

E. Mr. Klein was not required to separately seek a declaratory order..... 13

III. **Mr. Klein has Standing to Seek Judicial Review of the IPIB’s Final Decision Regarding his Complaint** 15

IV. **The IPIB is a Proper and Necessary Party to Mr. Klein’s Petition for Judicial Review**..... 25

CONCLUSION..... 26

INTRODUCTION

Mr. Klein’s Petition for Judicial Review establishes that the IPIB’s final agency action taken on his Complaint filed with the IPIB on May 15, 2015 against the Burlington Police Department and Iowa Department of Public Safety Criminal Investigation (“DCI”) was unlawful. (See Pet. Ex. 02, Klein Compl.) The dismissal of the contested case proceeding brought against the Respondents was unlawful because it violated Mr. Klein’s rights under Iowa’s Open Records Law (hereinafter “Chapter 22”). See Iowa Code § 22.2; 22.7(5); *Mitchell v. City of Cedar Rapids*, No. 18-0124, ___ N.W.2d ___, at *23 (Iowa Apr. 5, 2019) (“[W]e hold the police investigative reports at issue are not exempt from public disclosure under *Hawk Eye*. . . any member of the public could obtain the same reports through an Iowa Code chapter 22 open records request.”).

The IPIB’s arguments have no merit and its Motion to Dismiss should be denied. First, Mr. Klein’s petition does not improperly combine an appeal and original action. Mr. Klein has only sought judicial review of final agency action pursuant to Iowa’s Administrative Procedures Act (“IAPA”), and seeks only those forms of relief provided for therein. See 17A.19(10) (providing for “equitable or legal and including declaratory relief”). Second, Mr. Klein has exhausted all adequate administrative remedies as required under the IAPA, Chapter 23 (governing the IPIB), and IPIB regulations. Mr. Klein was not required to intervene in the IPIB’s

prosecution of *his own complaint* against the Burlington Police Department and Iowa Department of Public Safety, upon which the IPIB rendered final agency action.

Third, Mr. Klein has standing to challenge the IPIB's final agency action because by dismissing the petition filed by the IPIB to prosecute open records violation against Mr. Klein by the Respondents, IPIB caused a cognizable injury to Mr. Klein, the underlying Complainant. By upholding the unlawful withholding of records by the Burlington Police Department and DCI, it violated his statutory rights under Chapter 22. The IPIB's contention that Mr. Klein already has access to the records he seeks as a result of discovery in his client's separate federal litigation against the City of Burlington and Officer Jesse Hill is not supported by the record evidence, and states facts which, if true, would be subject to a protective order. Any records which Mr. Klein may or may not have as a result of that discovery are filed under seal, such that Mr. Klein cannot disclose them or disseminate them to the public, rights protected by Chapter 22. In addition, references within the unsealed records in the separate federal litigation prove that many records exist and were exchanged in discovery which are responsive to Mr. Klein's open records request and are the subject of his IPIB Complaint, but which were never filed in that federal action and thus were never unsealed or released to the public. As to those portion of the records which have been publically disclosed, the IPIB has preempted its own ability to now argue mootness; when it had the opportunity to dismiss the underlying petition as to those records already in the public domain on that basis, it instead determined to reach the merits of whether they were public records under Chapter 22, and erroneously determined they were not, violating Mr. Klein's right to those records as well as his ability to access law enforcement records in the future. (Pet. Ex. 01, IPIB Final Decision.)

Finally, IPIB is a properly named party to this judicial review action, as provided by the plain text of Iowa's Administrative Procedures Act and as consistent with similar administrative agency proceedings before the Iowa Civil Rights Commission ("ICRC"). *See* Iowa Code § 17A.19(4) (requiring the agency to be named as respondent); *see also, e.g., Renda v. Iowa Civil Rights Com'n*, 784 N.W.2d 8 (Iowa 2010) (appeal by complainant of final agency action regarding underlying complaint against third party respondent).

For these reasons, and as argued further below, IPIB's Motion to Dismiss should be denied in full, and Mr. Klein should be allowed to proceed with his Petition for Judicial Review.

STANDARD OF REVIEW

A motion to dismiss admits the well-pleaded facts of the petition, but not the conclusions. The Court should grant a motion to dismiss for failure to state a claim only if the petition shows the petitioner is not entitled to relief under any state of facts. *Ostrem v. Prideco Secure Loan Fund, LP*, 841 N.W.2d 882, 891 (Iowa 2014); *EerieAnna Good v. Iowa Dep't of Hum. Svcs.*, No. CVCV054956, Order Denying Motion to Dismiss, at *2-3 (Iowa Dist. Ct. Nov. 27, 2017) (Chief Judge Gamble's order setting forth the standard of review on a motion to dismiss an IAPA judicial review petition, and denying the state's motion)¹.

ARGUMENT

I. Mr. Klein's Petition Does Not Improperly Combine a Petition for Judicial Review with a Petition for Declaratory Relief and an Original Action under Chapter 22.

The IPIB argues both that Mr. Klein's Petition improperly joins a judicial review action with an original action filed to enforce Chapter 22 and that it is impermissible for a judicial review action to seek declaratory relief. (Mot. to Dismiss at 3-4.) Both arguments are in error.

¹ Available at https://www.aclu-ia.org/sites/default/files/order_denying_motion_to_dismiss.pdf.

First, the IPIB misreads Mr. Klein’s Petition in construing it, in part, as an original action to enforce Chapter 22.² Mr. Klein has filed a straightforward Petition for Judicial Review of Agency Action pursuant to Iowa Code section 17A.19. The statutory grounds upon which he has sought judicial review of the IPIB are sections 17A.19 (10) (b), (k), (l), (m), (n). *Id.* (variously: in violation of any provision of law, not required by law, based on an irrational, illogical, or wholly unjustifiable interpretation of a provision of law, and otherwise unreasonable, arbitrary, capricious, or an abuse of discretion) (Pet. at 8-11.) The “provision of law” that Mr. Klein alleges the IPIB violated in those grounds, properly set forth in his petition, is Chapter 22. Thus, it is through the mechanism of an IAPA judicial review of agency action, and not otherwise, that Mr. Klein’s Petition seeks to enforce his rights under Chapter 22.

