



DUBUQUE COUNTY ATTORNEY

July 21, 2025

County Attorney
Scott J. Nelson

Dubuque County Board of Supervisors
Dubuque County Courthouse
720 Central Ave.
Dubuque, IA 52001

Dear Board Members:

During the July 14, 2025 Board of Supervisors Meeting there was discussion concerning whether applications and resumes received in the appointment process for the open Recorder position can be kept confidential or whether the documents should be made public. Ms. Hillary thereafter provided a 2016 opinion from then County Attorney Ralph Potter on a related issue. Though I concur with Mr. Potter's opinion concerning the 2016 issue, the present facts differ slightly from facts upon which Mr. Potter opined. More importantly, while Mr. Potter's opinion was grounded upon the case of *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1998), the Supreme Court has since rendered several opinions, the most recent coming in February of this year addressing a similar issue and expanding upon the Press Club opinion. *See* *Dr. Allen Diercks and Diane Holst v. Scott County, Iowa*, and *Kerri Tompkins, Scott County Auditor*, Case No. 23-1729, which may affect how the Board of Supervisors should proceed.

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The Press Club issue involved applications for a vacant City Manager position which were designated as confidential from the outset of the process. The Court held that the applications were exempt from disclosure as they fell within the legislative goal of Iowa Code Section 22.7(18) of "permitting public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure".

The Court addressed the issue again in *Teig v. Chavez*, 8 N.W.3d 484 (Iowa 2024) by setting forth four criteria for communications to be covered by Section 22.7(18) which include: (1) not required by law; (2) made to a government body; (3) by someone outside the government; and (4) the government body could reasonably believe that the sender would be discouraged from making such communication if the government body publicly disclosed it. The Court had previously expanded the fourth criteria to include "records custodian" in *Ripperger v. Iowa Public Information Board*, 967 N.W.2d 540 (Iowa 2021), further stating that when the records custodian could reasonably believe disclosure of the document would deter such communication, the determination should be upheld, not second guessed, even if others could reasonably disagree.

Thus the issue in Scott County was whether the records custodian could reasonably believe that applicants would be discouraged from applying if the applications were made available for general public examination. The test is objective and applied from the perspective of the records custodian. The Court stated that “If the custodian could have reasonably believed that disclosure of the applications would deter people from outside the government from submitting them, even if others could reasonably disagree, that decision should stand.” However, the Court went on to note that unlike Ripperger and Press Club, where confidentiality was promised before submitting applications, there was no such promise beforehand in Scott County, further noting that 27 candidates applied with no promise of confidentiality, suggesting that the prospect of disclosure did not in fact deter applicants. Later, when applicants were prompted about confidentiality, only 13 wanted confidentiality. Further, the Court stressed that government officials cannot shield public documents from examination merely by promising confidentiality for communications that otherwise fall outside of Section 22.7(18). It is the expectation of the records custodian – not the applicants – that matters. Chapter 22 imposes no duty on government to affirmatively contact applicants to obtain consent for disclosure.

The Court also found that Scott County set a public meeting and took no steps to close their meeting under Chapter 21. Applicants were also given directions and times for the public meeting and thus it was not reasonable for the records custodian to believe applicants would be deterred from applying.

Though the Court held that an applicant for a vacant Board of Supervisors position being filled through the appointment process is not a confidential record exempt from disclosure, the reasoning supporting that conclusion is very case specific. It therefore seems that if a promise of confidentiality is made from the outset, Ripperger would control, however, given that the notice has already been published without a promise of confidentiality, it may be too late to make that promise now. Given the fact that the expectation of the records custodian is the lynch pin, the fact that confidentiality was discussed at the July 14th meeting might be sufficient to satisfy that expectation. Also, taking steps to close the meeting wherein you intend to discuss the applications and perhaps interview applicants would also seem to raise the reasonable expectation of confidentiality on the part of the records custodian.

Finally, bear in mind that this entire discussion pertains to whether the auditor, as the records custodian can withhold the applications in response to an open records request and says nothing about whether the board can keep the applications confidential in the appointment process. The two issues are mutually exclusive. Thus, you might keep applications confidential, yet disclosure through an open records request may be required.

As a side note, going into closed session would be under Iowa Code Section 21.5(1)(i) to evaluate the professional competency of an individual whose appointment is being considered when necessary to prevent needless and irreparable

injury to that individual's reputation and that individual requests a closed session. The applicants should be made aware of the fact that they must request a closed session and thereafter the board must, on the record, ascertain any specific damaging information that would justify continuing the interview outside of the public view.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott Nelson", with a long horizontal flourish extending to the right.

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SJN/clf

cc: Chelsea Greene
Keith Lucy