IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IOWA ATHEISTS AND FREETHINKERS, INC., Plaintiff, v. KIM REYNOLDS, in her official capacity as Governor of the State of Iowa, et al., Defendants.	Case No. CVCV069066 **RESISTANCE TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

The Plaintiff, Iowa Atheists and Freethinkers, Inc., ("IAF"), respectfully submits this Resistance to the Motion for Protective Order (D0020) submitted by Defendants, Kim Reynolds, in her official capacity as Governor of the State of Iowa, et al. (collectively, "Defendants," or the "Governor's Office").

INTRODUCTION

The Governor's Office has asserted "executive privilege," but it has not shown it exists or would apply to the withheld records. Indeed, it has barely elaborated on what it contends executive privilege even means. It brushes aside critical legal distinctions, including the type of executive privilege ostensibly claimed–and its source in law. Despite demanding the strongest possible protection from the normal rules of disclosure under Iowa's Open Records Act and the Iowa Rules of Civil Procedure governing discovery, it has still failed to provide evidence legitimizing its claim of privilege over the specific documents at issue and it has not made any showing at all warranting protection from Plaintiff's other discovery requests. On bare assertion alone,[1] it asks this Court to

[1] Defendants themselves appear to acknowledge their lack of support, refraining pronouncements of law or fact, and favoring instead qualified claims of what they would like the law to be. (Mot. for Protective Order, ¶¶ 1 ("Despite repeated *assertions* of executive privilege, Plaintiff propounds discovery . . ."), 9 ("Thus, before even considering the propriety of Defendants' *assertion* of executive privilege . . ."), 12 ("After all if, *as Defendants contend*,

suspend all discovery pending its motion for summary judgment. But discovery is critical to responding to the Governor's Office's motion in the first place, (*see* Mot. for Continuance of Summary Judgment Proceedings to Allow Discovery (Oct. 16, 2025) (D0022), and attachments), and critical moreover for this Court to review the legal and factual basis on which Defendants' motion relies. In short, an assertion alone cannot shield the Governor's Office from scrutiny by Plaintiff, the public, or this Court.

Plaintiff respectfully requests this Court deny Defendants' Motion for Protective Order in its entirety, or, in the alternative, grant a limited protective order that facilitates review of the withheld public records by the Plaintiff or, preliminarily, by the Court in camera.

LEGAL STANDARD

A protective order[2] "is not entered lightly," and must be warranted by "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements."

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executive privilege . . ."), 14 ("Defendants *assert that* executive privilege protects a limited set of documents from disclosure. Surveying States across the country, Defendants *assert* in their Brief . . ."), 15 ("Defendants' *position here* is that the documents at issue are protected by executive privilege . . ."). Even Defendants must—and do—recognize their "assertion" is untested, their "position" on uncertain ground. (*Id.* ¶¶ 9-10 (describing executive privilege issues as open legal questions), 14 (articulating a "*proposed* test" for claims of executive privilege).

[2] In the version of this Motion filed by the Governor's Office in *Records Custodian v. The Des Moines Register*, the Governor's Office pursued its desired outcome—suspension of all discovery—not with a motion for protective order, but under the common law authority of the district court to issue stays. (Mot. to Stay Proceedings, *Records Custodian v. The Des Moines Register*, No. CVCV069048 (July 28, 2025) (D0018)). The governing standard to stay focuses on "the interests of the parties and any consequences they might suffer," which the Defendants could not overcome there or here. (Ruling on Mot. to Stay and Order for In Camera Review 9, *Records Custodian v. The Des Moines Register*, No. CVCV069048 (Sep. 25, 2025) (D0027)). (Ruling on Defendants' Mot. for Stay 3 (Oct. 8, 2025) (D0018)). *See Chicoine v. Wellmark, Inc.*, 894 N.W.2d 454, 460 (Iowa 2017). Unsuccessful, the Governor's Office now opts for the approach of Iowa Rule of Civil Procedure 1.504(1)(a)(1).

However, the Governor's Office makes no argument for a different analysis or why, if its motion to stay was denied in the *Register* litigation, its Motion for Protective Order here seeking the same relief here should not also be denied.

