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IN THE SUPREME COURT OF IOWA
No. 23-0833

Robert Teig,
Plaintiff-Appellant,

vs.

Vanessa Chavez, Alissa Van Sloten, Patricia G. Kropf, Elizabeth Jacobi, Brad Hart, and Teresa Feldmann,
Defendants-Appellees.

Appeal From the Linn County Iowa District Court
CVCV098833
Honorable Lars G. Anderson, Chief District Court Judge

Appellant's Final Reply Brief

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STATEMENT OF THE ISSUES

1. May a city refuse to disclose public records based on an attorney-client privilege exemption that does not exist in Iowa Code chapter 22 or §622.10?

Davenport Water Co. v. Iowa State Commerce Com'n, 190 N.W.2d 583 (Iowa 1971)

*Democratic Senatorial Campaign Comm. v. Pa*te, 950 N.W.2d 1 (Iowa 2020)

Greene v. Athletic Council of Iowa State U., 251 N.W.2d 559 (Iowa 1977).

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Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla Sup Ct 1979)

Young v. Gibson, 423 N.W.2d 208 (Iowa Ct App 1988).

Iowa Code §22.7(4)

Iowa Code §622.10

2. May a city refuse to disclose job applications under an amended statute that now says "contractual relationship" communications are not confidential?

   City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523, 527 (Iowa 1980)

   Des Moines Sch. D. v. Des Moines Register, 487 N.W.2d 666, 670-71 (Iowa 1992)

   Ripperger v. Iowa Public Information Board, 967 N.W.2d 540 (Iowa 2021)

   Iowa Code §22.7(11)

   Iowa Code §22.7(18)

3. May a city refuse to disclose public records unless a requestor first agrees to pay inferred retrieval fees not specifically authorized in chapter 22 when chapter 22 says there is a presumptive "right to examine a public record without charge" unless fees are "provided for by law"?

   Bankers Life & Cas. Co. v. Alexander, 45 N.W.2d 258 (Iowa 1950)

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

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Iowa Code §364.3(4)

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4. May a court disregard injunctive relief as a potential chapter 22 remedy when §22.5 says "rights of persons under this chapter may be enforced by . . . injunction, whether or not any other remedy is also available" and Iowa R. Civ. P. 1.1501 says an injunction is an auxiliary remedy in any action?

   Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)

   Iowa Code §22.5

   Iowa Code §22.10(3)(a)

5. Was the court correct in finding there was no evidence of unreasonable delay in responding to record requests when prompt production was not made, requests were ignored, and complete responses still have not been made?

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

   Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232 (Iowa 1983)

   Horsfield Materials v. City of Dyersville, 834 N.W.2d 444 (Iowa 2013)

   Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)

   Matter of Mt. Pleasant Bank and Trust Co., 455 N.W.2d 680 (Iowa 1990).

   Silvia v. Pennock, 113 N.W.2d 749 (Iowa 1962).

   Solberg v. Davenport, 211 Iowa 612, 232 N.W. 477 (Iowa 1930)

Iowa Code §22.8(4)(d)

Iowa Code §22.10(2)

6. Was the court correct in finding Plaintiff "received all non-confidential records in response to his December 2021 records request" when Defendant Jacobi admitted in a filing that there were responsive records she did not provide?

7. Did the court correctly apply Iowa R. Civ. P. 1.509(1)(e) when it found related, non-discrete subparts of an interrogatory counted as separate interrogatories?

In Interest of BT, 894 N.W.2d 29 (Iowa 2017)

State v. Piper, 663 N.W.2d 894 (Iowa 2003).

Iowa R. App. P. 6.903(2)(g)(3)

Iowa R. App. P. 6.903(3)

ARGUMENT

1. There is no Attorney-Client Privilege Exemption from Public Record Disclosure

Defendants do not dispute that:

- there is no attorney-client exemption in chapter 22,
- the work product exemption in §22.7(4) does not apply, and
- Iowa Code §622.10 applies only to testimony and not to public record requests.

This establishes that there is no statutory attorney-client privilege that authorized Defendants to withhold records. See *In Interest of BT*, 894 N.W.2d 29, 30 (Iowa 2017) (quoting *In re P.L.,* 778 N.W.2d 33, 40 (Iowa 2010) ("Because the father does not dispute the existence of the grounds . . ., we do not have to discuss this step.")).

Instead, Defendants ask the Court to read the blanket common law privilege[1] into the statute. Def. Brf. p.22. The common law does not apply to chapter 22.

[1] See *Shook v. City of Davenport*, 497 N.W.2d 883, 886 (Iowa 1993), *abrogated by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.,* 690 N.W.2d 38, 44-45 (Iowa 2004) ("Any confidential communication between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client.").

Iowa's "'sunshine laws' are creatures of . . . statutes unknown to the common law." *Knight v. Iowa District Court,* 269 N.W.2d 430, 433 (Iowa 1978). A statute can change the common law, but the common law cannot change a statute.

