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 REPLY 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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ARGUMENT

I. Kirkwood Institute established a violation of Chapter 22 in the Auditor's failure to produce the McCormally/Belin email chain.

The Auditor makes three arguments about why, in his view, the case against him for refusing to produce the McCormally/Belin email chain should go away on summary judgment. None is meritorious. We respond to each, including those never raised by the Auditor in the district court.

A. Iowa Code Chapter 22 permits enforcement actions for the "refusal" to produce documents. Although refusal may be shown by "insufficiency" or "delay," those terms do not describe separate causes of action.

The Auditor says that any claim of liability for refusing to turn over the McCormally/Belin emails is moot because he produced those emails in discovery after initially refusing to do so in response to the open-records request. The Auditor disregards that the Kirkwood Institute was forced to sue him to vindicate its rights and that after he answered the petition, he *still* denied that he needed to produce those emails App. 13 at ¶ 13. The Auditor contends that summary judgment was appropriate because the Kirkwood Institute did not amend its petition to add a "delay claim." Appellee Br. 33-34 (citing *Belin* v. *Reynolds*, 989 N.W.2d 166 (Iowa 2023)). That argument misunderstands the private right of action in section 22.10, misreads this Court's decision in *Belin*, and flat-out misses the fundamental principle that Iowa is a notice-pleading state.

The Auditor's argument is creative, but meritless. The Kirkwood Institute's claim here is not based on some common-law theory described with colloquial labels. It is a statutory private-right-of action defined by the terms of Iowa Code § 22.10. Nothing in this Court's *Belin*'s decision changes that.

Iowa Code § 22.10(2) provides that "a party seeking judicial enforcement of this chapter" must only "demonstrate[] to the court that the defendant is subject to the requirements of this chapter, that the records in question are government records, and that the defendant refused to make those government records available." Those are the specifics of what a plaintiff must prove *at trial*. And thus, at summary judgment, a defendant must show that there are no disputes of fact as to any of those issues and that, based on those undisputed facts, it is entitled to judgment as a matter of law.

The record here shows that the Auditor absolutely refused to turn over the email (he did so expressly and by implicitly by delay). App. 33 at ¶ 21. But the Auditor argues that, based on *Belin*, a plaintiff is required to plead a claim of insufficient production or of delay. Appellee Br. 33. And since the Kirkwood Institute did not amend its petition to plead a "delay claim," the Auditor argues that the Kirkwood Institute cannot continue to maintain an action for attorney's fees and fines for refusal to produce the McCormally/Belin emails. That is wrong.

First, the Auditor's quote from this Court's *Belin* decision is misleading. True, the Court described two types of claims—insufficient and delay—but that was not its interpretation of Iowa law. Instead, it was the Court's

description of how the plaintiffs had structured their legal contention that, under section 22.10, the defendants had "refused" to produce records by unreasonably delaying production. This is hardly a subtle point, the Court explained this in language the Auditor chose not to quote in his brief: "Speaking broadly, the *plaintiffs are pursuing* two kinds of claims…" *Belin*, 989 N.W.2d at 170 (emphasis added).

Belin does not divide Chapter 22 "claims" into two categories. Nor could it; section 22.10 has one private right of action, one based on "refusal" to produce governmental records. So, as the Court reiterated in *Belin*, "where (as here) it is clear that the plaintiffs have sought government records from defendants who are subject to the requirements of chapter 22, the only question is whether the defendants 'refused to make those government records available.'" *Id.* at 176-77 (citing Iowa Code § 22.10(2)).

To be sure, *Belin* held that there are multiple ways to prove such a refusal, delay being one of them. But at the pleading stage, the Kirkwood Institute simply had to put the Auditor on notice of the general claim: a refusal to produce records under section 22.10. Kirkwood Institute's petition is sufficient in that regard. *U.S. Bank* v. *Barbour*, 770 N.W.2d 350, 354 (Iowa 2009) (petition must contain factual allegations that give defendant fair notice of the claim asserted).

