

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

IN THE MATTER OF:

RANDY RIPPERGER

Polk County Assessor
111 Court Avenue, Room 195
Des Moines, Iowa 50309

Respondent.

DIA No. 18IPIB0001

IPIB No. 17FC:0029

PROPOSED DECISION

STATEMENT OF THE CASE

The Iowa Public Information Board (“Board”) filed an order finding probable cause on January 18, 2018 that determined the Polk County Assessor, Randy Ripperger, violated the Open Records Act. Thereafter the Board, through its designated prosecutor, filed a Petition and Statement of Charges against Ripperger. The Board also issued an order on April 19, 2018 designating an administrative law judge with the Department of Inspections and Appeals as the presiding officer for this matter.

This matter came on for hearing at the Wallace State Office Building in Des Moines, Iowa on March 29, 2019 before Administrative Law Judge Kristine M. Dreckman. The Board’s designated prosecutor, Amanda Adams, appeared on behalf of the Board. Randy Ripperger appeared with counsel, Assistant Polk County Attorney Megan Gavin.

THE RECORD

The record includes the testimony of Clark Kauffman, Margaret Johnson, Sergeant Paul Parizek, former Justice Michael Streit, Randy Ripperger, Dr. Heidi Warner, and Jeff Noble. Additionally, exhibits marked A through H were admitted as evidence. The record also includes a binder of relevant statutes, rules and court opinions. Following the hearing, the record was held open to allow the parties to submit post-hearing briefs. Those briefs were timely submitted and also included in the record.

FINDINGS OF FACT

Randy Ripperger is the Polk County Assessor. As the county assessor, he is charged with listing and assessing all real property within the county for purposes of taxes.¹ Property owners are required by law to assist the county assessor in making out a list of his or her real property.² It is undisputed that the property records maintained by the assessor's office are public.³ Anyone may search the records in-person at the assessor's office. The office of the Polk County Assessor ("the assessor's office" or "the office") also maintains a website where individuals may search the records online by entering a property owner's name or address. (Ripperger Testimony; Exhibits A, C).

There was some concern from the public regarding the ease in which the website allows anyone access to residents' home addresses. Therefore, the office honors requests from property owners to "opt-out" of their information being searchable on the website by using their names, explaining as follows:

In order to address the concerns of those who do not want us to make it that easy for someone to find where they live, we have decided to disable the name search capability for an individual upon written request. These requests will be considered confidential. The names of the owners will remain on the property record but simply will not appear in an attempt to search the files by name. Those who wish to avail themselves of this option are reminded that there are several private search services that can be utilized to locate individuals...The requests must be signed and made in writing.

A property owner is only allowed to opt-out of the name search function on the website. Once a property owner's name is removed from the search function of the website, his or her records are still accessible by name by searching the records in-person at the office. (Ripperger Testimony; Exhibits A, C).

Although the assessor's website stated the opt-out requests must be submitted in writing and signed, its office routinely accepts verbal requests, either in-person or over the telephone. The office does not keep copies of any written requests that have been submitted. It also does not maintain records regarding how a particular request was made or who communicated said request. Although the office does not maintain a list of property owners who have been removed from the name search function on the website, that information is obtainable through electronic data sources. (Ripperger Testimony; Kauffman Testimony; Exhibits A, C).

Previously, the assessor's office considered the names of those who had opted-out of the website's name search function to be a matter of public record. Sometime in 2000, the office made the list of names available to a Des Moines Register reporter. The reporter, in turn, published a newspaper article regarding the opt-out requests and listed several property owners who had been removed from the name search function of the website. Following the article, the

¹ Iowa Code §§ 441.17(2); 441.19.

² Iowa Code § 441.19(1).

³ See Iowa Code § 22.1(3)(defining "public records").

office received a number of calls from concerned property owners who had previously opted-out of the name search function, and no longer wished to do so out of fear their names would also be published in the newspaper. (Ripperger Testimony; Exhibit A).

On March 27, 2017, Ripperger met with Clark Kauffman, a Des Moines Register reporter at the time, regarding the opt-out option for website's name search function. Following their meeting, Ripperger emailed Kauffman the following message:

Regarding our meeting this afternoon, I need to correct something I said about our disabling the name search function. ... If someone tries to search for that name on our website, they would not get any results from that search. We just disable the name search function for that name and parcel on the internet. And we do not redact the name on our website. Sorry for the confusion.

I will have the number of people on the disable list for you by tomorrow.

(Exhibit A).

Thereafter, on March 28, 2017, Ripperger sent a follow up email to Kauffman as follows:

The number of people on our name search disable list is 2,166 (I wasn't even close to this).

In response, Kauffman wrote:

Thanks, Randy.
Could I stop over sometime next week and look at the list of 2,166 property owners and/or their written requests (whichever is easier for you to produce)?

