IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-0124
Linn County No. LACV087209

JERIME ERON MITCHELL and **BRACKEN ANN MITCHELL**,

Plaintiffs-Appellees,

v.

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 APPEL FROM THE IWOA DISTRICT COURT FOR LINN COUNTY
HONORABLE PATRICK R. GRADY

PLAINTIFFS-APPELLEES' FINAL BRIEF

/s/ Pressley Henningsen

/s/ Laura Seelau
Pressley Henningsen AT0003402
Laura Seelau AT0011712
RSH Legal, P.C.
425 Second Street SE, Suite 1140
Cedar Rapids, IA 52401

Telephone: (319) 365-9200
Facsimile: (319) 365-1114
Email:
phenningsen@fightingforfairness.com
lseelau@fightingforfairness.com
ATTORNEYS FOR PLAINTIFFS-APPELLEES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANTS-APPELLANTS TO PRODUCE POLICE INVESTIGATIVE REPORTS WITHOUT A PROTECTIVE ORDER IN PLACE.

CASES

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ROUTING STATEMENT

Plaintiffs-Appellees agree that the Supreme Court should retain this case pursuant to Iowa R. App. P. 6.1101(2)(b), (c), (d) or (f).

STATEMENT OF THE CASE

Appellees agree with Appellants' statement of the case with regard to the procedural history of the discovery dispute presented in this appeal. Appellees disagree with Appellants' characterization of the nature of the proposed protective order at issue.

Ultimately, this interlocutory appeal concerns the overlap between Iowa's Open Records Act at Iowa Code § 22.7 and Iowa Rule of Civil Procedure 1.504 governing protective orders in discovery.

At the District Court, Defendants-Appellants sought a broad protective order "applicable to…all documents, materials, and information produced" through discovery wherein Defendants-Appellants could unilaterally mark any document as "confidential", even retroactively, thereby bringing the document within the scope of the protective order. (Defendants-Appellants' Proposed Protective Order, at pg. 2, ¶ 2) App. 103. The onus of challenging any declaration of confidentially would fall on the party who requested the document. (Defendants-Appellants' Proposed Protective Order, at pg. 2, ¶ 4) App. 104. The proposed protective order further limits the use and disclosure

of that information only as necessary for this litigation, and requires destruction or return of confidential material upon conclusion of the litigation. (Defendants-Appellants' Proposed Protective Order, at pgs. 2-3) App. 104-106.

The District Court ruling denying Defendants-Appellants' motion for protective order is narrow. (November 1, 2017 Order) App. 118-122. It orders Defendants-Appellants to produce without a protective order discovery materials related to "law enforcement investigative reports or electronic communications generated or filed within 96 hours of the incident" that is the basis of this lawsuit. (November 1, 2017 Order, at pg. 5) App. 122.

In light of the foregoing, Plaintiffs-Appellees agree that Defendants-Appellants' motion for protective order did not seek to limit the *scope* of discovery. However, Appellees disagree with Appellants' characterization that their Motion for Protective Order "did not seek to limit the discovery rights of Plaintiffs". (Defendants-Appellants' Brief pg. 1). The proposed protective order infringes on Plaintiffs-Appellants' ability to freely investigate and conduct discovery in this case without being hindered by the procedures necessary to protect confidential information. The proposed protective order additionally restricts Plaintiffs-Appellants case preparation and investigation

strategy more broadly beyond simply the formal discovery, deposition and trial procedures enshrined in the rules.

STATEMENT OF THE FACTS

Plaintiffs-Appellees are in broad agreement with the timeline of discovery in Defendants-Appellants statement of facts but disagree with the legal conclusions contained within that statement that peace officer investigative reports are confidential records. In addition to the facts stated by Defendants-Appellants, pursuant to Iowa R. App. P. 6.903(3), Plaintiffs-Appellees state the following additional facts:

On November 1, 2016 Defendant-Appellant Officer Lucas Jones initiated a traffic stop of Plaintiff-Appellee Jerime Mitchell. (Petition, pgs. 5-6) App. 8-9. During the course of this traffic stop, Jones withdrew his police-issued firearm and fired multiple shots at Mitchell. As a result of the shooting, Mr. Mitchell is paralyzed from the neck down. (Petition, pg. 11) App. 14. No criminal charges were ever filed against Jones. (Petition, pg. 11) App. 14; (Answer of City, pg. 16) App. 80; (Answer of Jones, pg. 20), App. 47.

Plaintiffs-Appellees petition lays out in detail the ways in which Defendants-Appellants were negligent, but in essence, Plaintiffs-Appellees claim that the traffic stop was unfounded and then improperly conducted; that the use of force was excessive and unfounded; and that – because Jones had

previously been involved in a different officer-involved shooting – the Defendant-Appellant City of Cedar Rapids knew or should have known that Jones had a propensity for excessive use of force and failure to comply with proper police procedure. (Petition, pgs. 12-14) App. 15-17.

The present discovery dispute arose upon the parties exchanging requests for written discovery. By the time this current discovery dispute arose, there was no ongoing investigation with respect to the records at issue. (Nov. 1, 2017 Order, pg. 5) App. 122. Defendants-Appellants filed their Motion for Protective Order on July 14, 2017, attaching the order they proposed the District Court enter. (July 14, 2017 Motion for Protective Order, Proposed Order) App. 99-108.

The Defendants-Appellants Proposed Protective Order:

- Applied to *all* documents, materials, and information produced formally through discovery mechanisms or informally through other means;
- Allowed any person, whether or not a party, to designate material as "Confidential" unilaterally and retroactively;
- Placed the onus of challenging a confidentiality designation on the receiving party;
- Created limits upon the disclosure of information marked "confidential" to persons outside the litigations and established strict procedures for use of such documents within the scope of litigation

(Proposed Order) App. 103-106.

Plaintiffs-Appellees resisted the entry of such a broad, one-sided protective order, but stated their agreement that a narrowly drawn protective order covering things such as medical information or government-issued personal identification numbers would be appropriate. (July 24, 2017 Plaintiffs' Resistance, para. 3) App. 109. Plaintiffs-Appellees again acknowledged the reasonableness of a limited protective order covering private and personal information, dates of birth, social security numbers, addresses of law enforcement officers, and other such information at the hearing on the motions. (Transcript, pg. 2, lines 18-23) App. 301. At the time of arguing the motion, Plaintiffs-Appellees of course had not seen any of the documents in Defendants-Appellants' possession that are contested, but maintained that all other requested information should be disclosed without a protective order. (Transcript, pg. 2, line 24 – pg. 4, line 9) App. 301. Defendants argued broadly that anything not already released to the public should be subject to a protective order in perpetuity, leaving the onus on the receiving parties to return to court to contest the confidentiality. (Transcript, pg. 8, line 14 – pg. 10, line 23) App. 302-303.

