

## ISAC's Analysis of Senate Study Bill 3164/House Study Bill 654

Here is a section-by-section summary of the bill, which rewrites Iowa's Open Meetings law and Public Records Law,

**Section 1:** NA

**Section 2:** NA

**Section 3:** NA

**Section 4:** NA

**Section 5:** "Walking quorums" issue. Defines a "meeting" to include the "calculated use" of a series of meetings of less than a majority of the members of a board, where the intent is to reach a final decision on a matter before the board. ISAC opposes this section because the language is so broad that it will inhibit perfectly legal speech, and it will not solve the problem since "intent" is so hard to prove.

ISAC opposes the language at page 3, line 10 through line 27 concerning emails. It says that if an email is sent to a majority of board members, that is a "meeting." ISAC opposes this provision for several reasons: 1)like much of the bill, this is confusing and hard to interpret, so it will be subject to differing interpretations; 2)it is so broad that it will prohibit speech that should not be prohibited; 3)this is putting substantive law in a definitions section, which is bad drafting; and 4)fundamentally ISAC does not believe that email communication can ever constitute a "meeting."

**Section 6:** This section addresses reconvened meetings, which was a problem for the Board of Regents. It says that you have to treat a reconvened meeting as a new meeting, and post a new agenda, unless the original meeting is reconvened within four hours of the end of the original meeting. ISAC has no objection to this.

**Section 7:** Professor Bonfield from the University of Iowa Law School was a consultant to the Legislative Interim Committee. One of his key points was that we need to redefine the terms used in these laws. So many of the changes this bill makes are just inserting new terminology. Here, for instance, the term "optional public record" is inserted to replace the term "confidential public record." ISAC thinks going to this new terminology is much more trouble than it is worth. There are three or four place where technical clean-up is required. Other than that, let it go.

**Section 8:** Conforming language.

**Section 9:** ISAC objects to this provision, which raises the fines for violation of the Open Meetings Law from \$100 - \$500 to \$1,000 to \$2,500. Our informal survey suggests there are few other states, if any, with penalties this high. Also, these fines apply to those who commit inadvertent violations of the law. ISAC favors a two-tiered approach, where there are higher fines for those that intentionally violate the law.

**Section 10:** Per Professor Bonfield, new terms are introduced into the Public Records Law, including "government record." The effect of these changes would be that every bit of information in the possession of every county official or employee that pertains to the

county job is a public record. This would include, for instance, emails that a county sheriff sends to his chief deputy via his personal computer at his home. Or a note one county supervisor passes to another in a board meeting. ISAC opposes this section.

**Section 11:** This section goes to the Iowa Supreme Court's *Gannon* decision. It is getting at situations where a government body delegates a job to a non-governmental agency. The question is, when do records of that non-governmental agency therefore become public records. This situation needs clarification. But this language is too broad and therefore subject to abuse.

**Section 12:** This section clarifies how long a custodian has to produce a public record. It shall provide the record immediately "if feasible in the ordinary course of business." If not feasible, the custodian shall notify the requestor when the record will be available, which must be within five business days. If there is "good cause for delay" beyond five days, the custodian shall tell the requestor in writing what the good cause is, and when the record will be provided. ISAC supports this language.

ISAC opposes the new requirement that if a records request is denied, a custodian must provide a written explanation of the denial at the time of the denial. That is not practical. Give the custodian three business days.

ISAC also supports adding language clarifying that individuals have no private right of action regarding the release of confidential records. Do not penalize custodians who err on the side of openness. This would codify the holding of the *Marcus v. Young* Iowa Supreme Court case (538 NW2d 285).

**Section 13:** Conforming amendment.

**Section 14:** NA

**Section 15:** This section is controversial. It clarifies what parts of an employee's personnel file are public records. The most controversial is subsection e, which changes the law to say that the county must provide information about "any final disciplinary action taken against the individual that resulted in the individual's discharge, suspension, demotion or loss of pay."

**Section 16:** NA To be struck per Senate subcommittee.

**Section 17:** Overturns Iowa Supreme Court case – clarifies that job applications are public records. See section 19.

**Section 18:** Clarifies 2007 change in law regarding charitable donations.

**Section 19:** Subsection 60 is very controversial. It changes the law regarding employment applications. Applications are only anonymous if the applicant request in writing and government body determines anonymity is necessary. But when final five applicants are selected, their applications have to be made public three business days before the final decision.

