IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 24-0373

HARVEY HARRISON
Plaintiff-Appellee,

vs.

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

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY, IOWA
THE HONORABLE COLEMAN MCALLISTER
POLK COUNTY CASE NO. CVCV064414

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Cases

<u>Other State Statutes</u>

STATEMENT OF ISSUES

I. Whether DMPD's 2020 use of force reports are personnel records exempt from public disclosure under Iowa Code 22.7(11)(a).

II. Whether DMPD's 2020 use of force reports are exempt from disclosure under Iowa Code § 80F.1(20).

III. Whether DMPD's 2020 use of force reports are exempt from disclosure under Iowa Code 22.7(5).

ROUTING STATEMENT

Retention is appropriate in this case as it involves a substantial issue of first impression: whether police use of force reports are public records subject to disclosure under the Iowa Open Records Act. Iowa R. App. P. 6.1101(2)(c). Retention is also appropriate in this case because it presents issues of broad public importance, namely, transparency in police-citizen relations. Iowa R. App. P. 6.1101(2)(d).

NATURE OF THE CASE

This is an open records case. Mr. Harrison sought production of the "use of force" reports authored by Des Moines police officers during the 2020 calendar year and was denied by City of Des Moines records custodian Lisa Mickey. Mr. Harrison then filed a Petition for Writ of Mandamus seeking those records. D0001, Petition (10/12/2022).

The district court concluded those reports are public records subject to disclosure and ordered the City to produce them to Mr. Harrison. D0026, S.J. Ruling at 23 (2/15/2024). The district court further specified that any information in those records about "whether the reporting officer was injured and/or went to the hospital" must be redacted, because that information is exempt from disclosure under Iowa Code § 22.7(11). *Id.* The district court did not order the records custodian, Lisa Mickey, to pay the statutory fine because she reasonably relied on her legal department's counsel per Iowa Code § 22.10(3)(b)(3). *Id.* The district court awarded attorney fees and costs to Mr. Harrison under Iowa Code § 22.10(3)(c). *Id.*

The City appeals the grant of summary judgment in Mr. Harrison's favor, contending these records are exempt from disclosure under (1) Iowa Code § 22.7(11) because they are confidential personnel records; and (2) Iowa Code 80F.1(20), the "police officers' Bill of Rights." The City also argues some records could be exempt under Iowa Code § 22.7(5). The district court correctly rejected the City's arguments, and this Court should affirm the ruling ordering the City to produce the Use of Force report.

FACTS

The following facts were undisputed. *See* D0026 at 4 (noting "[A]t the time of the hearing, both parties conceded that there are no issues of

disputed fact that preclude summary judgment."). May 25, 2020 was a flashpoint in American police and civilian relations. D0012, Petitioner's S.J. Br. at 2 (8/22/2023). Following the killing of George Floyd in Minneapolis, Minnesota, protests erupted across the nation—including in Des Moines, Iowa. *Id.* at 2-3. From May 29, 2020 to June 27, 2022, citizens, civil rights groups, and other organizations protested the deadly use of force that is disproportionately used against Black Americans by police officers. *Id.*

The Des Moines Police Department (DMPD) issued a "Use of Force Report" in 2020, which summarized and analyzed the department's uses of force in 2020. D0010, Petitioner's S.J. Appx. at 8–22 (8/22/2023). The report provides totals for different types of force used: physical control, pepper spray, physical strike, firearms etc. D0010 at 12. The report noted that DMPD changed some of its policies in the summer of 2020, including some changes that appear responsive to the concerns raised in the George Floyd protests. D0010 at 9 (adding specific provisions prohibiting prolonged force to neck area and force that creates a risk of asphyxiation).

Mr. Harrison is the founder of Just Voices, a non-profit formed to document and combat racial disparities in Des Moines. D0010 at 72. Just Voices is working on a research project called "A People's History of the 2020 Protests" that will provide interviews, videos, and statistical analysis about

the DMPD's use of force during this period of protests. *Id.* Just Voices has already begun publishing articles in a series about the George Floyd protests, published in Black Iowa News. D0010 at 73. One of the goals of this project is to evaluate how the DMPD uses physical and deadly force against residents of Des Moines in order to improve local police practices. *Id.* To achieve this goal, Mr. Harrison needs data. *Id.*

The Use of Force reports from 2020 are of particular interest to Mr. Harrison because several DMPD officers have recognized that they were told by supervisors not to complete Use of Force reports during the George Floyd protest responses. D0010 at 54, 56–57, 59, 61, 65, 73. Other officers reported that they did not necessarily complete Use of Force reports if they were assigned to the Metro Star unit. D0010 at 67, 62, 64, 69, 71, 73. 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. D0010 at 13, 73.

Accordingly, on March 7, 2022, Mr. Harrison submitted a records request to DMPD. Mr. Harrison sought:

> A copy of any and all documents used in the preparation of the 2020 report.

> A copy of any and all Appendices and/or supplemental documents used in the preparation of and /or concerning the 2020 report.
>
> Table 1 of the Report describes the "number of times and types of force". Provide a copy of each report referenced in this chart.
>
> Provide a copy of the Use of Force report related to the incident (shown on the video released by Just Voices) involving Captain Bagby that occurred on the morning of May 31, 2020.

