IN THE SUPREME COURT OF IOWA
No. 24-0029

Robert Teig,
Plaintiff-Appellant,

vs.

Brad Hart, Tyler Olson, Ann Poe, Patrick Loeffler, Dale Todd, Scott Olson, and Ashley Vanorney,
Defendants-Appellees.

Appeal From the Linn County Iowa District Court
CVCV097672
Honorable Andrew B. Chappell, District Court Judge

Appellant's Amended Brief

Robert L. Teig
Pro Se
282 Lamplite Ln SE
Cedar Rapids, Iowa 52403
bobteig@gmail.com
Cell: (319) 432-4695

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ROUTING STATEMENT

The Supreme Court should retain the case.

The case involves two issues of first impression that go to the heart of enforcement of Iowa's open meetings law:

> (1) whether government officials may close a job interview meeting when they have no knowledge of particular information that could needlessly and irreparable injure the applicant's reputation but merely rely on the possibility adverse information could arise, and
>
> (2) whether a court may close a trial when a recording of a closed meeting is introduced into evidence and then seal that evidence without any showing of compelling need.

NATURE OF THE CASE

Plaintiff sued the Cedar Rapids, Iowa, Mayor and six City Council members for a violation of Iowa's open meetings law. Iowa Code chapter 21 (2021). Plaintiff claimed defendants illegally closed the job interview of a person who applied for the City Clerk position when closure was not necessary to prevent needless and irreparable injury to the applicant's reputation. Plaintiff asked for statutory damages, costs and fees, injunctive relief, and "any other appropriate relief." (D0001, Petition at 10 (5/28/2021)).

After a two-day trial on September 13 and 14, 2023, the district court found it was "clear that no negative information revealed itself during [the] interview . . .[a]nd nothing said . . . during the interview would have negatively impacted [the applicant's] reputation in any real way." (D0248, Findings of Fact, Conclusions of Law, Analysis, and Ruling at 4 (12/03/2023), Attachment 1). However, the court dismissed plaintiff's case. (Id. at 13). Plaintiff appeals from that dismissal.

A recording of the closed meeting was submitted into evidence (D0240, Exh. 2), and plaintiff questioned one of the defendants about parts of the recording. The court closed this portion of the trial on

defendants' motion but cited no law and made no findings supporting its unwritten decision. (D0260, Tr. at 57, line 2 – 59, line 2; 60, line 6 – 62, line 3). It also sealed the recording. (Id. at 58, lines 19-20). Plaintiff appeals from these orders.

STATEMENT OF THE FACTS

The parties stipulated:

1. Plaintiff is a resident of Cedar Rapids and a citizen of Iowa.

2. Defendants were members of the nine-person Cedar Rapids City Council on April 29, 2021.

3. The Cedar Rapids City Council is a governmental body subject to the provisions of Iowa Code Chapter 21.

4. On April 29, 2021, the City Council held a special meeting to interview Alissa Van Sloten, a candidate for the city clerk position.

5. Defendants Hart, Tyler Olson, Loeffler, Todd, Scott Olson, and Vanorney were present when the meeting started and voted unanimously to close the meeting. Defendant Poe arrived and participated in the closed session after it began.

6. The closed session lasted about 40 minutes.[1]

(D0260, Tr. at 15, line 25 – 16, line 24).

[1] Exhibit 2 is a recording of both the open and closed parts of the meeting. The closed portion begins at 2:45, defendant Poe joins at 6:47, Ms. Van Sloten joins at 12:20 and leaves at 30:58, and the closed session ends at 41:32. The first nine and one-half minutes of the closed session involved "housekeeping" or "logistics" matters. (D0240, Exh. 2).

Defendants cited Iowa Code §21.5(1)(i) as the statutory basis for closing the meeting. (D0230, Exh. 6). When a person is being evaluated for a job, that section allows a meeting to be closed

> only to the extent a closed session is necessary . . . to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.[2]

§21.5(1)(i).

The court asked defense counsel:

> does the City dispute that the individual -- individual council members who voted to close the meeting did not have any individual or particularized concern or information that led them to be concerned themselves about the applicant's reputation at the time they agreed to close the meeting?

and counsel replied:

> The City does not dispute that the Council Members did not have specific information about Ms. Van Sloten at the time that they decided to close the meeting.

(D0260, Tr. at 21, lines 16-25).

The court also asked:

> is it fair to say that the Council Members would say or did say that each of them individually didn't have any information about her reputation that they were worried about, but didn't know what was going to come up?

[2] Ms. Van Sloten requested a closed interview. (D0228. Exh. 4).

and counsel said, "[c]orrect." (Id. at 22, line 21 – 23, line 1).

