IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-0833
Linn County No. CVCV098833

ROBERT TEIG,
Plaintiff—Appellant,

v.

VANESSA CHAVEZ, ALISSA VAN SLOTEN PATRICIA G. KROPF, ELIZABETH JACOBI, BRAD HART, AND TERESA FELDMANN
Defendants—Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY
HONORABLE LARS G. ANDERSON, CHIEF DISTRICT COURT JUDGE

AMENDED **FINAL BRIEF FOR DEFENDANTS-APPELLEES**

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III. Whether the District Court Correctly Held that Iowa Code § 22.3 Authorizes a Public Entity to Charge General Search and Retrieval Fees

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ROUTING STATEMENT

The Defendants-Appellees ("City Defendants") do not agree with the Routing Statement in the brief of the Appellant ("Teig"). This case concerns settled matters of law "presenting the application of existing legal principles" and should be assigned to the Court of Appeals. See Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case arises from open records requests made by Teig to various employees and officials of the City of Cedar Rapids (the "City"). The complained-about requests began in October of 2021 and continued through March of 2022. Teig's requests primarily revolved around documents related to the City's hiring of a new City Clerk and a new City Attorney. The District Court, in ruling on the City Defendants' motion for summary judgment, correctly held the individual City Defendants appropriately responded to Teig's requests and correctly withheld certain documents from disclosure in compliance with Iowa law. The decision of the District Court should be affirmed.

STATEMENT OF FACTS

Defendant-Appellee Chavez ("Chavez") is the current City Attorney for the City. She has held that position since December 13, 2021. APP. 2-3. Defendant-Appellee Van Sloten ("Van Sloten") is the current City Clerk for the City. She has held that position since May 11, 2021. APP. 2-78. Defendant-

Appellee Kropf ("Kropf") is currently employed as an Assistant City Attorney for the City. APP. 2-94. Defendant-Appellee Jacobi ("Jacobi") is currently employed as an Assistant City Attorney for the City. APP. 2-106. Defendant-Appellee Hart ("Hart") is the former Mayor of the City. He served as Mayor from January of 2018 through December of 2021. APP. 2-127. Defendant-Appellee Feldmann ("Feldmann") was the Human Resources Director for the City at all times relevant to this case. APP. 2-139.

Request for City Clerk Job Application

In March of 2021, the City began a recruiting process to fill the City Clerk position. APP. 2-166 – 2-168. Van Sloten applied for and was hired to fill the position. APP. 2-78. At the time of her application, she was already employed by the City. *Id.* Van Sloten was appointed as the City Clerk on May 11, 2021. *Id.*

On October 19, 2021, Teig requested from Van Sloten a copy of her job application for the City Clerk position. Van Sloten did not provide it to Teig. *Id.* On October 22, 2021,

Teig sent an e-mail to Kropf in which he requested clarification regarding Van Sloten's refusal to provide her job application. APP. 2-96 – 2-98. In response, Kropf informed Teig that the City considered the document confidential under the Open Records Law. *Id.* Van Sloten's job application has never been provided to Teig.

Request for City Attorney Hiring Documents

The City advertised its City Attorney job position in the summer of 2021, utilizing a third-party consulting group. APP. 2-130 – 2-137. Chavez and Jacobi applied for the position. APP. 2-3; 2-106.

Jacobi was employed as an Assistant City Attorney for the City at the time she applied for the City Attorney position. APP. 2-106. She was appointed as the Interim City Attorney on approximately August 1, 2021. *Id.* Chavez was employed as the City Attorney for the City of Green Bay, Wisconsin, at the time she applied for the City Attorney position. APP. 2-3. She was ultimately hired by the City and began her appointment as the Cedar Rapids City Attorney on December 13, 2021. *Id.*

A closed session meeting of the City Council was held on October 12, 2021, for the purpose of discussing and evaluating the City Attorney candidates. APP. 2-140. The City obtained a legal opinion from its outside counsel regarding its ability to enter closed session for this purpose. *Id.*

On October 21, 2021, Teig requested records related to the City Attorney hiring process. App. 2-169. Specifically, Teig 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.**

Id. On October 29, 2021, Teig requested a copy of the legal opinion regarding the closed session related to the City Attorney hiring process. App. 2-143 – 2-144.

In response to Teig's October 21, 2021 open records request, Feldmann provided non-confidential records to Teig on November 1, 2021. APP. 2-149 – 2-165. Specifically, she provided Teig with a copy of the contract between the City and the third-party consulting group who assisted with the City

Attorney recruitment process. *Id.* In her e-mail, Feldmann also informed Teig that the requested legal opinion would not be provided due to its confidential status. APP. 2-149. She stated in her response that she would provide a fee estimate to locate and assemble the remaining records. *Id.* That estimate was provided to Teig on November 3, 2021, and was consistent with the City's open records policy. APP. 2-148.

In response to the fee information, Teig chose to narrow his request. APP. 2-147 – 2-148. Hart then provided Teig with additional non-confidential records on December 14, 2021 in response to his narrowed request. APP. 2-129 – 2-138. Hart informed Teig the requested job applications and legal opinion would not be provided based upon their confidential status under the law. APP. 2-138.

Records Regarding November 23, 2021 Closed Session

On December 6, 2021, Teig requested documents related to a November 23, 2021, closed session meeting of the City Council. APP. 2-172. Teig requested the following:

> **Please provide records showing the name of the litigation, name of any attorney involved, and**

> **bills and expenditures related to the matter. I'm looking for financial and identification information, and not substance of the discussion at the meeting. I also request records showing who was at that closed session and how long it lasted.**

Id. This closed session was held for the purpose of discussing imminent litigation with legal counsel pursuant to Iowa Code § 21.5(1)(c), namely Teig's requests for job applications and his ongoing disagreement with the City over their confidential status. Teig filed this lawsuit on November 24, 2021, the day after the closed session was held. APP. 1-5.

Jacobi responded to Teig's request on December 8, 2021, and provided a copy of the minutes from the open session portion of the November 23, 2021 City Council meeting. APP. 2-108 – 2-123. Jacobi further responded as follows:

> **Regarding your request for records related to the Nov. 23 closed session showing the name of the litigation, and name of any attorney involved, there are no such documents responsive to this request.**
>
> **Regarding your request for bills and expenditures related to the matter, 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.

With regard to your request for records showing who was at that closed session, that documentation is confidential pursuant to Iowa Code Sec. 21.5(5)(b)(1).

