

IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

RICK FACCIN, in his official capacity as )  
Madison County Auditor, )  
 )  
Plaintiff, ) 19-MR-431  
 )  
v. )  
 )  
MADISON COUNTY BOARD, et al. )  
 )  
Defendants. )

**LEGAL MEMORANDUM IN SUPPORT OF**  
**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND**  
**PLAINTIFF'S RESPONSE TO DEFENDANTS KURT PRENZLER'S**  
**AND DOUG HULME'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

This action arises out of a resolution (the “Resolution”) passed by the Madison County Board (“Board”) that purports to give the County Chairman, his unnamed “designee,” the County Administrator, and the County Treasurer access to the auditing software of the County Auditor (“Auditor”), a separate constitutional officer. The Resolution also requires the purchase of additional licenses for the auditing software and the installation of the software on these individuals’ computers outside of the Auditor’s office, and would result in the unauthorized disclosure of confidential information of county citizens and employees.

The Illinois Counties Code<sup>1</sup> vests the elected Auditor with several powers and duties, including: (1) acting both as the accountant *and* auditor of the county’s other elected officers, departments, and agents; (2) maintaining a continuous internal audit of the elected officers, agents, and divisions; and (3) having access to all records, documents, and resources necessary to discharge these responsibilities, including confidential information contained in the records of county officers and departments, which is prohibited from disclosure under federal and state law. 55 ILCS 5/3-1005, 1006. To perform these functions, the Auditor is vested with statutory authority to control the internal operations of his office, subject only to the board’s budgetary limitations. 55 ILCS 5/3-1004. Further, “[n]o county board may alter the duties, powers and functions of county officers that are specifically imposed by law.” 55 ILCS 5/5-1087.

Before the Board voted on the Resolution, the Madison County State’s Attorney explained to the Board and the Auditor his legal opinion that the Resolution unlawfully intruded on the constitutional and statutory authority of the elected Auditor, exceeded the scope of the

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<sup>1</sup> 55 ILCS 5/1-1001 *et seq.* (the “Counties Code”).

Board and Chairman's statutory authority, and would result in the unauthorized disclosure of private information:

MR. GIBBONS: "I've viewed portions of the general ledger that are absolutely excluded from public release."

"[The Auditor] has the obligation to operate the [auditing software] system. He has the obligation to maintain control of it."

"[T]here's no button to press to scrub. These records go back decades.\*\*\* There's not just a column you can black out.\*\*\* To accomplish the scrubbing of these [records] is an extraordinary task \*\*\* because it will require going through hundreds of thousands of records to identify whether or not they contain that private information that we're obligated by law to protect. To keep from public view, as to the process of that, I think that is solely within the office holder's [Auditor's] determination."

"My legal concern is that the County is going to have a class action lawsuit if this [information] gets released in a way where personal records, including medical records and other kinds of things be released without creating a huge liability. Again, I think that [the Auditor] has an obligation to release information according to statute but only according to statute that relate to those records \*\*\* and there are limitations on that, and I think that a lot of information in that database falls under those limitations."

*[In response to question of whether any statute prohibits a county executive from viewing private information]:* "There are state statutes that prohibit the release of private information to all other individuals."

"There is no statute that gives [the Chairman] any authority beyond the Board."

"[T]his resolution, in the way that it is written, could be interpreted in a way that would create a massive violation of privacy rights for the citizens whose records are contained in it."

"The Chairman of the County Board's power does not include oversight of the County Auditor's office."

"My legal opinion is that this Board does not have the authority to enforce the Resolution.\*\*\* There is a separation of authorities between Constitutionally Elected Public Offices and County Boards and County Board Members and the Administration. I think that this crosses that line and that's my opinion. I think in order to enforce it, the Board would probably have to file suit."

MR PRENZLER: “Thank you. I think we’ve discussed this enough and I’m calling a roll call, thank you.”<sup>2</sup>

Despite the State’s Attorney’s legal opinion, the Board passed the Resolution on a party-line vote of 13-12. In response, Plaintiff filed his Complaint seeking declaratory judgment and injunctive relief to stop the enforcement of the Resolution.

On April 1, 2019, the Court issued a temporary restraining order after finding that the Auditor “established a clearly ascertainable right in need of protection, namely a statutory right to control the internal operations of the Auditor’s office, the right to be free from the enforcement of unauthorized resolutions, and the prevention of unauthorized disclosure of private information contained in the USL Financials, Inc. (“USL”) software utilized by the Auditor’s office.” TRO ¶ 3.<sup>3</sup> In addition to declaratory relief, the Auditor seeks a permanent injunction similar to the TRO to protect the privacy of county citizens and employees.<sup>4</sup>

On May 17, 2019, Defendants Kurt Prenzler (“Prenzler”) and Doug Hulme (“Hulme”) filed a Motion for Summary Judgment under 735 ILCS 5/2-1005, arguing they are entitled to judgment as a matter of law. In particular, Prenzler and Hulme contend that: (1) the Resolution is enforceable and the Board may purchase, or force the Auditor to purchase, additional software licenses and open access to the Auditor’s software pursuant to the Illinois Counties Code; (2) anyone with “duties and responsibilities to review county financial matters” should “have

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<sup>2</sup> Pl. MSJ Statement of Facts (“SOF”) ¶ 91.

<sup>3</sup> On May 13, 2019, the Court extended the TRO and continued the preliminary injunction hearing to allow Defendants additional time to respond to overdue discovery. At that time, the parties agreed to an expedited summary judgment briefing and hearing schedule in lieu of resetting the preliminary injunction hearing.

<sup>4</sup> The serious threat of Defendant’s improper use and dissemination of confidential information of county citizens and employees is evidenced by the recent action of County Administrator Defendant Hulme in intentionally leaking to the public a confidential investigation report conducted and submitted by retired Judge James Hackett regarding a pending sexual harassment complaint by a county employee against a Board member. Pl. MSJ SOF ¶ 88

unlimited access to the County USL software system and unredacted current and historic General Ledgers”; and (3) the court may compel the Auditor to stop entering confidential information in the auditing software. Def. MSJ pp. 29-30.

Defendants’ motion should be denied and summary judgment entered for Plaintiff.

First, the Resolution failed to pass with a 2/3 vote, as required by Illinois law. This fact alone renders the Resolution unenforceable.

Second, Prenzler and Hulme grossly misstate the law by ignoring the plain language and omitting relevant provisions. In particular, Prenzler and Hulme incorrectly rely on:

- Sections 5-1005, 5-1016, 5-1019, and 5-1106 of the Counties Code, *none of which authorize the Board to intrude on or delegate the Auditor’s statutory duties and powers, the internal control of his operations, or the power to procure equipment and services to perform his duties as prescribed by the Illinois legislature.*
- Section 3-13001 *et seq.* of the Counties Code, which provides for the accounting of fees received by county officers under the direction of the county board *and is, therefore, inapplicable because the Auditor’s office does not collect fees and is not under the direction of the county board.*
- Section 6-31001 *et seq.* of the Counties Code, *which is inapplicable because it expressly excludes an elected auditor from its definition of “auditor.”* To the extent it does apply, it expressly distinguishes between: (1) real time access to and monitoring of a third-party auditor’s records and (2) inspections of a third-party auditor’s “working papers” upon request, and only allows inspections of working papers upon request in Madison County.

Third, Defendants rely on unsupported and demonstrably false statements that the Auditor is “keep[ing] the books and records of the county secret.” Def. MSJ, p. 11. To the contrary, the undisputed facts demonstrate that the Auditor provides, among other things, *daily* financial reports to the Treasurer, *monthly* budget variance reports and budget expenditure reports to the Board’s Finance Committee, *monthly* comparative financial statements showing revenues and expenditures to the County Administrator, *quarterly* financial statements to the

Board showing actual and projected revenues, expenditures, and conditions of all funds and appropriations, numerous other reports, documents and information upon request, and a *Microsoft Excel file* containing requested portions of the general ledger (with redactions made for confidential information such as grand juror identities) that can easily be searched, filtered, or otherwise manipulated using the countless accounting functions provided by Excel. In fact, the former Republican Chair of the Board's Finance Committee for the current administration, Lisa Ciampoli, states under oath that the Auditor's office is "extremely cooperative" in providing information and documents requested, and never withheld from the Chair or Finance Committee financial information necessary to: (a) track the financial performance of the various Offices and Departments; and (b) establish their budgets.

