IN THE SUPREME COURT OF IOWA

No. 23-1729
Scott County No. EQCE136057

DR. ALLEN DIERCKS and DIANE HOLST, Plaintiff-Appellants
v.

SCOTT COUNTY, IOWA, and KERRI TOMPKINS, Scott County Auditor, Defendant-Appellees

APPEAL *from the* IOWA DISTRICT COURT
in and for SCOTT COUNTY

Honorable DISTRICT COURT JUDGE HENRY W. LATHAM II, *Presiding*

Conditional AMICUS BRIEF of the IOWA FREEDOM OF INFORMATION COUNCIL

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of December, 2023, I electronically filed this document with the Clerk of the Iowa Supreme Court using the Appellate EDMS system which will serve the following parties or their attorneys:

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IDENTITY & INTEREST OF AMICUS CURIAE

As outlined in the Iowa Freedom of Information Council’s Motion for Leave to File Amicus Curiae Brief filed contemporaneously with this brief and incorporated here by reference, the Iowa Freedom of Information Council (hereafter “FOIC”) is an organization composed of professionals whose interest intersects with the protections of the First Amendment, open meetings and open records laws, and educating the public at large about their rights under these protections. Headquartered in Des Moines, the FOIC was organized in 1976 and incorporated in 1977, serving as one of the oldest freedom of information organizations in the United States.

The questions posed in this case are particularly germane of the work of FOIC and its area of expertise. Access to information is a cornerstone of our democracy and the issues implicated in this contest are of the utmost importance for an informed and involved citizenry. The consequences of narrowing the public's access to knowledge related to how vacancies are filled violates their rights under public disclosure laws and limits the ability of the public to hold the government accountable in situations where transparency matters the most. It is incumbent on FOIC to attempt to provide additional relevant information to the Court that can lead to the correct determination in this case.

CERTIFICATE OF COMPLIANCE-AUTHORSHIP

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), counsel herein authored this brief in whole for the Iowa Freedom of Information Council. No party's counsel contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief.

/s/ Peter E. Larsen 12/12/23
Peter E. Larsen, Of Counsel, FOIC Date

CERTIFICATE OF COMPLIANCE- BRIEF REQUIREMENTS

Pursuant to Iowa Rule of Appellate Procedure 6.906(4), the undersigned states that this brief complies with rule 6.903(1)(g) as cross-referenced by Iowa Rule of Appellate Procedure 6.906(4). This brief is prepared in Times New Roman, a proportionally spaced typeface, and contains 6,422 words, which is less than one-half the length permitted for Appellant's brief. *See* Iowa R. App. P. 6.903(1)(g) (permitting 14,000 words for a proportionally spaced typeface).

/s/ Peter E. Larsen 12/12/23
Peter E. Larsen, Of Counsel, FOIC Date

ARGUMENT

I. PLAIN READING AND GUIDANCE FROM IOWA AUTHORITIES FAVOR DISCLOSURE OF CANDIDATES' INFORMATION

A. Plain Reading of the Iowa Code Expressly Supports Disclosure.

As with any cases relating to statutory interpretation, the best starting place is review of the plain language of the statutes. Fortunately, when it comes to the plain language of relevant provisions in Chapter 22 (and related provisions in Chapter 21), that writing is clear and paired with plain meaning interpretation, is decisively in favor of the plaintiff-appellants.

Had the Iowa Legislature's intent been to limit the public's access to information related to appointments, they would have specifically built out that exception within the statutory language of Chapters 21 and 22 as other states have done with their open records and open meetings laws. *See, e.g.*, Ariz. Rev. Stat. Ann. § 38.431.03(A)(1) (2023) (allowing for appointment discussions to be conducted in executive session following a public majority vote to that effect); Ohio Rev. Code Ann. § 121.22(G)(1) (2023) (authorizing appointments to be discussed in executive session following a majority roll call vote for that sole purpose); W. Va. Code Ann. § 6-9A-4(b)(2)(A) (2023) (approving limited executive session following public majority vote for the limited purpose of discussing an appointment). Exclusion of language to that effect in the Iowa Code evinces an intent to hold appointment discussions to the same standard as other publicly disclosed business.