(Exhibit A).

The following day, Ripperger denied Kauffman's request to inspect said records, stating:

We started this policy, we believe, in 2002 and throughout this time, we have told those who made the requests that their requests would be confidential. We even stated this on our website and it is still there today even though you have to look hard for it on our legacy site:

<http://www.assess.co.polk.ia.us/web/info/aboutus/welcome.html>

See the next to the last paragraph in the above link.

I have to honor the commitment we have made to these people. And I believe those requests should be kept confidential under Iowa Code section 22.7(18).

...

So that's where I am at on your request. If you want to discuss this further, feel free to call me at 515-286-3158.

Kauffman then replied to Ripperger's decision, stating:

One more thing: This policy of not disclosing the requests represents a change from past practice. Here's a story we wrote in 2000 based on the county's disclosure of the 490 names then on the list, back when the assessor considered those requests to public information. At that time, the county also gave out property information over the telephone even if the owner had his or her name scrubbed from the search engine.

Along with his reply, Kauffman attached the Des Moines Register article published in 2000 regarding the controversy over the website's option to remove a property owner's name from the search function. (Exhibit A).

On April 6, 2017, Kauffman forwarded the relevant email string to the Board's executive director, Margaret Johnson, and submitted his complaint as follows:

On March 28, I asked the Polk County Assessor's Office for the list of 2,166 owners who had filed written requests with the county asking that their names be pulled from the assessor's website search engine. I was refused access, with the assessor pointing out that it had promised the requestors their names would be kept confidential—despite the fact that state law, not office policy, determines what is a public record in Iowa, and despite the fact that these written requests are, by county policy, required of anyone wanting their names pulled from the search engine.

(Exhibit A).

Sometime after that, the Board, Johnson, Ripperger, and an assistant Polk County Attorney met and discussed the allegations contained within Kauffman's complaint. They further discussed potential resolutions to the complaint. (Johnson Testimony; Ripperger's Testimony; Exhibits F-G).

Johnson issued a revised probable cause report on January 12, 2018. Based upon that report, the Board entered an order on January 18, 2018 finding there was probable cause to believe Ripperger violated the Open Records Act and directed a designated prosecutor to issue a statement of charges to initiate a contested case hearing. (Exhibits C-D).

At hearing, several Polk County residents testified regarding their participation in the website's opt-out option. A sergeant with the Des Moines Police Department, a former Supreme Court justice, a psychologist, and an Assistant Polk County Attorney testified that the request to opt-out of the name search function was made out of concern for their safety. Some of the individuals made the request themselves, while in other cases, a family member or other individual did it for

them. Many believed that publicizing their names among those who had opted-out of the search function would call attention to them and further jeopardize their safety. (Noble Testimony; Ripperger Testimony; Warner Testimony; Streit Testimony; Parizek Testimony).

CONCLUSIONS OF LAW AND ANALYSIS

Background

The general assembly, in a decision to open Iowa's public record, enacted the Open Records Act ("the Act"), which is also known as the Iowa Freedom of Information Act, found in Iowa Code chapter 22.⁴ The purpose of the Act is "to open the doors of the government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act."⁵ There is a presumption in favor of disclosure, with a liberal policy in favor of access to public records.⁶ "Disclosure is the rule, and the one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability."⁷

Additionally, the legislature created the Iowa Public Information Board ("Board") to provide a means outside of litigation through district court by which to secure compliance with and enforcement of the requirements of the Act.⁸ The legislature conferred the Board broad duties, including receiving and investigating complaints, and deciding after such an investigation whether there is probable cause to believe a violation of the Act has occurred.⁹

Complaint/Probable Cause Procedure

At the onset of this matter, Ripperger argues that the Board failed to conduct an appropriate investigation as required by law, and accordingly, failed to establish probable cause that a violation of Iowa Code chapter 22 occurred.

Any aggrieved person may file a complaint with the Board to seek enforcement of the Act.¹⁰ Upon receipt of a complaint, the Board shall determine whether the complaint falls within its jurisdiction and could have merit.¹¹ After a complaint is accepted, the Board is required to work with the parties to reach an informal, expeditious resolution.¹² If no resolution is reached, then the Board is required to initiate a formal investigation concerning the facts and circumstances set forth in the complaint.¹³ After conducting "an appropriate investigation," the Board is required

⁴ Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 229 (Iowa 2019) (citing City of Riverdale v. Diercks, 806 N.W.2d 643, 645 (Iowa 2011); ACLU of Iowa, Inc. v. Atlantic Comm. School Dist., 818 N.W.2d 231, 232 (Iowa 2012)).

⁵ Diercks, 806 N.W.2d at 652.

