IN THE IOWA DISTRICT COURT FOR POLK COUNTY

HARVEY HARRISON, Plaintiff, vs. LISA MICKEY in her official capacity as Public Information Officer for Des Moines, Iowa Police Department and CITY OF DES MOINES, IOWA, Defendants.	Case No. CVCV064414 RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Introduction

This is a mandamus action in which Plaintiff seeks a writ of mandamus from the Court compelling Defendants to provide him with certain use of force reports authored by Des Moines Police Department officers during the calendar year 2020. Defendants resist production of the requested records because they contend that they are confidential records that are protected from release under Iowa law.

Plaintiff's motion for summary judgment was heard by the Court on January 19, 2024. The Plaintiff, Harvey Harrison ("Harrison"), appeared by and through counsel, Gina Messamer. The Defendants (collectively the "City") appeared by and through counsel, Michelle Mackel-Wiederanders and Luke DeSmet. The Court has considered Plaintiff's motion for summary judgment in light of the following legal principles.

Legal Principles Applicable to Mandamus Actions

Iowa Code § 661.1 defines the action of mandamus as being "one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station." *See*, Iowa Code §661.1. A mandamus

action is tried in equity. *See*, Iowa Code § 661.3. A writ of mandamus may be granted by the district court on the petition of any private party aggrieved. *See*, Iowa Code 661.8.

The decision as to whether to issue a writ of mandamus involves an exercise of discretion by the district court. *Baird v. City of Webster City*, 130 N.W.2d 432, 442 (1964). As the district court weighs its discretionary decision whether to issue a writ of mandamus in a particular case, the district court must be mindful that mandamus is a drastic remedy to be applied only in exceptional circumstances. *Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984). A writ of mandamus should be issued only where "rights and duties are clear." *Reed v. Gaylord,* 216 N.W.2d 327, 332 (Iowa 1974).

There are other limits on the district court's authority to issue a writ of mandamus. For example, mandamus cannot be used to establish rights but only to enforce rights that have already been established. *Stith v. Civil Serv. Comm'n of Des Moines*, 159 N.W.2d 806, 808 (Iowa 1986). Further, while mandamus can be used to compel a tribunal to act, the district court may not use a writ of mandamus to control a tribunal's discretion. *See*, Iowa Code § 661.2. In other words, "mandamus proceedings cannot be used to direct a public official or a public body to act a certain way," and the district court "cannot in a mandamus proceeding control discretionary decisions of public officials." *See*, *Hirsch v. City of Muscatine*, 10 N.W.2d 71, 73 (Iowa 1943); *Griebel v. Board of Supervisors*, 202 N.W. 379, 380 (Iowa 1925).

Finally, when a petitioner has an available plain, speedy, and adequate remedy at law, mandamus does not lie. *See*, Iowa Code § 661.7. The other available remedy, however, "must be competent to afford relief on the subject matter in question, and be equally convenient, beneficial and effectual." *Virginia Manor, Inc. v. City of Sioux City*, 261 N.W. 2d 510, 514-15 (Iowa 1978).

Summary Judgment Standard

Summary judgment is appropriate "when the moving party demonstrates there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law." *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013); Iowa R. Civ. P. 1.981(3). A fact is "material" when it "might affect the outcome of the suit." *Kolarik v. Cory Int'l Corp.*, 721 N.W.2d 159, 162 (Iowa 2006) (internal quotation marks omitted). "A fact question is generated if reasonable minds can differ on how the issue should be resolved." *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004). "The burden is on the party moving for summary judgment to prove the facts are undisputed." *Id.* (internal quotation marks omitted).

In determining whether summary judgment is appropriate, the Court shall consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Iowa R. Civ. P. 1.981(3). "On a motion for summary judgment, the Court must: '(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record.'" *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 774 (Iowa 2013) (quoting *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009)).

When a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest on the mere allegations or denials in the pleadings. Iowa R. Civ. P. 1.981(5); *Bitner v. Ottumwa Community School District*, 549 N.W.2d 295, 299-300 (Iowa 1996). The response must be supported by affidavits or as otherwise provided by the rule and must set forth specific facts showing that there is a genuine issue for trial. Iowa R. Civ. P. 1.981(5).

In reaching its decision, the Court has reviewed and considered the motion,

briefs, and appendix documents offered in both support and resistance to the Plaintiff's motion for summary judgment. Additionally, at the time of the hearing, both parties conceded that there are no issues of disputed fact that preclude summary judgment. In other words, the parties agree that this case presents a legal and not factual dispute. The Court will next turn to the underlying facts that it must consider in resolving the parties' legal dispute in this case.

