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IOWA PUBLIC INFORMATION BOARD

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

In the Matter of:)	No. 17IPIB001 FC: 0030
)	17IPIB002 FC: 0034
)	
Burlington Police Department,)	
Department of Public Safety)	Order Denying Motions
Division of Criminal Investigation)	For Summary Judgment
)	
)	
Respondents)	

Statement of the Case

A hearing on the Motions for Summary Judgment filed by the Burlington Police Department and the Division of Criminal Investigation was held by telephone on November 8, 2017 at 9:00 AM. The hearing was recorded. Mark McCormick appeared on behalf of the Iowa Public Information Board (IPIB). Holly Corkery appeared on behalf of the Burlington Police Department (Burlington). Jeffrey Peterzalek appeared on behalf of the Division of Criminal Investigation (DCI). Susan Patterson-Plank of the Iowa Newspaper Association, Erin Jordan of the Cedar Rapids Gazette, Joyce Russell of Iowa Public Radio, and Elizabeth Meyer of the Burlington Hawk Eye were also present by telephone. Michael Giudicessi also appeared by telephone.

The Burlington Police Department filed a Motion for Summary Judgment, a Brief in Support of the Motion for Summary Judgment, a Statement of Material Facts, an Appendix in Support of Material Facts, and a Reply to IPIB's Resistance to the Motion for Summary Judgment in support of the motion.

The DCI filed a Motion for Summary Judgment, a Brief in Support of the Motion for Summary Judgment, a Statement of Material Facts Supporting Motion for Summary Judgment, and a Reply Brief Supporting Motion for Summary Judgment in support of the motion.

The Iowa Public Information Board filed a Resistance to the Burlington Police Department's Motion for Summary Judgment, a Resistance to DCI's Motion for Summary Judgment, a Memorandum of Law in Resistance to Burlington Police Department's Motion for Summary Judgment, a Memorandum of Law in Resistance to DCI's Motion for Summary Judgment, a Response to Burlington Police Department's Statement of Material Facts, a Response to DCI's Statement of Material Facts, and a Reply to Respondents'

Responses to IPIB's Resistances to the Summary Judgment Motions in support of the Board's resistance.

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 (Burlington Appendix Ex C pp 38-44).

On February 27, 2015 Adam Klein, an attorney for Autumn's son, Trent Henkelvig, an attorney for Autumn's husband Gabriel and the couple's son, and J. Mark Shelnut, an attorney for Autumn's mother, wrote a letter to Agent Rick Rahn of the DCI and the county attorney. In the letter the attorneys requested "copies of all public records relating to the shooting of Autumn Steele by Burlington PD Officer Jesse Hill at 104 S Garfield, Burlington, on January 6, 2017 at approximately 10:25 A.M., its aftermath, and the incident which prompted the officer to be dispatched". The letter requested 15 specific pieces of information. An identical request was sent to Kristin Enland, the records supervisor at the Burlington Police Department. This letter requested 12 specific items. The letters were captioned "Chapter 22 Public Records Request" (Burlington Appendix Ex E pp 45-50).

On March 2 and 3, 2015 a reporter for the Hawk Eye newspaper in Burlington submitted

an open records request to the Burlington Police Department and the DCI seeking to obtain copies of all public records involving the Autumn Steele homicide including, but not limited to investigative reports by the DCI and the Burlington Police Department. In response, the DCI released a 12-second segment of video from an officer's body camera. The DCI cited Iowa Code section 22.7(5) in refusing to provide other requested records (IPIB Amended and Substituted Petition; Burlington Appendix Ex A).

On March 18, 2015 the attorney for the Division of Criminal Investigation (DCI) stated in an email to Klein that he would provide the county attorney's letter regarding charges, the DCI press releases, and a link to "some of the body camera footage" in response to the request for public records. He stated that other materials would be "protected from disclosure under Iowa's open records laws" (Burlington Appendix Ex E p 51).

On March 19, 2015 the attorney for Burlington responded to the open records request. The letter provided some information but stated that information requested by the request was were "peace officers' investigative reports" that were confidential pursuant to Iowa Code section 22.7(5) (Burlington Appendix Ex H pp 66-68).

On May 15, 2015 Klein filed a complaint with the Iowa Public Information Board against the Burlington Police Department, the Des Moines County Attorney, and the Division of Criminal Investigation.

