SUPREME COURT NO. 23-0833

ROBERT TEIG,
Plaintiff/Appellant,

v.

VANESSA CHAVEZ, ALISSA VAN SLOTEN, PATRICIA G. KNOPF, ELIZABETH JACOBI, BRAD HART and TERESA FELDMANN,
Defendants/Appellees.

Appeal from the Linn County Iowa District Court
Honorable Lars G. Anderson
Chief District Judge
Story County Court No. CVCV098833

CONDITIONAL BRIEF OF AMICUS CURIAE IOWA LEAGUE OF CITIES

IN SUPPORT OF DEFENDANTS-APPELLEES

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STATEMENT OF IDENTITY OF AMICUS CURIAE

Amicus is the Iowa League of Cities ("League"). The League serves as the unified voice of Iowa cities, providing advocacy, training and guidance to strengthen Iowa's communities. More than 850 Iowa cities, both large and small, are members of the League. The League is governed by members through an Executive Board of officials, balanced by geographic region and city size.

On issues of importance to Iowa cities, the League advocates sound public policies on behalf of its members in legislative and regulatory forums at the state level and files *amicus curiae* briefs in significant cases before the Iowa state and federal courts. This allows the League to share its broad, state-wide perspective with the judiciary on matters that shape and develop the law. Amicus' interest is in the clear, consistent and reasoned development of law that affects the League's members and the communities they serve.

STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

No party's counsel authored this brief, in whole or in part, and no party or party's counsel contributed money to fund the preparation or submission of the brief. The preparation and submission of this brief was funded solely by the League of Iowa Cities.

ARGUMENT

"Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

- James Madison

Transparency and accountability are essential components of good government. The League and its members agree Iowa's public records statutes serve a fundamental and laudable purpose: "to open the doors of government to public scrutiny--to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981).

However, "access to public records does not necessarily mean 'free' access." *Rathmann v. Bd. of Dirs*., 580 N.W.2d 773, 778-79 (Iowa 1998). Under Chapter 22 of the Iowa Code, cities are authorized "to charge members of the public a fee to cover the cost of retrieving public records." *Id*. In conformity with Iowa law, the city of Cedar Rapids adopted a policy outlining its charges for searching for and retrieving documents in response to a public records request. When Appellant submitted such a request, Cedar Rapids complied with its policy. Nevertheless, Appellant contends

Cedar Rapids is barred by Iowa Code section 22.3 from assessing *any* charges when responding to his records request with very limited exceptions.

Respectfully, Appellant reads § 22.3 too restrictively and out of context. The district court properly granted summary judgment to Defendants-Appellees, and its order should be affirmed. General search and retrieval fees play an important role in ensuring public records remain available; provide a source of funding cities can use to implement technologies that expand the public access; and serve as practical tool to reign in overly broad records requests, mitigate abuses of the system, and reduce the tax burden on Iowa citizens. That is why the Iowa legislature permitted them and why this Court has upheld them.

I. The proliferation of public records requests in recent years, coupled with the ever-increasing volume of public records, have increased the cost for cities (and ultimately taxpayers) to respond to records requests.

Governmental entities across the United States have been experiencing exponential increases in public records requests. In fiscal year 2021, the federal government overall received a total of 836,164 Freedom of

Information Act ("FOIA") requests.[1] That constituted an increase of 47,476 requests over the prior fiscal year.[2]

The federal government is not alone. States and municipalities have also seen increases in public records requests.[3] According to one study, released in September 2022, the volume of public records requests grew 74%, and the total time spent processed requests increased by 112% since 2018.[4]

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[1] U.S. Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2021* ("USDOJ FOIA Report"), p. 1, available at https://www.justice.gov/oip/page/file/1521211/download (last accessed August 23, 2023). See, also, *Rising Costs of Public Records Requests Concerns Cities Across Washington*, NBC Right Now, December 1, 2014 (indicating that records requests to the city of Yakima, Washington, had increased by 280% between 2011 and 2014), available at https://www.nbcrightnow.com/archives/rising-costs-of-public-records-requests-concerns-cities-across-washington/article_65d7c0e0-1521-5e17-aaf6-c232582d9496.html (last accessed August 23, 2023).

[2] USDOJ FOIA Report, *supra* note 1, p. 2.

[3] Jeff Forward, *City records requests costs saw big increase in 2022*, Fremont Tribune, January 14, 2023 (indicating the city of Fremont, Nebraska, saw an 18% increase in legal fees from 2021 to 2022 to address public records requests), available at https://fremonttribune.com/business/investment/city-records-requests-costs-saw-big-increase-in-2022/article_a6619852-2eff-5b29-b877-10f411b11d57.html (last accessed August 23, 2023).

