IPIB
Iowa Public Information Board

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Advisory Opinion 24AO:0010

DATE: September 19, 2024

SUBJECT: Clarification on the definition of "reasonable delay" as it pertains to the period of time for a record's custodian to determine the confidentiality of records

Kalen McCain
Washington Reporter
Southeast Iowa Union

Mr. McCain,

We are writing in response to your request dated July 29, 2024, requesting an advisory opinion from the Iowa Public Information Board (IPIB) pursuant to Iowa Code chapter 23 and Iowa Administrative Code rule 497-1.3. This opinion concerns clarification over the appropriate period of time for a "reasonable delay" under Iowa Code Chapter 22.8(4), and when a delay may be considered to be a "good-faith" delay under that same section. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "Any person may request a board advisory opinion construing or applying Iowa Code chapters 21, 22, and 23. An authorized agent may seek an opinion on behalf of any person. The board will not issue an opinion to an unauthorized third party. The board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

FACTS PRESENTED:

The Southeast Iowa Union (SEIU) made public records requests to the Henry County Sheriff's Office in separate emails regarding the following records held by the sheriff's office:

- A copy of any correspondence between any staff of the Henry County Sheriff's Office and any legal counsel besides the Henry County Attorney's Office, regarding Deputy Carlos Lopez and any Brady-Giglio list maintained by any prosecuting agency. This request only applies to correspondence that happened between Nov. 1, 2022 and the date this request is fulfilled. (Copy of this request attached)
- A copy of any correspondence between any staff and of the Henry County Sheriff's Office and any staff of the Henry County Attorney's Office, regarding Deputy Carlos Lopez and his potential placement on a Brady-Giglio list, or regarding the hire of outside legal counsel related to Deputy Carlos Lopez' placement on a Brady-Giglio list … on or after Nov. 1, 2022. (copy of this request attached)

Henry County Sheriff Rich McNamee is the lawful custodian of the requested records. By July 15, McNamee reached out stating he needed extra time to check whether he could provide the requested records. McNamee said that, because of a disagreement between the county sheriff's office and attorney's office, the typical practice of consulting the attorney's office "will not work," a factor that had slowed down the provision of the requested records.

The Henry County Sheriff's Office has stated verbally that it is uneasy about consulting the Henry County Attorney's Office in matters related to the county's Brady-Giglio list, since the sheriff's office believes that the attorney's office has a conflict of interest in the matter.

SEIU's provided notice the records had been mailed in an email by a third-party attorney on August 6, approximately 60 days after the initial request.

QUESTIONS POSED:

1. What constitutes a "reasonable delay" for a record's custodian to determine if a record is public or confidential under Iowa Code Chapter 22.8(4)(c) and whether a confidential record should be available for inspection and copying under Iowa Code Chapter 22.8(4)(d)?
2. Does the refusal to consult an attorney due to an internal dispute constitute a "good-faith" delay under Iowa Code Chapter 22.8(4)?

OPINION:

I. *What constitutes a "reasonable delay" for a record's custodian to determine if a record is public or confidential under Iowa Code Chapter 22.8(4)(c), and whether a confidential record should be available for inspection and copying under Iowa Code Chapter 22.8(4)(d)?*

The central issue involved in both of these questions, which the Iowa Supreme Court addressed in *Belin v. Reynolds*, 989 N.W.2d 166 (Iowa 2023), is how to determine whether a delay is reasonable based on the specific facts presented or whether the government body has essentially refused to provide the requested records — either explicitly or implicitly through an unreasonable delay.

In *Belin*, the Iowa Supreme Court applied the three-part test laid out in Chapter 22.10(2).

(1) Is the defendant "subject to the requirements of" chapter 22, i.e. is it a government body?
(2) Did the plaintiff ask for "government records"?
(3) Has "the defendant refused to make those government records available" for the plaintiff?

In situations in which the first two questions are clearly met, such as in this instance, the question to consider is whether the government body has refused to make the records available. A "defendant may 'refuse' either by (1) stating that it won't produce records [(explicit refusal)], or (2) showing that it won't produce records [(implied refusal)]." *Belin*, 989 N.W.2d at 174. Implied refusal "can be shown through an unreasonable delay in producing records." *Id.* The reasonability of a delay under Chapter 22.10(2)(3) may be determined by the following factors:

(1) how promptly the defendant acknowledged the plaintiff's requests and follow-up inquiries

(2) whether the defendant assured the plaintiff of the defendant's intent to provide the requested records

(3) whether the defendant explained why requested records weren't immediately available (e.g., what searches needed to be performed or what other obstacles needed to be overcome)

(4) whether the defendant produced records as they became available (sometimes called "rolling production")

(5) whether the defendant updated the plaintiff on efforts to obtain and produce records

(6) whether the defendant provided information about when records could be expected.

Belin, 989 N.W.2d at 175.

These inquiries are highly fact-specific, and should be viewed more as balancing factors than bright line rules. Neither in *Belin* nor in its successor case, *Kirkwood Inst. Inc. v. Sand*, 6 N.W.3d 1 (Iowa 2024), did the Court define any sort of maximum limit for the period of time which would constitute a reasonable delay, and a delay that may be reasonable for one type of request may be unreasonable for another.