On October 27, 2016 the Iowa Public Information Board issued an order finding probable cause to believe that the Burlington Police Department, the DCI, and the Des Moines County Attorney¹ violated Iowa Code section 22.2 when they withheld public records in response to Klein's request "including but not limited to, police audio records, body camera videos, and 911 calls that were subject to disclosure under Iowa Code Chapter 22". The Board designated a prosecutor to commence a contested case pursuant to Iowa Code section 23.10(3)(a). The Board designated this complaint case number 15FC: 0034 (Burlington Appendix Ex M p 113).

On October 27, 2016 the Iowa Public Information Board issued an order finding probable cause to believe that DCI withheld public records from the Hawk Eye newspaper "including, but not limited to, police audio records, body camera videos, and 911 calls that were subject to disclosure under Iowa Code chapter 22". The Board designated a prosecutor to commence a contested case pursuant to Iowa Code section 23.10(3)(a). The Board designated this complaint case number 15FC:0030 (IPIB Order 10-27-16).

The prosecutor filed a Petition against the Burlington Police Department and the DCI on

¹ The Des Moines County Attorney and the Public Information Board filed a settlement agreement resolving the complaint in January 2017.

November 4, 2016. In the Petition, he alleged that body camera videos and 911 calls were not “peace officers’ investigative reports” within the meaning of Iowa Code section 22.7 (5). The prosecutor accused Burlington and the DCI of violating Iowa Code section 22.2 by wrongfully refusing to produce public records including: “the recording and transcripts of 911 calls, bodycam videos taken by the officers, and videos taken by dashboard cameras” and “emails regarding the Autumn Steele homicide from and to representatives of the City of Burlington in correspondence with Autumn Steele’s family members” The prosecutor also alleged that Burlington and the DCI violated Iowa Code section 22.7(5) by failing to properly disclose the “date, time, specific location, and immediate facts and circumstances surrounding a crime or incident” (Burlington Appendix Exhibit A).

Conclusions of Law

Summary judgment standard: Summary judgment is available in administrative proceedings as provided in the Iowa Rules of Civil Procedure. 497 Iowa Administrative Code 4.14 (5). Judgment is properly granted when there is an absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007); Iowa R. Civ. P. 1.981(3).

The purpose of summary judgment is to avoid useless trials or hearings when the case can be decided as a legal matter. *Sorenson v. Shaklee Corp.*, 461 N.W.2d 324, 326 (Iowa 1990). “When the only controversy concerns the legal consequences flowing from undisputed facts, summary judgment is the proper remedy”. *Weddum v. Davenport Comm. Sch. Dist.*, 750 N.W.2d 114, 117 (Iowa 2008).

“The record on summary judgment includes the pleadings, depositions, affidavits, and exhibits presented”. *Stevens*, 728 N.W.2d at 827; *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996). “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered” Iowa R. Civ. P. 1.981(5).

Analysis: Burlington and DCI are the lawful custodians of the documents at issue. The issue in this case is whether they have mischaracterized “public records” under Iowa Code section 22.2 as “confidential records” under 22.7 (5).

Is There a Genuine Issue of Material Fact as to Whether the Burlington Police Department and the DCI complied with Iowa Code Chapter 22?

Burlington and DCI both assert that they have complied with Chapter 22 and that in fact the statute requires that they keep the documents in the “peace officers’ investigative

report” confidential. Burlington asserts that Iowa law *requires* that peace officers’ reports shall be kept confidential, unless otherwise ordered by a court or the lawful custodian of the records. DCI asserts that the “records DCI has withheld from disclosure *must* be “kept confidential, unless otherwise ordered by a court [or] by the lawful custodians of the records” (emphasis added).

There is strong legal support for the position that under section 22.7(5) “peace officers’ investigative reports” are confidential. The Court in *State ex rel Shanahan v. Iowa District Ct.* 356 N.W.2d 523, 529 (Iowa 1984) stated that the legislature clearly intended to allow peace officers and DCI investigators to perform much of their investigatory work in secret and have their sensitive files concerning their investigation protected from public disclosure. The purpose of the confidentiality exemption and the public officer privilege in chapter 622.11 is to “encourage persons to come forward with information which might be used to solve crimes and to deter criminal activity” *Id.* Another purpose is to allow officers to “privately and confidentially” discuss and record their “findings and theories about each case which is under investigation” *Id.* “The results of investigations of alleged criminal activity are by their nature the type of information that the public interest requires be kept secret” *Id.* Additionally, chapter 22 “provides that certain, expressed types of public records *shall be kept confidential*”. *Gabrilson v. Flynn* 554 N.W.2d 267, 272 (Iowa 1996) (emphasis in original).

