

CASE HISTORY AND FINDINGS OF FACT

This litigation involves the City of Davenport's attempt to purchase a river boat casino located in the City, the Plaintiffs three public records requests, and responses thereto pursuant to Chapter 22 of the Iowa Code.

The Isle of Capri owned and operated a riverboat casino in Davenport, Iowa, locally known as the Rhythm City Casino. The mayor and city council had for some time been unhappy with the level of investment from casino profits, which the owners of the casino were returning to their community. It was their belief that millions of dollars of local casino profits were flowing out of the community and being invested by the owners in other ventures outside of Iowa. A financial analysis prepared for the city suggested that as much as \$15 million per year in profits were taken from the Rhythm City Casino and invested elsewhere. The Mayor and Council wished to capture those profits for the City and they discussed several options to bring in a friendlier owner-operator.

In early 2012, the City formed a negotiating committee to discuss the terms under which it would acquire the casino. As part of that process, the City hired attorney John Hintze of Des Moines as an expert in gaming acquisitions to serve as lead counsel and advisor to the City. They also retained Gary Beutner, an expert in casino operations.

Direct negotiations between the City and the casino owners resulted in Plaintiffs' *Exhibit B*, a "proposed asset purchase term sheet" dated October 12, 2012. This document outlined City's agreement to purchase the casino for \$46 million subject to adjustments as set forth in the agreement. On page five of that agreement, the City

negotiated the right to perform due diligence regarding the casino's financial condition to determine if the agreed upon purchase price was fair and reasonable. This due diligence was a term of their acquisition of the casino. By late 2012, local media reported that the City of Davenport was investigating the possibility of purchasing the existing riverboat casino.

On October 12, 2012, the City of Davenport's finance committee directed the mayor to sign the proposed asset purchase term agreement. *See Exhibit C.* The City's rationale for the action was to resolve the land-based casino, hold taxes to a reasonable level, and diversify revenue. At the recommendation of attorney Hintze, on December 11, 2012, the City of Davenport engaged the services of DeLoitte & Touche, LLP, as consultants to perform the due diligence contemplated under the proposed asset purchase term sheet. Although DeLoitte's engagement agreement stated that their retention was confidential to the extent allowable by law, City Manager Malin stated it was his opinion their engagement was not confidential at all. In fact, Malin identified DeLoitte by name at the December 2012 council meeting. DeLoitte objected to this public identification but Malin continually ignored their requests for anonymity. It was Malin's opinion that once DeLoitte signed a contract with the City, nothing about that contract was confidential, including the identity of the firm providing services to the City. The terms of that agreement, signed on behalf of DeLoitte & Touche by Ayesha Rafique and by City Administrator Malin, are at the heart of Plaintiffs' litigation.

Malin testified that he has authority to sign binding contracts for City obligations up to \$50,000. As the between the City and Casino contained a purchase price in excess of \$46 million, he contacted City Attorney Tom Warner for direction as to the execution of the contract. The contract was presented to Davenport for signature on

December 11, 2012. Malin testified there were no scheduled council meetings in the month of December due to the pending holidays, as is the tradition of the City of Davenport. City Attorney Warner directed Malin to sign the agreement with the understanding and intent that the agreement would be later ratified by the council. Attorney Warner believed this action was in keeping with the policy directive of the finance committee evidenced in their October 12, 2012 resolution. In addition, it was not uncommon for the council to ratify contracts executed ex post facto. On May 22, 2013, this ex post facto approval occurred as evidenced by City Resolution 2013-176, Plaintiffs' *Exhibit X*.

Defendants' *Exhibit 1* is Resolution 2012-405 by which the city council directed the mayor to proceed with the casino acquisition plan. The council specifically ratified the City's contract with DeLoitte & Touche and their subsequent bill in the amount of \$387,500 on June 26, 2013, in Resolution 2013-198. See Plaintiffs' *Exhibit HH*. Defendants' *Exhibits 31-39* are ex post facto resolutions of the city council ratifying actions previously taken by various city officers for the acquisition of assets. It appears to the Court that the City of Davenport's usual and normal course of conduct included ex post facto ratification of conduct of city officers. In this case in particular, the city administrator's signing the engagement agreement with DeLoitte appears to be generally directed by Resolution 2012-405 and are specifically ratified by Resolution 2013-198, by action of the city finance committee dated October 17, 2012, pursuant to the City Council's policy statement in its resolution adopted the same day. See Plaintiff's *Exhibit C*.

