IN THE SUPREME COURT OF IOWA

No. 24-0029

Robert Teig,
Plaintiff-Appellant,

v.

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

APPEAL FROM THE DISTRICT COURT OF LINN COUNTY
CVCV097672
HON. Andrew B. Chappell, JUDGE

BRIEF OF DEFENDANTS-APPELLEES

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ROUTING STATEMENT

Pursuant to Iowa R. of App. P. 6.1101(2)(c), this case should be retained by the Iowa Supreme Court, as it presents a substantial issue of first impression regarding the proper interpretation of Iowa Code section 21.5(1)(i) (2021) ("Section 21.5(1)(i)").

NATURE OF THE CASE

This appeal arises from a civil case filed by Plaintiff-Appellant Robert Teig ("Plaintiff"), in which Plaintiff alleged that Defendants-Appellees ("Defendants") violated Iowa Code Chapter 21 ("Chapter 21"), commonly known as Iowa's Open Meetings Law. D0001, Petition (At Law) at 9 (5/28/21). Specifically, Plaintiff alleged Chapter 21 was violated when Defendants held a closed meeting pursuant to Section 21.5(1)(i) to interview a candidate for the position of Cedar Rapids City Clerk on April 29, 2021. D001 at 9.

Plaintiff's civil case proceeded to a bench trial on September 13 and 14, 2023, at which the district court admitted the confidential minutes and recording of the April 29, 2021 closed meeting into evidence at EDMS document security level 2, thereby restricting access to those items to Plaintiff (as a self-represented litigant), the attorneys of record in the case, internal court personnel, and clerks of court and judges.[1] D0260, Trial Tr. (Day 1) at 57:5 (9/13/2023); D0261, Trial Tr. (Day 2) at 345:5 – 6

[1] A description of the various EDMS security levels can be found on the Iowa Judicial Branch website at: https://www.iowacourts.gov/static/media/cms/EDMSSecurityLevels_F52E0C9950721.pdf. Document security levels are listed on page 4 and 5 of the pdf found at this link.

(9/14/2023); D0237, Order for Maintenance of Exhibit at 1 (9/14/2023). After the conclusion of trial and submission of post-trial briefs by the parties, the district court entered a ruling in which it found Defendants did not violate Chapter 21 and dismissed Plaintiff's case. D0248, Findings of Fact, Conclusions of Law, Analysis and Ruling at 13 (12/3/2023). Plaintiff appeals this dismissal of his case by the district court, as well as the district court's decision to admit the confidential recording of the closed meeting into evidence at EDMS document security level 2.[2] Appellant's Amended Brief at 8 – 9 (4/2/2024). Plaintiff also purports to appeal an unwritten decision of the district court to close a portion of the trial, but no such decision exists and, thus, no appeal on this ground can stand. Appellant's Amended Brief at 8 – 9; D0260 at 58:1 – 59:3 & 60:18 – 61:6.

[2] It does not appear Plaintiff is appealing the district court's decision to admit the confidential minutes of the closed meeting into evidence at security level 2, as the minutes are not referenced in the Statement of Issues, Nature of the Case, or Argument sections of Appellant's Amended Brief. Regardless, the arguments as to why the confidential recording of the closed meeting should remain filed at security level 2 contained later in this Brief apply with equal force to the confidential minutes of the closed meeting.

STATEMENT OF THE FACTS

Plaintiff accurately states the facts to which the parties stipulated prior to the trial of this matter in his Statement of Facts on page 9 of Appellant's Amended Brief filed April 2, 2024 ("Plaintiff's Brief"). The following additional facts are also relevant to the issues presented for review:

At the time of the vote to close the April 29, 2021 special meeting (the "Special Session") to interview Alissa Van Sloten ("Ms. Van Sloten"), Defendants were aware of the following facts: (1) an employment interview was about to be conducted (Plaintiff's Trial Exhibit 2 at approx. :20 (9/13/2023 trial)(no docket number); (2) there was a set of planned questions, but the follow-up questions to be asked by the Councilmembers, answers to be given by Ms. Van Sloten, and opinions or critiques of Ms. Van Sloten to be conveyed by the other Councilmembers during the interview were unknown (D0260 at 86:24 – 89:25 & 186:1 – 187:4; D0261 at 253:18 – 254:10, 283:18 – 284:1, 305:24 – 306:21, 321:12 – 321: 24, & 336:1-20); (3) based upon the prior experiences of Defendants, employment interviews can, and sometimes do, result in the unexpected and unpreventable disclosure of damaging information about the applicant (D0260 at 90:24 – 93:20, 184:13 – 185:14, 187:5 – 188:18 & 195:16 – 196:3; D0261 at 254:20 – 255:7, 284:2 – 15, 304:16 – 305:23, 322:3 – 323:22, & 336:21 – 337:13);

and (4) if the Special Session were not closed, it would be broadcast publicly on Facebook and available for viewing through the City Clerk's office (D0260 at 167:12 – 168:14; D0261 at 261:12; D0226, Defendants' Trial Exhibit J at 1 (9/14/2023)).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS DID NOT VIOLATE THE IOWA OPEN MEETINGS LAW WHEN THEY HELD A CLOSED MEETING TO EVALUATE THE PROFESSIONAL COMPETENCY OF A CANDIDATE FOR CITY CLERK

A. Statement of Error Preservation

Defendants do not contend there is a preservation of error problem in connection with the arguments contained in Division I of Plaintiff's Brief, which commence on page 12 and end on page 32 of Plaintiff's Brief.