Law enforcement’s right to shield investigative work from public scrutiny, however, is balanced against Iowa Code section 22.2. That section 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”. Iowa Code chapter 22 is “designed to open the doors of government to public scrutiny”. *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011). “Its purpose generally is to open the doors of government to public scrutiny and prevent government from secreting its decisionmaking activities from the public”. *Shanahan*, 356 N.W.2d at 528. Chapter 22 “establishes a presumption of openness and disclosure”. *Gabrilson*, 554 N.W.2d at 271.

The Iowa Supreme Court has stated that the exemption in section 22.7(5) and the privilege for public officers set out in Iowa Code section 622.11 are “two expressions of essentially the same legislative purpose with regard to DCI files”. *Shanahan*, 356 N.W.2d at 528-529. The Court stated that both “serve to assure that all 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”. *Id.* at 528. The *Shanahan* Court stated that the “peace officers’ investigative report” exemption in the public records law is “not an absolute but rather is a qualified privilege, applying ‘only when the public interests would suffer by the disclosure’”. *Shanahan*, 356 N.W.2d at 527.

In *Hawk Eye v. Jackson*, 521 N.W. 2d 750, 753 (Iowa 1994) the Supreme Court again

stated that the exemption in section 22.7(5) and the privilege in section 622.11 “express essentially the same legislative purpose” of providing “assurance upon whom law enforcement officials rely that ‘official confidentiality attends their conversations and may protect from public access the officers’ reports of what they have said’”. The Court repeated that the “privilege cloaking these communications, however, is qualified, not absolute”. *Hawk Eye*, 521 N.W.2d at 753.

The Supreme Court has also repeatedly found 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. While the phrase “peace officers’ investigative report” has been used frequently throughout these proceedings there is still an issue as to what that phrase means. The prosecutor asserts that the recording and transcripts of 911 calls, bodycam videos taken by the officers, and videos taken by dashboard cameras are not a “peace officers’ investigative report”. The prosecutor also asserts that Burlington and DCI may not determine that everything accumulated in an investigation becomes part of a “peace officers’ investigative report”. Questions therefore remain as to whether the documents at issue are part of a “peace officers investigative report” and if they are, whether Supreme Court precedent requires Burlington and DCI to satisfy a balancing test before withholding them.

Are Burlington and DCI Correct that Neer v. Iowa is the Applicable Legal Precedent?

DCI and Burlington maintain that *Neer v. Iowa*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011) is controlling in this case rather than any of the cases cited above. In *Neer*, the Court of Appeals held that records relating to the arrest of a person were “confidential as a matter of law pursuant to Iowa Code section 22.7(5)”. In the decision the Court of Appeals did not indicate that the privilege was qualified or that a balancing test was necessary in order to establish the privilege. *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). It will not be assumed that a Court of Appeals decision overrules Supreme Court precedent on this issue at this juncture. *C & J Vantage Leasing Co. v Wolfe*, 795 N.W.2d 65, 72 (Iowa 2011) (The nonmoving party is entitled to “every legitimate inference that can be reasonably deduced from the evidence”).

Additionally, *Neer* only tangentially addressed another issue raised here; whether a letter from the Department of Public Safety to *Neer* complied with the requirement in section 22.7(5) to disclose the “date, time, specific location, and immediate facts and circumstances surrounding a crime or incident”. This is an additional question that makes summary judgment inappropriate.

Does the “Plain Language” of Section 22.7(5) Make a Balancing Test Unnecessary under the Rationale of the Atlantic School District Case?

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”. Prior cases have defined the types of documents that might be a “peace officers’ investigative report”. *Shanahan*, for example, established that the exemption applies to “communications” made to a “public officer” in “official confidence”. *Shanahan*, 356 N.W.2d at 528. In *AFSCME v. Iowa Dept. of Public Safety*, 434 N.W.2d 401, 403 (Iowa 1988) the Supreme Court found that a lab analysis made as part of an investigation of a crime was sufficient to qualify the lab report as an “investigative report” under section 22.7(5). In *Neer*, the Court of Appeals found that “Video recordings are encompassed within the phrase ‘peace officers’ investigative reports”. *Neer*, slip op at 3. There is not, however, a definitive case indicating that the documents at issue “fit into the category” of a “peace officers’ investigative report”.

