IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0477

ROB SAND, Auditor of the State of Iowa

Applicant - Appellee,

vs.

JOHN DOE, in his official capacity, and
UNNAMED STATE AGENCY, STATE OF IOWA

Defendant - Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT
OF POLK COUNTY (CVCV059696)
THE HONORABLE HEATHER LAUBER, JUDGE

APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

This case presents a substantial issue of first impression and should be retained by the Supreme Court. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case:

This case centers on a request and subsequent subpoena issued by the Auditor of State pursuant to Iowa Code Chapter 11 for documents and information held by a department of state government.[1] Upon Defendant's failure to comply with the subpoena, the Auditor filed a Motion to Enforce, which was resisted by Defendants. The District Court sustained enforcement of the subpoena and Defendants have appealed.

Course of Proceedings:

The Auditor generally agrees with the Course of proceedings set forth by Defendants.

Facts:

In 2019, representatives of the Unnamed State Agency ("Agency") personally contacted Iowa Auditor of State Rob Sand, in

[11] Pursuant to longstanding advice from the Iowa Attorney General's Office, subpoenas issued by the Auditor of State are considered audit "workpapers" as that term is used in Iowa Code §11.42. Under that code section, the Auditor of State has a legal obligation to maintain the confidentiality of its workpapers. In order to adhere to that legal obligation, this litigation was filed under seal. At the direction of the Court, identifying information regarding Defendants has been removed from this brief.

order to provide Sand with information about a significant upcoming financial transaction ("Transaction") being contemplated by the Agency. The Transaction involved a complex financial transaction, creating a long-term multi-billion dollar obligation for the agency, as part of one of the largest financial transactions in Iowa history. Appx. 64-66. Representatives of the Agency presented information about the Transaction in Auditor Sand's office. They offered to answer questions or provide additional information if Auditor Sand so requested.

On December 12, 2019 Auditor Sand did in fact ask for additional information: the names of the potential investors in the Transaction. Appx. 55-56. The investors were publicly touted as over 20% coming from within Iowa as a group; yet their specific identities were withheld from the public as "trade secrets," as was the documentation about the Transaction's bidding procedures. Sand made his request via email simultaneously to the representatives with whom he had met from the Agency. Appx. 64-66. The Agency representative directed Auditor Sand to Defendant Doe without dispute. Appx. 55.

On December 13, 2019, Defendants informed the Auditor the requested documents were "considered confidential pending completion of the process." Appx. 54-55. Auditor Sand's emailed response reminded the Agency that the Auditor is expressly granted access to confidential information under the terms of Iowa Code § 11.41. Appx. 54.

On December 19, 2019, Defendants continued to resist the document request, saying via email that documents would be provided after financial close, with confidential information redacted. Appx. 53. The Auditor informed Defendants that a subpoena would be forthcoming if the documents were not produced. Appx. 52.

On January 8, 2020, the Auditor issued a subpoena to Defendants, identifying 13 categories of documents to be produced. The subpoena had a response date of January 22, 2020. Appx. 49-51. Defendants acknowledged service of the subpoena on January 14. Appx. 57.

On January 21, the Auditor and Defendants held a call to discuss the subpoena and the documents requested. On that call, the Auditor agreed to rolling production of items that would take effort to

collect (i.e., emails), but reasserted that the items originally requested on December 12 would need to be produced the following day.

On January 22, Defendants provided a substantially incomplete response to the subpoena. They continued to refuse to produce all items originally requested on December 12, which Defendants said they would "provide available information once the transaction has reached financial close." Appx. 58-59.

On February 3, the Auditor filed an application to enforce the subpoena, asking the court to order production of the documents. Appx. 44-45. Defendants did not respond prior to the District Court's order enforcing the subpoena on February 14. Upon that order, Defendants finally responded with a motion to quash. The Court stayed its previous order, and a hearing was held February 18. Following the hearing, the Court again entered an order sustaining the subpoena. Appx. 116. Defendants have appealed and have yet to produce the documents requested in December 2019.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ENFORCED THE SUBPOENA BECAUSE THE PLAIN LANGUAGE OF IOWA CODE CHAPTER 11 GRANTS THE AUDITOR OF STATE BROAD DISCRETION TO DETERMINE THE SCOPE AND SUBJECT OF AUDITS.