B. Statement of Scope and Standard of Appellate Review

Defendants agree with the statement of the standard of appellate review applicable to the arguments contained in Division I of Plaintiff's Brief, which is found on page 13 through 14 of Plaintiff's Brief.

C. Purpose and Interpretation of Open Meetings Law

Plaintiff's critique of Defendants' decision to close the Special Session focuses on the overall purpose of Chapter 21, as stated in Iowa Code section 21.1, and ignores the specific purpose of the particular section of Chapter 21 at issue in this case, Iowa Code section 21.5 ("Section 21.5"). *Cf. Feller v. Scott Cnty. Civ. Serv. Comm'n*, 435 N.W.2d 387, 390 (Iowa Ct. App. 1988)(noting that Section 21.5(1)(i) is for the protection of the employee) ("*Feller I*"). Defendants are not disputing that the purpose stated

in Section 21.1 is an important one. However, with the enactment of Section 21.5, the Iowa Legislature recognized that there are other important interests as well, and the need for confidentiality sometimes outweighs the public interest in open government. As this Court has explained,

> The [Open Meetings] statute was enacted for the public benefit and should be construed to favor openness. It was however for the legislature to set its parameters. In doing so it assumed responsibility for weighing the law's stated purpose against situations when the demands of efficient administration require a measure of confidentiality. We might or might not set some boundaries differently. Our clear responsibility is nevertheless to apply the ones established by the legislative branch of government.

Donahue v. State, 474 N.W.2d 537, 539 (Iowa 1991)(internal citation omitted). The Iowa Legislature determined that the scenarios described in Section 21.5 constitute situations in which the public interest in open government may, in the governmental body's discretion, have to yield to other important interests, and that determination by the Iowa Legislature must be given due consideration as well.

D. Defendants Met Their Burden to Demonstrate Compliance with the Requirements of Chapter 21

i. Section 21.5(1)(i) does not require specific negative information about the applicant be known in order to close the meeting

Section 21.5(1)(i) allows a governmental body to hold a closed session to the extent a closed session is necessary

> to evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

Iowa Code §21.5(1)(i)(2021). Section 21.5(1)(i) contains no requirement that any sort of factual record be made in open session as to why closure is necessary, nor does it require the governmental body possess any particular piece of information or recite any particular findings in order to exercise its discretion to close a job interview.

Plaintiff interprets Section 21.5(1)(i) to require that, prior to closing a meeting to interview a job applicant, the government body must identify a specific piece of harmful information regarding the applicant that would be disclosed during the interview. This interpretation improperly enlarges and/or changes the terms of the statute, not just as to Defendants, but also as to the applicant Section 21.5(1)(i) seeks to protect. *Cf. Feller*, 435 N.W.2d at 390 (noting that Section 21.5(1)(i) is for the protection of the employee). All Section 21.5(1)(i) requires of the applicant is that they request a closed session, but Plaintiff seeks to require much more from the applicant. In most circumstances, the only way a governing body is going to learn particular

damaging information regarding an applicant, prior to the interview, is for the applicant to voluntarily self-report that damaging information to the governing body (i.e. their desired future employer or, in Ms. Van Sloten's case, her current employer). Not only is this not required by Section 21.5(1)(i) - such an interpretation of Section 21.5(1)(i) would lead to an absurd result and would harm the public interest by deterring otherwise qualified applicants from applying for public employment. *Cf. Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 532 (Iowa 1980)(noting that the Court "seek[s] to avoid interpretations [of statutes] that would produce strained, impractical or absurd results."). Expecting job applicants to volunteer damaging information about themselves to their desired future employer (or, in this case, their current employer), before they even have the chance to present positive information about themselves in an interview, is not reasonable, is unfair to the applicant, and is not required by Section 21.5(1)(i).

Plaintiff's interpretation of Section 21.5(1)(i) also leads to an absurd result when considered in light of the fact that the legislature has largely exempted job applications from disclosure to the public, without regard to the contents of the particular job application. *See Teig v. Chavez,* No. 23-0833, 2024 WL 2869282 at *8 (Iowa June 7, 2024)(holding that job

applications received from external, but not internal, candidates are exempt from disclosure to the public under Iowa Code section 22.7(18)). *Cf. Albrecht v. General Motors Corp.,* 648 N.W.2d 87, 89 (Iowa 2002)("We presume that when the legislature enacts a statute that it intends '[a] just and reasonable result.' Accordingly, the court interprets statutes so as to avoid absurd results. In addition, we 'construe statutes that relate to the same or closely allied subject together so as to produce a harmonious and consistent body of legislation." (quoting *State v. Iowa Dist. Ct.*, 616 N.W.2d 575, 578 (Iowa 2000)). There is simply no reason to think the Iowa legislature would broadly exempt an employment application from public disclosure without requiring it contain any particular harmful information, but then narrow those situations where the applicant's employment interview can be closed from the public to only those where some specific piece of harmful information about the applicant can be identified in advance. If anything, a detailed employment interview seems more likely to result in harmful information being disclosed than an employment application and, therefore, is more worthy of protection.

