IN THE SUPREME COURT OF IOWA

No. 20-0902

POLK COUNTY ASSESSOR RANDY RIPPERGER,

Plaintiff-Appellant,

v.

IOWA PUBLIC INFORMATION BOARD,

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY FARRELL, PRESIDING

APPELLANT'S FINAL BRIEF

JOHN P. SARCONE
Polk County Attorney

MEGHAN L. GAVIN
Assistant Polk County Attorney
Polk County Administration Bldg.
111 Court Ave., Suite 340
Des Moines, Iowa 50309
P: (515) 286-2285
F: (515) 286-3314
Meghan.Gavin@polkcountyiowa.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes and Regulations:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the board members should have disqualified themselves due to actual and perceived concerns about board members impartiality.

AUTHORITIES

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006)

Iowa Code section 17A.17(1)(*a*)

Iowa Code section 17A.19(10)(*e*)

State v. Johnson, 744 N.W.2d 646, 649 (Iowa 2009)

Botsko v. Davenport Civil Right Comm'n, 774 N.W.2d 841, 850 (Iowa 2009)

Iowa Code section 17A.11(1)

Iowa Admin. Code r. 481—15.1

Iowa Code section 17A.17(2)

Iowa Code section 17A.17(1)(*b*)

Blinder, Robinson & Co., Inc. v. Goettsch, 431 N.W.2d 336, 341 (Iowa 1988)

Iowa Code section 17A.17(5)

Iowa Code section 17A.17(4)

State v. Smith, 242 N.W.2d 320, 323–24 (Iowa 1976)

Forsmark v. State, 349 N.W.2d 763, 767–68 (Iowa 1984)

II. Whether the IPIB has the burden of proof to demonstrate that the requested information is not confidential under Iowa Code section 22.7.

AUTHORITIES

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006)

Iowa Code chapter 23

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

2012 Iowa Acts, ch. 1115, section 4

Iowa Code section 23.10(1)

Iowa Code section 22.10(2)

Diercks v. Malin, 894 N.W.2d 12 (Iowa Ct. App. 2016)

Jahnke v. Deere & Co., 912 N.W.2d 136, 143 (Iowa 2018)

Ramirez-Truijilo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016)

State v. Mathias, 936 N.W.2d 222, 228 (Iowa 2019)

Iowa Code chapter 23.11

In re Langholz, 887 N.W.2d 770 (Iowa 2016)

Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 45 (Iowa 1999)

Iowa Code chapter 23.1

III. Whether no record exists responsive to Mr. Kauffman's public records request.

AUTHORITIES

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006)

Iowa Code section 17A.19(10)(*f*)

Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011)

Iowa Code section 17A.19(10)(c), (m)

IV. Whether IPIB erroneously determined that a list of citizens' oral and written requests for confidentiality were not "communications" the Assessor reasonably believed citizens would be discouraged from making if they were made public.

AUTHORITIES

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006)

Iowa Code section 17A.19(10)(c)

Iowa Code section 22.7(18)

City of Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895 (Iowa 2012)

V. Whether the safety concerns of private citizens outweighs any public interest in the release of this information.

AUTHORITIES

Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006)

Iowa Code section 23.11

In re Langholz, 887 N.W.2d 770 (Iowa 2016)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court under Iowa Rule of Appellate Procedure 6.1101(2)(c), (d). This case presents a matter of first impression and an issue of broad public importance, namely, the prosecutorial duties of the Iowa Public Information Board. As the state agency charged with advising and enforcing Iowa's Open Records and Open Meetings Acts, adjudication of the Board's burden of proof in contested cases will affect the enforcement of these Acts on every state agency, county board, municipality, and school district in the state.

STATEMENT OF THE CASE

Polk County Assessor Randy Ripperger filed a Petition for Judicial Review of the Iowa Public Information Board's (IPIB) decision determining that he violated Iowa's Open Records Act by refusing to release a list of property owners who had submitted oral or written requests to disable the name search function for their properties. As matter of first impression, the Assessor argues that IPIB failed to meet its burden of proof by presenting no evidence that the disputed record was not confidential under one of the articulated exceptions in the Open Records Act.

FACTUAL AND PROCEDURAL HISTORY

The operative facts of this case are largely undisputed. In late March 2017, Polk County Assessor Randy Ripperger met with the Des Moines Register Editorial Staff. App. 1. Following the meeting, the Assessor and former Des Moines Register reporter Clark Kauffman exchanged emails following up on several points discussed at the meeting. App. 1. Mr. Kauffman inquired as to the number of property owners who had requested to have the name-search function for their

properties disabled on the Assessor's website. App. 34. At some point in the exchange, Mr. Kauffman requested to examine the list of people who had submitted written requests to have the name-search function disabled and/or the written requests. App. 33. The Assessor denied the request noting that his website told property owners that their requests would remain confidential—a commitment he intended to honor—and he reasonably believed in good faith that the requests were confidential under Iowa Code section 22.7(18). App. 33.

