

# **Investigative Report 05-01**

## ***STATE OF IOWA CITIZENS' AIDE/OMBUDSMAN***



### **INVESTIGATION INTO LEE COUNTY AUDITOR'S RELEASE OF TAPE RECORDING OF BOARD OF SUPERVISORS' CLOSED SESSION**

TO: Anne Pedersen  
Lee County Auditor

FROM: William P. Angrick II  
Citizens' Aide/Ombudsman

RE: Case File 0401081

Issued: March 17, 2005

Released: April 25, 2005

## **Role of the Ombudsman**

The Office of Citizens' Aide/Ombudsman (Ombudsman) is an independent, nonpartisan, investigative agency of the Iowa General Assembly. Its powers and duties are defined in Iowa Code chapter 2C.

The Ombudsman investigates complaints against most Iowa state and local governmental agencies. The Ombudsman can investigate to determine whether agency action is unlawful, contrary to policy, unreasonable, unfair, oppressive, or otherwise objectionable. After an investigation, the Ombudsman may issue an investigative report, stating its findings and conclusions, as well as any recommendations for improving agency law, policy, or practice.

## **Complaint and Investigation**

The Ombudsman received a complaint alleging Anne Pedersen, the Lee County Auditor (Auditor), had released a cassette tape recording of a Lee County Board of Supervisors' (Board) closed session to *The Hawk Eye* newspaper reporter Matt LeBlanc, in violation of Iowa law.

The Ombudsman issued notice of investigation to the Auditor on May 14, 2004. The investigation was assigned to Assistant Citizens' Aide/Ombudsman Barbara Van Allen.

The Ombudsman interviewed the Auditor and Board members and examined records provided by them, including a cassette tape recording of the Board's September 2, 2003 closed session. The Ombudsman also reviewed relevant Iowa law, including statutes and court decisions, and the Attorney General's opinions and "Sunshine Advisory" bulletins.

## **Findings**

On or about March 2, 2004, reporter Matt LeBlanc (reporter) sent a fax to County Attorney Mike Short (County Attorney) requesting all of his correspondence with the Board from January 1, 2003 to February 1, 2004. On that date, the County Attorney informed Board Chairman Robert Woodruff (Board Chairman) about the reporter's request and his intention to release his correspondence under the belief that the documents are not privileged.

On March 3, 2004 the Board Chairman sent an e-mail to the County Attorney questioning his legal opinion about releasing documents to the public relating to the discussions during and surrounding the September 2, 2003 closed session.

On March 4, 2004 the County Attorney sent an e-mail to the Board Chairman to notify him that he has further reviewed the matter and now believes his legal opinion letters, sought by the reporter, are protected by the attorney-client privilege. He states "if either the board or Anne wished to release those letters, they would be free to do so, but I will not."

The request by the reporter to the County Attorney was not for a specific legal opinion letter; nor did he request at that time any closed session tape recording.

In response to the Ombudsman inquiry, the Auditor recounted the following:

Matt LeBlanc originally requested the *documents* from Lee County Attorney Mike Short. When Short refused his request due to attorney/client privilege, Matt LeBlanc made a verbal request for the opinion and the recording of the closed session to me on or about March 4, 2004. I spoke to Mike Short and he advised I could waive my attorney/client relationship and release his legal opinion *and also the tape of the recording of the closed session* due to the meeting being illegal and the tape not being protected. (Emphasis added.)

The Auditor purchased blank cassette tapes on March 6 and copied the recording of the September 2, 2003 closed session, after unsealing an envelope containing the recording of the closed session.

On the morning of March 8, the Auditor e-mailed the County Attorney a message stating:

On Thursday, March 4, 2004, we spoke regarding the closed session the Board held on September 2, 2003. You indicated to me that your written opinion dated October 7, 2003, on this matter would not be released to Matt LeBlanc of the Hawkeye due to your attorney/client relationship with Bob Woodruff. Because the October 7<sup>th</sup> letter was also addressed to me, you advised me that I could waive my attorney/client relationship and release the letter to Matt LeBlanc. You also advised me that the tape of the recording of the closed session was not protected due to your legal opinion that it was improperly held. Because I am the custodian of the Board's records, you advised me that it is my decision whether or not to make the tape public.

