IN THE SUPREME COURT OF IOWA

No. 17-1961

OTTUMWA POLICE DEPARTMENT and CITY OF OTTUMWA, IOWA,

Appellants,

versus

MARK LEONARD MILLIGAN,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR WAPELLO COUNTY
THE HONORABLE RANDY DEGEEST
NO. EQEQ110695

APPELLANTS' BRIEF

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ROUTING STATEMENT

The Court should retain this case because it presents matters of first impression, questions of statutory interpretation, and presents fundamental and urgent issues of broad public importance requiring prompt or ultimate

determination by the Court. Iowa R. App. P. 6.1101(2).

STATEMENT OF THE CASE

This is an appeal by the City of Ottumwa (City) from the final orders of the district court namely, a writ of mandamus directing the City to produce to Mark Milligan (Milligan) records he requested, and the award of attorney fees and costs to him.

Milligan initiated litigation on September 12, 2016 by filing a Petition in equity, alleging that the City violated the Iowa Open Records Act by refusing to produce certain requested documents and information. The City answered by asserting the records Milligan requested were confidential and not subject to disclosure under the Driver's Privacy Protection Act and its counterpart, Iowa Code section 321.11, among other grounds. The case largely presented legal issues as the facts were not in dispute.

The City moved for summary judgment, which the district court denied in a one-page ruling. The City filed an amended motion for summary judgment, which the district court also denied.

This matter went to a hearing before the Honorable Randy DeGeest. Several witnesses testified in the short hearing.

The district court concluded the City violated the Open Records statute and ordered the City to produce the records concerning the names of violators Milligan had requested. In the ruling, the district court concluded, "The name of speed regulation violators, which was requested, is information on driving violations, and is therefore, not confidential information under the DPPA or Iowa Code § 321.11." (App. 205). The City filed a timely notice of appeal.

Milligan filed an application for attorney fees and costs. The City resisted. The district court held a half-day hearing on Milligan's application. Milligan and City Attorney Joni Keith testified, and the parties introduced affidavits and other evidence for Judge DeGeest to consider. The district court awarded Milligan the entire amount he requested for a total of $57,315.75. The City filed a timely notice of appeal.

STATEMENT OF FACTS

In March of 2016, the City of Ottumwa (City) began using an unmanned RedSpeed Mobile Enforcement Vehicle. (App. 372-373). RedSpeed is a third-party vendor the City contracted with to provide automated traffic enforcement services. (App. 79-92). The purpose of the vehicle is to enforce speed laws within city limits. (App. 373) (Trial tr. p. 62: 2-5).

The City places the RedSpeed vehicle in areas of town where speed enforcement issues exist. (App. 372-373) (Trial tr. p. 62: 19-25). A certified

officer calibrates the radar and ensures everything is working correctly. (App. 372-373) (Trial tr. p. 62: 19-25, p. 63: 1-12).

The RedSpeed vehicle is equipped with a camera and modem. (App. 374) (Trial tr. p. 63: 14-16). It radars every vehicle that passes its onboard camera to determine whether the vehicle's speed exceeds the predetermined limit established by the City. (App. 155). If the vehicle's speed meets or exceeds the limit, then the camera takes a series of photographs to document the violation and to allow the vehicle's registered owner to be identified. (App. 155, 159). Speeders it records are transmitted via a cellular network to RedSpeed in Chicago, Illinois. (App. 374) (Trial tr. p. 63: 2-25). After undergoing a two-part quality control process, RedSpeed uploads information to an Internet portal. (App. 374, 159) (Trial tr. p. 63).

A certified police officer logs in to the portal to view each proposed speeding citation. (App. 375) (Trial tr. p. 64: 1-10). The officer accesses registered owner information from the National Law Enforcement Telecommunications System (NLETS) database – a database that is not public – and verifies the owner information contained on each proposed citation is true and correct. (App. 375-376) (Trial tr. p. 64: 16-25, p. 65: 1-25, p. 66: 1-25). The officer determines whether to approve or deny the citation based on the City's

guidelines, and ensures that the information on the ticket is correct. (App. 374-376) (Trial tr. pp. 63-65). If approved, the officer transmits the citation back to RedSpeed to process and to send to the vehicle's registered owner. (App. 375, 159) (Trial tr. p. 64: 1-10). The driver of the speeding vehicle is not necessarily the registered owner.

Mark Milligan (Milligan) was employed as a Police Sergeant for the City. (App. 349) (Trial tr. p. 38: 22-23). On May 24, 2016 at or about 8:56 PM the RedSpeed car found a City police vehicle, Iowa License Plate 500733, speeding 41 MPH in a 25 MPH zone. (App. 174). As Milligan was the driver of the police vehicle, the City gave the citation to Milligan. (App. 349-350, 355-356) (Trial tr. pp. 38-39, 44-45).

On or about August 1, 2016, Milligan, in his individual capacity, submitted a written request to the City under Iowa Code Chapter 22.[1] (App. 363-364) (Trial tr. pp. 52-53). Milligan requested a number of records regarding the City's automated traffic enforcement vendor, RedSpeed, and the use of the RedSpeed vehicle by the City.

[1] City Clerk Valent testified at the hearing that the City's time stamp was "supposed to be August 1st [2016]" but the City's file stamp system date and time had not been changed to August 1st when Milligan's request was received. (App. 363-364)(Trial Tr. pp. 52: 19-25, 53: 1-8). Thus, Milligan's request was in fact received by the City on August 1, 2016.

Milligan specifically requested "The names of violators issued citations from the Ottumwa Police Department once the violation is reported by Red Speed (sic) to the City of Ottumwa Iowa (sic)". (App. 76). He also sought, "The names of violators not issued citations after being reported as violations by the Ottumwa Police Department." (emphasis in original) (App. 76).