Indeed, Iowa's carve out narrows the exception considerably as opposed to these comparators. As a threshold matter, there must be an affirmative public vote to move to closed session, which requires not just a bare majority but rather an "affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting." Iowa Code §21.5(1) (2023). Further, in the case of appointments, the closed session may only be undertaken "To evaluate the professional competency of an individual whose appointment, hiring, performance,

or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session." Iowa Code §21.5(1)(i) (2023). (It bears noting that this is this only overt mention of appointments in Chapters 21 and 22).

Plain reading of this provision makes clear that any appointment consideration in closed session would be related to frank discussion of "professional competency" akin to job performance, and only in drastic cases where such privacy is "necessary to prevent needless and irreparable [reputational] injury" and additionally that the candidate has requested such closed session. **Obviously, mere candidacy for an appointment does not impute such irreparable reputational injury, and by itself cannot rise to the level of requiring a closed-door session.** Should such a concern have arisen, Iowa Code §21.5(1) states that such a session would only be undertaken "to the extent a closed session is necessary." In this case, solely for the limited purpose of highly aspersive information to be discussed. Iowa Code §21.5(6) additionally clarifies that "Nothing in this section requires a governmental body to hold a closed session to discuss or act upon any matter."

In the case of ambiguity, both the provisions of Chapter 21 and Chapter 22 are meant to be read as providing more expansive access to information rather than narrowing the public's access. *See* Iowa Code §21.1 (2023) ("This chapter seeks to

assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people. Ambiguity in the construction or application of this chapter should be resolved in favor of openness."); *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996) (stating in reference to Chapter 22: "Accordingly, there is a presumption of openness and disclosure under this chapter.")

A secondary issue relates to the contention that either the elected members of the Scott County Board of Supervisors and/or those appointed to fill mid-term vacancies are on par with regular employees. "Filling [a] vacancy of [an] elected county officer" in §69.14A is distinguishable from that of being a public employee generally. Certainly, the position of a County Supervisor is an elective office, and as a result, candidates for that office should likewise be expected to comply with the public disclosure requirements that those seeking to fill the office under normal circumstances are subject to.

County Supervisors are "public officers" under Iowa Code §69.14A. The common meaning of a "public officer" is "a person who has been legally elected or appointed to office and who exercises governmental functions." *See* Merriam-Webster Online Dictionary (2023) "public officer," https://www.merriam-webster.com/dictionary/public%20officer. Further, the language of "filling" a

vacancy as used in Iowa Code §69.14A is commonly denoted as "to possess and perform the duties of" as in to "fill an office," and "to place a person in" as in to "fill a vacancy." *See* Merriam-Webster Online Dictionary (2023) "fill," https://www.merriam-webster.com/dictionary/fill. Indeed, the language used within Iowa Code §69.14A specifies that the vacancy would be filled by an "appointment," which in common parlance would mean "to name officially" as in "will appoint her director of the program" and "to exercise the power of appointment." *See* Merriam-Webster Online Dictionary (2023) "appoint," https://www.merriam-webster.com/dictionary/appoint.

Importantly, the provisions of Iowa Code 69.14(3) expressly make a differentiation between hiring and appointment (and do not differentiate between elective and appointive office). The provision says in relevant part that "in the event of a vacancy for which no eligible candidate residing in the county comes forward for appointment, a county board of supervisors may employ a person to perform the duties of the office…" Iowa Code §69.14(3) (2023). This provides explicit support to the notion that there are again separate standards for the discrete processes of appointing someone to fill a vacancy and hiring someone to perform the duties of the office in lieu of an appointee. Note that while appointments are not elected positions, the appointment is not a traditional hiring process either. *See* Merriam-Webster Online Dictionary (2023) "appointment," https://www.merriam-

webster.com/dictionary/appointment. (defining "appointment" as "a nonelective office or position"); Merriam-Webster Online Dictionary (2023) "hiring," https://www.merriam-webster.com/dictionary/hiring. (defining "hiring" as "to engage the personal services of for a set sum"). Such an understanding mirrors the delineation between public officers and government employees as articulated at the federal level. *See, e.g., United States v. Hartwell*, 73 U.S. 385, 393 (1867) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."); *Burnap v. United States*, 252 U.S. 512, 516 (1920) ("Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties, and appointment thereto.")