Error Preservation.

The Auditor agrees Defendants have preserved error.

Standard of Review.

This Court's review of the District Court's order enforcing the subpoena is for abuse of discretion. *State ex rel. Miller v. Publishers Clearing House, Inc.*, 633 N.W .2d 732, 736 (Iowa 2001)(ordering enforcement of an Attorney General subpoena and stating "the standard of review is for abuse of discretion, as in other administrative subpoena cases").

Merits.

The District Court correctly sustained the Auditor's Motion to Enforce the subpoena because the plain language of Iowa Code Chapter 11 gives the Auditor of State broad discretion to determine the scope and subject of its procedures. Defendants are state entities, and all state entities are subject to review by the Auditor at all times:

> The auditor of state, when conducting any audit or examination required or permitted by this chapter, shall at all times have access to all information, records, instrumentalities, and properties used in the performance of the audited or examined entities' statutory duties or contractual responsibilities. All audited or examined entities shall cooperate with the auditor of state in the performance of the audit or examination and make available the information, records, instrumentalities, and properties upon the request of the auditor of state."

IOWA CODE §11.41 (emphasis added).

The plain language of § 11.41 is unambiguous. The Auditor is granted access to all information at all times when conducting an audit required or permitted by Chapter 11. Under Chapter 11, the Auditor is required to perform an annual audit of all state departments, including the Defendant Agency. IOWA CODE § 11.2. However, the auditor is permitted to audit any state entity at any time:

> The auditor of state shall annually, and more often if deemed necessary, audit the state and all state officers and departments receiving or expending state funds.

IOWA CODE § 11.2(1) (emphasis added). Under the statute's plain language, the Auditor is expressly granted discretion to determine

when additional audits are necessary. This does not mean that every action the Auditor takes is part of an audit. It does, however mean that the Auditor is permitted to audit when the Auditor deems it necessary. Chapter 11 explicitly gives the Auditor broad discretion to determine when and how to review the activities state entities engage in with taxpayer money, and broad authority to review all records of those entities at all times. Consequently, when Agency undertakes such a large financial transaction, the Auditor is permitted to audit the transaction, with no exception for that transaction's process prior to its completion.

A. The Subpoena Was Proper Under the Law.

Given the plain language of the statute, the Auditor should not have been forced to issue a subpoena for information from Defendants; the information should have been provided upon initial request. However, Chapter 11 also gives the Auditor broad subpoena power to access information. IOWA CODE § 11.52 (granting Auditor "power to issue subpoenas of all kinds, administer oaths and examine witnesses"). The power to issue subpoenas extends to all matters relating to an authorized audit. *Id*. As entities that are subject to audit

at all times, Defendants must comply with a subpoena from the Auditor. The District Court correctly twice sustained the Auditor's subpoena because of the plain text of the statute granting the Auditor subpoena power.

Iowa Courts generally rule in favor of enforcing agency subpoenas. "Enforcement is the rule, not the exception.[2]" *Citizens' Aide/Ombudsman v. Grossheim*, 498 N.W.2d 405, 407 (Iowa 1993). "Courts have been cautious to interfere with agency subpoena powers except to preserve due process rights." *Wilson & Co. v. Oxberger*, 252 N.W.2d 687, 688 (Iowa 1977). Agency subpoenas are enforced if they are "(1) within the statutory authority of the agency, (2) reasonably specific, (3) not unduly burdensome and (4) reasonably relevant to the matters under investigation." *Iowa City Human Rights C'mm'n v. Roadway Express, Inc.*, 397 N.W.2d 508, 510 (Iowa 1986). The Iowa Supreme Court has likened an agency investigation to a grand jury, "which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion the law is being violated, or even just because it wants assurance that it is not." *State*

[2] Curiously, Defendants' Brief does not provide the Court with the legal standard for the question before it.

ex rel. Miller v. Publishers Clearing House, Inc., 633 N.W.2d 732, 737 (Iowa 2001) (quoting *United States v. Morton Salt*, 338 U.S. 632, 642–43 (1950)). In addition to the general presumption in favor of enforcement, the District Court correctly sustained the subpoena because it meets all of the factors of the *Roadway* test.