Factual Background

At some point[1], the Des Moines Police Department (the "Department") issued a Use of Force Report (the "Report") in which it summarized each incident where one of the Department's police officers engaged in a use of force on a citizen during calendar year 2020.[2] As noted in the Report, the Department's General Orders in effect in 2020 required that anytime an officer used force against a citizen in making an arrest, a written report was required to be completed by the officer using such force.[3] Also, if more than one officer was required to use force against a person to make an arrest in a single incident, each officer was required to individually report their use of force.[4]

In its Report, the Department informed the public that during calendar year 2020, its officers made a total of 8,279 arrests.[5] Of these arrests, 282 involved a use of force incident.[6] These 282 use of force incidents resulted in 387 use of force reports.[7] In its Report, the Department broke down the use of force incidents to various categories including: physical control, pepper spray, physical strike, impact weapons,

[1] Perhaps the Court is simply overlooking it, but the Court could not find the date when this report was issued; however, the issuance date does not impact the Court's analysis in any way.
[2] Plaintiff's Appendix (D0010) at pgs. 9-22.
[3] Plaintiff's Appendix (D0010) at pg. 10.
[4] Plaintiff's Appendix (D0010) at pg. 10.
[5] Plaintiff's Appendix (D0010) at pg. 11.
[6] Plaintiff's Appendix (D0010) at pg. 10.
[7] Plaintiff's Appendix (D0010) at pg. 11.

taser, firearms, and K9.[8] The Department reported numbers of use of force incidents for each such subcategory but provided no specific detail as to any individual use of force incident.[9]

Harrison is a retired attorney and founder of Just Voices, which is a non-profit he formed to document and fight what he sees as racial disparities in Des Moines.[10] Following the Department's release of it Use of Force Report, on March 7, 2022, Harrison submitted an open records request to the Department. Specifically, Harrison sought the following records:

> A copy of any and all documents used in the preparation of the 2020 report.
>
> A copy of any and all Appendices and/or supplemental documents used in the preparation of and/or concerning the 2020 report.
>
> Table 1 of the Report describes the "number of times and types of force". Provide a copy of each report referenced in this chart.
>
> Provide a copy of the Use of Force report related to the incident (shown on the video released by Just Voices) involving Captain Bagby that occurred on the morning of May 31, 2020.[11]

Lisa Mickey, who works in the City of Des Moines' legal department[12] as the City's Open Records Coordinator, responded to Harrison's request on March 7, 2022. Mickey denied Harrison's open records request claiming that "the documents used in the preparation of the 2020 report were gathered in anticipation of litigation, and therefore are considered attorney work product."[13] In response, Harrison clarified his request as follows:

> Having now had the opportunity to review the Use of Force Report and the Supplement to that report I note that on page 2, it is reported that, during 2020, there were 282 personal contacts which involved a use of force. It goes on

[8] Plaintiff's Appendix (D0010) at pgs. 11-13.
[9] Plaintiff's Appendix (D0010) at pgs. 11-13.
[10] Plaintiff's Appendix (D0010) at pg. 72.
[11] Plaintiff's Appendix (D0010) at pg. 23.
[12] Chief Wingert Deposition (D0022) at pg. 5, lines 1-2.
[13] Plaintiff's Appendix (D0010) at pg. 24.

> to report that there were 387 use of force reports made regarding those 282 incidents.
>
> I am requesting a copy of each of the 387 Use Of Force reports that were made during the calendar year of 2020.[14]

On March 18, 2022, in its initial response to Harrison's updated open records request, Mickey informed Harrison that the City would not provide Harrison the source records that were used to prepare the Report because the City had determined that the requested records were "confidential both pursuant to Iowa Code subsection 22.7(5) and as attorney work product, as they are prepared in anticipation of litigation."[15]

On April 11, 2022, Carol Moser, who is the Deputy City Attorney, sent Harrison a letter in which the City changed its rationale for denying his open records request. Moser wrote:

> The documents sought are confidential personnel records and are exempt from disclosure under Iowa Code Section 22.7(11). See, *Des Moines Independent Community School District,* 487 N.W.2d 666, 669-70 (Iowa 1992).
>
> The records are used in the context of performance evaluations and are characterized as "in-house, job performance documents exempt from disclosure." *American Civil Liberties Union Foundation of Iowa, Inc. v Records Custodian, Atlantic Community School District,* 818 N.W.2d 231, 235 (Iowa 2012) citing *Des Moines Independent Community School District v. Des Moines Register and Tribune,* 487 N.W.2d 666, 669 (Iowa 1992).
>
> Additionally, the City is prohibited from releasing such information pursuant to Iowa Code Subsection 80F.1(20).[16]