> [C]ourts cannot enlarge an act by construction beyond the fair meaning of its language. *Fitzer v. Bloom,* 253 N.W.2d 395, 402 (Minn.1977). *See Snyder v. Davenport,* 323 N.W.2d 225, 227 (Iowa 1982) ("when a statute gives a right and creates a liability unknown at common law, and at the same time points to a specific method by which that liability can be ascertained and the right assessed, this method must be strictly pursued").

Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881, 883 (Iowa 1983).

"[C]ourts . . . must seek always for legislative intent by what the legislature said, rather than what it should or might have said." *Davenport Water Co. v. Iowa State Commerce Com'n*, 190 N.W.2d 583, 594-95 (Iowa 1971). "If the common law privileges are to be included as exemptions, it is up to the legislature, and not this Court, to amend the statute." *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 424 (Fla Sup Ct 1979) (Florida Public Records Act).

Defendants' policy arguments and parade of horribles do not change the law. This Court does not evaluate policy choices made by the legislature, *Democratic Senatorial Campaign Comm. v. Pat*e, 950 N.W.2d 1, 6 (Iowa 2020) (per curiam), but there are important policy reasons a blanket privilege should not apply.

- It is inconsistent with the purpose of chapter 22 and the presumption in favor of disclosure.

- It "impedes the full and free discovery of the truth" and must be "strictly construed." *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 504 (Iowa 1986).

- It "is established so clients can communicate concerns about their legal problems without fear the communication might subsequently be used as evidence against them." *Young v. Gibson*, 423 N.W.2d 208, 210 (Iowa Ct App 1988). The records were not about legal problems but about day-to-day city operations.

- Elected officials and public employees do not act for themselves or for government as an institution. They "act[ ] for the public." *Greene v. Athletic Council of Iowa State U.*, 251 N.W.2d 559, 561 (Iowa 1977). It would be anomalous if (a) a government body that must be open to public scrutiny, (b) could block public scrutiny, (c) by asserting a privilege that is supposed to protect the public, (d) when there is no harm to the public.

This Court examined and followed some of these policy matters in *Tausz v. Clarion-Goldfield Community Sch.*, 569 N.W.2d 125, 128

(Iowa 1997) when it considered how the common law privilege applies to government in discovery.[2]

Defendants had no basis to withhold records based upon attorney-client privilege.

2. Job Applications are not Exempt from Disclosure §22.7(11) –

Defendants claim the legislature "has now broadened the scope of" §22.7(11) to make job applications confidential under that section. Def. Brf. p.26. Plaintiff's brief shows why that is incorrect, and Defendants have not shown how the *City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 527 (Iowa 1980) §22.7(11) holding has been overruled.

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[2] Even *Tausz* would not help Defendants. *Tausz* recognized the privilege for "some communications" but did not apply the general rule in *Shook*. It adopted a limited privilege only for discussions of "legal advice concerning . . . pending litigation." Id. at 129. The Court said, "the privilege must be carefully circumscribed so as to prevent an abuse of utilizing closed sessions when public sessions are required by statute." Id. at 128. It "should be applied only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential." Id. (citation omitted).

Even if Defendants were correct, they agree job applications contain at least some information that §22.7(11) now specifies is not confidential. Def. Brf. pp.27-28. They then argue the inclusion of some unprotected information in a confidential document does not make it a public document.

Defendants have it backwards. If there is public information in a confidential document, the solution is not to suppress the public information. Defendants must "produce redacted copies." See *Des Moines Sch. D. v. Des Moines Register*, 487 N.W.2d 666, 670-71 (Iowa 1992).

Defendants' argument, in effect, concedes that §22.7(11) does not make an entire job application confidential.

§22.7(18) –

The problem with Defendants' argument about §22.7(18) starts with its premise – "the Legislature did nothing to overrule the Court's prior holding in *Greater Sioux City Press Club."* Def. Brf. p.31.

Records can be confidential if they come from "persons outside of government." When *Press Club* was decided in 1988,

the statute did not define "persons outside of government." In 2001 the legislature added:

> As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists.

Defendants incorrectly conclude, "[t]his portion of the statutory amendments was clearly directed at communications with the agents of a municipality's consultants and contractors, not job applicants." Def Brf. p.31.

Defendants do not dispute that applicants are communicating about government employment. They do not dispute that employment involves a "contractual relationship." This establishes that job applicants are not outside of government and applications are not confidential.

Defendants argue the legislature did not specifically say job applications are not confidential, but that is not the way chapter 22 works. All records are presumed non-confidential unless a statute says otherwise. The amendment overruled *Press Club*.

The "outside of government" determination is dispositive, but three other points warrant correction.

First, Plaintiff has already shown why *Ripperger v. Iowa Public Information Board*, 967 N.W.2d 540 (Iowa 2021) has no application. But Defendants say, "[t]he Court has further recognized that employment applications 'involve[] useful incoming communications which could be deterred by public disclosure'. *Id.* This point has now been established as a matter of law." Def. Brf. p.34.

Iowa cases say facts can show liability or defenses "as a matter of law." But Plaintiff can find no case that (absent issue preclusion) says a fact can be established as a matter of law. Defendants have not provided that case.

Second, Defendants argue applications are not "required by law, rule, or procedure" because no one is required to apply for a job. Plaintiff asked Defendants to identify any communication that then would be required. They responded:

- a license or permit application,
- a bid on public improvements, and
- a grant request.

Def. Brf. p.35, fn.3.

Using Defendants' no-one-is-required-to-apply-for-a-job reasoning, no one is required to sell liquor or add a downstairs bathroom; no one is required to bid on a government contract; no one is required to apply for a grant. Defendants do not explain how these communications are required within the meaning of §22.7(18) yet a job application is not.

Third, Defendants Van Sloten and Jacobi were both city employees. Defendants acknowledge someone "with whom an arrangement for compensation exists" is not "outside of government" so there is no confidentiality. Def. Brf. p.30. But then they incorrectly assert, "the 'outside of government' question has no application to the confidentiality of employment applications that are submitted by individuals in a personal capacity, even if they are a current governmental employee at the time of application." Def. Brf. p.36. Defendants add, "[i]t would be absurd to treat the confidentiality of job applications differently solely because some applicants were current City employees while others were not." Def. Brf. pp.37-38.

There is no different treatment. Current employees are covered because "an arrangement for compensation exists," and non-employees (and employees) are covered because they are seeking a "contractual relationship."

3. Chapter 22 Does Not Authorize a City to Charge General Search and Retrieval Fees[3]

The question is whether the legislature used language that shows it intended to authorize general search and retrieval fees. Evidence of its intent must be "clear and convincing." *Rusk v. Cort*, 369 U.S. 367, 380 (1962).

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[3] Defendants say, "[t]he City would be a necessary party . . ." and Plaintiff's "effort to invalidate the City's policy must fail" because the City is not a party. Def. Brf. p.50. This was not raised in Defendants' summary judgment motion and was not decided below. This "court [will] not decide a case based on a ground not raised in the district court." *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). Defendants incorrectly rely on *Paulson v. Paulson*, 286 N.W.2d [sic] 431 (Iowa 1939) (N.W., not N.W.2d). It has nothing to do with suing necessary parties. It dealt with district court parties who were not served with a notice of appeal.

Defendants are the ones who demand fees before they will provide record access. It is enough to enjoin them from requiring unauthorized payments; others will follow suit.

It is important to look at the precise nature of the charges Defendants infer. The brief from the League of Cities makes it clear that "fees" is a misnomer; the charges are excise taxes. This means there is a heightened level of specificity required in order to find charges are authorized.

A city cannot levy a tax unless expressly authorized by state law. Iowa Code §364.3(4); Iowa Const. art. III, §38A.[4] "[A] tax [i]s 'a charge to pay the cost of government without regard to special benefits conferred.'" *Home Builders Ass'n of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002) (citation omitted).

Chapter 22 confers a public, not a special, benefit. It provides "public access," *Rathmann v. Bd. of Dirs. of the Davenport Cmty. Sch. Dist.,* 580 N.W.2d 773, 777 (Iowa 1998), to allow "public scrutiny," *Iowa Civil Rights Comm'n v. City of Des*

[4] See also Iowa Const. art. VII, §7. "Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object." "A tax is distinctly stated when the amount, rate or factors from which the rate is computed are included in the act." *Motor Club of Iowa v. Department of Transp.*, 265 N.W.2d 151, 154 (Iowa Court 1978).

Moines, 313 N.W.2d 491, 495 (Iowa 1981). It can be enforced by the Iowa Attorney General or a county attorney; offices that do not provide legal representation for private interests.

And the League says the inferred fees "allow[ ] cities to maintain ever-growing databases," fund technologies "such as online portals," and hire new employees. League Brf. p.18. These are supplements to city resources and revenue.

Therefore, the charges Defendants infer are excise taxes – taxes "imposed on a transaction or as a condition to the exercise of a privilege." *Home Builders,* 644 N.W.2d at 346.

"This distinction is significant under Iowa home rule principles because" "the power to tax is never inferred," id. at 347, 350 (citation omitted), and chapter 22 "does not expressly permit local government to require payment of a tax" (id. at 347) for search and retrieval of records.

Defendants and the League say retrieval fees are authorized by the general language that a requester must pay "[a]ll reasonable expenses of the examination and copying." §22.3(2). But that language cannot be read in isolation.

First, this is subject to the overarching requirement that access should be free and only authorized expenses are chargeable. §22.2(1). All the words of the statute must be considered together.

