IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-0124

Linn County No. LACV087209

JERIME ERON MITCHELL and **BRACKEN ANN MITCHELL**,
Plaintiffs-Appellees,
vs.

CITY OF CEDAR RAPIDS, IOWA and **OFFICER LUCAS JONES**,
Individually and in his official capacity as an agent and/or employee of the City of Cedar Rapids Police Department, a governmental subdivision of the CITY OF CEDAR RAPIDS, IOWA,
Defendants-Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY
HONORABLE PATRICK R. GRADY

DEFENDANTS-APPELLANTS' BRIEF AND ARGUMENT

WILFORD H. STONE, AT0007699
GREGORY T. USHER, AT0012812
of
LYNCH DALLAS, P.C.
526 Second Avenue SE
Cedar Rapids, IA 52406-2457
Telephone: 319.365.9101
Facsimile: 319.866.9721
E-Mail: wstone@lynchdallas.com
gusher@lynchdallas.com

ATTORNEYS FOR DEFENDANT-APPELLANT OFFICER LUCAS JONES

ELIZABETH D. JACOBI, AT0003763
City Hall
Office of City Attorney
101 First Street SE
Cedar Rapids, IA 52401
Telephone: (319) 286-5025
Email: e.jacobi@cedar-rapids.org

ATTORNEY FOR DEFENDANT-APPELLANT CITY OF CEDAR RAPIDS, IOWA

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ROUTING STATEMENT

The Supreme Court should retain this case pursuant to Iowa R. App. P. 6.1101(2)(c), (d) and/or (f).

STATEMENT OF THE CASE

On February 7, 2018, this Court granted the Joint Application for Interlocutory Appeal filed by Defendants-Appellants City of Cedar Rapids, Iowa, and Officer Lucas Jones (collectively, "Jones and the City"), regarding the November 1, 2017 Order denying Jones' and the City's Joint Motion for Protective Order ("First Order") and the subsequent December 22, 2017 Ruling denying Jones' and the City's Rule 1.904(3) Motion to Reconsider, Enlarge, or Amend Order Denying Motion for Protective Order ("Second Order"). Both orders were entered in the Iowa District Court in Linn County by the Honorable Judge Patrick R. Grady and both ordered Jones and the City to produce certain documents with no protective order in place. This Court's February 7, 2018 Order granted Jones' and the City's Application for Interlocutory Appeal of the district court's two orders, and also stayed the district court proceedings.

As a threshold matter, Jones and the City's Motion for Protective Order did not seek to limit the discovery rights of Plaintiffs Jerime Mitchell and Bracken Mitchell (collectively the "Mitchells"), but instead sought only to protect confidential, non-public documents by prohibiting disclosure of such documents to

parties outside the litigation. Thus, this Court's consideration will determine whether the materials Jones and the City were ordered to produce, the peace officers' investigative reports, are confidential under Iowa law and, therefore, are exempt from public disclosure, such that they should be produced only after entry of a protective order to prevent dissemination for any purpose other than litigation between the parties.

Jones and the City request this Court reverse the district court's November 1, 2017 Order and its December 22, 2017 Order requiring Jones and the City to produce confidential documents under Iowa Code § 22.7 (2017) absent a protective order which prevents dissemination of those confidential records for any purpose other than legitimate litigation purposes.

STATEMENT OF THE FACTS

On February 24, 2017, in Linn County Case No. LACV087209, the Mitchells filed an Original Notice and a Petition ("Petition") bringing multiple claims against Jones and the City in connection with the officer-involved shooting incident that occurred in the early morning hours of November 1, 2016. In their Petition, the Mitchells allege state law claims in counts titled "negligence," "assault and battery," "intentional infliction of emotional distress," "loss of consortium," and "reckless willful and wanton [sic]." (App. 4-27.)

The relevant procedural posture of the appeal is as follows: following good faith efforts by the undersigned attorneys to resolve the discovery issues with opposing counsel prior to seeking court intervention, Jones and the City filed their Motion for Protective Order on July 14, 2017, along with their proposed Protective Order ("Proposed Protective Order"), and Brief. (App. 99-108.) The confidential information as to which Jones and the City sought a protective order includes medical information, personnel files, third-party communication, and information which is otherwise confidential, including "peace officers' investigative reports." (Id.) "Peace officers' investigative reports" is a term defined by the Iowa Open Records Act as a confidential record under Iowa Code § 22.7 (5) (2017). In this appeal, Jones and the City believe "peace officers' investigative reports" cover the November 1, 2016 incident and another shooting incident on October 2, 2015, involving Officer Jones, which, in turn, include audio and video recordings and transcripts, photographs and drawings, written reports and other investigative documents. (App. 116-117.) The Mitchells subsequently filed their Resistance to Jones' and the City's Motion for Protective Order. (App. 135-138.)

