BEFORE THE IOWA PUBLIC INFORMATION BOARD

IN THE MATTER OF:	)	14 FC:0021
	)	
Larry Brock, Washington County Attorney	)	
PO Box 841	)	FINAL ORDER
222 West Main Street	)	OF THE BOARD
Washington, IA 52353	)	
	)	
Respondent	)	

FILED
OCT 16 2014
IOWA PUBLIC INFORMATION BOARD

On September 8, 2014, an administrative law judge entered a Proposed Decision, which found that Respondent Larry Brock knowingly participated in a violation of Iowa Code section 22.2 and imposed the minimum statutory penalty of $1,000.00. At its meeting on September 18, 2014, the Iowa Public Information Board voted to accept the Proposed Decision. Neither party has filed a timely appeal from the Proposed Decision, as permitted by the Board's rules. *See* 497 IAC 4.26. On October 16, 2014, the Board met and approved entry of this Final Order.

ORDER

IT IS THEREFORE ORDERED that the Proposed Decision entered on September 8, 2014 is hereby AFFIRMED and ADOPTED as the Board's Final Order in this matter.

Dated this 16th day of October, 2014.

Robert Andeweg, Chairperson
Iowa Public Information Board

CC: Larry J. Brock, Washington County Courthouse, PO Box 841, Washington, IA 52353

Keith Luchtel, Executive Director, Iowa Public Information Board, Wallace Building, Third Floor, 502 East 9th Street, Des Moines, IA 50319

BEFORE THE IOWA PUBLIC INFORMATION BOARD

IN THE MATTER OF:	)	14 FC: 0021
	)	
Larry Brock, Washington County Attorney	)	
PO Box 841, 222 West Main St	)	PROPOSED DECISION
Washington, IA 52353	)	
	)	
Respondent	)	

STATEMENT OF THE CASE

On May 30, 2014, a Petition was filed charging Washington County Attorney Larry Brock with violating Iowa Code section 22.2 by failing to respond to a public records request that was made on March 3, 2014. A hearing was initially scheduled by the Iowa Public Information Board (IPIB) for July 10, 2014. On June 19, 2014, Respondent filed an Answer to Petition and a Request for Continuance of Hearing. The IPIB continued the hearing to August 21, 2014.

On August 4, 2014, Respondent filed a Request for Disqualification of Presiding Officer and a Request for Administrative Law Judge to Hear and Decide Petition. Keith Luchtel (Executive Director for the IPIB Acting as Prosecuting Attorney for the Petition) filed a Resistance for Disqualification and a Response to Request for Administrative Law Judge. On August 7, 2014, Respondent and Mr. Luchtel entered into a Stipulation, in which they agreed that Respondent was entitled to have the Petition heard by an administrative law judge employed by the Iowa Department of Inspections. The parties further agreed that the matter of the disqualification of the members of the IPIB should be held in abeyance and preserved until after a proposed decision is issued. On August 12, 2014, the IPIB issued a Ruling Granting Respondent's Request for an ALJ to Hear and Decide Petition.

The hearing was held before the undersigned administrative law judge on August 21, 2014 at 12:00 p.m. Keith Luchtel appeared as Prosecuting Attorney for the Petition. Respondent appeared and was self-represented. The hearing was open to the public and was digitally recorded.

THE RECORD

The record includes the Petition, Notice of Hearing; Answer to Petition and Request for Continuance; Amended Notice of Hearing; Order of Continuance; Respondent's Request for Disqualification of Presiding Officer and Request for Administrative Law Judge to Hear and Decide Petition; Resistance for Disqualification and Response to Request for Administrative Law Judge; Board Ruling Granting Respondent's Request for an ALJ to Hear and Decide Petition; Petitioner's Witness and Exhibit List; Petitioner's Hearing Memorandum; Respondent's written Objection to Petitioner's Exhibits 3, 4, 5, 6, 7, and 8 and Respondent's Hearing Memorandum. The evidentiary record includes Petitioner's Exhibits 1-11, Respondent Exhibit A, and the testimony of Margaret Johnson and Respondent Larry Brock. All of the objections to the Petitioner's Exhibits were overruled.[1]

