

Regulatory Analysis

Notice of Intended Action to be published: Iowa Administrative Code 761—Chapter 4
“Public Records and Fair Information Practices”

Iowa Code section(s) or chapter(s) authorizing rulemaking: 8A.615, 22.3, 22.11 and 321.11

State or federal law(s) implemented by the rulemaking: Iowa Code chapters 22, 553 and 692; Iowa Code sections 8A.615, 17A.2, 17A.3, 21.5, 72.3, 80G.2, 80G.3, 313.10, 321.11, 321.11A, 321.19, 321.186, 321.189A, 321.266, 321.271, 422.20, 452A.63, 622.10, 622.11, 804.29 and 808.13; 5 U.S.C. §552 and 552a; 18 U.S.C. §2721 et seq.; and 42 U.S.C. §405

Public Hearing

A public hearing at which persons may present their views orally or in writing will be held as follows:

July 30, 2024
10 to 10:30 a.m.

[Microsoft Teams Link](#)
Or dial: 515.817.6093
Conference ID: 147 372 117

Public Comment

Any interested person may submit written or oral comments concerning this Regulatory Analysis. Written or oral comments in response to this Regulatory Analysis must be received by the Department of Transportation no later than 4:30 p.m. on the date of the public hearing. Comments should be directed to:

Kelly Popp
800 Lincoln Way
Ames, Iowa 50010
Phone: 515.239.1295
Email: kelly.popp@iowadot.us

Purpose and Summary

The purpose of this chapter is to facilitate broad public access to open records and sound determinations with respect to the handling of confidential records.

The following summarizes the changes within the proposed repromulgated chapter:

1. Update references to Iowa Code section 305.15, which is now Iowa Code section 8A.615.
2. Update references to specific Department divisions and bureaus.
3. Improve clarity of procedures and clarified requirements for access and availability of public records.
4. Reduce unnecessary restrictive language.
5. Remove unnecessary provisions or duplicative language already included in Iowa Code chapter 22.

Analysis of Impact

1. Persons affected by the proposed rulemaking:
 - Classes of persons that will bear the costs of the proposed rulemaking:
Citizens, contractors and individual parties that request information from the Department to comply with the Iowa Open Records Law, Freedom of Information Act, litigation, or proceedings will bear the costs of the proposed rulemaking.
 - Classes of persons that will benefit from the proposed rulemaking:

Any requester of information to comply with the Iowa Open Records, Freedom of Information Act, litigation, or proceedings will benefit from the proposed rulemaking.

2. Impact of the proposed rulemaking, economic or otherwise, including the nature and amount of all the different kinds of costs that would be incurred:

- Quantitative description of impact:

The proposed chapter does not have a quantitative impact.

- Qualitative description of impact:

The proposed rulemaking provides government transparency and improved access to information for requesters.

3. Costs to the State:

- Implementation and enforcement costs borne by the agency or any other agency:

Costs to the Department directly associated with the chapter include staff time and computer infrastructure related to implementing and administering a records management program. These resources are used for classifying, storing, managing, granting access to, and applying appropriate disposition of records in compliance with Iowa Code chapter 22 and for the fulfillment of records requests.

- Anticipated effect on state revenues:

The rules have no anticipated fiscal impact on state revenues.

4. Comparison of the costs and benefits of the proposed rulemaking to the costs and benefits of inaction:

There are no additional implementation costs in the proposed rules as compared to inaction.

5. Determination whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rulemaking:

No less costly methods or less intrusive methods exist to achieve this purpose.

6. Alternative methods considered by the agency:

- Description of any alternative methods that were seriously considered by the agency:

No alternative methods were identified.

- Reasons why alternative methods were rejected in favor of the proposed rulemaking:

Not applicable.

Small Business Impact

If the rulemaking will have a substantial impact on small business, include a discussion of whether it would be feasible and practicable to do any of the following to reduce the impact of the rulemaking on small business:

- Establish less stringent compliance or reporting requirements in the rulemaking for small business.