After Mr. Kauffman was unable to change the Assessor's mind, he emailed a complaint to the IPIB's Executive Director Margaret Johnson on April 6, 2017. App. 35. The former Des Moines Register reporter complained that the Assessor denied him access to "the list of 2,166 ***property owners who had filed written requests*** with the county asking that their names be pulled from the assessor's web site search engine." *Id.* (emphasis added). Director Johnson was charged with conducting an investigation into the Kauffman complaint. App. 36. The sole means of investigation were

communications with the Assessor's attorney, Assistant Polk County Attorney David Hibbard. App. 94. At no time during the nine-month investigation did Director Johnson interview the Assessor, any of his employees, or any affected property owners. App. 94–98. At no time during the nine-month investigation did Director Johnson secure a copy of or inspect any written requests from property owners asking for the name-search function be disabled or a list of property owners whose names were not searchable on the Assessor's website. App. 94–95. At no time during the nine-month investigation did Director Johnson inquire into the affected property owner's employment, whether the property owners wished this information to remain confidential, or why the Assessor reasonably believed that property owners would not have made these requests had they known they would be made public. App. 95.

On January 12, 2018, Director Johnson drafted and filed a Revised Probable Cause Report recommending that the Board find probable cause that the Assessor violated the Open Records Act. App. 36. On January 18, 2018, the Board

issued a Probable Cause Order, adopting the recommendation of the Probable Cause Report and directing the prosecutor to issue a statement of charges to initiate a contested case hearing. App. 41. The Board's designated prosecutor filed a Petition to Commence a Contested Case Proceeding Before the Iowa Public Information Board on February 28, 2018, which was later amended on March 5, 2018 and January 7, 2019. App. 1.

A contested case hearing was held before Administrative Law Judge Kristine M. Dreckman on March 29, 2019. App. 44. The Board's prosecutor submitted a number of exhibits and called Mr. Kauffman as its sole witness. App. 28–43, 79. Following the minimal presentation, the Assessor moved for a directed judgment as the Board's prosecutor presented no evidence that the records were not confidential under the Open Records Act. App. 79. The motion was denied. App. 87. In his case in chief, Mr. Ripperger called the Director Johnson, Des Moines Police Sergeant Paul Parizek, former Iowa Supreme Court Justice Michael Streit, Assistant Polk County Attorney Jeffrey Noble, and clinical psychologist Dr. Heidi

Warner, PhD. The ALJ issued her proposed decision on July 19, 2019. App. 248. The ALJ found the disputed records not confidential under Iowa Code chapter 22, relying upon a novel argument not asserted by the parties and not supported by legal precedent. App. 261. The Assessor filed a timely notice of appeal to the entire board and filed a Motion to Disqualify. App. 7, 258, 274.

After additional briefing and oral arguments, IPIB affirmed the proposed decision on November 21, 2019. App. 258. The Board found that the Assessor had the burden of proof, found that the Assessor had not met his burden that the records were confidential, and refused to consider the Assessor's affirmative defenses. App. 259–60. In a separate order, the members refused to disqualify themselves as decisionmakers. App. 274. The Assessor filed a timely notice of appeal of the Board's final decision as well as the decision on the Motion for Disqualification.

The judicial review was heard by the Honorable Jeffrey Farrell. App. 299. Although the district court adopted a different legal analysis than the Board, it ultimately reached

the same conclusion—the Assessor violated the Open Meetings Law by refusing to release the names of private property owners who had requested that their properties not be searchable by name. The district court found that the IPIB did not have the statutory duty to prove that the disputed records were not confidential and found that the while the records were communications from persons outside government the Assessor's belief that people would be deterred from making such requests if they knew they would be public was illogical. App. 316. The Assessor filed a timely notice of appeal.

Additional facts will be set forth below as necessary.

ARGUMENT

I. The Board Members Should Have Disqualified Themselves Due to Actual and Perceived Concerns About Board Members Impartiality.

A. Error Preservation and Standard of Review. The Assessor raised this issue before the district court and it was ruled upon. App. 306. "When a district court exercises its authority on judicial review, it acts in an appellate capacity to correct any errors of law by the agency." *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006). This Court

applies the standards set forth in the IAPA to determine if the district court properly applied the law. *Id.*

B. Argument. Iowa Code section 17A.17(1)(*a*) states, "[A] presiding officer in a contested case shall not communicate directly or indirectly with any person or party in connection with any issue of fact or law in that contested case, except upon notice and opportunity for all parties to participate. . . ." Iowa Code § 17A.17(1)(*a*). On November 15, 2018, the IPIB heard the Assessor's request for a prehearing conference. All parties received notice of the request and were provided an opportunity to participate in the discussion. At the conclusion of the hearing, the Board voted unanimously to allow the prosecutor and the parties to pursue informal settlement. The vote closed the hearing on the Assessor's motion for a prehearing conference. After the Board heard the Assessor's motion, it voted to take a short break before resuming the meeting. Members of the Board thanked the Assessor's attorneys for attending and wished them well. The attorneys left the meeting at that time.

