

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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ADAM KLEIN, an individual,	)	
	)	
Petitioner,	)	Case No.
	)	
v.	)	
	)	<b>PETITION FOR JUDICIAL</b>
IOWA PUBLIC INFORMATION BOARD, an	)	<b>REVIEW OF AGENCY ACTION</b>
independent executive-branch agency of the	)	<b>UNDER IOWA CODE § 17A.19</b>
State of Iowa,	)	
	)	
Respondent.	)	
	)	

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COMES NOW Petitioner Adam Klein, by and through his undersigned counsel, and respectfully submits the following petition for judicial review of agency action:

**REQUIRED STATEMENTS OF AGENCY ACTION APPEALED FROM**

1. This is an appeal of final agency action by the Iowa Public Information Board (“IPIB”) in the Matter of Burlington Police Department, Des Moines County Attorney, and the Iowa Department of Public Safety Division of Criminal Investigation (“DCI”), No. 17IPIB002 FC:0034/15FC:0034, comprising the “Final Decision and Order Dismissing Petition” (“IPIB Final Decision”) issued February 21, 2019. (Ex. 01, IPIB Final Decision.)

2. The IPIB Final Decision was the result of a 4 year-long agency investigation, prosecution, and decision-making process that resulted from a complaint first filed with the IPIB by the Petitioner, Adam Klein, concerning the denial of a public records request he had made to the Burlington Police Department relating to the shooting death of Autumn Steele by Officer Hill on January 6, 2015.

3. On February 27, 2015, the Des Moines County Attorney wrote a letter to the DCI informing it that she had “completed her review of the DCI’s investigation” of the shooting death

of Autumn Steele by Officer Hill, that she had made a final determination not to charge Officer Hill with any crime related to the shooting, and was returning the DCI case file to DCI. (Ex. 02, Klein Compl., at “Petitioner’s Exhibit 1”.)

4. The same day, on February 27, 2015, Petitioner Adam Klein, attorney for the family of Autumn Steele, sought public records from the Burlington Police Department, the Des Moines County Attorney, and DCI under Chapter 22 including but not limited to police audio records, body camera videos, and 911 calls that were subject to disclosure under chapter 22. (Ex. 02, Klein Compl.)

5. Among those records included in his request to the Burlington Police Department, Mr. Klein asked for the following specific records, which he enumerated as follows:

6. Records of any internal investigation regarding the Incident or Ofc. Hill’s conduct during the Incident;
7. Records of any investigation into the dog who allegedly attacked Ofc. Hill, including all supporting evidence;
8. Records, including photographs, documenting any injuries received by Ofc. Hill during the Incident, and/or the treatment of any such injuries;

10. Dispatch logs, audio recordings transcripts, or any other records of communication by law enforcement personnel regarding the Incident, including all police radio dispatch;
11. Transcripts or audio recordings of any 911 call, emergency call, or other call to law enforcement regarding the Incident.
12. All records regarding the vicious animal complaint in October 2014 in which Ofc. Hill deployed a taser against a pit bull (see Statement of Amy Beavers, attached, p. 6), including, but not limited to:
  - a. the incident report and any and all supplemental reports
  - b. any records of injuries received by Ofc. Hill of treatment thereof

(Ex. 02, Klein Compl., at “Petitioner’s Exhibit 3”.)

6. On March 19, 2015, Holly Corkery, the attorney for the Burlington Police Department, denied Mr. Klein’s request with respect to those items he had enumerated as 6, 7, 8, 10, 11, and 12 as confidential “peace officers’ investigative reports” under Section 22.7(5):

All other items you requested 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).

(Ex. 02, Klein Compl., at "Petitioner's Exhibit 7"; See also Ex. 01, IPIB Final Decision, at 4).