The Auditor received an immediate reply e-mail from the County Attorney stating "this is an accurate reflection of our conversation."

Also on the morning of March 8, the Auditor released the legal opinion and the copied recording to the reporter. The Auditor required him to prepare a written request for documents in her office. The Auditor told the Ombudsman that the reporter gave her a specific request for "a copy of the written opinion of Mike Short on October 7, 2003 and/or a cassette tape of the September 2, 2003 meeting."

The Auditor did not make the Board aware of the March 4, 2004 conversation between herself and the County Attorney concerning whether she could release her copy of the County Attorney's October 7, 2003 legal opinion and the September 2, 2003 closed session tape. The Auditor did not inform the Board of the reporter's verbal or written request for these records nor her intention to release them. The Auditor explained to the Ombudsman, "I did not notify the Board of Supervisors of my intent to release these items due to our adversarial relationship."

The reporter did not make any request to the Board for the legal opinion and tape recording. The Board Chairman learned of the release of these records when the reporter contacted him on the evening of March 10, 2004. The Board Chairman sent the reporter an e-mail that evening, trying to persuade him to “get all the facts” before releasing any information about the discussions related to or on the September 2, 2003 closed session.

The Board Chairman told the Ombudsman that, had the reporter contacted the Board for the legal opinion and tape recording, the reporter would have been referred to Iowa Code Section 21.5 (4) and advised to pursue enforcement of Chapter 21 by petitioning the district court.

## **Analysis and Conclusion**

The Ombudsman’s investigation focused on whether the Auditor’s release of the Board’s closed session tape recording violated Iowa’s Open Meetings Law, in particular Iowa Code section 21.5, subsection 4, which states:

A governmental body shall keep detailed minutes of all discussion, persons present, and action occurring at a closed session, and shall also tape record all of the closed session. The detailed minutes and tape recording of a closed session shall be sealed and shall not be public records open to public inspection. However, upon order of the court in an action to enforce this chapter, the detailed minutes and tape recording shall be unsealed and examined by the court in camera. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding. In determining whether any portion of the minutes or recording shall be disclosed to such a party for this purpose, the court shall weigh the prejudicial effects to the public interest of the disclosure of any portion of the minutes or recording in question, against its probative value as evidence in an enforcement proceeding. After such a determination, the court may permit inspection and use of all or portions of the detailed minutes and tape recording by the party seeking enforcement of this chapter. A governmental body shall keep the detailed minutes and tape recording of any closed session for a period of at least one year from the date of that meeting.

In the case of *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W. 2d 529 (Iowa 1980), the Iowa Supreme Court held the tape recordings of illegally closed executive sessions of a city council did not constitute public records open to public inspection. The court noted the specific limitations in the statute against release of closed session records and said these limitations “militate strongly against a release of the tapes to the general public.” The Court declined a newspaper’s request to impose a sanction that would declare the tapes to be open for public inspection. The Court noted that there are specific sanctions available in section 21.6 for violations of the open meetings law, including voiding any action taken at an illegally closed meeting.

There is no administrative remedy or sanction in Iowa Code chapter 21 authorizing a governmental body to unilaterally release tapes of a closed session, even if the meeting was closed illegally. Considering the language of section 21.5 and the decision in the *Telegraph Herald* case, the Ombudsman believes the proper remedy is to petition the court for release. Proceeding in this manner would afford any aggrieved persons the opportunity to challenge or dispute the release of the records of a closed session or any portions of such records.

This case also presents an issue of whether the Auditor is the lawful custodian of the Board's closed session records. We determine the lawful custodian of those records is the Board.

