TAPE DON'T LIE

ABSTRACT

Central to any democracy is an informed citizenry. Recognizing this fact, a group of like-minded politicians, journalists, and reformers pushed for a regime of laws collectively known as Freedom of Information (FOI) laws or Sunshine Laws. Both federal and state FOI laws give citizens and the media a statutory right to the information held by those that govern them. Whether it's budget materials, memos, inventories, or even e-mails and text messages, government actors are subject to disclosure of these materials upon request (so long as there is not an exemption prohibiting disclosure). This statutory mandate is both a means of monitoring what federal, state, and local government officials are doing as well as a mechanism to scrutinize public conduct that runs counter to the will of those they govern.

In Iowa (like many states) that statutory right is crumbling. Beyond the many exemptions that legislators continue to add to the state's FOI law, recent judicial interpretations of the law (and its exemptions) have stymied the public's ability to know what its government is up to. That ability to police government action is under threat the most in matters of policing. As law enforcement agencies continue to use public funds to equip police officers with body cameras, the video from those cameras becomes vital records of officials' actions. In a climate where police brutality and officer-involved shootings continue to strain public confidence in law enforcement, it is imperative that Iowa embraces an FOI scheme that allows these materials to be turned over to the public. To do so, Iowa courts must reevaluate recent approaches to its FOI law and current exemptions for law enforcement records to accommodate a regime that increases both transparency and access.

TABLE OF CONTENTS

I. AN INTRODUCTION

A. *Shots in the Dark*

You heard gunshots in the distance. Then you heard the sirens. You watched the evening news; there was an officer-involved shooting. The cop was fine. The perpetrator was dead. You shook your head and then went to bed. You picked up the paper at the gas station on your way into work; information was scant. Over the following months, through shaky media reports and even shakier social media feeds, you learned the perpetrator was unarmed. You learned there was no preceding crime. You learned the shooting was prompted by the man acting bizarrely and a brief vehicular pursuit. You learned when the pursuit ended the unarmed man stepped out of his car, and instead of running on foot, he moved toward the officer's car. You learned the officer fired from inside the vehicle. Years later—after internal and criminal investigations into the officer's acts that night—you learned the officer lied when she told investigators that she warned the man before she killed him. But at this point, you don't wonder why charges weren't brought. Things happen, after all. Besides, in the intervening years, there were more recent officer-involved shootings to worry about.[1]

B. *Your Right (and Duty) to Know*

The U.S. public has, both as a matter of principle and as a matter of law, what is commonly called the Right to Know.[2] This right for Iowans is enshrined in the state's Freedom of Information Act (FOI Act).[3] At its most basic level, it entitles citizens with the right of access to both public bodies and any documents or information possessed by public agencies.[4] Law enforcement agencies—from your local police department to the FBI—are such agencies, and they too are subject to state and federal FOI laws.[5] As one of the most (if not the most) visible public services, their actions (or

1. This is not a hypothetical. This happened in Des Moines in the fatal 2015 shooting of Ryan Bolinger. Clark Kauffman, *Des Moines Police Officer Who Fatally Shot an Unarmed Man Said She Warned Him First. She Didn't.*, DES MOINES REG. (Oct. 17, 2017), http://www.desmoinesregister.com/story/news/2017/10/18/des-moines-police-officer-falsely-says-she-warned-shooting-victim/769670001/ [https://perma.cc/ET75-AP22].

2. *See* CHARLES N. DAVIS & SIGMAN L. SPLICHAL, ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 5 (2000) [hereinafter INFORMATION AGE].

3. IOWA CODE §§ 22.1–.16 (2019).

4. *Id.* § 22.2(1).

5. *See* 5 U.S.C. § 551(1) (2018); IOWA CODE § 22.1(1).

inactions) have immediate impacts that can far outweigh those of other public services. Thus, the public has a proportionally greater interest in access to documents that would illuminate law enforcement activity.[6]

And yet, law enforcement organizations enjoy one of the broadest exemptions to the Iowa FOI Act.[7] While law enforcement agencies by their very nature require a degree of discretion and insulation from the public eye, those agencies in Iowa are afforded too much of both.[8] In Iowa, citizens cannot get information from law enforcement related to the decades-old slaying of a loved one; investigations seemingly outlive those who knew the victims.[9] In Iowa, neighbors and taxpayers are still left mostly in the dark of how state social workers reacted to the torture, starvation, and murder of a girl by her foster parents—especially since state social workers had notice the girl was being abused.[10]

6. THE MEDIA FREEDOM & INFO. ACCESS CLINIC, POLICE BODY CAM FOOTAGE: JUST ANOTHER PUBLIC RECORD 6–7 (2015), https://pceinc.org/wp-content/uploads/2016/02/20151200-Police-Body-Camera-Footage-Just-Another-Public-Record-Clinic.pdf [https://perma.cc/FXH5-WK33].

7. *See infra* Parts III–IV.

8. Jason Clayworth, *Iowa's Open-Records Law Is Being Used to Hide Unflattering Police Video, Open Records Advocates Say*, DES MOINES REG. [hereinafter Clayworth I] (Sept. 12, 2018), https://www.desmoinesregister.com/story/news/investigations/2018/09/12/how-iowas-open-records-law-being-used-hide-police-video/1278686002/ [https://perma.cc/3BDF-UAS3] (quoting a former New Orleans homicide detective who turned private investigator) ("If the FBI can provide me with responsive documents . . . why can't the [Iowa Division of Criminal Investigations]? . . . There's something clearly, fundamentally wrong in the way they are applying this exemption."); *see also* Erin Murphy, *Iowa Law Vague on Police Video Footage as Open Records, Officials Say*, QUAD-CITY TIMES (Dec. 4, 2016), http://qctimes.com/news/local/government-and-politics/iowa-law-vague-on-police-video-footage-as-open-records/article_3526d3e8-304d-5e42-8194-311769904aaa.html [https://perma.cc/E4RQ-8CER] (interviewing FOI expert Randy Evans who points out that police want the public to pay for the police cameras but are often resistant to having to share the footage from those cameras).

9. Jason Clayworth, *New Interpretation Forever Seals Police Investigative Records*, DES MOINES REG. (Sept. 25, 2016), http://www.desmoinesregister.com/story/news/investigations/2016/09/25/new-interpretation-forever-seals-police-investigative-records/88315352/ [https://perma.cc/G6LP-YFA7] [hereinafter Clayworth II].

10. Lee Rood, *'Numerous' Abuse Reports Made in Starved Child Case, Lawmaker Says*, DES MOINES REG. (Dec. 28, 2016), http://www.desmoinesregister.com/story/news/crime-and-courts/2016/12/28/numerous-abuse-reports-made-starved-child-case-lawmaker-says/95935520/ [https://perma.cc/2Z5X-9SLW].

In Burlington, a family (and a local newspaper) spent four years fighting for police records, including the officer's body-camera footage and related 911 calls, detailing what exactly transpired that prompted an officer to kill an unarmed woman in her own yard in broad daylight.[11] The officer was not charged in the incident, but state and city officials nonetheless argued the related records—including the video—were exempt from public disclosure as "investigative reports."[12] Meanwhile, the public board created to ensure more transparency and compliance with the state law has taken to closed-door meetings to discuss how to handle the footage sought in Burlington.[13] And as it stands, the Iowa Supreme Court has held anything qualifying as an investigative report can be withheld in perpetuity.[14] According to the aforementioned Public Information Board, that means 911 calls, body-camera or dash-camera video, or any of "the information gathered and analyzed as part of [an] investigation" will not see the light of day.[15] Transparency is as transparency does, apparently.[16]

11. Jason Clayworth, *Iowa Cop Fatal Shooting Video Subject of Private Meeting*, DES MOINES REG. (Aug. 24, 2017), https://www.desmoinesregister.com/story/news/investigations/2017/08/24/iowa-cop-fatal-shooting-video-subject-private-meeting/598497001/ [https://perma.cc/BCT6-BBUB] [hereinafter Clayworth III].

12. The Steele family eventually received some of the materials they sought after they settled their claim with the city in federal court. However, the materials they obtained were released by the federal judge presiding over their case on grounds unrelated to Iowa's FOI Act. *See* Steele v. City of Burlington, 334 F. Supp. 3d 972, 981–82 (S.D. Iowa 2018); *see also* Andy Hoffman, *Public Info Board Tentatively Reinstates Charges Against Burlington Police, DCI*, THE HAWK EYE (Oct. 21, 2016), http://www.thehawkeye.com/a086a841-17a2-5598-821b-ffb042d73278.html [https://perma.cc/F6UU-LKLR]; Luke Nozicka, *ACLU Appeals Ruling That Denies Access to Iowa Police Records in Autumn Steele Shooting*, DES MOINES REG. (Mar. 25, 2019), https://www.desmoinesregister.com/story/news/crime-and-courts/2019/03/25/autumn-steele-aclu-iowa-police-shooting-burlington-crime-public-information-video-officer-involved/3267264002/ [https://perma.cc/P7CW-NBZE].

13. *Editorial: Iowa's No-Information Board Sets Shameful Example*, DES MOINES REG. (Aug. 30, 2017), http://www.desmoinesregister.com/story/opinion/editorials/2017/08/30/iowa-information-board-police-shooting-burlington/615133001/ [https://perma.cc/8L3Z-7S88].

14. Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 232 (Iowa 2019).

15. *See* Burlington Police Dep't, Dep't of Pub. Safety Div. of Criminal Investigation, Nos. 17IPIB001 FC:0030, 17IPIB002 FC:0034, at 17 (Feb. 21, 2019).

16. The Author's use of irony, understatement, and tongue-in-cheek comments is employed as an illustrative tool, one aimed at emphasizing the significance of the issues discussed.

The purpose of this Note is to demonstrate how the statute's exemption for law enforcement has been misapplied by courts at the expense of the public interest. As it stands, law enforcement enjoys nearly unbridled discretion in whether to disclose—or deny—information to the public so long as it can claim that information qualifies as an investigative report.[17] The purpose and policy of transparency cannot allow such a result.[18] This Note focuses on the so-called law enforcement investigative report exemption[19] and argues that it is inherently overbroad and that its recent interpretations by courts have betrayed both the policy goals and legislative intent undergirding the law.[20]

First, this Note briefly addresses the formation and subsequent weakening of the federal Freedom of Information Act (FOIA).[21] It then provides a brief history of Iowa's own FOI Act, followed by a review of how the statute has been riddled with statutory exemptions, and—after an analysis of its early interpretation by judges—it then shows how recent interpretations of Iowa's FOI Act by the courts threaten the public's Right to Know.[22] Following an examination of other states' FOI laws and their approach to police materials,[23] this Note then critically analyzes Iowa's FOI Act case law and argues for a more common-sense approach to police records, one that encourages courts to rely on balancing tests rather than bright-line rules when deciding FOI disputes over police records.[24] The Note then briefly argues why the police's body-camera footage should, as a matter of both law and policy, be accessible to the public.[25] In the addendum of the Note, I propose a legislative solution regarding police body-camera footage

17. IOWA CODE § 22.7(5) (2019). The Author would be remiss if it was not stated that the investigative reports exemption is just one of several problematic exemptions. Too often, materials that might be denied disclosure per the investigative reports exemption would also be withheld on other exemptions. One of the most common exemptions officials will use to justify a denial is the "personnel file" exemption. For example, if an officer is subjected to an internal investigation for potentially unlawful activity, even if that investigation were not exempted as an investigative report, it could easily be denied per Iowa Code § 22.7(11) as a part of that officer's personnel record. *See id.* § 22.7(11).

18. *See infra* Parts III, V.

19. IOWA CODE § 22.7(5).

20. *See infra* Parts II–V.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part V.

25. *See infra* Part V.B.3.

that—though not addressing many of the issues in Iowa's FOI Act—would be a modest and manageable step in the right direction.

II. THE BIRTH, LIFE, (AND DEATH?) OF THE FEDERAL FREEDOM OF INFORMATION ACT

A. *A Call for Disclosure and a Push for Compliance*

While still relatively young compared to other statutory or constitutional rights, the federal FOIA of 1966 was an effort by Congress to ensure that long-standing democratic principles would thrive in a society and government that was growing both in size and sophistication.[26] While the Founding Fathers may not have thought to address whether agency e-mails were public records, they saw a fundamental need for an informed public: one capable of holding its government accountable to those it would govern.[27] Freedom of the press was one expression of this principle.[28] It is no surprise then that one of the biggest advocates for the federal FOIA was the press, whose very profession serves as the connective tissue among FOIA, the First Amendment, and an informed citizenry.[29]

Even in the infancy of the FOIA, government agencies routinely resisted—or ignored altogether—the congressional mandate of transparency.[30] Five years following implementation, citizens and journalists alike were met by "five years of foot-dragging" and general indifference.[31] Congress, however, persisted. Empowered by calls for reform following President Richard Nixon's Watergate scandal, lawmakers gave teeth to the

26. JACQUELINE KLOSEK, THE RIGHT TO KNOW: YOUR GUIDE TO USING AND DEFENDING FREEDOM OF INFORMATION LAW IN THE UNITED STATES ix, 13 (2009) (quoting President James Madison) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy . . . . [P]eople who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

27. *See* INFORMATION AGE, *supra* note 2, at 4–7 (quoting President Woodrow Wilson) ("Let there be light.").

28. *See* U.S. CONST. amend. I.

29. Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's up to*, 11 COMM. L. & POL'Y 511, 519–20 (2006).

30. TRANSPARENCY 2.0: DIGITAL DATA AND PRIVACY IN A WIRED WORLD 17, 19–20 (Charles N. Davis & David Cuillier eds., 2014).

31. Halstuk & Chamberlin, *supra* note 29, at 532.

FOIA.[32] Congress would step in again a few years later to strengthen the FOIA, prompted not by intransigent agencies but rather by courts sympathetic to those agencies.[33]

Eventually, the Supreme Court came around. Holding great deference must be given to congressional intent favoring disclosure, the Court embraced a balancing-test approach to competing interests[34] in FOIA disputes.[35] This approach was consistent with the new language crafted by Congress to protect privacy interests (as well as sensitive law enforcement materials)[36] and was crafted with the intention that courts would weigh any harms to privacy interests against the benefit to the public in disclosure.[37] (This weighing of interests or balancing approach would be adopted by Iowa as well as other state courts.)[38] In *U.S. Department of the Air Force v. Rose*, the Court weighed the privacy concerns of Air Force Academy cadets against the public's interest in having access to those cadets' disciplinary files (with names redacted).[39] The *Rose* court held, although the files involved the privacy concerns protected by 5 U.S.C. § 552(b)(6), the redacted names softened any intrusion.[40] Furthermore, the public's interest in knowing the extent of cheating (and subsequent punishment per the academy's unique honor code) at the nation's eminent public institution outweighed any

32. *See* INFORMATION AGE, *supra* note 2, at 125 (noting the 1974 amendments to the law required federal agencies to do the following: respond to a request within 10 days; submit to federal judges' *in camera* reviews of disputed documents; and suffer increased penalties for noncompliance).

33. Halstuk & Chamberlin, *supra* note 29, at 535 (noting Congress passed amendments in direct reaction to an antidisclosure ruling in *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975), *superseded by statute*, Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1247 (1976), where the Supreme Court found a director could withhold public records if that director thought their release was not in the public interest).

34. Those competing interests are often considerations of privacy (or other sensitive purposes or objections such as the integrity of ongoing criminal investigations) weighed against the public's interest in knowing the information. *See* INFORMATION AGE, *supra* note 2, at 125.

35. U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 381–82 (1976) (resulting in the first and only FOIA case where the Supreme Court ruled in favor of disclosure).

36. *See* 5 U.S.C. §§ 552 (b)(6), (b)(7)(C) (2018).

37. Halstuk & Chamberlin, *supra* note 29, at 539 (citing H.R. REP. NO. 89-1497, at 4 (1966)); *see also* U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982).

38. *See infra* Part III, IV.

39. *Rose*, 425 U.S. at 380–81.

