

Before the Iowa Public Information Board

<p>In the Matter of:</p> <p>Burlington Police Department, Department of Public Safety Division of Criminal Investigation</p> <p>Respondents.</p>	<p>No. 17IPIB001 FC:0030 17IPIB002 FC: 0034</p> <p>Final Decision and Order Dismissing Petition</p>
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Statement of the Case

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

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

The DCI submitted Exhibit A into the record. At the hearing the prosecutor objected to Exhibit A because it was unsworn and contained hearsay. Burlington submitted documents marked as Exhibits 2, 3, 7 into the record. The prosecutor submitted a document marked as Petitioner’s Exhibit 1 into the record.

The motion to strike and the objection to Exhibit A were taken under advisement and later denied by the presiding officer. The presiding officer said she considered the press release for the limited purpose of showing that a press release announced that a settlement in the Autumn Steele civil case had been reached. The presiding officer also overruled the prosecutor's objection to Exhibit A.¹

The record was held open until September 4, 2018 to allow the parties to submit post-hearing briefs. The presiding officer issued a proposed decision on October 8, 2018. She found "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)." (Proposed Decision, 10-5-18, page 23). The presiding officer concluded "[t]he prosecutor's request for an order requiring the production of the documents is granted." *Id.* The presiding officer denied the prosecutor's request for damages on the ground the respondents reasonably relied on "previous interpretations by the board, attorney general opinions, proposed legislative amendments, and case law." *Id.* at 22.

Burlington and DCI appealed the presiding officer's proposed decision pursuant to Iowa Code section 17A.15 and Iowa Administrative Code r. 497—4.26. The board heard oral arguments on January 28, 2019.

Iowa Code section 17A.15, subsection 3, states in part:

On appeal from or review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule. The agency may reverse or modify any finding of fact if a preponderance of the evidence will support a determination to reverse or modify such a finding, or may reverse or modify any conclusion of law that the agency finds to be in error.

¹ The standard for admissibility in administrative hearings is that the evidence be "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs ... even if it would be inadmissible in a jury trial." Iowa Code 17A.14 (1) (2017). The general rule is that administrative agencies are not bound by technical rules of evidence. *McConnell v. Iowa Dep't of Job Serv.*, 327 N.W.2d 234,237 (Iowa 1982).

The board hereby adopts the presiding officer's procedural history, statement of facts, ruling on prehearing motions, and statement of applicable statutory provisions (recited below). Because the board finds the presiding officer's legal analysis and conclusions of law in error, it provides its own analysis and legal conclusions below.

Procedural History

This case was initiated under Iowa Code section 23.10(3)(a). Mark McCormick, the attorney selected by the executive director, filed a Petition on November 4, 2016 alleging Burlington and DCI violated chapter 22 by refusing to release public records including the recording and transcript of 911 calls, bodycam videos taken by the officers, videos taken by dashcam cameras, and records showing the "date, time, specific location and immediate circumstances surrounding the incident." The Petition also alleged that emails regarding the Autumn Steele homicide and correspondence with family members were public records. Petition (11-4-16).

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

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

Statement of Facts

On February 27, 2015 Des Moines County Attorney Amy Beavers wrote a letter to DCI Agent Matthew George. She stated that she was writing to let him know that she had completed her review of the DCI investigation involving the fatal shooting of Autumn Steele by Burlington Police Officer Jesse Hill. Beavers

then summarized her findings. In the letter she stated that on January 6, 2015 Gabriel Steele called 911 to report a domestic assault involving Autumn Steele. Officer Jesse Hill responded to the call. When he arrived at the residence, Officer Hill observed Gabriel walking out of the house with a child in his arms. He observed Autumn running behind Gabriel, grabbing the back of his shirt, pulling him down and hitting Gabriel in the back of the head. Officer Hill reported to dispatch that two individuals were fighting. He activated his body camera video and ran over to Autumn and Gabriel. Officer Hill attempted to pull Autumn away from Gabriel as she was punching and slapping him. A German shepherd owned by the Steeles started growling and bit Officer Hill in the thigh. According to Beavers' letter, Officer Hill told the Steeles to get the dog but 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 the ambulance. An autopsy revealed that Autumn sustained a gunshot wound to her right arm and a gunshot wound to her chest. Autumn died as a result of a gunshot wound to the chest. In the letter Beavers concluded that no criminal charges would be filed against Officer Hill (Exhibit A attached).