Second, declaratory relief is expressly available under the IAPA in judicial review actions:

The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and *including declaratory relief*...

Iowa Code § 17A.19(10) (emphasis added). That section specifically sets forth sections 17A.19 (10) (b), (k), (l), (m), (n), the grounds alleged by Mr. Klein in his Petition, (*see* Pet. at 8-11), as the basis for the court’s jurisdiction to grant those forms of relief. *Id.*

² Arguendo, were Mr. Klein to have improperly combined a section 17A judicial review action with an original action, the proper remedy would be to sever the actions, not dismissal. *See, e.g., League of United Latin American Citizens of Iowa et al. v. Iowa Sec’y of State Paul Pate*, Case No. CVCV056403, Ruling on Sec’y of State’s Mot. to Dismiss and Pet’r’s Mot. to Dismiss, at *1 (Iowa Dist. Ct. Jul. 6, 2018). “[T]he remedy for misjoinder is not to dismiss the action” *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 10 (Iowa 2000). Rather, “the court may simply order the causes docketed separately.” *Capitol City Drywall Corp. v. C. G. Smith Const. Co.*, 270 N.W.2d 608, 611 (Iowa 1978).

Finally, as to both arguments, Mr. Klein’s Petition follows long-standing practice in IAPA judicial review actions. *See, e.g. EerieAnna Good et al. v. Iowa Dep’t of Hum. Servs.* [hereinafter “*Good*”], Case No. CVCV054956, Pet. at *16-17, *23 (Iowa Dist. Ct. Sept. 21, 2017) (setting forth, *inter alia*, Count I as “Iowa APA, Section 17A.19(10)(b), . . . Section 216.7(1)(a) of the ICRA” and seeking declaratory relief that the challenged agency rule and action violated the Iowa Civil Rights Act)³; *Good*, Case No. CVCV054956, Order Granting Pet. (Iowa Dist. Ct. June 6, 2018) (*inter alia*, granting declaratory relief)⁴; *Good*, No. 18-1158, ___ N.W.2d ___ (Iowa Mar. 8, 2019) (upholding the district court’s decision). *See also Gartner v. Iowa Dep’t of Pub. Health* [hereinafter “*Gartner*”], Case No. CE 67807, Pet. (Iowa Dist. Ct. May 7, 2010) (alleging, *inter alia*, the agency’s action violated Iowa statute in light of how the statute must be construed under *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)); *Gartner*, Case No. Case No. CE 67807, Order at *3-4, *6-12 (Iowa Dist. Ct. Jan. 4, 2012) (*inter alia*, granting declaratory relief)⁵; *Gartner*, 830 N.W.2d 335 (Iowa 2013) (upholding the district court decision). *See also Tom Slockett v. Iowa Ethics and Campaign Disclosure Board* [hereinafter “*Slockett*”], Case No. CVCV049899, Am. Pet. at *19-21 (Iowa Dist. Ct. May 21, 2015) (seeking, *inter alia*, declaratory order stating that agency action violated statute)⁶; *Slockett*, Case No.

³ Available at: https://www.aclu-ia.org/sites/default/files/05771_cvcv054956_pfld_4875001_petition.pdf.

⁴ Available at: https://www.aclu-ia.org/sites/default/files/6-7-18_transgender_medicaid_decision.pdf.

⁵ Available at: https://www.lambdalegal.org/sites/default/files/gartner_ia_20110104_ruling-on-petition-for-judicial-review.pdf.

⁶ Available at: <https://www.aclu-ia.org/sites/default/files/iowa/wp-content/uploads/2015/06/file-stamped-petition.pdf>.

CVCV049899, Ruling on Am. Pet. for Jud. Rev. at *5-8 (Iowa Dist. Ct. Feb. 28, 2017) (granting said relief by construing the relevant statute and reversing the agency below on that basis)⁷.

Mr. Klein's straightforward judicial review action properly asserts the grounds upon which relief is sought under the IAPA and seeks declaratory relief as supported by the plain text of the IAPA, longstanding practice, and Iowa Supreme Court authority. As such, the IBIP's motion to dismiss on those bases should be denied.

II. Mr. Klein has Exhausted All Adequate Administrative Remedies.

Mr. Klein exhausted all adequate administrative remedies by filing the underlying Complaint that resulted in the IPIB's ruling that he had no right as a matter of law to the records he sought from the Respondent. The IPIB does not contest that this ruling is final agency action. Its arguments that Mr. Klein was required to intervene in the contested case hearing regarding his own Complaint, or to separately file a petition for declaratory relief in addition to his Complaint, are without merit.

A. Mr. Klein exhausted all adequate administrative remedies by filing his Complaint, upon which final agency action has been rendered, as provided by the express language and purpose of Chapter 23.

The IPIB's contentions that Mr. Klein failed to exhaust all adequate administrative remedies and that he did not participate below is puzzling and incorrect. (Mot. to Dismiss at 4-6.) First, Mr. Klein, as the *Complainant* to the IPIB regarding the Respondents' denial of his access to the documents in question, was a party to the proceedings below; his participation was marked by the filing of his Complaint. (Pet. Ex. 02, Klein Compl.) The entire process that unfolded before the IPIB below is one that was triggered by Mr. Klein's Complaint, and the final agency action appealed from here is that which ruled, erroneously, on the merits of it.

⁷ Available at: https://www.aclu-ia.org/sites/default/files/2017-2-28_-_judicial_review_order.pdf. No appeal to the Iowa Supreme Court was sought by the agency.