Consistent with Ms. Ciampoli's testimony, the Board's sworn responses to Plaintiff's Request for Production of Documents in this case demonstrate that *the Board cannot identify a single document "evidencing a denial by the Auditor within the past 24 months for information or records requested by" the Board, Prenzler, Hulme, or Slusser:*

3. All documents evidencing a denial by the Auditor within the past 24 months for information or records requested by:

- a. the Board;
- b. Prenzler;
- c. Hulme; or
- d. Slusser.

**ANSWER:** None

Pl. MSJ Ex. 9.

Fourth, Defendants (and the Resolution) fail to recognize that, in Madison County, the Auditor is more than the accountant/bookkeeper: he is the *auditor*. Defendants' mischaracterization of the USL software as purely financial/bookkeeping software ignores the

Auditor's duties to *audit* the county's various elected offices and departments, which requires that the auditing software contain confidential information.

The Resolution far exceeds the Board's budgetary control of the Auditor allowed by law. Defendants propose to interfere with the Auditor's operations, divest him of control over his office, regulate or control the performance of his statutory duties, and perform or delegate the Auditor's auditing functions to Prenzler, Prenzler's designee, Hulme, and Slusser—actions prohibited by Illinois law. *See* 55 ILCS 5-5-1087; *Heller v. County Board of Jackson County*, 71 Ill. App. 3d 31 (5th Dist. 1979) (constitutionally elected officers “operate free from interference,” and the county board cannot divest them of their statutory duties and functions, perform their duties, or direct the manner in which they should be performed); 50 ILCS 105/1.

Defendants fail to point to *any* statute authorizing the Board (or Prenzler and Hulme by extension) to access the entirety of the Auditor's software without his permission, force the Auditor to order additional licenses for the Auditor's software, install the software outside of the Auditor's office, open the records containing confidential information to individuals outside the Auditor's office, alter his duties and functions, dictate how he performs his duties, or delegate the auditing functions to other Board members and county officials. Because the Resolution plows over the powers and duties conferred on the Auditor as a separate elected officer, the Resolution is invalid and unenforceable.

Accordingly, the Court should deny Prenzler and Hulme's Motion for Summary Judgment, enter summary judgment in favor of Plaintiff, and issue permanent injunctive relief.

#### **LEGAL STANDARD**

“Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Outboard Marine Corp. v. Liberty*

*Mut. Ins. Co.*, 154 Ill. 2d 90, 102 (1992); 735 ILCS 5/2-1005. “[W]here the pleadings, depositions and other evidence before the court in a motion for summary judgment show that at trial a verdict would have to be directed, entry of summary judgment is proper.” *Beauvoir v. Rush-Presbyterian-St. Luke’s Medical Center*, 137 Ill. App. 3d 294, 301 (1st Dist. 1985).

### **STATEMENT OF UNDISPUTED FACTS**

Plaintiff incorporates herein by reference the Statement of Undisputed Facts (“SOF”) set forth in his Motion for Summary Judgment.

### **ARGUMENT**

#### **I. The Resolution is Unenforceable Because It was not Approved by 2/3 of the Board.**

If the Board had the authority to require the purchase of additional software licenses to access the Auditor’s USL system (it did not), under the Counties Code it needed 2/3 of its members (19.333) to approve the Resolution:

“The county board of each county may, upon the affirmative vote of two-thirds of its members, enter into one or more leases for a period of not to exceed 5 years for computer equipment, data processing machinery, and software, as may be required for its corporate purposes.” 55 ILCS 5/5-1130.

Defendants argue that the 2/3 statute does not apply because it only speaks to purchases of new software systems. Def. MSJ, p. 24. Defendants cite no case for this interpretation, and the statute’s plain language is for leases of software, not purchases of new software systems. It is undisputed that the Resolution requires the purchase of additional software licenses to access the USL system. SOF ¶ 94.<sup>5</sup> The USL license agreements are equivalent to the software leases contemplated by the statute. *See, e.g., DW Data, Inc. v. C. Coakley Relocation Sys., Inc.*, 951 F. Supp. 2d 1037, 1062 (N.D. Ill. 2013) (interchanging terms “lease” and “license” when examining

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<sup>5</sup> This is not the situation suggested by Defendants where a software license is reassigned to a new user or where an elected officer purchases licenses. *See* Def. MSJ p. 25.

“the plain terms of the Oracle license” in light of “the ubiquity of non-assignment and transfer clauses in software leases”); *First Nationwide Bank v. Fl. Software Serv.s, Inc.*, 770 F. Supp. 1537, 1543 (M.D. Fla. 1991) (“The license agreement in this case is, for all practical purposes, a commercial lease between a computer software company and a financial institution.”).

The Board approved the Resolution by a vote of 13 in favor and 12 opposed. SOF ¶ 92. It, therefore, failed to properly approve the Resolution. For this reason alone, summary judgment for Plaintiff is warranted.

**II. The Auditor is a Constitutional Office with Statutory Duties and Powers to Act as the County’s Accountant and Auditor.**

Defendants contend that “[t]he Auditor’s function is merely to ‘assist and advise’ the County Board in matters of finance.” Def. MSJ, p. 8. The Auditor, however, is a constitutional office. Ill. Const. 1970, art. VII, § 4(c). County government in Illinois is a creature of state statute. While the Auditor is charged by County Ordinance to assist and advise the Board in matters of finance, he is also charged by the Illinois legislature and County Ordinances to act as the accountant and auditor for the county. 55 ILCS 5/3-1001 *et seq.*

**A. The Auditor’s Accounting Duties Pursuant to §3-1006.**

Because of the county’s size, the Madison County Auditor is the county’s accountant. 55 ILCS 5/3-1006. As the accountant, the Auditor is responsible for presenting certain documents to the Board on a regular basis (which he does without issue), including “financial reports up to the first day of the month \*\*\* showing receipts, disbursements, investments and balances in each of the county budgets and funds.” Mad. Co. Ord. §31.15(A); § 31.02(B). The Auditor is also charged with “assist[ing] and advis[ing] the Board in all matters of finance and contracts,” which it also does without issue. Mad. Co. Ord. § 31.15(B).



In performing these functions, the Auditor promptly and effectively answers questions from Defendants and works with the Board, Chairman, Finance Committee, and others to prepare the annual budget. SOF ¶ 71. According to the former Finance Committee Chair for the current administration, the Auditor's Chief Deputy spends "countless hours" with Board Members, including the Finance Committee Chair, to assist in budgeting and financial matters. SOF ¶ 72. The Auditor attends monthly Board meetings and Finance Committee meetings to answer questions, make presentations, provide advice on the county's financial matters, and report on all claims and transfers for each county fund during the prior month. SOF ¶¶ 45-47.

The Auditor also provides periodic reports, including daily reports to the Treasurer, monthly Budget Variance Reports to the Finance Committee, monthly Budget Expenditure Analysis reports to the Finance Committee, a monthly comparative statement of financial position to the County Administrator showing assets, liabilities, fund balances, revenues, expenditures, transfers in/out, and fund balances for each fund/department, and quarterly reports to the Board showing the entire financial operations of the county including revenues anticipated and received, expenditures estimated and paid, obligations unpaid, and the condition of all funds and appropriations. SOF ¶¶ 48-61.

The Auditor provides other financial information, reports, and files upon request, including an Excel file containing the general ledger of all transactions with redactions made for confidential information of citizens and employees. SOF ¶¶ 62-64, 73. The entries in the general ledger can be searched, filtered, and matched with the account numbers and account codes found on the monthly reports to review all the expenditures and/or revenues shown on the monthly reports, or manipulated using any of the accounting functions in Excel.<sup>6</sup> SOF ¶¶ 65-67.

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<sup>6</sup> For example, one can see the 222 payments to jurors in March 2019 making up the total of \$14,375.00, though the identity of the jurors is redacted in the ledger provided by the Auditor. SOF ¶¶ 62-67.

According to the former Finance Committee, the Auditor's office is "extremely cooperative" in providing requested information, never refused to provide any financial information requested, and never withheld from the Chair or Finance Committee financial information necessary to: (a) track the financial performance of the various offices and departments; and (b) establish their budgets. SOF ¶ 74. In fact, the Board and Treasurer were both unable to identify a single document "evidencing a denial by the Auditor within the past 24 months for information or records requested by" the Board, Prenzler, Hulme, or Slusser. SOF ¶ 75.