APP. 2-109. Through this litigation, Teig was provided a copy of the legal opinion discussed at the closed session meeting and redacted copies of the attorney fee statements from outside counsel related to their representation on November 23. APP. 1-174[1]; Teig Brief at 77.

December 15, 2021 Records Request

On December 15, 2021, Teig requested the following from Hart:

Please provide records relating to:

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

[1] This Ruling acknowledges the legal opinion regarding the confidentiality of job applications, as discussed at the Nov. 23, 2021 closed session, had been provided to Teig.

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
7. your authorization to assert attorney/client privilege.

APP. 2-18.

Chavez responded to Teig's request on December 20, 2021, and sought clarification regarding his request. *Id.* Teig provided clarification on December 21, 2021. APP. 2-9 – 2-17. Chavez responded on December 30, 2022, and provided a fee estimate to respond to his records request. *Id.* The fee estimate was consistent with the City's open records policy. *Id.* Teig never agreed to pay the fees to provide the records and, therefore, Chavez did not provide any further response. APP. 1-59.

March 11, 2022 Records Request

On March 11, 2022, Teig requested from Chavez a "copy of the instructions you have given to city employees that my public records requests must go through your office". APP. 2-39. Chavez provided the requested document to Teig 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. APP. 2-39 – 2-43; Teig Brief at 74.

Open Records Policy

The City has adopted an open records policy, by resolution, which provides:

> **An hourly fee will be charged for the actual expenses in retrieving records, supervising the examination and copying of requested records, and for other necessary activities undertaken to make records available when such time exceeds 30 minutes. The hourly rate for such staff time will be charged the rate of $20 per hour pro-rated to the nearest 15 minutes.**

APP. 2-81. The policy further states:

> **Access to an open record shall be provided promptly upon request unless the size or nature of the request makes prompt access infeasible. Requests for access to open records will be given priority in a department's work activities. Absent unusual circumstances, access shall be provided within 5 working days from the date the request is received by the custodian. If the size or nature of the request for access to an open record requires time for compliance, the custodian shall comply with the request as soon as feasible.**

APP. 2-84 – 2-85.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE ATTORNEY-CLIENT PRIVILEGE IS APPLICABLE TO SHIELD DOCUMENTS FROM PRODUCTION IN RESPONSE TO AN OPEN RECORDS REQUEST

Preservation of Error. The City Defendants do not contend there is a preservation of error problem.

Standard of Review. This issue was addressed in the District Court's summary judgment ruling. The standard of review for motions for summary judgment is for corrections of errors of law and the appellate court's role is "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Kelly v. Iowa Mut. Ins. Co.,* 620 N.W.2d 637, 641 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995)).

Argument. Teig argues that because the attorney-client privilege is not listed as a confidentiality exception in Iowa Code § 22.7 it ceases to exist in the context of open records requests. Teig Brief at 22-26. He alleges the City Defendants violated the Open Records Law by failing to provide him with copy of a legal opinion related to the legality of going into

closed session on October 12, 2021. Teig Brief at 26. The City Defendants have maintained the legal opinion is a confidential record protected by attorney-client privilege. APP. 2-148; 2-138. The District Court agreed with City Defendants and concluded "there is no circumstance under which [Teig] would be entitled to the legal opinion under Iowa's open records law." APP. 1-235.

The District Court identified caselaw, statutory language and Iowa's discovery rules to support the applicability of the attorney-client privilege in the context of open records requests. APP. 1-235 – 1-236. Because 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," it is protected by attorney-client privilege and does not need to be produced in response to an open records request. APP. 1-236.

This is consistent with the undisputed facts of the case and the affidavit of Feldmann, who provided a summary of the nature of the contents of the legal opinion. APP. 2-140.

Because the District Court's conclusion is supported by the facts and law, it must be upheld.

Teig additionally argues the attorney-client privilege does not apply to the requested legal opinion because it does not include testimony and is not covered by the work product exception in Iowa Code § 22.7. Teig Brief at 25-26. But, the privilege is not as narrow as Teig suggests. Under Iowa law, "[a]ny confidential communication between an attorney and the attorney's client is absolutely privileged from disclosure against the will of the client." *Shook v. City of Davenport*, 497 N.W.2d 886 (Iowa 1993). "This privilege is of ancient origin. It is premised on a 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." *Keefe v. Bernard*, 774 N.W.2d 663, 670 (Iowa 2009) (citing *Bailey v. Chicago, Burlington & Quincy R.R.,* 179 N.W.2d 560, 563 (Iowa 1970)).

If the court were to overturn the ruling on this issue, the result would be untenable. Litigants would able to obtain confidential legal advice from governmental entities simply by

submitting open records requests for legal opinions and other similar communications between governments and their lawyers. These governmental entities would be unable to confidentially communicate and deliberate with their legal counsel regarding how to properly respond to records requests, threatened litigation, or pending litigation to name a few potential instances. This is clearly not what the law, or the legislature intended.

Governmental entities are entitled to seek and receive advice from their attorneys. Teig's arguments on this issue must be rejected.

II. THE DISTRICT COURT CORRECTLY HELD THE JOB APPLICATIONS FOR CITY CLERK AND CITY ATTORNEY POSITIONS ARE CONFIDENTIAL RECORDS UNDER THE OPEN RECORDS LAW

Preservation of Error. The City Defendants do not contend there is a preservation of error problem.

Standard of Review. This issue was addressed in the District Court's summary judgment ruling. The standard of review for motions for summary judgment is for corrections of errors of law and the appellate court's role is "to determine

whether a genuine issue of material fact exists and whether the law was correctly applied." *Kelly v. Iowa Mut. Ins. Co.,* 620 N.W.2d 637, 641 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995)).

Argument. The District Court correctly held the requested job applications, for the City Clerk and City Attorney positions, were confidential records under Iowa law. APP. 1-232 - 1-235. The City Defendants rightfully and lawfully withheld the documents from Teig pursuant to Iowa Code §§ 22.7(11) and 22.7(18). These conclusions are supported by the facts and law in this case and must be upheld.