Following oral arguments, the Court issued its First Order (App. 118-123.) Without expressly granting or denying Jones' and the City's Motion for a Protective Order, the district court ordered Jones and the City to produce certain law enforcement "investigative reports" without any protective order in place. In so

ruling, the district court relied on *Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994), where the Supreme Court used a three-part balancing test to consider whether law enforcement notes taken in connection with witness interviews should be disclosed pursuant to Iowa Code §§ 22.7 and 622.11. In the case at bar, the district court decided that certain documents falling within the scope of Jones' and the City's Motion for Protective Order do not qualify as "confidential" or non-public, stating:

> [T]his Court finds that the public's right to know greatly outweighs law enforcement and the party's right to privacy for an incident that happened one year ago, has already been fully investigated internally by the police and has already been through the grand jury process with no charges brought against the officer. The alleged facts of the incident have been the subject of wide media coverage and broad public discussion. Public disclosure of these reports in a county of over 200,000 people may enhance the public discussion but should not jeopardize any party's right to a fair trial.

(App. 122.) Without issuing any protective order, the district court ordered Jones and the City to produce those documents, defining them more specifically as investigative reports, emails and other police documents "generated or filed within 96 hours of the incident." Finding those specific documents were not confidential within Iowa Code § 22.7(5) (2017)'s meaning, the district court made no ruling as to the confidentiality of the same types of documents generated after the 96-hour mark or solely for purposes of internal review. The district court stated:

> Thus, the Court will attempt to fashion an order that allows for production and possible disclosure of reports about the

> incident itself and leave for another day, determination of the issue with regard to personnel records, medical records, the internal police investigation and other materials that fall outside the current order. See Iowa Code §§ 22.7 (11) and 622.10.

(Id.) The district court concluded the First Order by summarizing that Jones and the City were required to produce:

> [A]ny requested law enforcement investigative reports, including electronic recordings or telephone communications generated by or in the possession of a defendant or a police officer acting in the scope of his or her duties that were compiled as a result of the reporter's own observation or investigation, including interviews or conversations with law enforcement at the scene of the incident that resulted in the injuries to Plaintiff Jerime Mitchell or lay witnesses to that event. *The order covers any investigative reports or electronic communication generated or filed within 96 hours of the incident, but does not apply to reports or memorandum generated solely for the purposes of a police internal review of the incident*.

(Id.) (emphasis added).

On November 13, 2017, Jones and the City filed their Joint Rule 1.904(3) Motion, in which they requested the district court reconsider and amend its First Order. (App. 124-134.) On November 27, 2017, the Mitchells filed their Resistance to Jones' and the City's 1.904(3) Motion. (App. 135-138.) December 1, 2017 Defendants' filed their Joint Reply. (App. 139-147.)

The district court entered the Second Order December 22, 2017, denying Jones' and the City's 1.904(3) Motion and ordering the documents described in the

First Order be produced as previously ordered. (App. 148-153.) In so ordering, the district court relied on the reasoning of its First Order and went further by providing its own interpretation of Iowa Code § 22.7(5) (2017):

> The Court concludes there is some ambiguity in § 22.7(5). The Court construes the statute as providing that peace officers' investigative reports, privileged records or information specified in Iowa Code § 80G.2 are to be kept confidential, but then goes on to set forth its own sort of "balancing test" language to certain information. The section creates its own exception to confidentiality, by stating that "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual." Iowa Code § 22.7(5) (2017). In this case, there is no apparent ongoing investigation with respect to the records at issue, and there has been no allegation that any individual's safety will be impaired as a result of disclosure of the records. The Court finds that the temporal limits of its order allows disclosure of what the Court finds [to be] documents concerning, "immediate facts and circumstances surrounding a crime or incident."

(App. 152.)

January 18, 2018, Jones and the City filed their Joint Application for Interlocutory Appeal, which was granted February 7, 2018. (App. 154-297; 298-299.)

STANDARD OF REVIEW

The appellate court reviews a district court's discovery ruling for abuse of discretion. *Mediacom Iowa L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 66 (Iowa

2004). "A reversal of a discovery ruling is warranted when the grounds underlying a district court order are clearly unreasonable or untenable. A ruling based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion." *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 43 (Iowa 2004) (quoting *Exotica Botanicals, Inc. v. Terra Int'l, Inc.*, 612 N.W.2d 801, 804 (Iowa 2000)). However, the district court decision is also based upon the statutory interpretation of Iowa Code § 22.7(5) (2017) concerning peace officers' investigative reports, and the Supreme Court has held that "[t]o the extent [the court] . . . engages in statutory interpretation, [its] review is for correction of errors at law." *Willard v. State*, 893 N.W.2d 52, 58 (Iowa 2017). Thus, the appellate court in this case is not bound by "either the legal conclusions or application of legal principles reached by the district court." *Rucker v. Taylor*, 828 N.W.2d 595, 599 (Iowa 2013) (citations omitted).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ORDERING JONES AND THE CITY TO PRODUCE THE INVESTIGATIVE REPORTS AND OTHER CEDAR RAPIDS POLICE DEPARTMENT MATERIALS WITHOUT FIRST ENTERING A PROTECTIVE ORDER TO PRESERVE THE DOCUMENTS' CONFIDENTIALITY.