Chapter 23 sets forth the procedures for the IPIB to follow once a complaint is filed alleging a chapter 22 violation. And, logically, it expressly references the Complainant as a party to those procedures. *See* Iowa Code § 23.2 (defining the “Complainant” as the “person who files a complaint with the board”); Iowa Code § 23.8(1) (“Upon receipt of a complaint alleging a violation of chapter 21 or 22, the board shall . . . [d]etermine that, on its face, the complaint is within the board’s jurisdiction, appears legally sufficient, and could have merit. In such a case the board shall accept the complaint, and shall notify the *parties* of that fact in writing.”) (emphasis added.) Indeed, Mr. McCormick’s Petition initiating a contested case against Respondents properly identifies Mr. Klein as “[t]he Complainant in 15 FC:0034 and 15 MO:0017 . . . a person pursuant to Iowa Code § 23.2” under the heading “Parties, Jurisdiction, and Venue.” (Pet. at Ex. 05: IBIP Petition, at 1.) As stated in the IPIB’s Petition, “Complainants [Mr. Klein and the Hawk Eye] make essentially the same allegations against Respondents, and the allegations arise from the same circumstances. This petition is filed to initiate a contested case.” (Id.) The relief sought in turn “request[ed] that . . . a contested case hearing be set, that upon such hearing an appropriate order be entered to ensure Respondents’ compliance with Iowa Code Chapter 22, including a requirement that Respondents be ordered to produce the documents that have been withheld for examination and copying without cost to Complainants.” (Id. at 4.)

Mr. Klein was not required to do anything beyond filing his Complaint, and have final agency action taken on that Complaint, as it has been, to exhaust administrative remedies. Indeed, the stated legislative purpose for the very existence of the IPIB is to facilitate the resolution of open records disputes without burdening the complainant with the cost of having to undertake the litigation himself or herself. *See* Iowa Code § 23.1 (“The purpose of this chapter is to provide an alternative means by which to secure compliance with and enforcement of the

requirements of chapters 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.”) It would completely undermine the purpose of Chapter 23 to require to Mr. Klein to have obtained an attorney to intervene in the contested case brought by the IPIB on his Complaint in order to represent his interests in obtaining the public records he sought from Respondents.

To the contrary, the IPIB’s mechanism for enforcement of Chapter 22, once it makes a probable cause finding, is as follows:

If the board finds the complaint is within the board’s jurisdiction and 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. If there are no material facts in dispute, the board may order that the contested case procedures relating to the presentation of evidence shall not apply as provided in section 17A.10A. The executive director of the board or an attorney selected by the executive director shall prosecute the respondent in the contested case proceeding. At the termination of the contested case proceeding the board shall, by a majority vote of its members, render a final decision as to the merits of the complaint.

Iowa Code § 23.10(3)(a) (emphasis added). Upon a finding in favor of the complainant, Chapter 23 sets forth the remedies that it may provide the complainant—including to issue “any appropriate order to ensure enforcement of chapter ...22 including but not limited to an order requiring specified action . . ., [r]equire the respondent to pay damages, [and] [r]equire the respondent to take any remedial action deemed appropriate by the board.” Iowa Code § 23.10(3)(a)-(b).

Here, pursuant to that process, after the IPIB made a determination of probable cause as to Mr. Klein’s Complaint, it brought a contested case against the Respondents on his Complaint, seeking to prosecute the open records violations he complained of, and in order to provide him with the relief to which he was entitled under Chapters 22 and 23. After the ALJ rendered its

decision in favor of Mr. Klein, determining he was entitled to the records he sought, the Respondents appealed to the IPIB, which decided not to adopt the ALJ's decision, reversing the probable cause determination made by the earlier IPIB, and rendering final agency action on the matter of Mr. Klein's Complaint. Nothing more was required by Mr. Klein to exhaust administrative remedies in order to now seek judicial review of that final agency action, according to the plain text and purpose of chapter 23.

B. Chapter 23 Does Not Expressly or Impliedly Require Intervention by the Complainant in order to Exhaust.

The second reason that intervention was not required to exhaust is that neither Chapter 23 nor IPIB regulations expressly or impliedly require it. The Iowa Supreme Court has recognized that “the administrative-exhaustion requirement does not apply unless two conditions are satisfied: (1) an administrative remedy must exist for the claimed wrong, and (2) the statutes must expressly or impliedly require that remedy to be exhausted before resort to the courts.” *Travelers Indem. Co. v. D.J. Frazen, Inc.*, 792 N.W.2d 242, 247 (Iowa 2010) (internal citations omitted); *Al-Jurf v. Iowa Bd. of Medicine*, 838 N.W.2d 680, 2013 WL 3830159, *6 (Iowa 2013) (unreported) (finding physician was not expressly or impliedly required to file interagency appeal to exhaust for judicial review, because the agency rule was permissive, not mandatory).

Chapter 23 does not even mention, much less require, intervention—by the Complainant or at all. Iowa Code § 23.10 (providing for IPIB enforcement of Chapter 22 procedures, and not including any mention or requirement of intervention by the Complainant). IPIB administrative rules governing contested cases further demonstrate that intervention by the Complainant is not required to exhaust the Complainant's remedies—especially, as here, when the IPIB takes final agency action on the Complainant's Complaint. The rule provides that anyone seeking intervention must:

demonstrate that: (a) intervention would not unduly prolong the proceedings or otherwise prejudice the rights of existing parties; (b) the movant is likely to be aggrieved or adversely affected by a final order in the proceeding; and (c) the interests of the movant are not adequately represented by existing parties.

Iowa Admin. r. 497-4.18(3). As the Complainant—whose interests in obtaining the public records he sought were already being advanced by the IPIB against the Respondents in the contested case—Mr. Klein was an existing party, demonstrating the nonsensical nature of the IPIB’s ad hoc argument that he was required to intervene in the agency’s prosecution of his own Complaint. Any intervention by the Complainant in the contested case proceeding to decide the Complaint, if it would be entertained at all, would be permissive, not mandatory, because in the absence of his intervention, final agency action is rendered on the Complainant’s Complaint. Thus, intervention by the Complainant is not expressly or impliedly required to exhaust.