A. IOWA CODE § 22.7(11).

Teig alleges Iowa Code § 22.7(11) does not shield job applications of current City employees from disclosure based upon *City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523 (Iowa 1980). Teig Brief at 29. In that opinion, decided more than 40 years ago, the Iowa Supreme Court concluded employment applications were not confidential under the Open Records Law, *as it existed at that time*. *Telegraph Herald,* 297

N.W.2d at 527. At the time, the statute's pertinent confidentiality exception provided only:

> **Personal information in confidential personnel records of public bodies including but not limited to cities, boards of supervisors and school districts.**

Iowa Code § 68A.7(11) (1979). The Court in *Telegraph Herald* applied a narrow construction to this exception and concluded job applications were not included within the confidentiality exception. 297 N.W.2d at 527. The Iowa Supreme Court has since acknowledged the *Telegraph Herald* case has been superseded by subsequent statutory amendment. *Am. Civ. Liberties Union Found. of Iowa, Inc. v. Recs. Custodian, Atl. Cmty. Sch. Dist.*, 818 N.W.2d 231, 238 (Iowa 2012) ("superseded by statute on other grounds"); see also *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 897 (Iowa 1988) ("Our interpretation of the legislation in force at that time produced the conclusion that such applications were public records subject to the general disclosure provisions of the act. The decision in the *Telegraph Herald* case no longer provides a useful guidepost for resolving the

present controversy."). Further, in *Clymer v. City of Cedar Rapids*, the Court expressly stated "the legislature thereafter amended the statute to cloak employment applications with privacy. 601 N.W.2d 42, 46 (Iowa 1999)[2]. Therefore, *Telegraph Herald* is no longer controlling legal precedent as it has, in fact, been superseded by statutory amendment.

The Iowa Legislature has now broadened the scope of this confidentiality exception to include:

> **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.**

Iowa Code § 22.7(11)(a) (2023). Based upon this exemption, the District Court correctly held "job applications of current employees of the City … clearly are exempt from production in an open records request." APP. 1-234. This includes the applications of Van Sloten, Jacobi and Chavez.

In his brief, Teig nevertheless argues that Iowa Code § 22.7(11) is not applicable because job applications are not

[2] The Court referenced amendment to Iowa Code § 22.7(18) and the *City of Sioux City* decision. *Id*.

personnel records, and because they include information which is not exempt from disclosure pursuant to Iowa Code § 22.7(11)(a)(1)-(5). Teig Brief at 31. This language provides the following personnel information shall not be confidential under chapter 22:

> **(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.

Iowa Code § 22.7(11)(a)(1)-(5) (2023). Job applications for City employees may include some small portion of this information, but they certainly will not include the bulk or all of it. A job application will not identify whether the City employee was terminated or demoted by the City, what their City salary or benefits will consist of, or when they will begin or conclude the job they are applying for. As such, job applications contain very little of the information within Iowa Code §§ 22.7(11)(a)(1)-(5) that Teig relies upon. The potential for inclusion of some unprotected information upon a document does not make public a document that is otherwise confidential and protected by the statute.

Regardless, Teig's arguments are without consequence. Assuming Teig is correct in his assertion that § 22.7(11) would not protect all information contained within job applications of existing City employees, § 22.7(18) would.

B. IOWA CODE § 22.7(18).

The District Court correctly applied Iowa Code § 22.7(18) as a separate and independent basis for prohibiting disclosure of the requested job applications. APP. 1-235 – 1-236. Since 1988, the Iowa Supreme Court has considered employment applications confidential records pursuant to Iowa Code § 22.7(18). See *Greater Sioux City Press Club*, 421 N.W.2d at 899. In *Greater Sioux City Press Club*, the Court specifically discussed the legislative intent behind Iowa Code § 22.7(18), stating:

> **It 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 (emphasis added).

Since *Greater Sioux City Press Club* additional legislative amendments have been made to Iowa Code § 22.7(18). In 2001, the Iowa Legislature made changes to clarify who was considered "outside of government" for purposes of the exception. Laws of the Seventy-Ninth G.A., 2001 Session, Ch. 108, Senate File 344. The new statutory language clarifies:

> **"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.**

Iowa Code § 22.7(18) (2023). Contrary to Teig's assertions, this statutory language does not change the analysis under *Greater Sioux City Press Club*. On its face, this new language would exclude consultants and contractors from being "outside of government". It would also exclude those "with whom an arrangement for compensation exists". Records pertaining to these classifications would not be confidential under Iowa Code § 22.7(18).

Conversely, the Legislature did nothing to overrule the Court's prior holding in *Greater Sioux City Press Club* that job applications are and would remain confidential. The 2001 amendments made no mention whatsoever of job applications or job applicants. The Legislature could have done so, but it opted not to. This portion of the statutory amendments was clearly directed at communications with the agents of a municipality's consultants and contractors, not job applicants.

Since the 2001 amendments, the Iowa Supreme Court has expressly recognized the continued viability and applicability of the *Greater Sioux City Press Club* precedent, both generally as well as specifically to job applications. In *Ripperger v. Iowa Public Information Board*, the Court recognized:

> **The legislature enacted section 22.7(18) "to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure." *Press Club*, 421 N.W.2d at 898. Section 22.7(18) "is broadly inclusive" and "mechanical application of a 'narrow' construction rule does not aid in the ascertainment of the legislature's intent." *Id.* at 897. We have applied section 22.7(18) to keep**

> **confidential employment applications for the position of a city manager, *id.* at 896, 899, and communications related to an investigation of an elementary school principal, *Des Moines Indep. Cmty. Sch. Dist. Pub. Recs. v. Des Moines Reg. & Trib. Co.*, 487 N.W.2d 666, 667, 670 (Iowa 1992). Both involved useful incoming communications which could be deterred by public disclosure. *Id.* at 670 ("A public agency often conducts investigations by interviewing people who are not a part of the agency. In order to do so effectively the agency must be able to provide for confidentiality."); *Press Club*, 421 N.W.2d at 898 ("In viewing the potential category of solicited communications which might be received by public agencies and for which they may wish to maintain confidentiality, employment applications come immediately to mind."). 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.**

967 N.W.2d 540, 551 (Iowa 2021) (emphasis added).

Iowa Code § 22.7(18) now reads and exempts the following records from the Open Records Law:

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

Iowa Code § 22.7(18) (2023).

Job applications are covered by this statutory exception and are deemed confidential as has now been repeatedly recognized by controlling legal precedent. See *Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988); *Ripperger*, 967 N.W.2d at 540. The District Court rightfully relied upon these cases to uphold the confidentiality of the requested job

applications, and because the decision is supported by the law it must be upheld.