Plaintiff argues that, since the district court noted that his interpretation of Section 21.5 is not *necessarily* an unreasonable one, it was required to choose his interpretation because it favors openness. Plaintiff's Brief at 31 -

32. This argument ignores the fact that the district court also found that Plaintiff's interpretation of Section 21.5 could lead to strained, impractical or absurd results, and this Court has said that, despite the language in Section 21.1 regarding resolving ambiguity in favor of openness, "a statute must be read as a whole and given its plain and obvious meaning, a sensible and logical construction [and the Court] seek[s] to avoid interpretations that would produce strained, impractical or absurd results." D0248 at 10; *Telegraph Herald*, 297 N.W.2d at 532. Under these circumstances, the district court was not required to adopt Plaintiff's interpretation, even if it does favor openness. *Telegraph Herald,* 297 N.W.2d at 532.

ii. The information available to Defendants at the time of the vote to close the Special Session was sufficient to satisfy the requirements of Section 21.5(1)(i)

A governmental body's right to close a session typically turns "on factors apparent when the decision to close the [meeting] was made, not on anything subsequently said in the meeting." *Telegraph Herald,* 297 N.W.2d at 536. Therefore, the content of the Closed Session, and the fact that no harmful information regarding Ms. Van Sloten was ultimately revealed, are irrelevant to the determination of whether the Special Session should have been closed in the first place. The decision to close the Special Session cannot be evaluated with the benefit of hindsight Defendants did not have at

the time of that decision. Defendants had to rely on the information available to them at the time of the vote to close the Special Session and the district court properly relied on this information as well in making its decision in this matter. Contrary to Plaintiff's argument, the district court's finding that no negative information was revealed during Ms. Van Sloten's interview did not in any way necessitate a finding that Defendants violated Chapter 21. Moreover, the district court did not "abdicate[] its duty to review [D]efendants' actions[,]" as alleged by Plaintiff; the district court properly concluded that closing the Special Session was a proper exercise of Defendants' discretion, based upon the facts and information known by Defendants at the time the decision to close was made by them. D0248 at 11.

There were multiple factors supporting closure of the Special Session that existed at the time Defendants voted to do so. It is undisputed that, prior to the Special Session, Ms. Van Sloten requested her interview be conducted in closed session pursuant to Section 21.5(1)(i).[3] D0228, Plaintiff's Exhibit

[3] Once Ms. Van Sloten's request for a closed interview was made, Defendants could not just ignore it. To do so would have not only risked the very reputational harm Section 21.5(1)(i) seeks to prevent – it would have put Defendants at risk of violating Chapter 21 for *not* going into closed session. *See Feller*, 435 N.W.2d at 390 (finding that governmental body abused its discretion in denying the employee's request for a closed

4, Request to Close April 29 Meeting at 1; D0260 at 117:6 – 10. Defendants were aware of this request at the time they voted to close the Special Session. D0260 at 36:5 – 21 & 185:22 – 25; D0261 at 283:13 – 17, 299:17 – 23, & 321:12 – 15. A reasonable governmental body could infer from such a request that the job applicant is concerned about damage to their reputation occurring if their interview is conducted in open session. Even if this does not ring true for every single job applicant, it is still a reasonable inference for a governmental body to make when deciding whether to hold a closed session. It is difficult to imagine a plausible reason for making a request to close one's interview *other* than reputational concerns, particularly when the job applicant is already employed by the interviewer in another position, as Ms. Van Sloten was at the time she made her request to close her interview and, therefore, doesn't need to worry about their current employer learning that they are seeking work elsewhere. Moreover, Ms. Van Sloten's request to close the Special Session specifically referenced

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hearing). There is dictum in *Feller v. Scott Cnty. Civ. Serv. Comm'n*, 482 N.W.2d 154, 158 (Iowa 1992)("*Feller II"*) that "the court of appeals *may* have been incorrect in its interpretation of the open meetings law [in *Feller I*]." (emphasis added). However, there is nothing in the language of *Feller II* that would prohibit an Iowa court 30 thirty years later from deciding the Iowa Court of Appeals in *Feller I* was correct. Defendants cannot predict with certainty what the courts will do and, as it stands, *Feller I* has not been overruled and cannot just be disregarded by Defendants.

Section 21.5(1)(i), making it clear that her concern was damage to her reputation. D0228 at 1.

In addition to Defendants' awareness that Ms. Van Sloten had requested a closed session, Defendants were also aware of the following facts at the time of the vote to close the Special Session: (1) an employment interview was about to be conducted (Plaintiff's Trial Exhibit 2 at approx. :20); (2) there was a set of planned questions, but the follow-up questions to be asked by the Councilmembers, answers to be given by Ms. Van Sloten, and opinions or critiques of Ms. Van Sloten to be conveyed by the other Councilmembers during the interview were unknown (D0260 at 86:24 – 89:25 & 186:1 – 187:4; D0261 at 253:18 – 254:10, 283:18 – 284:1, 305:24 – 306:21, 321:12 – 321: 24, & 336:1-20); (3) employment interviews can, and sometimes do, result in the unexpected and unpreventable disclosure of damaging information about the applicant (D0260 at 90:24 – 93:20, 184:13 – 185:14, 187:5 – 188:18 & 195:16 – 196:3; D0261 at 254:20 – 255:7, 284:2 – 15, 304:16 – 305:23, 322:3 – 323:22, & 336:21 – 337:13);[4] and (4) if the Special Session were not

