IN THE SUPREME COURT OF IOWA

KIRKWOOD INSTITUTE, INC.,
Plaintiff-Appellant,
v.
IOWA AUDITOR OF STATE ROB SAND, JOHN MCCORMALLY, and OFFICE OF THE AUDITOR OF STATE,
Defendants-Appellees.

No. 23-0201

FINAL BRIEF OF KIRKWOOD INSTITUTE, INC.

Appeal to the Iowa District Court for Polk County
Hon. Robert Hanson, District Judge

Case No. EQCE087052

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. A governmental body must show that it complied with its obligations under Iowa Code Chapter 22 within a reasonable time. The Auditor failed to turn over a complete email chain for 216 days, but the district court said only an intentional refusal to produce was actionable and there was no time limit for production of records. Should the district court's grant of summary judgment to the Auditor be reversed?

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III. The law permits a governmental entity to withhold a communication from someone outside of government when disclosure would discourage such communications, but it must release the basic facts about alleged law breaking unless that disclosure would endanger someone's safety. The Auditor claimed this exemption permitted it to entirely withhold an email chain, but he didn't show how it applied. Should the district court have required disclosure?

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Iowa Code § 22.7(18)
Ripperger v. *Iowa Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021)

ROUTING STATEMENT

The Kirkwood Institute appeals the district court's denial of relief under Iowa Code Chapter 22 for the refusal of governmental defendants to produce eleven email chains in response to a records request. For one email chain, reversal is compelled by a recent decision of the Iowa Supreme Court and would ordinarily make routing of the case to the Court of Appeals appropriate. For the remaining email chains, the interplay of Iowa Code § 11.42 with Chapter 22 must be considered. Because this is a substantial question of first impression, retention by the Iowa Supreme Court is warranted. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

Plaintiff-Appellant Kirkwood Institute, Inc. sued Rob Sand, the Iowa State Auditor, his chief of staff John McCormally, and his office (collectively "the Auditor") for their failure to produce documents in response to a request made under Iowa Code Chapter 22, Iowa's law giving the public access to government records. The district court granted the Auditor's motion for summary judgment and denied Kirkwood's cross motion for summary judgment. The Honorable Robert Hanson, District Court Judge of the Fifth Judicial District, presided over all proceedings relevant to this appeal.

Course of Proceedings

Kirkwood sued the Auditor on October 3, 2021. App. 4. The Auditor answered on November 3, 2021. App. 12 The Auditor moved for summary judgment on May 2, 2022. App. 16. Kirkwood resisted the motion and cross-moved for summary judgment on May 27, 2022. App. 139. After a hearing on July 7, 2022, the district court granted the Auditor's motion and denied Kirkwood's cross motion in an order dated September 6, 2022. App. 161. Kirkwood moved to reconsider on September 18, 2022. App. 165. The district court held a hearing on the motion on November 30, 2022, and denied the motion in an order dated January 26, 2023. App. 168. Kirkwood timely gave notice of appeal on February 6, 2023. App. 172.

STATEMENT OF THE FACTS

In the late Fall of 2020, while the world grappled with the COVID-19 pandemic, Iowa Governor Kim Reynolds and her staff decided to use Federal CARES Act funding to produce and air a public-service message to encourage Iowans to take basic precautions against the virus. The message[1] featured Governor Reynolds along with former Governor Tom Vilsack, Iowa wrestling coaching legend Dan Gable, and others speaking into the camera. The message recommended that Iowans use the now familiar steps of isolation, testing, and sanitation to avoid spreading the covid virus. The 60-second spot aired on Iowa television stations and through social media channels and received nearly 3 million impressions.

The Auditor's office began to investigate whether the use of CARES Act funding violated an Iowa law that generally prohibits the use of public funds under the control of a statewide elected official to promote the name, likeness, or voice of that official. Iowa Code § 68A.405A. The investigation should have been short lived. The statute relied upon by the Auditor begins with "[e]xcept as provided in sections 29C.3 and 29C.6…" These two code sections grant the Governor power to declare a public disorder emergency and to take various steps to respond to a disaster emergency. Because the COVID-19 pandemic was a declared public health emergency and Governor Reynolds had issued a series of proclamations to respond to that emergency, a

[1] Viewable at https://www.youtube.com/watch?v=U7umw8kY8jY <last visited April 17, 2023>.

competent reading of the relevant statutes should have quickly revealed that the expenditure of public funds for this public health message was lawful.