D0010 at 23.

Defendant Lisa Mickey is the Open Records Coordinator at the DMPD. D0010, at 24. She denied Mr. Harrison's request. *Id.*

On March 13, 2022, Mr. Harrison clarified his request and told Defendant Mickey:

> Having now had the opportunity to review the Use of Force Report and the Supplement to that report I note that on page 2, it is reported that, during 2020, there were 282 personal contacts which involved a use of force. It goes on to report that there were 387 use of force reports made regarding those 282 incidents.
>
> I am requesting a copy of each of the 387 Use Of Force reports that were made during the calendar year of 2020.

D0010 at 25.

Mr. Harrison did not and does not request any disciplinary records, performance review documents, or other personal identifying information of individual DMPD officers. As noted by the district court, "Harrison is only requesting the basic information contained in the officer's use of force report

and not any subsequent investigation, disciplinary, or other records regarding supervisor review of such use of force reports." D0026 at 20.

On March 18, 2022, Defendant Mickey again denied Mr. Harrison's request. D0010 at 27. Then, on April 11, 2022, Deputy City Attorney Carol Moser wrote to Mr. Harrison confirming the denial of his request. D0010, at 28. Defendants have never released the requested individual Use of Force reports to Mr. Harrison. D0010 at 3.

The DMPD's Use of Force Reporting policy in effect in 2020 required "that any use of force incident be reported in a timely, complete, and accurate manner by involved officers." D0010 at 19 (Use of Force Reporting policy II); *accord* D0010 at 10. Officers must submit a Use of Force report before the end of their shift if possible. D0010 at 20 (Use of Force Reporting policy IV(B)(1)(b)).

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.
> (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.

D0010 at 20 (Use of Force Reporting policy IV(B)(3)).

The Use of Force report form used by DMPD collects basic information about when and where the use of force occurred, and the following information about the circumstances surrounding the use of force:

Use of Force Details

Reason For Using Force	Service Being Rendered	More Than 1 Citizen Involved
		No
Weather Condition	**Light Condition**	**Distance to Citizen**
Citizen Injured	**Citizen Taken to Hospital**	**Citizen Arrested**
No	No	No
Citizen Build	**Citizen Height**	**Citizen Influence Assessment**
Employee(s) Injured	**Employee(s) Taken to Hospital**	
No	No	

D0010 at 6. An officer is not required to set forth what was done correctly, incorrectly, or otherwise justify their use of force in this initial report.

DMPD Chief of police, Dana Wingert, testified in his deposition how these use of force reports are used in the day-to-day operations of DMPD. According to Chief Wingert, even if no arrest occurs, but an officer uses some kind of force, then a use of force report must be completed. D0022, Tr. Deposition of Wingert, at 9:12-18. Each use of force report is reviewed by an officer's direct supervisor, the section commander, and then the division commander. *Id.* at 11:6-24. This review process can trigger a formal

administrative review that can result in discipline if the reporting officer did not follow Department policy. *Id.* at 28:13-14. DMPD's own internal review does not necessitate administrative review or discipline.

As Chief Wingert explained during his deposition, Use of Force reports are distinct from complaints or "administrative reviews." D0022 at 17:7-18. A "complaint" is when a member of the public files a complaint about an officer. D0022 at 18:6-13. An "administrative review" is the internal review document that is generated if a supervisor or commander believes an officer did something wrong. *Id.* at 17:7-18. Both a citizen "complaint" and a supervisor "administrator review" trigger the creation of a disciplinary case. *Id.* at 18:11-19. Each "administrative review" discipline case is assigned its own number, which is distinct from the case number associated with a Use of Force report. *Id.* at 15:24-17:10. A Use of Force report does not automatically trigger an "administrative review" disciplinary case. *Id.* at 17:7-15. In order for an officer to receive discipline, an "administrative review" disciplinary case must be opened. *Id.* at 28:1-8, 28:22-25. In sum, Use of Force reports are not themselves disciplinary records.

Based on the Use of Force reports submitted throughout the year, DMPD conducts "an annual analysis of use of force activities" to identify trends and patterns. D0010 at 21 (Use of Force Reporting policy (VI)). That

report is then used to inform policy, training, and equipment improvement recommendations. D0010 at 22 (Use of Force Reporting policy (VI))). Use of Force reports are also reviewed within the DMPD:

> 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. If the officer used force inappropriately, a departmental investigation is initiated, and the officer may receive additional training and/or discipline as authorized by Iowa Code Chapter 400 up to and including termination from employment.

D0010 at 10.

In 2020, there were 387 Use of Force reports submitted. D0010 at 11. There were 15 total complaints regarding uses of force. D0010 at 13. Eleven complaints were made by civilians as "an outgrowth of civil unrest in the Summer of 2020." D0010 at 13. Only four of the 15 total complaints were internally generated; those four internal complaints were found to involve a policy violation. D0010 at 13. In response to the policy violations, DMPD took "corrective action to include reinstruction and/or discipline." *Id.* The other 11 use of force complaints that came from civilians apparently did not result in corrective action. *Id.* In other words, of the 387 Use of Force reports in 2020, only 1.03% resulted in corrective action.