7. Mr. Klein specifically sought the following records from the DCI and the Des Moines County Attorney:

1. the investigative report of the Iowa Department of Criminal Investigation into the Incident, in its entirety, including any and all supporting evidence;
  2. original or supplemental incident reports, and any other investigative reports;
  3. audio or video regarding the Incident or the scene, including squad car and body cameras from Ofc. Hill and any other responding officers;
  4. audio recordings or transcripts of communication by law enforcement personnel regarding the Incident, including all police radio dispatch;
  5. reports of any ballistic or forensic investigation into the Incident;
  6. any photographs relating to or depicting the incident or the scene, or any part thereof;
  7. the report of Ms. Steele's autopsy, including any photographs, audio, video, or other supplemental evidence;
- ...
8. audio or video, as well as transcripts, of any interview of Ofc. Hill, or any other person, relating to the Incident;
  9. records of any investigation into the dog who allegedly attacked Ofc. Hill, including all supporting evidence;
  10. records, photographs, or other documentation of the alleged attack on Ofc. Hill by a dog during the Incident, as well as any injuries received by Ofc. Hill;
  11. the names and contact information for any witnesses to the Incident;
  12. any written statement provided by witnesses to the Incident;
  13. any audio or video recording of any interview with witnesses to the Incident;
  14. any and all notes, memoranda, or other written records generated in the course of the investigation of the Incident;
  15. any other information regarding the Incident or its investigation within your possession or control;

(Ex. 02, Klein Compl., at "Petitioner's Exhibit 2".)

8. On March 16, 2015, the Des Moines County Attorney emailed Mr. Klein and informed him that she no longer possessed the requested articles, stating “Once I completed my review, all investigative items in my possession were returned to the DCI.” (Ex. 02, Klein Compl., at “Petitioner’s Exhibit 6”.)

9. On March 18, 2015, DCI responded to Mr. Klein’s request via an email from Assistant Attorney General Jeffrey Peterzalek, in which he offered to provide Mr. Klein with material which had previously been publicly released, including “the County Attorney’s letter regarding charges, DCI press releases and a link to some of the body camera footage” but otherwise claimed the remaining records Mr. Klein sought were confidential records:

While you folks sort out finding someone to talk to I can have DCI send you the material we are sending in response to media open records request. That would include the County Attorney’s Letter regarding charges, DCI press releases and a link to some of the body camera footage. That would be the same things we would provide to you in response to your open records request. Other materials would be protected from disclosure under Iowa’s open records laws. Hopefully we can continue our previous discussions once someone from the other side is identified. If you want to speak more specifically about open records issues please feel free to give me a call.

(Ex. 02, Klein Compl., at “Petitioner’s Exhibit 4”.)

10. Among the material released was a 12 second clip edited by DCI from the full bodycam recording, which excluded footage of the time leading up to the shooting, the shooting itself, and footage of time after the shooting. (Ex. 01, IPIB Final Decision, at 9 (“ . . . the decision to release 12 seconds of the bodycam video was a decision made by people ‘higher’ than him. . . .”); Ex. 02, Klein Compl., at 5; Ex. 05, IPIB Petition, at 2 (“The DCI provided only the twelve-second segment of the bodycam video.”).) All other bodycam video footage was withheld.

11. On May 15, 2015, Mr. Klein filed his Complaint with the IPIB regarding the denials of his open records requests by the Burlington Police Department, Des Moines County Attorney, and DCI. (Ex. 02, Klein Compl.)

12. On October 27, 2016, the IPIB determined the complaint fell within its jurisdiction and made a probable cause determination that the Burlington Police Department, Des Moines County Attorney, and DCI violated Iowa Code section 22.2 “when [they] withheld public records as defined therein in response to Complainant’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.” (Ex. 03, IPIB Probable Cause Order.)

13. The IPIB retained Mark McCormick as special prosecutor to commence a contested case against the Burlington Police Department, Des Moines County Attorney, and DCI. *See* Iowa Code § 23.10(3).

14. On November 4, 2016, IPIB filed a petition to initiate a contested case, and the matter was transmitted to the Department of Inspections and Appeals for a contested case hearing.<sup>1</sup> (Ex. 05, IPIB Petition.)

