IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SUMMIT CARBON SOLUTIONS LLC, Petitioner, vs. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Respondent.	)	No. CVCV 062900 RESPONSE TO PETITION FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF AND MOTION FOR TEMPORARY INJUNCTION

Comes now the Sierra Club Iowa Chapter, as Intervenor, and for its Response to Petition for Temporary and Permanent Injunctive Relief and Motion for Temporary Injunction, states to the Court as follows:

INTRODUCTION

Summit Carbon Solutions LLC (Summit) has compiled a list of the names and contact information of the landowners it notified that their land may be the subject of an easement for construction of a CO_2 pipeline. That list was submitted to the Iowa Utilities Board (IUB). The list thereby became a public record subject to the Iowa Open Records Law, Chapter 22 of the Iowa Code.

On August 13, 2021, Summit filed a motion to keep the landowner list confidential. The IUB received in its docket hundreds of comments from individuals, including many affected landowners, requesting that the landowner list be made public so landowners could communicate with each other and support each other. Food and Water Watch filed a comment also requesting that the list be made public. And Sierra Club filed

a motion to release the landowner list, and included an open record request pursuant to Chapter 22 of the Iowa Code.

Sierra Club filed its motion to release the landowner list and its open records request because the IUB had not ruled on Summit's motion to keep the records confidential even though three months had passed since Summit filed its motion. Although Sierra Club could have filed its open records request sooner, it was willing to let the IUB rule on Summit's motion.

On November 23, 2021, the IUB issued an order partially granting and partially denying Summit's motion for confidentiality of the landowner list (Ex. 1) The order requires Summit to release the names and addresses of business and governmental entities on the pipeline route, but not the names and addresses of individuals. However, the IUB in its Order did not refer to any provision in the Open Records Law that would authorize or justify keeping the individual names and addresses confidential.

It is important for the landowner list to be made public so the landowners can communicate with each other and support each other in the face of harassment and intimidation by Summit and its agents. Summit's actions are described by comments in the IUB docket by some of the landowners set forth in Exhibits 2. Summit has also used, or abused, its exclusive possession of the landowner list to send a letter signed by former governor Terry Branstad, who is described as a senior policy advisor to Summit, to all of the affected landowners. Mr. Branstad's letter is attached as Exhibit 3. Mr. Branstad's letter "warns" landowners that Sierra Club will intimidate and lie to them, and containing propaganda about the pipeline. This is a classic example of what psychologists call

projection – taking your own bad actions and attributing them to someone else. In fact, landowners have welcomed Sierra Club's support, as shown by the landowner statements attached as Exhibit 4.

This lawsuit continues Summits attempt to put the landowners at a disadvantage.

THE IOWA OPEN RECORDS LAW

The Iowa Open Records Law is codified as Chapter 22 of the Iowa Code. Pursuant to Iowa Code § 22.1(3)(a), a public record is any record or document in the possession of a government body. A landowner list in the possession of a government body is a public record. *Ripperger v. Ia. Pub. Info. Bd.*, Ia. Sup Ct., 12-17-21. The Iowa Supreme Court has explained the purpose of the Open Records Law as follows:

> The purpose of [Chapter 22] is 'to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.'" *Diercks*, 806 N.W.2d at 652 . . . . "There is a presumption in favor of disclosure" and "a liberal policy in favor of access to public records." *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012). "Disclosure is the rule, and one seeking the protection of one of the statute's exemptions bears the burden of demonstrating the exemption's applicability." *Diercks*, 806 N.W.2d at 652 (quoting *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42, 45 (Iowa 1999).

Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 229 (Iowa 2019).

The IUB's Order under review here must be considered consistent with these rules in mind.

GROUNDS FOR AN INJUNCTION

Summit has referred to two different sections of the Iowa Code which it presents as the basis for its request for an injunction, Iowa Code §§ 22.5 and 22.8. It is not clear, however, which provision Summit is relying on. It appears from the request for relief in

Summit's Motion for Temporary Injunction that it is relying on § 22.8. Pursuant to that section, an injunction can be issued only if (1) production of the documents would **clearly not** be in the public interest, and (2) production of the documents would substantially and irreparably injure any person or persons. The law further states:

> In actions brought under this section the district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others. A court may issue an injunction restraining examination of a public record or a narrowly drawn class of such records, only if the person seeking the injunction demonstrates by clear and convincing evidence that this section authorizes its issuance.

