



502 East 9th Street
Des Moines, Iowa 50319
www.ipib.iowa.gov

Margaret Johnson, JD
Executive Director
(515) 725-1783
margaret.johnson@iowa.gov

IPIB AO 2018-0010

May 17, 2018

SUBJECT: "Serial" submajority sessions of a governmental body and Chapter 21 Open Meetings

C. Joseph Holland
123 North Linn Street, Suite 300
Iowa City, Iowa 52245

Dear Mr. Holland:

This opinion is in response to your letter of March 30, 2018, 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.

FACTUAL STATEMENT: You are legal counsel for the Highland Community School District (District). The District has requested that you advise them on the legality of conducting a series of sessions between the school board members and a citizen. You are concerned that conducting these sessions as conceived could violate the open meetings laws as codified in Iowa Code chapter 21.

A member of the public has requested an opportunity to meet with the District school board. There are seven voting members on the school board, including the board president. The citizen has asked to present her grievances at a school board meeting. Over the last three years, this individual has shared her grievances in various forums. Most recently, this individual met with the school board president, District superintendent, and a state legislator to express her opinions.

Due to concerns about the appropriateness of a public meeting for the airing of her grievances, it has been suggested that she meet with two subgroups of three board members. There are a total of seven school board members. A majority would be four members. The plan is to hold two sessions, one after another, in serial fashion. The board president has already met and heard the grievances. The two sessions would be held one after the other, at 6:00 p.m. and 7:30 p.m. The superintendent would attend both sessions.

You have advised the District that conducting these serial sessions would require that board members merely listen and not engage in any discussion with the citizen. This could allow the sessions to be considered as a "listening", or ministerial gathering, and not a meeting as defined in Iowa Code section 21.2(2).

Board Members

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

The citizen objects to this process. She wants the board members to be able to ask questions and discuss her grievances. She has stated that this is possible because three members would not be considered a majority and such a gathering would not be a meeting subject to Chapter 21 requirements. She has asked that if discussion is not allowed at the serial meetings, then she should be allowed to present to the full board at an open meeting.

QUESTIONS:

1. Is the process by which the two sessions are scheduled compliant with Chapter 21?
2. Can you provide guidance as to what is a "clarifying question" and is not deliberation under Chapter 21?
3. Is it a problem that the Superintendent was present at the initial meeting, and (will be) present at both of the proposed sessions?

OPINION:

Iowa Code section 21.7 allows the public to record and photograph an open session. This section also grants the governmental body the authority to make and enforce "reasonable rules for the conduct of its meetings to assure those meetings are orderly, and free from interference or interruption by spectators." There is no requirement in Iowa Code chapter 21 that this citizen be permitted to speak at any meeting of the District board.

Iowa Code section 21.2(2) defines a meeting as requiring 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."

The process described in Question 1 is not a *per se* violation of open meetings laws, but it does compromise the spirit of Chapter 21, as stated in Section 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."

The Iowa Supreme Court has also opined that the definition requires that "temporal proximity exist among members of the governmental body" for there to be an actual gathering. (See Telegraph Herald, Inc., v. City of Dubuque, 297 N.W.2d 529, 534 (Iowa 1980))

While each proposed session does not include a majority of the seven member board, if the submajority group engages in deliberation on its policy-making duties, it would appear that the meetings are intentionally designed to avoid the policy of Chapter 21.

In 1981, the Iowa Attorney General issued two opinions on this issue. The first opinion cautioned that even when the members of a governmental body gather only to listen to the concerns of others, "deliberation" includes "the discussion and evaluative processes" of a government body "charged with a statutory duty of conducting investigations" in arriving at an eventual decision or policy. (Artis Reis and the Iowa Civil Rights Commission, Op. Atty. Gen # 81-2-13, February 16, 1981)

Later that year, the Iowa Attorney General stated that a ministerial function could include a situation in which members gather to receive information within the scope of their duties. "During the course of such a gathering, individual members may, by asking questions, elicit clarification about the information presented. We emphasize, however, that the nature of any such gathering may change if either 'deliberation' or 'action', as defined above, occurs. A 'meeting' may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely upon matters over which they may exercise judgment or discretion." (James D. O'Kane and the Sioux City Community School District, Op. Atty. Gen. # 81-7-4, July 6, 1981)

As you have noted in your request for this opinion, once the gathering has convened, the possibility for an inadvertent violation to occur is a risk your board does not want to take. As noted by the Iowa Court of Appeals in an unpublished decision, "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." Dooley v. Johnson County Board of Supervisors, No. 08-0195, Dec. 17, 2008.

The Dooley decision quoted Hettinga v. Dallas County Board of Adjustment, 375 N.W.2d 293, 295 (Iowa 1985):

"A 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. During the course of such a gathering, individual members may, by asking questions, elicit clarification about the information presented. We emphasize, however, that the nature of any such gathering may change if either "deliberation" or "action" [as defined earlier in the opinion] occurs. A meeting may develop, for example, if a majority of the members of a body engage in any discussion that focuses at all concretely on matters over which they exercise judgment or discretion." (Emphasis supplied).

If the members present begin to discuss each member's opinion and the reasons for such opinions, then Dooley would consider the meeting to have evolved into a Chapter 21 meeting. In answer to your Question 2, asking a "clarifying question" or engaging in any sort of debate with the citizen could result in the gathering going beyond a ministerial function.

Question 3 raises the concern that this plan could become a situation similar to that of Hutchinson v. Shull, 878 N.W.2d 221 (Iowa 2016). Hutchinson involved a county administrator who contacted each member of a three member board of supervisors to develop a plan to reorganize county departments, resulting in the elimination of a number of county positions. The Iowa Supreme Court remanded the case to the district court, in part to determine whether the actions of the county administrator rose to the level of creating an agency or proxy. While contact between staff and an elected official is not prohibited by Iowa laws, when the staff member goes beyond seeking information and instead facilitates deliberation and decision-making, open meeting violations concerns arise.

Having the superintendent attend both sessions raises the concern that the superintendent is facilitating decision-making. It also creates an environment that is more conducive to deliberation, as board members often rely upon the superintendent to answer questions and discuss policy. The serial nature of the two sessions, the meeting times, and the attendance of the superintendent, considered all together, may create "temporal proximity", resulting in a meeting that violates Chapter 21.

Even if the District could devise a series of sessions that do not violate Iowa Code chapter 21, such action would not comply with the overall policy of Chapter 21 – allowing the public to observe the basis and rationale of decisions made by this board. For that reason, the IPIB advises that the District not engage in the contemplated series of meetings.

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: Margaret E. Johnson, Executive Director

ISSUED ON: _____