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Iowa Public Information Board

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Via email to: hannah.fordyce@iowa.gov

Iowa Public Information Board
% Hannah Fordyce
Wallace State Office Building
502 East 9th Street, Third Floor
Des Moines, Iowa 50319

Re: *Comments to proposed rulemaking ARC#6360C*

To the Iowa Public Information Board:

The comments below apply to proposed rulemaking by the Iowa Public Information Board announced in ARC# 6360C.

These comments are mine alone; they do not represent the opinions of my law firm, my law partners, or the firm's clients.

1. *Proposed Rule 497-11.4(22) would impermissibly expand the limited grounds upon which a lawful custodian may delay providing access to public records to consider seeking or to seek an injunction to restrain examination.*

In proposed rule 497-11.4(22), the agency's drafters add language indicating 'the lawful custodian may engage in a good-faith reasonable delay, *including for purposes of*:" and then paraphrase the only four reasons permitted for delay that Iowa Code § 22.(4)(a-d) expressly authorizes.

Through addition of the italicized language, however, the proposed rule mistakenly implies that grounds for delay may exist *beyond* those four possibilities specified in the language that follows in subparts (1)-(4).

This is contrary Iowa Code § 22.8(4), which states, "Good-faith, reasonable delay by a lawful custodian in permitting the examination and copying of a government record is not a violation of this chapter if the purpose of the delay *is any of the following*: . . . "

Any indication that the grounds listed in Iowa Code § 22.8(4) are non-exclusive, or that the reasons for delay permitted by the rule include, but are not limited to, the four specified in the statute will result in confusion, if not alteration of the law.

Therefore, if the board persists that its rules need to rewrite or paraphrase what the Legislature said in subsection 22.8(4), it should strike the word "*including*" from proposed rule 497-11.4(22).

2. *Subpart 11.6(4) of proposed rule 497-11.6(22) would unduly and unwisely expand the factors considered when evaluating whether a lawful custodian has timely complied with a public records request by injecting the ambiguous and subjective factor of "the existence of unforeseen circumstance that reasonably interfered with the lawful custodian's ability to search for or retrieve the requested records."*

The board should reject subpart 11.6(4) of proposed rule 497-11.6(22) as unnecessary, unworkable, and unwise.

In *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013), the Iowa Supreme Court identified objective factors that might justify delay by a lawful custodian of public records in providing access.

Regarding this, the *Horsfield Materials* Court wrote:

> 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. . . . Under this interpretation, practical considerations can enter into the time required for responding to an open records request, including "the size or nature of the request." But the records must be provided promptly, *unless the size or nature of the request makes that infeasible.*

834 N.W.2d at 461 (internal citations omitted) (emphasis added).

Wisely, the Court used assessment criteria that relied on objective determinations that focused strictly on the information sought without injecting the post-hoc excuses or justifications of the lawful custodian. Further, the Court set a standard based on "size and nature" that did not rely on a loose, ambiguous term, such as the phrase "unforeseen circumstances." The proposed rule unfortunately would bring an unworkable assessment into the compliance analysis. Unforeseen by whom? Reasonably unforeseen, or subjectively unforeseen? And what are relevant circumstances—time off for vacation, budgetary limitations, the press of other work?

Moreover, the *Horsfield Materials* case has guided the courts and lawful custodians alike for nearly 10 years without legislative action to expand or reduce the factors used to determine compliance with the on-demand access requirements of Iowa Code Chapter 22.

For the board to provide a new excuse for delay now is imprudent and inappropriate.

First, any rulemaking effort to increase the potential excuses for delay by a lawful custodian appears to countermand that the public records act starts with "a presumption of openness and disclosure." *Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 217 (Iowa 2012). Beyond that, the statute favors results that enhance the public's ability to stay informed about governmental activities, to hold officials accountable, and to know how agencies spend taxpayer money. *Id.* at 228. The proposed rule instead authorizes a new basis for delaying access, which often yields the practical effect of denying meaningful access.

Second, action now by the board disregards that General Assembly could have added to, subtracted from, or otherwise modified the *Horsfield Materials* factors yet has not done so. If such an expansion is going to occur, it is better for it to take place through legislation rather than rulemaking. *See e.g. Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 234 (Iowa 2019) (discussing the doctrine of legislative acquiescence in the public records act context).

Lastly, it appears particularly untoward that an executive branch agency would seek to modify the *Horsfield Materials* factors while at least three interlocutory appeals by the Office of the Governor seek to undermine them in a similar fashion. Rather than putting its thumb on the scales in favor of one litigant—one from the government no less—an agency should sit on the sidelines while the seven members of the Iowa Supreme Court consider the public records act issues presented and the scope of the *Horsfield Materials* factors. If an agency has a view to express concerning the pending cases and their challenges to delayed access to public records (in at least one case extending for more than a year), it could take a far better approach by filing a friend of the court brief rather than by changing the rules while the appeals are in progress.

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Thank you for considering these views in opposition to two provisions of the proposed rules as you engage in rulemaking later this week. Please confirm by return email that you have received and filed these comments.

Very truly yours,

/s/Michael A. Giudicessi

Michael A. Giudicessi

MAG/tlr