The Iowa Supreme Court has recognized that a government body "could reasonably believe" persons would be discouraged from communicating with the government body regarding job openings. *Ripperger*, 967 N.W.2d at 551 ("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"). The 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.

The undisputed facts in the case-at-bar demonstrate these concerns were present with respect to the requested job applications. Feldmann provided an affidavit attesting to the City's policy to keep employment applications confidential due to concern that public disclosure of employment applications would dissuade applicants. APP. 2-139 – 2-140. Pursuant to

Ripperger, Feldmann's "determination should be upheld, not second-guessed, even if others could reasonably disagree with the custodian." 967 N.W.2d at 553.

The undisputed facts further demonstrate the subject applications in this case were voluntarily submitted to the City. APP. 2-3 – 2-4; 2-78 – 2-79; 2-106 – 2-107. Just as the Court has acknowledged property owners were "not required by law" to request removal from a name search function in *Ripperger*, individuals were "not required by law, rule, procedure, or contract" to apply for employment with the City. 967 N.W.2d at 552; see also *Greater Sioux City Press Club*, 421 N.W.2d at 898 ("The candidates were not required to submit these applications because they were not required to apply for the job").[3] Here, individual applicants decided for themselves whether or not to submit an employment application to the City. The applicants were not required to seek out these job positions. Employment applications easily fit within the

[3] Teig's brief challenges the City Defendants to support the Court's pronouncement in *Greater Sioux City Press Club*. See Teig Brief at 39, fn. 10. While the City Defendants need not justify the Court's prior holding to identify communications that would be required, the Court's holding would garner abundant support from varied communications that may be required (e.g., those seeking a license or permit from the City, bidders on public improvement projects, grant recipients).

category of "[c]ommunications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees". Iowa Code § 22.7(18).

In all cases, employment applications are submitted by persons "outside of government". The prior acknowledgement of the confidentiality applicable to employment applications in *Ripperger* does not distinguish between current government employees versus privately employed or former government employees for purposes of determining the confidentiality of employment applications. 967 N.W.2d at 551. This is because 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. Indeed, the employment applications made in this case were undoubtedly submitted outside the course and scope of any individual's job duties. APP. 2-3 – 2-4; 2-78 – 2-79; 2-106 – 2-107. There is no job requirement within the City that required any employee to submit an employment

application for the City Clerk or City Attorney positions. APP. 2-139 – 2-141. To the contrary, individuals opting to submit employment applications for these positions did so only in their own personal capacity irrespective of their present employment circumstance. Therefore, any such employment application was submitted by a person "outside of government".

If the statute were interpreted to treat the confidentiality of employment applications differently by distinguishing between candidates currently employed by the governmental body versus those who are not, it would serve to subordinate and extinguish the individual and personal privacy interests of government employees. The Court in *Ripperger* foretold its concern with such an interpretation stating, "[A] public employee has a substantial privacy interest in his or her address that outweighs the public's interest in disclosure, unless the information is necessary to open the government's actions to the light of public scrutiny." 967 N.W.2d at 552 (quoting *Clymer*, 601 N.W.2d at 47). It would be absurd to

treat the confidentiality of job applications differently solely because some applicants were current City employees while others were not.

The District Court was correct in holding the requested job applications are confidential pursuant to both Iowa Code §§ 22.7(11) and 22.7(18).

III. THE DISTRICT COURT CORRECTLY HELD THAT IOWA CODE § 22.3 AUTHORIZES A PUBLIC ENTITY TO CHARGE GENERAL SEARCH AND RETRIEVAL FEES

Preservation of Error. The City Defendants do not contend there is a preservation of error problem.

Standard of Review. This issue was addressed in the District Court's summary judgment ruling. The standard of review for motions for summary judgment is for corrections of errors of law and the appellate court's role is "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995)).

Argument. Teig asserts the District Court erred in concluding general search and retrieval fees are available under Iowa Code chapter 22. Teig Brief at 43-62. The District Court's ruling on this issue was correct, and its decision must be upheld.

A. SEARCH AND RETRIEVAL FEES ARE PERMITTED UNDER THE OPEN RECORDS LAW.

Iowa Code § 22.3 provides that a public body may charge for expenses incurred in fulfilling a public records request, providing:

> **...fulfillment of a request for a copy of a public record may be contingent upon receipt of payment of reasonable expenses ... In the event expenses are necessary, such expenses shall be reasonable and communicated to the requester upon receipt of the request.**
> **...**
> **All reasonable expenses of the examination and copying shall be paid by the person desiring to examine or copy. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or the custodian's authorized designee in supervising the examination and copying of the records. ... The fee for the copying service as determined by the lawful custodian shall not exceed the actual cost of providing the service. Actual costs shall include only those reasonable expenses directly attributable to supervising the examination of and making and**

> **providing copies of public records. Actual costs shall not include charges for ordinary expenses or costs such as employment benefits, depreciation, maintenance, electricity, or insurance associated with the administration of the office of the lawful custodian. Costs for legal services should only be utilized for the redaction or review of legally protected confidential information.**

Iowa Code § 22.3 (2023) (emphasis added).

The Iowa Supreme Court has confirmed that the actual expenses incurred, including retrieval fees, may be recovered by a public body under chapter 22. *Rathmann v. Bd. of Directors of Davenport Community Sch. Dist.*, 580 N.W.2d 773, 778–79 (Iowa 1998). Teig argues statutory amendments to Iowa Code § 22.3 since 1998 have superseded the *Rathmann* holding. Teig Brief at 58-62. Teig is mistaken.