[4] Granicus, *New Data Shows Increasing Demand for Transparency in Government*, September 29, 2011, available at https://granicus.com/press_release/new-data-shows-increasing-demand-for-transparency-in-government (last accessed August 23, 2023).

Besides the increases in numbers, the source of public records requests has shifted. In 2017, the Columbia Journalism Review did an analysis of FOIA requests.[5] Where journalists and the news media may have once led in the number of records requests, in 2017 they represented a mere 7.6% of those submitting requests.[6] The largest group – comprising 39% of all requesters – were businesses.[7] Law firms made up another 16.7%.[8] By comparison, individuals made up only 20.1%.[9]

As to these businesses, "four out of five requests were made by business executives for the principal purpose of obtaining competitor information." *Field Article*, 8 Roger Williams U. L. Rev. at 295 n 10. As one commentator noted,

> Today, a typical FOIA scenario is not, as [originally] envisioned by the Congress, the journalist who seeks information about the development of public policy when he will shortly publish for the edification of the electorate. Rather, it is the corporate lawyer seeking business secrets of a client's competitors; the felon attempting to learn who informed against him; the drug trafficker trying to evade the law; the foreign requester seeking a benefit that our citizens cannot obtain from his country; the private litigant who, constrained by discovery limitations, turns to the FOIA to give him what a trial court will not.

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[5] Cory Schouten, *Who files the most FOIA requests? It's not who you think*., Columbia Journalism Review, March 17, 2017, available at https://www.cjr.org/analysis/foia-report-media-journalists-business-mapper.php (last accessed August 23, 2023).

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*.

> And as if these uses do not diverge enough from the Act's original purpose, it is the public - the intended beneficiary of the whole scheme - who bears nearly the entire financial burden of honoring those requests while often reaping virtually none of the benefits from them.

Michael W. Field, *Article: Rhode Island's Access to Public Records Act: An Application Gone Awry*, 8 Roger Williams U. L. Rev. 293, 295 n. 10 (Spring 2003) ("*Field Article*") (quoting Fred H. Cate et *al*., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 Admin. L. Rev. 41, 50-51 (1994)).

Businesses are leading the records requests submitted to members of the Iowa League of Cities, too. But not just any businesses. Many of the requests are submitted by for-profit businesses *outside* of the State of Iowa, who then repackage and sell the information and data to third parties, or use the public information to compete against Iowa-based companies. While these businesses utilize the Iowa public record statutes for their own financial gain, it is Iowa taxpayers who are left shouldering the costs to collect, maintain and produce the records.

And costly it is. By way of example, in 2016 Washington "state and local governments spent more than $60 *million* to fulfill 285,000 requests – a

portion of which were automated 'bot' requests from computers."[10] To address the burgeoning costs, Washington lawmakers proposed legislation that would require that records requests specify an identifiable record, thereby eliminating requests for 'all records' related to a topic. The legislation also sought to permit agencies to deny multiple bot requests within a 24-hour period from the same source. As one of the bill's introducers explained:

> It is essential for the public to have open and unobstructed access to their government. By no means are we trying to change the original intent of the Public Records Act. However, technology has changed significantly, opening the door for much broader and more complex records requests. . . And in recent years, the number of these requests have exploded, including from those whom I call "vexatious requestors" — people who have little or no legitimate interest in the records themselves, other than to force agencies to spend precious time and limited resources trying to fulfill the requests.

The bill was signed in May 2017 and went into effect in July 2017.[11]

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[10] Washington State House Democrats, *Bipartisan legislation seeks to reduce vexatious public records requests while preserving transparency, access,* January 25, 2017, available at *https://housedemocrats.wa.gov/blog/2017/01/25/bipartisan-legislation-seeks-to-reduce-vexatious-public-records-requests-while-preserving-transparency-access/* (last accessed August 23, 2023).