Ultimately, the District Court denied the motion for a protective order, specifically ordering Defendants-Appellants to produce any requested law enforcement investigative reports generated within 96 hours of the incident.

The order did not address whether any other documents were subject to protection or privilege, placing the burden on the parties to identify any such documents for which further ruling was needed. (Nov. 1, 2017 Order) App. 118-123. The District Court affirmed its original ruling in a second order dated December 22, 2017. (Dec. 22, 2017 Ruling) App. 148-153.

STANDARD OF REVIEW

Plaintiffs-Appellees agree that the standard of review for district court discovery rulings is for abuse of discretion. *Mediacom Iowa L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004).

To the extent the district court's ruling hinged on statutory interpretation, Plaintiffs-Appellees also agree that the standard of review is for correction of errors at law. *Iowa Film Production Services v. Iowa Dept. of Economic Development*, 818 N.W.2d 207, 217 (Iowa 2012).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANTS-APPELLANTS TO PRODUCE POLICE INVESTIGATIVE REPORTS WITHOUT A PROTECTIVE ORDER IN PLACE.

a. IOWA RULE OF CIVIL PROCEDURE 1.504 PROVIDES THE PROPER FRAMEWORK FOR ANALYSIS OF THIS DISCOVERY DISPUTE

The threshold question before this Court is whether the District Court properly denied Defendants-Appellants' Motion for a Protective Order. Defendants-Appellants' incorrectly give priority to analysis of this case under Iowa Code § 22.7. *Mediacom*, 682 N.W.2d at 69. In *Mediacom*, the Court was asked to address whether information alleged to constitute trade secrets under § 22.7(11) was discoverable or subject to a protective order. The Court, in ordering discovery without a protective order noted:

> Section 22.7 would not automatically dictate absolute protection of the information sought through discovery. Iowa Code chapter 22 pertains to parties seeking access to government documents and ordinarily has no application to discovery of such information in litigation. Plaintiff is not seeking access to government documents as a member of the general public; it is seeking access to such records as a plaintiff in litigation with a governmental entity….*[s]ection 22.7 does not trump our discovery rules*.
>
> *Mediacom*, 682 N.W.2d at 69. (emphasis added).

Iowa Rule of Civil Procedure 1.504 thus provides the framework for analysis. Rule 1.504 provides that a court may grant a protective order upon a showing of good cause in order to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense." The party seeking the protective order bears the burden of establishing the basis for a protective order. *Id.* at 68.

i. DEFENDANTS-APPELLANTS HAVE FAILED TO ESTABLISH THAT THE POLICE INVESTIGATIVE REPORTS ARE "CONFIDENTIAL"

Defendants-Appellants' request for a protective order rests on their claim that the requested documents are confidential under Iowa Open Records Act and thus deserving of protection. Where the protective order is motivated by a need to protect confidential information, the Court in *Mediacom* set forth a two part test: first, the information subject to the protective order must actually be confidential; and second, there must be "good cause" to grant the protective order. *Id.* at 67-68.

Defendants-Appellants' argument that the police investigative reports constitute confidential information rests on Iowa Code § 22.7(5). Chapter 22 codifies Iowa's Open Records Act and provides for a broad right of all persons to examine public documents while enumerating specific categories of documents that are exempt from disclosure. *See* I.C.A. § 22.2(1) (2015).

In passing the Open Records Act, the Iowa Legislature "made the decision to open Iowa's public records." *American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Comm. Sch. Dist.*, 818 N.W.2d 231, 232 (Iowa 2012). The Act allows "public examination of government records to ensure the government's activities are more transparent to the public it represents" and "to remedy unnecessary secrecy in conducting

the public's business." *Id*. The goal of disclosure enshrined in the Act is "to facilitate public scrutiny of the conduct of public officers." *Id*. In order to fulfill these purposes this Court has "determined that the general assembly intended that we broadly interpret the disclosure requirement, but narrowly interpret the confidentiality exceptions." *Id.* at 233.

Defendants-Appellants rely primarily on the confidentiality exception found in §22.7(5) (2017):

> The following public 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:
>
> …
>
> Peace 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.
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> I.C.A. §22.7(5) (2017) (emphasis added).

1. THE SUPREME COURT PRECEDENT OF *HAWK EYE V. JACKSON* PROVIDES THE PROPER FRAMEWORK FOR ANALYSIS OF IOWA CODE SECTION 22.7(5).

The parties disagree as to the proper framework for interpreting section 22.7(5). Plaintiffs-Appellees argue that *Hawk Eye v. Jackson* controls; Defendants-Appellants argue that *Atlantic* overturned *Hawk Eye* and thus controls. *Atlantic*, 818 N.W.2d 231; *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994).

In 1994 the Supreme Court had occasion to analyze the overlap between discovery in civil litigation and Iowa Code § 22.7(5) in *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994).

The facts of *Hawk Eye* are nearly identical to the facts at hand here: a local news reporter was investigating allegations of misconduct of a particular peace officer within the national context of the Rodney King police brutality case. *Hawk Eye*, 521 N.W.2d at 751. The alleged misconduct was the subject of civil litigation. *Id*. The reporter requested, through Iowa's Open Records Act, materials related to a closed internal investigation of the officer's wrongdoing. *Id*. at 752. The county attorney resisted on the basis of both Iowa Code § 22.7(5) (1994) and Iowa Code § 622.11. *Id*. at 752. The primary difference between the facts in *Hawk Eye* and this case is that *Hawk Eye*

involved an actual public records request; the setting of this case is within the framework of protective orders in discovery.

Upon holding that sections 22.7(5) and 622.11 serve essentially the same legislative purpose, the Court in *Hawk Eye* employed a balancing test to determine if the requested records were subject to disclosure under then-existing section 22.7(5) or section 622.11. *Id.* at 753. The Court held that an official claiming privilege under one of these statutory provisions must satisfy a three-part test: "(1) a public officer is being examined; (2) the communication was made in official confidence; and (3) the public interest would suffer by disclosure." *Hawk Eye,* 521 N.W.2d at 753. The Court's focus was on the third prong of weighing the public harm of disclosure versus the public good. *Id*.

Ultimately the Court in *Hawk Eye* found the public good of disclosure outweighed the public harm and ordered disclosure of the investigative file. *Id.* at 754. Key to the Court's holding were the facts that: there were no confidential informants involved; there was no ongoing investigation; there were no concrete concerns of intimidation or retaliation against witnesses; and there were no concerns of implicating innocent suspects as there was only one investigative target. *Id.* at 753.

