IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

SUZETTE RASMUSSEN, **Plaintiff,** **v.** **GOVERNOR KIM REYNOLDS, MICHAEL BOAL, and OFFICE OF THE GOVERNOR OF THE STATE OF IOWA,** **Defendant,**	**05771 CVCV062318 (and consolidated case CVCV062322)** **ORDER DENYING MOTION TO DISMISS IN PART AND GRANTING MOTION TO DISMISS IN PART**

These consolidated cases revolve around Plaintiff's request for information regarding the Test Iowa program for Covid-19 testing. Plaintiff sued under Iowa Code chapter 22, the Iowa Fair Information Practices Act or Iowa Open Records Act, and the State moves to dismiss the case. On October 22, 2021, the Court granted a motion to consolidate CVCV062318 and CVCV062322, with all future filings to take place in CVCV062318.

I. BACKGROUND FACTS AND PROECUDRAL POSTURE.

For purposes of this motion to dismiss, the Court accepts the facts alleged in the Petition as true. Rasmussen submitted two requests under Iowa's Open Records Act to the Office of the Governor: one on March 11, 2021 and one on March 12, 2021. On July 20, 2021, Michael Boal, Senior Legal Counsel to the Office of the Governor, emailed Rasmussen and asked her to identify email domains or particular search terms to locate responsive records. On the same day, Rasmussen provided search terms. On August 20, 2021, Rasmussen filed two lawsuits, one for each request. On September 2, 2021, Boal provided responsive records to Rasmussen.

Rasmussen thereafter amended her petitions to assert a claim that the Defendants unlawfully delayed production of the records by failing to produce records as soon as feasible, subject to the size and nature of the request.

The State moves to dismiss on five grounds in each case: 1) that the claim is moot, 2) that the claim is a nonjusticiable political question and would infringe on executive privilege, 3) that the petition fails to state a claim as a matter of law that the Defendants violated chapter 22, 4) that Rasmussen lacks standing for the remedies she seeks except attorneys' fees, and 5) removal from office is not an available remedy.

Hearing was held on 10/22/2021. The Court allowed additional briefing, which was submitted on 10/29/2021 and 10/30/2021.

II. STANDARD ON A MOTION TO DISMISS.

When reviewing a motion to dismiss, the court accepts the facts alleged in the petition as true. Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 604 (Iowa 2012). Dismissal is proper only if "the petition shows no right of recovery under any state of facts." Id. Iowa's appellate courts "will affirm a district court ruling that granted a motion to dismiss when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted." Shumate v. Drake University, 846 N.W.2d 503 (Iowa 2014) (affirming motion to dismiss after finding no private right of action).

III. ANALYSIS AND CONCLUSIONS OF LAW.

A. Mootness.

The State first argues that because it has produced the records at issue, the case has become moot. "A case is moot if it no longer presents a justiciable controversy because the issues involved have become academic or nonexistent." Neer v. State, 2011 WL 662725, 798 N.W.2d 349 (Iowa Ct. App. 2011) (citing Junkins v. Banstad, 21 N.W.2d 130, 133 (Iowa 1988)). "The test is whether a judgment, if rendered would have any practical legal effect upon the existing controversy." Id.

In Neer, the Court of Appeals agreed that because the State had released the records at issue to the plaintiff, the case had become moot. Id. However, Neer also identified that the plaintiff's lawsuit sought a variety of relief beyond mere compliance with the requests, including prospective injunctive relief, statutory damages, attorneys' fees, and costs. Id. Neer specifically declined to address whether those remedies remained available after a voluntary production because both the district and appellate courts considered the case on the merits based on the public interest exception to mootness. Id.

Two years later, the Iowa Supreme Court addressed a case in which the government entity had produced the requested documents prior to trial in Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444 (Iowa 2013). Horsfield held that "a refusal to produce encompasses the situation where, as here, a substantial amount of time has elapsed since the records were requested and the records have not been produced at the time the requesting party files suit under the Act." Id. 834 N.W.2d 463, n.6. The State asserts Horsfield did not expressly consider mootness. However, Horsfield's holding that a government entity's delay in production can constitute a refusal to produce under Iowa's Open Records Act, even after the government has made the production, illustrates the claim is not moot.