But the Auditor didn't see it that way. He issued a report[2] of a special investigation on June 3, 2021, stating that the Governor had violated section 68A.405A. The report recited that the Governor's candidate committee could be subject to a civil penalty in the amount of the expenditure. The report also noted that a willful violation of the statute could result in a criminal charge. Because the report dwelled on the fact that Governor Reynolds had signed the name, likeness, and voice statute into law, the claim that the violation was willful (and charges could therefore be forthcoming) was plain. And the report recited, ominously, that a copy of the report would be filed "with the Polk County Attorney and the Iowa Ethics and Campaign Disclosure Board." The cover letter of the report ends with a disclaimer (the importance of which will soon be obvious) that the procedures used by the Auditor to prepare the report "do not constitute an audit of financial statements conducted in accordance with U.S. generally accepted auditing standards."

Having concluded the Governor broke the law and could face substantial civil and criminal penalties (and the time spent showing the violation must have been willful), one could be forgiven for assuming the report contained a detailed legal analysis of why the carve out for sections 29C.3 and 29C.6 did not apply. Not so. In fact, the Auditor's report *did not acknowledge the exception was in the statute at all*. This omission was perhaps because the special

[2] https://www.auditor.iowa.gov/reports/file/65892/embed

investigation report was written by an employee in his office who is neither a lawyer nor accountant.

As one would expect, the Auditor's assertion that the Governor broke the law met with a strong response from her office. The Governor pointed out to the Auditor that section 29C.6(10) authorized her to "[u]tilize all available resources of the state government as reasonably necessary to cope with the disaster emergency and of each political subdivision of the state." Because all the Governor's powers under section 29C.6, are exempted from the reach of section 68A.405A, the Governor plainly did not violate the statute. The Governor criticized the Auditor for not contacting her office or the Iowa Ethics and Campaign Disclosure Board for clarification before releasing his report.

The Auditor did not handle well having his mistake pointed out. He issued an addendum to his report 13 days later. The addendum claimed that the Auditor had considered the carve out for sections 29C.3 and 29C.6 (but did not explain why the report failed to discuss the Governor's emergency powers). The addendum quoted what it called "the relevant, constructive, and professional portion of the Governor's response" where the Governor identified section 29C.6(10)'s authority to expend all available resources to cope with the disaster emergency. The addendum said this response contained "two false assertions." The Auditor claimed they were false because the Governor had not used her power under section 29C.6(6) to specifically suspend the operation of section 68A.405A (as she had suspended the operation of other statutes, regulations, and rules), and that there didn't appear to be a

sufficient factual basis to show that the public service message was "reasonabl[y] necessary" to respond to the public health disaster.

The Kirkwood Institute was concerned by the shoddy nature of the Auditor's special investigation and that the report was amplified in traditional and social media by reporter Ryan Foley and blogger Laura Belin. Foley and Belin's publications showed they were ideologically opposed to the Governor. This, plus the Auditor's open political ambitions and opposition to Governor Reynolds, raised the real prospect that the Auditor had misused his office's resources to pursue private political gain.[3] To investigate this, the Kirkwood Institute on June 16, 2021, sent the Auditor's office a request for production of records under Iowa Code Chapter 22 for the following:

- 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".

[3] The Iowa Ethics and Campaign Disclosure Board met on August 12, 2021, to consider the Auditor's referral of a violation by the Governor of section 68A.405A. The meeting minutes reflect that "[t]he Board's two attorneys noted that the first eight words of [section 68A.405A] gave the Governor express permission to do what she did" and that the message "complied with the self-promotion statute in the first eight words." The board voted unanimously that the Governor "did not violate Iowa law as alleged by State Auditor Sand regarding the advertisement of 'step up and stop the spread' media campaign." The board's minutes are accessible here: https://ethics.iowa.gov/sites/default/files/meetings/minutes/2022-04/8_12_2021.pdf <last visited April 26, 2023>

- 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".

