

**IN THE SUPREME COURT FOR THE STATE OF IOWA**

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No. 24-0373

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HARVEY HARRISON,  
Petitioner-Appellee,

v.

LISA MICKEY in her official capacity as Open Records Coordinator and CITY  
OF DES MOINES, IA,  
Defendants-Appellants.

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Appeal from the Iowa District Court for Polk County, Iowa  
The Honorable Coleman McAllister  
Polk County Case No. CVCV064414

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Appellant's Brief

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For the City of Des Moines, Iowa

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## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- I. The City of Des Moines Police Department's unique use-of-force reports, and the mandatory evaluation process included, make these documents personnel confidential personnel records.
- II. Iowa Code Section 80F.1(20) supports the non-disclosure of the use-of-force reports.
- III. Iowa Code § 22.7(5) may bar disclosure of some use-of-force reports depending on the status of the investigation and for the safety of individuals involved.

## **ROUTING STATEMENT**

It is appropriate that this case be retained by the Iowa Supreme Court due to substantial questions of public importance, as well as questions of first impression.

## **NATURE OF THE CASE**

This is an appeal of a summary judgment ruling that ordered the City of Des Moines and Ms. Mickey (hereinafter City) to turn over “use-of-force” reports that the City asserted were personnel records, and therefore, exempt from production under Iowa Code §22.7 and other potential statutory protections. The summary judgment ruling issued on February 15, 2024. D0026, SJ Order (2/15/2024). A timely appeal was filed on March 1, 2024. D0027, N. Appeal (3/1/2024). The City moved for and received a stay from the Court on March 4, 2024 and March 7, 2024, respectively. Appellant Motion for Stay (4/4/2024) and Order Granting Stay (3/7/2024).

## **STATEMENT OF THE FACTS**

The Des Moines Police Department (hereinafter DMPD) has a policy that requires officers to report uses of force in a “timely, complete, and accurate manner by involved officers.” The DMPD policy provides the following direction regarding the contents of a use-of-force report:

a. Use-of-force reports shall be comprehensive and provide the degree of specificity necessary to fully document and evaluate the use-of-force, including any medical attention if necessary.

(1) Officers should ensure that their use-of-force report accurately relates what the officer knew, observed, or believed at the time of the incident. Any facts or information learned by watching video of the encounter, speaking with witnesses, etc. should be addressed.

The primary purpose of the Use-of-Force Reporting Policy is accountability of DMPD officers when they use force. D0014, City Attachment App. at 2 (9/7/2023). Once a use-of-force is reported, the officer's supervisor begins to conduct a performance review investigation to ensure the use-of-force comports with DMPD policy. D0014, City Attachment App. at 2 (9/7/2023). While the DMPD uses these reports to determine if additional training is needed department-wide, that does not change the fact that its primary purpose is performance evaluation. D0014, City Attachment App. at 2 (9/7/2023).

These records are kept with the Office of Professional Standards (OPS), along with other personnel documents. D0014, City Attachment App. at 2 (9/7/2023). These documents are accessible to a limited group: the officer being reviewed, his or her immediate supervisor, OPS, and command staff. D0014, City Attachment App. at 2 (9/7/2023). The Use-of Force reports are not stored in the DMPD's traditional records management system where all other routine

administrative and daily investigative reports are kept that are accessible to a majority of the DMPD. D0014, City Attachment App. at 3 (9/7/2023). The required data to be entered includes comprehensive information about the force used and then contains a portion for a multi-layer supervisory review. D0010, Harrison App. at 6-7 (8/22/2023).

Each individual use-of-force report is reviewed by the officer's supervisor and then through the chain of command to ensure the use was appropriate and within the guidelines of department policy and Iowa law. D0010, Harrison App. at 2-3, 21 (8/22/2023); D0014, City Attachment App. at 2 (9/7/2023). If the officer used force inappropriately, a disciplinary investigation is initiated, that will result in some kind of corrective action. D0010 Harrison App. at 21 (8/22/2023). The officer may receive additional training, oral or written counseling, and/or discipline as authorized by statute up to and including termination from employment. Iowa Code Chapter 400.

In the interest of transparency, the DMPD issued a "Use-of-Force Report" in 2020, which offered the public a summary of the Department's uses of force in 2020. The data reported was limited to what was reported in 2020. City Attachment App. at 3 (9/7/2023). Meaning, if a citizen waited until 2021 to report a use-of-force allegation, that complaint would not be reflected in the report, which



already went to print or was already published. City Attachment App. at 3 (9/7/2023).