The Horsfield court found the City had violated Iowa's Open Records Act. In finding the City had not substantially complied, the Court noted the time period between the request and production of documents was 71 days, the City did not produce any documents until the plaintiff filed suit, and there was a hiatus in communication of approximately a month. The Court also considered the City efforts required to locate and produce the documents and the other City business its employees were addressing.

Here, on a motion to dismiss, the question before this Court is whether Plaintiff Rasmussen has stated a claim. Pursuant to Horsfield, a plaintiff may pursue an open records violation even though the government entity voluntarily produces after the plaintiff has filed suit. That is exactly the scenario addressed in Horsfield and the Iowa Supreme Court unanimously held the City had violated the Open Records Act in its delay in production of documents. Just as in Horsfield, Plaintiff Rasmussen alleges a delay in production of documents (here 174/175 days), the State did not produce the documents until after Rasmussen filed suit, and Rasmussen's complaint alleges two hiatuses in communication from the State (one of 130/131 days from March 11, 2021 until July 20, 2021 and the other of 43/44 days between July 20, 2021 and September 2, 2021 production). Further, as noted in Neer, Rasmussen seeks remedies other than simply an order for production. Therefore, the Motion to Dismiss based on mootness is DENIED.

B. Failure to State a Claim as a Matter of Law.

The State also argues this court should find as a matter of law that the State's request for email search terms 130/131 days after the requests and production of records 174/175 days after the requests complied with the Iowa's Open Records Act as a matter of law. The State notes that this case involves the Governor's office instead of a City entity, like that in Horsfield. The State also notes that this time period of March to September 2021 overlapped with the continued Covid-19 pandemic. Horsfield provides for consideration of the government body's efforts required to produce requested information and the other urgent government matters being handled at the time. However, at this stage the Court is considering only whether, if taken as true, the allegations in the pleadings state a claim.

The time periods alleged in the petition are longer than those of which the Iowa Supreme Court was critical in Horsfield. Just as in Horsfield, Plaintiff Rasmussen alleges a delay in

production of documents (here 174/175 days compare to 71 in Horsfield), alleges that the State did not produce the documents until after Rasmussen filed suit, and alleges two hiatuses in communication from the State (one of 130/131 days from March 11, 2021 until July 20, 2021 and the other of 43/44 days between July 20, 2021 and September 2, 2021 production, compared to a hiatus of 41 days in Horsfield). Therefore, the Court cannot find as a matter of law that the petition fails to state a claim and the motion to dismiss on this basis is DENIED.

C. Nonjusticiable Political Question.

The State next asserts this matter should be dismissed because considering whether the Governor's office timely complied with Iowa's Open Records Act is a nonjusticiable political question. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution [to other branches of government]." King v. State, 818 N.W.2d 1, 16–17 (Iowa 2012). The doctrine is rooted in respect for the separation of powers. "Normally we apply the political question doctrine when a matter is entrusted exclusively to the legislative branch, to the executive branch, or to both of them." State ex rel. Dickey v. Beslar ("Beslar"), 954 N.W.2d 425 (Iowa 2021).

In determining whether an issue should be considered a nonjusticiable political question, the Court considers the following factors:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing a lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Iowa Citizens for Cmty. Improvement v. State ("Iowa Citizens"), 962 N.W.2d 780, 794 (Iowa 2021), as amended (Aug. 26, 2021), reh'g denied (Aug. 26, 2021).

The Iowa Supreme Court has decided two cases based on the political question doctrine in the past year. In Iowa Citizens, the Court held that the political question doctrine prohibited the plaintiff's claim. The plaintiff in Iowa Citizens sought a declaration that a statute setting the state's policy for nitrogen and phosphorous water pollution invalid under the common law public trust doctrine and sought an order of declaratory relief requiring legislation to address the problem of nitrate pollution in Raccoon River. 962 N.W.2d at 799. In Beslar, the Court held there was no justiciable controversy regarding the Governor's allegedly untimely appointment of a State District Court Judge where the only other official with authority to make the appointment (Chief Justice of the Iowa Supreme Court) had deferred and accepted the Governor's determination that the appointment was timely. 954 N.W.2d at 433-34.

