IN THE SUPREME COURT OF IOWA

No. 23-0201

KIRKWOOD INSTITUTE, INC.

Appellant,

vs.

IOWA AUDITOR OF STATE ROB SAND, JOHN McCORMALLY, and OFFICE OF THE AUDITOR OF STATE,

Appellees.

Appeal from the Iowa District Court
For Polk County, Case No. EQCE087052
Honorable Robert Hanson, District Judge

APPELLEES' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

ISSUES PRESENTED

I. The Auditor's confidentiality statute broadly protects "information received during the course of any audit or examination, including allegations of misconduct or noncompliance, and all audit or examination work papers shall be maintained as confidential." Did the district court correctly read section 11.42 to protect communications from nongovernmental third parties?

Burton v. Univ. of Iowa Hospitals & Clinics, 566 N.W.2d 182 (Iowa 1997)

Iowa Const. Art. IV, § 22

Iowa Code § 11.2

Iowa Code § 11.4

Iowa Code § 11.41

Iowa Code § 11.42

Iowa Code § 11.51

Iowa Code § 11.53

Nahas v. Polk Cnty., 991 N.W.2d 770 (Iowa 2023)

Serv. Emps. Int'l Union, Local 199 v. Iowa Bd. of Regents, 928 N.W.2d 69 (Iowa 2019)

II. Government agencies, like the Auditor's Office, may retain as confidential communications from third parties if the agency reasonably believes disclosure would discourage such communications. Did the district court properly conclude a withheld email fell within section 22.7(18)?

2023 Iowa Acts ch. 103, §§ 1–6

City of Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895 (Iowa 1988)

In re Des Moines Indep. Cmty. Sch. Dist. Pub. Records, 487 N.W.2d 666 (Iowa 1992)

Iowa Code § 11.4(1)(*c*)

Iowa Code § 22.7(5)

Iowa Code § 22.7(18)

Ripperger v. Iowa Pub. Info. Bd., 967 N.W.2d 540 (Iowa 2021)

III. Kirkwood exclusively filed an insufficiency claim against the Auditor under chapter 22. Did the district court properly grant summary judgment when the Auditor provided all requested emails?

Belin v. Reynolds, 989 N.W.2d 166 (Iowa 2023)

Iowa Code § 22.10(1)

Klein v. Iowa Pub. Info. Bd., 968 N.W.2d 220 (Iowa 2021)

McCoy v. Thomas L. Cardella & Assocs., 992 N.W.2d 223 (Iowa 2023)

State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)

ROUTING STATEMENT

The Court should keep this open-records case. The principal issue is the scope of confidentiality for "information received during the course of any audit or examination, including allegations of misconduct or noncompliance." Iowa Code § 11.42(1) (2021). This statute is specific to the State Auditor, and its interplay with the open records act, Iowa Code chapter 22, represents an issue of first impression. *See* Iowa R. App. P. 6.1101(2)(*c*). Other aspects of the case present "questions of enunciating or changing legal principles," *id.* r. 6.1101(2)(*f*), following the Court's recent decisions in *Ripperger v. Iowa Public Information Board*, 967 N.W.2d 540 (Iowa 2021) (regarding Iowa Code section 22.7(18)) and *Belin v. Reynolds*, 989 N.W.2d 166, 170–71 (Iowa 2023) (regarding different types of claims available in direct actions under chapter 22). Retention would enable the Court to enunciate these sparsely developed principles further.

STATEMENT OF THE CASE

This case is about eleven emails and whether they were properly produced or withheld under Iowa Code chapters 11 and 22.

The Kirkwood Institute sent an open-records request to the State Auditor. App. 116. The Auditor provided two batches of responsive emails, and the Auditor communicated with Kirkwood about the status of the request, the costs associated with retrieving older emails, and when the searches had been completed. App. 121–36. The Auditor also informed Kirkwood that some emails had been withheld as confidential under Iowa Code sections 11.42 and 22.7(18). App. 121–22; 135–36.

Dissatisfied, Kirkwood sued under chapter 22. App. 8. Kirkwood brought an insufficiency claim, alleging the Auditor erroneously withheld records and asking the court to order them produced. App. 8–20, ¶¶ 13–16. Specifically, Kirkwood pointed to a June 4 email that was already in the public domain and alleged it was erroneously withheld. App. 8, ¶ 13. The case proceeded to discovery.