On March 7, 2022, Mr. Harrison submitted a records request to DMPD. D0010 Harrison App. at 23 (8/22/2023). Mr. Harrison was seeking, in pertinent part, “A copy of any and all documents used in the preparation of the 2020 report.” D0010 Harrison App. at 23 (8/22/2023). After the City received the request, Harrison was informed that the documents he requested, meaning those used in the preparation of the 2020 report, were “gathered in anticipation of litigation, and therefore are considered attorney work product”, and therefore, denied Mr. Harrison’s open records request. D0010 Harrison App. at 24 (8/22/2023).

On March 13, 2022, Mr. Harrison narrowed his request stating, “I am requesting a copy of each of the 387 Use-of-force reports that were made during the calendar year of 2020.” D0010 Harrison App. at 25 (8/22/2023). On March 18, 2022, the City advised Mr. Harrison that the documents he sought were confidential pursuant to Iowa Code § 22.7(5) and attorney work product because they were prepared in anticipation of litigation. D0010 Harrison App. at 27 (8/22/2023). On April 11, 2022, the City wrote to Mr. Harrison and stated,

The documents sought are confidential personnel records and are exempt from disclosure under Iowa Code Section 22.7(11). See, *Des Moines Independent Community School District*, 487 N.W. 2d 666, 669-70 (Iowa 1992). The records are used in the context of performance evaluations and are characterized as “in-house, job

performance documents exempt from disclosure.” *ACLU Foundation v. Records Custodian, Atlantic Community School District*, 818 N.W. 2d 231, 235 (Iowa 2012).

D0010 Harrison App. at 28 (8/22/2023). This appeal followed.

## ARGUMENT

### I. **The City of Des Moines Police Department’s unique use-of-force reports, and the mandatory evaluation process included, make these documents personnel confidential personnel records.**

#### A. Issue Preservation

Error preservation rules require a party to raise an issue in the trial court and obtain a ruling from the trial court. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005). Further, Iowa Rule of Appellate Procedure 6.903(2)(8)(1) requires a statement addressing how an issue was preserved for appellate review with reference to the record where the issue was raised and decided.

The City of Des Moines first raised the issues herein by filing a resistance to Harrison’s motion for summary judgment and a cross-motion for summary judgment and a memorandum in support. D0014 SJ Resistance, Cross-Motion and Memo (9/7/23). Harrison resisted the City’s cross-motion. D0021 Harrison Resistance (12/11/23). The district court ruled in favor of Harrison on the matters argued herein on February 15, 2024. D0026 Ruling (2/15/2024). As such, error has been preserved for all the issues herein.

## **B. Standard of Review**

A district court properly grants a summary judgment “when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Robinson v. Fremont County*, 744 N.W.2d 323, 325 (Iowa 2008). When no genuine issue of material fact exists, the Court determines whether the district court correctly applied the law. *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006). As such, the district court’s grant of the City’s motion for summary judgment is reviewed for correction of errors at law. *Baratta v. Polk Cnty. Health Servs.*, 588 N.W.2d 107, 109 (Iowa 1999).

## **C. Contentions and Reasons**

Iowa Code Section 22.7 states that certain records held by a government body are confidential and not subject to open records requests. Specific to this case, Mr. Harrison has requested “use-of-force” reports made by police officers and evaluate through their chain of command for conformity with policy. The City denied Mr. Harrison’s request for these documents because they are performance review documents.

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: Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies.

Iowa Code § 22.7(11)(a).

The Iowa Supreme Court has analyzed this section of the Iowa Code several times in the last forty years, so a review of the relevant cases is instructive. The City will initially begin with the most recent case as it provides the lens for analyzing this case. The Court addressed Iowa Code §22.7(11) in *Atlantic School District*, in which the ACLU of Iowa requested disciplinary records of two teachers. *Am. C.L. Union Found. of Iowa, Inc. v. Recs. Custodian, Atl. Cmty. Sch. Dist.*, 818 N.W.2d 231 (Iowa 2012). Specifically, two teachers had conducted a strip search of five students to find \$100.00 that had been stolen from another student. *Id.* at 231. Initially, the school administrator stated that the teachers had followed policy. *Id.* Then, he retracted that statement and told them the teachers were being disciplined. *Id.* He eventually provided the teachers' names but refused to disclose the disciplinary action taken. *Id.* The court here found that the plain language of Iowa Code §22.7(11) made these documents exempt.