As a result, the identities of the candidates who applied for appointment to the vacant seat on the Scott County Board of Supervisors were not supposed to be held in confidence, and the appointment process was supposed to be transparent to the public under the provisions of both Chapter 21 and §69.14 of the Iowa Code. Further, the document requests made pursuant to the appointment process under Chapter 22 of the Iowa Code were perfectly legitimate and the plaintiff-appellants have met their burden under §22.10(3)(c)(2) of the Iowa Code (as explicated in detail in plaintiff-appellants' briefing).

B. Publicly Available Guidance from the Iowa Attorney General and Iowa Public Information Board Support Disclosure and Counsel Counties to Err on the Side of Disclosure.

Further supporting the contention that the closed session for discussion of filling the vacant seat and shielding the names of the candidates is inappropriate are a number of governmental and quasi-governmental sources. While no Iowa Attorney General Opinions are directly on point, one discusses the propriety of going into closed session for filling a vacancy as it relates to Iowa's open meetings law, strongly urging against the use of closed sessions.

> It appears that the council went into closed session to discuss candidates to be appointed to the vacated position. City council meetings are, by law, subject to the Open Meetings Law (Chap. 28A of the Code). Section 28A.3 provides that a meeting may be held in closed session upon a vote of two-thirds of the members, and when necessary to prevent needless harm to an individual's reputation whose employment or discharge is under consideration, or for some other exceptional reason so compelling as to override the general public policy. Not having before us any information as to what transpired in that closed session, we are unable to reach a decision on the legality of the meeting. We are not, however, condoning the closed meeting. We wish to emphasize that closed meetings are the exception, not the rule. They should be used sparingly, if at all, and only for exceptional and compelling reasons. We are not convinced that discussion of possible appointments to fill a vacancy automatically fall within § 28A.3.

Op. Iowa Att'y Gen. No. 76–3–4(L) (Mar. 5, 1976), 1976 WL 375885, at *2. The instant case is no different, and by practice appointments should be held publicly and transparently.

Over the years, the Iowa Attorney General has issued a number of "sunshine advisories" as "a general resource for government officials," including several on the topic of closed governmental meetings. These advisories remind government officials of their obligations under closed meetings, and warn about proper procedure and limited exceptions for using them. *See, e.g.*, Iowa Attorney General, Sunshine Advisory "Closed Sessions for Governmental Bodies, Motions to close a meeting, and any final action must be open" https://www.iowaattorneygeneral.gov/about-us/sunshine-advisories/closed-sessions-for-governmental-bodies-motions-to-close-a-meeting-and-any-final-action-must-be-op (Sept. 1, 2006) ("Remember, there are three steps for closed sessions: Start with a motion in open session. Close only for directly-related discussion. Conclude with final action (if any) in open session."); Iowa Attorney General, Sunshine Advisory, "Closed-Session Agendas," https://www.iowaattorneygeneral.gov/about-us/sunshine-advisories/closed-session-agendas (Jul. 1, 2004) ("In sum, closed session topics must be disclosed on the agenda in advance to give the public an opportunity to assess the reason for a closed session, hold accountable the members who vote to close a session, and decide whether to await a vote as final action."); Iowa Attorney General, Sunshine Advisory, "Closed Governmental Meetings: Known the Nuts and Bolts for Closed Sessions," https://www.iowaattorneygeneral.gov/about-us/sunshine-

advisories/closed-governmental-meetings-know-the-nuts-and-bolts-for-closed-sessions (Jul. 1, 2002) (Outlining that government officials must check the statutory language, publicly announce the reason, take a vote, keep records, stay focused only on the specific business of the closed session, and return to open session for final action).

Similarly, advisory opinions from the Iowa Public Information Board (hereafter "IPIB") are used by the public and governmental agencies in determining their obligations under open meetings and open records laws. They have been delegated this authority pursuant to Iowa Code §23.6 (2023). In IPIB Advisory Opinion 14FO:0002, IPIB notes that

> For a session to be closed, ALL of the following must occur:
> 1. The discussion must involve an evaluation of the professional competency of an individual.
> 2. The discussion must involve consideration of the appointment, hiring, performance, or discharge of the individual.
> 3. The discussion must be such that if conducted during an open meeting it would cause needless and irreparable injury to that person's reputation AND
> 4. The individual must request the closed session.