As for the summary judgment record, the issue of refused production (whether labeled as insufficient or delayed) was squarely presented and decided in the litigation of the cross motions for summary judgment. App. 161-

65. It is only on appeal that the Auditor comes up with his delay-not-insufficient argument.

The Auditor's abuse of *Belin* continues in his claim that if a plaintiff pursues an insufficiency claim the later production of the record renders his *case* moot. Appellee Br. 33. (citing *Belin*, 989 N.W.2d at 171) But this pin cite says simply that when the record has been turned over after litigation began, "any claims about *production* of those records are now moot." (emphasis original) The Auditor simply ignores the Court's statement *on the same page* that "[a]lthough mootness prevents the issuance of a court order *to produce* the already-produced records, 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." *Id.* (emphasis original) The Kirkwood Institute retains the right to return to district court to obtain the civil penalty[1], attorney fees, and court costs for the refusal to turn over the McCormally/Belin email chain. With these live issues to be litigated, the case isn't moot.

The Auditor claims the facts here are "markedly different" from *Belin*. True, the *Belin* plaintiffs were forced to argue that the delayed production of records amounted to an actionable refusal to produce. *Belin*, 989 N.W.2d at

[1] The appropriate civil penalty will likely be significant, given the Auditor's previously stated views about public officials who violate Chapter 22. William Morris, *After Iowa Supreme Court rebuke, Kim Reynolds settles open records lawsuits for $175,000*, DES MOINES REGISTER, June 21, 2023 (calling chapter 22 violation a "disgusting abuse of power" and suggesting maximum civil penalty should be imposed). The Kirkwood Institute presumes the Auditor will not claim that he should be held to a lesser standard.

172-74. But Kirkwood Institute knew that the Auditor had refused to produce the McCormally/Belin email chain because it was not within a set of documents that was purported to be a complete response to its request. The only difference between the two cases is that the wrongful refusal to produce the McCormally/Belin email chain was obvious from the filing of the petition. When this Court's holdings in *Belin* are correctly quoted, they show the Auditor's position lacks merit.

B. The Auditor's production of the McCormally/Belin email chain in discovery does not deprive Kirkwood Institute of standing.

In a single paragraph, the Auditor returns to a standing argument he made before the district court that cited *Klein* v. *Iowa Pub. Info. Bd.*, 968 N.W.2d 220 (Iowa 2021). Appellee Br. 34-35. As explained in its opening brief, the Kirkwood Institute did not lose standing to pursue an action under Chapter 22 after the McCormally/Belin email chain was produced in discovery. Appellant Br. 25-26. *Klein* is a case about the scope of judicial review under Chapter 17A, not the remedies available under Chapter 22. Because Kirkwood Institute still has a civil penalty, attorney fees, and court costs to obtain after the production of the email chain, it has standing to pursue this action.

C. The Auditor never argued on summary judgment that his delay in producing the records, after expressly refusing to do so, was reasonable.

Next, the Auditor claims that even if Kirkwood's claim is not moot, the Auditor has established—as a matter of law—that he did not "refuse" to produce the documents under Iowa Code § 22.10. Appellee Br. 35-36. Frivolous is a word that lawyers often overuse, but this argument is, in the original sense of the word, frivolous. To recap the undisputed facts:

The Kirkwood Institute requested from the Auditor all emails to or from him or his staff and Laura Belin at the email address of "desmoines-dem@bleedingheartland.com." App. 30-31 at ¶ 4. The Auditor's Chief of Staff, John McCormally, managed the Auditor's response to that records request but did not produce multiple emails that *he* had exchanged with Belin on his personal email account. App. 31-33 at ¶¶ 6-7, 17, 18, 20, 21. Those emails concerned a report that the Auditor's Office had issued on the Governor. App. 33 at ¶¶ 20, 21.

After four months went by, and the Auditor had purported to fully respond to the open-records request but did *not* produce the email chain between Belin and McCormally, the Kirkwood Institute brought this action. App. 4. The petition specifically called out *one* of the emails that McCormally had exchanged with Belin and had not produced, making clear to the Auditor and McCormally (in the event the email had somehow slipped his mind) that it was their obligation to produce a copy under Chapter 22. App. 8-9.

In response to this lawsuit, the *Des Moines Register* also asked for a copy of the emails and the Auditor denied that request as well, reinforcing that this email chain with Laura Belin, which was on McCormally's private email account, did not just somehow slip his or the Auditor's mind.[2] Rather than turning over those emails immediately after receiving the petition, the Auditor's Office called the Kirkwood Institute's counsel a "political hack" and once again *expressly* refused to produce the email. In his answer, the Auditor admitted "that the email [between McCormally and Belin] excerpted in the petition was not included in the document production request but den[ied] the implication it should have been included pursuant to Iowa Code chapter 22." App. 13 at ¶ 13. Not until 106 days after the lawsuit was filed and the Kirkwood Institute expended its resources did the Auditor finally change course and produce the emails. App. 33 at ¶ 21.

Multiple times in his brief, the Auditor claims that—under these facts—the district court correctly "found" or made a "finding" that the initial and continued outright refusal and then delay in producing the emails "was simply the result of the late discovery of the information." Appellee Br. 10, 21. But a district court cannot make "findings" on summary judgment, and even if such a finding were made after trial, it would be reversed even under the most

[2] *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. The *Register* article was also cited and quoted in the Kirkwood Institute's summary judgment briefing. See Kirkwood Institute Resistance to MSJ at 11 n.1.

deferential standard of review. It is, to put it bluntly, flat-out wrong to say that the Auditor produced the emails immediately when they were discovered. And it is wrong, factually and legally, to say that the Auditor did not, at any time, refuse to turn over the emails.

Knowing all of this, the Auditor asks this Court not to remand this case with instructions to grant the Kirkwood Institute's motion for summary judgment but to remand for "further record development." Appellee Br. 36-37. The Kirkwood Institute does not resist that request and, given the statements made in the Auditor's brief, welcomes the opportunity for that further factual development. After this Court's ruling against Governor Reynolds in *Belin*, the Auditor has made clear that he believes that "insiders" who skirt their duties under Chapter 22 have "no shame" and show a "disgusting abuse of power" if they are not "held responsible for it."[3] The Kirkwood Institute therefore welcomes the opportunity to explore further why the Auditor withheld these emails for so long and why he now claims that they were found because months later McCormally searched his private email "[i]n an abundance of caution." Appellee Br. 36.

[3] Video Recording posted by Auditor Sand on Twitter, at https://twitter.com/RobSandIA/status/1671588188052234243 at 0:30-38, 2:06-2:10.

D. The Auditor has never claimed or shown the McCormally/Belin email chain was not subject to the Kirkwood Institute's records request.

There is one more issue that the Auditor impliedly raises that requires addressing. The Auditor's brief repeatedly calls the McCormally/Belin email chain "personal," with the not-so-subtle implication being that it might not be a public record. Appellee Br. 20, 21, 23, 33-37. But after initially making this argument in the press and in his answer to the petition the Auditor never argued at summary judgment that the email chain was not a "public record" as defined in Iowa Code § 22.1(3). So this argument is not preserved. If the Auditor wants to make the claim that emails sent on personal accounts are not public records, even when they discuss government business, then he can do that in the next case.

The Auditor also impliedly denies that his office has the responsibility to search employee's personal email accounts. Appellee Br. 36. But that is also not an argument the Auditor raised below. And even so, consider the Iowa Public Information Board's advice on this question: "if a government official or employee uses privately owned electronic devices or services, such as cell phones, computers, email accounts, smart phones, or such to conduct official government business, then the record generated is a public record."[4] This advice tracks *City of Dubuque* v. *Telegraph Herald, Inc.*, 420 N.W.2d 450, 453

[4] Iowa Public Information Board, Chapter 22 Frequently Asked Questions, "If an email or other document is composed or stored on my personally-owned device, is it a public record?" https://ipib.iowa.gov/public-records/chapter-22-frequently-asked-questions <last visited July 31, 2023>.

(Iowa 1988), where the Court said the decision of whether documents are a public record within the meaning of Chapter 22 "does not turn on the physical location of the documents in question, rather, the appropriate inquiry is whether the documents are held by the [government] officials in their official capacity."

The Auditor says McCormally searched his personal email account for the McCormally/Belin email chain "[i]n an abundance of caution." Appellee Br. 36. This is a curious way to phrase it. McCormally presumably made the search because the petition *called him out for not turning the email over*. The Auditor's implication that the email was later produced out of some kind of additional and voluntary diligence on McCormally's part cannot be taken seriously. The McCormally/Belin email was produced because Auditor and his team were caught red handed. The Auditor's repeated use of the term "personal" is simply an attempted distraction from this point.

If the Auditor wants to make the claim that emails sent on personal accounts are not public records, even when they discuss government business, then he can do that in the next case. Because he has waived that argument here.

II. The Auditor does not have a blanket exception to Chapter 22 from the provision of section 11.42 that keeps confidential information learned "in the course of an audit or examination."

The Auditor takes an aggressive view of the scope of Iowa Code § 11.42's confidentiality for information learned "in the course of an audit or examination." The Auditor claims it covers any private citizen tip about misappropriation or misuse of public funds. Appellee Br. 23. Yet to the extent the Auditor claims that anything he does is an audit or examination, his argument is foreclosed by recent precedent. *Sand* v. *Doe*, 959 N.W.2d 99, 108-09 (Iowa 2021). And we must remember that section 11.42 requires the receipt of the information to occur temporally while the audit or examination is ongoing. The Auditor would have the Court read into the statute a confidentiality protection for information that *leads* the Auditor to *start* an audit or examination. But the Court is limited by what language the legislature used, not by speculating about what it might have said. *Chavez* v. *MS Tech. LLC*, 972 N.W.2d 662, 667 (Iowa 2022). The legislature used "in the course" of to delineate the confidentiality. That simply doesn't mean the same as "before" or "leading to."

The Auditor essentially claims that no private citizen tip could be kept confidential without section 11.42. But this argument is contradicted by the Auditor's invocation of Iowa Code § 22.7(18) to protect one additional email chain. It is this provision of Chapter 22 that would allow, in the appropriate circumstances, the Auditor to withhold a communication made in confidence that turns into a pending investigation. The Kirkwood Institute can accept in some

cases the government needs to protect an informer's tip. But those are covered by section 22.7(18), not by advancing the fiction that everything the Auditor does is an audit or examination.

Because the Auditor's claim about the scope of section 11.42 contradicts its text and the Court's precedent holding that not everything the Auditor does is an audit or examination, it lacks merit. The district court erred by failing to order disclosure of the nine email chains where the Auditor cited section 11.42 as the sole ground to withhold them.

III. The Auditor didn't meet his burden to show that Iowa Code § 22.7(18) exempted the tenth email chain from disclosure.

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.

One exception to confidentiality can occur when the tipster consents to the disclosure. Iowa Code § 22.7(18)(a). The Auditor rejects the idea that he had any duty to ask for consent here and cites as authority a public record case in which the Polk County Assessor would have had to contact *thousands* of individuals for consent. Appellee Br. 30 (citing *Ripperger* v. *Iowa Pub. Info. Bd.*, 967 N.W.2d 540, 553 (Iowa 2021)).

The Auditor mocks his duties under Chapter 22 with this argument. The Kirkwood Institute established its prima facia case to be entitled to disclosure of records. Because the Auditor asserts a confidentiality provision applies, it is his burden to prove it is so. Iowa Code § 22.10(2). The Auditor asserts a confidentiality provision that has a consent exception. He cannot make his showing unless he tried to get consent from the person who provided the information to him. Perhaps when thousands of individuals have made a request for confidential treatment of assessor records, as in *Ripperger*, the Court could look more broadly for evidence of consent. But it simply cannot be the case that the Auditor can meet his burden of proof here without trying to contact a *single* tipster.

The same analysis applies to the exception for when information can be redacted. Iowa Code § 22.7(18)(b). The Auditor made no showing that this couldn't work. Nor did he try to show the exception for disclosure of 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 the Auditor claims this provision applies, he faces a heightened burden to prove he is 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's argument is nothing more than his indignation that his word won't be accepted when he says the exception applies. But it is his burden to prove it so and he didn't even try.

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.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains **3,581** 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