FINDINGS OF FACT

Larry Brock (hereinafter, "Respondent) was elected to the office of Washington County Attorney on January 1, 2011. Following his election, Respondent attended some of the four day training for county attorneys that was presented in Des Moines. Respondent was unable to attend the training session on open meetings and open records because he became ill, but he did receive the written materials on these topics and did review them. (Respondent testimony)

In his position as Washington County Attorney, Respondent is responsible for the prosecution of all criminal and juvenile cases in the county and for providing legal advice and opinions to the Washington County elected officials and departments. This includes providing legal advice and assistance to: the Board of Supervisors; the offices of the Auditor, Treasurer, Recorder and Assessor; the departments of Engineering, Planning and Zoning, Environmental Health, Public Health, and Mental Health and Services; and the Washington County Conservation Board (hereinafter, "WCCB").

---

[1] Respondent cited 497 IAC 2.2(1)(a) as his legal basis for his objections to Exhibits 3-8. Respondent argued that these emails constituted "statements made in the course of discussions undertaken to attempt to reach an informal, expeditious resolution" and therefore were inadmissible in the contested case proceedings. Respondent's objections were overruled because the communications in these emails are not the types of statements targeted by the clear intent of subrule 2.2(1)(a). These exhibits included only one email from Respondent, which only stated that he was out of the office preparing for trial and was still researching the appropriate response to the records request, including whether the documents were covered by the attorney-client privilege. The rest of the emails were sent by IPIB Deputy Executive Director Margaret Johnson to Respondent and did not include any discussion or offer of settlement.

There is one assistant county attorney who assists Respondent in performing the duties of his office. (Respondent testimony)

On March 3, 2014, Robert Bellmer submitted a written public records request to Respondent, which included the following:

> ...As the employee discussed in the January 17 and 27 meetings, I would like the tape recordings in which I was discussed, as provided by the Iowa Public Records Law. I would also like copies of all correspondence (including emails) between members of the Washington County Conservation Board, as well as with/between the Washington County attorney and Conservation Director Steve Anderson, from November 1, 2013 through March 1, 2014...[2]

(Exhibit 1)

Mr. Bellmer's written records request cited to Iowa Code section 22.8 and asserted that this provision states that a reasonable delay in responding to the records request shall not exceed 20 calendar days and ordinarily should not exceed 10 calendar days. Mr. Bellmer requested advance notification of any fee for fulfilling the request. Mr. Bellmer's request further indicated that Margaret Johnson, attorney for the IPIB, had stated to him that the records were open to Mr. Bellmer under the Iowa Public Records Law. [3] (Exhibit 1)

Robert Bellmer was formerly employed as a park ranger by the Washington County Conservation Board (WCCB). The WCCB had placed Mr. Bellmer on paid administrative leave on December 31, 2013 and then terminated his employment as a park ranger on January 27, 2014. (Respondent testimony)

On March 20, 2014, Robert Bellmer sent Respondent an email stating that he had not received any of the information that he requested on March 3, 2014. In this email, Mr. Bellmer again asked Respondent if there was a cost for the materials and also asked

---

[2] Robert Bellmer also requested the tape recordings from the January 17 and January 27th meetings in which he was discussed, which apparently referred to closed session meetings of the WCCB. The IPIB determined that it had no jurisdiction to order the release of closed session tapes, and this records request was not included in the Petition. (Exhibit 1; Johnson testimony)

[3] At hearing, Margaret Johnson testified that she did not tell Robert Bellmer that the records he was requesting were open records, rather she told Mr. Bellmer that correspondence is an open record unless it falls under one of the statutory exceptions. Ms. Johnson further testified that she would not have known if an exception applied until she saw the records. (Johnson testimony)

when he could pick up the information and the emails. (Exhibit 2) There is no indication in this record that Respondent ever responded to Mr. Bellmer's email.