City Administrator Malin testified that Davenport's plan was to purchase the casino and lease the operation of the casino facility back to a non-profit organization to

be formed at a later time. This plan was modeled after the plan then in operation in Dubuque and Polk County. It was not the City's intention to directly manage and operate the casino. Davenport would act merely as landlord and would receive rental income but would not own nor operate the gaming operation. It was hoped that in so doing, Davenport would reap an annual reinvestment of around \$15 million per year.

As a result of the press reports about the casino plans, Plaintiffs served requests for public records regarding this negotiation on the City on April 11, 2013; April 24, 2013; and again May 23, 2013. These Freedom of Information Act (FOIA) requests are *Exhibits CC, FF, and GG*, respectively. On June 20, 2013, the Plaintiffs brought suit seeking declaratory judgment and sanctions under Chapter 22 of the Iowa Code. Count I of the petition seeks to have the contract between the City of Davenport and DeLoitte & Touche, be declared void, ultra vires, and illegal pursuant to Chapter 364 and 384 of the Code of Iowa and Title 2 of the Davenport City Code. The theory supporting Count 1 being that it is in violation of Iowa law for a municipal corporation to own and operate a for profit entity. This contract provides for DeLoitte to perform due diligence in the investigation of the financial situation of the casino prior to the City completing the purchase. See *Exhibit D*,

Plaintiffs further request the Court order and find that the City of Davenport has no legal authority to "purchase, own, and operate a private for-profit gambling business." See *Plaintiff's Petition*. Lastly, Plaintiffs request the Court find that the City of Davenport violated Chapter 22 of the Iowa open records law, ascertain certain rights of the parties, and award reasonable attorney fees and damages as provided by Section 22.10(3)(c) and (b) of the Code of Iowa.

Chapter 364 and 384 of the Code of Iowa administers both the authority of cities to enact certain ordinances and the manner in which city finances must be maintained and regulated. The Court finds nothing in either chapter which prohibits a city from purchasing a for-profit business which the City does not operate and wherein the City is merely a landlord of the real estate upon which the business is sited. A non-profit can become a licensee to operate a gaming entity but a municipal corporation cannot. *City of Dubuque v Dubque Racing Ass'n* 420 N.W.2d 450 (Iowa 1988). Iowa Code §99D.8. Accordingly, the Court FINDS that the contract between the City and Deloitte is not void or ultra vires and Count I of Plaintiffs' petition is **DENIED**.

The real fighting issue in this case involves alleged violations of Iowa's Open Records Law under Chapter 22 of the Code of Iowa. As stated above, the Plaintiffs made three open records requests of the City in April and May of 2013. A substantial volume of records were produced for the Plaintiffs in response to these records requests. At trial, Defendants' demonstrative exhibit which was not introduced into the record, showed that the records produced to the Plaintiffs filled three standard sized bankers storage boxes and contained thousands of pages. Despite these voluminous productions, Plaintiffs felt certain records were not being produced and they served a subpoena on DeLoitte which resulted in the disclosure of certain additional documents.

These additional documents were marked as Plaintiffs' *Exhibit MM*, a February 14, 2013, e-mail from Ayesha Rafique to Attorney John Hintze, with a progress bill in the amount of \$207,900; and Plaintiffs' *Exhibit MM-2*, a February 18, 2013, e-mail from Rafique to City Attorney Tom Warner enclosing the same progress bill. As to these e-mails, Attorney Tom Warner testified that he informed Ms. Rafique that the City would not pay any billing statement until the project was completed. Accordingly, DeLoitte

canceled the billing statements. The fact that the statement was canceled by DeLoitte is verified by further e-mail from Ayesha Rafique to John Hintze, dated March 12, 2013, which contained their final and only invoice for \$387,500. This e-mail is marked as Plaintiffs' *Exhibit RRR*.