Unfortunately, as the audio recording of the meeting evidences, Board members and staff continued their discussion of the above-captioned case despite the conclusion of the hearing and despite the Board having gone into recess. The audio—while poor—reveals that at least two, possibly three, Board members and the Board's Executive Director (a named witness in the case and the complaint's sole investigator) discussed factual and legal issues surrounding the case. For example, they can be heard discussing Dave Hibbard's previous statements about the existence of a responsive record, Iowa Code section 22.7(18), what names are on the list, whether "they did the right thing on that one," and whether one of the members is convinced if the list is or is not a public record. The Assessor was not given advance notice of these discussions nor an opportunity to participate. Other Board members were seemingly also unaware of these discussions as they can be heard discussing other, unrelated matters during the recess. When the Board came out of recess, it immediately moved to the next item on the agenda—

further evidencing that the hearing in *this* case ended upon the Board's vote.

As a result of these communications, the Assessor respectfully requested that the Board either allow the Administrative Law Judge to serve as final arbiter or ask the Governor to appoint a substitute decisionmaker. The Board declined. In refusing, the Board erroneously misinterpreted its duty under the Iowa Administrative Procedure Act and put an untenable burden of proof on the Assessor. The Board's order should be reversed under Iowa Code section 17A.19(10)(*e*) as "the product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification."

The statutory prohibition on ex parte communications is broad. It prohibits a presiding officer from talking to *any* other person. The term "any" means all or every person. *State v. Johnson,* 744 N.W.2d 646, 649 (Iowa 2009). This prohibition includes other presiding officers. To interpret the statue otherwise would defeat legislative intent. Allowing presiding

officers to discuss, deliberate, and arguably prejudge a case violates the basic tenants of due process. Since no evidence had been introduced, the Board should not have been discussing any alleged facts. Since no argument had been made by the parties, the Board should not have been discussing the intricacies of Iowa Code chapter 22. Most importantly, since no contested case had been held at that time, the Board should not have been deliberating on the ultimate issue—whether the disputed record is confidential under Iowa law. The district court incorrectly noted that agency personnel could talk to each. That is true about nonsubstantive issues related to the contested case. Of course, agency personnel will talk to Board members about scheduling and other administrative matters. Adjudicators, however, cannot and should not talk to witnesses, investigators, and others about the *merits* of a pending contested case.

Contrary to the Board's assertion, issues of fact and law were discussed during the conversation. The Board's own prosecutor acknowledged that one of the Board members

questioned whether the requested names are public record (the ultimate issue in the case) and even mentioned the specific statutory exception at issue. App. 275. The prosecutor also asserted that a Board member made disparaging comments about the Assessor's attorneys. App. 275. Moreover, the Board and the district court wholly failed to recognize that the *perception* of fairness is equally as important to an actual conflict of interest. *See Botsko v. Davenport Civil Right Comm'n*, 774 N.W.2d 841, 850 (Iowa 2009) (quoting *Nightlife Partners, LTD., et al. v. City of Beverly Hills*, 133 Cal. Rptr. 2d 234, 242–43 (Cal Ct. App. 4th 2003) (noting that procedural due process requires " 'the *appearance* of fairness and the absence of even a *probability* of outside influence on the adjudication.' ") (emphasis in original)). Board members are subject to the Iowa Code of Administrative Judicial Conduct when serving as presiding officers in a contested case proceeding. Iowa Code § 17A.11(1). Like the Iowa Code of Judicial Conduct, the Iowa Code of Administrative Judicial Conduct requires presiding officers to "uphold and promote the independence, integrity, and

impartiality of the administrative judiciary and shall avoid impropriety and the ***appearance*** of impropriety." Iowa Admin. Code r. 481—15.1 (emphasis added). No reasonable person would expect to receive a fair hearing under these facts and circumstances.

The involvement of the Board's Executive Director and witness in the discussion was equally problematic. Section 17A.17(2) prohibits presiding officers from discussing a pending contested case with any Board staff that personally investigated the case. While the Executive Director may not consider herself to be an investigator, she gathered all relevant information and drafted the Board's probable cause order. She served as the investigator in this matter. Moreover, at the time of the discussions, the Director had been listed as a witness in the case and, in fact, did later testify at the contested case hearing. As such, the Director should not have had any substantive discussions with the Board on the pending case or offered them advice as to "whether they handled that one correctly." *See* Iowa Code § 17A.17(1)(*b*);

Blinder, Robinson & Co., Inc. v. Goettsch, 431 N.W.2d 336, 341 (Iowa 1988).[1]

The ex parte communications, which occurred here, have not been cured. *Id.* § 17A.17(5). To date none of the participating Board members nor the Director reported this inappropriate conversation—despite the Assessor questioning their impartiality and an affirmative statutory duty do so. *Id.* § 17A.17(4). In its refusal to disqualify, the Board noted that the Assessor did not present sufficient information about the conversations to warrant refusal. Such information, however, is not in the Assessor's possession—nor could it be. The Board cannot have it both ways. The Board cannot refuse to disclose the nature of its conversations and simultaneously

[1] The mere fact that the Assessor happened to be present on the phone, does not make these conversations permissible. Chapter 17A and due process require notice and an opportunity to be heard. The Assessor did not have an opportunity to participate in the off-record discussions. The Board's reliance on this happenstance is troubling. Had the Assessor not stayed on the line—unbeknownst to the Board—he would presumably not have received any notice of this discussion.

hold that there is not sufficient evidence to warrant disqualification.