Section 21.5(4) requires a governmental body to "keep" minutes of a closed session and to tape record all of the closed session. In this case, the Board is the governmental body and the minutes and tape recording are the records of the Board. Section 331.303(2) expressly requires the Board to "[m]aintain its records in accordance with chapter 22," the public records law. Section 22.1(2) states that the "lawful custodian" is "the government body currently in physical possession of the public record," but adds that the "custodian of a public record in the physical possession of persons outside a government body is the government body owning that record." Therefore, the Board is the lawful custodian of its closed session records, as well as the minutes of all its meetings under section 21.3.

My determination is consistent with an opinion of the Iowa Attorney General which concluded a county board of supervisors is the lawful custodian of the records books that it is required to keep under section 331.303, even though the records are maintained in the physical possession of the Auditor under section 331.504(2). The opinion found the auditor merely acts as the "agent" of the board of supervisors. 1992 Op. Att'y Gen. 167.

Furthermore, it is up to the lawful custodian to "ultimately decide whether the records are open to public inspection." See, 1993 Op. Att'y Gen. 46. It was up to the Board to decide what to do with the closed session records. In situations when the Auditor is uncertain or has concerns about the release of the Board's records, the Ombudsman believes the Auditor has an implicit responsibility as an agent of the Board to inform and discuss the matter with the Board. In this incident, when the reporter requested the closed session records, and the Auditor was uncertain about their release, the Auditor should have directed the reporter to make the request to the Board or to notify or confer with the Board regarding the request.

In defense of her actions, the Auditor said she relied on the advice of the County Attorney. As to liability for violation of the open meetings law, section 21.6(4) states that: "Ignorance of the legal requirements of this chapter shall be no defense to an enforcement proceeding brought under this section. A governmental body which is in doubt about the legality of closing a particular meeting is authorized to bring suit. . . to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney for the governmental body." It is questionable whether the conversation the Auditor had with the County Attorney on March 4, 2004 and the e-mail exchanges between the two of them on March 8, 2004 constituted a formal legal opinion by the County Attorney on whether the Auditor could unseal, copy and release a copy of the September 2, 2004 closed session recording. Furthermore, even though an individual public official who reasonably relied on the opinion of the attorney for the governmental body

may be shielded from liability for monetary damages, attorney fees and costs, the governmental body can still be held accountable for the fees and costs if a violation is proven. *See, August 2004 Attorney General "Sunshine Advisory – But My Lawyer Said This Was Legal."*

The Ombudsman concludes that the Auditor's release of the Board's closed session tape recording violated section 21.5(4) of Iowa's Open Meetings Law. Given that the Board is the legal custodian of the record and the Auditor was uncertain about its release, the Ombudsman believes the Auditor had the implicit responsibility to refer the request for the Board's closed session tape recording to the Board or to notify or confer with the Board about the request.

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Re: Case File 0401081 – Written Reply

Dear Mr. Angrick:

Your investigative findings state a public official is responsible if they relied on a County Attorney's legal advice that turns out to be in error. As a public official, the County Attorney is my attorney and I must rely on his legal advice. You question whether the County Attorney's advice was a formal legal opinion. If the County Attorney had to write "a formal legal opinion" for every question he receives, it would take months to get an answer. The result would be to greatly slow down the process of County government.

You cite the case of *Telegraph Herald, Inc. v. City of Dubuque* as follows: "*the Ombudsman believes the proper remedy is to petition the court for release*". In an interview with *The Hawk Eye*, Burlington, Iowa, on June 30, 2004, you are quoted as follows (article attached):

"that Short's opinion and Pedersen's release of the tape is without precedent in Iowa".

In an article published in *The Hawk Eye*, on July 8, 2004, David Vestal, Deputy Director and legal counsel for the Iowa State Association of Counties was quoted as follows (article attached):

Vestal, speaking hypothetically, said an opinion by County Attorney Mike Short calling the closed meeting "improper" might have been the only permission needed to release the tape. He said later that only the state Supreme Court could determine whether the tape's release to area media outlets was legal.