In each case, the plaintiffs sought judicial action in an area where discretion or decision-making had been entrusted to another branch of government. In Iowa Citizens, the plaintiffs were asking the Court to compel legislation, an area left to the legislative branch. Iowa Citizens, 962 N.W.2d at 299 ("Instead, it seeks to order the legislature to enact a new set of environmental laws that balance the competing interests of stakeholders in different ways than before."). In Beslar, the plaintiff sought to invalidate an exercise of discretion by the Governor's office in choosing one of two candidates for a judicial position and compel an exercise of discretion by the Chief Justice to fill the role, in a situation where the Governor had exercised discretion and the Chief Justice accepted it. 954 N.W.2d at 433-34.

Here, the Court is confronted with a different claim. The Iowa legislature has already created a law and policy surrounding access to public records. Although the judicial branch may

be called on to apply and interpret Iowa's Open Records Act in this case, that is the customary role of the judiciary. This is not a situation where the judiciary is being called on to wade into a matter that is exclusively entrusted to another branch. Instead, the legislature has already acted and set forth requirements. The Iowa legislature has provided "every person" with the "right to examine and copy a public record …" Iowa Code section 22.2(1). The legislature also identified categories of public records that "shall be kept confidential." Iowa Code § 22.7. The legislature established a private right of action for "any aggrieved person" to "seek judicial enforcement of the requirements of the chapter." Iowa Code section 22.10(1). And the legislature set forth the available remedies. See Iowa Code section 22.10(3). The Iowa Supreme Court has interpreted the law to require that records be "provided promptly," unless it would be infeasible to do so. In addition, the legislature provided certain good faith or reasonableness defenses. See e.g., Iowa Code §22.8(4) ("Good-faith, reasonable delay by a lawful custodian in permitting the examination and copying of a government record is not a violation of this chapter if the purpose of the delay is any of the following …); § 22.10(b)(2) (noting defense of good faith belief to statutory penalty).

The Iowa statute did not exclusively entrust discretion regarding whether to allow examination of public records to the executive branch. Instead, the legislature required government bodies to provide examination of public records; included certain exceptions, defenses, and reasonableness considerations; and allowed aggrieved persons to seek judicial enforcement. The interpretation of statutes and consideration of defenses is the type of dispute within the judiciary's role to address. As the Supreme Court explained in U.S. v. Nixon, 418 U.S. 683 (1974), it is "the province and duty of the judicial department to say what the law is" and "[n]otwithstanding the deference each branch must accord the others," … judicial power cannot

be "shared with the Executive Branch." 418 U.S. at 703-04. The motion to dismiss as a nonjusticiable question is DENIED.

D. Executive Privilege.

The State asserts the Plaintiff's claim is barred by executive privilege. In U.S. v. Nixon, 418 U.S. 683 (1974), the United States Supreme Court recognized an executive privilege held by the President. In the case, President Nixon had been subpoenad in a criminal prosecution to produce tape recordings and certain documents. The Court held that "if a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena." Id. at 713. The Court recognized the role of the Court in balancing "weighty and legitimate competing interests." Therefore, it became the duty of the district court to treat the subpoenad material as presumptively privileged and to require the prosecutor to demonstrate the material was essential to justice in the pending case. Following such demonstration, the Court was then to review the matter in camera. Id. at 713-714.

Nixon recognizes executive privilege, but also provides a roadmap for the judiciary's consideration of legitimate competing interests. Iowa courts have confronted other privileges and, citing Nixon, considered whether a constitutional privilege is overridden by a compelling need for evidence. See Lamberto v. Brown, 326 NW2d 405, 307-08 (Iowa 1982) (applying two part test of necessity and compelling need in the Court's consideration of claim of first amendment reporter's privilege); Brown v. Johnston, 328 N.W.2d 510, 512 (Iowa 1983) (noting, in consideration of right to privacy in checking out library books, that "each claim of privilege must be weighed against a societal need for the information and the availability of it from other sources.").

However, assuming executive privilege is available, there is no specific question of executive privilege before the Court. "The guard, furnished to (the President) to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a (district) court after those subpoenas have issued; not in any circumstance which is to precede their being issued." Nixon, 418 U.S. at 715 (citation omitted). Executive privilege is a privilege against production, typically invoked in response to a subpoena or discovery request. The State anticipates the potential invocation of the privilege, but the issue is premature. Therefore, the request to dismiss the petition based on the executive privilege is DENIED.

E. Remedies.

The State next seeks to dismiss the petition on the grounds that Rasmussen does not have standing to pursue the relief she seeks or, in one instance, the relief is not constitutionally available. The State does not challenge Rasmussen's request for attorney's fees at this juncture.