**B. The Auditor's Auditing Duties Pursuant to § 3-1005, Use of USL, and Control over Access to USL.**

In addition to his § 3-1006 accounting duties, § 3-1005 of the Counties Code also vests the Auditor with specific powers and duties related to *auditing*, including: (1) auditing all claims against the county; (2) auditing the receipts of all elected officers and departments; and (3) maintaining a continuous internal audit of the operations and financial records of the officers, agents, or divisions of the county, and having access to all records, documents, and resources necessary for the discharge of this responsibility. 55 ILCS 5/3-1005. *See also* Mad. Co. Ord. § 31.15(C) ("The County Auditor shall audit all financial reports and statements of officeholders and department heads \*\*\*.").

Mr. Prenzler has acknowledged the multiple duties of the Auditor:

- Q. The function of the auditor is to do the bookkeeping but also internal auditing?
- A. Yes.

Pl. MSJ Ex. 3, Prenzler Dep. 54:7-9.

Pursuant to § 3-1005, the Auditor audits both county departments under the Board's control and other elected officeholders who are outside of the Board's direct control, including,

but not limited to, the Chief Judge’s office, the Sheriff’s Office, and the State’s Attorney. SOF ¶¶ 12, 15, 18-20. Moreover, pursuant to his duties provided by statute, the Auditor conducts internal audits, which the Chairman has acknowledged are sometimes conducted in secret so an office or department does not know it is being audited. SOF ¶ 14.

To perform his statutory auditing duties, including auditing the claims of the county, auditing the receipts of the elected officers and county departments, and maintaining a continuous internal audit of the operations and financial records of the officers, agents, and divisions of the county, the Auditor has chosen to use the USL software. SOF ¶ 15. To perform his auditing duties, the Auditor is required to input into USL information received from the elected offices and departments of the county, which includes confidential information of citizens and employees (the “Confidential Information”). SOF ¶ 17. For example, the Auditor audits the Chief Judge’s grand jury service payments, and data about the grand jurors is uploaded into USL to perform this function directly from a file provided to the Auditor by the Chief Judge’s Jury Commission. SOF ¶¶ 18-20. This information is not provided to the Board or anyone else outside the Jury Commission and the Auditor’s office. SOF ¶ 20. The Confidential Information is placed in USL to: (a) avoid duplicate payments; (b) audit receipts and disbursements of county offices and departments; and (c) create checks to be issued by the county to various vendors, employees or other individuals. SOF ¶ 19.<sup>7</sup> Moreover, the Auditor would be hindered in performing his auditing duties, such as preventing duplicate payments,

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<sup>7</sup> Certain information, such as the juror names, are kept in USL’s general ledger because the software is used to create the checks issued to the jurors (the “Vendor/Customer Name” field within the general ledger). SOF ¶¶ 19, 22. Other Confidential Information is located in other modules within USL, such as the Account Payable module, which contains tax ID and bank account numbers. SOF ¶ 23. The Confidential Information cannot be replaced with other codes in USL. SOF ¶ 19.

auditing receipts, maintaining an internal audit, or performing spot-audits, without maintaining the Confidential Information in the USL software. SOF ¶ 25.

The USL software must be directly installed on local computers, and currently, it is only installed on computers located in the Auditor's office. SOF ¶¶ 33, 37. The Chief Deputy Auditor is the software administrator, and the only people with full access to the data on the USL system are the Auditor, his deputy, and the Auditor's staff through password-protected access. SOF ¶¶ 36-37. Finally, the USL software does not have a function to redact the Confidential Information. SOF ¶24. Thus, giving individuals outside the Auditor's office read-only access to USL would allow them to view any module within USL, including the Confidential Information contained therein. SOF ¶¶ 68-69. Accordingly, the Auditor has not authorized the installation of the USL software outside the Auditor's office. SOF ¶ 41. Nor has he authorized read-only or other unrestricted access to USL to individuals outside the Auditor's office. SOF ¶ 41.

**III. The Resolution is Unenforceable because the Board's Control over the Auditor's Office, Operations, and Software is Limited Solely to Budgetary Control.**

**A. The Auditor Operates Free from the Board's Interference and the Board Cannot Divest him of his Statutory Duties and Functions, Perform his Duties, or Direct the Manner in which they should be Performed.**

The legislature has conferred on the Auditor internal control over the operations of his office, subject only to the Board's *budgetary* limitations:

“The county auditor shall control the internal operations of the office and procure equipment, materials and services necessary to perform the duties of the office, subject to the budgetary limitations established by the county board.” 55 ILCS 5/3-1004.

Defendants contend the internal control statute refers only to the Auditor's control “over wages, salaries, duties, and working conditions of his employees.” Def. MSJ, p. 11. This interpretation, however, would render meaningless § 3-1007, which specifically addresses the

Auditor's control over his employees. 55 ILCS 5/3-1007 ("The county auditor shall appoint deputies and employees. \*\*\* Compensation of deputies and employees not otherwise provided for by law shall be fixed by the county auditor subject to budgetary limitations established by the county board."). The Auditor's internal control over his operations covers more than employment matters. It includes controlling when auditing software is purchased, where it is installed, how it is used, and who accesses it, subject only to budgetary restrictions by the Board.

Furthermore, § 5-1087 of the Counties Code provides that "[n]o county board may alter the duties, powers and functions of county officers that are specifically imposed by law." 55 ILCS 5/5-1087. The legislature has clearly given the Auditor independence from the Board to act as the county's auditor (subject to the Board's power of the purse). In *Heller v. County Board of Jackson County*, 71 Ill. App. 3d 31 (5th Dist. 1979), the Fifth District explained that, in light of the language set forth in § 5-1087, the constitutionally elected office of supervisor of assessments was to "operate free from interference," and that the county board could not divest him of his statutory duties and functions, perform his duties, or direct the manner in which they should be performed:

"We believe the General Assembly intended that the office of supervisor of assessments operate free from interference in the important and often highly unpopular function of assessing property for purposes of taxation. Thus the supervisor of assessments is given a form of tenure. He is appointed for a four-year term and may only be removed for cause after judicial proceedings. [Citation.] This court has so held in *Macaluso v. West*, 40 Ill. App. 3d 392, 352 (5th Dist. 1976).\*\*\*

[The county board cannot] divest the supervisor of assessments of the duties and functions vested in him by law enacted by the General Assembly nor may the county board perform his duties or direct the manner in which they shall be performed. We reject the county board's argument that the power conferred on it by section 25.34 of the Counties Act (Ill. Rev. Stat. 1975, ch. 34, par. 429.18) or that any of the powers given county boards (Ill. Rev. Stat. 1975, ch. 34, pars. 303, 401 et seq.) give it the power to manage or control the day-to-day operation of any county office." *Id.* at 38.

The County Ordinance describing the Auditor’s duties recognizes this independence by providing that the Auditor’s accounting function involves the Board, while his auditing function does not:

- “(A) The County Auditor and County Treasurer shall *present financial reports at each Board meeting* up to the first day of the month in which the meeting is held showing receipts, disbursements, investments and balances in each of the county budgets and funds.
- (B) The County Auditor shall *assist and advise the Board in all matters of finance and contracts*, and specifically assist and advise the County Board Chairperson and Government and Finance Operations Committee in the preparation of the annual county budget.
- (C) The County Auditor shall *audit* all financial reports and statements of *officeholders and department heads* when due, whether made pursuant to state statute or by direction of the County Board Chairperson and Board.” Mad. Co. Ord. § 31.15 (emphasis added).

By “expressly providing” for auditing and accounting to be performed by the Auditor, and giving the Auditor internal control over his operations (subject only to the Board’s budgetary limitations), the legislature has limited the Board’s management over the county’s auditing and accounting functions, and limited its control over the Auditor’s operations to budgetary control.

**B. Sections 5-1016 and 5-1005 of the Counties Code do not Allow the Board to Intrude on the Auditor’s Internal Control of his Office and Operations.**

Defendants argue they have authority to access the Auditor’s software pursuant to § 5-1016 of the Counties Code. Def. MSJ, p. 3. Section 5-1016, however, provides that the Board has the power to manage county funds and business “except as otherwise specifically provided”:

“A county board may manage the county funds and county business, *except as otherwise specifically provided*. A county board may invest any trust fund, subject to its control and not otherwise restricted by law, in bonds or other interest bearing obligations of the United States maturing or subject to redemption at such time as shall not adversely affect the proper administration of the trust. Interest from any such investment shall accrue to the fund and shall, except to the extent otherwise provided by law or court order, become the property of the county upon disbursement of the fund.” 55 ILCS 5/5-1016 (emphasis added).

