

IN THE SUPREME COURT OF IOWA

Supreme Court No. 20-0657  
Polk County No. CVCV057831

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**ADAM KLEIN,  
Petitioner-Appellant,**

**v.**

**IOWA PUBLIC INFORMATION BOARD,  
Respondent-Appellee,**

**and**

**BURLINGTON POLICE DEPARTMENT and IOWA DEPARTMENT  
OF PUBLIC SAFETY, DIVISION OF CRIMINAL  
INVESTIGATIONS,  
Intervenors-Appellees.**

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ON APPEAL FROM IOWA DISTRICT COURT FOR LINN COUNTY  
HONORABLE SAMANTHA GRONEWALD

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**INTERVENOR–APPELLEE BRIEF AND ARGUMENT**

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## **ROUTING STATEMENT**

This case does not fall within the type of cases enumerated in Iowa R. App. P. 6.1101(2) and should, therefore, be transferred to the Court of Appeals pursuant to Iowa R. App. 6.1101(3). Furthermore, this case involves the application of existing legal principles and well settled law further supporting that this case should be transferred to the Court of Appeals. Iowa R. App. 6.1101(3)(a).

## **STATEMENT OF THE CASE**

Appellant Adam Klein (“Mr. Klein”) appeals from an adverse ruling on judicial review by the District Court. (App. 0461-0462.) Intervenor-Appellee Burlington Police Department (“BPD”) defends the ruling on judicial review made by the District Court. (App. 0437-0460.)

The events giving rise to this matter began in February, 2015 when Mr. Klein made a request for records pursuant to Iowa Code Chapter 22 to the BPD. (App. 0593-0595; CR 33-35<sup>1</sup>.) On March 19, 2015, the BPD provided Mr. Klein with some records and provided him with Iowa Public Information Board (“IPIB”) opinions, Iowa court opinions and Iowa statutes it relied on as authority for its position that the remaining records were confidential. (App. 0599-0602.) On May 15, 2015, Mr. Klein made a complaint to the IPIB that

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<sup>1</sup> All cites to “CR” refer to the Certified Agency Record.

the BPD's response to his records request violated Iowa Code Chapter 22. (App. 0579.) On September 17, 2015, the IPIB accepted Mr. Klein's complaint. (App. 0915.) Ultimately, the matter went to a contested case hearing on July 20, 2018. (App. 2037.) Following the contested case hearing, the Administrative Law Judge issued a proposed decision on October 5, 2018, finding that BPD had violated Chapter 22. (App. 2037-2060.) November 2, 2018, BPD timely filed Notice of Appeal of Administrative Law Judge Doland's October 5, 2018 Proposed Decision. (App. 2061-2066.) The IPIB declined to adopt the Administrative Law Judge's decision and on February 21, 2019, the IPIB issued a ruling dismissing the matter. (App. 2128-2150.) After analyzing Iowa law, the IPIB determined that the BPD's actions complied with Iowa law. (App. 2148-2149.)

Mr. Klein filed an application for judicial review of the IPIB's ruling to the Polk County District Court on March 22, 2019. (App. 0006-0018.) For the five years this matter has progressed through the agency and District Court levels, the central, substantive question with respect to BPD has been, and remains: Did BPD's February 27, 2015 response to Mr. Klein's open records request violate Iowa Code Chapter 22? However, the District Court was unable to reach that substantive issue. On March 23, 2020, the District Court issued its ruling dismissing Mr. Klein's application for judicial review

because Mr. Klein failed to intervene in the matter and therefore the District Court did not have the authority or jurisdiction to review the matter. (App. 0437-0460.)

### **STATEMENT OF THE FACTS**

A. *Key players related to Mr. Klein’s complaint against the BPD.*

Petitioner **Adam Klein** is an attorney licensed to practice in Georgia. (App. 0606.) In May, 2015 Mr. Klein issued a complaint to the IPIB that the BPD had violated Chapter 22. (App. 0579.) As the matter progressed through the agency to a contested case, and then was appealed to the IPIB and the District Court, Mr. Klein never intervened into the matter. (App. 0458.)

The **Burlington Police Department** is the police department for the City of Burlington, Iowa. (App. 0006-0018.)

**Doug Beard** was the police chief for the BPD at the time Mr. Klein’s request was made. (App. 2047.) Subsequently, and at the time of the contested case hearing, **Dennis Kramer** was appointed BPD’s police chief. (App. 2047.) Before being appointed chief, Chief Kramer was the BPD’s Major of Operations, which is one step below the Chief of Police. (App. 2247<sup>2</sup>.) Both former Chief Beard and Chief Kramer were involved in

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<sup>2</sup> All cites to “CR Hearing” refer to the hearing recorded July 20, 2018 as indicated at Item Nos. 155–157 on the Table of Contents of the Certified Agency Record. (App. 2243-2247.)



responding to Mr. Klein's open records request. (App. 2247; CR Hearing Part 3 at 2:20-3:00.)

