**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 Brief

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House Video, March 24, 2022, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20220324030455131&dt=2022-03-24&offset=4811&bill=SF%202322&status=i

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## ROUTING STATEMENT

Plaintiff argues that two prior decisions of the Court have been superceded by statute: (1) *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988) and (2) *Rathmann v. Board of Directors of Davenport Comm. Sch. Dist.*, 580 N.W.2d 773 (Iowa 1998).

The case also includes two issues of first impression that go to the heart of Iowa's open records law: (1) whether records may be withheld based upon an attorney-client privilege exemption that does not exist in Iowa Code chapter 22 or §622.10 and (2) whether a court may exclude injunctive relief as a potential chapter 22 remedy contrary to §22.5 and Iowa R. Civ. P. 1.1501.

The Supreme Court should retain the case.

## STATEMENT OF THE CASE

Plaintiff sued the Cedar Rapids Mayor, City Attorney, two Assistant City Attorneys, City Clerk, and Human Resources Director for multiple violations of Iowa's open records law. Iowa Code chapter 22 (2021). Plaintiff asked for (1) statutory remedies and (2) injunctive relief prohibiting Defendants from applying

policies that impair access to records. Second Amended Petition; (App. Vol. 1 – 28).

Plaintiff appeals from two orders: (1) a March 7, 2023, denial of Plaintiff's motions to compel and allow additional discovery (App. Vol. 1 – 172) and (2) a May 18, 2023, order granting Defendants' summary judgment motion. (App. Vol. 1 – 229). Plaintiff filed a timely notice of appeal on May 22, 2023. (App. Vol. 1 – 240).

Plaintiff appeals the court's findings that:

1. A city may refuse to disclose public records based on an attorney-client privilege exemption that does not exist.

2. A city may refuse to disclose job applications and related documents under an amended statute that says "contractual relationship" communications are not confidential.

3. A city may refuse to disclose public records unless a requestor first agrees to pay general search and retrieval fees not specifically authorized in amended chapter 22.

4. A court may disregard injunctive relief as a potential remedy despite the fact §22.5 says rights "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.

5. There was no evidence of unreasonable delay in responding to record requests when promised production was not made, requests were ignored, and complete responses still have not been made.

6. Plaintiff "received all non-confidential records in response to his December, 2021 records request" even though Defendants admitted in a filing that there were responsive records that were not provided.

7. Plaintiff exceeded the permissible number of interrogatories because, contrary to Iowa R. Civ. P. 1.509(1)(e), related, non-discrete subparts in an interrogatory counted as separate interrogatories.

## FACTS

There were five sets of records requests.

In October 2021, Plaintiff requested a copy of a Cedar Rapids city clerk job application submitted by Defendant Van Sloten. She and Assistant City Attorney Kropf claimed it was confidential and denied access.[1]

In October and November 2021, Plaintiff requested job applications and other records relating to hiring a new city attorney in October 2021. H.R. Director Feldmann, Mayor Hart,

[1] Plaintiff's Resistance to Defendants' Motion for Summary Judgment (App. Vol. 1 – 179).

and City Attorney Chavez provided a few records, but withheld or redacted records based upon fee payment demands and confidentiality claims not specifically authorized by statute. Defendant Feldmann agreed to provide additional records, but never did.[2]

On December 6, 2021, Plaintiff asked Interim City Attorney Jacobi for records related to a closed city council meeting on November 23, 2021, discussing city litigation. Her December 8 response said, "there are no such documents responsive" to the request for records "showing the name of the litigation, and name of any attorney involved." She also said, "[r]egarding your request for bills and expenditures related to the matter, the city has not yet received any invoices regarding this representation . . .." On January 4, 2023, one of Defendants' filings admitted there were billing statements beginning in November 2021 that related to the representation and the name of the attorney. It is undisputed that Defendants never provided those records to Plaintiff. After

[2] App. Vol. 1 – 14-17 – Defendants' May 27, 2022, Answer admitted allegations 32-35, 37-38, 41-44, and 46-49.

that admission, Plaintiff searched online public records and found initial payment was approved at a city council meeting on December 7, the day before Defendant Jacobi said there were no bills. She was at that council meeting as Interim City Attorney.[3]

On December 15, 2021, Plaintiff asked Defendant Hart for follow-up records related to responses to the October/November attorney-hiring document requests. He never responded to that request. Defendant Chavez became involved in the request and refused to provide records unless Plaintiff agreed to pay a non-specific amount for record retrieval. Plaintiff sent her a follow-up email about production, and Defendant Chavez never responded.[4]

Finally, on March 11, 2022, Plaintiff asked Defendant Chavez for a copy of "the instructions you have given to city employees that my public records requests must go through your office." She replied, "I will need to locate the records you are seeking and anticipate I will have a response for you by next Friday, 3/18. At this time I do not anticipate the time needed to

[3] App. Vol. 1 – 214-17.
[4] App. Vol. 2 – 5-11, 16-18.

locate the records will exceed 30 minutes." She did not provide the reason it would take a week to provide access. On the 11th, Plaintiff wrote back: "City policy says 'promptly' and requests are to take priority over other work. Are you using the policy's five-day rule to get to the 18th?" Defendant Chavez did not respond, and Plaintiff sent additional requests for responses on March 14 and 16. Defendant Chavez did not respond. On March 18, Defendant Chavez sent Plaintiff a copy of a one-page email she had sent to the City Manager and City Clerk on December 30.[5]

Additional facts are set out by issue.

## ARGUMENT

### *Iowa's Freedom Of Information Act*

"'[T]he policy of [chapter 22 is] that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others.' Iowa Code §22.8(3)." *Belin v. Reynolds*, 989 N.W.2d 166, 172-73 (2023) (alterations in original). Free examination "include[s] the right to examine a

[5] App. Vol. 1 – 27, Defendants' Answer admitted these allegations.

public record without charge while the public record is in the physical possession of the custodian of the public record" unless the legislature "otherwise provide[s]." §22.2(1).

"There is a presumption in favor of disclosure" under chapter 22 and "a liberal policy in favor of access to public records." *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012). "The purpose of [chapter 22] is 'to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.'" *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019) (alterations in original) (citation omitted). "Disclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." Id. (citation omitted).

*Standards Of Review*

When this Court reviews a summary judgment order, its "task is to determine only whether a genuine issue of material fact exists and whether the trial court correctly applied the law." *KMEG Tele. v. Iowa State Bd. of Regents*, 440 N.W.2d 382, 384

(Iowa 1989). "The burden of showing the nonexistence of a fact question rests with the moving party." *Gannon v. Bd. of Regents*, 692 N.W.2d 31, 37 (Iowa 2005). The Court views the

> record in a light most favorable to the nonmoving party [and] must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions.

*Hedlund v. State*, 930 N.W.2d 707, 715 (Iowa 2019) (citations and quotation marks omitted).

The Court "review[s] the district court's interpretation of chapter 22 for correction of errors at law [and] discovery rulings for abuse of discretion. A ruling based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion." *Vaccaro v. Polk County*, 983 N.W.2d 54, 57 (2022) (citations and quotation marks omitted).

**1. <u>There is no Attorney-Client Privilege Exemption from Public Record Disclosure</u>**

Defendants Feldmann, Hart, and Chavez raised attorney-client privilege as an objection to providing access to an attorney

letter sent to the city council. Defendant Jacobi raised that privilege as a general objection to providing access to records.

*The ruling* –

> The Court next addresses Defendants' argument that the legal opinion related to holding a closed city council session is protected by the attorney-client privilege and is confidential. Plaintiff seeks production by Defendants of a legal opinion from the City's counsel regarding holding a closed city council session. Even when the facts are viewed in the light most favorable to Plaintiff, the Court concludes that there is no circumstance under which Plaintiff would be entitled to the legal opinion under Iowa's open records law.
>
> "Iowa's attorney-client privilege is codified at Iowa Code section 622.10." Konchar v. Pins, --- N.W.2d. ---, 2023 WL 2939140, *6 (Iowa Apr. 14, 2023). Iowa Code §622.10(1) provides:
>
> > A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.
>
> Iowa Code § 622.10(1) (2023).

