No. 22-0452
Polk County No. EQCE086910

IN THE
SUPREME COURT OF IOWA

SUZETTE RASMUSSEN,
Plaintiff – Appellee,

v.

IOWA DEPARTMENT OF PUBLIC HEALTH AND
SARAH EKSTRAND,
Defendants - Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
JOSEPH SEIDLIN, DISTRICT COURT JUDGE

FINAL BRIEF FOR APPELLEE

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PROOF OF SERVICE & CERTIFICATE OF FILING

On December 5, 2022, I served this brief on all other parties by EDMS to their respective counsel, and I emailed a copy of this brief to appellee.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on December 5, 2022.

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CASES

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ROUTING STATEMENT

Because this case presents substantial issues of first impression and urgent issues of broad public importance., the Iowa Supreme Court should retain jurisdiction. Iowa R. App. P. 6.1101(2)(f).

STATEMENT OF THE CASE

In July 2021, Suzette Rasmussen filed a petition in the Iowa District Court for Polk County against the Iowa Department of Public Health and its custodian of records, Sarah Ekstrand, alleging violations of Iowa Code chapter 22, the Iowa Open Records Act. (App. at 4). In August 2021, *after Rasmussen filed her lawsuit*, the Department and Ekstrand produced the records to her request. (App. at 8-9). Thereafter, the Department and Ekstrand filed a motion to dismiss, asserting that Rasmussen's claim became moot after they produced the responsive records. (App. at 9).

In response, Rasmussen filed an amended petition asserting an Open Records Act violation arising out of the delayed production of records. (App. at 11). The Department and Ekstrand renewed their motion to dismiss on mootness grounds. (App. at 19). In addition, they claimed that Rasmussen lacked standing to obtain any statutory remedies other than attorney fees. (App. at 19). Following a hearing on these issues, the

district court entered an order denying the motion to dismiss. (App. at 85-86). This interlocutory appeal followed.

STATEMENT OF THE FACTS

In 2020, the COVID-19 swept through countries around the world. In April 2020, the State of Iowa awarded a $26 million contract to Utah entities Nomi Health, Dom, Inc., and Co-Diagnostics to run its Test Iowa program. (App. at 12). On March 11, 2021, Suzette Rasmussen submitted a public record request pursuant to Iowa Code chapter 22 to the Iowa Department of Public Health requesting all correspondence between the Department, the Iowa Governor's Office, Utah state officials, Nebraska state officials, and Tennessee state officials regarding the Test Iowa contract. (App. at 12). On April 14, 2021, Sarah Ekstrand sent an email to Rasmussen indicating that she anticipated fulfilling the request within five days. (App. at 12).

On May 26, 2021, Rasmussen asked to supplement her original request to include "IDPH communications regarding NOMI Health contract from March 20, 2020 to March 11, 2021." (App. at 12). Two days later, she sent an email to Ekstrand

confirming the redefined search and identifying additional key words relevant to the search. (App. at 12).

Rasmussen followed up with several emails to Ekstrand regarding the status of her request, including emails on June 8, 2021, and July 14, 2021. (App. at 12). On July 20, 2021, Ekstrand indicated that the records were in final review, and she anticipated being able to release them soon. (App. at 12). On July 29, 2021, Rasmussen filed this lawsuit alleging the failure to produce the records violated the Iowa Open Records Act. (App. at 4). On August 19, 2021. Ekstrand provide Rasmussen with one hundred fifty-eight documents responsive to her request. (App. at 13). Eight days later, Ekstrand provided Rasmussen with an additional fourteen hundred documents and notified her that the Department had produced all documents responsive to her May 28, 2021, request. (App. at 13)

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED THE MOTION TO DISMISS BECAUSE RASMUSSEN'S OPEN RECORDS VIOLATION CLAIM PRESENTS SEVERAL LIVE AND JUSTICIABLE ISSUES NOTWITHSTANDING THE DEPARTMENT'S PRODUCTION OF RECORDS

Error Preservation

The Department and Ekstrand preserved error on their mootness claim by moving to dismiss and obtaining a ruling from the court on the issues presented. (App. at 19, 81).

Standard of Review

The Court reviews rulings on motions to dismiss for correction of errors of law. *Enskin v. Inc. v. W. Bank*, 952 N.W.2d 292, 298 (Iowa 2020).