The use of the balancing test in *Hawk Eye* to determine whether investigatory files should be disclosed under § 22.7(5) was first employed by this Court almost thirty-five (35) years ago in *State ex. rel. Shanahan v. Iowa Dist. Court For Iowa County*, 356 N.W.2d 523 (Iowa 1984). Since that time, this Court has maintained that "it is appropriate for the court to consider the nature of the investigation and whether it is continuing or completed." *Shannon by Shannon v. Hansen*, 469 N.W.2d 412, 415 (Iowa 1991).

Eighteen years after *Hawk Eye* was decided, this Court issued the decision in *ACLU Found. Of Iowa, Inc. v. Records Custodian, Atlantic Community School District*, 818 N.W.2d 231 (Iowa 2012). *Atlantic* involved a petition filed by the American Civil Liberties Union Foundation of Iowa, Inc., seeking an injunction ordering the Atlantic Community School District to comply with a request for information made under Iowa's Open Records Act. *Atlantic*, 818 N.W.2d at 232. The records sought related to the specific discipline imposed on two school employees who conducted a "locker room strip search" on five female students at school. *Id.*

Similar to *Hawk Eye*, the dispute in *Atlantic* arose following a public records request rather than in the context of discovery. *Id*. Unlike the Court in *Hawk Eye*, the Court in *Atlantic* was tasked not with analyzing section 22.7(5), but rather 22.7(11), which at the time exempted the following from disclosure

under the Open Records Act: "Personal information in *confidential personnel records* of public bodies including but not limited to cities, boards of supervisors and school districts." I.C.A. § 22.7(11) (2009) (emphasis added).

In reaching the conclusion that these records were confidential, this Court outlined the history of prior cases that directly involved the issue of public dissemination of records under §22.7(11), and stated:

> "In summary, to determine if requested information is exempt under 22.7(11), we must determine whether the information fits into the category of "[p]ersonal information in confidential personnel records." We do this by looking at the language of the statute, our prior case law, and case law from other states. If we conclude the information fits into this category, then our inquiry ends. If it does not, we will then apply the balancing test under our present analytical framework."
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> *Atlantic*, 818 N.W.2d at 235.

In reviewing prior case law, the Court made no references to the *Hawk Eye* ruling on section 22.7(5). This Court noted that the ACLU of Iowa had requested records or information describing the discipline imposed on the two employees. *Id.* at 235. Accordingly, the Court was first required to determine whether Iowa Code § 22.7(11) categorized the requested information as "[p]ersonal information in confidential personnel records." *Id.*

The Court found the documents at issue fell within that category and relied on its earlier holding in *Des Moines Indep. Cmty. Sch. Dist. v. Des*

Moines Register & Tribune Co., 487 N.W.2d 666 (Iowa 1992), in which the Court determined that performance evaluations were exempt from disclosure. Specifically, the Court noted that these records were akin to in-house job performance records which the Court in *Des Moines Indep. Cmty. Sch. Dist.* had previously found were exempt from disclosure under §22.7(11) without performing a balancing test. *Atlantic*, 818 N.W.2d at 235-36. On that basis, the Court held that the requested records were exempt from disclosure. *Id.* at 235.

Defendants-Appellants argue that *Atlantic* overturned *Hawk Eye* and therefore provides the framework for analysis. *Atlantic*, however, makes no reference to the precedent in *Hawk Eye*. The Court in *Atlantic* does not state that it is overturning prior precedent to the contrary. *Atlantic* dealt with section 22.7(11) and not section 22.7(5), the provision at issue in this case. Additionally, § 22.7(11) explicitly states that personnel records are "confidential". *See* I.C.A. §22.7(11) (2009) ("Personal information in *confidential personnel records*…") (emphasis added). Such language does not exist in section 22.7(5). Thus, this Court should take into account this wording of §22.7(11). *See State v. Ahitow*, 544 N.W.2d 270, 273 (Iowa 1996) ("We do not interpret statutes in a way that makes portions of them irrelevant or redundant.").

Defendants-Appellants argue that *Atlantic* has been followed by the Polk County District Court in *Allen v. Iowa Dept. of Public Safety*. Importantly, *Allen* involved a request under § 22.7(5) for records relating to *unsolved homicides*. *See Allen v. Iowa Dept. of Public Safety*, Case No. EQC074161 (Polk County Dist. Ct. Mar. 7, 2014). Although the district court determined that *Atlantic* should apply, it went on to find that the records were confidential given the ongoing investigations, and then further went on to apply the balancing test. *Id.*

Additionally, Defendants assert the Iowa Public Information Board has followed the holding in *Allen*, and found that the language "if that information is related to an ongoing investigation" of §22.7(5) is irrelevant when it comes to the confidentiality of police investigative reports. *In the Matter of Cali Smith and City of Nevada Police Dept.*, Complaint No. 14 FC:0096 (Jan. 9, 2015). However, this reasoning is contrary to that of the Iowa Court of Appeals in *State v. Tekippe*, 771 N.W.2d 653, No. 07-1840, 2009 WL 1492660 (Iowa Ct. App. 2009). In *Tekippe*, the Iowa Court of Appeals held that information that is covered by §22.7(5) is confidential so long as it is a part of "*an ongoing investigation*." No. 07-1840, 2009 WL 1492660, at *3 (emphasis added).

Atlantic does not operate to overturn *Hawk Eye*, the case most on-point in the present controversy. The proper framework for analysis is the public good/public harm balancing test employed in *Hawk Eye*. 521 N.W.2d at 753.

Finally, Defendants-Appellants cannot ignore the prefatory language of section 22.7 which states, "The following public records shall be kept confidential, unless otherwise ordered by a court". I.C.A. §22.7 (2017).

"Legislative intent is expressed by omission as well as by inclusion of statutory terms." *Ovens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 193 (Iowa 2011); *see also Chesnut v. Montgomery*, 307 F.3d 698, 701-02 (8th Cir. 2002) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion"). The legislature incorporated the prefatory clause, "unless otherwise ordered by a court" into § 22.7, which indicates that the following provisions provide a qualified, not absolute, privilege. *Hawk Eye*, 521 N.W.2d at 753. "When interpreting the meaning of the statute, the courts give effect to all words in the statute unless no other construction is reasonably possible." *State v. Osmundson*, 546 N.W.2d 907, 910 (Iowa 1996). By incorporating this language into section 22.7, the legislature granted to the judiciary the authority to order disclosure, even if an enumerated exemption

is met. *See Brown v. Iowa Legislative Council*, 490 N.W.2d 551, 554 (Iowa 1992) (noting that "the legislature placed an escape clause in the public records law.")