40. *Id*. at 381.

theoretical claims of privacy and thus warranted disclosure.[41] In so doing, the *Rose* Court emphasized there was a presumption of disclosure in requests made under the FOIA, that any exemptions to the FOIA should be construed narrowly, and that the public interest in disclosure must be given great deference.[42]

B. *The Beginning of an End*

The victory for transparency advocates in *Rose*, however, was short-lived. A series of Supreme Court cases followed *Rose* that, over time, minimized the legislative edict (and judicial prerogative) for a narrow construction of the FOIA's exemptions.[43] Over time, the Court began to eschew its balancing process by inflating the scope and power of the privacy exemptions claimed by government agencies while shrinking the import of the public's interest in disclosure.[44]

The Supreme Court expanded the statutory exemption for personnel files, medical files, and similar files whose disclosure would constitute a clearly unwarranted invasion of personal privacy[45] to bar disclosure of any information that related to an individual because this information would thus be personal.[46] It later justified denying disclosure of an FBI compiled "rap sheet" (a master list of arrests and convictions compiled from other public sources) because such a document—one made up of already public information—would also be "personal" and thus violate the subject's right to privacy.[47] In yet another case, the Court ruled this broad right to privacy

41. *See id.*

42. *See id.*

43. INFORMATION AGE, *supra* note 2, at 128–29, 131.

44. Halstuk & Chamberlin, *supra* note 29, at 546.

45. 5 U.S.C. § 552(b)(6) (2018).

46. *See* U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 602 (1982) (denying a newspaper's request for information in order to confirm reports that the federal government had issued passports to Iranian nationals who were members of an anti-American organization). For more information related to the expansion of the personnel and similar files exemption, see generally Halstuk & Chamberlin, *supra* note 29, at 538–46.

47. *See* U.S. Dep't of Justice v. Reporter's Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989). Here, the Court ruled against disclosure of a rap sheet of a high-profile businessman caught up in a scandal with a sitting congressman regarding dealing with the Department of Defense. *Id.* at 757. The Court justified its ruling, in part, by stating, "[A]lthough there is undoubtedly some public interest in anyone's criminal history . . . the FOIA's central purpose is to ensure that the *Government's* activities be

justifying denial of disclosure extended to a dead man's[48] family.[49] In another blow to the receding public interest, the Court opined that in order to outweigh a claimed privacy interest, an individual seeking withheld materials must pass a two-pronged test: the requester must show there is a public interest and then show the disclosure would likely further that interest.[50] In short, if met with a claim of exemption due to privacy, a media organization, attorney, or John Q. Public would have to show malfeasance or inefficiency by the government and that disclosure of the related documents would then further a remedy, vis-à-vis the public's awareness, in order to justify disclosure.[51]

As it stands now, the federal FOIA is useless.[52] Despite multiple attempts by Congress to strengthen both the substantive and the procedural rights of citizens to public documents through amendment,[53] after amendment,[54] after amendment,[55] the law is arguably weaker now than it was when it was first given teeth in 1974.[56] In the eight FOIA cases handled by the Supreme Court, only once did the Court rule in favor of disclosure after weighing the public's interest against the claimed privacy rights of the

opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government . . . ." *Id.* at 774. In short, the FOIA can be used to learn more about what the government does but not *who* it does it with. *See* Hannah Bergman, *Out of Sight, Out of Bounds*, THE NEWS MEDIA & THE LAW, Spring 2009, at 11, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2009/out-sight-out-bounds [https://perma.cc/9LU6-QCMC].

48. While you can't libel the dead, apparently you can violate their rights to privacy vis-à-vis their surviving family.

49. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004).

50. Halstuk & Chamberlin, *supra* note 29, at 550.

51. TRANSPARENCY 2.0, *supra* note 30, at 24–25 (noting that in his majority opinion, Justice Anthony Kennedy wrote the government is entitled to a "presumption of legitimacy" in its conduct and thus its records). This presumption of legitimacy is inconsistent with the legislative intent of the FOIA, which calls for a presumption for disclosure. *See* Halstuk & Chamberlin, *supra* note 29, at 532.

52. *See* Daxton R. "Chip" Stewart & Charles N. Davis, *Bringing Back Full Disclosure: A Call for Dismantling FOIA*, 21 COMM. L. & POL'Y 515, 516 (2016).

53. *See id.* at 520.

54. *Id.* at 523 (citing the 1996 amendment to the FOIA [The Electronic Freedom of Information Act] that required federal agencies to apply the law to computerized and other electronic records).

55. *Id.* at 530 (referencing the FOIA Improvement Act of 2016, which reiterates congressional intent for a presumption of openness with public records).

56. *See id.* at 516–17.

government agency.[57] In acknowledging that federal case law and obstructionist agencies have muddied both the law and the process of the FOIA, even Congress has declared the FOIA is "broken."[58] With decades of well-intended amendments met by obstructionism from courts and government agencies alike, some leading scholars are calling for the law to be torn down to the studs and rebuilt entirely.[59]

This historic trend (and burgeoning body of case law) against disclosure is instructive; Iowa's and other state's FOI laws operate in similar environments where they are subject to interpretation by judges who often turn to federal jurisprudence for guidance in interpreting their own statutes.[60] Equally instructive is how federal law enforcement agencies enjoy even greater protections from the FOIA than other agencies.[61] The law enforcement exemption under the federal FOIA is, on its face, less stringent than the privacy exemption set forth elsewhere in the law.[62] Whereas 5 U.S.C. § 552(b)(6) will exempt personnel, medical, and other similar files from disclosure if they would result in a "clearly unwarranted invasion of personal privacy," the law enforcement exemption—5 U.S.C. § 552(b)(7)(C)—merely requires the government to show that disclosure "*could reasonably* be expected to constitute an unwarranted invasion of privacy."[63] As discussed later, it is not just federal law enforcement agencies that enjoy a statutory privilege from disclosure that other public agencies do not.[64]

Courts have regularly ruled against the legislative intent and policy purposes of the FOIA, effectively squeezing out the vitality of the statute by

57. *Id.* at 525.

58. STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT 39 (2016).

59. Stewart & Davis, *supra* note 52, at 518–19.

60. *See infra* Parts III–V.

61. *See* FBI v. Abramson, 456 U.S. 615, 628, 629–30 (1982) (finding law enforcement may be exempt from disclosure regarding investigative materials, even if those materials had been subsequently "reproduced in a non-law-enforcement record"); *see also id.* at 640 (O'Connor, J., dissenting) ("[T]he Court accuses Congress of having arbitrarily drawn the line between exempt and nonexempt materials. . . . [Congress] is free to draw lines without cavil from this Court.").

62. Halstuk & Chamberlin, *supra* note 29, at 540–41.

63. 5 U.S.C. §§ 552(b)(6), (b)(7)(C) (2018) (emphasis added). Additionally, § 7(A) prevents disclosure that would "reasonably interfere with ongoing investigations." *Id.* § 552(b)(7)(A).

64. *See infra* Part III.

broadening exemptions to disclosure when dealing with federal law enforcement.[65] Following *U.S. Department of Justice v. Reporter's Committee for Freedom of the Press*, agencies—especially law enforcement agencies—were emboldened to reject requests for information that did not directly bear on the "agency's performance."[66] It should be no surprise that, given the barriers to transparency, federal law enforcement accounts for nearly half of an ever-growing number of lawsuits over denied FOIA requests.[67]

III. FREEDOM OF INFORMATION IN THE LABORATORIES OF DEMOCRACY: THE IOWA EXPERIMENT

A. *Its Origins, Its Hopes, and Its Glaring Ambiguity*

The success of and need for the FOIA led to a push for localized FOI laws.[68] Presently, all 50 states have some form of an FOI statute while courts in some states have gone so far as to rule that citizens have a constitutional right to documents and public meetings.[69] In so doing, many of the state FOI laws were modeled after their federal counterpart.[70] That being said, states' laws are hardly uniform.[71] Differences in wording and structure also preceded departures in interpretation by courts, resulting in a checkerboard of standards for what is and is not a matter of public record.[72]

65. *See* Stewart & Davis, *supra* note 52, at 524–25.

66. *Id.*; U.S. Dep't of Justice v. Reporter's Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

67. David Burnham, *FOIA Lawsuits Reach Record High*, FOIA PROJECT (Jan. 6, 2016), http://foiaproject.org/2016/01/06/foia-lawsuits-reach-record-high/ [https://perma.cc/RV8U-E7ES]; *FOIA Lawsuits*, FOIA PROJECT, http://foiaproject.org/lawsuit/ [https://perma.cc/SW93-6D6R] (last visited June 19, 2019) (showing the Department of Justice and the Department of Homeland Security account for 3,529 FOIA lawsuits while the rest of the federal government accounts for 4,098).

68. Susan P. Elgin, Note, *What Happens in Iowa Stays in Iowa: A Framework for Implementing Changes to State Open Records Laws*, 98 IOWA L. REV. 1677, 1681 (2013).

69. Michael A. Giudicessi, Susan P. Elgin & Douglas Phillips, *Iowa – Open Government Guide*, REP.'S COMMITTEE FOR FREEDOM OF THE PRESS (2011), https://www.rcfp.org/open-government-guide/iowa/#forward [https://perma.cc/HLB3-HN6G].

70. TRANSPARENCY 2.0, *supra* note 30, at 104.

71. *Compare* MINN. STAT. ANN. §§ 13.01–.10 (West 2019), *with* IOWA CODE § 22.1 (2019).

72. *See, e.g.*, *Project*, WNYC, https://project.wnyc.org/disciplinary-records/ [https://perma.cc/JS4W-NR2D] (last visited June 25, 2019) (graphically displaying a state-by-state analysis on which states allow disclosure of law enforcement personnel

Iowa joined the wave of state legislatures in embracing transparency and passed its own FOI Act in 1967.[73] The statute gave all persons the right to request access to and the right to inspect or copy "all records and documents" held by state and local governments.[74] The Iowa legislature gave a clear signal to agencies and courts alike that requests for information under the FOI Act came with a strong presumption in favor of disclosure.[75] Lawmakers designed the law to preemptively shoot down any rationalizations for withholding public documents merely because they did not appear to be of a "public nature."[76] In fact, the drafters of the law feared allowing any exceptions to the statute and only allowed for a handful of exemptions to disclosure for the purposes of passage.[77] There was a fear that those exemptions presented a "threat to the concept of free and open examination" and thus were narrowly tailored, and any departures from disclosure were—both as a matter of policy and legislative intent—to be discouraged.[78]

The creators of Iowa's FOI Act did not intend nor want an exemption for police records.[79] The inclusion of an exemption for law enforcement agencies was merely the result of pressure and lobbying from the state's law enforcement establishment.[80] While the current (and vague) prohibition against the release of investigative reports is frustrating,[81] more frustrating still is the fact that no one knew what it meant in 1967 either.[82] While there are many policy justifications for limiting or restricting the public's access to law enforcement files (such as disclosing false or malicious information, invading detectives' methods and strategies, discouraging witnesses from cooperating for fear that their statements will become public, etc.), there is no record of any debate or discussion of those policies.[83] In fact, when

files under FOI laws).

73. Giudicessi, Elgin & Phillips, *supra* note 69.

74. Note, *Iowa's Freedom of Information Act: Everything You've Always Wanted to Know About Public Records but Were Afraid to Ask*, 57 IOWA L. REV. 1163, 1169 (1972) [hereinafter *Afraid to Ask*].

75. *See id.*

76. *Id.* at 1168–69.

77. *See id.* at 1177.

78. *See id.* at 1178.

79. *See id.* at 1181.

80. *See id.* at 1181–82.

81. *Id.* at 1182.

82. *Id.*

83. *Id.*

pressed about whether "anyone else in the General Assembly" knew what specific types of records were covered by the investigative report exemption, the co-author of the law, state senator David M. Stanley of Muscatine, responded: "I doubt it."[84]

Despite lawmakers' intentions of providing the public with a robust tool to check government inefficiency and abuse, the law enforcement exemption has undermined—and even antagonized—the principles and policy purposes of the law.[85] As a matter of policy—and common sense—certain materials possessed by law enforcement (such as records detailing active investigations, potential suspects, and confidential informant information) should be left out of the public purview.[86] But a blanket protection of any documents that are arguably investigative in nature grants a deference and protection for law enforcement not enjoyed by other public bodies.[87] Although the Iowa Supreme Court has yet to address how police's body-camera footage would fit into this prohibitive regime, it takes little imagination to see how—without a change in the statute or in judicial analysis—the deck is already stacked against disclosure. The law enforcement exemption's language, as noted by the *Afraid to Ask* author, effectively inverts the presumption of disclosure and requires the requester of information to rebut the presumption against inspection, a requirement that runs contrary to the intent and purpose of the FOI Act.[88] Indeed, that author's fears have been realized.[89]

B. *We Have to Turn over What? Let's Talk to Our Senator: Lawmakers' Time-Honored Tradition of Tacking on Exemptions to the Iowa FOI Act*

The Iowa General Assembly, in enacting its FOI Act, sought a law that broadly favored disclosure and that made any exemption to it narrowly

84. *Id.* at 1182 n.152.

85. *See supra* Part III; *infra* Part V.

86. *Afraid to Ask*, *supra* note 74, at 1182.

87. *See id.* at 1181.

88. *See id.* at 1184.

89. Janet Rorholm & Colleen Krantz, *Law Enforcement Lags in Open Records Check*, THE COURIER (Mar. 21, 2005), http://wcfcourier.com/news/metro/law-enforcement-lags-in-open-records-check/article_331653db-0554-597b-b000-bb9a151d109c.html [https://perma.cc/DS5M-Z89W]; *see* Giudicessi, Elgin & Phillips, *supra* note 69 (referencing a 2000 experiment by Iowa media organizations to make random FOI requests and being routinely denied information they were legally entitled to, especially by law enforcement); *infra* Parts IV, V.

tailored and interpreted.[90] But over the years, it has been weakened by state legislators with exemption after exemption.[91] The original Iowa FOI Act contained but 11 exemptions.[92] By 2006, that number grew to 51.[93] Following the 2017 session, there were 69 exemptions.[94] There are now 73 exemptions.[95] While there have been the occasional affirmative grants of disclosure,[96] the substantive scope and strength of the statute remains untouched.[97] The definitions, stated purpose, and other measures within Iowa's FOI Act read relatively the same now as they did 40 years ago.[98] It would seem the ability of government (and those who do business with it) to operate in secret continues to grow while the public's Right to Know remains stagnant.[99]

While there was no push or effort to broaden the rights of citizens regarding access to public materials,[100] in 2017 lawmakers endeavored to secure as many exemptions for interest groups as they could.[101] For example,

90. *See* Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994); City of Dubuque v. Tel. Herald, Inc., 297 N.W.2d 523, 527 (Iowa 1980), *superseded by statue on other grounds*, IOWA CODE § 22.8 (2019); *see also Afraid to Ask*, *supra* note 74, at 1189.

91. *The Public Does Have a Right to Know*, IOWA FREEDOM OF INFO. COUNCIL (Apr. 6, 2017), http://ifoic.org/2017/04/06/public-right-know/ [https://perma.cc/XLB5-Z5TT].

92. IOWA CODE § 68A.7 (1975).

93. IOWA CODE § 22.7(5) (2007).

94. IOWA CODE § 22.7(5) (2019).

95. *See, e.g.*, Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 229 (Iowa).

96. *See* Ryan Foley & Barbara Rodriguez, *New Law Helps Reveal Why Iowa Public Workers Were Fired*, DES MOINES REG. (July 18, 2017), http://www.desmoinesregister.com/story/news/2017/07/18/iowa-public-workers-fired-reasons-made-public/489138001/ [https://perma.cc/SE76-GYCX] [hereinafter Foley & Rodriguez I] (explaining provision of amendment to state FOI Act allowing state to disclose the reason an employee is terminated or demoted; conspicuously enough, there was little public awareness of this provision because it was tucked into a larger and much more controversial law that revamped public employees' collective bargaining rights); *see also* Elgin, *supra* note 68, at 1679 (detailing how a 2011 law—one prompted by news that an Iowa teacher fired amid sexual assault allegations was later hired as a teacher outside the state—authorized state officials to declare whether former employees' tenures were ended due to a final disciplinary action).

97. *See* IOWA CODE § 22.1(3) (2019); *see also* IOWA CODE § 22.1(3) (2005).

98. *Compare* IOWA CODE § 22.1(3) (2019), *with* IOWA CODE § 68A.1 (1975).

99. *See* IOWA CODE § 22.1(3) (2019); *see also* Allen v. Iowa Dep't of Pub. Safety, Case No. EQCE074161, at 7 (Iowa Dist. Ct. Mar. 7, 2014).

100. This is other than the aforementioned law allowing for an explanation for why someone was fired or demoted. *See* Foley & Rodriguez I, *supra* note 96.

