IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ADAM KLEIN, an individual, Petitioner, v. IOWA PUBLIC INFORMATION BOARD, an independent executive-branch agency of the State of Iowa, Respondent, and BURLINGTON POLICE DEPARTMENT and IOWA DEPARTMENT OF PUBLIC SAFETY, DIVISION OF CRIMINAL INVESTIGATIONS, Intervenors.	Case No. CVCV057831 **PETITIONER'S BRIEF ON JUDICIAL REVIEW**

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Iowa Code § 22.7(5)

Renda v. Iowa Civil Rights Comm'n, 784 N.W.2d 8 (Iowa 2010)

City of Des Moines v. Iowa Dep't of Transp., 911 N.W.2d 431 (Iowa 2018)

Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act*, *Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* (1998)

Iowa Land Title Ass'n v. Iowa Finance Authority, 771 N.W.2d 399 (Iowa 2009)

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Brandenburg v. Ohio, 395 U.S. 444 (1969)

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Mulhern v. Catholic Health Initiatives, 799 N.W.2d 104 (Iowa 2011)

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Iowa Admin. R. Bulletin ARC 8604—Insurance Division (Apr. 6, 1988) at 1909, *available at* https://www.legis.iowa.gov/docs/publications/IACB/854692.pdf

Iowa Admin. R. Bulletin ARC 6608—Commerce Comm'n (June 4, 1986), at 1830, *available at* https://www.legis.iowa.gov/docs/publications/IACB/854644.pdf

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Hawk Eye v. Jackson, 521 N.W.2d 750 (Iowa 1994)

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Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)

Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n, 850 N.W.2d 403 (Iowa 2014)

Iowa Citizen/Labor Energy Coal., Inc. v. Iowa State Commerce Comm'n, 335 N.W.2d 178 (Iowa 1983)

Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012)

Winnebago Industries, Inc. v. Haverly, 727 N.W.2d 567 (Iowa 2006)

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Lowe's Home Centers, LLC v. Iowa Department of Revenue, 921 N.W.2d 38 (Iowa 2018)

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1. failing to apply a public interest balancing test to this section 22.7(5) dispute?

or

2. failing to treat as exempt from the investigative report's confidentiality those bodycam, dashcam, and 911 call recordings that comprised the "immediate facts and circumstances" of the incident, which must be released absent a determination that releasing them would pose a clear and present danger to an individual?

Iowa Code § 17A.19(10)(b)

Iowa Code § 17A.19(10)(c)

Mitchell v. City of Cedar Rapids, 926 N.W.2d 222 (Iowa 2019)

Iowa Code § 22.1

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Hawk Eye v. Jackson, 521 N.W.2d 750 (Iowa 1994)

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Oral Argument, *Mitchell*, 926 N.W.2d 222, https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/18-0124

Carolan v. Hill, 553 N.W.2d 882, 887 (Iowa 1996)

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Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5 (Iowa 1973)

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Iowa Code § 17A.19(10)(k)

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Hawk Eye v. Jackson, 521 N.W.2d 750 (Iowa 1994)

State v. Brown, 930 N.W.2d 840, 849 (Iowa 2019)

Damien Cave and Rochelle Oliver, *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. Times (updated Apr. 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html

Bijan Stephen, *How Black Lives Matter Uses Social Media to Fight the Power*, Wired, Nov. 2015

https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/

German Lopez, *How Video Changed Americans' Views Toward The Police, From Rodney King to Alton Sterling*, Vox.com (Jul. 6, 2016), https://www.vox.com/policy-and-politics/2015/12/10/9886504/police-shooting-video-confidence

Gaymon v. Borough of Collingdale, 150 F.Supp.3d 457 (E.D. Pa 2015)

Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U.Pa. L. Rev. 335 (2011)

Jocelyn Simonson, *Copwatching*, 104 Cal. L. Rev. 391 (Apr. 2016)

Seth W. Stoughton, *Police Worn Body Camera,* 96 N.C. L. Rev. 1363 (2018)

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Iowa Code § 17A.19(10)(l)

Iowa Code § 17A.19(10)(m)

Mitchell, 926 N.W.2d at 234

Iowa Code § 22.7(5)

Iowa Civil Rights Commission v. Massey-Ferguson, Inc., 207 N.W.2d 5 (Iowa 1973)

Iowa Code § 622.11

Shanahan v. Iowa Dist. Ct. for Iowa Co., 356 N.W.2d 523 (Iowa 1984)

Hawk Eye v. Jackson, 521 N.W.2d 750 (Iowa 1994)

IV. Was the Final Decision unreasonable, arbitrary, capricious, or an abuse of discretion?

Iowa Code § 17A.19(10)(n)

Iowa Code § 22.7(5)

STATEMENT OF THE CASE

I. Nature of the Case

This case involves a dispute over access to law enforcement public records related to the unintentional January 6, 2015 fatal shooting of 34-year old Autumn Steele, an unarmed mother standing in her front yard near her toddler, by City of Burlington Police Department Officer Jesse Hill. (AR 21.) The case languished before the agency for nearly four years before final agency action was rendered, with the Iowa Public Information Board determining that the Burlington Police Department and Iowa Division of Criminal Investigation did not violate Iowa's Open Records laws in withholding records related to the shooting from Mr. Klein, the Petitioner in this matter.

Despite the voluminous record, the two primary legal questions this Court needs to decide in order to resolve this judicial review case are straightforward:

(1) whether a public interest balancing test should have been applied to the disputed law enforcement records, pursuant to Iowa Code section 22.7(5), and

(2) whether a subset of the requested records—the bodycam, dashcam, and 911 records, specifically—fit into a statutory exception under Iowa Code section 22.7(5) governing "immediate facts and circumstances" that required their disclosure regardless.

The former of these issues has been resolved in the affirmative by the recent Supreme Court of Iowa decision of *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 234 (Iowa 2019) (holding that a balancing test is required under section 22.7(5) governing disputes over access to peace officers' investigative reports involving no confidential informant or unidentified suspect).

The Court's analysis in *Mitchell* also provides important guidance as to the second issue because *Mitchell* strongly indicates that the Court will find that 911 calls, dashcam video, and

bodycam recordings comprise the "immediate facts and circumstances" that must be disclosed by law enforcement under section 22.7(5) "except in those unusual circumstances"—not asserted below by law enforcement in this case—"where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual." *Id.* at 232, 234-35 (holding that "the district court acted within its discretion" to require disclosure of "investigative reports or electronic communications generated or filed within 96 hours of the incident".).

In order to protect Petitioner's right to access and distribute the disputed records, the Petitioner respectfully seeks reversal of the agency decision below and remand with instructions to provide the relief requested.

II. Procedural History

On February 27, 2015, Adam Klein, attorney for the family of Autumn Steele, submitted a chapter 22 open records request to the Burlington Police Department ("Burlington PD"), Des Moines County Attorney ("County Attorney"), and Iowa Department of Public Safety Division of Criminal Investigation ("DCI"). (AR 30-35.) Mr. Klein requested various records related to the shooting death or the investigation, including contemporaneously-made recordings such as the 911 tapes, dashcam videos, and bodycam videos. (*Id.*) The entities denied him access to these records as confidential under section 22.7(5). (AR 36, 39-42.)

Mr. Klein subsequently initiated a formal complaint with the Iowa Public Information Board ("IPIB") on May 15, 2015. (AR 8-20.) The complaint named the Burlington PD, County Attorney, and DCI as respondents and alleged that their failure to disclose the records he sought violated chapter 22. (AR 8.) On October 27, 2016, the IPIB found Mr. Klein's complaint fell within its jurisdiction and determined there was probable cause that the respondents violated chapter 22 by denying Mr. Klein's access to the records. (AR 719.) The special prosecutor retained by the

IPIB, Mark McCormick, filed a petition to initiate a contested case against the Burlington PD and DCI on November 4, 2016. (AR 720-724.) The Petition sought statutory damages from the Respondents and an order requiring production of the withheld documents without cost to Mr. Klein. (AR 724.) The IPIB separately settled the case with the County Attorney on December 13, 2016. (AR 810-11.)

A contested case hearing was held on July 20, 2018. (AR 1477.) Administrative Law Judge Karen Doland issued the Proposed Decision on October 5, 2018 finding that the Burlington PD and DCI did not comply with chapter 22. (AR 1477-1500.) The ALJ found the Burlington PD and DCI improperly "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 section 22.7(5)." (AR 1499.) The Proposed Decision granted the IPIB's request for an order requiring production of the withheld documents. (*Id.*)

The Burlington PD and DCI appealed the ALJ's Proposed Decision to the IPIB, whose membership had changed since voting to open a contested case proceeding. (AR 1502-11; *compare* membership list as provided on AR 1608 *with* AR 1679.) The IPIB issued its Final Decision and Order Dismissing Petition on February 21, 2019. (AR 1570-90.) The IPIB accepted the ALJ's "procedural history, statement of facts, ruling on prehearing motions, and statement of applicable statutory provisions," but found that the ALJ's "legal analysis and conclusions of law [were] in error." (AR 1572.) Applying its own legal analysis to conclude the Burlington PD and DCI complied with chapter 22, the IPIB dismissed the petition. (AR 1589.)

Mr. Klein then timely petitioned this Court for judicial review of agency action under section 17A.19 on March 22, 2019. (Klein Pet.) The IPIB thereafter filed a motion to dismiss this action, which Mr. Klein resisted. (IPIB Mot. to Dismiss, Klein Resistance to Mot. to Dismiss.)