Since the billing statement was canceled, Warner deleted the e-mail from his server in February, 2013, two months prior to Plaintiff's first FOIA request in April 2013. City Attorney Warner testified the e-mail and attached bill was not produced for the Plaintiffs because he deleted it as being irrelevant once the billing statement was canceled.

Plaintiffs' discovery included *Exhibit GGG*, a December 2012 e-mail from Rafique to Attorney Hintze which attached an accounting data request dated December 21, 2012. This e-mail and attachment outlined the scope of services DeLoitte would provide for the City pursuant to their due diligence agreement. Plaintiffs also discovered *Exhibit JJJ*, an e-mail from Hintze to City Attorney Warner in which Hintze attached a memo summarizing his conversations with the attorneys for the casino. It appears these documents were not produced to Plaintiffs because they were in the hands of Mr. Hintze but not provided to the custodian of the public record.

The Plaintiffs additionally discovered by subpoena their *Exhibits AAAA* and *BBBB*. *Exhibit AAAA* is an e-mail to Michael Hilcove from a Lucas Greyerbiehl, an employee of DeLoitte. A copy of this email was sent to the City's hired outside legal counsel, Mr. Hintze, among others. Attached to that e-mail was DeLoitte's tax supplemental data request, dated January 28, 2013, which is a list of further information requested of the casino operators which had not been provided to date. *Exhibit BBBB* is an e-mail from Ms. Rafique of DeLoitte to Mr. Hintze complaining that the various

requests for information by DeLoitte to the casino were not being promptly responded to. Also attached to that e-mail is a list of the asset purchase comments dated March 2, 2013, setting forth additional information requested and not yet provided. The court does not find that the City intended to conceal these exhibits. Rather, the Court finds that these exhibits were never transmitted to the City custodian of public records and this failure was an administrative oversight on behalf of outside counsel, Hintze.

The most critical document the Plaintiffs discovered through subpoena was *Exhibit YYY*. This voluminous exhibit is DeLoitte's raw work product which the Plaintiffs' requested in paragraph three of their third FOIA request dated May 23, 2013, *Exhibit GG*. In that paragraph, Plaintiffs request "copies of any and all due diligence reports, memorandums, data analyses, and all other paperwork from DeLoitte & Touche, LLP, regarding the Isle of Capri casino that the City is proposing to sell to Rodney Blackwell for \$387,500."

The City's argues that their failure to produce *Exhibit YYY* is excused because the FOIA request did not properly seek this document. The City argues that in order for a document to be "from" DeLoitte & Touche, this implies that the document was transmitted from DeLoitte & Touche to the City. Since *YYY* was never transmitted to the City by Deloitte, the city is excused from producing it under Plaintiffs' FOIA request.

It is true that *Exhibit YYY* was never received by the City. When Mayor Gluba and several council members contacted DeLoitte to request the work product, a summary report or executive report based on their work product to date, DeLoitte informed the City that it was unethical and potentially misleading for them to produce a report based on partial information. Even though DeLoitte estimated they were 75 percent done with the good faith investigation, they were unwilling to produce a

summary or executive analysis based on the partial information which they had at the time. DeLoitte expressed concern that providing any information to the City based on an incomplete investigation could expose them to liability. Mayor Gluba was noticeably annoyed that DeLoitte would provide nothing but expected to be paid over \$387,000.

The city council asked their consultants, Hintze and Buettner, and both parties informed the City that it was standard operating procedure in the industry for a CPA firm such as Deloitte to refuse to produce work product, a summary or analysis thereon until the investigation was fully completed. Further, that the Deloitte billing statement of \$387,500 was fair and reasonable considering the scope of services provided to date. Based principally upon this representation, the City paid DeLoitte's billing and in response to Plaintiffs' request for information, did not provide the documents shown in *Exhibit YYY* as the City did not have possession nor were the documents available to them.

