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Iowa Public Information Board

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Advisory Opinion 23AO:0001

DATE: March 3, 2023

SUBJECT: Effect of Discovery Rulings on Access to Public Records

RULING:

This opinion is in response to a question raised with the Iowa Public Information Board (IPIB) concerning the potential for a court's discovery rulings to limit access to public records under Chapter 22. Advisory opinions may be adopted by the board pursuant to Iowa Code section 23.6(3) and Rule 497–1.2(2): "[t]he board may on its own motion issue opinions without receiving a formal request." We note at the outset that IPIB's jurisdiction is limited to the application of Iowa Code chapters 21, 22, and 23, and rules in Iowa Administrative Code chapter 497. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

QUESTION POSED:

Can a person's access to public records that are otherwise accessible under Iowa Code Chapter 22 be limited by a court's discovery rulings made in the course of litigation?

OPINION:

The short answer to the question posed in this advisory opinion is "no," access to public records otherwise accessible under Iowa Code Chapter 22 cannot be limited by a court's discovery rulings.

The more detailed answer to the question requires a review of a recent Iowa Supreme Court opinion, *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222 (Iowa 2019), which deals with the interplay between the rules of discovery and Chapter 22 of the Iowa Code.

In *Mitchell*, the documents at issue were police investigative reports. Police investigative reports are government documents. Therefore, they are normally subject to disclosure under a chapter 22 public records request unless they are determined to be exempt from disclosure under Iowa Code section 22.7. The Plaintiff in *Mitchell* requested the investigative reports by way of a discovery request—not a Chapter 22 request. The Defendant responded by seeking a protective order from the court preventing the Plaintiff from disclosing the reports to third parties.

In seeking this protective order, the Defendant argued that the documents requested by the Plaintiff were confidential and therefore exempt from disclosure under Iowa Code section 22.7(5). Under the Iowa Supreme Court's interpretation of Rule 1.504 of the Iowa Rules of Civil Procedure, a court may

issue a protective order to protect confidential information upon a showing of good cause. Iowa R. Civ. P. 1.504(1)(a)(7); *Mediacom Iowa, L.L.C. v. Inc. City of Spencer,* 682 N.W.2d 62, 67 (Iowa 2004). This interpretation of Rule 1.504 results in a two-step process courts must follow when determining whether to issue a protective order for government documents alleged to be confidential under Iowa Code section 22.7:

1. Determine whether the documents are in fact confidential under section 22.7:
    a. If the document fits within one of the categorical exemptions in section 22.7, then it is confidential;
    b. If the document does not fit within a categorical exemption, or if the exemption itself prescribes a balancing test to determine whether the document fits within it (e.g., Iowa Code § 22.7(5)), then perform the balancing test outlined in *Hawk Eye v. Jackson*, 521 N.W.2d 750 (Iowa 1994) (hereinafter "*Hawkeye* balancing test") to determine confidentiality.
2. Determine whether good cause exists to issue a protective order.

In *Mitchell*, the district court followed this two-step process in deciding whether to issue the protective order for the investigative reports. Upon applying the *Hawkeye* balancing test as prescribed by 22.7(5), the district court determined that the documents were not confidential. Accordingly, it determined that good cause did not exist to issue a protective order.

The Supreme Court affirmed the district court's ruling. In affirming the ruling, the Court began by confirming that the district court had properly determined the investigative reports were not confidential by applying the *Hawkeye* balancing test. In proceeding to the second step of the Rule 1.504 analysis, the good cause analysis, the Court stated:

> The parties' arguments for and against the protective order are addressed in our review of the district court's application of the *Hawk Eye* balancing test. As set forth above, we hold the police investigative reports at issue are not exempt from public disclosure under *Hawk Eye*. A protective order limiting disclosure to third parties *would be pointless here when any member of the public could obtain the same reports through an Iowa Code chapter 22 open records request.*

Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 236 (Iowa 2019) (emphasis added).