**Rick Rahn** is a Special Agent for the Iowa Department of Criminal Investigation. (App. 2042.) Mr. Rahn was involved in the investigation into the matters giving rise to Mr. Klein's complaint to the IPIB. (App. 2042-2047.)

B. *Mr. Klein's Initial Document Request.*

February 27, 2015 Mr. Klein requested several records from the BPD. (App. 0593-0595.) These records related to the January 6, 2015 officer-involved shooting resulting in Autumn Steele's death. (App. 0593-0595; 0672-0678.) On February 27, 2015, the same day Mr. Klein made his records request, following an independent investigation by the Iowa Department of Criminal Investigation ("DCI"), the County Attorney released a letter determining that her office would not press charges for Ms. Steele's death. (App. 0678.) The County Attorney's letter was seven pages long and included the date, time, location and immediate facts and circumstances surrounding Ms. Steele's death. (App. 0581-0589.)

The Burlington Police Department timely responded to Mr. Klein's request on March 19, 2015. (App. 0599-0602.) Mr. Klein requested twelve records or categories of records. (App. 0599-0602.) Of the records requested,

two did not exist. (App. 0600.) Three of the items requested were confidential personnel records. (App. 0599-0602.) The BPD declined to provide Mr. Klein with personnel records requested but did provide him with all personnel information records custodians are required to provide pursuant to Iowa law. (App. 0599-0600.) One requested item consisted of policies and procedures which BPD stated it would provide pursuant to the requirements of Iowa Code Chapter 22. (App. 0602.) BPD identified the remaining six items as confidential peace officer investigative records. (App. 0601.) Of those confidential peace officer investigative reports, BPD offered to make any of the public notices provided as part of public hearings available to Mr. Klein pursuant to the requirements of Chapter 22. (App. 0601.) Regarding the remaining records, BPD provided Mr. Klein with information related to the date, time, specific location and immediate facts and circumstances for any crime or incident Mr. Klein had inquired about. (App. 0601.) BPD relied on the advice of its legal counsel to respond to Mr. Klein's requests. (App. 2247; CR Hearing Part 3 at 3:20-3:28.)

C. *Mr. Klein's Complaint before the IPIB.*

The BPD's peace officer investigative files have become the point of contention in this case. (App. 0567-0580, 1280-1284.) On May 15, 2015, Mr. Klein made a complaint to the IPIB, requesting that the IPIB find the

records BPD identified as peace officer investigative reports were not confidential under Iowa law, that BPD have to disclose those records, that BPD willfully failed to comply with Chapter 22, and for the imposition of fines and attorney fees against BPD. (App. 0579.) BPD responded to Mr. Klein's complaint through its attorney, relying on case law as had been interpreted by the IPIB and Polk County District Court previously to state that peace officer investigative reports were confidential and that a balancing test should not be applied to requests for such records. (App. 0605-0614, 1423-1444.) The IPIB's Executive Director, W. Charles Smithson, agreed with the BPD's interpretation of the facts and law and recommended the IPIB dismiss Mr. Klein's complaint. (App. 0668-0671.) Mr. Smithson's recommendation provides that BPD did not violate Iowa Code Chapter 22. (App. 0668-0671.)

The IPIB rejected Mr. Smithson's advice and proceeded with informal resolution and drafting of a Probable Cause Report. (App. 0914-0920.) On December 4, 2015, Deputy Director and legal counsel for IPIB, Margaret Johnson provided a Probable Cause Report stating that she found "no evidence to establish probable cause for a violation of Iowa Code section 22.7(5) for failure to release the 'date, time, specific location, and immediate facts and circumstances' of the January 6, 2015 incident." (App. 0919-0920.) Ms. Johnson further stated that "[t]he position taken by the [BPD] in denying

release of the records sought is supported by case law and the interpretation of the Attorney General and the IPIB.” (App. 0919.) May 27, 2016, the matter was transmitted to the Department of Inspections and Appeals with the filing of a Petition in the contested case. (App. 1015-1021.) The Administrative Law Judge assigned to this matter, Karen Doland, dismissed the Petition on September 2, 2016 for procedural reasons. (App. 1266-1271.)

On October 27, 2016, in compliance with the procedural requirements for initiating a contested case hearing, the IPIB issued an order finding that Mr. Klein’s February 27, 2015 complaint was within its jurisdiction; that there was probable cause to believe the BPD had violated Iowa Code Chapter 22 when it withheld public records in response to Mr. Klein’s request including, but not limited to, police audio records, body camera videos, and 911 calls. (App. 1279.)