> The Konchar Court reiterated that the privilege is "of ancient origin" and "is premised on recognition of the inherent right of every person to consult with legal counsel and secure the benefit of his advice free from any fear of disclosure." Konchar, at *6 (citing Keefe v. Bernard, 774 N.W.2d 663, 667 (Iowa 2009)). Iowa's discovery rules also provide a basis for a party to withhold privilege matter from an opposing party. See I.R.Civ.P. 1.503(1). Iowa's open records law "does not affect other specific statutory privileges recognized by the legislature, such as the attorney-client privilege." Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 463 (Iowa 2013).
>
> There is no doubt that the document at issue is a legal opinion that provides an opinion to the City's mayor and city council regarding entering into a closed session, and reviewing city attorney candidates and arranging for hiring for the city attorney position. This Court already has specifically found, in its March 7, 2023 Ruling, that the communications at issue in this case are the sort that are entitled to the protection of the attorney-client privilege, and that Defendants have met their burden of showing that privilege applies under the facts of this case. This document is confidential under the attorney-client privilege and does not need to be provided to Plaintiff.

(App. Vol. 1 – 235-36).

*The law* –

Neither Defendants nor the court identified a chapter 22 attorney-client exemption; there is none. Instead, they relied on dicta in *Horsfield Materials*, 834 N.W.2d at 463 about "other

specific statutory privileges." The court applied the testimonial privilege in Iowa Code §622.10(1):

> A practicing attorney . . . shall not be allowed, **in giving testimony**, to disclose any confidential communication . . .. [emphasis supplied].

"When the asserted privilege is based on a statute, the terms of the statute define the reach of the privilege." *Agrivest Ptshp. v. C. Iowa Prod. Cred. Assn*, 373 N.W.2d 479, 483 (Iowa 1985) (discovery). "The privilege in section 622.10 is limited to disclosure of confidential communications *by the giving of testimony*." *McMaster v. Bd. of Psychology Examiners*, 509 N.W.2d 754, 757 (Iowa 1993) (emphasis in original) (mental health professional). This is "an evidentiary privilege," *Iowa Ins. v. Core Group, Iowa Justice Ass'n*, 867 N.W.2d 58, 74 (Iowa 2015), that has nothing to do with public record disclosures.

The legislature knew how to address record confidentiality when an attorney is involved. Section 22.5(4) exempts "work product of an attorney . . . related to litigation or claim made by or against a public body."

"Work product protection is not the same as the attorney-client privilege." *Robbins v. Iowa-Ill. Gas & Elec. Co.*, 160 N.W.2d 847, 855-56 (Iowa 1968). An exemption for only work product records means the legislature did not intend to exempt attorney-client records. *Inclusio unius est exclusio alterius.*

A court may not read into a statute something the legislature did not see fit to include, *Envirogas, LP v. Cedar Rapids*, 641 N.W.2d 776, 783 (Iowa 2002), and should "decline to create through interpretation a virtually limitless exception to our public records law." *Hall*, 811 N.W.2d at 487.

Attorney-client privilege does not authorize records to be withheld.

**2. <u>Job Applications are not Exempt from Disclosure</u>**

Plaintiff was denied access to job applications submitted by Defendant Van Sloten (city clerk job) and all city attorney job applicants (including Defendants Chavez and Jacobi). The court incorrectly found the applications were exempt from disclosure under (1) §22.7(11) (personnel records) and (2) §22.7(18)

(communications not required by law, rule, procedure, or contract).

### A. Applications are not confidential personnel records under §22.7(11)

Plain statutory language and a prior decision of this Court show this portion of the ruling is incorrect.

*The ruling –*

> It is true that the Iowa Supreme Court previously has held that the legislature did not exempt employment applications from disclosure in the enactment of a prior version of Iowa's open records law. See City of Dubuque v. Telegraph Herald, Inc., 297 N.W.2d 523, 527 (Iowa 1980). However, since the Telegraph Herald opinion was issued, there have been numerous changes to the open records law, including with respect to § 22.7. The language of subsection 11 went from "Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts" to the current version of "Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies." Further, the Iowa Supreme Court addressed Telegraph Herald in Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 45-46 (Iowa 1999), and specifically found that "the legislature thereafter amended the statute to cloak employment applications with privacy." Based on the plain language of the current version of § 22.7(11), the Court agrees with Defendants that job applications of current employees of the City (in this case, this includes

> Defendants Van Sloten, Jacobi, and Chavez) clearly are exempt from production in an open records request.

(App. Vol. 1 – 234).

*The statute* –

Section §22.7(11) says the following records are confidential:

> a. Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies. However, the following information relating to such individuals contained in personnel records shall be public records, except as otherwise provided in section 80G.3:
> (1) The name and compensation of the individual including any written agreement establishing compensation or any other terms of employment excluding any information otherwise excludable from public information pursuant to this section or any other applicable provision of law. For purposes of this paragraph, "compensation" means payment of, or agreement to pay, any money, thing of value, or financial benefit conferred in return for labor or services rendered by an official, officer, or employee plus the value of benefits conferred including but not limited to casualty, disability, life, or health insurance, other health or wellness benefits, vacation, holiday, and sick leave, severance payments, retirement benefits, and deferred compensation.
> (2) The dates the individual was employed by the government body.
> (3) The positions the individual holds or has held with the government body.
> (4) The educational institutions attended by the individual, including any diplomas and degrees earned, and the names of the individual's previous employers,

> positions previously held, and dates of previous employment.
> (5) The fact that the individual resigned in lieu of termination, was discharged, or was demoted as the result of a disciplinary action, and the documented reasons and rationale for the resignation in lieu of termination, the discharge, or the demotion. For purposes of this subparagraph, "demoted" and "demotion" mean a change of an employee from a position in a given classification to a position in a classification having a lower pay grade.
> b. Personal information in confidential personnel records of government bodies relating to student employees shall only be released pursuant to 20 U.S.C. §1232g.

**1) The court failed to follow binding precedent**

In 1980, this Court held that job applications "do not fall within the section 68A.7(11) [now 22.7(11)] exemption." *City of Dubuque*, 297 N.W.2d at 525-27. That holding has not been overruled, and the district court was "under a duty to follow it." *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.").

The court noted there have been changes to §22.7 but did not reason how they superseded *City of Dubuque*. They have not.

There was a 2011 amendment to the first sentence of (11):

| 1980 | 2023 |
| --- | --- |
| Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts. | Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies. |

2011 Acts, ch 106, §10 (also adding remainder of §22.7(11)).

This did not change the *City of Dubuque* holding. The scope of the exemption is the same. It applies to "[p]ersonal information in confidential personnel records." The meanings of "public" and "government" bodies are indistinguishable, and the remaining language merely reiterates that records relate to people then on government payrolls; i.e., "personnel."

This Court has made it clear that the subsection (11) holding has not been superseded. Rather, the result of *City of Dubuque* was "*superseded by statute on other grounds,* Iowa Code §22.7(18)." See citation in *ACLU Found. of Iowa, Inc. v. Records Custodian, Atlantic Cmty. Sch. Dist.*, 818 N.W.2d 231, 233 (Iowa 2012).

*City of Dubuque* is still good law.

**2) The plain language of §22.7(11) shows job applications are not confidential personnel records**

To be confidential, records must relate to people "who **are** officials, officers, or employees of the government bodies." (emphasis supplied). At the moment the applications were submitted, they were **public** records. But they were not **personnel** records. Defendants and other applicants were applying to be officials – they were not those officials.

The applications are just that; applications and nothing more. They are "generic information like that requested in the *City of Dubuque* case, which is clearly subject to disclosure." *Delamater v. Marion Civil Service, Com'n*, 554 N.W.2d 875, 879 (Iowa 1996). Job applications contain the type of generic information – name, compensation, employment history, education, discharge, etc. – that is not confidential under §§22.7(11)(a)(1)-(5).

Finding otherwise creates an anomalous situation between an application from a person hired and an application from a person not hired.

Federal law requires a city to retain all employment applications for two years. 29 CFR §1602.31. An application from a person not hired is not confidential under §22.7(11) – the person is not an employee and has no personnel file.