Moreover, the question in this case is whether DCI and Burlington may determine that all information gathered in an investigation is “confidential” because DCI and Burlington have determined that the information has been gathered for a “peace officers’ investigative report”. There is not a case that definitively answers this question. The prosecutor is entitled to make a record in this case and have the issue decided.

Is Burlington Entitled to Summary Judgment on the Issue of Whether it Failed to Disclose Emails Regarding Autumn Steele’s Death?

Burlington and DCI have made similar arguments throughout the proceedings. In its motion for summary judgment, however, Burlington makes the additional argument

that because Adam Klein did not request emails from the City of Burlington regarding correspondence with Autumn Steele's family members, Burlington could not have withheld those records in violation of Iowa law. The prosecutor notes that this public records request was in the Hawk Eye request rather than the Adam Klein request and that Burlington responded to this complaint as well. The Board's probable cause order accused only DCI of violating the Hawk Eye's request for public records. It is not clear whether Burlington is arguing that it is not the custodian of those records, that the records were never requested, or that the Board never intended to accuse Burlington of a violation with regard to this category of documents. The prosecutor's petition referenced both complaints and accused both Burlington and DCI of violating Chapter 22. The two cases have been consolidated. Burlington and DCI have taken an identical position that all documents accumulated in the Autumn Steele investigation are a "peace officers investigative report". To the extent Burlington is requesting a partial summary judgment on this particular category of records at this juncture, it is denied.

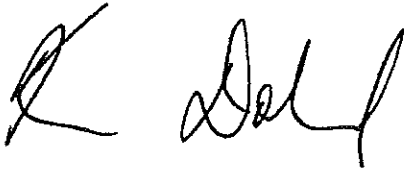
Does the Board's Interlocutory Order Establish that the Records are Confidential?

Burlington and DCI contend an Order on Interlocutory Appeal filed by the Iowa Public Information Board on August 17, 2017 established as a matter of law that the records sought in this case are confidential investigative reports not subject to disclosure. In the Interlocutory Order, the Iowa Public Information Board was reviewing an Order Granting the Prosecutor's Motion to Compel. The Board cited *Dierks v. Malin*, 894 N.W. 2d 12 (2016) for its finding that Burlington and DCI met their burden to show the records "are confidential investigative reports as defined under Iowa Code section 22.7(5) and thus not subject to disclosure". The Board concluded that Burlington and DCI were not required to provide the disputed records or a privilege log "at this juncture". The phrase "at this juncture" is interpreted to mean prior to a hearing, as part of a discovery dispute between the parties. It is not interpreted to mean that the Board decided the ultimate issue in this case. The parties proceeded with the case and with arguments on these Summary Judgment motions. The Board did not dismiss the case. It therefore appears that the Board was deciding the discovery dispute and not the ultimate issue in this case. The Interlocutory Order is therefore not controlling on whether summary judgment should be granted.

Order

The Motions for Summary Judgment filed by the Burlington Police Department and the Division of Criminal Investigation are denied.

Issued on December 4, 2017



Karen Doland
Administrative Law Judge

cc:

Iowa Public Information Board, Petitioner
Mark McCormick, Atty
666 Walnut Street, Ste 2000
Des Moines, Iowa 50309

(First Class Mail)

Burlington Police Department, Respondent
Patrick J. O'Connell, Brett S. Nitzschke, Holly Corkery, Attys
Lynch Dallas PC
526 2nd Avenue SE
PO Box 2457
Cedar Rapids, IA 52406-2457

(First Class Mail)

Division of Criminal Investigation, Respondent
Jeffrey Peterzalek
Assistant Attorney General
Department of Justice Administrative Law Division
Hoover Building, 2nd Floor
1305 E Walnut
Des Moines, Iowa 50319

(Local/ First Class Mail)

The Hawk Eye, Complainant
Michael Giudicessi & Erin Del Val, Attys
Faegre Baker Daniels
801 Grand Avenue, 33rd Floor
Des Moines, IA 50309

(First Class Mail)

Autumn Steel, Complainant
Adam Klein
Law Offices of Adam Klein
2751 Buford Hwy NE Suite 600
Atlanta, GA 30324-5457

(First Class Mail)