[11] Washington State Legislature, HB 1595 – 2017-18, available at https://app.leg.wa.gov/billsummary?BillNumber=1595&Year=2017 (last accessed August 23, 2023). A second bill, HB 1594-2017-18, was also enacted into law. It is available at https://app.leg.wa.gov/billsummary?BillNumber=1594&Year=2017. The aim of HB 1594-2017-18 was to create a grant program to help local governments, particularly smaller agencies, to pay for training on how to

The increasing complexity of records requests have also driven up costs. The fact that many public records are now digital does little to alleviate the burdens on cities. To the contrary, the explosion of email and social media postings exacerbate the process and cost. As one state explained,

> Advances in technology have transformed the way governments conduct their business and increased the amount of digital information they must manage. . . . Maintaining records today requires investments in information technology to organize, store, secure, search and inventory records, and trained employees to manage them. Many governments [] do not have sufficient resources to conduct these activities. [12]

Broad requests, which are especially time-consuming, further escalate the expense, as records are often spread across systems (*i.e.*, some in email, others from social media, or maybe even in filing cabinets). With more complex requests come larger responses, and file sizes have ballooned, with one study indicating an increase of 333% between 2018 and 2021.[13]

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better manage records. It would also allow the Attorney General's office to assist local governments in complying with requests. *See* Washington State Democrats, *supra* note 10.

[12] Washington State Auditor's Office, *The Effect of Public Records Requests on State and Local Governments*, August 29, 2016, available at https://mrsc.org/getmedia/d3dbec02-f6f2-4aa7-b1dd-94cd71a5fb4a/w3saoPRA.aspx (last access August 23, 2023).

[13] *Pandemic Drives Up Public Records Request Volumes While Growing Complexity Impacts Processing Time, Says New GovQA PoPRIndex Data*, PR Newswire, May 27, 2021, available at https://www.prnewswire.com/news-releases/pandemic-drives-up-public-

State courts have acknowledged the increased burden and the role fees play in reducing that burden. Alaska's supreme court noted it "could heavily burden a political subdivision to be required to be required to comply with every search request, no matter how onerous, without charging some fee." *Fuller v. City of Homer*, 113 P.3d 659, 665 (Alaska 2005). A Vermont court explained that electronic records have "enabled far more complicated records requests (such as for all documents responding to a keyword search) and correspondingly far more substantial burden on public agencies responding to records requests." *Doyle v. City of Burlington Police Dep't*, 2018 Vt. Super. LEXIS 811, at *6-7 (Washington Cty. Super. Ct. 2018) (unpublished). Due in part to the burden records production places on records custodians, the Vermont court found a statute permitting fees for "copying" documents also allowed custodians to charge fees for the search and production of electronic files. *Id.* at *11.

These costs, of course, do not include legal fees associated with record requests. While custodians have a duty to maintain and produce public records, they also have a corresponding duty to ensure information

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records-request-volumes-while-growing-complexity-impacts-processing-time-says-new-govqa-piprindex-data-301300679.html (last accessed August 23, 2023).

excluded by the public records statutes is kept confidential. These at-times conflicting mandates can leave cities stuck between the proverbial rock and hard place.

> [Cities] have to rely on the help of expensive, yet necessary, legal counsel to ensure they do not release exempted or protected information or redact information that should be disclosed, and to provide all records that satisfy the request. They fear litigation if they make a mistake, yet this preventive effort – in addition to its high cost – risks delaying responses to requesters.[14]

Cities' fear of public records litigation is justified. One town in Florida spent "$20,000 on legal fees because it gave a citizen a bill for a $1.20 in photocopies." Keith W. Rizzardi, *Sunburned: How Misuse of the Public Records Laws Creates An Overburdened, More Expensive, and Less Transparent Government*, 44 Stetson L. Rev. 425, 437 (Winter 2015). Another town had to litigate a public records request it had fulfilled simply because the requester alleged the town's "two-day response was not fast enough." *Id*.

Public records litigation detrimentally impacts cities in several ways. As the state of Washington discovered,

> Public records litigation can have a severe impact on the financial position of some governments, especially those with small operating budgets. Seventeen percent of the governments responding to our survey – large and small – reported they were involved in public records litigation in the past five years, and spent more than $10

[14] Washington State Auditor Report, *supra* note 12, p. 6.

> million in the most recent year alone. . . .[T]ypical litigation expenses incurred include settlement payments, legal review and counsel, and court ordered fees and penalties. The effect of public records litigation extends beyond monetary costs. . . .[L]egal review may delay responses to requesters. Moreover, some governments [] avoid using emerging technologies and approaches to managing information, despite the potential for cost savings and efficiencies. They expressed concerns about the upfront costs in purchasing and implementing such approaches and technologies. Some also said that they fear using them could complicate the disclosure process and expose them to litigation.[15]

Unfortunately, the costs and burdens associated with responding to records requests have led some states to ***limit*** the scope of available public