Analysis

A. Applicable Legal Principles

Iowa's Open Records Act, Iowa Code section 22.1 *et seq.*, provides that "[e]very person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." Iowa Code § 22.2. The purpose of the statute is to open the doors

of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011) (quoting *Rathman v. Bd. of Dirs.*, 580 N.W.2d 773, 777 (Iowa 1998)). "Accordingly, there is a presumption of openness and disclosure under this chapter." *Id.* (quoting *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996)).

The Act initially places the burden of showing three things on the party seeking enforcement. That party must "demonstrate[] to the court that the defendant is subject to the requirements of this chapter, that the records in question are government records, and that the defendant refused to make those government records available for examination and copying by the plaintiff." Iowa Code § 22.10(2). Once the plaintiff makes these showings, the defendant has the burden to show compliance, and the Court must issue an injunction if it finds the defendant has not complied by a preponderance of the evidence. *Id.* § 22.10(3)(a); *see also Diercks*, 806 N.W.2d at 653 ("Once the citizen

shows the city denied his or her request to access government records, the burden shifts to the city to demonstrate it complied with the chapter's requirements").

While the Act does not expressly place upon the records custodian a deadline by which to make the records available for inspection, section 22.4 states that "[t]he rights of persons under this chapter may be exercised at any time during the customary office hours of the lawful custodian of the records." Iowa Code § 22.4. The Iowa Supreme Court has interpreted this provision to mean that "our legislature contemplated immediate access to public records." *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 461 (Iowa 2013). Similarly, a longstanding interpretation of chapter 22 states that open records requests should be provided as soon as feasible:

> Access to an open record shall be provide *promptly* upon request unless the size or nature of the request makes prompt access *infeasible*. If the size or nature of the request for access to an open record requires time for compliance, the custodian shall comply with the request *as soon as feasible*.

See Iowa Uniform Rules on Agency Procedure, Fair Information Practices, Agency No. X.3 (17A,22) (emphasis added);[1] *see also Griffin Pipe Prods. Co. v. Bd of Review*, 789 N.W.2d 769, 775 (Iowa 2010) ("Longstanding administrative interpretations are entitled to some weight in statutory construction"). Thus, a records custodian does not comply with the requirements of the Act merely by producing requested records. To the contrary, it has a "legal obligation to produce the records promptly, subject to the size and nature of the request." *Horsfield Materials, Inc.*, 834 N.W.2d at 462.

The Act provides a slew of statutory remedies for violations. First, the Act provides that a court "[s]hall issue an injunction punishable by civil contempt ordering the offending lawful custodian and other appropriate person to comply . . . and, if appropriate, may order the lawful custodian and other appropriate persons to refrain for one year from any future violations." Iowa Code § 22.10(3)(a). Second, the Act directs the court to "assess the

[1] A*vailable* at www.legis.iowa.gov/DOCS/Rules/Current/UniformRules.pdf (last accessed Nov. 10, 2022)(emphasis added).

persons who participated in the violation damages in the amount of not more than five hundred dollars and not less than one hundred dollars. However, if a person knowingly participated in such a violation, damages shall be in the amount of not more than two thousand five hundred dollars and not less than one thousand dollars." *Id.* § 22.10(3)(b). Third, the court "[s]hall order the payment of all costs and reasonable attorney fees, including appellate attorney fees, to any plaintiff successfully establishing a violation." *Id.* §22.10(3)(c). Lastly, the court "[s]hall issue an order removing a person from office if that person has engaged in a prior violation of this chapter for which damages were assessed against the person during the person's term." *Id.* § 22.10(3)(d).

B. Rasmussen's claim is not moot because she seeks relief in the form of statutory damages, injunctive relief, and attorney fees

The Department and Ekstrand initially seek dismissal on the basis that Rasmussen's claim was moot because the requested records were produced after commencement of the lawsuit. The mootness doctrine has its roots in Article III of the United States Constitution, limits the jurisdiction of federal courts to "Cases"

and "Controversies." The Iowa Constitution, however, contains no similar analog. *Hawkeye Bancorp. V. Iowa Coll. Aid. Comm'n*, 360 N.W.2d 798, 801-802 (Iowa 1985). Despite the lack of any textual basis to support it, the Iowa Supreme Court has adopted a case-or-controversy requirement similar to the federal requirement. *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 869 (Iowa 2005).