This was a stipulation that defendants had no particularized concern about Ms. Van Sloten's reputation at the time they voted to go into closed session. (Id. at 23, lines 19-23).

Closure was not based upon a particular determination as to Ms. Van Sloten; as a matter of policy, the Council closed interviews when requested. (D0261, Tr. at 343, line 18 – 344, line 1; 265, lines 13-16; D0260, Tr. at 78, line 14 – 79, line 2). Defendants said they closed the meeting because they did not know what might come up. (D0260, Tr. at 195, line 19 – 196, line 1; D0261, Tr. at 291, lines 2-16; 306, lines 3-21; 330, lines 4-19).

Defendants admitted that Ms. Van Sloten did not convey any facts to them that she thought might lead to needless or irreparable damage to her reputation. (D0260, Tr. at 33, lines 5-11). They also admitted that, "during the Closed Session no information was revealed that would have caused needless and irreparable injury to Ms. Van Sloten's reputation." (D0260, Tr. at 20, lines 1-12).

The recording (D0240, Exh. 2) shows that nothing said during the meeting would have harmed Ms. Van Sloten's reputation.

JURISDICTIONAL STATEMENT

On December 3, 2023, the district court entered its Findings of Fact, Conclusions of Law, Analysis, and Ruling dismissing plaintiff's case. (D0248) (Attachment 1). Plaintiff filed a timely Iowa R. Civ. P. 1.904(2) motion to reconsider on December 10, 2023 (D0250), and the court denied that motion on December 31, 2023 (D0253) (Attachment 2). Plaintiff filed a timely notice of appeal on January 5, 2024. Iowa R. App. P. 6.101(1)(b). (D0254)

ARGUMENT

I. DEFENDANTS ILLEGALLY CLOSED A JOB INTERVIEW WHEN THEY HAD NO KNOWLEDGE OF PARTICULAR ADVERSE INFORMATION AND NOTHING SAID AT THE MEETING WOULD HAVE CAUSED NEEDLESS AND IRREPARABLE INJURY TO THE JOB APPLICANT'S REPUTATION.

All Cedar Rapids City Council meetings must be public unless there is an express statutory exception allowing closure. Iowa Code §21.3(1). Here, defendants had no proof – at the time of the meeting or at trial – that a statutory exception applied. There was no proof that closure was necessary to prevent needless and irreparable injury to the job applicant's reputation.

A. Preservation for Review

Whether a closed session was necessary to prevent needless and irreparable injury was the fighting issue in this case. The Petition alleged, "Closing the April 29 meeting violated Chapter 21 because City Council Members had no information to show a closed session was 'necessary to prevent needless and irreparable injury to [the applicant's] reputation.'" (D0001, Pet. at 9, ¶55). Plaintiff's trial brief, post-trial brief, and motion to reconsider all made the same argument. (D0196, Trial Brf. at 1-4 (09/01/2023)); (D0239, Post-trial Brf. at 2-10 (09/19/2023)); (D0250, Mot. Rec. at 1-8 (12/10/2023)).

B. Standard of Review

> Actions to enforce the open meetings law are ordinary, not equitable, actions. *Schumacher v. Lisbon Sch. Bd.,* 582 N.W.2d 183, 185 (Iowa 1998). In such actions, we accord a trial court's factual findings the same degree of deference we accord a jury's special verdict. *See* Iowa R. App. P. 6.907. Thus, factual findings by the trial court are binding if substantial evidence supports them. *See Schumacher,* 582 N.W.2d at 185; *Tel. Herald, Inc. v. City of Dubuque,* 297 N.W.2d 529, 533 (Iowa 1980). Substantial evidence supports a factual finding when the finding "may be reasonably inferred from the evidence presented." *Vaughan v. Must, Inc.,* 542 N.W.2d 533, 538 (Iowa 1996).
>
> Additionally, this appeal requires us to construe the Iowa open meetings law. *See* Iowa Code §§21.2(2), .3. We review questions of statutory construction for correction of errors at

> law. *Estate of Ryan v. Heritage Trails Assocs., Inc.,* 745 N.W.2d 724, 728 (Iowa 2008).

Hutchison v. Shull, 878 N.W.2d 221, 229-30 (Iowa 2016).

C. Purpose and Interpretation of Open Meetings Law

The purpose of Chapter 21 is to require meetings of governmental bodies to be open and permit the public to be present. *Dobrovolny v. Reinhardt*, 173 N.W.2d 837, 840-41 (Iowa 1970). Section 21.1 says it "seeks to assure, through a requirement of open meetings of governmental bodies, that the basis and rationale of governmental decisions, as well as those decisions themselves, are easily accessible to the people." "The open meetings law is intended to safeguard free and open democracy by ensuring the government does not unnecessarily conduct its business in secret." *Hutchison*, 878 N.W.2d at 237.