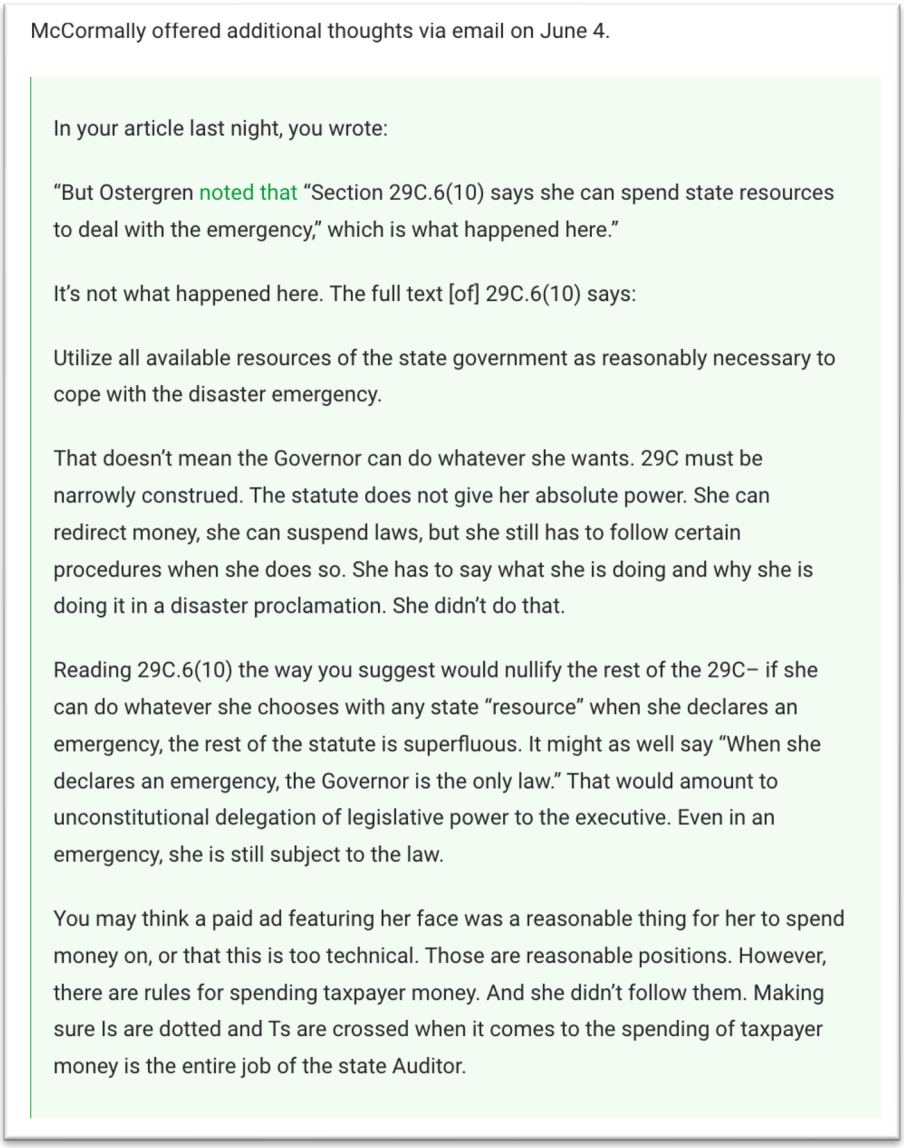
- All emails and text messages sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the word "Foley".

App. 6.

The Auditor's office provided its response in two tranches. The Auditor, acting through Chief of Staff McCormally, stated the office was withholding ten email chains. App. 31. For nine of those email chains, he claimed the information did not have to be disclosed because it was "information received during the course of any audit or examination" and therefore exempt from disclosure under Iowa Code § 11.42. *Id.* For the tenth email chain, he claimed it was exempt from disclosure under section 11.42 and Iowa Code § 22.7(18) as a communication made by a person outside of government where disclosure could reasonably be believed to discourage such communications. *Id.*

The Auditor's reliance on the exemption from Chapter 22 for documents received in the course of an audit or examination did not ring true to the Kirkwood Institute because it had requested communications with the Auditor from individuals outside of government. Because the Auditor has no authority to audit or examine nongovernmental actors, and because these are reporters not whistleblowers, his assertion of section 11.42 appeared suspect. So, too, was his assertion of section 22.7(18). While this section permits withholding of certain information communicated to government, it requires the disclosure of the "date, time, specific location, and immediate facts and circumstances" surrounding a report of illegal activity unless disclosure would "plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person." Because of the Auditor's refusal to provide even basic information about the communication, it would be the Auditor's burden to establish this exception applied.

There was also an eleventh email chain, which the Auditor did not disclose but that the Kirkwood Institute knew of. In one of her blog posts, Belin had included an excerpt of an email exchange with McCormally on her website where he defended the office's report, but that entire email chain had not been posted and the Auditor did not produce any part of the email chain in response to the Kirkwood Institute's request. The email was McCormally's effort at damage control over the floundering report:



McCormally offered additional thoughts via email on June 4.

In your article last night, you wrote:

"But Ostergren noted that "Section 29C.6(10) says she can spend state resources to deal with the emergency," which is what happened here."

It's not what happened here. The full text [of] 29C.6(10) says:

Utilize all available resources of the state government as reasonably necessary to cope with the disaster emergency.

That doesn't mean the Governor can do whatever she wants. 29C must be narrowly construed. The statute does not give her absolute power. She can redirect money, she can suspend laws, but she still has to follow certain procedures when she does so. She has to say what she is doing and why she is doing it in a disaster proclamation. She didn't do that.

Reading 29C.6(10) the way you suggest would nullify the rest of the 29C– if she can do whatever she chooses with any state "resource" when she declares an emergency, the rest of the statute is superfluous. It might as well say "When she declares an emergency, the Governor is the only law." That would amount to unconstitutional delegation of legislative power to the executive. Even in an emergency, she is still subject to the law.