When presented with a motion for recusal or disqualification, judges must make a record that discloses all relevant facts and circumstances relating to the motion and then determine whether a reasonable person with knowledge of all the facts and circumstances would conclude that the judge's impartiality could be reasonably questioned. *See State v. Smith*, 242 N.W.2d 320, 323–24 (Iowa 1976); *Forsmark v. State*, 349 N.W.2d 763, 767–68 (Iowa 1984). The Board did not do so here. The existence of this inadvertently recorded conversation calls into question whether other inappropriate communications and conversations have occurred in the year and a half this matter was pending. After all, Board members and staff were not constrained from engaging in this discussion despite the fact that it took place during a recess of a public meeting and was being recorded. Small boards are particularly susceptible to ex parte violations. The Board had an obligation to be transparent. A duty they woefully ignored.

Because the Board members should have been disqualified, the Board's order must be reversed.

II. The IPIB Has the Burden of Proof to Demonstrate that the Requested Information is Not Confidential under Iowa Code section 22.7.

A. Error Preservation and Standard of Review. The Assessor raised this issue before the district court and it was ruled upon. App. 308. This Court applies the standards set forth in the IAPA to determine if the district court properly applied the law. *Winnebago Indus., Inc.*, 727 N.W.2d at 571.

B. Argument. Throughout this litigation, the parties have disputed the appropriate burden of proof. The Board construes chapter 23 only require it to investigate and prove (1) that a public records request was made; and (2) that the government entity did not release records pursuant to that public records request. The Assessor, conversely, has and continues to argue that chapter 23 requires the Board to prove that he violated the Open Records Act. Under the plain reading of chapter 22 and 23, the Assessor cannot *violate* the Open Records Act by refusing to release records deemed confidential by the Open Records Act.

The district court incorrectly construed chapter 23 to be silent on the burden of proof. That conclusion, however, ignores the plain language of the chapter and the admission by the Board's Executive Director that public officials have no duty to release confidential records. Because it was based upon this erroneous interpretation of law whose interpretation has not clearly been vested by a provision of law in the agency's discretion, the Board's decision should be reversed under Iowa Code 17A.19(10)(*c*); *see Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8 (Iowa 2010) (discussing the rare circumstances when an agency will be afforded discretion).

While the Open Meetings and Open Records Acts share a long history in Iowa, the Board is a more recent invention. Created by chapter 23, the Board's enabling statute was passed in 2012. 2012 Iowa Acts, ch. 1115, § 4. Pursuant to Iowa Code section 23.10(1), the IPIB is required to "initiate a formal investigation" of a complaint within its jurisdiction. "[A]fter an appropriate investigation" the board shall make a "determination as to whether the complaint is within the board's jurisdiction and whether there is probable cause to

believe that the facts and circumstances alleged in the complaint constitute a ***violation of chapter 21 or 22***" (emphasis added). *Id.*

The language in chapter 23, specifically the repeated use of the term "violation" as the standard, is directly contrary to the civil enforcement language in the Open Records Act. The civil enforcement action in Iowa Code section 22.10(2) explicitly sets forth a burden-shifting process. The section provides,

> Once a party seeking judicial enforcement of this chapter demonstrates to the court that the defendant is subject to the requirements of this chapter, that the records in question are government records, and that the defendant refused to make those government records available for examination and copying by the plaintiff, the burden going forward shall be on the defendant to demonstrate compliance with the requirements of this chapter.

Iowa courts have recognized and applied this burden-shifting analysis in numerous cases cited by the Board. *See, e.g.*, *Diercks v. Malin*, 894 N.W.2d 12 (Iowa Ct. App. 2016).

The burden shifting explicit in civil enforcement actions is not found anywhere in the Board's enabling chapter. Instead, the General Assembly repeatedly charged the Board

with investigating and prosecuting violations of chapter 22. Had the legislature intended the Board's burden of proof to be equivalent to that of a civil enforcement action it would have said so. It did not. This Court must presume that this choice was deliberate and give different meaning to the General Assembly's use of different words. *Jahnke v. Deere & Co.*, 912 N.W.2d 136, 143 (Iowa 2018) (quoting *State v. Iowa Dist. Ct.*, 730 N.W.2d 677, 679 (Iowa 2007) (" 'Statutory text may express legislative intent by omission as well as inclusion,' and we may not read language into the statute that is not evident from the language the legislature has chosen."); *see also Ramirez-Truijilo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016) (noting that this Court interprets a statute based upon the words chosen by the legislature and not based on what they should have or could have said).

Under the plain reading of chapter 23, IPIB is charged with investigating and prosecuting *violations* of Iowa Code chapter 21 and 22. The Board is not charged with investigating and prosecuting public record denials. Therefore, the Board has the burden to prove more than (1) an

open records request was made, and (2) the government official declined to produce records responsive to part or all of the request. To prove a *violation* of the Open Records Act, the IPIB must prove that the records in question were not deemed confidential under that same act. Director Johnson agreed with this common sense approach. Director Johnson acknowledged during her testimony that if the requested records were deemed confidential under section 22.7, an official would not be legally compelled to release them, and no violation of chapter 22 would occur. App. 102.

