation for board members to individually communicate with members of the public or regulated community. In fact, in some situations, such as a pending contested case, it would be wholly inappropriate for a Board member to have *ex parte* communications."
2. "I provided Ms. Belin with the records she requested except for the personal email addresses which were the means those records were transmitted. The redaction did not in any way limit [Ms. Belin's] right to view records concerning the operation or activities of the government body."

Therefore, in fulfilling your record request for email communications, the Executive Director of the IECDB was likely in substantial compliance with Iowa law, when after reviewing the content, character and nature of the email communications she determined the personal information relating to individual board members (such as personal email accounts and/or addresses) qualified for confidentiality and/or redaction under Iowa Code section 22.7(11) Confidential records: Personal information.

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.

BY DIRECTION AND VOTE OF THE BOARD

Mary Unga-Sogaard, Chair
E. J. Giovannetti
Keith Luchtel
Monica McHugh
Frederick Morain
William Peard
Julie Pottorff
Suzan Stewart
Renee Twedt

Submitted by: Travis L. Starr, Legal Counsel

ISSUED ON: _____