You may think a paid ad featuring her face was a reasonable thing for her to spend money on, or that this is too technical. Those are reasonable positions. However, there are rules for spending taxpayer money. And she didn't follow them. Making sure Is are dotted and Ts are crossed when it comes to the spending of taxpayer money is the entire job of the state Auditor.

App. 9. Because the Auditor had failed to turn over the McCormally/Belin email and had withheld production of other email chains for dubious reasons, the Kirkwood Institute filed this lawsuit followed on October 3, 2021. App. 4.

Within a week of the lawsuit being filed, the Auditor's Office commented on the lawsuit to the *Des Moines Register*. Rather than addressing the allegations, the Auditor's Office attacked both Governor Reynolds and counsel for the Kirkwood Institute: "[b]ecause the Governor herself ignores open

records requests, a political hack who previously attacked Rob Sand with baseless legal claims is now attempting to drag him down to her level." The *Register* asked the Auditor's Office for a copy of the eleventh email chain (the one Belin had partially posted to on her blog), but the Auditor's Office declined, telling the *Register* that the Auditor's Office is "not the lawful custodian of the email." [4]

Meanwhile, the lawsuit continued and the parties conducted discovery. In response to a demand for production of documents, on January 18, 2022, the Auditor finally produced the eleventh email chain with Belin—more than 216 days after the Kirkwood Institute had requested it and 106 days after the Kirkwood Institute filed this lawsuit, which specifically alleged that the Auditor had failed to produce the email chain with Belin. App. 33. The remaining ten email chains were not disclosed by the Auditor in discovery.

The parties cross-moved for summary judgment. They agreed that the district court could examine the ten email chains in camera to determine whether the Auditor's claimed exemptions from production were correct. The Auditor claimed sections 11.42 and 22.7(18) excused disclosure of the ten email chains. App. 25-28. The Auditor also claimed the Kirkwood Institute lacked standing to object to the failure to produce the McCormally/Belin email chain because Kirkwood Institute had seen *part* of the email chain when

[4] *Iowa auditor sued for refusing to release emails about rejected accusation against Gov. Kim Reynolds.* The Des Moines Register, October 12, 2021. https://perma.cc/4W24-KW6T

it filed suit, and the rest of the email chain was produced in discovery 216 days after the request was made and 106 days after the lawsuit was filed. *Id.* The Auditor never presented a separate claim that the McCormally/Belin email chain was not a public record, as it had done with the *Register*. The Auditor also never claimed his failure of production could be excused because of inadvertence.

The district court first considered the email chain where the Auditor claimed both section 11.42 and section 22.7(18) applied. The district court recited the statute and stated simply, "[h]aving reviewed the email *in-camera*, the Court concludes it is information which must be kept confidential within the meaning of section 22.7(18) and, therefore, was properly withheld pursuant to section 22.7(18)." App. 164. The district court did not make a finding about section 11.42, nor did it explain why the Auditor was not required to disclose the "date, time, specific location, and immediate facts and circumstances" surrounding an illegal act.

The district court next considered the nine email chains where the Auditor claimed only section 11.42's protection. Again, the district court recited the statute and provided its conclusion that "the emails fall under the protection of section 11.42 as having been received during the course of an audit or examination." App. 165. The district court did not discuss how information received from a blogger and a reporter could be considered information gathered in the course of an audit or examination.

The district court's order did not examine the eleventh email chain, save from reciting that it "was subsequently discovered that there was an email between Chief of Staff McCormally and Laura Belin in a personal account rather than the official email accounts. This full email thread was provided to Plaintiff as well." App. 162.

Because the district court's order included no legal analysis about the applicability of sections 22.7(18) or 11.42, and because it omitted any discussion of the consequences of not producing the eleventh email chain between McCormally and Belin for 216 days, Kirkwood Institute moved to reconsider the district court's grant of summary judgment to the Auditor. The motion asked the district court to find that the release of the McCormally/Belin email chain in discovery did not resolve the Auditor's failure to produce it in response to the original records request. App. 167. The motion also asked the district court to provide more detailed legal analysis about the applicability of sections 22.7(18) and 11.42. *Id.* at 168-69. The Auditor did not file a resistance to Kirkwood Institute's motion to reconsider.

The district court denied the motion to reconsider. As to the McCormally/Belin email chain, the district court said it found "no evidence establishing the delay was purposeful or the result of any improper motive on the part of Defendants, but was simply the result of the late discovery of the information. The email chain was immediately produced once it was determined that it was responsive to plaintiff's request(s)." App. 170-71. The district court also held "Iowa Code section 22.10 does not contain a time limit for

compliance and the quote and case Plaintiff cites in support is not the holding of the case, but merely a footnote. *Horsfield Materials, Inc*. v. *City of Dyersville*, 834 N.W.2d 444, n.6 (Iowa 2013). Footnote 6 in *Horsfield* contemplates an intentional refusal, which was not established here." App. 171.