101. *See The Public Does Have a Right To Know*, *supra* note 91.

lawmakers succeeded in passing a law that shields the state's gaming industry from public inspection, an exemption ending decades of transparent accountability for the state's billion-dollar relationship with gambling interests.[102] There were several unsuccessful (but nonetheless alarming) efforts for FOI exemptions, including a proposal that would prohibit citizens from being able to inspect birth certificates, divorce records, and other materials at a county recorder's office.[103] Lobbying from state hospital interests led lawmakers to push for an exemption to allow the identity of volunteers for state institutions to remain hidden from public view.[104] The bill's supporters argued that subjecting hospital volunteers to the FOI Act was onerous, invasive, and chilling to potential volunteers; critics of the bill argued the bill posed a safety threat because the public would be unable to see if volunteers at, for example, state hospitals had criminal histories.[105] The sponsor of the measure eventually dropped his support but only after learning the county hospital that had been pushing for the exemption had been trying to prevent disclosure of the fact that one of its volunteers had multiple convictions for sexual acts with children.[106]

And of course, lawmakers also pushed for greater secrecy for law enforcement records.[107] Lawmakers succeeded in pushing through a law prohibiting disclosure of information regarding certain types of peace officers.[108] Legislators failed, however, in a separate attempt to further

102. Andrew DeMillo & Ryan J. Foley, *Request Denied: States Try to Block Access to Public Records*, ASSOCIATED PRESS (Sept. 17, 2017), https://apnews.com/f85d54cc952d4dc58ed0eff7eadb3bbd [https://perma.cc/83KB-2BRB].

103. *See The Public Does Have a Right To Know*, *supra* note 91.

104. Jason Clayworth, *Bill Would Make Gov't Volunteers' Names Secret*, IOWA FREEDOM OF INFO. COUNCIL (Mar. 15, 2017), http://ifoic.org/2017/03/15/bill-make-govt-volunteers-names-secret/ [https://perma.cc/9KB4-4HW9] [hereinafter Clayworth IV].

105. *Id.*

106. Jason Clayworth, *An Iowa Lawmaker Was Pushing for Volunteer Secrecy. But What He Learned Changed His Mind*, DES MOINES REG. (Mar. 28, 2017), https://www.desmoinesregister.com/story/news/investigations/2017/03/28/iowa-legislature-drops-volunteer-secrecy-effort-after-info-surfaces/99733578/ [https://perma.cc/US6N-MMBC] [hereinafter Clayworth V].

107. Ryan J. Foley & Barbara Rodriguez, *Iowa Lawmakers Consider Making Most 911 Calls Confidential*, DES MOINES REG. (Mar. 30, 2017), http://www.desmoinesregister.com/story/news/2017/03/30/iowa-lawmakers-consider-making-most-911-calls-confidential/99830944/ [https://perma.cc/54M5-UAQF] [hereinafter Foley & Rodriguez II].

108. While no reasonable person would argue against ensuring undercover officers

insulate law enforcement from public scrutiny.[109] A bill that would exempt (at least in part) 911 calls from public disclosure passed out of the House of Representatives.[110] The bill would have potentially made these records medical records and thus exempt from disclosure per Iowa Code § 22.7(2).[111] Prompted by the release of 911 calls detailing gun "mishaps" that resulted in two fatalities and one serious injury in Tama County, Republican supporters of the law said allowing 911 tapes to be disclosed (and later used by the media) violated the privacy rights of those in need of emergency services.[112] Opponents argued the 911 tapes obtained by media demonstrated the dangers of gun ownership and that making these materials exempt would limit the public's ability to scrutinize how local police, firemen, and medics respond to emergency situations.[113] The bill died in senate committee after passing easily in the house.[114] Weeks later, 911 tapes detailing a fatal crash involving Iowa native and reality-show star, Chris Soules, were released.[115] Initially charged with a felony for fleeing the scene of a deadly accident, the local celebrity eventually pleaded guilty to a lesser charge.[116] With recent legislative efforts to increase transparency routinely thwarted[117] and what appears to be a growing indifference to whether the public has an

can work without fear of being "outted," the new exemption is worrisome because it may tempt obstructionism from law enforcement agencies via generous classifications of what qualifies as an "undercover" officer. *See The Public Does Have a Right to Know*, *supra* note 91.

109. *See* Foley & Rodriguez II, *supra* note 107.

110. *Id.*

111. *See id.* (noting Iowa Code § 22.7(2) protects individuals' medical information from disclosure).

112. *Id.*

113. *Id.*

114. H.F. 571, 87th Gen. Assemb., Reg. Sess. (Iowa 2017).

115. Kelly McGowan & Chayanee Haley, *Audio: Soules Made 911 Call from Fatal Crash Scene*, DES MOINES REG. (Apr. 26, 2017), http://www.desmoinesregister.com/story/news/2017/04/26/chris-soules-911-call-fatal-accident-buchanan-county-iowa/306624001/ [https://perma.cc/U9KD-627C].

116. Nancy Newhouse, *Chris Soules Sentencing Date Pushed Back*, THE COURIER (Jan. 2, 2019), https://wcfcourier.com/news/local/crime-and-courts/chris-soules-sentencing-date-pushed-back/article_9ec7c25c-61f2-5bde-8cce-7752b1458866.html [https://perma.cc/VTB3-YPJS].

117. The Iowa Public Information Board proposed legislation that would give the public limited access to an officer's body-camera footage following shootings. *See* H. Study B. 141, 88th Gen. Assemb., Reg. Sess. (Iowa 2019). Not one of Iowa's elected legislators opted to sponsor it. *See id.*

opportunity to be informed—or even heard[118]—it is clear Iowans cannot rely on their elected officials to safeguard their Right to Know.

C. *Iowa's FOI Act: Hemmed in from the Bench*

Iowa courts have made strong rulings in favor of disclosure in the realm of public financing,[119] public–private partnerships,[120] and in matters of open meetings.[121] But when it comes to matters of police records, Iowa courts are often less than champions of public access.[122] Currently, Iowa law prohibits the disclosure of a more than 30-year-old homicide file.[123] It bars defendants from access to their own criminal files.[124] And given Iowa courts' recent rulings on questions of public records, it likely also bars Iowans from accessing video related to a law enforcement incident.[125] And it likely bars Iowans the right to access internal investigations or other important officer records (like use of force records), leaving citizens with few other means of checking police misconduct in their own community.[126] Given the earnest but straightforward purpose of Iowa's FOI Act and in order to understand the

118. The Republican-dominated Iowa Senate—while not subject to the state's FOI Act but rather its own rules—decided it will no longer be required to give public notice of upcoming subcommittee hearings where citizens and activists can be heard. Randy Evans, *Evans: Making Laws Should Not Be About Lawmakers' Convenience*, IOWA WATCH (Jan. 23, 2019), https://www.iowawatch.org/2019/01/23/evans-making-laws-should-not-be-about-lawmakers-convenience/ [https://perma.cc/PT6J-E9LJ].

119. Iowa Film Prod. Servs. v. Iowa Dep't of Econ. Dev., 818 N.W.2d 207, 230 (Iowa 2012).

120. *See* Gannon v. Bd. of Regents, 692 N.W.2d 31, 43–44 (Iowa 2005).

121. *See* Hutchinson v. Shull, 878 N.W.2d 221, 224 (Iowa 2016).

122. *See, e.g.*, State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 531 (Iowa 1984); Allen v. Iowa Dep't of Pub. Safety, Case No. EQCE074161, at 7 (Iowa Dist. Ct. Mar. 7, 2014).

123. *See Allen*, Case No. EQCE074161, at 5.

124. Neer v. State, No. 10-0966, 2011 WL 662725, at *4 (Iowa Ct. App. Feb. 23, 2011).

125. *See id.*; Elizabeth Meyer, *Iowa Public Information Board Decision on Steele Records Favors Law Enforcement*, THE HAWK EYE (Feb. 22, 2019), https://www.thehawkeye.com/news/20190221/iowa-public-information-board-decision-on-steele-records-favors-law-enforcement [https://perma.cc/NC37-YEBL] (noting the recent administrative decision by the Board found that nearly everything related to the shooting of Steele—from officer video to 911 call data—qualified as an investigative report and could be withheld forever from the public); *see also* Murphy, *supra* note 8.

126. *See* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 233 (Iowa 2012) (holding records of internal investigation or discipline are inherently personal and thus exempt from disclosure); *see also* Hoffman, *supra* note 12.

downward course of Iowans' rights to access information regarding law enforcement materials (and to know how to reverse this course), it is best to start from the beginning.

1. *"Courts do not have license to sit as censors"*[127]*: The Iowa Supreme Court, the FOI, and the Big Picture*

One of the earliest high-profile FOI cases in Iowa involved a lawsuit against the Des Moines Register over its publication of a story detailing the horrific treatment of the mentally ill by the state.[128] After obtaining public records from the governor's office, the Des Moines Register reported about a woman who had been involuntarily sterilized at a Jasper County home.[129] The family of the woman sued, arguing the information used by the newspaper to report the woman had been involuntarily sterilized by the state was not a public record and thus an invasion of privacy.[130] In holding the information was a public record, the court noted the exemption to disclosure banning the release of materials from a hospital or other medical records did not apply because the newspaper obtained the information from a governmental memo and not directly from the patient's file.[131] In short, the court held a concrete fact cannot be hidden merely because, at one time or another, that fact was documented in a way that was exempt from disclosure.[132]

Although not involving law enforcement, this case is an important guide to how the Iowa Supreme Court once approached the FOI Act. First, it held the ultimate source of a fact would not necessarily limit that fact from disclosure, a principle that would be modified, or abandoned, by later decisions.[133] It also held that a fact, though highly personal, may be fair game for public disclosure given the public's clear interest in being able to review and, if necessary, condemn government actions.[134] The court sowed the seeds

127. Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302 (Iowa 1979).

128. *See id.* at 292.

129. *Id.* at 296.

130. *Id.* at 297.

131. *Id.* at 300.

132. *Compare id.* at 300–01, *with* Des Moines Indep. Cmty. Sch. Dist. v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 670–71 (Iowa 1992) (holding otherwise disclosable information becomes exempt once placed in a public employee's personnel file).

133. *See* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 233–34 (Iowa 2012).

134. *Howard*, 283 N.W.2d at 300–02.

for a balancing of interests regarding matters of public information.[135] It then expressly tied the importance of public information and public interest with the vital importance of media in using these facts to share that information in the name of the public interest.[136] The court also cautioned future courts that it was the prerogative of the public (and its champion, the media) to determine what was in the public's interest; it is not the role of courts to "impose their own views about what should interest the community. Courts do not have license to sit as censors."[137]

From then on, Iowa courts adopted a liberal policy of disclosure, embracing a presumption favoring disclosure and requiring any exemption to be narrowly applied.[138] In so doing, the Iowa Supreme Court embraced the balancing contemplated by the *Howard v. Des Moines Register & Tribune Co.* court (and the *Rose* court's interpretation of the federal FOIA),[139] applying a balancing test in FOI disputes rather than making rigid, formalistic calls from the bench.[140] Iowa courts would go on to grant greater deference to disclosure in favor of the public interest in matters of policing.[141]

In *Hawk Eye v. Jackson*, the Iowa Supreme Court ruled the Burlington newspaper had a right under the FOI Act to access the investigative files (both criminal and internal) into allegations of misconduct by a Burlington police officer.[142] The city had resisted, of course, saying these materials (which both concluded with findings that the officer did no wrong) were exempt under section 22.7(5), which forbade the disclosure of officers'

135. *See id.* at 299–300.

136. *Compare id.* at 301, *with* Halstuk & Chamberlin, *supra* note 29, at 519–20 (noting the central role of the media in using FOI is to advance the public interest and check government corruption).

137. *Howard*, 283 N.W.2d at 302.

138. *See* City of Dubuque v. Tel. Herald, Inc., 297 N.W.2d 523, 527 (Iowa 1980), *superseded by statue on other grounds*, IOWA CODE § 22.8 (2019).

139. *See id.* at 526, 527 (citing *Howard*, 283 N.W.2d at 299); *see also* U.S. Dep't of the Air Force vs. Rose, 425 U.S. 352, 381 (1976).

140. *Tel. Herald, Inc.*, 297 N.W.2d at 526–27 (citing federal case law in supporting a presumption of openness and a narrow reading of any exemption, including reliance on *Rose*, 425 U.S. at 372–73); *contra* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 235 (Iowa 2012).

141. *See* Hawk Eye v. Jackson, 521 N.W.2d 750, 751 (Iowa 1994) (noting the incendiary instance of police brutality in the Rodney King beating and subsequent fallout raised social interest in disclosing law enforcement materials, even in Burlington, Iowa).

142. *Id.*

investigative reports.[143] The city argued the court should endorse its reading of the law, arguing disclosure of these files could erode future cooperation and trust with informants and witnesses and that it could unfairly air "speculative" or "potentially libelous revelations" into the public record and result in a "landslide" of media requests.[144]

The court was unconvinced. In noting a subsequent civil suit against the officer in question (one his own chief apparently had no knowledge of until confronted by the media), the Iowa Supreme Court found there was a valid public interest in disclosing the materials the city claimed were exempt.[145] Privacy concerns of the officer, as well as concerns that future trust among investigators, informants, and witnesses might be harmed, could not stand against the right of the public to check its own officials' conduct.[146] The *Hawk Eye* court noted: "[A]llegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern. . . . So long as [police can withhold these investigatory reports], the newspaper is effectively prevented from assessing the reasonableness of the [decision not to punish the officer]."[147]

This balancing of interests was eventually standardized, and due to the legislature's lack of instruction on certain terminology (i.e. what is a personnel record), courts needed to look to federal and other persuasive law when evaluating a conflict over a public record's exemption.[148] In *DeLaMater v. Marion Civil Service Commission*, the Iowa Supreme Court cobbled together a template of a balancing test that would consider the following:

(1) the public purpose of the party requesting the information;

(2) whether the purpose could be accomplished without the disclosure of personal information;

(3) the scope of the request;

143. IOWA CODE § 22.7(5) (1993). This version reads nearly identically to the statute currently in effect. *See* IOWA CODE § 22.7(5) (2019).

144. *Hawk Eye*, 521 N.W.2d at 752.

145. *Id.* at 754.

146. *See id.* at 753.

147. *Id.* at 754.

148. DeLaMater v. Marion Civil Serv. Comm'n, 554 N.W.2d 875, 879 (Iowa 1996).

(4) whether alternative sources for obtaining the information exist; and

(5) the gravity of the invasion of personal privacy.[149]

In *DeLaMater*, the Iowa Supreme Court found the public interest in ensuring police exams were administered fairly trumped the privacy rights of some of the officers involved in the exam.[150] Three years later, the Iowa Supreme Court solidified this balancing test in a case that similarly held the public had a right to review records of municipal employees' use of sick time and vacation time.[151] The court rejected arguments by a municipal employee union that the materials were exempt in *Clymer v. City of Cedar Rapids*,[152] finding that though the information was personal and could theoretically warrant exemption from the FOI Act, any privacy concern was overshadowed by the public's interest in ensuring good government by putting it "to the light of public scrutiny."[153] In using the balancing test, the *Clymer* court went even further than the *DeLaMater* court, crafting a logistical solution that would allow the thrust of the public's interest to be satisfied while still affording some privacy protections.[154]

2. *Investigators and Their "Reports"*

When it comes to matters of law enforcement records—specifically what qualified as an investigative report exempted by the state's FOI Act—Iowa courts took an approach in the spirit of the *Rose* decision: balancing public interest and the purpose of the statutory exemption.[155] Although *State ex rel. Shanahan v. Iowa District Court* was decided a decade before the court's balancing test was institutionalized in *Clymer*, the court weighed

149. *Id.*

150. *Id.* at 880.

151. Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 47 (Iowa 1999).

152. *Id.* at 44–45 (noting the union argued that Iowa Code § 22.7(11) prohibited disclosure of the leave-time usage because those records qualified as personal information in confidential personnel records and were thus exempt).

153. *Id.* at 47. The court noted potential "embarrassment" of an employee subject to the request is not a valid reason to deny public disclosure. *Id.* at 48.

154. *Id.* (holding that given the interest of the newspaper (and the public) in preventing abuse of sick and leave time by public employees, the release of individual employees' names (and use of sick and leave time) was proper, while release of their addresses or birthdays was deemed too invasive for the FOI Act).