There is no reasoned basis for different treatment for an application from a person hired. "The nature of the record is not controlled by its place in a filing system." *Des Moines Sch. D. v. Des Moines Register*, 487 N.W.2d 666, 670 (Iowa 1992). Likewise, the nature of the record does not change just because the status of the applicant changes.

The interpretation of the §22.7(11) exemption "depends solely on legislative intent." See *City of Sioux City*, 421 N.W.2d at 897. In *City of Dubuque*, the Court "determined the legislature's failure to exclude employment applications from disclosure, 'coupled with its plain intent that we construe the exemptions narrowly,' compelled a finding that such documents fell outside section 68A.7(11)'s protection. *Id.* at 527." *Clymer*, 601 N.W.2d at 46. If the legislature disagreed with that determination, it would have said so when it amended §22.7(11) in 2011.

## B. Amendments to §22.7(18) made applications non-confidential and superseded *City of Sioux City v. Greater Sioux City Press Club*

The court also found applications are confidential under §22.7(18) and *City of Sioux City*.

*The ruling* –

> Turning to the application of subsection 18 to this dispute, the Iowa Supreme Court, in City of Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895 (Iowa 1988) noted that the legislature had taken action to amend the open records law following Telegraph Herald, and "[i]t is the legislative goal to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure. We believe that employment applications fall within this area of legislative concern." Id. at 898. The Court applies Sioux City and holds that employment applications do not fall within the areas of legislative concern when it comes to production of public records, and the employment applications sought by Plaintiff in this case do not need to be disclosed by Defendants. Defendants also correctly point out that the persons "outside of government" language in § 22.7(18) appears to apply to consultants and contractors, and the Court does not view anything about this language as negating the Sioux City holding that employment applications are confidential. This is supported by the more recent holding of the Iowa Supreme Court in Ripperger v. Iowa Public Information Board, 967 N.W.2d 540 (Iowa 2021), in which the Court noted that it has "applied section 22.7(18) to keep confidential employment applications for the position of a city manager…and communications related to an investigation of an elementary school principal." Id. at

> 551. "Both involved useful incoming communications which could be deterred by public disclosure." Id. "Presumably some of those job applicants would have thought twice about applying if doing so put them on a public list that could be seen by their current employer, and some parents would have been reluctant to criticize their school principal if their names were shared." Id. The same rings true here when it comes to applicants for positions with the City, and a conclusion that the employment applications are confidential is supported by the current version of § 22.7(18).

(App. Vol. 1 – 235).

*City of Sioux City* has been superseded by statute – §22.7(18) was amended so the plain language does not exempt applications from disclosure. And language in *Ripperger* is dicta.

*The statute* –

In relevant part, §22.7(18) exempts:

> Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. 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. [underlined language added by amendment in 2001 Acts, ch 108, §1].[6]

**1) Amendments to §22.7(18) make job applications public**

Section 22.7(18) confidentiality requires Defendants to prove: a) applicants met the definition of being "outside of government;" b) the applications were not required; and c) the city council could reasonably believe applicants would have been discouraged from submitting the applications if they were available to the public.

Defendants failed to prove all three.

**a) Defendants and other applicants were not "outside of government"**

Under the definition added in 2001, a person is not outside of government if (1) their communication is about a contractual relationship with the government or (2) they already have a compensation agreement with the government. The first factor applies to all applicants – including Defendants Van Sloten,

[6] The remainder of the section sets out when information is public. Those exemption exceptions do not apply.

Chavez, and Jacobi. The second factor applies to Defendants Van Sloten and Jacobi.

First, each job application was used to seek city employment. That means each was a communication about a "contractual relationship" with the city.

> All employment relationships are contractual in nature. Even at-will employment is contractual. *See Godfrey v. State*, 898 N.W.2d 844, 874 (Iowa 2017) (explaining "employment contracts are presumed to be at-will under Iowa law"); *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 281 (Iowa 1995) (observing "the doctrine of employment at-will is merely a gap-filler, a judicially created presumption utilized when parties to an employment contract are silent as to duration"); *Toney v. Casey's Gen'l Stores, Inc.*, 372 N.W.2d 220, 222 (Iowa 1985) (recognizing tort of interference with a contractual relationship for an employment contract at will).

*Anderson v. Anderson Tooling, Inc.*, 913 N.W.2d 273 (Iowa Ct. App. 2018) (table), 2018 WL 739242, *3, *aff'd in part and vacated in part*, 928 N.W.2d 821, 826 (Iowa 2019) (adopting court of appeals opinion on employment contract issue).

Second, Defendants Van Sloten and Jacobi already had arrangements with the city for compensation – they were employees.

Defendants and all other applicants were within the controlling plain language of the statute, and the Court need look no further.

In a one-sentence conclusion without analysis, the court said:

> Defendants also correctly point out that the persons "outside of government" language in § 22.7(18) appears to apply to consultants and contractors, and the Court does not view anything about this language as negating the *Sioux City* holding that employment applications are confidential.

The statute does not refer to a **contractor** relationship. It says "**contractual**" relationship (emphasis supplied). The court did not explain how "contractual" is ambiguous or how it came to its conclusion. It did not say what it meant by "contractors" or how that term did not apply here. And the court did not heed this Court's instructions on how to view a statute.

> If the text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction.

*Sand v. An Unnamed Loc. Gov't Risk Pool*, 988 N.W.2d 705, 708 (Iowa 2023) (quotation marks and citations omitted).

> We may not, under the guise of statutory construction, enlarge or otherwise change the terms of a statute.

*City of W. Branch v. Miller*, 546 N.W.2d 598, 602 (Iowa 1996).

The meaning of "contractual relationship" is clear. It is "of, relating to, or constituting a contract"[7] "between those having relations or dealings."[8] Whatever the court meant by contractors, it was not free to change the clear terms of the statute.

The undisputed facts show Defendants and other applicants were communicating about a contractual relationship.

***b) The city required the applications***

No matter how qualified, a person will not be considered for a city job if they do not submit an application. The city's website says, "[t]o be considered as a candidate for an open position with the City of Cedar Rapids, **a completed application is required and must be submitted by that position's closing date**."[9] (bold in original).

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[7] *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/contractual.
[8] *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/relationship.
[9] https://www.cedar-rapids.org/local_government/departments_g_-_v/human_resources/employment_opportunities_city_jobs.php.

An application is required because it is essential in deciding how public money should be spent. In turn, "[t]he public has a right to know how public money is being spent." *Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 228 (Iowa 2012).

The court did not mention this factor.[10]

***c) Defendants provided no facts showing the city council could reasonably believe applicants would have been discouraged from submitting job applications if they were available to the public***

"This is an objective test, from the perspective of the record custodian." *Ripperger*, 967 N.W.2d at 553. An objective test requires objective facts, but Defendants' Statement of Undisputed Material Facts does not mention any facts to support a reasonable belief of the city council.

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[10] Defendants may try to piggyback on a statement in *City of Sioux City*, 421 N.W.2d at 898: "[t]he candidates were not required to submit these applications because they were not required to apply for the job." If Defendants raise this approach, Plaintiff challenges them to give examples of any communication that then would be required. Under this reasoning, no one is ever required to deal with the City on anything. That would make the "required by" language meaningless.

### 2) *The court incorrectly relied on a) a case that has been superseded by statute and b) dicta in another case*

The court's decision rested on *City of Sioux City*, 421 N.W.2d at 897, and *Ripperge*r, 967 N.W.2d at 549. *City of Sioux City* has been superseded by statute, and *Ripperger* has no holding about job applications.

#### a) *City of Sioux City* has been superseded by statute

In *City of Sioux City*, the Court found employment applications were confidential because new §68A.7(18) exempted a "broad category" of communications from disclosure. 421 N.W.2d at 898.

That 1984 amendment superseded the *City of Dubuque* result. The new subdivision exempted:

> Communications not required by law, rule, or procedure that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. * * *.

1984 Iowa Acts, ch. 1185, §6.

A 2001 amendment, in turn, superseded *City of Sioux City*. A new definition says:

> "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.

*City of Sioux City* read subsection (18) broadly, and the 2001 amendment was a response to that broad reading. The bill, SF 344, says it is, "[a]n Act restricting the exemption in the public records law for communications made to government bodies."[11]

This Court must assume that the "amendment [was] adopted to accomplish [that] purpose and was not simply [a] futile exercise of legislative power." See *Jenney v. Iowa Dist. Ct.*, 456 N.W.2d 921, 923 (Iowa 1990). "[A]n amendment to a statute raises a presumption that the legislature intended a change in the law." *City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 677 (Iowa 2005).