Milligan did not provide waivers to the City from the registered owners of the vehicles. (App. 186-189).

Police Lieutenant Mickey Hucks (Lt. Hucks) testified at the hearing that he handles all of the FOIA requests for the police department. (App. 380) (Trial tr. p. 69: 21-25). Upon learning of Milligan's request for the names of violators and non violators, Lt. Hucks contacted RedSpeed and the Iowa Department of Public Safety (DPS). (App. 382, 386-387) (Trial tr. p. 71: 6-24, p. 76: 2-25, p. 77: 1-8). Lt. Hucks spoke with Attorney Barb Edmundson, who represents DPS, regarding Milligan's requests and his own questions and concerns. (App. 387) (Trial tr. p. 76: 5-18). Attorney Edmundson shared her opinion with Lt. Hucks. (App. 387-388) (Trial tr. p. 76-77). Lt. Hucks also raised his concerns to the City Attorney, Joni Keith. (App. 386-387) (Trial tr. pp. 75: 15-25, 76: 1).

After speaking with Attorney Edmundson, Lt. Hucks responded to Milligan's third and fourth requests in writing by stating, "Information obtained by

RedSpeed is accessed through NLETS portal and is confidential information under state and federal law." (App. 388, 391) (Trial tr. p. 77: 3-8, p. 80). Otherwise the City complied with Milligan's requests.

Milligan admitted at the hearing that he did not follow up or touch base with the city clerk's office or police department regarding any specific records that he felt they should have provided him. (App. 358) (Trial tr. p. 47: 1-21).

Ten days after receiving the City's response, on September 12, 2016 Milligan filed a Petition alleging that the City violated the Iowa Open Records Act by refusing to produce the information he requested in numbers three and four of his request of August 1, 2016. (App. 359) (Trial tr. p. 48: 8-11).

Additional facts are recited in the City's argument.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ORDERING THE CITY TO PRODUCE RECORDS TO MILLIGAN.

Standard of review

The standard of review for actions under Chapter 22 is de novo. Gannon v. Bd. of Regents, 692 N.W.2d 31, 37 (Iowa 2005). The standard of review of questions of statutory construction is for the correction of errors at law. Zimmer v. Vander Waal, 780 N.W.2d 730, 730 (Iowa 2010); Estate of Ryan v. Heritage Trails Assocs., Inc.,745 N.W.2d 724, 728 (Iowa 2008).

Preservation of Error

The City preserved error on this issue by raising it in its Motion for Summary Judgment (App. 22-23), Amended Motion for Summary Judgment, Motion for Judgment on the Pleadings (App. 190-194), and a notice of appeal.

A. The Driver's Privacy Protection Act.

In 1994, Congress enacted the Driver's Privacy Protection Act (DPPA). See 18 U.S.C. §§ 2721 – 2725. Congress enacted the DPPA in response to privacy concerns and mounting public safety concerns over the easy access by stalkers and other criminals of personal information kept by state motor vehicle departments. Maracich v. Spears, 133 S.Ct. 2191, 2198 (2013); Locate.Plus.Com, Inc. v. Iowa Dep't of Transp., 650 N.W.2d 609, 614 (Iowa 2002).

The DPPA regulates the disclosure of "personal information" found in the records of state motor vehicle departments. Spears, 133 S.Ct. at 2195. Congress provided the specific meaning of "personal information" as used in the DPPA. Under 18 U.S.C. section 2725(3), " 'personal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, *name*, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3) (2017) (emphasis added). In defining "personal information", the statute states it "means", therefore, the "clear import is that this is its only meaning." See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 226 (2012) (When a definitional section states "that a word 'means' something, the clear import is that this is its only meaning").

18 U.S.C. section 2721(a) generally bars disclosure of personal information in a driver's motor vehicle record. 18 U.S.C. § 2721(a) (2017). But under 18 U.S.C. section 2721(b), personal information may be disclosed for a use authorized in a list of 14 statutory exceptions under 11 categories. See 18 U.S.C. § 2721(b) (2017); Locate.Plus.Com, 650 N.W.2d at 615 (recognizing states have the discretion to disclose personal information for a number of purposes).

Under 18 U.S.C. section 2722, "It shall be unlawful for any person knowingly to *obtain* or *disclose* personal information, from a motor vehicle record, for any *use* not permitted under section 2721(b) of this title." 18 U.S.C. § 2722 (2017) (emphasis added). The disclosure restrictions of the DPPA apply to the state government, in addition to persons or entities who have obtained the information from motor vehicle departments. Locate.Plus.Com, 650 N.W. 2d at 615.

Violations of the DPPA constitute a criminal offense. Section 2723 of the DPPA criminalizes a person's knowing violation of the chapter. 18 U.S.C. § 2723 (2017). Additionally, section 2724 creates a civil cause of action against "a person who knowingly obtains, *discloses* or *uses* personal information, from a motor vehicle record, for a purpose not permitted under this chapter [who] shall be liable to the individual to whom the information pertains…". 18 U.S.C. § 2724 (2017) (emphasis added). McDonough v. Anoka Cty., 799 F.3d 931, 945 (8th Cir. 2015) ("It is clear that under § 2724, obtaining drivers' information without a permissible purpose, regardless of whether that information is subsequently used, violates the DPPA."). "There are substantial fines and penalties imposed for state agencies or private persons who violate the provisions of the Act, in addition to liability in civil proceedings." Locate.Plus.Com, Inc., 650 N.W.2d at 615.