155. *See* IOWA CODE § 22.7(5) (2019); *see also* City of Dubuque v. Tel. Herald, Inc., 297 N.W.2d 523, 527 (Iowa 1980) (citing U.S. Dep't of the Air Force v. Rose, 425 U.S. 352, 372–73 (1976)).

competing considerations in a request for disclosure of a homicide file for an unsolved killing and found it was the public interest that compelled it to deny disclosure.[156]

After losing loved ones in a 1980 double homicide at an Amana motel, the family of the deceased filed a wrongful death suit against the motel proprietor and sought state investigators' files in a case that, after two years of investigation, had resulted in no arrests.[157] The court weighed the interests of disclosure (greater information to the families of the slain as well as the public) against the shared interests the public and law enforcement had in ensuring these grave investigations, when still unsolved, remained confidential.[158] Fears of spoiling that investigation and hampering future investigators' candor and autonomy—as well as a fear of chilling cooperation from witnesses and informants in future investigations—led the court to rule against disclosure.[159] For the court, the public's overall interest in the integrity of murder investigations generally trumped any public interest in unearthing the specifics of those 1980 killings.[160]

Beyond the information unearthed by investigators during an investigation, Iowa courts have interpreted the investigatory reports exemption to extend to materials added to the file by investigators.[161] In *AFSCME/Iowa Council 61 v. Iowa Department of Public Safety*, a prison guard killed himself after he was accused of sexually assaulting an inmate, and his union sought the lab reports that would have exonerated him had he lived.[162] The court wrote the analysis of the guard's blood sample was "made as part of the [sexual assault] investigation," and that relationship was enough to bar disclosure.[163]

156. State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 531 (Iowa 1984).

157. *Id.* at 525–26 (noting the family sought files both through the state's FOI Act as well as through discovery procedures set out in the Iowa Code of Civil Procedure).

158. *See id.* at 529.

159. *Id.* at 529–31 (finding the FOI exemption was tied to a similar officer-confidentiality statute and thus derived from the same principle and governed by the same public interest).

160. *See id.* at 531.

161. *See* AFSCME/Iowa Council 61 v. Iowa Dep't of Pub. Safety, 434 N.W.2d 401, 402 (Iowa 1988).

162. *See id.* at 402–03 (explaining that while the vindicating test results were sought as part of a lawsuit against the state by the union, they were ultimately given to the guard's wife on grounds unrelated to the FOI Act).

163. *Id.* at 403. More troubling, of course, is how Iowa courts have held that Iowans

But the bench's aversion to disclosure of police materials is not absolute. While FOI requests made of law enforcement agencies are often denied for fear of compromising an ongoing investigation (or harming future ones by scaring investigators and witnesses with the threat of potential disclosure),[164] that fear cannot be speculative. The Iowa Supreme Court has ruled the disclosure of witness statements, in the context of crash reports, would not impair "official confidence" because those statements routinely became available.[165] Law enforcement cannot merely hide information because of some theoretical threat to future investigations.[166] Claims that public safety would be compromised if officers, potential witnesses, and informants are chilled by the specter of disclosure must be balanced by citizens' interests in access to the very materials the state relies on in safeguarding the safety of those citizens.[167] "[Law enforcement's fear of loss of confidence] is *only* a factor to be considered and is not determinative as to the 'public interests . . . .'"[168] Other factors to consider, the court noted, are the nature of the type of investigation these reports fall under and whether that investigation was complete.[169] Indeed, there is a presumption of disclosure with police materials, even if they are claimed to be investigative reports, and that presumption requires more than speculative or theoretical claims of harm to law enforcement operations to overcome the public's Right to Know.[170] In short, the government cannot rely on what harm might occur as a result of disclosure when it seeks to prevent public access to public materials.[171]

3. *Presumed Exempt: Recent Troubles in Disclosure*

The decades-old tradition of using a balancing of interests in FOI disputes may have met its end, or at least its greatest setback. In 2012's *ACLU v. Atlantic Community School District*, the court held community

have no right to investigations (criminal or administrative) of officers if they meet the personnel file exemption of the statute. But as noted earlier in this Note, that is a topic for another article. *See supra* Part III.C.

164. *See Shanahan*, 356 N.W.2d at 531.

165. Shannon *ex rel.* Shannon v. Hansen, 469 N.W.2d 412, 415 (Iowa 1991).

166. *See id.*

167. *Id.*

168. *Id.* (emphasis added).

169. *Id.*

170. *See* State v. Henderson, No. 01–0295, 2002 WL 987851, at *3 (Iowa Ct. App. May 15, 2002).

171. *See id.*

members categorically had no right to access the records detailing how school officials disciplined overzealous staff who had gone too far in the name of maintaining discipline.[172] In *Atlantic*, $100 went missing at an Iowa school, and two school administrators ordered a strip search of five female students to recover the money;[173] public scrutiny followed.[174] Requests for information—which would have given the public (including district parents) insights as to how the events and subsequent investigation were handled by district officials—were rejected at the trial court and again on appeal when it reached the Iowa Supreme Court.[175] The court categorically rejected the advocates' claim to the information.[176] Any record of discipline, and any information tied to it, qualified as "[p]ersonal information in confidential personnel records."[177] The court characterized the records sought as "performance evaluations" and held that the plain language of the statute prohibited it from considering any balancing test in determining whether to compel disclosure.[178] Though courts are supposed to interpret the law with a presumption of disclosure, the court wrote that the legislature's broadly worded exemption required it to assume the legislature intended these records to remain out of the public domain.[179] Despite decades of contrary precedent, the court found balancing tests were unnecessary, especially when it was able to divine what information was truly personal information in confidential records.[180]

Although *Atlantic* involved Iowa Code § 22.7(11) and the disciplinary records of school employees—and despite a recent Iowa Supreme Court decision that distinguished the two code sections involved[181]—the analysis

172. ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 236 (Iowa 2012) (citing IOWA CODE § 22.7(11) (2011)) ("Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies. . . .").

173. *Id.* at 232.

174. *Id.*

175. *Id.*

176. *See id.* at 235–36.

177. IOWA CODE § 22.7(11) (2019).

178. *Atlantic*, 818 N.W.2d at 233.

179. *Id.*

180. *See id.* at 237 (Cady, C.J., dissenting) (writing the majority now takes an "amorphous interpretive approach" that undoes decades of precedent).

181. Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 233–35 (Iowa 2019). This recent holding—both the good and bad—will be briefly explored in the Addendum of this Note.

employed in the *Atlantic* decision will likely extend to questions of whether something is an investigative report, including footage from police body cameras.[182] Indeed, an aversion to any balancing test for investigative reports was already established by the Iowa Court of Appeals a year before the *Atlantic* decision.[183] In *Neer v. State*, a man convicted of DWI sought the trooper's pursuit report, use of force report,[184] and the car's camera footage of his arrest.[185] The court denied the materials, finding they were all exempt as investigative reports.[186] Relying on the holding in *AFSCME*, the court held any material used as part of investigative reports qualified for the exemption.[187] Without weighing the interests involved or exploring the arguments made by Neer's attorney (that these materials were factual materials that preceded an actual investigation and were thus an exception to the investigative report exemption) and despite the absence of an ongoing investigation or any express argument that the public interest was served by withholding the documents, the court found all of these materials are necessarily investigatory reports and, without weighing any interests, ruled against disclosure.[188]

In so ruling, the court further buttressed the notion that anything touched by the hand of investigators could qualify as an investigative report exempt from disclosure.[189] Routine reports on the pursuit and the officer's use of force, which typically involve no witness statement or internal detective deliberations, were also exempted.[190] Even more impactful is the finding that dash-camera video, which preceded any actual investigation,

182. *See Atlantic*, 818 N.W.2d at 237–38 (chiding the majority's approach to not inquire whether materials fit the actual definition and instead mandating that they do and that no balancing test is required).

183. *See* Neer v. State, No. 10–0966, 2011 WL 662725, at *3–4 (Iowa Ct. App. Feb. 23, 2011).

184. Lee Hermiston, *Use of Force: How Do Iowa Police Decide?*, GAZETTE (Feb. 22, 2015), http://www.thegazette.com/subject/news/use-of-force-20150222 [https://perma.cc/27B2-6737] [hereinafter Hermiston I] (detailing how officers' reports of when they use force vary department by department and suggests uniform policies could yield greater transparency).

185. *Neer*, 2011 WL 662725, at *2.

186. *Id.* at *4.

187. *Id.* at *3.

188. *Id.* at *4.

189. *See id.*

190. *Compare id.*, *with* State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 531 (Iowa 1984) (where the Iowa Supreme Court justified reasons for secrecy of reports).

was now an investigative report.[191] Although the Iowa Supreme Court has not directly addressed whether such a holding would apply to body cameras, the deference it often gives law enforcement, as well as its recent aversion to the balancing of interests, shows any video involving officers and their official duties would likely be out of reach of the public under Chapter 22.[192]

IV. ILLUSTRATIVE ALTERNATIVES: AN EXAMINATION OF HOW MINNESOTA AND ARKANSAS PUBLIC INFORMATION LAWS ALLOW FOR REASONABLE USE OF POLICE RECORDS

While Iowa, Minnesota, and Arkansas all embraced public records laws at around the same point in history (following the passage of the federal FOIA), the latter two states' approaches to public records, particularly those involving law enforcement records, are far more consistent with the spirit and purpose of those laws than Iowa's.[193] The following is a brief look at the statutes themselves as well as key case law in those states.[194] While states have different statutes (and subsequently varying approaches to their interpretation), they all draw from the same principles of transparency and face the same concerns: invading the privacy of citizens and compromising police work.[195] However, this Part demonstrates how greater transparency is not only possible but commendable even in the face of some of these concerns.[196]

A. *Minnesota*

Minnesota, like its neighbor to the south, embraced a public records law during the national push by state legislatures in the 1970s.[197] Unlike most states, Minnesota does not have a FOI law or Sunshine law but rather a

191. *Neer*, 2011 WL 662725, at * 3.

192. *See* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 232 (Iowa 2012); *see also Neer*, 2011 WL 662725, at *4. *Contra* Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994).

193. *See infra* Parts IV.A, B.

194. Why Minnesota and Arkansas? Arkansas, although southern, has roughly the same population and shares similar business and agricultural climates. Minnesota, though larger than Iowa, is similarly an agricultural state and is comparable to Iowa in terms of demographics and cultural history.

195. *See infra* Parts IV.A, B.

196. *See infra* Parts IV.A, B.

197. Leita Walker, *Minnesota – Open Government Guide*, REP.'S COMMITTEE FOR FREEDOM OF THE PRESS (2018), https://www.rcfp.org/open-government-guide/minnesota/ [https://perma.cc/H69S-5F27].

Government Data Practices Act, one that makes all government "data" a matter of public record (save for data specifically exempted by the legislature).[198] Beyond a philosophic difference in approaching public records as data, Minnesota lawmakers were detailed in drafting a law that is considerably more voluminous than its Iowan counterpart.[199] Moreover, it expressly offers definitions of who it applies to, carving out considerations for various types of public records such as library data, education data, employment and training data, state agency data, and energy and utilities data.[200] Indeed, there are no "general exemptions," but rather the exemptions must be specifically addressed by the legislature, an approach that can lend to greater transparency for the public.[201]

Most notably, the Minnesota Data Practices Act has nearly two dozen subsections detailing the availability of data related to law enforcement and other criminal justice materials.[202] The law offers greater access to citizens in Minnesota to information that would allow them to more effectively evaluate government action than does Iowa's FOI Act. For example, unlike Iowa, Minnesota law expressly sets out that public employee discipline actions (and their related investigations) are public records once they are finalized.[203] In giving greater access to public records to the citizenry, Minnesota courts have emphasized the interests in privacy (in this case, public employees) must be balanced with the public's Right to Know.[204]

More specifically, police-related materials are far easier to access in Minnesota than in Iowa. Iowa's incident report exception to its investigative

198. *Id.*

199. *Compare* MINN. STAT. ANN. ch. 13 (West 2019) and its scores of specific, express sections, *with* IOWA CODE ch. 22 (2019) and its 13 sections.

200. *See generally* MINN. STAT. ANN. ch. 13 and its meticulous approach to categorizing and qualifying the thrust of disclosure under the Data Practices Act.

201. *See* Walker, *supra* note 197 (detailing how administrative agencies can obtain temporary classification to exempt materials from disclosure but this classification is subject to a process of official scrutiny that culminates with consideration by the legislature).

202. MINN. STAT. ANN. §§ 13.80–13.90.

203. *Id.* § 13.43.

204. *See, e.g.*, Minneapolis Fed'n of Teachers Local 59 v. Minneapolis Pub. Sch. Dist., 512 N.W.2d 107, 112 (Minn. 1994) ("We do not weigh lightly the potential harm to the school employees' personal and professional reputations. . . . The [newspaper] faces harm, however, if the names [of individuals] are not released. Without the names of individuals, their story will likely have less credibility and the reporters will have difficulty fully investigating repeated complaints.").

report exemption requires law enforcement to disclose "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident."[205] Minnesota's version of that, however, obliges officials to disclose more than a dozen fields of information, some as specific as "whether any weapons were used" and "whether parties involved were wearing seatbelts."[206] By expressly stating what materials law enforcement must disclose upon request, the courts not only have clear standards of what the public is entitled to but more support for disclosure whenever they must divine legislative intent.[207]

Investigations themselves, while active, are not matters of public record, but individuals can bring suit and win the release of materials if they can merely demonstrate the benefit to the public outweighs any harm to the individuals in the investigation or the investigation itself.[208] If an investigation becomes inactive, which can occur when a prosecutor decides not to bring charges, investigator reports can be obtained under public records laws (so long as disclosure would not jeopardize another investigation or put witnesses or victims at great risk of harm).[209]

Minnesota case law bears out how these statutes better serve the public interest by prioritizing disclosure. In November 1992, police began a rape investigation following an incident involving professional hockey players[210] at their hotel.[211] Two weeks after the incident,[212] the prosecutor's office decided not to press charges against the star athletes.[213] When the hockey players tried to stop the now inactive file from being turned over to local media following a public data request, the Minnesota Supreme Court looked to the statute and found the hockey players' potential "emotional distress"

205. IOWA CODE § 22.7(5) (2019).

206. *See* MINN. STAT. ANN. § 13.82.

207. *Contra* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 233 (Iowa 2012) (eschewing any invitation to weigh policy concerns because policy priorities are the province of the legislature).

208. MINN. STAT. ANN. § 13.82(7).

209. *Id.*

210. No discussion of Minnesota case law would be complete without an exploration of a law's effect on hockey.

211. *In re* Quinn, 517 N.W.2d 895, 896 (Minn. 1994).

212. *Id.* at 897 (writing Jane Doe told investigators that a hockey player forced himself on her, she fled to the hotel hallway where she vomited, and then returned for her clothes only to find the hockey players had doused them in beer and called her a "fucking bitch").

213. *Id.*

from disclosure did not outweigh the public's right to examine how investigators handled the incident (and what prosecutors had in front of them when they decided not to prosecute).[214] The court also rejected the argument made by the hockey players (and often made by government officials in Iowa) that future investigations would suffer if it was known that this material might come out.[215]

Even if there are documents that are not fit for disclosure (due to an ongoing investigation), that does not provide a blanket exemption for any information loosely tied to that investigation. In a dispute over disclosure of documents related to emergency plans between Mall of America security and local law enforcement, a newspaper won access to some documents that were easily separable from those deemed too sensitive for disclosure.[216] There, the court noted Minnesota's law favors disclosure of materials unless they are so "inextricably intertwined" that it would be impossible to disclose without disclosing confidential or sensitive materials as well.[217] In ruling for disclosure (or de-bundling), the court noted Minnesota's law is interested in the disclosure of data and not documents, suggesting that the format or location of information (or its association with otherwise confidential or sensitive materials) will not operate as a blanket exemption.[218]

Recent legislation in Minnesota has set out that body-camera video is not a public record until the end of an investigation and only if that camera captures an officer using force that results in death or substantial injury.[219] The only other way to obtain the footage is for a subject (i.e., a suspect or witness in the incident) to request the data be released to the public.[220] Transparency advocates were rightly outraged by the recent move, arguing it would cause undue delays for citizens trying to determine what really happened following an incident and could make these findings difficult due

214. *Id.* at 899–900.

215. *Compare id.* at 899, *with* State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 528–29 (Iowa 1984).

216. Nw. Publ'n, Inc. v. City of Bloomington, 499 N.W.2d 509, 510 (Minn. Ct. App. 1993).

217. *Id.* at 511.

218. *See id.*

219. MINN. STAT. ANN. § 13.825(2) (West 2019).

220. *Id.* § 13.825(2)(a)(2).

to the costs of litigation.[221] Nonetheless, having some access is better than none.[222]

B. *Arkansas*

Arkansas led the vanguard of the national push for FOI laws with passage of its own law in 1967.[223] But its structure and language are more akin to Iowa's than Minnesota's statute.[224] It sets out stridently in its purpose section that "[i]t is vital in a democratic society that public business be performed in an open and public manner," so citizens are aware of the decisions made by those that govern (whereas Iowa's only has a similar declaration for its Open Meetings law).[225] Its definition of what materials qualify as public records is similar to Iowa's,[226] but it includes language emphasizing that information could be a "record of the performance or lack of performance" by state actors.[227] This criteria, as well as an underlying emphasis that materials in possession of public entities or actors are presumed to be public records, mandates deference to the public interest and their rights to public oversight and accountability.[228]

Unlike Iowa, the Arkansas FOI law is a vital part of public life in Arkansas and one that is baked into the culture and commands a sense of

221. *See* James Eli Shiffer, *Body Camera Video: In Minnesota, for Police Eyes Only*, STAR TRIB. (May 23, 2016), http://www.startribune.com/body-camera-video-in-minnesota-for-police-eyes-only/380375431/ [https://perma.cc/TC9V-29LT].