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[11] https://www.legis.iowa.gov/legislation/BillBook?ga=79&ba=SF%20344.

After *City of Sioux City*, the legislature drew a clear distinction between "a broad category of useful incoming communications" 421 N.W.2d at 898, and approaches to the public trough. The public has a right to know how its money is being spent, and the legislature struck the confidentiality balance in favor of disclosure when someone is trying to obtain public funds.

The restricted exemption must "be construed narrowly." *Iowa Film Prod. Servs.*, 818 N.W.2d at 219. The new definition means job applications are categorically outside the exemption in §22.7(18).

**b) Dicta in *Ripperger* does not control**

As for *Ripperger*, it was not a job application case; it involved property records. The court cited dicta saying, "[p]resumably some of those job applicants would have thought twice about applying if doing so put them on a public list that could be seen by their current employer . . .." *Ripperger*, 967 N.W.2d at 551, but that does not help Defendants.

First, that was not an issue in *Ripperger* – the case is not controlling precedent. Second, non-disclosure can never be

presumed – Defendants must provide facts to prove an exemption applies. Third, the concern mentioned by the court could not apply to Defendants Van Sloten and Jacobi – their current employer was the same as their prospective employer. Fourth, *Ripperger* did not review the restrictive 2001 amendment to §22.7(18). Finally, the Court sent the case back for an "outside of government" finding that had not been made.

Had the legislature wanted to exempt job applications, it would have said so in 2001. Instead, it narrowed the broad language upon which the Court relied in 1988. Section 22.7(18) does not prevent disclosure of job applications or related records.

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

Defendants refused to provide access to records unless Plaintiff agreed in advance to pay general search and retrieval fees. Estimates of fees were provided, but the city refused to provide a basis for its estimates and would not provide an accounting for time spent responding to requests.[12]

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[12] Plaintiff's Resistance to Defendants' Motion for Summary Judgment (App. Vol. 1 – 197).

### A. Chapter 22 does not specifically authorize general search and retrieval fees, and amendments show those fees can no longer be inferred

Section 22.2 has a presumption of free access to records:

> Unless otherwise provided for by law, the right to examine a public record shall include the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record.

The charge prohibition can be overcome only by specifically authorized fees, but the court inferred retrieval fees for every request. That inference means there never can be a right to examine a public record without charge.

Statutory interpretation cannot be used to read part of the law out of existence.

*The ruling* –

> Next, the Court considers Defendants' argument that the City Defendants appropriately charged retrieval fees to respond to Plaintiff's open records requests. Plaintiff has argued that Defendants may not charge search and retrieval fees for open records requests. Even when the facts are viewed in the light most favorable to Plaintiff, the Court finds there is no genuine issue of material fact as to this issue, and summary judgment should be entered in favor of Defendants on this issue.

Iowa Code § 22.3 provides that the examination and copying of public records "may be contingent upon receipt of payment of reasonable expenses," but "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." Iowa Code § 22.3(1) (2023). "In the event expenses are necessary, such expenses shall be reasonable and communicated to the requester upon receipt of the request." Id. "All reasonable expenses of the examination and copying shall be paid by the person desiring to examine or copy." Iowa Code § 22.3(2) (2023). The Iowa Supreme Court has concluded "that the provisions of section 22.3 generally contemplate reimbursement to a lawful custodian of public records for costs incurred in retrieving public records." Rathmann v. Board of Directors of Davenport Comm. Sch. Dist., 580 N.W.2d 773, 778 (Iowa 1998). More recently, in an unpublished opinion, the Iowa Court of Appeals held that fees charged by a municipal light plant at $35.00 per hour that covered reviewing correspondence and records; printing records; compiling records; drafting emails in response to the records request; redacting emails; and copying records were authorized by statute to be assessed to the person seeking the records. Hackman v. Kolbet for New Hampton Municipal Light Plant, No. 16-2063, 2017 WL 3065168, *2-3 (Iowa Ct. App. July 19, 2017). The version of chapter 22 currently in place, as cited above, makes clear that costs related to examination and copying can be assessed to the person requesting the records. The Court finds, as a matter of law, that the City of Cedar Rapids has adopted its own open records policy that provides for an hourly fee of $20.00 per hour, prorated to the nearest 15 minutes, for requests that take over 30 minutes to compile. This is consistent with the language of the statute, and Defendants properly required

> payment of fees from Plaintiff for the document requests.

(App. Vol. 1 – 236-37).

The court provided no independent reasoning for its conclusion, and the dicta in *Rathmann* and *Hackman* do not analyze the plain language of the statute as it exists today.

> *The law* –
>
> Our first task in interpreting a statute is to determine whether the relevant language is ambiguous. If the statutory language is plain and the meaning clear, we do not search for legislative intent beyond the express terms of the statute.

*Borst Brothers v. Finance of America*, 975 N.W.2d 690, 699 (Iowa 2022) (citations and quotation marks omitted).

The court did not say the plain language of chapter 22 expressly authorizes general search and retrieval fees – it does not. Instead, the court – without applying rules of statutory construction – inferred those fees from language in §22.3.

#### *1) Search and retrieval fees are authorized only in four limited circumstances*

Only four parts of chapter 22 specifically authorize search and retrieval fees. None of those are in §22.3:

- Section 22.2(4)(a) – "reasonable rates and procedures for the retrieval of specified records."

- Section 22.3A(2)(d) – "the reasonable costs of any required processing, programming, or other work required to produce the public record in the specific format in addition to any other costs allowed under this chapter."

- Section 22.3A(2)(e) – "[t]he cost chargeable to a person receiving a public record separated from data processing software under this subsection shall not be in excess of the charge under this chapter unless the person receiving the public record requests that the public record be specially processed or produced in a format different from that in which the public record is readily accessible to the government body."

- Section 22.3A(2)(f) – "payment rates . . . to provide access to data processing software . . .."

These authorizations do not apply here.

***2) The only other authorized fees relate to examination and copying***

Section 22.3 authorizes fees, but they are limited to fees related to examination and copying of records:

> 22.3 Supervision — fees.
> 1. The examination and copying of public records shall be done under the supervision of the lawful custodian of the records or the custodian's authorized designee. The lawful custodian shall not require the physical presence of a person requesting or receiving a copy of a public record and shall fulfill requests for a copy of a public record received in writing, by telephone, or by electronic

means. Although fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of reasonable expenses, 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 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. The lawful custodian may adopt and enforce reasonable rules regarding the examination and copying of the records and the protection of the records against damage or disorganization. The lawful custodian shall provide a suitable place for the examination and copying of the records, but if it is impracticable to do the examination and copying of the records in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for the examination and copying.

2. 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. If copy equipment is available at the office of the lawful custodian of any public records, the lawful custodian shall provide any person a reasonable number of copies of any public record in the custody of the office upon the payment of a fee. 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. However, a county recorder shall not charge a fee for the examination and copying of public records necessary to complete and file claims for benefits with the Iowa department of veterans affairs or the United States department of veterans affairs.

The first sentence of §22.3(1) applies to the "[t]he examination and copying of public records." The second sentence deals with requesting or receiving a copy from the government.[13] And the third sentence refers to fulfilling a copy request. The final sentences in (1) refer to examination and copying.

Section 22.3(2) also shows the limits on authorized fees. It begins with, "[a]ll reasonable expenses of the examination and copying . . .." The next sentence deals with fees for "supervising the examination and copying of the records." The third sentence allows copy fees for use of an office copy machine. The next sentence says the copy fee cannot exceed "actual costs of providing the service," and those costs must be "directly attributable to

[13] Any person may make their own copy without charge. §22.2(1).

supervising the examination of and making and providing copies." The section allows costs for legal services for "redaction or review of legally protected confidential information." This could take place only after records were retrieved, so it is part of examination and not a search or retrieval fee.