Following the City's denial of his open records request, Harrison initiated this mandamus action with the filing of a petition on October 12, 2022. In this lawsuit, Harrison, through his counsel, has clarified that he is requesting only the use of force

[14] Plaintiff's Appendix (D0010) at pg. 25.
[15] Plaintiff's Appendix (D0010) at pg. 27. In its briefing and legal arguments to the Court, the City no longer advocates that the requested records are exempt from production based on the grounds identified by Mickey in her March 18, 2022, correspondence to Harrison.
[16] Plaintiff's Appendix (D0010) at pg. 28.

reports that the police officers fill out and not any reports or documents related to any supervisory review of an officer's use of force report.[17] To understand this distinction, a little more background is required.

The Department has promulgated a Use of Force Policy.[18] The Policy provides that "[a]ll uses of force shall be documented and reviewed pursuant to department policies."[19] The Chief of the Des Moines Police Department is Chief Wingert who was deposed in this case. During his deposition, Chief Wingert explained the nuts and bolts of how use of force reports are filled out by officers and reviewed by the chain of command.

Specifically, Chief Wingert explained that even if no arrest occurs, but a use of force occurs, then a use of force report needs to be filled out by the officer in order to comply with the Department's policy.[20] Following the officer's completion of the use of force report, every such report is first reviewed by the officer's direct supervisor.[21] Following review by the officer's direct supervisor, the use of report review is next reviewed by the police officer's section commander before it is finally reviewed by the division commander.[22]

Chief Wingert explained that this review process can trigger the opening of an administrative review case should a reviewing supervisor believe that the officer who used force should be disciplined for not adhering to Department policy.[23] To be clear, no discipline occurs solely based on a use of force report without their first being a separate administrative review case initiated.[24] Plaintiff has also included a blank use

[17] Chief Wingert Deposition (D0022) at pg. 3, lines 19-23.
[18] Plaintiff's Appendix (D0010) at pgs. 2-5
[19] Plaintiff's Appendix (D0010) at pg. 2, specifically Section IV(6).
[20] Chief Wingert Deposition (D0022) at pg. 9, lines 12-18.
[21] Chief Wingert Deposition (D0022) at pg. 11, lines 6-10.
[22] Chief Wingert Deposition (D0022) at pg. 11, lines 11-24.
[23] Chief Wingert Deposition (D0022) at pg. 28, lines 13-14.
[24] Chief Wingert Deposition (D0022) at pg. 28, lines 22-25.

of force report so that the Court can better understand what information a police officer who is involved in a use of force incident must include in their use of force report.

A review of the blank example of the use of force report[25] demonstrates that the reporting officer must provide the following: date, time, and location of the incident; what service the officer was rendering; the weather and light conditions; whether the citizen was injured and/or taken to the hospital; whether the citizen was under the influence; the citizen's physical build and height; whether the officer was injured or taken to the hospital; whether more than one citizen was involved; and the officer's reason for using force.[26] In other words, an officer completing a use of force report must answer basic who, what, where, when, and why questions.

After a use of force report is completed by the police office involved in the use of force, such reports are stored in an electronic format. [27] Specifically, all use of force reports are physically stored in computer files maintained by the Department in the Office of Professional Standards. These use of force reports are only accessible to the four individuals that work in that office.[28] In contrast, police reports are stored in a department-wide records management system and are more widely available to other Department employees.[29]

Analysis

The parties agree that the use of force reports sought by Harrison are public records, but they disagree as to whether the records are exempt from disclosure. The City's position is that disclosure of the records is statutorily prohibited by three

[25] Plaintiff's Appendix (D0010) at pg. 6.
[26] Plaintiff's Appendix (D0010) at pg. 6.
[27] Chief Wingert Deposition (D0022) at pg. 40 lines 11-14.
[28] Chief Wingert Deposition (D0022) at pg. 39, lines 9-22.
[29] Chief Wingert Deposition (D0022) at pg. 39 line 23 to pg. 40, line 5.

separate code sections: § 22.7(11); § 80F.1(20); and § 22.7(5). The Court will address each claim in turn. Before doing so, the Court must first discuss the general purposes behind Iowa's Open Records Act, and the relevant burden of proof applicable to the City's claim that the requested records are exempt from disclosure.