During discovery, the Auditor provided detailed explanations for each of the withheld emails. App. 54. And it produced the June 4 email—which was an email sent from the Auditor's Chief of Staff's personal email account and thus was not included in the initial records search. App. 117–18.

Both parties moved for summary judgment and the district court granted summary judgment for the Auditor. Ruling on App. 161–65. The court conducted an in-camera review of the ten withheld emails and concluded they were indeed confidential under sections 11.42 and 22.7(18). App. 163–65.

Kirkwood moved to expand the court's initial ruling, which was silent on the later-produced June 4 personal email. App. 167. The district again found for the Auditor, explaining there was "no evidence establishing the delay was purposeful or the result of any improper motive on the part of Defendants, but was simply the result of the late discovery of the information." App. 170–71.

Kirkwood now appeals.

STATEMENT OF THE FACTS

To begin, Kirkwood's Statement of Facts is largely a discussion of allegations never developed before, or proven to, the district court. Kirkwood made no effort below to litigate its narrative, and in turn generated no admissible evidence to support its account. Yet on appeal, Kirkwood offers an extra-record polemic, spending pages discussing extraneous allegations without any supporting record citations. Appellant Br. at 10–13; *see also* Iowa R. App. P. 6.903(2)(*f*) (requiring "[a]ll portions of the statement shall be supported by appropriate references to the record or the appendix").

Courts routinely "disregard . . . unsupported contentions" in briefs. *In re C.M.*, No. 18-1901, 2019 WL 3315891, at *2 n.1 (July 24, 2019) (citing *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001)). The Court can do so here and disregard much of Kirkwood's Statement of Facts in favor of the facts properly presented to the district court and supported by the record.

I. The Auditor of State.

The Auditor of State is a constitutional officer elected by the public. Iowa Const. Art. IV, § 22. Defendant Rob Sand is Auditor of State and Defendant John McCormally serves as his Chief of Staff. App. 115.

The Auditor is specifically entrusted to "annually, and more often if deemed necessary, audit the state and all officers and departments receiving or expending state funds." Iowa Code § 11.2(1). In support of these duties, the Auditor can "issue subpoenas of all kinds" and "administer oaths and examine witnesses." *Id.* § 11.51. "The Iowa Code grants the auditor of state broad access to all information when conducting an audit," including "all information, records, instrumentalities, and properties used in the performance of the audited or examined entities' statutory duties or contractual responsibilities" and "full access to all papers, books, records, and documents of any officers or employees." *Sand v. Doe*, 959 N.W.2d 99, 106 (Iowa 2021) (quoting Iowa Code §§ 11.41(1), (2)).

At the culmination of an audit, the Auditor must create a written report. Iowa Code § 11.4(1). These reports must include: (1) "[t]he financial condition of the state or department;" (2) "[w]hether, in the auditor's opinion . . . [f]unds have been expended for a purpose for which they have been appropriated;" (3) "[w]hether, in the auditor's opinion . . . [t]he department so audited or examined is efficiently conducted, and if the maximum results for the money expended are obtained;" (4) "[w]hether, in the auditor's opinion . . . [t]he work of the departments so audited or examined needlessly conflicts with or duplicates the work done by another department;"

(5) "[a]ny illegal or unbusinesslike practices;" (6) "[a]ny recommendations for any greater simplicity, accuracy, efficiency, or economy in the operation of the business of the several departments and institutions;" and (7) "[a]ny other information which, in the auditor's judgment, may be of value." *Id.* § 11.4(1)(*a*)–(*e*).

Because audits are not tied to a set schedule, but can be completed whenever the Auditor deems necessary, the Auditor's Office often "takes in confidential information, tips from whistleblowers, and the like." App. 115. And audits revealing fraud can often lead to significant consequences for public officials and employees.

For example, when "an auditor examination discloses any significant irregularity in the collection or disbursement of public funds, in the abatement of taxes, or other findings the auditor believes represent significant noncompliance," then the report must be sent to the relevant county attorney, who in turn is tasked with cooperating with the Auditor to "secure the correction of the irregularity." *Id.* § 11.53.

Auditor reports have led to criminal charges against individuals misusing public funds. *See, e.g.*, Office of Auditor of State, *Report on Special Investigation of the Iowa State University Extension and Outreach Monroe County Agricultural District for the Period September 1, 2017 Through June 30, 2020* at 3–4 (Jun.