Search and retrieval fees are not mentioned. Therefore, they are not "provided for" in Section 22.3. Silence provides nothing, but "[t]hat silence speaks volumes." See *Allison v. State*, 914 N.W.2d 866, 897 (Iowa 2018) (Waterman, Mansfield, and Zager, JJ., dissenting).

The lack of express authorization for general search and retrieval fees should end the discussion. However, even if §22.3 were ambiguous, rules of statutory construction show those fees are not authorized.

### 3) *Rules of statutory construction show general search and retrieval fees are not authorized*

> If the statute is unambiguous, we do not search for meaning beyond the statute's express terms. *Id.* However, if the statute is ambiguous, we consider such concepts as the "object sought to be attained"; "circumstances under which the statute was enacted"; "legislative history"; "common law or former statutory provisions, including laws upon the same or

> similar subjects"; and "consequences of a particular construction." Iowa Code § 4.6; *accord State v. McCullah,* 787 N.W.2d 90, 95 (Iowa 2010). Additionally, we consider the overall structure and context of the statute, *Rolfe State Bank,* 794 N.W.2d at 564, "not just isolated words or phrases," *Kline v. SouthGate Prop. Mgmt., LLC,* 895 N.W.2d 429, 438 (Iowa 2017).

*State v. Lopez*, 907 N.W.2d 112, 117 (Iowa 2018).

The court did not apply these rules of statutory construction.

**Inferred general search and retrieval fees make specific authorizations superfluous**

Reading §22.3 to infer general search and retrieval fees makes the four specific authorizations in §22.2 and §22.3A irrelevant; they would be covered by the general. A court must give effect to all words in a statute unless no other construction is reasonably possible. *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011).

> [W]e apply the fundamental rule of statutory construction that we should not construe a statute to make any part of it superfluous. Accordingly, we "presume the legislature included all parts of the statute for a purpose, so we will avoid reading the statute in a way that would make any portion of it redundant or irrelevant."

*In re Chapman*, 890 N.W.2d 853, 857 (Iowa 2017) (citations omitted).

Rejecting inferred general search and retrieval fees "harmonizes and gives effect to all terms in the" statute. *Oyens*, 808 N.W.2d at 194.

**The statute as a whole**

"[L]egislative intent is expressed by omission as well as by inclusion of statutory terms," and it is presumed the legislature "acts intentionally and purposely in the disparate inclusion or exclusion." *Oyens*, 808 N.W.2d at 193 (quotation marks and citations omitted).

The legislature knew how to authorize retrieval fees. It used "retrieval" in §22.2(4)(a) (rates for specified records) but not in §22.3.

Similarly, §22.3A(2)(d), §22.3A(2)(e), and §22.3A(2)(f) authorize fees to "produce," "process," and "provid[e] access to" specific records. But the legislature excluded similar language from §22.3.

**Lack of guidance on how to compute general search and retrieval fees**

The legislature went to lengths to specify the way authorized fees for examination, copying, and legal review must be computed.

See §22.3. There are no similar instructions for general search and retrieval fees. Such fees can defeat the purpose of Chapter 22, and there is no reason to think the legislature would take any less care with them if they were authorized.

Further, §22.3(1) makes it logically impossible to infer search and retrieval fees. It says, "expenses shall be reasonable and communicated to the requester upon receipt of the request." It is impossible to determine search and retrieval fees when a records request is first received. The government can provide no more than a sheer guess about records before they know how many, how accessible, the type, or even if there are records. The only informed estimates that can be made for fees are for supervision, copy, and possible legal fees after the government has assembled the records.

**The object sought to be attained**

The goal of chapter 22 is that "the right to examine a public record shall include the right to examine a public record without charge" unless another law provides otherwise.

The court's order makes the §22.2(1) "without charge" language meaningless. The order says general search and retrieval fees are authorized for every request. When fees are always authorized, there can never be a right to examine without charge. Inferred fees read free access out of existence and defeat the policy of liberal access to records.

**Legislative history**

The legislative history of a 2022 amendment to §22.3 also makes it clear general search and retrieval fees are not authorized. The amendment addressed fees for computer information dumps requested for commercial purposes. Senate File 2322, House Video, March 24, 2022.[14]

Before the vote in the House, a representative said, "[i]t allows anyone to visually look at public records at any time without any cost at all. And that should be allowed again by the

[14]https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h20220324030455131&dt=2022-03-24&offset=4811&bill=SF%202322&status=i.

public. They have a right to know and a right to see." House Video, March 24, 2022, at 4:25:06 p.m.[15]

In addition, the Fiscal note to the bill says:

> Under Iowa Code chapter 22, all expenses for the examination and copying of public records are paid by the person desiring to examine or copy the record. Government bodies may include charges **directly attributable to supervising the examination of public records, providing copies of public records, and cannot include charges for ordinary expenses** or costs such as employment benefits, depreciation, maintenance, electricity, or insurance associated with the administration of the office. [emphasis supplied].[16]

Search and retrieval fees are not "directly attributable to supervising the examination of public records." They are not charges for "providing copies." The Court may "assume one of the reasons the legislature passed the bill is because of the fiscal statement . . .." See *State v. Dohlman,* 725 N.W.2d 428, 432 (Iowa 2006).

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[15] Id.

[16] Final Fiscal Note on SF2322, Fiscal Services Division of the Legislative Services Agency, June 24 , 2022; www.legis.iowa.gov/docs/publications/FN/1289529.pdf.

**Other public access law**

Chapter 21 is the open meeting component of Iowa's Sunshine laws and should be considered in para materia with chapter 22. Section 21.1 says, "ambiguity in the construction or application of this chapter should be resolved in favor of openness." This should hold true for fees.

**The title of §22.3: "Supervision – Fees"**

A requestor does not search for and retrieve records, so there is nothing to supervise. With no supervision, there is no fee. "Although the title of a statute cannot limit the plain meaning of the text, it can be considered in determining legislative intent." *T & K Roofing Co. v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 163 (Iowa 1999).

**The consequences of inferring general search and retrieval fees**

The legislature sets the boundaries of fees. The right to examine records conveys a public benefit, and the legislature decided not to place a general private fee burden on this public right. Defendants may disagree with this policy choice, "[b]ut it is not this court's role to pass on the wisdom of legislation." *City of*

*Dubuque*, 297 N.W.2d at 527. The Court's "clear responsibility is . . . to apply the [boundaries] established by the legislative branch of government." *Donahue v. State*, 474 N.W.2d 537, 539 (Iowa 1991) (applying amendment of "governmental body" definition to supersede prior chapter 21 decision).

Inferring general search and retrieval fees invades the province of the legislature and improperly restricts access to records.

### B. The court incorrectly relied on dicta from two cases superseded by statute

Defendants and the court relied on *Rathmann*, 580 N.W.2d at 778-79, and *Hackman*, 906 N.W.2d 206 (Iowa Ct. App. 2017) (table decision). Defendants said *Rathmann* was "still-controlling and binding precedent" and *Hackman* was "definitive legal authority." Defendants' Memorandum in support of summary judgment, (App. Vol. 1 – 46).

Neither is either.

*Hackman* is an unpublished Court of Appeals decision that is not "controlling legal authority." Iowa R. App. P. 6.904(2)(c). It is "not precedential." See *State v. Shackford*, 952 N.W.2d 141, 145

(Iowa 2020). Further, the plaintiff in *Hackman* did not challenge whether general search and retrieval fees could be charged. The court did not analyze §22.3; it merely followed *Rathmann*.

In turn, *Rathmann* is not binding precedent. Its language inferring fees is dicta under a now-amended statute.

*Rathmann* involved a school board member who was charged fees to inspect school district records. The Court concluded a school district may not charge a board member a fee to inspect records they had a right to see as a board member. *Rathmann*, 580 N.W.2d at 783.

Statements about charging the general public fees "were not necessary to a determination of the case and were therefore mere dicta and not authority to be followed" in this case. See generally, *Westinghouse Credit Corporation v. Crotts*, 98 N.W.2d 843, 848 (Iowa 1959); *Shoemaker v. City of Muscatine*, 275 N.W.2d 206, 208 (Iowa 1979) (statement in prior case "is dicta and is not to be followed").

Even if this were not the case, *Rathmann* has been superseded by chapter 22 amendments.

*Rathmann* said:

> 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.