- Establish less stringent schedules or deadlines in the rulemaking for compliance or reporting requirements for small business.

- Consolidate or simplify the rulemaking's compliance or reporting requirements for small business.

- Establish performance standards to replace design or operational standards in the rulemaking for small business.

- Exempt small business from any or all requirements of the rulemaking.

If legal and feasible, how does the rulemaking use a method discussed above to reduce the substantial impact on small business?

The rules do not have a substantial impact on small business.

Text of Proposed Rulemaking

ITEM 1. Rescind 761—Chapter 4 and adopt the following **new** chapter in lieu thereof:

CHAPTER 4
PUBLIC RECORDS AND FAIR INFORMATION PRACTICES

761—4.1(8A,22) General provisions.

4.1(1) Purpose and scope. It is the policy of the department that free and open examination of public records is generally in the public interest. The purpose of this chapter is to facilitate broad public access to open records and sound determinations with respect to the handling of confidential records. This chapter:

- a. Describes the provisions governing public access to records that are owned by or in the physical possession of the department. However, access to personnel and payroll records may also be subject to the rules of the department of administrative services.
- b. Does not affect the policy of the department to respond, without charge, to routine oral or written inquiries that do not involve the furnishing of records.
- c. Does not make available records compiled by the department in reasonable anticipation of court litigation or formal administrative proceedings. The availability of these records to the public or to any individual or party to such litigation or proceedings is governed by applicable legal and constitutional principles, statutes, rules of discovery, evidentiary privileges, and applicable regulations of the department.

4.1(2) Custodian. The custodian of a record is the person who heads the departmental office responsible for that record. The department's electronic Records Management Manual identifies the offices that are responsible for particular records.

- a. As used in this chapter, the term "custodian" includes the custodian's superiors and the custodian's designees.
- b. A custodian's designee may include but is not limited to the records center.
- c. The custodian of a record is authorized to provide or deny access to that record in accordance with the provisions of this chapter. However, the custodian's authority to provide access to a confidential record is limited to the persons listed in subrule 4.3(2).

4.1(3) Address of records center. The address of the department's records center is: Records Center, Iowa Department of Transportation, 800 Lincoln Way, Ames, Iowa 50010.

4.1(4) Records Management Manual.

- a. The department's electronic Records Management Manual contains the records management information required by Iowa Code section 8A.615, including descriptions of department records and their formats, management, maintenance, storage, retention, security, and disposal.
- b. The manual also contains the descriptive information on records that is required by Iowa Code section 22.11. The manual is updated as needed, and its provisions are made a part of these rules.
- c. The manual is available for examination and copying at the department's records center and at various other departmental offices located throughout the state. A copy of the manual may also be obtained, upon request, from the records center.

4.1(5) Availability of open records. Open records of the department are available to the public for examination and copying unless otherwise provided by state or federal law, regulation or rule.

4.1(6) Warranty. No warranty of the accuracy or completeness of a record is made.

4.1(7) Existing records. A request for access applies only to records that exist at the time the request is made and access is provided. The department is not required to create, compile or procure a record solely for the purpose of making it available. EXCEPTIONS: See Iowa Code section 22.3A and subrule 4.3(3).

4.1(8) Definitions. As used in this chapter:

"Confidential record" means a record that is not available as a matter of right for examination and copying by members of the public under applicable provisions of law. Confidential records include

records or information contained in records that the department is prohibited by law from making available for examination by members of the public, and records or information contained in records that are specified as confidential by Iowa Code section 22.7 or another provision of law, but that may be disclosed upon order of the court, the custodian of the record, or by another person duly authorized to release the record. Mere inclusion in a record of information declared confidential by an applicable provision of law does not necessarily make that entire record a confidential record.

“Director” means the director of transportation or the director’s designee.

“Open record” means a record other than a confidential record.

“Personally identifiable information” means information about an individual in a record that identifies the individual and is retrievable by a unique personal identifier associated with the individual.

“Public” means those persons who are not officials, employees or agents of the department.