On February 27, 2015 Adam Klein, an attorney for Autumn's family requested public records from the incident. On March 19, 2015, attorney Holly Corkery responded to Klein's request. The letter stated that Officer Hill's personnel file was confidential under Iowa Code section 2.7(11). She set out personnel information that she stated was non-confidential under section 22.7(11)(a)(1-5). In response to a number of open records request Corkery stated:

"All other items you request in your Requests Nos. 6, 7, 8, 10, 11 and 12 are peace officers' investigative reports and therefore are confidential records pursuant to Iowa Code Section 22.7(5), except for the date, time, specific location, an immediate facts and circumstances surrounding the incident. Iowa Code 22.7(5) (2014); *see also Neer v. State*, 7898 N.W.2d 349 (Iowa Ct. App 2011)." (Exhibit 2).

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

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

Chief Beaird replied in an email:

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

If you have any questions please feel free to give me a call.”

(Petitioner Exhibit 1).

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

“While the goal of Chapter 22 is to provide public access to governmental bodies’ records, Chapter 22 also provides several exceptions for confidential records. Please be advised that the records you have requested are confidential records pursuant to Iowa Code Section 22.7(5). Iowa Code Section 22.7(5) provides that peace officers’ investigative reports which include video recordings and photographs, are confidential records. Iowa Code 22.7(5) (2014); *see also Neer v. State*, 798 N.W.2d 349 (Iowa Ct. App. 2011). At this time the City cannot produce these confidential records pursuant to your open records request.”

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

Special Agent Richard Rahn of the Division of Criminal Investigation (DCI) testified on behalf of DCI at the hearing. He works with the major crime unit and is responsible for assisting local agencies with the investigation of crimes – primarily felonies—that occur in their area. He oversees twenty counties that are considered in his “zone”. He dispatches agents as needed to that zone. The DCI assists the investigation of officer-involved shooting cases. The DCI does not have the ability to investigate “anything anywhere.” It provides expertise

only when the local law enforcement agency asks for it. In January 2015 Agent Rahn became aware of an officer-involved-shooting in Burlington. The Burlington Police Department called the DCI for assistance in investigating the shooting. In response he dispatched staff to Burlington to investigate. Agent Rahn also went to Burlington. He generally sends two agents but in this case he sent three or four because officer-involved shooting cases are complex and involve multiple interviews.

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

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

According to Agent Rahn, the interviews conducted by DCI agents are very thorough. They “get into the weeds” as much as possible. There is an autopsy

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

According to Rahn an investigative report is rarely completed because there is always a flow of information that is continually added in order to supplement the report. He stated that even when a case is closed the investigative report may be supplemented. The investigative report is submitted to the county attorney or the attorney general. The agent does not submit an opinion as to whether a crime occurred. Instead, agents provide facts and circumstances to the prosecutor and the prosecutor makes the charging decision.

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

Agent Rahn stated that in this case the investigative report was submitted to the county attorney. The county attorney made a determination as whether the officer would be charged with a crime. She reviewed the material and then drafted a document to let everyone know what her findings were. He stated that Exhibit A is the document drafted by the Des Moines County Attorney and

provided to the DCI concerning the Autumn Steele shooting. He stated that the county attorney went into great detail about the information submitted for her review. She stated that the date of the occurrence was January 6, 2015, the location was 104 South Garfield Street. According to Agent Rahn, the county attorney recited the facts and circumstances in substantial detail. He stated that she “provided more detail than I would submit in a press release.”