This Court denied the motion to dismiss "as it relates to Petitioner's request for judicial review" and granted the motion "as it relates to Petitioner's requests for declaratory relief." (Order Re: Resp't's Mot. to Dismiss.) In addition, the Burlington PD and DCI intervened as of right in this judicial review action. (Burlington PD's Appearance and Notice of Intervention at 1-2; Appearance and Notice of Intervention at 1.) Mr. Klein now submits this brief on Judicial Review.

III. Facts

A. The Autumn Steele shooting and investigation

The Proposed Decision established the facts described in this section, which the IPIB accepted in its Final Decision. (AR 1572.) On January 6, 2015, Autumn Steele was shot and killed by City of Burlington Police Officer Jesse Hill. (AR 1480.) The Des Moines County Attorney, Amy Beavers, investigated the incident and determined that she would file no criminal charges against the officer. (*Id.*) Beavers summarized her findings in a February 27, 2015 letter to DCI Agent Matthew George. (*Id.*)

According to Beavers, Gabriel Steele called 911 to report a domestic incident involving Autumn Steele. (AR 1480, 1592.) When Officer Hill responded to the call, he observed Autumn grabbing, pulling, and hitting Gabriel. (*Id.*) Officer Hill then approached the pair and attempted to separate them when the Steele's dog growled and reportedly bit him on the thigh, *id.,*—although documents Mr. Klein sought which are relevant to establishing whether a bite occurred have not been released. Beavers stated that Officer Hill told the Steeles to "get the dog", but the dog continued toward him. (*Id.*) Officer Hill then drew his weapon and fired as he fell backwards. (*Id.*) He fired a second time as he fell. (*Id.*) Autumn Steele was shot in her right arm and chest, and the autopsy concluded that she died as a result of the gunshot wound to her chest. (AR 1480, 1593.) Mr. Klein does not concede the accuracy of the Beavers report or her conclusions of facts or law. (*See* AR 16, 123, 124, 139, 182, 183.)

DCI Special Agent Richard Rahn testified as to the records collected. (AR 1482-87.) He testified that in DCI investigations, agents try to "get as much data as we can," including body camera footage, patrol vehicle footage, and 911 calls to dispatchers. (AR 1483.) It is the "norm" that all of the information is included in what DCI denominates the "investigative report". (*Id.*) When asked if a 911 tape or tapes were obtained by the DCI in this investigation, Special Agent Rahn stated he was "sure they would have been." (AR 1486.) Special Agent Rahn also confirmed that body camera footage and patrol car video were collected and put into the "investigative report". (AR 1486-87.) He testified to personally reviewing video of the shooting. (AR 1484.)

At some point prior to March 18, 2015, DCI released a 12-second video clip cut from Officer Hill's full bodycam recording. (AR 36, 1485.) Special Agent Rahn testified that people "higher" than him made the decision to release the clip. (AR 1485.) He believed the decision was probably made by those representing DCI, the Attorney General, and the Burlington PD, but he could not say for certain. (*Id.*)

Burlington PD Police Chief Dennis Kramer also testified about the records. (AR 1487.) Chief Kramer testified that "all" investigative information was provided to the DCI. (*Id.*) This investigative file included body cam footage, dashcam video, and initial reports from the officers. (AR 1488.) Although the 911 tapes were not included as part of the investigative file at that time, it was established that DCI "eventually obtained the 911 tapes." (*Id.*)

B. Mr. Klein's open records requests and refusals to disclose public records

On February 27, 2015, the same day that Beavers declined to bring charges against Officer Hill, Mr. Klein made a chapter 22 public records request to the DCI. (AR 30-31.) He requested, as a catch-all "any and all public records regarding the incident." (*Id.*) He also specifically requested the following records:

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 person, relating to the Incident;

9. records of any investigation into the dog who allegedly attached 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;

(*Id*.)

Assistant Attorney General Jeffrey Peterzalek responded to Mr. Klein's open records request on behalf of DCI on March 18, 2015. (AR 36.) The response stated in part:

> 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.

(*Id.*)

On February 27, 2015, Mr. Klein also made a chapter 22 public records request to the Burlington PD. (AR 33-34.) He made the same catch-all request for "any and all public records regarding the incident." (*Id.*) He also specifically requested the following records:

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

(*Id*.) (numbered as in the original)

Holly Corkery, counsel for the Burlington PD, responded to Mr. Klein's open records request on March 19, 2015. (AR 39-42.) The Burlington PD declined to produce most of the requested records. (AR 41.) The response stated:

> 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).
>
> The date, time, specific location, and immediate facts surrounding the Ms. Steele's death on January 6, 2015, are contained in the County Attorney's memorandum which has been provided to the public and is enclosed with this letter.

(AR 41.)

C. High Public Interest in Case

The Burlington PD's shooting of Autumn Steele, the reinstatement of Officer Hill, and suspicions regarding a cover-up garnered widespread local, statewide, and even national public interest. *See, e.g.,* Andy Hoffman, *City to pay $2 million to Autumn Steele family in deadly police shooting*, The Hawk Eye (June 18, 2018), https://www.thehawkeye.com/news/20180618/city-to-pay-2-million-to-autumn-steele-family-in-deadly-police-shooting; Jason Clayworth, *Lawyer for family of mother slain by Iowa cop: 'Burlington covered up a murder'*, Des Moines Register (Oct. 18, 2018), https://www.desmoinesregister.com/story/news/investigations/2018/10/18/autumn-steele-burlington-iowa-police-shooting-records-show-cover-up/1286178002/. Trish Mehaffey, *Video of officer shooting Burlington mother must be public, judge rules*, The Gazette (Aug. 14, 2018), https://www.thegazette.com/subject/news/public-safety/autumn-steele-shooting-burlington-judge-rules-body-camera-footage-released-settlement-2-million-police-department-20180814.

The enormous public interest in this case is reflected in the record. *See, inter alia,* AR 1-2 (letter from Burlington Hawk Eye newspaper to Mr. Smithson, describing public interest in the matter, and mentioning a local rally opposing the reinstatement of Officer Hill); AR 16 (Compl. filed by Adam Klein, describing not only the public interest in the shooting itself, but also "allegations of leniency or cover-up" by officials, as well as the reinstatement of Officer Hill

without any discipline); AR 123 (Hawk Eye brief below, citing a Washington Post article describing community interest in police shootings of civilians around the country and in Autumn Steele's case particularly); AR 124, 139 (Hawk Eye brief below, describing the concern of cover up: "Yet every law enforcement agency involved in this open records dispute has circled the squad cars in a collective effort to make sure that objective video depictions and other records evidencing what transpired on the morning Autumn Steele was shot can be seen only by those within government and to the exclusion of the very citizenry the police agencies involved are charged with serving and protecting."); AR 182 (Klein brief below, describing how the public interest is harmed by allowing police to "cherry-pick from the facts and circumstances, releasing those which serve their interests and suppressing those which do not" in reference to the police releasing an edited twelve-second clip from Officer Hill's body camera."); AR 183 (Klein brief below, describing concerns that the records made available at that point demonstrated that "Officer Hill was ready to fire, weapon drawn, before he asked the Steeles to 'get the dog.'"); AR 206 (letter from reporter Andy Hoffman describing purpose in seeking records as "related to news-gathering purposes only" and stating "release of the information would contribute substantially to the public's understanding of this incident.")

D. Unsealing of some records related to federal civil rights lawsuit

In 2016, Mr. Klein filed a federal lawsuit against the Burlington PD and Officer Hill on behalf of the family of Autumn Steele. (AR 1580.) A protective order was entered through stipulation of the parties to govern discovery in that matter. (AR 1581.) The Defendants moved for summary judgment, and pursuant to the protective order, the majority of the Appendix of exhibits supporting and opposing summary judgment was initially sealed. (Ex. 05: Defs.'App. in Supp. of Resistance to Pls.' Mot. Summ. J., Ex. 08: Pls.'App. Supp. Summ. J. on Liability.) The Iowa Freedom of Information Council subsequently filed a motion to unseal those documents,

which was granted in part. *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 to Resistance to Mot. to Dismiss as Ex. 02).

Through that unsealing, a portion, but not all, of the records Mr. Klein sought and which are subject to this judicial review proceeding were disclosed. The unsealed evidence made publicly available does not include any of the public records which were not filed in court. Nor does it include many records, exchanged in discovery, which were responsive to Mr. Klein's open records request and subsequent IPIB Complaint. The unsealed, publicly available documents provide many examples of documents and records which were responsive to Mr. Klein's open records request that was the subject of the subsequent IPIB decision and this judicial review action, but which were not unsealed.

Below are just a few examples of responsive records which have not been publicly released:

- Unsealed Doc. 112-0 is a narrative describing "follow up questions for Officer Jesse Hill" asked by DCI "after the conclusion of Officer Jesse Hill's interview." (attached to Resist. to Mot. to Dismiss, 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 Resist. to Mot. to Dismiss). 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. (Resistance to Mot. to Dismiss, 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, publicly 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. (attached to Resist. to Mot. to Dismiss, Ex. 03: *Steele* Doc. 112-0, at 15). A pen mark made by a witness obscures the

area of the leg where the alleged bite mark was. (*Id.*). 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." (attached to Resist. to Mot. to Dismiss: 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 they have not been publicly 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, all of 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.)

(attached to Resist. to Mot. to Dismiss, Ex. 04: *Steele* Doc. 109-0, at 28).