1. The subpoena was with the authority of the Auditor

The Auditor's subpoena regarding the Transaction was squarely within the authority of the Auditor. While Defendants correctly assert that the Auditor's subpoena power is predicated on an "authorized audit or examination," as explained above the Auditor is always permitted to audit state entities, as many times a year as it independently deems necessary. IOWA CODE § 11.2(1). Defendants suggest such a reading would render meaningless the words "when engaged in an authorized audit or examination" in Iowa Code § 11.51. However, Chapter 11 encompasses both the Auditor's oversight of state agencies, and its role in reviewing governmental subdivisions. In that context, the "authorized" language of Section 11.51 creates at least two significant boundaries the Auditor must respect, and has respected.

First, the Auditor is generally not authorized to audit private entities. The Auditor may review private entities that receive public dollars in some circumstances. See IOWA CODE § 11.24(3). However, an Auditor subpoena to a private entity would generally be unenforceable, unless it was connected to an authorized audit of public funds. Second, the boundary set by Section 11.51 also means public entities being audited by other auditors do not have to comply with a request from the Auditor. Notably, the Auditor is not always authorized to audit local governments. While governmental subdivisions must have annual audits, they are not required to be audited by the State Auditor and may choose to hire a private CPA firm to perform their required annual audit. IOWA CODE § 11.6. If a local entity has contracted their annual audit to a private firm, the Auditor is not authorized to audit that entity, and it may not be required to comply with an Auditor subpoena. Put simply, local governments have no duty to provide documents to the Auditor, unless the Auditor is engaged with that entity.[3] As a result, the Auditor would not be authorized to subpoena documents from

[3] The Auditor can be engaged to review local governments through the "reaudit" provisions in Iowa Code § 11.6, as well as direct engagement for annual audits under the same code section.

governmental subdivisions who have not engaged the Auditor.

Conversely, absent specific statutory authority to the contrary,[4] all state entities are required to be audited by the Auditor of the State. IOWA CODE 11.2(1). ("The auditor of state shall annually, and more often if deemed necessary, audit the state and all state officers and departments receiving or expending state funds") (emphasis added).

And, of course, the limitation of the Auditor's powers to authorized audits and examinations is necessary to ensure the Auditor's powers are limited to the scope of the Office itself.

In sum, the Auditor has subpoena power over everything related to the disposition of Iowa state taxpayer dollars, and has access to all related information at all times. IOWA CODE § 11.41. The Auditor of State is provided with subpoena power, and the power to apply to the court for enforcement of subpoenas. IOWA CODE §§ 11.51, 11.52. As a result of this statutory authority, as well as the jurisdiction to review State entities as often as deemed necessary, the Auditor's subpoena to Defendants was firmly in the bounds of the Auditor's authority.

[4] For example, the Iowa Finance Authority is required at Iowa Code § 16.27(4) to procure an audit, but is allowed their choice of auditors.

2. The subpoena was reasonably specific

As to the second factor of the *Roadway* test, Defendants do not contest that the subpoena was sufficiently specific. Indeed, all indications are that it is precisely the specificity of the Auditor's subpoena that triggered this dispute, namely the request for the names of the investors in the Transaction, their financial information, and bidding documentation. Appx. 50. Defendants originally claimed this information was a trade secret and not subject to disclosure. Appx. 55. In the District Court, Defendants claimed the subpoena was aimed at the wrong party.[5] Appx. 82. Defendants have dropped both of these spurious arguments and have not raised the specificity of the subpoena as an issue. The requests in subpoena are specific and discrete, and therefore meet the second factor of *Roadway* test for enforcement of an administrative subpoena.