In furtherance of this purpose, any "[a]mbiguity in the construction or application of [the Act] should be resolved in favor of openness." Iowa Code §21.1.

> Open meetings statutes are enacted for the public benefit and are to be construed most favorably to the public. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). This principle is reflected in the liberal construction generally accorded such statutes.

Greene v. Athletic Council of Iowa State U., 251 N.W.2d 559, 560 (Iowa 1977).

D. The Law as Applied

1. Plaintiff met his burden of proof

Under §21.6(2), a plaintiff's only burden is to "demonstrate[] to the court that the body in question is subject to the requirements of [chapter 21] and has held a closed session." Id. Then, the defendants have the burden to prove "compliance with the requirements of [chapter 21]." Id.

The undisputed facts show the Cedar Rapids City Council and defendants are subject to chapter 21 and that they held a closed meeting to interview Ms. Van Sloten.

The undisputed facts also show the City Council and defendants violated chapter 21.

2. Defendants failed to prove the session was closed "only to the extent . . . necessary . . . to prevent needless and irreparable injury to . . . reputation"

When defendants closed the meeting, they cited §21.5(1)(i):

> A governmental body may hold a closed session only to the extent a closed session is necessary . . . [t]o evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when

> necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

The plain language of the statute shows the legislature anticipated the potential that some damage to reputation can occur during any job interview. But the legislature found this potential, standing alone, did not outweigh the public interest in open interviews. Had it intended otherwise, it would have simply exempted all meetings where a person's professional competency was being considered.

Instead, the legislature placed strict limits on when such a meeting may be closed:

> **First, there must be injury to reputation if the meeting is open.**

The threshold showing must be that there is information that will cause injury. If everything about an applicant is good, there is no reason to protect them.

> **Second, the injury must be needless.**

The statute does not protect against all injury. An injury must be "completely unnecessary"[3] before a session may be closed. When

[3] Definition of "needless." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/needless.

adverse information is relevant to a job applicant's abilities and suitability, any injury is not needless. For example, "an employer has a duty to exercise reasonable care in hiring individuals, who, because of their employment, may pose a threat of injury to members of the public," *Godar v. Edwards*, 588 N.W.2d 701, 709 (Iowa 1999), and the public needs to know if government is fulfilling its duty to consider an applicant's history (especially if negative). Disclosure of relevant information is not an undue invasion of personal privacy even if it injures reputation. An injury must rise to the level of the needless and irreparable injury exemplified in *Feller v. Scott County Civil Serv. Comm'n*, 435 N.W.2d 387, 390 (Iowa App. 1988) (*Feller* I) where information about associations with a felon and private sexual misconduct was not relevant to job performance.

Third, the injury must be irreparable.

Even if there is needless injury, it must exist to the extent that it can never be made right. A session must remain open unless it would be "impossible to repair"[4] needless damage.

[4] Definition of "irreparable." *Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/irreparable.

Fourth, the meeting must remain open by default and closed only during the time necessary to prevent the needless and irreparable injury.

Closure is allowed only to the extent "needed in order to"[5] prevent needless and irreparable injury. Non-injurious information must be aired in open session. It may be inconvenient to have to stop and close an open session when damaging information is about to come to light, but inconvenience does not trump Iowa's sunshine laws. Cf. Iowa Code §22.8(3) (it is "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.").[6] Inconvenience or inefficiency are not permissible grounds for closing a session.

A defendant must prove all four things to show compliance with chapter 21. Defendants proved none of them.

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[5] Definition of "necessary." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/necessary.

[6] Chapters 21 and 22 should be considered in pari materia. See generally *Farmers Co-op. Co. v. DeCoster*, 528 N.W.2d 536, 538 (Iowa 1995) ("When statutes relate to the same subject matter or to closely allied subjects they are said to be in pari materia and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation.").

a. The district court's finding there was no information that injured Ms. Van Sloten's reputation means the court should have found defendants violated the law

Here, the court found:

> it is clear that no negative information revealed itself during Van Sloten's interview – not from her and not from any of the Council Members. The interview itself was very positive in its tone. And nothing said by Van Sloten or any of the Council Members during the interview would have negatively impacted Van Sloten's reputation in any real way.

(D0248, Findings at 4, Att. 1).

With no negative information, there could be no injury, much less needless and irreparable injury. And with no negative information, it was not necessary to close any part of the meeting.