“When [the Court] find[s] that a requested piece of information fits into a category of an exemption, [it] will not apply a balancing test.” *Id.* The Court’s

[I]nterpretation of these exceptions depends solely on legislative intent. *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895, 897 (Iowa 1988). In prior cases considering the scope of the confidentiality exceptions, we have said “the legislature intended for the disclosure requirement to be interpreted broadly, and for the confidentiality exception to be interpreted narrowly.” *In re Des Moines Indep. Community Sch. Dist. Pub. Records*, 487 N.W.2d 666, 669 (Iowa 1992); *accord City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 527 (Iowa 1980). Nevertheless, where the

legislature has used broadly inclusive language in the exception, we do not mechanically apply the narrow-construction rule; instead, we give effect to the legislative purpose underlying the exception. *Gabrilson*, 554 N.W.2d at 271; *City of Sioux City*, 421 N.W.2d at 897.

*DeLaMater v. Marion Civ. Serv. Comm'n*, 554 N.W.2d 875, 878 (Iowa 1996). At core in the ACLU case is that the legislature chose to use broad language for the “personal information in confidential personnel records” so the Court interpreted the term broadly.

Moving backward, in *Des Moines Independent*, a school principal was in conflict with a group of parents and teachers. *Des Moines Indep. Cmty. Sch. Dist. Pub. Recs. v. Des Moines Reg. & Trib. Co.*, 487 N.W.2d 666, 670 (Iowa 1992). The principal claimed race discrimination; the parents/teachers claimed disrespect, failure to follow through, and absence at PTA meetings. *Id.* The district appointed two investigative committees, one to investigate the claim of race discrimination, another to investigate the parents/teachers’ complaints. *Id.* The principal ultimately sued and the parties settled the case. The Des Moines Register sought, among other items, the investigative documents from the committees. *Id.* The Court determined that the documents in the investigative files related to employee performance and were “in-house, job performance documents exempt from disclosure.” *Id.* The court:

[D]etermined performance evaluations contained in an employee’s confidential personnel file were exempt from disclosure

under section 22.7(11) based on the plain language of the statute. 487 N.W.2d at 670. Because we determined the plain language of the statute exempted performance evaluations, we declined to apply a balancing test.

*Id.*

That balancing test was central to the *DeLaMater* case. There, the Court considered a records request for the raw scores of civil service test and the grading scale, which included the maximum number available on each portion of the test. *DeLaMater v. Marion Civ. Serv. Comm'n*, 554 N.W.2d 875, 879 (Iowa 1996). Mr. DeLaMater appealed the district court decision denying him access to this information. The balancing test employed requires weighing the public interests served by disclosure against the private interest in protecting against invasions of privacy. *Id.* at 878. In applying the balancing test, courts consider a number of factors:

[T]he public purpose of the party requesting the information; whether the purpose could be accomplished without the disclosure of personal information; the scope of the request; whether alternative sources for obtaining the information exist; and the gravity of the invasion of personal privacy. *E.g.*, *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252, 255 (1992) (considering the existence of an alternative source for the requested information and the gravity of the invasion); *Bowie v. Evanston Community Consol. Sch. Dist.*, 128 Ill.2d 373, 131 Ill.Dec. 182, 185, 538 N.E.2d 557, 560 (1989) (considering whether purpose could be accomplished without disclosure of personal information); *State ex rel. Jones v. Myers*, 61 Ohio Misc.2d 617, 581 N.E.2d 629, 631 (1991) (considering nature of invasion, value of public interest and existence of alternative sources). A review of these decisions confirms that the balancing inquiry is intensely fact specific.

*Id.* The Court scoured other states for similar fact patterns and found, generally, other state courts ordered that the raw score, without identification of individuals tied to those scores, was non-exempt and had to be turned over. *Id.* at 880. After methodically applying a balancing test, the Court determined that Mr. DeLaMater was entitled to the documents he sought. *Id.* at 881.

The DMPD's use-of-force documents are for performance review and compliance with policy determination by supervisors. They are far more like the documents in *Des Moines Independent* and *Atlantic Schools*. As such, this court should not apply a balancing test based on the plain language of the statute and find that they are exempt from disclosure under Iowa Code §22.7(11). Even if a balancing test were necessary, these reports would lean toward nondisclosure. There is a strong public interest in police reporting force, with candor, and having supervisors investigate those actions, also with candor. The de-identified data is available through the annual report provided, so the public and Mr. Harrison are apprised of the DMPD's uses of force and consequent corrective action. Mr. Harrison can access arrest data by way of arrest reports and body worn camera video. The scope of his request is extremely broad; every single use of force report for an entire year; that is 387 individual officer's performance evaluations. There are ample ways for Mr. Harrison to access arrest information where force was

used. In the face of such an egregious invasion of privacy, the balance favors the City.