ARGUMENT

I. Preservation & Standard of Review

The issues raised in this appeal were preserved by the parties' respective summary judgment briefing and the district court's ruling on those motions. D0009, Plaintiff MSJ (8/22/2023); D0014, Defendant Cross-M.S.J. (9/7/2023); D0026. There were no material disputed facts; the parties agreed at the summary judgment hearing that this case "presents a legal and not factual dispute." D0026 at 4.

Review is for corrections of errors at law. *Rieder v. Segal*, 959 N.W.2d 423, 425 (Iowa 2021). The grant of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Susie v. Fam. Health Care of Siouxland P.L.C.*, 942 N.W.2d 333, 336-37 (Iowa 2020) (quoting Iowa R. Civ. P. 1.981(3)).

II. Mr. Harrison is entitled to the Use of Force reports under Iowa Code § 22.7(5)

Before responding to the City's arguments for why the records Mr. Harrison requests are exempt for disclosure, it is worth explaining why the records *are* subject to disclosure. As a general matter, the purpose of the Iowa Open Records Act is "to open the doors of government to public

scrutiny and to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act." *Mitchell v. City of Cedar Rapids,* 926 N.W.2d 222, 229 (Iowa 2019) (cleaned up). Accordingly, there is a "presumption in favor of disclosure" and "a liberal policy in favor of access to public records." *Id.* (internal quotation marks omitted). "Disclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." *Id.* (internal quotation marks omitted). While the disclosure requirement of the Act is interpreted broadly, all confidentiality exceptions are interpreted narrowly. *American Civil Liberties Union Foundation of Iowa, Inc. v. Atlantic Cmty. School District*, 818 N.W.2d 231, 233 (Iowa 2012).

Mr. Harrison's request for records is governed by Iowa Code § 22.7(5) because it involves a request for information created by a peace officer regarding the facts and circumstances about an incident. That statute provides:

> 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: . . . .
>
> 5. Peace officers' investigative reports, privileged records or information specified in section 80G.2, and specific portions of electronic mail and telephone billing records of law enforcement

> agencies if that information is part of an ongoing investigation, except where disclosure is authorized elsewhere in this Code. However, **the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section**, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual. [Irrelevant remainder omitted].

Iowa Code §22.7(5) (emphasis added).

None of the exceptions in § 22.7(5) authorizing nondisclosure apply.

a. Disclosure will not jeopardize an investigation or pose a danger to the safety of an individual

Mr. Harrison is not requesting anything that is exempt under the first sentence of § 22.7(5); no investigative reports, privileged records, information specified in Iowa Code § 80G.2,[1] electronic mail, or telephone billing records. His request falls under the second sentence of § 22.7(5), not the first. The Use of Force records Mr. Harrison requests pertain to the "immediate facts and circumstances surrounding a crime or incident." Those records "shall not be kept confidential . . . except in those unusual circumstances where disclosure would plainly and seriously jeopardize an

[1] Iowa Code § 80G.2 protects information relating to undercover investigations and information regarding officers and their families that could be used to threaten them or invade their privacy.

investigation or pose a clear and present danger to the safety of an individual." Iowa Code § 22.7(5).

As a matter of law, Defendants cannot establish that the Use of Force Reports present "unusual circumstances" where disclosure would jeopardize an investigation or pose a danger. There is no pending investigation. Mr. Harrison is seeking records that document every time the DMPD used force in 2020—more than three years ago. There is no basis to conclude that disclosure would jeopardize anyone's safety. Consequently, these records are subject to disclosure and the Court should enter a writ of mandamus compelling Defendants to make the Use of Force reports publicly available to Mr. Harrison.

b. The public interest is served by disclosure

Even if Mr. Harrison's request were governed by the first sentence of Iowa Code § 22.7(5), he is entitled to the Use of Force reports under the balancing test set forth in *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994) and applied most recently in *Mitchell*, 926 N.W.2d at 234. Both of those cases involved requests for investigative reports and thus implicated the first sentence of Iowa Code § 22.7(5).

In *Hawk Eye*, a Burlington newspaper reporter filed a writ of mandamus seeking disclosure of a report prepared by the Iowa Department

of Criminal Investigations (DCI) regarding a police shooting. *Hawk Eye*, 521 N.W.2d at 752. The Iowa Supreme Court recognized that the privilege cloaking law enforcement communications and reports "'is qualified, not absolute.'" *Hawk Eye*, 521 N.W.2d at 753; *accord Mitchell*, 926 N.W.2d at 230. *Hawk Eye* set forth a three-part test that an official claiming privilege must satisfy: "(1) a public officer is being examined, (2) the communication was made in official confidence, and (3) the public interest would suffer by disclosure." *Hawk Eye*, 521 N.W.2d at 753. In applying that test to the reporter's request for the DCI report, the *Hawk Eye* court noted that only the third prong of the analysis was of concern. *Id.*

For its analysis of that third prong, the Court employed a balancing test to weigh the public interest against the need for confidentiality. Generally speaking, confidentiality of police records "encourages persons to come forward with information, whether substantiated or not, that might be used to solve crimes and deter criminal activity." *Id.* That interest is particularly heightened when a case involves a confidential informant. *Id.* Confidentiality also "permits law enforcement officials the necessary privacy to discuss findings and theories about cases under investigation." *Id.* Those general interests, however, must be weighed against the public interest and in light

of case-specific factors. Two important factors are "nature of the investigation and whether it is completed or ongoing."