10, 2021)[1] (finding local employee Madison Kahoe charged personal expenses to the Monroe County Agricultural Extension), *State v. Kahoe*, Monroe Cnty. Case No. FECR061054, Dkt. 18 (Iowa Dist. Ct. 2022) (employee Madison Kahoe pled guilty to First-Degree Theft and sentenced based on conduct revealed in audit); *State v. Eccleston*, 2023 WL 1248747, at *1 (Iowa Ct. App. Feb. 22, 2023) (noting municipal employee was charged with forgery and theft after an audit revealed missing funds totaling $56,549); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Meyer*, 944 N.W.2d 61, 65–66 (Iowa 2020) (noting "the state auditor conducted a special investigation" of public defender contract attorney claims, listing other disciplinary cases involving those attorneys, and observing the conduct in the audit led to criminal charges against Meyer herself).

As a necessary corollary to the Auditor's broad investigative and supervisory powers, the Auditor is required to "maintain as confidential" all "information received during the course of any audit or examination, including allegations of misconduct or noncompliance." Iowa Code § 11.42(1). This includes preserving confidentiality over "all audit or examination work papers." *Id.* Work papers are documents and "records kept by an independent

[1] https://www.auditor.iowa.gov/reports/file/65905/embed.

auditor of the procedures followed, tests performed, information obtained, and conclusions reached in an audit." *Working Papers*, Black's Law Dictionary, at 1843 (10th ed. 2014); *accord* Iowa Admin. Code r. 191–98.12 (defining "work papers" for some annual financial reporting requirements related to insurance); *see also* Haw. Rev. Stat. § 23-9.5 (defining a state auditor's working papers under Hawaii law to include "records of work performed" and "any and all project evidence collected").

The only exceptions to the Auditor's strict confidentiality requirements are the information contained in a final report; when disclosure is "necessary to complete the auditor examination"; or "[t]o the extent the auditor is required by law to report the same or testify in court." *Id.* §§ 11.42(2), (3).

Auditor confidentiality thus diverges from the general open-records regime within chapter 22, as it makes confidentiality the rule, not the exception. *See Burton v. Univ. of Iowa Hospitals & Clinics*, 566 N.W.2d 182, 189 (Iowa 1997) (holding chapter 22 "does not trump or supersede specific statutes" that may contain different confidentiality frameworks). Indeed, failing to maintain confidentiality over audit-related records is "grounds for termination of employment with the auditor of state," Iowa Code § 11.42(4), whereas open-records custodians may release otherwise confidential records under chapter 22 without repercussion. *Nahas*

v. Polk Cnty., 991 N.W.2d 770, 783–84 (Iowa 2023) ("Whether the termination letter is confidential or not, Polk County still was not prohibited from releasing it under section 22.7.").

II. The records request from the Kirkwood Institute.

On June 16, 2021, the Auditor's Office received an open-records request from the Kirkwood Institute. App. 116. The request was for all records from January 2, 2019—Auditor Sand's first day in office, *see* Iowa Const. art. IV, § 22—to the present, falling within these categories:

1. All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, and the email address "desmoinesdem@bleedingheartland.com";

2. All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the phrase "desmoinesdem@bleedingheartland.com";

3. All emails and text messages sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the word "Belin";

4. All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, and the email address "rjfoley@ap.org";

5. All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office,

including the Auditor, that contain the phrase "rjfoley@ap.org"; and

6. All emails and text messages sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the word "Foley."

App. 116.

That same day, the Auditor's Office sent the request to an IT specialist to initiate the record retrieval process for emails from employees' work accounts. *Id.* The IT specialist performed email searches in accordance with Kirkwood's requested terms and provided the resulting emails to McCormally for review. App. 116–17.

McCormally reviewed the emails individually, looking to ensure that no confidential information was improperly publicized. App. 117. He reviewed over 700 pages of emails. App. 118. McCormally identified a handful of email threads as work papers, information received during the course of any audit or examination, or otherwise confidential under chapter 22. *Id.*

On July 6—just 20 days after the request—the Auditor's Office provided Kirkwood with the first tranche of responsive records at no cost to Kirkwood. *Id.* In a letter accompanying the July 6 production, McCormally informed Kirkwood that the Auditor's Office switched email service providers roughly five months into Auditor Sand's first term. App. 121–22. Accordingly,

potentially responsive emails between January and May 2019 would need to be retrieved from a separate archive, which in turn required greater staff time and resources. *Id.* Because of the extra effort to locate the earlier emails, McCormally informed Kirkwood that the Auditor's Office would charge for the staff time to fulfill that portion of the request. *Id.*; *see also* Iowa Code § 22.3 (discussing fees for completing open-records requests).