Although statutory changes to Iowa Code § 22.3 were made in 2005, the operative language from *Rathmann* remains in place. Indeed, the operative language considered by the *Rathmann* Court was:

> **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. <u>All expenses</u> of such work shall be paid by the person desiring to <u>examine or copy</u>. The lawful custodian may charge a reasonable fee for the services of the lawful custodian or the custodian's authorized deputy in supervising the records during such work. ...**

Rathmann, 580 N.W.2d at 777 (emphasis added). While the phrase "such work" no longer appears in Iowa Code § 22.3, the references to "all expenses" and "examination and copying" remain. The pertinent statutory language currently in place continues to provide:

> **<u>All reasonable expenses</u> of the <u>examination and copying</u> 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.**

Iowa Code § 22.3(2) (2023). Because the statute continues to allow for the collection of "all reasonable expenses of the examination and copying" of public records, the underlying holding of *Rathmann* continues to apply:

> **Reading the statute as a whole, we conclude that the provisions of section 22.3 generally contemplate reimbursement to a lawful custodian of public records for costs incurred in retrieving public records. We find the phrase "all expenses**

> **of such work" to be especially significant and indicative of the legislature's intent that a lawful custodian has the authority to charge a fee to cover the costs of retrieving public records. Thus, access to public records does not necessarily mean "free" access. We recognize that permitting entities covered under chapter 22 to charge members of the public a fee to cover the cost of retrieving public records does, to some extent, limit public access to public records. While the legislature did not intend for chapter 22 to be a revenue measure, at the same time it did not intend for a lawful custodian to bear the burden of paying for all expenses associated with a public records request. We thus reject Rathmann's interpretation that the words "expenses," "fees" and "payment" in the section were only intended to cover the costs of supervising or photocopying the documents.**

Rathmann, 580 N.W.2d at 778-79. More recently, the Iowa Court of Appeals has likewise authorized the collection of search and retrieval fees by a governmental entity to produce public records responses. See *Hackman v. Kolbet for New Hampton Mun. Light Plant*, 2017 WL 3065168 (Iowa Ct. App. 2017) (table decision)(unpublished). This decision is subsequent to the 2005 statutory amendments to Iowa Code § 22.3 and confirms that the *Rathmann* holding remains good law.

The City adopted an open records policy, pursuant to Iowa Code § 22.3, which provides:

> **An hourly fee will be charged for the actual expenses in retrieving records, supervising the examination and copying of requested records, and for other necessary activities undertaken to make records available when such time exceeds 30 minutes. The hourly rate for such staff time will be charged the rate of $20 per hour pro-rated to the nearest 15 minutes.**

APP. 2-81. The City's policy is consistent with – and, in fact, less costly than – the policy approved by the courts in the *Hackman* case. 2017 WL 3065168 at *2.

The City's policy does not assess fees for time less than 30 minutes, which is consistent with the statute's desire that municipalities "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). Indeed, this legislative provision serves to recognize 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, which is precisely how the City has administered these costs pursuant

to its policy. APP. 2-81. The premise underlying Teig's argument for "cost-free" records is negated by this legislative recognition.

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.

Pursuant to the City's policy, Teig was appropriately advised beforehand he would be asked to pay fees for responses to certain requests requiring time to produce. See Iowa Code § 22.3(1); see also APP. 2-148; 2-9 – 2-17; 2-23 – 2-38.

The City's policy is permitted and appropriate under Iowa Code § 22.3, *Rathmann*, and *Hackman*. There is no merit to Teig's challenge of the District Court's conclusion that search and retrieval fees are authorized by Iowa law.

B. RECENT LEGISLATIVE CHANGES TO IOWA CODE § 22.3 FURTHER SUPPORT THE DISTRICT COURT'S DECISION

Senate File 2322 was passed by the Iowa Legislature during the 2022 legislative session, and this bill included revisions to Iowa Code § 22.3 showing the legislature intended to allow fees – beyond examination and copying fees – by public entities responding to public records requests. Specifically, the statute was revised as follows:

> **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. ~~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. 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.**

Iowa Code § 22.3 (effective July 1, 2022).

The 2022 revisions clarify that fees must be "reasonable" and that fees should not be charged for responses that take less than thirty minutes to produce. *Id.* The City's open records policy, and the City Defendants' application of the policy to Teig's open records requests, are consistent with this new language. APP. 2-81; 2-148; 2-9 – 2-17; 2-23 – 2-38. The City does not charge for open records responses that take less than 30 minutes to produce and the City charges an hourly rate of $20 per hour to produce responsive documents, regardless of who is completing the tasks.[4]

[4] The records custodians involved in this case earn more than $20 per hour, and Tieg has therefore not been charged their actual rate of pay.

The 2022 statutory amendment also 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. Legal review was not previously mentioned in Iowa Code § 22.3; however, it was recognized as a permissible expense in *Hackman.* This legislative change is consistent with existing caselaw regarding fees under chapter 22.

If 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 during the 2022 legislative session when it was amending the statute. If the Legislature wished to reign in search and retrieval fees in light of the *Rathmann* and *Hackman* decisions it could have done so, but it did not. Instead, the Legislature allowed the *Rathmann* and *Hackman* precedent to remain and continue in effect.

General search and retrieval fees have been and continue to be authorized by chapter 22, and the District Court's ruling affirming these prior holdings upon this issue must stand.

C. TEIG'S DECISION TO EXCLUDE THE CITY FROM HIS CHALLENGE TO THE CITY'S FEE POLICY NEGATES HIS CHALLENGE.

Teig seeks to challenge the City's policy to institute a fee for the search and retrieval of records. Teig Brief at 43-62. This policy was enacted by the City. APP. 2-81. Teig did not, however, bring claim against the City. See APP. 1-11 – 1-29. Instead, Teig opted not to include the City and to pursue claims only against various individuals in this cause-of-action. *Id.* The absence of the City to defend its policy, which was not enacted by any of the involved individuals, prevents Teig from now pursuing a claim to invalidate a policy of the City.

Iowa Code § 22.10(1) allows an aggrieved person to "seek judicial enforcement of the requirements of this chapter in an action brought against the lawful custodian and any other persons who would be appropriate defendants under the circumstances." The City would be the "lawful custodian" as defined pursuant to Iowa Code § 22.1(2) to "mean[] the government body currently in physical possession of the public record." Teig's claim against the individual City

Defendants must, therefore, hinge upon these individuals being "appropriate defendants under the circumstances."

The individual City Defendants are not "appropriate defendants under the circumstances" for purposes of Teig's effort to invalidate a City policy relative to search and retrieval fees. None of these individuals enacted the policy at issue. APP. 2-81. They would, as a result, not have an interest in the amount of fees charged by the City for the search and retrieval of records. Instead, it would be the City itself that instituted the policy, and therefore has an interest in defending enforceability of its policy.

The City would be a necessary party to such a claim. Because Teig opted not to include the City, Teig's effort to invalidate the City's policy must fail. The Iowa Supreme Court has held it "cannot consider an appeal in the absence of necessary parties." *Paulson v. Paulson*, 286 N.W.2d 431 (Iowa 1939).