Iowa's Open Records Act is codified in chapter 22 of the Iowa Code. Iowa Code § 22.2(1) states, in relevant part, "[e]very person shall have the right to examine and copy a public record." The Iowa Supreme Court has concluded that the "purpose of the statute is 'to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.'" *Iowa Film Prod. Servs. v. Iowa Dept. of Economic Development*, 818 N.W.2d 207, 218 (Iowa 2012) (alteration in original) (quoting *City of Riverdale v. Diercks*, 806 N.W.2d 643, 652 (Iowa 2011)).

The Iowa Supreme Court has also concluded that Iowa's Open Record Act "establishes 'a presumption of openness and disclosure.'" *Id.* (quoting *Gabrilson v. Flynn*, 554 N.W.2d 267, 271 (Iowa 1996)); *See also Gannon v. Bd. of Regents*, 692 N.W.2d 31, 38 (Iowa 2005) ("The right of persons to view public records is to be interpreted liberally to provide broad public access to public records." (citation omitted)).

Further, under Iowa's Open Records Act, "[d]isclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." *City of Riverdale* v. *Diercks*, 806 N.W.2d 643, 652 (Iowa 2011) (quoting *Clymer*, 601 N.W.2d at 45). "Exceptions to the general rules of disclosure are to be narrowly construed." *Gannon*, 692 N.W.2d at 38; *accord Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev.*, 818 N.W.2d 207, 219 (Iowa 2012).

With these general legal principles in mind, the Court will next analyze the specific exemptions the City claims support its nondisclosure of the requested public records.

Iowa Code § 22.7(11)(a) – Confidential Personnel Records

Iowa Code § 22.7(11)(a) provides that "personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies" are confidential records that are not subject to disclosure. Confoundingly, neither the term "personal information" nor the phrase "confidential personnel records" is statutorily defined.

While neither term is statutorily defined, in 2011 the Iowa Legislature amended § 22.7(11) to specify personal information contained in personnel records that would be considered public records. In other words, the statute now makes clear that the following records contained in a public employee's personnel file are public records: (1) the name and compensation of the individual; (2) the dates the individual was employed by the government body; (3) the positions the individual holds or has held; (4) the educational institutions attended by the individual, degrees earned, and names and dates of previous employers; and (5) whether the person resigned in lieu of termination, was discharged or demoted as a result of a disciplinary act, and the rationale for such resignation in lieu of termination, discharge, or demotion. *See*, Iowa Code § 22.7(11((a)(1) – (5).

Prior to the statutory amendments in 2011, the Iowa Supreme Court addressed the parameters of the § 22.7(11) exemption on several occasions. In 1992, the Iowa Supreme Court held that "in house, job performance documents" related to an investigation into claims raised by parents against a school principal's job performance were exempt from disclosure under § 22.7(11). *Des Moines Sch. Dist. v. Des Moines Register*, 487 N.W.2d 666, 670 (Iowa 1992).

In 1996, the Iowa Supreme Court concluded that the raw scores of each individual taking a civil service promotional examination and the grading scale for each component of the examination were not exempt from disclosure under § 22.7(11); however, information linking the names of applicants to specific scores was exempt from disclosure. *DeLaMater v. Marion Civil Service Com'n*, 554 N.W.2d 875 (Iowa 1996).

In 1999, the Iowa Supreme Court concluded that individualized payroll information for sick leave pay and benefits, including dates taken and hours accrued by city employees, was not exempt from disclosure under § 22.7(11); however, information about employees' addresses, birth dates, and gender were exempt from disclosure. *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999).

In 2012, applying the pre-2011 version of § 22.7(11), the Iowa Supreme Court concluded that information pertaining to discipline imposed on two school district employees after a strip search was conducted on five female students was exempt from disclosure under § 22.7(11). *ACLU of Iowa v. Records Custodian*, 818 N.W.2d 231 (Iowa 2012). In *ACLU of Iowa*, the Iowa Supreme Court adopted the following test that district courts are to follow in determining whether public records are exempt from disclosure under § 22.7(11):

> In summary, to determine if requested information is exempt under section 22.7(11), we must first determine whether the information fits into the category of "[p]ersonal information in confidential personnel records."
>
> We do this by looking at the language of the statute, our prior case law, and case law from other states.
>
> If we conclude the information fits into this category, then our inquiry ends. If it does not, we will then apply the balancing test under our current analytical framework.