“Record” means the whole or a part of a “public record” as defined in Iowa Code section 22.1 that is owned by or in the physical possession of the department.

“Requester” means a member of the public.

This rule is intended to implement Iowa Code chapter 22 and section 8A.615.

761—4.2(22) Access to records.

4.2(1) *Submission of request for access.*

a. Submit a request for access to a record to the custodian of the record. If the requester does not know the identity of the custodian, the request may be submitted to the records center at the address in subrule 4.1(3). The records center will forward the request to the custodian.

b. Notwithstanding paragraph 4.2(1)“*a.*,” any request that may be related to a potential or an actual tort claim or other litigation is to be submitted to: Attorney General’s Office, Transportation Section, Iowa Department of Transportation, 800 Lincoln Way, Ames, Iowa 50010. If the custodian receives a request of this nature, the custodian is to forward the request to the Attorney General’s Office, Transportation Section.

c. If a request for access is misdirected, department personnel will forward the request to the custodian.

4.2(2) *Form of request.* A requester shall not be required to give reasons for requesting an open record.

4.2(3) *Response to request.* The custodian is to provide access to an open record promptly upon request. However, if the size or nature of the request makes prompt access infeasible, the custodian is to fill the request as soon as feasible and give the requester an estimate of when the record will be available.

4.2(4) *Delay.* Access to a record may be delayed for one of the purposes authorized by Iowa Code section 22.8(4) or 22.10(4). The custodian will inform the requester of the reason for the delay and the estimated length of the delay.

4.2(5) *Copies.* A photocopy of an open record may be made on department photocopiers. If a photocopier is not available in the office where an open record is kept, the custodian may permit the open record’s examination in that office and, if requested, arrange to have a copy made elsewhere. Most department records are stored in electronic formats; therefore, if the requested record is electronic, an electronic copy will be provided. If the requester is unable to open and read an electronic copy, or if the record does not exist in electronic form, a hard copy may be provided.

4.2(6) *Fees.* The department may charge fees for records as authorized by Iowa Code section 22.3 or another provision of law. Under Iowa Code section 22.3, the fee for the copying service, whether electronic or hard copy, is not to exceed the cost of providing the service.

This rule is intended to implement Iowa Code sections 22.2, 22.3, 22.4, 22.8, 22.10 and 22.11.

761—4.3(22) Access to confidential records. The following provisions are in addition to those specified in rule 761—4.2(22) and are minimum requirements. A statute or another department rule

may impose additional requirements for access to certain classes of confidential records. A confidential record may, due to its nature or the way it is compiled or stored, contain a mixture of confidential and nonconfidential information. The department will not refuse to release the nonconfidential information simply because of the manner in which the record is compiled or stored.

4.3(1) Procedure.

a. Form of request. The custodian is to ensure that there is sufficient information to provide reasonable assurance that access to a confidential record may be granted. Therefore, the custodian may require the requester to:

- (1) Submit the request in writing.
- (2) Provide proof of identity and authority to secure access to the record.
- (3) Sign a certified statement or affidavit listing the specific reasons justifying access to the record and provide any proof necessary to establish relevant facts.

b. Response to request. The custodian is to notify the requester of approval or denial of the request for access. If the requester indicates to the custodian that a written notice is desired if the request for access is denied, the custodian will provide such notice promptly. The notice is to be signed by the custodian and include:

- (1) The name and title or position of the custodian, and
- (2) A brief statement of the grounds for denial, including a citation to the applicable statute or other provision of law.

c. Reconsideration of denial. A requester whose request is denied by the custodian may apply to the director for reconsideration of the request.

4.3(2) Release of confidential records by the custodian. The custodian may release a confidential record or a portion of it:

- a.* To the legislative services agency pursuant to Iowa Code section 2A.3.
- b.* To the ombudsman pursuant to Iowa Code section 2C.9.
- c.* To other governmental officials and employees only as needed to discharge their duties.
- d.* To those persons as permitted or required by rule 761—4.9(22).
- e.* To persons authorized by the subject of the record in accordance with rule 761—4.4(22).
- f.* To the public information board pursuant to Iowa Code section 23.6.