- Unsealed Doc. 111-1 includes the cover sheet from Officer Jesse Hill's deposition. (attached as Resist. to Mot. to Dismiss, Ex. 06: *Steele* Doc. 111-1, at 5). It itemizes deposition exhibits—which were responsive records that have not been publicly 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 Beaird'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 scanned property forms 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

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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 publicly 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. (attached to Resist. to Mot. to Dismiss, 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 twenty eight (28) pages of various "photocopied color photographs". Of those, only three (3) pages were released, because they were the only records among the twenty eight (28) that were included in summary judgment proceedings and thus filed in in court and subject to unsealing. (*Compare* Resist. to Mot. to Dismiss, Ex. 08, *Steele* Doc. 101-3, at 15-17 (showing the three released pages of photos) *with* Resist. to Mot. to Dismiss, Ex. 08, *Steele* Doc. 101-3, at 45 (describing 28 pages of photographs in deposition exhibits).) Deposition exhibits listed which also were not publicly 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." (attached to Resist. to Mot. to Dismiss, Ex. 08, *Steele* Doc. 101-3, at 45.)

E. The Proposed Decision

On October 5, 2018, the ALJ issued the Proposed Decision. (AR 1477-1500.) The Proposed Decision held that the Burlington PD and DCI failed to comply with chapter 22 when they determined that the 911 call, body camera video, and dash camera video were exempt from disclosure under section 22.7(5). (AR 1499.) The ALJ granted the prosecutor's request for an order requiring production of the records but declined to assess damages. (AR 1498-99.)

The Proposed Decision made a number of legal determinations in support of this conclusion. First, the Proposed Decision rejected the application of *Neer v. State*, 798 N.W.2d 349 (Iowa Ct. App. 2011) (unpublished opinion), in interpreting section 22.7(5). (AR 1491-95.) The ALJ reasoned that *Neer* was not controlling because the unpublished opinion did not constitute binding legal authority. (AR 1493.) Additionally, the Proposed Decision found that *Neer* was distinguishable from the facts of the current case because the "[d]epartment had already voluntarily

provided the records to Neer." (*Id.*) Nor did *Neer* impact the Supreme Court of Iowa's prior precedent requiring the application of the *Hawk Eye* public interest balancing test to disputed records under section 22.7(5). (*Id.*)

Second, the Proposed Decision found that *Am. Civil Liberties Union Found. of Iowa, Inc. v. Records Custodian, Atlantic Cmty Sch. Dist.*, 818 N.W.2d 231 (Iowa 2012), did not overrule prior Iowa Supreme Court precedent interpreting section 22.7(5) to require the use of the *Hawk Eye* public interest balancing test. (AR 1496-97.) The ALJ reasoned that *Atlantic* dealt with a section 22.7(11) exemption—not section 22.7(5). (AR 1497).

Third, the Proposed Decision rejected the notion that simply placing a record into an investigative file thereby makes it confidential under section 22.7(5). (AR 1494, 97, 98.) The ALJ found that the immediate facts and circumstances clause of section 22.7(5) "supports the prosecutor's argument that the 911 tape, the dashcam videos, and the bodycam videos are not 'confidential' in the first instance" even if later placed into an investigative file. (AR 1498.)

F. The Final Decision

On February 21, 2019, the IPIB issued its Final Decision, rejecting each legal determination made in the ALJ proposed decision, and holding that the Burlington PD and DCI complied with chapter 22 in responding to Mr. Klein's public records request. (AR 1589.) The IPIB cited *Neer*, an unpublished Court of Appeals decision, as persuasive authority for finding that all the disputed records, including dashcam, bodycam, and 911 call records, were confidential. (AR 1585-86, 88.) Second, the IPIB found that *Atlantic*'s ruling reached section 22.7(5) and eliminated the long-standing *Hawk Eye* balancing test. (AR 1587-88.) Third, again citing *Neer*, the IPIB determined that the County Attorney's summary letter and short bodycam clip, without more, satisfied the immediate facts and circumstances clause of section 22.7(5). (AR 1588.)

ARGUMENT

I. Introduction and Summary of Argument

This Court should reverse the agency's final decision below and remand with orders to provide the relief sought by the IPIB prosecutor in the underlying agency matter, for four reasons. Any of these grounds is sufficient, on its own, to reverse.

First, because no deference is owed to the agency's interpretation of the relevant legal terms found in section 22.7(5) below, this court should reverse the decision because it violated Iowa Code chapter 22, and was based on an erroneous interpretation of law, in two ways: (A) in failing to apply the *Hawk Eye* balancing test to the disputed records comprising peace officers' investigative reports; and (B) in failing to treat as exempt from the investigative report's confidentiality those bodycam, dashcam, and 911 call recordings that comprised the "immediate facts and circumstances" of the incident, which must be released absent a determination that releasing them would pose a clear and present danger to an individual. As a result, the decision is reversible under Iowa Code sections 17A.19(10)(b) and 17A.19(10)(c).

Second and in the alternative, should the court give deference to the agency's interpretation of section 22.7(5) below, it should reverse the decision because it was not required by law and had a disproportionate negative impact on private rights and the public interest. As a result, the decision is reversible pursuant to Iowa Code section 17A.19(10)(k).

Third, also in the alternative, should this court give deference to the agency's interpretation of the statute, it should reverse the decision because it was based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law and application of law to fact. Thus, the decision is reversible pursuant to Iowa Code section 17A.19(10)(l) and 17A.19(10)(m).

Fourth, the IPIB's decision was unreasonable, arbitrary, capricious, and an abuse of discretion. As a result, it is also reversible pursuant to Iowa Code section 17A.19(10)(n).

No deference is due to the agency's interpretation of law because the legislature did not expressly or clearly vest the IPIB with the authority to interpret section 22.7(5)'s relevant terms. Second, interpretation of the statute's relevant terms does not require the special expertise of the agency, and the words have meaning independent of the IPIB's expertise. Third, Iowa Code section 22.7(5) preceded the creation of the IPIB, and courts have interpreted the statute independent of the IPIB both before and after its creation.

II. Deference and Standards of Review

A. No Deference Is Due To The Agency's Interpretation Of Law.

The Iowa Public Information Board Act created the IPIB and established its powers under chapter 23. Iowa Code §§ 23.2, 23.6. Nowhere in these powers is the grant of authority to interpret section 22.7(5)'s relevant terms: "peace officers", "investigative reports" (or "investigation" and "report"), "privileged records" (or "privilege" and "record"), "immediate", "facts and circumstances" (or "immediate facts and circumstances"), "crime", "incident", or "clear and present danger". *Compare* Iowa Code § 22.7(5), *with* Iowa Code § 23.6. Since the legislature did not clearly vest the IPIB with interpretive discretion over the disputed terms within section 22.7(5), no deference should be given to their interpretation and this Court should review *de novo*. *See Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010).

An agency's powers are limited to those that are prescribed to it by statute. *City of Des Moines v. Iowa Dep't of Transp.*, 911 N.W.2d 431, 439 (Iowa 2018). "Normally, the interpretation of a statute is a pure question of law over which agencies are not delegated any special powers by the General Assembly so, a court is free to, and usually does, substitute its judgment *de novo* for that of the agency and determine if the agency interpretation of the statute is correct." *Renda*, 784 N.W.2d at 11 (quoting Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act*, *Report on Selected Provisions to Iowa State Bar Association and Iowa State Government*

(hereinafter Bonfield) 62 (1998)). In order to overcome this rule of statutory interpretation, "the reviewing court, using its own independent judgment and without any required deference to the agency's view, must have a firm conviction from reviewing the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration of the provision in question." *Id.* (citing Bonfield at 63); *Iowa Land Title Ass'n v. Iowa Fin. Auth.,* 771 N.W.2d 399, 401 (Iowa 2009) ("Unless the legislature vested the agency with the power to construe the statute, this court gives no deference to the agency's construction.").

Renda provides the relevant framework to assess whether an agency has been clearly vested with the authority to interpret particular statutory terms. 784 N.W.2d at 14. *Renda* involved a dispute over whether the Iowa Civil Rights Commission had authority to interpret the terms "employee" and "dwelling" as used in the Iowa Civil Rights Act. *Id*. at 10. The Court ultimately held that the agency had not been clearly vested with the authority to interpret the relevant terms. *Id.* at 14. Accordingly, no deference was due. *Id.*

The Court first looks to see if there was an explicit interpretive grant of authority. *Id.* at 14. Even if not expressly stated, interpretive authority can still be found if the legislature has "clearly" vested the power in the agency. *Id*. at 11. In *Renda,* since there was no explicit grant, the Court considered the language of the statute, its context, its purpose, and the practical considerations involved to determine the legislative intent. *Id.* at 14. In assessing these factors, the Court asked whether it was "firmly convinced" that the legislature intended, or would have intended, for the interpretive authority to be vested in the agency with the force of law. *Id.*

The Court recognized that despite the Iowa Civil Rights Commission being vested with authority "to adopt, publish, amend, and rescind regulations consistent with and necessary for the enforcement of this chapter," Iowa Code § 216.5(10), it was not empowered with authority to interpret the terms "employee" or "dwelling." *Renda*, 784 N.W.2d at 13-14. Rather, "each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." *Id.* at 13.

The Court also reasoned that "[b]oth terms have specialized legal meaning and are widely used in areas of law other than the civil rights arena." *Id.* at 14.

Under the *Renda* analysis as set forth below, this Court should find that the legislature has not clearly invested the IPIB with interpretive authority of section 22.7(5)'s relevant terms, for three reasons:

(1) It has not been expressly or clearly granted the power to interpret the terms of law necessary to decide this matter;

(2) interpretation of the statute's relevant terms does not require the special expertise of the agency, and the words have meaning independent of the IPIB's expertise; and

(3) Iowa Code section 22.7(5) preceded the creation of the IPIB, and courts have interpreted the statute independent of the IPIB both before and after its creation.