15. The IPIB Petition sought statutory penalties to be assessed against the Burlington Police Department and DCI in the amount of \$100-\$2,500, and an order requiring them to produce the documents that have been withheld for examination and copying without cost to Mr. Klein. (Ex. 05, IPIB Petition, at 5.)

16. The IPIB separately settled the case with the Des Moines County Attorney on December 13, 2016. (Ex. 04, IPIB-Des Moines County Attorney Settlement Agreement.)

17. After extensive pre-hearing procedures, a contested case hearing was held on July 20, 2018 and post-hearing briefs were submitted by the parties.

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<sup>1</sup> This Petition followed an earlier Probable Cause Finding and Petition which were substantively the same. They were dismissed and required to be re-initiated because of a prior failure to make a formal written determination of probable cause.

18. The ALJ hearing the matter issued her Proposed Decision on October 8, 2018, determining that “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)” and granting the prosecutor’s request for an order requiring the production of the documents. (Ex. 06, IPIB Proposed Decision.)

19. The Proposed Decision determined that the records should have been disclosed under the 3-part balancing test set forward by the Iowa Supreme Court in interpreting section 22.7(5) in *Shanahan v. Iowa Dist. Ct.*, 356 N.W.2d 523, 527 (Iowa 1984), *Shanahan v. Hansen*, 469 N.W.2d 412, 414 (Iowa 1991) and *Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994). (Ex. 06, IPIB Proposed Decision, at 17-20.)

20. The Proposed Decision rejected the arguments by the Burlington Police Department, DPS, and DCI that *American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic School District*, 818 N.W.2d 231 (Iowa 2012) overturned the balancing test established by the Iowa Supreme Court in construing section 22.7(5). (Ex. 06, IPIB Proposed Decision, at 20-21.)

21. The Proposed Decision also determined that “the 911 tape, 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’” based on the fact that “section 22.7(5) states that the ‘immediate facts and circumstances surrounding a crime shall not be kept confidential under this section.’” (Ex. 06, IPIB Proposed Decision, at 22.)

22. Burlington and DCI appealed the ALJ's Proposed Decision to the IPIB, which heard arguments on January 28, 2019, and issued its final decision rejecting the Proposed Decision's findings of law on Feb. 21, 2019. (Ex. 01, IPIB Final Decision, at 3.)

23. Specifically, the IPIB Final Decision determined that "Under Iowa Code § 22.7(5), peace officers' investigative reports are confidential, regardless of whether the investigation is ongoing." (Ex. 01, IPIB Final Decision, at 15-16.)

24. It also found that the 911 tape, dashcam videos, and the bodycam video comprised peace officers' investigative reports and not merely the immediate facts and circumstances surrounding a crime, basing its determination on an unpublished Iowa Court of Appeals decision, *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011.). (Ex. 01, IPIB Final Decision, at 16-17.)

25. Finally, the IPIB determined that despite not expressly saying that it was doing so, in *Atlantic*, the Iowa Supreme Court implicitly overruled its prior establishment of a 3-part balancing test in *Shanahan* and *Hawk Eye* in construing section 22.7(5) (Ex. 01, IPIB Final Decision, at 17-19.).

26. Based on those determinations the IPIB dismissed the contested case brought by the IPIB. (Ex. 01, IPIB Final Decision, at 20.)

### **JURISDICTION AND VENUE**

27. Mr. Klein has exhausted all administrative remedies and has been adversely affected by IPIB's final agency action. *See* Iowa Code § 17A.19(1).

28. The Court has jurisdiction to resolve this matter under Section 17A.19(1) of the Iowa APA, which permits judicial review of final agency actions. *See* Iowa Code § 17A.19(1).

29. The Court also has jurisdiction to resolve this matter (a) under Rule 1.1101 of the Iowa Rules of Civil Procedure, *et seq.*, which permit declaratory judgments; (b) the common law of the State of Iowa, which permits declaratory relief; and (c) Section 602.6101 of the Iowa Code, which grants the Iowa district court “exclusive, general, and original jurisdiction” over all civil “actions, proceedings, and remedies . . . .” *See* Iowa R. Civ. Pro. 1.1101, *et seq.*; Iowa R. of Civ. Pro. 1.1501, *et seq.*; Iowa Code § 602.6101.