*Rathmann*, 580 N.W.2d at 778. The Court then found two underpinnings for inferred retrieval fees.

The first underpinning was based on incomplete statutory language. The Court looked to the 1995 statute and said, "access to public records does not necessarily mean 'free' access" and the legislature "did not intend for a lawful custodian to bear the burden of paying for all expenses associated with a public records request." *Rathmann*, 580 N.W.2d at 778-79.

But §22.2 was amended weeks before *Rathmann* issued:

| **1995** | **2023** |
|---|---|
| Every person shall have the right to examine and copy public records and to publish or otherwise disseminate public records or the information contained therein. | Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record. Unless otherwise provided for by law, the right to examine a public record shall include the right |

to examine a public record without charge while the public record is in the physical possession of the custodian of the public record. * * *

* * *

The presumption of free access was approved by the governor on May 21, 1998, and became effective July 1 – the day *Rathmann* was published.[17]

The *Rathmann* opinion does not mention this amendment, so its statement that access "does not necessarily mean 'free' access" has been undermined.

The second underpinning was, "[w]e 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." *Rathmann*, 580 N.W.2d at 778.

The ambiguous phrase "such work" was used six times in 1995. Amendments in 2001, 2005, and 2006 replaced all six with unambiguous phrases. Four were replaced by "the examination

[17] 98 Acts, ch. 1224, §17. www.legis.iowa.gov/docs/publications /iactc/77.2/CH1224.pdf.

and copying of the records" and two were replaced by "the examination and copying."

| 1995 | 2023 |
| --- | --- |
| **22.3 Supervision.** Such examination and copying shall be done * * * | **22.3 Supervision — fees.** 1. The examination and copying of public records shall be done * * * |
| The lawful custodian may adopt and enforce reasonable rules regarding such work and the protection of the records against damage or disorganization. | The lawful custodian may adopt and enforce reasonable rules regarding the examination and copying of the records and the protection of the records against damage or disorganization. |
| The lawful custodian shall provide a suitable place for such work, but if it is impracticable to do such work in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for such work. | The lawful custodian shall provide a suitable place for the examination and copying of the records, but if it is impracticable to do the examination and copying of the records in the office of the lawful custodian, the person desiring to examine or copy shall pay any necessary expenses of providing a place for the examination and copying. |
| All expenses of such work 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 | 2. 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 |

| | |
|---|---|
| custodian's authorized deputy in supervising the records during such work. | or the custodian's authorized designee in supervising the examination and copying of the records ~~during the work~~. |
| * * * | * * * |
| [2001 amend] [2005 amend] | [2006 amend] |

When the legislature made these changes, it must have had a reason. The legislature is assumed to know "the existing state of the law and prior judicial interpretations . . .." *Jahnke v. City of Des Moines*, 191 N.W.2d 780, 787 (Iowa 1971). Why would it eliminate "such work" six times unless it meant to change how the statute was being interpreted? "[A]n amendment to a statute raises a presumption that the legislature intended a change in the law." *James Props., Inc.*, 701 N.W.2d at 677. By eliminating the ambiguous language upon which *Rathmann* relied, the statute superseded any allowance for general search and retrieval fees.

With both underpinnings for the Court's opinion gone, *Rathmann's* dicta can no longer stand. General search and retrieval fees are not authorized.[18]

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[18] The Iowa League of Cities appears to agree: "the city may not charge a fee to examine a public record as long as the public

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

In addition to requesting statutory enforcement under §22.10, Plaintiff asked for equitable injunctive and declaratory relief protecting his chapter 22 rights. Section 22.5 says:

> The provisions of this chapter and all rights of persons under this chapter may be enforced by mandamus or injunction, whether or not any other remedy is also available.

This protection is also independently available under Iowa R. Civ. P. 1.1101 (Declaratory Judgment) and Rule 1.1501 (Injunction).

Plaintiff alleged Defendants were interfering with his rights under chapter 22 by:

- refusing to provide access to records if the request was not made through the City Attorney's office instead of the designated records custodian,
- substituting a city "five-day rule" in place of prompt production of records, and
- charging general search and retrieval fees.

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record is in the physical possession of its custodian. The custodian may charge a reasonable fee for supervising the examination and copying of records." *Open Records, Guidance on the Iowa Open Records Law, Code of Iowa Chapter 22*, Iowa League of Cities, February 2023, p. 3. https://iowaleague.org/wp-content/uploads/2023OpenRecords.pdf.

The court did not address the merits of these claims. Instead, it adopted "Defendants' argument that there is no **open records cause of action** for 'interference.'" (emphasis supplied). (App. Vol. 1 – 238). The court said:

> Plaintiff has included in his requests for relief a claim of "Interference with Plaintiff's Rights to Public Records Access." This is not a recognized claim under Iowa's open records law . . ..

(App. Vol. 1 – 238).

Plaintiff was not asking for recognition of a private "cause of action" created by chapter 22. See e.g., *Estate of McFarlin v. State*, 881 N.W.2d 51, 56 (Iowa 2016) ("A private statutory cause of action exists only when the statute, explicitly or implicitly, provides for such a cause of action." (quotation marks and citation omitted)).

"[T]he district court always has the authority to decide what the law requires in a particular case." *Klein v. Iowa Pub. Info. Bd.*, 968 N.W.2d 220, 238 (Iowa 2021). And injunctive relief is an available remedy to implement its decision.

The court was incorrect in dismissing Plaintiff's equitable claims as a matter of law.

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

Plaintiff requested records related to 1) hiring a new city attorney and 2) the city attorney interfering with the process required by state and city law for responding to record requests. Defendants Feldmann, Hart, and Chavez refused to make records available in two ways. They directly stated they would not produce records, and they unreasonably delayed producing records. See *Belin*, 989 N.W.2d at 174.

*The ruling*

> Finally, the Court addresses Defendants' argument . . . that Plaintiff has no rightful claim of untimeliness of responses. . . . at any rate, the Court does not find any evidence that there was an unreasonable delay on the part of Defendants in responding to Plaintiff's requests.

(App. Vol. 1 – 238).

*The law* –

"[R]ecords must be provided promptly, unless the size or nature of the request makes that infeasible." *Horsfield Materials*, 834 N.W.2d at 461. "[S]ection 22.4 . . . suggests that our legislature contemplated immediate access to public records." Id. Any delay must be reasonable. *Belin*, 989 N.W.2d 175.

Cedar Rapids policy dictates that records must be provided "as soon as feasible." They "shall be provided promptly upon request unless the size or nature of the request makes prompt access infeasible." Requests "will be given priority in a department's work activities."[19]

**Attorney Hiring Records**

On October 21, 2021, Plaintiff requested:

> Records to or from the search company, all candidate applications and resumes, letters, interview schedules, emails or other communications among council members or others, and all other records."

This included an attorney opinion letter about closing a council meeting where applicants were considered.

*Defendant Feldmann –*

H.R. Director Feldmann was the records custodian. On November 1, she provided only a contract between the city and a consulting group. She refused to provide the opinion letter, claiming it was protected by attorney-client privilege. On

[19] *City of Cedar Rapids Open Records Policy,* §3.3(4) *Response to request*. https://www.cedar-rapids.org/CityCouncil/Open_Records_City_Policy.pdf.

November 3, she said the city would not begin to look for other records unless Plaintiff agreed to pay fees "to research, compile, review, and redact information." She estimated it would take approximately six hours to complete the request. Plaintiff then asked what the charge would be for fewer records.

On November 4, Defendant Feldmann said she could complete that request, "in such a time that wouldn't require any charge to you [less than one-half hour]." Plaintiff asked her to proceed, but she did not complete that request before Plaintiff sued on November 24, 2021.

Defendant Feldmann was personally responsible for providing the records. She still has not provided those records or all the records first requested.[20] Defendants did not dispute these facts and did not provide facts to show why Defendant Feldmann did not follow through.

On November 4, Defendant Feldmann said it would take her less than one-half hour to provide records Plaintiff sought. Three

[20] Plaintiff's Resistance to Defendants' Motion for Summary Judgment (App. Vol. 1 – 212).

weeks later, she had not done it. It is now almost 20 months later, and she still has not done it. The reasonable inference that must be drawn in Plaintiff's favor is that Defendant Feldmann failed to timely provide records.