222. *See* Erin Jordan, *Iowa Division of Criminal Investigation Won't Make Public Record About Autumn Steele's Death*, GAZETTE (Aug. 30, 2017), http://www.thegazette.com/subject/news/delay-in-public-records-case-over-burlington-fatal-police-shooting-20170829 [https://perma.cc/4LPF-T3B2].

223. John E. Tull III et al., *Arkansas – Open Government Guide*, REP.'S COMMITTEE FOR FREEDOM OF THE PRESS (2018), https://www.rcfp.org/open-government-guide/arkansas/#open-government-guide [https://perma.cc/B4YZ-YB93] (noting that the law, which was authored in part by media organizations, was innovative and meant to be an example for other states to follow).

224. *See* ARK. CODE ANN. §§ 25-19-102–111 (West 2019).

225. *Compare id.* § 25-19-102, *with* IOWA CODE chs. 21, 22 (2019).

226. IOWA CODE § 22.1(3).

227. ARK. CODE ANN. § 25-19-103(7)(A).

228. *See id.*

pride and devotion.[229] This deference to the law (until recently, at least)[230] might be an indicator of why the statute—one so similarly structured and worded as Iowa's—only contains roughly two dozen exemptions (compared to Iowa's 71).[231] The law's approach to personnel records (which allows disclosure of documentation that resulted in suspensions or terminations) favors transparency[232] and is often used by the media to expose how public entities are managed. These stories, and thus public oversight, would likely not be possible in Iowa due to the state's more stringent approach in barring the disclosure of materials that could be construed as performance records.[233]

Arkansas similarly takes a liberal approach to requests for information regarding police departments and their investigations. Although the state's exemption for "undisclosed investigations by law enforcement agencies of suspected criminal activity" appears similar to Iowa's exemption for investigative reports, the two states take vastly different approaches in application.[234] Iowa's statute is an open-ended ban on items considered investigative reports while Arkansas's statute only applies to materials tied to undisclosed investigations, which, on their face, suggest that when investigations are completed or disclosed they become matters of public record.[235]

Arkansas case law has borne this distinction out. After Little Rock officers determined the grisly murder-suicide of a Little Rock family by their

229. As a reporter in Little Rock for nearly seven years, the letters *F–O–I* constituted a verb, noun ,and at times an expletive among police officers, neighborhood activists, lawmakers, and judges alike—most of them revered the role it played in the process of governing.

230. Sonny Albarado, *Under Attack: Arkansas FOIA*, BAYOU ZEITGEIST (Mar. 7, 2017), https://salbarado.com/2017/03/07/arkansas-public-records-law-under-attack/ [https://perma.cc/BXE2-KMXM] (indicating Arkansas lawmakers proposed more than 30 bills that would carve out exemptions to weaken the state's FOI law).

231. *See* ARK. CODE ANN. § 25-19-105.

232. *Id.* § 25-19-105(c)(1); *see, e.g.,* Spencer Willems, *Officer Off Job 6 Times in 5 Years*, ARK. DEMOCRAT-GAZETTE., Sept. 4, 2012 (noting that a problematic Little Rock officer who would weeks later be charged with manslaughter in the killing of a 15-year-old routinely broke policies and that his mental stability was a concern of supervisors).

233. *See* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 233 (Iowa 2012); Foley & Rodriguez I, *supra* note 96 (detailing how unclear the law will now be when applied to documentation of firings of employees following enactment of recent law).

234. *See* ARK. CODE ANN. § 25-19-105(b)(6).

235. *Id.*

wealthy father was a contained incident, there was an FOI push for release of the materials to allay public skepticism over the slaying.[236] That push was met by protest from police and the mother of the suicidal patron, who was portrayed negatively in many of the suicidal patron's writings and a purported cause of the murderous act.[237] Despite the arguments that disclosure would violate her and her family's rights to privacy, the Arkansas Supreme Court ruled the public's interest outweighed the actress's privacy interests by giving the public an unfiltered, realistic look into what happened and why investigators sought no further arrests.[238] The court noted:

> Appellant will naturally be sensitive to the pictures, but balanced against the appellant's interest in preventing dissemination of the photographs are the government's strong interests in depicting how the multiple murders occurred, why the police consider the case closed as a triple murder-suicide matter, and why no further action should be taken. This is a highly valued governmental interest.[239]

In the case, the court also struck down an argument in favor of withholding the materials made by city police, one that echoes common justifications in Iowa case law: that disclosure would chill future cooperation with witnesses and confidential sources of information.[240] When a case is closed, the court noted, "[T]he reason for the exemption [of investigative materials] no longer exists." In a concurrence, Justice Darrell Hickman emphasized that the suicide "letter" from the murderous father that blamed his mother for his troubles (and admitting to his plan to murder his family) was not a private matter and was inherently public. He additionally criticized the police for trying to subvert the clear intention of the law to provide the public with access to government materials.[241]

236. McCambridge v. City of Little Rock, 766 S.W.2d 909, 911 (Ark. 1989).

237. Brandon Riddle, *Murders on Main*, ARK. ONLINE, http://www.arkansasonline.com/murdersonmain/ [https://perma.cc/XCS7-T8VZ] (last visited June 22, 2019).

238. *McCambridge*, 766 S.W.2d at 915.

239. *Id.*

240. *Id.*

241. *Id.* at 916 (Hickman, J., concurring) ("When Markle killed his family and then himself, he made his actions a public matter; he opened the door to an investigation of what happened and why. With that comes the right to examine all the available evidence relative to his motive and actions. . . . Under Arkansas law, they are public documents. . . . The word 'undisclosed' is not vague or hard to interpret—it is just not the word the city wants. . . . The city and law enforcement officials should take up this question with the legislature.").

In a more recent case, Arkansas State Police resisted turning over an unsolved homicide file to the family of the victim who sought the materials more than 50 years after the crime.[242] The Arkansas high court rejected the state police's arguments that the investigation was still ongoing and thus beyond release under the undisclosed investigation exemption.[243] In a unanimous opinion, the court noted since there was no action on the investigation in nearly 50 years, the family was entitled to the materials in order to evaluate how investigators performed their job,[244] a central tenant of the Arkansas FOI statute.[245] In so holding, the court highlighted the law's commitment to public disclosure, one that does not blindly concede to the interests of law enforcement.

Police and prosecutors should not be permitted to apply this exemption as a matter of course until conviction or acquittal, or indefinitely until a charge is brought, if there is no genuine interest in enduring secrecy. To do so would excessively insulate the government against legitimate probes by the public and media into the performance of law enforcement functions, even apart from the disadvantage to criminal defendants.[246]

There have been recent attempts in Arkansas to take police's body-camera footage out of the public record.[247] But as it stands, this footage, like dash-camera video and 911 calls, is available to the public,[248] allowing media and the public to scrutinize police accounts with what actually happened, a function expressly intended by the language of Arkansas's statute.[249]

242. Dep't of Ark. State Police v. Keech Law Firm, P.A., 516 S.W.3d 265, 268 (Ark. 2017).

243. *Id.* at 267–68.

244. *Id.* at 268.

245. ARK. CODE ANN. § 25-19-102 (West 2019).

246. *Keech*, 516 S.W.3d at 268 (quoting JOHN J. WATKINS ET AL., THE ARKANSAS FREEDOM OF INFORMATION ACT 148 (6th ed. 2017)).

247. David Ramsey, *Bill Filed to Exempt Certain Police Body-Cam and Dash-Cam Recordings from FOI*, ARK. TIMES (Jan. 24, 2017), https://www.arktimes.com/ArkansasBlog/archives/2017/01/24/bill-filed-to-exempt-certain-police-body-cam-and-dash-cam-recordings-from-foi [https://perma.cc/5DSH-29NK].

248. *Id.* (explaining that though subject to disclosure, they can still be withheld by agencies if an investigation is still ongoing, a tactic that is often abused by local agencies).

249. *Id.* (referencing audio and video of arrests of public officials that varied greatly from the written arrest reports and incident reports filed by officers).

In short, Minnesota's lengthy and detailed approach to public information gives clear guidance to public actors and the courts. More importantly, it gives the public greater access to materials by which it can assess the efficacy (or lack thereof) of government operations. In Arkansas, the law is similar to Iowa's in structure, but the statute and the courts embrace greater transparency in order to ensure effective government operations.[250] While these are different laws in different states, the policies they promote—as well as the pitfalls they face—are no different than those faced by Iowa judges.

V. CONSTRUCTING CRITICISM: FLAWS IN REASONING AND POLICY OF CURRENT APPROACH TO INVESTIGATIVE REPORTS: A RETURN TO COMMON SENSE AND BALANCING INTERESTS

The goal of FOI laws is to arm the citizenry with the information needed to better govern itself and, when necessary, take corrective action against those who would govern them.[251] But unless Iowa courts reverse their current trajectory, citizens seeking an officer's use of force report, information related to an unsolved crime, or body-camera footage will likely remain left in the dark.[252]

A. *Weighing by Fiat: The Problem with Recent Iowa Rulings on the FOI Act*

1. Atlantic *Was Decided in Error and Has Profoundly Negative Implications for the Public's Right to Know*

In circumventing decades of precedent by rotely declaring materials related to an investigation of student strip searches, *Atlantic* was, in a word, wrong.[253] Operating with no definition of personnel records, the court failed to balance any interests and took a narrow prohibition against disclosure of "personal information in confidential personnel records" to mean disclosure of anything that could relate to an identifiable person—as opposed to sensitive personal information (such as medical records, social security information, etc.)—which flew in the face of Iowa precedent.[254]

250. ARK. CODE ANN. § 25-19-102.

251. *Supra* Part I.

252. *See, e.g.*, State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 531 (Iowa 1984).

253. *See id.*

254. *Id.* This generous interpretation of *personal* invokes the same misplaced analysis seen in *U.S. Department of Justice v. Reporter's Committee for Freedom of the*

The majority justified its broadly stroked ruling by invoking a decades-old decision that prevented the disclosure of administrative investigations of a Des Moines school administrator who had recently settled a lawsuit with the district.[255] But the precedent from *Des Moines Independent Community School District v. Des Moines Register & Tribune Co.* did not decide whether, on the whole, performance evaluations were exempt; it merely held that exempt information does not lose its status by virtue of being incorporated into an administrative investigation.[256] Even more telling, the *Atlantic* court justified its decision not to weigh the interests claimed in its case by pointing out that *Des Moines Independent* did not engage in a balancing test.[257] Though balancing tests had been used prior to *Des Moines Independent* (1992), they had yet to become the institutions that they would be following cases like *Hawk Eye*,[258] *DeLaMater*,[259] and *Clymer*.[260] Put another way, when the *Atlantic* court made the leap of settling an issue without weighing the interests involved, it should have checked its footing first.

Though the damage of this decision seems to have been nominally limited to personnel records,[261] the type of judicial reasoning nonetheless has grave implications for citizens seeking information on police matters.[262] First,

Press where the Court ruled that the personal privacy interests of four known mafiosos dealing in defense contracts through a corrupt congressman outweighed the public's interest in knowing the extent of their criminal histories). U.S. Dep't of Justice v. Reporter's Comm. for Freedom of the Press, 489 U.S 749 (1989); *see also* ACLU v. Atl. Cmty. Sch. Dist., No. 11–00952011, 2011 WL 4950199, at *4 (Iowa Ct. App. Oct. 19, 2011) (Pottsfield, J., dissenting) (noting records should be examined even if it may cause embarrassment to public officials).

255. Des Moines Indep. Cmty. Sch. Dist. v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 670 (Iowa 1992).

256. ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 237–38 (Iowa 2012) (Cady, C.J., dissenting) (arguing that the majority misread and misapplied *Des Moines Independent School District* and that "[w]ithout question, the balancing test continued as our law following our decision [there]").

257. *Id.* at 233 (majority opinion).

258. Hawk Eye v. Jackson, 521 N.W.2d 570, 753–54 (Iowa 1994).

259. DeLaMater v. Marion Civil Serv. Comm'n, 554 N.W.2d 875, 880–81 (Iowa 1996).

260. Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 48 (Iowa 1999).

261. Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 223–35 (Iowa 2019). The import (and confusion) of this holding will be explored in the Addendum & Conclusion *infra.*

262. *Atlantic*, 818 N.W.2d at 244 (Cady, C.J., dissenting) ("[W]ithout the balancing test, courts will only be able to apply [FOI exemptions] through their own personal

although this case appears to apply to nonpolice matters, the exemption involved most certainly can and will be used to stonewall citizens seeking information on law enforcement actions.[263] When police officers use deadly force, they become the subject of two parallel investigations: one criminal and the other internal.[264] But by the court's holding, officer conduct will be doubly shielded from public oversight.[265] First, law enforcement authorities will be able to withhold information involving the officer until the criminal investigation is complete.[266] Even once there is no risk of affecting a criminal investigation by disclosure, any internal review or critique of how the officer handled a situation could still be exempt.[267] Worse still, any otherwise public information incorporated into that internal review, vis-à-vis the settled criminal investigation, will be swallowed by an exemption that could, by the *Atlantic* court's logic, be applied so far as to withhold the identity of officers involved in the shooting.[268] In short, what officers knew, what their commanders knew, what the city knew, etc., may never see the sunlight of public scrutiny.[269]

The other result of such a ruling is that in shedding the need for a balancing test, courts could be empowered to categorically reject requests for anything they deem to be an investigative report.[270] Such a ruling would allow, for example, a repeat civil rights offender to stay on as a police officer with no recourse from the community he or she is empowered to police.[271] Given the ambiguous nature of the *investigatory report* language, it is hard to see where the court would draw the line as to what qualifies as exempt from public disclosure.[272] Public surveillance footage? Body-camera footage? What about past complaints of abuse or unprofessionalism of an

assessment [of the nature of the exemption], *divorced from any legitimate public need for the information*." (emphasis added)).

263. *See* Hoffman, *supra* note 12.

264. Hermiston I, *supra* note 184 (detailing how officers' reports of when they use force vary by department and suggests uniform policies could yield greater transparency).

265. *See Atlantic*, 818 N.W.2d at 236 (majority opinion).

266. *See* Allen v. Iowa Dep't of Pub. Safety, Case No. EQCE074161, at 5 (Iowa Dist. Ct. Mar. 7, 2014).

267. *See Atlantic*, 818 N.W.2d at 236.

268. *See id.* at 235–36.

269. *See, e.g.*, Rood, *supra* note 10.

270. *See Atlantic*, 818 N.W.2d at 244 (Cady, C.J., dissenting).

271. *See* Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994).

272. IOWA CODE § 22.7(5) (2019).

officer? Or what about an officer's past punishments for failure to follow procedure or commands? Where the public's interest would be weighed accordingly under a balancing test, the ruling in *Atlantic* gives Iowa courts free reign to defer to a city or county's claims that requested information is prima facie tied to an investigative report.[273] This blind deference to government authority is exactly the ill sought to be cured by the Iowa FOI Act,[274] and it results in a rule of law where "the public will have no means to measure the appropriateness of the government's response to misconduct in matters of legitimate public interest. This approach is a return to the government of the past and a danger to our future."[275] And though the Iowa Supreme Court recently seemed to distinguish *Atlantic* from rulings related to police reports, it did so without rebuking its approach to categorization and analysis, one that gives courts the ability to cabin police materials from public scrutiny by *ipse dixit* determinations that an inert item (such as body-camera video) is an investigative report.[276]

2. *The Decision in* Neer *Wrongly Found Against Disclosure and Poses Threats to Citizens' Access to Basic Police Records*

A year before the *Atlantic* decision, the Iowa Court of Appeals similarly ruled against disclosure based on an overly broad interpretation of statutory exemptions to the Iowa FOI Act.[277] There, the plaintiff sought materials that were alleged as being exempt because they were investigatory reports.[278] Despite the absence of an ongoing investigation or any express argument that the public interests was served by withholding the documents, the court held these materials are necessarily investigatory reports and, without weighing any interests, ruled against disclosure.[279]

The plaintiff argued the video from the officer's squad car was not a report,[280] and even if it was, it existed before any actual investigation began

273. *See Atlantic*, 818 N.W.2d at 235–36 (majority opinion).

274. *See Afraid to Ask*, *supra* note 74, at 1189.

275. *Atlantic*, 818 N.W.2d at 244 (Cady, J., dissenting).