[5] Defendants' attempt to obfuscate the proper custodian of the records was always a red herring. The Agency is charged by statute with managing the facilities under its control, and the Transaction involves facilities that fall squarely within the statutes. The statutes in question are of such specificity that to provide their citations would be to reveal the identity of Defendants. Suffice to say, if the agency does not possess the documentation requested, it is not fulfilling its statutory duties.

3. The subpoena was not unduly burdensome

Likewise, Defendants do not argue the third *Roadway* factor on appeal, and do not contend that the subpoena is unduly burdensome. "A party opposing enforcement of this type of subpoena must establish that the subpoena is unreasonable or that compliance would be unnecessarily burdensome." *Publishers Clearing House, Inc.*, 633 N.W.2d at 737. In assessing the burdensomeness of a subpoena, the primary considerations are the time and expense required by compliance. *Id.* at 738. In this case, the time and expense are negligible. Defendants has pointed the Auditor to where many of the items requested can already be found on the internet, but resists providing the investor information for the Transaction. Providing this information is not burdensome. In a document outlining the Transaction hosted on the Agency's public website in December 2019, Defendants represented that "21.5% of the [Transaction's] committed private placement financing comes from Iowa-based investors." Appx. 66. If Defendants can publicly provide such a specific percentage for the identity of Iowa-based investors, they can provide its supporting information to the Auditor.

4. The subpoena is relevant to the Auditor's work

There is no real dispute as to the fourth factor either. Defendants acknowledged that the Auditor has the authority to audit the Transaction specifically, and claim that had the Auditor made the requests following an "entrance conference" they would have provided the subpoenaed information. Appx. 117. The District Court correctly enforced the subpoena based in part, on these acknowledgements that the Auditor was entitled to the requested information as part of its review of Defendants. However, Defendants continue to assert that the form and timing of the request render the subpoena unauthorized. Their assertions are legally wrong and factually misleading. It is the Auditor, not the auditee that determines the scope of audit review. See *Publishers Clearing House*, 633 N.W.2d at 738 (Iowa 2001) (enforcing administrative subpoena issued by the Attorney General and noting "[t]o adopt PCH's argument that it is excused from producing all of the information requested by producing some of it would allow it, rather than the attorney general, to determine the scope of the discovery"). Defendants attempt to draw false distinctions between "performance"

and "financial" audits, rely on their own misunderstanding of the Auditor's procedures and duties, and ignore the plain text of Chapter 11. The Court should reject these arguments and affirm the District Court.

a. The Auditor engages in multiple audits of Defendants

Defendants rely heavily on an affidavit provided by an Agency officer with extensive financial experience. In the affidavit, the officer purports to detail the purposes of an Audit and the procedures used by the Auditor of State. Appx. 85-86. The officer's affidavit misleads on key information and overlooks the Auditor's statutory duties.

The official should be aware that the Auditor engages in more than one audit for the Agency. In addition to a financial statement audit, the Auditor is required by Iowa Code to review the other aspects of the Agency's activities and report on their legal compliance.[6] Furthermore, the Auditor undertakes annual audits of the Agency information technology systems and processes. Appx. 107-109. And of course, the Auditor is not limited in the number of audit procedures he undertakes for a state agency. In the case of

[6] Citing the specific code sections containing these requirements would identify the Defendants.

Defendants, the Auditor regularly performs additional procedures beyond the "annual financial audit" described by the Officers affidavit.

b. Entrance Conferences do not begin an audit

The Officer's affidavit, and Defendant's entire argument, place a great deal of weight on the "annual financial audit," and in particular the false assertion that the Auditor is not authorized to audit the Transaction because the Auditor had not held an "entrance conference" for this audit. The Officer's affidavit states that the "[Agency's] annual financial audit begins with an entrance conference."; Appx. 88. This assertion is wrong. Audits begin—as this one did—with a request for documents and information.