Id. at 235.

It does not appear that the Iowa Supreme Court has had an opportunity to examine § 22.7(11) since the 2011 amendments were enacted. In 2013, the Iowa Court of Appeals, in an unpublished opinion, concluded that a settlement agreement entered between an employee and the University of Iowa was not exempt from disclosure under § 22.7(11). *Doe v. University of Iowa*, 2013 WL 85781, No-12-0357, (Ia.Ct.App. 1/9/2013). In so holding, the Iowa Court of Appeals noted the 2011 statutory amendment but clearly did not believe such amendments in any way changed the analytic framework the Iowa Supreme Court had previously adopted to analyze § 22.7(11) exemption claim.

Consequently, the Court concludes that despite the 2011 statutory amendments, the legal standard for analyzing a § 22.7(11) claim remains as articulated by the Iowa Supreme Court in *ACLU of Iowa*, and the Court will next analyze the City's claim using this test. Under the *ACLU of Iowa* test, the first step in determining whether the use of force reports fits into the category of "[p]ersonal information in confidential personnel records" is to look to the language of the statute.

Iowa Code § 22.7(11) prevents disclosure of "personal information" contained in personnel files. A review of the sample use of force report demonstrates that an officer who fills out a use of force report is required to disclose some "personal information" that would seem to fit the category of information that would be included in a personnel file. Namely, the police officer's health or medical information, specifically, whether the police officer was injured or taken to the hospital because of the use of force incident. There can be no doubt that a police officer has a privacy interest in their medical or health information which weighs against disclosure.

Under the *ACLU of Iowa* test, the second step in the Court's analysis is for the Court to review prior Iowa case law with an eye towards determining if the information

contained in the use of force reports falls within the category of information that Iowa courts have previously found the Legislature intended to keep confidential under the statute. As described above, the Iowa Supreme Court has previously held that employee addresses, birth dates, disciplinary records, or in-house job performance documents are exempt from disclosure under § 22.7(11).

The City takes the position that the use of force reports at issue in this case are akin to in-house job performance records that fall within the category of documents that are exempt from disclosure under § 22.7(11). *Des Moines Sch. Dist. v. Des Moines Register*, 487 N.W.2d 666, 670 (Iowa 1992). Specifically, the City contends that the use of force records are best understood as being a part of either a police officer's disciplinary record or part of an investigation that could lead to an officer's discipline. For these reasons, the City contends such records are exempt from disclosure under § 22.7(11).

In support of its position, the City points out that the Department's Policy requires each officer to fill out a use of force report after each use of force incident. The City points out that the record is clear that every submitted use of force report is then initially reviewed by the officer's supervisor before being passed up the chain of command for their review for a determination as to whether the officer's use of force in a particular situation conformed to City policy.

While Harrison is not requesting the production of any documents related to the supervisor review and/or any discipline records, the City still contends that the officer's initial use of force report is an investigative documents because the City categorizes the police officer's use of force report as a form of "self-review." Because each officer's use of force report is evaluated by the officer's supervisors for accountability for policy failures, which may include imposing discipline on the officer,

the City argues that each officer's use of force report is confidential as it is the functional equivalent to an in-house job performance record or a disciplinary investigative report.

Harrison disagrees with the City's characterization of the use of force report as a "self-review" by the officer or an in-house job performance record. Harrison notes that use of force reports are separate and distinct from complaints of administrative reviews of an officer's conduct each of which trigger the creation of a disciplinary case. In other words, not every use of force report triggers a disciplinary case against the officer. Finally, Harrison contends that if the Court accepts the City's logic, then conceivably any report drafted by a police officer could be exempt from disclosure because it is a form of self-review or self-evaluation or which, upon review by a supervisor, might subject the officer to discipline.

The Court concludes that Harrison's argument is more persuasive than the position taken by the City. The Court reaches this conclusion in part by reviewing the sample use of force report. It is clear that an officer who fills out the report is primarily limited to reporting the basic facts of what happened during the use of force incident such as: what happened; who was involved, when the incident occurred; where the incident took place; and why the officer used force.

Consequently, according to the report's express terms, an officer is not required to set forth what could have been done differently or what was done correctly or incorrectly. The officer is also not asked to review, assess, or otherwise justify his or her job performance in any way. In sum, the Court does not conclude that the use of force reports are akin to in-house job performance records or disciplinary records that fall within the category of documents that are exempt from disclosure under § 22.7(11).