As a result, no deference is due to the agency's interpretation of law in this matter.

1. The legislature did not expressly or clearly vest the IPIB with the authority to interpret section 22.7(5)'s relevant terms.

The powers expressly granted to the IPIB are contained in section 23.6. Iowa Code § 23.6. These include, *inter alia*, the power to adopt rules "calculated to implement, enforce, and interpret the requirements of chapters 21 and 22", receive and investigate complaints, and issue orders determining whether chapters 21 or 22 have been violated. Iowa Code §§ 23.6(2), (4), (8).

However, there is no express grant of authority to interpret section 22.7(5)'s relevant terms (e.g., "incident", "crime", "immediate", "facts and circumstances", "investigative report", "clear and present danger") under the agency's enumerated "board powers and duties." *See* Iowa Code § 23.6.

The IPIB's grant of *rulemaking* authority under section 23.6(2) does not grant broader authority to interpret the relevant terms of section 22.7(5). Section 23.6 gives the IPIB the powers to "[a]dopt rules pursuant to chapter 17A calculated to implement, enforce, and interpret the requirements of chapters 21 and 22." Iowa Code § 23.6(2). However, the Iowa Supreme Court has ruled that a grant of rulemaking authority is substantially different from, and does not infer, a grant of authority to interpret statutory language more broadly. *Renda*, 784 N.W.2d at 13 ("[W]e have not concluded that a grant of mere rulemaking authority gives an agency the authority to interpret all statutory language.") (citing as examples *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006) (holding Department of Revenue had not been granted authority to interpret the term "competent evidence" as it is used in chapter 622, though it was granted rulemaking authority)); *Insituform Techs., Inc. v. Employment Appeal Bd.,* 728 N.W.2d 781, 800 (Iowa 2007) (holding labor commissioner was not vested with authority to interpret the term "willful" under penalty provision, though it was granted authority to make rules governing Iowa's occupational safety and health standards); *State v. Pub. Employment Relations Bd.,* 744 N.W.2d 357, 360 (Iowa 2008) (rulemaking authority did not give board authority to interpret a provision which would determine if board had authority to remedy non-willful violations of chapter 20); *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 708 (Iowa 2007) (rulemaking authority did not vest board with authority to interpret whether information was "confidential"); *see also Iowa Land Title Ass'n,* 771 N.W.2d at 402.

Iowa Land Title Ass'n is also point. That case required the Court to resolve a dispute about whether the agency had interpretive discretion of the terms "hardship" and "public interest" as used in section 16.91(5). *Iowa Land Title Ass'n*, 771 N.W.2d at 401. The Iowa Finance Authority had been given express power to adopt rules "necessary for the implementation of the title guaranty program" under section 16.91(8). *Id.* at 402. The agency was also provided the power to "make, alter, or repeal rules consistent with the provisions of chapter 16 of the Iowa Code and pursuant to the Iowa Administrative Procedure Act." *Id.* Despite these extensive grants of power to "effectuate its purpose" and make rules, the Court found the agency had not been vested with a "power to construe statutes." *Id.* Thus, no deference was due to the agency's interpretation of section 16.91(5). *Id.*

Finally, reviewing the statute as a whole, the principle of statutory construction that "the mention of one thing implies the exclusion of other things not specifically mentioned" also supports a finding that no deference to the IPIB is due to the IPIB outside of its powers of rulemaking. *See, e.g., Hawkeye Land Co. v. Iowa Utils. Bd.*, 847 N.W.2d 199 (Iowa 2014) (citation omitted). Section 23.6(2) shows that the legislature in fact deliberated whether the IPIB should be given interpretative authority of chapter 22. It considered this question and specifically addressed it by limiting any interpretive authority the IPIB enjoys to the exercise of rulemaking. There is no clear grant of interpretive authority elsewhere in the enabling statue. *See generally* Iowa Code § 23. This rebuts any notion that the legislature did not contemplate this question but would have intended for the agency to have the power nonetheless.

The IPIB has not actually construed the relevant terms of section 22.7(5) through rulemaking—currently or at the time of its decision. *See* Iowa Admin. Code r. 497 (passim) (lacking any construction or definition of the relevant terms). This notably stands in contrast with

other state agencies which *have* construed those terms. (*See* Argument Section II.B, below, discussing longstanding rules adopted by Iowa Insurance Division and Iowa Utilities Board interpreting relevant terms of section 22.7(5).)

Here, as in *Renda* and *Iowa Land Title Ass'n*, although the IPIB has been vested with rulemaking powers and powers to effectuate its purpose to enforce chapter 22, it has not been expressly or clearly vested with authority to construe the specific terms of law at issue at this case.

2. Interpretation of the statute's relevant terms does not require the special expertise of the agency, and the words have meaning independent of the IPIB's expertise.

The second reason this Court should find that the legislature did not vest the IPIB with interpretive authority over the relevant terms of Iowa Code section 22.7(5) is that those terms have independent legal meaning outside of the expertise of the agency. As in *Renda*, and other cases discussed below, the statute's words at issue in this matter—"peace officers", "investigative reports" (or "investigation" and "report"), "privileged records" (or "privilege" and "record" for that matter"), "immediate", "facts and circumstances" (or "immediate facts and circumstances"), "crime", "incident", or "clear and present danger"—have longstanding and independent legal meaning and significance outside of the enforcement of chapter 22.

The examples of cases referencing or defining these terms, especially within the criminal law and criminal procedure context, are innumerable. A few notable Iowa law sources clearly outside of the IPIB's interpretive authority include Iowa R. Evid. 5.803 (8)(B) exempting investigative reports by police or other law enforcement, or prepared by or for a government, public office, or agency from the public records exception to the hearsay rule; Iowa Code section 80G, cross-referenced by section 22.7(5), describing privilege and confidentiality regarding undercover officers; and Iowa Code section 562A.27A, providing for termination of leases when one tenant creates a clear and present danger to others. Indeed, almost the entire second sentence

of section 22.7(5) can also be found in section 321.271(3), which addresses exceptions to confidential reports under Iowa's motor vehicle code. *Id.* If the phrase were so specialized that it required IPIB expertise, it would not appear verbatim in another chapter of the Iowa Code.

The phrase "Facts and circumstances" can be found in various other chapters of the Iowa Code as well, including: (1) section 554.1303 (used to define "present value" in Article 13 of Iowa's Uniform Commercial Code), (2) chapter 633A (used multiple times in wrongful imprisonment cause of action statute), and (3) section 232.68 (used in subsection defining child abuse under Iowa's juvenile justice code). The criminal corrections subsection of the Iowa Code also refers to the "facts and circumstances surrounding the crime" when addressing supervision during a probationary period. Iowa Code § 907.8.

Additionally, the Supreme Court of Iowa has construed the word "immediate" and "immediately." *See, e.g. State v. Eickelberg*, 574 N.W.2d 1, 4 (Iowa 1997) (construing "immediate control" consistently with dictionary definition of "immediate as 'being near at hand: not far apart or distant.'"); *see also State v. White*, 545 N.W.2d 552, 554-56 (Iowa 1996) (construing "immediately" from its dictionary meaning interpreting statute requiring dealer to have 'the [stamp] permanently affixed on the taxable substance [immediately]').

Myriad examples also occur outside both the criminal law context and Iowa cases. *See, e.g., F.T.C. v. Feldman*, 532 F.2d 1092, 1097 (7th Cir. 1976) (referencing "immediate facts and circumstances" in federal antitrust case); *Curtiss v. Kingman*, 159 F. 880, 883 (1st Cir. 1908) (referencing "immediate facts and circumstances" in federal bankruptcy case); *Davis v. Lacy*, 121 F. Supp. 246, 248 (E.D. Ky. 1954) (referencing "immediate facts and circumstances" in case adjudicating issue of federal diversity jurisdiction); Fed. R. Evid. 501 and Iowa R. Evid. 8.501, and accompanying case law (setting out evidentiary privileges in general); *Brandenburg v. Ohio*,

395 U.S. 444, 449 (1969) (Black, J., concurring) (discussing "clear and present danger" test used in First Amendment jurisprudence).

The precise language of section 22.7(5) being interpreted in this case matters: an agency may have authority to interpret certain portions of a statute but not others. *Renda*, 784 N.W.2d at 13-14. Interpretive authority has been found when the language at issue is a substantive term deemed to be within the special expertise of an agency. *Id.* at 14. For example, the Court ruled that the Iowa Utilities Board had interpretive authority over the "rates and services" provision since they were granted the power to regulate public utility rates. *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 527 (Iowa 2008). By contrast, the Iowa Department of Transportation lacked jurisdiction to interpret "jurisdiction" and "deems necessary" because they are used widely in other areas of law. *City of Des Moines*, 911 N.W.2d at 439. The discretion to interpret a term that has independent legal definition is generally not vested in the agency. *Renda*, 784 N.W.2d at 14.

Like the words "jurisdiction" and "deems necessary," there is nothing unique to the IPIB's expertise about the phrases "investigative report" or "immediate facts and circumstances surrounding a crime or incident" or the individual words therein. "When the statute's language is plain and unambiguous, we will look no further." *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 113 (Iowa 2011) (citing *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 730 (Iowa 2008)). The court may not "extend, enlarge, or otherwise change the meaning of a statute under the guise of construction." *Id. (citing Auen v. Alcoholic Beverages Div.,* 679 N.W.2d 586, 590 (Iowa 2004). Terms of a statute that have plain meaning and are unambiguous will be given their plain and rational meaning. *State v. Caskey*, 539 N.W.2d 176, 177 (Iowa 1995).