Op. Iowa Pub. Inf. Bd. No. 14FO:0002 (Feb. 20, 2014), https://ipib.iowa.gov/closed-meeting-personnel-issues. This same guidance has been echoed in a number of other IPIB opinions as well. *See, e.g.*, Op. Iowa Pub. Inf. Bd. No. 16AO:0001 (Jan. 21, 2016), https://ipib.iowa.gov/personnel-records-and-evaluations; Op. Iowa Pub. Inf. Bd. No. 21AO:0004 (Oct. 21, 2021),

https://ipib.iowa.gov/job-applicant-records; Op. Iowa Pub. Inf. Bd. No. 21AO:0007 (Oct. 21, 2021), https://ipib.iowa.gov/closed-session-requirements. IPIB has also created and shared resources for the Iowa State Association of Counties to the same effect. *See, e.g.*, IPIB, "Iowa Sunshine Laws," (2017) https://iowacounties.org/wp-content/uploads/2017/01/2017-ISAC-NCO-Open-Meetings-Margaret-Johnson.pdf.

All of this taken together paints a unified picture regarding easily accessible guidance from Iowa's legal authorities on the questions presented in this case. In order for a closed session to be utilized for appointments, actions must happen prior to (in the form of an announced reason) and following (in the form of a final action) the closed session. Further, the closed session must be requested, must deal with information that would cause irreparable reputational harm, must be limited to discussion of that narrow purpose. And even in close questions—which this is not—the presumption goes toward disclosure.

C. Iowa Supreme Court Precedent Unequivocally Favors Broad Disclosure in this Case and the Precepts of Iowa's Open Records Law Would be Harmed by Preventing Disclosure

While this issue presents a case of first impression for the Iowa Supreme Court, the history of open records law, particularly as applied in a number of cases decided by the Iowa Supreme Court provide guidance in the instant case. From its adoption in 1967, the Iowa Open Records and Open Meetings Laws have provided

means for accountability, transparency, and good governance; however, an inherent tension exists in balancing privacy rights of individuals who may be impacted by disclosures and the right of the general public to know information related to governance. In the instant case, the question of striking that balance in the context of identity and evaluation of professional competency was discussed and largely resolved in favor of disclosure soon after adoption. In an Iowa Law Review article from 1972, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know about Public Records But Were Afraid to Ask*, we find guidance for the question at hand today.

> "Any such test for personal information which ignores the nature of the data in the file unduly restricts the right of inspection**. Focusing on the identity of the individual subject to inquiry as the touchstone for concealment totally eliminates from inspection large quantities of data without a corresponding reduction in the potential for substantial and irreparable harm to the individual, the standard for exemption specified by section 68A.8.** The individual's legitimate concern for privacy can be maintained, and the public's right to know maximized, if the nature of the information, for example, personal or professional, is the criterion for access. Otherwise, inquiry into the background and performance of appointed officials or licensed operatives is limited so as to frustrate the right of the public to hold them and the appointing or licensing officials accountable. Such an interpretation is completely at ease with the policy of narrowly construing these exemptions. **Since the exemptions are to be read narrowly, it makes little sense to rely on the broadest possible definition of any term unless such reliance is indicated by the language of the provision.** In this regard it should be noted that Webster's also defines 'personal' as relating to an individual's 'character, conduct, motives, or private affairs.' It is suggested that such a view of 'personal' better suits the policy of the enactment by maximizing the release of information relating to public

> concerns, while guarding against disclosure of more private matters such as medical histories."

Iowa's Freedom of Information Act: Everything You've Always Wanted to Know about Public Records But Were Afraid to Ask, 57 Iowa L. Rev. 1163, 1179-80 (1972). (Emphasis added.)

The Iowa Supreme Court has routinely interpreted the right-to-know under Iowa law as expansive, and read the exceptions narrowly, in accordance with legislative intent and plain meaning. This Court has consistently held that the open governance laws are meant "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.." *Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981). This Court has understood that this access is a foundational issue to democracy. *See Gannon v. Bd. of Regents*, 692 N.W.2d 31, 38 (Iowa 2005) ("Thomas Jefferson is said to have remarked that an informed citizenry is the bulwark of a democracy."); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999) ("Iowa's 'open records' act invites public scrutiny of the government's work, recognizing that its activities should be open to the public on whose behalf it acts.").