In his summary judgment brief and statement of facts, Mr. Harrison included page 1 of a template for the use-of-force report. What is missing is page 2, which clearly shows that this report is a performance evaluation. D0010, Harrison App. at 7 (8/22/2023). There is input space for a chain-of-command review. That stands to reason based on the purpose of the reporting policy—accountability. The Use-of-force reporting policy states, “The authority to use force carries with it the need for accountability in order to safeguard the rights of the public and to preserve the integrity of the department.” D0010, Harrison App. at 19 (8/22/2023). Accountability comes by way of supervisory review. That starts with self-review by the officer.

The report begins with an officer providing a self-evaluation that justifies why she used force. She must explain what she did and why she did it.

Specifically, the policy states,

Use-of-force reports shall be comprehensive and provide the degree of specificity necessary to fully document and evaluate the use-of-force, including any medical attention if necessary.

- (1) Officers should ensure that their use-of-force report accurately relates what the officer knew, observed, or believed at the time of the incident. Any facts or information learned by watching video of the encounter, speaking with witnesses, etc. should be addressed. [Emphasis added].



D0010, Harrison App. at 20 (8/22/2023).

The underlined portions demonstrate that the officer is reporting a force incident so that it can be reviewed by supervisors to determine if the officer performed in accordance with policy. Not only is the officer preparing a thorough report for supervisory review, if there are any discrepancies or omissions of information that become apparent by review of video or witness statements, the officer must address and explain those in her report.

A supervisor's duties with regard to review of use-of-force reports are as follows:

#### Supervisor Responsibilities

1. When investigating a display of force incident, the officer's immediate supervisor shall review the report and any related video. A supervisor interview and photographs are not required, but may be done at the supervisor's discretion.
2. When investigating a use-of-force incident, an officer's immediate supervisor shall respond and ensure the following are completed and documented:
  - a. A thorough interview regarding the incident is conducted individually with the officer and suspect
  - b. Injuries observed and medical treatment requested and provided
  - c. Witnesses are identified and interviewed, as appropriate
  - d. Photographs are taken of the suspect and officers involved, detailing any specific injuries or property damage
  - e. Identify if any video is available or needs to be recovered (body camera, in-car camera, other video sources)
3. Supervisors shall:
  - a. Ensure the officer's incident report is completed in a timely manner.

- b. Review the incident report and;
  - (1) If it meets department guidelines, endorse it or
  - (2) If it does not, make a recommendation to address the policy violation.
- c. Forward the incident report through the chain of command for additional review.

D0010, Harrison App. at 20 (8/22/2023).

It is important to note that these records are kept with the Office of Professional Standards (OPS), along with other personnel documents. D0014, City Attachment App. at 2-3 (9/7/2023). They are accessible to a very limited group: the officer being reviewed, his or her immediate supervisor, OPS and command staff. D0014, City Attachment App. at 2-3 (9/7/2023). They are not stored in DMPD's traditional records management system with other administrative and daily business documents. D0014, City Attachment App. at 2-3 (9/7/2023).

The Des Moines Police Department's use-of-force reports are personnel records because they are used to evaluate the officer's actions for accountability for policy failures, including potential discipline. *Atlantic School District* makes clear that disciplinary records are exempt personnel records. The *Des Moines Independent* case shows that the investigation that could lead to discipline is part of an exempt personnel file. Because every DMPD use-of-force report triggers an investigation and evaluation of officers' conduct that could result in discipline, Iowa's caselaw exempts these records from disclosure under section 22.7(11)(a).

The out-of-state cases cited by Mr. Harrison at summary judgment miss the mark for several reasons. Beginning in Arkansas, there was an Attorney General opinion for the state that defined what employee evaluation or job performance records, which is very narrow. *Thomas v. Hall*, 399 S.W.3d 387 (2012). In Iowa, the Supreme Court has determined that the term “personal information in confidential personnel records” is broad because the legislature intended this portion to be broad. *DeLaMater v. Marion Civ. Serv. Comm’n*, 554 N.W.2d 875, 878 (Iowa 1996), citing *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996).

Further, unlike the Arkansas review process, every one of the use-of-force reports in Des Moines is investigated by a supervisor. As noted above, upon receipt of a use-of-force report, the supervisor shall investigate including a thorough interview being conducted with the officer and the suspect. The supervisor must review the report and any related video. The supervisor must look into any injuries and medical treatment requested and provided. The supervisor must ensure that witnesses are identified and interviewed. The supervisor must ensure that photographs are taken of the suspect and officers involved. The supervisor must identify if video is available or needs to be recovered. This is not a passive review process. The supervisor is conducting a full investigation into the officer’s actions. He or she isn’t just reading the officer’s words and sending it up the chain of command for a rubber stamp.