Second, §22.3 does not refer to retrieval fees. Defendants argue they are implied by the word "examination." The plain meaning of "examination" is, "the act of looking at or considering something carefully." https://dictionary.cambridge.org/us/dictionary/english/examination. It does not include gathering what will be looked at.

Third, the language, "[a]ll reasonable expenses of the examination and copying" must be considered in the context of all of §22.3(2). It takes the entire section to define the authorized "expenses of the examination and copying."

> Guidance is provided by a canon of construction, *noscitur a sociis,* which "summarizes the rule of both language and law that the meanings of particular words may be indicated or controlled by associated words." 11 Richard A. Lord, *Williston on Contracts* § 32:6, at 432 (4th ed.1999) [hereinafter *Williston]; see also Fleur de Lis Motor Inns, Inc. v. Bair,* 301 N.W.2d 685, 690 (Iowa 1981) ("'The rule of *noscitur a sociis* and the rule of *ejusdem generis* produce identical results in most situations.'"

> (quoting 2A Sutherland, *Statutes & Statutory Construction* §§ 47.16, 47.17 (4th ed.1973))). "'The maxim *noscitur a sociis,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings.'" *Williston,* § 32:6, at 433-34 (quoting *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859, 863 (1961)).

Peak v. Adams, 799 N.W.2d 535, 547-48 (Iowa 2011).

Subsection 2 is a "semantic field[ ], words that share a common meaning and allow the topic to be understood as a connected text rather than a disconnected thought." *Mall Real Estate, LLC v. City of Hamburg*, 818 N.W.2d 190, 202 (Iowa 2012). Considering the entire subsection, the "expenses of the examination and copying" that must be paid are fees "directly attributable to":

- supervising the examination and copying; and
- providing copies.

Defendants say a 2022 amendment "recognize[s] public entities are expected to incur search and retrieval costs that may be passed along to the requestor when it takes more than 30 minutes to produce the record." Def. Brf. p.43. That amendment does not refer to search and retrieval, and Defendants come to

their conclusion by looking at only part of the statute out of context.

The amendment says:

> ~~Fulfillment~~ Although fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of reasonable expenses ~~to be incurred in fulfilling the request and~~, the lawful custodian shall make every reasonable effort to provide the public record requested at no cost other than copying costs for a record which takes less than thirty minutes to produce. In the event expenses are necessary, such ~~estimated~~ expenses shall be reasonable and communicated to the requester upon receipt of the request. A person may contest the reasonableness of the custodian's expenses as provided for in this chapter.

SF 2322, https://www.legis.iowa.gov/docs/acts/2022/CH1039.pdf.

Defendants quote "make every reasonable effort to provide the public record requested at no cost other than copying costs for a record which takes less than thirty minutes to produce." Def. Brf. p.43. But they overlook the introductory qualifying language, "fulfillment of a request for a copy."

"The public record requested" means the copy. "The" is a definite article, so "public record requested" is the one previously

specified[5] – the copy. If no copy is requested, the sentence Defendants quote does not apply.

When Defendants refer to "fulfillment," they take the word out of context.

Defendants speak of burdens that arise from responding to record requests. Def. Brf. pp.53, 55-56. They say there is a "significant burden placed upon responding public entities in fulfilling requests for records." Def Brf. p.59. They then say §22.3 expressly allows collection of reasonable expenses "in fulfilling such requests." Id.

That is not what §22.3 says.

Section 22.3 does not refer to fulfillment of a request for access. It says, "fulfillment of a request for a copy . . .."

Under Defendants' theory, retrieval fees may always be charged. This reads the §22.2(1) presumption of a "right to examine a public record without charge" out of the statute. "The rule that repeals by implication are not favored has special

[5] "The" is "used as a function word to indicate that a following noun or noun equivalent is definite or has been previously specified." https://www.merriam-webster.com/dictionary/the.

application to important public statutes of long standing." *In re Klug's Estate*, 104 N.W.2d 600, 604 (Iowa 1960).

Defendants argue:

> Teig's allegations that only examination and copying costs are allowed would mean that the statute would only permit the City to charge expenses where a person sits at city hall, looking at physical documents, for more than 30 minutes, or where the custodian takes more than 30 minutes to use a photocopy machine to copy physical documents. It is hard to imagine these scenarios actually occurring in the digital age, and it seems unreasonable that this is what the legislature had in mind when passing the current version of the statute.

Def. Brf. p.44.

This must be precisely what the legislature had in mind when it said there is a right to examine a public record without charge. §22.2(1). That was the legislative goal.

Part of the reason examination and copying expenses are acceptable is because there is accountability; the requestor has control of the time taken and copies made and can verify those items. The potential for government abuse is minimized. This is not the case with search and retrieval fees.

For example, Defendants' view of legal review fees shows the likelihood of abuse. They say the 2022 amendment "specifically authorizes legal review fees, when such review is necessary to determine whether confidential information is included within a record and whether redaction is necessary." Def. Brf. p.48.