"The doctrine of standing generally assesses whether [a personal interest in the dispute] exists at the outset, while the doctrine of mootness considers whether it exists throughout the proceedings." *Uzuegbunam v. Preczeewski*, ___ U.S. ___, 141 S. Ct. 792, 796 (2021). "In general, an action is moot if it no longer presents a justiciable controversy because the issues involved have become academic or nonexistent." *Buchhop v. Gen. Growth Properties & Gen. Growth Mgmt. Corp.*, 235 N.W.2d 301, 301 (Iowa 1975). The "test of mootness is whether an opinion would be of force or effect in the underly controversy." *Grinnell College v. Osborn*, 751 N.W.2d 396, 399 (Iowa 2008). Thus, a case becomes moot "only when it is *impossible* for a court to grant any effectual relief whatever." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)

(emphasis added). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.*

Rasmussen's statutory claim is not moot, despite the Department's production of records, for several reasons. For starters, Rasmussen is entitled to statutory damages upon a finding that defendants failed to substantially comply with the Act. When a "plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608-609 (2001). "For better or worse, nothing so shows a continuing state in a dispute's outcome as a demand for dollars and cents." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. ___, 139 S. Ct. 1652, 1660 (2019). "If there is any chance of money changing hands, [the] suit remains live." *Id.* Indeed, a case is not moot, even if the only available remedy is $1. *Uzuegbunam*, ___ U.S. ___, 141 S. Ct. at 802-803 (holding that nominal damages are sufficient to defeat dismissal on mootness grounds where a plaintiff's claim is based on a

completed violation of a legal right). That is because a "judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992).

Rasmussen's claim remains viable for another reason—she seeks prospective injunctive relief to which she is entitled under the Act. "Courts are skeptical when a defendant seeks dismissal of an injunctive claim as moot on the ground that it has changed its practice while reserving the right to go back to its old ways after the lawsuit is dismissed." *Ciarpaglini v. Norwood*, 817 F.3d 541, 544 (7th Cir. 2016). Accordingly, the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). Any subsequent self-serving statement suggesting the Department has reformed its freedom-of-information practices is simply not credible. Case in point – on January 7, 2021, in a recorded interview with the Iowa Capitol

Press Association President Erin Murphy, Governor Reynolds acknowledged her administration's past failure to respond timely to open records requests and made a commitment to responding in a timely manner going forward.[2] Governor Reynolds' pledge came a full two months prior to Rasmussen's open records request, which was not fulfilled until 169 days later. Moreover, the Department's conduct in delayed production appears to be part of a pattern within Iowa's executive branch. This Court can take judicial notice that Rasmussen has filed two other lawsuits based on the executive branch's refusal to produce records to which she was entitled until after she had to file a lawsuit seeking enforcement. *See Rasmussen v. Reynolds*, CVCV062318 (Iowa Dist. Ct. Polk Cty); *Rasmussen v. Reynolds*, CVCV062322 (Iowa Dist. Ct. Polk Cty.); *see also Belin v. Reynolds*, CVCV062945 (Iowa Dist. Ct. Polk Cty.).

Lastly, Rasmussen seeks statutory attorney fees. Even where production of records moots the question of whether a

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[2] Erin Murphy, Interview with Governor Kim Reynolds, (Iowa Capitol Press Ass'n January 7, 2021), *available at* https://www.youtube.com/watch?v=-T39kSB1MeI (last accessed 11/11/22).

plaintiff is entitled to the records, it does not moot the claim to statutory attorney fees. *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App.3d 778, 780-82 (Ill. App. Ct. 1999); *see also Roxana Cmty. Unit. Sch. Dist. No. 1 v. EPA*, 998 N.E.2d 961, 969 (Ill. App. Ct. 2013) ("in accord with *Duncan*, plaintiffs' request for attorney fees and a civil penalty survive"). For these reasons, the district court correctly denied the motion to dismiss on mootness grounds.