Finally, other state agencies have also interpreted the same relevant terms in section 22.7(5). For example, the Iowa Insurance Division regulations provide that "information contained

in [a] communication is a public record to the extent it indicates the date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except to the extent its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person." Iowa Admin. Code r. 191-1.3. It further provides, "[i]n any action challenging the failure of the lawful custodian to disclose any particular information of the kind enumerated in this paragraph, the burden of proof is on the lawful custodian to demonstrate that the disclosure of that information would jeopardize an investigation or would pose a clear and present danger." *Id.* The Iowa Utilities Board has an identical administrative rule. Iowa Admin. Code r. 199-1.9(22). Both rules make clear that a record, or information within a record, that "indicates . . . immediate facts and circumstances" of an incident or crime are not confidential. Iowa Admin. Code r. 191-1.3; Iowa Admin. Code r. 199-1.9(22). The two rules were adopted in 1986 and 1988, respectively, decades before the IPIB was created. *See* Iowa Admin. R. Bulletin ARC 8604—Insurance Division (Apr. 6, 1988) at 1909, *available at* https://www.legis.iowa.gov/docs/publications/IACB/854692.pdf; Iowa Admin. R. Bulletin ARC 6608—Commerce Comm'n (June 4, 1986), at 1830, *available at* https://www.legis.iowa.gov/docs/publications/IACB/854644.pdf. The IPIB, by contrast, has never adopted any rule interpreting the relevant terms of Iowa Code section 22.7(5). *See* Iowa Admin. Code r. 497 (passim) (lacking any construction or definition of the relevant terms).

Because the relevant, specific terms of section 22.7(5) at issue in this case have plain legal meaning independent of the IPIB and are used widely in other areas of law, and by other state agencies, the expertise of the IPIB is not required to interpret section 22.7(5). As a result, no deference to the agency's interpretation of law is due.

3. Iowa Code section 22.7(5) preceded the creation of the IPIB, and courts have interpreted the statute independent of the IPIB both before and after its creation.

Finally, no deference should be given the IPIB's interpretation of the relevant words of section 22.7(5), because the Iowa Supreme Court has interpreted the provisions of section 22.7(5) independently of the IPIB for over 40 years, and nothing in the agency's enabling statute, nor in case law, has altered this interpretation since. *Mitchell*, 926 N.W.2d at 234 (citing to the *Hawkeye* case in 1994 and the *Shanahan* case in 1984) ("We conclude that the legislature has acquiesced in our interpretation of section 22.7(5).")

The construction given to a statute by an agency does not change its legal meaning as determined by the Iowa Supreme Court. *Painters & Allied Trades Local Union 246 v. City of Des Moines*, 451 N.W.2d 825, 826 (Iowa 1990); *Office of Consumer Advocate v. Iowa Utils. Bd.*, 744 N.W.2d 640, 643 (Iowa 2008) ("Regardless of the standard of review" the ultimate interpretation and construction of a statute is "for the courts to decide.").

Section 22.7 was transferred to its current code section from section 68A.7 in 1985. Iowa Code § 22.7. But the provisions for "Examination of Public Records" consisting of sections 68A.1 to 68A.9 date back to 1967. Iowa Code Ann. tit. I, Subt. 9, Ch. 22, Refs & Annos (West 2019). The IPIB was not even created until 2013. Acts 2012 (84 G.A.) ch. 1115, S.F. 430, §§ 4-17. A body of case law interpreting the peace officer's investigative report exemption was in place long before the IPIB, and courts have continued to rely on these precedents to the current day un-impacted by the agency's creation. *See Mitchell*, 926 N.W.2d 222; *Hawk Eye*, 521 N.W.2d 750*; Shanahan*, 356 N.W.2d 523.

Since the courts have already construed section 22.7(5) prior to the creation of the IPIB and have continued to do so after, no deference should be given to the IPIB's conflicting interpretations.

However, even if the court were to find deference due to the IPIB's interpretation of chapter 22 as a general matter, the Iowa Supreme Court's interpretations of section 22.7(5) control as to the matters at issue *in this case*. An interpretation by the agency of a statute in a manner contrary to case law is "irrational, illogical, and wholly unjustifiable" and "arbitrary, capricious, or an abuse of discretion." Iowa Code §§ 17A.19(10)(k)-(n). *See Lechmere, Inc. v. Nat'l Labor Relations Bd.*, 502 U.S. 527, 536-37 (1992) (holding that there is no deference applied to an agency's interpretation of a statute that is inconsistent with a prior court interpretation under principle of *stare decisis*) (citing *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 131 (1990); *see also Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm'n*, 850 N.W.2d 403, 418 (Iowa 2014) ("Decisions by federal courts interpreting the Federal Administrative Procedure Act are persuasive in our interpretation of the IAPA.") *(citing Iowa Citizen/Labor Energy Coal., Inc. v. Iowa State Commerce Comm'n,* 335 N.W.2d 178, 180 (Iowa 1983)).

Either way, therefore, the agency's decision below is reversible error, as set forth below.

B. Standards of Review

The relevant standard of review depends on the deference given to agency interpretation. *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012).

On judicial review, a district court acts in an appellate capacity to correct errors of law by the agency. *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006). The reviewing court may reverse an agency decision that is "affected by an error of law or violative of constitutional or statutory provisions." *Nw. Bell Tel. Co. v. Iowa Utils. Bd.*, 477 N.W.2d 678, 682 (Iowa 1991). The court will "interpret a statute *de novo* in the absence of a delegation of interpretive authority to the agency." *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 186 (Iowa 2013). Absent deference, "[o]ur review is for correction of errors at law and we

are free to substitute our interpretation of the statute de novo." *Tremel v. Iowa Dep't of Revenue*, 785 N.W.2d 690, 692–93 (Iowa 2010).

In the alternative, should the court grant deference to the agency's interpretation of section 22.7(5)'s relevant terms, the court may reverse if the interpretation is "irrational, illogical, or wholly unjustifiable." *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 343 (Iowa 2013); *Burton*, 813 N.W.2d at 256; *Birchansky Real Estate, L.C. v. Iowa Dep't of Pub. Health*, 737 N.W.2d 134, 138 (Iowa 2007); *Lowe's Home Centers, LLC v. Iowa Department of Revenue*, 921 N.W.2d 38, 46 (Iowa 2018)). When interpretive discretion has been vested in the agency by law, courts will review the agency action for abuse of discretion. *Thoms v. Iowa Pub. Employees' Ret. Sys.*, 715 N.W.2d 7, 11 (Iowa 2006).

III. The Final Decision violated Iowa Code chapter 22 and was based on an erroneous interpretation of law whose interpretation was not clearly vested in the agency.

The agency action in this case should be reversed because the Final Decision violated section 22.7(5) in two ways. First, the agency violated the law in regard to the disputed records comprising a peace officer investigative report by failing to engage in a public interest balancing test, as required by longstanding precedent, allowing all the disputed records to be withheld. Iowa Code § 22.7(5). Second, the agency violated the law in regard to the disputed records *not* comprising the peace officer investigative reports—specifically, the 911 call, dashcam, and bodycam records which comprise the immediate facts and circumstances of the incident and which are *not* confidential records absent a showing that releasing them would pose a clear and present danger to an individual. *Id.* Because the legislature has not vested the IPIB with authority to interpret the relevant statutory terms of section 22.7(5), and the IPIB's interpretation was erroneous, the Final Decision should be reversed under section 17A.19(10)(b) and 17A.19(10)(c).

A. The Final Decision failed to apply the Hawk Eye public interest balancing test to the peace officer investigative reports dispute as required by Iowa law.

In its Final Decision, the IPIB held it was "inappropriate to apply a balancing test for the purposes of Iowa Code § 22.7(5)." (AR 1586.) The IPIB's based this determination "on the *Atlantic* case." (AR 1588 (citing *Atlantic*, 818 N.W.2d at 235-36).) However, as recognized by the Iowa Supreme Court earlier this year, application of the *Hawk Eye* balancing test to section 22.7(5) disputes has been required under Iowa law for decades, and nothing in *Atlantic* overturned that precedent. *Mitchell*, 926 N.W.2d at 234.

The Iowa Open Records Act is codified in Iowa Code chapter 22, titled "Examination of Public Records (Open Records)." Iowa Code § 22. The law states that every person has a right to examine, copy, publish, or otherwise disseminate a public record. Iowa Code § 22.2. Public records include "all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county, city, township, school corporation, political subdivision, [or] nonprofit corporation." Iowa Code § 22.1.

The law is intended "to open the doors of government to public scrutiny" and prevent secretive government decision-making from occurring out of view from the public. *Mitchell*, 926 N.W.2d at 229. The presumption favors access to public records. *Id.*

Iowa Code § 22.7 designates certain records as confidential and not subject to disclosure "unless otherwise ordered by a court." *Id.* Disclosure is the rule, and a party seeking confidentiality under an exemption bears the burden of demonstrating its applicability. *Mitchell*, 926 N.W.2d at 229. Exemptions under section 22.7 should be construed narrowly. *Id.*

Section 22.7(5) makes peace officer investigative reports confidential, subject to a public interest balancing test, but exempts from confidentiality altogether the immediate facts of

circumstances of a crime or incident absent a showing that releasing them would present a clear and present danger:

> 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.

Iowa Code § 22.7(5); *Mitchell*, 926 N.W.2d at 234.