APPLICABLE IOWA LAW

Iowa Code Chapter 22 sets forth Iowa's open records law. In sum, this statute requires that a lawful custodian in physical possession of records belonging to a city make those records available to a member of the public upon request. Section 22.1(1) defines a governmental body, which includes a city. Section 22.1(2) defines a lawful custodian as a "governmental body in physical possession of the public record." Section 22.1(3) defines public records, which includes "all records, documents, tape, or other information.... belonging to a city." Public records also include all records relating to investments of public funds. Enforcement a citizen's right to public records may be by mandamus or injunction pursuant to Section 22.5. A city wishing to protect records from public view may seek an injunction pursuant to Section 22.8. A Section 22.5

injunction can only be granted after reasonable notice and a public hearing which results in the Court making findings required by Section 22.8. Section 22.2(2) states that “a government body shall not prevent examination or copying of a public record by contracting with a non-governmental body to perform any of its duties or functions.”

When a Section 22.10 FOIA request for public records is made to a city, the law states that “the city must make the public records available with reasonable costs for the reproduction of those records, and the custodian of record and those who participate in the denial of access to the public records are subject to certain sanctions should they be found to have refused to make records available.” Once such refusal to make records available is proven by a preponderance of the evidence, the burden shifts to the Defendant pursuant to 22.10(3) to prove that they have complied with the requirements of Chapter 22.

Iowa’s Freedom of Information Act, Chapter 22 of the Code, seeks to prevent the government from secreting its decision making activities from the public whom it represents. The tool to prevent secret government action is the right of every citizen to demand inspection of the public record. The right to review public records is to be interpreted liberally to provide the public with access to public records. *Gannon v Board of Regents* 692 N.W.2d 31 (Iowa 2005). The goal of Chapter 22 is to facilitate public scrutiny of the conduct of public officers. *ACLU of Iowa v. Atlantic Comm. Schools*, 818 N.W.2d 231 (Iowa 2012). Iowa law favors disclosure and exceptions to disclosure should be narrowly construed. *Rathmann v. Board*, 580 N.W.2d 733 (Iowa 1998), *Iowa Film Production v. Iowa*, 818 N.W.2d 207 (Iowa 2012). Records are public if they are held by an official in their official capacity. *City of Dubuque v. Dubuque Racing Association*, 420 N.W.2d 450 (Iowa 1998). Every person has the right to examine

public records. *Iowa Code 22.2*. The purpose of the public records law is to remedy unnecessary secrecy in conducting the public's business. *U.S. West Commission v. Office of Consumer Advocate*, 498 N.W.2d 711 (Iowa 1993). The purpose of the state's Freedom of Information Act is to open the doors of government to public scrutiny and prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act. *Riverdale v. Diercks*, 806 N.W.2d 643 (Iowa 2011).

APPLYING THE LAW TO THE FACTS

In this case, the Court finds that DeLoitte was a contractor working for the City and that *Exhibit YYY* constitutes public records discoverable by the Plaintiffs pursuant to Chapter 22. The sole issue before the Court is whether or not the City *refused* to produce these records as defined by Chapter 22. Deputy Clerk Holecek, the custodian of public records for the City of Davenport, testified that she did not have the documents which constitute *Exhibit YYY* in her possession. Further, City Attorney Warner, Administrator Malin, and Mayor Gluba did not have these records in their possession. In fact, Mayor Gluba testified with some frustration that he was unable to get this information from DeLoitte even after his request. This testimony is substantiated by the testimony of several aldermen who stated that they also requested the work product of DeLoitte. It was DeLoitte who refused to provide the work product to the City even though it was requested by them. The fact that the Mayor and several aldermen requested DeLoitte's work product is not controverted.

Plaintiff Diercks testified that his goal in making his FOIA request was to determine what the City received in exchange for its \$387,500 paid to DeLoitte. He complains principally that the raw work product of DeLoitte was not made available to

him even though he made a request for it. The City states they never received DeLoitte's work product even though they requested it. Considering there had been a lawful request to the City for DeLoitte's work product, the burden shifts to the City to prove their compliance with the statute. The City is obliged to produce public records which are in their physical possession under Chapter 22. They are also required to provide public records which are in the possession of a contractor employed by the City. However, a city's good faith efforts to obtain public records from a private contractor and substantial compliance in delivering those requested records to the public is all that is required by Chapter 22. *Wings v Dunlap* 527 N.W. 2nd 407 (Iowa 1994). Further, the City argued that they attempted in good faith to obtain the raw work product from Deloitte and this effort was unchallenged by the Plaintiffs. Mayor Gluba's assertion that he requested the Deloitte work product and/or an executive summary based thereon was uncontroverted in the record.

