IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| SUMMIT CARBON SOLUTIONS, LLC,<br><br>Petitioner,<br><br>v.<br><br>IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,<br><br>Respondent. | Case No. CVCV062900<br><br>**REPLY IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION** |

## INTRODUCTION

On December 14, 2021, Summit Carbon Solutions, LLC ("Summit Carbon") filed a request for a temporary injunction (as part of a lawsuit seeking a permanent injunction) to prevent the Iowa Utilities Board ("Board") from releasing mailing lists pursuant to a request from Sierra Club, Iowa Chapter ("Sierra Club"). The Board and the Office of Consumer Advocate ("OCA") filed statements with the Court that they have no objection to a temporary injunction in this case. Sierra Club, more than a month later, on January 17, 2022, filed a resistance to the temporary injunction. Sierra Club's resistance missed the mark: it is built on a faulty premise about the purpose of the Iowa Open Records Act, and relies on erroneous interpretations of several key legal and factual issues involved in the motion. For the reasons in Summit Carbon's motion and those below, the Court should issue the temporary injunction to protect the information of unwitting landowners at issue in this case. That this is the correct outcome is only more certain in light of the Iowa Supreme Court decision in *Ripperger v. Iowa Public Information Board*, 967 N.W.2d 540 (Iowa 2021), issued three days after Summit Carbon's petition was filed.

As even Sierra Club admits, "the purpose of the Open Records Law" is "to open the doors of government to public scrutiny [and] to prevent government from secreting its decision-making activities from the public. . ." Sierra Club Brief at 3 (citing *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 229 (Iowa 2019). Nonetheless, as Sierra Club's brief, and the January 26, 2022 Affidavit from Jess Mazour repeatedly make clear, Sierra Club brings this case to facilitate that private entity's private activities – to make it easier for them to advocate against Summit Carbon's innovative investment in Iowa's agricultural economy. That is, Sierra Club's interest in the records is for one private entity to campaign against another private entity through communications with private citizens, and allow private landowners to "communicate with each other." *See*, *e.g.*, Sierra Club Brief at 1. None of this, in any way, pertains to the acts or actions of government. While such lists have always been generated as part of infrastructure projects to provide notice to potentially impacted local landowners, the lists have never been filed in prior similar projects and Sierra Club has never claimed a right to those lists in the hands of the developer of the infrastructure. Sierra Club is simply seeking a private windfall as a "gotcha" from these lists making incidental contact with a state agency after the Board staff asked for the lists and Summit Carbon voluntarily provided them subject to a request for confidential treatment.

Sierra Club's fundamental premise for its entitlement to the records has nothing to do with the purpose of the Open Records Act; the rest of Sierra Club's argument cannot stand for having been built on a faulty foundation. Summit Carbon's fundamental premise, on the other hand, is that individual landowners have a right to privacy recognized in Iowa law that Summit Carbon is seeking to protect, and that those individual landowners have had no meaningful process by which to protect their interests. The temporary injunction should issue.

## THE SECTION 22.7(18) EXCEPTION

The lists were provided for what Summit Carbon understood to be administrative benefits to the Board; they are not part of Board decision-making. They are not required to be filed by the relevant statute (Iowa Code chapter 479B) or the relevant Board rules (199 Iowa Admin. Code chapter 13) and as noted many similar decisions have been made without such lists being provided to the Board. The Board's decision making will be based on a public record of evidence entered in the Petition, testimony of parties, and a public hearing. This is precisely the scenario the exception in Iowa Code § 22.7(18) is aimed at. The exception in § 22.7(18) provides, in relevant part:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:
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> . . .
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> 18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:
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> a. The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.
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> b. Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity of the person outside of government making it or enabling others to ascertain the identity of that person.

In this case, the filing of the list was not required by any law or procedure, it was made to the Board, a government agency, by Summit Carbon, a person outside of government. Not only

could the Board reasonably believe persons would be discouraged from providing such lists if they were public, we know this in fact has happened: Navigator CO2, a similar, competing project, did not file its lists voluntarily, and only filed them when specifically ordered to do so and with the assurance they would be held confidentially pending the outcome of this litigation.[1] As for the two "notwithstanding" paragraphs, Summit Carbon clearly did not consent – to the contrary, it filed for confidential treatment and has consistently objected to disclosure, and as the dispute is over lists of names and addresses, there is no way to disclose the information without indicating the identity of the persons.

Sierra Club, however, resists the obvious fit of this exception. Sierra Club argues that the filing of the lists was in fact required by a "procedure" of the Board and cites a Board order from December 2021 where the Board ordered three pipeline projects to file such lists. Logically, however, such an order cannot change the analysis as to communications filed in August 2021. There is no dispute that when the materials were filed, there was no requirement to do so. More important, however, Sierra Club misstates the Board's position by omitting subsequent history.

As Sierra Club notes, the Board's order requiring such lists be filed was issued on December 16, 2021. On December 28, 2021, however the Board limited the impact of that Order by allowing such filings to remain confidential pending the outcome of this litigation. The Board further made clear that it sees the Court as the arbiter of the Open Records Act issue in the first instance in its Order Denying Motion to Reconsider in Summit Carbon's docket before the Board (HLP-2021-0001). As the Court is aware, the Board on November 23, 2021 ruled on a motion

[1] *See* Board Order of December 28, 2021, Granting Request for Additional Time (Attached as **Exhibit A**). Sierra Club also raises a hypothetical question of whether the Board would have allowed Summit Carbon to proceed with its required informational meetings had it not filed the lists. We have evidence that the answer, notwithstanding Sierra Club's erroneous assumption, is "yes": the competing Navigator CO2 project had completed nearly all of its public information meetings *before* its lists were filed. This can be easily confirmed by reviewing the Board's electronic filings system under docket HLP-2021-0003.