A. The District Court Should Have Found the Documents Ordered to be Produced by Jones and the City Were Protected From Disclosure under Iowa Code § 22.7(5) (2017).

Iowa Code § 22.7(5) (2017) provides in relevant part that:

> The following records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information: . . . [p]eace officers' investigative reports, privileged records or information specified in section 80G.2, and specific portions of electronic mail and telephone billing records of law enforcement agencies if that information is part of an ongoing investigation, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual. Specific portions of electronic mail and telephone billing records may only be kept confidential under this subsection if the length of time prescribed for commencement of prosecution or the finding of an indictment or information under the statute of limitations applicable to the crime that is under investigation has not expired.

Iowa Code § 22.7(5) (2017).

The Iowa Supreme Court has held clearly that with respect to Iowa Code § 22.7 (2017), it no longer uses a balancing test like the one used in *Hawk Eye* (and relied upon by the district court) because "the plain language of the statute supports the exemption." *Am. Civil Liberties Union Found. of Iowa, Inc. v. Records Custodian, Atlantic Comm. Sch. Dist.*, 818 N.W.2d 231 (Iowa 2012). This court observed that Iowa Code § 22.7 (2017) "lists specific categories of records that must be kept confidential by those responsible for keeping records." *Id.*, at 236 (emphasis

added). In fact, the Supreme Court stated a balancing test's application "undermines the categorical determination of the legislature and rewrites the statute." *Id*.

Since *Atlantic*, Iowa Courts have declined to apply the balancing test to material that is confidential under Iowa Code § 22.7(5) (2017). See, e.g., *Allen v. Iowa Dept. of Pub. Safety*, Case No. EQCE074161 (Polk County. Dist. Ct. Mar. 7, 2014 (App. 281-289.) ("If the plain language of a statutory exclusion in Iowa Code § 22.7 (2017) supports an exemption from disclosure for particular records, it is unnecessary for courts to apply a balancing test to determine whether the records should be disclosed.") (citing *Atlantic Comm. Sch. Dist*., 818 N.W.2d at 231). Additionally, the Iowa Public Information Board, which is the administrative agency tasked with fielding public records complaints, has also applied the *Atlantic* holding to eliminate the balancing test's requirement when a record fits squarely into any of the Iowa Code § 22.7 exemptions. See, e.g., *In the Matter of Cali Smith and City of Nevada Police Dept*., Complaint No. 14 FC:0096 (Jan. 9, 2015). (App. 290-291; Attachment to Defendants' December 1, 2017 Joint Reply to Plaintiffs' Resistance to Defendants' 1.904(3) Motion.)

Taken together, the above authority establishes that, when determining whether a record is confidential under Iowa Code § 22.7 (2017), the inquiry ends upon a finding that the record in question falls into a categorical exemption under the law. It is only when the record does not fit into a categorical exemption that the

court applies any balancing test. See *Atlantic Comm. Sch. Dist.*, 818 N.W.2d at 233; see also *Allen*, Case No. EQCE074161 (Polk County Dist. Ct. Mar. 7, 2014). (App. 281-289.)

In its November 1, 2017 Order, the district court specifically agreed that the documents and records at issue (i.e., police officer investigative reports) are clearly confidential public records under Iowa Code § 22.7(5) (2017). (App. 122.) The inquiry as to disclosure, therefore, should end because the documents in question fall within the statutory exemption defined by the unambiguous language of Iowa Code § 22.7(5) (2017). Instead, the district court incorrectly applied a balancing test to those records to determine whether a protective order should govern the production of the documents and records, ultimately concluding that a protective order was not necessary with respect to the "investigative reports or electronic communication generated or filed within 96 hours of the incident." (Id.) The district court did so after finding that Iowa Code § 22.7(5) (2017) is ambiguous and creates a balancing test of sorts "for certain information," that being the "date, time, specific location and immediate facts and circumstances surrounding a crime or incident" or what one might call the basic information of the "who, what, when and where" of an incident. But as the district court itself acknowledges by using the term "certain information," the Legislature created a balancing test only for the basic information

of a crime or incident, not for the documents made confidential by the first sentence of § 22.7(5) (2017).