Note that the Officer's affidavit incorporates a timeline for the past two annual financial audits. Id. It lists "Entrance Conference" as the first ordered item for each year, and "Internal Control documents" as the second item. However, the actual dates listed show that in both years, the Auditor collected documents for months prior to the entrance conference:

Description		FY 2018		FY 2019	
		From	To	From	To
1	Entrance Conference	6/11/2018		6/12/2019	
2	Internal Control documents	3/26/2018	5/11/2018	4/22/2019	6/21/2019
3	Audit Schedules (PBCs / Lead Sheets)	7/3/2018	9/26/2018	7/23/2019	9/27/2019
4	GAAP Package (For State CAFR)	10/1/2018		10/1/2019	
5	Financial Report (auditor draft to final draft)	10/31/2018	12/13/2018	10/31/2019	12/17/2019
6	Audit opinion report date	12/13/2018		12/17/2019	
7	Audit opinion report received	12/13/2018		12/18/2019	
8	Exit Conference	6/12/2019		TBD	

The timeline's ordering is misleading because its dates are correct: the agency's audits begin with requests for information, then an entrance conference occurs later. This is standard practice for auditing. Appx. 108. With the timeline's dates contradicting Defendant's misleading assertions, Defendants are left with no factual support for the idea that the Auditor's request was not part of an authorized audit or examination.

The Auditor asks the Court to review the affidavit of Brian Brustkern, CPA. Appx. 108. As a 27-year employee of the Auditor of State, Brustkern has guided audits of the many state agencies, including Defendants, and other state and local agencies. Id. Brustkern states "that with all our state department or agency work,

we regularly request and review records and information prior to entrance conferences." Id. Workpapers show the auditor puts in hundreds of hours of work prior to the entrance conference, including requesting and reviewing information from the auditees. Id. Brustkern's affidavit establishes in detail that every audit begins with the request and provision of records and information months in advance of any entrance conference, and that this is in keeping with professional standards. Id.

As a public policy matter, mandating an official "entrance conference" prior to commencing audit work would hinder transparency and accountability, creating the potential for absurd results. All information and documentation requests would be denied until an entrance conference. An entrance conference could be denied until all necessary parties agreed upon a date for that conference. All necessary parties agreeing upon a date could be denied until parties decided to respond to the request for a date, and decide to be honest about their availability. And so on. It would mean the Auditor had little oversight power until those overseen agreed to it, no matter

what actions they might be taking in the meanwhile to obfuscate, falsify, or destroy the material they learned would be requested.

In addition to its factual and logical flaws, Defendants' argument about "entrances conferences" is legally off-base. Iowa Courts rejected a similar argument in the context of a county attorney subpoena. In *State v. Kelley*, 353 N.W.2d 845 (Iowa 1984). In *Kelley*, the recipient of a county attorney subpoena sought to quash it on the grounds that there was no bona fide criminal investigation occurring. *Id*. at 845. The *Kelley* court noted an investigation by a state agency "does not depend on a case or controversy to get evidence, but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not," and relied merely upon the County Attorney's word for assurance the investigation existed. *Id.* In another context, the Supreme Court has held that an administrative subpoena by the Attorney General's office was proper, noting "even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public

interest." *State ex rel. Miller v. Smokers Warehouse Corp.*, 737 N.W.2d 107, 112 (Iowa 2007) (citation omitted); *See also State ex rel. Miller v. dotNow.com, Inc.*, 715 N.W.2d 768 (Iowa Ct. App. 2006) (rejecting a relevancy challenge to an Attorney General's investigatory s subpoena due to "the broad scope of the attorney general's subpoena power"). Thus, when it comes to Iowa law regarding official investigations, courts hold that the investigator's assurance is a sufficient basis for a subpoena.