The League first seems to disagree ("These costs, of course, do not include legal fees associated with record requests."). League Brf. p.15. But then the League says those fees are "appropriate and compliant with Iowa law" and relies on *Hackman*. League Brf. pp.25-26.

Defendants and the League are wrong for at least two reasons.

First, review and redaction cannot be part of search and retrieval. It can only be done after retrieval. See *Fuller v. City of Homer*, 113 P.3d 659, 666 (Alaska Sup Ct 2005) ("Indeed, a privilege review would seem conceptually to require that the

search already have been conducted and the requested documents identified.") cited by the League.[6]

Second, the 2022 amendment to §22.3 overruled *Hackman*. The statute authorizes costs related to redaction or review of "legally protected confidential information" and not wholesale review of everything.[7]

The Iowa Public Information Board has issued an opinion saying, "a lawful custodian should not charge for an attorney's preliminary review of records to determine whether the records contain confidential information." 23AO:0002, March 3, 2023, https://ipib.iowa.gov/rulings/advisory-opinions/costs-legal-services. "The enactment of SF 2322, which specifically addresses which legal costs may be charged to a requester, overruled the portion of *Hackman* that addressed this issue." Id.

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[6] Alaska's Public Records Act specifies when search fees may be charged. Section 40.25.110. That is the type of specific language that would be anticipated if the Iowa legislature intended to authorize general search fees.

[7] "Costs for legal services should only be utilized for the redaction or review of legally protected confidential information." 2022 Acts, ch 1039, §1.

Despite this, Defendants say the amendment is consistent with *Hackman*, Def. Brf p.48. And the League claims the amendment, "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." League Brf. p.27.[8]

Hackman inferred search and retrieval legal review fees as part of "expenses of the examination and copying of the records." It was wrong. However, the legislature decided to authorize limited fees as part of examination and copying. This shows the legislature knows how to authorize fees when that is its intent. Just as it has not authorized legal review fees as part of general search and retrieval, it has not authorized any fees as part of general search and retrieval.

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[8] The League's approach to fees is not a model of consistency. It argues a search and retrieval fee is proper for every examination of records. But its website still says "the city may not charge a fee to examine a public record as long as the public record is in the physical possession of its custodian. The custodian may charge a reasonable fee for supervising the examination and copying of records." *Guidance on the Iowa Open Records Law, Code of Iowa Chapter 22*, https://iowaleague.org/wp-content/uploads/2023OpenRecords.pdf.

The legislature specifically authorized charges for examination and copying expenses – fees that are unlikely to preclude access. If the legislature intended to authorize general retrieval charges, would it have left such unbridled expenses[9] to inference?

The League relies on Judicial Branch and Attorney General policies to define the law. Neither are persuasive except to show the need for the Court to define the law.

For example, Judicial Branch policy is it will charge fees to review documents for confidential information and redacting. https://www.iowacourts.gov/newsroom/public-records-requests. Amended §22.3 and the IPIB say this is not allowed.

The Attorney General argued in *Belin v. Reynolds*, 989 N.W.2d 166 (Iowa 2023), that there was no timeliness requirement for access to electronic records. But a Sunshine

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[9] Defendants say, "[t]he records custodians involved in this case earn more than $20 per hour, and Tieg [sic] has therefore not been charged their actual rate of pay." Def. Brf. p.47, fn.4. This is not in the record. If true, why does the HR director herself retrieve a job application when a generalist making half the salary could find that record?

Advisory says, "[t]ime is of the essence in responding to public records requests. In order to assure compliance with the statute, any delay should be for a reason authorized by law." *Getting Access to Public Records: What is a Good Faith, Reasonable Delay?*, August 1, 2005, https://www.iowaattorneygeneral.gov/about-us/sunshine-advisories/getting-access-to-public-records-what-is-a-good-faith-reasonable-delay.[10] The Court rejected the Attorney General's argument.

Defendants say, "[i]f the Iowa Legislature wanted to clarify that search and retrieval fees are not available under the provisions of chapter 22, it could have done so." Def Brf. p.48. Again, that is not how chapter 22 works. The rule is not, "pay unless the legislature specifically says no." The rule is "do not pay unless the legislature specifically says yes."

[10] Section I of the League's brief does not relate to, or show an impact on, Iowa government. One example is 20 years old, and there is no explanation why requests and costs have gone up. Is it because of government's increased secrecy or its increased failure to comply with public access laws? What is clear is that government intends to charge more fees that will deny access to records.

The legislature said yes to retrieval fees in four specific circumstances for computer-related records. It did not say yes for general search and retrieval fees.

If the legislature intended its plain language to authorize general search and retrieval fees, that was its prerogative, and the Court should enforce its decision. But if those fees are merely inferred, that can spell the end of chapter 22 and the legislative demand for open government. This is not hyperbole; it is the nature of government.