1. Injunctive Relief. The State asserts that because Rasmussen has not pled that she plans to submit future requests for records, she lacks standing to seek prospective relief. Iowa's Open Records Act provides that any "aggrieved party" may bring suit to enforce chapter 22. Iowa Code §22.10(1). The Iowa statute further provides the availability of prospective injunctive relief, including, that the Court "if appropriate, may order the lawful custodian and other appropriate persons to refrain for one year from any future violations of this chapter." Iowa Code § 22.10(3)(a). The legislature considered what remedies should be available and specifically included prospective injunctive relief. Therefore, the Court rejects the argument that an individual lacks standing to seek such relief. If the individual otherwise has standing as an aggrieved party, about which there does not appear to be a dispute for purposes of the motion to dismiss, then the

individual has standing to seek the remedies provided by statute. Whether or not those remedies are appropriate is a matter of the merits that cannot be resolved at the motion to dismiss stage.

2. Statutory Damages. Similarly, the State argues no private individual would have standing to seek the statutory damages provided for by the Iowa Legislature because the Legislature also determined that such statutory damages would be paid to the government entity at issue (the State or local government). The Court rejects this argument for the same reasons set forth above. The Iowa Legislature provided by statute that any aggrieved person may sue and provided a remedy of statutory damages as a mechanism to enforce the individual's right to open records.

3. Removal from Office. Finally, the State argues Rasmussen cannot seek the remedy of removal from office as to Governor Kim Reynolds or Michael Boal. The State argues the statute is unconstitutional as applied to Governor Reynolds and, therefore, the petition fails to state a claim. On this ground, the Court agrees.

Iowa's Open Records Act provides an additional remedy of potential removal from office. Iowa Code section 22.10(3)(d) provides that: "Upon a finding by a preponderance of the evidence that a lawful custodian has violated any provision of this chapter, a court: … Shall issue an order removing a person from office if that person has engaged in a prior violation of this chapter for which damages were assessed against the person during the person's term." Iowa Code § 22.10(3)(d). Rasmussen filed her two claims separately in an effort to seek damages in each claim and, thereby, seek removal of the Governor from office.

The Iowa Constitution provides that:

> The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit, under this state; but the

> party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment, according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general assembly may provide.

Iowa Const. art. III, § 20.

Under Iowa law, "When the term of office is fixed by the constitution, and the method of trial and cause of removal is prescribed by the constitution, it is not competent for the legislature to prescribe any other method or cause for removal of such officer." Brown v. Duffus, 23, N.W. 396 (1885) (citing Brown v. Grover, 6 Bush 1). Brown distinguished a statute that allowed for suspension of a state officer by the governor in situations of misappropriation of public money, noting that suspension was intended to temporarily protect the state from loss and was not the same as removal. Brown, 23 N.W. at 398-99. The converse holding is directly applicable here, where the statute would expressly allow "removing a person from office." Iowa Code § 22.10(3)(d). Because the mechanism to remove the Governor from office is prescribed by Iowa's constitution, it is unconstitutional to apply Iowa Code § 22.10(3)(d) to the Governor.

The Plaintiff relies on a separate constitutional term regarding when the Lieutenant Governor assumes power because the provision separately lists impeachment and removal. However, the Iowa Constitution provides that the house of representatives has the power of impeachment and then impeachments are tried in the senate. Iowa Const. Art. III §19. If judgment is entered, "judgment in such cases shall extend only to removal from office." Iowa Const. Art. III §20. Therefore, the separate reference to impeachment and removal is consistent with the mechanism of impeachment, trial in the senate, and removal as a judgment. Brown v. Duffus is applicable and the motion to dismiss is GRANTED as to the requested relief of removal of the Governor from office.

The State also argues Boal cannot be removed "from office" because he is an employee and not a state officer. The Plaintiff did not address this argument in its resistance to the motion or in the additional briefing ordered by the Court. Therefore, the Motion to Dismiss is GRANTED on that basis.

IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED IN PART and the Request for Relief identified in Paragraph D of the Amended Petition in each case is hereby DISMSISED.

IT IS FURTHER ORDERED that the Motion to Dismiss is DENIED on all other grounds raised.

IT IS SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV062318	SUZETTE RASMUSSEN VS GOVERNOR KIM REYNOLDS ET AL
Type:	OTHER ORDER

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

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