The Court reaches this conclusion also because not every use of force report results in discipline. In fact, the Department's internal review process, at least in 2020, generated very few disciplinary actions. For example, only four internally generated complaints resulted from internal review of the 387 use of force reports filed in 2020.[30] This means that in 2020, less than .01 percent of use of force reports resulted in a disciplinary proceeding that was generated through internal review. These numbers do not support the City's contention that use of force reports are either in-house job performance records or disciplinary records that are exempt from disclosure under § 22.7(11).

Finally, while the Iowa Supreme Court has recognized that in-house job performance documents and disciplinary documents are exempt from production under § 22.7(11), in each such case, the documents at issue were part of an ongoing investigation. *See*, *Des Moines Sch. Dist. v. Des Moines Register*, 487 N.W.2d 666, 670 (Iowa 1992)(records sought related to an ongoing investigation into claims raised by parents against a school principal's job performance); *See also*, *ACLU of Iowa v. Records Custodian*, 818 N.W.2d 231 (Iowa 2012)(records sought about actual discipline imposed on two school district employees after a strip search was conducted on five female students). Here, the City contends that the mere speculative possibility of such disciplinary or job performance evaluation prevents disclosure. Iowa case law does not support this position.

The final step in the Court's analysis under *ACLU of Iowa* is for the Court to consider case law from other jurisdictions. In its research the Court has found five other states where an appellate court has considered whether an officer's use of force report is a public record subject to disclosure under such state's open records law. In

[30] Plaintiff's Appendix (D0010) at pg. 13.

each such case, the court has ordered production of the use of force report. Of course, as the City points out in its briefing, there can be no doubt that not one of these other five states has identical statutory language or identical caselaw to Iowa. Nevertheless, it is striking that no other state has found that use of force reports are exempt from disclosure. The Court will next briefly summarize how other states have addressed this issue.

In 1996, the Wisconsin Court of Appeals was called upon to decide whether the Milwaukee Police Department was required to disclose use of deadly force reports and weapon discharge reports prepared by its officers in response to a public records request made by a local newspaper. *State ex. rel. Journal/Sentinel v. Arreola,* 558 N.W.2d 670 (Wis.App. 1996). The Milwaukee Police Department contended that the requested records were exempt from disclosure because they were generated for the purposes of personnel evaluation and discipline. This is remarkably similar to the position the City takes in the instant case.

The Wisconsin Court of Appeals did not find the Milwaukee Police Department's argument to be persuasive. After utilizing a fact specific balancing test, the Wisconsin Court of Appeals concluded that such records were not exempt from disclosure. The Wisconsin Court did conclude that the police officer's home addresses and any supervisory conclusions, recommendations, or other comments regarding disciplinary action should be redacted from the forms prior to disclosure. *Id.* at 679. No such records are sought by Harrison in this case.

In 2000, the Texas Court of Appeals considered whether use of force reports completed by San Antonio Police Department officers after any type of use of force incident were subject to disclosure pursuant to an open records request made by a local newspaper. *San Antonio v. San Antonio Express News*, 47 S.W.3d 556 (Tex.App. –

San Antonio 2000). Just like the City in this case, San Antonio resisted release of the use of force reports claiming they were part of an officer's personnel file that was exempt from disclosure. *Id* at 562.

In requiring disclosure, the Texas court concluded that use of force reports were more "administrative in nature as opposed to personnel-related." *Id*. at 565. Significantly, the Texas court also concluded that a use of force report was "not any more reasonably related to an individual officer's employment relationship with the department than an 'offense report' completed by the same officer detailing the incident." *Id*. at 565. This last conclusion resonates with the Court in this matter because at the hearing in this matter, the City conceded that Harrison would be entitled to receive police reports and video recordings of any use of force incident that occurred in 2020 should he specifically identify such an incident.

In 2009, the New Jersey Superior Court Appellate Division concluded that a township was required to provide a citizen a copy of use of force report on file from its police department. *O'shea v. Township of West Milford*, 982 A.2d 459 (N.J.Super.A.D. 2009). The sole claim raised in resistance to disclosure in *O'shea* was that the records were exempt from disclosure as criminal investigatory records. *Id*. at 463. However, the New Jersey court did specifically hold that it did "not regard the possible, speculative use of a [use of force report] in an internal affairs investigation to provide the necessary basis for precluding access" to the report under New Jersey's open records law. *Id*. at 468.