Yet here, not only do we have the Auditor's word, but also his statutory obligation at Iowa Code § 11.2(1), which obligates him Audit Defendants *at least* once a year. Given the Auditor's mandate to have access to all information at all times pertaining to state agencies, the Auditor's request in this case is part of an authorized audit.

c. Defendants fail to comprehend the Auditor's role

In addition to their red-herring about the lack of an entrance conference, Defendants spend much of their brief discussing the distinction between "financial" and "performance" audits. Given that no such distinction occurs anywhere within Iowa Code, the relevance of such a discussion is questionable. However, the Auditor will

address it for the sake of clarity for the Court.

As the District Court correctly noted, Chapter 11 contains no definition of the word "Audit." Appx. 116. The District Court looked to Black's Law Dictionary to define Audit as "[a] formal examination of an individual's or organizations account records, financial situation, or compliance with some other set of standards." AUDIT, Black's Law Dictionary (11th ed. 2019). Iowa Code Chapter 11 defines "examination" as "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 (b). The determination for the procedures to be utilized in any audit or examination are determined by the Auditor and the professional staff in the office.

Performance vs. Financial Audits

The Auditor has adopted rules dividing its professional staff into "Performance" and "Financial" divisions. 81 IAC 25.4. These distinctions are fluid, as financial audit division staff routine work on performance engagements and vice versa. *See* Appx. 108. Rather than being grounded in statute or administrative rules, the Auditor's

divisions have their roots in the "Yellowbook," the handbook of Generally Accepted Government Accounting Standards (GAGAS) set forth by the Government Accounting Office (GAO). The Yellowbook describes three different types of GAGAS engagements, including Performance and Financial, as well as "Attestation Engagements." GOVERNMENT ACCOUNTING OFFICE (2018), *Government Auditing Standards*, (GAO18-568G), p. 7-14. Retrieved from: www.gao.gov/Yellowbook. These engagement types overlap in a number of key ways. While the primary purpose of a financial audit is to offer an opinion on whether an entity's financial statements are presented fairly, financial audits also include reports on applicable legal compliance and internal controls. Id. p. 8. Performance audits also assess compliance and internal controls, as well program effectiveness and objective analysis. Id. pp. 10-11. A necessary component of such an analysis is assessing the financial condition of the entity and the program being reviewed. Id. P. 12.

The overlapping nature of these engagement types illustrates the fluidity of the audit process. As noted in the Brustkern affidavit, it is not uncommon for an engagement that begins as a financial audit

to morph into a performance audit with a more specific scope. As Brustkern notes, "a good audit goes where facts lead it." Appx. 108.

In fact, a client's familiarity can be anathema to effective audit work. As noted in the Brustkern affidavit:

> Care is required when communicating with those charged with governance about the planned scope and timing of the audit so as not to compromise the effectiveness of the audit, particularly when some or all of those charged with governance are involved in managing the entity. For example, communicating the nature and timing of detailed audit procedures may reduce the effectiveness of those procedures by making them too predictable."

Id. (citing AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (2018) *Codification of Statements on Auditing Standards*, AU-C 300.A18. Defendants lack of clarity about whether the Auditor's review of the Transaction is a performance or financial audit is a good thing under audit standards, since audit procedures can and should change "when information comes to the auditor's attention that differs significantly from the information available when the auditor planned the audit procedure." Appx. 109. While the Auditor needs no justification for additional audits, the fact that the Transaction

agreement creates a huge financial liability for the Agency and taxpayers makes it worthy of scrutiny. Appx. 109. Moreover, a lack of scrutiny could be seen as the Auditor's failure to do his job.