D. *The Contested Case Proceeding.*

On November 4, 2016, the IPIB filed a second Petition against BPD. (App. 1280-1285.) The Petition alleged that BPD “possessed public records that included at least initial reports, body camera videos of two police officers, and 911 calls related to [Autumn Steele’s] shooting.” (App. 1282.) The Petition acknowledges that BPD provided information showing the date, time, specific location and immediate facts and circumstances related to the January

6, 2015 shooting, but complains that BPD failed to provide “any requested public record in support of that assertion other than a twelve-second video clip.”<sup>3</sup> (App. 1283.) The Petition specifically identifies the records BPD “wrongfully refused to produce” as “the recording and transcripts of 911 calls, bodycam videos taken by the officers, videos taken by dashboard cameras, records showing ‘the date, time, specific location, and immediate facts and circumstances surrounding the . . . incident,’ and emails regarding the Autumn Steele homicide from and to representatives of the City of Burlington in correspondence with Autumn Steele’s family members.” (App. 1283.) The Petition asks that the Administrative Law Judge find the BPD in violation of Iowa Code Chapter 22 for withholding these records and enter an order to ensure BPD’s compliance with Iowa Code Chapter 22 including statutory damages and a requirement that BPD produce the records withheld. (App. 1283-1284.)

On February 17, 2017, BPD filed an Amended Answer denying that it violated Chapter 22 because it was BPD’s position that pursuant to Iowa law the records requested were confidential peace officer investigative reports. (App. 1410-1417.)

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<sup>3</sup> DCI produced the twelve-second clip with BPD’s consent.

As part of the record in this proceeding, on August 17, 2017, the IPIB ruled on an interlocutory appeal filed by BPD and DCI. (App. 1778-1780.) The IPIB's prosecutor filed a Motion to Compel seeking to compel the BPD and DCI to either identify each of the records it withheld in something similar to a privilege log. (App. 1778.) Administrative Law Judge Doland granted the Motion to Compel, but on interlocutory appeal, the IPIB overturned her ruling and denied it. (App. 1778-1780.) As part of its ruling, the IPIB found "the records in dispute are confidential investigative reports as defined under Iowa Code Section 22.7(5), and thus not subject to disclosure." (App. 1779.) The IPIB elaborated, stating that including these records in a privilege log would "essentially eliminate their statutory protection as confidential records." (App. 1779.)

The matter went to a contested case hearing on July 20, 2018. (App. 2037.) The only issue noticed in the case was whether BPD violated Iowa Code Chapter 22. (App. 1280-1285.) At no point prior to the contested case hearing, during or after did Mr. Klein intervene in the underlying matter. (App. 0458.)

Four days before hearing, the IPIB filed a brief requesting disclosure of the entire DCI file. (App. 1913-1922.) The BPD never possessed the DCI file; however, it should be noted that this was the first time such request was

made. (App. 2247; CR Hearing Part 1 10:30-11:10.) The IPIB prosecutor admitted that IPIB had changed its requested remedy. (App. 2247; CR Hearing Part 1 10:30-18:30.) The Administrative Law Judge clarified on the record that the IPIB Prosecutor was changing his position from requesting only the 911 call, dash cam video, and body camera video as public records to requesting the entire peace officer investigative report, which the IPIB Prosecutor confirmed. (App. 2247; CR Hearing Part 1 21:00-22:10.)

At the contested case hearing, Administrative Law Judge Doland describes the Petition as alleging a violation of Iowa Code Chapter 22. (App. 2247; CR Hearing Part 1 at 2:00-3:00.) The IPIB offered one exhibit as evidence at the hearing, a press release from attorney Dave O'Brien who represented the Steele family in the civil matter related to Ms. Steele's death. (App. 2247; 2037; CR Hearing Part 1 at 5:30-6:00, CR 1477.) The BPD objected to and filed a Motion to Strike the exhibit as it was not timely produced, it is extraneous and irrelevant to the issues in the case, and it is hearsay. (App. 2247; CR Hearing Part 1 6:00-8:34.) Administrative Law Judge Doland overruled the objection and admitted the Exhibit as Exhibit A. (App. 2038.) Exhibit A is the only evidence IPIB offered in this matter. (App. 2247; CR Hearing Part 1 28:00-28:36.) The IPIB Prosecutor offered no other evidence to support the allegations in his Petition. (App. 2247; CR Hearing

Part 1 28:00-28:36.)<sup>4</sup> BPD and the DCI moved to dismiss the IPIB's Petition based on the lack of evidence presented. (App. 2247; CR Hearing Part 1, Generally.)

BPD called Chief Dennis Kramer. (App. 2047.) Chief Kramer testified that at the time Mr. Klein's request was made, he was the Major of Operations for the BPD. (App. 2247; CR Hearing Part 3 1:10-1:25; CR 1487.) He testified this is one step below Chief of Police. (App. 2247; 2047; CR Hearing Part 3 1:10-1:45; 1487.) Chief Kramer testified that, to his knowledge, BPD's peace officer investigative report would have included body camera video, dash camera video, investigative reports, and writings from other officers. (App. 2140.) Chief Kramer testified that at the time the request was made, the 911 tapes would have been in the possession of another entity, DESCOM, but if they would have been in BPD's possession they would have been part of the peace officer investigative report. (App. 2247; 2140; CR Hearing Part 3 9:00-10:10, CR 1580.) Chief Kramer further testified that, to his knowledge, there was no correspondence regarding Ms. Steele's death between representatives for the City of Burlington and Autumn Steele's family

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<sup>4</sup> The IPIB prosecutor stated on the record he was relying on the Summary Judgment record as his evidence in the contested case; however, he failed to identify what document or parts of the record produced by BPD he was challenging, or which parts supported his argument. (App. 2247; CR Hearing Part 1 1:09:00-1:12:41, 1:14:00-1:15:10.)



members. (App. 2247; CR Hearing Part 3 10:15-10:50.) He testified that BPD had run a search for such e-mails and found none. (App. 2247; CR Hearing Part 3 10:15-10:50.) Chief Kramer testified the BPD did provide Mr. Klein with the date, time, specific location, and immediate facts and circumstances surrounding Ms. Steele's death. (App. 2247; CR Hearing Part 3 10:50-12:12.)