In addition to ruling that peace officers' investigative reports are categorically confidential, the Iowa Supreme Court and the Iowa Court of Appeals have applied Iowa Code § 22.7(5) (2017) and the term "investigative reports" broadly so as "to encompass not only reports but also other material and evidence incorporated into reports." *Neer v. State*, 2011 WL 662725 (Iowa Ct. App. Feb. 23, 2011) (holding that the video recording, use of force reports, and pursuit reports were confidential as part of the peace officers' investigative report); *see also AFSCME/Iowa Council 61 v. Iowa Dept. of Pub. Safety*, 434 N.W.2d 401, 403 (Iowa 1988) (holding that a blood analysis lab report made part of an investigation into a crime was part of the peace officers' investigative report).

There is no dispute that Jones and the City have made public the "date, time, specific location and immediate facts and circumstances surrounding" the November 1, 2016, incident which gave rise to this litigation (and also the October 20, 2015, shooting incident). Indeed, that information has been widely disseminated in public. Jones and the City do not even seek to prevent the Mitchells from having the peace officers' investigative reports. Rather, Jones and the City seek only to preserve those documents' confidentiality by means of a protective order that prevents the parties from disseminating them for any purpose other than the litigation

itself. In part, at least, this is to protect those who willingly gave the police their ear and eye witness accounts of the incident from being contacted by the media or others who are not subject to the court's control. A protective order extending to all peace officers' investigative reports, as Iowa law contemplates, would permit the parties in this case to advance the merits of the Mitchells' claims as well as Jones' and the City's defenses without allowing the case to be tried in the court of public opinion.

It is also important to note that the Mitchells have never articulated how public dissemination of confidential peace officers' investigative reports—outside of litigation—would advance the merits of their claims. It would be contrary to Iowa Code § 22.7(5) (2017) to enable such public dissemination, as well as potentially prejudicial to the parties' ability to seat an impartial jury.

In light of the *Atlantic* case, it is now clear that Iowa Code § 22.7(5) (2017) is distinct in certain material respects from Iowa Code § 622.11 (2017), providing that "a public officer cannot be examined as to communications made to a public officer in official confidence when the public interest would suffer by the disclosure." Iowa Code § 622.11 (2017). In *Hawk Eye*, the Court held at that time when determining whether a record should be disclosed pursuant to Iowa Code §§ 22.7(5) (2017) or 622.11 (2017), a public official claiming privilege under these laws must meet a three-part test before the records are disclosed. *Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994). The Court noted the legislative purpose of the two provisions

is similar with respect to DCI files. While Iowa Code § 622.11 (2017) and the 1994 *Hawk Eye* case may be instructive for certain purposes, they are no longer helpful to this case because Jones' and the City's Motion for Protective Order does not involve an evidentiary question about the examination of a public officer, as might be the case during a deposition, hearing or trial, but rather the public dissemination of peace officers' investigative reports which are confidential and non-public under Iowa Code § 22.7(5) (2017). *Atlantic* now already governs the analysis under the public records laws, quite apart from *Hawk Eye* and Iowa Code Chapter 622 (2017).

Thus, the district court's use of a balancing test in this case is contrary to the Iowa Supreme Court's prior 2012 ruling in *Atlantic* and the plain language of Iowa Code § 22.7(5) (2017). Therefore, this Court should find that the district court abused its discretion in ordering Jones and the City to produce the documents in question without first entering a protective order preserving the confidentiality of those documents.

B. **The District Court Erred in Interpreting the Language of Iowa Code § 22.7(5) (2017) to Allow for the Unprotected Production of Investigative Reports and Related Materials**.

In its November 1, 2017 Order, the district court offered an erroneous interpretation of Iowa Code § 22.7(5) (2017) by holding that in order to preserve the confidentiality of documents via protective order, Jones and the City had to show the peace officers' investigative reports in question were part of an ongoing

investigation. (App. 118-123.) Such an interpretation is contrary to the well-established doctrine of "last preceding antecedent" which the Supreme Court of Iowa has applied on numerous occasions to interpret a statute. In *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376 (Iowa 2000), for instance, the Court defined the doctrine as follows:

> Under the doctrine of last preceding antecedent, qualifying words and phrases refer only to the immediately preceding antecedent, unless a contrary legislative intent appears. Evidence of a contrary legislative intent can arise when a comma separates the qualifying phrase from the antecedent. In this circumstance, the qualifying phrase generally applies to all antecedents.

Id., at 380 (Iowa 2000) (citations omitted); *see also Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 824 (Iowa 1987) ("In exploring statutory intent, we have consistently reasoned that qualifying words and phrases ordinarily refer only to the immediately preceding antecedent."). The ultimate goal in applying the rules of statutory construction is to determine the intent of the Legislature. *Iowa Comprehensive Petroleum*, 606 N.W.2d at 380.