Comes v. Microsoft Corp., 775 N.W.2d 302, 305 (Iowa 2009). It is an order that is inherently contrary to a legal system that "favors full access to relevant information," *Mediacom Iowa, L.L.C. v. Incorporated City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004) (quoting *State ex rel. Miller v. Nat'l Dietary Research, Inc.*, 454 N.W.2d 820, 822–23 (Iowa 1990)), as well as the rules establishing that system, including a party's entitlement to discovery regarding any matter relevant to the litigation. *See* Iowa R. Civ. P. 1.503(1). Accordingly, if a party wants to limit the facts available to the court and opposing party, if it resists discovery and seeks a protective order by invoking a privilege, then that party bears "the burden to show that the privilege exists and applies," *before* a protective order can be issued. *Mediacom Iowa*, 682 N.W.2d at 66; *see also Comes*, 775 N.W.2d at 305–06 (articulating further requirement of good cause for entry of protective order, including satisfaction of three criteria: (1) a showing of "substantial and serious" harm from dissemination, (2) whether the requested order is "precisely and narrowly drawn," and (3) whether "alternative means of protecting the public interest" are available).

As in its previous Motion for Stay, and indeed, as with its claim of executive privilege, the Governor's Office fails to engage meaningfully with the legal standards on which it relies; it fails to draw a connection between their existence, somewhere, and their application here.

ARGUMENT

The Governor's Office wants a theoretical executive privilege, but it hasn't shown any practical need for one.[3] So, too, it wants a protective order, but the Governor's Office declines to

[3] For example, in support of its Motion for Summary Judgment, Defendants do not include an appendix of documents or testimony attempting to legitimize their claim that disclosure of the withheld "agency report" and "media prep" documents would somehow, as they assert, interfere with the Governor's ability to perform her constitutional role—they attach only past administrations' agreements with historical societies for the holding of documents. (Appendix 39–44 (Oct. 9, 2025) (D0019-1)). At most, though even this a stretch, these agreements show past administrations, like this one, *assert* a vaguely defined executive privilege exists, but they say little

make any case for a "precisely and narrowly drawn" order necessary to protect it from "substantial and serious harm," and relies instead on "stereotyped and conclusory statements" to demand a complete stay of discovery. *Comes*, 775 N.W.2d at 305 (quoting *Miller*, 454 N.W.2d at 823). Absent even an attempt to make this showing, the Defendants' Motion fails. *See Mediacom*, 682 N.W.2d at 68 (reversing entry of protective order where movant "presented no evidence" to support claim of trade secrets); *Nat'l Dietary Research*, 454 N.W.2d at 824 (reversing entry of protective order where "defendants made no showing in the district court" on the existence of a trade secret or of potential harm from disclosure, noting the defendants' "allegations and conclusions . . . are not enough to establish good cause for the protective order"); *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 390 (Iowa 1983) (affirming denial of protective order where movant "did not state facts as opposed to conclusions from which the court could identify" the applicability of claimed privilege, and the order sought was not particularized).

A. The Governor's Office Must Establish a Privilege Before It May Enjoy Its Protections.

The Governor's Office's request for a protective order amounts simply to another claim of an absolute executive privilege; once invoked, it argues, no further disclosure is required. (Mot. for Protective Order, ¶ 12 ("After all if, as Defendants contend, executive privilege protects these documents from disclosure as a matter of law then that resolves the case. There is no subsequent need for discovery.")). To their credit, the Defendants have walked away from their original, more extreme position, as they now admit that not only the existence, but also the application, of the claimed privilege remain to be determined. (*Id.* at ¶ 7). Yet the Defendants maintain a demand of this Court—rule first, ask questions later—that flips open records litigation on its head. The proper

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of their actual use of executive privilege (if any), its purported legal basis, or its potential application to the records withheld from Plaintiff.

and ordinary course is to require the Governor's Office to muster its evidence in support of the claimed privilege, allow the Plaintiff to test it, and reach a decision based not on a hypothetical principle of law, but on an actual application of law to fact.

For example, in *Belin v. Reynolds*, as the Governor's Office well knows, the Iowa Supreme Court did not recognize executive privilege or "reaffirm[] that some claims brought under Chapter 22 risk 'invading executive privilege.'" (Mot. for Protective Order, ¶ 2). To the contrary, it rejected the Governor's Office's claim that discovery would intrude upon allegedly "privileged" decisionmaking processes by pointing out that it need not. 989 N.W.2d 166, 176 (Iowa 2023). Rather than needlessly adjudicate a novel assertion of expansive executive privilege, the Iowa Supreme Court determined that *even if* such a privilege were to exist, it would be of no use to the Governor's Office under the facts of that case. *See id.* Such is the doctrine of constitutional avoidance to which the Court adheres. *See, e.g.*, *Cmty. Lutheran Sch. v. Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 291–92 (Iowa 1982). The Governor's Office is wrong to claim executive privilege at the outset, and it is wrong, too, to demand this Court dive headfirst into a constitutional ruling without any facts establishing its necessity.