Section 22.8(4)((e) further states that an injunction under this section can be requested only by the records custodian or by another governmental body or person who would be aggrieved or adversely affected by the production of the record. Summit falls into none of those categories. It is certainly not the governmental records custodian. That would be the IUB. Nor is it a party aggrieved or adversely affected, as will be explained more fully below.

THE EXCEPTION IN IOWA CODE § 22.7(6) DOES NOT APPLY

Initially Summit asserted that the exemption in Iowa Code § 22.7(6) for material that would give an advantage to competitors prevented disclosure of the landowner list. The IUB rejected that argument. Summit has not reasserted that argument in its Motion to Reconsider to the IUB, but in this case Summit has resurrected that argument, now claiming that the Navigator project is a competitor and that disclosure of Summit's landowner list would be material subject to the § 22.7(6) exception. But it appears that the Summit and Navigator pipelines take different routes and would therefore impact

different landowners. Therefore, it is impossible to see how release of the Summit landowner list would give any advantage to Navigator.

That being the case, Summit is now, in desperation, claiming that Sierra Club is a competitor within the meaning of § 22.7(6). Unsurprisingly, Summit does not cite any cases supporting that argument. Indeed, there are none. The few Iowa cases applying § 22.7(6) (or its predecessor § 68A.7) all dealt with business competitors. See, *Craigmont Care Ctr. v. Dept. of Social Services*, 325 N.W.2d 918 (Ia. App. 1982); *U.S. West Comm. v. Office of Consumer Advocate*, 498 N.W.2d 711 (Iowa 1993); *N.E. Council on Substance Abuse v. Ia. Dept. of Pub. Health*, 513 N.W.2d 757 (Iowa 1994); *Gabrilson v. Flynn*, 554 N.W.2d 267 (Iowa 1996). That is clearly what the legislature intended. In this case, Sierra Club is simply a non-profit organization assisting impacted landowners.

THE EXCEPTION IN IOWA CODE § 22.7(18) DOES NOT APPLY

In its Motion to Reconsider to the IUB, Summit, after no mention in its previous filings, asserted that the landowner list comes within the open records exception in § 22.7(18). Summit repeats that argument to the Court in this case. That exception precludes release of documents submitted to a government body if the documents are not required to be submitted pursuant to a law, rule, or procedure. But the landowner list was submitted to the IUB pursuant to the IUB's procedure of obtaining the list for the IUB's purposes.

The inapplicability of §22.7(18) is even more clear now after the filing of the IUB's Order regarding filing requirements on December 16, 2021 (Ex. 5). In that Order the IUB ordered Summit and other hazardous liquid pipeline projects, proposed currently

or in the future, to submit their landowner lists to the IUB. Therefore, the landowner lists are documents required by IUB procedure within the terms of § 22.7(18). So Summit cannot rely on that exception to prevent disclosure of the landowner list.

Furthermore, the cases relied on by Summit do not support its argument. In *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988), the documents at issue were employment applications for the position of city manager. This was apparently the Supreme Court's first interpretation of § 22.7(18) after its adoption by the legislature. There were 46 applicants for the city manager position. Nine of those applicants consented to public disclosure and 37 requested confidentiality. Those 37 applications where confidentiality was specifically requested were the subject of the case. The specific question addressed by the Supreme Court was whether the job applications were documents required by "law, rule or procedure," as set out in § 22.7(18). The court concluded that the job applicants were not required to apply for the job, so their applications were within the exemption.

In this case, no landowner has requested confidentiality. On the contrary, it is clear that the landowners want the list released so they can communicate with each other. And Summit's contention that it "voluntarily" submitted the landowner list to the IUB is not credible. The IUB told Summit the IUB needed the list. What would have happened if Summit had refused to provide the list? Would the IUB have not conducted the informational meetings, in which case Summit would not have been able to proceed with its application for a permit for its pipeline? The fact that submission of the landowner list was required by IUB procedure is confirmed by the IUB's December 16, 2021, Order.

