

SUPREME COURT NO. 22-0452
POLK COUNTY CASE NO. EQCE086910

IN THE SUPREME COURT OF IOWA

Suzette Rasmussen,

Plaintiff-Appellee,

v.

Iowa Department of Public Health and Sarah Ekstrand,

Defendants-Appellants.

*APPEAL FROM THE POLK COUNTY DISTRICT COURT
HONORABLE JOSEPH SEIDLIN, DISTRICT COURT JUDGE*

FINAL BRIEF OF AMICI CURIAE

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IOWA CAPITAL DISPATCH, RANDY EVANS, AND IOWA FREEDOM
OF INFORMATION COUNCIL

IN SUPPORT OF PLAINTIFF-APPELLEE

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Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by counsel for amici curiae.

**STATEMENT OF IDENTITY AND INTEREST
OF AMICI CURIAE**

Collectively, amici are prominent reporters and media organizations who fulfill a vital function in our state’s democracy by investigating and reporting the news daily. Access to open records is vital to their ability to do that work. Amici are dedicated to preserving an open and accountable government and hold continuing interests in promoting the right of access to government records, including those records in the custody of the State and the IDPH. Amici are plaintiffs in related open records litigation involving the State. *See Belin v. Reynolds*, 22-0789.

Laura Belin (“Belin”) is an experienced reporter, commentator, and editor for the political blog Bleeding Heartland LLC (“Bleeding Heartland”). Bleeding Heartland is a community blog providing original reporting and commentary about Iowa politics and state government. Bleeding Heartland is a limited liability corporation, and Belin is the sole member of the Bleeding Heartland.

Clark Kauffman (“Kauffman”) is a reporter and deputy editor for the Iowa Capital Dispatch. Iowa Capital Dispatch is a hard-hitting, independent and non-profit news organization dedicated to connecting Iowans to their state government and its impact on their lives. It combines government coverage and relentless investigative journalism and dives deep in the consequences of policy, political insight, and principled commentary.

Randy Evans (“Evans”) is a reporter and the executive director for the Iowa Freedom of Information Council (“FOIC”). FOIC is a nonprofit organization of newspapers, radio and television stations, media associations, educators, publishers, broadcasters, and others interested in openness of government and First Amendment rights.

ARGUMENT

This Court should reject the State’s novel argument that Chapter 22 does not apply to electronic records and that *Horsfield Materials, Inc.*, should be overruled. Appellants’ Br. at 23; *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444 (Iowa 2013). This Court should also decline the State’s invitation to make a factual determination of the reasonableness of its delay in producing the records in light of the COVID-19 public health proclamation. Factual determinations are for the trial court to decide on a fully developed record, not for this Court to decide on an appeal of a denial of a

motion to dismiss. Finally, because the public health proclamation the State relies on expressly did not create a basis for noncompliance with electronic records, and included language that the proclamation could not be used as a basis for failure to comply with law not specifically listed, it cannot provide an ad hoc basis to dismiss Rasmussen's claims.

I. Chapter 22's Timeliness Requirement Applies to Both Electronic and Non-electronic Records.

Chapter 22 and the *Horsfield Materials, Inc.* case require a records custodian to timely provide a public record to a requestor. *Horsfield Materials, Inc.*, 834 N.W.2d at 461. Under Chapter 22, public records must be promptly provided unless the size or nature of the request makes prompt access not feasible; in that case, the record custodian must comply with the open records request as soon as feasible. *Id.* Chapter 22's timeliness requirement applies to both electronic and non-electronic records. And the Court should decline the State's invitation to overrule *Horsfield Materials, Inc.*

The delay between when the records were requested and when they were eventually produced was seventy-one days long in *Horsfield Materials, Inc.*, and records were provided only after the litigation was filed. *Id.* at 449-51. The Iowa Supreme Court held that Chapter 22 had been violated as a result of this unlawful delay:

Although section 22.10(2) speaks in terms of a refusal rather than a delay in production, we think a refusal to produce encompasses the situation where, as here, a substantial amount of time has elapsed since the records were requested and the records have not been produced at the time the requesting party files suit under the Act.

