



THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319
TELEPHONE: 515/281-5164
FACSIMILE: 515/281-4209

November 22, 2006

David Vestal
General Counsel
Iowa State Association of Counties
501 SW 7th Street, Ste. Q
Des Moines, Iowa 50309-4540

Re: Senate File 2410

Dear Mr. Vestal:

On behalf of the Iowa State Association of Counties and the Iowa League of Cities, you have requested advice from this office regarding compliance with several of the requirements within Senate File 2410. Specifically, you ask about provisions of Senate File 2410, the Government Accountability Act, amending Iowa Code section 28E.6 to require certain 28E entities to comply with the open meetings and public records laws and publish proceedings, including a schedule of bills allowed and salaries paid. 2006 Iowa Acts, 81 G.A., ch. 168, § 7 (S.F. 2410). Because we do not believe that the new requirements are triggered by all 28E agreements, we begin by examining the scope of chapter 28E and differentiating between the types of 28E agreements, before addressing your specific inquiries.

Overview of chapter 28E: "The purpose of [chapter 28E] is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to co-operate in other ways of mutual advantage." Iowa Code § 28E.1 (2005). To this end, a public agency is authorized to enter into agreements for joint enterprise with other public or private agencies [Code sections 28E.4 through 28E.6] and to contract to purchase governmental services from another public agency [Code section 28E.12]. "Public agencies" include "any political subdivision of the state; any agency of the state government or of the United States; or any political subdivision of another state." Iowa Code § 28E.2 (2005). The term "private agency" means "an individual or any form of business organization authorized under the laws of this state or any other state." *Id.*

Agreements for joint or cooperative enterprise:

28E.4 Agreement with other agencies.

Any public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force.

Iowa Code § 28E.4 (2005).

Although this statute allows local governments and state agencies to participate in joint undertakings, chapter 28E "does not confer any additional powers on the cooperating agencies; it merely provides for their joint exercise." Barnes v. Dept' of Housing and Urban Dev., 341 N.W.2d 766, 767 (Iowa 1984). "Public agencies or political subdivisions of the state can exercise jointly only those powers, granted by the legislature, that they can exercise individually." Goreham v. Des Moines Metro. Area Solid Waste Agency, 179 N.W.2d 449, 461 (Iowa 1970) (rejecting argument that chapter 28E unconstitutionality delegated authority to political subdivisions). A public agency cannot delegate more power than it has to a separate entity created under section 28E.5. Barnes, 341 N.W.2d at 768 (city could not give 28E housing agency authority to act without statutorily required city council approval).

Agreements for joint or cooperative action, executed under section 28E.4, must comply with the requirements of Code sections 28E.5 and 28E.6.

28E.5 Specifications.

Any such agreement shall specify the following:

1. Its duration.
2. The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created. However, if the agreement establishes a separate legal or administrative entity, the entity shall, when investing funds, comply with the provisions of sections 12B.10 and 12B.10A through 12B.10C and other applicable law.
3. Its purpose or purposes.
4. The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.
5. The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.
6. Any other necessary and proper matters.

Iowa Code § 28E.5 (2005) (emphasis added).

28E.6 Additional provisions.

1. If the agreement does not establish a separate legal entity to conduct the joint or co-operative undertaking, the agreement shall also include:

a. Provision for an administrator or a joint board responsible for administering the joint or co-operative undertaking. In the case of a joint board, public agencies party to the agreement shall be represented.

b. The manner of acquiring, holding and disposing of real and personal property used in the joint or co-operative undertaking.

2. The entity created or the administrator or joint board specified in the agreement shall be a governmental body for purposes of chapter 21 and a government body for purposes of chapter 22 unless the entity created or agreement includes public agencies from more than one state.

