

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building – 3rd Floor
Des Moines, Iowa 50319

FILED
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IOWA PUBLIC
INFORMATION BOARD

In the Matter of:)	No. 17IPIB001 FC: 0030
)	17IPIB002 FC: 0034
)	
Burlington Police Department,)	
Department of Public Safety)	Proposed Decision
Division of Criminal Investigation)	
)	
)	
Respondents)	

Statement of the Case

An in-person contested case hearing pursuant to Iowa Code section 17A and Iowa Administrative Code section 497 was held on this matter on July 20, 2018. The hearing was open to the public and was recorded. Mark McCormick appeared on behalf of the Iowa Public Information Board (the board). Patrick O’Connell and Holly Corkery appeared on behalf of the Burlington Police Department (Burlington). Jeffrey Peterzalek appeared on behalf of the Department of Public Safety, Division of Criminal Investigation (DCI).

Prior to the hearing, the prosecutor filed a Brief in Support of Order Requiring Disclosure of the DCI File. Attached to the brief was a June 18, 2018 press release from attorney Dave O’Brien announcing that a civil lawsuit in Autumn Steele v. City of Burlington and Jesse Hill had been settled. During the hearing, Burlington filed a Motion to Strike the press release on the basis that it was not timely, not sworn, and contained hearsay. Burlington’s Motion to Strike also stated that the press release failed to reflect that the settlement had not been finalized. DCI joined in the motion to strike filed by Burlington.

The DCI submitted Exhibit A into the record. At the hearing the prosecutor objected to Exhibit A because it was unsworn and contained hearsay. Burlington submitted documents marked as Exhibits 2, 4, 7 into the record. The prosecutor submitted a document marked as Petitioner’s Exhibit 1 into the record.

The motion to strike and the objection to Exhibit A were taken under advisement and are now denied. The press release is considered for the limited purpose of showing that a press release announced that a settlement in the Autumn Steele civil case had been reached. The prosecutor's objection to Exhibit A is also overruled. The standard for admissibility in administrative hearings is that the evidence be "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs ... even if it would be inadmissible in a jury trial." Iowa Code § 17A.14 (1) (2017). The general rule is that administrative agencies are not bound by technical rules of evidence. *McConnell v. Iowa Dep't of Job Serv.*, 327 N.W.2d 234, 237 (Iowa 1982).

The record was held open until September 4, 2018 to allow the parties to submit post-hearing briefs.

Procedural History.

This case was initiated under Iowa Code section 23.10 (3) (a). Mark McCormick, the attorney selected by the executive director, filed a Petition on May 27, 2016 alleging that the Des Moines County Attorney, the Burlington Police Department (Burlington), and the Department of Public Safety, Division of Criminal Investigation (DCI) violated the open records law (Petition 5-27-16). The prosecutor filed an Amended and Substituted Petition on July 19, 2016 (Amended Petition 7-19-16).

The Respondents each filed a Motion to Dismiss the Amended Petition. The Motions to Dismiss filed by Burlington and DCI were granted. The Motion to Dismiss filed by the Des Moines County Attorney was denied (Order 9-2-16).

After the Amended Petitions filed against Burlington and DCI were dismissed the board issued new Orders finding probable cause to believe Burlington and DCI violated Iowa Code section 22.2. On October 27, 2016 the board found probable cause to believe that DCI violated Iowa Code section 22.2 when it withheld public records in response from a public records request from the Burlington Hawk Eye including but not limited to police audio records, body camera videos, and 911 calls that were subject to disclosure under chapter 22 (FC: 0030 Order 10-27-16). On October 27, 2016 the board found probable cause to believe that the DCI, the Burlington Police Department, and the Des Moines County Attorney violated chapter 22 when they withheld public records in response to a public records request from Adam Klein including but not limited to

police audio records, body camera videos, and 911 calls that were subject to disclosure under chapter 22. (FC: 0034 Order 10-27-16).

On December 13, 2016 the prosecutor and Des Moines County Attorney Amy Beavers entered into a settlement agreement. The settlement agreement stated that the Des Moines County Attorney fully cooperated with the board's staff's investigation including participating in an informal resolution process and creating an office policy concerning open records request. In the settlement the parties agreed that "the facts are sufficient that a reasonable fact finder could find a violation of Iowa Code Section 22.2(1) by the Des Moines County Attorney". The settlement stated "The Des Moines County Attorney" does not admit guilt in this circumstance". She agreed to pay a fine of \$200 as full resolution of the matter (Des Moines County Settlement Agreement and Order 12-13-16). On December 15, 2016 the board approved the settlement agreement and dismissed the open records complaints filed against the Des Moines County Attorney (Board Order 12-15-16).

In November 4, 2016 the prosecutor filed a new Petition alleging that Burlington and DCI violated chapter 22 by refusing to release public records including the recording and transcript of 911 calls, bodycam videos taken by the officers, videos taken by dashcam cameras, and records showing the "date, time, specific location and immediate circumstances surrounding the incident". The Petition also alleged that emails regarding the Autumn Steele homicide and correspondence with family members were public records. Petition (11-4-16).