This construction is also consistent with the statute when construed as a whole. *See State v. Mathias*, 936 N.W.2d 222, 228 (Iowa 2019) (noting that when construing a statute, the court will consider the statute as a whole and not give undue meaning to particular sections). In Iowa Code section 23.11, "A respondent may defend against a proceeding before the board . . . on the ground that if such a violation occurred it was harmless error or that clear and convincing evidence demonstrated that grounds existed to justify a court to issue an injunction against disclosure pursuant to section 22.8."

Notably, section 23.11 does not state that an affirmative defense to a Board action are the exceptions listed in 22.7. The only "defenses" recognized in 23.11 are harmless error and grounds justifying an injunction under 22.8.

As the Iowa Supreme Court has recognized, the injunctive power under 22.8 is independent of the exceptions in 22.7. *In re Langholz*, 887 N.W.2d 770 (Iowa 2016). In other words, even if a record is public under chapter 22 and does not meet an exception in 22.7, an injunction may nevertheless be granted if release of the record is clearly not in the public interest and examination would substantially and irreparably injure any person or persons. *Id.* at 777; *see also Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999).

The district court erroneously determined that the General Assembly could not have intended the Board's burden of proof to be greater than a private citizen's in a civil enforcement action. Not only is this conclusion contrary to the explicit language chosen by the legislature in drafting chapter 23, it also is contrary to common sense. The statutory purpose of the IPIB is to provide "an alternative means" of

securing compliance with Iowa's Open Meetings and Open Records Acts. Iowa Code § 23.1. The Board process was never intended to replicate the civil process. More importantly, the Board process is easier for complainants. Private citizens do not have to hire a lawyer to complain to the Board. Private citizens do not have the burden to bring the case or to present evidence.

By creating the Board, the General Assembly did create a less cumbersome path for citizens to pursue open records enforcement. None of this, however, means that the legislature intended the path to be easier for the *Board*. The legislature created the Board and endowed it will investigatory, prosecutorial, and adjudicative power. It did not create the Board to be a clearinghouse for open records complaints. Under the Board's construction of its statutory obligations, government agencies—like the Assessor—are subject to prosecution and sanction by the Board for withholding records deemed confidential by Iowa Code section 22.7.[2]

[2] The Assessor further questions the depth of investigation conducted in this case. As noted previously,

The Board's reliance on appellate decisions to support its interpretation is misplaced. Every appellate case cited by the Board does not interpret the Board's obligations under chapter 23. These cases exclusively deal with the civil enforcement actions of chapter 22 initiated by private individuals or cases where government entities have affirmatively sought an

---

Director Johnson was charged with investigating Mr. Kaufmann's complaint. During her testimony, Ms. Johnson acknowledged that she did not interview the Assessor, did not interview the five staff members charged with operating the Assessor's website and database, and did not seek release of the relevant data within the Assessor's possession. Ms. Johnson testified that she failed to take these steps because the Assessor was represented by counsel. Despite repeated questioning on the matter, Ms. Johnson could not and did not explain why she did not seek to conduct such interviews through the Assessor's counsel or seek release of the relevant data within the Assessor's possession. She never asked the Assessor's counsel for permission. Despite repeated questioning on the matter, Ms. Johnson could not and did not explain why she did not seek to compel the Assessor's formal participation in the investigation. The only explanation offered by Ms. Johnson was that she did not utilize the Board's statutory subpoena power because she did not want to be "adversarial." Ironically, the Board's hesitancy to be adversarial during a confidential investigation did not prevent it from making a public probable cause finding and initiating the adversarial process of a public contested case hearing. At no time during the Board's "investigation" was anyone with personal knowledge interviewed or consulted. This is woefully inadequate.

injunction against release under Iowa Code section 21.8. No case law supports the Board's decision.[3] There are no appellate decisions setting forth the burden of proof for chapter 23 administrative hearings. The Board's reliance on its own precedent is equally unpersuasive. Such precedent only demonstrates that the Board has held this erroneous interpretation for some time.

IPIB is statutorily charged with investigating and prosecuting violations of the Open Meetings and Open Records Acts. If a record is deemed confidential by the Open Records Act, failing to produce that record cannot be, as a matter of law, a violation of the Act. As a result, the Board has the burden to prove whether the disputed record is confidential. The Board wholly failed to recognize—let alone meet—this statutory duty. The Board's decision must be reversed.

III. No Record Exists Responsive to Mr. Kauffman's Public Records Request.

---

[3] The Board prosecutor cited this authority as "proof" that it does not have an obligation to disprove an affirmative defense. The affirmative defense to civil enforcement actions recognized in these decisions, however, is ***compliance*** with Iowa Code chapter 22.

