

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

KIRKWOOD INSTITUTE, INC., Plaintiff, v. IOWA AUDITOR OF STATE ROB SAND, JOHN MCCORMALLY, and OFFICE OF THE AUDITOR OF STATE, Defendants.	Case No. EQCE087052 McCORMALLY AFFIDAVIT
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I, John McCormally, upon being duly sworn, state as follows:

1. I am currently Chief of Staff and General Counsel in the Office of the Auditor of the State of Iowa, a position I have held since January 2, 2019.
2. I was admitted to practice law in Iowa bar 2008 and formerly practiced law with the Iowa Attorney General's Office, where my duties included advising state agencies on how to handle public records request and investigating complaints regarding sunshine law issues.
3. I am familiar with Iowa Code Chapter 22, the Public Records Act.
4. I am familiar with Iowa Code Chapter 11, which sets forth the powers and duties of the State Auditor.
5. Iowa Code § 11.42 creates strict confidentiality requirements for the Auditor's Office distinct from other arms of state government, because our Office takes in confidential information, tips from whistleblowers, and the like. Because the provisions are strict

(including termination for improper disclosure) and because of my legal background on these issues, I am involved with every public records request made to the Auditor's Office.

6. On June 16, 2021, Public Information Officer Sonya Heitshusen informed me of a public records request made by the Kirkwood Institute.
7. The request was for all records since January 2, 2019, Auditor Sand's first day in office, until the date the request was processed in the following categories:
 - All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, and the email address "desmoinesdem@bleedingheartland.com".
 - All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the phrase "desmoinesdem@bleedingheartland.com".
 - All emails and text messages sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the word "Belin".
 - All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, and the email address "rjfoley@ap.org".
 - All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the phrase "rjfoley@ap.org".
 - All emails and text messages sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the word "Foley".
8. That same day, with my approval, Heitshusen forwarded the request to IT Specialist Jacob Lloyd to begin the record retrieval process.
9. Jacob provided me with access to four ".pst" files, which contained the emails returned by the email searches he performed on the terms provided in the Kirkwood request.

(There were four email files, rather than six, because the request for emails exchanged with the email addresses "desmoinesdem@bleedingheartland.com" and "rjfoley@ap.org"

were contained in the searches for the identical phrases

"desmoinesdem@bleedingheartland.com" and "rjfoley@ap.org," respectively).

10. I opened each .pst file individually in Microsoft Outlook and went through each email individually.

11. My review of the records was guided by chapter 22 but primarily Iowa Code 11.42, which sets forth limitations on disclosures by the Auditor's office.

12. Under Iowa Code section 11.42(4), Auditor's office staff are subject to termination for improperly disclosing documents subject to confidentiality. As a result, I am consistently mindful of the specific requirements of Iowa Code section 11.42 and the circumstances where they will override the general requirements of chapter 22.

13. Iowa Code section 11.42(1) reads:

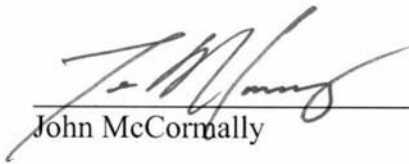
Notwithstanding chapter 22, information received during the course of any audit or examination, including allegations of misconduct or noncompliance, and all audit or examination work papers shall be maintained as confidential.

14. A plain language reading of that section is that audit workpapers (the materials prepared by the auditors for use in completing the audit) are distinct from "information received in the course of any audit or examination." The former might generally be described as records created or maintained by the Auditor's office for the purpose of an audit, while the latter includes at least records received from outside the office related to an audit, and especially those regarding allegations of misconduct or noncompliance. In many cases but not all, "information received" is incorporated into audit "workpapers" by the auditor. Regardless, by law, both categories must be maintained as confidential.

15. In addition, it is significant that 11.42 begins with the phrase, “Notwithstanding Chapter 22.” The legal interpretation of “notwithstanding” is best described as “in spite of.” BLACKS LAW DICTIONARY. Consequently, 11.42 is best interpreted as “In spite Chapter 22, records that fall under Iowa Code 11.42 MUST be maintained as confidential, except as necessary to complete an audit or as otherwise ordered by a court.” Iowa Code 11.42(2).
16. With this framework, I apply the following analysis when evaluating a record for disclosure:
 - a. Is the information “of or belonging to the state,” making it a “public record” within the meaning of Iowa Code chapter 22?
 - b. If so, is the record subject to the confidentiality provisions of section 11.42?
 - c. If section 11.42 does not apply to a record, is it otherwise subject to one of the exceptions to disclosure in Iowa Code section 22.7?
17. I reviewed over seven hundred pages of emails to fulfill the Kirkwood request. I identified a handful of threads as either workpapers, information received, or as otherwise confidential under chapter 22. Some of these had nothing to do with either Laura Belin or Ryan Foley but fell under the request due to the commonality of the search terms. Ten threads were ultimately withheld from production.
18. One email that was not included in the document review I performed is a June 4, 2021, email that I sent to Laura Belin, the writer of the Bleeding Heartland blog, from my personal email account. (Exhibit #JBM7).

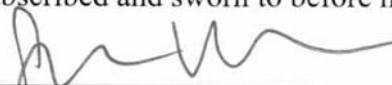
19. I have reviewed all email that I sent to Laura Belin from my personal email account since January 1, 2019, and there are no other emails are even arguably related to the Office of the Auditor or state government.
20. On July 6, I provided all records responsive to the Kirkwood request that were subject to disclosure for the period since May 30, 2019 without charge, and summarized the response in a letter. (Ex. # JBM1).
21. In that letter, I made Ostergren aware of a complicating factor in facilitating his request: the fact that the Auditor's Office had switched email service providers approximately five months into Auditor Sand's term. Because of this switch, emails from those months existed only in an archive that Office had ceased maintaining. (*Id.*).
22. I informed Ostergren that the emails from January through May 2019 were archived, and that reviewing them would take additional time and staff resources to access. I informed him that the Auditor's Office would charge him for the staff time needed to fulfill that part of the request due to the additional effort needed. I also informed him that the office would not impose any charges for the records provided from after May 2019. (*Id.*).
23. On July 22, Ostergren emailed me asking to justify the basis for imposing the costs. (Ex. #JBM2).
24. On July 26, I replied with an email summarizing Iowa Law regarding the imposition of costs relevant to public records requests. (Ex. #JBM3)
25. On August 3, Ostergren emailed me a brief response, "please proceed with the additional review." (Ex. #JBM4). I acknowledged this response and began the review.

26. On August 16, I emailed Ostergren that the review was complete, and that the cost was less than expected. I informed him that we would provide him the remaining records upon payment of \$231. (Ex. #JBM5).
27. On August 23 we received a check from the Kirkwood Institute, and Ostergren was provided access to the remaining records. (Ex. #JBM6).
28. After the Kirkwood Institute filed its Petition in this case, I provided the full email thread for the June 4, 2021, personal email to the Kirkwood Institute in discovery. The full personal email thread includes two short emails that were sent later in the day on June 4. (Exhibit #JBM7).



John McCormally

Subscribed and sworn to before me on this 29th day of April, 2021.



NOTARY PUBLIC, STATE OF IOWA

cc:

