

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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KIRKWOOD INSTITUTE, INC., Plaintiff, v.	No. _____
IOWA AUDITOR OF STATE ROB SAND, JOHN MCCORMALLY, and OFFICE OF THE AUDITOR OF STATE, Defendants.	PETITION

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**Parties, Jurisdiction, and Venue**

1. Plaintiff the Kirkwood Institute, Inc. is an Iowa nonprofit corporation. Its mission includes the promotion of constitutional governance and accountability in governmental institutions in the State of Iowa. It is a “person” for purposes of Iowa Code Chapter 22.

2. Defendant Iowa Auditor of State Rob Sand is an elected official who is the head of the Office of the State Auditor. Defendant John McCormally is the Chief of Staff in the Office of the State Auditor. All defendants are a “government body” that is the “lawful custodian” of records under the definitions and requirements of Iowa Code Chapter 22. Their principal place of business is located at the State Capitol Building, Des Moines, Polk County, Iowa.

3. The district court has the jurisdiction to hear an action to compel compliance with the requirements of Iowa Code Chapter 22. Iowa Code § 22.10.

4. Venue in Polk County is proper against a state official and a state department.

### **Factual Background**

5. On June 3, 2021, the Office of the State Auditor released a special investigation report into the “Step Up, Stop the Spread” media campaign implemented by Iowa Governor Kim Reynolds to encourage Iowans to take measures to prevent the spread of COVID-19. The auditor’s report alleged that the media campaign violated Iowa Code § 68A.405A, a statute that generally prohibits the expenditure of public resources to disseminate the likeness of a statewide elected official, because Governor Reynolds appeared in the campaign video.

6. Because the law cited by the state auditor has an express carve-out for expenditures related to the use of emergency powers (which the media campaign plainly was), the Kirkwood Institute decided to investigate the potential political overtones of the auditor’s special investigation report. The Kirkwood Institute was concerned by the fact that the report, which contained erroneous legal analysis, had been authored by a nonlawyer employee of the Office of State Auditor. The Kirkwood Institute noted that it appeared that a politically sympathetic blogger and a similarly aligned Associated Press reporter had picked up the auditor’s report and amplified its

erroneous legal conclusions.<sup>1</sup> These facts, combined with Auditor Rob Sand's open political opposition to Governor Reynolds, raised the real prospect that Auditor Sand had misused public resources to pursue private political gain.

7. To further its investigation of Auditor Sand's actions, the Kirkwood Institute submitted a request on June 16, 2021, to the Office of State Auditor 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](mailto:desmoinesdem@bleedingheartland.com)".
- All emails sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the phrase "[desmoinesdem@bleedingheartland.com](mailto: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](mailto: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](mailto:rjfoley@ap.org)".
- All emails and text messages sent to, sent from, or otherwise exchanged between any employee of the Auditor of State's office, including the Auditor, that contain the word "Foley".

8. The defendants, acting through McCormally, provided its response in two tranches. For both, they claimed that certain documents responsive to the request would be withheld. The defendants claimed two justifications for nondisclosure, the provisions of Iowa Code §§ 11.42 and 22.7(18). In a follow up communication,

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<sup>1</sup> Auditor Sand made a referral of the alleged ethics violation by the Governor to the Iowa Ethics and Campaign Disclosure Board, the administrative agency charged with enforcement of ethics rules for statewide elected officials (among other duties). The board unanimously voted to reject the complaint as lacking merit. See <https://www.desmoinesregister.com/story/news/politics/2021/08/12/kim-reynolds-didnt-violate-self-promotion-law-covid-face-mask-ads-auditor-rob-sand-iowa-ethics-board/8115605002/>

McCormally could not provide a specific number of withheld emails but estimated that “less than a dozen” email threads were excluded from production.

9. Sand has expressed his support for prohibiting Iowa government bodies, including his office, from charging fees for attorney review of document production under Iowa Code Chapter 22.

10. Despite these statements, the defendants charged plaintiff \$162.50 for attorney time spent on the review of their document production to the plaintiff.

11. Iowa Code § 11.42(1) grants confidentiality to “information received during the course of any audit or examination, including allegations of misconduct or noncompliance” and further provides that “all audit or examination work papers shall be maintained as confidential.”

12. Iowa Code § 22.7(18) allows a governmental body to withhold certain communications made to it by persons outside of government “to the extent that the 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.” The code section requires disclosure of allegations “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.” The code further provides “[i]n 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.”

13. The Kirkwood Institute is aware of at least one withheld communication which plainly does not meet the definitions contained in Iowa Code §§ 11.42 or 22.7(18). The website<sup>2</sup> for the blogger included in the records request made by the Kirkwood Institute reproduced an email from McCormally that was not included in the document production made in response to the request:

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<sup>2</sup> See <https://www.bleedingheartland.com/2021/06/03/a-failure-to-communicate/> (Archived at <https://perma.cc/XUG8-2NGC>).

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.

14. There is no set of circumstances where an auditor employee's communication doing damage control over a legally flawed report can be withheld under Iowa Code §§ 11.42 or 22.7(18). It is the law "that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others." Iowa Code § 22.8(3).

15. The grounds cited by the defendants to withhold production of the requested records call for the supervision of the Court to determine whether they truly apply or are merely raised to avoid the auditor's inconvenience and embarrassment. The defendants must prove to the Court's satisfaction that the withheld documents are either communications related to an audit or are genuinely made in confidence as provided by sections 11.42 and 22.7(18).

### **Cause of Action – Iowa Code Chapter 22**

16. Under the provisions of Iowa Code § 22.10, the Kirkwood Institute respectfully requests the Court order the following:

- a. that defendants must produce the withheld records;
- b. that the defendants be enjoined from further violations of Iowa Code Chapter 22, with violations of said injunction punishable by civil contempt proceedings;
- c. that the defendants pay a civil penalty for a knowing violation of their duties under Iowa Code Chapter 22 of not less than \$1,000 nor more than \$2,500;
- d. that because of the imposition of damages Sand will be removed from office if he violates the provisions of Iowa Code Chapter 22 again during his term; and
- e. that the defendants pay the Kirkwood Institute's reasonable attorney fees and the costs of this action.

Respectfully submitted,

/s/ Alan R. Ostergren

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