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SUBJECT: Application of Iowa Code section 22.7 to email addresses of agency board members

Laura Belin
1705 Plaza Circle
Windsor Heights, Iowa 50324

Dear Ms. Belin:

This opinion is in response to your filing of March 9, 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 request an advisory opinion concerning the confidentiality of private email addresses of appointed members of a board for a government agency.

In February of 2018, you requested copies of email correspondence between the appointed board members of a state agency and the executive director of that agency. The record request was fulfilled, but the private email addresses of the board members were redacted.

When you inquired about the reason for such redaction, you were informed that Iowa Code subsections 22.7(11), 22.7(38), 22.7(50), and 22.7(67) pertain to privacy. Subsection 22.7(11), confidential personnel records, was cited as the reason for the redaction, based upon the 1999 Iowa Supreme Court decision in *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999).

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

OPINION:

Iowa Code section 22.7 lists over seventy types of records that are considered confidential and can be withheld from release by the records custodian. Subsection 22.7(11), personal information in confidential personnel records, was cited as the legal reason for the redactions.

Subsection 22.7(11) defines this confidential record as:

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11. a. *Personal information in confidential personnel records of government bodies 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. For purposes of this paragraph, "compensation" means payment of, or agreement to pay, any money, thing of value, or financial benefit conferred in return for labor or services rendered by an official, officer, or employee plus the value of benefits conferred including but not limited to casualty, disability, life, or health insurance, other health or wellness benefits, vacation, holiday, and sick leave, severance payments, retirement benefits, and deferred compensation.

(2) The dates the individual was employed by the government body.

(3) The positions the individual holds or has held with the government body.

(4) The educational institutions attended by the individual, including any diplomas and degrees earned, and the names of the individual's previous employers, positions previously held, and dates of previous employment.

(5) The fact that the individual resigned in lieu of termination, was discharged, or was demoted as the result of a disciplinary action, and the documented reasons and rationale for the resignation in lieu of termination, the discharge, or the demotion. For purposes of this subparagraph, "demoted" and "demotion" mean a change of an employee from a position in a given classification to a position in a classification having a lower pay grade.

b. *Personal information in confidential personnel records of government bodies relating to student employees shall only be released pursuant to 20 U.S.C. § 1232g.*

A state agency is a government body as defined in Iowa Code section 22.1(1). Board members of a state agency would be identifiable officials of that agency. Most board members are appointed by the governor of the state, with confirmation by the state senate. Most board members have clearly defined responsibilities, duties, and obligations. Subsection 22.7(11) would apply to records maintained by the agency pertaining to each board member, as these records would probably contain personal information subject to the protection of this subsection.

Subsection 22.7(11) does not define personal information. Instead, it lists information that is not considered personal and must be released, such as names, compensation, position, dates employed, etc. (subsection 22.7(11)(a)(1) through (5)). Home addresses, telephone numbers, and personal email addresses are not included in the list of information that must be released.

Iowa Code section 22.7 does not list any exemption that specifically addresses the question you pose. Subsection 22.7(67) includes the email addresses collected by state agencies "for the sole purposes of disseminating emergency or routine information and notices through electronic communications that are not prepared for a specific recipient." To the extent that any emails fall within this limited exemption, those personal email addresses could be withheld.

The Iowa Supreme Court provided some guidance on the definition of 'personal information' in *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999). In allowing the personal addresses of public employees to be withheld, the Court reasoned:

"...the basic theme emerging from the few cases dealing with disclosure of public employees' addresses is that such information does not serve the core purpose of the freedom of information statutes – to enlighten the public about the operation or activities of the government. Put another way, a public employee has a substantial privacy

interest in his or her address that outweighs the public interest in disclosure, unless the information is necessary to open the government's actions to the light of public scrutiny.” (at 47)

Applying the Clymer decision, personal email addresses of state officials, like home addresses, are personal information that would not become public records upon appointment of the person to a state agency. But, should personal email addresses be regularly used for public business, the email addresses may lose their “personal” nature and become public records. Assessing the factual circumstances under which this might occur is beyond the scope of an advisory opinion. We would, however, caution agencies not to withhold personal email addresses as confidential while continuing to use the personal email addresses regularly to conduct public business.

Accordingly, the IPIB encourages government agencies to release email addresses that are used regularly as a point of communication of government business and would support legislation that specifically requires the release of the email addresses under these circumstances. To the extent that state officials object to the release of email addresses that they additionally use for unrelated personal communications, we point out that a separate email account can be created by state officials solely for the purpose of conducting government business.

Whether state officials use personal email or the government email system, it is clear that the communication itself may be a public record as determined by the content.

The IPIB has previously provided guidance concerning the use of private devices to conduct public business. As noted on the IPIB website under the topic “FAQs” (frequently asked questions):

This issue has been addressed in Iowa in a limited manner. Iowa Code Section 22.1 includes “all records, documents, tape or other information, stored or preserved in any medium” in the definition of public records. Subsection 22.2(2) states that a governmental body cannot prevent access to a public record by contracting with a nongovernmental body (such as a cloud storage provider). Section 22.3A addresses public records and data processing software. The cumulative effect of these statutes is that a public record does not lose its public status by being retained on a privately owned electronic device.

The Iowa Supreme Court, in a 1967, pre-email decision, addressed the idea that you must look at the contents of the document or communication to determine whether it is a public record: “It is the nature and purpose of the document, not the place where it is kept, which determines its status”, Linder v. Eckard, 152 N.W.2d 833, 835 (Iowa 1967).

To allow a governmental body to avoid public records disclosure by simply requiring that officers or employees use their privately owned electronic devices would be to completely thwart the transparency goals of Chapter 22.

You mention in paragraph six of your request for an advisory opinion that citizens “should be able to contact those who serve on public bodies directly, without going through staff.” A citizen’s “right to petition the government for a redress of grievances” is included in the First Amendment of the United States Constitution. The Iowa Constitution, Section 20, includes the right “...to make known their opinions to their representatives and to petition for a redress of grievances.”

As noted in the first paragraph, generally the IPIB’s jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Nevertheless, we do not believe this issue rises to a constitutional violation.

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: 7/19/18