The DCI called Special Agent Rick Rahn. (App. 2042.) Rahn testified the investigative report materials BPD provided to DCI for DCI's investigation are considered part of DCI's peace officer investigative report. (App. 2247; CR Hearing Part 2 CR 45:50-47:55.)

Following the June 20, 2018 hearing, and completely unrelated to this matter, on August 14, 2018, following settlement of the civil hearing between Ms. Steele's family and the City of Burlington, some of the records sought in the IPIB's November 6, 2016 Petition were made public. (App. 2141.) ("Because the federal court provided access to records at issue in this contested case under a different legal theory, we proceed to address the merits of the alleged violation of Iowa Code Chapter 22."); *Steele v. City of Burlington, Iowa*, 334 F.Supp.3d 972, 985-86 (S.D. Iowa 2018). These records were made public when a protective order, which had previously prevented the BPD from sharing the records outside the requirements of the

protective order, was lifted. *Id.* However, these records were not part of the contested case hearing in this matter. (App. 1283-1234; 2039.)

E. *Administrative Law Judge Doland's Proposed Ruling.*

On October 5, 2018, Administrative Law Judge Doland issued her proposed ruling. (App. 2037-2060.) Her ruling denied BPD's Motion to Strike and objections to Exhibit A. (App. 2037-2060.) Administrative Law Judge Doland also denied BPD's Motion to Dismiss, acknowledging that the IPIB presented no evidence at the hearing, but ignoring that the IPIB carried any burden of proof at the hearing. (App. 2037-2060.) Finally, the proposed order rejected BPD's reliance on case law from the Iowa Supreme Court, the Iowa Court of Appeals, Polk County District Court, and the Iowa Public Information Board and opinions from the Attorney General for the State of Iowa, and found that BPD failed to comply with Iowa Code Chapter 22 when it determined that the 911 call, body camera video, dash camera video were confidential peace officer investigative reports pursuant to Iowa Code Section 22.7(5). (App. 2037-2060.) Administrative Law Judge Doland determined that although the BPD did provide Mr. Klein with the date, time, specific location, and immediate facts and circumstances, BPD violated the law when it determined that all of the records generated as part of the investigation into

Ms. Steele's death constituted part of the peace officer's investigative report. (App. 2037-2060.)

F. *IPIB Issues its Final Agency Action.*

On November 2, 2018, BPD timely filed Notice of Appeal of Administrative Law Judge Doland's October 5, 2018 Proposed Decision. (App. 2061-2066.) On February 21, 2019, the Iowa Public Information Board issued a ruling dismissing the November 6, 2017 Petition. (App. 2129-2150.) The Iowa Public Information Board held that peace officer investigative reports include not only the actual report summarizing the facts and circumstances of the crime or incident, but also the information gathered and analyzed as part of the investigation and therefore BPD did not violate the law when it determined that such records were part of the confidential peace officer investigative report. (App. 2129-2150.) The Iowa Public Information Board further held that BPD had complied with Iowa Code Chapter 22 and dismissed the Petition filed against it. (App. 2129-2150.) In making this finding, the IPIB specifically cited the testimony of Department of Public Safety witness Agent Rick Rahn and BPD witness Chief Dennis Kramer stating that the records in dispute at the hearing were part of the confidential peace officer investigative report. (App. 2134-2149.) The IPIB also relied on Chief Kramer's testimony that the protective order in place in the civil matter

prevented him from disclosing the records. App. 2140-2141; *see also generally Steele*, 334 F.Supp.3d 972. Analyzing the applicable authority available at the time, BPD reiterated the holdings from that authority and held that the peace officer investigative report includes not just the report summarizing the facts and circumstances but also the information gathered and analyzed as part of that investigation. (App. 2146.) The Board further found that because the records were clearly peace officer investigative reports, it was inappropriate to apply a balancing test. (App. 2146-2147.) Again, the IPIB relied on Iowa case law in reaching this conclusion. (App. 2146-2147.) After analyzing Iowa law, the IPIB determined the BPD's actions complied with Iowa law. (App. 2148-2149.)

G. *District Court's Judicial Review of IPIB's Final Agency Action.*

Mr. Klein filed his Petition for Judicial Review of the IPIB's decision on March 22, 2019. (App. 0440.) March 23, 2020, the District Court dismissed Mr. Klein's Petition for Judicial Review, finding that he failed to intervene in the underlying case and therefore, failed to meet the Iowa Administrative Procedures Act requirements that would permit him to seek judicial review as a petition now. (App. 0458.) The District Court ruled that it did not have "the authority or jurisdiction to reach the merits of this case."