C. Because Intervention Would Have Served No Purpose, Mr. Klein was Not Required to Intervene.

The third reason intervention was not required is that intervention would have provided Mr. Klein with no additional remedy. The Iowa Supreme Court had held that the IAPA does not require the exhaustion of fruitless procedures:

The doctrine of exhaustion of administrative remedies has never been thought to be absolute. If the agency is incapable of granting the relief sought during the subsequent administrative proceedings, a fruitless pursuit of these remedies is not required.

Salsbury Labs. v. Iowa Dep't of Env'tl. Quality, 276 N.W.2d 830, 836 (Iowa 1979) (internal citations omitted).

Here, the IPIB determined that as a matter of law Mr. Klein had no right to the documents he sought. Thus, even if Mr. Klein were required to intervene in the IPIB’s prosecution of his own complaint—putting aside the absurdity of that prospect in light of the plain text and purpose of Chapter 23—doing so would have yielded him no more or relief than

declining to intervene. Intervention would have been especially wasteful and fruitless in this case, because the only contested matter before the agency was the legal question of whether the records sought by Mr. Klein and set forth in his Complaint are open records under Chapter 22. Mr. Klein contested no facts from those set forth by the IPIB's prosecutor upon the IPIB's determination of probable cause regarding his Complaint. Scholarship by Professor Bonfield, the generally acknowledged author of the IAPA, makes clear the unnecessary of additional agency proceedings when facts are not in dispute:

Therefore, when there are no facts in dispute between the parties to a proceeding, or the facts in dispute are wholly irrelevant to its outcome, a court is not likely to find a hearing required by statute within the meaning of the section 2(2) definition of "contested case." This is true, even if the statute in question otherwise seems to demand an opportunity for an evidentiary hearing in that particular type of proceeding.

Arthur Earl Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 Iowa L. Rev. 285, 321-22 (1977) (emphasis added).

Because Mr. Klein disputed no facts as set forth by the IPIB prosecutor in prosecuting a contested case against the Respondents regarding his Complaint, and because intervention would have provided no remedy in light of the IPIB's determination that as a matter of law he was not entitled to the records he sought, intervention was not required.

D. There is No Precedent to Support the Idea that a Complainant Would be Required to Intervene in His Own Case following a Probable Cause Determination, and Exhaustion Before Analogous Agencies Requires No Such Thing.

Finally, there is no precedent to support the argument that a Complainant would be required to intervene in his own case as prosecuted by the agency against the Respondent following a probable cause determination. The Iowa Civil Right Commission ("ICRC") functions analogously to the IPIB. Like the IPIB, the ICRC serves both an investigatory role as a

neutral fact-finder until a probable cause determination is made, and a prosecutorial role, when, following a probable cause determination, should informal assistance or mediation fail to resolve the matter, it acts against the Respondent on the matter of the Complaint by bringing a contested case. In fact, the IPIB's administrative agency rule governing intervention in contested cases is taken directly from the ICRC's administrative agency rule governing the same. *Compare* Iowa Admin. r. 161-4.26 *with* Iowa Admin. r. 497-4.18 (the only differences between the otherwise identical provisions is that the ICRC allows parties 14 days to respond to a motion to intervene, while the IPIB allows parties 10 days to respond to a motion to intervene.) The ICRC process allows a Complainant to be represented by an attorney at their expense during the contested case, but does not require the Complainant to intervene in order to do so, and failure to intervene does not deprive the Complainant of their rights to appeal under the IAPA. *See, e.g., Renda v. Iowa Civil Rights Com'n*, 784 N.W.2d 8 (Iowa 2010) (IAPA judicial review filed by complainant against agency to appeal final agency action dismissing complaint against third party). The IPIB's argument that the Complainant would be required to intervene in the agency's contested case based on his Complaint against the Respondent is as nonsensical and undermining of the purpose and role of the agency in the case of the IPIB as it is for the ICRC. Because Mr. Klein filed the underlying Complaint triggering the agency contested case here, and because final agency action has in fact been rendered regarding his Complaint in the contested by the agency, all adequate agency remedies have been exhausted.

E. Mr. Klein was Not Required to Separately Seek a Declaratory Order.

The IPIB's Motion also argues that Mr. Klein was required to separately seek a declaratory order from the IPIB in order to now seek declaratory relief from this Court through his duly filed 17A action. (Mot. to Dismiss at 6.) For the same reasons as set forth in section I,

above, this Court has jurisdiction to provide both legal and equitable remedies to aggrieved petitioners in 17A actions upon determination in their favor on the merits.

Additionally, in his Complaint, Mr. Klein *did* specifically ask that the IPIB:

- (1) Conduct an investigation as to the facts and circumstances underlying this complaint;
- (2) *Find that the requested records are not exempt from disclosure under Iowa Code § 22.7(5), and*
- (3) Order Respondents to fully disclose all records responsive to Complainant's request, and
- (4) Find that Respondents willfully failed to comply with Chapter 22, and
- (5) Impose civil fines on Respondents as directed by Chapter 22 and 23, and
- (6) Expedite the proceedings under this complaint as much as possible, and
- (7) Order Respondents to pay Complainants' reasonable attorneys' fees in connection with this complaint (pursuant to its authority under Iowa Code § 23.10(3)(b)(3), and
- (8) Provide such other relief as the Law may provide."

(Pet. Ex. 02, Klein Compl.) (emphasis added). So in addition to the jurisdiction the Court has under the express language of the IAPA to grant the declaratory relief Mr. Klein seeks, he in fact did seek declaratory relief from the IPIB, and the IPIB denied him that relief in its final agency action.