The *Hawk Eye* court accordingly weighed the "relative merits of the interests at stake" in that particular case. *Id.* The Court began by noting that the need for witness confidentiality was absent. No confidential informants were used. *Id.* Further, the official investigation had ceased; there was no risk of hindering the investigation by disclosure of the DCI report. *Id.* Finally, there was no showing that the DCI report contained hearsay, rumor, or libelous comment or that it would slander the name of innocent suspects. *Id.* In sum, there was no demonstrable harm in disclosing the DCI report. On the other hand, there was legitimate community interest and concern over allegations of police brutality: "There can be little doubt that allegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern." *Id.* at 754. The Court thus concluded, "Under the unique facts of this case, any public harm created by the disclosure of the DCI investigatory report is far outweighed by the public harm accruing from its nondisclosure." *Id.*

The Iowa Supreme Court again addressed the § 22.7(5) privilege in the April 2019 case *Mitchell v. City of Cedar Rapids*. 926 N.W.2d at 229. The Court held that police investigative reports do not lose their confidential

status under § 22.7(5) when an investigation closes, but reaffirmed *Hawk Eye*'s conclusion that § 22.7(5) does not operate as an absolute bar on discovery of police records. *Id.* at 232–33. *Mitchell* stated explicitly: "*Hawk Eye* remains the controlling precedent for disputes over access to police investigative reports." *Id.* at 234.

The *Mitchell* court therefore proceeded to employ the *Hawk Eye* balancing test to decide if the plaintiffs—an African American shot by a police officer and the victim's wife—were entitled to disclosure of police investigative reports. *Id.* at 234–35. *Mitchell* recognized that, like *Hawk Eye*, "the dispute arose against the backdrop of a national debate over the use of force by police on unarmed African Americans." *Id.* at 234. And, again like *Hawk Eye*, the investigation was complete, and no confidential informant or unidentified suspect was implicated. *Id.* Consequently, the *Mitchell* court concluded the public interest favored disclosure. *Id.* The Court reiterated:

> "[I]t goes without saying that police misconduct is a matter of public concern." As we previously noted, "The image presented by police personnel to the general public "is vitally important to the police mission." Additionally, such image "also permeates other aspects of the criminal justice system and impacts its overall success." For these reasons, "police officers must earn and maintain the public trust at all times by conducting themselves with good judgment and sound discretion."

Id. at 235.[2]

Mr. Harrison is entitled to the Use of Force reports under the *Hawk Eye* and *Mitchell* balancing test. This case mirrors *Hawk Eye* and *Mitchell* in all relevant respects. Like *Hawk Eye* and *Mitchell*, no confidential informant or unidentified suspect is implicated. Like *Hawk Eye* and *Mitchell*, any related investigations have concluded.

Like *Hawk Eye* and *Mitchell*, the request for the Use of Force Reports is related to the use of force by police; a key purpose of Mr. Harrison's project is to analyze the disparate impact police force has against racial minorities in order to advocate for reform. These are the same public concerns raised in *Hawk Eye* and *Mitchell*; unfortunately, this problem has not resolved with the passage of time. The public has a tremendous interest in evaluating whether police officers appropriately use force and accurately report the degree of force they used. It should go without saying that police departments are funded by the public and answerable to the public.

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[2] Though *Mitchell* arose in the context of civil discovery (not an open records request) and involved a protective order, those aspects of the case do not meaningfully distinguish it from this case. The procedural posture of *Hawk Eye* is the same as the instant case. Just as Mr. Harrison has done in this case, the reporter in *Hawk Eye* filed a writ of mandamus seeking records.

Like *Hawk Eye* and *Mitchell*, "any public harm created by the disclosure of the [requested records] is far outweighed by the public harm accruing from its nondisclosure." *Hawk Eye*, 521 N.W.2d at 754. Given the parallels between this case, *Hawk Eye*, and *Mitchell*, as a matter of law, Defendants cannot carry their burden to demonstrate these records are exempt from disclosure. (*See also* Appx 47–51 (June 22, 2020 ruling by Judge John Telleen ordering body camera and squad car footage to be disclosed); Appx 28–46 (October 6, 2020 ruling by Judge Paul Scott ordering body camera footage to be disclosed)).

Mr. Harrison will now turn to explaining why the City's arguments against disclosure are legally incorrect.

III. Iowa Code § 22.7(11) does not bar disclosure.

Defendants argue that section 22.7(11) exempts the use of force reports from being disclosed. Iowa Code § 22.7(11)(a) provides that "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" are confidential records that are not

subject to disclosure.[3] The legislature did not define the terms "personal information" or "confidential personnel records" in the statute.