(App. 0458.) Mr. Klein appeals the District Court’s dismissal of his Petition for Judicial Review. (App. 0461-0462.)

### **STANDARD OF REVIEW**

The standard of review for an appeal of a final judgment of a District Court under Iowa Code Chapter 17A is for errors of law. *Jackson Cnty. Pub. Health v. Pub. Employment Relations Bd.*, 280 N.W.2d 426, 429 (Iowa 1979) (citing Iowa Code §17A.20)); *Filipelli v. Iowa Racing and Gaming Comm’n*, 899 N.W.2d 741, 2017 WL 1088101, at \*2 (Iowa Ct. App. Mar. 22, 2017) (unpublished table decision) (citing *Godfrey v. State*, 752 N.W.2d 413, 417 (Iowa 2008) (finding that on review of a District Court’s decision that an individual lacked standing in part because of his failure to intervene in the agency action, the correct standard of review was for errors at law).

### **ARGUMENT**

#### **I. Adam Klein Has Not Met the Statutory Requirements to Properly Bring a Petition for Judicial Review.**

The Iowa Code provides that only a “person or party *who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action* is entitled to judicial review thereof under this chapter.” Iowa Code § 17A.19(1) (2020) (emphasis supplied). Mr. Klein was required to meet this definition to bring a petition for judicial review to the district court. Mr. Klein failed to exhaust all

administrative remedies and he is not aggrieved or administratively affected by a final agency action. Each of these is discussed as follows.

A. *Mr. Klein Failed to Exhaust All Administrative Remedies Prior to his Petition for Judicial Review.*

The right of judicial review is limited to persons or parties participating in the proceedings before the agency. *Public Employment Relations Bd. v. Stohr*, 279 N.W.2d 286, 291-92 (Iowa 1979). Failure to participate in agency proceedings makes “clear” that a person or party has failed to exhaust their administrative remedies. *Id.* at 291 (quoting Iowa Code § 17A.19(1) (2020)); *see also Filipelli v. Iowa Racing and Gaming Comm’n*, 899 N.W.2d 741, 2017 WL 1088101, at \*3 (Iowa Ct. App. Mar. 22, 2017) (unpublished table decision) (“[Appellant] was never a party in the underlying proceedings and thus clearly did not exhaust all adequate administrative remedies” (quoting Iowa Code § 17A.19(1) (2020)) (internal quotation marks omitted)); *Meyer v. Iowa Util. Bd.*, No. 99-1627, 2000 WL 1421854, at \*4 (Iowa Ct. App. Sept. 27, 2000) (holding that a person failed to exhaust his administrative remedies when he failed to intervene in an underlying agency action).

The Iowa Legislature vested the IPIB with the authority to enforce Iowa’s Open Records Act. Iowa Code § 23.6(2) (2020). Using that authority, the IPIB has developed a process to internally address complaints before accepting or dismissing them. Iowa Admin. Code r. 497-2.1 (2020). If the

matter is accepted as within the IPIB's jurisdiction, appearing to be legally sufficient, and that it could have merit, the IPIB notifies the complainant and the respondent in writing. *Id.* At that point, the IPIB works toward an informal resolution with the complainant and the respondent, and, if that is not possible, initiates an investigation to determine if there is probable cause to believe the respondent violated Iowa Code Chapter 22. Iowa Admin. Code r. 497-2.2. If the IPIB determines there is probable cause to believe the respondent violated Chapter 22, it may, as it did in this case, designate a prosecutor and direct the issuance of a statement of charges to initiate a contested case proceeding. Iowa Admin. Code r. 497-2.2; *see* App. 1279.

Once a contested case proceeding is initiated, the Iowa Legislature has made it clear that the IPIB is the party represented by the prosecutor prosecuting the respondent in a contested case proceeding. Iowa Code § 23.6(4) (2020) (“The board shall have all of the following powers and duties: . . . if probable cause has been found to prosecute the respondent before the board in a contested case proceeding conducted according to the provisions of chapter 17A.”). Based on the plain language of the statute, at the initiation of the contested case proceeding, Mr. Klein became a spectator to rather than a participant in the action. *See generally id.*

At the conclusion of the contested case proceeding, it is the IPIB's responsibility to issue final decisions as to the merits of the complaint. Iowa Code § 23.10(3) (2020). The IPIB's final decision is a final agency action subject to judicial review pursuant to Iowa Code Chapter 17A. Iowa Code § 23.10(3)(d). February 21, 2019, the IPIB issued its final decision ultimately dismissing the Petition, overturning the Administrative Law Judge's proposed decision. (App. 2130-2149.) The IPIB's final decision lists the parties and those that appeared on behalf of the parties, and Mr. Klein is not listed as either. (App. 2130.)