As stated above, Iowa Code § 22.7 creates a qualified immunity such that the courts retain the discretion to order records be released that are confidential under the statute. *Hawk Eye*, 521 N.W.2d at 753. Specifically, §22.7 states, in relevant part, "[t]he following public records shall be kept confidential, *unless otherwise ordered by a court*, by the lawful custodian of the records, or by any other person duly organized to release such information." (emphasis added). Interpreting the statute in *Simington v. Banwart*, the court stated:

> "[we] do not view the 'unless otherwise ordered by a court" language in section 22.7 as authority for a court to order release of an otherwise confidential public record whenever it thinks that would be fair and appropriate. Rather, we believe this language is meant to provide an escape valve when strict application of literal language of the exemption would undermine the exemption itself... or some other provision of law."
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> *Simington v. Banwart*, 786 N.W.2d 520, No. 09-1561, 2010 WL 2089348, at *4 (Iowa Ct. App. 2010).

Furthermore, this Court has stated that the "otherwise ordered" language is "an escape clause" that can be used by the district court to order disclosure where a fundamental right was at issue. *Brown*, 490 N.W.2d at 554.

a. UNDER THE *HAWK EYE* BALANCING TEST, THE PUBLIC GOOD OF DISCLOSURE OUTWEIGHTS THE PUBLIC HARM SUCH THAT THE RECORDS ARE NOT CONFIDENTIAL.

Similar to *Hawk Eye*, here the public good of disclosure outweighs the risk of harm to the public. In this case, the investigation is closed; there are no confidential informants; there are no alleged concerns of intimidation or retaliation against witnesses; there are no alleged concerns of implicating innocent suspects to a criminal investigation. As the Court in *Hawk Eye* held: "There can be little doubt that allegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern." *Hawk Eye*, 521 N.W.2d at 754.

This Court has recognized that "[t]he image presented by police personnel to the general public is vitally important to the police mission" and that the image presented by police personnel "also permeates other aspects of the criminal justice system and impacts its overall success." *Civil Service Com'n of Coralville v. Johnson*, 653 N.W.2d 533, 538 (Iowa 2002). Accordingly, it is vitally important to the overall health of the justice system that police officers not only earn but "maintain the public trust at all times by conducting themselves with good judgment and sound discretion." *Johnson*, 653 N.W.2d at 538. Further, this Court has stated that the Open Records Act

"seeks to prevent government from secreting its decision making activities from the public, on whose behalf it is its duty to act." *Gannon v. Board of Regents*, 692 N.W.2d 31, 38 (Iowa 2005). In fact, the Act itself "is designed to open the doors of government to public scrutiny." *Id.* at 38. Specifically, the Act "invites public scrutiny of the government's work, recognizing that its activities should be open to the public on whose behalf it acts." *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999).

In their appeal, Defendants assert that the public interest is strongest "when the records concern defective and/or dangerous products or goods." (Defendants-Appellants' Brief pg. 25). This statement is belied by that of this Court in *Johnson v. Civil Service Com'n of City of Clinton*, in which the Court recognized that "the welfare of the general public is of paramount concern" in cases involving police misconduct. *Johnson v. Civil Service Com'n of City of Clinton*, 352 N.W.2d 252, 255 (Iowa 1984). In so finding, this Court noted that it simply "cannot ignore what the public good requires", even if the public good requires action that may seem unfair. *Id.* at 255.

Similarly, the Seventh Circuit has noted that "it goes without saying that police misconduct is a matter of public concern." *Martinez v. Hooper*, 148 F.3d 856, 859 (7th Cir. 1998). In fact, courts across the country have recognized that public disclosure of records related to allegations of and

investigations into police misconduct is necessary not only to serve the significant public interest that exists with respect to the information contained therein. *See e.g.*, *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D. NY 1985) ("Misconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist."); *Welsh v. City and County of San Francisco*, 887 F.Supp. 1293, 1302 (N.D. Cal. 1995) ("The public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely."), but additionally, that public scrutiny is necessary in order to remedy the underlying cause of the problem. *See e.g.*, *Doe v. Marsalis*, 202 F.R.D. 233, 238-239 (N.D. Ill. 2001) (discussing the "multiple layers of victims" caused by police misconduct and finding "these issues require public debate and appropriate media scrutiny" in order to bring an end to "[t]his ugly and expensive syndrome".). The above cited cases and this Court's finding in *City of Clinton,* clearly support a finding that the public interest in access to court records is strongest when those records are related to allegations of police misconduct.

In *Richmond Newspapers, Inc. v. Virginia*, the United States Supreme Court, addressing the issue of whether members of the press were improperly

denied access to a criminal trial, recognized the "significant community therapeutic value" that is served through the transparent administration justice. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-71 (1980). The Court noted that "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Id.* at 571. In fact, the Court found that "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a dark corner or in any covert manner" and further that "it is not enough to say that results alone will satiate the natural community desire for satisfaction." *Id.* The Court held that "[t]o work effectively, it is important that society's criminal processes satisfy the appearance of justice [citations omitted], and the appearance of justice can best be provided by allowing people to observe it." *Id.*

Although Plaintiffs-Appellees in this case understand and respect the purpose of the secrecy provided to the grand jury during its deliberations, the following quote from *Richmond* aptly states the appropriate reasoning for now lifting the cloak of confidentiality: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* A similar sentiment was recognized

and adopted in this State in *Iowa Freedom of Information Council v. Wifvat*, where this Court stated "[o]ur society has less difficulty accepting that which it observes than that which it is not permitted to observe." *Iowa Freedom of Information Council v. Wifvat*, 328 N.W.2d 920, 923 (Iowa 1983).

In light of the above cited precedent, this Court should consider the significant harm that is caused by refusing to allow public inspection of documents used by grand juries and internal investigators in making determinations regarding whether to bring criminal charges and/or to impose disciplinary sanctions in the face of allegations of police misconduct. Simply stated, the information cited *infra* indicates that there exists a substantial need for more transparency than that which is otherwise afforded under the current system.

In 2015, the Associated-Press, in collaboration with the non-partisan research organization NORC at the University of Chicago concerning racial divisions and the public's view of law enforcement and the criminal justice system. "Law Enforcement and Violence: The Divide between Black and White Americans", The Associated Press-NORC Center for Public Affairs Research at the University of Chicago (2015), available at: http://www.apnorc.org/projects/Pages/HTML%20Reports/law-enforcement-

and-violence-the-divide-between-black-and-white-americans0803-9759.aspx#study.