Id. at 463, n.6. Assuming without deciding that the substantial compliance test applies, the Court found that the records custodian did not substantially comply with its obligation to produce the records promptly, subject to the size and nature of the request. *Id.* at 462. In so finding, the Court reasoned that the delay between the request and production was seventy-one days, the records custodian did not produce any documents until the plaintiff filed the suit, and there was a hiatus in communication between the records custodian and the plaintiff. *Id.* Additional factors raised by the records custodian—which the Court considered but ultimately did *not* find sufficient to justify the delay—were the records custodian’s efforts to locate and produce the documents and the other business it was addressing. *Id.*

Chapter 22 applies to both electronic and non-electronic open records; it does not exempt electronic records as the State argues. *Horsfield Materials, Inc.* itself involved electronic records. In processing the open records request, the records custodian “had to go through individual employee email accounts,” “had to figure out how to get administrative rights,” and then had to “run an appropriate email search.” *Horsfield Materials, Inc.*, 834 N.W.2d

at 462. The Court discussed the relevant statutory provisions, did a thorough textual analysis, properly considered administrative guidance, and concluded that the production of the electronic records was unreasonably delayed in violation of Chapter 22. *Id.* at 459-63. The Court reaffirmed the holding that “the Open Records Act applies to electronic records” just last year. *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 550 (Iowa 2021).

The text of Chapter 22 supports, rather than undermines, the requirement of reasonable timeliness to provide both electronic and non-electronic records in response to requests. Public records are specifically defined as “*all* records, documents, tape, or other information, stored or preserved *in any medium*, of or belonging to this state. . . .” Iowa Code § 22.1(3)(a) (emphasis added). And a requestor may examine public records either by in-person or “electronic examination and copying . . . in lieu of . . . in-person examination and copying of a public record.” *Id.* § 22.2(3). Under section 23.3A, electronic public records “shall be made available” to the requestor either in the format that is commonly useable or in a different format. *Id.* § 22.3A(2)(d). If the electronic record is contained in data processing software, the “public record shall not be withheld from the public because it is combined with data processing software” and “[a] governmental body shall not acquire any electronic data processing system for the storage,

manipulation, or retrieval of public records that would impair the government body's ability to permit the examination of a public record and the copying of a public record in either written or electronic form." *Id.* § 22.3A(2)(a)-(b). The government body "shall establish policies and procedures to provide access to public records which are combined with its data processing software." *Id.* § 22.3A(2)(a). Thus, the plain language of the statute provides that Chapter 22's timeliness requirement applies to both electronic and non-electronic records.

The State makes much of the legislature amending the electronic records provisions in section 22.3A after *Horsfield Materials, Inc.* was decided. Appellants' Br. at 24-25. Chapter 22 was amended in 1996 to add new provisions, codified in section 22.3A, dealing with access to records on data processing software, which include access to electronic records. 96 Acts, ch. 1099, § 15. But nothing in the changes to section 22.3A dealing with electronic records altered the analysis that electronic records are public records, which are subject to Chapter 22's timeliness requirement.

If the Iowa legislature desired to exempt electronic records from Chapter 22's timeliness requirement, it could have done so at any time, including when the Chapter 22 was amended in 1996. However, the legislature did not exempt electronic records in 1996 nor did it do so later when it amended section 22.3A several more times. *See* 96 Acts, ch. 1099, §

15; 98 Acts, ch. 1224, § 18; 99 Acts, ch. 207, § 12; 2003 Acts, ch. 35, § 38, 49; 2011 Acts, ch. 127, § 45, 89; 2015 Acts, ch. 42, § 2. In fact, the 1996 amendment does the opposite, recognizing those things about electronic records that facilitate access and requiring public records custodians to have processes in place to facilitate that access—not, as the State urges, undermine it. Electronic records are typically easier and faster to produce than non-electronic records, not more difficult. This ease and quickness comes from the ability to index electronic records and utilize search features, which are not likely available for non-electronic records.

If the Iowa legislature truly had a problem with *Horsfield Materials, Inc.*'s holding treating electronic records the same as non-electronic records and applying the normal timeliness requirements, it would have passed an amendment that expressly provided otherwise. The 1996 amendment did not do that, nor did any other law. Under the doctrine of legislative acquiescence, the Court ““presume[s] the legislature is aware of [the Court’s] cases that interpret its statutes. When many years pass following such a case without a legislative response, [the Court] assume[s] the legislature has acquiesced in [the Court’s] interpretation.”” *State v. Iowa Dist. Ct.*, 902 N.W.2d 811, 818 (Iowa 2017) (quoting *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013)). The Court must presume the legislature was aware of

the *Horsfield Materials, Inc.* case, which interpreted Chapter 22. Since many years have passed following the *Horsfield Materials, Inc.* case without a legislative response, the Court should assume that the legislature has acquiesced in the Court's interpretation of the case.