If Mr. Klein wanted to participate in the action as a *party* rather than as a *spectator*, he was required to take some sort of action indicating to the agency and the parties that was his desire. *Fisher v. Iowa Bd. of Optometry Examiners*, 476 N.W.2d 48, 51 (Iowa 1991) (finding that an entity must take affirmative action for the status of "party" to be conferred on the entity). The law provides Mr. Klein and others in his position the option of filing a motion for leave to intervene in the contested case. *See* Iowa Admin. Code r. 497-4.18 ("A person granted leave to intervene is a party to the proceeding."). In addition to a motion for leave to intervene, the law also provides that Mr. Klein, or someone in his position, can take affirmative action to become a party in a contested case by "either seek[ing] to be admitted as a party by



requesting recognition as such or proceed[ing] as a party in the administrative action.” *See Fisher*, 476 N.W.2d at 51 (finding that where the State of Iowa proceeded as party including filing pleadings in the agency action, the State became a party).

The record in this action is clear that Mr. Klein never filed a motion to intervene. (App. 1280-1285; 2130-2149.) Furthermore, the record illustrates that from the beginning to the end of the contested case proceeding, Mr. Klein never took any affirmative action at all to be recognized as a party to the contested case proceeding. (App. 1280-1285; 2130-2149; 556-2247.) Mr. Klein’s appellate brief does not cite to anywhere in the record that reflects that he was either admitted or named as a party nor does it cite to any evidence Mr. Klein took any action to be recognized as a part to the contested case proceeding. (*See generally* Appellant’s Brief.)

Mr. Klein argues he is a party to the action because he filed the initial complaint to the IPIB in this matter that ultimately caused the IPIB to choose to act and pursue a contested case proceeding. (Appellant’s Proof Brief at p. 39.) He argues that simply by virtue of filing a complaint with the agency, he becomes a party if the agency decides to later initiate a contested case action. (Appellant’s Proof Brief at p. 41.) However, Mr. Klein cites no legal authority to support this argument. (*See generally* Appellant’s Brief.) Mr. Klein

describes the requirement that he take some action to become a party to the contested case proceeding after IPIB chose to pursue a contested case following Mr. Klein's underlying complaint as "nonsensical." (Appellant's Proof Brief at p. 45.) However, his brief is absent as to any legal authority for these arguments. (*See generally* Appellant's Brief.) His brief is absent of any explanation about the *Stohr* case and its application to his situation. 279 N.W.2d 286. Mr. Klein cites to *Fisher* as authority for his position that he did not need to be on the caption to be considered a party, however, Mr. Klein ignores the fact that *Fisher* requires that in order to be recognized as a party to an action, one must take affirmative action to do so. *See Fisher*, 476 N.W.2d at 51. Although he may view them as "nonsensical", the record illustrates that Mr. Klein failed to follow the very minimal requirements that exist for an entity to participate in a judicial review proceeding following a contested case hearing. (App. 556-2247.)

Because Mr. Klein was not a party to the contested case proceeding, he failed to exhaust his administrative remedies and therefore his right of judicial review of the final agency action. *See Stohr*, 279 N.W.2d at 291-92. Therefore, Mr. Klein failed to exhaust his administrative remedies and the District Court did not err in ruling that Mr. Klein is not permitted to seek judicial review. (App. 0459.)

B. *Mr. Klein Does Not Have Standing To Bring A Petition For Judicial Review.*

In addition to finding that Mr. Klein failed to exhaust his administrative remedy, the District Court also correctly found that Mr. Klein did not have standing to bring a petition for judicial review with respect to some of the disputed records. (App. 0445-0450.) To have standing to bring his petition for judicial review, Mr. Klein must show he was aggrieved or adversely affected by the IPIB's final action. *Polk Cnty. v. Iowa State Appeals Bd.*, 330 N.W.2d 267, 273 (Iowa 1983). "The test for aggrievement requires that [Mr. Klein] demonstrate (1) a specific, personal and legal interest in the subject matter of the [IPIB's] decision and (2) that this interest has been specifically and injuriously affected by the decision." *Id.* (citing *City of Des Moines v. PERB*, 275 N.W.2d 753, 759 (Iowa 1979); Iowa Code § 17A.19(1) (2020)). While these are two separate requirements, they have much in common and are often considered together. *Godfrey*, 752 N.W.2d at 418-19.

Mr. Klein failed to meet the requirements of standing. Mr. Klein has not been specifically and injuriously affected by the IPIB's decision for two reasons. The first is that the majority of the records sought in the contested case proceeding have been made available to Mr. Klein, and those that have not been made available remain subject to a protective order. (App. 0449.) The second is that the other records he now seeks were not the subject of the

contested case or the IPIB's final decision. Each of these issues will be addressed as follows.

- (1) Mr. Klein does not have a specific, personal, and legal interest specifically and injuriously affected by the IPIB's final decision.

Mr. Klein cannot prove standing because he does not have a specific, personal, and legal interest specifically and injuriously affected by the IPIB's final decision. With respect to the injury component of standing, Mr. Klein must show a personal injury beyond general vindication of the public interest. *Godfrey*, 752 N.W.2d at 424. His injury must be a specific and legally cognizable injury which is not shared by the general public. *Polk Cnty. v. Iowa State Appeals Bd.*, 330 N.W.2d 267, 273 (Iowa 1983). For someone to be aggrieved for purposes of Iowa's Open Records Act, they must have been denied the right to access and disseminate public records. Iowa Code § 22.2(1) (2020).