Subsection 61 makes a public records exception for information invading personal privacy. This is aimed at curbing identity theft. But ISAC opposes the language, since it is

too broad to give a custodian any notion of what information to withhold. A better idea is to create a laundry list of information that shall not be disclosed.

Subsection 62 is very controversial. It makes draft material confidential until such time as it is used to form public policy. ISAC opposes this language, as it is a solution looking for a problem, and is hard to implement.

Subsection 63 just says that if a government body could go into closed session to discuss certain information, that information is confidential.

**Section 20:** This is a controversial section. It changes the standard that must be met in order to get an injunction preventing examination of a public record.

**Section 21:** The length of time to consult with an attorney about disclosure of a record is reduced from 20 calendar days to 10 business days.

**Section 22:** Changes the public records penalties from \$100 - \$500 to \$1,000 to \$2,500. Our informal survey suggests there are very few other states with penalties this high.

**Section 23:** Strikes reference to criminal penalties.

**Section 24:** Requires that any settlement agreement include a brief statement summarizing the facts of the case. ISAC opposes this requirement as written, as it would be difficult to draft a summary meeting these requirements.

**Section 25:** Clarifying amendment regarding public records related to investments.

**Section 26:** Sections 26-37 involve the new Iowa Public Information Board (IPIB), the new executive branch enforcement agency. ISAC favors the creation of a new agency, but opposes the specifics as to how it will operate.

**Section 27:** Definitions related to IPIB.

**Section 28:** IPIB consists of five members appointed by the governor. ISAC objects to the fact that no qualifications are listed for the Board members.

**Section 29:** Board members reimbursed for actual expenses.

**Section 30:** Controversial section. It provides that if someone files a lawsuit over a violation of Chapter 21 or Chapter 22, and then someone else files a complaint with the IPIB regarding the same incident, the lawsuit is dismissed without prejudice. ISAC favors this approach. The trial attorneys favor having the court case stayed, rather than dismissed.

**Section 31:** The IPIB is authorized to hire necessary staff, including ALJs and attorneys. The cost of the IPIB has been an issue, with some estimating an annual operating cost of \$500,000.

The IPIB has subpoena power. It is directed to, through contested case proceedings before the board, determine whether there has been a violation of Chapter 21 or 22 and impose civil penalties as provided in those chapters.

The IPIB is charged with providing training opportunities, and has the authority to require that records custodians get training.

**Section 32:** Any person may file a complaint with the IPIB. The complaint must be filed within 60 days from the time of the violation, or from the time the complainant should have known about the violation. ISAC favors this deadline, which does not exist in current law.

The complaint is filed without cost to the complainant. This is important, because this will have a tendency to encourage the number of complaints. One of the biggest complaints about the current law is that the burden falls on private citizens to hire their own lawyers to pursue complaints. The question is, does this no-cost process go too far the other way?

**Section 33:** The first thing that happens when a complaint is filed is that the IPIB determines whether the complaint is legally sufficient and within the IPIB's jurisdiction.

**Section 34:** The IPIB shall offer voluntary mediation and settlement.

**Section 35:** If mediation fails, then the IPIB conducts an investigation to determine if probable cause exists. If it does, then the IPIB shall commence a contested case proceeding under Chapter 17A before the IPIB. The IPIB shall reach a final decision on the merits by majority vote.

The IPIB can enforce any penalty allowed under Chapter 21 or 22, but cannot remove public officials from office.

Any final IPIB decision can be appealed to district court.

**Section 36:** Adds defense of "harmless error."

**Section 37:** The IBIB shall not have jurisdiction over the judicial or legislative branches, due to separation of powers concerns.

**Sections 38-68:** In each case, these are simply conforming changes. The bill replaces the term "confidential record" with the term "optional public record," so almost all of these changes are just substituting the new language. ISAC opposes the changes. We have had 30 years to figure out the existing terminology, and it is working just fine.

**Section 69:** Strikes the provision in the law that provided for criminal sanctions for public records violations. ISAC favors this change.

**Section 70:** Sets the effective date of the bill as July 1, 2009. At least that much time will be needed to get custodians up to speed on these changes.