This statute’s plain language says it must be read in context with other powers and duties that are specifically provided by law, which include the powers and duties conferred on the Auditor by the Illinois Constitution and the Counties Code. *See also Weeks v. Hoffman*, 1 Ill. App. 3d 337, 338-39 (2d Dist. 1971) (“This section does not confer an absolute power of management of county funds when there is an absence of any specific provision to the contrary – it merely expresses the conferring of power to manage county funds and transact county business according to law.”); 1977 Ill. Op. Att’y Gen S-1260, p. 3 (“[A] county board’s authority to manage county funds and county business [citation] and its authority to alter powers and functions of county officers [citation] is limited to that which is not otherwise specifically provided for by law.”). Because the legislature has expressly conferred the auditing duties on the elected Auditor and given him control over his operations, § 5-1016 provides that the county board **may not** manage the business of the Auditor. *See Heller*, 71 Ill. App. 3d at 38 (board cannot perform duties of constitutional officer, direct how they are to be performed, or manage or control his operations).

Defendants also rely on § 5-1005 of the Counties Code, which permits counties:

“[t]o install an adequate system of accounts and financial records in the offices and divisions of the county, suitable to the needs of the office and in accordance with generally accepted principles of accounting for governmental bodies, which system may include such reports as the county board may determine.” 55 ILCS 5/5-1005(16).

Contrary to Defendants’ assertion, this section does not give the Board “plenary auditing and oversight power, and access to books.” Def. MSJ, p. 6. Instead, as the Attorney General has explained, this section must be read and construed together with § 3-1006, and any installation of a system of records in county offices must be done through the Auditor’s office:

“This section [5-1005(16)] and section 3-1006 of the Counties Code must be read and construed together in the light of the general purpose and plan of the statutes, and the object to be obtained.

\* \* \*

Construing the two sections together, it appears that the auditor is given the power to devise a system of financial records and both the auditor and the board have the power to install such a system in county offices and divisions. Because the board cannot alter the statutory duties of the auditor [§ 5-1087], however, the board’s means of implementing its powers in this area, in counties required by statute to have an auditor, ***must be through the auditor’s office.***” 1991 Ill. Op. Att’y Gen. 11, pp. 5, 6 (emphasis added).

*See also Heller*, 71 Ill. App. 3d at 38.

Here, the Resolution runs afoul of these principles and is an unlawful attempt by the Board to either: (1) access the Auditor’s software without his authorization; (2) force the purchase of additional licenses for the Auditor’s software without the consent of the Auditor; or (3) delegate auditing and accounting duties to persons other than the auditor.

In light of the Auditor’s internal control over his operations, attempts by the Board to “exercise direct control over purchases by county officers” constitutes “an impermissible attempt to abridge the statutory powers of county officers to control the internal operations of their officers.” 1991 Ill. Op. Att’y Gen. 11, p. 3. *See also* 1996 Ill. Op. Att’y Gen. 21, p. 6 (“[I]t is clear that the county board cannot exercise direct control over purchases made by \*\*\* county officers who have been granted internal control authority \*\*\*.”); 1977 Ill. Op. Att’y Gen. 93 (county boards cannot regulate or control internal ***equipment and material*** of county clerk’s office); 1977 Ill. Op. Att’y Gen. 136 (custody and care of the courthouse must remain in the office of sheriff and cannot be taken away by county ordinance).<sup>8</sup>

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<sup>8</sup> *See also* 1991 Ill. Op. Att’y Gen. 11, p. 3 (the Auditor’s office “cannot be required to make their purchases through a county purchasing department”); Mad. Co. Ord. §34.08(D) (“It is recognized that certain officers/agencies may have independent statutory authority to purchase their own services, materials equipment and supplies.”). Contrary to the internal control statute and purchasing ordinance’s acknowledgement of the Auditor’s independence, Mr. Prenzler contends that the Auditor has to follow the



Furthermore, the Resolution constitutes a blatant attempt by the Board to delegate the Auditor's duties and responsibilities to the Chairman, his designee, Administrator, and Treasurer. Such a delegation of duties is prohibited because "the function of accounting for the county has been specifically imposed upon the auditor by law." 1991 Ill. Op. Att'y Gen. 11, p. 4. Therefore, "general accounting duties for the county *cannot be delegated* to an officer other than the auditor." *Id.* (emphasis added). Likewise, the Auditor's statutorily-prescribed auditing duties cannot be delegated. *See Heller*, 71 Ill. App. 3d at 38 (board cannot divest constitutional officer "of the duties and functions vested in him by law enacted by the General Assembly nor may the county board perform his duties or direct the manner in which they shall be performed"); SOF ¶ 91, Mad. Co. State's Attorney comments to Board ("[The Auditor] has the obligation to operate the [auditing software] system. He has the obligation to maintain control of it."). Nor could the Chairman or any board member take on the Auditor's role. *See* 50 ILCS

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county's purchasing ordinance to obtain software because, under his mistaken belief, the software is under the Board's control:

Q. So your view is, your understanding of 1004 is that at least under your view of Madison County and these statutes of Madison County, that it is the County Board that controls the right to procure equipment, materials and services necessary for the auditor to perform the duties of his office?

A. In the same way that when I was treasurer, when we got bids for publishers and printing of our tax bills, that would be reviewed by the finance committee, it would be bid out, not by our office but by the purchasing department. It would be a third-party agency receiving those bids, opening the bids, but that's within the budget of the treasurer's office. But that's how we do purchasing in Madison County.

\* \* \*

Q. As far as you're concerned, that's correct? USL Financials is under the authority of your Board, not under Rick Faccin's authority; is that correct?

A. Yes.\*\*\*

Pl. MSJ Ex. 3, Prenzler Dep. 124:5-18, 126:3-6. ***Prenzler's testimony directly contradicts his own prior actions as County Treasurer, in which he made purchases without Board authority.*** *See* PL MSJ Ex. 6, Email from Doug Hulme to J. Zoelzer dated March 21, 2014 ("Kurt [as Treasurer] is allowed to spend his budget as he wants \*\*\* and it was our hope to go through the finance committee as a courtesy \*\*\*.").

105/1 (“No member of a county board, during the term of office for which he or she is elected, may be appointed to, accept, or hold any office other than [] chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, \*\*\* unless he or she first resigns from the office of county board member or unless the holding of another office is authorized by law.”).

Defendants ignore these principles and rely on a misstatement of a 1912 case, *Donlevy v. Sims*, 175 Ill. App. 290 (2d Dist. 1912). Defendants argue that in *Donlevy*, “the county board had the power to investigate and audit the State’s Attorney.” Def. MSJ, p. 18. The court in *Donlevy*, however, expressly stated that the third-party hired by the board in that case “was in no way authorized by [the] contract to audit anything.” 175 Ill. App. at 295. Nor was there any issue in the 1912 case involving access to auditing software or forcing the purchase of additional software licenses and installation of the software outside the Auditor’s office.

Finally, Prenzler has acknowledged the separation between his office and the Auditor’s office by explaining that he would not attempt to obtain information or enter any software system of a constitutional office without authorization or permission from the elected officeholder—***he is simply unaware that the Auditor is a constitutional officer:***

- Q. \*\*\* You are aware, are you not, and familiar with the separateness of constitutional offices versus county government; is that correct?
- A. Yes.
- Q. And you understand that offices like the treasurer and the county clerk, the circuit clerk, sheriff’s department and the state’s attorney’s office are found in the Illinois Constitution; correct?
- A. I’m aware that certainly the state’s attorney and the treasurers are in the Constitution. ***I’m not familiar with the auditor’s office being in the Constitution.***
- Q. Fair enough. And you are aware, for example, with regard to county government, that is a beast of statute as opposed to being in the Constitution; correct?

- A. Yes.
- Q. Okay. Now, you would agree, wouldn't you, that, and correct me if I'm wrong, that *you would not attempt to obtain information or enter any system of any constitutional office without authorization or permission*; isn't that correct?
- A. I'm glad we are having this process so that we are doing everything legally.
- Q. Right. *Am I correct when I make that statement?*
- A. *Yes. Yes.*
- Q. And that you have not directed anyone to undertake investigation or to get into any constitutional office's software system without their permission or without authorization; isn't that correct?
- A. That's correct.