1. The District Court Erred in Interpreting and Constructing 18 U.S.C. § 2725.

In resolving issues of statutory construction, the starting point is the language of the statute itself. Watt v. Alaska, 451 U.S. 259, 265-66 (1981) (internal quotation omitted); accord Nordgren v. Burlington Northern R. Co., 101 F.3d 1246, 1250 (8th Cir. 1996); McGill v. Fish, 790 N.W.2d 113, 118 (Iowa 2010). Where Congress expressly provided a statutory definition, as it did in this case, the language of that definition is controlling. See Burgess v. U.S., 553 U.S. 124, 129 (2008). As Justice Cardozo explained, "definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves." Fox v. Standard Oil Co. of New Jersey, 294 U.S. 87, 96 (1935) (per Cardozo, J.).

Under 18 U.S.C. section 2725(3), Congress provided a specific definition of the term "personal information" as used in the DPPA. The text of the statute expressly states, "In this chapter…'personal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include

information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3) (2017). Thus, under the text of the law, information that identifies an individual constitutes personal information. See 18 U.S.C. § 2725(3) (2017).

The district court erred in constructing the statute. The task of constructing section 2725(3) starts with the statute's plain language. In relevant part, section 2725(3) states, " 'personal information' means information that identifies an individual, including an individual's…name…but does not include information on…driving violations…" Based on the statute's plain language, an individual's name constitutes confidential "personal information" under the DPPA. But "information…on driving violations" is not "personal information". "Information" is not defined in the statute. Thus, the question in this case is what is the meaning of "information" "on driving violations" under the statute?

Courts must give words their ordinary and common meaning by considering the context within which they are used, absent a statutory definition or an established meaning in the law. See Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291, 295 (Iowa 2015) (citation omitted). "Information" is defined as "(1): knowledge obtained from investigation, study, or instruction (2): intelligence, news (3): facts, data." Merriam-Webster Dictionary (2018) https://www.merriam-

webster.com/dictionary/information. Thus, in context, "information" "on driving violations" includes facts and data. It follows that general information about driving violations, such as the location of violations or statistics about driving violations, is not personal information regulated under the DPPA. This makes sense in the context of the chapter, which Congress intended to protect individuals' personal information and privacy, because the location of a violation or statistics is information (data and facts) that cannot be used to identify an individual. See Sanon v. City of Pella, 865 N.W.2d 506, 511 (Iowa 2015) (citation omitted) (recognizing the court considers the entire chapter to ascertain proper meaning in context).

The general-specific canon suggests that Congress intended to limit the scope of "information" "on driving violations" to general information and not more specific "information that identifies an individual", such as an individual's "name". It is well-established that the more specific term controls the general term. See Teamsters Local Union No. 421 v. City of Dubuque, 706 N.W.2d 709, 715 (Iowa 2005) Messerschmidt v. City of Sioux City, 654 N.W.2d 879, 884 (Iowa 2002); Berger v. Gen. United Grp., Inc., 268 N.W.2d 630, 638 (Iowa 1978). Applying this canon here, it is obvious that "information that identifies an individual" is more specific than the general word "information". This is further evidenced by section 2725(3)'s other words and context. Congress provided a nonexclusive list

of specific examples of what constitutes "information that identifies an individual, *including* an individual's…*name*." 18 U.S.C. § 2725(3) (2017) (emphasis added); see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 132-133, 226 (2012) ("Include" introduces examples, not an exhaustive list. "When a definitional section says that a word "includes" certain things, that is usually taken to mean that it may include other things as well."). It follows that an individual's "name" is more specific "personal information" than "information".

The district court's reading of the statute renders its express terms superfluous. It is a "fundamental rule of statutory construction that [the court] should not construe a statute to make any part of it superfluous." Petition of Chapman, 890 N.W.2d 853, 857 (Iowa 2017); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 520 (Iowa 2012) (" 'we will not read a statute so that any provision will be rendered superfluous' "). In this case, the specific phrase "information that identifies an individual" and its list of examples, such as an individual's "name", precedes "but does not include information…on driving violations…" in the statute. In providing three examples of what does not constitute personal information, Congress limited those examples to "information" in the general sense. The general term "information" immediately precedes "driving violations". Thus, "information" modifies "driving violations". Given that "information" is more general than "information that identifies an individual", particularly an

individual's "name", the district court should have read the statute to give meaning to the more specific language. But the court ignored the specific phrase and plain language of the statute, which prohibited the City from disclosing personal information, such as individuals' names.

Additionally, the district court's construction of section 2725(3) does not give full effect to the purpose and intent of the DPPA, or the spirit of the chapter, which is to protect drivers' privacy. See Teamsters, 706 N.W.2d at 716 (reasoning that interpretation of law as argued would not give full effect to the purpose and intent of statute).

Finally, the district court erred by essentially rewriting the definition of "personal information" to state "…but does not include information *that identifies an individual*…on driving violations." (added words in italics). In doing so, the court erred in light of the well-settled maxim that courts may not add modifying words to a statute or change its terms. See State v. Dann, 591 N.W.2d 635, 639 (Iowa 1999); see also Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291, 295 (Iowa 2015) (courts "may not extend, enlarge, or otherwise change the meaning of a statute under the guise of construction."); Ranniger v. Iowa Dept. of Revenue & Fin., 746 N.W.2d 267, 270 (Iowa 2008) (court is bound by what the legislature wrote); Snook v. Herrmann, 161 N.W.2d 185, 190 (Iowa 1968) (it is not

the function of the courts to rewrite a statute). Moreover, the court is prohibited from "reading something into the law that is not apparent from the words chosen by the legislature." In re Marshall, 805 N.W.2d 145, 160 (Iowa 2011) (reiterating court must not disregard the language of a statute employing a fallacious theory of construction in attempt to impose court's own ideas as it invades the province of the legislative branch of government) (internal citation and quotation omitted). Had Congress wanted to exclude from the definition of "personal information" information that identifies an individual on driving violations, then it would have done so.