Regardless, whether the Auditor review of the Transaction is part of an annual financial engagement, or a separate performance audit, the distinction between financial and performance engagements provides no justification for Defendants failure to comply with Auditor's request for information or the subsequent subpoena. Chapter 11 grants the Auditor discretion to determine audit scope, frequency and procedures for all state entities.

d. Defendants cannot dictate the scope of their audit

Defendants, however, take the remarkable position that the auditees should get a say in the scope of an audit:

> Agencies and institutions rely upon a clear understanding of the scope of an audit – especially financial audits in order to organize their efforts in cooperating with the Auditor's staff, as well as ensuring the Auditor is not simply engaged in a fishing expedition of that the audit process upends significant programs or initiatives.

Appellants Brief at 23-24.

No. Allowing auditees to become too familiar with audit procedures, or in any way dictate the scope of an audit, makes for a bad audit, as described in detail in accounting standards cited. Such familiarity would make it easy to mask wrong-doing or misdirect attention for material matters. In addition, case law regarding administrative subpoenas by investigative agencies clearly illustrates that official investigators are allowed to undertake what Defendants deride as "fishing expeditions" but what a good investigator calls "a hunch." The Iowa Supreme Court has likened an agency investigation to a grand jury, which "can investigate merely on suspicion the law is being violated even just because it wants assurance that it is not." *Publishers Clearing House, Inc.* 633 N.W.2d at 737. In addition to the case law, the plain language of Section 11.41 grants the Auditor access to "all information" "at all times." Requests for information must be honored because "all audited or examined entities *shall cooperate* with the auditor of state in the performance of the audit or examination and make available the [materials] *upon the request* of the auditor of state." IOWA CODE § 11.41(1) (emphasis added). There is, of course, a very good public policy rationale for this legal obligation.

State government is handling the public's business, and the Auditor fills the role of an independent body that can investigate and report on how the public's business is handled. Were the Auditor not to have this power, it would be easy to place malfeasance beyond discovery or accountability.

While Defendants may believe the only purpose of an audit is another letter affirming the Agency's financial statements, the intent behind Chapter 11 is to promote transparency and accountability in government. Under the code, the Auditor is charged with going deeper than simply looking at financial statements. Generally, audits "shall include, if applicable" issues such as whether the work of the auditee is "efficiently conducted," if its work "needlessly conflicts with or duplicates the work done by any other department," "all illegal or unbusinesslike practices," and "any other information which, in the auditor's judgment, may be of value." IOWA CODE § 11.4. In addition, "The reports shall make recommendations as may be deemed of advantage and to the best interests of the taxpayers of the state." IOWA CODE § 11.28. As such, the Auditor regularly delves into matters far beyond opining on whether financial statements meet

Generally Accepted Government Accounting Standards (GAGAS).

Regardless if they are concerned about the content of the requested material, or if they are concerned about what the Auditor will do with that information, Defendants are nevertheless required to provide the Auditor access to all information at all times. Exercising statutorily granted authority to perform oversight is the Auditor's job. Under both the plain language of the statute and the standard of the *Roadway* test, the subpoena should be enforced. The Court should affirm the District Court.

B. The Auditor's Confidentiality Requirements do not allow Defendants to withhold information.

Defendants bizarrely cite the Auditor's confidentiality obligations regarding what he may do with information after he receives it, as a reason not to give it to him at all. This nonsensical position is accompanied by an analysis-free footnote spouting media articles quoting the current Auditor of State. It is analysis free because any actual analysis would alleviate any basis for concern.

Under Chapter 11, the Auditor must keep confidential "information received during the course of any audit," IOWA CODE § 11.42(1). The information received and all audit workpapers are

specifically exempt from disclosure from Iowa Code Chapter 22. This confidentiality requirement contains two notable exceptions: Information and workpapers are subject to disclosure as required by legal proceedings and/or "as necessary to complete the report." IOWA CODE § 11.42(2). As noted previously, reports of the Auditor are required to contain certain categories of information. IOWA CODE § 11.4. Ultimately the law does not require the Auditor to become a party to ongoing illegal activity, or keep such activity concealed just because it is confidential. To the contrary, the law states the Auditor "*shall*" include in his reports "*all* illegal or unbusinesslike practices," and "any other information which, in the auditor's judgment, may be of value." Id. (emphasis added). It makes no exception for confidential information.