"There's no legal precedent for deciding a precedent such as this," Vestal said. "In the first 25 years of the open meetings laws, there were, roughly, 50 attorney

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general's opinions. In the last four years, there hasn't been any, and I think that's a shame."

"I don't think that the natural result is (that) there's no other way it can be disclosed," said Vestal, adding that Dunagan should not assume that only a judge can unseal a closed-session document.

"If the county attorney, who is the auditor's lawyer, determines that it (a meeting) was not a properly constituted closed session, there would be no legal basis to refuse to disclose the contents of the tape recording," Vestal said.

With due respect to your office and position, I believe there remains considerable confusion and difference of legal *beliefs* regarding the legality of releasing a tape recording of an illegal closed session.


Referring back to the Hawk Eye article published on June 3, 2004, it states

"Also, the ombudsman's office could examine the legality of the meeting itself."

I am disappointed your investigation did not pursue this violation of the open meetings laws. By addressing only my actions and not the actions of the Lee County Board of Supervisors, it appears mine were more serious than theirs. My actions were based on legal advice and, therefore, a sincere intention to comply with Iowa Code Chapter 21. The Lee County Board of Supervisors' actions were based on an attempt to circumvent Iowa Code Chapter 21.

The Lee County Board of Supervisors was repeatedly criticized by the press with several allegations of working outside of the law. I was not willing to join in the same alleged type of activities or being painted with the same brush. The County Attorney determined the closed session on September 2, 2003, was an illegal act and advised the tape recording was therefore not protected. Being given the choice between open government and the allegation of a cover up, I followed the spirit of Chapter 21 and the advice of the County Attorney – openness.

Respectfully submitted,



Anne Pedersen



**Publication:** Hawk Eye    **Category:** Local News  
**Pub. Date:** 6/3/04    **Written By:** Matt LeBlanc  
**Pub. Page:** 2A    **Created:** 10:02:28 AM on 6/10/04

## Ombudsman investigates tape

By MATTHEW LeBLANC  
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FORT MADISON — The state ombudsman's office is investigating allegations that Lee County Auditor Anne Pedersen illegally released copies of a 2003 closed session Board of Supervisors meeting to local media in March.

State Ombudsman William Angrick said Wednesday that his staff has begun reviewing information — including news reports and interviews with county officials — surrounding the case.

"First, we want to see if we have a problem," Angrick said. "Right now, all I have is a question."

Pedersen released the tape March 8, along with a letter from Lee County Attorney Mike Short calling the meeting "improper," following a request for the information by The Hawk Eye under Iowa's open meetings laws. The information was subsequently released to other media outlets in Lee County.

Angrick's office will examine whether the release of the information was legal, but the investigation could also determine the accuracy of an opinion by Short saying that the tape of the meeting could be released. Also, the ombudsman's office could examine the legality of the meeting itself.

The investigation is currently in "very preliminary" stages, Angrick said, and no decisions have been made. There is no timeline for the probe's completion.

Supervisors held a closed session meeting Sept. 2, 2003, citing a section of Iowa law allowing closed meetings "to evaluate the professional competency" and "appointment, hiring, performance or discharge" of county employees. Short later stated in a letter to Pedersen and Supervisors Chairman Bob Woodruff that because the meeting's focus was not on the evaluation of an employee, the meeting was improperly closed.

During the meeting, the board members and Pedersen discussed transferring the position of budget director from the auditor's office to the board of supervisors.

In an e-mail to Pedersen after the request for the information was made, Short indicated the tape could be released because the meeting was not lawful.

Still, the ombudsman's office may determine whether Short's interpretation of the law is accurate. Under state law, only a court challenge can secure the release of a closed session tape. At issue is whether Short's opinion that the meeting was not legally held circumvents the need for a challenge in district court.