This survey revealed that a majority (41%) of Americans in this country are of the opinion that police officers accused of misconduct are treated "too leniently" by the justice system (vs. 40% who say police are treated fairly and 17% who say they are treated too harshly). This same poll also found that a majority (47%) of Americans are of the belief that the major reason behind police violence against citizens is the leniency this police officers receive from the courts and prosecutors (vs. 31% who say it's a minor reason and 21% who say it's no reason at all). When these same figures are broken down along lines of race, the survey reveals concerning statistics regarding the perception in the black community of how police officers accused of misconduct are treated by the justice system and the courts. Specifically, the survey found that the vast majority (70%) of blacks believe that police officers are treated too leniently by the justice system (vs. 32% of whites); an even larger majority (75%) of this same community views minimal consequences and lack of prosecution as a major precipitating factor in the continuation of this sordid cycle (vs. 40% of whites).

Put simply, the general public has serious concerns about the police departments and local prosecutors' investigations into allegations of misconduct by local police departments and local prosecutors.

The truth of this statement is demonstrated by two facts revealed in the Associated Press-NORC study: (1) the vast majority (71%) of all Americans believe that requiring video recording of all on-duty interactions would be extremely or very effective in preventing violence against citizens; and (2) a true majority (51%) of all Americans believe that one of the most effective way to help prevent police violence against civilians is through the appointment of a special prosecutor whenever a civilian is injured or killed by police. These facts lead to two reasonable conclusions regarding the general public's perception of a local police department and local prosecutor office's ability to investigate and address citizen complaints: (1) as it relates to the use of body-cameras or similar video recording devices, the perception is that police officers cannot be trusted to provide open and honest reports and/or statements regarding incidents in which they or their colleagues are alleged to have engaged in misconduct; (2) regarding the appointment of special prosecutors, the perception is that the relationship between the local prosecutor's office and the local police department creates a bias in favor of

the department that prevents the local prosecutor from fairly and adequately redressing citizen complaints.

The above cited statistics paint a concerning picture of the public's lack of confidence regarding appropriate investigations of police misconduct and the public benefit that results from enhanced transparency and public oversight of police departments. This lack of confidence is a reality with respect to the Cedar Rapids Police Department and the Linn County's prosecutor's office.[1] In this light, this Court should consider the great public interest in transparency, as well as the ramifications of continuing to shield from the public dissemination, not only the investigative reports and other documents covered by Judge Grady's November 1, 2017 order, but the information used and relied upon during the internal investigation and grand jury proceedings as well. Because, where this lack of confidence is present but has been left un-redressed, the onus must fall on the courts to make the

[1](*See*,http://cbs2iowa.com/news/local/jerime-mitchell-refutes-officers-account-of-nov-altercation; *and*, https://www.cbsnews.com/news/no-charges-for-lucas-jones-white-iowa-police-officer-who-paralyzed-jerime-mitchell-in-shooting/: *and*, http://abcnews.go.com/US/questions-linger-dash-cam-video-man-shot-cedar/story?id=44087880; *and*, http://iowapublicradio.org/post/cedar-rapids-police-officer-wont-be-indicted-some-say-grand-jury-should-have-been-postponed; *and* http://www.thegazette.com/subject/opinion/staff-editorial/justice-talks-need-maximum-openness-20171028; *and* *http://cbs2iowa.com/news/local/special-report-whats-different-one-year-after-jerime-mitchell-was-shot*; *and* http://www.thegazette.com/subject/news/government/talks-continue-on-community-policing-racial-profiling-in-cedar-rapids-20171214

strides necessary to begin the process of restoring confidence. *See Doe*, 202 F.R.D. at 238 (Ordering disclosure of confidential documents "[i]n the hopes of further stimulating public debate and media scrutiny of the [defendant's] past practices…").

Accordingly, the best way to restore the confidence in the decisions of the internal investigators as well as the grand jury is through a public airing of the underlying documents, which presumably support the conclusions reached by those bodies. This process is necessary in order to quell the disconcert caused by the grand jury's decisions not to pursue criminal charges and by the Internal Investigator's choice to refrain from taking disciplinary action against the Defendant, Lucas Jones.

b. EVEN UNDER THE *ATLANTIC* FRAMEWORK, THE RECORDS ARE NOT CONFIDENTIAL UNDER EITHER A BALANCING TEST OR A PLAIN LANGUAGE TEST.

Plaintiffs-Appellees do not concede that *Atlantic* controls; however, even application of the *Atlantic* framework to this case leads to the same conclusion that the police investigative reports that are the subject of this interlocutory appeal are not confidential.

Under *Atlantic*, to determine if a confidentiality exemption applies to a given public record, the court first looks to the plain language of the section

22.7 exemption. *Atlantic*, 818 N.W.2d at 233. Only where the plain language fails to produce a clear result does the Court proceed to a balancing test to determine if disclosure is proper. *Id.* at 234-35.

The District Court ruling at issue properly held that section 22.7(5) created ambiguity and also suggested the need to employ a balancing test:

> The Court construes the statute as providing that peace officer's investigative reports, privileged records and 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 and specific location and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential, 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. (App. 152).

That holding was proper and therefore, even under *Atlantic*, the District Court correctly proceeded to conduct the *Hawk Eye* balancing test.

To the extent this Court finds there is no ambiguity, the language of section 22.7(5) clearly states that peace officer investigative reports are only confidential to the extent that they are part of an *ongoing investigation*. I.C.A § 22.7(5) (2017). In the case at hand, it is undisputed there is no ongoing investigation concerning the November 1, 2016 officer-involved shooting of Plaintiff-Appellant Jerime Mitchell. Therefore, even using the plain language test of *Atlantic*, the confidentiality exemption has not been met.

Defendants-Appellants argue in their brief that the clause "if that information is part of an ongoing investigation" only refers to the disclosure of "specific portions of electronic mail and telephone billing records". (Defendants-Appellants' Brief pg. 15). In support of this argument, Defendants-Appellants cite to the "last preceding antecedent" doctrine found in *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 376, 380 (Iowa 2000). Defendants-Appellants did not provide the full extent of this Court's discussion in *Comprehensive Petroleum.* After the passage Defendants-Appellants cite, the Court continued, "[w]hile we adhere to the doctrine of last preceding antecedent, we also recognize that punctuation is not always a highly persuasive factor in interpreting a statute, and will not defeat clear legislative intent." *Id*. Therefore, the "last preceding antecedent does not apply, giving rise to ambiguity in the statute in and of itself, resulting in application of the balancing test.

Whether the plain language test of *Atlantic* or the balancing test of *Hawk Eye* is applied in the case at hand, the result is the same: the police investigative reports are not confidential and the grounds for a protective order have not been met.

ii. EVEN IF THE RECORDS ARE CONFIDENTIAL, DEFENDANTS-APPELLANTS HAVE FAILED TO ESTABLISH THAT GOOD CAUSE EXISTS TO GRANT A PROTECTIVE ORDER

Defendants-Appellants have also failed to establish the second prong required for the granting of a protective order: that "good cause" exists under Rule 1.504.