Burlington and DCI again filed motions to dismiss the Petition. The motions to dismiss were denied on January 18, 2017 (Ruling on Motion to Dismiss 1-18-2017). On June 12, 2017 the prosecutor's motion to compel the Respondents to answer interrogatories was granted. (Order 6-12-17). On August 17, 2017 the board granted the Respondents' request for Interlocutory Relief and reversed the Order granting the prosecutor's motion to compel. (Board Order 8-17-17). Burlington and DCI filed motions for summary judgment. The motions for summary judgment were denied on December 4, 2017 (Ruling on Motion for Summary Judgment 12-4-17). Burlington and DCI each filed an Application for Interlocutory Appeal of the denial of the motion for summary judgment to the board. The board denied the Respondents' Applications for Interlocutory Appeal on March 15, 2018 (Board Order 3-15-18).

On July 16, 2018 the Respondents filed a Joint Motion to Continue (Joint Motion 7-16-18). The prosecutor filed a resistance. The request for continuance was denied on July 19, 2018 (Order 7-19-18). This contested case hearing followed on July 20, 2018.

Statement of Facts

On February 27, 2015 Des Moines County Attorney Amy Beavers wrote a letter to DCI Agent Matthew George. She stated that she was writing to let him know that she had completed her review of the DCI investigation involving the fatal shooting of Autumn Steele by Burlington Police Officer Jesse Hill. Beavers then summarized her findings. In the letter she stated that on January 6, 2015 Gabriel Steele called 911 to report a domestic assault involving Autumn Steele. Officer Jesse Hill responded to the call. When he arrived at the residence, Officer Hill observed Gabriel walking out of the house with a child in his arms. He observed Autumn running behind Gabriel, grabbing the back of his shirt, pulling him down and hitting Gabriel in the back of the head. Officer Hill reported to dispatch that two individuals were fighting. He activated his body camera video and ran over to Autumn and Gabriel. Officer Hill attempted to pull Autumn away from Gabriel as she was punching and slapping him. A German shepherd owned by the Steele's started growling and bit Officer Hill in the thigh. According to Beavers' letter, Officer Hill told the Steele's to get the dog but the dog continued toward him. Beavers' reported that Officer Hill drew his weapon, the dog continued toward him, and Officer Hill fired his weapon as he fell backwards. Officer Hill fired his weapon a second time as he fell into the snow.

According to Beavers, Officer Hill was not aware that he had shot Autumn; Gabriel advised him that she had been shot. An ambulance was requested through dispatch. Another officer arrived at the scene to provide assistance. Officers could not locate a gunshot wound on Autumn. They performed chest compressions on Autumn while waiting for an ambulance. An autopsy revealed that Autumn sustained a gunshot wound to her right arm and a gunshot wound to her chest. Autumn died as a result of a gunshot wound to the chest. In the letter Beavers concluded that no criminal charges would be filed against Officer Hill (Exhibit A).

On February 27, 2015 Adam Klein, an attorney for Autumn's family requested public records from the incident. On March 19, 2015 attorney Holly Corkery responded to Klein's request. The letter stated that Officer Hill's personnel file was confidential

under Iowa Code section 22.7(11). She set out personnel information that she stated was non-confidential under section 22.7(11) (a) (1-5). In response to a number of the open records requests Corkery stated:

“All other items you request in your Requests Nos. 6, 7, 8, 10, 11 and 12 are peace officers’ investigative reports and therefore are confidential records pursuant to Iowa Code Section 22.7(5), except for the date, time, specific location, and immediate facts and circumstances surrounding the incident. Iowa Code 22.7(5) (2014); *see also Neer v. State*, 798 N.W.2d 349 (Iowa Ct. App. 2011)” (Exhibit 2).

On March 2, 2015 Andy Hoffman of the Hawk Eye sent an email to Burlington Police Chief Doug Beard stating:

“Under Iowa Open Records Law Section 22.1 et seq. I am requesting an opportunity to obtain copies of all public records, including but not limited to, investigative reports by the Iowa Division of Criminal Investigation, the Burlington Police Department, any police audio, body camera videos and 911 calls, involving the Jan. 6, 2015, fatal shooting of Autumn Steele by Burlington Police Officer Jesse Hill.”

Chief Beard replied in an email:

“We have received several of these requests. I have forwarded them to our legal counsel. I will let you know [their] response to this request when I know, also I do not have the authority to release anything created by the DCI. What we do have in our possession is initial reports, body cam video’s of Officer Hill and Officer Merryman, and the 911 calls.

If you have any questions please feel free to give me a call”. (Petitioner Exhibit 1).

On March 19, 2015 Corkery sent a letter to Hoffman acknowledging his request. The letter stated:

“While the goal of Chapter 22 is to provide public access to governmental bodies’ records, Chapter 22 also provides several exceptions for confidential records. Please be advised that the records you have requested are confidential records pursuant to Iowa Code Section 22.7(5). Iowa Code Section 22.7(5) provides that peace officers’

investigative reports, which include video recordings and photographs, are confidential records. Iowa Code 22.7(5) (2014); *see also Neer v. State*, 798 N.W.2d 349 (Iowa Ct. App. 2011). At this time the City cannot produce these confidential records pursuant to your open records request.”

Corkery attached the Des Moines County attorney’s letter and stated that it contained the “date, time, specific location, and immediate facts and circumstances surrounding” Ms. Steele’s death”. (Exhibit 4).