4.3(3) Information released. If a person is provided access to less than an entire record, the department will take measures to ensure that the person is furnished only the information that is to be released. This may be done by providing to the person either an extraction of the information to be released or a copy of the record from which the information not to be released has been deleted.

This rule is intended to implement Iowa Code section 22.11.

761—4.4(22) Consent to release a confidential record to a third party. To the extent permitted by law, the subject of a confidential record may consent to the confidential record's release to a third party. The consent must be in writing and must identify the particular record that may be disclosed and the particular person or class of persons to whom the record may be disclosed. The subject of the record may be required to provide proof of identity. Appearance of counsel before the agency on behalf of a person who is the subject of a confidential record may be deemed to constitute consent for the department to disclose records about that person to the person's counsel.

This rule is intended to implement Iowa Code section 22.11.

761—4.5(22) Requests for confidential treatment.

4.5(1) A person may request that all or a portion of a record be confidential. The request must be submitted in writing to the custodian and:

- a.* Identify the information for which confidential treatment is sought.
- b.* Cite the legal basis that justifies confidential treatment.
- c.* Demonstrate that disclosure of the information would clearly not be in the public interest.

d. Give the reasons why any person or persons would be substantially and irreparably injured by disclosure of the information. The requester may be required to provide any proof necessary to support these reasons.

4.5(2) The custodian is to notify the requester in writing of the granting or denial of the request and, if denied, the reasons therefor.

4.5(3) If the request is denied, the requester may apply to the director for reconsideration of the request.

This rule is intended to implement Iowa Code sections 22.8 and 22.11.

761—4.6(22) Procedure by which additions, dissents, or objections may be entered into records.

Except as otherwise provided by law, the person who is the subject of a record may have a written statement of additions, dissents or objections entered into that record and be filed with the custodian. The statement must be dated and signed by the person who is the subject of the record and include the person's current address and telephone number. This rule does not authorize the person who is the subject of the record to alter the original record or to expand the official record of any agency proceeding.

This rule is intended to implement Iowa Code section 22.11.

761—4.7(22) Notice to suppliers of information. When the department requests a person to supply information about that person, the department will notify the person of the use that will be made of the information, which persons outside the department might routinely be provided this information, which parts of the requested information are required and which are optional, and the consequences of a failure to provide the information requested. This notice may be given in these or other rules of the department, on the written form used to collect the information, on a separate fact sheet or letter, in brochures, in formal agreements, in contracts, in handbooks, in manuals, orally, or by other appropriate means.

This rule is intended to implement Iowa Code section 22.11.

761—4.8 Reserved.

761—4.9(22) Confidential records. This rule describes the types of departmental information or records that are confidential. This rule is not exhaustive. A citation of the legal authority for confidentiality follows each description. The following records will be kept confidential. Records are listed by category, according to the legal basis for withholding them from public inspection.

Descriptions:

4.9(1) Records that are exempt from disclosure under Iowa Code section 22.7.

4.9(2) Records that constitute attorney work product, attorney-client communications, or are otherwise privileged. (Attorney work product is confidential under Iowa Code sections 22.7, 622.10 and 622.11; Iowa R.C. P. 1.503; Fed.R. Civ.P. 26(b)(3); and case law. Attorney-client communications are confidential under Iowa Code sections 622.10 and 622.11, the rules of evidence, the Iowa Rules of Professional Conduct, and case law.)