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

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

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

Under cross-examination Special Agent Rahn stated the incident began with a report of a domestic dispute. He stated that it would be in the “norm” to include the 911 call as part of the investigative report. If there was a transcript

of the 911 call it would have been included in the report provided to the county attorney. It is “standard” and not “uncommon” for the 911 call to be part of the investigative file. He agreed that the 911 call could be part of the immediate facts and circumstances but stated that the immediate fact and circumstances includes a “multitude of things.” He stated that the entire bodycam video was placed into the investigative file. He is not sure how long the video was. The decision to release 12 seconds of the bodycam video was a decision made by people “higher” than him. He believes the decision was probably made by people representing DCI, the Attorney General, and the Burlington Police Department, but he does not know for sure.

Agent Rahn stated that he would define the “immediate facts and circumstances” as the “who, what, when, and where.” The DCI tries to answer that as best as it can. If there is an issue involving public safety that is provided as well. Agent Rahn stated that he was not aware of what was used to determine the immediate facts and circumstances of the investigation. He stated that he was not aware of what the county attorney used to draft the letter that is Exhibit A. The county attorney had access to the entire investigative file and then returned the entire investigative file. The last line of the letter states the county attorney concluded no charges would be filed against Officer Hill. Agent Rahn testified the county attorney included more information than would be included in a press release. On page 6 of the letter she described the facts and stated that the officer’s actions were reasonable.

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

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

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

Peterzalek: And put into the investigative report?

Agent Rahn: Yes, sir.

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

Agent Rahn: Yes sir.

Paterzalek: Was that put into the investigative report?

Agent Rahn: Yes.

Peterzalek: Was patrol car video obtained by the DCI?

Agent Rahn: Yes.

Peterzalek: Was that placed into the investigative report?

Agent Rahn: Yes.

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

Police Chief Dennis Kramer of the Burlington Police Department testified at the hearing on behalf of Burlington. He stated he was a major of operations at the time of the shooting. He reported to the Chief of Police Doug Beard. He oversaw criminal investigations and the patrol operations. Chief Beard was the person who responded to the open records requests made by Adam Klein and the Burlington Hawkeye newspaper. He was briefed by the Chief regarding the requests. Chief Kramer testified the general practice when an open records request is made in an officer-shooting case is to seek legal counsel before fulfilling the request. According to Chief Kramer, the Burlington Police Department made reports of the “initial incident” and then the investigation was turned over to the Iowa Division of Criminal Investigation. He stated that when there is an officer-shooting investigation, someone in command calls the special agent in charge at the DCI and asks for assistance in the investigation. He testified that any material the police department gathers is “most definitely”

given to DCI. He stated that “all” investigative information was provided to the DCI. The department did not retain anything as part of the investigation.

Chief Kramer stated that Exhibit 2 is a letter to Adam Klein from the department’s attorneys. Exhibit 2 outlines the written request. The letter references Chapter 22 and states that there may be reasonable fees charged to produce the records. The letter then goes into detail about the information. Chief Kramer stated that he had no say in the drafting of this letter. At this point on March 19, 2015 the department had turned over everything to its attorneys. The department allowed its attorneys to review the information and make any decision. The letter contains the non-privileged portion of Officer Hill’s personnel file. Neither he nor Chief Beard had anything to do with the letter. They were relying in good faith on the judgment of their attorneys. Chief Kramer testified that the entire investigative file was turned over to the attorneys. The file included bodycam footage, dashcam video, and initial reports from the officers. He stated the 911 tapes were not part of the file at this point. Later, a lawsuit was filed. The 911 tapes were obtained. Chief Kramer stated the 911 tapes may have been obtained directly from the department or from “Descom” – the Des Moines County Communication Center. The DCI eventually obtained the 911 tapes.