The process for filing a Petition for Declaratory Order that the IPIB points to is outside of and separate from the Complaint and contested case procedure at issue in this case. *Compare* Iowa Admin. r. 497-3 (setting forth process for filing petitions for declaratory orders) *with* Iowa Admin. r. 497-4 (setting forth the Contested Case process). Unlike a contested case following the filing of a Complaint, anyone can seek a declaratory order from the Board after filing a petition that sets out "the questions petitioner wants answered." *See* Iowa Admin. r. 497-3 (1) (providing "[a]ny person may file a petition with the board for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the board."); *see also* Iowa Admin. r. 497-3.1 (setting out form for petition). In other words, a complainant need not file a petition for a declaratory order to exhaust administrative remedies on

their complaint, and a petitioner for a declaratory order need not file a complaint to exhaust administrative remedies on their petition for a declaratory order. The complaint and contested case process inherently require the Board to determine the rights of the parties under Chapter 22 in order to resolve the Complaint. Nowhere in Chapter 23 or the IPIB's administrative rules are the remedies available to a complainant limited by the existence of a separate procedure for seeking declaratory orders outside of the complaint and contested case processes.

III. Mr. Klein has Standing to Seek Judicial Review of the IPIB's Final Decision Regarding his Complaint.

By rendering final agency action on Mr. Klein's Complaint determining that he is not entitled to the records he sought from Respondents as a matter of law, the IPIB caused a specific and cognizable injury to his rights to those records under Chapter 22. (*See, e.g.*, Pet. at 9 ¶ 35) ("The IPIB's Final Decision violated Mr. Klein's right to public records under Iowa Code Ch. 22. . .").⁸ Under Chapter 22, "[e]very 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 § 22.2(1); *Mitchell*, __ N.W.2d at *10 ("The Act essentially gives all person the right to examine public records" unless those records fit "specific categories of records that must be kept confidential.") (*citing Am. Civil Liberties Union of Iowa v. Atlantic Cmty. Sch. Dist.*, 818 N.W.2d 231, 232 (Iowa 2012)). As the Iowa Supreme Court has noted, this is a right of high order and import. "The purpose of chapter 22 is to open the doors of

⁸ As the Petition makes clear, the description of how the IPIB decision negatively impacts attorneys, journalists, community activists, and other government watchdogs which the IPIB cites to, (Mot. to Dismiss at 7), is in reference to one of the specific grounds for appeal asserted by Petitioner in Paragraphs 36-37—Iowa Code § 17A.19(10)(k) (providing agency action may be challenged on the ground that it was "not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.").

government to public scrutiny and to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.” *Mitchell*, ___ N.W.2d at *10 (internal citations and quotations omitted).

Accordingly, the Iowa legislature has provided that when a person’s right to open records under Chapter 22 is violated, they have a choice of remedies. Chapter 22 provides that “[a]ny aggrieved person” may bring a civil enforcement action in district court to enforce their right to the open records. Iowa Code § 22.10(1). Alternatively, the person may file a timely complaint with the IPIB. Iowa Code § 23.5(1).⁹ Once a complaint is filed with the board, the complainant is entitled to a decision on that complaint by the IPIB and, when final agency action is rendered by the IPIB on his or her complaint in violation of Chapter 22, the complainant has a right to judicial review of that action under the IAPA. *See* Iowa Code § 23.10(3)(d) (“A final board order resulting from such [contested case] proceedings . . . is subject to judicial review.”); Iowa Code § 17A.19 (providing for judicial review to a person who is aggrieved by agency action who has exhausted all adequate remedies). Mr. Klein’s injury in this case is the denial of open records to which he is statutorily entitled under chapter 22, including the right to further disseminate those records.

While the IPIB states that it “did not ‘allow’ the withholding of the disputed records, as alleged in the Petition. Petition ¶ 35,” (Mot. to Dismiss at 8), that is precisely what it did. The

⁹ However, when more than one person seeks enforcement of chapter 22 as to the same alleged violation, and one person chooses to file a complaint with the IPIB while the other seeks enforcement by filing an action directly in district court, the district court action is stayed pending resolution of the same matter with the IPIB. Iowa Code § 23.5(2). Thus, after the Burlington Hawk Eye elected to pursue the complaint process with the IPIB, Mr. Klein was limited to the same, because any direct enforcement action he would have filed in district court would have been stayed pending resolution of the IPIB decision. As a result, Mr. Klein determined to file his complaint with the IPIB in addition to the Hawk Eye’s so that his interests would be protected.

IPIB prosecutor sought, and the IPIB had the authority to grant, an order requiring the Respondents to turn over the open records Mr. Klein sought in his Complaint. Iowa Code § 23.6(8) (“The board shall have all of the following powers and duties. . . [a]fter appropriate board proceedings, issue orders with the force of law, determining whether there has been a violation of chapters 21 or 22, requiring compliance with specified provisions of those chapters, imposing civil penalties equivalent to and to the same extent as those provided for in sections 21.6 or 22.10, as applicable, on a respondent who has been found in violation of chapter 21 or 22, and imposing any other appropriate remedies calculated to declare, terminate, or remediate any violation of those chapters.”). By issuing final agency action on his Complaint reversing the ALJ’s proposed decision requiring the Respondents to turn over the documents Mr. Klein sought, the IPIB allowed Respondents to withhold them in violation of Chapter 22.

The IPIB argues that “[a]ll of the records that were the subject of the contested case proceeding in front of the Board were produced in a civil lawsuit in federal court” and that Mr. Klein “would have had access to all of the records in that case on behalf of his clients.” (Mot. to Dismiss at 7-8.) It also argues that “[m]ost of the records were subsequently released to the public.” (Mot. to Dismiss at 8) (emphasis added). Yet any records produced through discovery in that separate litigation are subject to a protective order, attached as an exhibit to this Resistance. (Ex. 01: Protective Order, at 4 ¶ 10.) The protective order requires Mr. Klein either to have returned them to the producing party, certified that he has destroyed them, or retained them in his files on the condition that those files will remain confidential. (Id.) Indeed, Mr. Klein is not able even to confirm the existence of said records, (Ex. 01, Protective Order, at 2 ¶ 5) (stating that “information obtained from or materials designated as ‘confidential’ shall not be disclosed to any

person, except [persons involved in the separate federal court case].”).¹⁰ Mr. Klein’s statutory rights under Chapter 22, by contrast, come with no such limitations, and specifically includes his right “to publish or otherwise disseminate” the record. Iowa Code § 22.2(1). Because Mr. Klein is aggrieved by deprivation of his right under Chapter 22 to obtain, disclose the existence of, and disseminate the documents he sought in his Complaint filed with the IPIB, irrespective of the separate federal court case, his injuries under Chapter 22 are not moot.