4.9(3) Those portions of the department's staff manuals, instructions or other statements issued by the department that set forth criteria or guidelines to be used by its departmental staff in auditing, making inspections, settling commercial disputes or negotiating commercial arrangements, or in the selection or handling of cases, such as operational tactics or allowable tolerances or criteria for the defense, prosecution or settlement of cases, when the disclosure of such statements would enable law violators to avoid detection, facilitate disregard of requirements imposed by law, or give a clearly improper advantage to persons who are in an adverse position to the department. (Iowa Code section 17A.2)

4.9(4) The detailed minutes and recordings of closed sessions of the commission. However, if a closed session regards a real estate purchase or sale, the minutes and recording are to be available for public inspection when the transaction discussed is completed. (Iowa Code section 21.5)

4.9(5) Vehicle accident reports submitted to the department by drivers and peace officers. (Iowa Code sections 321.266 and 321.271)

- a. However, access will be granted to those persons authorized by Iowa Code section 321.271.
- b. Reserved.

4.9(6) Unless otherwise ordered by the court, all information filed with the court for the purpose of securing a warrant for an arrest, including but not limited to a citation and affidavits, until such time as a peace officer has made the arrest and has made the officer's return on the warrant, or the defendant has made an initial appearance in court. (Iowa Code section 804.29)

a. However, the information in the record may be disseminated without court order during the course of official duties to the persons authorized in Iowa Code section 804.29 unless access to such information is expressly denied by court order.

- b. Reserved.

4.9(7) All information filed with the court for the purpose of securing a warrant for a search, including but not limited to an application and affidavits, until such time as a peace officer has executed the warrant and has made return thereon. (Iowa Code section 808.13)

a. During the period of time that information is confidential, it shall be sealed by the court, and the information contained therein shall not be disseminated to any person other than a peace officer, magistrate or other court employee, in the course of official duties.

- b. Reserved.

4.9(8) Information obtained by the department from the examining of reports, returns or records required to be filed or kept under the provisions of Iowa Code chapter 452A, except where disclosure is authorized by Iowa Code chapter 452A. (Iowa Code section 452A.63)

4.9(9) Sealed bids, until the time set for the public opening of bids, whereupon bids are unsealed and no longer confidential. (Iowa Code section 72.3)

4.9(10) Those records that, if disclosed, would diminish competition or would give an improper advantage to persons who are in an adverse position to the department. These records are to be kept confidential until the transaction to which they relate is consummated. However, if disclosure would reveal information that would hinder future competition, the records will be kept confidential. (Iowa Code sections 17A.2, 22.7 and 313.10; Iowa Code chapter 553; and 761—Chapter 20)

a. Examples of records that could, in the proper circumstances, be determined to be within this category include but are not limited to:

- (1) Detailed estimates of the cost of a proposed contract.
- (2) Economic analyses for determining pavement types.
- (3) Negotiations for a proposed contract.
- (4) Methodology for determining unfair bidding practices or bid rigging.
- (5) Price quotations solicited.
- (6) The value of points assigned to a bid rating formula prior to the time set for public opening of bids.
- (7) Laboratory testing reports of suppliers' products. These may also be trade secrets. The subject of the report has the right of access to it.

- b. Reserved.

4.9(11) Audit reviews for determining equal employment opportunity contract compliance. (Iowa Code section 22.7 and 5 U.S.C. §552 and 552a)

- a. The subject of the audit review has the right of access to it.
- b. Reserved.

4.9(12) All financial records and any information contained within them that are made available to the department, unless otherwise expressly permitted to be divulged by federal or state law. (Iowa Code sections 22.7 and 422.20 and 5 U.S.C. §552 and 552a)

4.9(13) Personal information in any motor vehicle record, including personal information contained on electronic driver's license or nonoperator's identification card records that is provided by the licensee or card holder to the department for use by law enforcement, first responders, emergency

medical service providers, and other medical personnel responding to or assisting with an emergency. (Iowa Code sections 22.7 and 321.11 and 18 U.S.C. §2721 et seq.)

a. Information other than personal information contained on electronic driver's license or nonoperator's identification card records that is provided by the licensee or card holder to the department for use by law enforcement, first responders, emergency medical service providers, and other medical personnel responding to or assisting with an emergency may be disclosed only as provided in Iowa Code sections 321.11 and 321.11A, 18 U.S.C. §2721 et seq., and 761—Chapter 301.

b. The subject of the personal information has the right of access to the information.