Government does not embrace public scrutiny. If it did, there would be no need for chapter 22; there would be no cases enforcing chapter 22.[11] While we want to believe the best of government, we cannot ignore that "misconduct . . . thrives in darkness." *City of Riverdale v. Diercks*, 806 N.W.2d 643, 645 (Iowa 2011). The reality is that government will use fees to keep the public in the dark.

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[11] *More Iowa public records, open meetings cases going to court*, Erin Jordan, The Gazette, August 6, 2023, https://www.thegazette.com/state-government/more-iowa-public-records-open-meetings-cases-going-to-court/.

"Statutes intended for public benefit are to be taken most favorably to the public," *Bankers Life & Cas. Co. v. Alexander*, 45 N.W.2d 258, 264 (Iowa 1950), and inferred search and retrieval fees conflict with the liberal reading the Court must give the Iowa Freedom of Information Act. See *Gannon v. Board of Regents*, 692 N.W.2d 31, 43 (Iowa 2005).

Government can eliminate access to public records through the guise of search and retrieval fees. What Defendants try to justify as a shield then becomes a sword.

This Court should not drive that blade home unless it is certain of the legislature's intent.

4. The Court Incorrectly Found Injunctive Relief is not an Available Remedy

Defendants say, "injunctive relief compelling compliance is only available '[u]pon a finding by a preponderance of the evidence that a lawful custodian has violated any provision of' chapter 22. Iowa Code § 22.10(3)(a)." Def. Brf. pp. 61-62. But Plaintiff also seeks independent injunctive relief under §22.5. That is not governed by §22.10(3)(a), and relief is not limited to "either prohibit a party from disclosing records or to compel a party to

provide records or otherwise comply with the statute." Def Brf. p.61.

There is no error preservation issue. Plaintiff noted that Defendants' motion for summary judgment did not deal with Plaintiff's §22.5 injunctive request, App. Vol. 1 – 179, but the court dismissed Plaintiff's entire case – including that request.

The law cited by Defendants does not apply. Plaintiff identified an issue that was not before the court for decision, but the court decided it anyway. This is not a case where the court failed to rule on an issue. See *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012). The court considered the issue and ruled on it – nothing more is required. Id. at 864.

5. Defendants Refused to Provide Records Both Directly and by Unreasonably Delaying Responses

Defendants violated chapter 22 in two ways. First, they explicitly refused to provide certain records and still have not provided all records sought. Second, Defendant Chavez waited a week to provide a one-page email and did not provide it promptly.

Defendants say, "[t]here is no hard and fast deadline by which a local government or its representatives must respond to

an open records request under Iowa law or be subject to a lawsuit and damages . . .." Def. Brf. pp.64. They also say, "there is no evidence to support finding any impermissible express or implicit 'refusals.'" Def. Brf. p.67.

There are two related but independent time considerations under chapter 22: (1) implicit refusal to make records available and (2) violation of chapter 22 by failing to promptly comply.

The first triggers the right to enforcement under §22.10(2). In *Belin*, the issue was whether failure to provide records for an extended time could be implicit refusal. The Court said refusal "can be shown through an unreasonable delay in producing records." *Belin*, 989 N.W.2d at 174. Because delays went from months to more than a year, the case did not require the Court to go further and decide if a bright line rule should apply.

The Court should set that rule now and require "immediate" production. As a way to define "immediate," the Court could use "no later than the end of the office hours during which a request is received."

This is the logical application of the Court's statement in *Horsfield Materials v. City of Dyersville*, 834 N.W.2d 444, 461 (Iowa 2013):

> section 22.4 of the Open Records Act, by stating 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," suggests that our legislature contemplated immediate access to public records.

Unless otherwise qualified, a request for records is a request for records "now." If business hours are over and the requester does not have the records, access has been refused. Whether refusal is explicit or implicit, the result is the same.

But the fact of refusal can be separate from the reason for refusal. The fact of refusal itself need have no inherent reasonable or unreasonable component.

It shows whether a requester got the record or did not. If the requester did not get the record, the enforcement threshold has been crossed and the government must show it did not violate the law.

It is impractical to impose an "unreasonableness" burden on a plaintiff's trigger for enforcing chapter 22. This would require a trial before a trial, and a plaintiff will not have access to the facts.

"The key is access to the proof; the burden of proof ordinarily rests on the party who possesses the facts on the issue in dispute. *Matter of Mt. Pleasant Bank and Trust Co.*, 455 N.W.2d 680, 685 (Iowa 1990). The burden is on the plaintiff to show implicit refusal, but a defendant has the information on any reason for delay in access.

In addition, government has a fiduciary duty to the public under chapter 22. "[T]he burden 'shifts to the fiduciary to show fair dealing in all matters within the fiduciary obligation.'" *Clinton Land Co. v. M/S Assocs., Inc.*, 340 N.W.2d 232, 233 (Iowa 1983). When violations of fiduciary duty are the subject of controversy, the fiduciary "must establish he properly discharged his obligation." Id. at 234.