3. All proceedings of each regular, adjourned, or special meeting of the entity created or the administrator or joint board specified in the agreement, including the schedule of bills allowed, shall be published after adjournment of the meeting in a newspaper of general circulation within the geographic area served by the entity created or the administrator or joint board specified in the agreement. The entity created or the administrator or joint board specified in the agreement shall furnish a copy of the proceedings to be published to the newspaper within one week following adjournment of the meeting. The publication of the schedule of bills allowed shall include a list of all salaries paid for services performed, showing the name of the person or firm performing the service and the amount paid. However, the names and gross salaries of persons regularly employed by the entity created or the administrator or joint board specified in the agreement shall only be published annually. This subsection shall not apply if the entity or the administrator or joint board specified in the agreement includes public agencies from more than one state.

Iowa Code § 28E.6, as amended by 2006 Iowa Acts, 81 G.A., ch. 168, § 7 (S.F. 2410).

Joint or cooperative enterprise 28E agreements executed between public agencies or public agencies and private entities pursuant to sections 28E.4 through 28E.6 are quite common. They are used, for example, to establish regional or county-wide economic development organizations and solid waste agencies. It is important to note, however, that not all 28E agreements are subject to the requirements of these sections.

Contracts for governmental services:

Public agencies are also authorized to contract with other public agencies for the provision of governmental services.

28E.12 Contract with other agencies.

Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking

which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties.

Iowa Code § 28E.12 (2005). A 1986 Attorney General's opinion concluded that section 28E.12 provides an alternative to the requirements of sections 28E.4 through 28E.6.

[A]pplying the definition of 'public agencies' set forth in section 28E.2, it is our opinion that section 28E.12 separately authorizes governmental bodies to contract with each other to perform authorized governmental services. If this section is used as authority to contract, rather than sections 28E.4 through 28E.6, then the contract must meet the requirements of this particular section in lieu of compliance with sections 28E.5 and 28E.6, i.e., it must 'set forth fully the purposes, powers, rights, objectives, and responsibilities of the contracting parties.'

1986 Iowa Op. Att'y Gen. 97, 1986 WL 627782 (#86-7-4(L)). Examples of situations in which a 28E.12 agreement could be utilized include an agreement for a city to provide fire protection services to a township and an agreement for a county sheriff's department to provide law enforcement services to a city.

Filing requirement:

28E.8 Filing and recording.

Before entry into force, an agreement made pursuant to this chapter shall be filed with the secretary of state and recorded with the county recorder. In counties in which the office of county recorder is abolished, the agreement shall be recorded with the county auditor.

Iowa Code § 28E.8. The Attorney General has opined that an agency "could not likely rely on chapter 28E as authority [for action taken] unless it filed a 28E agreement with the Secretary of State as required by Iowa Code section 28E.8." Iowa Op. Att'y Gen. # 98-1-3, 1998 WL 213719, citing City of Windsor Heights v. Spanos, 572 N.W.2d 591, 593 (Iowa 1998) (holding that city attorney lacked de jure authority to prosecute county offenses where 28E agreement was never recorded, but prosecution upheld based on de facto authority). The 28E agreement under consideration in Spanos was based upon the 28E.12. Therefore, I believe that the section 28E.8 filing requirement is applicable to all agreements executed under chapter 28E.

S.F. 2410: Because section 7 of Senate File 2410 amends 28E.6, the requirements of the act are applicable only to agreements between public agencies or public agencies and private agencies for "joint or co-operative action" executed pursuant to sections 28E.4 through 28E.6. A section 28E.12 contract between public agencies for the performance of governmental services is not subject to the section 28E.6 requirements.

You specifically inquire about three of the requirements imposed by the Senate File 2410 amendments to section 28E.6. Your first inquiries concern application of the open meetings law requirement to the sole administrator of a 28E agreement. Sections 28E.5 and 28E.6 allow a joint or cooperative enterprise 28E agreement to "establish a separate legal entity to conduct the joint or co-operative undertaking" or provide for "an administrator or a joint board responsible for administering the joint or co-operative undertaking." Iowa Code §§ 28E.5(2) and 28E.6(1)(a). Effective July 1, 2006, the separate governing entity, or the administrator, or joint board responsible for administering an agreement executed under section 28E.4 "shall be a governmental body for purposes of chapter 21 and a government body for purposes of chapter 22 unless the entity created or agreement includes public agencies from more than one state." Iowa Code § 28E.6(2), as amended by 2006 Iowa Acts, 81 G.A., ch. 168, § 7 (S.F. 2410).