[4] Plaintiff argues that this is speculation. It is not. It is a fact Defendants knew to be true based upon their past experience with employment interviews. D0260 at 90:24 – 93:20, 184:13 – 185:14, 187:5 – 188:18 &

closed, it would be broadcast publicly on Facebook and available for viewing through both Facebook and the City Clerk's office (D0260 at 167:12 – 168:14; D0261 at 261:12; D0226 at 1). The Iowa Public Information Board ("IPIB"), the State board tasked with investigating alleged violations of the Open Meetings Law pursuant to Iowa Code Chapter 23, recognizes that professional competency evaluations are "unpredictable in nature" and "requiring an individual to expressly state in an open session the exact nature of the reputational harm they would suffer would render [Section 21.5(1)(i)] useless." *See* Attachment 1 to D0197, IPIB opinion at 2 (9/1/2023).[5]

It is not an abuse of discretion for Defendants to find that, having no way of knowing at the time of the vote to go into closed session what information would be disclosed during the interview, and having an applicant who had requested a closed session, it was necessary to close the Special Session. Once the harmful disclosure is made in open session, and live over Facebook, it cannot be undone; at that point, the harm is clearly irreparable. Any such harm suffered by the applicant would be "needless"

195:16 – 196:3; D0261 at 254:20 – 255:7, 284:2 – 15, 304:16 – 305:23, 322:3 – 323:22, & 336:21 – 337:13.

[5] This IPIB opinion can also be found online at: https://ipib.iowa.gov/closed-session-requirements.

(i.e. unnecessary[6]) because all that had to be done to prevent it was to close the interview, as requested by the applicant. It was, therefore, reasonable and appropriate for Defendants to conclude that closing the session was necessary to prevent needless and irreparable injury to Ms. Van Sloten's reputation. Defendants' decision to close was based upon the facts stated above, not just speculation as argued by Plaintiff.

Plaintiff claims that "[a]n injury must rise to the level of the needless and irreparable injury exemplified in" *Feller I* in order to justify closure of under Section 21.5(1)(i). Plaintiff's Brief at 17. There is no support for this contention in *Feller I*, Chapter 21, or elsewhere, and this sets the bar too high. There is plenty of information that could cause needless and irreparable injury to an applicant's reputation that does not rise to the level of the private sexual misconduct and associations with a known felon involved in *Feller I.*

iii. The Special Session was not closed longer than necessary

Plaintiff's claim that Defendants closed the Special Session for longer than was necessary is also without merit. The sole purpose of the Special

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[6] *See Merriam-Webster Dictionary Online*, https://www.merriam-webster.com/dictionary/needless (defining "needless" as "not needed: unnecessary").

Session was to interview Ms. Van Sloten for the position of City Clerk and that is all that occurred during the closed meeting. An interview can include not only a question-and-answer period with the applicant, but also discussion of the open job position and the applicant among the members of the interview panel before and/or after the question-and-answer session. The evidence at trial established that at any point, during any of those portions of the interview, damaging information about Ms. Van Sloten could have been disclosed. Plaintiff appears to believe that the disclosure of damaging information was not possible when Ms. Van Sloten was not present at the interview, but this is incorrect. Ms. Van Sloten was a current employee of the City and had worked with several of the Defendants in the past. D0260 at 146:15 – 25, 163:6 – 20, and 189:4 – 9; D0261 at 284:17 – 285:4 & 306:22 – 307:6. Any of the Defendants who had worked with Ms. Van Sloten in the past could have expressed a negative opinion about, or disclosed a negative experience with, Ms. Van Sloten during any portion of the closed session, which would have damaged Ms. Van Sloten's reputation. D0260 at 147:1 – 7. There were also City staff present at the Special Session who had worked with Ms. Van Sloten in the past and could have volunteered damaging information about Ms. Van Sloten. D0260 at 90:1 –

13 & 100:19 - 24; Plaintiff's Trial Exhibit 2[7] (9/13/2023 trial)(no docket number). Again, the fact that this did not actually occur is irrelevant.

Plaintiff takes particular issue with the content of the first few minutes of the closed session, which he referred to at trial as "housekeeping items," claiming it was not possible damaging information could have been disclosed during this portion of the Special Session. However, the testimony at trial was that the participants in the closed session were not prohibited from making statements during this portion of the meeting, so this portion of the meeting was not entirely safe for Ms. Van Sloten either. D0260 at 89:17 – 25. Moreover, "housekeeping items" do not constitute a "meeting" subject to the Open Meetings Law, so there can be no open meetings violation based upon those items not being discussed in open session. *See* Iowa Code § 21.2(2) (2021)(defining a meeting as a gathering where there is "deliberation or action upon any matter within the scope of the governmental body's policy-making duties" and excluding gatherings for "purely ministerial"

[7] The timestamp on the undersigned's copy of this exhibit is not functioning properly at the time of preparing this citation, but Defendants refer this Court to the discussion of the interview participants after Ms. Van Sloten leaves the closed meeting. This discussion establishes that Ms. Van Sloten worked with both Sandi Fowler and Jim Flitz in the past, both of whom were present for at least a portion of the closed meeting.

purposes "when there is no discussion of policy or no intent to avoid the purposes of [Chapter 21].").