A. Error Preservation and Standard of Review. The Assessor raised this issue before the district court and it was ruled upon. App. 310. This Court applies the standards set forth in the IAPA to determine if the district court properly applied the law. *Winnebago Indus., Inc.*, 727 N.W.2d at 571.

B. Argument. In order to prove that the Polk County Assessor violated the Open Records' Act, the IPIB must first prove that a record responsive to the request exists. On April 6, 2017, Kauffman filed a complaint with the IPIB alleging that the Assessor had denied him access to a list of "property owners who had filed written requests with the county asking that their names be pulled from the assessor's web site search engine." App. 35. The evidence submitted at hearing demonstrates that no record responsive to that request exists. Mr. Ripperger testified that property owners made requests to have the name-search function disabled in writing, by phone, or in person. App. 186–88. He further testified that in numerous instances, people other than the property owner made the request. App. 185–86. Several witnesses substantiated this testimony. Justice Michael Streit testified

that neither he nor his wife requested that the name search function for his property be disabled. App. 170. Justice Streit testified that he believed one member of the Iowa Supreme Court or State Court Administrator David Boyd made the request on his behalf and on behalf of other justices who owned property in Polk County. App. 168–70. Dr. Heidi Warner testified that her husband made the request on their behalf. App. 196.

Mr. Ripperger testified that his database is able to produce a list of individuals whose property is not searchable by name, but *not* a list solely composed of individuals who had made a request—let alone a written request. App. 181–82. Justice Streit's name, for example, appears on the list even though he did not make a written request to have the name-search function for his property disabled. App. 181–82. The Board failed to introduce any evidence contrary to this testimony. The list capable of production by the Assessor is simply not responsive to Mr. Kauffman's request.

Factual determinations made by agencies are typically afforded great deference. Under Iowa Code section

17A.19(10)(*f*) this Court shall reverse an agency decision that is based upon a determination of fact "not supported by substantial evidence in the record before the court when that record is viewed as a whole." In reviewing a substantial evidence claim, this Court is not to reweigh evidence or determine whether evidence supports a contrary finding. *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011). Instead, Courts are required to determine whether substantial evidence supports the agency's actual finding. *Id.* The issue presented here, however, is not a typical substantial evidence issue. The Board did not find that the Assessor was able to produce a list of "property owners who had filed written requests with the county asking that their names be pulled from the assessor's web site search engine," as Mr. Kauffman requested. Instead, the administrative law judge and the Board determined that "the real record" in controversy is the actual list of property owners whose names were removed from the website's search function.

It is unclear whether this determination is a finding of fact, an application of law to fact, or a legal interpretation. If it

is a finding of fact, no evidence, let alone substantial evidence, supports such a conclusion. Mr. Kauffman's requests were in writing. There is no reasonable dispute as to what information he requested from the Assessor. The Board's conclusion, however, appears to be a legal conclusion or application of law to fact. If so, it is not entitled to deference. *See* Iowa Code section 17A.19(10)(*c*), (*m*). The Polk County Assessor does recognize that Mr. Kauffman or any other individual could in the future request the names of individuals whose names have been removed from the search function. That hypothetical, however, is not the issue in this case. Mr. Ripperger has been charged with violating the Open Records Act by not responding to Clark Kauffman's request. The evidence introduced at hearing demonstrates that no record responsive to the request exists.

IV. IPIB Erroneously Determined that a List of Citizens' Oral and Written Requests for Confidentiality Were Not "Communications" the Assessor Reasonably Believed Citizens Would be Discouraged From Making if They Were Made Public.

A. Error Preservation and Standard of Review. The Assessor raised this issue before the district court and it was

ruled upon. App. 311. This Court applies the standards set forth in the IAPA to determine if the district court properly applied the law. *Winnebago Indus., Inc.*, 727 N.W.2d at 571.

B. Argument. The Iowa Open Records Act outlines a series of records that are confidential as a matter of law. As discussed previously, under the unambiguous language in chapter 23, the Board has the burden of proof to demonstrate that the Assessor violated chapter 22 and not merely that he failed to respond to a public records request by releasing records. That burden includes proving by a preponderance of the evidence that the requested information does not fall within one of the seventy plus statutory exceptions in section 22.7. The Board's conclusion that the disputed records do not fall within one of these articulated exceptions should be reversed under Iowa Code section 17A.19(10)(*c*) ("Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.") and/or (*m*) ("Based upon an irrational, illogical, or wholly unjustifiable application of law

that has clearly been vested by a provision of law in the discretion of the agency.").

From the inception of this case, the Assessor has relied on a single exception—Iowa Code section 22.7(18)—to justify his refusal to release records to Mr. Kauffman. Subsection 18 states

> The following public records shall be kept confidential . . . (18) Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the governmental body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that governmental body if they were available for general public examination.

Iowa Code § 22.7(18). To meet this exception the information must (1) not be required by law, rule, procedure or contract; (2) be given by identified persons outside government; and (3) the governing body could reasonably believe that those persons would be discouraged from making such communications if they knew they would be made public. Each part of the test will be addressed in turn.