This should have resolved the case with the district court finding defendants did not prove compliance with the statute. But the court did not apply the plain language of the statute. Instead, it added a gloss not supported by any statutory or case law.

The court made the government the final arbiter of legality and eliminated any possibility of enforcing chapter 21.

b. The court improperly abdicated its duty to review defendants' actions

The court said there were two issues raised by ambiguous language in chapter 21:

> who decides closure is necessary (to prevent needless and irreparable injury) and what information must that decision must [sic] be based on?

(D0248, Findings at 8, Att. 1). The court then decided (1) the government body, not a court, is the ultimate decision maker and (2) possibilities rather than actual facts are sufficient to warrant closure.

The court said:

> the Court is convinced that it is the governmental body that has the discretion to determine what information it needs in order to determine whether closure of the meeting is appropriate. The employee or candidate signals that s/he believes a closed session is necessary to prevent needless and irreparable injury to their reputation by requesting a closed session. The governmental body is than free to agree, as happened in this case, and close the meeting based on that request and its members' own concerns about what might come up in the meeting. It matters not, whether any damaging information *actually* comes out in the meeting. In the alternative, members of the governmental body have the discretion to require more information prior to agreeing to closure. For instance, they could inquire whether the employee has particular or generalized concerns about negative information being disclosed. And if the members (collectively) decide they are not comfortable closing the meeting without more specific information, they could close the meeting to the extent it was necessary to secure that

> information (as Plaintiff suggests). Ultimately, however, the voting members of the governmental body decide whether the information they have is sufficient to honor the employee or applicant's request to close the meeting, and then vote accordingly. If sufficient numbers of the membership are not adequately convinced, or simply are unwilling to close the meeting, there will not be the necessary votes to go into closed session. [italics in original, underlining supplied].

(Id. at 9-10).

The court's decisions were incorrect.

i. A court, not the government body, determines whether there was sufficient evidence to prove defendants complied with the law

As noted, defendants have the burden to prove they complied with chapter 21. Proof requires facts to show closure was necessary to prevent needless and irreparable injury. It is up to a court to evaluate that proof, but that did not happen here.

The court cited two factors when it decided defendants should be their own judge:

- the closure of an otherwise open meeting "is for the protection of the employee and not for the protection of the [governmental body]." *Feller v. Scott County Civil Service Com'n*, 435 N.W.2d 387, 390 (Iowa Ct. App. 1988) (*Feller I*).

- the language of Section 21.5 is permissive. It gives a governmental body the discretion to hold a closed session in specific circumstances and after following certain steps.

(D0248, Findings at 9, Att. 1).

Neither of these factors supports abandoning the proper role of the courts.

First, the *Feller* quotation is taken out of context and irrelevant for present purposes. The statement was a response to the government's claim that it would suffer the irreparable injury from a closed meeting and it needed public vindication.

As between the government and the individual, the statute does not look to any injury to the government. But the statute does protect the interests of the public versus the individual. The quotation does not consider the overriding public interest that gives way only in limited, extenuating circumstances; circumstances that did not exist here.

Second, permissive does not mean carte blanche. The court overlooked language and action in *Feller I* that is contrary to what the court did here. In *Feller I*, the Court of Appeals said:

> . . . Iowa Code section 21.5 indicates that the Commission "may" close a public session upon a proper showing. The use of the word "may" in the statute confers a power and places discretion within the one who holds the power. Iowa Code §4.1(36)(c). Discretion is abused when it is exercised on clearly untenable grounds or to a clearly unreasonable extent. *Ashmead v. Harris*, 336 N.W. 2d 197, 199 (Iowa 1983).

Id. at 390. The Court then reviewed the closure decision and found a violation because of an "arbitrary and capricious exercise of discretion." Id.

In other words, it is the court – not the government – that ultimately determines whether closure was necessary and what information supported the decision. *Feller I* has not been overruled, and the district court was "under a duty to follow it." *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957).[7]

The district court failed to follow the dictates of *Feller*. In *Feller*, the government body decided not to close a meeting. Under the district court's reading of the law here, that would be the end of the matter. But that was not the end in *Feller*.