In short, the district court erroneously constructed the statute to conclude that "[t]he name of speed regulation violators…is information on driving violations…" (App. 205). The district court erred as the plain language of the statute allows only the disclosure of general information on driving violations, but not information that identifies an individual, such as an individual's name. It is apparent that Congress simply intended to not classify certain general information, such as data or statistics, as "personal information", but defined the term in such a way to ensure that "information that identifies an individual" remains "personal information" subject to the DPPA. In constructing the DPPA, the district court erred.

2. The District Court Erred in Ordering the City to Disclose Personal Information to Milligan because he had no Permissible Use.

Under 18 U.S.C. section 2721(b), personal information may be disclosed for a use authorized in a list of 14 statutory exceptions under 11 categories. See 18 U.S.C. § 2721(b) (2017). The district court completely ignored 18 U.S.C. section 2721(b)'s use requirement.

Milligan failed to provide the requisite written consent of the motorists to allow the City to disclose their confidential personal information. See 18 U.S.C. § 2721; Iowa Code § 321.11(2) (2017) (requiring the express written consent of a person to release their confidential personal information to a requestor). In this case, it is undisputed that Milligan has not obtained releases from any individuals.

As such, Milligan must (1) provide the City with facts to establish that he met the specific requirements under 18 U.S.C. § 2721(b), and/or (2) show a permissible use under that section. See Locate.Plus.Com, 650 N.W. 2d at 616-617 (identifying and discussing the specific categories of permissible users of confidential information and their associated permissible uses).

The first requirement makes practical sense because if a request, on its face, lacks sufficient information for the City to determine whether a requestor qualifies, then they must deny the request under the DPPA. See 18 U.S.C. §§ 2721 – 2722.

Otherwise the City would run the risk of both criminal and civil prosecutions, as well as administrative action by the federal government or NLETS. See 18 U.S.C. §§ 2723 – 2724. Indeed, motorists have brought civil claims for violations of the DPPA. See e.g., Spears, 133 S.Ct. at 2196 (resident motorists sued trial lawyers licensed to practice in South Carolina for obtaining and using confidential information without their consent). Because the disclosure restrictions of the DPPA apply to the state government, as well as persons or entities who have obtained the information from the state motor vehicle department, the City simply may not disclose confidential information without the requisite showing by the requestor. See Locate.Plus.Com, 650 N.W. 2d at 615. Moreover, as a matter of law, "a government agency could not receive personal information under § 2721(b)(1) if the information was being used for a private purpose." Id. (citing DeVere v. Attorney General, 781 A.2d 24, 28-29 (N.H. 2001).

Milligan fails to fall under a qualifying class of persons authorized to receive and use confidential personal information. In this case, it is undisputed that Milligan was acting as a private citizen. His request is devoid of any indication that he was acting as someone other than a private citizen. To the contrary, Milligan provided his personal home address, personal email address, and personal telephone number on his request. (App. 74-78). Further, Milligan made no representation that he was acting on behalf of any permissible user identified in §

2721(b). It is evident that he is not a government agency, business, insurer, private investigative agency, or employer. While Milligan was an employee of the City, he was not acting in his official capacity as a peace officer. Thus, Milligan failed to meet the person requirements of § 2721(b).

Further, it is undisputed that Milligan's request failed to supply the City with any permissible use under 18 U.S.C. § 2721(b). See also Iowa Code § 321.11(2) (2017). Therefore, Milligan's request is barred under the DPPA and section 321.11.

Additionally, the names of registered owners issued or not issued citations under the RedSpeed program are property of the states, accessed through NLETS, and therefore are not subject to Iowa's Open Records Act. See generally U.S. v. Story County, Iowa, 29 F.Supp.3d 861, 872 (S.D. Iowa) (concluding emails were federal records and not subject to Iowa's Open Records Act).

In short, Milligan wasn't within the qualifying class of persons authorized to receive and use confidential personal information under the DPPA, he failed to provide any record evidence to establish he qualified under the law, and the district court failed to correctly apply the Act's requirements to the facts of this case.

3. The District Court Erred in its Application of the DPPA to the Facts.

Even assuming *arguendo* that the district court did not err in interpretating

and constructing the DPPA, regardless, the court erred in applying the law to the facts. Specifically, the district court erroneously ordered the City to produce records that Milligan did not request and the City did not have, and the court's order is inconsistent with its own findings of fact.

Preliminarily, it is important to note that the City does not challenge the district court's finding that Milligan's written request was for the names of individual drivers. (App. 205). It is apparent from the court's order that it considered Milligan's request as seeking the names of the drivers of vehicles, not the registered owners. This is evident from the court's analysis, "The Plaintiff's denied requests were for the names of *individuals* who have violated the speed regulation as reported by RedSpeed." (emphasis added) (App. 205).

The district court's finding is supported by a plain reading of Milligan's request and common sense. Despite Milligan's vague and ambiguous phrasing of his request, his use of the word "violator" indicates he seeks the *drivers* that RedSpeed caught speeding. (emphasis added). This makes sense as only individuals (human beings) have the ability to drive a motor vehicle in excess of the posted speed limit. Unless the registered owner is an individual, the owner cannot drive a vehicle.

Moreover, what Milligan expressly left out of his August 1, 2016 written

request is telling. Milligan did not specifically request the names of the vehicles' registered owners who the City did, or did not, issue notices to. Given that he was a police sergeant and had more experience with DOT records than the average citizen, if Milligan wanted the owners' names, he could have made such a specific request. Therefore, the City agrees with the district court that Milligan's requests were for the names of drivers.

Notably, the district court ordered the City to provide Milligan "the requested information" without specifiying what information the City was ordered to provide. Is it the names of the drivers, the names of the vehicles' owners, or both? The City will now turn to the Court's erroneous application of the law to the facts.