The fact that the Plaintiffs were able to obtain work product from DeLoitte through lawful subpoena does not necessarily prove that the City *refused* to provide public records within the meaning of 22.10 when those records were not in the physical possession of the City and the City requested those records but the City's request was refused. The Court FINDS that the City exercised its duty to obtain and disclose the public record to the Plaintiffs in good faith and they therefore did not *refuse* the production of those records within the meaning of 22.10.

Interestingly, Plaintiff Patricia Lane testified that she only glanced at the documents contained in *Exhibit YYY* even though she had grave concerns about the City purchasing a casino. Neither she nor Plaintiff Diercks testified that any information contained in *Exhibit YYY* or any of the other documents which the City failed to produce

shed any light on Davenport's decision making process. The purpose of Iowa's FOIA is to shed light on the governmental decision making process which process is at the heart of the intent of Chapter 22. *Riverdale* 806 N.W.2nd 643. This makes sense when one inspects *Exhibit YYY* as it is a report of the casino's financial and operational information with that information omitted through redaction. Plaintiffs do not object to the redactions and are more principally focused upon the City's failure to produce records which they were later able to obtain by subpoena. The Court finds that Davenport substantially complied with the Plaintiff's FOIA requests in this matter. The documents obtained by Plaintiffs which were not produced by the City did not, in any meaningful way, shed light upon the City's decision making processes. Therefore, the City substantially complied with Chapter 22 by producing the vast majority of records which included all of the records relative to the City's decision making process. DeLoitte's raw data simply did not advance the cause of understanding the City's decision making process in purchasing a casino. Chapter 22 is not a cat and mouse game of "gotcha" where the mere discovery of any document, no matter how insignificant its content may be, gives rise to a claim for damages and attorney fees.

Plaintiffs complain that the scope of work agreement between the City and DeLoitte contains language indicating that the agreement is "private and confidential." However, that same agreement indicates that it is subject to the requirements of Iowa's public records law and is confidential only to the extent the law allows. The City did not treat this work agreement as confidential, much to the chagrin of DeLoitte. City Manager Malin disclosed DeLoitte's retention in the first public meeting after signing the engagement agreement with them. It is clear the City took no action to conceal DeLoitte's contract of services or the sums to be paid to them. Accordingly, the Court

finds no violation of law based on headings of documents where the contents of the same documents state that the parties must comply with current Iowa law. Further, the City discussed these documents in open meetings which were reported by the press in late 2012 and it was those very reports that caused Plaintiffs to file their FOIA requests.

Based on all of the credible evidence before the Court, the Court FINDS the City made a good faith effort to obtain the work product of DeLoitte in order to comply with the Plaintiffs' FOIA requests. Further, the City substantially complied with the FOIA requests by producing all documents which shed light on the governmental decision making process. The failure to produce a few records, one of which is so heavily redacted as to be useless in providing the public with meaningful information as to the City's decision making processes, is excusable where the failure to produce is founded upon the City's good faith efforts to obtain and produce the requested documents which efforts were rebuffed by DeLoitte. The Court FINDS that the City did not "refuse" to provide this documentation to the Plaintiffs in violation of 22.1 of the Code of Iowa. The City made good faith efforts to obtain the requested work product which DeLoitte denied.

Accordingly, for the reasons set forth above, Plaintiffs' Petition is **DENIED**. Costs are assessed to Plaintiffs.



State of Iowa Courts

Type: OTHER ORDER

Case Number EQCE123119
Case Title DIERCKS, DR ALLEN VS MALIN, CRAIG

So Ordered



Stuart P. Werling, District Court Judge,
Seventh Judicial District of Iowa