276. *See* Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 233–35 (Iowa 2019).

277. *Compare* Neer v. State, No. 10–0966, 2011 WL 662725, at *3 (Iowa Ct. App. Feb. 23, 2011), *with Atlantic*, 818 N.W.2d at 235–36 (majority opinion).

278. *Neer*, 2011 WL 662725 at *1, *3 (deciding the FOI issue even though it was thought moot because law enforcement eventually disclosed them).

279. *Id.* at *4.

280. *Id.* at *3 (arguing there is no language in the confidentiality segments of the law that includes tape or other video).

(presumably because these videos are typically triggered by police sirens and thus a routine process rather than a tool of investigators).[281] The court did not bite. In leaning on the *AFSCME* ruling, it reasoned that if blood tests used by investigators in a death investigation were investigatory reports exempt from disclosure, surely video of a criminal act would be exempt—even from the criminal.[282] The court also rejected the claim that the video was not investigative—because it merely documented the actions taken by officers in effecting the arrest—by inexplicably reasoning that requiring an "item-by-item" assessment of an investigative file would "eliminate" the exemption for investigatory reports.[283] The court also found the video did not qualify as time, specific location, or immediate facts and circumstances of a crime that must be disclosed upon request.[284] Though coming from a lower appellate level, the court's generalized prohibition against disclosure of video and use of force reports has already been lent as a shovel to public officials looking to bury materials subject to good-faith FOI requests.[285]

The court wrongly relied on *AFSCME*, as well as *State ex rel. Shanahan*, in finding an officer's dash-camera video was an investigatory report.[286] The blood test analysis withheld in *AFSCME* was tied to the investigation because it was directly related to the underlying cause of a man's suicide,[287] and in *State ex rel. Shanahan*, the court merely held plaintiffs were not entitled to the entirety of an ongoing homicide file.[288] The dash-camera video was merely footage of an investigation and an arrest that would be no more an investigatory report than if a passerby had decided to stop and record the incident. In short, the video was not a report by any basic

281. *See id.*

282. *Id.*

283. *Id.* at *4.

284. *Id*. It is worth noting there is scant explanation from the court as to why real-time video does not qualify as materials related to the time, specific location, or immediate facts and circumstances of the stop and arrest.

285. Burlington Pol. Dep't, Dep't of Pub. Safety Div. of Criminal Investigation, Nos. 17IPIB001 FC:0030, 17IPIB002 FC:0034, at 19–20 (Feb. 21, 2019) (justifying its holding that the Steele family's requests for police video, 911 calls, and other reports were all investigative reports under *Neer* and thus exempt from disclosure). A more detailed analysis of this decision will unfold in the Addendum & Conclusion *infra*.

286. *Neer*, 2011 WL 662725, at *3.

287. AFSCME/Iowa Council 61 v. Iowa Dep't of Pub. Safety, 434 N.W.2d 401, 403 (Iowa 1988).

288. State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 528 (Iowa 1984).

definition.[289] The court then justified the video as an exempt investigative report because allowing an audit of what is contained in a file would be tantamount to handing over the entirety of an investigative file.[290] This logic echoes the flawed reasoning used by the United States Supreme Court in *National Archives & Records Administration v. Favish*, which held, in order to get access to documents, plaintiffs had to state just what those documents contained,[291] an *argumentum ad ignorantiam* indeed.

The *Neer* ruling also runs contrary to the purpose of the FOI Act by forestalling any request for video footage from officers, even after an investigation is completed. [292] The court engaged in no balancing or weighing of public interests, disposing of controlling precedent for Iowa FOI Act cases (even those involving police investigations).[293] If it had conducted a balancing test, law enforcement would have had to show there was a significant risk to the public interest by allowing the video's release and weigh that risk against the public's future interest in being able to access video detailing police actions.[294] It is unclear how the release of a video of a traffic stop following the end of its subsequent investigation (and even prosecution) could win out over the public's right to see just how its officers handle themselves.[295] Indeed, the video was handed over, and it does not seem to have kept officers from making more drunk-driving arrests.[296] When combined with the reasoning and holding in *Atlantic*, it appears there is no recourse for individuals to access public records so long as officers can give the court the most remote of ties between the information sought and an investigation (or personnel file). As such, citizens will have to take the government at its word that it did nothing wrong.[297]

289. *See Report*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/report [https://perma.cc/L9FT-8TF7].

290. *State ex rel. Shanahan*, 356 N.W.2d at 531.

291. *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 174–75 (2004); *see also* Halstuk & Chamberlin, *supra* note 29, at 550–51.

292. *See* Neer v. State, No. 10–0966, 2011 WL 662725, at *3 (Iowa Ct. App. Feb. 23, 2011).

293. *Contra* Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994); *State ex rel. Shanahan*, 356 N.W.2d at 529.

294. *See State ex rel. Shanahan*, 356 N.W.2d at 529.

295. *See Hawk Eye*, 521 N.W.2d at 754.

296. *Neer*, 2011 WL 662725, at *1–2.

297. *See* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 244 (Iowa 2012) (Cady, C.J., dissenting) ("[Without a balancing test,] transparency in government will surely be thwarted by those in government who . . . will be able to quell public discourse and end

As it stands, it appears this pair of rulings would give law enforcement (and a sympathetic judge) the ammunition needed to prevent the disclosure of any number or type of materials held by law enforcement, including but not limited to what has been sold—to governments and the public alike—as a tool for preventing police misconduct: body cameras.[298]

B. *Applying Common Sense to the Investigative Report Exemption*

1. *The Present Approach to Law Enforcement's Investigative Report Exemption Runs Contrary to the Law's Legislative Intent and Yields Absurd Results*

Under current judicial interpretations, most requests for materials with even a tangential tie to police investigations might be denied.[299] This is contrary to the plain language, spirit, and purpose of the law.[300] A dubious concept in its inception, law enforcement's investigatory report exemption has led to results that not only run counter to the spirit and purpose of the law but are absurd.[301] This absurdity alone is cause for Iowa courts to reevaluate their approach.[302] Per the Iowa Supreme Court, judges should "give effect to the spirit of the law rather than the letter, especially so where adherence to the letter would result in absurdity, or injustice, or would lead to contradiction, or would defeat the plain purpose of the act."[303]

controversies over [public] employee misconduct of public concern with no public scrutiny . . . .").

298. *See infra* Part V.

299. *See Atlantic*, 818 N.W.2d at 233–34 (majority opinion) (eschewing any balancing tests and finding incidental inclusion of performance records in an administrative investigation justified withholding it from the public); AFSCME/Iowa Council 61 v. Iowa Dep't of Pub. Safety, 434 N.W.2d 401, 403 (Iowa 1988); *Neer*, 2011 WL 662725, at *4; *see also* Lauren Mills, *Iowa Given a D+ for Government Transparency*, DES MOINES REG. (Nov. 9, 2015), https://www.desmoinesregister.com/story/news/2015/11/09/iowa-given-d-rating-government-transparency/75416520/ [https://perma.cc/64DK-CLJN] (quoting former director of the Iowa Freedom of Information Council (and Drake law alumni) Kathleen Richardson describing the investigatory report exemption as a "black hole").

300. *See* IOWA CODE § 22.2(1) (2019).

301. *See, e.g.,* Allen v. Iowa Dep't of Pub. Safety, Case No. EQCE074161, at 4–5 (Iowa Dist. Ct. Mar. 7, 2014) (denying a family access to a decades-old homicide file because the placement of a comma can justify withholding public documents in perpetuity).

302. Brakke v. Iowa Dep't of Nat. Res., 897 N.W.2d 522, 538 (Iowa 2017).

303. *Id.* (quoting Case v. Olson, 14 N.W.2d 717, 719 (Iowa 1944)).

As pointed out in *Afraid to Ask*, there are other legal avenues to protect the privacy of individuals referenced in police materials, as well as common-sense safeguards against spoiling active investigations; the blanket exemption for police materials was viewed, even in its inception, as language that invited administrative mischief.[304] In viewing the purpose and scope of the law, courts then needed, and now need, to be proactive in preventing abuses by government officials.[305] Otherwise, citizens are left to live in a police state where law enforcement agencies may share information when it is to their advantage while denying citizens access to information when it is to the agencies' detriment.[306] In doing so, courts "excessively insulate the government against legitimate probes by the public and media into the performance of law-enforcement functions."[307]

Arguably, we are already in a place where the law is subverted by the whims of law enforcement's own self-interest, and the facts of the *Mitchell v. City of Cedar Rapids* case are illustrative of that.[308] In early November 2016, news reports came out of an officer-involved shooting of a suspect who fled following a traffic stop and altercation with officers.[309] Given the many prior media cycles showing black men being gunned down by officers for seemingly little reason, suspicion, as well as tension, rose.[310] Following a decision not to prosecute the officer, officials released the dash-camera

304. *See Afraid to Ask*, *supra* note 74, at 1182–83.

305. *Id.* at 1189 ("The specific exemptions . . . [of the law] are mostly redundant and ambiguous. Their presence can only serve to cloud the efficient access of the public to governmental records by seemingly affording the custodian grounds for denying inspection without regard to the public interest. The limitations thus imported to the right to know can only be overcome by judicial interpretations consistent with the underlying goals of [the law] . . . .").

306. *See id.* at 1181–82 (discussing how law enforcement freely discloses video that portrays officers in positive, even heroic lights, yet citizens seeking similar materials that paint them negatively are met with denials).

307. Dep't of Ark. State Police v. Keech Law Firm, P.C., 516 S.W.3d 265, 268 (Ark. 2017).

308. *See* Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 224–25 (Iowa 2019).

309. Lee Hermiston, *Dash-Cam Video Exists of Officer-Involved Shooting in Cedar* Rapids, GAZETTE (Nov. 2, 2016), http://www.thegazette.com/subject/news/public-safety/linn-county/unclear-if-video-exists-of-officer-involved-shooting-in-cedar-rapids-20161102 [https://perma.cc/KLK4-2W7L].

310. *See* Enjoli Richards, *Questions Linger After Dash-Cam Video of Man Being Shot by Police During Traffic Stop Is Released*, ABC NEWS (Dec. 9, 2016), http://abcnews.go.com/US/questions-linger-dash-cam-video-man-shot-cedar/story?id=44087880 [https://perma.cc/YS7X-CYNZ].

video to the public, which to many appeared to exonerate the officer.[311] Others in the community, of course, maintained their doubts.[312] Nonetheless, law enforcement officials in Cedar Rapids saw no problem with releasing a video vindicating their own interests.[313]

And yet officials in Burlington fought to the end in refusing to release similar video of an officer killing Burlington wife and mother Autumn Steele.[314] Unless the courts embrace balancing tests that give fair weight to the public interest in disclosure, law enforcement will continue to use the investigatory report exemption as a shield from public scrutiny, only to release officer video and other otherwise-exempt material when it furthers their own interest.[315]

These inconsistencies are not the only absurdities to result from the state's law. In 2014, a private investigator hired to look into cold-case homicides from the 1970s was denied the investigative files into the unsolved murders.[316] Despite decades of no progress, an Iowa judge refused to enforce their disclosure because "[t]he initial phrase before the first comma [of the statute][317] is unqualified; thus, investigative reports are confidential without condition."[318] Although some police departments will disclose materials

311. *Id.*

312. Phil Reed, *Jerime Hill Shooting: One Year Later*, KCRG TV9 NEWS (Oct. 31, 2017), http://www.kcrg.com/content/news/Jerime-Mitchell-shooting-one-year-later-454369953.html [https://perma.cc/XCZ7-ABRX].

313. *See* Richards, *supra* note 310.

314. *See, e.g.*, Burlington Police Dep't, Dep't of Pub. Safety Div. of Criminal Investigation, Nos. 17IPIB001 FC:0030, 17IPIB002 FC:0034, at 17 (Feb. 21, 2019); *see also* Jordan, *supra* note 222.

315. *See* Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994) ("[A]llegations of leniency or cover-up with respect to the disciplining of those sworn to enforce the law are matters of great public concern. . . . So long as [police can withhold these investigatory reports], the newspaper is effectively prevented from assessing the reasonableness of the [decision not to punish the officer.]"); *see also* Matt Stroud, *Police Body Camera Footage Is Becoming a State Secret*, VERGE (June 12, 2017), https://www.theverge.com/2017/6/12/15768920/police-body-camera-state-secret [https://perma.cc/ZA4T-2DRV] (discussing how law enforcement freely discloses video that portrays officers in positive, even heroic lights, yet citizens seeking similar materials that paint officers negatively are met with denials).

316. Clayworth II, *supra* note 9 (noting scholars feel the permanent prohibition of disclosure on unsolved cases runs contrary to the law's purpose).

317. Allen v. Iowa Dep't of Pub. Safety, Case No. EQCE074161, at 3 (Iowa Dist. Ct. Mar. 7, 2014).

318. *Id.*

once an investigation is closed,[319] according to precedent, there is no requirement that law enforcement ever release information contained in an investigatory report.[320] Even run-of-the-mill requests for video detailing the propriety of a traffic stop will be met with a rote investigative report denial.[321] This absurdity is aggravated by a range of past rulings and ongoing controversies[322] that would allow investigators to enshroud permanently any fact, public or private, merely by dragging it into an investigation.[323] Meanwhile, friends, families, and entire communities are left to wonder what happened and if anything more could have been done.[324]

2. *Justifications for Denying FOI Requests for Law Enforcement Materials Are Overstated and Can Be Easily Accounted for by a Diligent Weighing of Interests*

When it comes to information held by investigators, judges are rightly reluctant to greenlight disclosure of records that could harm an investigation or put someone in danger.[325] Though judges faced with a request for documents that law enforcement seeks to exempt from the FOI Act as investigatory reports must consider the public interest put at risk by

319. *See* Clayworth II, *supra* note 9.

320. *See Allen*, Case No. EQCE074161, at 4–5.

321. *See, e.g.*, Ryan Foley, *Public Regularly Denied Access to Police Officer Videos*, ASSOCIATED PRESS (Mar. 13, 2019), https://www.apnews.com/67f22d5857f14413a4a9b34642c49ae3 [https://perma.cc/3E5B-HJWC] (detailing how a North Liberty city attorney refused to disclose video of a traffic stop that resulted in the officer's firing and even demanded a reporter not release a copy of the video they had independently obtained).

322. Jason Clayworth, *After 2 Die on Iowa School Bus, Inspection Records Are Sealed*, DES MOINES REG. (Dec. 27, 2017), https://www.desmoinesregister.com/story/news/investigations/2017/12/27/iowa-school-bus-deaths-state-seals-inspection-records/985533001/ [https://perma.cc/7FW4-K7RZ] [hereinafter Clayworth VI] (reporting that otherwise-public records were immediately sealed once investigators began investigating a bus fatality with a tie to those records).

323. *See generally* Des Moines Indep. Cmty. Sch. Dist. v. Des Moines Register & Tribune Co., 487 N.W.2d 666, 670 (Iowa 1992); AFSCME/Iowa Council 61 v. Iowa Dep't of Pub. Safety, 434 N.W.2d 401, 403 (Iowa 1988) (lab tests were exempt because they were a part of an investigatory report).

324. *See* Dep't of Ark. State Police v. Keech Law Firm, P.C., 516 S.W.3d 265, 268 (Ark. 2017) ("The victim's family and the public are entitled to know how the officials in this case, i.e., law enforcement, performed their duties.").

325. *See, e.g.*, State *ex rel.* Shanahan v. Iowa Dist. Ct., 356 N.W.2d 523, 529–30 (Iowa 1984) (quoting State v. Eads, 166 N.W.2d 766, 774 (Iowa 1969)) (detailing the risks of prematurely releasing information related to a criminal investigation).

disclosure, judges must also consider the public interest to be gained from disclosure.[326] Too often, courts give greater deference to the government's objections than those seeking the materials, contravening the purpose of the Iowa FOI Act.[327] This deference is not novel to Iowa; there is ample empirical evidence of bias by federal judges against disclosure in FOIA cases generally.[328] Given the influence of the federal statute and Iowa judges use of federal case law in making FOI-related rulings,[329] this Author would wager that most Iowa judges are as deferential to state agencies as their federal peers.

Most justifications for denying FOI requests related to investigations or other police materials are set out in *State ex rel. Shanahan*, an oft-quoted case in decisions denying disclosure under the FOI Act.[330] As noted earlier, these justifications involve ensuring that investigations are not prematurely spoiled, investigators feel free to investigate independently, and witnesses are not discouraged from cooperating for fear of public outing.[331] But these justifications, as noted by the *State ex rel. Shanahan* court, are neither dispositive nor are they automatic.[332] Indeed, the *State ex rel. Shanahan* court left room for a fair weighing of factors favoring disclosure, especially when there are questions of police conduct involved.[333]

Some vague fear that witnesses or informants might not come forward in future investigations or that investigations might not be conducted as

326. *See, e.g.*, Hawk Eye v. Jackson, 521 N.W.2d 750, 753–54 (Iowa 1994); Shannon *ex rel.* Shannon v. Hansen, 469 N.W.2d 412, 415 (Iowa 1991).