*Defendant Hart –*

On December 14, Mayor Hart sent Plaintiff copies of an ad and the recruitment brochure for the city attorney position. He said, "[w]e will not provide the applications" and "we will not be providing the opinion on closing the session as that is protected under attorney client privilege."

On December 15, Plaintiff asked Defendant Hart for records showing:

1. the exceptions asserted and disclosed to me in your letter,
2. the name of any person who provided the exceptions,
3. the name of any person who instructed or advised you on whether to disclose the records,
4. the instruction or advice relied upon in deciding not to disclose the records,
5. the decision to assert attorney /client privilege,
6. actions by the City Council or its members to assert attorney/client privilege and any council member communications about this record request or decision to deny disclosure of the records, and
7. your authorization to assert attorney/client privilege.

Defendant Hart was personally responsible for complying with the request, but he never acknowledged or responded to it. And he did not provide any other records responsive to the November requests.[21]

Defendants did not dispute these facts and did not provide facts to show why Defendant Hart ignored the December 15 request. And – as shown in Issues 1, 2, and 3 – there was no basis to withhold other requested records.

*Belin*, 989 N.W.2d at 175 says relevant considerations are:

> (1) how promptly the defendant acknowledged the plaintiff's requests and follow-up inquiries, (2) whether the defendant assured the plaintiff of the defendant's intent to provide the requested records, (3) whether the defendant explained why requested records weren't immediately available (e.g., what searches needed to be performed or what other obstacles needed to be overcome), (4) whether the defendant produced records as they became available (sometimes called "rolling production"), (5) whether the defendant updated the plaintiff on efforts to obtain and produce records, and (6) whether the defendant provided information about when records could be expected.

[21] App. Vol. 1 – 21.

Defendant Hart did none of these things. The reasonable inference that must be drawn in Plaintiff's favor is that Defendant Hart failed to timely provide requested records.

*Defendant Chavez –*

New City Attorney Chavez then became involved in the record requests.

On December 29, 2021, Plaintiff emailed Defendant Chavez:

> Where are the records I requested two weeks ago? You are beyond the City's five-day rule (that blanket rule does not comply with Iowa Code) and not in compliance with other City policies.
> I'm sending this reminder as a courtesy even though it is not required.

Defendant Chavez responded, "[w]e are in the process of identifying records in order to respond to your request. * * * We are working diligently to fulfill your request . . .." On December 30, she wrote about fees and said, "[t]o date, I have already dedicated a few hours to your request, and I estimate your request will take approximately 4 additional hours to complete." She did not provide an estimate of total fees.

On January 4, Plaintiff emailed Defendant Chavez that Iowa law did not allow the city to charge for record searches. Plaintiff also said:

> As far as the request to Brad [Hart], who has looked for those records? Do they exist? How did you arrive at your estimate? It would seem that inquiry of Brad would reveal any materials that are responsive since they relate to his decision to not provide records; he is the custodian of those records.

The email said, "[h]ave I misread the statute? The requested record responses are seriously delinquent. When can we get them taken care of?"

Defendant Chavez never responded to this follow-up inquiry. She did not provide documents that could have been produced without charge ("rolling production"). She did not explain what searches needed to be performed. She did not update Plaintiff; Plaintiff had to contact her.[22] Defendant Chavez has not provided records requested on December 15.

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[22]On December 30, Plaintiff wrote, "You have given me no total estimate. How many documents can there be? What is the basis for your estimate? What documents have you found so far? Why haven't I received those?" CITY MSJ APP 006. In June 2022 Plaintiff made a similar request for an accounting. Defendant

On January 5, 2022, Defendant Chavez provided copies of two written requests to close the October session. They are incomplete because they have the requestors' names redacted. She claimed redaction was pursuant to Iowa Code §22.7(11)(a) and §22.7(18). She has provided no other records responsive to the attorney hiring records request.

Defendants submitted no facts to show why Defendant Chavez could not have provided at least some of the documents requested on December 15. They also submitted no facts supporting the fee estimate that was used as a basis to deny access to records. And – as shown in Issues 1, 2, and 3 – there was no basis to withhold records. The reasonable inference that must be drawn in Plaintiff's favor is that Defendant Chavez failed to timely provide requested records.

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Chavez responded, "The itemized breakdown and detailed explanation of the estimate and legal position is neither contemplated nor required, and is not the City's practice." CITY MSJ APP 081.

**Records related to interfering with record requests**

State and city law require that records requests must go to employees designated by the city council. The city made each department head responsible for records in their department.

In December 2021, Interim City Attorney Jacobi told Plaintiff his records requests instead had to go to the City Attorney. Plaintiff learned Defendant Chavez also sent this instruction to city employees. This requirement is not contained in state or city law.

At 10:40 a.m. on March 11, 2022, Plaintiff asked Defendant Chavez for a copy of "the instructions you have given to city employees that my public records requests must go through your office."

At 4:03 p.m., she replied, "I will need to locate the records you are seeking and anticipate I will have a response for you by next Friday, 3/18. At this time I do not anticipate the time needed to locate the records will exceed 30 minutes." She did not provide the reason it would take a week to provide access. And it wasn't "records" she was looking for; it was one email.

On the 11th, Plaintiff wrote back: "City policy says 'promptly' and requests are to take priority over other work. Are you using the policy's five-day rule to get to the 18th?"

Defendant Chavez did not respond, and Plaintiff sent additional requests for responses on March 14 and 16. Defendant Chavez did not respond.

On March 18, Defendant Chavez sent Plaintiff a copy of a one-page email she had sent to the City Manager and City Clerk on December 30.[23]

Defendants' Statement of Undisputed Material Facts[24] has only two paragraphs about that disclosure:

> 35. On March 11, 2022, Plaintiff requested from Defendant Chavez a "copy of the instructions you have given to city employees that my public records requests must go through your office". CITY MSJ APP 053.
>
> 36. Defendant Chavez provided the requested document to Plaintiff on March 18, 2022, within five working days from the date the request was received, which is consistent with the City's open records policy. CITY MSJ APP 053; 058.

[23] The facts are set out in Plaintiff's Resistance to Defendants' Motion for Summary Judgment (App. Vol. 1 – 178).
[24] App. Vol. 1 – 54.

It would have taken Defendant Chavez only seconds to search her emails for "Teig." She estimated it would take her less than one-half hour to find the record.

Defendant did not acknowledge follow-up inquiries. She did not explain why the requested record wasn't immediately available (e.g., what searches needed to be performed or what other obstacles needed to be overcome). She did not update Plaintiff on efforts to produce the record. See *Belin* 989 N.W.2d at 175.

The undisputed facts do not show only one permissible conclusion creating a right to judgment as a matter of law. See *Hedlund*, 930 N.W.2d at 715.

**6. Undisputed Facts Show Plaintiff did not Receive all Non-Confidential Records in Response to a December 2021 Records Request – Defendants Admitted in a Filing There Were Responsive Records not Provided**

When the court dismissed Plaintiff's claim against Defendant Jacobi, it said:

> As to Plaintiff's general claim that he has not received all non-confidential records in response to his December, 2021 records request. . . the Court finds he has received all non-confidential records in response to his December, 2021 records request.

(App. Vol. 1 – 238). The undisputed facts show the opposite.

On December 6, 2021, Plaintiff asked Interim City Attorney Jacobi for records related to a November 23 city Council meeting that was closed "to discuss strategy with legal counsel with regard to pending litigation." Plaintiff asked for records showing the name of the litigation that was discussed, the name of any attorney involved, and bills and expenditures related to the matter.

On December 8, she responded that there were no documents showing the name of the litigation or name of the attorney. She also said, "the city has not yet received any invoices regarding this representation but we will examine them upon receipt to determine whether any redactions are necessary to preserve the attorney client privilege."

On January 4, 2023, Defendants admitted there were documents she did not provide.