Plaintiff argues that Defendants should have left the Special Session open at the start of the interview and then closed it only once it became apparent that damaging information was about to come to light. D0239, Plaintiff's Post-trial Brief at 5 (9/19/2023). The primary problem with this argument is that, once the concern is raised, it is too late to close the session – the issue has already been made public and the bell cannot be un-rung. That is why it was necessary to close the entire interview. Not knowing Ms. Van Sloten's answers in advance, or knowing what the other participants in the interview would say or when they would say it, the piecemeal closing of the Special Session suggested by Plaintiff is not a realistic option, nor is it one that adequately protects the applicant.

Moreover, as noted by the district court, "Plaintiff's suggested *required* procedure could end up exceptionally impractical, or even absurd depending on the circumstances." D0248 at 10. Plaintiff compares his suggested procedure to a courtroom sidebar (Plaintiff's Brief at 27), but this is not an apples-to-apples comparison. Calling the parties to the court's bench for a quick sidebar during trial is a significantly different and less complicated process than that which is necessary for a nine-member

governmental body to close an open meeting. To close a meeting, a member of the government body must move to go into closed session and another member must second that motion. The government body then must vote on that motion and the members of the governing body must be polled as to their vote. *See* Iowa Code § 21.5(2) (2021). The observing public must then be removed from the meeting room, the closed session must be properly recorded, and a member of the governing body then must move to reopen the session, with another member seconding that motion, and the governing body must then vote on that motion. *See* Iowa Code § 21.5(5)(a) (2021). Once the governing body has voted to reopen the meeting, the public must then be brought back into the meeting room and the whole closing process must start over again if the meeting needs to be closed again. This is an absurd result that could not have been intended by the Iowa Legislature.

iv. At a minimum, Defendants substantially complied with Chapter 21 and substantial compliance is all that was required of them

Section 21.5(1)(i) confers a power on governmental bodies and, in turn, those governmental bodies are required to substantially comply with any procedure established by state law for exercising that power. *See Feller*, 435 N.W.2d at 390 (stating that the use of the word "may" in Iowa Code section 21.5 "confers a power and places discretion within the one who

holds the power."); Iowa Code § 364.6 (2021)(stating the city is to "substantially comply with a procedure established by a state law for exercising a city power."); *KCOB/KLVN, Inc. v. Jasper Cnty. Bd. of Sup'rs,* 473 N.W.2d 171, 176 (Iowa 1991)(applying County statute analogous to Iowa Code 364.6 to alleged violations of the Open Meetings Law and stating that "[w]hen procedures are imposed on county governmental bodies, the standard is substantial rather than absolute compliance with the statutory requirements."). At a minimum, Defendants substantially complied with the Open Meetings Law, both with regard to the decision to close the Special Session and the extent of the closing, and that is all that was required of them.[8] Therefore, Plaintiff's claim that Defendants violated the Open

[8] Plaintiff has argued that substantial compliance is an affirmative defense Defendants failed to plead in this matter. D0244, Plaintiff's Reply to Defendants' Post-Trial Brief at 2 (9/27/2023). This is not accurate. An affirmative defense is one that "would avoid liability although admitting the allegations of the petition[,]" such as an immunity defense. *Smith v. Smith*, 646 N.W.2d 412, 415 (Iowa 2002). Substantial compliance is not an affirmative defense; it is a legal standard. *See KCOB/KLVN*, 473 N.W.2d at 176 (Iowa 1991)("When procedures are imposed on county governmental bodies, the *standard* is substantial rather than absolute compliance with the statutory requirements." (emphasis added)). Defendants are entitled to have the court apply the proper legal standard, regardless of whether Defendants specifically articulated that standard in their pleadings. Moreover, Defendants argued substantial compliance during the summary judgment proceedings in this case, as well as in their Pretrial Brief, so Plaintiff was aware of this argument at the time of trial. *See* D0151, Defendants' Reply to

Meetings Law when they voted to close the Special Session was properly dismissed by the district court.

E. The Relief Plaintiff Requests from This Court is Not Appropriate, Even if This Court Finds the District Court Erred in Finding No Violation of Chapter 21 Occurred

i. If this Court finds a violation of Chapter 21 occurred, this matter should be remanded back to the district court for a determination in the first instance as to whether Defendants' statutory defense to damages applies

Plaintiff asks this Court to not only reverse the district court, but also to proceed with imposition of a $100 "penalty"[9] against each Defendant. Plaintiff's Brief at 38. To do so would skip an important step. In addition to Defendants' denial that a violation of Chapter 21 occurred, Defendants have asserted throughout this case, and continue to assert, that, even if a violation of Chapter 21 occurred, Iowa Code section 21.6(3)(a)(3) ("Section 21.6(3)(a)(3)") provides Defendants a complete defense to damages in this matter. D0012, Answer of Defendants at 8 (7/6/2021); D0197, Defendants' Pretrial Brief at 8 – 9 (9/1/2023); D0243, Defendants' Post-Trial Brief at 6 (9/26/2023). Section 21.6(3)(a)(3) provides, in part, that "[a] member of a

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Plaintiff's Resistance to Defendants' Motion for Summary Judgment at 14 (7/7/2023); D0197, Defendants' Pretrial Brief at 9 (9/1/2023).