It is widely known that there was a wrongful death lawsuit involving Ms. Steele's death filed in the Southern District of Iowa. *Steele*, 334 F. Supp. 3d at 985. As part of that lawsuit, as with nearly every lawsuit, documents were exchanged in discovery. *Id.* These records were subject to a protective order. *Id.* On August 14, 2018, the protective order was lifted with respect to the 911 calls and body camera video, but not the dash camera video. *Id.*

Mr. Klein's failure to prove any such injury is best illustrated through his own appellate brief. In his appellate brief, Mr. Klein admits that he has access to "many records exchanged in discovery" in the civil wrongful death matter related to this case "which are responsive to his case," but complains that those records were not "publicly released." (Appellant's Proof Brief at 23.) For example, with respect to the 911 calls and the body camera video he describes those records as being "publicly available" to him (and the general public for that matter), but not "publicly released." Mr. Klein never describes to the Court what the practical difference is between the two and how that affects the alleged injury he has sustained. (Appellant's Proof Brief at 23.)

The District Court correctly found that Mr. Klein did not have an injury with respect to the 911 calls and the body camera video because he can access and disseminate them. *See* Iowa Code § 22.2(1); App. 0448-0449; Ruling at pp. 12-13. However, the District Court found that Mr. Klein did establish injury and therefore standing with respect to the dash camera video because he could not disseminate the dash camera video. However, with respect to the dash camera video, neither the BPD nor the IPIB can provide the remedy of "publicly releasing" the records as they remain subject to a federal protective order. While Mr. Klein can access but not disseminate the dash camera video, there is no remedy that the District Court could have provided Mr. Klein

without forcing the BPD to violate the federal protective order. *Reis v. Iowa Dist. Cnty. for Polk Cnty.*, 787 N.W.2d 61, 66 (Iowa 2010) (holding that the court entering a protective order retains jurisdiction to enforce or modify the protective order). The injury that Mr. Klein allegedly has with respect to the 911 calls is not attributable to the IPIB's final decision, rather it is attributable to a separate matter in a completely different tribunal. *Steele*, 334 F. Supp. 3d at 972. Mr. Klein has failed to prove standing with respect to the 911 calls and the body camera video, and therefore, Mr. Klein fails to prove the necessary elements to establish he has standing with respect to those records to bring a petition for judicial review in this matter.

- (2) Records beyond the body camera video, dash camera video, and 911 calls were not the subject of the IPIB's decision and therefore Mr. Klein does not have standing with respect to a petition for judicial review concerning those records.

Mr. Klein's appellate brief argues that he has standing because records beyond the dash camera videos, body camera videos, and 911 calls are disputed. (App. 1280-1284.) However, these records were not properly brought before the IPIB. To establish standing, Mr. Klein must identify a specific personal and legal interest *in the subject matter of the [IPIB's] decision* and that this interest has been specifically and injuriously affected by

the decision. *Polk Cnty. v. Iowa State Appeals Bd.*, 330 N.W.2d 267, 273 (Iowa 1983) (emphasis supplied).

The record reflects that only the 911 calls, body camera video, and dash camera video records were the subject matter of the IPIB's decision. (App. 2049, 2141-2142.) Both the presiding officer over the contested case and the IPIB in its final decision determined that the special prosecutor's petition only provided BPD with notice that the 911 calls, body camera video and dash camera video were in dispute. (App. 2049; 2141-2142.) This is supported by the fact that eight days prior to the contested case hearing the special prosecutor requested to change his requested remedy to require BPD and DCI to request the entire peace officer investigative report into Ms. Steele's death. (App. 2049.) If he had already requested those records in his petition, such filing would have been unnecessary. Based on this, the subject matter of the IPIB's final decision is limited to the 911 calls, body camera video, and dash camera video. (App. 2141-2142.) Because any records beyond the 911 calls, body camera video, and dash camera video were not part of the subject matter of the IPIB's final decision, Mr. Klein has failed to establish standing with respect to those records. Therefore, Mr. Klein fails to prove the necessary elements to establish he has standing to bring a petition for judicial review in this matter.

Therefore, Mr. Klein has failed to establish that he has standing to bring his Petition for Judicial Review in this matter and the District Court did not err in dismissing his Petition for Judicial Review.