This is a much different evaluation process than some routine reporting by the officer, as was the case in Arkansas. The supervisor's investigation is a major part of the report itself. This difference was magnified in a later decision by the Court of Appeals of Arkansas. In that case, a parent of a student requested the reviews by the school related to allegations about two altercations between a teacher and the student. The parent likened those investigative assessments to the use-of-force reports in *Thomas*. The appellate court stated:

*Thomas* discussed whether routine “use-of-force reports” created by police officers were exempt from disclosure as employee-evaluation and job-performance records under FOIA. *Id.* Ultimately, our supreme court held that they are subject to disclosure. In relevant part, our supreme court held that the reports at issue were not employee-evaluation or job-performance records because the reports were not prepared by the police officer's supervisor, nor did the reports contain any notation or comments about the officer's conduct by the supervisor. *Thomas, supra.* The same is not true here. There was no evidence presented to suggest that the records at issue were not created by the employer regarding the employee's performance with regard to specific incidents as appellee affirmatively pleaded in its answer. Thus, *Thomas* is distinguishable and inapplicable to the records at issue in this case. [Emphasis added].

*Davis v. Van Buren Sch. Dist.*, 2019 Ark. App. 157, 9, 572 S.W.3d 466, 472 (2019). That is precisely why the *Thomas* case is not comparable or persuasive regarding the situation herein.

It is important to note that, as can be seen from Mr. Harrison's focus on the number of disciplinary actions related to the use-of-force, he is not just interested in the “what happened”. In his statement of facts at summary judgment, Harrison

stated, “The 2020 Use of Force reports are also of interest to Mr. Harrison because he is aware of several individuals who complained about inappropriate uses of force in 2020, and DMPD apparently did not take any corrective action in relation to those uses of force.” D0011 Harrison SOF at 2 (August 22, 2023). He wants complaint-based outcome information, in other words, he wants to know who was disciplined and for what uses of force. That is the only conclusion because his statement indicates he already knows the “who, what, where” about some number of uses of force. He wants to learn the disciplinary outcomes in order to confirm his speculative critique about the City’s evaluation of officers’ actions, as can be easily discerned from his summary judgment facts:

26. In 2020, there were 387 Use of Force reports submitted.

27. There were 15 total complaints regarding a use of force.

28. Eleven complaints were made by civilians as “an outgrowth of civil unrest in the Summer of 2020.”

29. Only four of the 15 total complaints were internally generated; those four internal complaints were found to involve a policy violation.

30. In response to the policy violations, DMPD took “corrective action to include reinstruction and/or discipline.”

31. The other 11 use of force complaints that came from civilians apparently did not result in corrective action.

32. In other words, of the 387 Use of Force reports in 2020, only 1.03% resulted in corrective action.<sup>1</sup>

D0011 Harrison SOF at 5-6 (August 22, 2023).

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<sup>1</sup> These numbers also reflect that out of 387 uses of force, only 3.8% resulted in complaints, internal and external, and of those 15 complaints, 26.6% resulted in corrective action.

These seven statements demonstrate how Harrison’s intent to access internal reviews runs afoul of Chapter 22. This raises another case from Arkansas. When an individual wanted to learn the outcome of an internal review, the Court denied that and noted the important “public interest in maintaining an effective public-employee-evaluation system and in the privacy interests of its employees requires that “employee evaluation or job performance records” be treated differently.

*Hyman v. Sadler for Arkansas State Police*, 539 S.W.3d 642, 644.

Moving on to the Texas case cited by Harrison at summary judgment, the court, in that case, examined the two-tier statutory scheme for police personnel files. *City of San Antonio v. San Antonio Exp. News*, 47 S.W.3d 556 (Tex. App. 2000). The statute created one mandatory file containing documents related to an individual’s relationship with the employer, including commendations, evaluations, and discipline. Tex. Gov’t Code Ann. §552.102 (a-h). The statute prohibited disclosure of this file, unless otherwise required by law. *Id.* Then, the statute allows for a department to keep its own personnel file and, likewise, prohibits the release of that information. *Id.*

The question arose in San Antonio, as it arose here, as to whether use-of-force reports were confidential personnel records. In deciding they were not, the court looked at the policy, placement, use, and nature of the reports. *City of San Antonio*, 47 S.W.3d at 560. First, the court asserted that the department’s

policy was silent as to the purpose of the reports in relation to the Office of Professional standards, which kept the use-of-force reports. *Id.* That is not so with the Des Moines Police Department. The purpose of the use-of-force reporting is accountability of the officer using force. That is reflected in the rigorous investigation that must follow within the DMPD. Contrast with *San Antonio*, in which the court stated that use-of-force reports were “not any more reasonably related to an individual officer’s employment relationship with the department than an ‘offense report’ completed by the same officer detailing the same incident.” *Id.*