On July 22, Kirkwood responded to the letter inquiring into the basis for the estimated fee. App. 123. In response, McCormally provided the estimated cost breakdown and the basis in chapter 22 to charge for reasonable expenses. App. 124. On August 3, Kirkwood consented to the additional record review. App. 126. On August 16, McCormally notified Kirkwood that the additional review was finished and the actual cost was less than half of what was estimated. App. 130. McCormally provided Kirkwood with an itemized basis for the cost and instructed that the records would be provided upon receipt of payment. *Id.* A week later, after receiving payment, the Auditor produced the responsive emails from January through May 2019. App. 135.

In all, the Auditor's Office produced over seven hundred pages of responsive records. App. 118. The Auditor's Office withheld ten emails from the production. Nine emails were withheld under Iowa

Code section 11.42, and the tenth was withheld under Iowa Code section 22.7(18). App. 53–57.

III. Kirkwood's lawsuit.

Dissatisfied with the Auditor's withholding, Kirkwood sued the Auditor's Office, Auditor Sand, and McCormally (collectively "the Auditor"). App. 8, ¶ 13. *See* Iowa Code § 23.5(1) (authorizing those aggrieved by open records responses either to sue directly under chapter 22 or file a complaint with the Iowa Public Information Board); *accord Klein v. Iowa Pub. Info. Bd.*, 968 N.W.2d 220, 228 (Iowa 2021) ("Iowa Code section 23.5 offers a choice to persons seeking to enforce the open records law.").

Of the two types of chapter 22 actions, Kirkwood brought an insufficiency claim, alleging the Auditor erroneously withheld records in response to its request. App. 10, ¶ 16; *Belin*, 989 N.W.2d at 170–71 (explaining chapter 22 authorizes "two kinds of claims: (1) claims of *insufficient* production, that is, failure to produce records, and (2) claims for *delay* in producing records"). Insufficiency claims turn on an alleged failure "to produce the records that the plaintiffs had requested." *Belin*, 989 N.W.2d at 171. Consistent with Kirkwood's insufficiency claim, it sought to compel the Auditor to produce all withheld records. App. 10, ¶ 16(a).

When responding to Kirkwood's open-records request, only official Auditor's Office email accounts were searched. App. 116.

Kirkwood's Petition identified a June 4, 2021 email between McCormally and Laura Belin, which was not produced but already in the public domain, and questioned whether it was erroneously withheld. App. 8–10, ¶¶ 13, 15.

During discovery, the Auditor provided detailed explanations for each of the ten withheld emails, including:

1. The date of the first and last email in the chain.
2. The personnel of the Auditor of State's office included in the email or email chain.
3. The subject matter of the chain.
4. The specific basis, described in narrative form with citation to legal authority, of the grounds to withhold the email or email chain.
5. A description of any inquiry made to any nongovernmental employee who sent or received information in the email or email chain as to whether such person would consent to the disclosure of the email or email chain.
6. Whether the email or email chain relates to an audit or examination conducted by the Office of the Auditor of State and, if so, the date the audit or examination was or will be completed.

App. 54.

With respect to the June 4 email, McCormally sent the email to Laura Belin from his personal email account. App. 117–18. Because only official email accounts were searched, it was not located and produced during the initial productions. *Id.* McCormally searched his personal email and then produced the

June 4 email chain during discovery. App. 118, 137–38. His search yielded no other responsive emails in his personal email account. App. 118–19.

Both parties then moved for summary judgment. Kirkwood exclusively argued the Auditor failed to prove the eleven emails were properly withheld, and thus was entitled to judgment on its claim. App. 139, ¶ 2. The Auditor argued that the ten withheld emails were properly protected under sections 11.42 and 22.7(18). App. 18–27. And the private email was produced, ending the production controversy and, in turn, Kirkwood's claim. App. 27–28.