In addition, without even accounting for those records which are subject to the protective order in the separate federal litigation, the IPIB’s contention that most of those records have been publically disclosed is refuted by those records which have been unsealed. The records which have been unsealed and subsequently released to the public are limited to those records which were filed in court or submitted as evidence inside the Appendix to support the Plaintiff’s Motion for Summary Judgment in that case. *See Steele et al. v. City of Burlington et al.*, 3:16-cv-105, Doc. 79-1, Movants-Intervenors Randy Evans and the Iowa Freedom of Information Council’s Br. in Supp. of their Limited Mot. to Intervene with Respect to Sealed Court Records and to Unseal and Make Public all Court Filings, Including Summary Judgment Mots., Pleadings, Brs., and Evid., at 1 (S.D. Iowa June 12, 2018) (attached as Ex. 02 to this Resistance). The unsealed evidence made publically available does not include any of the public records which was not filed in court, and does not include all evidence exchanged in discovery, which were responsive to Mr. Klein’s open records request and subsequent IPIB Complaint.

¹⁰ Indeed, it is not clear how the IPIB would have come to the conclusion that all the records Mr. Klein sought in his open records request, and subject to his IPIB Complaint, were turned over in discovery, since the same protective order prohibited the Respondents from sharing that information with the IPIB. In any case, those assertions are not supported by any record evidence.

Below are a few examples of responsive records which have not been publically released. Unsealed Doc. 112-0 is a narrative describing “follow up questions for Officer Jesse Hill” which were asked by DCI “after the conclusion of Officer Jesse Hill’s interview.” (Ex. 03: *Steele*, Doc. 112-0, at 23.) An excerpt from the transcript of the DCI interview of Officer Jesse Hill is included in the unsealed documents which has been marked by DCI as beginning on page 38 and line 1526, in unsealed Doc. 105-3, at 4-5 (attached as Ex. 04 to this Resistance). Unsealed Doc. 109-0 includes another short excerpt from the same interview. The DCI-marked pages jump from the first page to page 27, and from line 21 to line 1066. (Ex. 05: *Steele* Doc. 109-0, at 31-32.) Thus, at least 26 pages and 1045 lines of the transcript before the excerpt, as well as some number after that, aren’t included in the unsealed, publically available record. The remainder of that interview has not been released, since it was never filed. (Id.)

Also in Doc. 112-0 is a deposition exhibit which is a photograph of Officer Jesse Hill’s leg after he was allegedly bitten by the Steele family dog. A pen mark made by a witness obscures the area of the leg where the alleged bite mark was. (Ex. 03: *Steele* Doc. 112-0, at 15). However, the unmarked, original photograph—responsive to Mr. Klein’s open records request and subject to his IPIB Complaint—was never released.

Unsealed Doc. 105-3 is a transcript from the deposition of Burlington Police Chief Douglas Beaird, which also discusses documents “regarding Defendant Hill and his interactions with dogs or other animals and complaints regarding Officer Hill” . . . including “some documents that have been provided about an interaction that Officer Hill had with another animal where he ultimately used his Taser to subdue that animal.” (Ex. 04: *Steele* Doc. 105-3, at 19.) Those documents are also responsive to Mr. Klein’s open records request and covered by his IPIB Complaint, but have not been publically released.

Unsealed Doc. 109-0 likewise references a wealth of records, highlighted below in yellow and including an autopsy report, ambulance records, a photograph of the alleged dog bite, and lab results from a urine sample collected from Officer Jesse Hill, which have never been released:

from right to left. (Please see Dr. Firchau's **autopsy report** located in Section 8 for details. **Ambulance records** will be located in Section 6 when the information becomes available.)

Officer JESSE HILL received a dog bite to his left thigh area. He was treated on January 6, 2015, at the GRMC in Burlington, Iowa. **The dog bite was photographed.** Officer HILL's pants were examined and no noticeable tear or rip was observed on the left thigh area. There was an area of fabric on the left thigh, about the size of a BB that was standing up slightly. Officer HILL's pants were (left thigh) photographed. (The photos are located in Section 10 of this case report. Officer HILL's medical records are located in Section 7 of this case report.)

A urine sample was collected from Officer JESSE HILL on January 6, 2015. The sample was submitted to the DCI Lab for analysis. **Lab results** will be located in Section 9 of this case report.)

STEELE'S dog, SAMMY, was identified as a German Shepherd mix. The dog weighed approximately 80 pounds. The dog had a gunshot wound to his right shoulder. According to the staff at Allgood's, the bullet grazed the shoulder. No projectile was recovered from the dog. **The dog was photographed.** (The pictures are located in Section 10 of this case report.)

(Ex. 04: *Steele* Doc. 109-0, at 28).