The State's proposed holding would also undermine the purpose of Chapter 22 in requiring timely compliance, and work to read out the timeliness requirements from the statute in contravention of principles of statutory interpretation. *See Johnston v. Iowa Dep't of Transp.*, 958 N.W.2d 180, 190 (Iowa 2021) ("Canons of statutory interpretation require that every word and every provision in a statute is to be given effect, if possible, and *not* deemed mere surplusage.") (emphasis in original). There would be no production requirement if there is no timeliness requirement. The lack of a deadline in which to provide records means that any delay is permissible, which is not what the legislature intended. Therefore, the district court properly rejected the State's claim that the production of the records after the lawsuit was filed rendered the case moot. Ruling on Mot. to Dismiss at 2-3. As the district court reasoned,

[i]f this was true, then there would be no enforceable obligation to turn over public records until the responsible party or entity is sued. The Act did not intent to require citizens of this State to sue in order to obtain government records. A plain reading of all the remedies beyond compelling compliance that the Act affords, including statutory damages, attorney fees, prospective

injunctive relief and removal from office, confirms that the Act's intent was not to moot claims simply by providing the requested documents.

Id. at 2.

For these reasons, Chapter 22's requirement of timeliness applies to both electronic and nonelectronic records, and the Court should continue to follow the *Horsfield Materials, Inc.* case.

II. The Reasonableness of the State's Delay in Producing the Records in Light of the Public Health Proclamation Is a Fact Question for the Trial Court, Not for This Court on Appeal.

Whether the State reasonably delayed producing the records in this case because of the COVID-19 public health proclamation is a factual determination for the trial court. It is not a determination that this Court can or should decide on appeal as a matter of law from the denial of the State's motion to dismiss. Troublingly, the State's brief fails to discuss the standards for ruling on a motion to dismiss. But under these applicable standards, the State's request that this Court make factual findings regarding the reasonableness of delay stemming from the COVID-19 pandemic fail.

Iowa is a notice pleading state; therefore, motions to dismiss are generally disfavored. *Benskin, Inc. v. West Bank*, 952 N.W.2d 292, 296 (Iowa 2020). "Nearly every case will survive a motion to dismiss under notice pleading." *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812

N.W.2d 600, 609 (Iowa 2012) (quotation omitted). The Iowa Supreme Court has warned against using motions to dismiss as a “premature attack[] on litigation” and instead challenge cases by summary judgment or trial. *Benskin, Inc.*, 952 N.W.2d at 296 (quotation omitted). When reviewing a motion to dismiss, the court must accept the facts alleged in the petition as true. *Hawkeye Food Service Distrib., Inc.*, 812 N.W.2d at 604. In addition, the allegations are viewed “in the light most favorable to the plaintiff with doubts resolved in that party’s favor.” *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) (quotation omitted). Dismissal of a case is only proper “if the petition shows no right of recovery under any state of the facts.” *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007) (quotation omitted). Stated another way, there must be “no conceivable set of facts entitling the non-moving party to relief.” *Rees*, 682 N.W.2d at 79 (quotation omitted). If the claim’s viability is debatable, then the court should deny a motion to dismiss. *Southard*, 734 N.W.2d at 194.

Applying these principles to this appeal, the question of the reasonability of the delay at issue, and impact of the COVID-19 pandemic to that delay, is an untried factual question for the district court, which cannot be decided for the first time on appeal. Accepting the facts in the petition as true, viewing them in the light most favorable to Rasmussen, and resolving doubts

in her favor, a reasonable factfinder could find that a delay of more than five months—about twice the delay found to be unreasonable in *Horsfield Materials, Inc.*—is unreasonable, even considering COVID-19. As a result, the district court’s denial of the State’s motion to dismiss on this basis was not error at law and should be affirmed.

III. The Public Health Proclamation Did Not Exempt Electronic Records and Included Language that It Could Not Be Cited as a Basis to Fail to Comply with Law Not Specifically Listed.

The COVID-19 public health proclamation that the State relies on undermines its arguments, because it expressly carved out electronic records, and by its own terms, provided no basis to withhold or delay access to those.