[9] Iowa Code section 21.6(3)(a) ("Section 21.6(3)(a)") refers to "damages," not a "penalty."

government body found to have violated this chapter shall not be assessed such damages if that member proves that the member…reasonably relied upon…a formal opinion of the attorney for the governmental body, given in writing…or an advisory opinion of…the attorney for the governing body, given in writing." Iowa Code § 21.6(3)(a)(3) (2021).

At trial, Defendants presented significant evidence in support of their defense pursuant to Section 21.6(3)(a)(3). Defendants also argued that, at a minimum, Defendants substantially complied with the procedure Section 21.6(3)(a)(3) requires for government officials to shield themselves from damages under Chapter 21. *See* Iowa Code § 364.6. However, the district court declined to make any determination as to Defendants' entitlement to the Section 21.6(3)(a)(3) defense because it did not need to do so to decide this case. Specifically, the district court stated:

> Having found that the Defendants did not violate the statute, the Court finds it needn't address the parties dispute over whether Defendants had a defense to damages due to their reliance on a formal or advisory opinion by their attorney. The Court finds it was clear the Council Members believed they were following their attorney's advice that it was acceptable to go into closed session, but whether that advice came in the form of a formal or advisory opinion could be a different question. The Iowa Supreme Court appears to have never weighed in on what exactly constitutes a formal or advisory opinion for the purposes of the statutory defense. And the Court finds it would not be advisable for the undersigned

> to do so now, when it clearly is not necessary in order to decide the case.

D0248 at 11.

In the event this Court determines the district court erred in its determination that Defendants did not violate Chapter 21, this case should be remanded back to the district court for a determination as to Defendants' entitlement to the Section 21.6(3)(a)(3) defense. In the event a Chapter 21 violation is found, the issue of whether Defendants are entitled to a Section 21.6(3)(a)(3) defense must be decided before any damages can be imposed and, as a reviewing court, this Court should decline to be the decisionmaker on that issue in the first instance. *See 33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co.,* 939 N.W.2d 69, 76 (Iowa 2020)("We are a court of *review*, and we do not generally decide an issue that the district court did not decide first." (emphasis in original)). Defendants do not dispute that, if a violation of Chapter 21 is found *and* Defendants' statutory defense to damages fails, $100 is the appropriate damages amount to assess, but a determination as to Defendants' Section 21.6(3)(a)(3) defense must first be made by the district court.

ii. Prohibiting the City of Cedar Rapids from indemnifying Defendants would be contrary to Iowa law and inappropriate

Plaintiff asks this Court to order that any damages assessed against Defendants "are personal obligations of each defendant that may not be paid or reimbursed from public funds." Plaintiff's Brief at 39. Again, the district court did not rule on this issue and this Court should decline to do so in the first instance. Moreover, prohibiting the City of Cedar Rapids from indemnifying Defendants would be contrary to Iowa law.

Iowa Code Chapter 670 ("Chapter 670") provides that a governing body must indemnify its officers and employees against any tort claim or demand that arises "out of an alleged act or omission occurring within the scope of their employment or duties." Iowa Code §670.8 (2023). It is beyond legitimate dispute that Plaintiff's claims arise out of an alleged act or omission occurring within the scope of Defendants' employment or duties. However, Plaintiff argues that the duty to indemnify provided for in Iowa Code section 670.8 ("Section 670.8") does not apply in this case because Section 670.8 "only applies to tort claims." Plaintiff's Brief at 39. Careful review of Chapter 670 reveals the flaw in this argument. A "tort" under Chapter 670 is defined to include "actions based upon…breach of duty, whether statutory or other duty or denial or impairment of any right under

any…statute…" Iowa Code § 670.1(4). Plaintiff's claims are clearly based upon an alleged breach of a statutory duty and/or an alleged denial or impairment of his rights under Iowa Code Chapter 21 and, therefore, Plaintiff's claims fall within the broad definition of "tort" provided for in Chapter 670. Therefore, the City of Cedar Rapids' duty to indemnify under Section 670.8 clearly applies in this matter.[10]

Plaintiff also argues the damages that may be assessed for a violation of the Iowa Open Meetings Law are punitive damages and Section 670.8 "does not allow indemnification for punitive damages." Plaintiff's Brief at 39. Neither of these statements is accurate. The damages described in Section 21.6(3)(a) cannot be characterized as punitive damages because

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[10] By way of further illustration of the legislative intent of Section 670.8, subsection (2) thereof expressly provides that the duty to indemnify "shall include but not be limited to cases arising under 42 U.S.C. §1983." It is well established that, in cases arising under 42 U.S.C. §1983, a cause of action against an officer or agent of a municipality can only be made against the officers or agents in their individual capacity since claims against them in their official capacity are, in reality, claims against the municipality. *Kentucky v. Graham*, 473 U.S. 166, 166, 105 S. Ct. 3099, 3105 (1985). *See also Parrish v. Ball*, 594 F.3d 993, 997 (8th Cir. 2010)("'[a] suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent;'")(quoting *Elder-Keep v. Akasamit*, 460 F.3d 979, 986 (8th Cir. 2006); *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010) (dismissing Section 1983 claims against public officials in their official capacities as redundant to Section 1983 claims made against the governmental entity). Therefore, even where a judgment may be entered against a defendant individually, the duties under Section 670.8 remain.