In order to determine if requested information is exempt under § 22.7(11), the Court must first determine whether the information fits squarely within the language of § 22.7(11). In *ACLU of Iowa*, the Iowa Supreme Court provided the framework for analyzing § 22.7(11). *Am. Civ. Liberties Union Found. of Iowa, Inc.*, 818 N.W.2d 231, 235 (Iowa 2012). The first step in this framework is determining whether the requested documents are exempt is to look at the plain language of the statute. *Id.* The second step is to review Iowa's prior caselaw to determine whether the documents at issue fall into a category that Iowa courts have previously kept confidential. *Id.* The final step in the *ACLU of Iowa* framework is to consider the law from other jurisdictions. *Id.* Lastly, if a statute is ambiguous, or there are competing statutory interests, courts employ the balancing test articulated in *DeLaMater v. Marion Civil Service Com'n*, 554 N.W.2d 875, 879 (Iowa 1996). *See Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 47 (Iowa 1999)

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[3] Iowa Code § 22.7(11) was amended in 2011 to specify a list of information that may be released despite its inclusion in "personnel records." *See Doe v. U. of Iowa*, 828 N.W.2d 326, 2013 WL 85781 n.4 (Iowa App. 2013) (unpublished). For example, the dates of employment, position held, and the fact a person resigned in lieu of termination. As the district court correctly recognized, (D0026 at 12), the 2011 amendment does not impact the analysis of this case.

("Given the ambiguity of the statute, we believe the district court properly engaged in a balancing test of the competing interests.")

a. Statutory Language

The § 22.7(11) exemption "obviously do[es] not include all personnel records—only *confidential* personnel records." *City of Dubuque v. Telegraph Herald, Inc.*, 297 N.W.2d 523, 526 (Iowa 1980) (emphasis added). "In addition, even when confidential personnel records are involved, not all information contained therein is exempt from public scrutiny—only personal information in such records." *Id.* (emphasis added). "Iowa's personal records exemption, section 22.7(11), does not list examples of 'personal records,' nor does it define that term." *DeLaMater*, 926 N.W.2d at 879.

The plain language of Iowa Code § 22.7(11) does not bar disclosure here. The only "personal information" contained in the Use of Force reports is the reporting officer's name and whether the officer was injured or taken to the hospital. Mr. Harrison accepts the district court's ruling that the officer's injuries and hospital visits be redacted from the records.

Otherwise, as discussed above, the information contained in the Use of Force reports reflects "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident," which "shall not be kept confidential" under § 22.7(5). *See City of San Antonio v. San Antonio Exp.-*

News, 47 S.W.3d 556, 563 (Tex. App.--San Antonio 2000) (recognizing information in use of force reports was akin to information in regular police reports that were subject to disclosure). The factual information in the Use of Force reports is subject to disclosure under § 22.7(5). *State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999) ("When more than one statute is pertinent to the inquiry, the court considers the statutes together in an attempt to harmonize them.").

b. Iowa Caselaw

Looking next to Iowa caselaw, the information requested is unlike information that the Iowa Supreme Court has said does fall within the protection of § 22.7(11). In three cases the Iowa Supreme Court has found § 22.7(11) barred disclosure.

First, *in Am. Civ. Liberties Union Found. of Iowa, Inc. v. Records Custodian, A. Community Sch. Dist.*, the Court held that records describing discipline imposed fell within the plain language of § 22.7(11). 818 N.W.2d at 236. The Use of Force reports Mr. Harrison has requested do not contain disciplinary information. He seeks only the initial report that the involved officer submits to DMPD, with a factual report of what occurred— not the chain of command review that subsequently occurs.

Next, in *Clymer v. City of Cedar Rapids*, the Iowa Supreme Court applied the *DeLaMater* balancing test and held that gender, address, and birth date are protected information, in part because the disclosure of that information did not "advance[] the general purpose of the open records law or the particular examination proposed here by the media." 601 N.W.2d at 48. Again, here there is no confidential personal information besides name and basic information about the circumstances surrounding the incident. And, unlike Clymer, the information in the Use of Force reports is directly relevant to Mr. Harrison's purpose—to examine if the force was appropriate and accurately reported.

Lastly, in *Des Moines Indep. Community Sch. Dist. Pub. Records v. Des Moines Register & Trib. Co.*, 487 N.W.2d 666, 670 (Iowa 1992), the Court held that documents related to an administrative investigation of discrimination charges, which were "essentially in-house, job performance documents," were protected. Unlike the records in Des Moines Independent Community School District, the Use of Force reports Mr. Harrison has requested do not contain any administrative investigation or performance review information. While an individual use of force report could result in discipline, the report is not created for that purpose. A use of force report is created to document what force was used by an officer, why was force used,

and the mental impressions of the officer who made those determinations. The reports are used to identify "trends or patterns resulting in injury" and "trends or patterns" related to demographic characteristics. D0010 at 21. They are used to inform "policy, training or equipment improvements." D0010 at 20. They serve as the basis for a yearly report on force. D0010, at 8.