In the DMPD, an officer’s standard arrest report, even in a situation with force used, is not the mechanism that triggers a supervisory review of the officer’s performance, it is the use-of-force report that is the performance evaluation piece. The arrest report does not get placed in the officer’s personnel file, only the use-of-force report is placed in that confidential file. Also, notice the contents of San Antonio Police Department’s use-of-force report:

The report contains information regarding the incident in which force was used, such as the date, time, and location of the incident; the case number assigned to the incident; the officer's name, badge number, and unit assignment; the offense classification; and the prisoner's name and birth date. The officer must explain the incident and indicate the type of weapon used. If the arresting officer was assisted, the name and badge number of the assisting officer must be included. The report indicates whether the prisoner was injured, and if so, a section relating to the injury must be completed. If a supervisor was at the scene, the supervisor completes a section of the report indicating

whether the departmental policies and procedures were complied with, and if not, what policies or procedures were violated and what action, if any, should be taken.

*Id.* at 559 [Emphasis added]. There is a conditional and single supervisory review if, and only if, the supervisor was on scene. This use-of-force report and process is not equivalent to the City of Des Moines Police Department's.

The Texas court also stated that the use-of-force reports were not physically kept in the officers' personnel files, or at least the record at summary judgment failed to illuminate that issue. They were *maintained* by the department's professional standards office, but the physical relationship between the use-of-force reports and internal personnel files was murky, based on the evidence. Further, the court noted that the record reflected that the purpose of maintaining the files was to "track use-of-force by the SAPD in general." *Id.* at 564.

The DMPD's office of professional standards maintains the internal personnel file that contains use-of-force reports, and other personnel material. The DMPD does not maintain these files to track use-of-force in general; they are to be used to engage in a multi-layered performance review every time an officer uses force. For the reasons stated above, the San Antonio, Texas practice with use-of-force reporting is not comparable to the DMPD's use-of-force reports, and the case, therefore, is not persuasive.



The Wisconsin case relates to firing of firearms and the court was concerned that there was not any other way to get the information about the circumstances related to shootings. *State ex rel. J. Sentinel, Inc., Anne Bothwell v. Philip Arreola, Chief of Police, City of Milwaukee*, 558 N.W.2d 670 (Ct. App. 1996). Here, that is not a problem. Harrison could ask for the incident reports that would contain the same information but would not disclose the review process. The DMPD has specifically created a public document to account for uses of force demonstrating its interest in transparency. That is what prompted this request for use-of-force reports. Unfortunately, that effort is now being used as a sword to get at personnel records.

Also, in the Wisconsin case, the court applied a balancing test because its jurisprudence held that personnel records are not *per se* exempt from disclosure. That is not the case in Iowa. The Iowa Supreme Court has indicated that the term “personnel records” is to be read broadly and cover personnel evaluations. Finally, the Wisconsin case specifically allowed for redaction of some police officer personal information and any supervisory conclusions and recommendations for discipline. *Id.* at 669. Here, the district court required the City of Des Moines to turn over all reports, with the exception of medical information contained therein. While Harrison’s attorney stated for the first time at hearing that they were not seeking personnel information, the record does not

reflect that in any way. He requested the entire use-of-force report and never ceded the evaluation section.

Finally, Harrison points to a New York case from 2019, in which an advocacy group requested incident reports, use of force reports and inmate behavioral reports of some inmates imprisoned in state correctional. The state provided redacted documents, stating the redacted portions were personnel records exempt from disclosure, and the advocacy group challenged the redactions. *Prisoner Legal Servs. of New York v. New York State Dep't of Corr. & Cmty. Supervision*, 173 A.D.3d 8, 9–10 (2019). The claimed exemption was based on a civil rights law, which provides, in pertinent part, that “[a]ll personnel records used [by DOCCS] to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the [correction officer’s] express written consent . . . except as may be mandated by lawful court order.” § 5 N.Y. Civ. Rights Law § 50-a (Repealed, June 12, 2020).