Using immediate access as the refusal trigger promotes the purposes of chapter 22 and encourages the parties to discuss and

resolve issues without court action. The government also will be less likely to use an "if you don't like it, sue us" approach.

Concepts like "reasonable delay" or "infeasible" are then best left to the violation determination. Possession of the evidence and the burden of proof are congruent. At that point, the government will have the opportunity to show that, while it may not have provided immediate access, delayed access was not a violation. This could come as a "good-faith, reasonable delay" defense under §22.8(4) or as an impossibility defense, see generally *Silvia v. Pennock*, 113 N.W.2d 749, 752-53 (Iowa 1962).

Requests beginning in October –

Defendants say, "[t]he undisputed facts in this case demonstrate" they "required time to seek legal advice to respond to Teig's narrowed request for the City Attorney applications." Def. Brf. p.66. There is no record cite because this is not in the record.[12]

[12] The original request for records was made on October 21. Assuming time was needed to make a confidentiality determination and the November 23 closed council meeting was part of that process, Def. Brf. p.16, Defendants were already well outside the 20-day safe harbor provision of §22.8(4)(d).

They say, "[t]he delay from the November 3 request until the December 14 production of documents was reasonable in light of these circumstances." Def. Brf. p.66. Again, no facts support this claim. And the violation is not just from delay; there was insufficient production. Defendant Feldmann was responsible for producing records and still has not provided documents she said would take less than one-half hour to produce.

December request –

Likewise, Defendants Hart and Chavez never provided records related to Plaintiff's December 15 request. The timeline is:

- December 15 request to Defendant Hart, App. Vol. 2 – 18.
- December 20 response from Defendant Chavez, "I need greater clarify [sic] in order to conduct the search," App. Vol. 2 – 18.
- December 21 email from Plaintiff, App. Vol. 2 – 17.
- December 22 response from Defendant Chavez, "[t]he request is still vague and ambiguous, but I will spend some time looking for records again to see if this helps clarify the request and will confirm," App. Vol. 2 – 16.
- December 29 email from Plaintiff, "[w]here are the records I requested two weeks ago?" App. Vol. 2 – 11.
- December 29 response from Defendant Chavez," [w]e are in the process of identifying records," App. Vol. 2 – 10.
- December 30 email from Defendant Chavez regarding fees without specific estimate, App. Vol. 2 – 9-10.

- December 30 response from Plaintiff requesting time records on the search, noting estimate was untimely and incomplete, noting fees had not been demanded on other requests, asking why documents found to date had not been provided, noting phone discussion that Mayor's response was incorrect when it said there were no records requesting attorney interviews be closed,[13] and asking for access by January 3, App. Vol. 2 – 8-9.
- January 3 email from Defendant Chavez seeking agreement to pay fees, App. Vol. 2 – 7-8.
- January 4 response from Plaintiff saying, "[b]efore I filed litigation, there were no charges for records or mention of charges. As far as the request to Brad, who has looked for those records? Do they exist? How did you arrive at your estimate?" Also outlining why chapter 22 did not allow fees and asking, "[h]ave I misread the statute?" Stating, "[t]he requested record responses are seriously delinquent. When can we get them taken care of?" App. Vol. 2 – 5-6.
- Defendant Chavez never replied.

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[13] On October 12, 2021, the council held a closed meeting. App. Vol. 2 – 127. Plaintiff's October request would have included any request to close that meeting. Plaintiff then asked for the attorney opinion about "closing the session" and "requests to close the interviews," App. Vol. 2 – 142, 147. On December 14, Defendant Hart said there were no records of requests to close the interviews, App. Vol. 2 – 138. Plaintiff and Defendant Chavez discussed this on December 22, and that is when Plaintiff found out the session was for discussion and not interviews. Defendant Chavez then provided two redacted requests to close the session, saying, "the City provided records to you in accordance with what you requested. To reiterate, the interviews were not held in closed session; the Council's discussion of the candidates was held in closed session." App. Vol. 2 – 19-21. No matter the label Plaintiff used, the City knew what was sought and did not turn the records over until pressed. Even that production is inadequate because of redactions.

March 11 request –

For the one-page email requested in March, App. Vol. 2 – 39, Defendants have not shown it was reasonable to delay access. They say, "Chavez responded as promptly as her job duties, workload and personal responsibilities allowed, and within the parameters of the City's open records policy to the greatest extent possible." Def Brf. p.67. Her affidavit says that, App. Vol. 2 – 4, but she does not refer specifically to the email requested. There is no proof the request was given priority; no proof earlier production was not feasible; no proof of other duties, workload, or personal responsibilities. She did not provide updates on production and did not explain why the one-page document was not "immediately available (e.g., what searches needed to be performed or what other obstacles needed to be overcome)." *Belin v. Reynolds*, 989 N.W.2d at 175. There is no evidence to show a one-week delay was necessary.