Turning to Iowa Code § 22.7(5) (2017), its first sentence reads:

> *The following records shall be kept confidential*, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information: . . . [p]eace officers' investigative reports, privileged records or information specified in section 80G.2, *and specific portions of electronic mail and telephone billing records of law enforcement agencies if that information is part of an*

> *ongoing investigation*, except where disclosure is authorized elsewhere in this Code.

(emphasis added). Under the doctrine of last preceding antecedent, then, the words "if that information is part of an ongoing investigation" refer only to the words "specific portions of electronic mail and telephone billing records of law enforcement agencies." The two sets of words are actually part of one continuous clause. This fact is further evidenced by the third and final sentence of subsection (5), which states:

> Specific portions of electronic mail and telephone billing records may only be kept confidential under this subsection if the length of time prescribed for commencement of prosecution or the finding of an indictment or information under the statute of limitations applicable to the crime that is under investigation has not expired.

Iowa Code § 22.7(5) (2017). This sentence explains how to determine whether an ongoing investigation affects the confidentiality of certain material and refers only to "specific portions of electronic mail and telephone records," not to any of the other types of documents or information listed in that subsection. *See Allen v. Iowa Dept. of Pub. Safety*, Case No. EQCE074161 (Polk Cnty. Dist. Ct. Mar. 7, 2014). (App. 281-289.) By contrast, "peace officers' investigative reports and privileged records or information specified in section 80G.2" are two categories of documents with no qualifying language such that they are confidential regardless of whether they are part of an ongoing investigation. In other words, the confidentiality of peace

officers' investigative reports (and certain other documents specified in § 80G.2) does not turn on whether they are part of an ongoing investigation.[1]

Given the Legislatures' unambiguous intent to modify only the emails and phone records portion of the statute, the district court erred in determining that certain peace officers' investigative reports need **not** be kept confidential under § 22.7(5) (2017). That error is reflected in the following excerpt from the district court's November 1, 2017 Ruling which lists the records the court ordered Jones and the City to produce with no protective order:

> [A]ny requested law enforcement ***investigative reports***, including electronic recordings or telephone communications generated by or in the possession of a defendant or a police officer acting in the scope of his or her duties that were compiled as a result of the reporter's own observation or ***investigation***, including interviews or conversations with law enforcement at the scene of the incident that resulted in the injuries to Plaintiff Jerime Mitchell or lay witnesses to that event, *[including] any* ***investigative reports*** *or electronic communication generated or filed* ***within 96 hours of the incident****, but*

[1] Additional support for Jones' and the City's position is found by contrasting the very last phrase in the first sentence of § 22.7(5) (2017) with the prior phrase "if that information is part of an ongoing investigation." The phrase at the end of the sentence says "except where disclosure is authorized elsewhere in this Code," and it is separated by a comma from all the preceding antecedents. By contrast, the phrase "if that information is part of an ongoing investigation" immediately follows the reference to specific portions of electronic mail and telephone records. *Iowa Comprehensive Petroleum*, 606 N.W.2d at 380. The distinct lack of a comma in the clause "specific portions of electronic mail and telephone billing records . . . if that information is part of an ongoing investigation" establishes that peace officers' investigative reports are confidential regardless of whether they are part of an ongoing investigation.

> *does not apply to reports or memorandum generated solely for the purposes of a police internal review of the incident.*

(App. 122) (emphasis added). By recognizing the documents the Mitchells requested as "investigative reports" and requiring production of documents that were created as the result of an officer's own "investigation," the district court itself recognized that those materials fall within the clear and unambiguous category of unconditionally confidential documents carved out by § 22.7(5) (2017). However, with no explanation or apparent basis for doing so, the district court proceeded to rule that any "investigative report" that was "generated or filed within 96 hours of the incident" is no longer an investigative report that must remain confidential. Respectfully, the district court erred in so ruling.

Reading ambiguity into a statute where none exists, the district court has contradicted its own finding that the documents at issue are peace officers' investigative reports by ordering their disclosure contrary to the statute and Iowa Supreme Court cases. For these reasons, this Court should reverse the district court's Order denying Jones' and the City's Motion for Protective Order and further require that the documents requested by the Mitchells be produced pursuant to an appropriate protective order.

C. **The District Court Abused its Discretion by Declining to Enter a Protective Order to Prohibit Dissemination of Confidential Discovery Materials to Parties Outside the Litigation.**

i. Good cause exists for entry of a protective order in this case.