First, no law, rule, procedure, or contract requires property owners to request that the name-search function for their property be disabled. Mr. Ripperger testified that most property owners in Polk County choose not to make such requests. App. 187. For those property owners who do choose to make such requests, the Assessor's website directs them to put the request in writing. In fact, however, as Mr. Ripperger testified his office will accept requests in writing, over the phone, or in person—by the property owners themselves or by other individuals. App. 186–87. The situation here is directly analogous to *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 2012). In *Greater Sioux City Press Club*, the Iowa Supreme Court held that employment applications fell within subsection (18). *Id.* In so holding, the Court explicitly rejected the argument that the applications were required by law, rule, or procedure because in order to apply for the city manager position an individual had to submit the application. *Id.* at 898. The Court reasoned that no candidate was required by law to apply for that particular position, but if a candidate *chose* to apply for the city manager position, he or

she must submit an application. *Id.* Property owners are not required to request that the name-search function be disabled, but if they choose to, they must make a request orally, in person, or in writing.

Second, all of the requests to have the name-search function disabled came from "persons outside government." Subsection 18 does not define what it means to be a "person outside government." Common law, however, has long recognized that people exist in their individual and official capacities. Property owners who work for a government entity, nevertheless retain an individual identity. The line between an individual and official identity is sometimes difficult to discern, especially in the context of 42 U.S.C. section 1983 claims. In the case at hand, distinguishing between the individual and official is simple. Justice Streit, Dr. Warner, and Jeffrey Noble all testified that they own their homes in their personal, individual capacities. App. 146, 197, 229–30. The government did not purchase their property or provide them the loan for their property. They were not able to purchase the property due to their statutory duties and powers. Their

requests to the Assessor were not made in furtherance of an official or statutory duty or power. These requests were made in their private capacity as homeowners. Thus even individuals who are employed by a government entity—which could be city, state, federal, or county—qualify as "persons outside government." Dr. Warner, moreover, testified that neither she nor her husband worked for any government entity. App. 197. The Warners, and presumably many other property owners included on the list, are "persons outside government" in all respects. The Board did not introduce the disputed list into evidence. Nor did the Board conduct any investigation to the occupation or employer of individuals on the list. The Board, therefore, has failed to meet its burden to show that the people on the list are not "persons outside government."

Finally, subsection 18 requires that the *governing body could reasonably believe* that those persons would be discouraged from making such communications if they knew they would be made public. It is the Assessor's reasonable belief that is at issue in this case—not the Board's and not the

district court's. Mr. Ripperger testified that he reasonably believed that property owners would not have made these requests if they had known they would be made public for one simple reason—numerous property owners told him so. App. 190–92. The Assessor testified that when Kauffman's request was publicized, he received numerous phone calls from property owners who wanted to get their names *off* the list. App. 191–92. At least one of those requests came from a domestic violence victim who told Mr. Ripperger that she feared for her safety should her estranged partner find out that she had requested to have the name-search function disabled. App. 191. Dr. Warner and Mr. Noble testified that they expected the Assessor to keep their requests/names confidential and they reasonably feared release of the list of names. App. 199, 231. Subsection 18 requires that the Assessor have a reasonable belief that persons could be discouraged from providing such information. Mr. Ripperger indisputably has that reasonable belief. The Board may disagree or even find this conclusion hard to believe. Under the statute, however, the Board is not to replace its

speculative conclusion for that of the Assessor. The Assessor's conclusions is based upon his lived experience and interactions with affected property owners.

The Board's decision fundamentally misconstrues exception 18. While generally, disclosure is the rule and confidentiality the exception and all exceptions to the Open Records Act are to be construed narrowly, the Iowa Supreme Court adopted a different standard for exception 18. In *Greater Sioux City Press Club*, the Court explicitly rejected a narrow construction for exception 18. *Greater Sioux City Press Club*, 421 N.W.2d at 897. The Court reasoned that by its explicit language, exception 18 was intended to apply to a broad category of information and to apply the narrow construction principle would be to thwart legislative intent. *Id.* As a result, any ambiguities in the construction and application of subsection 18 should be construed in favor of confidentiality, not disclosure. The information sought is confidential under section 22.7(18).

Rather than delve into the nuances of exception 18, the Board sidestepped the issue entirely. The Board concluded

that "the list" did not fall within the exception because a list of names is not a "communication." App. 261–62. Under this reasoning, the request for removal was a communication, but the list of people who had been removed was not. The Board cited no case law in support of such an interpretation. This rationale puts form over function. Under this rationale, a list of job applicants would not fall within the exception even though the applications would be confidential. The district court disagreed with the Board's analysis and found that the disputed records were the distillation of the Assessor's communications with thousands of property owners.

Nevertheless, the district court upheld the Board's decision, because like the Board, the district court, made its own assessment of whether property would be discouraged from making such communications if they knew they would be made public. As noted previously, however, that is not the standard. The standard, as set forth in the statute, is the reasonableness of the Assessor's belief. The record is replete with evidence to support the Assessor's belief. The reasonableness of the Assessor's belief is also reflected in the

purpose of original communication. Property owners communicated with the Assessor's Office to have their names removed from the search function. The purpose of the original communication was privacy. As Dr. Warner and Mr. Noble testified, they did not seek anonymity to then have their name and information included on another, public list. It is illogical to believe that people would not be discouraged from requesting privacy if they knew that request would be made public.