On April 5, 2014, the IPIB received a formal signed complaint from Robert Bellmer stating, in part, that Respondent had not responded to his March 3, 2014 records request or to his email on March 20, 2014. (Exhibit 3; Johnson testimony)

On April 15, 2014, the IPIB's Deputy Executive Director, Margaret Johnson, sent an email to Respondent and attached a copy of Robert Bellmer's complaint. Ms. Johnson also attached a copy of Mr. Bellmer's original records request, and she asked Respondent to contact her to discuss the progress that had been made in fulfilling the record request or any reason Respondent had for thinking that the request should not be fulfilled. In this email, Ms. Johnson also told Respondent that she had informed Mr. Bellmer that the IPIB does not have the authority to order the release of any tape recordings from closed meetings of governmental bodies and does not have jurisdiction over employment/termination issues. (Exhibit 4; Johnson testimony)

On April 18, 2014 at 8:19 a.m., Margaret Johnson sent a second email to Respondent after he did not respond to her first email. In this email, Ms. Johnson asked Respondent if he had any questions about the information that she sent to him on the 15th. She informed Respondent that she would be giving the IPIB Board an update on Mr. Bellmer's formal complaint that afternoon and that any information he might have for the IPIB should be submitted by 1:00 p.m. Respondent replied to this second email on April 18, 2014 at 11:03 a.m. In his email, Respondent stated that he was out of the office that day preparing for a trial that would last the upcoming week. He further stated that he was "still researching the appropriate response including researching whether the documents being requested are covered by attorney-client privilege. " (Exhibit 5; Johnson testimony)

On April 18, 2014 at 3:09 p.m., Margaret Johnson sent Respondent another email. Ms. Johnson stated that she understood Respondent was very busy but that it had been over 6 weeks since the records request was made, and Mr. Bellmer had not been provided any information for the delay. Ms. Johnson testified that she also spoke to Michael Bennett at the PATC (Prosecuting Attorneys Training Council) to see if he could provide assistance to Respondent. (Exhibit 6; Johnson testimony)

On April 23, 2014, Ms. Johnson sent another email to Respondent informing him that he could communicate with her or with Michael Bennett at the PATC regarding privileges that may apply to the public records request. She further advised Respondent that she

would be preparing a report for the Board at least a week prior to their next meeting on May 15, 2014. She also informed Respondent that he may want to review a recent court of appeals decision. (Exhibit 7; Johnson testimony)

On May 16, 2014, Margaret Johnson emailed Respondent her May 7, 2014 memo to the IPIB in which she recommended that the IPIB accept the complaint concerning Mr. Bellmer's public records request but dismiss the part of the complaint concerning closed session tape recordings as outside of the IPIB's jurisdiction. (Exhibit 8; Johnson testimony)

The Petition was filed against Respondent on May 30, 2014. On that same date, the IPIB issued a Notice of Hearing charging Respondent with violating Iowa Code section 22.2 for his failure to respond to the request for copies of correspondence between himself and members of the WCCB. The IPIB dismissed the portion of the complaint that concerned the request for closed session tapes. (Exhibit 10; Notice of Hearing; Johnson testimony)

On June 6, 2014, Respondent notified Robert Bellmer that copies of the records that he had requested were ready for him to pick up. This was 94 days after Respondent received the public records request and one week after the Petition was filed and the Notice of Hearing was issued. At hearing, Respondent testified that he spent one full day conducting research to determine if any attorney-client or attorney work product privilege was applicable. When he was unable to find a definitive answer after researching Iowa law and the law of surrounding states, Respondent decided that he would produce the requested documents. Respondent further testified that he had to review thousands of ingoing and outgoing emails for the four month period covered by Mr. Bellmer's request. Respondent searched for the relevant emails by entering the names of Conservation Director Steve Anderson and the five members of the WCCB as search terms. He testified that he spent two full days reviewing the emails for content, printing the emails, and making copies for Mr. Bellmer to pick up. He further testified that while he notified Mr. Bellmer on June 6, 2014 that the records were ready for him, Mr. Bellmer did not pick up the records until June 13, 2014. The records consisted of 355 pages of email correspondence. (Respondent testimony; Exhibit 9, Exhibit A)