In *Mitchell*, the Iowa Supreme Court reaffirmed decades of case law establishing that the *Hawk Eye* public interest balancing test governs determinations of confidentiality of investigative reports under section 22.7(5). *Mitchell*, 926 N.W.2d at 234 ("We conclude that the legislature has acquiesced in our interpretation of section 22.7(5). We first used the three-part balancing test thirty-five years ago in *Shanahan* . . . and then again in 1994 in *Hawkeye*.") (citations omitted).

In determining whether records contained in the investigative file should be released, the three-part balancing test weighs: (1) whether the record is a communication to a public officer; (2) whether, if so, the communication was made in official confidence, and (3) whether the public interest would suffer by disclosure." *Mitchell*, 926 N.W.2d at 233; *Hawk Eye*, 521 N.W.2d at 753; *Shanahan*, 356 N.W.2d at 527-31. The third element requires a public interest balancing test to consider whether the public's interest in access to the records is overcome by the public harm that would be suffered by their release. *Hawk Eye*, 521 N.W.2d at 753. "Determining where the line falls between public harm and public good requires weighing the relative merits of the interests at stake." *Id.; Mitchell*, 926 N.W.2d at 233-34 (employing public interest balancing test to uphold district court determination that records were not confidential).

In *Mitchell*, the Court applied the *Hawkeye* test to weigh the public interest in the ongoing national debate over the use of force by police on unarmed African-Americans, as well as law enforcement arguments that disclosure would impede future investigations, and the fact that the record was devoid of evidence that disclosure would harm any specific individual or witness. 926 N.W.2d at 234-35. The Court specifically rejected the argument that *Atlantic* barred application of the *Hawk-Eye* balancing test to section 22.7(5) disputes. *Mitchell*, 926 N.W.2d at 234.

Here, faced with the law enforcement agencies' failure in the first instance to engage in the required public interest balancing test to determine whether the portion of the records request comprising peace officer investigative reports should be released[1], the IPIB itself then failed to apply that test to adjudicate the records dispute pursuant to section 22.7(5) as required. *Mitchell*, 926 N.W.2d at 236; Iowa Code § 22.10(1) (allowing "[a]ny aggrieved person" to bring a civil enforcement action in district court to enforce their right to the open records."; Iowa Code § 23.5(1) (allowing the person alternatively to file a timely complaint with the IPIB)[2]. Finding no balancing

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[1] In releasing or withholding peace officer investigative reports, the lawful custodian of the records should engage in the required *Hawk Eye* balancing test, and release all appropriate portions of those public records which can be released. Iowa Code § 22.1(2) (defining lawful custodian, and providing "Each government body shall delegate to particular officials or employees to whom responsibility for implementing the requirements of this chapter has been delegated."); *see also Mitchell*, 926 N.W. at 236 ("A protective order limiting disclosure to third parties would be pointless here when any member of the public could obtain the same [investigative] reports [at issue in *Mitchell*] through an Iowa Code chapter 22 open records request.").

[2] This choice of enforcement venue only exists in the absence of a complaint on the same matter to the IPIB. 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 avenue of enforcement, because any direct enforcement action he would have filed in district court would have been stayed pending resolution of the IPIB

test applied and all peace officer investigative reports were confidential, the IPIB dismissed the underlying petition and foreclosed Mr. Klein's ability to access and distribute the public records to which he was entitled under chapter 22.7(5). (AR 1586-88; 1589.)

Applying the *Hawk Eye* balancing test *de novo*, the IPIB's decision should be reversed, and the records in this case should be released to Mr. Klein. First, as in *Mitchell* and *Hawk Eye*, the investigative reports in this matter involve no confidential informant or unidentified suspect. *Mitchell*, 926 N.W.2d at 234; *Hawk Eye*, 521 N.W.2d at 753; (AR 1495). Second, as in "both cases, one officer injured or killed a civilian." *Mitchell*, 926 N.W.2d at 234; *Hawk Eye*, 521 N.W.2d at 753. Third, as in both cases, Klein's public records request "arose only after official investigation into the []incident had ceased." *Hawk Eye*, 521 N.W.2d at 753; *Mitchell*, 926 N.W.2d at 234. In fact, Mr. Klein made his public records request on the day that the investigation was closed. (AR 30-35, 1480.) While the fact that an investigation is no longer ongoing does not strip a peace officers' investigative report of confidentiality, subject to the *Hawk Eye* public interest test, *Mitchell*, 926 N.W.2d at 231-32, it is a factor the Court weighs in determining the public interest in releasing versus withholding the record, *id.* at 234; *Hawk Eye*, 521 N.W.2d at 753.

Fourth, as in *Mitchell* and *Hawk Eye*, this records dispute arose in the context of growing concern regarding police use of force on unarmed civilians. *Id.* (in those cases, excessive force against African Americans in particular was at issue). The Iowa Supreme Court recognizes the strong public interest served by allowing the public to scrutinize claims of police misconduct. *Mitchell*, 926 N.W.2d at 235 (recognizing that "police misconduct is a matter of public concern" in a time where "police shootings have sparked debates nationally about race, policing, and

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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.

community relations."); *State v. Brown*, 930 N.W.2d 840, 849 (Iowa 2019) (recognizing the value of bodycam and dashcam recordings to monitor and reduce racial profiling). The Court also declared over 20 years ago that "allegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern." *Hawk Eye*, 521 N.W.2d at 754. Here, as in *Hawk Eye*, there was, and continues to be, enormous interest locally, statewide, and even nationally in the Burlington PD's shooting of Autumn Steele, the reinstatement of Officer Hill, and suspicions regarding a cover-up garnered widespread local, statewide, and even national public interest. (*See* Facts section III.C, above).

Fifth, whereas in *Mitchell and Hawk Eye*, law enforcement had argued that "disclosure would impede future investigations"—which was insufficient to overcome the weight of the public interest in disclosure, *Id.*—here, law enforcement made no such argument or finding in determining to withhold the investigative report. Instead, the Burlington PD and DCI failed to give any consideration of the public interest whatsoever. The IPIB then, in adjudicating the open records violation, did the same—neither requiring the law enforcement agencies to undertake a review on their own, nor engaging in a review itself. In all three cases—*Mitchell*, *Hawk Eye*, and this one, "the record is devoid of evidence that disclosure would harm any specific individual." *Mitchell*, 926 N.W.2d at 234.[3]

Sixth, this case is even stronger than the one in *Mitchell* because there is no potential to taint a jury pool. In *Mitchell*, defendants had argued disclosure would taint the jury pool. *Id.* at 235. The Court considered weighed the argument but found it insufficient in light of the obligation

[3] The mere fact that records contain communications initially made in confidence is insufficient, without more, to require that they be kept secret. *Mitchell*, 926 N.W.2d at 234 (noting civilian witnesses, like law enforcement officers, should have "an expectation that [they] might be expected to testify in a public proceeding" regarding their communications with officers.).

of counsel from making such statements posing a substantial likelihood of materially prejudicing an adjudicative proceeding. *Id.* at 235. In this case, there is not any such ongoing criminal or civil dispute regarding the incident itself, other than this matter regarding the secrecy of the disputed records, which is not subject to a jury trial.

Under the required *Hawk Eye* balancing test, the IPIB should have ordered the Burlington PD and DCI to release the investigative report to Mr. Klein. The IPIB failed to even apply the *Hawk Eye* public interest balancing test that is required in resolving section 22.7(5) public records disputes and improperly determined all peace officer investigative records could be withheld. Doing so violated Mr. Klein's statutory rights to public records, was based on an erroneous interpretation of law, and must be reversed. Iowa Code §§ 17A.19(10)(b)-(c).

B. The Final Decision violated Iowa Code chapter 22 by finding the requested 911 tapes, dashcam videos, and bodycam recordings of the requested public records constituted confidential peace officers' investigative reports under section 22.7(5).

The IPIB's conclusion that all the public records requested by Mr. Klein—including the 911 tapes, dashcam videos, and bodycam recordings—were confidential peace officers' investigative reports was also reversible error at law. (AR 1586) (relying on *Neer v. State*, 798 N.W.2d 349 (Iowa Ct. App. 2011) (unpublished decision) to find that all records placed in an investigative file become confidential by virtue of their inclusion). The requested 911 tapes, dashcam videos, and bodycam recordings constitute the immediate facts and circumstances of a crime or incident which are not confidential under section 22.7(5), and must be disclosed unless law enforcement can show that disclosure would pose "a clear and present danger" to an individual's safety.[4]

[4] Records comprising the "immediate facts and circumstances"—such as police bodycam recordings, may otherwise be confidential under other state or federal law. For example, to the

While section 22.7(5) sets forth that peace officer investigative reports are confidential (subject to the *Hawk Eye* balancing test, as set forth above), it also contains an exception to the confidentiality of peace officers' investigative reports, requiring disclosure of the "immediate facts and circumstances surrounding a crime or incident." Iowa Code § 22.7(5). This exception reads:

> 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.

Iowa Code § 22.7(5).

In *Mitchell*, the Iowa Supreme Court determined that the district court "acted within its discretion under *Hawk Eye*, consistent with the second sentence of Iowa Code section 22.7(5)" when ordering disclosure of the "investigative reports or electronic communications generated or filed within 96 hours of the incident". 926 N.W.2d at 234-35.

Mitchell thus gives guidance on the word "immediate" in the "immediate facts and circumstances" exception. In this case, the requested 911 tapes, dashcam videos, and bodycam videos Mr. Klein sought were contemporaneous recordings of the facts and circumstances leading up to, during, and after the police shooting. Given *Mitchell*'s guidance that recordings or records produced in the initial 96 hours following the incident were reasonably determined by the district court to comprise "immediate facts and circumstances," the *contemporaneous* recordings of an incident requested by Klein are clearly also immediate.