The district court erred in applying the law to the facts. To the extent the district court's order requires the City to provide Milligan with a list of the names of the drivers, the court's ruling was inconsistent with its own findings of fact. The district court found RedSpeed "provides the violating vehicle's information" to the City. (App. 201). RedSpeed does not provide the name of the drivers it finds speeding to the City.[2] The undisputed evidence showed the City didn't issue citations to the drivers of the vehicles caught speeding rather the City sent notices

[2] It is evident from the record that ATE systems such as RedSpeed are unlike a traditional traffic stop where a police officer identifies the driver of a car because RedSpeed identifies the vehicle's registered owner through NLETS.

to the registered owners. The driver and the registered owner may or may not be one and the same. Moreover, the City does not know or possess the names of the drivers, except for Milligan as he was a City employee. (App. 445) (Fee Hearing tr. p. 18: 9-25). Therefore, the City has no names to provide Milligan other than his own.

To the extent that the district court's order commands the City to create a list of the names of registered owners issued notices and to provide it to Milligan, the court erred. Such an order would be inconsistent with the district court's finding that Milligan's requests were for the names of "*individuals*". (App. 205). What's more, the district court cannot rewrite Milligan's request, much like the court cannot rewrite the statute as addressed above.

Finally, even if the district court did not misconstrue the DPPA, Milligan's request for the names of violators not issued citations must fail because, under the district court's own reasoning, the violators' names is not "information on driving violations". If the City issued no notice of citation, then no violation occurred. Thus, their names would fall outside of the classification, and therefore, the DPPA bars disclosure. Therefore, the district court erred in applying the law to the facts.

B. Iowa Code Section 321.11(1).

The Iowa Legislature followed in the footsteps of the DPPA, amending Iowa

Code section 321.11 to bar disclosure of records "made confidential and not permitted to be open" under the DPPA. Iowa Code § 321.11(1) (2017); Locate.Plus.Com, 650 N.W.2d at 615. Further, it prohibits disclosure to a requestor unless permitted under 18 U.S.C. § 2721. Id. Overall, Section 321.11 is nearly identical to the DPPA.

Under Iowa Code section 321.11, "personal information" means information that identifies a person, including a person's photograph, social security number, driver's license number, *name*, address, telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status or a person's zip code. Iowa Code § 321.11 (2017).

Considering the almost identical statutes, the City reincorporates its arguments from section "A" herein. The City notes that in the event of a conflict between the DPPA and Iowa law the DPPA prevails. U.S. Const. art. VI, cl. 2 ("…the Laws of the United States…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Where a conflict exists between the Iowa Public Records Act and the DPPA, "it is the state statute that must give way." U.S. v. Story County, Iowa, 28 F.Supp.3d 861, 877 (S.D. Iowa

2014) (citing Oklahoma v. United States, 161 F.3d 1266, 1272 (10th Cir. 1998)).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING UNREASONABLE AND EXCESSIVE ATTORNEY FEES AND COSTS TO PLAINTIFF.

Preservation of Error

The City preserved error on this issue by raising it in its Resistance to Milligan's Application for Attorney Fees and Costs (App. 237-243), at a hearing on Milligan's application, and by filing a notice of appeal.

Standard of Review

A district court's award of attorney fees and costs is reviewed for an abuse of discretion. City of Riverdale v. Diercks, 806 N.W.2d 643, 659 (Iowa 2011).

Argument

Under Iowa Code section 22.10(3)(c), the court shall order the payment of all costs and reasonable attorney fees, including appellate attorney fees, to any plaintiff successfully establishing a violation of Iowa Code Chapter 22. Iowa Code § 22.10(3)(c) (2017). In City of Riverdale v. Diercks, the Diercks sought security camera video of a confrontation with the mayor from the City of Riverdale (Riverdale). 806 N.W.2d at 645-46. For sixteen months Riverdale litigated the case in the district court, and lost to the Diercks. Id. at 645-651.

The Diercks' attorney, Michael Meloy[3], submitted a fee application to the court under Iowa Code section 22.10(3)(c) seeking recovery of attorney fees in the amount of $71,225. Id. at 649-50. His application claimed an hourly rate of $175.00 per hour, and a total of 407 hours. Id. at 650. Riverdale did not contest Meloy's hourly rate; they contested whether the hours Meloy worked on the case were reasonable, arguing his hours were "excessive". Id. The district court reduced Meloy's fee award by 37.1 hours or $6,493 for work post-trial that the court found excessive, but awarded $64,732 in fees. Id. at 650-51.

On appeal to the Iowa Supreme Court, the issue presented by Riverdale was whether the district court abused its discretion in determining the amount of the Diercks' attorney fees. Id. at 659. Notably, while Riverdale conceded Attorney Meloy's rate of $175 per hour was reasonable for the area, it disputed the reasonableness of his hours. Id. The Court affirmed the district court's award, concluding the court did not abuse its discretion in determining the amount of Diercks' award. Id.

In considering whether the issue, the Court reiterated the longstanding principle that the district court is an expert in what constitutes a reasonable attorney fee and it has wide discretion in determining the amount of an award. Diercks, 806 N.W.2d at 659 (internal citation omitted).

[3] Attorney Meloy is a former city attorney.

The Court explained that the reason the statute requires the court to award successful litigants attorney fees " 'is to ensure that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies' of the statute". Diercks, 806 N.W.2d at 653 (quotation omitted). The Court observed that statutory attorney-fee awards motivate lawyers to step up and fight city hall on behalf of residents whose elected officials refuse requests for disclosure. Id. at 645.