[7] It could be argued that "may" in §21.5(1)(i) does not confer a power. Iowa Code §4.1 does not apply when it is inconsistent with legislative intent or "repugnant to the context of the statute." Section 21.3 requires all meetings to be open unless "closed sessions are expressly permitted by law." Here, the word "may" could be seen as being used in §21.5 to define the statutory exceptions to §21.3 and not to grant a discretionary power. That would mean the government's actions would be examined for sufficiency of the evidence and errors of law and not for abuse of discretion. The distinction, however, is academic. An abuse of discretion occurs when there is insufficient evidence or an error of law. See *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

In *Feller* I, the district court reviewed the closure decision and found no abuse of discretion because the decision was based on "reason and explanation." *Feller v. Scott County Civil Serv. Comm'n*, 482 N.W.2d 154, 157 (Iowa 1988) (*Feller II*). The Court of Appeals then reversed that decision. While the Supreme Court expressed doubt as to the remedy granted in *Feller I*, id. at 158, it did nothing to disturb the fact that a closure decision is subject to judicial review.

ii. The decision to close a meeting must be based upon specific negative information and not merely upon "what might come up"

The district court said what actually comes out at a meeting is irrelevant and generalized concerns are sufficient to close a meeting. In support of this, the court said:

> Defendants are correct that the statute does not specifically require that a determination that closing the meeting is necessary be supported by any particular factual finding or information.

(Docket 0248, Findings at 9, Att. 1). It also said an interpretation that government officials were required to have specific, negative information in their possession prior to closing a session "could lead to some strained, impractical or absurd results." (Id. at 10).

Although the statute may not have a laundry list of particular facts that warrant closure or set out a particular process for evaluating information, that is not significant. The legislature cannot account for every potential circumstance and does not have to set the procedure. It sets the policy – the limitations on the public meeting exemption. It is then left to the government body and courts to apply that policy in a specific case. Those determinations are fact specific, and it is common for a court to establish specifics for how a statutory exemption is applied. See e.g., *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999) ("courts commonly apply the following factors as a means of weighing individual privacy interests against the public's need to know.").

What is significant is what the legislature did write into the statute: "only to the extent necessary," "necessary to prevent," and "needless and irreparable injury." A court must give effect to all these words. See *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011) ("'we give effect to all the words in the statute unless no other construction is reasonably possible'" (citation omitted)).

Plaintiff did not have to provide a way defendants could comply with the law; it was defendants' burden to prove compliance. But plaintiff suggested a possible process:

> The default is an open meeting. Every meeting must be open unless and until damaging information is about to come to light. At that point, a request to close can be considered and the information may be submitted in a closed session to substantiate the request. If the information warrants closure, the closed session can proceed only to the extent necessary to prevent needless and irreparable injury from that information. Then the session must be reopened.

(D0239, Pl. Post-trial Brf. at 5).

This serves both legislative policy choices of (1) easy public access to the reasons for government decisions (§21.1) and (2) prevention of needless and irreparable injury to reputation (§21.5(1)(i)).

The district court said a reading of the statute that "Council Members were required to have specific, negative information in their possession prior to proceeding in closed session" was "not necessarily an unreasonable one." (D0248, Findings at 10, Att. 1). But the court rejected that interpretation because it:

> could lead to some strained, impractical or absurd results. To begin with, Plaintiff's suggested required procedure of closing the meeting in order to evaluate whatever negative information there is could end up being exceptionally impractical, or even absurd depending on the circumstances.

> It could result in a meeting being closed and reopened multiple times based on what questions were asked. It also would seem to require much of the deliberation regarding a hiring decision to be done in open session, with a separate vote to close the meeting in the event a member thought they were going to make an observation or share an impression that would be damaging to the candidate's reputation.

(Id. at 10-11).

Holding a session in public and closing it only when necessary is not foreign to any court in the United States. The occasional hearing or sidebar out of the hearing of a jury or the public is more likely the rule rather than the exception for any trial. In fact, that took place in this trial more than once. (D0260, Tr. at 51, lines 4-13; 58, lines 1-11; 61, line 20 – 62, line 3). This process is far from absurd and has not brought the judicial system crashing down.

Most telling, this was the process used in *Feller* where the governmental body started in public session and then went into multiple closed sessions to consider the request for a closed hearing. See *Feller*, 482 N.W.2d at 155-56 (*Feller II*).

iii. Defendants violated chapter 21 because they possessed no specific facts to support closure before voting to close the meeting, closing the entire meeting would not have been necessary in any event, and no closure was necessary to prevent needless and irreparable injury to reputation

The court relied on the following to find defendants did not violate chapter 21:

> In this case, Van Sloten requested a closed session. She was concerned about her reputation and thought closing the meeting was necessary in case something negative came out. The Council Members voting for the closed session found her request to be adequate to justify closing the meeting, especially in light of their individual experiences with the unpredictability of job interviews. Thus, her professional competence was being evaluated, she requested a closed session, and the Council Members decided a closed session was necessary to protect her reputation. Moreover, the Court does not find that the preliminary information discussed at the beginning of the session was such that it did not "directly relate to the specific reason announced as justification for the closed session" and instead should necessarily have been conducted in the open session. Under these facts, the Council Members voting to close the meeting did not violate Iowa's Open Meetings Law. Plaintiff's case must be dismissed.