Protective orders are not entered into lightly. *Comes v. Mircosoft Corp.*, 775 N.W.2d 302, 305 (Iowa 2009). "To establish 'good cause', a party seeking the protective order must make 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Mediacom*, 682 N.W.2d at 67-68. The district court should analyze this factual showing using three criteria: "the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." *Id.*; *see also, Comes*, 775 N.W. 2d at 305.

1. DEFENDANTS-APPELLANTS HAVE FAILED TO DEMONSTRATE WITH PARTICULARITY AND SPECIFICITY THAT SUBSTANTIAL HARM WILL RESULT FROM DISCLOSURE

Defendants-Appellants, as the party seeking the protective order, must set forth more than mere conclusory or speculative statements describing the

"substantial harm" that will result from disclosure of the requested documents without a protective order.

Defendants-Appellants seem to argue a few different potential harms: first, that Plaintiffs-Appellees may disseminate the documents; dissemination might discourage thorough criminal investigations and stringent internal review of police conduct; dissemination might cause annoyance, embarrassment, oppression, and undue burden or expense; members of the public may be deterred from participating in criminal investigations; and dissemination may unduly taint the jury pool through pretrial publicity. (Defendants-Appellants' Brief pgs. 20-22).

Defendants-Appellants have provided no factual basis to sustain their position; they merely offer conclusory, speculative statements. Such statements are an insufficient basis for a good cause finding. *See Comes*, 775 N.W.2d at 305; *see also Mediacom*, 682 N.W.2d at 67-68.

In their motion, Defendants cite *Gutierrez v. Benavidas*, a case from the District Court in the Southern District of Texas, in support of their argument that "there is good cause to protect these documents from public disclosure." (Defendants-Appellants' Brief pg. 20). However, *Gutierrez* offers no support for the Defendants' position in this case, as the only documents that were protected from public disclosure in that case were "documents which do not

constitute records indicating official misconduct, abuse of power, or constitutional violations by [d]efendants". *Gutierrez v. Benavidas*, 292 F.R.D. 401, 406 (S.D. Tex. 2013). In reaching this conclusion, the court relied on other cases in which officers' personnel files were publically disclosed. *Id.* at 405-406. Specifically, the court noted that in the cases where disclosure was ordered, the only limitation placed on disclosure was that records such as tax, salary, and medical information be protected from disclosure. *Id.* Thus, *Gutierrez* offers no support for the Defendants' argument that records such as those covered by the Order in this case, *i.e.* investigative reports and communications generated within the first 96 hours after the incident, should be protected from public disclosure.

Defendants' citations to *General Elec. Capital Corp. v. Lear Corp.* and *Cannon v. Lodge* are each equally unavailing. In *General Elec.*, the District Court of Kansas did not reach the merits of the asserted confidentiality privilege because the parties reached an agreement regarding a protective order in that case, however, the court ultimately overruled the defendants' objection based on confidentially. *General Elec. Capital Corp. v. Lear Corp.*, 215 F.R.D. 637, 643 (D. Kan. 2003). Similarly, the protective order in *Cannon v. Lodge* shielded only documents which the court found could be legitimately said that the defendants had an expectation of privacy with

respect thereto. *Cannon v. Lodge*, No. Civ. A. 98-2859, 1999 WL 600374, at *1 (E.D. La. 1999).[2] Here, although the District Court did not reach this issue directly, the language employed in both orders clearly suggests that Defendants-Appellants are unable to show good cause justifying the entry of a protective order in this case.

In their appeal, Defendants-Appellants claim that the absence of a protective order in this case would have a chilling effect on criminal investigations and internal review of police misconduct. (Defendants-Appellants' Brief pg. 20). Specifically, the Defendants-Appellants assert that a protective order is necessary in order to ensure "stringent internal review of police conduct"[3] and that the absence of a protective order in this case "would tend to discourage thorough criminal investigations". (Defendants-Appellants' Brief pg. 20). Importantly, these are the same arguments that have been resoundingly rejected by numerous courts across the country. *See Wood v. Breier*, 54 F.R.D. 7, 12-13 (E.D. Wis. 1972); *Mercy v. Suffolk County*, 93

[2] In *Cannon*, the district court ordered that the only information protected from discovery was that "regarding defendants' marital status, legitimacy of children, identity of fathers of children, welfare payments, family fights, medical records, other than psychological testing done to determine whether defendants were fit to be deputy sheriffs, and defendants tax records will be removed, but all other information in the personnel file will be produced." *Cannon*, No. Civ. A. 98-2859, 1999 WL 600374 at *1.

[3] Defendants make this assertion despite explicitly acknowledging the fact that the Honorable Judge Grady "has not yet ordered the production of personnel files or **internal review documents**". (*See* Defendants-Appellees' Brief p. 21) (emphasis added).

F.R.D. 520, 522 (E.D. N.Y. 1982); *King v. Conda*, 121 F.R.D. 180, 192-93 (E.D. N.Y. 1988); *Welsch v. City and County of San Francisco*, 887 F.Supp. 1293, 1300-01 (N.D. Cal. 1995)*; Wiggins v. Burge*, 173 F.R.D. 226, 229-30 (N.D. Ill. 1997)). In fact, in rejecting these same arguments, many courts have come to the exact opposite conclusion, *i.e.* that public disclosure not only facilitates criminal investigations, but actually ensures honesty in the police review process. *See e.g.*, *Wiggins*, 173 F.R.D. at 229-230.

Defendants-Appellants' contention that public disclosure would inhibit stringent internal review of police conduct seemingly implies that officers would be less than fully truthful and honest in providing information during an internal investigation if that information is subject to public dissemination. This Court has held that the Citizens of Iowa should not "be subjected to an officer who has no compunction about stretching the truth concerning his conduct involving citizen's constitutional rights." *Johnson*, 653 N.W.2d at 542. In fact, the Court has held that such conduct is "detrimental to the public interest." *Id.* Accordingly, this Court should make it clear that an officer's obligation to be truthful during internal investigations into their own or their colleagues' misconduct is not contingent on whether his or her statements and/or reports will be subject to public dissemination.

In *King v. Conde*, the District Court for the Eastern District of New York rejecting the contention that public dissemination will inhibit internal reviewing on finding that "there is no empirical evidence…supporting th[is] contention." *King v. Conde*, 121 F.R.D. 180, 193 (E.D. NY 1988). Accordingly, the court held that "[w]ithout some basis for believing that real police officers conceal or distort their statements to internal investigatory bodies, courts should reject this contention." *Id.* In fact, the court specifically rejected this contention outright, finding:

> [I]f the fear of disclosure in civil rights lawsuits does have some real effect on officer's candor, the stronger working hypothesis is that fear of disclosure is more likely to increase candor than to chill it.