Special Agent Richard Rahn of the Division of Criminal Investigation (DCI) testified on behalf of DCI at the hearing. He works with the major crime unit and is responsible for assisting local agencies with the investigation of crimes -- primarily felonies-- that occur in their area. He oversees twenty counties that are considered in his “zone”. He dispatches agents as needed to that zone. The DCI assists in the investigation of officer-involved shooting cases. The DCI does not have the ability to investigate “anything anywhere”. It provides expertise only when the local law enforcement agency asks for it. In January 2015 Agent Rahn became aware of an officer-involved-shooting in Burlington. The Burlington Police Department called the DCI for assistance in investigating the shooting. In response he dispatched staff to Burlington to investigate. Agent Rahn also went to Burlington. He generally sends two agents but in this case he sent three or four because officer-involved shooting cases are complex and involve multiple interviews.

The DCI agents made contact with the police department to let them know that they were responding. He assigned Agent Matt George as the “case agent”. The agent in charge decides whether search warrants are necessary and tries to determine whether a crime scene team is needed at the scene. Generally the investigation would involve interviews of the officers involved in the shooting. A neighborhood canvass would be conducted to locate other possible witnesses. Agents investigate the background of the victim and the officer involved in the shooting. They collect any evidence obtained at the scene. They collect the weapon used in the shooting. They also collect officers’ body cameras, in-car cameras, and any other supporting evidence. Agents then put this in the investigative report.

According to Agent Rahn, the DCI compiles a very “thorough” investigative report. The investigative report is used to assist the agent to help him through the

investigation. It is also used to document officer findings. It documents interviews. It basically supports the investigation. The investigative report is then submitted to the county attorney and to the attorney general's office if the attorney general is involved in the case. The compiled information is entitled "Iowa Division of Criminal Investigation Investigative Report". The general types of things that would be in an investigative report would be a "crime scene section", an "officer" section when it involves an officer shooting, an "autopsy" section, a section concerning the background of the person who was shot, and a "neighborhood canvass section". The individual sections also have supporting documents. There is a crime scene report drafted by the crime scene team. It includes all the evidence collected or seized. It would include photographs. If there is a body, the photographs would include the area where the body was found. The report lists the names of people interviewed and included their addresses, telephone numbers, dates of birth, and social security numbers. The report also includes the information the individuals provided to agents in interviews.

According to Agent Rahn, the interviews conducted by DCI agents are very thorough. They "get into the weeds" as much as possible. There is an autopsy report submitted by a pathologist as well as photographs of the autopsy. In terms of "victimology" the DCI gets as much background on the individual as possible including dates of birth, social security number, telephone number, and criminal history. The search warrants are put in the investigative file. Special Agent Rahn stated: "Anything and everything we do, we try to put it in the investigative report". He stated that this would include the reports of the local police officers. Additionally, if a report is drafted by the law enforcement agency the agent will put that into the investigative report. There may be criminal history information in the file. Some documents in the investigative report, such as criminal history information, may be confidential under other laws. He stated that it is a criminal offense to release criminal history information. He agreed that social security numbers, driver's license information, and vehicle information in the file may be confidential. Special Agent Rahn stated that the DCI tries to "get as much data as we can to aid the county attorney and the attorney general to make a determination". This includes body camera footage, patrol vehicle footage, and 911 calls to dispatchers. Agent Rahn stated that all of this information is included in the investigative report as the "norm".

According to Rahn an investigative report is rarely completed because there is always a flow of information that is continually added in order to supplement the report. He

stated that even when a case is closed the investigative report may be supplemented. The investigative report is submitted to the county attorney or the attorney general. The agent does not submit an opinion as to whether a crime occurred. Instead, agents provide facts and circumstances to the prosecutor and the prosecutor makes the charging decision.

The investigative report is given only to the prosecutor. The police department does not get the investigative report. Members of the public do not get the report. If information is provided to the public, it is provided through a press release or a press conference. The DCI does not provide the information, particularly when the investigation is ongoing and disclosure would be detrimental to the investigation. Agent Rahn stated that if there is a public safety concern the DCI will release information for the safety but "most all we do is release immediate facts and circumstances".

Agent Rahn stated that in this case the investigative report was submitted to the county attorney. The county attorney made a determination as whether the officer would be charged with a crime. She reviewed the material and then drafted a document to let everyone know what her findings were. He stated that Exhibit A is the document drafted by the Des Moines County Attorney and provided to the DCI concerning the Autumn Steele shooting. He stated that the county attorney went into great detail about the information submitted for her review. She stated that the date of the occurrence was January 6, 2015, the location was 104 South Garfield Street. According to Agent Rahn the county attorney recited the facts and circumstances in substantial detail. He stated that she "provided more detail than I would submit in a press release".

Agent Rahn testified that he reviewed a video of the incident in this case. It shows Officer Hill responding to a "domestic". His body camera shows him exit the squad car and confront two individuals on the sidewalk. There is snow and it appears to be cold. Agent Rahn stated that two people can be heard arguing on the video. He stated that you "can see or hear a dog that sounds like it is approaching in aggressive manner". He stated that an order from the officer to contain or control the dog can be heard and then a couple of gunshots being fired are heard. Agent Rahn stated that "everything in that clip provided immediate facts and circumstances as to whether there was a criminal element" to the incident.

Agent Rahn testified that the DCI is involved only in the investigation of the local police officer. In this case it only investigated the shooting. If there was an underlying burglary that the officer was responding to, the local police department would investigate the burglary. The DCI are not "internal affairs" officers. They decide whether a crime was committed. The agency collects facts and circumstances and provides it to the charging agency. He stated that the DCI did not play a role in the county attorney's drafting of the letter that is Exhibit A. This letter is put in the investigative report as well. The letter was also posted to the agency's website.