(D0248, Findings at 11, Att. 1).

This was error for at least three reasons.

First, defendants had no specific, negative information in their possession. The closure decision was based only on speculation about what might happen. "Speculation, however, is not evidence . . .." *Willey v. Riley*, 541 N.W.2d 521, 527 (Iowa 1995). See also, *In re MS*, 889 N.W.2d 675, 683 (Iowa 2016) ("Speculation and conjecture are not enough . . .."); *State v. Miller*, No. 22-0903, p. 9 (Iowa March 8, 2024),

www.iowacourts.gov/courtcases/18516/embed/SupremeCourtOpinion ("Evidence raising only 'suspicion, speculation, or conjecture' is not sufficient evidence to support a finding." (citations omitted)).

Second, there never would have been a basis to close the introductory nine and one-half minutes of the meeting. This housekeeping part of the meeting set up the process that was going to be followed and did not discuss Ms. Van Sloten or her application. (D0240, Exh. 2). The court alluded to §21.5(2) when it said it "does not find that the preliminary information discussed at the beginning of the session was such that it did not 'directly relate to the specific reason announced as justification for the closed session.'" (D0248, Findings at 11, Att. 1). But that statement is irrelevant. There was never a claim that portion of the meeting was improper under §21.5(2).[8] The claim has always been that it should have been public because it could not have created needless and irreparable injury to anyone's reputation.

[8] "* * * A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session." §21.5(2), last sentence.

Finally, the court did not consider its findings "that no negative information revealed itself during Van Sloten's interview. * * * And nothing said by Van Sloten or any of the Council Members during the interview would have negatively impacted Van Sloten's reputation in any real way." (D0248, Findings at 4, Att. 1). The same would have been true if the meeting had been public. The test under the statute is whether a closed session was necessary to prevent needless and irreparable injury – it was not.

There is no safe harbor in "we didn't know what could have happened," or unpredictability of job interviews, or "something negative might come up." There is a safe harbor in §21.6(3)(a)(2) limited to damages, but that requires the government member to prove they "[h]ad good reason to believe and in good faith believed facts which, if true, would have indicated compliance with all the requirements of this chapter."

A defendant can avoid a fine if they had a good faith belief in specific facts when those facts turn out not to be true. Even that requires belief in facts, not possibilities, and it is not a defense to a violation.

It takes a "proper showing" to support closing a meeting. *Feller*, 435 N.W.2d at 390. A proper showing requires facts.

If the legislature wanted to protect from the unknown, it would have allowed closure merely upon a request. But it required more. If a court does not require more, it reads controlling words out of the law. Cf. *Town of Mechanicsville v. State Appeal Board*, 111 N.W.2d 317, 320 (Iowa 1961) ("We cannot read these words out of the law.").

The district court choose between two different readings of the statute. Defendants argued that all that is required is a request for a closed session with no specific showing of existing damaging information or particularized knowledge of damaging facts. (D0248, Findings at 8, Att. 1). Plaintiff argued that "a closed session would have been appropriate only after there was a specific showing that information likely to cause needless and irreparable injury . . . was going to come to light, and that closing the meeting was the only way – was necessary – to avoid that damage from occurring." (Id.).

The court said plaintiff's "interpretation is not necessarily an unreasonable one," but chose defendants' interpretation. (Id. at 10). When faced with two possible interpretations of chapter 21, the court

was required to choose the one that favors openness. See §21.1 (ambiguity "should be resolved in favor of openness."). The court chose poorly.

II. THE COURT ABUSED ITS DISCRETION WHEN IT CLOSED PART OF THE TRIAL AND SEALED THE RECORDING OF THE MEETING WITHOUT CITING ANY LAW AND WITHOUT MAKING ANY FINDINGS SUPPORTING ITS ACTIONS.

A. Preservation for Review

Plaintiff preserved his right to appeal through pre-trial filings, arguments at trial, and posttrial filings. Plaintiff gave notice of an intent to use the recording in open court. Defendants then filed a motion to close that portion of the trial and seal the recording, and plaintiff resisted that motion. (D0202, Res. to Mot. to Close (9/6/2023)). At trial, plaintiff argued the trial should remain open and the recording not be sealed (D0260, Tr. at 43, line 4 – 59, line 3). Plaintiff's motion to reconsider asked the court to reconsider its rulings involving the recording. (D0250, Mot. Rec. at 1, fn.1 (12/10/2023)).