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[15] *Id*. *See also*, Keith Rizzardi, *Article: Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 Stetson L. Rev. 425, 437 (Winter 2015) ("Washington State public officials have endured particularly difficult times due to citizen suits related to the public records laws. The state attorney general warned that requests for public records had tripled in a decade and that people were requesting records and 'gaming the system' by suing state agencies to catch the agencies in a costly mistake. The emergence of 'gotcha' litigation in Washington State has economic consequences for the government too - as well as the taxpayers who ultimately pay the judgment.' The Washington State Department of Labor and Industries was ordered 'to pay $500,000 because of errors related to a single Public Records Act Request.' The City of Prosser settled with a requester for $175,000 to avoid even greater liability because the city was unable to respond to forty-one requests filed by the requester within the five-day requirement. In another instance, even though the state agencies did respond to a public records request by producing approximately 9,200 emails covering a two-year span, the agency still had to defend itself in court to prove that its response, which took two months instead of the statutorily mandated five days, was reasonable. According to one study, payouts for public records lawsuits leapt from $108,000 in 2006 to nearly $1.7 million in 2011, for a grand total of $4.8 million spent between 2006 and 2011 on alleged violations of the State's Public Records Act.")

records. In the face of litigation over the cost to review, redact and produce body camera footage, several states enacted laws to either exclude the footage from the definition of 'public records,' making it not subject to disclosure at all, or severely limited access to the footage. *E.g*., Kan. Stat. Ann. §§ 45-215 et *seq*. (strictly limiting who may view footage and permitting a fee for those requesting it); S.C. Code § 23-1-240(G)(1) (excluding body worn camera footage as a public record); N.C.G.S. § 132-1.4A (excluding law enforcement recordings from the definition of public records); Alabama HB 289, 2023 Leg., Reg. Sess., (Ala 2023) (passed into law May 24, 2023 and effective September 1, 2023) (strictly limiting disclosure of recordings). Thus, the intended goal of public records statutes – transparency – can be ***stifled***, not furthered, when governments are unable to pass the costs of records requests along to the requesting party.

These restrictions, however, can be averted through the use of public records research and retrieval fees, because these fees alleviate many of the issues identified above. First and foremost, fees ensure the records' continued availability, both in terms of allowing cities to maintain ever-growing databases, but also by funding technologies which facilitate public access (such as online portals) or hiring dedicated employees to respond to requests instead of diverting resources away from the performance of key

government services. Fees also prevent the entire cost of producing records being shifted to the individual citizens. For League members, passing along these costs is the only way to prevent Iowa residents from being forced to subsidize external, for-profit businesses.

Research and retrieval fees also safeguard tax dollars. Initial records requests are often broad and generate mountains of unnecessary or non-responsive documents that are unhelpful to the requester yet increase the burden (and cost) to the city without benefiting the public at large.[16] However, where overly broad requests are employed, fee estimates often cause the requester to narrow the parameters of their search. This allows them to get the records they actually need while reducing the burden on the responding city.

These fees also thwart the weaponization of public records requests. Regrettably, records requests are sometimes used as tools to harass or intimidate. Take, for example, the individual who decided he wanted to make a "hobby" of requesting police data.[17] After sending copious records

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[16] Consider *Jimenez v. FBI*, 938 F. Supp. 21, 24-25 (Dist. D.C. 1996), discussing an inmate who served a request on numerous federal agencies requesting "all records 'in any way connected to, related to or even remotely in reference to [his] name.'" In many instances, the searches resulted in no producible records by the agency.

[17] McKenzie Funk, *Should We See Everything a Cop Sees*, New York Times Magazine, October 18, 2016, available at

requests to departments throughout state, he programmed a 'bot' that "scraped the [Seattle] department's website for new case numbers, then automatically requested the corresponding police reports, firing off emails 10 times a day."[18] He also asked a state university "for all its records dating back to 'the formation of the Earth 4.54 billion years ago,'" and filed requests with 60 additional state agencies demanding every email they had ever sent — an estimated 600 million messages in all. [19] One agency said it would need 132 years to complete the job.[20]

Another researcher described an attempt to use a massive public records request to "intimidate the State [of Rhode Island] into dropping the lead paint lawsuit" by serving a request for sixty-four categories of lead paint-related documents upon no fewer than five state agencies and several city departments. *Field Article*, 8 Roger Williams U. L. Rev. at 325-331. The broad request encompassed any record relating to lead paint since 1950. Collectively, the state agencies estimated that the search and retrieval process would consume 2,641 hours, or 377 workdays, and generate approximately one-and-a-half million documents. *Id*. at 331. When

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https://www.nytimes.com/2016/10/23/magazine/police-body-cameras.html (last accessed August 23, 2023).