It is true that the Use of Force reports are reviewed by the DMPD chain of command, but the information about that review and ultimate assessment (including potential "corrective action") is not sought by Mr. Harrison. He seeks only the Use of Force reports generated by the involved officers. And even if a use of force report leads to discipline, its original purpose does not change. "The nature of the record is not controlled by its place in a filing system." *Des Moines Independent Cmty. School District*, 487 N.W.2d at 670. As the Arkansas Supreme Court has explained:

> [T]he reports are routinely compiled by each police officer every time force is employed, and that officer's use-of-force may or may not result in an investigation and evaluation of the officer's actions. Stated another way, the report is prepared first and then an investigation may or may not come second. This is not a situation where an investigation had already begun and the police officer is directed to prepare a report detailing his actions with regard to a specific incident as a result of that investigation.

Thomas v. Hall, 399 S.W.3d 387, 395 (Ark. 2012).

Moreover, the fact that corrective action was taken on only 1.03% of Use of Force reports in 2020 confirms that the primary purpose of these records is not disciplinary. As the district court found, "[t]hese numbers do not support the City's contention that use of force reports are either in-house job performance records or disciplinary records that are exempt from disclosure under § 22.7(11). D0026 at 15.

The district court therefore was correct in concluding the Use of Force reports do not ask officers to "review, assess, or otherwise justify his or her performance in any way." *Id.* at 14. Instead, the officer "is primarily limited to reporting the basic facts of what happened during the use of force incident." *Id.*

c. Caselaw from Other Jurisdictions

Caselaw from other jurisdictions confirms that Use of Force reports are not "personnel records." One New York court confronted this exact same question, applying statutes very similar to Iowa's. *Prisoners' Leg. Services of New York v. New York State Dept. of Corrections and Community Supervision*, 173 A.D.3d 8, 10 (N.Y. App. Div. 3d Dept. 2019). The New York statute protected "[a]ll personnel records used [by the department of corrections] to evaluate performance toward continued employment or promotion," but—like Iowa—provided no definition defining "personnel

records." *Id.* at 11. The Court emphasized that—like Iowa—the use of force reports were authored "as a mandatory component of their job duties, by staff members with knowledge of the underlying event." *Id.* at 13. The use of force reports did not arise out of inmate allegations or grievances, nor were they documentation of disciplinary proceedings or disciplinary action taken. *Id.* The Court accordingly concluded:

> Given their factual nature and that each is written by a witness or witnesses with knowledge of the underlying facility event, we find unusual incident reports, use of force reports and misbehavior reports to be more akin to arrest reports, stop reports, summonses, accident reports and body-worn camera footage, none of which is quintessentially "personnel records."

Id.

Like Iowa, the New York use of force reports were subject to "multiple layers of review" and may "prompt an investigation that may lead to disciplinary action or even criminal prosecution against a correction officer." *Id.* at 13. But this did not transform the reports into "personnel records." As the New York court aptly recognized, "Otherwise, any employee work product or record documenting an employee's on-duty actions would classify as a personnel record with the justification that it could be used to evaluate work performance and would, thus, result in a situation in which the exception swallows the rule." *Id.* at 14. The Court thus ordered that the unredacted use of force reports be disclosed.

The Texas Court of Appeals has also concluded that use of force reports do not qualify as "personnel files." Like DMPD, the San Antonio Police Department requires an officer who has used force to complete a use of force report, which is given to the officer's supervisor and then routed to "Professional Standards" for investigation. *City of San Antonio*, 47 S.W.3d at 560. Also like DMPD, the San Antonio Police Department uses use of force reports to "detect or show patterns in the use of force." *Id.* at 564. Like Iowa, Texas law exempts "personnel files" from disclosure under the open records law. Tex. Gov't Code § 552.102. Applying a commonsense definition, Texas courts construe "personnel file" to include information related to an individual's employment relationship. *City of San Antonio*, 47 S.W.3d at 563. "Information in the department file that is not reasonably related to the individual's employment relationship remains subject to disclosure[.]" *Id.*

In *City of San Antonio*, the Texas Court of Appeals recognized the information contained in use of force reports is similar to information contained in regular "offense reports," which are considered public. Both contain "the identity of the arresting officer and any assisting officers; whether a supervisor made the scene; the identity of the prisoner; whether the prisoner was injured and how; and whether force was used and, if so, the type of weapon." *Id.* at 564. The court accordingly concluded use of force

reports are subject to disclosure "because they are 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*. at 565. At the district court, the Defendants conceded that Mr. Harrison would be entitled to receive police reports and video recording of any incident if he made a specific request for those records. D0026 at 17. The Texas Court found it immaterial that use of force reports were maintained by the internal Professional Standards office. *Id*. at 564.

This is the same conclusion reached by the Court of Appeals of Wisconsin when it ordered the release of Use of Force report information:

> Factual material gathered in connection with an investigation of police conduct is generally subject to public inspection. Further, any impact on investigations if solely factual information is disclosed would be remote. These incidents are occurring in public. Limiting the disclosure to only the facts should not impact on an officer's ability to conduct an investigation.