That Order states, "The landowner mailing list is an important document that allows the Board to determine whether there are conflicts of interest with the proposed pipeline and whether proper notice has been provided to landowners in the corridor. The Board therefore **requires** pipeline companies to file a mailing list for each county where the pipeline is proposed to be located." (emphasis added). In other words, it has always been the IUB's **procedure** to **require** submission of the landowner lists.

The other case previously relied on by Summit in its Motoin to Reconsider to the IUB but not cited to the Court in this case, is *Des Moines Indep. Comm. Sch. Dist. Pub. Records v. Des Moines Register and Trib. Co.*, 487 N.W.2d 666 (Iowa 1992). The documents at issue in that case were reports of an investigation into complaints about a school administrator and her complaint alleging discrimination. The court held that the names of witnesses interviewed in the investigations were subject to § 22.7(18) because witnesses might not be willing to cooperate in the investigation if they knew their names would be made public.

In this case, it is not a question of whether the landowners would participate in having their land taken for an easement if they knew their names would be made public. They had no choice. Summit has put them in that position. Now Summit wants to keep the information confidential so the landowners cannot communicate with each other. The record is clear that the landowners want the names to be public. And, again, all of that is irrelevant because the IUB requires by its procedure that the landowner lists be submitted to the IUB, so § 22.7(18) does not apply.

There is another recent case dealing with § 22.7(18) not cited in Summit's Motion in this case. *Ripperger v. Ia. Pub. Info. Bd.*, Ia. Sup Ct., 12-17-21, like the *Sioux City* case discussed above, dealt with a list of persons who specifically requested that their names not be published. The Supreme Court clearly said that the issue in the case was whether the county assessor could reasonably believe that publicizing the list of people who wanted their information kept confidential would discourage people from requesting removal from the list. It is also worth noting that the "majority" opinion in *Ripperger* consisted of only three members of the court. Three justices did not participate and Justice Mansfield dissented from the primary issue in the case.

None of the landowners in this case have requested that their information not be made public. On the contrary, the record shows that the landowners want the information released. But certainly, if any landowners do not want their information released, Sierra Club has no desire to seek release of those landowners' information.

It should be obvious that Summit does not care about the landowners' privacy. Summit's motive is to prevent the landowners from communicating with each other and joining in responding to Summit's propaganda and harassment. Comments and objections from landowners in this docket show the actions by Summit's agents that landowners have been subjected to. And when Summit sends the landowners, whose names and addresses it has, but landowners don't have, misinformation like the recent letter from former Governor Terry Branstad, which is attached, landowners cannot respond to other landowners whose names and addresses they don't have. Surely, § 22.7(18) was not meant to allow this kind of asymmetrical power over the landowners.

THE IUB'S RULES AND PROCEDURES CANNOT VIOLATE THE OPEN RECORDS LAW

As mentioned above, the IUB's Order of November 23, 2021, did not rely on, or even mention, any provision of the Open Records Law to support its decision that the names and addresses of individual landowners would not be released. The IUB was therefore saying it was not bound by the requirements of the Open Records Law. Nor did the IUB refer to or rely on its own rules, 199 I.A.C. § 1.9. The IUB was therefore acting without any attempt to comply with the Open Records Law.

Rather, the IUB purported to rely on Iowa cases that were not relevant to the type of records at issue here. In *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999), *ACLU Foundation of Iowa v. Records Custodian*, 818 N.W.2d 231 (Iowa 2012), and *DeLaMeter v. Marion Civ. Srv. Comm'n.*, 554 N.W.2d 875 (Iowa 1996), the specific open records exemption at issue was Iowa Code § 22.7(11). That section protects personal information in confidential personnel records relating to individuals employed by the government body. The only issue in the foregoing cases was whether the specific information requested came within the confines of that exemption. Those cases had nothing to do with the kind of information at issue in this case.

In *DeLaMeter* the plaintiff sought test scores for an examination for promotion in the Marion Police Department. The court determined that the term "personal information" in § 22.7(11) was not defined in the statute. Therefore, the court used a balancing test to determine if the information sought was personal information for which privacy should be afforded. The balancing test was used only to determine if the records requested were personal information that would be subject to the privacy exemption in § 22.7(11).

Clymer involved a request for records of sick leave taken by employees of the City of Cedar Rapids. The court engaged in a balancing test, within the context of § 22.7(11), again because that statute does not define the terms "personal information" and "confidential personnel records," as used in the statute. However, § 22.7(18), on which Summit relies, contains no reference to personal information or any other reference that would implicate the determination of personal privacy.