C. The *Horsfield Materials, Inc.* decision demonstrates why Rasmussen's claim is not moot

The Department and Ekstrand's contention that a belated production of records moots a statutory cause of action for violating Chapter 22 cannot be squared with the Iowa Supreme Court's decision in *Horsfield Materials, Inc.* In that case, the plaintiff submitted an open records request to the City of Dyersville on January 11, 2010. *Horsfield Materials, Inc.*, 834 N.W.2d at 450. The City did not produced documents in response to the request until April 6, 2010. *Id.* at 451. The plaintiff filed a claim alleging that the City's delay in producing the records violated the Iowa Open Records Act. *Id.* at 459. The Iowa

Supreme Court held that the City's delayed production did not "substantially compl[y] with its obligation to produce public records promptly." *Id.* at 462.

The *Horsfield Materials, Inc.* decision is controlling. Just as in this case, the claim in *Horsfield Materials, Inc.* involved the delayed production of records materials subject to public disclosure under the Act. Notwithstanding the fact that the City produced the records during the pendency of the lawsuit, the Iowa Supreme Court reached the merits of the alleged violation of the Act. *Id.* at 463. Even where no party raises the mootness issue, the Iowa Supreme Court "has responsibility *sua sponte* to police its own jurisdiction." *Bribriesco-Ledger v. Klipsch*, 957 N.W.2d 646, 649 (Iowa 2021); *Rieff v. Evans*, 639 N.W.2d 278, 285 (Iowa 2001) ("if our court felt we lacked jurisdiction . . . we could have raise that on our own motion"). If production of the records mooted the plaintiff's lawsuit, surely the Iowa Supreme Court would have said so. *See Birbriesco-Ledger*, 957 N.W.2d at 649 (considering sua sponte whether the claim was moot on appeal); *State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 432 (Iowa 2021)

(invoking sua sponte the "political question doctrine" even though neither party mentioned the doctrine in their district court and appellate briefs); *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 473 n.1 (Iowa 2004) (district court raised standing issue sua sponte). From *Horsfield Materials, Inc.*, it follows *a fortiori* that Rasmussen's claim is not moot simply because the Department produced the documents when the production was untimely.

The Department and Ekstrand try to overcome *Horsfield Materials, Inc.* by citing to the court of appeals decision in *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011), for the proposition that supplying records renders a public records lawsuit moot. Their reliance on *Neer* is misplaced for three reasons. First, *Neer* is an unpublished opinion, and therefore, it is not controlling authority. Second, the court in *Neer* invoked the public importance exception to the mootness doctrine. As a result, the court expressly declined to decide whether prospective injunctive relief, statutory damages, and attorney fees "remained viable after the State's voluntary production of the requested

information." *Id.* at *3. Accordingly, the *Neer* court's mootness analysis is classic *orbiter dictum*. Third, *Neer* is not doctrinally sound. In summarily passing over the mootness issue, the court cited to *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002), as holding that a belated production of records moots a FOIA claim. *Id.* In this way, the court of appeals misreads the breath of the *Papa* holding. The original federal from which *Papa* follows is limited to cases in which the only relief sought by the complaining party is production of records.[3] Here, Rasmussen seeks a declaration that the Department and Ekstrand violated the Open Records Act along with an award of statutory injunctive relief and damages. Finally, Iowa Supreme Court's more recent decision in *Horsfield Materials, Inc.*, in which the court reached

[3] The court in *Papa* cites to the decision in *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982). *See Papa*, 281 F.3d at 1013 n.42. *Perry* cites to the decision in *Crooker v. United States State Dept.*, 628 F.2d 9, 10 (D.C. Cir. 1980), which, in turn, cites to *Ackerly v. Ley*, 420 F.2d 1336, 1340 (D.C. Cir. 1969). The mootness finding in *Ackerly* turned upon the fact that the only remedy the plaintiff sought was compelled production. *See Ackerly*, 420 F.3d at 1340 ("In any event, we think the lawsuit lost its substance at to this item, *since the only specific relief appellant seeks is compelled disclosure and that has been rendered moot by the disclosure in this instance which has now actually been made*") (emphasis added).

the merits of the alleged statutory violation notwithstanding the belated disclosure by the records custodian undermines *Neer's* mootness analysis. In all these respects, the *Neer* decision offers no guidance.