Of the many flaws in seeking a ruling on executive privilege in the abstract—meaning, under the proposed protective order, without review of the withheld records and without any context beyond an "assertion, affidavit, and privilege log," (Mot. for Protective Order, ¶ 12)—the Governor's Office, to borrow its terms, demands the Court engage in "messy constitutional" analysis. (Mot. for Protective Order, ¶ 2). The Governor's Office appears to relish the opportunity, opening its Motion with broad claims of a "constitutional privilege" and closing with dire warnings of an "interbranch constitutional dispute." (*Id.*, ¶¶ 1, 14). But this can be avoided if the Governor's Office is only held to the standard of every other entity seeking exemption from chapter 22 or

protection from discovery under rule 1.504 and required first to meet *its* burden. *See City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 ("Disclosure [under chapter 22] is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." (Quoting *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999))); *Miller*, 454 N.W.2d at 824.

By proceeding now, the Governor's Office avoids questions it does not want to or does not know how to answer, like the basic question of what privilege is claimed. If it asserts a deliberative-process type of executive privilege, then there is no constitutional dispute: unlike a communications privilege, a deliberative process privilege is a creature of the common law. *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) ("While the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes. . . . The presidential privilege is rooted in constitutional separation of powers principles and the President's unique constitutional role; the deliberative process privilege is primarily a common law privilege."). Granting their Motion also allows them a privilege of unlimited scope that has *no* basis in law; where recognized, a clearly asserted deliberative process privilege would require, among other things, a showing that the withheld materials reflect communications that were "predecisional and . . . deliberative." *In re Sealed Case*, 121 F.3d at 737. The Defendants' Motion does not purport to make any such showing.

Stalling discovery, preventing inquiry into the factual basis for the claimed privilege, and forcing the parties to argue abstract legal theories as if they were exchanging law review notes is a waste of judicial and party time and resources. The Governor's Office clearly wants an Iowa Supreme Court opinion on executive privilege. It cannot just skip down the road and get it. *See UAW v. Iowa Dep't of Workforce Dev.*, No. 00-2112, 2002 WL 1285965, at *2 (Iowa June 12,

2002) (per curiam) (noting court requires "specific adverse claims, based upon present rather than future or speculative facts," and will not render advisory opinion where there is "no present need for such determination") (quoting *Grains of Iowa L.C. v. Iowa Dep't of Agric. and Land Stewardship*, 562 N.W.2d 441, 445 (Iowa Ct. App. 1997)); *see also Riley Driver Ent. I, Inc. v. Reynolds*, 970 N.W.2d 289, 300 (Iowa 2022) (noting Iowa Supreme Court will "generally try to avoid" "rendering an abstract, advisory opinion on the legal authority of the head of a coequal branch of government"). Until the Governor's Office makes a showing of *why these specific documents* should enjoy an unrecognized executive privilege, it is premature to determine whether that privilege exists, let alone to offer its protection.

B. Any Protection Offered Despite the Lack of Showing Must Be Limited.

As a final matter, the Governor's Office attaches the discovery requests sent, but it does not seriously consider their content. Yes, the first three requests for production seek the withheld records themselves. (Ex. A to Mot. for Protective Order at 8 (D0020-1)). But there is no assertion, and certainly no showing, that other requests or interrogatories risk invading the claimed privilege.[4] (Exhibit C to Mot. for Protective Order at 1–2 (D0020-3) (correspondence between counsel regarding exchange of discovery besides the public records at issue). The Governor's Office is not entitled to a protective order preventing *all* discovery when it has only claimed privilege over a few of the documents requested. *See Farnum*, 339 N.W.2d at 391 (protective order properly rejected where movant failed to "identify what information in the NDA file" was protected and where other requested information "was not shown to be in the protected category").

[4] The Governor's Office appears to misconstrue Request No. 11 as seeking every document ever withheld under an assertion of executive privilege. (Mot. for Protective Order, ¶ 5). The document request does not seek the withheld documents, if any: it seeks the records of *invocations* of the privilege, such that the Plaintiff can understand the circumstances under which it has been typically claimed. (Ex. A to Mot. for Protective Order at 10).