Agent Rahn stated that DCI received documents from the Burlington Police Department. The police department documented why they were called to that location. That document then became part of the investigative file. The investigative file includes body camera footage. Agent Rahn stated: "We try to collect anything and everything that is part of the criminal investigation". The dashcam video was turned over to the DCI. Any and all video taken by police was part of the investigative file. Any reports by the officers were included in the file. The reports generated by the local police were included as part of the file.

Under cross-examination Special Agent Rahn stated that the incident began with a report of a domestic dispute. He stated that it would be the "norm" to include the 911 call as part of the investigative report. If there was a transcript of the 911 call it would have been included in the report provided to the county attorney. It is "standard" and not "uncommon" for the 911 call to be part of the investigative file. He agreed that the 911 call could be part of the immediate facts and circumstances but stated that the immediate fact and circumstances includes a "multitude of things". He stated that the entire bodycam video was placed into the investigative file. He is not sure how long the video was. The decision to release 12 seconds of the bodycam video was a decision made by people "higher" than him. He believes the decision was probably made by people representing DCI, the Attorney General, and the Burlington Police Department, but he does not know for sure.

Agent Rahn stated that he would defined the "immediate facts and circumstances" as the "who, what, when, and where". The DCI tries to answer that as best as it can. If there is an issue involving public safety that is provided as well. Agent Rahn stated that he was not aware of what was used to determine the immediate facts and circumstances

of the investigation. He stated that he was not aware of what the county attorney used to draft the letter in Exhibit A. The county attorney had access to the entire investigative file and then returned the entire investigative file. The last line of the letter states that the county attorney concluded that no charges would be filed against Officer Hill. Agent Rahn testified that the county attorney included more information than would be included in a press release. On page 6 of the letter she described the facts and stated that the officer's actions were reasonable.

Agent Rahn agreed that the 911 call preceded the DCI investigation. He agreed that the 911 call was not something that was produced by the DCI. He stated that the bodycam video was generated by a device that the officer typically wears on the torso. The bodycam video preceded the investigation and was not something produced by the DCI. He agreed that some of the material gathered by the DCI came from different sources and were created before the shooting. Agent Rahn testified that he was not involved in the production of documents turned over in response to the public records request for information. During the hearing the following exchange occurred between the attorney for the DCI and Agent Rahn:

Peterzalek: As part of the DCI investigation into this officer-involved shooting was a 911 tape or tapes obtained by the DCI?

Agent Rahn: I'm sure they would have been, yes.

Peterzalek: And put into the investigative report?

Agent Rahn: Yes, sir.

Peterzalek: Was body camera footage gathered by the DCI as part of this investigation?

Agent Rahn: Yes sir

Peterzalek: Was that put into the investigative report?

Agent Rahn: Yes

Peterzalek: Was patrol car video obtained by the DCI?

Agent Rahn: Yes

Peterzalek: Was that placed into the investigative report?

Agent Rahn: Yes

Agent Rahn testified that it would be extremely difficult to go through an investigative file line-by-line because of how large the report generally is. He stated that he has had reports that encompass twelve binders; an investigative report can be quite large. Exhibit A indicates the "who, what, where, and when of the investigation". Page 2 of Exhibit A summarizes information gathered from two independent witnesses gathered as part of the investigation. He stated that he does not specifically know how large the investigative file was in this case. He stated, however, that officer-involved shootings are generally "particularly" long. Agent Rahn testified that the county attorney or attorney general use the investigative file to decide what the charging decision in the case will be (Special Agent Rahn Testimony).

Police Chief Dennis Kramer of the Burlington Police Department testified at the hearing on behalf of Burlington. He stated that he was a major of operations at the time of the shooting. He reported to the Chief of Police Doug Beaird. He oversaw criminal investigations and the patrol operations. Chief Beaird was the person who responded to the open records request made by Adam Klein and the Burlington Hawkeye newspaper. He was briefed by the Chief regarding the requests. Chief Kramer testified that the general practice when an open records request is made in an officer-shooting case is to seek legal counsel before fulfilling the request. According to Chief Kramer, the Burlington Police Department made reports of the "initial incident" and then the investigation was turned over to the Iowa Division of Criminal Investigation. He stated that when there is an officer-shooting investigation, someone in command calls the special agent in charge at the DCI and asks for assistance in the investigation. He testified that any material the police department gathers is "most definitely" given to DCI. He stated that "all" investigative information was provided to the DCI. The department did not retain anything as part of the investigation.

Chief Kramer stated that Exhibit 2 is a letter to Adam Klein from the department's attorneys. Exhibit 2 outlines the written request. The letter references Chapter 22 and

states that there may be reasonable fees charged to produce the records. The letter then goes into detail about the information. Chief Kramer stated that he had no say in the drafting of this letter. At this point on March 19, 2015 the department had turned over everything to its attorneys. The department allowed its attorneys to review the information and make any decision. The letter contains the non-privileged portion of Officer Hill's personnel file. Neither he nor Chief Beard had anything to do with the letter. They were relying in good faith on the judgment of their attorneys. Chief Kramer testified that the entire investigative file was turned over to the attorneys. The file included bodycam footage, dashcam video, and initial reports from the officers. He stated that the 911 tapes were not part of the file at this point. Later, a lawsuit was filed. The 911 tapes were obtained. Chief Kramer stated that the 911 tapes may have been obtained directly from the department or from "Descom" -- the Des Moines County Communication Center. The DCI eventually obtained the 911 tapes.