The italicized portion of the text quoted above is important for two reasons. First, it answers the question posed in this advisory opinion: a court's ruling on discovery issues—specifically, on protective orders—has no effect on the accessibility of otherwise accessible public records through a Chapter 22 request. That is because, as the Court notes repeatedly throughout the opinion, Chapter 22 and the rules of discovery are fundamentally distinct processes for obtaining documents and generally have no application to, or effect on, each other. *See, e.g., Mitchell*, 926 N.W.2d at 228, 236 (*stating* "In *Mediacom*, we observed, 'Iowa Code chapter 22 pertains to parties seeking access to government documents and ordinarily has no application to discovery of such information in litigation'," *and* "The public records act is generally distinct from our discovery rules.").

The reason that Chapter 22 was involved at all in *Mitchell* was because the Defendant sought the protective order based on the contention that the investigative reports were confidential information under section 22.7. This fact leads to the second important point to be gleaned from the quotation above. By stating that a protective order would be pointless given that the government documents at issue are not confidential, the Court seems to be intimating that good cause for a protective order

generally does not exist when the government documents at issue are determined not to be confidential under section 22.7. Justice Appell, in his concurrence, makes this point more explicit:

> Similarly, courts considering the converse situation find an open records law persuasive but not controlling. In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 775 (3d Cir. 1994), a group of newspapers sought access to a settlement agreement made confidential by a protective order. The court said,
>
> "[W]e hold that where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law."

Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 240 (Iowa 2019) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 775 (3d Cir. 1994)).

These statements from the *Mitchell* opinion mean that the question of whether a protective order could limit access to otherwise accessible public records under Chapter 22 is more or less entirely academic. In practice, a litigant would never be able to show good cause for the issuance of a protective order over any public record that has been determined to be non-confidential. The non-confidential nature of the public record itself would preclude, or at the very least, create "a strong presumption against" the possibility of showing good cause. *Id.*

Whether the determination that a public record is not confidential necessarily precludes the issuance of a protective order limiting its disclosure, or instead merely creates a strong presumption against the issuance of such an order, is left somewhat unclear by the *Mitchell* opinion. The following statement by the Court, in which it emphasized the word "confidential," seems to imply that a determination of non-confidentiality precludes the issuance of a protective order: "Because litigants' access to *confidential* records may be subject to a protective order, we must decide whether the records at issue are confidential." *Mitchell*, 926 N.W.2d at 228.

However, after the Court had determined that the investigative reports were not confidential, it still proceeded to consider whether good cause had been shown—albeit briefly, and in a conclusory manner that relied on the determination that the reports were not confidential. *Mitchell*, 926 N.W.2d at 235–236. The previously quoted text of Justice Appel's concurrence makes it clear that he believed that non-confidentiality weighs heavily against, but does not necessarily preclude, the issuance of a protective order.

Regardless, the Court makes clear in *Mitchell* that if a court were to issue a protective order over a non-confidential public record, "any member of the public could obtain the same reports through an Iowa Code chapter 22 open records request," rendering the issuance of such a protective order "pointless." *Id.* at 236. Thus, a person's access to public records that are otherwise accessible under an Iowa Code Chapter 22 request cannot be limited by a court's discovery rulings made in the course of litigation. Further, a determination that a public record is non-confidential creates, at the very least, a strong presumption against issuance of a protective order over that record.

BY DIRECTION AND VOTE OF THE BOARD:

Daniel Breitbarth
Joan Corbin
E.J. Giovannetti
Barry Lindahl
Joel McCrea
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SUBMITTED BY:

Daniel M. Strawhun
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ISSUED ON:

March 3, 2023

Pursuant to Iowa Administrative Rule 497-1.3(3), a person who has received a board opinion may, within 30 days after the issuance of the opinion, request modification or reconsideration of the opinion. A request for modification or reconsideration shall be deemed denied unless the board acts upon the request within 60 days of receipt of the request. The IPIB may take up modification or reconsideration of an advisory opinion on its own motion within 30 days after the issuance of an opinion.

Pursuant to Iowa Administrative Rule 497-1.3(5), a person who has received a board opinion or advice may petition for a declaratory order pursuant to Iowa Code section 17A.9. The IPIB may refuse to issue a declaratory order to a person who has previously received a board opinion on the same question, unless the requestor demonstrates a significant change in circumstances from those in the board opinion.