B. Standard of Review

This is an ordinary action. Factual findings by the trial court are binding if substantial evidence supports them, and the case is reviewed for errors at law. *Hutchison*, 878 N.W.2d at 229-30. To the extent court

closure and sealing evidence involve an exercise of judicial discretion, review of those decisions would be for abuse of discretion. A court abuses its discretion when its decision "is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber*, 616 N.W.2d at 638.

C. The district court improperly closed part of the trial and sealed the recording of the closed meeting

The court gave plaintiff pre-trial access to the recording of the closed session under §21.5(5)(b)(1) that allows disclosure to a plaintiff for use in the enforcement proceeding. (D0075, Order (4/5/2022)). Plaintiff asked for permission to play the recording in open court as part of a witness examination, and defendants filed a pre-trial motion to close that portion of the trial. (D0198, Def. Mot. to Close (9/1/2023)). Defendants' motion also asked that the recording be sealed.

Defendants' motion cited no law dealing with a court's authority to close a trial. Plaintiff resisted and cited both statutory and case law. (D0202, Res. to Mot. To Close (9/6/2023)). The matter was deferred for resolution by the trial judge. (D0200, Order (9/5/23)).

At trial, the court excluded all non-participants from the courtroom while the video was played. (D0260, Tr. at 61, line 20 -62, line 3). It ordered Exh. 2 sealed (D0260, Tr. at 58, lines 19-20).

Defendants request was contrary to Iowa Code §602.1601 ("All judicial proceedings shall be public, unless otherwise specially provided by statute or agreed to by the parties."). It also was contrary to the right of public access to trials under the First and Fourteenth Amendments to the U.S. Constitution and Article I, Section 7 of the Iowa Constitution.

"In *Waller v. Georgia,* 467 U.S. 39 (1984), the Supreme Court established stringent criteria" for closing a trial. *State v. Schultzen*, 522 N.W.2d 833, 836 (Iowa 1994).

Waller required:

> 1. The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
> 2. the closure must be no broader than necessary to protect that interest;
> 3. the trial court must consider reasonable alternatives to closing the proceedings; and
> 4. the trial court must make findings adequate to support the closure.

Id. at 48, 104 S.Ct. at 2216, 81 L.Ed.2d at 39.

Schultzen, 522 N.W.2d at 836. See also, *State v. Hightower*, 376 N.W.2d 648, 650 (Iowa Ct. App. 1985); *Des Moines Register & Tribune v. Dist. Ct.*, 426 N.W.2d 142, 146-48 (Iowa 1988).

As noted in *State v. Farnum*, 397 N.W.2d 744, 747 (Iowa 1986):

> Closed proceedings are rare and are granted "only for cause shown that outweighs the value of openness." *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 509, 104 S.Ct. 819, 824, 78 L.Ed.2d 629, 638 (1984); *see State v. Lawrence,* 167 N.W.2d 912, 915 (Iowa 1969). Absent an overriding interest, the trial of a criminal case must be open to the public. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581, 100 S.Ct. 2814, 2829-30, 65 L.Ed.2d 973, 992 (1980). The justification for denying access to a trial must be a weighty one. *Waller v. Georgia,* 467 U.S. 39, 45, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31, 38 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606, 102 S.Ct. 2613, 2620, 73 L.Ed.2d 248, 257 (1982).

These cases deal with criminal proceedings, but "[t]he historical support for access to criminal trials applies in equal measure to civil trials." *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983).

At trial, defendants did nothing to satisfy any of the *Waller* factors. In fact, defendants never discussed *Waller*. Likewise, the court did not mention *Waller* or any Iowa case. It said it was aware of the law but did not identify that law. (D0260, Tr. at 45, lines 12-13).

"[T]here were no specific findings in support of closure. The record reflects that there was no specific evidence submitted concerning prejudicial effects or alternatives to closure." *Des Moines Register*, 426 N.W.2d at 148. Plaintiff mentioned the need for the court to make findings on relevant factors, and the court acknowledged that need. (D0260, Tr. at 58, lines 12-16). But the court never made any findings to support closure. It was error to grant the closure motion without making the required specific findings. *Des Moines Register*, 426 N.W.2d at 148.

In addition, neither defendants nor the court cited any law warranting sealing the recording from public access. Chapter 21 and case law show the recording should be part of public evidence.

Defendants cited Iowa Code §21.5(5)(b)(1) but did not argue how it applied. (D0260, Tr. at 44, lines 1-9). That section says:

> The detailed minutes and audio recording of a closed session shall be sealed and shall not be public records open to public inspection. However, upon order of the court in an action to enforce this chapter, the detailed minutes and audio recording shall be unsealed and examined by the court in camera. The court shall then determine what part, if any, of the minutes should be disclosed to the party seeking enforcement of this chapter for use in that enforcement proceeding.