The district court granted judgment for the Auditor. App. 165. The court reviewed the ten withheld emails in camera and concluded they properly fell within sections 11.42 and 22.7(18). App. 163–65. Kirkwood moved to reconsider the ruling, noting the district court did not address the later-produced personal email. App. 167. The court again found for the Auditor, finding "no evidence establishing the delay was purposeful or the result of any improper motive on the part of Defendants, but was simply the result of the late discovery of the information." App. 171. Accordingly, the Auditor's response to Kirkwood's request did not defy chapter 22.

ARGUMENT

I. The district court properly granted judgment for the Auditor.

A. Error preservation and standard of review.

The Auditor agrees that Kirkwood preserved error by resisting the Auditor's motion for summary judgment.

"Generally, actions brought under [chapter 22] are in equity and reviewed de novo." *Am. Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Cmty. School District*, 818 N.W.2d 231, 232 (Iowa 2012). However, when an open-records action is resolved on summary judgment, this Court reviews the district court's order for "correction of errors at law." *Id.*

B. Nine emails were properly withheld under section 11.42.

First considering the nine emails withheld under the Auditor's confidentiality provision, Kirkwood misreads section 11.42 and misstates the record.

We begin with the statute. "Notwithstanding chapter 22, information received during the course of any audit, including allegations of misconduct or noncompliance, and all audit or examination papers shall be maintained as confidential." Iowa Code § 11.42. Notably, Kirkwood selectively quotes from section 11.42 rather than including its entire text. Appellant Br. at 28.

The unabridged statute shows that "information received during the course of any audit" includes any "allegations of misconduct or noncompliance." *Id.* Thus, Kirkwood's insistence that external communications that may trigger or aid an audit—communications from whistleblowers, muckrakers, or tipsters—are not confidential is contradicted by the plain language of the statute.

Kirkwood improperly narrows and atextually limits the Auditor's confidentiality provision. Under Kirkwood's reading, no private citizen (be it a journalist or an embezzler's confidant) could securely tip off the Auditor's office—even if the private citizen had credible knowledge of an ongoing misappropriation or misuse of public funds. But the Legislature wanted this information protected—it took care to explicitly include allegations within the sphere of protected Auditor information.

Nor does Kirkwood's insistence that information received during an audit must come from a governmental source find any textual support. When the Auditor receives information during an audit that is made confidential by another source of law, the Auditor must respect that confidentiality. Iowa Code § 11.41(3). Thus, when the Auditor wants government records that are confidential (like, for example, closed session meeting minutes or records containing personal health information), he gets them, and the confidentiality of such records is protected under section 11.41.

Yet the Legislature continued, creating another confidentiality provision to capture all "information received during the course of any audit or examination, including allegations of misconduct or noncompliance, and all audit or examination work papers." *Id* § 11.42(1). That provision does what it says—protects all information received, from any source, during an audit, including allegations of misconduct or noncompliance. Adopting Kirkwood's anemic reading of section 11.42 renders it duplicative of section 11.41, but that's not how statutes are read. *Serv. Emps. Int'l Union, Local 199 v. Iowa Bd. of Regents*, 928 N.W.2d 69, 76 (Iowa 2019) (noting the obligation to "read related statutes together and harmonize them" and collecting cases).

When interpreting section 11.42, both its text and purpose show that persons who send communications about possible misconduct or noncompliance are protected from having their communications publicized. And communications that reference audit information are likewise protected. Given the specter of administrative, civil, and criminal ramifications for employees and officers who misuse public funds, ensuring confidentiality promotes the free flow of information to the Auditor, which in turn allows the Auditor to fulfill his statutory and constitutional duties.

Turning to the nine withheld emails, Kirkwood also misstates the record. Kirkwood asserts the Auditor "never explained why or

how emails he received from a reporter or blogger could be protected by section 11.42." Appellant Br. at 31. But that is not true. The Auditor provided Kirkwood with the audit context for each of the nine emails withheld under section 11.42. *See* Defs. MSJ App'x at 21–24; App. __.

During discovery, the Auditor provided Kirkwood with statements explaining "whether [a withheld] email or email chain relates to an audit or examination conducted by the Office of the Auditor of State, and if so, the date the audit or examination was or will be completed." App. 54. And the Auditor also explained that tips or complaints will often be "incorporated into audit 'workpapers' by the auditor." App. 117.