D. TEIG'S AND AMICI'S POLICY ARGUMENTS TO PROHIBIT SEARCH AND RETRIEVAL FEES IGNORE CURRENT STATUTORY PROTECTIONS AND WOULD UNDULY BURDEN PUBLIC ENTITIES AND TAXPAYERS[5]

Amici, ACLU of Iowa and the Iowa FOIC, argue that "general search and retrieval" charges are used as "a new tactic" taking "increasing prominence" that appears to be "calculated to hinder access to information". Amici Brief at 12. In support, the Amici refer the Court to examples of ostensibly outrageous fees quoted by public entities in response to record requests made by their members. Amici Brief at 14-24. These anecdotal stories raise more questions than support for Amici's argument, notably these unanswered questions include the breadth of the subject requests and the extent of search and retrieval and production efforts needed to respond. Amici refer to a handful of stories to "show that abuse of general 'search and retrieval' fees is not a rare or isolated occurrence." Amici Brief at 24. But, Amici's handful of stories

[5] The Court's August 28, 2023 Order required any amended brief be filed within fifteen (15) days of the Order. This order required the City Defendants' amended brief be filed by September 12, 2023. This amended brief is being filed in response to this Order with Sections III(D) & (E) of the Argument intended to respond to the Amici brief.

do not support their claim of frequent abuse without showing the prevalence of record requests.[6] What Amici clearly fail to acknowledge, however, are the current statutory protections against unreasonable search and retrieval fees and the burden put upon records custodians in responding to record requests.

Public entities cannot charge unreasonable fees for records requests under current law. See Iowa Code § 22.3 (effective July 1, 2022). The Legislature's 2022 revisions specifically clarified that fees must be "reasonable" and that fees should not be charged for responses that take less than thirty minutes to produce. *Id.* In the case-at-bar, the City's policy and implementation were entirely consistent with the statutory language. APP. 2-81; 2-148; 2-9 – 2-17; 2-23 – 2-38. It is noted that while Amici critique the "reasonableness" of fees purportedly received by their members in other circumstances, they do not critique the "reasonableness" of the City's fees in the case-at-bar. Instead, Amici seek to

[6] By comparison, the Iowa League of Cities' brief cites to a total of 836,164 Freedom of Information Act requests directed to the federal government in 2021. League Brief, pp. 9-10. The brief further cites to significant increases of requests directed at states and municipalities. *Id.* at 10. The complaints made by Amici may, in fact, be isolated and rare.

invalidate all search and retrieval fees – fair or otherwise – because they believe there is a potential for abuse in other circumstances. If Amici's members feel that fees charged in response to records requests to other public entities are unreasonable, there are already mechanisms in place to address such concerns. There is no need to completely discard and prohibit search and retrieval fees to avoid the mere possibility that a public entity would charge unreasonable fees in violation of current law. The legislature has already accounted for this possibility.

The burdens put upon public entities in responding to record requests can be substantial. While the City Defendants can neither affirm nor dispute Amici's anecdotal stories that are outside the record, they can point to emails in this case as an example of the kind of burdens that a single requester can place upon the City and its employees.

By way of example, on December 15, 2021, Teig requested the following from Hart:

Please provide records relating to

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
6. your authorization to assert attorney/client privilege.

APP. 2-18. Then, on December 30, 2021, Teig sent an email to Chavez which included the following:

I would like all time records on the search to date, please.
Any estimate is supposed to be given when the request is made. That means mid-December instead of as an afterthought when I made clear this has delayed more than long enough.
Who talked to you about charging me, and when did they talk to you?
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?

APP. 2-8. On January 4, 2022, Teig requested "records relating to LBA Foundation that were generated after October 1, 2021." APP. 2-24.

In the span of a little more than two weeks, this single requester submitted three separate emails setting forth numerous record requests for documents relating to a multitude of topics. It takes significant time to search for and retrieve records that may be responsive to these types of requests. Should the public entity provide a deficient response – or one that is merely perceived as deficient – the public entity and/or its representatives may then be required to defend a lawsuit. Indeed, this appeal is a ready example of how individuals may become subject to suit, and the burdens inhering thereto, when a requester perceives the response to be inadequate. The City Defendants cite these examples from Teig's requests as examples of requests that can and have been received, not to argue public entities should be shielded from requests for documents but, to demonstrate burdens

placed upon public entities and their representatives in providing responses.

Responding to open records requests requires public employees to divert their time and attention from their normal day-to-day duties. The current statute, which allows for "reasonable expenses" to be paid by the requester of public records, strikes a practical and legitimate balance of the competing interests involved in open record requests. The City, and its residents, should not be required to bear the complete and full cost of searching and retrieving records in response to the many varied and broad record requests received from Teig or others. It is consistent with the statute and eminently reasonable to require that the person requesting records bear some of that expense as well. The legislature was correct to allocate these burdens, as was previously recognized by this Court in *Rathmann*.

E. AMICIS' RELIANCE UPON PRECEDENT FROM OTHER JURISDICTIONS DOES NOT SUPPORT THEIR ARGUMENT

In their brief, Amici argue caselaw from Wisconsin, Indiana, Ohio and Alaska have found some fees are not permitted in those states under their respective statutory frameworks, and therefore this Court should not permit search and retrieval fees in Iowa. Amici Brief at 30-34. This argument is, however, flawed as precedent from these jurisdictions do not support Amici's request to invalidate search and retrieval fees in Iowa; if anything, they affirm the the District Court's application of the statute and this Court's prior precedent in *Rathmann*.

As the Iowa League of Cities correctly notes in its brief, there are a plethora of differences between the statutes involved in Wisconsin, Indiana, Ohio and Alaska as compared to Iowa Code § 22.3. League Brief at 30-34. In fact, contrary to Amici's suggestions, Wisconsin law permits an authority to "impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is $50 or more." Wis. Stat. § 19.35(3)(c) (2023). Similarly, Indiana law permits a school district to charge "a

search fee for any time spent searching for records that are in an electronic format that exceeds five (5) hours." Ind. Code § 5-14-3-8(m) (2023). In Ohio, the public records statute requires records to be made available for inspection, free of charge, but a "person responsible for public records shall make copies of the requested public record available to the requester at cost." Ohio Rev. Code Ann. § 149.43(B)(1) (2023).