Additionally, the Court highlighted significant litigation activities of the parties in its reasoning. Before trial, the parties deposed thirteen witnesses. Id. at 659. Both parties filed pretrial motions, including summary judgment motions. Id. At trial, eighteen witnesses testified, including expert witnesses for both parties. Id. The trial lasted for three days. Id.

What's more, the Court pointed out that Riverdale employed two separate law firms and two experienced trial attorneys to prosecute its case through a three-day trial. Id. at 659. The Court noted that much of his Attorney Meloy's time was spent because of Riverdale's handling of the case. Id. Therefore, the Court held that the district court did not abuse its discretion in reducing the Diercks' award to $64,732 in fees. Id.

Although the district court has "wide discretion" in determining what

constitutes a reasonable fee award, the court's discretion is not limitless. Lynch v. City of Des Moines, 464 N.W.2d 236, 240 (Iowa 1990).

The district court must determine the whether the applicant has met its burden of proof. "An applicant for attorney fees has the burden to prove that the services were reasonably necessary and that the charges were reasonable in amount." Diercks, 806 N.W.2d at 659 (internal quotations and citations omitted); Vaughan v. Must, Inc., 542 N.W.2d 533, 541 (Iowa 1996) ("The plaintiff has the burden of proving both that the legal services performed were reasonably necessary and the charges themselves were reasonable.") (citing Green v. Iowa Dist. Ct. for Mills County, 415 N.W.2d 606, 608 (Iowa 1987)).

To meet its burden, the applicant must submit competent evidence to the district court to evaluate. "The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); see also Grunin v. International House of Pancakes, 513 F.2d 114, 127 (8th Cir. 1975) ("…attorneys are generally required to submit detailed affidavits which itemize their fee claims."); In re Polo Builders, Inc., 397 B.R. 396, 409 (Bankr. N.D. Ill. 2008) ("An attorney seeking a large fee owes the court a coherent statement of the work done, the necessity for the work and its reasonableness and value in light of the results achieved.").

The district court must consider factors, such as

> the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibilities assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar services.

Vaughan, 542 N.W.2d at 41 (quoting Landals v. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990)).

A. In considering the factors to determine the reasonableness of an attorney fee award application, the district court relied on clearly unreasonable and/or untenable grounds.

Preliminarily, the City addresses the district court's failure to make detailed findings of fact regarding the factors it considered in deciding the fee award. The district court must make "detailed findings of fact with regard to the factors considered" as part of an attorney fee award. Dutcher v. Randall Foods, 546 N.W.2d 889, 896 (Iowa 1996) (internal citations omitted); accord Boyle v. Alum-line, Inc., 773 N.W.2d 829, 833 (Iowa 2009). As the Court in Dutcher noted with approval, the court's findings must be concise and provide a clear explanation of the reasons for the fee award. Dutcher, 546 N.W.2d at 897 (citation omitted).

In this case, the City addressed each factor before the district court. (App. 237-243, 489-509) (Fee Hearing tr. pp. 62-82). Despite this, the court made no findings and no reference to most of the factors, including the time necessarily

spent, the nature and extent of the service, the amount involved, the skills requisite to perform the legal services, the undesirability of the case, or awards in other Open Records cases. Thus, this Court must reverse the district court's award of attorney fees.

Further, the district court's findings were minimal and lack sufficient detail. For example, in reasoning that an hourly rate of $400 for Attorney Gardner was reasonable, the district court explained, "It is true that Mr. Gardner's hourly rate is higher than many attorneys practicing within the Ottumwa area; however, his level of experience is commensurate with that rate." (App. 309) (Ruling 2/22/18 at 4). Although the court referenced Gardner's "litigation experience", it made no findings or particular details on what specific experience Attorney Gardner had to support such a rate. As detailed below and in the City's arguments before the district court, the City disputed Attorney Gardner's experience in Open Records matters. But the district court made no detailed findings as required.

Similarly, the district court found "Attorney Gardner's work on this case has been stellar". (App. 309) (Ruling 2/22/18 at 4). But this is entirely subjective, conclusory, and is devoid of details. Further, the district court failed to specify what factor related to his finding. The City assumes the district court was referring to the nature and extent of the service factor, but it is unclear given the court's

silence.

In summary, this Court must reverse the district court because it failed to provide detailed findings related to the applicable factors.

Next, the City addresses the factors the district court expressly or implicitly referenced in its ruling. Because the district court did not address some of the factors in its ruling, the City will not address them herein, but reserves all arguments presented to the district court below as to each factor.

1. The difficulty of handling the case (novelty and difficulty of the questions) and importance of the issues.

The district court noted that this case involved issues of federal, state, and local law. The City does not disagree with this finding. But the City challenges the district court's weighing of this factor in Milligan's favor. Just because a case involves different bodies of law does not make it complicated. This wasn't a patent case, an employment discrimination case, or an antitrust case, for example. It is an Open Records case that presented straight forward facts, which the parties largely did not dispute, and the issues were mostly legal issues, such as statutory construction and interpretation.

Further, the court noted "Open Records litigation is not typically within the wheelhouse of general practice lawyers." (App. 309-310) (Ruling at p. 4-5). There

was no evidence in the record to support this finding. What's more, even if general practice attorneys don't usually handle such cases, that doesn't transform the case at bar into a difficult case. It depends on each case. While this case is important to Milligan, there were no findings how it is important to the public at large. Thus, the court's reasoning is untenable.

2. The standing and experience of the attorney.

The district court found that Attorney Gardner is an experienced litigator. (App. 309). The City does not dispute that he is an experienced attorney. But the City challenges Attorney Gardner's experience in the practice of Open Records cases. (App. 494-497) (Fee Hearing tr. pp. 67-70).