*C. The District Court Correctly Denied Mr. Klein's Request for Declaratory Relief.*

The District Court did not err in dismissing Mr. Klein's request for declaratory relief. The Iowa Legislature has made clear that the process laid out in Iowa Code Chapter 17A is the "exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code § 17A.19 (2020). As part of this legislatively mandated process, a person or party seeking judicial review of such agency action must first exhaust all adequate remedies. *Id.* As such, [f]undamentally in judicial review proceedings the district court exercises only appellate jurisdiction and has "no original authority to declare the rights of the parties or the applicability of any rule or statute." *Black v. Univ. of Iowa*, 362 N.W.2d 459, 462-63 (Iowa 1985) (citing *Pub. Employment Relations Bd. v. Stohr*, 279 N.W.2d at 290; *Westmarc Cablevision, Inc. v. Bair*, 699 N.W.2d 684, 2005 WL 1224269, at \*10 (Iowa Ct. App. May 25, 2005) (unreported) ("[Petitioners'] petitions for judicial review had invoked the district court's appellate jurisdiction, and not its original jurisdiction, and they could not obtain an exercise of original jurisdiction in that appellate



proceeding.”). Because of that, petitioners in judicial review action cannot “‘piggyback’ a separate action onto [a] petition for judicial review of agency action.” *Black*, 362 N.W.2d at 463.

The Legislature provided particular guidance for when a petitioner’s administrative remedies had been exhausted and judicial review of a request for a declaratory order would be appropriate, stating that “[i]f a declaratory order has not been rendered within sixty days after the filing of a petition therefor under section 17A.9, or by such later time as agreed by the parties, or if the agency declines to issue such a declaratory order after receipt of a petition therefor, any administrative remedy available under section 17A.9 shall be deemed inadequate or exhausted.” Iowa Code 17A.19(1) (2020). This makes clear the requirement that an individual exhaust their administrative remedies applies to requests for declaratory orders as well as contested cases and other matters.

In addition to an order reversing the IPIB’s decision in the contested case hearing finding in favor of Respondents BPD and the Department of Public Safety, Mr. Klein also requests two declaratory rulings, including a ruling as to what is an “immediate fact and circumstance” and therefore confidential under Iowa Code Section 22.7(5) and that public records that are

confidential under Iowa Code Section 22.7(5) are subject to a balancing test as described in *Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994).

On July 15, 2019, the District Court dismissed Mr. Klein's request for a declaratory ruling finding that Mr. Klein did not exhaust his administrative remedies with respect to that request. Mr. Klein appeals that dismissal, arguing that Iowa Code Chapter 17A allows district courts to make declaratory rulings as a remedy to petitions for judicial review of contested cases, and, that alternatively Mr. Klein did make a request for a declaratory ruling.

As Mr. Klein's brief points out, there is a specific process for an individual seeking a declaratory ruling from the IPIB. *See* Iowa Admin. Code r. 497-3.1. The rules provide that anyone can petition the IPIB for a declaratory order "as to the applicability of a statute, rule, or order within the primary jurisdiction of the board" by filing a petition that provides eight, specifically listed categories of information. *Id.* The record is absent of any such filing by Mr. Klein, or any other party for that matter. Furthermore, Mr. Klein's brief is absent of any citation indicating that he made such a filing. Therefore, Mr. Klein never made a proper request for a declaratory ruling to the IPIB.

Mr. Klein failed to take any action to request a declaratory judgment and exhaust his administrative remedies before filing a petition for judicial review with the district court seeking such relief as required by Iowa law and the IPIB's rules. Before a district court can consider a request for a declaratory ruling on judicial review the petitioner must exhaust his administrative remedies. *Black*, 362 N.W.2d at 462-63; Iowa Code 17A.19(1). If Mr. Klein wanted to seek a declaratory ruling from the IPIB, he needed to make a request as required by their rules. *See Black*, 362 N.W.2d at 462-63; *see also* Iowa Admin. Code r. 497-3.1. He could have chosen to join that with the contested case action or manage it as a separate action, but no matter how he requested the declaratory relief he had to do it in order to exhaust his administrative remedies. *Id.* Petitioners like Mr. Klein cannot sit on their claims throughout administrative proceedings and then “piggyback” those claims which have never been raised onto petitions for judicial review. *See Black*, 362 N.W.2d at 463. However, that is what Mr. Klein is doing in the present action. Because Mr. Klein failed to take any such action, the IPIB has never been presented with a petition for a declaratory ruling on the issues listed in his petition. Therefore, he has failed to exhaust his administrative remedies.

Therefore, the District Court did not err in ruling that Mr. Klein had failed to exhaust his administrative remedies with request to this request for declaratory rulings and properly dismissed his petition for judicial review.

### **CONCLUSION**

WHEREFORE, for all the reasons stated above, the District Court did not err when it denied Mr. Klein's Petition for Judicial Review and should be affirmed.

### **REQUEST FOR ORAL ARGUMENT**

Because this case involves the application of settled legal principles applied to undisputed facts, the Burlington Police Department respectfully requests the Court deny Mr. Klein's request for oral argument. However, in the event the Court grants Mr. Klein's request, the Burlington Police Department respectfully requests to be heard in an amount equal to that which Mr. Klein receives.

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**CERTIFICATE OF COMPLIANCE**  
**WITH TYPE-VOLUME LIMITATION, TYPEFACE**  
**REQUIREMENTS, AND TYPE STYLE REQUIREMENTS.**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or 2 because this brief contains **6,982 words**, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated this 19th day of November, 2020.

/s/ Holly A. Corkery