Further, this Court has traditionally read the access granted under the open government laws are meant to be as expansive as possible. *See, e.g., Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 299 (Iowa 1979) (endorsing

the view that the laws "establish a liberal policy of access from which departures are to be made only under discrete circumstances."); *City of Dubuque v. Tel. Herald, Inc*., 297 N.W.2d 523, 526 (Iowa 1980) ("It is plain that our analysis must start from the premise that chapter 68A is to be interpreted liberally to provide broad public access to Dubuque's public records."); *Des Moines Indep. Cmty. School Dist. Public Records v. Des Moines Register & Tribune Co.*, 487 N.W.2d 666, 669 (Iowa 1992), overruled by statute on other grounds (finding that "the legislature intended for the disclosure requirement to be interpreted broadly, and for the confidentiality exception to be interpreted narrowly."). Building upon this foundation, this Court has also continued to find that exemptions are the exception rather than the rule. *See, e.g., Bd of Dirs. of Davenport Cmty. School Dist. v. Quad City Times, Unincorporated Div. of Lee Enterprises, Inc.*, 382 N.W.2d 80, 82, (Iowa 1986) ("Disclosure is favored over non-disclosure, and exemptions from disclosure are to be strictly construed and granted sparingly."); *Hall v. Broadlawns Med. Ctr*., 811 N.W.2d 478, 485 (Iowa 2012) ("Although we should not thwart legislative intent, the specific exemptions contained in freedom of information statutes are to be construed narrowly.")

Being that there is no statutory differentiation between elected and appointed officials, in the instant case, there is no greater expectation of privacy available to appointed public officials. Since candidates for that same seat in elections

necessarily must disclose identifying information, so too should candidates applying for appointment to fill a mid-term vacancy for the same seat.

However, assuming arguendo an examination of the defendant=appellees' contention that they must hold identifying candidate information confidentially, the legal basis falls apart quickly. Exemptions to public disclosure under Iowa Code §22.7 are discretionary. *See* Iowa Code § 22.7 (2023) ("The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information.") Further, even if they weren't discretionary, they would not fall under this Court's or the Iowa Attorney General's understanding of information protected from public disclosure. *See* Op. Iowa Att'y Gen. No. 81–3–72(L) (Jan. 19, 1981), 1981 Iowa AG Lexis 72, at *5-8 (finding that the public policy concerns weigh heavily toward disclosure in the case of applicants for appointment to municipal office, and further that applications could not fall under the personnel record exemption).

In cases where it is unclear whether particular information falls under exemptions under Iowa Code §22.7, this Court has applied a fact intensive, multi-factor balancing test. *See DeLaMater v. Marion Civ. Serv. Comm'n*, 554 N.W.2d 875, 879 (Iowa 1996) ("Courts applying a balancing test consider several factors: (1) the public purpose of the party requesting the information; (2) whether the

purpose could be accomplished without the disclosure of personal information; (3) the scope of the request; (4) whether alternative sources for obtaining the information exist; and (5) the gravity of the invasion of personal privacy.") Applying the factors to this case yields the same result of public disclosure.

For the first factor, even asking the question appears to be at odds with the provision that "every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." Iowa Code § 22.2(1) (2023); however, as voters and citizens of Scott County, plaintiff-appellants' have a strong purpose in asking for transparency around an appointment for a seat they as voters would typically elect themselves. For the second factor, quite plainly there is no way to disclose an applicant's identity without disclosing personal information such as their name. For the third factor, the scope of the request asks for appropriate identifying information from applicants and does not expand into requesting information that would not typically be available from candidates for this seat. For the fourth factor, no other alternative sources exist for obtaining the information. For the fifth factor, the gravity of the invasion of personal privacy is de minimis—no more than had the applicant applied for the position on an election year. The totality of the factors leads decisively to disclosure.