Chief Kramer testified that he is not aware of any department emails regarding the Autumn Steele family. He stated that the department provided the immediate facts and circumstances to Klein. Attached to the letter in Exhibit 2 is a letter to Agent George from County Attorney Amy Beavers. Chief Kramer stated that the letter contains the immediate facts and circumstances--the "who, what, when, where". It was produced through the department's attorneys. He stated that the letter included things above and beyond the immediate facts and circumstances because it also "included facts that she thought necessary to make her decision".

Chief Kramer stated that the department received another public records request from Hawk Eye reporter Andy Hoffman. Exhibit 4 is the request from the Hawk Eye. It was his understanding that the attorneys would reply on behalf of department. He consulted with attorneys. That letter was the result of that consultation. The department believed that it was following Iowa law in providing the letter. The department attorneys had all of the information that the department had.

The parties entered into a joint stipulated protective order in the federal lawsuit filed by Autumn Steele's family. Exhibit 7 is the order requiring the parties not to disclose records that are part of the federal case. Chief Kramer stated that he is limited by that protective order. He stated that if the administrative agency ordered him to disclose information he would be precluded from doing so until the federal court determined the issue. He stated that the protective order prevented him from talking about the

evidence. According to Chief Kramer, the parties reached a settlement that is “in process”. Chief Kramer testified that the Burlington Police Department did not retain anything in the investigation. It turned everything over to the DCI (Chief Kramer Testimony).

Conclusions of Law

Prehearing Motions

At the beginning of the contested case hearing, the prosecutor requested to amend the petition to require Burlington and DCI to release the entire peace officer investigative report in light of the fact that the civil litigation between the Autumn Steele family and the Burlington Police Department had been settled. Burlington and DCI objected to the amendment. The prosecutor’s motion to amend the petition is denied. Iowa Code section 23.10 (3) (a) requires the board, in a written order, to find that a complaint is within its jurisdiction and that a violation of chapter 22 has occurred. The probable cause finding by the board alleged that Burlington and DCI violated chapter 22 by withholding public records such as the 911 call, the dashcam videos and the bodycam videos. Burlington and DCI have responded that the documents within a peace officers investigative report are not public records because they are confidential under the exemption in section 22.7(5). This contested case has been limited to that issue throughout these proceedings and it would be unfair to expand the issues at the time of hearing. 497 Iowa Administrative Code (IAC) 4.20(3) (“Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues”).

During the hearing the Respondents moved for a dismissal and a motion for judgment as a matter of law because the prosecutor failed to present any witnesses or exhibits in support of his petition. The motions were taken under advisement and are now denied. In denying the Respondents’ interlocutory appeal of the denial of the motion for summary judgment the board found that issues remained as to whether the documents at issue were part of a peace officer’s investigative report and whether a balancing test applies. The board chose to review the merits of this case with the benefit of a hearing record. *Purethane, Inc. v. Iowa State Bd. of Tax Review*, 498 N.W.2d 706, 708 (Iowa 1993) (A “contested case” is defined as a proceeding in which “the legal rights, duties or privileges of a party are required by Constitution or statute to be determined

by an agency after an opportunity for an evidentiary hearing.”). Moreover, this case involves a legal interpretation of chapter 22 and the board has been vested with authority to interpret chapter 22. See Iowa Code section 23.6. *Simon Seed & Sod Inc. v. Dubuque Human Rights Commission*, 895 N.W.2d 446, 455 (Iowa 2017). Iowa Code section 17A.12 (6) provides that the record in a contested case includes “all pleadings, motions, and intermediate rulings” as well as all “evidence received or considered and all other submissions”. The record in this case is voluminous and includes the exhibits filed in support of the motions to dismiss, the motions to compel, and the motions for summary judgment. For these reasons, the motion for dismissal and for judgment as a matter of law are denied.

Applicable Statutory Provisions

The “Public Access to Government Information” or “Iowa Public Information Board Act” is in Iowa Code Chapter 23 (2017). The purpose of the chapter is to “provide an alternative means by which to secure compliance with and enforcement of the requirements of chapter 21 and 22 through the provision by the Iowa public information board to all interested parties of an efficient, informal, and cost-effective process for resolving disputes.” The public information board (the board) has 13 delineated “powers and duties” with regard to chapter 21 (open meetings) and chapter 22 (open records). The board may issue declaratory orders, receive complaints, issue subpoenas, and issue orders with the “force of law” that determine whether there has been a violation of the open meetings law or the open records law. Iowa Code section 23.6. The board may examine records, including records that are “confidential by law,” that are the subject matter of a complaint. Iowa Code section 23.6(6).

Iowa Code section 23.10 sets out the board’s enforcement powers. Section 23.10(1) states:

If any party declines informal assistance or if informal assistance fails to resolve the matter to the satisfaction of all parties, the board shall initiate a formal investigation concerning the facts and circumstances set forth in the complaint. The board, shall, after an appropriate investigation, make a determination as to whether the complaint is within the board’s jurisdiction and whether there is probable cause to believe that that facts and circumstances alleged in the complaint constitute a violation of chapter 21 or 22.

Under Iowa Code section 23.10 (2) the board may issue a written order dismissing a complaint when it is outside the board's jurisdiction or when "there is no probable cause to believe there has been a violation of chapter 21 or 22". When the board does have jurisdiction and it finds "there is probable cause to believe there has been a violation of chapter 21 or 22" the board "shall issue a written order to that effect and shall commence a contested case proceeding under chapter 17A against the respondent". The executive director of the board or an attorney selected by the executive director "shall prosecute the respondent in the contested case proceeding". Section 23.10(3) (a).