Respondent has never claimed that he was not the custodian of the requested records or that he was not obligated to produce the records. Respondent never asked Robert Bellmer to clarify or narrow his records request. Respondent never gave Mr. Bellmer a reason for his delay in responding to the records request. Respondent did not ask Margaret Johnson or Michael Bennett for assistance in determining whether he had

legal grounds to deny all or part of the records request based on attorney-client privilege. Respondent did not claim any privileges to withhold any portion of the requested correspondence, and the documents that he produced contain no apparent redactions. (Exhibits 9, 10, 11; Johnson, Respondent testimony)

On June 13, 2014, Robert Bellmer signed a written acknowledgment of his receipt of the documents that he requested. Mr. Bellmer was not charged any fee for the public records, but he did incur $49.66 in costs to copy the documents and mail them to the IPIB. (Johnson, Respondent testimony; Exhibits 9, A)

CONCLUSIONS OF LAW

I. Applicable Statutory Provisions

The Iowa legislature, through enactment of the "Iowa Public Information Board Act," has established a nine-member Iowa Public Information Board (IPIB).[4] The purpose of the Iowa Public Information Board Act is to provide an alternative means to secure compliance with and enforcement of the provisions of Iowa Code chapter 21 (Open Meetings) and Iowa Code chapter 22 (Open Records) through the IPIB's provision of an efficient, informal, and cost-effective process for resolving disputes.[5]

The IPIB's powers and duties include, but are not limited to:

> ...
>
> 4. Receive complaints alleging violations of chapter 21 or 22, seek resolution of such complaints through informal assistance, formally investigate such complaints, decide after such an investigation whether there is probable cause to believe a violation of chapter 21 or 22 has occurred, and if probable cause has been found prosecute the respondent before the board in a contested case proceeding conducted according to the provisions of chapter 17A.
>
> ...
>
> 8. After appropriate board proceedings, issue orders with the force of law, determining whether there has been a violation of chapter 21 or 22, requiring compliance with specified provisions of those chapters, imposing civil penalties equivalent to and to the same extent as those provided in section 21.6 or 22.10, as applicable, on a respondent who has

[4] Iowa Code chapter 23.

[5] Iowa Code section 23.1(2013).

> been found in violation of chapter 21 or 22, and imposing any other appropriate remedies calculated to declare, terminate, or remediate any violation of those chapters.
>
> ...

Iowa Code section 22.2(1) (2013) provides, in relevant part:

> Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record. Unless otherwise provided for by law, the right to examine a public record shall include the right to examine a public record without charge while the public record is in the physical possession of the custodian of the public record. The right to copy a public record shall include the right to make photographs or photographic copies while the public record is in the possession of the custodian of the public record.

As used in Iowa Code chapter 22, *"public records"* includes all records, documents, tape or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, ...or any branch, department, bureau, commission, council, or committee of any of the foregoing.[6] *"Lawful custodian"* means the government body currently in physical possession of the public record.[7] *"Government body"* includes, in relevant part, a county and any "branch, department, board, bureau, commission, council, committee, official, or officer" of a county or any employee delegated the responsibility for implementing the requirements of Iowa Code chapter 22.[8]

Iowa Code section 22.7 provides a list of public records that 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. Included in the categories of confidential records are "records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body."[9]

A good faith, reasonable delay by a lawful custodian in permitting the examination and copying of a government record is not a violation of Iowa Code chapter 22 if the purpose of the delay is one of the following:

---

[6] Iowa Code section 22.1(3)(a)(2013).

[7] Iowa Code section 22.1(2)(2013). *See also* Iowa Code section 23.2(4)(2013).

[8] Iowa Code section 22.1(1)(2013). *See also* Iowa Code section 23.2(5),(6)(2013).

[9] Iowa Code section 22.7(4)(2013).