The Auditor is specifically authorized to receive information that would otherwise be confidential under the law. IOWA CODE § 11.41(3). When receiving such information, the Auditor is required to maintain the same confidentiality as the custodian from whom it was received, and is subject to the same penalties. Id. In essence, the

Auditor stands in the shoes of its auditee with respect to information it receives in the course of an audit.

Changes made to the Auditor's confidentiality statutes in 2011 are instructive. Previously, the statute read: "no such auditor shall make any disclosure of the result of any investigation, except as the auditor is required by law to report the same or to testify in court." IOWA CODE § 11.7 (2008). The current version in Iowa Code § 11.42 makes clearer the distinction between workpapers (the materials from which an audit report is assembled) and an audit report itself. It also makes disclosure more generally appropriate. No restrictions limit the Auditor's ability to confirm to the public that a particular area, transaction, or program is being audited.

The Auditor understands state agencies may at times be concerned about information and actions they wish to keep quiet being included in an Auditor's report. The better position under Iowa law and public policy is to avoid doing such things in the first place. Nevertheless, the Auditor is to have access to all information at all times, and is granted the discretion to determine the content of

reports, including "information in the Auditor's judgment that may be of value."

The Auditor does not serve at the pleasure of state departments. He serves in a Constitutional office, elected by the people of the Iowa. The Auditor's job performance is subject to public referendum every four years. This is not true for the appointed officials, whose conduct is not subject to the same level of public accountability. In fact, it is incumbent upon the Auditor to create transparency and accountability for a department's stewardship of State resources, especially when officials themselves refuse to do so.

As such, this Court should reject Defendants' consternation over confidentiality. This matter was filed under seal because the Auditor noted it should be under Iowa Code § 11.42, not because Defendants said so. The Auditor will continue to follow the law and to use his discretion as required by Chapter 11 to fulfill his duties to provide accountability and transparency to the taxpayers who elected him.

C. Defendants Have Engaged in Bad Faith Delay Tactics.

Worthy of this Court's consideration is the fact that Defendants have invented new and increasingly suspect notions to ensure that the Auditor would not receive the originally requested materials, relating to bidding and conflicts-of-interest, until after the Transaction agreement was fully finalized. In the life of this dispute, Defendants have:

- Violated their Iowa Code Chapter 11 obligations to "cooperate" and provide access "upon request" to "all materials at all times";
- Asserted the materials were "confidential" when Iowa Code 11.42 clearly makes that irrelevant;
- Directed the Auditor to this Defendant, then claimed it was the wrong party;
- Failed to comply with a lawfully issued subpoena;
- Ignored the subpoena and the action to enforce until after the District Court filed an order sustaining the subpoena;
- Challenged the action only after the order sustaining the subpoena; and

- Offered misleading arguments to delay enforcement, including insisting that that an entrance conference must happen prior to documents being requested and provided.

It seems clear that all this is intended to ensure the specific legal and financial contours of this $3.5 billion repayment obligation are not scrutinized- at least not prior to it being finished. Why?

It seems to be a pattern of bad faith by the Agency and their institutions. In a separate matter, a Polk County District Court found the Agency was acting in bad faith by delaying another matter in January, 2020.[7] They did it for the same reason: to run out the clock on the legitimate lawful requests of another party.[8] Defendant is using the Court to delay disclosing documents it is required to produce. No matter the reason, this Court should put a stop to these bad faith actions and order Defendants to comply with the law.

CONCLUSION

The District Court correctly found the Auditor's subpoena was validly issue and its order enforcing the subpoena should be affirmed.

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[7] Polk. Co. CVCV058643, Order, Judge Jeffrey Farrell (January 13, 2020).
[8] Id.

REQUEST FOR ORAL ARGUMENT

The Auditor requests the opportunity to be heard in oral argument.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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Dated: August 21, 2020

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