Iowa R. Civ. P. 1.504(a) allows the court to enter a protective order upon showing of "good cause" in order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . ." Iowa R. Civ. P. 1.504(a). Although open records principles do not pertain directly to discovery, a protective order is necessary in this case in order to preserve the Legislature's determination in Iowa Code § 22.7(5) (2017) that peace officers' investigative reports are confidential because the Mitchells insist they have a right to disseminate those non-public documents outside of the litigation. Thus, in this case Iowa Code § 22.7(5) (2017) provides an appropriate basis for a protective order. "Iowa courts have wide discretion to enter a protective order pursuant to Iowa R. Civ. P. 1.504." *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 305 (Iowa 2009) (citing *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 389 (Iowa 1983)). To demonstrate "good cause" for a protective order, the party seeking protection should set forth "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Comes*, 775 N.W.2d at 305 (citations omitted).

"In evaluating [whether good cause exists for a request for a protective order], the district court should employ three criteria: (1) the harm posed by dissemination

must be substantial and serious; (2) the restraining order must be narrowly drawn and precise; and (3) there must be no alternative means of protecting the public interest which intrudes less directly on expression." *Mediacom Iowa, L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 68 (Iowa 2004). "These criteria strike a balance between the policy favoring discovery and free expression on one side and a party's interest in avoiding commercial damage and preventing an abuse of discovery on the other." *Comes*, 775 N.W.2d at 306.

Applying these three criteria to this case, the district court's ruling effectively denying Jones and the City's Motion for Protective Order as to certain peace officers' investigative reports should be reversed and the entry of Jones' and the City's Proposed Order should be ordered. First, while there is no commercial interest at stake, the potential harm to the interests of the public at large as well as Jones and the City themselves, is both substantial and serious. The public, because dissemination of peace officers' investigative reports and other non-public documents would tend to discourage thorough criminal investigations and stringent internal review of police conduct. Documents the Mitchells requested in their Proposed Order for Preservation of Evidence and those they seek in discovery are voluminous, and include sensitive medical and employment information, interviews and testimonial records of ear and eye witnesses which became part of both the criminal investigations into the incident in question and the internal review(s) by the

Cedar Rapids' Police Department's Professional Standards Division. Public dissemination of such documents could cause annoyance, embarrassment, oppression, and undue burden or expense, thus deterring members of the public from participating in criminal investigations and undermining a thorough review of officer conduct. As such, and quite apart from the fact that peace officers' investigative reports are categorically confidential under Iowa statute (as set forth more thoroughly above), there is good cause to protect the documents from public dissemination. *See e.g.*, *Gutierrez v. Benavides,* 292 F.R.D. 401, 405-06 (S.D. Tex. 2013) (stating that "[a]lthough the public may have a legitimate interest in 'records indicating official misconduct, abuse of power, or constitutional violations by Defendants,'" that same interest would not extend to a number of the documents found in the "personnel files of law enforcement agents")[2] (citations omitted); *General Elec. Capital Corp. v. Lear Corp.*, 215 F.R.D. 637, 643 (D. Kan. 2003) (noting that, under the similar "good cause" requirement contained in F.R.C.P. 26, and even if they are not subject to any common law or statutory privilege, personnel records were protected from disclosure by protective order); *Cannon v. Lodge*, No. Civ.A. 98–2859, 1999 WL 600374, at *1 (E.D.La. Aug. 6, 1999) (granting the

[2] Jones and the City acknowledge that the district court has not yet ordered production of personnel records or internal review documents but note that the underlying rationale of these decisions is applicable to the protection of peace officers' investigative reports from public disclosure.

motion to compel "with respect to the defendants' personnel records" and "with respect to investigative and complaint records," because the records were relevant to the plaintiff's allegations of excessive force, but ordering the records be produced "pursuant to a protective order/confidentiality agreement to be prepared by the defendants"); *Walters v. Breaux*, 200 F.R.D. 271, 274–75 (W.D.La. 2001) (ordering production of the defendant's personnel files and internal affairs division and citizen complaint files, but because of the "legitimate privacy and confidentiality concerns," restricting the use of the records to purposes of the litigation). Indeed, the documents the Mitchells seek to obtain without a protective order and which the district court ordered Jones and the City to produce are documents the public has no right to inspect under Iowa Code § 22.7 (2017). It would thus be an abuse of discovery to permit the Mitchells to publicly disseminate documents that are not even public according to the Legislature. *See Comes*, 775 N.W.2d at 306.