This means a recording is confidential unless a court authorizes disclosure in an enforcement action. When a recording is disclosed, it is no longer confidential for trial purposes. It may be used in the case like any other evidence.

The entire recording was ordered disclosed to plaintiff, and "[i]f the sealed records are of probative value in these cases, they ordinarily will surface and become public in an enforcement trial." *Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 535 (Iowa 1980). This happened in *City of McGregor v. Janett*, 546 N.W.2d 616, 618 (Iowa 1996) (recorded transcript of closed session when tape recordings could not be found). See also *West v. Wessels*, 534 N.W.2d 396, 400 (Iowa 1995) (transcripts of closed-session meetings made part of record in summary judgment proceedings; "Relevant material contained in the closed-session meetings should also be made available to West for such use as is allowed under the rules of evidence in pursuing those claims remaining after our decision is filed and procedendo has issued.").

Beyond this, defendants did nothing to show there were sufficient grounds to override the common-law right of access to judicial records recognized in *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978).

The recording was received in evidence. No rule of evidence or case law has ever been cited that warrants sealing this probative yet innocuous evidence that was no longer confidential.[9]

The district court cited no law and made no findings to support its orders closing the courtroom and sealing the recording. Those orders were abuses of discretion.

CONCLUSION

Plaintiff asks the Court to reverse the district court and (1) find defendants violated chapter 21, (2) impose a $100 penalty against each defendant to be paid personally by each, (3) order that the recording and minutes of the closed session be unsealed, and (4) order defendants to personally pay fees and costs.

Plaintiff asks the Court to directly impose the penalties rather than remand because the district court said that is the fine it would have imposed for a violation, (D0248, Findings at 12, Att. 1). The record supports imposition of the statutory minimum by this Court. See

[9] The same arguments apply to Exh. P1 (D0235), the minutes of the closed session, offered by defendants. Plaintiff objected to that exhibit being sealed. ((D0261, Tr. at 344, line 13 – 345, line 2).

Olinger v. Smith, 892 N.W.2d 775, 787 (Iowa Ct. App. 2016) ("We find the record is sufficient to address this on appeal . . ..").

Defendants evidently intend to use public money to pay their damages, and plaintiff asks the Court to order that the damages are personal obligations of each defendant that may not be paid or reimbursed from public funds.[10] Generally, public funds may not be used for private liabilities. Iowa Constitution, Article III, Section 31.

At page 8 of their post-trial brief, defendants refer to "the City's obligation to save harmless and indemnify its officers and employees under Iowa Code section 670.8." (D0243, Def. Brf. at 8). Section 670.8 applies only to tort claims. See *City of West Branch v. Miller*, 546 N.W.2d 598, 603 (Iowa 1996). In addition, it does not allow indemnification for punitive damages. Code §680.8(1).

Damages under chapter 21 are not compensatory. They are punitive. They are not based upon loss; they seek to punish and deter. The district court and the *Olinger* Court called them "fines."

[10] Plaintiff asks the same for costs and fees assessed against defendants.

This request was not specified in the Petition, but plaintiff's post-trial brief (D0239 at 15) requested this relief, and the Petition asked for "any other appropriate relief" (D0001, Petition at 10 (5/28/2021)). This authorizes the Court to grant relief not specifically sought in the Petition. *Anderson v. Yearous*, 249 N.W.2d 855, 859-60 (Iowa 1977) (prayer for relief "to be liberally construed and will often justify a grant of relief in addition to that contained in the specific prayer"). "'Courts should not discourage actions on the part of citizens to compel a strict observance by public officials of their duties, but, as far as authorized by law, should encourage such practice.'" *Carter v. Jernigan*, 227 N.W.2d 131, 134 (Iowa 1975) (citation omitted).

The public was the victim in this case. Public money already has been used to pay to defend defendants' illegal actions. Public money should not also be used to pay the penalty for defendants' illegal actions. That would add injury to injury.

REQUEST FOR ORAL ARGUMENT

Plaintiff requests oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(i)(1) because it contains 6,959 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(g)(1) because it was prepared using Century Schoolbook 14-point font.

CERTIFICATE OF SERVICE

This brief was electronically filed with the Clerk of Court and served on counsel of record using EDMS.

April 2, 2024.

Respectfully Submitted,

s/ Robert L. Teig
Robert L. Teig
Pro Se
282 Lamplite Ln SE
Cedar Rapids, Iowa 52403
bobteig@gmail.com
Cell: (319) 432-4695