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

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

On November 14, 2016, Autumn Steele’s family filed a federal lawsuit against Burlington and Officer Hill. During the discovery process, the plaintiffs

obtained the DCI investigative report, which includes all of the records that are the subject of this public records request. The parties in the federal lawsuit entered into a joint stipulated protective order. Exhibit 7 is the order requiring the parties not to disclose records that are part of the federal case. Chief Kramer stated he is limited by that protective order. He stated if the administrative agency ordered him to disclose information he would be precluded from doing so until the federal court determined the issue. He stated the protective order prevented him from talking about the evidence. According to Chief Kramer, the parties reached a settlement that is “in process.” Chief Kramer testified that the Burlington Police Department did not retain anything in the investigation. It turned everything over to the DCI (Chief Kramer Testimony).

On August 14, 2018, after the contested case hearing in this matter, a United States district court judge granted the plaintiffs’ motion to unseal most of the court records in the federal case. *Steele v. City of Burlington*, No. 3:16-cv-00105-JEG, slip op. at 17 (S. Dist. Iowa Aug 7, 2018). In his ruling, Judge Gritzner stated:

Although the Court’s decision regarding the common-law right of access may effectively moot the question before the IPIB regarding the release of certain materials that are contained in both the summary judgment records in this case and the records at issue in the IPIB proceeding, the Court renders no judgment as to the scope of confidentiality under, or the City’s compliance with, Iowa Code § 22.

Id. at 12.

Because 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.

Conclusions of Law

Prehearing Motions

At the beginning of the contested case hearing, the prosecutor requested to amend the petition to require Burlington and DCI to release the entire peace officer investigative report in light of the fact that the civil litigation between the Autumn Steele family and the Burlington Police Department had been settled. Burlington and DCI objected to the amendment. The prosecutor’s motion to amend the petition is denied. Iowa Code section 23.10(3)(a) requires the board,

in a written order, to find that a complaint is within its jurisdiction and that a violation of chapter 22 has occurred. The probable cause finding by the board alleged that Burlington and DCI violated chapter 22 by withholding public records such as the 911 call, the dashcam videos and the bodycam videos. Burlington and DCI have responded that the documents within a peace officers investigative report are not public records because they are confidential under the exemption in section 22.7(5). This contested case has been limited to that issue throughout these proceedings and it would be unfair to expand the issues at the time of hearing. Iowa Administrative Code r. 497—4.20(3) (“Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues”).

During the hearing the Respondents moved for a dismissal and a motion for judgment as a matter of law because the prosecutor failed to present any witnesses or exhibits in support of his petition. The motions were taken under advisement and are now denied. In denying the Respondents’ interlocutory appeal of the denial of the motion for summary judgment the board found that issues remained as to whether the documents at issue were part of a peace officer’s investigative report and whether a balancing test applies. The board chose to review the merits of this case with the benefit of a hearing record. *Purethane, Inc. v. Iowa State Bd. of Tax Review*, 498 N.W.2d 706, 708 (Iowa 1993) (A “contested case” is defined as a proceeding in which the “legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.”). Moreover, this case involves a legal interpretation of chapter 22 and the board has been vested with authority to interpret chapter 22. See Iowa Code § 23.6; *Simon Seed & Sod Inc. v. Dubuque Human Rights Comm’n*, 895 N.W.2d 446, 455 (Iowa 2017). Iowa Code section 17A.12(16) provides that the record in a contested case includes all pleadings, motions, and intermediate rulings” as well as all “evidence received or considered and all other submissions.” The record in this case is voluminous and includes the exhibits filed in support of the motions to dismiss, the motions to compel, and the motions for summary judgement. For these reasons, the motion for dismissal and for judgment as a matter of law is denied.

Applicable Statutory Provisions

The “Public Access to Government Information” or “Iowa Public Information Board Act” is in Iowa Code Chapter 23 (2017). The purpose of the chapter is to

“provide an alternative means by which to secure compliance with and enforcement of the requirements of 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.” Iowa Code § 23.1. The public information board (the board) has 13 delineated “powers and duties” with regard to chapter 21 (open meetings) and chapter 22 (open records). *Id.* § 23.6. The board may issue declaratory orders, receive complaints, issue subpoenas, and issue orders with the “force of law” that determine whether there has been a violation of the open meetings law or the open records law. *Id.* The board may examine records, including records that are “confidential by law,” that are the subject matter of a complaint. *Id.* § 23.6(6).