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extent that footage contains confidential student records (Iowa Code § 22.7(1)), medical records (Iowa Code § 22.7(2)), trade secrets (Iowa Code § 22.7(3)), attorney work product (Iowa Code § 22.7(4)), etc. those specific portions of footage could otherwise be withheld through redaction, 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. However, law enforcement below did not argue that any other provision of law would exclude the records, nor did the IPIB consider any, and those grounds are inapplicable to the analysis here.

Indeed, further instructing is the following colloquy regarding these types of records that took place during oral argument in *Mitchell*:

> Mansfield, J.: Could Cedar Rapids have withheld the dashcam video if they had chosen to do so in your view?
>
> Attorney for City of Cedar Rapids (resisting disclosure): I'm speculating. I'm not sure what went into the decision-making your honor, but as we've talked about earlier, the second sentence of 22.7(5) where the parties are-I'm sorry a public entity-is allowed to disclose the immediate facts and circumstances. That particular dashcam video could constitute the immediate facts and circumstances.
>
> Mansfield, J.: Because you see the concern expressed by the other side that it's one…open government is one thing, and then selective open government is also something that raises a concern when the government only releases what they choose to release–what they choose the public to know. And that strikes me as maybe contrary to the philosophy of chapter 22, don't you agree?
>
> Attorney for City of Cedar Rapids: I don't your honor because, whether it's discovery between the two litigants like us here this evening or entities like the ACLU or any other civil rights organization that wants to obtain public records, 22.7 arguably applies to both of them. Whether it's in discovery or in an open records request.
>
> Appel, J.: But a custodian can release…release in the discretion of the custodian, your position is that the city can release favorable parts of a police investigation and withhold unfavorable parts, right?
>
> Attorney for City of Cedar Rapids: No, because I've already stated I believe that that dashcam video, which recorded that specific facts and instances, is specifically allowed by the second sentence of 22.7(5).
>
> Appel, J.: No, could be. But I guess I'm speaking more broadly. You have an investigative file that contains a hundred some files, some of which might be favorable to the city and some less favorable. Your view would be that the custodian could release, selectively, parts of the file and withhold other parts.

Oral Argument at 38:40, *Mitchell*, 926 N.W.2d 222, https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-oral-argument-schedule/case/18-0124.

The release of the dashcam video by police in *Mitchell* is also consistent with longstanding practice. As both the nightly news on any given day and the record below reflects, 911 calls and dashcam video are routinely released to journalists and reports in response to open records requests. (AR 125-30) (Burlington Hawk Eye brief, below.)

As the ALJ in the case below recognized:

> A 911 call, a bodycam video, and a dashcam video are not the type of information that 'investigating officers have gleaned from communications with other persons" *Shanahan*, 356 N.W.2d at528. Further, a 911 call, a bodycam video, and a dashcam video are not "information about criminal activity or crimes which DCI agents receive from other person and record as part of their files." *Id.* The DCI received these items from the Burlington Police Department or in the case of the 911 call, possibly from "Descom" the Des Moines Communication Center. The disclosure of these items does not threaten the "communications" made to the officer in "official confidence" outlined in any of the cases.

(AR 1495-96.)

The plain meaning of the law is that these types of records comprise "immediate facts and circumstances". The 911 tapes, dashcam videos, and bodycam videos requested are "the immediate facts and circumstances surrounding a crime or incident" because they are literally contemporaneous recordings of the incident: something that is contemporaneous is by definition immediate. "Precise, unambiguous language will be given its plain and rational meaning in light of the subject matter." *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996). The plain and rational meaning for these unambiguous terms can be established by their dictionary definitions. *See State v. White*, 545 N.W.2d at 556.

"Immediate" is defined as "occurring without delay; instant . . . . Not separated by other persons or things." *Black's Law Dictionary* (11th ed. 2019). "Fact" is defined as "something that actually exists; an aspect of reality." *Id.* "Circumstance" is defined as "an accompanying or accessory fact, event, or condition." *Id.*

Under these plain meanings, the requested 911 tapes, dashcam videos, and bodycam videos constituted the immediate facts and circumstances, and should have been ordered released by the Burlington PD, DCI,[5] or the IPIB in adjudicating the records dispute. The 911 tapes, dashcam videos, and bodycam videos requested by Mr. Klein are contemporaneous recordings. There was no "delay" whatsoever in their creation. These records contain the immediate facts recorded as they actually existed at the time of the incident. The 911 tapes, dashcam videos, and bodycam videos leading up to, during, and immediately after the incident make up the circumstances because they are accompanying facts, events, and conditions to the incident itself.

Such a reading is further required by principles of statutory construction. Classifying contemporaneous recordings as outside of the immediate facts and circumstances renders the exception to the confidentiality of investigative reports meaningless. As argued by Mark McCormick before the IPIB below, "[i]t is not enough that the DCI characterizes the material in its file as part of a 'peace officers' investigative report:' 'The nature of the record is not controlled by its place in the filing system.' (AR 1564) (citing *Des Moines Independent School Dist. Public Records v. Des Moines Register*, 487 N.W.2d 466, 670 (Iowa 1992)).) Such a construction is impermissible. *Iowa Civil Rights Commission v. Massey-Ferguson, Inc.*, 207 N.W.2d 5, 7 (Iowa 1973) ("It will not be presumed that useless and meaningless words are used in a legislative enactment, and an interpretation reaching that result should be avoided if possible.").

[5] The records custodian should have made the determination whether "a clear and present danger" existed in the first instance. Iowa Code § 22.1(1) (defining lawful custodian as individual "to whom responsibility for implementing the requirements of this chapter has been delegated."). Such is the longstanding approach notably taken by two state agencies in responding to open records requests from the public. *See* Argument Section II.A.2, above, discussing longstanding rules adopted by Iowa Insurance Division and Iowa Utilities Board interpreting immediate facts and circumstances exception of section 22.7(5).

To withhold records comprising "the immediate facts and circumstances", law enforcement has the burden to show "unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual." Iowa Code § 22.7(5). In this case, however, the Burlington PD and Iowa DCI made no such claim in denying these records to Mr. Klein in response to his open records request, or to the IPIB, instead relying on the spurious notion that such records became confidential peace officer investigative reports only by virtue of DCI designating them as such. (AR 36, 41; 1541; 1551-54.) The IPIB, in its final decision, also made no such finding, instead determining all records law enforcement designates as such are peace officer investigative reports. (AR 1585-86).

Because contemporaneous recordings like 911 calls, dashcam video, and bodycam recordings comprise the immediate facts and circumstances of a crime or incident, they must normally be released under section 22.7(5) absent law enforcement meeting its burden to show that releasing them would pose a clear and present danger. The IPIB's decision violated chapter 22 in determining that the 911 tapes, dashcam videos, and bodycam videos Mr. Klein sought constituted the confidential investigative report, subject to the *Hawk Eye* public interest test, rather than the immediate facts and circumstances of the incident. The IPIB must be reversed on this basis. Iowa Code §§ 17A.19(b)-(c).

IV. The Final Decision was not required by law and had a disproportionate negative impact on private rights and the public interest.

Even if this court determines that it should given deference to one or more of the agency's interpretations of the relevant terms of section 22.7(5), below, it should still reverse the IPIB's 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).

As the Iowa Supreme Court has explained, section 17A.19(10)(k) sets out a specific type of agency action that should be overturned as unreasonable, arbitrary, capricious, or an abuse of discretion:

> Section 17A.19(10) identifies several subsets of unreasonable, arbitrary, and capricious agency action. One of these subsets is agency action that 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." *See id.* § 17A.19(10)(*k*); *see also* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 69 (1998) (noting paragraphs 17A.19(10)(*h*)-(*m*) "provide specific examples of agency action that any reviewing court should *533 overturn as unreasonable, arbitrary, capricious, or an abuse of discretion").

Zieckler v. Ampride, 743 N.W.2d 530, 532–33 (Iowa 2007).

As explained above, the IPIB's decision was not required by law because it violated Mr. Klein's rights to access and distribute public records under chapter 22—both because the *Hawk Eye* public interest balancing test should have been applied to the peace officer investigative report at issue, and because certain records at issue, like the 911 call, dashcam video, and bodycam recordings, didn't belong in the confidential investigative report to begin with, and should have been released because they comprise the immediate facts and circumstances of the incident. Iowa Code § 22.7(5).

The IPIB's decision also had a disproportionately negative impact on the private rights affected by the improper agency action in this case. Here, those rights included not only Mr. Klein's own statutory rights, but also the rights of all persons who seek to enforce their rights to access and distribute public records of law enforcement in Iowa through the IPIB. This necessarily negatively impacts not just members of the public generally in their individual ability to engage in

oversight of law enforcement, but also those reporters, journalists, scholars, community activists, and attorneys whose newsgathering and advocacy work is vital to an informed electorate and a functioning democracy.

The Supreme Court of Iowa has repeatedly recognized the strong public interest served by allowing the public to scrutinize claims of police misconduct. In *Mitchell*, the Court recognized that "police misconduct is a matter of public concern" in a time where "police shootings have sparked debates nationally." 926 N.W.2d at 235. In the context of claims of excessive force by police, the Court declared over 20 years ago that "allegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern." *Hawk Eye*, 521 N.W.2d at 754.