"I don't want to close the door as to where we might go" with the investigation, Angrick said, adding that Short's opinion and Pedersen's release of the tape is without precedent in Iowa.

"It has been my experience that the people who are seeking the information go to court," he said.

The state Citizens' Aide/Ombudsman is an independent agency under the Iowa Legislature charged with hearing and investigating allegations surrounding state, county and city governments. The agency cannot enforce legal determinations, but can issue reports critical of officials who may have violated laws.

Reports, however, are rarely published. Out of more than 4,000 allegations received annually by the agency, only about two reports are written. However, Angrick said media attention and public interest in a specific case could bring about a report.

Angrick said Pedersen has cooperated with questions posed by investigators and "has submitted a significant amount of information on this."

Two assistant ombudsmen will conduct the investigation. It remains to be seen whether a report will be published.

The issue of the release of the closed session meeting tape was referred to the ombudsman's office from the state Ethics and Campaign Disclosure Board, which received similar allegations from an anonymous caller some time in March or April. The ethics board declined to investigate the matter, saying the release of the tape did not violate the state's campaign laws.

## Tape release discussed

**Publication:** Hawk Eye    **Category:** Local News  
**Pub. Date:** 7/8/04    **Written By:** Transporter  
**Pub. Page:** 1A    **Created:** 3:08:10 PM on 7/15/04

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By MATTHEW LeBLANC

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Despite arguments from some county officials to the contrary, the release of a cassette tape of a closed-session meeting of the Lee County Board of Supervisors might have been legal, according to an attorney for a consortium of Iowa counties.

David Vestal, deputy director and legal counsel for the Iowa State Association of Counties, addressed the issue of the release by Lee County Auditor Anne Pedersen of a closed session tape during a session Wednesday for area public officials to review Iowa's open meetings and open records laws.

Vestal, speaking hypothetically, said an opinion by County Attorney Mike Short calling the closed meeting "improper" might have been the only permission needed to release the tape. He said later that only the state Supreme Court could determine whether the tape's release to area media outlets was legal.

Even if it was released illegally, there is no prescribed penalty for the offense, Vestal said.

"There's no legal precedent for deciding a precedent such as this," Vestal said. "In the first 25 years of the open meetings laws, there were, roughly, 50 attorney general's opinions. In the last four years, there hasn't been any, and I think that's a shame."

Vestal said the state attorney general's office has stopped producing opinions due to budget constraints. Attorney general opinions are not legal rulings.

Pedersen released the tape of the September 2003 meeting in March after The Hawk Eye requested it under state open records laws. Lee County Attorney Mike Short, in a 10-page letter addressed to the Board of Supervisors in October, called improper a closed meeting called by the Board of Supervisors to discuss personnel issues.

Instead, during the meeting the board discussed a policy issue of transferring the county's budget director position from the auditor's office to under the supervisor's budget.

For months, some county officials have maintained that the release of the tape was illegal under Iowa law, which states that tape recordings of closed-session meetings can be unsealed only "upon order of the court."

Dan Dunagan, a county supervisor who was part of the 2003 meeting, questioned whether the tape should have been distributed to the media based solely on the opinion of the county attorney.

"Can a county attorney and/or a county auditor override a judge's decision?" Dunagan asked.

"I don't think that the natural result is (that) there's no other way it can be disclosed," said Vestal, adding that Dunagan should not assume that only a judge can unseal a closed-session document.

Vestal's comments mark the first legal observation on the closed-session meeting since portions of the tape were published in *The Hawk Eye*. Short has been quiet on the issue since, even refusing to release his October letter to supervisors or the media, citing attorney/client privilege.

"If the county attorney, who is the auditor's lawyer, determines that it (a meeting) was not a properly constituted closed session, there would be no legal basis to refuse to disclose the contents of the tape recording," Vestal said.

During the 2003 closed session called "to evaluate the professional competency of an individual," supervisors barred the public and reporters from the meeting.