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

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

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

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

Analysis

1. *Under Iowa Code § 22.7(5), peace officers' investigative reports are confidential, regardless of whether the investigation is ongoing.*

The crux of this case is whether DCI and Burlington violated chapter 22 by refusing to release the recording and transcript of 911 calls, bodycam videos taken by officers, videos taken by dash cameras, and records showing the “date, time, specific location and immediate circumstances surrounding the incident.” Throughout this case, DCI and Burlington have argued they acted lawfully and pursuant to Iowa Code section 22.7(5). Section 22.7 provides certain types of 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.” There are currently seventy-three categories of confidential records under section 22.7. The relevant category in this case is found in subsection 5, which states in full:

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.

According to DCI and Burlington, the information requested is all part of the DCI’s “peace officers’ investigative report” into the shooting death of Autumn Steele. As a threshold matter, the board must determine whether this public records exception applies to peace officers’ investigative reports indefinitely or just while “that information is part of an ongoing investigation.”

To make that determination, the Board relies on “an established canon of statutory construction:”

Under the “doctrine of the last preceding antecedent,” referential, relative or qualifying words and phrases refer only to the immediately preceding antecedent, unless a contrary legislative intent

appears. Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.

State v. Gen. Elec. Credit Corp. of Delaware, 448 N.W.2d 335, 345 (Iowa 1989) (internal citations and quotations omitted). In Iowa Code section 22.7(5), the qualifying words “if that information is part of an ongoing investigation” are not separated from the antecedents by a comma. Under the doctrine of the last preceding antecedent, only “specific portions of electronic mail and telephone billing records of law enforcement agencies” are confidential “if that information is part of an ongoing investigation.” Iowa Code § 22.7(5). Thus, peace officers’ investigative reports remain confidential under section 22.7(5) even after an investigation is closed. See *Allen v. Dept. of Public Safety*, No. EQCE074161, slip op. (Polk Co. 5th Dist. Mar. 7, 2014) (“[p]eace officers’ investigative reports,” for purposes of confidentiality “is unqualified; thus investigative reports are confidential without condition.”).

2. *Peace officers’ investigative reports include the information gathered as part of the investigation and incorporated into the reports.*

The Board must next determine what is included in “peace officers’ investigative reports.” Under section 22.1(3)(a), the term “public records” includes “all records, documents, tape, or other information, stored or preserved in any medium” The prosecutor argues that “peace officers’ investigative reports” does not include items produced before the DCI investigation started. A similar argument was made in *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011).² In that case, Neer requested video recordings, use of force reports and pursuit reports from the Iowa Department of Public Safety related to his arrest for operating while intoxicated and eluding. *Id.* at *1-2. The state claimed the records were confidential under Iowa Code section 22.7(5) as “peace officer’s investigative reports.” *Id.* at *2. Neer claimed the requested records were not confidential because a video recording “is not a ‘report’” and “none of the requested records were ‘investigative’ in nature.” *Id.* at *3. The court of appeals stated:

While this argument is appealing at first blush, the term “investigative reports” has been interpreted to encompass not only reports but also other material and evidence incorporated into reports. See, e.g., *AFSCME/Iowa Council 61 v. Iowa Dep’t of Pub. Safety*, 434 N.W.2d 401,

² Although an unpublished court of appeals decision is not binding, it nevertheless offers persuasive authority. See *State v. Murray*, 796 N.W.2d 907, 910 (Iowa 2011).