D. The Department and Ekstrand's statutory construction argument was not preserved in the court below

Implicitly waving the white flag on the mootness issue, the Department and Ekstrand argue – *for the first time on appeal* – that chapter 22 treats an agency's duty to produce electronic records differently than non-electronic records. (Appellants' Br. at 23). But, their argument fails out of the starting gate because they did not raise it in the court below. Neither their motion to dismiss, nor their supporting brief argues that chapter 22 applies differently to electronic records. (App. at 19, 28). Likewise, the district court's ruling on their motion makes no mention of differing standards for electronic records. (App. at 81). The Department and Ekstrand filed a motion to enlarge, but they did not raise the issue in the motion. (App. at 88). Accordingly, they cannot now change horses in midstream. *Clark v. Estate of Rice*

ex. rel. Rice, 653 N.W.2d 166, 171-72 (Iowa 2002) (holding that appellant cannot change theory on appeal to pursue an argument that was not made in the district court); *see also Felderman v. City of Maquoketa*, 731 N.W.2d 676, 679 (Iowa 2007) (declining to address issue raised for the first time on appeal).

In any event, the Department and Ekstrand are wrong in their interpretation of chapter 22. Iowa's Open Records Act gives every person the right to inspect, copy, and disseminate public records and their content. Iowa Code § 22.2. "Public records" include information "stored or preserved in any medium." *Id.* § 22.1(3). By definition, therefore, the right to access public records necessarily includes the right to inspect, copy, and disseminate electronic records. The statutory provisions upon which the Department and Ekstrand rely – sections 22.2(4) and 22.3A – involve the public's right to access the underlying "data processing software." *Id.* §§ 22.2(4), 22.3A. These sections simply clarify that the right to public records does not give the public power to commandeer the underlying software used to store and retrieve an electronic record. *Id.* The Department and Ekstrand's argument

that these provisions exempt electronic records from the timeliness requirement of chapter 22 is borderline frivolous.

E. Any mootness problem should be excused because Rasmussen's claim presents an issue of great public importance that is capable of repetition yet will evade review

Even if the Court determines that Rasmussen's claim is moot, it should still consider the issues presented under the public interest exception. *Dubuque v. Public Employment Relations Bd.*, 339 N.W.2d 827, 831 (Iowa 1983). Under the exception, the Court "may still conder a [moot issue] if it is of great public importance and likely to recur." *Id.* There can be no meaningful dispute that timely production of records pertaining to the State's pandemic testing regime is a matter of great public importance. And, if the Department's hide-and-go-seek interpretation prevails, an aggrieved party will never be able to obtain the statutory remedies afforded under the Iowa Open Records Act. Imagine a public records statute whose transparency mandates mean nothing. That is exactly the scenario the Department and Ekstrand ask this Court to endorse. Taking their argument to its logical conclusion, a nefarious public agency can intentionally ignore a

records request until the requestor files a lawsuit – only to moot the litigation simply by producing the records prior to entry of judgment. Looking beyond this case, violations of the Iowa Open Records Act will go unremedied and government officials will have a blueprint for shirking their statutory obligations and avoiding any accountability. That cannot be right. Accordingly, the Court should not dismiss Rasmussen's claim on mootness grounds.

F. The Department and Ekstrand's defense as to the timeliness of their records production presents a question of fact that cannot be decided as a matter of law at the motion to dismiss stage

The Department and Ekstrand next claim that their response was not unreasonable because the request was made "during an unprecedented *public health disaster emergency*." (Appellant Br. at 26). Essentially, they ask the Court to decide the merits of the case on the pleadings. But, that is not how Rule 1.421 works. To the contrary, a motion to dismiss that simply requests a judgment on the pleadings is disfavored in Iowa:

> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing

> rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal.

Rees v. City of Shenandoah, 682 N.W.2d 77, 79 (Iowa 2004). "The only issue when considering a motion to dismiss is the petitioner's right of access to the district court, not the merits of his allegations." *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 604 (Iowa 2012). In other words, there must be "no conceivable set of facts entitling the non-moving party to relief." *Rees*, 682 N.W.2d at 79. The Department and Ekstrand's argument in this regard present the facts as they would like the ultimate factfinder to except and ignores Rasmussen's well pleaded facts. "Such a mode of presentation is unhelpful to the court." *Vodak v. City of Chicago*, 639 F.3d 738, 740 (7th Cir. 2011). It is also fatal to their motion to dismiss. Because the facts alleged on Rasmussen's complaint are sufficient to state grounds upon which relief may be granted, the district court correctly denied their motion to dismiss.