To briefly summarize, withheld email #1 is an internal Auditor's Office email trail accumulating information relating to an ongoing audit of federal expenditures. App. 54. The accumulation was deemed a "workpaper" relating to an "ongoing audit of federal expenditures." *Id.* The Auditor further explained, "Audit reports issued in November 2021, June 2021 and October 2020 may or may not have utilized these workpapers." *Id.* As well, the ongoing federal audit may result in "[s]ubsequent reports referencing these workpapers" as the Auditor deems necessary. *Id.*

Similarly, withheld emails #3, #4, and #7 are also tied to an "ongoing audit of federal expenditures." App. 54–56. These emails

are each from a person who contacted the Auditor with information relating to public expenditures. And withheld email #5 is also an email from a person who contacted the Auditor with information, this time relating to an "ongoing audit of a state agency." App. 55.

Withheld emails #6, #8, and #9 relate to another person and efforts to obtain protected information from the Auditor's office. App. 56–57. Email #6 relates to an audit that was in progress and references audit workpapers. App. 56. Email #8 is a thread that includes an email discussing information received during an ongoing audit of a state agency. *Id.* And email #9 is also a thread that included an email containing new information about an audit. App. 57.

Finally, withheld email #10 was captured by the search because it contained the name "Foley," though the individual was not Ryan Foley. *Id.* The email thread is a discussion of audit procedures at an employment agency and constituted audit workpapers, as well as information received during the course of an audit. *Id.*

The district court properly applied section 11.42 in its in-camera review of these emails and did not commit any errors at law. Accordingly, the Auditor properly withheld these nine emails and summary judgment should be affirmed.

C. One email was properly withheld under section 22.7.

Next, the Auditor withheld one email as confidential under Iowa Code section 22.7(18). Like with chapter 11, the provision's language controls:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:
>
> . . .
>
> 18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination.

Iowa Code § 22.7(18).

The purpose of this confidentiality provision is "to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure." *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 898 (Iowa 1988). The provision is "broadly inclusive," *id.* at 897, shielding wide swaths of

communications that "could be deterred by public disclosure." *Ripperger*, 967 N.W.2d at 551.

Significantly, whether publicizing a communication would discourage future such communications "is an objective test, from the perspective of the record custodian." *Id.* at 553. If the Auditor "could reasonably believe disclosure of the [communication] would deter such communications, that determination should be upheld, not second-guessed, even if others could reasonably disagree with the custodian." *Id.*

"A public agency often conducts investigations by interviewing people who are not a part of the agency." *In re Des Moines Indep. Cmty. Sch. Dist. Pub. Records*, 487 N.W.2d 666, 670 (Iowa 1992). "In order to do so effectively the agency must be able to provide for confidentiality." *Id.* The same logic holds true here. Collecting communications on the front end, to determine *whether* to audit or investigate, is equally important for the Auditor. Just as a county assessor "concluded that fewer people would request removal from the search-by-name function [for property ownership] if doing so placed them on a public list," *Ripperger*, 967 N.W.2d at 553, the Auditor can reasonably conclude that fewer people would report wrongdoing or suspected wrongdoing if their reports were public.

So too during an audit, investigation, or examination itself. Especially after recent legislation that, as of July 1, limits the categories of information the Auditor can access and alters his authority to enforce subpoenas in court, *see* 2023 Iowa Acts ch. 103, §§ 1–6, confidentiality for communications (including whistleblowing reports or allegations) remains imperative so that the Auditor can fulfill his statutory directive to evaluate proper use of government funds and uncover "illegal or unbusinesslike practices." Iowa Code § 11.4(1)(*c*). Section 22.7(18) permits "agencies to keep confidential a *broad* category of useful incoming communications which might not be forthcoming if subject to public disclosure." *City of Sioux City*, 421 N.W.2d at 898 (emphasis added). And almost any tip—whether the Auditor eventually acts on it or not, and whether it is ultimately credible or not—fits the bill. The district court therefore correctly granted summary judgment for the email subject to section 22.7(18).

Kirkwood's appeal to paragraphs 22.7(18)(*a*), (*b*), and (*c*) is unavailing. Notwithstanding section 22.7(18):

> *a.* The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.
>
> *b.* Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity

of the person outside of government making it or enabling others to ascertain the identity of that person.

c. Information contained in the communication is a public record to the extent that it indicates the date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except to the extent that its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person. In any action challenging the failure of the lawful custodian to disclose any particular information of the kind enumerated in this paragraph, the burden of proof is on the lawful custodian to demonstrate that the disclosure of that information would jeopardize such an investigation or would pose such a clear and present danger.