In 2012, the Arkansas Supreme Court held that an officer's use of force report regarding a specific incident was not exempt from disclosure as an "employee evaluation or job performance record" under Arkansas's open records law. *Thomas v. Hall*, 399 S.W.3d 387 (Ark. 2012). Similarly to the instant case, the record custodian

in *Thomas* argued that the use of force report were exempt because they were created so supervisors can evaluate whether the police officer performed his or her duties pursuant to departmental policy. *Id.* at 389-90. The Arkansas Supreme Court held:

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

Id. at 394-95.

Finally, in 2022, the Ohio Supreme Court found that use of force reports were not exempt from disclosure as confidential law enforcement investigatory records under Ohio's public records law but remanded the matter for further proceedings. *SER Sandifer v. Cleveland*, 213 N.E.3d 665 (Ohio 2022).

A review of these decisions from five other states leads the Court to a few conclusions. While based on separate statutory schemes, every state that has addressed this issue has required the production of use of force reports. In doing so, these states have specifically rejected identical or similar claims that the City has advanced in this case to support non-production.

Specifically, as summarized above, other states have specifically rejected claims that a use of force report is part of an officer's personnel record. Other states have also specifically rejected a speculative claim that because a use of force report may later be used in a disciplinary action against the officer, such report is exempt from production. Other states have also specifically rejected the City's contention in this

case that because supervisors review such reports to evaluate whether an officer performed his or her duties pursuant to department policy, such reports are somehow transformed into evaluation or job performance records that are exempt from production.

In sum, the Court concludes that the weight of authority from other jurisdictions supports the conclusion that use of force reports are public records subject to disclosure. In fact, the City has not pointed the Court to any reported decision anywhere, at any level, where a reviewing court has concluded that a use of force report is not a public record subject to disclosure upon request.

Consequently, after considering the language of the statute, Iowa case law interpreting the statute, and after considering case law from other jurisdictions, with the exception of certain personal information regarding an officer's injuries or medical treatment that can easily be redacted, the Court concludes that the use of force reports do not fit into the category of records that the Legislature sought to exempt from disclosure by enacting § 22.7(11). Because the Court has reached this decision, the Court does not believe it necessary to apply any balancing test. *See*, *Doe v. University of Iowa*, 2013 WL 85781, *3, No-12-0357, (Ia.Ct.App. 1/9/2013). Nevertheless, this Court will follow the example of the Iowa Court of Appeals in *Doe,* and, out of an abundance of caution, the Court will also apply the balancing test.

The Iowa Suprem Court has adopted a balancing test to weigh an individual's privacy interests against the public's need to know. *Clymer*, 601 N.W.2d at 45. As the Court of Appeals stated in *Doe*:

> The balancing test commonly used considers the following factors: (1) the public purpose of the party requesting the information; (2) whether the purpose could be accomplished without the disclosure of personal information; (3) the scope of the request; (4) whether alternative sources for obtaining the information exists; and (5) the gravity of the invasion of personal privacy. *DeLaMater,* 554 N.W.2d at 879. Whether information should remain confidential under this test is

dependent upon the specific facts of each case. *Id.*

As to the first factor, Harrison is the founder of a non-profit organization formed to document and fight what he contends are racial disparities in Des Moines. Harrison and his organization have participated in publishing articles in a series about the George Floyd protests that occurred in Des Moines in 2020. Harrison seeks to evaluate how the Department used physical and deadly force against citizens in 2020 with an eye towards improving policing. The Court concludes that the public has a right to know about the fact and circumstances surrounding where a police officer uses force against a citizen. This factor favors disclosure.

As to the second factor, it is true that the City has published a summary of the use of force reports that were filed in 2020. The Court can only presume that the City has done so to ensure public trust and confidence in the important work that the City's police force performs daily. Because the summary does not contain specific information about the circumstances surrounding each use of force incident, the Court concludes that it does not accomplish the purpose of sufficiently informing the public about the facts and circumstances of the Department's use of force against citizens in 2020. This factor also favors disclosure.

As to the third factor, the scope of the request is relatively narrow in that Harrison is only requesting the basic information contained in the officer's use of force report and not any subsequent investigation, discipline, or other records regarding supervisor review of such use of force reports. As summarized above, the use of force reports only contain basic summaries of the parties involved, when the events occurred, and why force was used. This factor also favors disclosure.