> *a.* To seek an injunction under this section.
> *b.* To determine whether the lawful custodian is entitled to seek such an injunction or should seek such an injunction.
> *c.* To determine whether the government record in question is a public record, or confidential record.
> *d.* To determine whether a confidential record should be available for inspection and copying to the person requesting the right to do so. A reasonable delay for this purpose shall not exceed twenty calendar days and ordinarily should not exceed ten business days.[10]

Iowa Code section 22.10 includes provisions for the civil enforcement of Iowa Code chapter 22. It provides, in relevant part, that once a party seeking judicial enforcement of Iowa Code chapter 22 has demonstrated that the defendant is subject to the requirements of the chapter, that the records in question are government records, and that the defendant refused to make those government records available for copying and examination by the plaintiff, then the burden of going forward shall be on the defendant to demonstrate compliance with the requirements of Iowa Code chapter 22.[11]

In addition, Iowa Code section 22.10 provides that upon a finding by a preponderance of the evidence that a lawful custodian has violated any provisions of Iowa Code chapter 22, a court:

> *b.* Shall assess the persons who participated in the violation damages in the amount of not more than five hundred dollars and not less than one hundred dollars. However, if a person knowingly participated in such a violation, damages shall be in the amount of not more than two thousand five hundred dollars and not less than one thousand dollars...A person found to have violated this chapter shall not be assessed such damages if that person proves that the person did any of the following:
> ...
> (2) Had good reason to believe and in good faith believed such facts which, if true, would have indicated compliance with the requirements of this chapter.
> ...
> *c.* Shall order the payment of all costs and reasonable attorney fees, including appellate attorney fees, to any plaintiff successfully establishing

[10] Iowa Code section 22.8(4)(2013).
[11] Iowa Code section 22.10(2)(2013).

> a violation of this chapter in the action brought under this section. The costs and fees shall be paid by the particular persons who were assessed damages under paragraph "*b*' of this subsection...[12]

The IPIB is authorized to impose these same sanctions for a violation of chapter 22.[13] Ignorance of the legal requirements of Iowa Code chapter 22 is not a defense to an enforcement proceeding brought under Iowa Code section 22.10. A lawful custodian or its designee in doubt about the legality of allowing the examination or copying or refusing to allow the examining or copying of a government record is authorized to bring suit at the expense of that government body in the district court of the county of the lawful custodian's principal place of business, or to seek an opinion of the attorney general or the attorney for the lawful custodian, to ascertain the legality of any such action.[14]

II. Analysis

In his Answer to the Petition, Respondent admits that as Washington County Attorney he is an officer of a government body in the state of Iowa and therefore considered a government body, pursuant to Iowa Code sections 22.1 and 23.2. Respondent further admits that he is a custodian for public records within that office, pursuant to Iowa Code sections 22.1 and 23.1. Moreover, at no time in this proceeding has Respondent disputed that he was the custodian of the public records requested by Robert Bellmer.

The preponderance of the evidence established that Respondent did not timely comply with Robert Bellmer's March 3, 2014 records request. In addition, Respondent failed to establish by a preponderance of the evidence that his 94 day delay in responding to the request was reasonable and necessary in order for him to identify the requested records and to determine if the records were subject to the attorney work product privilege. Prior to producing the records, Respondent's only acknowledgment of the records request was his April 18, 2014 email to Margaret Johnson. In that email to Ms. Johnson, Respondent provided the following two reasons for his delay in responding to the request: 1) that he was preparing for a week-long trial; and 2) that he was still researching whether the requested documents were covered by the attorney-client privilege. Respondent never explained the delay to Robert Bellmer, and he provided no further explanations prior to his eventual compliance with the request on June 6, 2014.

---

[12] Iowa Code section 22.10(3)(2013).
[13] Iowa Code section 23.6(8)(2013).
[14] Iowa Code section 22.10(4)(2013).

Respondent never sought an injunction or an attorney general's opinion concerning his obligation to turn over the requested records. Moreover, Respondent admits that he did not ask Ms. Johnson for assistance in determining whether the attorney-client privilege may apply to the request, and he did not consult with Michael Bennett at PATC, as suggested by Ms. Johnson.

At hearing, Respondent described the records request as a "broad and overreaching" request from a disgruntled former county employee. Mr. Bellmer's motivation in making the records request is irrelevant to Respondent's obligation to comply. Moreover, Respondent never asked Mr. Bellmer if he could narrow or clarify his records request. The only other reason provided by Respondent for the delay in his response was that he was extremely busy with his county attorney duties and did not have time to research the attorney-client privilege or to go through thousands of emails to determine what had to be turned over. Although Respondent no doubt has a very busy schedule as county attorney, timely complying with the records request was also an important part of his official duties.