As your questions indicate, application of the open meetings law to a sole administrator of a 28E entity is problematic. If the 28E agreement establishes a multi-member separate legal entity or joint board to administer the joint undertaking, then that body must comply with the requirements of chapter 21 any time the body conducts a meeting, as defined by section 21.2(2). This is not a significant change in the law. See 1988 Iowa Op. Att'yGen. 116, 1988 WL 247811 (# 88-12-4(L)) (concluding that the governing board of a 28E entity must comply with the open meetings law). Because the definition of "meeting" requires "a gathering in person or by electronic means . . . of a majority of the members of a governmental body," it seems apparent that the requirements of chapter 21 have no logical application unless a multi-member separate legal entity or joint board is established by the 28E agreement. Iowa Code § 21.2(2) (2005) (meeting defined). If the agreement designates a single individual as an administrator for the undertaking, that person should not be required to comply with chapter 21 when acting individually. Even though the Senate File 2410 amendment designates "the administrator" as a governmental body for purposes of chapter 21, it appears absurd to attempt to apply the chapter 21 open meetings notice and access requirements to the acts of an individual. For this reason, we believe it is unlikely that a court would construe the new provision to require a sole administrator to comply with chapter 21. See Carolan v. Hill, 553 N.W.2d 882, 885 (Iowa 1996) (court does not construe statute in a way that produces absurd or impractical results). It is our view that chapter 21 can reasonably be applied only if a multi-member separate legal entity or joint board is established by the agreement.

Your final two questions relate to the publication requirement imposed by Senate File 2410. Effective July 1, 2006, "[a]ll proceedings of each regular, adjourned, or special meeting of the entity created or the administrator or joint board specified in the [28E] agreement, including the schedule of bills allowed, shall be published after adjournment of the meeting in a newspaper of general circulation within the geographic area served by the entity created or the administrator or joint board specified in the agreement." Iowa Code § 28E.6(3), as amended by 2006 Iowa Acts, 81 G.A., ch. 168, § 7 (S.F. 2410). The submission for publication shall occur "within one week following adjournment of the meeting" and "shall include a list of all salaries paid for services performed, showing the name of the person or firm performing the service and the amount paid." Id. "However, the names and gross salaries of persons regularly employed by the

entity created or the administrator or joint board specified in the agreement shall only be published annually." Id.

You request guidance regarding the selection of a newspaper for the publication. As you note, the publication must take place "in a newspaper of general circulation within the geographic area served by the entity created or the administrator or joint board specified in the agreement." Specifically, you use the example of a 28E entity that serves 14 counties and ask whether the proceedings can be published in a newspaper that serves only one of those counties as opposed to publication in one or more newspapers that reach residents in all 14 counties. The new provision requires publication in "a newspaper of general circulation within the geographic area served." The use of the singular form provides indication that publication in a single newspaper can be sufficient to satisfy this requirement. See 1972 Iowa Op. Att'y Gen. 44, 45 (concluding that statutory requirement for publication "in a newspaper published therein" could be satisfied by "publication in a single newspaper"). We believe, however, that the entity must select a newspaper "of general circulation" in the area served, rather than a newspaper with circulation primarily limited to one county in a multi-county area.