[18] *Id.*

[19] *Id.*

[20] *Id.*

informed of the estimated cost to fulfill the request, and that prepayment was required, the requester declined to pursue nearly all aspects of its request. *Id*. There are other instances of abuse as well. [21]

[21] In another example, the Republican Party of Wisconsin filed a request for the records of a professor within 36 hours of the professor's editorial – criticizing the party – being published in the New York Times. The request, made by a member of the party, sought all the professor's work emails that "reference any of the following terms: Republican, Scott Walker, recall, collective bargaining … rally, union," and the names of various Wisconsin Republican legislators and others connected to public sector unions. "The timing of the request, the nature of the requestor, and the scope of emails requested made apparent the naked attempt to intimidate a professor into silence and made the national news." Zach Greenberg, *Article: The Chilling Effect of Sunlight*, 29 Geo. Mason U. Civ. Rts. L.J. 145, 158 (Spring 2019). *See also*, Keith Rizzardi, *Article: Sunburned: How Misuse of the Public Records Laws Creates an Overburdened, More Expensive, and Less Transparent Government*, 44 Stetson L. Rev. 425, 436 (Winter 2015) ("In California, an upset general contractor whose contract was terminated by the city filed a public records suit against the city, alleging unreasonable delays, even though the city had already produced more than 40,000 pages of requested documents. In Montana, the state attorney general has warned that the use of public records requests can have a chilling effect on whether records are generated in the first place. In New Jersey, where one citizen admitted to sending more than a thousand public record**s** requests to his local government so he could track the government's performance, town clerks have declared the number of public records requests to be "through the roof," emphasizing that public time is being used to help private companies develop marketing information. In North Carolina, as a result of increasing numbers of public records requests, the governor enacted controversial new policies requiring people to pay for public records that once were free. In Tennessee, the publisher and editor of an alternative newspaper who wanted to get even with a city demanded that the city produce cookie and cache file records from city computers.").

Fortunately, Iowa Code chapter 22 creates a balance by making public records available while allowing cities to pass along the direct costs of responding to the requesting party. The district court's order, enforcing chapter 22's provisions, should be affirmed.

II. Under its plain terms, Iowa Code section 22.3 permits cities to charge general search and retrieval fees.

Iowa Code chapter 22 is Iowa's freedom of information statute. *Northeast Council on Substance Abuse v. Iowa Dep't of Pub. Health, Div. of Substance Abuse*, 513 N.W.2d 757, 759 (Iowa 1994), and strikes a balance between the needs of the public and those of the cities. On the one hand, it furthers the very important goal of holding public entities accountable by declaring that most records are "public" and giving members of the public the right to examine and copy public records from the records' lawful custodian. Iowa Code § 22.3(1). On the other hand, Iowa Code section 22.3 also permits state agencies and cities to pass along its actual costs in producing records to the requesting party.

The statute, as it was in effect when Appellant filed his records request, stated in relevant parts:

> …fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of reasonable expenses … In the event expenses are necessary, such expenses shall be reasonable and communicated to the requester upon receipt of the request.

> …
> All reasonable expenses of the examination and copying shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or the custodian's authorized designee in supervising the examination and copying of the records. … The fee for the copying service as determined by the lawful custodian shall not exceed the actual cost of providing the service. Actual costs shall include only those reasonable expenses directly attributable to supervising the examination of and making and providing copies of public records. Actual costs shall not include charges for ordinary expenses or costs such as employment benefits, depreciation, maintenance, electricity, or insurance associated with the administration of the office of the lawful custodian. Costs for legal services should only be utilized for the redaction or review of legally protected confidential information.

Iowa Code § 22.3 (2023). The Iowa appellate courts have twice interpreted this statute; and twice they have determined that the statute permits cities to assess fees for the costs they incur in searching for, retrieving and producing public records.

The Iowa Supreme Court first addressed the issue in *Rathmann,* 580 N.W.2d at 773. *Rathmann* involved a member of the public and the school board who petitioned for a writ of mandamus against the board alleging the board had violated Iowa Code § 22.3 by charging her retrieval fees. Applying Iowa principles for statutory interpretation, namely to give effect to the intent of the legislature, *Lockhart v. Cedar Rapids Community School Dist.*, 577 N.W.2d 845, 847 (Iowa 1998), the *Rathmann* Court agreed that § 22.3 permitted the board to charge members of the public, but not school

board members, "a fee to cover the costs of retrieving school district records that qualify as public records under Iowa Code chapter 22." *Rathmann*, 580 N.W.2d at 777. In reaching this conclusion, the Court reasoned,