State ex rel. J./Sentinel, Inc. v. Arreola, 558 N.W.2d 670, 677 (Wis. App. 1996).

And the Arkansas Supreme Court reached the same holding when applying their state disclosure exception for "employee-evaluation or job-performance records":

> We conclude that use-of-force reports routinely prepared in accordance with General Order 303 are not employee-evaluation or job-performance records. These reports are created by the

> police officer, not by a supervisor, and are a routine narrative account of the officer's actions during a specific incident. Furthermore, these reports are not an assessment or evaluation of the police officer's performance or lack of performance, because they are created by the police officer himself or herself, and self evaluation is not what is contemplated by General Order 303. The fact that these reports are sometimes used by supervisors later on to evaluate a police officer's performance and in preparing their own incident reports does not transform the initial reports into evaluations or job-performance records.

Hall, 399 S.W.3d at 394.

The Ohio Supreme Court recently reached a similar conclusion in *SER Standifer v. Cleveland*, 213 N.E.3d 665 (Ohio 2022). In *Standifer*, the court found that use of force reports "are distinct from police reports" because "they provide a 'detailed account' of the use of force, including the reason for the initial police presence, specific description of the acts that preceded the use of force, the level of resistance encountered, and a description of the force used." *Id.* at 367. Ordering disclosure of the reports, the court held "[W]e do not foreclose the possibility that a [use of force report] could, in certain circumstances, identify an uncharged suspect and thus be exempt from disclosure…we decline to recognize per se rule that [use of force reports] always do so." *Id.* at 372.

In sum, all authorities point to the same conclusion: Use of Force reports are not "personal information in confidential personnel records" exempt from disclosure under § 22.7(11). As noted by the district court, "the

City has not pointed the Court to any reported decision anywhere, at any level, where a reviewing court has concluded that a use of force report is not a public record subject to disclosure upon request." D0026 at 19. This remains true on appeal. .

d. Balancing Test

Although not necessary to decide this appeal, the factors articulated in *DeLaMater* confirm the legitimacy of Mr. Harrison's request. In *DeLaMater*, the Iowa Supreme Court articulated the following factors that must be weighed when deciding to produce certain public records:

> (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 exists; and (5) the gravity of the invasion of personal privacy.

554 N.W.2d at 879. Each factor supports public disclosure.

First, Mr. Harrison's purpose for his request serves the purpose of the Iowa Open Records Act—to allow public examination and scrutiny of government activity in order create greater transparency with the public. *Atlantic Cmty. School District*, 818 N.W.2d at 232. Independent review of police use of force is a substantial public interest, especially in light of concerns about DMPD's inadequate use of force reporting related to the George Floyd protests. *See Mitchell*, 926 N.W.2d at 233 (recognizing "heightened public interest in police use of force").

Second, Mr. Harrison's purpose cannot be accomplished without the disclosure of the individual Use of Force reports. While the DMPD has produced its summary 2020 Use of Force report, it is impossible for Mr. Harrison and the public to know if the DMPD's report accurately reflects the information in the 387 individual Use of Force reports. He cannot determine if there are unreported uses of force without knowing which uses of force were reported. He cannot compare civilian accounts of force to the officially reported version of events. Being able to analyze the data underlying the summary report is crucial to create and sustain transparency with the public. Even assuming the 2020 summary Use of Force report presents accurate data, the public has no way of evaluating if the force that was used was appropriate or excessive.

Third, the scope of Mr. Harrison's request weighs in favor of disclosure. Mr. Harrison's request only seeks production of the Use of Force reports. He does not seek any records about the internal review process or the four instances of corrective action that were imposed subject to that review. While there are 387 reports, this is not such a voluminous amount that Mr. Harrison's request is unmanageable or impossible for Defendants to produce. Defendants already accessed these reports to create their own summary report.

Fourth, the privacy interest in the information in these reports is minimized because some of the information is available through other sources. For one, DMPD summarized all of the individual Use of Force Reports into their 2020 summary report. Further, some of the uses of force have been witnessed, subject to reporting, and many of the uses of force in 2020 led to a bevy of lawsuits and criminal charges. And much of the information is likely available in regular police reports, including the name of the officer involved. "If multiple sources of the requested information are available, individual privacy interests would be minimized. Consequently, the existence of multiple sources of information supports disclosure." *Atlantic Cmty. School District*, 818 N.W.2d at 243 (Cady, C.J., dissenting). To any extent that the information in the reports differs from what is already public knowledge, this reinforces the first factor of the balancing test and the purposes of the Iowa Open Records Act—transparency and accountability.

The City suggests that Mr. Harrison can therefore access the information he desires by requesting arrest records and reports for anyone he believes was arrested in a use of force incident. But as the district court pointed out:

> The problem with the City's position is twofold. First, . . . it has the effect of improperly shifting the burden to Harrison to try to identify incidents where an officer used force against a citizen so

> he can request reports. Second, . . . a use of force can be created even in the absence of an arrest.

D0026 at 21. Moreover, simply because Mr. Harrison could obtain *some* information through a much more onerous process does not change the fact that the Use of Force reports themselves are open records.