403 (Iowa 1988) (finding lab reports analyzing a suspect's blood were “investigative reports” within the meaning of section 22.7(5)); *State ex. rel. Shanahan v. Iowa Dist. Ct.*, 356 N.W.2d 523, 531 (Iowa 1984) (“[T]he district court abused its discretion in ordering the DCI to give the civil litigants and their attorneys access to the *entire* criminal investigation file.” (emphasis added)). Based on this interpretation, we conclude video recordings are encompassed within the phrase “peace officers’ investigative reports.”

Id.

In *AFSCME* (cited by *Neer*), the Supreme Court of Iowa determined a lab report was part of an investigative report for purposes of Iowa Code section 22.7(5). 434 N.W.2d at 403. The Court stated “[t]here is no dispute the *analysis* of Gott’s blood was made as part of the investigation of Cline’s allegation of sexual abuse. We believe this fact is sufficient to qualify the lab reports as ‘investigative reports.’” *Id.* (emphasis added).

In this case, Burlington requested the DCI to investigate Officer Hill’s shooting of Autumn Steele. As part of that investigation, the DCI gathered and analyzed various pieces of information, including the 911 calls and videos recorded on officers’ body cameras and the cameras on their dash boards. According to Agent Rahn, these types of records are typically included in an investigative report provided to the prosecutor to make the charging decision. Based on *Neer* and *AFSCME*, the board finds the term “peace officers’ investigative reports” includes not just the report summarizing the facts and circumstances of the crime or incident but also the information gathered and analyzed as part of the investigation. *See also In the Matter of Cali Smith and City of Nevada Police Department*, IPIB complaint No. 14FC:0096 (Jan. 15, 2015) (unanimously voting to dismiss complaint because police body camera video was part of “peace officers’ investigative reports” and therefore confidential under Iowa Code section 22.7(5)).

3. *It is inappropriate to apply a balancing test for purposes of Iowa Code § 22.7(5).*

The prosecutor and respondents disagree on whether the board should apply the three-part balancing test articulated in *Shanahan* and relied upon in *Hawkeye v. Jackson*, 521 N.W.2d 750 (Iowa 1994) and *Shannon v. Hansen*, 469 N.W.2d 412 (Iowa 1991). The *Shanahan* case arose “from a wrongful death action which followed in the aftermath of a double homicide in a motel room.” 356 N.W.2d at 525. The parties litigating the wrongful death action sought

discovery of the state's files concerning the homicide investigation. *Id.* at 526. The state contended its DCI file regarding the homicides was confidential and privileged based on Iowa Code section 622.11 and section 68A.7 (now 22.7(5)). Iowa Code section 622.11 (1983) provides: "A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure." The court in *Shannon* nicely summarized the *Shanahan* decision:

In *Shanahan*, we concluded . . . subsection 22.7(5), providing for the confidentiality of peace officers' reports, and section 622.11, creating a public officer privilege for communications, are two expressions of essentially the same legislative purpose with regard to DCI files. In *Shanahan* we identified three tests which the State must satisfy to establish the privilege. They require that (1) a public officer is being examined, (2) the communications made to the officer were in official confidence, and (3) the public interests would suffer by disclosure.

Shannon, 469 N.W.2d at 414 (citing *Shanahan*, 356 N.W.2d at 527-28). Similarly in *Hawkeye*, the Court analyzed a request for a DCI report regarding alleged excessive force under both sections 22.7 and 622.11. 521 N.W.2d at 752. The Court applied the three-part test from *Shanahan* and determined "[u]nder the unique facts of this case, any public harm created by the disclosure of the DCI investigatory report is far outweighed by the public harm accruing from its nondisclosure."

The board finds the three-part test outlined in *Shanahan* is not applicable here. First, the board only has jurisdiction to enforce chapters 21 and 22. It does not have jurisdiction to interpret and apply section 622.11. Secondly, this three-part test is essentially a restatement of section 622.11. It offers a qualified privilege "when the public interests would suffer by the disclosure." Iowa Code section 22.7(5) includes no such qualification or limitation.