II. PERSUASIVE AUTHORITY AND PUBLIC POLICY CONSIDERATIONS WEIGH DECIDEDLY IN FAVOR OF DISCLOSURE

A. State Caselaw in Comparable Situations has been Resolved in Favor of Disclosure.

While it's rare to find cases exactly on point from other jurisdictions, one case was directly applicable. In the case of *Lambert v. Belknap County Convention*, 949 A.2d 709 (N.H. 2008), we find a similar set of events to the instant case. In *Lambert*, Sheriff Dan Collis resigned from his elected office prior to the term's expiration, causing a mid-term vacancy. *Id*. at 712-13. The county convention voted to enter into a nonpublic session, during which they interviewed seven candidates and selected two finalists. *Id*. The convention declined to disclose the full slate of candidates considered. *Id*. Following the convention proceedings, members of the public sought disclosure of the full slate of seven candidates who were considered by the convention. This was denied on privacy grounds. *Id*. at 714.

The New Hampshire Supreme Court makes several important determinations. First, the court finds that filling a vacancy for an elective office is not analogous to hiring. *Id*. at 715 ("In common understanding, public officers are elected or appointed, not hired.") Further, the court concluded that to conflate appointments and hiring would be against the explicit purposes of the state's FOI protections. *Id*. ("To do so would be contrary to our well-established practice of construing

exemptions under the Right-to-Know Law narrowly, in order to further the primary purpose of the statute to permit freedom of access to public records and proceedings.")

The court then turned to the question of whether it was appropriate to move to closed session for evaluation, interview, and decision-making on the candidates. Here too, the court found that this action violated the state's FOI protections.

> "[O]ur legislature chose to limit instances in which a body or agency may meet in nonpublic session to those where the body or agency is considering or acting upon the hiring of a person as a public employee. We will not insert words that the legislature did not see fit to include. Accordingly, because the trial court did not cite, and the respondents do not offer, any other exemption supporting the notion that the Convention could have filled the vacancy in the office of the sheriff in nonpublic session, we conclude that the Convention was required to fill the vacancy in the office of the sheriff in public session."

Id. at 715-16. (Citations omitted.)

At last, the court turned to the question of whether the applicants' rights to privacy prevented disclosure of their names and information. When evaluating the public's interests in disclosure and the applicants' rights to privacy, the court considered three factors. First, in determining whether the applicants had a general privacy interest in nondisclosure, the court saw

> "no reason why candidates who apply for a vacancy in an elected office should have a greater privacy interest than candidates who run for that same office during an election year. In both situations, a candidate's decision to apply for an elected public office places his or her qualifications for that office at issue, and, consequently, requires

> members of the public, either individually or through their representatives, to evaluate the particular candidate. Thus, a candidate voluntarily seeking to fill an elected public office has a diminished privacy expectation in personal information relevant to that office."

Id. at 718. In evaluating the second factor, the public's interest in the disclosure, the court found that

> "the members of the public should have the opportunity to evaluate the candidates and determine which candidate they believe is best qualified to perform the duties of the office…. Moreover, absent disclosure, members of the public would be left in the dark and would have no means of assessing the votes of their representatives. In these circumstances, where the Convention, based upon the information contained in the documents, is substituting its judgment for that of the people in selecting an interim sheriff, the public's interest in disclosure is paramount."

Id. at 718-19. In its final cumulative factor evaluation, the court stated that

> "in balancing the foregoing interests, we conclude that the public's interest in disclosure significantly outweighs the privacy interests of the candidates. The sole reason for the application process was the mid-term vacancy caused by the retirement of a sheriff who had been chosen by the people in a prior election. The public has a significant interest in information about the candidates who will fill the elected position. By applying to fill an elected public office, the candidates surrendered much of 'the privacy secured by law for those who elect not to place themselves in the public spotlight.' Thus, the public's interest in disclosure outweighs the candidates' privacy interests in nondisclosure."

Id. at 719. (Citations omitted.) Importantly, the court reached these conclusions even without the additional explicit irreparable reputational injury prerequisite requirement for moving to closed session that is found in Iowa Code §21.5.

While no other state cases come as directly on point as the Lambert case, several other state cases stand for the proposition that candidates for an appointment are not granted anonymity under FOIA exemptions. *See, e.g.*, *State ex rel. Plain Dealer Publ. Co. v. City of Cleveland*, 661 N.E.2d 187, 191 (Ohio 1996) (finding that "the city's assertion that the constitutional right to privacy excepts resumes of applicants seeking public employment from disclosure under R.C. 149.43 is without merit."); *Attorney Gen. v. School Committee of Northampton*, 375 N.E.2d 1188, 1190 (Mass. 1978) (finding that candidates for appointment should "expect open and public discussion of his professional competence" and that if privacy under a FOIA exemption was warranted that it could be dealt with on an applicant-by-applicant basis in camera); *Herald Co. v. City of Bay City*, 614 N.W.2d 873, 881 (Mich. 2000) (finding that "disclosure of the information concerning the final candidates for fire chief in the instant case would serve the policy underlying the FOIA because disclosure would facilitate the public's access to information regarding the affairs of their city government [since it] can hardly be challenged that the citizens of Bay City had a valid interest in knowing the identities of the final candidates considered in contention for this high-level public position.").