The fifth and final factor considers to what extent the personal privacy of public employees is invaded by the production of the requested material. If a request results in a substantial invasion of privacy, then privacy weighs against disclosure. But any embarrassment or inconvenience caused by disclosure is intrinsic to being a public employee, and such considerations are not considered *DeLaMater*. *See Clymer*, 601 N.W.2d at 48 (noting "the mere fact that a reporting of compensated sick days might cause embarrassment to an individual employee is not a controlling consideration"). Iowa Code § 22.8(3) specifically directs: "the district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest *even though such examination may cause inconvenience or embarrassment to public officials or others*." (Emphasis added). The district court appropriately accounted for this factor by ordering redaction of medical and hospital information.

IV. Iowa Code 80F.1 (20) does not preclude the City from disclosing the 2020 use of force Reports.

Next, Defendants attempt to rely on Iowa Code Chapter 80F, also known as the Officer's Bill of Rights. Defendant's suggestion that Iowa Code § 80F.1 should be read in harmony with the Open Records Act is specious at best. The plain language of § 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.

(emphasis added).

The Officer Bill of Rights is meant to provide protection for public safety officers when responding to disciplinary complaints. Iowa Code § 80F.1 enumerates rights that apply during a "formal administrative investigation," which is defined as

> an investigative process ordered by a commanding officer of an agency or commander's designee during which the questioning of an officer is intended to gather evidence *to determine the merit of a complaint* which may be the basis for seeking removal, discharge, or suspension, or other disciplinary action against the officer.

Iowa Code § 80F.1(1)(c) (emphasis added); *see also United States v. Wendt*, No. 4:22-cr-00199-SHL-HCA, 2023 WL 428754 at *13 (S.D. Iowa 2023) (discussing purpose of § 80F.1). The protections of § 80F.1 are triggered

when there has been a complaint against the officer, not by the filing of routine paperwork.

Most importantly, § 80F.1(1)(h) specifically defines the word "statement" as "the statement of the officer *who is the subject of an allegation in response to a complaint*." (Emphasis added). Mr. Harrison is not seeking any record created in a disciplinary proceeding or related to a complaint. Yes, the individual Use of Force reports are "an officer's statement," but they were not created to report a fellow officer's misconduct or to initiate disciplinary action. They are not statements by an officer "who is the subject of an allegation in response to a complaint." Iowa Code § 80F.1(1)(h). They were created in accordance with the DMPD's own mandatory record keeping policies. By its plain language, Iowa Code § 80F.1(20) does not apply.

As the district court found, "the Legislature in enacting § 80F.1(2) certainly could not have intended that any statement an officer authors outside the confines of a disciplinary or complaint proceeding is exempt from disclosure." D0026 at 22. If this Court were to adopt the City's interpretation of Chapter 80F, "virtually anything authored by a police officer would be confidential." *Id.* Such an overbroad reading would throw Chapter 22 and 80F into disharmony. The City failed to provide the district court with any

authority to support its interpretation of 80F.1. Therefore, the district court did not commit any errors at law, and the court's ruling must be upheld.

V. Mere Speculation that Iowa Code § 22.7(5) might apply Cannot Prevent the City from Following the law.

Defendants ask the Court to grant them "the right to refuse producing reports that otherwise protected by statute" because there "may indeed be some use-of-force records that are also protected under other portions of Iowa Code Chapter 22." (Appellants' Br. at 33).

The party opposing disclosure of a public record based on an exemption "bears the burden of demonstrating the exemption's applicability." *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011) (quoting *Clymer*, 601 N.W.2d at 45). Defendants' final argument is entirely speculative. The City failed to meet their burden before the district court, and they fail again here. *See* D0026 at 22 ("[T]he City has presented nothing more than the bold assertion that this subsection may apply.").

The New Jersey Superior Court rejected a similarly speculative argument in *O'shea Township of West Milford*, 982 A.2d 459 (N.J. Super A.D. 2009). The court held: "We also do not regard the possible, speculative use of a [use of force report] in an internal affairs investigation to provide the necessary basis for precluding access under [the open records act]." *Id.* at 468. Likewise, the Ohio Supreme Court rejected the same argument the City

makes here in *Standifer*. 213 N.E.3d at 670-71. Like the City of Des Moines, the City of Clevland failed to identify which specific use of force reports contained information that is exempt from disclosure. *Id.* Defendants speculative language is the same kind of "broad strokes" characterization that was rejected in *Standifer*.

Defendants have not come close to satisfying their burden that any exemption applies, and the district court was right to grant summary judgment to Mr. Harrison.

CONCLUSION

The district court did not err when it granted summary judgement in favor of Mr. Harrison. This Court should affirm and order the production of the Use of Force reports.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 13,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains **7,887** words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Georgia font.

I hereby certify that on June 11, 2024, I did serve Petitioner-Appellee's Brief on Appellee by mailing one copy to:

Harvey Harrison

Petitioner-Appellee

/S/ *Gina Messamer*

Dated: June 11, 2024

Gina Messamer