Iowa Code section 23.11 states that a respondent may defend against a proceeding before the board charging a violation of chapter 21 or 22 on the ground that if such a violation occurred it was only harmless error or that clear and convincing evidence demonstrated that grounds existed to justify a court to issue an injunction against disclosure pursuant to section 22.8.

Analysis

Neer v. Iowa Did Not Overrule Prior Supreme Court Precedent Interpreting Iowa Code Section 22.7(5)

Throughout this case, the Respondents have cited *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011) for support. Neer pleaded guilty to operating while intoxicated and eluding and was sentenced. He then asked the Department of Public Safety for records relating to his arrest. The Department declined. Neer filed a lawsuit under Iowa Code section 22.10 seeking to compel production as well as requesting injunctive relief, statutory damages, attorney fees, and costs. *Id.* at 1. The Department "voluntarily turned the records over to Neer" then filed a motion for summary judgment on the basis that the lawsuit was moot, or alternatively, that the records were confidential. The district court concluded that the public records lawsuit was moot but found the confidentiality issue was of sufficient public importance to warrant a decision on the merits. The district court found that the requested records were confidential and granted summary judgment to the Department. *Id.*

Neer argued that the Court of Appeals should find that the case was not moot with the release of the record because rendering it moot would affect his right to injunctive relief,

statutory damages, attorney fees, and costs under Iowa Code section 22.10. The Court of Appeals rejected this argument. It found that the district court had authority to use the public interest exception to overcome the mootness doctrine. The Court noted in a footnote, however, that the voluntarily release of documents by the State generally resulted in limitations on the recovery allowed the Plaintiff in a public records case. *Id.* at FN 2.

The Court of Appeals summarized the district court conclusion as follows:

Whether investigative reports remain confidential upon completion of an investigation is an important issue. It is very likely that videos from a police chase and other records associated with an arrest will be requested in the future by other individuals. A determination of the issue would guide not only the defendants but other lawful custodians of records and could prevent the delay of court proceedings in the future.

Id. at 2.

The Court found that there was a public interest in finding that the case was not moot because the “scope of the public records exception invoked here would be of interest to the State, as well as any arrestee seeking the disclosure of arrest records”. The Court then proceeded to the merits. According to the Court, Neer argued the documents were not confidential “investigative reports” because “(A) A video recording is not a ‘report’ (B) none of the requested records were ‘investigative’ in nature, and (C) the records were specifically excluded from the section 22.7(5) exemption under the ‘date, time, specific location, and immediate facts and circumstances exclusion’.” *Id.* at 3.

The Court of Appeals cited *State ex rel Shanahan v. Iowa District Ct.* 356 N.W.2d 523, 529 (Iowa 1984) and *AFSCME v. Iowa Dept. of Public Safety*, 434 N.W.2d 401, 403 (Iowa 1988) in finding that “video recordings are encompassed within the phrase ‘peace officer’s investigative reports’”. *Id.* at 3. Neer argued that because the video recording, use of force reports, and pursuit reports “merely detail the actions the Troopers took in pursuing him and his eventual arrest” there was “no inquiry by the Troopers as to what happened” they were not “investigatory”. The Court rejected this argument citing *Shanahan* 356 N.W.2d at 529-30. It did so without viewing the requested records. *Id.* at 3. The Court of Appeals stated “It is undisputed that that video recording, use of force reports, and pursuit reports related to the officer’s encounter with Neer just prior to his

arrest.” *Id.* The Court found that requiring an “item-by-item assessment of everything within a criminal investigation file would, for all practical purposes, eliminate the investigative report exemption”. *Id.* The Court of Appeals stated “For this reason, we conclude as a matter of law that the requested materials were part of the investigation”. *Id.* at 4.

The Court of Appeals also found that the Department disclosed the “date, time, specific location, and immediate facts and circumstances surrounding a crime or *incident*” early on in a letter to Neer. *Id.* at 4 (emphasis in original). The Court found that Neer failed to cite authority that required additional disclosure. The Court stated that imposing such a requirement would result in the “*incident*” disclosure exception swallowing the provision holding “investigative reports” confidential. *Id.*

Neer is not controlling because unpublished Court of Appeals decisions do not constitute controlling legal authority for the Supreme Court *State v. Murray*, 796 N.W.2d 907, 910 (Iowa 2011) *citing* Iowa Court Rule 6.904(2)(c) (“Unpublished opinions or decisions shall not constitute controlling legal authority”.) Additionally, the timing of the open records complaint was completely different than the one here. After Neer’s criminal case was over and he was sentenced on the criminal charges he sued the Department of Public Safety under the open records law for failing to provide him with records “relating to his arrest” *Id.* at 1. Neer sought “prospective injunctive relief, statutory damages, attorney fees, and costs” from the Department under the civil enforcement section of the open records law. *Id.* *citing* Iowa Code section 22.10(1) (3) (a- c). *Id.* at 1. The Department “voluntarily turned the records over to Neer” and then sought summary judgment on the basis that the lawsuit was moot. *Id.* (emphasis added). The Court of Appeals therefore had no reason to apply the 3- part test announced in *Shanahan* to decide whether Neer’s records were protected from disclosure. The Department had already voluntarily provided the records to Neer.