During public health disaster emergencies, the Governor has the authority to issue proclamations suspending the requirements of Iowa law. *See* Iowa Const. art. IV, §§ 1 and 8; Iowa Code § 29C.6(1) and (6). In conjunction with the IDPH, the Governor issued successive COVID-19 emergency proclamations from April 1, 2020, through June 25, 2020, at 11:59 p.m., partially suspending the “requirement of the in-person examination or copying of public records” under Iowa Code sections 22.2(1) and 22.3(1) “to the extent those records can be examined and copies provided by mail or electronic means.” Proclamation of Disaster Emergency, Apr. 10, 2020, at 9, <http://publications.iowa.gov/32378/1/Public%20Health%20Proclamation%2>

[0-%202020.04.10%20%282%29.pdf](#); Proclamation of Disaster Emergency,

Apr. 27, 2020, at 24,

<https://publications.iowa.gov/32389/1/Proclamation04272020.pdf>;

Proclamation of Disaster Emergency, May 26, 2020, at 28,

[https://publications.iowa.gov/32446/1/Public%20Health%20Proclamation%](https://publications.iowa.gov/32446/1/Public%20Health%20Proclamation%20-%202020.05.26.pdf)

[20-%202020.05.26.pdf](#). The provisions of section 22.4 were suspended only

“to the extent those provisions require a lawful custodian of records to maintain office hours to receive in-person records requests, so long as the custodian has posted clear direction for making requests in writing, by telephone, or by electronic means in a prominent place that is easily accessible to the public.” *See id.*

Starting on June 25, 2020, the Governor modified the partial suspension of provisions of Chapter 22 by eliminating the suspension of sections 22.2(1) and 22.3(1) and continuing the suspension of section 22.4. *See* Proclamation

of Disaster Emergency, June 25, 2020, at 22

<https://publications.iowa.gov/32812/1/Public Health Proclamation ->

[2020.06.25.pdf](#). An identical version of this partial suspension of Chapter 22

appeared in successive proclamations that ultimately expired on July 25,

2021, at 11:59 p.m.⁵ Subsequent to July 25, 2021, the Governor did not issue any proclamations that partially suspended provisions of Chapter 22. At no

⁵ See Proclamation of Disaster Emergency, July 24, 2020, at 21, <https://publications.iowa.gov/33099/1/Public%20Health%20Proclamation%20-%202020.07.24.pdf>; Proclamation of Disaster Emergency, Aug. 21, 2020, at 21, https://publications.iowa.gov/33531/1/Public%20Health%20Proclamation%20-%202020.08.21_0.pdf; Proclamation of Disaster Emergency, Sept. 18, 2020, at 23, <https://publications.iowa.gov/33881/1/Public%20Health%20Disaster%20Proclamation%20-%202020.09.18.pdf>; Proclamation of Disaster Emergency, Oct. 16, 2020, at 20-21, <https://publications.iowa.gov/34413/1/Public%20Health%20Proclamation%20-%202020.10.16.pdf>; Proclamation of Disaster Emergency, Nov. 10, 2020, at 22-23, <https://publications.iowa.gov/34414/1/Public%20Health%20Proclamation%20-%202020.11.10%20%281%29.pdf>; Proclamation of Disaster Emergency, Dec. 9, 2020, at 25, <https://publications.iowa.gov/34731/1/Public%20Health%20Proclamation%20-%202020.12.09.pdf>; Proclamation of Disaster Emergency, Jan. 7, 2021, at 23-24, <https://publications.iowa.gov/35076/1/Public%20Health%20Proclamation%20-%202021.01.07.pdf>; Proclamation of Disaster Emergency, Feb. 5, 2021, at 16-17, <https://publications.iowa.gov/35190/1/Public%20Health%20Proclamation%20-%202021.02.05ocr.pdf>; Proclamation of Disaster Emergency, Mar. 5, 2021, at 17-18, https://publications.iowa.gov/35571/1/Public%20Health%20Proclamation%20-%202021.03.05_OCR.pdf; Proclamation of Disaster Emergency, Apr. 2, 2021, at 16, <https://publications.iowa.gov/35665/1/PH%20Proclamation%20-%202021.04.02.pdf>; Proclamation of Disaster Emergency, Apr. 30, 2021, at 17, <https://publications.iowa.gov/35978/1/Public%20Health%20Proclamation%20-%202021.04.30.pdf>; Proclamation of Disaster Emergency, May 27, 2021, at 12, <https://publications.iowa.gov/36222/1/Public%20Health%20Proclamation%20-%202021.05.27.pdf>

time did the Governor suspend the obligation to comply with Chapter 22 when it came to the request or examination of electronic records, such as the electronic records that Rasmussen requested. The Governor had the authority to suspend the requirements of Chapter 22 concerning electronic records during the pandemic. However, the Governor did not so do. And the Governor cannot do so after the fact.