In Short's letter, however, he states that since the employee was not an employee under the Board of Supervisors' control, the meeting was improper.

"The board of supervisors had no authority to 'evaluate the professional competency' of the budget director," Short wrote, moving on to a second section of the law concerning personnel discussions. "The budget director's 'appointment, hiring, performance or discharge' was not properly considered by the board of supervisors."

Dunagan, who was present at the Wednesday gathering at the Port of Burlington, said he was not satisfied by Vestal's response. He argued that the confidence of county employees in the board would wither because discussions about county personnel could potentially become public under such opinions.

"He didn't go deep enough," Dunagan said. "It's still an attorney's opinion. Should that (opinion) justify a person's reputation being harmed? Of course it shouldn't."

However, nothing on the tape speaks directly to the competency or job performance of the budget director.

Steve Cirinna, a Montrose resident whose wife, Celeste Cirinna, ran against Pedersen in a June 8 primary election for the auditor post, also questioned the opinion. Steve Cirinna is Lee County's emergency management coordinator.

Pedersen, who also was present at the session, said she was "pleased" with Vestal's remarks.

## Ombudsman's Comments to Lee County Auditor's Reply

In her Reply, the Lee County Auditor seems to focus on her reliance on the advice of the County Attorney in defending her action to release the closed session tape recording. This misses a key issue and finding in the Ombudsman's report. The Ombudsman acknowledges the Auditor, as a public official, can seek and may rely on the formal legal opinion of the County Attorney regarding the release of the Auditor's public records. However, the Board of Supervisors is the "legal custodian" of the tape recording involved, and it was ultimately up to the Board to decide how to respond to the reporter's request and whether to seek the advice of the County Attorney.

The Auditor also claims "there remains considerable confusion and difference of legal *beliefs* regarding the legality of releasing a tape recording of an illegal closed session." As stated in the report, "[c]onsidering the language of section 21.5 and the decision in the *Telegraph Herald* case, the Ombudsman believes the proper remedy is to petition the court for release." The Auditor indicates the Ombudsman expressed a contradictory viewpoint earlier in a June 3, 2004 story in *The Hawk Eye*; the newspaper reported the Ombudsman had said that "Short's opinion and Pedersen's release of the tape is without precedent in Iowa." However, the Ombudsman was not referring to *legal* precedent, but rather his office's experience with complaints of this nature. This is evident from the ensuing quote by the Ombudsman in the newspaper story stating, "It has been my experience that the people who are seeking the information go to court." That statement is consistent with the Ombudsman's subsequent conclusion in this report.

In support of her claim, the Auditor also referenced statements made in a July 8, 2004 *The Hawk Eye* article by David Vestal, General Counsel to the Iowa State Association of Counties. The Ombudsman does not know exactly what Mr. Vestal stated at that time or the context in which he made those statements. The Ombudsman can confirm that Mr. Vestal, in a September 30, 2004 ICN Training entitled "Public Records 101" and sponsored by the Iowa Attorney General, referenced the 1992 Attorney General Opinion discussed in this report and stated the following:

If the County Auditor is not the custodian of the Board of Supervisors records, then all decisions about releasing documents would have to be made by the County Board of Supervisors and not the Auditor.

In response to a question about an Auditor releasing a tape recording of a Board of Supervisor's closed session, Mr. Vestal said:

Well, we've said the custodian of these records is technically the Board of Supervisors, so they would have to approve any release of those tapes, it would be up to them, if, unless the County Auditor has been designated as the custodian.

These statements by Mr. Vestal are consistent with the Ombudsman's analysis and conclusion.

The Auditor expressed disappointment that the Ombudsman did not investigate the Board's closed session, which the County Attorney determined to have been improperly closed. The Ombudsman did not receive a complaint on that issue and therefore did not make it a part of this investigation. That issue does not affect the Ombudsman's conclusion in this report.