Milligan had the burden of proof, but Attorney Gardner introduced no evidence concerning his experience *in any Open Records* case(s) to support a rate of $400.00 per hour. Milligan failed to provide substantial evidence to support his experience in Open Records matters, therefore the district court erred.

The district court abused its discretion by relying on Gardner's general experience in non-Open Records cases, such as employment matters and other civil matters, and misapplied the experience factor. This is significant because an attorney who is experienced in a specific practice area commonly receives a higher market rate commensurate with his experience in that field. The Oregon Supreme

Court's decision in Moro v. State, 384 P.3d 504, 515-16 (Or. 2016), is illustrative. There, three attorneys sought an hourly rate of $500 per hour in a Public Employee Retirement System case. One of the attorneys established his normal rate for labor and employment work was $315 per hour, except for unions, which received a discounted rate because they were long-standing clients. Id. at 515. Two of the attorneys failed to offer evidence of their usual market rate. Id. After observing that "[a] court should not rubberstamp hourly rates, particularly when an attorney seeks rates beyond what he or she ordinarily would receive from paying clients and when the rates sought are at the very top of the market, such as those in this case", the court affirmed the top-of-the-market hourly rate of $500 for two of the attorneys. Id. The court explained that both attorneys had substantial experience in PERS litigation, noting that PERS cases are "generally high stakes and are both factually and legally complicated." Id. But the Court reversed the award of $500 for the third attorney, reasoning that he had no particular experience in PERS litigation. Id. The court awarded him $350 per hour. Id.

Like the attorneys in Moro, Attorney Gardner sought a top-of-the-market hourly rate. Despite seeking top-dollar, similar to two of the attorneys in Moro, Gardner failed to introduce evidence of his usual market rate. But unlike Moro, the district court in this case failed to consider Attorney Gardner's lack of record evidence concerning his experience in Open Records matters.

The district court should have concluded a higher hourly rate is only justified where an attorney has actual experience in the particular type of litigation at bar, here, in Open Records matters. Notably, it is axiomatic that courts of this state routinely reason that an attorneys experience in a particular practice area, such as employment law, weighs in considering the reasonableness of an award.

What's more, the district court should have weighed the experience factor against Attorney Gardner because he presented no record evidence of his hourly rates, despite suggesting in his own affidavit that his rate is different for Open Records matters (App. 283-284), and Gardner failed to support his application with evidence of his experience in Open Records matters. These points also suggest the district court should have reduced Attorney Gardner's hourly fee and the overall award.

In short, the district court's reliance on Attorney Gardner's general "litigation experience" was unreasonable and untenable.

Because of the lack of appellate guidance on this issue, the City requests this Court to hold that the district court must consider the applicant's attorney's experience in the particular practice area, including in Open Records matters, and the court must make specific findings as to this issue. Such a rule is needed out of fairness to the municipalities and taxpayers, to guard against abuse by

unscrupulous attorneys, to ensure that district court's simply do not rubberstamp an applicant's request, such as in this case, and to provide clarity to the bar and lower courts in the future.

3. The customary charges for similar services.

Milligan provided no evidence of what the customary fee in an Open Records matter is in the Ottumwa area. Therefore, Milligan did not meet his burden of proof.

Although the district court's ruling did not expressly reference the customary charge for similar services factor, it appears the court considered it. The court referenced an affidavit from Attorney Michael Guidicessi, claiming an approved hourly market rate of $620 per hour, which was discounted to $475 per hour for his client. (App. 309). The court did not reference any of the City's affidavits from attorneys who had practiced in Open Records matters. (App. 257-260, 285-287, 296-297). The City's evidence showed hourly rates ranging from $175 to $225 per hour. (App. 257-260, 285-287, 296-297). The court noted the City pointed to an Iowa Court of Appeals decision where an hourly rate of $175 was affirmed. (App. 309). The court reasoned that the $400 rate Attorney Gardner requested was within the range of hourly rates. (App. 309).

The district court misapplied that factor. The district court considered the

customary charges for similar services based on the hourly rate for the entire state of Iowa rather than the prevailing market rate in the Ottumwa community. See Dutcher v. Randall Foods, 546 N.W.2d 889, 896 (Iowa 1996) (internal citations omitted) (The hourly rate is based on the "prevailing market rates in the relevant community."). In considering the range of fees, the district court took a broad view of the "relevant community" in considering the customary charge for similar services. More specifically, the court relied upon Attorney Guidicessi's affidavit for the figure approved by the Eighth Circuit Court of Appeals in the amount of $475, but that was a case outside of the Ottumwa area, and therefore not in the "relevant community". The only record evidence before the court of the customary fee for similar services in the Ottumwa area was offered by the City. (App. 449-450, 257-260) (Fee Hearing tr. pp. 22-23). The district court should have considered the City of Ottumwa and its immediate surrounding area in analyzing the customary fee factor, weighed this factor against Milligan, or at least reduced his award, particularly given that Milligan offered no evidence to establish what the customary charge for similar services was in the Ottumwa community. In relying upon charges from outside of the Ottumwa community and ignoring Milligan's lack of evidence, the district court's grounds are unreasonable and untenable.

This Court should hold that in analyzing this factor, the district court must

consider the customary fee for similar services in the relevant local area, or an analogous community. So holding promotes the district court considering customary fees in accordance with the local market. The customary rate for an attorney in a given practice area varies from community to community, and depends on what the market will bear. For example, generally, the customary fee for attorneys in Des Moines is higher than the fee for attorneys in Ottumwa. What's more, so holding encourages fairness. It is unfair for the taxpayers of the City of Ottumwa to pay fees not customarily charged by local attorneys, especially in a case such as this where the applicant's attorney in fact practices in Ottumwa. It's also unfair for the taxpayers of Ottumwa to have to pay Attorney Gardner's claimed rate of $400 per hour considering there is no record evidence that Gardner had ever been awarded such a hefty rate in the past, let alone in an Open Records case.