King v. Conde, 121 F.R.D. at 193.

The court based this conclusion in part on the "real possibility that officers working in closed systems will feel less pressure to be honest than officers who know that they may be forced to defend what they say and report." *Id.* (citing *Kelly v. City of San Jose*, 114 F.R.D. 653, 655 (N.D. Cal. 1987)). Ultimately, the court in *King* concluded that this argument requires empirical evidence, and that the "burden rests on the party seeking to limit disclosure to show such empirical support." *Id.*; *see also Wiggins*, 173 F.R.D. at 229-30 ("Before determining that there is a chilling effect, the court should

have some empirical evidence that police officers conceal or distort statements in their internal reports."). Similarly, the district courts in Illinois, Wisconsin and California each rejected this same contention on finding the underlying premise fundamentally flawed. *Wiggins*, 173 F.R.D. at 229-30; *Wood,* 54 F.D.R. at 12-13; *Welsh*, 887 F.Supp. at 1300-01.

In each of the above cited cases, the district court specifically called into question the conclusion that officers even considered the possibility of disclosure at the time of making their reports. *See e.g.*, *Wiggins*, 173 F.R.D. at 229-30 ("[T]his [c]ourt agrees with its distinguished colleague in New York, … that the threat of future disclosure of this type of information in civil rights litigation is probably not of great importance to the officers at the time they file their reports."). In *Wood*, the court noted that at the time of reporting, officers "who reported did so under threat of administrative sanctions knowing that their reports might be used against themselves or their fellow officers in either criminal or departmental disciplinary actions." *Wood*, 54 F.D.R. at 13. Accordingly, the court found it "doubtful that the addition of possible civil sanctions to criminal and departmental ones would end candor or result in refusal to make reports." *Id.* The district court in *Welsh* reached a similar conclusion, however, based its reasoning on the fact that department rules required officers to be truthful and not evasive "when questioned on

matters relating to their employment with the police department …by one designated by a superior officer for this purpose". *Welsh,* 887 F.Supp. at 1300.

In *McGee v. City of Chicago*, the court noted that it "strongly disagrees" with the defendants' assertion in that case the public interest is better served through maintaining confidentiality with respect to these types of files. *McGee v. City of Chicago,* No. 04 C 6352, 2005 WL 3215558, at *4 (N.D. Ill. 2005). In fact, the court in that case concluded that "the effectiveness of the … internal investigations is strengthened by public review of C[ompliant] R[egister] files produced in civil rights litigations." *Id.* Relying on the conclusion reached in *King*, the court stated its agreement with the reasoning that officers are more likely to be truthful or candid if they are aware that their reports will be subject to disclosure to litigants in discovery. *Id.* However, the court further found that disclosure was warranted because "public and media scrutiny over how allegations of police misconduct are handled and investigated by the police department encourages the police department to fairly and honestly investigate and resolve such allegations." *Id.*

As to the Defendants-Appellants' claim that the absence of a protective order would discourage thorough criminal investigations, this argument should similarly be rejected by this Court. Defendants argument is based on their belief that public dissemination "*could* cause annoyance,

embarrassment, oppression, and undue burden and expense", thereby deterring members of the public from participating in criminal investigations. (*See* Defendants-Appellants' Brief pg. 20). Again, however, Defendants have offered no definitive evidence in support of this claim, nor do they assert to whom or what harm could occur beyond offering generalized and conclusory statements. Rather, Defendants assert only that these undesirable results "could" result from public dissemination. These claims are simply not sufficient. *See Iowa Film Production Services*, 818 N.W.2d at 230 (rejecting argument "presented entirely at abstract level"). Rather, a defendant is required to put forth "a particular and specific demonstration of fact". *Comes*, 775 N.W.2d at 305.

Finally, Defendants-Appellants contend that counsel for Plaintiffs-Appellees will disseminate information prior to trial and thus taint the jury pool. (Defendants-Appellants' Brief pg. 22). This case has already received significant media attention in Cedar Rapids, even before the civil action was initiated.[4] Defendants-Appellants in their brief point to a single news article

[4] *See e.g.*, http://cbs2iowa.com/news/local/jerime-mitchell-refutes-officers-account-of-nov-altercation; *and*, https://www.cbsnews.com/news/no-charges-for-lucas-jones-white-iowa-police-officer-who-paralyzed-jerime-mitchell-in-shooting/: *and*, http://abcnews.go.com/US/questions-linger-dash-cam-video-man-shot-cedar/story?id=44087880

from the time of filing in which counsel for Jerime Mitchell made statements to the press. (Defendants-Appellants' Brief pgs. 27-28).

None of counsel's quoted statements in any way suggest that he has or will in any way improperly disclose information to taint the jury pool. Plaintiffs-Appellees are just as interested in a fair and impartial jury as are Defendants-Appellants. Furthermore, all counsel in this case are already bound by Iowa Rules of Professional Conduct governing trial publicity. *See* Iowa R. of Prof'l Conduct 32:3.6(a).

Defendants-Appellants appear to argue that Plaintiffs-Appellees must make some showing of how dissemination will further the merits of their claims. (Defendants-Appellants' Brief pg. 28). That argument is nothing more than burden shifting. The burden for obtaining a protective order rests completely on the shoulders of Defendants-Appellants. Plaintiffs-Appellees need not make any showing whatsoever. The fact that the lack of a protective order or the ability to disseminate information may benefit them is wholly irrelevant to the issue. In fact, the default context in discovery is that the materials are not subject to protective orders.

In the absence of demonstrated fact supporting any of harm Defendants-Appellants allege will occur, Defendants-Appellants have failed to establish that substantial harm justifies the entry of a protective order. *See*

Farnum v. G.D. Searle & Co., 339 N.W.2d 384, 391 (Iowa 1983). In their attempt to establish that serious and substantial harm would result from public dissemination, Defendants have asserted nothing more than "stereotyped and conclusory statements", and such are insufficient to establish good cause for the entry of a protective order. *Comes*, 775 N.W.2d at 305. Accordingly, the District Court properly denied the Defendants' motion.