The district court also declined to elaborate on its analysis of the ten other email chains. Stating that such information would "frustrate the purpose of the court's in-camera review," the district court stated its ruling "is fully supported by the facts and applicable Iowa law." *Id*. Kirkwood Institute then filed its notice of appeal.[5] App. 174.

[5] The withheld email chains have been filed in the district court at a security level that permits only court access.

ARGUMENT

I. A governmental body must show that it complied with its obligations under Iowa Code Chapter 22 within a reasonable time. The Auditor failed to turn over a complete email chain for 216 days, but the district court said only an intentional refusal to produce was actionable and there was no time limit for production of records. Should the district court's grant of summary judgment to the Auditor be reversed?

Summary judgment rulings are reviewed for correction of errors at law. *Slaughter* v. *Des Moines Univ. Col. of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019). Kirkwood Institute preserved error by resisting the motion for summary judgment. *Otterberg* v. *Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27-28 (Iowa 2005). When the district court's original ruling on the cross motions for summary judgment did not address points made by Kirkwood Institute, it moved to reconsider under Iowa R. Civ. P. 1.904 to alert the district court to the omission and request a ruling. *Lamasters* v. *State*, 821 N.W.2d 856, 862 (Iowa 2012).

A. A governmental body must respond to a request for records under Iowa Code Chapter 22 within a reasonable time.

The district court held there was no Chapter 22 violation in the belated production of the McCormally/Belin email chain because it found "no evidence establishing the delay was purposeful or the result of any improper motive on the part of Defendants, but was simply the result of the late discovery of the information. The email chain was immediately produced once it was determined that it was responsive to plaintiff's request(s)." App. 171-72. The

district court also held "Iowa Code section 22.10 does not contain a time limit for compliance and the quote and case Plaintiff cites in support is not the holding of the case, but merely a footnote. *Horsfield Materials, Inc*. v. *City of Dyersville*, 834 N.W.2d 444, n.6 (Iowa 2013). Footnote 6 in *Horsfield* contemplates an intentional refusal, which was not established here." App. 172.

The district court's legal view that a failure to produce is not actionable if it is not "purposeful" or the "result of any improper motive" is unsupported by the text of Chapter 22 or this Court's precedents. The district court's holding on this point lacked any citation of authority. Nor could it have. Indeed, the public enjoys a broad right "to examine and copy a public record." Iowa Code § 22.2(1). Once a member of the public makes a prima facie case in an enforcement action, the "burden of going forward shall be on the defendant to demonstrate compliance with the requirements of [Chapter 22]."

True, the law increases the potential penalty for a *knowing* violation, Iowa Code § 22.10(3)(b) ($1,000 to $2,500), but it hardly forgives lesser violations. For violations that are not committed knowingly, the district court must still assess monetary penalties. *Id.* (setting penalty at $100 to $500). The Auditor never argued it could be excused for an accidental or purely motivated refusal. App. 27-29. Rather, the Auditor argued the Kirkwood Institute's claim was mooted by the production (an argument addressed below). *Id.* Indeed, the Auditor did not claim that his failure to produce the document was unintentional, because it clearly was intentional. After the lawsuit was filed,

the Auditor's declined to produce the same email chain to the *Register* and did not produce the email to the Kirkwood Institute for 106 days after the lawsuit was filed and the email chain was specifically called out in the petition. This was no accident, and the district court erred in so finding (even if findings could be made on summary judgment).

Without a basis for the accidental/not improper excuse, we can now turn to the district court's finding that Chapter 22 has no time limit for production of records. We now know the district court was wrong in that regard too. The law permits a custodian a "good-faith, reasonable delay" to determine whether a record is subject to release. Iowa Code § 22.8(4). "This implies that *unreasonable* delay can constitute a violation." *Belin* v. *Reynolds*, 989 N.W.2d 166 (Iowa 2023)) (emphasis original).[6] This is "also consistent with the legislature's stated policy, namely, to encourage the 'free and open examination of public records.'" *Id.*

Belin embraces, rather than distinguishes, this Court's decision in *Horsfield Materials* (the case relied upon by Kirkwood Institute in its summary judgment briefing and which the district court distinguished). The finding that Chapter 22 covers both an explicit refusal to produce and "an implied or silent refusal…is consistent with our observation in *Horsfield Materials*…that…a refusal to produce encompasses the situation where, as here, a substantial

[6] Although *Belin* was decided after the district court's rulings here, it must be applied to any case pending on direct review. *State* v. *Hahn*, 961 N.W.2d 370, 372 (Iowa 2021).

amount of time has elapsed [without production of records]." *Id.* The Auditor's failure to produce the McCormally/Belin email chain for 216 days cannot survive *Belin*.