30. Venue is proper in Polk County under (a) Section 17A.19(2) of the Iowa APA, which allows proceedings for judicial review to be instituted in Polk County, and (b) Section 616.3(2) of the Iowa Code because part of the action arose in Polk County, which is where the IPIB is located. *See* Iowa Code §§ 17A.19(2), 616.3(2).

**GROUNDNS ON WHICH RELIEF IS SOUGHT**

**Iowa APA, Sections 17A.19(10) (b), (k), (l), (m), (n),  
and  
Iowa Open Records Law, Chapter 22**

31. Mr. Klein incorporates paragraphs 1 through 30 as though fully set forth in this paragraph.

32. Under Section 17A.19(10)(b) of the Iowa APA, a court may reverse an agency action if substantial rights of the person seeking judicial relief have been prejudiced because the agency action is beyond the authority delegated to the agency by any provision of law or in violation of any provision of law. *See* Iowa Code § 17A.19(10)(b).

33. The IPIB Final Decision in dismissing the IPIB’s contested case against the Burlington Police Department and DCI violated Iowa Code Chapter 22, which gives all persons the right to examine public records unless those records are designated as confidential. Iowa

Code §§ 22.2, 22.7; *see also DeLaMater v. Marion Civil Serv. Comm'n*, 554 N.W.2d 875, 878 (Iowa 1996).

34. Iowa Code Section 22.7(5) provides that the following records are confidential:

Peace officers' investigative reports, privileged records or information specified in section 80G.2, and specific portions of electronic mail and telephone billing records of law enforcement agencies if that information is part of an ongoing investigation, except where disclosure is authorized elsewhere in this Code. However, 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. Specific portions of electronic mail and telephone billing records may only be kept confidential under this subsection if the length of time prescribed for commencement of prosecution or the finding of an indictment or information under the statute of limitations applicable to the crime that is under investigation has not expired.

Iowa Code § 22.7(5).

35. The IPIB's Final Decision violated Mr. Klein's right to public records under Iowa Code Chapter 22 by allowing the Burlington Police Department and DCI to withhold all the various public records Mr. Klein sought as provided herein in paragraphs 5 and 7, including but not limited to the 911 tape, dashcam videos, and the bodycam videos Mr. Klein requested.

36. Mr. Klein further challenges the IPIB Final Decision as "[n]ot 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." Iowa Code § 17A.19(10)(k).

37. The decision was not only "not required by law"—as it improperly dismissed Mr. Klein's Complaint regarding the withholding of public records he sought by the Burlington Police Department and DCI—it also results in a profoundly disproportionate negative impact on the ability of all persons such as Mr. Klein who seek to access public records of law enforcement

in Iowa. This necessarily negatively impacts not just the public generally in its ability to engage in oversight of law enforcement, but specifically those reporters, journalists, scholars, community activists, and attorneys—like Mr. Klein, looking to investigate their clients’ cases—whose work is vital to an informed electorate and a functioning democracy. There is no public interest served by denying public oversight of virtually all law enforcement records concerning any crime or incident by construing them all to be “peace officers’ investigative reports” and further determining that such reports remain confidential in perpetuity regardless of whether the investigation is ongoing or complete, or whether there was ever any investigation commenced, and without ever engaging in a balancing test that weighs the public interest in disclosure against the government interest in nondisclosure.

38. To the extent that the Court finds that the IPIB has clearly been vested by a provision of law in the discretion of the agency, Mr. Klein challenges the legal determinations made by IPIB in its Final Decision as “[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency.” Iowa Code § 17A.19(10)(l).

39. To the extent that the Court finds that IPIB’s determination that the bodycam, 911 call, and dashcam recordings comprised the “peace officers’ investigative report[.]” was a factual finding, and to the extent that the Court finds the IPIB had been vested with discretion to make that factual finding, Mr. Klein challenges the Final IPIB Decision on the ground that it was “[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.” Iowa Code § 17A.19(10)(m).