2. DEFENDANTS-APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THE PROPOSED PROTECTIVE ORDER WAS NARROWLY DRAWN OR PRECISE, AS IT PROVIDED THE DEFENDANTS WITH CARTE BLANCHE TO UNILATERALLY AND RETROACTIVELY DEEM ANY AND ALL DOCUMENTS CONFIDENTIAL

In his November 1, 2017 order, the Honorable Judge Grady specifically stated that "[t]he order covers any investigative reports or electronic communications generated or filed within 96 hours of the incident, but does not apply to reports or memorandum generated solely for purposes of a police internal review of the incident." (November 1, 2017 Order, at pg. 5) App. 122. The order recognizes that some documents may still be "subject to confidentiality or privilege", and allows "any party" to lodge an objection based thereon. In the event the parties disagree regarding a particular document's designation, the order further provides a mechanism for court intervention to address the claim of confidentiality and/or privilege.

(November 1, 2017 Order, at pg. 5) App. 122. Thus, the November 1, 2017 order appropriately places the burden of establishing good cause on the party asserting the claim of privilege and/or confidentiality.

This Court has recognized that in interpreting I.C.A. 1.504, helpful guidance is supplied through reliance on federal cases addressing Rule 26(c) of the Federal Rules of Civil Procedure. *See Farnum*, 339 N.W.2d at 389 (addressing what is now I.C.A. 1.504 and finding "[f]ederal cases interpreting its counterpart in Federal Rules of Civil Procedure 26(c) … provide helpful guidance"); *Comes*, 775 N.W.2d at 305 (citing federal cases throughout and specifically noting in footnote 5 that "[t]he language of Iowa rule 1.504(1)(a) is virtually identical to its federal counterpart.").

Importantly, in *U.S. ex. rel. Davis v. Prince*, the District Court for the Eastern District of Virginia was faced with a protective order that was nearly identical to the one presented by the Defendants in this case. *U.S. ex. rel. Davis v. Prince*, 753 F.Supp.2d 561, 567 (E.D.Va. 2010). Specifically, under the protective order entered by the magistrate judge in that case, "a party may challenge a confidential designation, and the magistrate judge would then determine whether good cause exists to maintain the designation." *Id.* The district court found that "the protective order violates Rule 26(c) by delegating

the good cause determination to the parties, thereby erasing the rule's requirement that there by a *judicial* determination of good cause." *Id.*

Here, rather than properly placing the burden of establishing good cause on the party seeking the order of protection, Defendants-Appellants' proposed protective order improperly reverses the burden. Just like the protective order in *Prince*, under Defendants-Appellants' proposed protective order, they may designate any and all documents as confidential and the burden falls on the Plaintiffs-Appellees to go before the court and establish that they are not.

Defendants-Appellants claim in their brief that there are certain categories of documents they acknowledge aren't confidential and that they would not designate such documents as confidential, but their proposed protective order includes no such limiting language. (Defendants-Appellants' Proposed Protective Order) App. 103-106. Instead, it gives Defendants-Appellants carte blanch to simply stamp any document they want as "confidential" and putting the onus on Plaintiffs-Appellants to challenge that designation. By shifting the burden, the Defendants proposed protective order violates the provisions of 1.504(1), which requires a judicial determination that good cause be shown. Iowa R. Civ. P. 1.504(1). By the terms of the statute, it's clear that the legislature intended that protective orders be entered

into only after there has been a judicial determination that good cause has been shown.

Defendants-Appellants' proposed protective order is not narrowly tailored and as such violates the terms as well as the legislative intent of Rule 1.504.

3. DEFENDANTS-APPELLANTS HAVE FAILED TO DEMONSTRATE THAT THERE IS NO ALTERNATIVE MEANS OF PROTECTING THE PUBLIC INTEREST.

Defendants-Appellants have also failed to establish that – short of their proposed protective order – there is no alternative means of protecting the public interest that would be less intrusive on expression. Again, they offer only conclusory, speculative statements about there being no alternative means, without setting forth any specific factual basis in support of their argument. Defendants-Appellants have thus failed to establish the third and final prong necessary to carry their burden that "good cause" exists for a protective order.

CONCLUSION

Iowa's discovery rules – including the rules governing protective orders – are interpreted in favor of broader discovery and disclosure. Parties to litigation should not be subject to unwarranted limitations on their ability to

freely investigate and prepare to litigate their claims. In the case at hand, Defendants-Appellants are attempting to do just that by asking this Court to adopt a sweeping protective order that would give them unilateral authority to mark any and all documents confidential and subject to strict limitations on dissemination. In doing so, Defendants-Appellants ironically rely on Iowa's Open Records Act, an Act intended to bring greater – not less – transparency and oversight to our public institutions. Defendants-Appellants are asking this Court to upend the broad disclosure goals of the Open Records Act and allow them to use it as a shield to keep documents of broad public interest in a highly publicized officer-involved shooting incident hidden from the public eye.

Defendants-Appellants failed to sustain their burden to establish that grounds exist for a protective order over all documents produced in discovery. The police investigative reports that the District Court ordered to be produced without a protective order are not confidential under Iowa's Open Records Act. Even if such documents were confidential, Defendants-Appellants failed to provide specific and concrete facts that substantial harm will occur if the documents are not protected, that their proposed protective order was narrowly tailored, and that there are no alternative means of protecting the public interest. As a result Defendants-Appellants have failed to establish

good cause exists for a protective order. The District Courts ruling should be upheld.

Respectfully submitted,

/s/ Pressley Henningsen

/s/ Laura Seelau

Pressley Henningsen AT0003402
Laura Seelau AT0011712
RSH Legal, P.C.
425 Second Street SE, Suite 1140
Cedar Rapids, IA 52401
Telephone: (319) 365-9200
Facsimile: (319) 365-1114
Email: phenningsen@fightingforfairness.com
lseelau@fightingforfairness.com
ATTORNEYS FOR PLAINTIFFS-APPELLEES

REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument in the maximum amount of time allowed.

CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that on May 31, 2018, Plaintiffs-Appellees' Final Reply Brief was e-filed with the Clerk of the Iowa Supreme Court and served by Iowa EDMS upon the following:

Wilford H. Stone
Gregory T. Usher
Lynch Dallas, P.C.
526 2nd Ave SE
Cedar Rapids, IA 52406
ATTORNEY FOR DEFENDANT-APPELLANT OFFICER LUCAS JONES

Elizabeth D. Jacobi
City Hall
Office of City Attorney
101 First St SE
Cedar Rapids, IA 52401
ATTORNEY FOR DEFENDANT-APPELLANT CITY OF CEDAR RAPIDS

By */s/ Laura Seelau*
Laura Seelau AT 0011712

ATTORNEY'S COMPLIANCE CERTIFICATE

Pursuant to Iowa R. App. P. 6.903(1)(g)(4), the undersigned certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 9,320 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 Office Word 2013 in Times New Roman 14-point type.

By *_/s/ Laura Seelau_*
Laura Seelau AT 0011712