> Section 22.3 does not expressly establish a procedure for retrieving public records requested pursuant to chapter 22, but does expressly authorize the charging of reasonable fees for necessary expenses incurred during examination and copying of public records. Specifically, a reasonable fee may be charged to cover expenses associated with (1) providing a place for examining and/or copying records; (2) supervising the records during examination and/or copying; (3) and photocopying public records. Section 22.3 also states that "all expenses of such work shall be paid by the person desiring to examine or copy." The phrase "such work" appears several times in section 22.3 and apparently refers back to the first sentence in the section which uses the terms "examination and copying" in reference to the rights established in section 22.2.
>
> Reading the statute as a whole, we conclude that the provisions of section 22.3 generally contemplate reimbursement to a lawful custodian of public records for costs incurred in retrieving public records. We find the phrase "all expenses of such work" to be especially significant and indicative of the legislature's intent that a lawful custodian has the authority to charge a fee to cover the costs of retrieving public records. Thus, access to public records does not necessarily mean "free" access. We recognize that permitting entities covered under chapter 22 to charge members of the public a fee to cover the cost of retrieving public records does, to some extent, limit public access to public records. While the legislature did not intend for chapter 22 to be a revenue measure, at the same time it did not intend for a lawful custodian to bear the burden of paying for all expenses associated with a public records request. We thus reject Rathmann's interpretation that the words "expenses" "fees" and "payment" in the section were only intended to cover the costs of supervising or photocopying the documents.

Id. at 778-779. Turning to the school board's written policy for public records requests, which assessed "an actual fee for the time of the specific [board] employee or employees to retrieve the requested data, if the retrieval process exceeds 30 minutes of staff time," *id*. at 777, the Court found the policy "complie[d] with Iowa law as applied to members of the public." *Id*. at 783.

Nearly two decades later, the issue was addressed again, this time by the Iowa Court of Appeals. In *Hackman v. Kolbet*, No. 16-2063, 2017 Iowa App. LEXIS 755, 906 N.W.2d 206 (Iowa App. July 19, 2017) (published in table format), a member of the public challenged the fees assessed against him by the New Hampton Municipal Light Plant when responding to Hackman's records request. Hackman argued he was, for all practical purposes, charged for the plant's attorney fees, which are not authorized by statute. Citing *Rathmann*, the Court of Appeals was not persuaded. "Hackman made a broad request for information that included over 400 emails from within the Plant." To fulfill it, the plant had to review, compile and print correspondence and records and then redact certain emails. The plant's written policy provided for a fee of $35 per hour for research, which included activities related to complying with the request. *Hackman*, 2017

Iowa App. LEXIS 755, *5-6. Since that was what Hackman was charged, the fees were appropriate and compliant with Iowa law.

If the Iowa legislature intended for costs to be limited to only examination and copying charges, as Appellant contends (Appellant's Proof Brief, p. 47), the legislature would not have used the word "fulfillment" when referencing the prepayment of expenses. "Fulfillment" necessarily encompasses more than just the cost of the copy itself. Nor would the legislature have used the broad phrase "all expenses."

Interpreting substantively the same statute, this Court has already determined that the kind of fees charged by Cedar Rapids are permissible. Under principles of stare decisis, which this Court is "slow to depart from" and then only "under the most cogent circumstances," *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013), *Rathmann* should control.

Besides stare decisis, "[w]hen many years pass following such a case without a legislative response, [the Court assumes] the legislature has acquiesced in [its] interpretation." *Id.* *Rathmann* has been the law in Iowa for a quarter century, and since its enactment the legislature has taken no action to undermine it or limit is holding. Although there have been legislative changes to Iowa Code section 22.3, *none* of the provisions in §

22.3 the *Rathmann* and *Hackman* courts relied upon in reaching their decisions have been removed or substantively altered. If anything, they have only been further strengthened.

In 2022, the Iowa Legislature amended Iowa Code § 22.3 as part of Senate File 2322. The bill was approved by the governor on May 2, 2022, and went into effect in July 2022. The amendment clarifies that fees must be "reasonable." It also says explicitly what the Court of Appeals held in *Hackman*: that cities may recoup from the requesting party the costs the city incurs for legal review of documents in response to a public records request. These recent amendments demonstrate that the legislature intended to permit public entities to charge fees for public records requests beyond mere copying charges, to include a city's actual costs (actual costs -including the labor to search, collect and collate the requested records). After all, labor constitutes the overwhelming majority (98%) of the expenses cities incur when fulfilling public records requests.[22]

To see that this is the apparent meaning of § 22.3's plain terms, the Court needs look no further than the two entities responsible for declaring

[22] Washington State Auditor Report, *supra* note 12, p. 23 ("Survey analysis showed that staff time needed to locate, review, redact and prepare public records for release to requestors makes up 98 percent of the expense incurred in responding to requests.").

and enforcing Iowa law: the Iowa Judicial Branch and the Iowa Attorney General. For purposes of their own public record policies, each has long interpreted Iowa Code § 22.3 to permit them to charge fees for general search and retrieval services in response to a public records request.