The court noted that the purpose of this privacy law is to “safeguard against potential harassment of officers through unlimited access to information in personnel files...[r]ecords that have no potential or remote potential to be used to degrade, embarrass, harass, or impeach the integrity of an officer do not fall within the purview of Civil Rights Law §50-a.” *Prisoner Legal Servs.* at 11, internal

citations omitted. The court also focused on whether the records could be used, as opposed to, would be used for evaluative purposes. “[I]t will not suffice for the agency or department opposing disclosure to merely...demonstrate that the recorded data may be used to evaluate performance toward continued employment or promotion” and “these reports are catalogued and, depending on the circumstances, possibly subjected to multiple layers of review. That fact alone shows that this case is not comparable to the situation in the DMPD, where every single use-of-force report triggers a mandatory, multiple layer review of performance.

It is important to point out a dubious position the Texas court asserts. It acknowledged that some of the use-of-force reports could indeed be personnel records, if there was an investigation and action against the employee. However, the court reasoned that those documents are converted to non-personnel records by virtue of the fact that they have multiple uses, including “analyzing for trends and reviewed for overall quality control.” By that rationale, if an employer studies annual performance evaluations for trends, a prodigiously-recognized personnel record would convert to a non-personnel record. That cannot be correct.

All of these out-of-state cases have critical material differences from the way that the DMPD treats use-of-force reports. The primary purpose of these reports is employee accountability. That is demonstrated by the mandatory investigation of

each of these uses of force. It is important to point out, Mr. Harrison could gain access to date, time, specific location, and immediate facts and circumstances surrounding a crime or incident, as allowed in Iowa Code §22.7(5), through Investigative Reports and the body and car camera that provide those basic pieces of information. One needn't access the evaluative report to get at the immediate facts and circumstances of any given arrest or encounter.

Mr. Harrison's interest in the force reports as personnel records is indicated by his statement of facts at summary judgment. In the facts, he speculated on the percentage of force reports that lead to discipline or retraining. While his speculation is irrelevant to whether the documents are exempt, it shows his focus on the corrective action and whether the DMPD is disciplining or retraining its officers up to his standards. This further underscores their nature as personnel records, and therefore, exempt from production. For all these reasons, This Court should declare the DMPD's use-of-force reports and evaluation process are confidential personnel records, and reverse the decision of the district court.

## **II. Iowa Code Section 80F.1(20) supports the non-disclosure of the use-of-force reports.**

### **A. Issue Preservation**

Error preservation rules require a party to raise an issue in the trial court and obtain a ruling from the trial court. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005). Further, Iowa Rule of Appellate Procedure

6.903(2)(8)(1) requires a statement addressing how an issue was preserved for appellate review with reference to the record where the issue was raised and decided.

The City of Des Moines first raised the issues herein by filing a resistance to Harrison's motion for summary judgment and a cross-motion for summary judgment and a memorandum in support. D0014 SJ Resistance, Cross-Motion and Memo (9/7/23). Harrison resisted the City's cross-motion. D0021 Harrison Resistance (12/11/23). The district court ruled in favor of Harrison on the matters argued herein on February 15, 2024. D0026 Ruling (2/15/2024). As such, error has been preserved for all the issues herein.

### **B. Standard of Review**

A district court properly grants a summary judgment “when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Robinson v. Fremont County*, 744 N.W.2d 323, 325 (Iowa 2008). When no genuine issue of material fact exists, the Court determines whether the district court correctly applied the law. *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006). As such, the district court's grant of the City's motion for summary judgment is reviewed for correction of errors at law. *Baratta v. Polk Cnty. Health Servs.*, 588 N.W.2d 107, 109 (Iowa 1999).

### **C. Contentions and Reasons**

Iowa Code Chapter 80F is known as the Police Officers' Bill of Rights. It provides increased protections, specifically privacy for investigations that could lead to discipline. Iowa Code §80F.1(20) states:

The employing agency shall keep an officer's statement, recordings, or transcripts of any interviews or disciplinary proceedings, and any complaints made against an officer confidential unless otherwise provided by law or with the officer's written consent. Nothing in this section prohibits the release of an officer's statement, recordings, or transcripts of any interviews or disciplinary proceedings, and any complaints made against an officer to the officer or the officer's legal counsel upon the officer's request.

As such, within the complaint process, an officer's statement is to be confidential except otherwise provided by law.

Mr. Harrison previously argued that Iowa Code §80F.1(20) applies only to disciplinary complaints and has no impact on this records request. He also argued that §80F.1(20) only applies to "formal administrative investigations" is not supported by the statute. Because the statute also includes "Informal Inquiry" which means a "meeting by a supervisor or command personnel with an officer who is the subject of an allegation, for the purpose of resolving the allegation or determining whether a formal administrative investigation should be commenced." §80F.1(1)(d). Whether that section or section 80F.1(1)(c) regarding formal investigation is applied, at least some of the use-of-force records would fall within

the protection of §80F.1(20)—those where a complaint or allegation was made against the officer related to a particular use of force. So, §80F.1(20) could have a direct impact related to withholding some of the use-of-force reports.