Neer therefore did not change the prior Supreme Court cases finding that the State must satisfy a 3-part test in order to establish the privilege of the “peace officers’ investigative report” exemption in the public records law. *Shanahan* 356 N.W.2d at 527, *Shannon v. Hansen*, 469 N.W.2d 412, 414 (Iowa 1991), *Hawk Eye* 521 N.W. 2d at 753. The custodian of the records must therefore first “establish” that the documents are privileged before withholding them. Burlington and DCI incorrectly relied on *Neer* in refusing to determine whether the 911 calls, the bodycam videos, and the dashcam videos were

public records in this case.

If the custodian of the documents does not “establish” that a record is confidential, the record is a public record. The open records law makes clear that the “default” position for a record in the government’s possession is that it is a public record. Iowa Code section 22.2 states that “every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011) (Iowa Code chapter 22 is “designed to open the doors of government to public scrutiny”) *Shanahan*, 356 N.W.2d at 528. (“Its purpose generally is to open the doors of government to public scrutiny and prevent government from secreting its decisionmaking activities from the public”) *Gabrilson*, 554 N.W.2d at 271. (Chapter 22 “establishes a presumption of openness and disclosure”).

During the hearing Special Agent Rahn of DCI testified that every document gathered as part of the investigation became part of the “peace officer’s investigative report”. Similarly Chief Kramer of the Burlington Police Department testified that every document the police department gathered was turned over to the DCI to be a part of that “peace officer’s investigative report”. Burlington and DCI therefore never made a decision as to whether the 911 tape, the bodycam videos, and the dashcam records were “public” records. Instead they determined that once the 911 tape, the bodycam videos, and the dashcam videos went into the file labeled the “peace officer’s investigative report” they became confidential. Under this interpretation virtually every document in every investigation would be confidential. This is a very broad interpretation of an exemption that the Supreme Court has repeatedly characterized as “qualified not absolute”. *Shanahan*, 356 N.W.2d at 527; *Jackson*, 521 N.W.2d at 753; *Shannon*, 469 N.W.2d at 415.

Moreover, language in each of the cases interpreting the exemption suggest that a “peace officer’s investigative report” is something more than a file labeled “peace officer’s investigative report”. In *Shanahan*, the Supreme Court noted that DCI criminal investigation files are confidential because they contain information which the officers have gleaned from other persons “in official confidence” 356 N.W.2d at 528. The Court concluded that both the public records exemption and the officer’s privilege in Iowa Code section 622. 11 are expressions of the “same legislative purpose with regard to DCI files”:

"Both serve to assure all those persons upon whom law enforcement officers rely for information, as well as the officers themselves, that official confidentiality attends their conversations and may protect from public access the officers' reports of what they have said. Both statutes label as confidential information about criminal activity or crimes which DCI agents receive from other persons and record as part of their files."

Shanahan 356 N.W.2d at 528.

In *Shannon*, the Supreme Court again stated that in order to establish the privilege in Iowa Code sections 22.7 and 622.11 the State must establish a 3-part test including that the "communications made to officer were in official confidence". 469 N.W.2d at 414. The Court stated the requirement of this test is that "the communication is made to the officer in "official confidence" *Id.*

In *Hawk Eye* the Court reiterated the *Shanahan* rationale for the confidentiality exemption:

"We have long recognized that confidentiality encourages persons to come forward with information, whether substantiated or not, that might be used to solve crimes and deter criminal activity. Secrecy is especially vital where reports are based on confidential informants, persons indispensable to successful police work but who frequently fear intimidation and reprisal. Furthermore, nondisclosure permits law enforcement officials the necessary privacy to discuss findings and theories about cases under investigation."

Hawk Eye, 521 N.W.2d at 753 citing *Shanahan* 356 N.W.2d at 529-530.

A 911 call, a bodycam video, and a dashcam video are not the type of information that "investigating officers have gleaned from communications with other persons" *Shanahan*, 356 N.W.2d at 528. Further, a 911 call, a bodycam video, and a dashcam video are not "information about criminal activity or crimes which DCI agents receive from other person and record as part of their files". *Id.* The DCI received these items from the Burlington Police Department or in the case of the 911 call, possibly from "Descom" the Des Moines Communication Center. The disclosure of these items does not threaten the "communications" made to the officer in "official confidence" outlined

in any of the cases. Placing these public records with other records that are confidential impermissibly places a secretive cloak over the entire investigation. In fact, in this case it placed a secretive cloak over two investigations --the investigation by the Burlington police officer officers in response to the original 911 call at the Steele residence, and the investigation by the DCI of the shooting of Autumn Steele by Officer Hill.

Additionally, even if Burlington and DCI are correct that 911 tapes, bodycam videos and dashcam videos are confidential because they have been placed in a confidential peace officer's investigative report, the State's interest in keeping an investigative file confidential is strongest during an "ongoing criminal investigation" *Shanahan* 356 N.W.2d at 529. The Court stated that "the State has a very real interest in protecting the relative secrecy of much of the information its agents gather, analyze, and record during their investigation of criminal activity and crimes". *Id.* at 530. Iowa Code section 22.7(5) specifically mentions items that are part of an "ongoing investigation". And whether there is an "ongoing investigation" is mentioned as a factor in the other Iowa Supreme Court cases interpreting the confidentiality provision. When "applying the tests of *Shanahan*, it is appropriate for the court to consider the nature of the investigation and whether it is continuing or completed". *Shannon*, 469 N.W.2d at 415.