Alaska, meanwhile, has adopted a fee provision which seems to be aimed towards serial requesters, such as is involved in the case-at-bar. The statute provides:

> **If the production of records for one requester in a calendar month exceeds five person-hours, the public agency shall require the requester to pay the personnel costs required during the month to complete the search and copying tasks. The personnel costs may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks. The requester shall pay the fee before the records are disclosed, and the public agency may require payment in advance of the search.**

Alaska Stat. § 40.25.110(c).

What can generally be said about these various statutes is they all attempt to strike the difficult balance between

competing interests of access to government documents and the significant burden placed upon responding public entities in fulfilling requests for records. The Iowa Legislature has already balanced these interests by its adoption of Iowa Code § 22.3 and its express allowance for the collection of "reasonable expenses" in fulfilling such requests. Neither Teig nor Amici present good cause for this Court to overrule prior precedent in *Rathmann* to invalidate the controlling legislative provisions and bar public entities from charging reasonable search and retrieval fees.

IV. INJUNCTIVE RELIEF

Preservation of Error. Teig has failed to preserve error to challenge the rejection of injunctive relief as an available remedy. At the District Court, Teig addressed his request for injunctive relief only within the background section of his resistance to the City Defendants' motion for summary judgment by claiming this requested relief was not part of the City Defendants' motion for summary judgment. APP. 1-179. Teig did the opposite of raising an entitlement to injunctive

relief in defense of the summary judgment motion. He argued that his request for injunctive relief was not even involved in the motion. *Id.*

Nor did the District Court separately or expressly address Teig's request for injunctive or equitable relief within its order. See generally APP. 1-229 – 1-239.

"Generally, a party must raise an issue and the district court must decide it for that issue to be properly preserved for appellate review." *Duck Creek Tire Service, Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 892 (Iowa 2011). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Teig neither raised his sought-after injunctive or equitable relief in resisting summary judgment, nor did Teig seek or obtain a ruling addressing this issue in order to preserve error. Teig failed to preserve this issue for appellate review.

Standard of Review. The standard of review for motions for summary judgment is for corrections of errors of law and the appellate court's role is "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Kelly v. Iowa Mut. Ins. Co.,* 620 N.W.2d 637, 641 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995)).

Argument. Teig argues that he is somehow entitled to injunctive relief, even though he has failed to demonstrate an underlying violation of Iowa Code chapter 22 by the City Defendants. Teig Brief at 63-64. In his brief, Teig summarily contends the District Court "was incorrect in dismissing Plaintiff's equitable claims as a matter of law." Teig Brief at 64.

Under the Open Records Law, injunctive relief may be requested to either prohibit a party from disclosing records or to compel a party to provide records or otherwise comply with the statute. Iowa Code §§ 22.5, 22.8(1) & 22.10(3)(a). The 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). Because the City Defendants successfully demonstrated compliance with the Open Records Law, Teig neither was nor is entitled to injunctive relief. The District Court was correct not to award it.

V. UNREASONABLE DELAY

Preservation of Error. The City Defendants do not contend there is any preservation of error problem.

Standard of Review. This issue was addressed in the District Court's summary judgment ruling. The standard of review for motions for summary judgment is for corrections of errors of law and the appellate court's role is "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Kelly v. Iowa Mut. Ins. Co.,* 620 N.W.2d 637, 641 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995)).

Argument. Teig alleges the City Defendants violated the Open Records Law by unreasonably delaying their responses to

his requests. Teig Brief at 65-75. Specifically, he complains about Feldmann, Hart and Chavez's responses to his various and repeated requests for city attorney records.[7] Teig Brief at 65-72.

The undisputed facts in this case show that Teig made an initial request for records related to the City Attorney hiring process on October 21, to which Feldmann responded on November 1. APP. 2-169; 2-149 – 2-165. A fee estimate was provided on November 3 to produce additional documents. Teig then revised his request to produce a new request on November 3. APP. 2-148. The City held a closed session meeting on November 23, 2021, to discuss the confidentiality of the requested job applications with legal counsel. APP. 2-123. Teig filed this lawsuit the following day, on November 24, 2021. APP. 1-5. Additional non-confidential documents were provided to Teig on December 14, 2021. APP. 2-129 – 2-138. On December 22, 2021, Teig requested additional documents, and Chavez

[7] Teig fails to mention other records requests where he was provided responsive documents by Chavez. See e.g. APP. 2-22 – 2-38; 2-44 – 2-45; 2-49 – 2-62.

provided redacted copies of those documents on January 5, 2022. APP. 2-19 – 2-21.

Teig further complains about a request for records made to Chavez on March 11, 2022, and that it took Chavez one week to provide the requested document to him. Teig Brief at 73-74.

The Iowa Supreme Court has held "[a]ccess to an open record shall be provided *promptly* upon request unless the size or nature of the request makes prompt access *infeasible.* If the size or nature of the request for access to an open record requires time for compliance, the custodian shall comply with the request *as soon as feasible.*" *Horsfield Materials, Inc., v. City of Dyersville,* 834 N.W.2d 444, 461 (Iowa 2013). There 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 like those asserted by Teig.

Under Iowa law, each open records request must be evaluated and responded to separately. The confidentiality

exceptions to the Open Records Law are extensive and discrete, and each separate request for open records must be evaluated in light of the confidentiality provisions available under the law. See Iowa Code § 22.7 (2023) (listing 75 separate confidentiality exceptions to the Open Records Law).

Iowa Code § 22.8(4) also allows a "good-faith, reasonable delay" for response to a public records request "if the purpose of the delay is …[t]o determine whether the government record in question is a public record, or confidential record."

In *Belin v. Reynolds*, the Iowa Supreme Court recently held that "unlimited delay would hamper the 'free and open examination of public records.'" 989 N.W.2d 166, 175 (Iowa 2023). Therein, the Court made clear the question when evaluating the time for response involving determining whether the public entity had "refused" to make government records available. *Id.* A "refusal" could be express or implicit. *Id.* "Extensive delay may – on its own – establish an implicit refusal"; however, "other evidence may also be relevant when deciding whether" the public entity "refused" to make the

records available. *Id.* The Court provided a non-exhaustive list of examples of relevant inquiries in making this determination. *Id.*

The undisputed facts in this case demonstrate the City Defendants required time to seek legal advice to respond to Teig's narrowed request for the City Attorney applications. A lawsuit was filed by Teig during that limited timeframe. The delay from the November 3 request until the December 14 production of documents was reasonable in light of these circumstances.