In addition, a protective order like the one proposed by Jones and the City is critical to ensure that confidential information does not unfairly or unduly taint the prospective jury pool through pretrial publicity. By way of recent example, a change of venue was granted in a local eastern Iowa case involving a Marion Independent School District teacher who allegedly failed to report sexual abuse. As Linn County District Associate Judge Casey Jones found, the significant pretrial publicity prejudiced the teacher and prevented her from being able to receive a fair and

impartial trial in Linn County. (App. 237; see http://www.thegazette.com/subject/news/education/k-12-education/judge-rules-marion-teachers-trial-will-be-moved-out-of-linn-county-20170619). To paraphrase Judge Jones, the allegations and stories (news stories) regarding the parties in that case became intertwined and continued to generate more news stories.[3] The case highlights the damage that can be done without an order protecting the confidentiality of discovery documents that are not public records. The same risks apply in this case, particularly where confidential information might be disclosed to the media, an issue addressed more thoroughly below. In terms of the second of three criteria for obtaining a protective order, the proposed protective order is "narrowly drawn." Jones and the City do not intend to classify as "confidential" any document that would otherwise be available for public inspection pursuant to an appropriately submitted request pursuant to Iowa Code Chapter 22. The proposed Protective Order serves the important purpose of ensuring Iowa Code § 22.7 cannot be circumvented by the Mitchells disseminating non-public documents to the public.

A protective order is necessary to avoid the detriment this would cause Jones and the City, as well as the public's interests in thorough criminal and internal affairs investigations. Jones and the City narrowly crafted their Proposed Protective Order

[3] The case at bar continues to receive publicity, including the KCRG story chronicling the case on the one-year anniversary of the November 1, 2016 incident. (App. 131-132.)

so that it precisely fits the needs of this case. For example, Paragraph 2 of the Proposed Protective Order states that a party may designate information as confidential only where there is a "reasonable good faith belief" that the documents are in fact confidential. (App. 103-108.) Also, Paragraph 4 requires the parties to meet and confer to attempt to resolve disputed designations prior to seeking the Court's intervention, something the parties have already engaged in on more than one occasion prior to filing this Application. (App. 104.) Another example is Paragraph 10 of the Proposed Protective Order, which provides for modification of the Protective Order. (App. 106-107.) Taken together, Paragraphs 4 and 10 specify a clear procedure for challenging any confidentiality designation should a dispute arise. But, by effectively denying Jones' and the City's proposed protective order as to peace officers' investigative reports, and not granting it as to anything else, the district court order precludes the parties from following the process contemplated by the proposed protective order. Finally, there is no provision for "attorney's eyes only" ("AEO"), nor are there other restrictions on sharing discovery materials for purposes of the litigation. Contrary to the Mitchells' concerns (see App. 112-113), there is nothing in the proposed protective order preventing the existing attorneys from sharing discovery materials or otherwise preventing collaborative use of the discovery received from Jones and the City, so long as it is done in connection with this litigation and in compliance with the protective order.

As for the last of the three criteria for obtaining a protective order, there is no alternative means of protecting the public interest which intrudes less directly on expression. In this case, the public interest deserving of protection is at least twofold: first, the rigorous investigation into suspected criminal offenses, with open and active participation by private citizens, and second, the free exchange of ideas and self-critical analysis during the internal review/investigation process following officer-involved shootings and complaints against public agencies. This is especially so with respect to allegations of police misconduct. By narrowly tailoring their Proposed Protective Order and including by its own terms clear mechanisms for challenging the confidentiality of discovery materials, Jones and the City's Proposed Protective Order provides for adequate protection of these vital public interests, while simultaneously ensuring the public has the ability to access non-confidential case documents that properly belong in the public domain. The third criterion for a protective order is easily satisfied in this case.

The public's interest in access to court records is strongest when the records concern defective and/or dangerous products or goods. *See, e.g., Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180-81 (6th Cir. 1983) (vacating district court's sealing of court records involving the content of tar and nicotine in cigarettes and emphasizing that the public had a particularly strong interest in the court records at issue because the "litigation potentially involves the

health of citizens who have an interest in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market"); *see also United States v. General Motors Corp.*, 99 F.R.D. 610 (D.D.C. 1983) (stating that the "greater the public's interest in the case the less acceptable are restraints on the public's access to the proceedings"); *In re Air Crash at Lexington, Ky.*, August 27, 2006, No. 5:06-CV-316-KSF, 2009 WL 1683629, at *8 (E.D. Ky. June 16, 2009) (the "public has an interest in ascertaining what evidence and records the . . . Court [has] relied upon in reaching [its] decisions," and "the public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety").

By contrast to the above-cited cases, the instant case does not warrant public access to documents deemed confidential by the Iowa Legislature. In fact, Jones and the City agree that the public at large is entitled to know the City of Cedar Rapids' policies and procedures for investigating incidents like the one at issue in this case, as well as the policies and procedures governing operations of the Cedar Rapids Police Department more generally. These are not documents Jones and the City would designate as "confidential." However, the peace officers' investigative reports, documents detailing the internal review of this specific incident and the contents of personnel files are confidential under Iowa law. Allowing the Mitchells' counsel to disclose such documents to persons outside the litigation would only serve to: (a) discourage individuals from assisting in criminal investigations by police and

the State of Iowa's Department of Criminal Investigations; (b) hamper the Cedar Rapids' Police Department's self-critical internal review processes; and (c) invade Officer Lucas Jones' and other officers' legitimate privacy interests with respect to their confidential personnel matters. There is also substantial risk that disclosing this information to the media may result in inappropriate pretrial publicity and risk tainting the prospective jury pool.