The Iowa Judicial Branch, for example, indicates on its website that fees will be charged not only for paper copies, but also "staff time involved in responding to records requests." Further, "staff time" includes time spent retrieving potentially responsive records, reviewing documents for responsiveness and for confidential or other information exempt from disclosure and redacting as necessary, and supervising the requester's examination and duplication of records.[23]

The Iowa Attorney General's website similarly provides that "Expenses and fees may include time spent retrieving, copying and supervising the records. Expenses and fees for office personnel should be based on the hourly wage of the staff providing the service multiplied by the

[23] Iowa Judicial Branch, *Public Records Requests*, August 23, 2023, available at https://www.iowacourts.gov/newsroom/public-records-requests (last accessed August 23, 2023). An archived version of the Iowa Judicial Branch's website, captured in September 2021, shows this was the Judicial Branch's policy even *before* the 2022 amendments, and therefore cannot be attributed to any clarification the amendments provided. Iowa Judicial Branch, *Public Records Requests*, September 8, 2021, available at https://web.archive.org/web/20210908161557/https:/www.iowacourts.gov/newsroom/public-records-requests/ (last accessed August 23, 2023).

hours actually spent, and must exclude employment benefits like health insurance."[24] Further, "[t]o keep costs down, officials should assign lower-paid staff as appropriate to retrieve, copy or supervise records."[25]

The Iowa Judicial Branch and Attorney General are not alone. The Iowa Public Information Board ("IPIB") is a board established under chapter 23 of the Iowa Code. The IPIB's purpose is to "secure compliance with and enforcement of the requirements of chapters 21 and 22" of the Iowa Code.[26] Among other things, it provides an alternative dispute resolution process to resolve complaints or alleged violations of chapters 21 and 22.[27] In a recent post, the IPIB, citing *Rathmann,* concluded that "actual costs" under Section 22.3 "include the cost of the employee's time in supervising record review and the cost of examining the record and making the copy, but do not

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[24] Iowa Attorney General, *Charges Under the Public Records Law: Impose Only Actual Costs!*, April 1, 2005, available at https://www.iowaattorneygeneral.gov/about-us/sunshine-advisories/charges-under-the-public-records-law-impose-only-actual-costs (last accessed August 23, 2023). Like the Iowa Judicial branch, archived versions of the Attorney General's website show this has been its policy since at least December 2014. https://www.iowaattorneygeneral.gov/about-us/sunshine-advisories/charges-under-the-public-records-law-impose-only-actual-costs.

[25] *Id*.

[26] Iowa Public Information Board, *Iowa Code Chapter 23 (authorizing IPIB),* available at https://ipib.iowa.gov/chapter-23-ipib-statute (last visited Aug. 23, 2023).

[27] *Id*.

include overhead costs of the government body, such as employment benefits, maintenance, or electricity."[28]

They cannot all be wrong. Nor are they. The state of Iowa law is, and has been, that general search and retrieval fees are authorized by chapter 22.

Nevertheless, eschewing Iowa precedent (binding and otherwise), the Iowa Freedom of Information Council (Iowa FOIC) and the American Civil Liberties Union of Iowa Foundation (ACLU of Iowa) (together, "Amici"), cite several cases from other states for the proposition that charging search fees is disfavored in other jurisdictions. To the extent those cases bear any relevance to these proceedings,[29] they are altogether distinguishable from Iowa's statutory provisions.

Take *Milwaukee J. Sentinel v. City of Milwaukee*, 815 N.W.2d 367 (Wis. 2012). In that case, Wisconsin's supreme court found their state's freedom of information statute allowed a record holder to charge fees only for "reproduction and transcription of the record," "photographing,"

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[28] Iowa Public Information Board, *Monthly Column – What Kind of Fees Can Be Charged for Producing a Records Request*, June 2, 2023, available at https://ipib.iowa.gov/standard/2023-06-02/reasonable-fees (last visited August 23, 2023).

[29] One of the cases identified by Amici notes that reviewing case law from other jurisdictions in these matters is "not particularly helpful" because the issue inevitably is decided by the relevant statutory language, which is state specific. *Fuller v. City of Homer*, 113 P.3d 659, 665 (Alaska 2005).