The police have been empowered to deprive civilians of their freedom and other civil liberties, including, in some cases, the use of deadly force. The public has increasingly become engaged in efforts to hold police accountable to ensure police use the power they have appropriately and constitutionally. *See, e.g.,* Jocelyn Simonson, *Copwatching*, 104 Cal. L. Rev. 391, 408 (Apr. 2016) ("Today, given the widespread use of smartphones, civilian recording of police officers is ubiquitous."). While not a panacea, access to police worn body camera footage and other public records recording law enforcement interactions with civilians provides oversight and accountability to the public. *See, e.g.,* Seth W. Stoughton, *Police Worn Body Camera,* 96 N.C. L. Rev. 1363, 1422 (2018). By promoting police accountability, access to recordings of police interactions fosters the reforms that are necessary to increase public confidence in our justice system more broadly.

The Iowa Supreme Court has recognized in dicta that there is a public interest served by monitoring police activity through access to video records. *State v. Brown*, 930 N.W.2d 840, 849

(Iowa 2019) ("We are hopeful, though, that the spread of technology such as body cams, dash cams, and cell phone videos taken by private citizens will enable our society to better monitor and reduce racial profiling in the future.") Indeed, video recordings of police have become an important tool to combat disparities in policing and disproportionate use of force by police, helping to amplify and propel important organizations and efforts for reform, such as Black Lives Matter. Damien Cave and Rochelle Oliver, *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. Times (updated Apr. 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html; Bijan Stephen, *How Black Lives Matter Uses Social Media to Fight the Power*, Wired, Nov. 2015, https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/; German Lopez, *How Video Changed Americans' Views Toward The Police, From Rodney King to Alton Sterling*, Vox.com (Jul. 6, 2016), https://www.vox.com/policy-and-politics/2015/12/10/9886504/police-shooting-video-confidence.

These significant benefits accruing to the public interest, however, are nonexistent if the government can unilaterally decide what can be disclosed and what remains confidential. 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' investigate reports, and further, once so construed, to then fail to employ the required *Hawk Eye* public interest balancing test—a balancing test which itself recognizes the stakes for the public in considerations about confidentiality of law enforcement records.

The withholding of the Steele records has occurred against this backdrop, when police shootings of unarmed civilians have experienced enormous public interest and scrutiny. The

Burlington PD's shooting of Autumn Steele, the reinstatement of Officer Hill, and suspicions regarding a cover-up garnered widespread public interest. (*See* Facts, Section III.C, above.)

Given the recognized societal interest in scrutinizing claims of police misconduct, and the important interests of Mr. Klein and the public in the specific records in dispute in this case, the agency's decision was not only "not required by law," as the *Mitchell* case makes clear, it was grossly disproportionate to the benefits accruing to the public in transparency generally, and in transparency regarding police use of force against civilians specifically. On these grounds, the Final Decision should be reversed. Iowa Code § 17A.19(10)(k).

V. The interpretation of relevant terms of Iowa Code section 22.7(5) and application of that interpretation to the facts were irrational, illogical, and wholly unjustifiable.

No deference should be given to the IPIB's interpretation of chapter 22 for the reasons explained above. However, even if this court gives deference to the IPIB's construction of any of the relevant terms of section 22.7(5), the IPIB's decision should be reversed as irrational, illogical, and wholly unjustifiable. Iowa Code §§ 17A.19(10)(l)-(m).

Declining to apply the public interest balancing test to the disputed records in this case was irrational and wholly unjustifiable, because doing so contravened 35 years of established Supreme Court of Iowa precedent as set forth in *Shanahan* and *Hawk Eye*. *Mitchell*, 926 N.W.2d at 234 ("We first used the three-part balancing test thirty-five years ago in *Shanahan*, and then again in 1994 in *Hawk Eye*. We have not retreated from that approach in any subsequent case applying Iowa Code section 22.7(5)."") (internal citations omitted). This longstanding appropriate legal framework was amply cited to the IPIB not only by the complainants and the IPIB's own prosecutor, but also by the ALJ below, whose proposed decision the IPIB rejected. (*See* AR 175-87 (Klein brief); AR 368-90 (Hawkeye brief); AR 507-09, 585-93 (IPIB Special Prosecutor

McCormick Petition and Resistance brief); AR 706-10, 1491-98 (ALJ Order on Mots. to Dismiss and Proposed Order).)

The Final Decision also found that "information gathered and analyzed as part of the investigation" is considered a peace officers' investigative report. (AR 1586.) Under this interpretation, simply placing a record into an investigative file, and claiming it as such, automatically renders it confidential, even if it is, factually, a record of the immediate facts and circumstances of an incident which the plain text of section 22.7(5) requires to be disclosed. This is an illogical, irrational, and wholly unjustifiable interpretation section 22.7(5) and application of section 22.7(5) to the facts of this case, because it contravened the purpose of the law to ensure greater government transparency and accountability. It also rendered the exception within section 22.7(5) for immediate facts and circumstances meaningless in contravention to normal principals of statutory construction. *Iowa Civil Rights Commission v. Massey-Ferguson, Inc.*, 207 N.W.2d 5, 7 (Iowa 1973).

Additionally, the IPIB found that the County Attorney's release of a summary letter and short bodycam clip provided the immediate facts and circumstances of the shooting as required by law. (AR 1588.) Based on this, it determined that the Burlington PD and DCI were not required to provide the dashcam, body cam, and 911 call records Mr. Klein Sought. (*Id.*) It is irrational to interpret the law as allowing the government to simply write its own account of the immediate facts and circumstances instead of releasing the actual contemporaneous recordings comprising those immediate facts and circumstances. This result is especially illogical when, as was the case here, Klein's interest and the public interest in the disputed public records in this case stemmed in part from a concern regarding a government cover-up. (*See* AR 1-2; AR 16; AR 123; AR 124, 139; AR 182; AR 183; AR 206).

The IPIB's determination is further riddled with irrational, illogical, and wholly unjustifiable reasoning. For example, it determined that it could not apply the *Hawk Eye* public interest balancing test because it does not have authority to interpret and apply section 622.11. (AR 1587.) The statute in dispute was section 22.7(5)–not section 622.11. Furthermore, as the ALJ had recognized, (AR 1491-98), and the cases make clear, the *Hawk Eye* public interest balancing test applies to section 22.7(5) records disputes, regardless of whether it may *also* apply to section 622.11. *Shanahan*, 356 N.W.2d at 528; *Hawk Eye*, 521 N.W.2d at 752-53. Indeed, basing the denial of relief in part on a lack of jurisdiction over section 622.11 was especially unjustifiable because neither the Burlington PD nor DCI ever asserted a privilege from disclosure under section 622.11 in denying Mr. Klein's public records request. (AR 36, 41.)

As a final example of unjustifiable reasoning, the IPIB decision that the County Attorney's summary letter satisfied the immediate facts and circumstances clause of section 22.7(5) was based on the fact that "a portion of the video footage was released." (AR 1588.) But there is nothing in the record to show that the Burlington PD or DCI released the video footage in response to Mr. Klein's public records request. Neither the edited video clip nor the unsealing of federal court filings were a direct response to Mr. Klein's request as required under Chapter 22, and in any case they do not bear on the matter of those records which were *not* disclosed.

For these reasons, even if deference is given, the IPIB's decision should be reversed because the interpretation of chapter 22.7(5), and application of that interpretation to the facts of the case, were irrational, illogical, and wholly unjustifiable. Iowa Code §§ 17A.19(10)(l)-(m).

VI. The Final Decision was unreasonable, arbitrary, capricious, and an abuse of discretion.

The agency action in this case should also be reversed on the grounds that it was unreasonable, arbitrary, capricious, and an abuse of discretion—even if the court gives any

deference to the IPIB's construction of the relevant terms of section 22.7(5). Iowa Code § 17A.19(10)(n). The Final Decision is unreasonable and arbitrary because it accepts the government's unilateral decision-making as to what can cannot be released in conflict with controlling case law governing section 22.7(5) or the plain text of the statute.

In this case, law enforcement made the unilateral decision that 12 seconds of the video would be released, and the IPIB cited this release in support of its conclusion that the immediate facts and circumstances of the incident were properly disclosed. (AR 1588.) The record is devoid of any justification as to why 12 seconds was the appropriate amount of disclosure under Iowa's open records framework for deciding section 22.7(5) records disputes. Why not 13 seconds? Why not 13 minutes? This arbitrary and unreasonable decision is precisely the concern expressed by the Iowa Supreme Court in oral arguments in the *Mitchell* case. (*See* Argument Section III.B, above.)

The Final Decision's conclusion that information included in an investigative file is confidential under section 22.75 was also unreasonable, arbitrary, capricious, and an abuse of discretion. (AR 1585-86.) Under this theory, the government can unilaterally label any record part of an investigative file, without regard for the content or substance of the record, and thereby make it confidential (subject to the *Hawk Eye* public interest test). The government would not even have to show that the record was analyzed in any manner or otherwise used validly for investigative purposes to circumvent the disclosure requirement of chapter 22. This is an absurd result that renders the statute meaningless. Most pointedly for Mr. Klein's case, this eviscerates the plain-text exception for immediate facts and circumstances which the law requires must be disclosed.

For these reasons, the Final Decision should be reversed as unreasonable, arbitrary, capricious, and an abuse of discretion.

CONCLUSION

For the reasons stated above, Mr. Klein requests the following relief:

a. 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 and Burlington PD.

b. An order for the imposition of financial penalties sought by the IPIB prosecutor against the Burlington Police Department and DCI;

c. An award of costs assessed against the IPIB; and

d. Any other relief the Court deems just and proper.

Respectfully submitted,

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All parties served by EDMS.

Printed brief will be hand-delivered to the Court once the clerk accepts and stamps the filing.