Section 21.6(3)(a) does not require anywhere near the willful and wanton conduct that must be shown to justify an award of punitive damages. *See* Iowa Code § 668A.1 (2023). For the lowest range of damages authorized under Section 21.6(3)(a), it is not even required that Defendants knowingly participated in the violation at issue, much less that they did anything willful or wanton. Moreover, even if the statutory damages under Section 21.6(3)(a) were punitive damages, Section 670.8 merely states that a governing body does not have a *duty* to indemnify for punitive damages. This does not mean a governing body cannot voluntarily agree to indemnify an officer or employee against punitive damages and, in fact, Section 670.8 explicitly provides that a governing body can purchase insurance to protect its officers and employees from punitive damages. *See* 1988 Iowa Op. Att'y Gen. 5 (1987), 1987 WL 119630 (opining that a municipality may voluntarily agree to pay punitive damages assessed against an employee for acts arising from his or her employment, even though the municipality is not required to do so, if the municipality finds said expenditure serves the public interest). Therefore, even if the damages authorized under Section 21.6(3)(a) are punitive damages, the decision as to whether or not to indemnify Defendants against them should be left to the discretion of the City of Cedar Rapids.

Plaintiff's attempt to cast any damages assessed against Defendants in this matter as "private liabilities" is misleading, as it suggests that Defendants were acting in an individual or personal capacity when they proceeded with the closed session at issue in this matter, and this is not accurate. While Plaintiff has chosen to name Defendants in their individual capacity, it is inaccurate to characterize the capacity in which Defendants acted as individual, private or personal. It is clear the conduct of which Plaintiff complains took place in connection with Defendants' discharge of their official duties as elected councilmembers. There is nothing personal or private about the conduct of which Plaintiff complains in this matter. In fact, it is difficult to imagine an action of a city councilmember that is more official than casting a vote at a council session.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS TREATMENT OF THE CONFIDENTIAL RECORDING OF THE CLOSED MEETING

A. Statement of Error Preservation

Plaintiff did not properly preserve error as to the arguments contained in Division II of Plaintiff's Brief, which commence on page 32 and end on page 38 of Plaintiff's Brief. In his Division II, Plaintiff challenges the district court's ruling admitting the recording of the closed session into

evidence at a heightened security level. This ruling was made during the trial of this matter on September 13, 2023, and was incorporated into the district court's Order Concerning Management of Exhibits filed September 14, 2023 (the "Exhibit Management Order"). D0260 at 57:5 – 8; D0237, Order Concerning Management of Exhibits at 1 (9/14/2023). The Exhibit Management Order clearly provided that objections and requests for changes to that order were to be made within ten business days or said objections or requests would be waived. D0237 at 1. Plaintiff filed no objections or requests in response to the Exhibit Management Order within the ten-business day window by which to do so and, therefore, his objections to the filing of the closed session recording under EDMS document security level 2 were waived.

Plaintiff did ask the district court to reconsider its ruling as to the closed session recording as part of his Rule 1.904(2) Motion to Reconsider, but that request was not timely, as it was made 87 days after the filing of the Exhibit Management Order. D0250, Plaintiff's Rule 1.904(2) Motion to Reconsider at footnote 1 (12/10/23); Iowa R. Civ. P. 1.904(3)(requiring a motion to reconsider to be filed within 15 days after the filing of the order to which it is directed). Therefore, the district court did not have jurisdiction to entertain that request. *See State ex rel. Miller v. Santa Rosa Sales &*

Mktg., Inc., 475 N.W.2d 210, 213-14 (Iowa 1991)(stating "[t]he timeliness of posttrial motions and appeal is a matter of jurisdiction…")(*superseded by statute on other grounds*).

B. Statement of Scope and Standard of Appellate Review

Division II of Plaintiff's Brief challenges evidentiary rulings of the district court and/or discretionary actions on the part of the district court. Therefore, the standard of appellate review is abuse of discretion. *Andersen v. Khanna*, 913 N.W.2d 526, 535 (Iowa 2018)("We review evidentiary rulings for an abuse of discretion.").

C. The District Court Did Not Close Part of the Trial

Plaintiff claims the district court "closed part of the trial" of this matter. Plaintiff's Brief at 33. This is not the case. Defendants filed a pretrial motion asking the Court to close the courtroom before it allowed the confidential recording of the closed session to be played but, at the time Plaintiff sought to play that recording, no members of the public were present in the courtroom.[11] D0198, Defendants' Motion to Close Portions of Trial to the Public at 4 (9/1/2023); D0260 at 43:14 – 15, 57:9 – 13, & 58:4 – 8. Therefore, it was not

[11] Vanessa Chavez, the City Attorney for the City of Cedar Rapids, was the only individual present in the courtroom other than the judge, court reporter, parties, and the undersigned attorney, and was present to assist the undersigned. D0260 at 12:24 – 13:3 & 57:10 – 11.

necessary to close the courtroom, and the district court explicitly stated it was not doing so. D0260 at 58:4 – 59:2 & 60:18 – 61:3. There can be no error on the part of the district court relating to closing part of the trial when the district court did not, in fact, close any portion of the trial.

