

July 14, 2022

VIA EMAIL ONLY

Hannah Fordyce
Iowa Public Information Board
Wallace State Office Building
502 East 9th Street, Third Floor
Des Moines, IA 50319
hannah.fordyce@iowa.gov

RE: IAMU Comments re: Proposed Rule 11.2(1)

Dear Ms. Fordyce:

We represent the Iowa Association of Municipal Utilities (“IAMU”). Following the public hearing on July 11, IAMU asked us to provide you with comments regarding the jurisdictional question raised by the proposed Rule 11.2(1). We hope you find these comments useful in your deliberations and we are happy to have further discussions if appropriate.

The starting point for this analysis is the recognition that “agencies have no inherent power and [have] only such authority as [they are] conferred by statute or is necessarily inferred from the power expressly given.” *Wallace v. Iowa Stat Bd. of Educ.*, 770 N.W.2d 344, 348 (Iowa 2009). “The power of the agency is limited to the power granted by statute.” *Brakke v. Iowa Dep’t of Nat. Res.*, 897 N.W.2d 522, 533 (Iowa 2017). Thus, to be valid, an administrative rule “cannot be inconsistent with either statutory language or legislative intent.” *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 196 (Iowa 1980). An agency “may not ignore the clear language of a statute and impose its own ideas through the guise of construction, even if it is the best way to promote public welfare and achieve a desirable result.” *Brakke*, 897 N.W.2d at 534. An agency “cannot by rule expand or limit authority granted by statute.” *Smith-Porter v. Iowa Dep’t of Human Servs.*, 590 N.W.2d 541, 545 (Iowa 1999). Thus, specific grants of authority may not be interpreted “broadly so as to encompass areas not clearly included within those grants.” *City of Des Moines v. Iowa Dep’t of Transportation*, 911 N.W.2d 431, 445 (Iowa 2018).

These restraints on agency power take on particular importance in the municipal context. Iowa law grants municipalities broad authority to govern their own affairs. The Iowa Constitution was amended in 1968 to grant municipal corporations “home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government.” Iowa Const. art. III, § 38A. The purpose of this amendment “was to grant cities power to rule their local affairs and government subject to the superior authority of the general assembly.” *City of Clinton v. Sheridan*, 530 N.W.2d 690, 693 (Iowa 1995). This grant of home rule authority is echoed in Iowa Code § 364.1:

A city may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

Iowa Code § 364.1.

An exercise of municipal power is not inconsistent with a state law unless it is “irreconcilable” with the state law. Iowa Code § 364.2(3). “Iowa law requires some legislative expression of an intent to preempt home rule authority....” *Goodell v. Humboldt Cty.*, 575 N.W.2d 486, 493 (Iowa 1993). “Limitations on a municipality’s power over local affairs are not implied; they must be imposed by the legislature.” *City of Des Moines v. Gruen*, 457 N.W.2d 340, 342-43 (Iowa 1990); *see also Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978) (“Any limitation on a city’s powers by state law must be expressly imposed.”). Thus, municipalities “have the authority to act ‘unless a particular power has been denied them by statute.’” *Id.* (quoting *City of Des Moines v. Master builders of Iowa*, 498 N.W.2d 702, 703-04 (Iowa 1993)).

In this case, IPIB’s proposed Rule 11.2(1) requires municipalities to formally acknowledge an open records requests within two days of receipt and dictates the manner in which open records requests are considered received by the municipality. Nothing in Iowa Code chapter 22 imposes an acknowledgment requirement on municipalities or otherwise dictates the procedure municipalities must follow in responding to open records requests. While Iowa Code section 22.11(1)(c) requires *state agencies* to adopt procedures for providing access to public records, there is no such requirement for municipalities. To the contrary, Iowa Code section 22.12 expressly states that political subdivisions are “not required to adopt policies to implement section 22.11.” Iowa Code § 22.12. The clear legislative intent of this provision is that municipalities get to decide for themselves how open records requests are responded to. IPIB’s proposed rule is contrary to that legislative intent because it purports to dictate a certain procedure when no procedure is required. While IPIB has statutory authority to “implement” the requirements of chapter 22, *see* Iowa Code section 23.6(2), there is nothing to implement in this regard because the legislature has left it to the municipalities to decide what if any procedures will be followed. Because the legislature has not required municipalities to adopt procedures—let alone any specific procedures—the determination of how to respond to open records requests falls squarely within municipalities’ home rule authority. The legislature has not expressed an intention to preempt home rule authority in this area; it has *affirmed* that home rule authority by expressly leaving it up to the municipalities to decide. Thus, IPIB’s proposed Rule 11.2(1) infringes on municipalities’ home rule authority and is beyond the authority delegated to IPIB.

The proposed Rule 11.2(1) is also problematic insofar as it dictates the manner in which municipalities receive open records requests. For example, the rule appears to require municipalities to accept open records requests “received by other means, including social media.” Beyond the practical difficulties of such a requirement, nothing in chapter 22 requires municipalities to receive open records requests through social media. Rather, chapter 22 requires each governing body to delegate to a particular official or employee the responsibility for implementing the requirements of chapter 22 and authorizes such official or employee to provide

July 14, 2022

Page 3

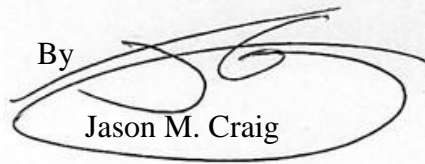
instructions to the public for making such requests. Iowa Code §§ 22.1(2); 22.4(2). Because the legislature has left it up to the municipalities to decide how to implement chapter 22 and how to receive open records requests, IPIB's proposed rule is inconsistent with the statute and infringes on municipal home rule authority.

In sum, because the statutory scheme of chapter 22 expressly contemplates that each municipality will decide for itself how to receive and process open records requests, and considering the broad home rule authority reserved in municipalities, we would urge IPIB to reconsider the proposed Rule 11.2(1) as it relates to municipalities. Thank you for your consideration and feel free to contact me should you have any questions or if you would like to discuss further.

Very truly yours,

AHLERS & COONEY, P.C.

By

A handwritten signature in black ink, appearing to read "J. M. Craig", is written over a large, loopy oval shape.

Jason M. Craig

JMC:pn