For the reasons set forth above, the district court's November 1, 2017 Order denying Jones' and the City's Motion for Protective Order should be reversed, and this Court should issue orders instructing the district court to enter the proposed protective order submitted by Jones and the City in conjunction with their initial Motion.

ii. Jones and the City have a good-faith belief that the Mitchells' counsel will disseminate confidential records to the media, causing prejudice to Jones and the City.

The Mitchells' counsel, Larry Rogers, Jr., has made various statements to the media in this case, including:

> "Jerime has some significant needs going forward. He's gonna need some rehabilitation care. He's gonna need some physical therapy, occupational therapy." (See KCRG article entitled "Jerime Mitchell shooting: one year later"). (App. 131-132.)
>
> "He [Officer Lucas Jones] is off the charts with respect to how frequently [officer-involved shootings] happen[], even in metropolitan areas. So I think the city of Cedar Rapids needs to look long and hard about the risk they're

> exposing the citizens to, and their department to by have [sic] Officer Lucas Jones on the streets." (Id.)
>
> "Settlement is not even a topic of discussion at this point. There are a lot of things that need to be flushed out, aired out and investigated more thoroughly." (Id.)
>
> "I am absolutely confident that that should have never resulted in a shooting and um we have police consultants on board, we have a number of individuals that will, will put forth that theory and explain that." (Id.)
>
> "He [Officer Lucas Jones] is a danger to the community. He's a danger for the citizens of Cedar Rapids, and quite frankly, is a danger to other police officers because of the culture that type of aggressiveness represents."

(See KGAN article entitled "Jerime Mitchell's attorney launching investigation into shooting".) (App. 133-134.)

Thus, beyond the fact certain records are confidential under Iowa law and should not be disseminated outside this litigation, Attorney Rogers' public remarks give rise to Jones and the City's good faith and well-founded belief he will disseminate the confidential, non-public records to the media. Publicizing the case may have prejudiced and still could prejudice the adjudicative proceeding in this matter. Moreover, the Mitchells have yet to articulate how the merits of their claims would be advanced by disclosing to the public documents the Legislature has deemed confidential. Jones and the City cannot think of a single reason the Mitchells would need to use the requested materials for purposes outside the litigation unless it is in an attempt to litigate this case in the media rather than in the courtroom. Given

Attorney Rogers' prior conduct, if the disputed documents and records are produced to the Mitchells without a protective order, those records will likely be provided to the media, resulting in a high likelihood of prejudice to these judicial proceedings.

Therefore, in addition to considering the authority cited above regarding the confidentiality of the records and documents at issue here, Jones and the City request that this Court also consider the prior conduct of Attorney Rogers and order that all confidential records pursuant to Iowa Code § 22.7(5) (2017) and other confidential information be produced under a protective order similar or identical to the one Jones and the City initially proposed in conjunction with their July, 2017 Motion for Protective Order.

CONCLUSION

For the reasons stated above, Jones and the City request this Court to find that the district court's orders of November 1, 2017, and December 22, 2017, were a misinterpretation of law and an abuse of discretion. Accordingly, this Court should reverse the district court's orders requiring production of the confidential, non-public documents without a protective order prohibiting disclosure of them to parties outside the litigation, and issue orders instructing the district court to enter the proposed protective order submitted by Jones and the City in conjunction with their initial Motion, and for such further relief as the Court deems equitable.

REQUEST FOR ORAL ARGUMENT

Jones and the City respectfully request oral argument in the maximum amount of time allowed.

/s/ Wilford H. Stone
WILFORD H. STONE, AT0007699
GREGORY T. USHER, AT0012812
of
LYNCH DALLAS, P.C.
526 Second Avenue SE
Cedar Rapids, IA 52406-2457
Telephone: 319.365.9101
Facsimile: 319.866.9721
E-Mail: wstone@lynchdallas.com
gusher@lynchdallas.com

ATTORNEYS FOR DEFENDANT-APPELLANT OFFICER LUCAS JONES

/s/ Elizabeth D. Jacobi
ELIZABETH D. JACOBI, AT0003763
City Hall
Office of City Attorney
101 First Street SE
Cedar Rapids, IA 52401
Telephone: (319) 286-5025
Email: e.jacobi@cedar-rapids.org

ATTORNEY FOR DEFENDANT-APPELLANT CITY OF CEDAR RAPIDS, IOWA

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Dated this 30th day of May, 2018.

/s/ Wilford H. Stone