II. THE IOWA OPEN RECORDS ACT EXPRESSLY CONFERS STANDING ON RASMUSSEN TO PURSUE HER CLAIM

Error Preservation

The Department and Ekstrand preserved error by moving to dismiss and obtaining a ruling from the court on the issues presented. (App. at 19, 95).

Standard of Review

The Court reviews rulings on motions to dismiss for correction of errors of law. *Enskin*, 952 N.W.2d at 298.

Analysis

As their fallback defense, the Department and Ekstrand claim that Rasmussen lacks standing to seek injunctive relief and statutory damages.[4] To establish standing, a plaintiff must show that she has suffered an "injury in fact" traceable to the defendant's conduct that is likely to be redressed by a favorable court ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is "a general and indisputable rule, that where there is

[4] The Department and Ekstrand concede that Rasmussen has standing to seek attorney fees under chapter 22. (Appellants' Br. at 28).

a legal right, there is also a legal remedy." *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 66 (1992) (quoting 3 William Blackstone, *Commentaries* 23 (1783)). Here, the Department and Ekstrand deprived Rasmussen of timely access to public records as required under chapter 22. The deprivation of "information which must be publicly disclosed pursuant to a statue" is sufficient to confer standing upon the requesting party. *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

The Department and Ekstrand challenge Rasmussen's standing to seek statutory damages on the basis that an award would not redress her injury because the damages are paid to the state of Iowa; not her. Iowa Code § 22.10(3)(b). Under their logic, the only party that would ever have standing to bring a claim for

statutory damages against them under section 22.10 would be the state of Iowa itself. That is nonsensical.[5]

It also overlooks that Rasmussen's pursuit of the statutory remedies under chapter 22 is, in essence, a proceeding in the public interest. In *Dickey*, the Iowa Supreme Court recognized the "loosening of traditional standing" requirements in cases that proceed in "the public interest." *Dickey*, 954 N.W.2d at 432. As with the quo warranto action at issue in *Dickey*, an open records violation lawsuit "is strictly statutory in character." *Id.* Similarly, like in *Dickey*, section 22.10 contains no standing requirement beyond being "an aggrieved person." *Id.*; Iowa Code § 22.10(1).

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[5] The Department and Ekstrand's argument is also incongruent. They acknowledge that the attorney general and county attorney would have standing to recover statutory damages under section 22.10 because they are enumerated as parties that may "seek judicial enforcement." (Appellants Br. at 31). This acknowledgement concedes the question presented because section 22.10 equally enumerate Rasmussen as a party that may seek judicial enforcement as an "aggrieved party." Iowa Code § 22.10. Neither the attorney general, nor the county attorney, would personally receive the statutory damages. Nothing in the statute's text states that they attorney general or county attorney are merely parties to bring a claim on behalf of the state. In all respects, Rasmussen's statutory right to seek the remedies in section 22.10 is the same as the attorney general or county attorney—both of which admittedly have standing.

Accordingly, any litigant who "can articulate a colorable interest in the subject matter" has standing to seek redress. *See id.* Here, there can be no meaningful dispute that Rasmussen's has a colorable interest in timely receipt of the records under chapter 22.

The Department and Ekstrand's attack on Rasmussen's standing to seek injunctive relief is equally unavailing. The gist of their argument is that her request for an injunction lacks merit. But, "standing does not depend on the legal merits of the claim." *Godfrey v. State*, 752 N.W.2d 413, 420 (Iowa 2008). In this way, the Department and Ekstrand attempt an end-run judgment on the pleadings. While the district court may determine that Rasmussen's request for injunctive relief is not warranted, such a determination cannot be determined at the pre-answer motion to dismiss stage.

CONCLUSION

For the reasons set forth above, the district court's ruling must be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellee requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellee's brief was $ 14.25, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

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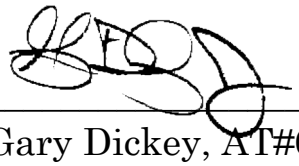

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