Iowa Code § 22.7(18).

First considering paragraph (*a*), Kirkwood cites no authority to support its novel proposition that an agency can only withhold useful communications under section 22.7(18) if it affirmatively contacts each and every person and first attempts to obtain consent.

The proposition is untenable—consider *Ripperger*. There, thousands of people asked to remove themselves from a county assessor's online property search database. *Ripperger*, 967 N.W.2d at 544 n.1. The assessor received an open-records request for the list of people who asked to be removed, and the assessor withheld the list under section 22.7(18). *Id.* at 545. When analyzing whether

the names were properly withheld under section 22.7(18), the court did not require that the assessor prove it contacted every judge, police officer, government employee, and other list member before invoking the provision. *Id.* at 551–54. Under Kirkwood's view, the county assessor could *never* prevail under section 22.7(18) unless he showed that he first contacted every communicator and attempted to obtain consent. But that's not what this Court required.

And such a requirement would be contrary to the Legislature's goal of promoting useful communications. Here, seeing Auditor tips publicized, even if the tipster was contacted and gave consent, may give the public the false impression that Auditor tips are not confidential, dissuading future tipsters or whistleblowers from coming forward. Paragraph (*a*) has never been read as obligating the records custodian to affirmatively contact each communicator and seek consent when the communication was silent on consent and the custodian reasonably believes disclosure would chill future communications. Accordingly, because the email did not convey consent to disclosure, and the Auditor reasonably believed disclosure of the email would discourage future useful communications, the email was properly withheld under section 22.7(18).

Second, paragraph (*b*) is also inapposite. As the Court will see in its in-camera review, the substance of the communication

indirectly reveals the source, and thus there were no possible redactions. Nor was the Auditor required to do so. Again, revealing involuntary communications of this type may give the false impression that Auditor tips are not confidential, dissuading future such communications and undermining the purpose of section 22.7(18). Thus, the email was properly withheld as confidential.

Finally, paragraph (*c*) is inapplicable. Paragraph (*c*) is substantially like section 22.7(5) and was included to ensure that law enforcement agencies did not improperly rely on section 22.7(18) to subvert the disclosure obligations of section 22.7(5). *See* Iowa Code § 22.7(5) (making peace officer investigative reports confidential except "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual"). Nor does the withheld communication fall within (*c*)—it provides no specific dates, times, locations, or immediate facts and circumstances of crimes or illegal acts.

In sum, the Auditor reasonably believed that the withheld communication was of the type that, if disclosed, would discourage future such communications. The district court correctly granted summary judgment.

D. Producing the personal email mooted the production dispute, and Kirkwood cannot expand its suit on appeal from an insufficiency claim to a delay claim.

Chapter 22 authorizes "two kinds of claims: (1) claims of *insufficient* production, that is, failure to produce records, and (2) claims for *delay* in producing records." *Belin*, 989 N.W.2d at 170–71. Insufficiency claims allege failure "to produce the records that the plaintiffs had requested." *Id.* at 171. Insufficiency claims become moot if the requester-plaintiff receives the records. *See id.* Delay claims, by contrast, allege a records custodian has not expressly refused to produce records, but "fails to produce the [requested] records for an extended period of time." *Id.* at 173.

Kirkwood's petition alleged there was one email "not included in the document production" that should have been and sought an order requiring production of it. App. 8–10, ¶¶ 13, 16(a). That indicates an insufficiency claim, not a delay claim. Thus, when Kirkwood eventually received that email during discovery below, its insufficiency claim seeking production—the only claim it brought—became moot with respect to the personal email. *See Belin*, 989 N.W.2d at 171. And because the production did not violate chapter 22, other remedies in chapter 22 are inapplicable.

Kirkwood never amended its petition below to raise a delay claim, even after receiving the June 4 email, and it cannot sing that

song for the first time on appeal. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). Kirkwood cannot transmute its insufficiency claim into a delay claim just by repeatedly referencing the number of days that elapsed between the request (or the lawsuit) and the formal production. Appellant Br. at 17, 18, 19, 21, 23, 24. What matters for an insufficiency claim is *whether*—not when—the record was produced. And here, there's no dispute Kirkwood eventually received formal production of exactly the email it sought. Kirkwood acknowledges *Belin* differentiates between the types of claims, Appellant Br. at 23, yet attempts to sidestep the delineation. But the plaintiff is the master of the claim, and the Court should hold Kirkwood to that adage. *Cf. McCoy v. Thomas L. Cardella & Assocs.*, 992 N.W.2d 223, 231 (Iowa 2023) (observing a "problem with [a litigant's] shifting positions" as the case progressed, including a changed theory of liability).