327. *See, e.g.*, *AFSCME*, 434 N.W.2d at 403–04; Neer v. State, No. 10–0966, 2011 WL 662725, at *4 (Iowa Ct. App. Feb. 23, 2011); *see also* Gabrilson v. Flynn, 554 N.W.2d 267, 271 (Iowa 1996) (citing City of Dubuque v. Tel. Herald, Inc., 297 N.W.2d 523, 527 (Iowa 1980) (holding there is a presumption of openness and disclosure under Iowa's FOI Act)).

328. Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 187 (2013). Despite Congress's mandate that federal courts review legal challenges of agency refusals of FOIA requests under a de novo standard, there is an affirmance rate of 90 percent in favor of agencies. That rate far exceeds affirmance rates of other types of review over actions of federal agencies, even when those decisions are reviewed at a standard that is far more favorable to agencies' decisions. *Id.*

329. *See, e.g.*, *Tel. Herald, Inc.*, 297 N.W.2d at 527; Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302–03 (Iowa 1979).

330. *State ex rel. Shanahan*, 356 N.W.2d at 529–30.

331. *Id.*

332. *See* Shannon *ex rel.* Shannon v. Hansen, 469 N.W.2d 412, 415 (Iowa 1991).

333. *State ex rel. Shanahan*, 356 N.W.2d at 531.

frankly as the needs demand is not an adequate justification for denial of disclosure.[334] State actors need to state, with specificity, the harm that will occur with disclosure.[335] Additionally, the sanctity of an investigation is not itself dispositive but merely one factor to be considered in evaluating the public's interest for or against disclosure.[336] This concept is embraced outside of Iowa as well. In California, "investigatory files" can only be withheld from disclosure if there is a concrete prospect of future enforcement or investigations.[337] In Washington, a fear of any chilling effect cannot be argued in general terms to justify withholding public records but must be specifically targeted to the effect.[338] In Oregon, law enforcement cannot deny requests related to a criminal (as well as internal) investigative file of an officer's conduct merely out of fear there will be hurtful or untrue statements made public; this reasoning actually encourages witnesses to speak speculatively or vindictively when they know their statements will never see the light of day.[339]

Even if there are sensitive investigative report materials, that does not justify general denials for information related to those sensitive materials.[340] Indeed, requiring disclosure of these materials can enhance public confidence and even encourage more people to come forward to work with police.[341] Any fear of investigators that the names of bad leads or other harmful information could invade individuals' privacy rights can similarly be resolved by redactions and other preventive measures.[342] Simply put, efforts

334. *See* State v. Henderson, No. 01–0295, 2002 WL 987851, at *3 (Iowa Ct. App. May 15, 2002).

335. *Id.* at *2.

336. *Hansen*, 469 N.W.2d at 415 (noting officers' concerns about investigations being stymied by disclosure was "not determinative" but merely one factor of a "public interests" test).

337. State *ex rel* Div. of Indus. Safety v. Superior Court, 43 Cal. App. 3d 778, 785 (1974).

338. *See* Does v. King Cty., 366 P.3d 936, 945 (Wash. Ct. App. 2015).

339. City of Portland v. Oregonian Publ'g Co., 112 P.3d 457, 459–60 (Or. Ct. App. 2005).

340. *See* Globe Newspaper Co. v. Police Comm'r, 648 N.E.2d 419, 426–27 (Mass. 1995).

341. *See id.* at 427 (citing Bougas v. Chief of Police, 354 N.E.2d 872, 876 (Mass. 1976)).

342. Napper v. Ga. Television Co., 356 S.E.2d 640, 651 (Ga. 1987) (holding that a task force's investigative reports should be disclosed and that any privacy concerns could be mitigated by deleting the names of those targeted by the investigation but never charged).

by law enforcement or other government officials to refuse disclosure because of a document's tie to an investigation must state a distinct or profound harm that could occur as a result; secrecy for secrecy's sake is not sufficient and would "seal every government record associated with a criminal investigation . . . . directly contraven[ing] [a] citizen's right of access to government records."[343]

Beyond the contents of criminal investigations, how those materials can reflect on the agency conducting them is also a matter of public interest that can favor disclosure.[344] Not only should materials be available to the public in order to evaluate the effectiveness and fairness of law enforcement, these materials can also warrant public disclosure if they help the public "in the review of government affairs."[345]

While the Iowa Supreme Court has ruled against disclosure of materials tied to an ongoing investigation, other states have found the fact that an investigation is ongoing is not dispositive.[346] In *Muniz v. Roth*, the New York Supreme Court held that although the public was not entitled to all of the materials involved in an active, fingerprint-fraud investigation, they were entitled to objective data and reports explaining fingerprint fraud that were relied on by investigators.[347] Fears that the release of this information would only embolden more wrongdoing was not a sufficient reason to deny release under that state's FOI law.[348] In Arkansas, state police could not withhold a 50-year-old murder investigation file because, though unsolved, the investigation was dormant for decades and the victim's family was entitled to know how law enforcement performed its duties in the investigation.[349] In both of these cases, the courts evaluated the harm that an investigation would suffer via disclosure and weighed it against the potential benefit to the public.[350] Given the emergence of new technologies—such as

343. Courier News v. Hunterdon Cty. Prosecutor's Office, 817 A.2d 1017, 1022 (N.J. Super. Ct. App. Div. 2003).

344. *See, e.g.*, Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994).

345. *See* State v. Henderson, No. 01–0295, 2002 WL 987851, at *3 (Iowa Ct. App. May 15, 2002).

346. *See* Dep't of Ark. State Police v. Keech Law Firm, P.C., 516 S.W.3d 265, 268 (Ark. 2017); Muniz v. Roth, 620 N.Y.S.2d 700, 703 (N.Y. Sup. Ct. 1994).

347. *Muniz*, 620 N.Y.S.2d at 702–03.

348. *Id.* at 703.

349. *Keech*, 516 S.W.3d at 268; *contra* Allen v. Iowa Dep't of Pub. Safety, Case No. EQCE074161, at 5 (Iowa Dist. Ct. Mar. 7, 2014).

350. *See Keech*, 516 S.W.3d at 268; *contra Allen*, Case No. EQCE074161, at 5–7.

body cameras—that would give the public an unprecedented ability to evaluate government action, Iowa courts should also consider the virtues of disclosure, not merely its potential vices.

3. *The Tape Don't Lie: A Need for Disclosure with Body Cameras*

Police body cameras are no longer an abstraction or some silver bullet that, were it not for cost or technological limitations, could resolve public confidence (or lack thereof) in community policing; they have arrived.[351] Some of Iowa's largest police departments have acquired cameras and either completed, or are in the process of completing, department policies on their use and the disclosure of their contents to the public.[352] Given the rate of their adoption by departments big and small,[353] the technology is bound to become as much a hallmark of local policing as tasers and squad car dash cameras.[354]

Body cameras became a national talking point in 2014.[355] For years now the airwaves and headlines have been dominated by officer-involved shootings and other uses of force by officers—often times involving unarmed individuals who are often persons of color—that have opened a window to those unacquainted with the harsher side of law enforcement, while providing the initial, documented evidence of brutality and racism

351. Kathy A. Bolten & Mackenzie Elmer, *Des Moines Police Using Body Cameras. Will You Be Able to See the Video?*, DES MOINES REG. (Feb. 7, 2017), https://www.desmoinesregister.com/story/news/crime-and-courts/2017/02/07/300-des-moines-police-get-body-cameras-heres-how-theyll-use-them/97586856/ [https://perma.cc/88F2-7DRL].

352. Kathy A. Bolten, *Iowa's Body Camera Rules Fall Short of National Standards*, DES MOINES REG. (Dec. 31, 2015), https://www.desmoinesregister.com/story/news/crime-and-courts/2015/12/31/body-worn-camera-policies-law-enforcement/76794694/ [https://perma.cc/S4EM-W9FE] (noting only one of eight police agencies surveyed stated body-camera footage would be available by request to the public).

353. *See, e.g.*, Renee Wielenga, *Deputies Don Body Cameras*, SIOUX CTR. NEWS (Sept. 22, 2017), http://www.nwestiowa.com/scnews/deputies-don-body-cameras/article_a176c652-9d7a-11e7-8250-afd36b48bdc9.html [https://perma.cc/8N2W-S938] (detailing how a small sheriff's office is joining a trend whose actualization one official described as "just a matter of time").

354. *See, e.g.*, Bolten & Elmer, *supra* note 351.

355. *Deep National Mistrust of Police by Minorities Exposed in Ferguson, Missouri*, CBS NEWS (Aug. 19, 2014), http://www.cbsnews.com/news/ferguson-missouri-highlights-deep-national-mistrust-of-police-by-minorities/ [https://perma.cc/A4JR-WXRT].

allegations.[356] And since 2014, law enforcement and the communities they police have increased discussions of—and demands for—greater use of police body cameras.[357]

The push for expansion of and access to body cameras is rooted in police accountability to the community and a skepticism, especially within minority communities, about how, when, and why officers use force.[358] Law enforcement officials and experts have concluded that use of the cameras increases confidence in policing's legitimacy in the eyes of the public,[359] serves as a check against would-be bad-actor officers, and even causes drops in uses of force as well as complaints of police brutality.[360] Though the cameras are being mainstreamed, how they will be used (and for our purposes) when their contents will be available to the public are issues in their "infancy" and are being discussed state by state.[361]

a. *State of body-camera access in Iowa.* As it stands, there is no clear guidance on whether police's body-camera footage is available to the public, either because it is not a public record as defined in the statute or because this footage would qualify under the investigatory report exemption.[362] While Iowa has experimented with legislation regarding body cameras, Iowa is in the majority of states that have yet to pass a law that would settle this question.[363] Surveys of larger police departments in Iowa showed a varied

356. Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos That Have Sparked Outrage*, N.Y. TIMES (Apr. 19, 2018), https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html [https://perma.cc/AF77-YZ43] (quoting Georgetown law professor Paul Butler) ("A lot of white people are truly shocked by what these videos depict; I know very few African-Americans who are surprised . . . .").

357. *See* Alberto R. Gonzales & Donald Q. Cochran, *Police-Worn Body Cameras: An Antidote to the "Ferguson Effect"?*, 82 MO. L. REV. 299, 309–10 (2017).

358. *See* Chris Pagliarella, Note, *Police Body-Worn Camera Footage: A Question of Access*, 34 YALE L. & POL'Y REV. 533, 534 (2016).

359. Kyle J. Maury, Note, *Police Body-Worn Camera Policy: Balancing the Tension Between Privacy and Public Access in State Laws*, 92 NOTRE DAME L. REV. 479, 480 (2016) (citing findings from the Police Executive Research Forum).

360. *Id.* at 488–89 (presuming officers are less likely to use force when being monitored and those making a frivolous complaint will know not to bother if the run-in is recorded).

361. *Id.* at 512.

362. *See* Murphy, *supra* note 8 (writing that FOI expert Randy Evans points out that police want the public to pay for the cameras but are often resistant to having to share the footage from police video cameras).

363. *See Body-Worn Camera Laws Database*, NAT'L CONF. OF STATE

approach to body-camera policies generally.[364] But even more telling is the diverging approaches to body-camera footage access taken by two of the state's largest police forces in Des Moines and Cedar Rapids.[365] Des Moines has implemented a policy that the footage may be a public record but still could be withheld subject to an ongoing investigation or other statutory exceptions.[366] Cedar Rapids police officials have ordained that the footage, paid for by public funds and concerning public safety, is not a public record and thus exempt from disclosure.[367]

It is no surprise that law enforcement is reluctant to share this video. Indeed, law enforcement has objected to demands for public disclosure of police materials since before the Iowa FOI Act was enacted.[368] Given the present condition of Iowa case law and recent examples of law enforcement's refusal to share body-camera information, it is likely that more and more agencies will insist that these videos are not subject to disclosure under the Iowa FOI Act.[369] Courts could easily look at video of a police encounter, ask if it is tied to any investigation, and declare it an investigative report exempt from disclosure, even if the investigation had concluded.[370] Indeed, even outside commentators looking at the state's statute assume this footage is, as a matter of law, exempt.[371]

b. *As a matter of cogent legal reasoning (and good public policy), body-camera footage should not be exempt from public disclosure.* As a matter of plain language, body-camera footage is clearly a public record. Public records are "all records, document, *tape*, or other information, stored or preserved in *any* medium" that is possessed by a state or local government body.[372] Body-camera footage clearly fits that broad categorization. Body

LEGISLATURES (Oct. 27, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/ [https://perma.cc/9Q6L-YCYY].

364. *See, e.g.*, Bolten, *supra* note 352.

365. Bolten & Elmer, *supra* note 351.

366. *Id.*

367. *Id.*

368. *See Afraid to Ask*, *supra* note 74, at 1182 n.155.

369. *See* Clayworth II, *supra* note 9.

370. *See* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 235–36 (Iowa 2012); Neer v. State, No. 10–0966, 2011 WL 662725, at *3 (Iowa Ct. App. Feb. 23, 2011).

371. *See* Karson Kampfe, *Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action*, 76 OHIO ST. L.J. 1153, 1170–71 (2015) (suggesting Iowa's "narrow" FOI Act would restrict disclosure even if an investigation of the incident documented is complete).

372. IOWA CODE § 22.1(3) (2019) (emphasis added).

cameras are paid for by the public for the use of public employees to further public safety.[373] To suggest access to the end product of these tools—purchased to provide for better accountability in policing—is forbidden to the public is absurd[374] and runs counter to the purpose of the state law.[375]

These materials do not qualify as investigatory reports exempt from disclosure. While Iowa case law is sparse on the characteristics or factors of an investigative report,[376] case law from other states is persuasive on this matter. For example, Ohio law states that the investigative materials exempt from disclosure are materials that would expose an "investigator's deliberative and subjective analysis, his interpretation of the facts, his theory of the case, and his investigative plans. The exception does not encompass the objective facts and observations he has recorded."[377] While investigators deserve a degree of autonomy and their work a level of confidentiality, a court cannot go so far as to say that a neutral and routine document is suddenly exempt because an investigation has begun.[378] Once a body camera is activated, it captures what it sees and is as involved in an investigation as a nearby security camera or a potential witness passing by. It reveals nothing more than what happened, or as NFL coach Adam Gase would say: "[T]he tape don't lie."[379] 911 calls in Iowa are not exempt from disclosure as investigatory reports because these are instances where individuals are giving their own version or account of what has happened; surely an objective video detailing what actually occurred should also be accessible to the public.[380]

373. *See* Bolten & Elmer, *supra* note 351 (noting that cameras for 300 officers costs $1.6 million).

374. *See* Murphy, *supra* note 8.

375. *See Afraid to Ask*, *supra* note 74, at 1182–83.

376. Indeed, recent case law shows that courts have not wrangled with these questions and instead applied a blanket denial for requests like in *Neer v. State*. Neer v. State, No. 10–0966, 2011 WL 662725, at *3–4 (Iowa Ct. App. Feb. 23, 2011).

377. State *ex rel.* Nat'l Broad. Co., Inc. v. City of Cleveland, 526 N.E.2d 786, 790 (Ohio 1988).

378. *See* Thomas v. Hall, 399 S.W.3d 387, 396 (Ark. 2012) (writing that use of force reports of an officer under investigation are still routine documents subject to disclosure and that "the fact that an investigation later ensued [concerning the use of force documented] does not transform the initial report into an exempt document").

379. Joe Schad, *The Tape Don't Lie: Miami Dolphins at Buffalo Bills, a Review*, PALM BEACH POST (Dec. 19, 2017), http://dailydolphin.blog.palmbeachpost.com/2017/12/19/the-tape-dont-lie-miami-dolphins-at-buffalo-bills-a-review-2/ [https://perma.cc/5UE7-6BD2].