The Iowa Supreme Court recently addressed the issue of the "timeliness" of a response to an open records request in a case where the city of Dyersville took 70 days to produce 617 pages of requested public records.[15] In that case, the Court declined to interpret Iowa Code section 22.8(4)(d) as providing an absolute 20 day deadline for a government entity to find and produce requested public records, no matter how voluminous the request.[16] Rather, the Court found that the statute imposes an outside deadline for the government entity to determine "whether a confidential record should be available for inspection to the person requesting the right to do so."[17]

In addition, the Iowa Supreme Court cited to a longstanding administrative interpretation of chapter 22, which states that:

> Access to an open record shall be provided *promptly* upon request unless the size or nature of the request makes prompt access *infeasible*. If the size or nature of the request for access to an open record requires time for

[15] *Horsfield Materials, Inc. v. City of Dyersville,* 834 N.W. 2d 444 (Iowa 2013).
[16] *Id.* at 461.
[17] *Id.*

> compliance, the custodian shall comply with the request *as soon as feasible.*[18]

Ultimately, the Iowa Supreme Court determined that the City of Dyersville violated the Open Records Act and failed to comply with its legal obligation to produce the records promptly, based on the size and nature of the request. The Court rejected the City's arguments that the city administrator's need to go through individual employee email accounts (and to figure out how to get administrative rights and run an appropriate email search) and that other urgent matters requiring the city administrator's time justified the 70 day delay in producing the records. The Court pointed out that Iowa Code section 22.10(2) placed the burden on the City of Dyersville to demonstrate its compliance with the Act, but that the City failed to establish how much time it really took for city officials to respond to the records request. [19]

The preponderance of the evidence in this record supports the conclusion that Respondent Larry Brock violated Iowa Code section 22.2 when he did not respond to a public records request for 94 days. Although Respondent certainly had a legitimate basis for questioning whether the attorney work product exception found in Iowa Code section 22.7(4) may have provided a legal basis for withholding some of the requested records, he did not raise this concern until 46 days after the records request was made, and he never directly communicated this concern to the person who made the request. Even considering the scope of the request, 46 days should have been more than sufficient time for Respondent to determine if the attorney work-product privilege applied and to assert the privilege.

Ultimately Respondent did not claim any privilege with respect to the requested documents. Even if identifying and producing the documents required two full days of work, as claimed by Respondent, this does not justify a delay of 94 days in responding to the request. Respondent's delay of 94 days in responding to the records request was clearly unreasonable, especially in light of the prompts and reminders sent by Margaret Johnson. The preponderance of the evidence in the record supports the conclusion that Respondent *knowingly* participated in a violation of Iowa Code section 22.2. The minimum statutory penalty for a knowing violation of Iowa Code section 22.2 is $1,000.00.[20] Given the facts and circumstances of this case, $1,000 is an appropriate penalty.

---

[18] *Id.* (citing to Iowa Uniform Rules on Agency Procedure, Fair Information Practices, Agency No. X.3 (17A, 22)

[19] *Id.* at 462-463.

[20] Iowa Code section 22.10(3)(b)(2013).

ORDER

IT IS THEREFORE ORDERED that Respondent Larry Brock shall pay a penalty of one thousand dollars ($1,000) for knowingly participating in a violation of Iowa Code section 22.2. This penalty is based on Respondent's unreasonable delay of 94 days to respond to a public records request.

Dated this 8th day of September, 2014.

Margaret LaMarche
Administrative Law Judge
Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building-Third Floor
Des Moines, Iowa 50319

CC: Larry J. Brock, Washington County Courthouse, PO Box 841, Washington, IA 52353 [and by email at: lbrock@co.washington.ia.us]

Keith Luchtel, Executive Director, Iowa Public Information Board, Wallace Building, Third Floor, 502 East 9th Street, Des Moines, IA 50319 [and by email at: keith.luchtel@iowa.gov]