Unsealed Doc. 111-1 includes the cover sheet from Officer Jesse Hill's deposition. (Ex. 06: *Steele* Doc. 111-1, at 5). It itemizes deposition exhibits—which were responsive records that have not been publically released—including “1/6/15 Iowa DCI George Narrative” and “Photocopied Color Photographs (9 pages).” (Id.) The same unsealed document includes the cover sheet from Chief Beard's deposition, which references additional “Photocopied Color Photographs (10 pages)” and “Webb, Rank, Mellinger Interview Notes”. (Id. at 87-88.) Neither of those records has been released. Unsealed Doc. 111-1 also includes a table of “Evidence and Exhibit List as of February 20, 2015.” (Id. at 89-90.) The document references multiple records which were responsive to Klein's open records request (highlighted in yellow), of which only

three (highlighted in blue), were released in the summary judgment/FOI Council related unsealing:

SECTION 3 - EVIDENCE AND EXHIBIT LIST AS OF FEBRUARY 20, 2015

LAB/DCI NUMBER	LOCAL AGENCY NUMBER	QTY/ WGT	DESCRIPTION	CHAIN OF EVIDENCE
			The Burlington (Iowa) Police Department will maintain most items of evidence in their evidence room. This section of the report contains <u>scanned property forms</u> generated by the Burlington Police Department.	
		1	Container containing urine sample from JESSE HILL collected 1/06/2015	S/A George – BPD Storage Room refrigerator – Det. Moret – S/A George – DCI Office – S/A Ryan Kedley – DCI Lab
		1	Box containing Glock .40 caliber handgun belonging to Officer JESSE HILL, serial # [REDACTED]	Det. Short – BPD Evidence Room – Det. Moret – S/A George – DCI Office – S/A Ryan Kedley – DCI Lab – S/A Kedley – S/A George – BPD
			Bag containing 1 magazine removed from Officer HILL's handgun and 14 rounds of ammunition	Det. Short – BPD Evidence Room – Det. Moret – S/A George – DCI Office – S/A Ryan Kedley – DCI Lab – S/A Kedley – S/A George – BPD
		2	Boxes containing spent .40 caliber shell casing recovered in the 100 block of South Garfield, Burlington, Iowa	S/A Lestina – Det. Short – BPD Evidence Room – Det. Moret – S/A George – DCI Office – S/A Kedley – DCI Lab – S/A Kedley – S/A George – BPD
		1	Projectile removed from AUTUMN STEELE's body during autopsy	SA Herman – S/A George – DCI Office – S/A Kedley – DCI Lab – S/A Kedley – S/A George – BPD
		1	DVD containing the January 9, 2015, interview of Officer JESSE HILL at the DCI Catfish Bend Casino	Catfish Bend DCI Evidence Room
		2	Original Affidavits prepared by S/A Matt George	Stockton DCI Office
		2	Not-to-scale diagrams prepared by Officer JESSE HILL	S/A Matt George – Stockton DCI Office
		1	Criminal Investigation Warning signed by Officer JESSE HILL	S/A Matt George – Stockton DCI Office
		2	Diagrams prepared by GABRIEL STEELE and S/A Ryan Kedley	S/A Kedley – S/A George – Stockton DCI Office
		2	DCI Receipts dated January 6, 2015	S/A Lestina – S/A George – Stockton DCI Office

...

CASE: 15001378

PAGE 2

SECTION 3 - EVIDENCE AND EXHIBIT LIST AS OF FEBRUARY 20, 2015

LAB/DCI NUMBER	LOCAL AGENCY NUMBER	QTY/WGT	DESCRIPTION	CHAIN OF EVIDENCE
		1	Consent to Provide Chemical Test of Urine signed by Officer JESSE HILL	S/ George – Stockton DCI Office
		1	DVD containing photos of shooting scene of 100 block of South Garfield in Burlington, Iowa, and AUTUMN STEELE's clothing	Stockton DCI Office
		1	DVD containing photos of packaged evidence stored at the BPD on January 6, 2015	Stockton DCI Office
		1	DVD containing photos of Officer HILL in uniform on January 6, 2015; Officer HILL's dog bite injury on January 6, 2015; Officer HILL's firearm and equipment; Officer HILL's duty pants	Stockton DCI Office
		1	DVD containing photos of AUTUMN and GABRIEL STEELE's dog taken January 6, 2015	Stockton DCI Office
		1	DVD containing photos taken by Det. Schwandt of AUTUMN STEELE on January 6, 2015, at Lunning Chapel	Stockton DCI Office
		1	DVD containing AUTUMN STEELE's autopsy photographs	Stockton DCI Office
		1	CD containing the audio recording of Officer JESSE HILL's January 9, 2015, DCI interview	Stockton DCI Office
		1	CD containing the audio recording of EBONY TURNER and CHRIS BURK's interview	Stockton DCI Office
		1	DVD containing (copy) of Officer JESSE HILL's body camera documenting the January 6, 2015, shooting incident	Stockton DCI Office
		1	DVD containing (copy) of Officer TIM MERRYMAN'S body camera documenting his activity on January 6, 2015, post shooting	Stockton DCI Office
		1	DVD containing (copy) of 911 calls made on January 6, 2015, by GABRIEL STEELE and citizen	Stockton DCI Office
			DVD containing (copy) of in-dash camera from BPD Lieutenant Greg Allen's squad car on January 6, 2015 (maintained at Stockton DCI Office)	
			GRMC Medical Records documenting Officer HILL's dog bite injuries (maintained at the Stockton DCI Office)	

(Id. at 89-90.)

The released body camera footage reveals that the officers drove their vehicles to the Steele home; yet no dashcam video, also referenced above, and responsive to Mr. Klein's request and IPIB Complaint, has been publically released.

Unsealed Doc. 114-0 is the transcript of the summary judgment hearing. Statements by counsel refer to witness statements about the Steele family dog which were included in the bodycam video released to the public, but which were omitted from the written reports prepared by police that have *not* been released to the public, as they were never filed in court. (Ex. 07, *Steele* Doc. 114-0, at 29:1-8) (stating, in alluding to actions by the Burlington Police Department to cover-up the circumstances of the shooting, “all three of them said the dog was not aggressive. *None of that is in the reports that the police prepared*, but that’s what is in their video statements.”).

