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Written Comments Re: ARC 6360C

Dear Members of the Board:

On behalf of the ACLU of Iowa, please accept these written Comments regarding ARC 6360C, amending the rules regarding the Iowa Public Information Board with respect to complaints, removal of inapplicable rules, and the timeline for government bodies to respond public records requests.

1) *497—11.2(22) Acknowledgment.*

We generally agree with these proposed rules, amended as follows:

497—11.2(22) Acknowledgment. A government body must acknowledge the receipt of a public records request.

11.2(1) A public records request shall be acknowledged in writing, where contact information has been provided, within two business days after receipt by the lawful custodian, including, but not limited to, in the following circumstances:

- a. A verbal request, within two business days after a telephone call is received, a voicemail message is received, or an oral request is made in person;
- b. A request sent by first-class mail, within two business days after the letter is opened;
- c. A request sent by email, within two business days after the email is opened;
- d. A request sent by fax, within two business days after the fax is received; or
- e. A request received by other means, including social media, within two business days after the communication is received.
- f. The acknowledgment period shall not be construed to extend the timeliness requirement of responding to a public records request.

11.2(2) An acknowledgment must include the name and contact information of the person responsible for processing the public records request.

2) **497—11.3(22) Processing.**

We find this to be problematic as written, and believe this will likely lead to bottlenecks of information that could be released in part, even if and when the entire record may redacted or withheld for reasons allowed by law. We recommend amending the proposed rule to reflect the following:

497—11.3(22) Processing Access to an open record shall be provided promptly upon request, ~~unless the size or nature of the request makes prompt access infeasible.~~ If the size or nature of the request for access to an open record requires time for compliance, ~~the custodian shall comply with the request as soon as feasible.~~ would reasonably delay access to the entire record, the custodian shall notify the requestor in writing, and shall explain specifically why the size or nature of the request requires a delay. In such an event, the custodian shall ask the requester which piece or pieces to fulfill first, and shall provide the requestor with any segments of the request that can be released separately from the records that are lawfully subject to any such delay.

3) **497—11.4(22) Good-faith reasonable delay.**

We generally agree with these proposed rules, amended as follows:

497—11.4(22) Good-faith reasonable delay. The custodian shall provide the requestor in writing an estimate of the reasonable amount of time to satisfy the request, and shall itemize any segments of the record that may or will be subject to a lengthy or multistep process as provided by law or rule. ~~In providing prompt access to an open record, or providing access as soon as feasible,~~ for the purpose of examination and copying, the lawful custodian may engage in a good-faith reasonable delay, including for the purposes of:

- 11.4(1) Seeking an injunction under Iowa Code section 22.8;
- 11.4(2) Determining whether the lawful custodian is entitled to seek or should seek an injunction;
- 11.4(3) Determining whether the record requested is a public record or a confidential record; or
- 11.4(4) Determining whether a confidential record should be available for inspection and copying to the person requesting the right to do so. A reasonable delay for this purpose shall not exceed 20 calendar days and ordinarily not exceed 10 business days.

4) 497—11.6(22) **Factors affecting timely compliance.**

We are concerned that these proposed rules provide too much discretion to the custodian of the records, given that definitions such as ‘difficulty’ are necessarily subjective.

At the end of the day, events such as disasters, or even pandemics, while not predictable in terms of when they occur, are in fact predictable events in the sense that such conditions will, inevitably, arise from time to time. Custodians of records must have procedures in place to reconcile their obligations to produce records with predictable difficulties in doing so; a failure to do so creates a scenario in which predictable situations become a pretext for ‘impossibility,’ even when the agencies and offices have the capacity and the obligation to provide public records in even some form. For example, an agency’s inability to produce paper copies of a record due to physical inaccessibility of the record should not prevent a custodian from providing electronic data when it remains accessible to the custodian. So, the custodian’s obligation to produce the segments that are available should be clearly established in these rules. The same is true regarding the obligation of continued compliance and release of any other records as they become available.

The public policy reasons for that are self-evident; it is in times of duress and emergency that the public’s access to understand and see what our government is doing is most important. In such times, access to public records - whether by individual citizens, educational groups, organizations like ours - and particularly by the free press – are of paramount public interest and can, and often do, become matters of life and death.

*Finally, while not addressing the substance of any ongoing litigation in these Comments, we are concerned at the potential for courts to give interpretative deference to any rule that a state agency or office may use to extend the timeliness period of requests made even **prior** to these rules being promulgated. As such, we recommend the Board make these suggested revisions and in issuing these rules, make unambiguous that the prompt provision of records is the standard under Iowa law and rules, and that any deviation from that standard should be understood as one of impossibility to timely produce as opposed to mere inconvenience or highly-subjective “difficulty”.*

We recommend amending the proposed rule to reflect the following:

497—11.6(22) Factors affecting timely compliance. In assessing whether a government body provided access to records promptly, or, when temporarily unavailable, as soon as they became available,-the following factors may be considered:

11.6(1) The estimated amount of time to search for and retrieve the number of records requested;

~~11.6(2) The difficulty of searching for or retrieving the records requested;~~

~~11.6(3~~2~~) The difficulty of formulating estimated amount of time to formulate effective search criteria for retrieving electronic records;~~

11.6(3) Whether the government body has provided, or is providing, access to open records to other requestors in the same time period, or since; and

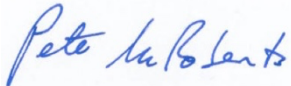
11.6(4) The existence of ~~unforeseen~~ circumstances that ~~reasonably interfered with the lawful custodian's ability to search for or retrieve the requested records.~~ that render it impossible for the government body to promptly provide access to the records due to a disaster or emergency declaration by the governor, or any other unforeseen event that makes the records temporarily or permanently inaccessible, such as fire, flood, theft, and other similar acts beyond the control of the government body.

5) **SF 2322**

Additionally, on July 1st, 2022, Governor Reynolds signed into law [Senate File 2322](#), an act relating to the assessment of fees when a person requests examination and copying of public records. We recommend that the Board take the requirements of the newly enacted law into account when promulgating this set of rules. The new law addresses timeliness in the context of certain requests and fees. Governing bodies are required to make every reasonable effort to provide records at no cost other than photocopying fees, for requests that takes less than thirty minutes to produce. We strongly recommend the Board incorporate the provisions of this new law into the adopted rules.

Should the Board or staff have any questions relating to these Comments, please feel free to contact me directly. As always, we appreciate the opportunity to weigh in on these matters of great importance to Iowans, and to our system of open and transparent government.

Sincerely,



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