Pl. MSJ Ex. 3, Prenzler Dep. 143:17-144:23 (emphasis added).

Accordingly, §§ 5-1016 and 5-1005(16) do not give the Board an unlimited ability to intrude on the Auditor's internal control of his office and operations, including by accessing his software without permission, forcing the purchase and installation of the Auditor's software outside his office without his consent, or delegating his auditing and accounting functions.

**C. Sections 5-1019 and 5-1106 of the Counties Code do not Authorize the Board to Access the Auditing Software Used by the Auditor's Office.**

Defendants also argue that §5-1019 of the Counties Codes authorizes access to USL.

Section 5-1019 provides:

“A county board may examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county, to issue purchase orders and make payments thereon upon compliance with the terms of such purchase orders, and to establish procedures therefor.” 55 ILCS 5/5-1019.

This general statutory provision of § 5-1019 must be read with, and is superseded by, the more specific provisions of § 3-1006, which confers accounting duties on the elected Auditor in counties of 275,000 population or less, and § 3-1004, which limits the Board's control over the

Auditor's operations to budgetary control. *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002) ("It is also a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject the specific provision controls and should be applied.").

More importantly, however, USL is the software used by the Auditor to perform his *auditing* duties (SOF ¶¶ 12-15, 17-25), and § 5-1019 does not give the Board the right to examine the auditing software. While the software can be used to generate financial reports, the data in the software is, by necessity, more extensive than financial data. SOF ¶¶ 17-23. Defendants' repeated mischaracterization of the USL software as the county's "financial software" does not make it so. In fact, the only support Defendants provide to support their mischaracterization that the USL software is used by the Auditor simply for financial record-keeping is a reference to paragraph 7 of the Complaint. Def. MSJ SOF ¶ 6. Paragraph 7 of the Complaint, however, simply states: "To perform his statutory duties, the Auditor utilizes software provided by USL Financials, Inc." Compl. ¶ 7.<sup>9</sup> Plaintiff, on the other hand, provides undisputed evidence that the auditing software is not equivalent to the county's financial books and accounts (SOF ¶¶ 12-41), undermining the argument that accessing USL is the same as examining the county's accounts.

Moreover, Defendants (or anyone else) are currently free to examine all the accounts of the county should they desire. They may do so by examining, *inter alia*, the Monthly Variance Reports; the Monthly Budget Expenditure Analysis, the Monthly Comparative Statement of Financial Position, the Quarterly Reports, the general ledger (with redactions made to Confidential Information), or the Comprehensive Annual Financial Report. SOF ¶¶ 50-67, 77.

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<sup>9</sup> Defendants have further testified they have not seen the data contained in the USL software. SOF ¶ 30.

The former Chair of the Finance Committee for the current administration has found this information sufficient and reliable. SOF ¶¶ 39, 74. For example, it can easily be determined from these sources that, in March 2019, the county paid \$14,375.00 in juror fees to 222 jurors, along with the date and amount of each juror payment. SOF ¶ 67. But if additional information is desired, Board members may work (and have worked) with the Auditor, who spends “countless hours with Board Members,” to create different reports or obtain other information. SOF ¶¶ 54, 62-67, 71-75.

The uncontroversial proposition that the Board may examine this financial information, however, is significantly different from the proposition that the Board should be allowed to see the identity of the jurors, which include grand jurors, or their tax ID numbers, which, as set forth below, is prohibited from disclosure by the Illinois Code of Criminal Procedure. Access to the USL auditing software results in the disclosure of such information. SOF ¶¶ 68-69.

Furthermore, the proposition that the Chairman, Board, County Administrator, or Treasurer should be able to *examine* the financial records is different from the proposition that these individuals should be able to *audit* the juror payments when they are made. As set forth above, that demand crosses the line to an improper delegation of the Auditor’s duties to Board members or unelected officials. *See* § II.B; *Heller*, 71 Ill. App. 3d at 38.

These examples show the fallacy of Defendants’ unsupported assertion that the auditing software is equivalent to the county’s financial books and accounts. There is no evidence supporting this equivalency or the claimed need to access USL for accounting, budgeting, or financial oversight purposes. In fact, no prior county administration, chairman, board member, or treasurer has had, or requested access to, the USL system. SOF ¶ 38. Even the former Republican Chair of the Finance Committee for the current administration explained that neither

she nor the Finance Committee ever requested or required access to USL to perform their budgeting and financial oversight duties. SOF ¶ 39. Similarly, the Board has never purported to need access to the software, and was unable to identify a single document evidencing a communication to or from any current Board member during the past year that related to USL in any way. SOF ¶ 40.

As shown by the undisputed facts, allowing the individuals listed in the Resolution to examine the financial information of the county is accomplished without opening access to the entirety of the Auditor's software, a fact acknowledged by Hulme.

Q. You just need the information?

A. The information, yes. That's what's important. That's what's public is the information. *It's not the system. It's the information.*

\* \* \*

Q. Jennifer has always given you -- information is critical, is what's critical to you; right? *Not the software?* Not the medium? It's the information; is that your point?

A. *Absolutely.*

SOF ¶ 70.

Defendants also rely on § 5-1106 of the Counties Code, which provides for an annual financial statement by the Board:

“It shall be the duty of the county board of each county:

\* \* \*

Fifth—To make out at its meeting in September, annually, a full and accurate statement of the receipts and expenditures of the preceding year, which statement shall contain a full and correct description of each item, from whom and on what account received, to whom paid, and on what account expended, together with an accurate statement of the finances of the county at the end of the fiscal year, including all debts and liabilities of every description, and the assets and other means to discharge the same; and within 30 days thereafter to cause the same to be posted up at the court house door, and at 2 other places in the county, and published for one week in some newspaper therein, if there is one, and the same can be done without unreasonable expense.” 55 ILCS 5/5-1106.

There is no fact showing that the Board actually does this each September. Nonetheless, should they want to do so (or want the Auditor to do so), all the required information could be obtained from the information already provided by the Auditor in the Monthly Variance Reports (expenditures); Monthly Budget Expenditure Analysis (expenditures line-item by each department/fund); monthly comparative statement of financial position (assets by line-item, liabilities by line-item, fund balance by line-item, revenues by line-item for each department/fund); Quarterly Reports (entire financial operations of county, including revenues received and anticipated, expenditures paid and estimated, obligations unpaid, and condition of all funds and appropriations); and the Comprehensive Annual Financial Report presented each July. SOF ¶¶ 50-61, 76-77. No prior administration, nor the Finance Committee in this administration, nor the current Board has ever requested access to USL to perform this function. SOF ¶¶ 37-40.

Nothing in §§ 5-1019 or 5-1106 supports Defendants' intrusion into the Auditor's software or to view the confidential, non-financial information contained therein.

**D. The Board may not Force the Auditor to Disclose Confidential Information Otherwise Prohibited from Disclosure.**

Mr. Prenzler has never seen the USL software, has no idea what confidential information is in the USL software, and has not asked the Auditor what information is there because "He's an elected official. He's the bookkeeper. I'm not." SOF ¶ 30. Despite his lack of knowledge, Mr. Prenzler claims that the Auditor's refusal to authorize access to USL is criminal and a violation of the principle of government transparency and accountability. Def. MSJ, pp. 7, 23.

Governmental transparency, however, must be balanced against other provisions of law that prohibit or exempt the disclosure of private information. The Resolution ignores this balancing act and instead focuses solely on the Chairman's desire to access all the data.

Q. So what is it you're looking for that you're not being provided?

A. Access to the software.

\* \* \*

Q. You want it all?

A. I want access to the financial software ideally with no confidential information.

Q. Well, there is confidential information. There is grand juror information. There's information regarding ongoing investigations, perhaps. Not only do you want it, you want your designee to have it under this resolution; right?

A. Ideally I would like access with that information redacted.

Q. It's not redacted. We are on Planet Earth, and today is it redacted?

A. I understand it is not.

Pl. MSJ Ex. 3, Prenzler Dep. 92:1-3, 95:9-21. *See also* Def. MSJ, p. 29-30 (asking Court to declare that anyone with "duties and responsibilities to review county financial matters" should "have unlimited access to the County USL software system and unredacted current and historic General Ledgers").