Moreover, as is the subject of the Plaintiff's Motion for Continuance of Summary Judgment Proceedings to Allow Discovery, the interrogatories and requests for production seek crucial context regarding the Defendants' assertion of privilege: for example, if a deliberative process privilege is claimed, then Plaintiff must ascertain what decision is allegedly being deliberated in the withheld records.[5] *See In re Sealed Case*, 121 F.3d at 737 (deliberative process privilege covers only "predecisional" and "deliberative" materials, and does not apply after the decision is made); *Gwich'in Steering Committee v. State, Office of the Governor*, 10 P.3d 572, 579 (Ala. 2000) (same); *City of Colorado Springs v. White*, 967 P.2d 1042, 1051 (Colo. 1998) (same). Except for a vague, unsupported claim of burden, (Mot. for Protective Order, ¶ 1), the Governor's Office does not articulate any need for protection from these other interrogatories and requests for production. Accordingly, to the extent the Court is inclined to entertain the request for secrecy, the order should be limited to those specific records over which a privilege is claimed. *See Comes*, 775 N.W.2d at 306 (any protective order must be "precisely and narrowly drawn").

As for those specific records, it is the approach of jurisdictions recognizing either a deliberative process privilege or, should it be at issue, a gubernatorial communications privilege, to grant in camera inspection of the disputed records prior to reaching the merits of the claim. *See, e.g.*, *City of Colorado Springs*, 967 P.2d at 1054 ("Depending on the circumstances, the court should use the inspection 'to determine whether the material is privileged, to sever privileged from non-privileged material if severability is feasible, and to weigh the government's need for

[5] This inquiry assumes—without support—that such a privilege has a basis in Iowa law. *But see Rigel Corp. v. Ariz.*, 234 P.3d 633, 640–41 (Ariz. Ct. App. 2010) (rejecting claim of state deliberative process privilege as unfounded under state statute and common law); *People ex rel. Birkett v. City of Chicago*, 705 N.E.2d 48, 52–53 (Ill. 1998) (same); *News and Observer Pub. Co. v. Poole*, 412 S.E.2d 7, 20 (N.C. 1992) (same); *Sands v. Whitnall Sch. Dist.*, 754 N.W.2d 439, 458 (Wis. 2008) (same). Notwithstanding, Plaintiff must make this inquiry, because if there is no factual reason such a privilege would apply, then there is no reason to consider whether it exists.

confidentiality against the litigant's need for production.") (quoting *Hamilton v. Verdow*, 414 A.2d 914, 927 (Md. 1980)); *Republican Party of N.M. v. N.M. Tax'n & Rev. Dep't*, 283 P.3d 853, 870 (N.M. 2012) (in open records litigation, party requesting the record assumed to have individualized need for disclosure, and court "must independently determine whether the documents are in fact covered by the privilege," and "should conduct an in camera review of the documents at issue as part of their evaluation"). This is consistent with how Iowa courts have also typically resolved claims of exemption from open records law. *See, e.g.*, *Vaccaro v. Polk Cty.*, 983 N.W.2d 54, 61 (Iowa 2022) . In this case, the Governor's Office's assertion of privilege is so baseless, so lacking in legal authority or factual showing of legitimacy, that Plaintiff should simply receive the withheld records. Yet, if *some* protection must be offered—and the Governor's Office continues to refuse offers of a *negotiated* protective order, (Attachment A to Trial Scheduling and Discovery Plan, App. D (July 30, 2025) (D0011-1))—in camera review is an option and the one utilized in the *Register* litigation. (Ruling on Mot. to Stay and Order for In Camera Review 9, *Records Custodian v. The Des Moines Register*, No. CVCV069048 (Sep. 25, 2025) (D0027)).[6]

CONCLUSION

The Defendants' Motion fails immediately because to obtain a protective order the movant must first show the claimed privilege exists and applies to the documents for which protection is sought. *Mediacom Iowa*, 682 N.W.2d at 66. The Governor's Office admits that it can do neither, for it does not make the attempt. Transparently, it only wants to jump ahead to an appellate opinion on executive privilege and has little regard for how it gets there. Nevertheless, if judicial caution compels this Court to presumptively credit the legally and factually unfounded assertion of

[6] The Iowa Supreme Court recently granted the Governor's Office's application for interlocutory appeal of this ruling denying a stay and ordering in camera review. (Order, *Records Custodian v. The Des Moines Register*, No. 25-1680 (Nov. 12, 2025)).

privilege, then any order short of denial must be limited to the documents at issue and be minimally restrictive. Under no circumstances should all discovery be stayed, nor the records continue to be hidden from all eyes.

Accordingly, the Plaintiff, Iowa Atheists and Freethinkers, Inc., respectfully requests this Court deny Defendants' Motion for Protective Order, grant instead relief as requested in Plaintiff's Motion for Continuance, and order all such other and further relief as this Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties of record via EDMS on November 13, 2025.

/s/ Thomas D. Story
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