380. *See* Foley & Rodriguez II, *supra* note 107 (demonstrating that 911 calls are

Compelling disclosure of this video, like the dash-camera video in *Neer*, would not be forcing investigators to show their hand but rather would be consistent with the statutory mandate that law enforcement share basic information about an incident.[381] Baked into the investigative reports exemption is yet another exemption requiring government officials to disclose "the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident" unless they would plainly "jeopardize an investigation" or pose a "clear and present danger" to an individual's safety.[382] The footage typically sought is recordings of events that are not being investigated but responded to. They are, more and more, routine documents (such as incident reports) that are subject to disclosure and satisfy the public's Right to Know.[383]

Arguments often made in favor of withholding documents as investigative reports similarly do not apply to body cameras. A chief argument made against disclosure is that it will inhibit investigators' candor and autonomy during an investigation;[384] this is unfounded. First, as noted above, the types of raw video sought by citizens from individual officer's cameras are typically footage of an event as it unfolds, akin to a 911 call.[385] It is not opening an investigator's playbook but rather an objective snapshot of what occurred or what officers encountered before an investigation began.

The claim that the release of this video would "chill" future investigations by deterring otherwise would-be witnesses or confidential informants from working with investigators is equally overstated.[386] Officer body cameras capture an incident at its very end, or as it unfolds, and would only involve parties immediately present. It is unclear how straightforward video could sully the cooperation of reluctant witnesses present for officers' first arrival.[387] The only chilling effect worth considering is the effect these

presently subject to disclosure under the Iowa FOI Act because it gives oversight over law enforcement operations).

381. *See* IOWA CODE § 22.7(5) (2019).

382. *Id.*

383. Compare materials sought in *Neer v. State*, No. 10–0966, 2011 WL 662725, at *3–4 (Iowa Ct. App. Feb. 23, 2011), with documents contested in *Thomas v. Hall*, 399 S.W.3d 387, 395 (Ark. 2012).

384. *See* State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 529 (Iowa 1984).

385. *See* Foley & Rodriguez II, *supra* note 107.

386. *See State ex rel. Shanahan*, 356 N.W.2d at 529.

387. *See* IOWA CODE § 22.7(5) (excepting the disclosure of immediate facts and

cameras, and their imminent disclosure, have on both police and those they encounter.[388] The fact that citizens and officers are both better behaved when cameras are in play is a fact in favor of disclosure.[389]

Critics of allowing public access to body-camera footage often cite privacy concerns in favor of suppression.[390] The intersection of body cameras and privacy rights is a broad topic and one fit for its own note.[391] But, the focus of this Note is the abuse of the investigative report exemption and, as a corollary, the argument that body-camera footage should not be withheld by virtue of being tied to an investigation (indeed, a contrary interpretation would render nearly all of these videos exempt from disclosure). That being said, some approaches to addressing privacy concerns can apply equally to concerns of law enforcement that the release of this video might somehow jeopardize current or future investigations.[392]

Most states have handled this by enacting legislation that prohibits the cameras from continuous use; they are only run at the start of incidents or at the officer's discretion.[393] This prevents a rolling camera that captures any passerby officers may come across.[394] Concerns of chilling investigations by outing witnesses or confidential informants can be resolved by video redaction, which is commonly used by departments that disclose this footage per public information requests.[395] Still others have relied on the courts to determine whether disclosure would pose a greater harm to the public interest.[396] In evaluating requests on a case-by-case basis, courts can engage in a balancing test to determine whether the good done by release would outweigh any harm (such as an invasion of privacy).[397] As a matter of both federal and Iowa law, nominal privacy interests, for either the officers taking the video or those captured on it, do not justify an outright prohibition of disclosure of materials if their release would advance the public interest vis-

circumstances of an incident that would typically include the names or other identifiable information about those present that the video would similarly capture).

388. Maury, *supra* note 359, at 488–89.
389. *See id.*
390. *See id.* at 493.
391. *See generally id.* at 479.
392. *See id.* at 492.
393. *Id.* at 494–95.
394. *Id.* at 495.
395. Kampfe, *supra* note 371, at 1172.
396. *See id.* at 1172–73.
397. *See id.* at 1173.

à-vis public oversight of government operations.[398] If Iowa courts were to honor precedent by engaging in balancing tests regarding investigative reports, video sought in order to ensure lawful conduct by police would likely trump any speculative fears of chilling future investigations.[399]

Lastly, and most importantly, the underlying values and goals of the Iowa FOI Act are parallel with the *leitmotif* of the expansion of police body cameras: public oversight and public trust.[400] Law enforcement is most effective when it has the confidence of its community, which is only achieved when law enforcement can be held accountable.[401] But in order to be accountable, law enforcement must be transparent.[402] "General police mistrust stems largely from the inability to assess exactly 'what happened' in situations where police apply force. Body cameras change the dynamic by serving as a watchful eye over police conduct."[403] The nation's top law enforcement officer has not only echoed this sentiment but has promoted it in seeking better police relations with the public.[404] But body cameras serve no public purpose—and are just another tool at the disposal of the police state—if the public is denied access to their end product.[405]

These laudable purposes are commensurate with those of the Iowa FOI Act. Iowa courts weighing the costs and benefits of disclosure of this footage must bear in mind that law enforcement, like any other government entity, is subject to account by its own citizens.[406] Indeed, concern over police

398. *See* ACLU v. U.S. Dep't of Justice, 655 F.3d 1, 12–13 (D.C. Cir. 2011); Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 45 (Iowa 1999).

399. *See* State v. Henderson, No. 01–0295, 2002 WL 987851, at *3 (Iowa Ct. App. May 15, 2002).

400. *Compare id.* (holding there is a substantial public interest in citizens being able to review government action), *with* THE MEDIA FREEDOM & INFO. ACCESS CLINIC, *supra* note 6, at 6–7.

401. *See* Maury, *supra* note 359, at 492.

402. *See id.*

403. *Id.*

404. Mark Berman, *Justice Dept. Will Spend $20 Million on Police Body Cameras Nationwide*, WASH. POST (May 1, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/05/01/justice-dept-to-help-police-agencies-across-the-country-get-body-cameras [https://perma.cc/9LN9-ZJBV] (quoting former U.S. Attorney General Loretta Lynch) ("Body-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve . . . .").

405. THE MEDIA FREEDOM & INFO. ACCESS CLINIC, *supra* note 6, at 7 ("[B]ody cam footage serves no legitimate purpose without public oversight.").

406. *See* Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994).

misconduct, which is the predominant purpose of requests for officers' body-camera footage, is a strong factor that favors disclosure and is consistent with the purpose of the Iowa FOI Act.[407] To hold that, as a matter of law, this footage is perpetually exempt from disclosure would mark yet another defeat for the public's Right to Know and would further alienate the community from those who would try to police them.[408] In a cynical age, one where confidence in public institutions continues to dwindle, it is imperative that citizens be given access to materials necessary to hold law enforcement accountable. If sunlight is the best disinfectant, then surely public access to body-camera footage can make for more effective policing. [409]

VI. ADDENDUM & CONCLUSION

Shortly before this Note's publication, there were two key decisions related to Iowa's FOI Act and the law enforcement investigative report exemption. Both decisions have been incorporated (somewhat) into the analysis above, but they are both worth briefly examining here.

In February 2019, the Iowa Public Information Board (IPIB) finally held, as a matter of law, the family of Autumn Steele was not entitled to various materials, including the officer's body-camera video, that would detail what exactly transpired in the woman's fatal shooting by an officer in her own yard.[410] The legal saga following Steele's death had been settled after years of filings, motions, and hearings in multiple venues, but the IPIB ultimately held state officials did not violate Iowa Code § 22.7(5) when it refused to release body-camera and dash-camera video of the shooting or the 911 call, as they were subject to the investigative report exemption.[411] In doing so, the IPIB justified its decision in ways this Author both feared and anticipated: by pointing to the *Neer* decision[412] and finding there was no

407. State *ex rel.* Shanahan v. Iowa Dist. Court, 356 N.W.2d 523, 531 (Iowa 1984).

408. THE MEDIA FREEDOM & INFO. ACCESS CLINIC, *supra* note 6, at 10.

409. Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) (quoting former Justice Louis Brandeis) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

410. *See* Burlington Police Dep't, Dep't of Pub. Safety Div. of Criminal Investigation, Nos. 17IPIB001 FC:0030, 17IPIB002 FC:0034, at 20 (Feb. 21, 2019).

411. *Id.*

412. *Id.* at 16–17 (finding these video materials are indeed investigative reports and were not otherwise releasable under the exception to the law enforcement exemption of "date, time, specific location, and immediate facts and circumstances surrounding a crime or incident").

longer a need to balance interests following the Iowa Supreme Court's broad ruling against disclosure in *Atlantic*.[413] While not as authoritative as an Iowa appellate court on the law, the decision, though illogical, was a predictable result given the direction that both the courts and lawmakers have taken regarding Iowans' Right to Know.[414] While no Iowa court had definitively held that officer video (be it body-camera or dash-camera) was inherently an investigative report, the IPIB did hold so—hammering yet another nail into the settled law cabining Iowans from accessing materials paid for by the public and presumably used to further their safety.[415]

Two months later, however, the Iowa Supreme Court stepped in and provided a mixed result for transparency advocates when it held a trial court did not abuse its discretion in ordering some of the materials related to the shooting of Jerime Mitchell by a Cedar Rapids peace officer be released without a protective order preventing public dissemination.[416] The underlying trial court decision said that the release of materials (including officer video) occurring within 96 hours of Mitchell's shooting was not precluded by the investigative report exemption because it fit within the "immediate facts and circumstances surrounding a crime or incident" exception.[417] Before sanctioning the lower court's order, the Iowa Supreme Court held that investigative reports are indeed exempt from disclosure in perpetuity and that it is irrelevant whether they are part of an ongoing or closed investigation.[418]

Seemingly striking a blow to those who would seek to hold police officials accountable, the court went on to decide that, despite this statutory prohibition, there is a common law end-around to the restrictive exemption to disclosure.[419] The court invoked the *Hawk Eye* decision and held that the lower court properly engaged in that decision's balancing test of whether it was proper to disclose otherwise prohibited materials.[420] Noting there was no concern about outing a confidential informant or suspect and that there was a compelling public interest in disclosure, the Iowa Supreme Court held

413. *Id.* at 18–19.

414. *See supra* Part I.B.

415. *See Burlington Police Dep't*, Nos. 17IPIB001 FC:0030, 17IPIB002 FC: 0034, at 20.

416. *See* Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 233–35 (Iowa 2019).

417. *Id.* at *3.

418. *Id.* at *8.

419. *See id.* at *10.

420. *See id.* at *10–11.

that use of the *Hawk Eye* test is appropriate and that disclosure of seemingly exempt materials is proper even despite protestations from law enforcement.[421]

In holding so, the court allayed some of the concerns held by transparency advocates (and this Author) that the *Atlantic* decision would allow outright denials of these materials.[422] By holding that *Atlantic* was still good law for personnel records ("no balancing of interests is necessary for such an exemption"), the court curiously said balancing was appropriate for law enforcement records.[423] Reasoning that since *Atlantic* never overruled the *Hawk Eye* balancing test, *Hawk Eye* was still good law, and moreover, the legislature had never reacted to the *Hawk Eye* ruling and thus had acquiesced to it.[424]

This decision presented a mixed bag for transparency advocates. On the one hand, the court held that courts can use balancing tests to determine whether certain law enforcement records, including body-camera materials, can be disclosed (despite the statutory prohibition); however, it would require citizens or media organizations to expend great resources to fight for those materials in court.[425] The court did not affirmatively decide whether officer's body-camera video qualifies as an investigative report; it merely held that a lower court's customized order for disclosure did not run afoul of the law.[426] In short, it held investigative reports can be forever withheld, but it also ruled that they can be subjected to a *Hawk Eye* balancing test if challenged in court.[427]

The *Mitchell* decision in some respects is what this Note urged: a common-sense approach to disclosure of law enforcement materials that weighed goods and harms rather than denying disclosure on some bright-line rule.[428] However, the court's ruling comes on a very particularized set of facts: the matter was not a true FOI dispute but a discovery dispute involving

421. *See id.*

422. *See* ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 235 (Iowa 2012).

423. *Mitchell*, 926 N.W.2d at 234.

424. *Id.*

425. *See* Ryan Foley, *Iowa Supreme Court Sees Wide FOIA Exemption for Police Files*, ASSOCIATED PRESS (Apr. 5, 2019), https://www.apnews.com/15ebddf5161646c2a0eb934a18ab6d9f [https://perma.cc/MJW7-DPWV].

426. *See id.*

427. *See generally Mitchell*, 926 N.W.2d 222.

428. *See supra* Part V.

a narrowly tailored trial court order mandating disclosure for purposes of litigation.[429] Neither the Iowa Supreme Court nor the lower court had reviewed the disputed materials *in camera*; thus, the scope of this ruling is unclear because the entire subject matter of disputed materials is unclear.[430] Moreover, the court did not address whether police body-camera video is inherently an investigative report or something short of it.[431] Instead, it merely said the lower court did not abuse its discretion in ordering the exchange of some materials without a protective order, excluding other materials sought by the plaintiffs—such as internal investigation records—as something the parties could work out among themselves.[432]

Though the Iowa Supreme Court did not rotely apply the investigative report exemption like it had with the personnel record exemption in *Atlantic*, it left much unanswered. Given the steady stream of exemptions to the state's FOI Act crafted each year in the legislature[433] as well as steady resistance to disclosure from public officials and recent Iowa case law, transparency advocates like this Author would be better served offering a more modest proposal aimed at increasing transparency without wholly threatening law enforcement and public officials' perceived threats to confidentiality.

Given that community mistrust is often most pronounced in instances of officer-involved shootings and that public officials are often opposed to sharing detailed information about these incidents, the best place would be to address body-camera footage related to these incidents. A straightforward approach to increasing public accountability, while also maintaining law enforcement's needs to investigate in a frank and unmolested manner, would be to mandate body-camera—or car-camera—video capturing fatal or near-fatal uses of force by officers be subject to public disclosure.

Minnesota's statute on this very matter would prove a helpful template.[434] However, the statute's prohibition against disclosure until completion of an investigation could prove problematic in Iowa in ways it is not in Minnesota. For example, if an officer was exonerated of any criminal wrongdoing following a fatal or near-fatal use of force, that video would

429. *See Mitchell*, 926 N.W.2d at 227–28.
430. *See id.* at 229.
431. *See id.* at 230–32
432. *See id.* at 235–36.
433. *See supra* Part III.B.
434. MINN. STAT. ANN. § 13.825(2) (West 2019).

likely still be exempt from disclosure under Iowa's personnel record exemption; Minnesota's restriction on disclosure of internal investigations is far less severe.[435] If advocates and lawmakers were to work together and provide legislation that would require agencies to disclose video of fatal or near-fatal uses of force by officers within a period of days after the shooting and even subject them to basic editing to protect identifying any on-screen informants or unidentified suspects, the standard concerns of law enforcement could be satisfied, while the public would get a proper window into what their peace officers are up to.

Iowa's FOI Act, like many state FOI laws, is on the defensive.[436] This is especially true where it is law enforcement that is being asked to disclose information to the public.[437] Beyond attempts by lawmakers to further insulate law enforcement, the courts have also helped keep police activities in the dark[438] and have the footing to further obstruct the public's view of how its own policing is conducted.[439] These efforts, or omissions, run contrary to the purpose of the Iowa FOI Act.[440] Moreover, recent decisions made contrary to that purpose are too formalistic and far too rigid to allow for effective public oversight of police in a time where policing is often at the center of public discourse.[441] Further still, it is unclear what public agencies and lower courts will make of a recent decision that at once allows investigative reports to be confidential in perpetuity while also finding they can be wrested toward disclosure through litigation.[442]

The laws after all are supposed to favor disclosure in the face of ambiguity, narrowly interpret exemptions in light of the spirit and purpose of these laws,[443] and allow for the governed to check the performance (or lack thereof) of the governing.[444] Similarly, as issues with policing,

435. *See, e.g.*, ACLU v. Atl. Cmty. Sch. Dist., 818 N.W.2d 231, 236 (Iowa 2012).

436. *See, e.g.*, Albarado, *supra* note 230 (indicating Arkansas lawmakers proposed more than 30 bills that would carve out exemptions to weaken the state's FOI act); DeMillo & Foley, *supra* note 102; Part IV.

437. *See* Foley & Rodriguez II, *supra* note 107.

438. *See generally* Allen v. Iowa Dep't of Pub. Safety, Case No. EQCE074161 (Iowa Dist. Ct. Mar. 7, 2014).

439. *Supra* Parts III, IV.

440. *Supra* Part III.

441. *See supra* Parts IV, V.

442. *See* Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 234–36 (Iowa 2019).

443. *See* City of Dubuque v. Tel. Herald, Inc., 297 N.W.2d 523, 527 (Iowa 1980).

444. *See* Hawk Eye v. Jackson, 521 N.W.2d 750, 754 (Iowa 1994).

transparency, and the FOI develop, courts should acknowledge that police body-camera footage is a public record subject to disclosure.[445]

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445. *See supra* Part V.C.

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