It is undisputed that there is Confidential Information in the various modules within USL, and that the Auditor would be hindered in performing his duties without maintaining such information in the USL software. SOF ¶¶ 17-25. Moreover, there is no function within USL to redact the Confidential Information, and creating such programming would require an expenditure of approximately \$10,000, which is not in the Auditor's budget and which has not been appropriated by the Board. SOF ¶ 24. Accordingly, forcing the Auditor to provide read-only access to USL to individuals outside his office divests him of his control over his internal operations, including the use, placement, and control of the auditing software, and results in the disclosure of the Confidential Information contained in the various modules within USL. SOF ¶¶ 68-69. It also divests him of the authority to control the process for keeping the Confidential Information from public view. *See* SOF ¶ 91, Mad. Co. State's Atty ("[A]s to the process of



[keeping confidential information from public view], I think that is solely within the office holder's determination.”).

**1. The Auditor is prohibited by the Illinois Code of Criminal Procedure from disclosing to the Board, or its designees, grand jury information in his possession.**

The Illinois Code of Criminal Procedure prohibits the disclosure of “[m]atters other than the deliberations and vote of any grand juror.” 725 ILCS 5/112-6(b). The Illinois Supreme Court recently explained that this prohibition “encompasses any material that tends to ‘reveal some secret aspect of the grand jury’s investigation, [including] the identities of witnesses or jurors \*\*\*.” *Better Gov’t Ass’n v. Office of the Special Prosecutor*, 2019 IL 122949, ¶ 36 (quoting *Lopez v. Department of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005)).

Because the Auditor is auditing elected offices, his office is in possession of confidential information sent to it by elected offices, including the Chief Judge’s office, the Sheriff’s Office, and the State’s Attorney. For example, the Auditor audits the Chief Judge’s grand jury service payments, and data about the grand jurors is uploaded into USL to perform this function directly from a file sent by the Chief Judge’s Jury Commission. SOF ¶ 20. This information is not provided to the Board or anyone else outside the Jury Commission and the Auditor’s office. *Id.*

The Resolution improperly forces the Auditor to disclose this information in violation of the Criminal Code. *See also* SOF ¶ 91, Mad. Co. State’s Atty (“[The Auditor] has an obligation to release information according to statute, but only according to the statutes as they relate to those records \*\*\* and there are limitations on that, and I think that a lot of information in that database falls under those limitations.\*\*\* There are state statutes that prohibit the release of private information to all other individuals.”).

**2. The Auditor is prohibited from disclosing to any person other private information that is exempt from disclosure under the Freedom of Information Act and other statutes.**

Defendants' reference to the principles of transparency espoused in the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.* ("FOIA" or the "Act"), are also misguided because the Act provides *exemptions from disclosure* of, *inter alia*, "*private information*" and other "*materials prepared or compiled with respect to internal audits of public bodies.*" 5 ILCS 140/7(1)(b), (m) (emphasis added).

The Auditor must consider FOIA exemptions and withhold disclosure when appropriate because it is a "public body" under FOIA.

"Public body" means all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code." 5 ILCS 140/2(a).

With respect to the Auditor's office, the elected auditor is the "head of the public body" because he is the individual "holding primary executive and administrative authority for the [auditor's office]." 5 ILCS 140/2(e). *See also* 55 ILCS 5/3-1003-1007.

Under the Act, Prenzler, Hulme, Slusser, and their designees are "persons" under the Act because they are individuals. 5 ILCS 140/2(b). As the Madison County State's Attorney tried to explain to the Board: "There are state statutes that prohibit the release of private information to *all* other individuals." SOF ¶ 91.

The Act defines "public record" as documents "pertaining to the transaction of public business \*\*\* prepared by or for, used by, received by, in the possession of, or under the control of" the Auditor's office. 5 ILCS 140/2(c). As a public body, the auditor "may not grant to *any*

*person* or entity, whether by contract, license, or otherwise, the *exclusive right to access* and disseminate any public record as defined in [the] Act.” 5 ILCS 140/3(a). Contrary to this provision, the Resolution seeks to provide certain persons outside the Auditor’s office with the exclusive right to access the data in the auditing software.<sup>10</sup>

Furthermore, the fact that the software contains “public records” does not end the matter because public records are subject to non-disclosure and redaction under the Act. *See* 5 ILCS 140/3(a) (public body shall make public records available “except as otherwise provided in Sections 7 and 8.5 of this Act”). For example, because the Auditor uses the USL software to perform his internal auditing functions, the USL software contains “*materials prepared or compiled with respect to internal audits of public bodies*,” which are specifically exempt from disclosure “to any person.” 5 ILCS 140/7(1)(m), 140/3(a).

As set forth above, the Auditor is also in possession of other information exempt from disclosure under the Act, including, *inter alia*: (1) “private information” as defined by § 2(c-5) of the Act; (2) information prohibited from disclosure by federal or state law (e.g. HIPAA); and (3) personal information. *See* 5 ILCS 140/7(1)(a), (b), (c). The Auditor inputs this information into the USL software to perform the auditing functions of his office. SOF ¶¶ 17-25. The Act exempts disclosure of this information “to any person.” 5 ILCS 140/3(a).

The Auditor is also in possession of information received from the judicial branch and the clerk of the court. The auditor inputs this information into the USL software to perform the auditing functions of his office. SOF ¶¶ 17-25. The judiciary, including the clerk of the court, is

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<sup>10</sup> The first sentence of Section 3(a) provides: “Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act.” The next sentence discussed herein, however, prohibits the granting of exclusive access to any person, thus showing the Act’s distinction between *providing* documents (see Title of Section 3 “Provision of public records”) and exclusive *access* to those records. The Resolution improperly seeks the latter.

not subject to the disclosure requirements of FOIA. *Nelson v. Kendall County*, 2014 IL 116303, ¶ 29 (“[O]ur appellate court has held that because the FOIA does not include the judicial branch in its listing of public bodies, the judiciary is exempt from the statute’s provisions. [Citations.] It is also the case that the exemption for the judicial branch has not been limited to actual courts. It has been extended to include court-affiliated entities which perform judicial functions, such as pretrial services (*id.*) and nonjudicial components of the judicial branch, such as the clerks of the courts.”). By forcing the Auditor to disclose confidential records received from the judiciary, the Resolution sidesteps the judiciary’s exclusion from FOIA.

Likewise, the Auditor may assert FOIA exemptions related to information in its possession, even if that information came from another department or county officer. The other departments/county officers who submit the information may also assert exemptions, even if the Auditor does not. *Twin-Cities Broadcasting Corp. v. Reynard*, 277 Ill. App. 3d 777 (4th Dis. 1996) (“Although the FOIA does not expressly require consultation under section 3(d)(vii) \*\*\* we conclude the FOIA implicitly requires it if the agency of which the request is made denies that the material is exempt from disclosure or decides not to assert an otherwise applicable exemption and knows the originating agency would assert the exemption. We conclude that mere possession of the documents, standing alone, is not determinative of an agency’s ability to release documents pursuant to the FOIA if another governmental entity has a substantial interest in asserting an exemption.”). The Resolution deprives the Auditor of the ability to exert exemptions, or to consult with other offices, such as the Chief Judge, as to whether certain confidential information or other information is exempt from disclosure under FOIA.

**E. The Board may not Dictate the Manner in which the Auditor Performs his Duties.**

Defendants ask the Court to compel the Auditor to stop entering confidential information in USL or replace it with coded numbers. Def. MSJ p. 23. Again, the Fifth District has explained that the Board cannot “divest the [constitutional officer] of the duties and functions vested in him by law enacted by the General Assembly nor may the county board perform his duties or *direct the manner in which they shall be performed.*” *Heller*, 71 Ill. App. 3d at 38.

Defendants argue for judicial compulsion by asserting that “[t]he Auditor’s current practice is \*\*\* contrary to generally accepted accounting principles.” Def. MSJ p. 23 (citing Doug Hulme Depo. p. 24). First, Hulme’s deposition at page 24 does not mention the words “generally accepted accounting principles.” He does state his belief that the way in which the Auditor enters data into USL is “just dumb.” Def. MSJ Ex. 13, p. 24. Second, it is undisputed that Doug Hulme is *not* a licensed, practicing Certified Public Accountant. SOF ¶ 29. Nor is there any evidence that he has seen the USL software, is familiar with its purposes or how data is entered and maintained in it, or is otherwise qualified to render any opinion about the manner in which the Auditor uses the software. The same is true of Prenzler. SOF ¶¶ 29-30.