And the district court was simply wrong to assert that the Auditor never refused to produce the McCormally/Belin email chain. The Auditor produced a set of documents that it represented to be its complete response to Kirkwood Institute's request. This is not a case of a request sitting on someone's desk until a lawsuit was filed. Compare, *Belin*, at 170 (explaining there was no response to records requests until Chapter 22 petition was filed). And, again, the district court's finding that the email chain "was immediately produced once it was determined that it was responsive to plaintiff's request(s)" is belied by the record. The petition, which cited the incomplete McCormally/Belin email chain, was served on the Auditor on October 14, 2021. He didn't produce the email chain until January 18, 2022, or **106 days** later.

The Auditor cannot escape *Belin*'s holding. His failure to produce the McCormally/Belin email chain until well after the lawsuit was filed (and after he claimed to have complied with Kirkwood Institute's request) was a refusal to produce records. The Auditor may well escape the maximum civil penalty under section 22.10(3), but he cannot avoid his failure to comply with Chapter 22 by saying it was an accident. It was no accident; instead, the Auditor expressly refused to produce the document and resorted to calling the Kirkwood Institute's counsel a "political hack."

B. The Auditor's production of the McCormally/Belin email chain in discovery does not moot the claim.

The Auditor's entire defense before the district court for the McCormally/Belin email chain was mootness, citing *Klein* v. *Iowa Pub. Info. Bd.*, 968 N.W.2d 220 (Iowa 2021). But *Klein* does not help the Auditor. *Klein* involved a complaint about withheld public records by various law enforcement agencies related to a police shooting filed with the Iowa Public Information Board. *Id.* at 223. The board is an administrative agency that provides an enforcement mechanism for violating both public records and open meetings laws. See Iowa Code § 23.5(1) (authorizing the filing of a board complaint "in the alternative" to pursuing statutory remedies). The complaint led to a long and somewhat convoluted procedural tangle before an ALJ and the board. *Id.* at 224-226. Ultimately the board denied the complaint, finding the records sought were confidential peace officer investigative reports. The complainant had received the disputed records, however, in collateral federal litigation about the police shooting.

The Auditor claimed *Klein* holds that a Chapter 22 case becomes moot when the plaintiff ultimately receives the records at issue. But that is not what *Klein* says. Remember, the complainant was dissatisfied with how the agency adjudicated his complaint and sought judicial review of its holding. Because of this procedural posture, he had to show he had "a specific, personal, and legal interest in the litigation" and "the specific interest must be adversely affected by the agency action in question." *Id.* (citing Iowa Code § 17A.19). Citing

Dickey v. *Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34 (Iowa 2020), the Court said, "we held that the petitioner lacked standing to obtain judicial review of an administrative decision in a campaign finance reporting matter where the petitioner already had the relevant information." *Id.* at 225. In other words, the complainant did not have the right to pursue judicial review against an agency to achieve a purely symbolic vindication of some principle.

Our case is different. The Kirkwood Institute did not hand over its claim to an administrative agency to prosecute. There is no additional standing requirement on it as there was in a petition for judicial review under Iowa Code § 17A.19. That the Kirkwood Institute has the full email chain in its possession after being forced to file the lawsuit does not moot its claim. Although the petition's demand for *production* of the full email chain is moot, "mootness would not bar any other relief that may be available under the Act, e.g., attorney fees incurred in filing suit to compel production." *Belin* 989 N.W.2d at 171. The Kirkwood Institute has a right to pursue its claim for a civil penalty against the guilty parties and attorney fees for having to go to Court to make the Auditor follow the law. There is a live dispute about the McCormally/Belin email chain and the district court was wrong to hold otherwise. Its order should be reversed.

II. The law requires the Auditor to keep confidential "information received during the course of any audit or examination…" The communications sought here were emails with a blogger and a reporter—private individuals beyond the Auditor's authority. Did the district court err by treating these communications as confidential?

Summary judgment rulings are reviewed for correction of errors at law. *Slaughter*, 925 N.W.2d at 800. Kirkwood Institute preserved error by resisting the motion for summary judgment. *Otterberg*, 696 N.W.2d at 27-28. When the district court's original ruling on the cross motions for summary judgment did not address points made by Kirkwood Institute, it moved to reconsider under Iowa R. Civ. P. 1.904 to alert the district court to the omission and request a ruling. *Lamasters*, 821 N.W.2d at 862.

The law allows the Auditor to keep confidential what he learns in an audit or examination. So, for example, when the Auditor looks at a city's payroll records, the employees' social security numbers and bank account information doesn't get transformed into something the public has the right to examine. This makes perfect sense.