Further, each of the proclamations that partially suspended the requirements of Chapter 22 included implementation and interpretation language. Specifically, the proclamations provided that “[n]othing contained in this declaration shall be construed as an exemption from *any other portion* of the Iowa Code or Iowa Administrative Code not specifically identified in this proclamation.”⁶ Therefore, because electronic records were not

[20-%202021.05.27.pdf](#); Proclamation of Disaster Emergency, June 25, 2021, at 11, <https://governor.iowa.gov/sites/default/files/documents/COVID%20Disaster%20Proclamation%20-%206.25.2021.pdf>.

⁶ Proclamation of Disaster Emergency, Apr. 10, 2020, at 10, <http://publications.iowa.gov/32378/1/Public%20Health%20Proclamation%20-%202020.04.10%20%282%29.pdf>; Proclamation of Disaster Emergency, Apr. 27, 2020, at 31, <https://publications.iowa.gov/32389/1/Proclamation04272020.pdf>; May 26, 2020, at 34, <https://publications.iowa.gov/32446/1/Public%20Health%20Proclamation%20-%202020.05.26.pdf>; Proclamation of Disaster Emergency, July 24, 2020, at 27, <https://publications.iowa.gov/33099/1/Public%20Health%20Proclamation%20-%202020.07.24.pdf>.

<https://publications.iowa.gov/33531/1/Public%20Health%20Proclamation%20-%202020.07.24.pdf>; Proclamation of Disaster Emergency, Aug. 21, 2020, at 27,

https://publications.iowa.gov/33531/1/Public%20Health%20Proclamation%20-%202020.08.21_0.pdf; Proclamation of Disaster Emergency, Sept. 18, 2020, at 29,

<https://publications.iowa.gov/33881/1/Public%20Health%20Disaster%20Proclamation%20-%202020.09.18.pdf>; Proclamation of Disaster Emergency, Oct. 16, 2020, at 27,

<https://publications.iowa.gov/34413/1/Public%20Health%20Proclamation%20-%202020.10.16.pdf>; Proclamation of Disaster Emergency, Nov. 10, 2020, at 29,

<https://publications.iowa.gov/34414/1/Public%20Health%20Proclamation%20-%202020.11.10%20%281%29.pdf>; Proclamation of Disaster Emergency, Dec. 9, 2020, at 31,

<https://publications.iowa.gov/34731/1/Public%20Health%20Proclamation%20-%202020.12.09.pdf>; Proclamation of Disaster Emergency, Jan. 7, 2021, at 29,

<https://publications.iowa.gov/35076/1/Public%20Health%20Proclamation%20-%202021.01.07.pdf>; Proclamation of Disaster Emergency, Feb. 5, 2021, at 22,

<https://publications.iowa.gov/35190/1/Public%20Health%20Proclamation%20-%202021.02.05ocr.pdf>; Proclamation of Disaster Emergency, Mar. 5, 2021, at 22,

https://publications.iowa.gov/35571/1/Public%20Health%20Proclamation%20-%202021.03.05_OCR.pdf; Proclamation of Disaster Emergency, Apr. 2, 2021, at 22,

<https://publications.iowa.gov/35665/1/PH%20Proclamation%20-%202021.04.02.pdf>; Proclamation of Disaster Emergency, Apr. 30, 2021, at 21,

<https://publications.iowa.gov/35978/1/Public%20Health%20Proclamation%20-%202021.04.30.pdf>; Proclamation of Disaster Emergency, May 27, 2021, at 16,

<https://publications.iowa.gov/36222/1/Public%20Health%20Proclamation%20-%202021.05.27.pdf>; Proclamation of Disaster Emergency, June 25, 2021, at 16,

<https://governor.iowa.gov/sites/default/files/documents/COVID%20Disaster%20Proclamation%20-%206.25.2021.pdf>. (emphasis added).

specifically identified in the partial suspension under the COVID-19 public health proclamations, the requirement remained that electronic public records were subject to disclosure.

In summary, the State cannot point to the existence of the public health emergency or proclamations issued thereunder as a basis not to comply with Chapter 22 in the examination of electronic records.

CONCLUSION

The district court's denial of the State's motion to dismiss was correct and should be affirmed on appeal. Chapter 22's timeliness requirement encompasses both electronic and non-electronic records consistent with the text of the statute, *Horsfield Materials, Inc.*, and *Ripperger*. This Court should also reserve the factual issue of the reasonableness of the State's delay in producing the records in light of a COVID-19 public health proclamation for the trial court. The COVID-19 public health proclamation provides no legal basis to withhold or delay electronic public records.

Respectfully submitted,

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COST CERTIFICATE

I hereby certify that the cost of printing this application was \$0.00 and that that amount has been paid in full by the ACLU of Iowa.

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