Finally, in *ACLU Foundation of Iowa,* the documents sought were records of a strip search of students and the identities of the school employees who conducted the search. In that case the court declined to conduct a balancing test because the records sought to be produced clearly came within the statutory exemption of § 22.7(11). The court stated that it is not the responsibility of the court (or the IUB) to balance competing policy interests when the legislative intent of the statute is clear.

Unlike § 22.7(11), the statute at issue in the foregoing cases, § 22.7(18) has no reference to personal information or any inference that it relates to personal privacy. And the cases relied on by Summit, addressing § 22.7(18), did not engage in a balancing test. Furthermore, it is clear that § 22.7(18) does not apply in this case, because, as explained above, the landowner list is required by IUB procedure. Therefore, the IUB's attempt to justify its November 23, 2021, Order by using a balancing test fails.

The IUB seems to be creating its own body of law in conflict with the Open Records Law. It cannot do that. The IUB is clearly a government body within the requirements of the Open Records Law. The Open Records Law controls what records must be released and what records come within the designated exceptions. And those

exceptions must be given a narrow interpretation. *Greater Comm. Hosp. v. PERB*, 553 N.W.2d 869 (Iowa 1996). Neither the IUB nor Summit has credibly shown any exemption to the Open Records Law that would apply to the landowner list at issue here. Therefore, pursuant to Sierra Club's open records request, the IUB must release the landowner list.

THERE IS NO COMMON LAW BALANCING TEST FOR PRIVACY INTERESTS

Summit claims that there is a common law balancing test for privacy interests unconnected to the specific exemptions in § 22.7. But the cases on which Summit relies were not creating a common law test. As explained above, the court was interpreting and applying specific statutory exemptions. The Open Records Law controls the release of public records. The legislature has determined that it is in the public interest to release public records, subject only to the narrow exceptions in § 22.7. Summit has not, and cannot, cite any cases where a balancing test was used that was not within the context of a specific statutory exemption.

In *ACLU Foundation of Iowa v. Records Custodian*, 818 N.W.2d 231, 234 (Iowa 2012), the court said, "[I]t is not our responsibility to balance competing policy interests. This balancing is a legislative function and our role is simply to determine the legislature's intent about those policy issues." The court in that case went on to explain even more clearly:

> The annotation we cited in *DeLaMater* based its test on the fact that "[a] majority of state freedom of information laws include some form of privacy exemption, and, with few exceptions, the exemptions closely track the Federal Freedom of Information Act's sixth exemption." . . . The Iowa Open Records Act's privacy exemption does not track the Federal Freedom of Information Act (FOIA). FOIA's provision relating to personnel records exempts from disclosure "personnel and

> medical files and similar files the disclosure *of which would constitute a clearly unwarranted invasion of personal privacy*." 5 U.S.C. § 552(b)(6) (2006) (emphasis added). The exemption for personnel, medical, and similar files is qualified, and a court must determine whether disclosure of a document would constitute a "clearly unwarranted" invasion of privacy. See *id*. This language requires a balancing test. The Iowa Open Records Act does not have the qualifying language of FOIA. **Therefore, we question whether Iowa even has a balancing test.** (emphasis added).

Id. at n. 2.

It is clear, therefore, that the release of public records is governed exclusively by Chapter 22, including the specific exemptions in § 22.7. There is no "common law" exemption for the Open Records Law.

CONCLUSION

Summit has made no showing by clear and convincing evidence, as required by § 22.8, that it has any valid interest in preventing the release of the landowner list. The facts lead to the obvious conclusion that Summit simply wants the landowner list for itself so its agents can harass and intimidate landowners into signing easements and send the landowners propaganda and misinformation, while the landowners cannot communicate with and support each other in opposing Summit's plan to place an unwanted pipeline on their property. No landowner has said he or she does not want the list make public. On the contrary, many landowners have asked the IUB to make the list public.

Summit is attempting to misuse the Open Records Law to its advantage, and to the disadvantage of the landowners who will be impacted by Summit's pipeline. In the words of Plymouth County landowner, Lori O'Brien, "Shame on them!" (Ex. 4).

/s/ *Wallace L. Taylor*
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