"locating a record," and "mailing or shipping" a copy of a record. *Milwaukee*, 815 N.W.2d at 618. Since redaction cannot fairly be describing as reproduction—which the court defined as "to produce a counterpart, an image, or a copy of,"—or location, the court excluded costs related to redacting documents from the fee a city could charge. *Id.* at 620.

Another case cited by Amici, *Fuller v. City of Homer*, similarly found the costs of redacting documents could not be recovered by fees. 113 P.3d at 660. Notably, the case expressly holds the applicable statute, while not permitting recovery of costs related to privilege review, *does* allow payment of general fees for "searching for and copying public records." *Id.* at 663. Moreover, the holding of *Fuller* is quite limited: the court found "production" meant "producing [or] bringing forth." *Id.* at 665. Because a document review is not inherent to the concept of "bringing forth" a document, it was not recoverable by statute. *Id.* at 666.

These cases do not support Amici's assertions for two reasons. First, Iowa's statute is not nearly as limited as Wisconsin's. Iowa Code section 22.3(2) allows the imposition of fees for "[a]ll reasonable expenses of the examination and copying." The inclusion of *all reasonable expenses* is necessarily encompassing and broad, whereas the Wisconsin's statute used

language that plainly limits the scope of fees to the four defined circumstances.

Further, contrary to Amici's assertion, *Milwaukee* and *Fuller* do not suggest a record holder cannot impose "a general search and retrieval fee." Instead, the cases merely holds that under Wisconsin and Alaska state law, respectively, labor costs for *redaction* cannot be included in a fee for the production of a document. Indeed, *Fuller* expressly noted that ministerial acts related to finding and copying documents can be recovered by charging a fee. 113 P.3d at 666. Appellant in this case does not assert the fees he was charged included the cost of redactions.[30] But even if he did, § 22.3 *expressly* permits them. *See id*. ("Costs for level services should only be utilized for the redaction or review of legally protected confidential information.").

Amici's reliance on *Tutt v. Evansville Police Dep't*, 204 N.E.2d 305 (Indiana Ct. App. 2023), is also misplaced. Indiana's Access to Public Records Act (APRA) includes a provision that expressly bans fees for inspecting documents: "[A] public agency may not charge any fee under this chapter . . . [t]o inspect a public record." *Tutt*, 204 N.E.3d at 308 (quoting

[30] The most recently amended version of section 22.3 permits fees for "legal services . . . utilized for redaction or review of legally protected confidential information."

Indiana Code § 5-14-3-8(b)). In the context of accident reports, fees were limited to $5 for "each report" or "a copy of the accident report." *Id.* Thus, in Indiana, inspecting reports is free, while fees are permitted for obtaining an actual physical copy of the record. *Id.* at 308-09. Iowa has no similar restrictions. Instead, section 22.3 permits fees covering "all reasonable expenses" of an examination and copying. Therefore, whereas Indiana expressly provides for free inspection regardless of the costs incurred by the record custodian, Iowa law expressly allows recovery of those expenses by statute.

Finally, the Ohio supreme court found their statute provided for free inspection of documents but permitted fees for copies of records. *State ex rel. Warren Newspapers v. Hutson*, 640 N.E.2d 174, 178 (Ohio 1994). That case involved the interpretation of a statute that provides:

> . . . upon request by any person, a public office or person responsible for public records shall make copies of the requested public record available to the requester at cost and within a reasonable period of time.

Ohio Rev. Code Ann. § 149.4(B). The court found the statute's only limitation on the right to inspect records was temporal, while the right to copy records was subject to the cost of copies. *Hutson*, 640 N.E.2d at 178. No such distinction is contemplated by Iowa Code section 22.3. Indeed, by

its own terms the section permits fees for both the examination and copying of records. Iowa Code § 22.3(2). *Huston* is simply inapposite to this case.

For all these reasons, the order of the district court, finding that Cedar Rapid's public records policy complies with Iowa law, should be affirmed.

CONCLUSION

"[A]ccess to public records does not necessarily mean "free" access." *Rathmann*, 580 N.W.2d at 778-779. As this Court held a quarter century ago, cities are permitted to charge a reasonable fee when responding to a public records request. That is what Cedar Rapids did through its public records policy and when responding to Appellant's records request. The order of district court, enforcing that policy, should be affirmed.

DATED this 24th day of August, 2023.

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

/s/ *Cathy S. Trent-Vilim*
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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) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in font size 14 and contains 6,762 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Cathy S. Trent-Vilim*
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The undersigned hereby certifies that a true and correct copy of the above and foregoing Document was filed electronically with the Clerk of Court using the EDMS filing system, which will send electronic notice to all parties of record.

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