More recently, the Supreme Court of Iowa held it will not apply a balancing test "when [it] find[s] that a requested piece of information fits into a category of an exemption" in Iowa Code section 22.7. *Am. Civil Liberties Union Found. v. Atlantic Cmty Sch. Dist.*, 818 N.W.2d 231, 234 (Iowa 2012). The *Atlantic* Court said "[w]e have reiterated this rule in response to arguments that we must nonetheless determine whether the public's 'right to know' outweighs the government entity's interest in privacy even where we find section 22.7 exempts information from disclosure." *Id.* Similarly in *Gabrilson v. Flynn*, the Supreme Court said "it is not our responsibility to balance competing policy

interests. This balancing is a legislative function and our role is simply to determine the legislature's intent about those policy issues.'” 554 N.W.2d 267, 273 (Iowa 1996) (quoting *Ne. Council on Substance Abuse, Inc. v. Iowa Dep't of Pub. Health*, 513 N.W.2d 757, 761 (Iowa 1994)).

In this case, the board has already found the 911 calls, and the videos recorded on the officers' body camera and dash board cameras fit into the “peace officers' investigative reports” exception. Based on the *Atlantic* case and the absence of section 622.11, the board finds it would be inappropriate and beyond the board's authority to employ a balancing test to determine whether the requested information should nevertheless be disclosed.

4. *DCI and Burlington satisfied the requirements of § 22.7(5) when they provided the Des Moines County Attorney's letter detailing the facts and circumstances of the shooting.*

Iowa Code section 22.7(5) provides that “peace officers' investigative reports” are confidential. Subsection 5, however, does provide a limited exception. It states “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.”

The prosecutor alleged Burlington and DCI violated chapter 22 because the letter written by the county attorney on February 27, 2015 and provided to Adam Klein and Andy Hoffman did not satisfy this limited exception for the facts and circumstances of the incident. In *Neer*, the Court of Appeals found that a letter written by the county attorney that disclosed these specifics without disclosing parts of the investigative file complied with this requirement. *Neer* at *4. The Des Moines County attorney's letter was over 6 pages long. It included 2 pages of detailed facts and a lengthy legal analysis explaining why she chose not to charge Officer Hill with a crime. Additionally, a portion of the video footage was released. The prosecutor has not cited any authority for the proposition that additional disclosure is required nor has he alleged the letter and video failed to include “the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident.” We find the county attorney's letter in this case sufficient to meet the facts and circumstances exception in subsection 5.

The board does not have the authority to substitute its decision making for that of the lawful custodians merely because it would have provided a different

response to a public records request if it stood in the lawful custodians' shoes. The board's authority in this contested case is limited to determining whether the respondents have violated chapter 22. See Iowa Code § 23.10(3); see also *id.* § 23.6(8) (allowing IPIB to "examine" confidential records, but qualifies that such records "shall continue to maintain their confidential status"). Although the board finds the DCI and Burlington did not violate chapter 22, the board shares the complainants' frustration with the lack of publicly available information after a police-involved shooting.

In order to assure more public information is provided under these circumstances in the future the board has proposed legislation to expand public access to the dashcam and body cam videos and the 911 calls when a police officer is involved in a violent altercation with a citizen.³

Order

Burlington and DCI complied with Iowa Code chapter 22 when they released the Des Moines County Attorney's letter detailing the facts and circumstances of the shooting. Under Iowa Code section 22.7(5), the 911 call, the body camera video, and the dash camera video were part of the confidential "peace officers' investigative reports" and not required to be disclosed in response to a public records request.⁴ **The petition is hereby dismissed.**

Dated this ____ day of _____, 2019

Chair,

Iowa Public Information Board

³ House Study Bill 138 and House Study Bill 141 are two of the board's proposed bills currently under consideration.

⁴ There is a pending interlocutory appeal before the Supreme Court of Iowa that will likely address many of the issues presented in this case. See *Mitchell v. City of Cedar Rapids*, (Supreme Court No. 18-0124). The board will review the Court's decision in that case once it is published.

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