4.9(14) A report received by the department from a physician licensed under Iowa Code chapter 148, an advanced registered nurse practitioner licensed under Iowa Code chapter 152 and licensed with the board of nursing, a physician assistant licensed under Iowa Code chapter 148C or an optometrist licensed under Iowa Code chapter 154 regarding a person who has been diagnosed as having a physical or mental condition that would render the person physically or mentally incompetent to operate a motor vehicle in a safe manner. (Iowa Code section 321.186)

4.9(15) Privileged and personnel records or information of law enforcement officers and undercover law enforcement officers, as specified in Iowa Code sections 80G.2 and 80G.3, as well as certain records regarding undercover driver's licenses issued to certified peace officers employed by a local authority or by the state or federal law enforcement officers, as specified in 761—Chapter 625. (Iowa Code sections 22.7, 80G.2, 80G.3 and 321.189A)

a. The subject of the record and the head of the law enforcement agency employing the subject have the right of access to the record.

b. Reserved.

4.9(16) Records related to confidential plates issued for government vehicles. (Iowa Code section 321.19)

a. The head of the agency to which the vehicle is assigned has the right of access to the record.

b. Reserved.

4.9(17) Certified transcripts of labor payrolls (also known as certified payroll records) filed by contractors for federal-aid construction contracts, in accordance with the following paragraphs. (Iowa Code section 22.7, 5 U.S.C. §552 and 552a, and 42 U.S.C. §405)

a. The social security numbers in a certified payroll record are confidential. The record itself may be confidential if its release would give advantage to competitors and serve no public purpose.

b. The prime contractor and subcontractor, if applicable, that filed the record have the right of access to it.

c. Certified payroll records are to be released to the U.S. Department of Labor and Federal Highway Administration during investigations.

d. The custodian may release a certified payroll record with social security numbers withheld to representatives of the Iowa Labor Management Work Preservation Fund.

e. The custodian may release a certified payroll record with social security numbers withheld to persons outside the department other than the persons listed in paragraphs 4.9(17) "b" through "d" according to the following procedure:

(1) The request for the record must be in writing.

(2) The custodian is to send a copy of the request by registered mail to the prime contractor. If the request is for subcontractor information, the custodian is to send copies of the request to both the subcontractor and prime contractor.

(3) The requested record may be released after 14 calendar days have expired from receipt of the request by the contractor(s) to give the contractor(s) an opportunity to seek an injunction.

4.9(18) Information concerning an open or pending railroad accident investigation conducted on behalf of or in conjunction with the Federal Railroad Administration or National Transportation Safety Board to the extent necessary to prevent denial of funds, services or essential information from the United States government. (Iowa Code section 22.9)

4.9(19) A geographic computer database, except upon terms and conditions acceptable to the department. (Iowa Code section 22.2)

4.9(20) Confidential information, as defined in Iowa Code section 86.45, filed with the workers' compensation commissioner. (Iowa Code section 22.7)

4.9(21) An intelligence assessment and intelligence data under Iowa Code chapter 692, except where disclosure is required or authorized by the Iowa Code. (Iowa Code chapter 692 and Iowa Code section 22.7)

4.9(22) Information in a record that would permit the commission, subject to Iowa Code chapter 21, to hold a closed session pursuant to Iowa Code section 21.5 in order to avoid public disclosure of that information, until such time as final action is taken on the subject matter of that information or unless otherwise authorized by the Iowa Code. (Iowa Code section 22.7)

4.9(23) All other information or records that by law are or may be confidential.

This rule is intended to implement Iowa Code chapters 22, 553 and 692; Iowa Code sections 17A.2, 21.5, 72.3, 80G.2, 80G.3, 313.10, 321.11, 321.11A, 321.19, 321.186, 321.189A, 321.266, 321.271, 422.20, 452A.63, 622.10, 622.11, 804.29 and 808.13; 5 U.S.C. §552 and 552a; 18 U.S.C. §2721 et seq.; and 42 U.S.C. §405.