"Other case-specific factors, such as the nature of the investigation and whether it is completed or ongoing, may tip the balance in favor of public disclosure". *Hawk Eye*, 521 N.W.2d at 753.

The criminal investigation was over in February 2015 when the Des Moines County attorney notified the DCI that she would not file criminal charges against Officer Hill and that she would return the investigative file to the DCI (Exhibit A). Burlington and DCI failed to take this into account in determining whether items in the investigative file remained confidential after the criminal investigation was completed. Even if Burlington and DCI were correct that the requested information was confidential during the ongoing criminal investigation they were required to apply the balancing test once the criminal investigation ended.

The Atlantic Community School District Case Did Not Overrule Prior Supreme Court Precedent Interpreting Iowa Code Section 22.7(5).

Burlington and DCI also cite *American Civil Liberties Foundation of Iowa, Inc. v. Records Custodian, Atlantic Comm. Sch. Dist.* 818 N.W.2d 231 (Iowa 2012) for support that a

balancing test does not apply to peace officers' investigative reports. In *Atlantic School District*, the Supreme Court held that when the plain language of a statute supports the exemption it is unnecessary to apply a balancing test to weigh the privacy interest against the public's need to know. *Id.* at 235. In the *Atlantic School District* case, the Supreme Court reviewed the public records exemption of "personal information in confidential personnel records" in section 22.7(11) *Id.* at 233. The Court looked at "the language of the statute, our prior caselaw, and caselaw from other states" to determine whether the information "fit into the category" of "personal information in confidential personnel records". *Id.* at 235. When the Court determined that the information requested did "fit into the category" of the exemption, it found that a balancing test was unnecessary. *Id.* at 236.

Atlantic School District is not determinative in this case. The Court was interpreting the section 22.7(11) exemption. This is the section 22.7(5) exemption. And unlike *Atlantic School District*, the statute, the Court's prior case law, and caselaw from other states do not establish, as a matter of law, that the withheld records are "peace officers' investigative reports". Testimony at the hearing established that Burlington and DCI believe that a document "fits into the category" of a "peace officer's investigative report" whenever the document is obtained as part of the peace officer's investigation and placed into a file labeled "investigative report". As mentioned, prior Supreme Court precedent does not support this very broad interpretation of what the Court has characterized as a "qualified" exemption.

The Prosecutor has not shown that the Respondents Violated the Requirement to Disclose the Date, Time, Specific Location, and Immediate Facts and Circumstances Surrounding a Crime or Incident

The Prosecutor also alleged that Burlington and DCI violated chapter 22 because the letter written by the county attorney on February 27, 2015 did not satisfy the requirement that the "date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual". In *Neer*, the Court of Appeals found that a letter written by the county attorney that disclosed these specifics without disclosing parts of the investigative file complied with this requirement. *Neer* at 4. The Court stated that *Neer* did not cite any

authority for the proposition that additional disclosure was required. Similarly here, the prosecutor has not cited any authority that additional disclosure is required. The fact that section 22.7 (5) states that the “immediate facts and circumstances surrounding a crime or incident *shall not be kept confidential under this section*” however, supports the prosecutor’s argument that the 911 tape, the dashcam videos, and the bodycam videos are not “confidential” in the first instance even if they are later placed into a file labeled “peace officer’s investigative report”.

Iowa Code Section 22.10 States That Damages Shall Not Be Assessed When the Respondent Reasonably Relied on Prior Cases and Formal Opinions of the Iowa Public Information Board

The prosecutor requested an order requiring the Respondents to produce the documents that have been withheld for examination as well as statutory damages pursuant to Iowa Code section 22.10. Iowa Code section 23.10 (3) (b) (1) allows the board to order a Respondent to pay damages as provided in section 22.10. The Respondents should produce the 911 tape, the dashcam videos, and the bodycam videos. It does not appear, however, that damages are appropriate given Iowa code section 22.10 (3) (b). That section states:

“A person found to have violated this chapter shall not be assessed such damages if that person proves that the person did any of the following:

“(3) Reasonably relied upon a decision of a court, a formal opinion of the Iowa public information board, the attorney general, or the attorney for the government body, given in writing, or as memorialized in the minutes of the meeting at which a formal oral opinion was given, or an advisory opinion of the Iowa public information board, that attorney general, or the attorney for the government body, given in writing.”

The executive director and deputy director of the board both issued written opinions in this case recommending that the board determine that probable cause did not exist to believe that Respondents violated the public records law. They advised the board to dismiss the complaints. In doing so they cited previous interpretations by the board, attorney general opinions, proposed legislative amendments, and case law. This, in combination with the *Neer* case, show that the respondents reasonably relied on a decision of a court and the board, in maintaining that they did not violate chapter 22. Damages are therefore not appropriate in this case.

Order

Burlington and DCI failed to comply with Iowa Code Chapter 22 when they determined that all records gathered as part of a criminal investigation, including the 911 call, the body camera video, and the dash camera video, were confidential "peace officers' investigative reports" under Iowa Code section 22.7(5). The prosecutor's request for an order requiring the production of the documents is granted.

Dated this 5th day of October 2018



Karen Doland
Administrative Law Judge

APPEAL RIGHTS

Any adversely affected party may appeal a proposed decision to the board within 30 days after issuance of the proposed decision. 497 Iowa Administrative Code 4.26(1).

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