That day, Defendants filed a resistance to Plaintiff's motion to compel discovery. Defendants argued:

> Plaintiff has received the attorney fee statements related to the representation and the name of the attorney involved in the closed session. * * *

> The closed session on Nov. 23, 2021 was held for the purpose of discussing litigation pursuant to Iowa Code section 21.5(1)(c). The City Council was discussing the confidentiality of job applications, in the context of Plaintiff's public records requests, which ultimately led to the filing of this lawsuit the following day, on Nov. 24, 2021.
>
> On January 5, Plaintiff contacted counsel:
>
> I don't recall receiving documents showing the name of the attorney at the meeting or fee statements. * * * I also don't recall ever being told what the meeting was for. * * * Did I miss something?

On January 6, Counsel responded:

> It is our understanding that Lynch Dallas has provided its attorney fee statements related to its representation in this matter. We believe those fee statements disclosed the attorneys involved in the representation. These are the disclosures we are referring to in our resistance.

Plaintiff independently received redacted Lynch Dallas, P.C. billing documents from attorney Holly Corkery's counsel in March 2022. Defendant Jacobi has never provided copies in any form.

The first bill was dated November 22, 2021. All the substance had been concealed, and there was no information about the nature of the representation or any closed meeting.

Plaintiff used the January 4 and 6 information to search online city records and found other related records Defendant Jacobi did not disclose.

A December 7 city council resolution approved a $3,167.50 payment to Lynch Dallas. The city's "Accounts Payable Expenditures for the Period ending December 7, 2021" shows $2,167.50 of the $3,167.50 was for the November 22 invoice.

Defendant Jacobi was at the December 7 meeting in her role as interim City Attorney.[25]

These facts show the city had been billed, and had paid, for services prior to December 8 when Defendant Jacobi said there were no billing or other responsive records. Defendant Jacobi did not provide the records.

Defendant Jacobi did not dispute these facts. It was her burden to prove compliance with chapter 22, but she provided no facts excusing her failure to produce documents she now admits

[25] The facts are set out in Plaintiff's March 27, 2023, Resistance to Defendants' Motion for Summary Judgment (App. Vol. 1 – 178).

exist. There was no factual support for the summary judgment order.

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

One discovery order has implications beyond this case. Based on an incorrect application of "discrete subparts" in Iowa R. Civ. P. 1.509(1)(e), the court said Plaintiff submitted more than 30 interrogatories to each Defendant.

Rule 1.509(1)(e) says:

> a party must not serve on any other party more than 30 interrogatories, including all discrete subparts. Any discrete subpart to a nonpattern interrogatory will be considered a separate interrogatory.

Plaintiff has found no Iowa case providing guidance on this rule, and one is needed.

In April 2022, Plaintiff submitted a contention interrogatory related to admission requests.[26] It said:

> You must individually admit or deny the following statements. If any statement is denied in full or in part, state all facts, opinions of fact, ultimate facts, circumstances, events, the application of law to fact, and

[26] The facts are in Plaintiff's November 22, 2022, Motion to Compel and for Sanctions (App. Vol. 1 – 62).

> other information that support that denial. Each explanation is a response to an interrogatory.

Defendants said they would respond but did not. Plaintiff contacted counsel twice about this failure. Defendants still did not answer.

On August 1, Plaintiff tried again:

> I have redone the interrogatory related to the admission requests. It is adapted from California model interrogatory 17.1[27] and Iowa R. Civ. P. 1.503(5)(a). This is what the Iowa Supreme Court calls a "classic contention interrogatory."
> If you are concerned about subparts, *PRECISION OF NEW HAMPTON, INC. v. TriCOMPONENT PRODUCTS CORPORATION*, Dist. Court, ND

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[27] California Form Interrogatory 17.1 says:

> Is your response to each request for admission served with these interrogatories an unqualified admission? If not, for each response that is not an unqualified admission:
> (a) state the number of the request;
> (b) state all facts upon which you base your response;
> (c) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and
> (d) identify all DOCUMENTS and other tangible things that support your response and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT or thing.

https://www.courts.ca.gov/forms.htm?query=discovery%20and%20subpoenas, DISC-001.

Iowa, No. C12-2020, United States District Court, N.D. Iowa, Eastern Division, December 13, 2012, is helpful.

The revision read:

> A. For each response to a request for admission that was not an unqualified admission:
>
> 1. state the number of the request;
> 2. state all facts upon which you base your response;
> 3. state the names, addresses, and telephone numbers of all persons who have knowledge of those facts;
> 4. identify all records and other tangible things that support your response and state the name, address, and telephone number of the person who has each record or thing; and
> 5. if your response claimed any privilege or confidentiality protection, describe the records, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or confidentiality protection.

Counsel replied that Defendants objected:

> because it exceeds the allowable number of interrogatories pursuant to Iowa Rule of Civil Procedure 1.509(1)(e). * * * Interrogatory A is not a single interrogatory, but five separate interrogatories directed to each objection in response to requests for admissions.

Defendants did not file an objection or respond to the original interrogatory; instead, they provided partial responses to the revised interrogatory. They treated 2, 3, and 4 as separate

interrogatories and stopped answering when they decided they were at 30.

There were 28 admission requests for Defendant Van Sloten, 23 for Defendant Hart, and 18 for Defendant Chavez – they quit at request 10. There were 27 requests for Defendant Kropf and 17 for Defendant Jacobi – they quit at 8. There were 23 requests for Defendant Feldmann – she quit at 11. (App. Vol. 1 – 95, Exh 2).

Plaintiff filed motions to compel discovery relating to the interrogatory and to submit additional interrogatories. (App. Vol. 1 – 62, 159). The court denied the motions and said:

> Iowa Rule of Civil Procedure 1.509(1)(e) provides that "a party must not serve on any other party more than 30 interrogatories, including all discrete subparts." I.R.Civ.P. 1.509(1)(e). In determining whether good cause exists for deviations from the discovery rules, the district court can properly consider "the seriousness of the deviation and [the opposing party's] prejudice or lack thereof." Hantsbarger v. Coffin, 501 N.W.2d 501, 505 (Iowa 1993).
>
> The Court is not persuaded that Plaintiff should be permitted to serve additional discovery responses on any Defendant. Defendants have arguably responded to more than 30 interrogatories from Plaintiff, since Plaintiff included subparts in many of his interrogatories.

(App. Vol. 1 – 176).

There was only one interrogatory with related subparts for each admission request.

Number 2 was the core request. It asked for the facts supporting Defendants' contentions. Numbers 3 and 4 do not stand alone. They were subsumed in the facts requested in number 2 and were there to ensure the interrogatory was answered "fully." Iowa R. Civ. P. 1.509(1)(c). Number 5 was a reminder of Rule 1.503(5)(a) requirements because Defendants had raised admission objections without complying with that rule.

Plaintiff cannot find an Iowa case dealing with discrete subparts, but *Precision of New Hampton, Inc. v. TriComponent Prod. Corp.*, No. CV12-2020, 2012 WL 6520139, at *2 (N.D. Iowa Dec. 13, 2012), sets out "[p]robably the best test."

> Courts have struggled with finding a workable method to determine if a "subpart" is properly counted as an additional interrogatory. "Although the term 'discrete subparts' does not have a precise meaning, courts generally agree that 'interrogatory subparts are to be counted as one interrogatory if they are logically or factually subsumed within and necessarily related to the primary question.'" *Trevino v. ACB American, Inc.*, 232 F.R.D. 612, 614 (N.D. Cal. 2006). *See also Willingham v. Ashcroft,* 226 F.R.D. 57, 59 (D.C. 2005) ("[O]nce a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the

> inquiry made by the portion of the interrogatory that precedes it, the subpart must be considered a separate interrogatory no matter how it is designated."). In *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684 (D. Nev. 1997), the test was described as follows:
>
> > Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related, is to examine whether the first question is primary and subsequent questions are secondary to the primary question. Or, can the subsequent question stand alone? Is it independent of the first question? Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they are joined by a conjunctive word and may be related. [citation omitted].

Id. These "federal interpretations are persuasive." *Brody v. Ruby*, 267 N.W.2d 902, 904 (Iowa 1978).

Plaintiff asks the Court to adopt the *Precision of New Hampton, Inc.* test, find the court abused its discretion in deciding Plaintiff exceeded the interrogatory limit, and reverse the denial of discovery.

## CONCLUSION

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

## REQUEST FOR ORAL ARGUMENT

Plaintiff requests oral argument.

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 13,502 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.

September 25, 2023.

Respectfully Submitted,

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