"This court is not dumb, and has a right to consider that which everyone knows . . .." *Solberg v. Davenport*, 211 Iowa 612,

619, 232 N.W. 477, ___ (Iowa 1930). Someone with email knows it takes only seconds to search for and locate an email they sent.

The records requested in October, November, and December still have not been provided (two documents provided are redacted). That violated chapter 22. The one-week delay in providing the one-page email was not reasonable. That also violated chapter 22.

6. Plaintiff did not Receive all Records in Response to a December 2021 Records Request

Defendants do not deny that, at a minimum, there were responsive billing statements that existed in December that Defendant Jacobi should have provided. They also do not deny that Defendant Jacobi has never provided them. Defendants try to argue around this violation by saying, "Teig has admitted that he received those fee statements through this litigation in March 2022." Def. Brf. pp.69-70.

First, this statement is not true. The heavily-redacted billings did not come from Defendants or case discovery. The billing law firm was not a party, and the billings were received

informally from counsel for the firm. Second, this third-party access does not excuse Defendant Jacobi's chapter 22 violation.

Beyond that, Defendants rely on wordplay. The November 23, 2021, city council meeting minutes say:

> Motion to go into closed session to discuss strategy with legal counsel with regard to *pending* litigation . . . pursuant to Iowa Code Sections 21.5(1)(c) . . .. [App. Vol. 2 – 123, emphasis supplied].

Plaintiff's December 6 record request said:

> the Council held a closed session on a legal matter on November 23. Please provide records showing the name of the litigation, name of any attorney involved, and bills and expenditures related to the matter. [App. Vol. 2 – 172].[14]

On December 8, Defendant Jacobi responded there were no documents "showing the name of the litigation, and name of any attorney involved" and "the city has not yet received any invoices regarding this representation." App. Vol. 2 – 109.

Defendants now say the minutes are not correct – there was no pending litigation because the case was not filed until

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[14] Defendants' brief misquotes the request. The quotation says, "records showing the name of the litigation that was discussed." Def. Brf. p.69. The words "that was discussed" are not in the request. App. Vol. 2 – 172.

November 24. Defendants say Defendant Jacobi, "could not provide records showing the name of any *pending* litigation, or the attorney engaged in that litigation, because there was no *pending* litigation at the time of the closed session. * * * Jacobi's response to Teig was accurate when it was made on December 8th." (emphasis in original).[15] Def. Brf. p.69.

Defendants' cavil overlooks the facts that Plaintiff did not use the word "pending" and the case was filed two weeks before Defendant Jacobi responded.

Defendants also overlook the fact that the City had billings related to the "legal matter" and that these records showed counsel's name.

[15] Defendants' summary judgment motion did not make this claim. It argued, "[a]ny records related to the closed session were withheld due to their confidential status under Iowa Code Ch. 21." App. Vol. 1 – 49. The present argument did not come up until Defendants replied to Plaintiff's summary judgment resistance. Reply to Plaintiff's Resistance, April 6, 2023, p.9.

7. The Court Incorrectly Applied the Limitation on Number of Interrogatories by Finding Related, Non-Discrete Subparts Were Separate Interrogatories

The issue is how many interrogatories are in a request that connected an interrogatory to a request for admission.[16]

Plaintiff set out the law and argument in his brief, and Defendants have failed to dispute either. That failure is enough to establish that this is one interrogatory with related subparts. See *In Interest of BT*, 894 N.W.2d at 30.

Defendants' brief does not comply with Iowa R. App. P. 6.903(3) because there is no "argument containing the . . . contentions and the reasons for them with citations to the authorities relied on . . .." Iowa R. App. P. 6.903(2)(g)(3). "Failure to cite authority in support of an issue may be deemed waiver of that issue." Id.

Defendants' argument is, "[b]ecause the District Court's ruling on limiting discovery was reasonable under the

[16] Plaintiff learned this technique from Professor Allan D. Vestal in first-year civil procedure almost 50 years ago. Professor Vestal served as chair of the Advisory Committee on Rules of the Iowa Supreme Court.

circumstances of this case and well within the trial court's exercise of discretion, Teig's request that the ruling be overturned should be denied." Def. Brf. p.74. This "one-sentence conclusion without analysis" waived Defendants' argument. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003).

Defendants have done nothing to show the subparts were discrete.

CONCLUSION

Plaintiff asks the Court to reverse on all issues and remand the case for completion of discovery and trial.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 6,802 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e)(1) because it was prepared using Century Schoolbook 14-point font.

COST CERTIFICATE

There was no cost for printing this brief.

CERTIFICATE OF SERVICE

This brief was electronically filed with the Clerk of Court and served on all counsel of record using EDMS.

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Respectfully Submitted,

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