As to the fourth factor, the City contended that Harrison could access this information by simply requesting an arrest record for anyone that he believed was

arrested in a use of force incident. The problem with the City's position is twofold. First, the Court concludes that it has the effect of improperly shifting the burden to Harrison to try to identify incidents where an officer used force against a citizen so he can request reports. Secondly, the record is clear that a use of force report can be created even in the absence of an arrest. For these reasons, this factor also favors disclosure.

As to the last factor, the gravity of the invasion of personal privacy, the Court concludes that there is only one privacy concern applicable to the use of force report. That being, whether an officer was injured or received medical treatment as a result of the use of force incident. The Court concludes that this is the type of information that is "personal", and which is exempt from disclosure under § 22.7(11)(a). This privacy concern can be addressed through redaction. In sum, after taking into account redactions, this factor also favors disclosure.

In sum, after considering the law and after applying the applicable balancing test, the Court concludes that the City has failed to meet its burden of proving that the 387 use of force reports requested by Harrison for calendar year 2020 are exempt from disclosure under Iowa Code § 22.7(11). The Court will turn next to the City's alternate grounds for exemption from disclosure.

Iowa Code § 80F.1(20)

The City next points to Iowa Code § 80F.1(20) to support its contention that an officer's use of force report is confidential as a matter of law, and therefore, exempt from disclosure. Specifically, the City points to the following language in Iowa Code § 80F.1(20):

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

> officer's statement, recordings, or transcripts of any interviews or disciplinary proceedings, and any complaints made against an officer to the officer or the officer's legal counsel upon the officer's request.

The City contends that this Court should read the language of § 80F.1(20) broadly to protect an officer from the release of a use of force report because an officer is potentially subject to discipline following supervisory and administrative review of such reports. The City cites no case law in support of its position.

The Court concludes that the City reads § 80F.1(20) too broadly. There can be no doubt that § 80F.1(20) protects the release of an officer's statement made during a disciplinary proceeding or in response to a complaint. However, the Legislature in enacting § 80F.1(2) certainly could not have intended that any statement an officer makes or any report an officer authors outside the confines of a disciplinary or complaint proceeding is exempt from disclosure.

The City's reading of § 80F.1(2) would mean that virtually anything authored by a police officer would be confidential at least until the officer was no longer employed and subject to discipline. If the Legislature had intended this to be the rule, they could have clearly said so, but they did not. Consequently, the Court concludes that the requested records are not exempt under § 80F.1(20).

Iowa Code § 22.7(5)

The Court can easily deal with the City's last argument that some of the use of force reports may be protected from release by Iowa Code § 22.7(5). This provision protects the release of police officer reports "in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual." *Id.*

In advancing this claim, the City has presented nothing more than the bold assertion that this subsection may apply. In other words, the City has presented no

facts or evidence to support the conclusion that disclosure of any single use of force report would jeopardize any investigation or pose any clear and present danger to anyone's safety. Again, the City has the burden of proving the applicability of any exemption to disclosure. The Court concludes that the City has failed to meet its burden of proving that the records fall within the exemption for disclosure found in § 22.7(5).

RULING

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's motion for summary judgment is GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that pursuant to Iowa Code § 22.10(3(a), the Court issues an injunction requiring Defendants to comply with the requirements of Iowa Code chapter 22 by providing Plaintiff with a copy of all 387 use of force reports authored by its police officers in calendar year 2020; however, the City shall redact from each such report any information about whether the reporting officer was injured and/or went to the hospital as such information is exempt from disclosure under Iowa Code § 22.7(11). Defendants shall provide Plaintiff with the requested information within 45 days of the date of this Ruling.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that no damages shall be assessed against Defendant Lisa Mickey under Iowa Code § 22.10(3)(a) because the Court concludes that Defendant Lisa Mickey reasonably relied upon an opinion of her department's legal counsel, given in writing, in denying Plaintiff's records request. *See*, Iowa Code § 22.10(3)(b)(3).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, pursuant to Iowa Code § 22.10(3)(c), Defendant City of Des Moines shall be responsible for Plaintiff's attorney fees and the court costs in this case. Plaintiff shall have 15 days to

file an attorney fee affidavit. Defendant City of Des Moines shall have 7 days thereafter to file any objections to the claimed amount. The Court will then issue a supplemental attorney fee order.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that all other claims for relief advanced by any party are DENIED.

SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV064414	HARVEY HARRISON VS LISA MICKEY ET AL
Type:	ORDER FOR JUDGMENT

So Ordered

Coleman McAllister, District Judge
Fifth Judicial District of Iowa

Electronically signed on 2024-02-15 15:55:26