In contrast, the Internal Auditor working in the Auditor’s office since 2001, Dana Kunz, who has been a licensed, practicing CPA since 1998, uses USL and is familiar with the method in which data is entered and maintained in USL. SOF ¶¶ 26-27. Ms. Kunz has researched and reviewed the Generally Accepted Accounting Principles (“GAAP”) with respect to the manner in which the Confidential Information is entered and maintained in the USL software, and found nothing inconsistent or prohibited by GAAP with respect to the Auditor’s keeping of the Confidential Information. SOF ¶ 28. Moreover, the Auditor would be hindered in performing his auditing duties without maintaining the Confidential Information in the USL software. SOF

¶ 25. Finally, despite Defendants' wishes, the undisputed fact is that the Auditor cannot replace the Confidential Information in the USL software with other codes. SOF ¶ 19.<sup>11</sup>

Accordingly, Defendants fail to provide sufficient evidence to support their request for a judicial decree prescribing, regulating, and/or enforcing the Auditor's performance of his official duties. *See also In re F.B.*, 206 Ill. App. 3d 140, 156 (1st Dist. 1990); *Foley v. Godinez*, 2016 IL App (1st) 151814, ¶ 22; *United Legal Found. v. Pappas*, 2011 IL App (1st) 093470, ¶ 20.<sup>12</sup>

**IV. The Resolution is not Supported by Section 3-13001 et seq. of the Counties Code because that Section Only Applies to Offices that Collect Fees and the Auditor does not Collect Fees.**

Recognizing that §§ 5-1016, 5-1005, 5-1019, and 5-1106 are insufficient sources of authority for the Resolution, Defendants incorrectly contend that § 3-13002 of the Counties Code "vests county boards with 'full authority' to examine and audit all books, papers, forms etc. of county offices." Def. MSJ. p. 4.

Section 3-13002 provides nowhere near the broad authority Defendants say it does:

"The county boards in counties of all classes shall have full authority *in their respective meetings*, to inspect, examine and audit the records, feebooks, books, papers, forms, memoranda and reports *of any county*

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<sup>11</sup> Plaintiff agrees with Defendants that "the use of HIPPA [sic] protected information by the County is beyond the scope of the issues presented in this lawsuit." Def. MSJ p. 10. Defendants' assertion that the county "should be designated a 'Hybrid Entity'" is also irrelevant, as that is a political issue for the Board. Moreover, even with a "hybrid entity" designation, the health care components of the county could not disclose protected health information to other components of the entity. 45 C.F.R. § 164.105(a)(2)(ii)(A). Defendants also fail to point to any accepted purpose for the disclosure of the confidential health information to others within a workplace as set forth in the HIPAA regulations. 45 C.F.R. § 164.512. Likewise, Defendants' assertion that the county "definitely must use the de-identifier method described in the Code of Federal Regulations" is unsupported and incorrect. Def. MSJ p. 10. The HIPAA regulations provide two permissive methods if an entity wishes to de-identify private health information. If the Board wishes to hire an expert pursuant to the first method (45 C.F.R. § 164.514(b)(1)), it may do so. Currently, the Auditor, whose Chief Deputy has attended HIPAA training (SOF ¶ 36), provides a redacted general ledger to those who request it, in accordance with the de-identification principles of 45 C.F.R. § 164.514(b)(2) (listing information to be removed prior to disclosure). *See also* § 164.514(d)(2) (identifying persons who may need protected health information and purposes and limitations on disclosure); *id.* § 164.512.

<sup>12</sup> Plaintiff also incorporates by reference the arguments in his Motion to Dismiss Counterclaim.

*officer in which fees are charged or recorded* and in which is kept any minutes or records of the business of their respective offices for the purpose of checking, auditing and correcting the accounts rendered by the county officers.” 55 ILCS 5/3-13002 (emphasis added).<sup>13</sup>

Defendants ignore the plain language of this Section. First, this section only allows the board to inspect records of county officers “in which fees are charged or recorded.” The Auditor does not charge fees (SOF ¶ 9), a fact acknowledged by Mr. Prenzler:

- Q. The auditor does not report any fees to the Board; is that correct?  
A. I’m not aware of any fees.

Pl. MSJ Ex. 3, Prenzler Dep. 61:18-20.

Defendants claim that “Plaintiff admits the Auditor records fees.” Def. MSJ, p. 5 (citing Pl. Prelim. Inj. Brief p. 19). Page 19 of Plaintiff’s PI brief, however, states just the opposite: “The Auditor does *not* charge fees.” Defendants also provide an unsupported assertion that the Auditor receives reports of fees received from county offices and “[t]he Auditor then reports these fees and receipts to the County Board in the form of monthly summaries of the fees and receipts.” Def. MSJ, p. 5. Defendants claim this makes the Auditor the “‘Super Recorder’ of fees.” *Id.* The undisputed facts show otherwise. The Board meeting minutes reflect that, each month, the County Clerk, Circuit Clerk, and Recorder of Deeds prepare and provide a certified, line-item report to the Board each month on the fees earned by each office. SOF ¶ 10. Because the Auditor does not collect fees, the Auditor’s office does not make a similar fee report to the Board, or the June/December reports described in §13-13001. SOF ¶ 11.<sup>14</sup>

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<sup>13</sup> Defendants’ Motion incorrectly cites this sentence as 55 ILCS 5/5-1016 and 55 ILCS 5/3-13001. *See* Def. MSJ, pp. 4, 5.

<sup>14</sup> Moreover, to the extent this statute applies to the Madison County Auditor, it only allows access to certain records “for the purpose of checking, auditing and correcting the accounts rendered,” which the statute describes as a bi-annual report of fees to and expenses by the office. 55 ILCS 5/3-13001, 13002.

Furthermore, § 5-13002 *supports the Auditor's position* that the Board does not have an inherent right to free and unrestricted access to the Auditor's records. The statute expressly gives such "power and authority" only to county boards in counties of the third class—counties with a population exceeding 1,000,000:

"Counties containing a population over 25,000 and not exceeding 1,000,000 shall be known as counties of the second class.

Counties containing a population exceeding 1,000,000 shall be known as counties of the third class." 55 ILCS 5/4-1001.

"[T]he county board in *counties of the third class*, or anyone by such boards authorized to do so, are hereby *vested with power and authority to enter the said offices* of such county officers [who collect fees] of the counties of the third class at all times, and *have free and unrestricted access* to all of the books, papers, forms, records and reports, used by the county officers named herein." 55 ILCS 5/3-13002 (emphasis added).

Thus, although the statute does not confer any power on the Board over the Auditor because the Auditor does not collect fees, it does reveal that the Board of Madison County (a county of the second class) is *not* "vested with the power and authority to enter" any county office that collects a fee or to "have free and unrestricted access to all of the books, papers, forms, records and reports, used by [such] county officers." Rather, in smaller counties, the board is only permitted to inspect the books and records of county officers *who collect fees* "in their respective meetings." 55 ILCS 5/3-13002.

Accordingly, § 3-13002 does not, as Defendants contend, make it "crystal clear that in Illinois counties, the county board has full oversight of, and access to, all information" held by the Auditor. Def. MSJ, p. 7. Nor does the statute say that such access includes full access to auditing software.

Finally, Defendants rely on the penalty provision of § 3-13002 to argue that "any county officer (which includes a county auditor) who refuses to permit a county board, or anyone



authorized by such boards, to have ‘free and unrestricted access’ to such information commits a crime.” Def. MSJ, p. 7. Defendants again ignore the plain language of the statute, which: (1) only applies to county offices that collect fees; and (2) only allows free and unrestricted access to such offices in counties with populations over 1,000,000:

“Any officer who fails or refuses to permit county boards or any one authorized by such boards, to have free and unrestricted access to books, papers, records and memoranda, *as provided for herein*, or fails or refuses to make the payments to the county treasurer, as herein provided, or fails or refuses to produce books for inspection or fails or refuses to make the semi-annual report, *as herein provided*, shall be guilty of a petty offense.” 55 ILCS 5/3-13002 (emphasis added).

Because § 3-13002 is inapplicable here, Defendants’ reliance on the penalty provision of § 3-13002 is misplaced. Nonetheless, Defendants fail to show the Auditor refuses to produce financial information under § 3-13002. To the contrary, the undisputed facts show just the opposite, including the Auditor’s production of countless financial documents, both periodically and upon request, along with the Board’s inability to provide a single example of a refusal to produce such documents by the Auditor. *See supra*, § I.A.