Finally, unsealed Doc 101-3 is the full summary sheet from Officer Jesse Hill’s deposition. It references 28 pages of various “photocopied color photographs”. Of those, only 3 pages were released, because only those 3 were included in summary judgment proceedings and thus filed in in court and subject to unsealing. (*Compare* Ex. 08, *Steele* Doc. 101-3, at 15-17 (showing the three released pages of photos) *with* Ex. 08, *Steele* Doc. 101-3, at 45 (describing 28 pages of photographs in deposition exhibits).) Deposition exhibits listed which also were not publically released through the unsealing motion include deposition exhibits 13-15 (“Diagrams”), deposition exhibit 17, a “Vicious Animal Investigation of ‘Jimmy’”), deposition exhibit 19, “Reports Related to a 10/11/14 Incident”, deposition exhibits 23-25, “Kramer Memo[s]”, and deposition exhibit 26, “Beaird Memo.” (Ex. 08, *Steele* Doc. 101-3, at 45.)

This is not an exhaustive list, but is sufficient to refute the IPIB’s claim that Mr. Klein already possesses and has the right to distribute the documents subject to his Complaint and this judicial review, as well as its claim that all or most documents have already been released to the public. Of course, the evidentiary-intensive nature of this argument itself demonstrates the

inappropriateness of dismissing Mr. Klein's review at this early stage based on the IPIB's easily refutable factual assertions made in its Motion.

Moreover, as to the portion of the records which has been disclosed publically, the IPIB has waived its own ability to now argue mootness. When it had the opportunity to dismiss the underlying petition as to those records already in the public domain on that basis, it instead decided to reach the merits of whether they were public records under Chapter 22. Rather than decline to reach the merits as to those records already in the public domain, it determined that "[b]ecause the federal court provided access to records at issue in this contested case under a different legal theory, we proceed to address the merits of the alleged violation of Iowa Code chapter 22." (Pet. Ex. 01, IPIB Final Decision.) Having done so, and having now erroneously determined they were not open records, the IPIB violated Mr. Klein's right to those records as well as his ability to access law enforcement records in the future, causing ongoing injury to his rights under Chapter 22.

Finally, even if this Court were to find that Mr. Klein's claims to those portion of the sought records which have been publicly produced are moot, the matter falls neatly within the test the Iowa Supreme Court uses to determine when to consider moot issues in IAPA cases. Under that test, the Court considers "(1) the private or public nature of the issue;"—with more public issues weighing in favor of adjudication; "(2) the desirability of an authoritative adjudication to guide public officials in their future conduct"; "(3) the likelihood of the recurrence of the issue;" and "(4) the likelihood the issue will recur yet evade appellate review." *Grinnell College v. Osborn*, 751 N.W.2d 396 (Iowa 2008) (finding exception to mootness existed allowing adjudication even though matter was private because the broader question at issue in the case was substantial, lacking an authoritative adjudication, likely to recur, and

evading review). Here, all those factors weigh in favor of adjudication: the public nature of the issue as between the public and law enforcement; the need for authoritative adjudication so that law enforcement is given the requisite guidance it needs to determine its obligations under Chapter 22; the nature of these circumstances as likely to recur given the police use of force and continued public interest in bodycam and dashcam video surrounding those incidents; and finally the nature of these cases as tending to avoid review given the expense and difficulty of challenging denials under Chapter 22 in court.

Because Mr. Klein has standing to seek judicial review of the IPIB's final agency action on his Complaint, the IPIB's Motion to Dismiss should be denied.

IV. The IPIB is a Proper and Necessary Party to Mr. Klein's Petition for Judicial Review.

The IPIB's argument that it is not a properly named party to this judicial review of agency action is meritless and belied by the plain text of the Iowa Administrative Procedures Act establishing the process for judicial review.¹¹ Iowa Code section 17A.19(4), governing judicial review of agency action, specifically provides that "[t]he petition for review shall name the agency as respondent". *Id.* Therefore, naming the IPIB was not only appropriate but required under the IAPA.

Doing so is also consistent with other analogous actions brought naming the Iowa Civil Rights Commission ("ICRC") in appealing final agency action it renders in matters in which it, as the IPIB does, acts in both an investigatory and an adjudicatory capacity in resolving complaints filed against non-agency third parties. *See, e.g., Renda v. Iowa Civil Rights Com'n,*

¹¹ IPIB's argument that it is not a properly named party may stem from its misreading of Mr. Klein's Petition for Judicial Review as a direct enforcement action. (*See* section I, above.) But, for the reasons already set forth in section I, above, this Petition for Judicial Review is not an original action under 22.

784 N.W.2d 8 (Iowa 2010) (appeal by complainant of final agency action by the ICRC determining it did not have jurisdiction to hear prisoner’s complaint against third party correctional facility based on its erroneous interpretation of the Iowa Civil Rights Act—which, like the IPIB and Chapter 22, it is vested with enforcing); *Sommers v. Iowa Civil Rights Com’n*, 337 N.W.2d 470 (Iowa 1983) (appeal by complainant of final agency action by ICRC dismissing her complaint against third party employer based on its antiquated determination that she was not covered by the Iowa Civil Rights Act protections against sex discrimination); *Mowrey et al. v. Iowa Civil Rights Com’n*, 424 N.W.2d 764 (Iowa 1988) (complainants who alleged sex discrimination in their complaints with the ICRC against non-party employer sought judicial review of agency dismissal of their claims under 17A). Because it is the IPIB’s erroneous interpretation of Chapter 22 as to his Complaint, which final agency action Mr. Klein appeals in this judicial review, the IPIB is an appropriate and necessary party.

CONCLUSION

None of the grounds asserted by the IPIB have any merit, and this Court should deny the IPIB’s Motion to Dismiss.

Respectfully submitted,

/s/ Rita Bettis Austen
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 808
Des Moines, IA 50309-2316
Telephone: 515-207-0567
Facsimile: 515-243-8506
rita.bettis@aclu-ia.org

Shefali Aurora, AT00012874
ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309–2317
Telephone: 515-243-3988

Fax: 515-243-8506

Email: Shefali.Aurora@aclu-ia.org