But the Auditor wants more. He wants to turn this commonsense provision into a blanket exemption from Chapter 22. The Auditor claims that section 11.42 protects emails he received from a blogger and a reporter relating to public expenditures. App. 26. He claims that some of the email chains contain confidential information related to audits that these individuals asked about. *Id.* But the Auditor never explains how his apparently unsolicited receipt of information from these media sources constitutes an audit or examination. A

reporter's email is plainly different from the Auditor going into a state office and examining its records. Perhaps these emails led the Auditor to start an audit. Or perhaps these emails requested information from an audit. But that is different from saying that they themselves were information the Auditor learned "in the course of an audit or examination."

The Court has not yet addressed the specific requirements for section 11.42 to excuse the Auditor from complying with Chapter 22. But the Court's precedents examining the Auditor's statutory authority, and the necessary limits placed on him by the grant of power to audit governmental agencies, lead to the inescapable conclusion that the district court was wrong to find that section 11.42 permits the Auditor to withhold records to the Kirkwood Institute.

The Auditor's authority is to audit and examine the state, state officers and departments, and governmental subdivisions. Iowa Code § 11.2(1) (state entities) and Iowa Code § 11.6 (subdivisions). These statutes define and limit his authority. *Sand* v. *An Unnamed Local Gov't Risk Pool*, 988 N.W. 2d 705, 708-09 (Iowa 2023) (*Sand II*). Section 11.42 protects only information obtained in the "course of an audit or examination" and "audit or examination work papers." Iowa Code § 11.42. An "audit" is "a formal examination of an individual or organization's accounting records, financial situation, or compliance with some other set of standards." Black's Law Dictionary (11th Ed.) 161. An "examination" describes "procedures that are less in scope than an audit but which are directed toward reviewing financial activities and

compliance with legal requirements." Iowa Code § 11.1(1)(b). The phrase "in the course of" is not defined in section 11.42. But when used in the workers' compensation context, it refers "to the time, place, and circumstance of the injury." *Lakeside Casino* v. *Blue*, 743 N.W.2d 169, 174 (Iowa 2007). "To satisfy this requirement, the injury must take place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto." Id. (cleaned up).

Section 11.42's exemption should be understood in context. *Albaugh* v. *The Reserve*, 930 N.W.2d 676, 683 (Iowa 2019) ("We assess the entire statute and its enactment to give the statute its proper meaning in context.") The exemption follows a statute giving the Auditor "access to all information, records, instrumentalities, and properties used in the performance of the audited or examined entities' statutory duties or contractual responsibilities." Iowa Code § 11.41(1). The Auditor's access does not destroy the underlying confidentiality of the material. Iowa Code § 11.41(3) (requiring the Auditor to "maintain the confidentiality of all such information" and making him subject to "the same penalties as the lawful custodian" for its disclosure.)

When read with its companion, section 11.42's limited scope is plain. The Auditor must keep the underlying confidentiality of information he gathers during an audit or examination, notwithstanding his duty to release information under Chapter 22. But section 11.42's exemption only makes sense if the information it protects was gathered under the Auditor's broad access to

the records of state and local government. Section 11.42's work targets the Auditor's right to confidential information, not every communication that comes in the door. There must be a formal effort to investigate the affairs of an agency subject to the Auditor's duties for sections 11.41 and 11.42 to be triggered. *Sand* v. *Doe*, 959 N.W.2d 99, 108-09 (Iowa 2021) (*Sand I*). Informal requests for information from the Auditor to a state agency do not trigger the confidentiality protections and duties of sections 11.41 and 11.42. *Id.* at 109 ("We agree with the Agency that the initial email request from Auditor Sand to Agency and Institution representatives was not an audit.")

Although the Court did not "decide the exact moment the request for information" in *Sand I* "turned into an audit," the Court's determination that the Auditor was not conducting an audit when he emailed a state agency is controlling here. If the Auditor is not engaged in an audit when he *makes* an informal initial inquiry to an agency under his jurisdiction, then logically it cannot apply to information the Auditor *receives* from individuals who are not.

The Court's recent decision in *Sand II* is also instructive. In that case, the Auditor served a subpoena on a local government risk pool seeking certain financial records. *Sand II*, 988 N.W.2d at 708. The risk pool argued that it was not subject to the Auditor's statutory authority. *Id.* The Court agreed. "The statute does not grant the state auditor free-floating subpoena power. Instead, the state auditor has the authority to issue a subpoena as an auxiliary aid only while performing an authorized audit or reaudit." *Id.* at *3. Because the risk

pool was not a governmental subdivision organized under Iowa Code Chapter 28E, it was not subject to the Auditor's authority. *Id.*

The Auditor might wish the law exempted all communications to his office from the scope of Chapter 22. But that is not what the law says. He is bound by the legislature's decision to only exempt those he obtains in an audit or examination. *Id.* at 711-12 (Acknowledging the legislature might have granted the Auditor authority over entities that could have been organized under Chapter 28E, "[b]ut it did not do so. In interpreting statutes, we are bound to apply the 'language chosen by the legislature and not what the legislature might have said.'")