B. The District Court Abused its Discretion in Awarding Milligan Costs.

Milligan failed to meet his burden of proof regarding costs as no receipts or itemizations were provided. (App. 242, 506-507) (Fee Hearing tr. pp. 79: 12-25, 80: 1-7). The district court made no findings regarding Milligan's requested costs; the district court's decision is not supported by substantial evidence. The court simply rubberstamped his application. This was an abuse of discretion.

The City does not contest Milligan's filing fee of $185.00. But the City contests his other costs and postage as no receipts were supplied in support of Milligan's request, and postage is not supported by Iowa Code. See Iowa Code § 625.7 (2017) ("Postage paid by the officers of the court, or by the parties, in sending process, depositions, and other papers being part of the record, by mail, shall be taxed in the bill of costs."). Therefore, this Court should reverse the district court's award.

C. The District Court Abused its Discretion by Simply Rubberstamping Milligan's Application.

Although the district court has "wide discretion" in determining what constitutes a reasonable fee award, the court's discretion is not limitless. Lynch, 464 N.W.2d at 240. As courts across this country have recognized, the district court's role is not to simply rubberstamp an applicant's request. See e.g., Moro v. State, 384 P.3d 504, 515 (Or. 2016) ("A court should not rubberstamp hourly rates, particularly when an attorney seeks rates beyond what he or she ordinarily would receive from paying clients and when the rates sought are at the very top of the market, such as those in this case."); Golba v. Dick's Sporting Goods, Inc., 190 Cal. Rptr. 3d 337, 352 (Ca. Ct. App. 2015) (Recognizing under California law, "[t]he court has a duty, independent of any objection, to assure that the amount and mode of payment of attorney fees are fair and proper, and may not simply act as a

rubberstamp for the parties' agreement.") (internal quotation omitted); Concepcion v. Amscan Holdings, Inc., 168 Cal. Rptr. 3d 40, 54 (Ca. Ct. App. 2014) ("A trial court may not rubberstamp a request for attorney fees, but must determine the number of hours *reasonably* expended.").

This Court should reverse the district court's award of attorney fees because the court simply rubberstamped Milligan's application. In First Nat. Bank in Eureka v. Beckstrom, the Montana Supreme Court held an applicant's hourly rate that was double the attorney's normal rate should be cut in half, reasoning "[i]t does not engender public confidence on the bench and bar for a court to rubberstamp a demand for attorney fees, especially when that demand is double the usual hourly billing rate of the attorney." 651 P.2d 45, 50 (Mont. 1982). The Montana Court's reasoning applies perfectly here.

In this case, the district court abused its discretion by rubberstamping Milligan's application for attorney fees and costs; simply rubberstamping Milligan's application was to exercise no discretion at all.

The district court has the power to reduce an applicant's requested award. See e.g., Hensley, 461 U.S. at 433 (recognizing district court's power to reduce fee award where the documentation of hours is inadequate). Indeed it is common for courts of this state to reduce an applicant's request for fees and costs. See e.g.,

Diercks, 806 N.W.2d at 659; but see Olinger v. Smith, 892 N.W.2d 775, 787 (Iowa Ct. App. 2016) (unpublished) (district court's reduction of hourly rate reversed and $175 fee hourly fee sought by applicant approved). But the district court made no reduction in any of Milligan's fees or costs. Moreover, the court made no detailed findings, addressed above, and provided scant reasoning to support such a hefty award. The district court should have substantially reduced Milligan's award as it was rife with block billing, inadequate and deficient proof, and was excessive.

This Court should reverse the district court's award of fees and costs. Attorney fee awards are not intended to be a windfall for the plaintiff, which is what happened in this case. While the district court must award *reasonable* attorney fees and costs upon finding a violation of Chapter 22, the court's excessive award encourages citizens and their attorneys to race to the courthouse. In cases such as this, where the City made good faith attempts to address the issue, including with Iowa Public Information Board and Iowa Department of Public Safety's counsel, and where Milligan sprinted to file several actions just days after receiving the City's response, a hefty award is unreasonable. Reversing the district court's decision is in the interest of conserving limited judicial resources and ensuring the system is fair both for the public and the government.

CONCLUSION

The district court should not have concluded the City violated the Open Records Act in declining to provide Milligan records pursuant to the Driver's Privacy Protection Act and Iowa Code section 321.11. In constructing and interpreting the law, the district court erred by failing to follow the plain language of the law and well-established maxims. The court essentially rewrote the law and rendered textual provisions surplusage. Moreover, the district court erred in applying the law to the facts. The court's ruling was inconsistent with its own findings of fact and Milligan's records request. This Court must reverse the district court's ruling.

This Court should reverse the award of attorney fees and costs because Milligan failed to meet his burden of proof, and because the district court's decision was not supported by substantial record evidence.

Further, the district court abused its discretion by awarding Milligan unreasonable attorney fees and costs. Despite the City's detailed contentions, the district court made no reductions in Milligan's award. The court simply rubberstamped Milligan's application without detailed findings of fact or sufficient analysis. Moreover, the court improperly weighed factors in Milligan's favor, despite Milligan's failure to introduce sufficient evidence to support his

application. In considering the attorney fee and cost issue, the City requests this Court to clarify the factors and provide clear guidance upon remand and for the future.

REQUEST FOR ORAL ARGUMENT

The City requests oral argument.

PROOF OF SERVICE

The undersigned certifies that on the 24th day of August, 2018, he served the Appellants' Brief on counsel for the Appellee electronically using the EDMS. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of the Iowa Court Rules.

Skylar Limkemann

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 8,709 words, excluding the parts of the brief exempted.

2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type.