The undisputed facts further demonstrate Chavez responded to Teig's December 15 request on December 20, 2021, and sought clarification regarding his request. APP. 2-18. Teig provided clarification on December 21, 2021. APP. 2-9 – 2-17. Chavez then responded on December 30, 2022, and provided a fee estimate for responding to Teig's records request. *Id.* The fee estimate was consistent with the City's open records policy. Teig never agreed to pay the fees to provide the records and, therefore, Chavez did not provide any

further response. This timeframe was eminently reasonable under the circumstances; and, would not support a finding of a "refusal" by the City Defendants.

With respect to the March request, the undisputed facts show that in responding to Teig's multitude of records request, 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. APP. 2-4.

The facts in this case demonstrate repeated good faith attempts by the City Defendants to promptly respond to Teig's many requests for records (and at times answers to varied questions). Teig's requests, however, went far beyond any typical request for records. Even more, Teig's complaints regarding "delay", sometimes involving mere days, are relatively slight when compared to the years-long period considered by the Court in *Belin*. Under these circumstances, there is no evidence to support finding any impermissible express or implicit "refusals" to support Teig's delay claim.

The District Court was correct in rejecting Teig's claims of unnecessary delay.

VI. THE DISTRICT COURT CORRECTLY CONCLUDED TEIG HAS RECEIVED ALL NON-CONFIDENTIAL RECORDS RELATED TO HIS DECEMBER 2021 REQUEST

Preservation of Error. The City Defendants do not contend there is any preservation of error problem.

Standard of Review. This issue was addressed in the District Court's summary judgment ruling. The standard of review for motions for summary judgment is for corrections of errors of law and the appellate court's role is "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Kelly v. Iowa Mut. Ins. Co.,* 620 N.W.2d 637, 641 (Iowa 2000) (quoting *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995)).

Argument. Teig argues the District Court incorrectly dismissed his claim against Jacobi related to his December 2021 public records request for documents related to a November 23, 2021 closed session of the City Council. Teig Brief at 75-79. However, in its Ruling, the District Court

affirmatively stated Teig "has received all non-confidential records in response to his December, 2021 records request." APP. 1-238.

Teig's request for documents related to the November 23rd closed session sought "records showing the name of the litigation that was discussed, the name of any attorney involved, and bills and expenditures related to the matter." APP. 2-172. However, there was no *pending* litigation at the time of the November 23 closed session. Teig's petition was filed the next day, Nov. 24th. APP. 1-5. The closed session was held for the purpose of discussing imminent litigation, namely this subsequent lawsuit. Jacobi, therefore, could not provide records related to the closed session 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. APP. 2-108 – 2-123. Jacobi's response to Teig was accurate when it was made on December 8th.

With respect to the fee statements related to the closed session on November 23, 2021, Teig has admitted that he

received those fee statements through this litigation in March 2022. Teig Brief at 77. He has, therefore, received all non-confidential documents responsive to his request. The District Court's conclusion is supported by the facts and the law.

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN LIMITING TEIG'S INTERROGATORIES

Preservation of Error. The City Defendants do not contend there is a preservation of error problem.

Standard of Review. This issue was addressed in the District Court's March 7, 2023 Ruling regarding discovery motions. APP. 1-169 – 1-177. The standard of review for discovery motions is for abuse of discretion. *Citizens' Aide/Ombudsman v. Grossheim*, 498 N.W.2d 405, 407 (Iowa 1993). "An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds." *Fenton v. Webb*, 705 N.W.2d 323, 326 (Iowa App. 2005).

Argument. In providing their responses to Teig's second set of interrogatories, the City Defendants asserted objections as the interrogatories were unduly burdensome because they

exceeded the allowable number of interrogatories pursuant to Iowa R. of Civ. P. 1.509(1)(e). APP. 1-126 – 1-158.

The discovery filings in the case demonstrate Teig improperly submitted written discovery requests in confusing fashion by combining requests for admissions with what he considered to be interrogatories that would attach to each admission request and become active dependent upon the nature of responses provided by the City Defendants. APP. 1-90. The City Defendants were not aware that Teig was expecting answers to interrogatories embedded within each and every request for admission.

Teig later issued additional interrogatories to the City Defendants that sought the same type of answers applicable to each response to various individual City Defendant's responses to requests for admissions. The City Defendants provided appropriate responses to these onerous interrogatories. APP. 1-126 – 1-158. In providing their responses to the second set of interrogatories, the City Defendants objected to Teig's interrogatories as unduly

burdensome because they exceeded the allowable number of interrogatories pursuant to Iowa Rule of Civil Procedure 1.509(1)(e). *Id.*

In responding, Hart, Jacobi, Van Sloten, Feldmann and Kropf considered Interrogatory A as including four separate and distinct requests for information, including: (1) identifying "all facts upon which you base your response", (2) identifying "all persons who have knowledge of those facts", (3) identifying "all records and other tangible things", and (4) identifying any confidential documents for which privilege or confidentiality protections were previously asserted in responding to the requests for admissions. *Id.* However, in their responses, they treated Interrogatory A as containing only three (3) discrete interrogatories since the answer to subpart No. 5 in most instances was "Not Applicable". *Id.* Using this approach, these City Defendants were accommodative and provided appropriate responses while objecting to the remaining interrogatories once answers had been provided to the

maximum allowable 30 interrogatories for each individual defendant.

Teig believed these responses were insufficient and filed a motion to compel on November 22, 2022, seeking answers from the individual defendants to the additional and remaining interrogatories. APP. 1-62 – 1 -100. Incredibly, Teig believed even more written discovery was necessary and, therefore, also sought permission to issue even more interrogatories to the defendants. APP. 1-159 – 1-164. The District Court did not abuse its discretion in denying Teig's onerous and burdensome requests. In its ruling, the District Court stated:

> **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. The amount of time the parties have spent on discovery is extensive, and the Court finds that service of additional requests and the time it would take to answer would be prejudicial to Defendants.**

APP. 1-176. Because the District Court's ruling on limiting discovery was reasonable under the 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.

CONCLUSION

The rulings of the District Court must be affirmed.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The City Defendants respectfully request to be heard at oral argument on this appeal if such right is granted to Appellant Robert Teig.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that on September 8, 2023, the foregoing Amended Final Brief of Appellees was electronically filed with the Iowa Supreme Court by using the EDMS system. I further certify that all parties or their counsel of record are registered as EDMS filers and will be served by the EDMS system.

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