The Kirkwood Institute's ability to develop a specific argument about the nine email chains withheld under section 11.42 is hampered by the district court's truncated analysis. Of course, the filing of a Chapter 22 lawsuit does not itself entitle the plaintiff to production of confidential records. *Vaccaro* v. *Polk Cnty*, 983 N.W.2d 54, 60 (Iowa 2022). But the district court did not provide any guideposts or broad reasoning suitable for consideration. The Auditor never explained why or how emails he received from a reporter or blogger could be protected by section 11.42. He merely asserted they were. Nor did he explain why these entire email chains must be withheld. If he believes the substance of the communication is audit or examination material, he could offer redactions. The Auditor never did this. The emails are available to the Court to review as a sealed portion of the record so it may make its own independent review of them.

It is the Auditor's burden to show his compliance with Chapter 22. Iowa Code § 22.10(2). Because the Auditor could not have been conducting an audit or examination when he was emailed by a reporter and a blogger, his invocation of section 11.42 was baseless. The district court's order should be reversed.

III. The law permits a governmental entity to withhold a communication from someone outside of government when disclosure would discourage such communications, but it must release the basic facts about alleged law breaking unless that disclosure would endanger someone's safety. The Auditor claimed this exemption permitted it to entirely withhold an email chain, but he didn't show how it applied. Should the district court have required disclosure?

Summary judgment rulings are reviewed for correction of errors at law. *Slaughter*, 925 N.W.2d at 800. Kirkwood Institute preserved error by resisting the motion for summary judgment. *Otterberg*, 696 N.W.2d at 27-28. When the district court's original ruling on the cross motions for summary judgment did not address points made by Kirkwood Institute, it moved to reconsider under Iowa R. Civ. P. 1.904 to alert the district court to the omission and request a ruling. *Lamasters*, 821 N.W.2d at 862.

For the tenth email chain the Auditor claimed both Iowa Code § 11.42 and Iowa Code § 22.7(18) permit it to be withheld. As with the other nine email chains, the Auditor made no effort to show the information was obtained in the course of an audit or examination. His invocation of Iowa Code § 22.7(18) similarly fails.

That provision allows a public entity to withhold "[c]ommunications not required by law, rule, procedure, or contract" made "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." *Id.* But there are exceptions.

The communication cannot be withheld if the persons consents. Iowa Code § 22.7(18)(a). It can also be disclosed if it is possible to redact the information that would identify the person. Iowa Code § 22.7(18)(b). And information must be released about the "date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except to the extent that its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person." If defendants claim this provision applies, they face a heightened burden to prove they are correct. Iowa Code § 22.7(18)(c) ("In any action challenging the failure of the lawful custodian to disclose any particular information of the kind enumerated in this paragraph, the burden of proof is on the lawful custodian to demonstrate that the disclosure of that information would jeopardize such an investigation or would pose such a clear and present danger.")

The Auditor did not engage with any of the particulars of Iowa Code § 22.7(18). He didn't explain why a person would have been discouraged from

providing the information if it was public. Nor did he share whether his office sought the consent of the individual to release it. If he claimed that someone would be jeopardized by the release of the information, he never said so. And because the Auditor refused to provide the basic information about the communication—the date, time, specific location, and immediate facts and circumstances of alleged lawbreaking—he faces the heightened burden to justify withholding this information.

The district court provided nothing to support its determination that section 22.7(18) was properly invoked by the Auditor, undermining the ability to make specific arguments on appeal why the district court was wrong. The Auditor's determination that the exception applies is viewed objectively. *Ripperger* v. *Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 553 (Iowa 2021). Although the district court should not substitute its judgment for the Auditor on this question, this is different from saying there should be no review at all. The district court's grant of summary judgment to the Auditor should be reversed.

CONCLUSION

The Court should reverse. It should find the Auditor violated his duties under chapter 22 and remand to the district court for an order to produce the withheld email chains, the assessment of civil penalties, an injunction against further violation of the law, costs, and attorney fees.

REQUEST FOR ORAL SUBMISSION

The Kirkwood Institute requests that this appeal be submitted for oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains **6639** words, excluding parts of the brief exempted by that rule.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the typestyle requirements of Iowa R. App. P. 6.903(1)(f) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Equity, 14-point type.

/s/ Alan R. Ostergren
Alan R. Ostergren