D. Even if the District Court Closed the Trial, Such Closure Was Proper, as Was the Filing of the Recording of the Closed Session at Document Security Level Two

Even if this Court finds the district court closed a portion of the trial, such closure was proper. Iowa Code § 21.5(5)(b)(1)(2023) ("Section 21.5(5)(b)(1)") requires the recording of a closed session of a government body be sealed and not be a public record open to public inspection. Section 21.5(5)(b)(1) provides a mechanism for the recording to be disclosed *to the party seeking enforcement of the Open Meetings Law* upon a proper finding by the Court after an *in camera* review, but only "for use in that enforcement proceeding." Section 21.5(5)(b)(1) does not contain any language authorizing release of the confidential recording *to the public* in connection with the enforcement proceeding.

In this case, the district court made a finding that the confidential recording should be disclosed to Plaintiff but, in doing so, the Court also found that a protective order limiting disclosure of the recording to Plaintiff and Defendants' counsel was necessary. D0058, Ruling on Plaintiff's

Request for Disclosure of Minutes and Recording at 6 (1/20/2022). After the protective order was entered, Plaintiff was given a copy of the recording and was later allowed to use it at the trial of his enforcement proceeding. D0076, Protective Order (4/5/22); D0098, Notification to the Court at 1 (8/2/22); D0260 at 63:18 – 73:5. That is all Plaintiff was entitled to under Section 21.5(5)(b)(1). Nowhere in Chapter 21 did the Iowa Legislature give Plaintiff the right to publish the confidential recording to the public, or to admit the confidential recording as a public exhibit, particularly considering such publication and public admission were not necessary parts of his enforcement proceeding.

Allowing members of the public to view the closed session recording, when there has not been any determination by the district court that the Special Session should not have been closed, would entirely defeat the purpose of Section 21.5(1)(i). Once the public sees the confidential recording of the closed session, the damage is done even if the court later finds no violation of Chapter 21 occurred. Moreover, there is no legitimate reason Plaintiff needed to play the recording in open court, or make it accessible to the public as part of the court record. Even if the courtroom was "closed" while the content of the closed session was being discussed or shown, this closure did not cause any detriment to Plaintiff or his case, nor

did the admission of the confidential closed session at a heightened security level. At least arguably, Plaintiff does not even have standing to raise the claims he asserts in Division II of Plaintiff's Brief because he has not suffered any injury as a result of the public not having access to the confidential recording of the closed meeting.

Plaintiff's citation to Iowa Code Section 602.1601 (2023) in Division II of Plaintiff's Brief does not help Plaintiff's case because that section states that judicial proceedings are public *unless otherwise provided by statute* or agreed to by the parties. (emphasis added). In this case, Section 21.5(5)(b)(1) specifically provides that the closed session recording shall not be open to public inspection, so the recording cannot be part of a public trial or admitted into the public record without running afoul of Section 21.5(5)(b)(1). The cases cited in support of Plaintiff's argument that the public is entitled to access to the closed session recording are of no help to Plaintiff's case either. All but one of those cases are inapplicable because they are criminal cases, and the one non-criminal case cited by Plaintiff is a non-binding decision of the 6th Circuit Court of Appeals. *See* Plaintiff's Brief at 34 – 35.

With regard to the district court's decision to admit the confidential recording of the closed meeting at EDMS document security level 2, that

decision was well within the court's discretionary powers, particularly in light of Section 21.5(5)(b)(1) and the fact that the closed session recording was not even relevant to Plaintiff's case. *Cf.* Iowa R. Elec. P. 16.405 (2023) (giving the court authority to restrict access to electronic filings).[12] Plaintiff has cited no authority to support the proposition that the court does not have authority to control access to its own records under the circumstances of this case.

CONCLUSION

Wherefore, Defendants pray this Court affirm the judgment of the District Court in its entirety.

REQUEST FOR ORAL OR NONORAL SUBMISSION

Defendants request oral argument in this matter.

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[12] This rule provides a means for EDMS filers to seek to restrict access to materials, in circumstances where those materials are not deemed confidential by statute, by filing an application asking the court to do so. Iowa R. Elec. P. 16.405(2)(a). In this case, Defendants were not required to make such an application because the recording at issue is deemed confidential by Section 21.5(5)(b)(1). Even if such an application were required in this case, Defendants' Motion to Close Portions of Trial to the Public and Defendants' Objections to Plaintiff's Exhibits are sufficient for that purpose. D0198 at 4; D0205, Defendants' Objections to Plaintiff's Proposed Exhibits at 1 (9/6/2023).

Respectfully submitted,

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CERTIFICATE OF FILING/SERVICE

I hereby certify that on June 10, 2024, I electronically filed the foregoing Brief of Defendants-Appellees with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System, which will send notice of electronic filing to Plaintiff-Appellant Robert Teig. Pursuant to Rule 16.315(1)(b), this constitutes service of this Brief on Plaintiff-Appellant Robert Teig for purposes of the Iowa Court Rules.

/s/ Candace A. Erickson
Candace A. Erickson

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font and contain 7,517 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

Dated this June 10, 2024.

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