B. Public Policy Considerations Support Disclosure for Transparency Accountability, and Public Confidence

In addition to the legal protections implicated in this case, there are also strong public policy considerations weighing in favor of disclosure. First and foremost is the well-functioning of Iowa's sunshine laws. "Just as FOIA operates as the 'crown jewel' of the federal transparency regime, the most significant transparency mechanism in state and local government are these public records statutes." Christina Koningisor, *Transparency Deserts*, 114 NW. U. L. Rev. 1461, 1480 (2020). The chief benefit of these statutory protections is a well-informed citizenry. "Effective transparency measures allow citizens to hold elected officials accountable, make informed democratic decisions, and understand the limits and confines of the exercise of government power." *Id*. at 1482. The most salient benefit of an informed citizenry is to "enhance democratic governance. As the [U.S.] Supreme Court has said in the context of FOIA, the 'basic purpose' of the law 'is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" *Id*., quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Having a vigorous and beneficial system of open governance laws is a preventative against nepotism and corruption, ensuring integrity and accountability within governmental processes. Indeed, the functioning of open governance laws

is intrinsically tied to our most dear and basic rights as citizens of the United States and Iowa.

> "The public's right to know derives from the same values of open and robust exposure of ideas that underpin the First Amendment, and is therefore fundamental to the operations of the democratic process. Free speech is meaningless unless the public is free to gather information about which to speak. And informed decision making in electing public officials is impossible unless the public is knowledgeable about the actions of those officials and about the institutions which they are to govern."

Harlan Cleveland, *The Costs and Benefits of Openness: Sunshine Laws and Higher Education*, 12 J.C. & U.L. 127, 130-31 (1985).

Particularly germane to the instant case is the benefit of incumbency as it may apply in a municipal context. Though the conventional wisdom is that the "incumbency effect" benefits those who are current office-holders in election and reelection situations, there has been little research regarding its applicability to municipal contests; however, what evidence does exist shows a distinct advantage for incumbents. Not only are municipal incumbents "more likely to run and win in their next elections because they served a term in office," but the data shows that "incumbents are about 39 percentage points more likely to run and about 32 points more likely to run and win." Jessica Trounstine, *Evidence of a Local Incumbency Advantage*, 36 Legis. Stud. Q. 255, 271 (2011).

In that way, transparency in the appointment of an officeholder is extremely important. It allows citizens to be informed about their governmental

representatives, allows citizens to maintain accountability in the appointment process by safeguarding against nepotism and corruption, and ensures that the appointee who may benefit from the effect of incumbency is appointed and governing in a transparent method. In the instant case, while the controversy can be decided on plain meaning grounds, it is nevertheless important to plead public policy considerations and contextualize them within the larger framework of understanding these issues.

CONCLUSION

The actions taken by the Scott County Board of Supervisors, both in filling the vacancy and in response to the public records requests of the plaintiff-appellants were incorrect. The discussion of candidates to fill the mid-term vacancy of a County Supervisor, including disclosure of the identity of all candidates, should have taken place in an open session. Moving to closed session for consideration and keeping applicants confidential can only be done on very limited grounds, which were not met here.

That decision can be made relying purely upon plain reading of the statutory language and relying upon common understanding of the roles and processes at play. The plain meanings differentiate hiring and appointment processes, as well as public officers from government employees. Here, the vacancy is an appointment of a public officer, and as such, demands greater transparency.

Should the Court feel it necessary to apply a balancing test, the outcome would still remain the same. The factors weighing toward public disclosure far outstrip any considerations for personal privacy. The Iowa Supreme Court should affirm plaintiff-appellants' right to view records and uphold the transparency of governmental activities in the incredibly important work of filling mid-term vacancies.