**V. The Resolution is not Supported by Section 6-31001 *et seq.* of the Counties Code because that Section Specifically Excludes the Elected Auditor from its Provisions.**

Defendants contend that the “plenary auditing and oversight power, and access to books, held by county boards is further enshrined in the Code provision that requires county boards to conduct a yearly independent audit (CAFR) with an outside auditor. 55 ILCS 5/6-31003.” Def. MSJ, p. 6. Defendants cite a portion of the County Auditing Law arguing that “the Code provides that ‘[i]n connection with this, each county board shall retain the right of inspection of the auditor’s working papers and shall make them available to the Comptroller, or his designee, upon request.’” Def. MSJ, p. 6 (*quoting in part* 55 ILCS 5/6-31003).

The County Auditing Law does not give the Board power over the elected Auditor. Rather, it requires that the *Board select* an *outside auditor* to create an “audit report” for the county, and expressly *excludes the elected Auditor* from its definition of “auditor”:

“As used in this Division, unless the context otherwise requires:

\* \* \*

2. ‘accountant’ or ‘accountants’ means and includes all persons authorized to practice public accounting under the laws of this State.

\* \* \*

4. ‘audit report’ means the *written report of the accountant* or accountants and all appended statements and schedules relating thereto, presenting or recording the findings of an examination or audit of the financial transactions, affairs and condition of a county.

\* \* \*

6. ‘auditor’ means a licensed certified public accountant, as that term is defined in Section 0.03 of the Illinois Public Accounting Act, who performs an audit of county financial statements and records and expresses an assurance or disclaims an opinion on the audited financial statements; *‘auditor’ does not include a county auditor elected or appointed under Division 3-1 of the Counties Code [55 ILCS 5/3-1001 et seq.]*.” 55 ILCS 5/6-31002 (emphasis added).

“The county board of each county shall cause an audit of all of the funds and accounts of the county to be made annually by an accountant or accountants *chosen by the county board* or by an accountant or accountants retained by the Comptroller, as hereinafter provided.” 55 ILCS 5/6-31003 (emphasis added).

Defendants’ reliance on one sentence from the County Auditing Law to suggest the Board has unfettered access to the elected Auditor’s software is a gross mischaracterization of the statute. In light of the statute’s context, definitions, and plain language, and when the portions of the paragraph that Defendants exclude from their quotation are considered, it is clear that this section simply empowers the board to inspect a *third-party auditor’s working papers* upon request. It does not give the board unrestricted access to the elected Auditor’s software:

“When the *accountant or accountants* have completed the audit a full report thereof shall be made and not less than 2 copies of each audit report

shall be submitted to the county board. Each *audit report* shall be signed by the accountant making the audit and shall include only financial information, findings and conclusions that are adequately supported by evidence in the *auditor's working papers* to demonstrate or prove, *when called upon*, the basis for the matters reported and their correctness and reasonableness. In connection with this, each county board shall retain the right of *inspection of the auditor's working papers* and shall make them available to the Comptroller, or his designee, upon request.” 55 ILCS 5/6-31003 (emphasis added).

Defendants’ reliance on § 6-31011 likewise misses the mark. This section provides:

“The corporate authorities of a county *may establish an audit committee*, and may appoint members of the corporate authority or other appropriate officers to the committee, *to review audit reports prepared under this Division* and any other financial reports and documents, including management letters prepared by or on behalf of the county.” 55 ILCS 5/6-31011 (emphasis added).

This section simply allows for the establishment of an audit committee to review the audit reports and other documents *prepared by the third-party auditor*. Here, the Resolution does not attempt to create an audit committee, and Defendants’ reference to this irrelevant section exemplifies their struggle to find legislative support for their actions.

Defendants’ mischaracterization of the County Auditing Law is concerning, given that the Board authorizes substantial sums of money to engage a third-party auditor every year. SOF ¶ 76. Ultimately, Defendants fail to point to *any* statute that gives the Madison County Board authority to access the Auditor’s software without his permission, force the Auditor to order additional licenses for the Auditor’s software, install the software outside of the Auditor’s office, open the records containing confidential information to individuals outside the Auditor’s office, or delegate the auditing functions to other county officials.

**VI. Upholding the Resolution Allows the Board, Chairman, and Administrator to Access the Software of Any Other Elected Constitutional Office.**

Defendants' arguments that this Court should disregard the Auditor's statutory right to control his office, operations, software, and equipment opens the floodgates to allow the Chairman, the unelected County Administrator, other elected officers, or the Board access to any software and confidential information maintained by any other elected office who has the same internal control authority as the Auditor. The offices of various elected officials have their own software systems, including the Sheriff, the State's Attorney, the Chief Judge, the County Clerk, and the County Recorder, which contain confidential information to which the Board and Chairperson do not currently have access. SOF ¶ 85.

The Board's oversight and management of county business should not be interpreted as conferring on the Board unfettered access to such information. For example, the Board may have a right to know and understand the legal matters currently pending in the county courts, but this should not translate into a right to have unlimited access to sealed court files in the electronic filing system, Clericus Magnus. Allowing the Resolution to stand, however, suggests the Chairman, the County Administrator, other elected officers, or the Board are entitled to unfettered access to all these elected offices' systems and information for the sake of overseeing and managing county business. This is clearly not contemplated by the "internal control" statutes or the distinct statutory duties and powers conferred on these separate offices.

**VII. A Permanent Injunction is Necessary to Avoid Defendants' Unauthorized Intrusion of a Constitutional Office and the Unlawful Disclosure of Confidential Information.**

"To be entitled to a permanent injunction, a party must demonstrate (1) a clear and ascertainable right in need of protection, (2) that he or she will suffer irreparable harm if the

injunction is not granted, and (3) that no adequate remedy at law exists.” *Vaughn v. City of Carbondale*, 2016 IL 119181, ¶ 44 (internal quotation marks omitted).

Following an extended hearing at the TRO motion, this Court found all the elements for injunctive relief satisfied and made the following findings:

“3. Plaintiff has established a clearly ascertainable right in need of protection, namely a statutory right to control the internal operations of the Auditor’s office, the right to be free from the enforcement of unauthorized resolutions, and the prevention of unauthorized disclosure of private information contained in the USL Financials, Inc. (“USL”) software utilized by the Auditor’s office.

\* \* \*

5. Plaintiff has shown he will suffer irreparable harm if an injunction does not issue, namely, the invasion of statutory rights and duties by the implementation of an *ultra vires* resolution, the unauthorized disclosure of the private and protected data contained in hundreds of thousands of records, which could expose the Auditor and the County to significant liability under federal and state law.

6. Plaintiff has shown that he has no adequate remedy at law or in equity to compensate him for the loss of statutory powers or losses incurred by unauthorized disclosure of private information.” TRO dated April 1, 2019.

Based on the undisputed facts and law set forth herein, these findings are still true today.

Law enforcement’s seizure of computer equipment of Hulme and Rob Dorman, the head of the County IT department, and the recent disclosure of Hulme’s involvement in leaking to the public a confidential investigation report conducted by Judge James Hackett, justify the Auditor’s concerns for the privacy and welfare of the citizens of the county and demonstrate the need for permanent injunctive relief. As the Madison County State’s Attorney explained to the Board prior to its passage of the Resolution:

“This Resolution, the way it is written, could be interpreted in a way that would create a massive violation of privacy rights for the citizens whose records are contained in it.

\* \* \*

The Chairman of the County Board's power does not include oversight of the County Auditor's office.

\* \* \*

My legal opinion is that this Board does not have the authority to enforce this Resolution.\*\*\* There is a separation of authorities between constitutionally elected public offices and county boards and county board members and the administration. I think that this crosses that line. That's my opinion."

Therefore, in addition a judicial declaration that the Resolution is invalid and unenforceable, and in light of the Defendants' claim to have an inherent right to unrestricted access to the USL software with or without any Resolution, a permanent injunction prohibiting Defendants from implementing the Resolution or otherwise accessing, or attempting to access, the USL system unless expressly authorized to do so by the Auditor, is warranted.

### **CONCLUSION**

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be granted and Defendants' Motion for Summary Judgment should be denied.

By: /s/ Kevin P. Green

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that on May 28, 2019, a copy of the foregoing document was electronically filed with the Circuit Court of Madison County, Illinois, which sent notification to all parties of record as of that date. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

By: /s/ Kevin P. Green