⁶ Mitchell, 926 N.W.2d at 229 (citing Hall v. Broadlawns Med. Ctr., 811 N.W.2d 478, 485 (Iowa 2012)).

⁷ *Id.* (quoting Diercks, 806 N.W.2d at 652).

⁸ Iowa Code § 23.1.

⁹ Iowa Code § 23.6(4).

¹⁰ Iowa Code § 23.5(1).

¹¹ Iowa Code § 23.8; 497 Iowa Administrative Code (IAC) 2.1(2).

¹² Iowa Code § 23.9; 497 IAC 2.2(1).

¹³ Iowa Code § 23.10(1).

to make a determination as to whether the complaint is within the Board's jurisdiction and whether there is probable cause to believe that the facts and circumstances alleged in the complaint constitute a violation of Iowa Code chapter 22.¹⁴ The standard for an "appropriate investigation" or probable cause is not provided for in Iowa Code chapter 23. The common definition of an appropriate investigation is one that is "suitable or proper in the circumstances."¹⁵ Per regulation, the Board's investigation *may* include the issuance of subpoenas to produce certain documents, as well as requiring the attendance and testimony of witnesses.¹⁶ "Probable cause" is often defined as "a reasonable belief in the existence of fact on which a claim is based and in the legal validity of the claim itself."¹⁷

Candidly, in light of the evidence entered into this record, it does not appear that the facts relevant to the issue in this case warranted a lengthy or complicated investigation. Accordingly, Ripperger's argument on this issue is without merit.

Disqualification

Ripperger additionally asserts that certain members of the Board must be disqualified as the presiding officers because of a certain conversation that occurred on November 15, 2018 between the Board members and Executive Director Margaret Johnson that he maintains amounted to *ex parte* communications.

The applicable regulations provide that the Board, or one or more members of the Board, acts as the presiding officer in a contested case proceeding.¹⁸ The Board may designate that the presiding officer assigned to render a proposed decision be an administrative law judge employed by the Department of Inspections and Appeals.¹⁹ All rulings by an administrative law judge acting as presiding officer are subject to appeal to the board, and a party must seek any available intra-agency appeal in order to exhaust adequate administrative remedies.²⁰ The Board, when reviewing a proposed decision upon intra-agency appeal, shall have the powers of and shall comply with the applicable rules which apply to presiding officers.²¹

The Board designated the undersigned administrative law judge as the presiding officer in this case via an order issued on April 19, 2018. The Board is not the presiding officer at this juncture in the contested case proceeding, and the undersigned has no authority to disqualify a member of the Board for any future review or appeal.

Iowa Code Section 22.2(1)

¹⁴ *Id.*; 497 IAC 2.2(4).

¹⁵ "Appropriate," Merriam-Webster.com (last viewed July 16, 2019).

¹⁶ 497 IAC 2.2(2).

¹⁷ "Probable Cause," Black's Law Dictionary (11th ed. 2019).

¹⁸ 497 IAC 4.2.

¹⁹ 497 IAC 4.5.

²⁰ 497 IAC 4.5(5).

²¹ 497 IAC 4.5(6).

The Act generally requires every person to “have the right to examine and copy a public record and to publish or otherwise disseminate a public record of the information contained in the public record.”²²

Public records is defined to include all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation, or political subdivision.²³

In this case, the Board alleged that Ripperger violated the Act by refusing Clark Kauffman’s request to examine a public record. There is no dispute that a county assessor is subject to the provisions of the Act.

Ripperger argues that no violation occurred, because his office did not possess records responsive to his request. In support of his argument, Ripperger points to the specific language used in Kauffman’s complaint filed with the Board:

On March 28, I asked the Polk County Assessor’s Office for the list of 2,166 property owners who had filed written requests with the county asking that their names be pulled from the assessor’s web site search engine. (Exhibit B).

According to Ripperger, Kauffman’s request was to inspect a list of individuals who made the request, and not a list of the property owners that were removed from the search function themselves. As the testimony at hearing demonstrated, sometimes third parties made a request on the property owner’s behalf to remove his or her name from the search function. Therefore, pursuant to Ripperger’s argument, because the office did not keep records regarding the individuals who actually made the request on the property owner’s behalf, there was nothing for Kauffman to inspect.

Ripperger is correct in that the language used in Kauffman’s complaint identifies the records in controversy as “the list of ... property owners who had filed written requests.” The actual request made by Kauffman, however, must be reviewed in context of the parties’ entire email exchange. That exchange starts, in relevant part, by Ripperger informing him that “[t]he number of people on our name search disable list is 2,166.” Kauffman then responds, “Could I stop over sometime next week and look at the list of 2,166 property owners and/or their written requests (whichever is easier for you to produce)?” (Exhibit A).