V. The Safety Concerns of Private Citizens Outweighs Any Public Interest in the Release of this Information.

A. Error Preservation and Standard of Review. The Assessor raised this issue before the district court and it was ruled upon. App. 314. This Court applies the standards set forth in the IAPA to determine if the district court properly applied the law. *Winnebago Indus., Inc.*, 727 N.W.2d at 571.

B. Argument. Iowa Code section 23.11 explicitly permits a public official to defend his/her actions in a contested case before IPIB by asserting "that grounds existed to justify a court to issue an injunction against disclosure

pursuant to section 22.8." This Court has held that "[i]f a public record does not fall under one of the stated exemptions," a court may still grant an injunction if "the examination would clearly not be in the public interest" and the "the examination would substantially and irreparably injure any person or persons." *In re Langholz*, 887 N.W.2d 770, 776 (Iowa 2016) (quoting Iowa Code § 22.8(1)).

There is no public purpose to the release of this information. Mr. Kauffman already published an article about "the list" and the Assessor's policy. https://iowacapitaldispatch.com/2020/01/07/uncovering-polk-countys-secret-list-of-property-owners/ (last accessed March 13, 2020). The undisputed record, moreover, demonstrates that several of the witnesses have tremendous concerns about the prospective release of the list. Dr. Warner, a clinical psychologist, testified that the risk of releasing the names is on private citizens—not on the Assessor and not on Mr. Kauffman. App. 200. She believed that releasing the list would result in further searches and make people—perhaps dangerous people—curious as to why she sought privacy.

App. 200. Most compellingly, Dr. Warner testified why the Assessor's policy of disabling the name-search function was so important, even though her address is publically available by other means. She stated,

> It's a huge measure of safety. Again, someone who is impulsive and angry is not going to take the time to go down to the courthouse necessarily. That's more premeditated. And we know that as psychologists. Emotions don't last that long. Someone is not going to be in the middle of an anxiety attack for three days or two days or the 24 hours it's going to take to go down to the actual building and get that information. They'll have calmed down by then most likely.

App. 201.

Jeffrey Noble, an assistant county attorney with twenty-nine years of experience, testified that releasing the list would create a "challenge, by saying these are the people who have tried to hide their address, I think it whets the appetite of those people with OCD tendencies that want to find that information." App. 235. Justice Streit testified about the Court's creation of the electronic database management system and why the Court prevented public access to all documents via the internet, even though those same

documents are available for public inspection at the courthouse or by request to the clerk. App. 156–58. These other means of obtaining public information leave a definitive trail—log in, telephone number, email address, or surveillance video. App. 159–60. The requestor's anonymity is removed. There is no evidence in the record that contradicts the legitimacy of these concerns. The real and substantial safety concerns of private citizens, as set forth in the record and in their initial requests to have their names removed from the search function, overweighs whatever morbid curiosity there is in the information.

CONCLUSION

The purpose or legislative intent of the Open Records Act is indisputable. As this Court recently observed, "The Act allows public examination of government records to ensure the *government's activities* are more transparent to the public it represents." *American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Cmty. Sch. Dist.*, 88 N.W.2d 231, 232 (Iowa 2012) (emphasis added). "In construing the Act, [the Court has] said its purpose is 'to remedy unnecessary

secrecy in conducting the public's business.' " *Id.* (quoting *City of Dubuque v. Tel. Herald, Inc.*, 297 N.W.2d 523, 527 (Iowa 1980)); *see also Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981) ("The purpose of the [the Act] is to open the doors of government to public scrutiny—to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act."); *Howard v. Des Moines Register & Tribune Co.*, 183 N.W.2d 289, 299 (1979) (noting that the Act's goal of transparency seeks "[t]o facilitate public scrutiny of the conduct of public officers.").

The record at issue in this case is solely comprised of private citizens' information, which happens to be in the hands of government. The list does not shed light on the actions of the Assessor's Office. The list does not show how public funds are utilized in the Assessor's Office. The list does not shed light on the decision-making activities of the Assessor's Office. The list does not shed light on the conduct of any public officers. Instead, the list only sheds light on those property owners in Polk County who are concerned

about their safety or anonymity. For the reasons expressed above, the Polk County Assessor respectfully requests the decision of the Iowa Public Information Board be reversed.

REQUEST FOR ORAL ARGUMENT

The Polk County Assessor Randy Ripperger respectfully requests to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief complies with the type-volume limitation, typeface, and the type-style requirements of Iowa Rule of Appellate Procedure 6.903. This Final Brief was prepared in Microsoft Word using Bookman Old Style font, size 14. The number of words is 7,979, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

Date: December 16, 2020

/s/Meghan L. Gavin

MEGHAN L. GAVIN
Assistant Polk County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Emily Willits
Office of the Iowa Attorney General
1305 East Walnut Street
Des Moines, Iowa 50319
emily.willits@iowa.gov

/s/Meghan L. Gavin