In *Belin*, the Court remanded the matter for consideration of whether extensive delays in providing the requested records extending into after the suit was brought was an unreasonable delay. 989 N.W.2d at 167. Similarly, in *Kirkwood* the State Auditor's Office did not produce at least some of the records the plaintiff had requested for 216 days after the initial request. The Court remanded that case to determine whether the delay was reasonable. *Kirkwood*, 6 N.W.3d at 10. "[W]hether a party's conduct is reasonable," we have said, "is usually a fact question." *Id.* (quoting *Knake v. King*, 492 N.W.2d 416, 417 (Iowa 1992) (per curiam)).

There have not yet been additional published cases interpreting these factors, so the following are some ways that these will likely to be reviewed and considered.

How promptly the defendant acknowledged the plaintiff's requests and follow-up inquiries

Best practices are to "promptly acknowledge" the receipt of a records request, but what is considered "promptly" has always been based on the facts existing at the time the request is made.

For instance, in some government bodies, the custodian is not a full-time employee and may be the only person available to receive the requests. Whether a request was promptly acknowledged in that type of situation would depend on the work schedule and availability of the custodian. In other instances, acknowledging receipt of the request would be considered promptly if it occurred within a couple days of receipt, because there is a full-time custodian immediately available to receive and respond.

In other instances, the county attorney may be embroiled in an extensive multi-day trial that is consuming the time and attention of the office. The expectation that the request be promptly acknowledged in that situation would likely not be until after the trial had completed and the attorney could return to the office and catch up on administrative tasks.

Whether the defendant assured the plaintiff of the defendant's intent to provide the requested records

Showing an intent to provide the requested records would include considering such things as communications by the custodian to the requestor establishing an estimate for when the records may be available or the custodian providing an estimate regarding the cost of retrieval and copying the records, and communications seeking clarification of the request.

Whether the defendant explained why requested records weren't immediately available (e.g., what searches needed to be performed or what other obstacles needed to be overcome)

The Court has repeatedly refused to provide a specific timeframe for when requests must be produced because the variety and scope of requests is as vast as the type of government body subject to the requirements of Iowa Code Chapter 22. For simple requests, generally, there should be limited delay in producing the records by the custodian. For more complex or broad requests, however, retrieval and production could take time. Ongoing communications with the requestor regarding the process as well as providing to the requestor an explanation as to why the timeframe is necessary based on the location of the records, search required, etc. can help establish the reasonableness of the delay in producing the records. It establishes efforts are being made to locate and retrieve the records and that the government body is actively working to respond to the request.

Whether the defendant produced records as they became available (sometimes called "rolling production")

In *Horsfield Materials, Inc. v. City of Dyersville*, the court found troubling a situation in which trouble providing video recordings by the government body held up the production of other requested documents. 834 N.W.2d 444, 462 (Iowa 2013). Providing documents on a rolling basis can help establish facts showing good-faith efforts to comply with the record request. Communicating with the requestor regarding whether they prefer receipt of records as they are available is also important. This allows them to decide whether to receive records as available and the added documentation necessary by both parties to ensure they track what has been produced and what is still pending. If the requestor wants all the records at one time, they have chosen to wait based on an estimate of when the documents will be produced.

Whether the defendant updated the plaintiff on efforts to obtain and produce records

Further, ongoing communications with the requestor regarding the request and addressing any outstanding issues that arise also helps establish good-faith reasonable efforts to comply with the request. It is not unusual that issues may arise in responding to a request. Working with the requestor to address these issues sooner rather than later can reduce delays and helps both parties stay aligned on the timeframe and any additional costs involved in the production of the documents.

II. Does the refusal to consult an attorney due to an internal dispute constitute a "good-faith" delay under Iowa Code Chapter 22.8(4)?

"Good faith, reasonable delay by a lawful custodian in permitting the examination of a government record is not a violation of this chapter [….]" The facts provided establish the potential for a conflict of interest between the county attorney's office and the Sheriff's office. Whether a conflict does in fact exist is beyond the jurisdiction of IPIB.

Without delving too deeply into the facts presented and merely examining the question posed on its face, it is clear that, in general, if an internal dispute or conflict between a government entity and their legal counsel arises, a government entity may need to seek outside representation to comply with a records request. It is also clear that the process of locating and acquiring outside legal representation may take some time. Therefore, this may lead to reasonable delays in obtaining legal advice regarding the confidentiality of records under Iowa Code § 22.7.

As *Belin* establishes, however, informing the requester of the need to retain outside representation and that this is causing a delay is important in helping determine whether the delay is reasonable. Government bodies certainly may have good faith reasons for retaining third-party representation when the conflict arises from the documents requested and potentially whether the documents could be confidential.

Further, the government body must take steps to respond to the request and to take necessary steps to retrieve the requested documents and produce all of the non-confidential documents to the requestor within a reasonable timeframe.

BY DIRECTION AND VOTE OF THE BOARD:

Joan Corbin
E. J. Giovannetti
Barry Lindahl
Joel McCrea
Monica McHugh
Luke Martz
Jackie Schmillen

SUBMITTED BY:

Erik Johnson, Legal Intern, and Erika Eckley, Executive Director

ISSUED ON:

September 19, 2024

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.