Reviewing the entirety of the exchange, it is evident both parties understood Kauffman’s request to be the list of property owners who were removed from the name search function on the assessor’s website *and/or* their written requests to be removed from that function of the website. Ripperger maintains that his office did not keep copies of any such written requests, and that appears to be undisputed by the Board.

While the evidence supports the conclusion that Ripperger does not have copies of said written requests, the real record in controversy in this case is “the list”: the names of property owners

²² Iowa Code § 22.2(1).

²³ Iowa Code § 22.1(3).

that were removed from the website's search function. The undersigned concludes that Ripperger had access to that information.

This conclusion is also supported by Ripperger's response to Kauffman's request. At that time, Ripperger did not inform Kauffman the records did not exist, but rather that he declined to make them available because "those requests should be kept confidential under Iowa Code section 22.7(18)."

Iowa Code Section 22.7(18)

Alternatively, Ripperger argues that the records responsive to Kauffman's request were confidential pursuant to statute. The Act does list specific categories of records that must be kept confidential by those responsible for keeping records, and are thus exempt from the public disclosure.²⁴ Currently, there are approximately 70 categories of records that are exempt from disclosure.²⁵ The confidentiality exemptions are to be construed narrowly.²⁶ Nevertheless, where the legislature has used broadly inclusive language in the exception, the narrow-construction rule is not mechanically applied.²⁷ It is the burden of the governmental body claiming an exemption to prove a public record is exempt from disclosure.²⁸

The claimed exemption at issue in this case is found in Iowa Code section 22.7(18) and is recited as follows:

The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:

...

18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees 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. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communication with a government body with whom an arrangement for compensation exists.

Notwithstanding this provision:

²⁴ Iowa Code § 22.7.

²⁵ *Id.*

²⁶ *ACLU of Iowa, Inc.*, 818 N.W.2d at 233 (citing *DeLaMater v. Marion Civil Serv. Comm'n*, 554 N.W.2d 875, 878 (Iowa 1996)).

²⁷ *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 897 (Iowa 1988).

²⁸ See *Diercks v. Malin*, 894 N.W.2d 12, 23 (Iowa 2016) (stating "[O]ur courts have consistently held the burden of proving a public record is exempt from disclosure or production is on the governmental body claiming the exemption.").

- a. The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.
- b. Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity of the person outside of government making it or enabling others to ascertain the identity of that person.
- c. Information contained in the communication is a public record to the extent that it indicates the date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except the extent that its disclosure plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person. 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.

At the most basic level, to qualify for this exemption the record at issue must be a “communication.” As previously discussed herein, there is a distinction between the actual request made to remove a property owner’s name from the search function of the website and the name of a property owner who was removed from the search function as a result of the request. While the former is most certainly a communication, the latter is not. Because said records do not constitute communication, they do not fall under the cited exemption and are therefore subject to disclosure under the Act.

Sanction

Once it is determined that a government body has violated the Act, the Board, or in this case, the undersigned administrative law judge assigned to act as presiding officer for the Board, may issue an appropriate order to ensure enforcement of the Act, including but not limited to an order requiring specified action or prohibiting specified action and any appropriate order to remedy any failure of the government body to observe any provision of the Act.²⁹ The Board may also require the government body to undertake appropriate remedial action or require it to pay damages as authorized by statute.³⁰

In considering the testimony of the parties and other evidence in the administrative record, the undersigned determines that the most appropriate resolution is an order prohibiting Ripperger

²⁹ Iowa Code § 23.10(3)(a).

³⁰ Iowa Code § 23.10(3)(b).

and the Office of the Polk County Assessor from preventing the inspection or publication of the names of property owners that have been removed from the name search function of its website.

ORDER

Respondent, Randy Ripperger, failed to allow a member of the public to examine and copy a public record in violation of Iowa Code section 22.2. Respondent is ordered to cease and desist from the practice that resulted in the violation.

Dated this 19th day of July, 2019.



Kristine M. Dreckman
Administrative Law Judge

cc: Randy Ripperger (mail); Meghan Gavin (mail and email); Amanda Adams (email); Margaret Johnson (email); Clark Kauffman (mail); Julie Bussanmas (email); Braedi Gloschen (email).

APPEAL RIGHTS

Pursuant to 497 Iowa Administrative Code 4.26, any party adversely affected by this proposed decision may appeal to the board within 30 days after its issuance. The Board may also initiate a review of this proposed decision on its own motion at any time within 30 days following its issuance.

An appeal of a proposed decision is initiated by filing a timely notice of appeal with the Board. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. The notice shall specify: 1) the parties initiating the appeal; 2) the proposed decision or order appeal from; 3) the specific findings or conclusions to which exception is taken and any other exceptions to the decision or order; 4) the relief sought; and 5) the grounds for relief. Additionally, any request to present additional evidence must be filed with the notice of appeal.