As we have previously opined, determination of what constitutes "a newspaper of general circulation" is an open-ended question, the resolution of which is largely dependent upon the facts of the specific circumstance. See 1988 Iowa Op. Att'y Gen. 116, 1988 WL 411501 [#88-12-3(L)]. In the absence of a statutory definition for the term, we turn to the common meaning of the term. Mason v. Vision Iowa Bd., 700 N.W.2d 349, 354 (Iowa 2005). By standard definition, a "newspaper of general circulation" is "[a] newspaper that contains news and information of interest to the general public, rather than to a particular segment, and that is available to the public within a certain geographic area." BLACK'S LAW DICTIONARY 1064 (7th ed. 1999). This definition is consistent with these observations from our 1988 opinion:

The Iowa Supreme Court set forth the basic criteria to define this phrase in Burak v. Ditson, 209 Iowa 926, 930, 229 N.W. 227, 228 (1930), as follows: First, that a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. Second, that, even though a newspaper is of particular interest to a particular class of persons, yet, if it contains news of a general character and interest to the community, although the news may be limited in amount, it qualifies as a newspaper of "general circulation."

In determining whether a newspaper has sufficiently broad circulation within the district to constitute a "newspaper of general circulation," the board should consider that the purpose of these provisions is to give notice to the general public. There are cases holding that the number of subscribers served by a paper was too small relative to the city population to be a "newspaper of general circulation." See, e.g., Times Printing Co. v. Star Pub. Co., 51

Wash. 667, 99 P. 1040, 1042 (1909) (1,000 of 500,000). On the other hand, in People v. South Dearborn Street Building Corp., 372 Ill. 459, 461-62, 24 N.E.2d 373, 374-75 (1939), the Court held that a paper circulated to 6000 people mainly in southwest Chicago but with a few subscribers in the remaining area of the city was a newspaper of general circulation for Cook County. The board should evaluate all of the facts regarding the newspaper's circulation in determining whether the statutory requirement is met.

1988 Iowa Op. Att'y Gen. 116, 1988 WL 411501 [#88-12-3(L)]. Because determination of whether a particular newspaper has general circulation in a particular area is largely fact driven, we are limited to providing guidance regarding the basic principles controlling selection of the newspaper.

Your final question relates to the requirement for publication of the schedule of bills allowed. New subsection 28E.6(3) provides, in relevant part, that "[a]ll proceedings of each regular, adjourned, or special meeting of the entity created or the administrator or joint board specified in the agreement, including the schedule of bills allowed, shall be published after adjournment of the meeting." You ask: "If a board does not currently approve individual bills, and leaves that task to individuals employed for that purpose by the 28E board, does this language in SF 2410 require that 28E boards begin approving individual bills?"

We do not interpret the new publication requirement as creating a requirement for board approval prior to the payment of bills. However, given the nature of the publication requirement, the feasibility of routinely publishing schedule of bills paid and annually publishing salary information, and the clear legislative intent to increase accountability by publishing expense and salary information, we think it is unlikely that a court would find the requirement is negated by the lack of board action prior to bill payment. We believe 28E boards should take action to substantially comply with the publication requirement. Possible options for compliance include directing the employees who approve bill payment to publish a schedule of bills paid on behalf of the 28E entity on a regular basis or requiring a report of bills paid to be provided to the board prior to each meeting for publication pursuant to subsection 28E.6(3) after the meeting. From our perspective, the key to substantial compliance with this new requirement is the publication of bills paid, to ensure public access to the 28E entity's expense and salary information.

Compliance with the Senate File 2410 amendments to section 28E.6 presents many administrative challenges to 28E entities. Although the goal of public accountability is laudable, the amendments create several ambiguities and we anticipate further legislative action to clarify and refine the requirements. In the mean time, we encourage 28E entities to attempt to comply with the requirements as fully as possible.

David Vestal
Page 8

I am hopeful that this information will be of assistance to you. Please note, however, that the analysis set forth herein represented my personal assessment and advice on the issue and not a formal opinion of the Attorney General. Feel free to contact me if I can provide further clarification or assistance.

Sincerely,



Christie J. Sease

Assistant Attorney General

cc: Tom Bredeweg, Iowa League of Cities
Mike Tramontina, Iowa Dept. of Management