What's more, even if Kirkwood adequately raised a distinct delay claim with respect to the personal email, the Court should still affirm. A delay claim is about establishing a records custodian's "implied or 'silent' refusal" to produce a record—by proving there was "an unreasonable delay in producing records." *Belin*, 989 N.W.2d at 174. But here, there was no refusal. Indeed, Kirkwood's claim is close to the scenario in *Klein*, where the petitioner "lacked standing . . . with respect to records that were already available,"

like the email here. *Klein*, 968 N.W.2d at 235. Although *Klein* involved judicial review of a Public Information Board decision rather than a direct action under chapter 22, it nevertheless establishes that Kirkwood is not an "aggrieved person" under chapter 22 when the record it sought production of was already public. Iowa Code § 22.10(1); *see Klein*, 968 N.W.2d at 235.

Kirkwood leans heavily on *Belin*, but the facts here are markedly different and show that the Auditor's production did not constitute a refusal under chapter 22. In *Belin*, open-records requests went unacknowledged for months—with one request being ignored for 18 months despite repeated renewals. *Id.* at 167. Here, conversely, McCormally immediately began working on Kirkwood's request, updated Kirkwood on the status of its request, and provided a rolling production of documents. App. 116–20.

In *Belin*, the court outlined relevant inquiries to discern whether an agency implicitly refused to make records available. *Id.* at 175. Satisfying those inquiries, the Auditor (1) promptly responded to Kirkwood's inquiries; (2) explained its production and withholdings when it produced records; (3) explained why documents were provided in tranches, including the email archive issue that required extra resources; (4) produced the emails as they became available, producing the readily accessible emails first, rather than making Kirkwood wait until the older archive was

searched; (5) explained the Office's efforts to locate all responsive emails, and (6) communicated costs, expected staff time, and notified Kirkwood when the searches were completed.

True, the personal email accounts of the Auditor's staff were not searched during the initial production. But, to the Auditor's knowledge, no case has required agencies to search its employees or officers' personal email accounts as a matter of course in response to an open-records request. In an abundance of caution, McCormally searched his personal email during discovery and the Auditor opted to produce the June 4 email. On the record below, the district court properly concluded there was "no evidence establishing the delay was purposeful or the result of any improper motive on the part of Defendants, but was simply the result of the late discovery of the information." App. 171. Accordingly, the record provides no basis to find a refusal to produce, and the district court's judgment should be affirmed.

Alternatively, if the Court concludes Kirkwood adequately raised a delay claim and the district court should not have granted summary judgment on it, at most the Court should remand for further record development rather than remanding with instructions to grant Kirkwood's cross-motion for summary judgment. Further record development would be necessary on the reason for the delay in producing the personal email that was

already public, particularly with respect to the delay-claim factors set forth in *Belin*. *See Belin*, 989 N.W.2d at 175 (explaining delay alone "may . . . establish an implicit refusal" to provide records, "[b]ut other evidence may also be relevant").

Because Kirkwood brought only an insufficiency claim that became moot once Kirkwood received the personal email it sought to obtain, nor did the Auditor's production otherwise violate chapter 22, the Court should affirm with respect to the personal email.

CONCLUSION

Kirkwood disliked the Auditor's June 3, 2021 special report, and embarked to highlight, demonstrate, and amplify what Kirkwood believed was the report's "shoddy nature." Appellant Br. at 13. But this case isn't about the report, or about establishing "officially who was right and who was wrong" with respect to it. *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991). Instead, it's about eleven emails—that's all.

Kirkwood's opinions that the Auditor "dwelled on" something in a report, and made "ominous" recitations—actually statutory requirements, *see* Iowa Code § 11.53—don't mean, nor are they relevant to whether, the Auditor violated the open-records law with respect to eleven emails. And as for those eleven emails, the district court properly granted summary judgment based on chapter 11 and chapter 22. The Court should affirm.

REQUEST FOR ORAL SUBMISSION

Appellees request to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 6,214 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 11th day of August, 2023, this Appellees' Final Brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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