Addressing the argument that §80F.1 is completely irrelevant to this issue, the City disagrees. Section 80F.1 provides context to the argument section above. It is clear that the legislature has carved out additional privacy protections for first responders so that even allegations of wrongdoing, triggering an internal investigation that may result in discipline, are kept confidential.

The very existence of §80F.1, speaks volumes regarding the legislature's desire to protect law enforcement officers and fire fighters. According to the National Conference of State Legislatures,<sup>2</sup> the State of New York does not have a corollary to §80F.1. Wisconsin does but it does not contain a confidentiality section of internal investigations. Wisconsin State Code §164.01, et seq. The same is true of Arkansas. Arkansas State Code §14-52-302-303. Only Texas has something similar to what is in place in Iowa, however, it was created in 2011—more than a decade after the *San Antonio* case discussed above. Tex. Loc. Gov't Code §143.1214. The above comparators are all the states whose decisions were discussed above. Context matters and helps to frame the question of whether use-of-force reports, that have a mandatory performance evaluation process, should be

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<sup>2</sup> Microsoft Power BI

considered personnel records in the unique environment of Iowa.

Much like the policy considerations in Iowa Code § 22.7(11), the legislature intended to keep personnel matters of police officers protected. Point being, Iowa Code 80F.1, should be read in harmony with Iowa Code § 22.7(11). When that is done, it is evident that the legislature intended for police officers to be candidly and thoroughly investigated and evaluated, to ensure that disciplinary matters are addressed. If these types of performance reviews are made public, perhaps, police departments will be disincentivized from performing them; that would be an unfortunate result for officers and for the public. Because these use-of-force reports must be reviewed, investigated, and evaluated to ensure officers are accountable for policy violations related to the most serious and weighty power the police carry—the power to detain and seize people by using force, they should be declared personnel records. For these reasons, the decision of the district court should be overturned.

### **III. Iowa Code may bar disclosure of some use-of-force reports depending on the unique circumstances.**

#### **A. Issue Preservation**

Error preservation rules require a party to raise an issue in the trial court and obtain a ruling from the trial court. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005). Further, Iowa Rule of Appellate Procedure 6.903(2)(8)(1) requires a statement addressing how an issue was preserved for



appellate review with reference to the record where the issue was raised and decided.

The City of Des Moines first raised the issues herein by filing a resistance to Harrison’s motion for summary judgment and a cross-motion for summary judgment and a memorandum in support. D0014 SJ Resistance, Cross-Motion and Memo (9/7/23). Harrison resisted the City’s cross-motion. D0021 Harrison Resistance (12/11/23). The district court ruled in favor of Harrison on the matters argued herein on February 15, 2024. D0026 Ruling (2/15/2024). As such, error has been preserved for all the issues herein.

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### **C. Contentions and Reasons**

Based on fact-intensive considerations, there may indeed be some use-of-force records that are also protected under other portions of Iowa Code Chapter 22

or other statute. For example, if a case is still actively open and being investigated or if disclosure would pose a clear and present danger, that could preclude its availability to the public. Another example, in the event the subject was a minor or a juvenile, those reports would be barred from production under various statutes. Should this Court affirm the decision below, the City asks that, in circumstances that meet other exemptions or statutory proscriptions, the City be granted the right to refuse producing reports that are otherwise protected by statute.

### **CONCLUSION**

The City of Des Moines Police Department publishes annual reports related to force to give people data, to be accountable and transparent. Those reports are now being used as a sword to access personnel information of those whose performance is being scrutinized to ensure conformance with use-of-force policy. Public policy, statute, and case law require that the decision of the district court be reversed and this Court find that summary judgment should have been granted to the City and Ms. Mickey.

### **ORAL ARGUMENT**

Because this is a matter of first impression and presents weighty issues of public importance, oral argument is appropriate.

## CERTIFICATIONS

### Certificate of Compliance

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 6,837 words.

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the typestyle requirement for Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Word 2022 in Times New Roman 14 point font.

### Service

I, Michelle Mackel-Wiederanders, hereby certify that on May 31, 2024, I filed this Appellant's Brief with the Clerk of the Supreme Court of Iowa electronically through EDMS. A copy of Appellants' Brief was served upon counsel for Appellee electronically on May 31, 2024, through EDMS.

/s/Michele Mackel-Wiederanders  
Michelle Mackel-Wiederanders