40. Finally, Mr. Klein challenges the Final IPIB Decision on the ground that it was “unreasonable, arbitrary, capricious, or an abuse of discretion.” Iowa Code § 17A.19(10)(n).

41. The Final IPIB Decision improperly leaves the decision of whether to release public records entirely to the discretion of law enforcement, as the “lawful custodian of the records.” Iowa Code § 22.7 (“The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information”). The result is an entirely unreasonable, arbitrary, and capricious system where law enforcement may release or withhold records in any manner: e.g., video deemed favorable to law enforcement can be released; redacted videos showing only partial footage can be released; video deemed unfavorable to law enforcement may be withheld; video showing the full story or both sides of an issue may be withheld.

42. Indeed, that precise thing occurred in this case, with the Burlington Police Department and DCI releasing only 12 seconds of the bodycam recording, which had been edited to exclude important information leading up to the shooting, the shooting itself, and events after. (Ex. 01, IPIB Final Decision, at 9 (“ . . . the decision to release 12 seconds of the bodycam video was a decision made by people ‘higher’ than him. . .”); Ex. 02, Klein Compl., at 5; Ex. 05, IPIB Petition, at 2 (“The DCI provided only the twelve-second segment of the bodycam video.”).)

### **RELIEF SOUGHT**

**FOR THESE REASONS**, Petitioner Adam Klein requests the following relief:

43. A declaratory ruling that 911 calls, bodycam video, and dashcam video are not “peace officers’ investigative reports”, but rather comprise the “immediate facts and circumstances surrounding a crime or incident” and thus “shall not be kept confidential. . . except in those circumstances where disclosure would plainly and seriously jeopardize

an investigation or pose a clear and present danger to the safety of an individual” per Iowa Code section 22.7(5) or would otherwise be confidential under section 22.7<sup>2</sup>;

44. A declaratory ruling that peace officers’ investigative reports are only potentially confidential so long as the investigation is ongoing under Iowa Code section 22.7(5);

45. A declaratory ruling that even when deemed potentially confidential, peace officers’ investigative reports under Iowa Code section 22.7(5) are subject to the *Hawk Eye* and *Shanahan* 3-part balancing test to weigh the public interest in disclosure against the government interest in nondisclosure.<sup>3</sup>

46. An order reversing and vacating the IPIB Final Decision, and remanding with instructions to grant the IPIB prosecutor’s prior request for an order requiring production of all records Mr. Klein requested from the DCI, enumerated herein as records 1-15 in paragraph 7, as well as those records Mr. Klein requested from the Burlington Police Department, enumerated herein as records 6, 7, 8, 10, 11, and 12 in paragraph 5; as well as his prior request for the imposition of financial penalties sought by the IPIB prosecutor against the Burlington Police Department and DCI;

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<sup>2</sup> For example, to the extent that footage contains confidential student records (§ 22.7(1)), medical records (§ 22.7(2)), trade secrets (§ 22.7(3)), attorney work product (§ 22.7(4)), etc. those specific portions of footage could otherwise be withheld, much as a police report containing social security numbers or confidential medical records could be redacted of that specific information prior to release to the public.

<sup>3</sup> There is a pending interlocutory appeal before the Iowa Supreme Court which may address some, but is unlikely to address all, of the issues presented in this case. *See Mitchell v. City of Cedar Rapids* (Iowa Supreme Court No. 18-0124). Specifically, while the *Mitchell v. City of Cedar Rapids* case is likely to address the questions of whether peace officers’ investigative reports remain confidential even after an investigation is no longer ongoing and whether a balancing test applies to those records, the case is unlikely to resolve the question of whether 911 calls, bodycam video, and dashcam video are peace officers’ investigative reports in the first place.

47. An award of costs assessed against the Respondent IPIB; and
48. Any other relief the Court deems just and proper.

Dated: March 22, 2019.

Respectfully submitted,

/s/ Rita Bettis Austen

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