Sierra Club had made there, granting in part and denying in part Summit Carbon's request for confidential treatment – specifically, the Board maintained the confidential treatment for *individuals*, but would have required names and addresses of *business and governmental entities* to be disclosed. Summit Carbon sought reconsideration as to non-individual entities. In denying the reconsideration on January 12, 2022, the Board took no position on the merits[2] but rather noted the separate records request made by Sierra Club and the resulting litigation and stated:

> Pursuant to Iowa Code § 22.8, the district court will now determine whether the documents in question are confidential as well as the scope of confidentiality. . . The Board will deny the motion to reconsider as the issue of confidentiality of the lists is before the Polk County District Court, and the Board will comply with the ruling and requirements established by the District Court.

*In re Summit Carbon Solutions LLC*, Docket No. HLP-2021-0001, Order Denying Motion to Reconsider (Iowa Utils. Bd., January 12, 2022)(attached as **Exhibit B**) at 2.

That the § 22.7(18) exception both applies and is controlling on this dispute is absolutely clear after the recent *Ripperger* case. In that case, the Polk County Tax Assessor, Randy Ripperger, holds records with information similar to that in the landowner lists at issue in this case. The Iowa Supreme Court considered whether a list of Polk County landowners who had requested that their names be removed from the county assessor website's "search-by-name" function were confidential records under Section 22.7(18). The search-by-name function allowed users of the assessor's website to type in the name of a landowner and retrieve information regarding their property, including an address. *Ripperger, 967 N.W.2d* at 544. The assessor's office permitted Polk County landowners to request that their names be removed from

[2] OCA, however, agreed with Summit Carbon on an important sub-issue: that *trusts* should be treated like individuals, not like corporate entities, and their identity should be protected from disclosure. *See* **Exhibit C**.

the search-by-name function to, as the court put it, "attain a measure of privacy for their home addresses." *Id*. at 544.

The Iowa Supreme Court held that the list *was* confidential under Section 22.7(18). Recalling prior precedent, the Court noted:

> We reiterate that 'it is the legislative goal to permit public agencies to keep confidential a *broad* category of useful incoming communications [under section 22.7(18)] which might not be forthcoming if subject to public disclosure.

*Id*. at 553 (emphasis in original) (quoting *Des Moines Indep. Cmty. Sch. Dist. Pub. Recs*., 487 N.W.2d 666, 670 (Iowa 1992)). The Supreme Court concluded, "[w]e hold the disabled name list of communications from persons outside of government is a confidential record exempt from disclosure under section 22.7(18)…" *Id*. at 555.

The facts of the present case similarly require confidentiality of the mailing lists in this case – arguably even more so than in *Ripperger*. Whereas the list in *Ripperger* was only a list of landowner names, the mailing lists in this case include both landowner names *and corresponding addresses*. Further, whereas the landowners in *Ripperger* were aware of the potential for their names to be released (and in fact objected to such disclosure) the landowners on the mailing lists here are largely unaware that their names are on such a list and have no meaningful opportunity to object to the disclosure of their names and addresses.[3] Finally, the landowners in *Ripperger* directly communicated with the relevant agency and made a request for an action from that

[3] It is important to rebut here a misleading argument Sierra Club makes. Sierra Club seems to suggest that all landowners want the lists released – citing, however, "hundreds of comments from individuals, including many affected landowners. . .". Sierra Club Brief at 1. The lists have *15,000* records of potentially impacted landowners. For Sierra Club to claim to speak for all 15,000 landowners on the basis of a couple hundred comments, a significant number of which Sierra Club concedes (correctly) are from Sierra Club's supporters who are not landowners impacted by the project, is a significant exaggeration by Sierra Club of its support among farmers and landowners. Moreover, it would be hard for landowners – most of whom likely aren't even aware of this issue – to object because to do so could require them to publicly identify themselves, defeating the very purpose of their objections. The reason the Polk County Assessor in *Ripperger* has a process to remove landowners from the search feature and the fact it is utilized disproves Sierra Club's suggestion that everyone is comfortable with their identities being disclosed.

agency; the open records request in that case sought to learn who was utilizing a benefit provided by the government -- removal from the search function. Here, the landowners have had no contact with the Board, have asked nothing of the state, and the lists are therefore even farther removed from any legitimate purpose of the Open Records Act.

The mailing lists in this case are a subset of county tax rolls, essentially "pre-searched" for location in the potential pipeline corridor, which is higher profile and inspires stronger reactions than paying taxes. The landowners are farther from any nexus with government action than were the landowners requesting privacy in *Ripperger*. If the Iowa Supreme Court withheld the list of landowners' names who had requested to be made non-searchable from the *Des Moines Register*, it is a much easier case to withhold a list of pre-sorted and pre-organized names *and addresses*, from landowners *who have not asked for any government action*, from Sierra Club. *Ripperger* compels the outcome in this case; the § 22.7(18) exception applies.

## THE PRIVACY BALANCING TEST

While Summit Carbon believes the § 22.7(18) exception resolves this matter, if the Court finds that the facts and issues are not a clean fit with § 22.7(18) but that the privacy interests of persons are nonetheless implicated, the Court should analyze the case under a common law balancing test established by the Iowa Supreme Court. *See*, *e.g.*, *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999); *DeLaMater v. Marion Civil Serv. Comm'n*, 554 N.W.2d 875 (Iowa 1996). In resisting such analysis, Sierra Club substantively misreads the law.

At page 11 of its brief, Sierra Club makes a bold assertion in its heading: "THERE IS NO COMMON LAW BALANCING TEST FOR PRIVACY INTERESTS." That unqualified statement, however, cannot be reconciled with the case Sierra Club cites in support of the proposition. Sierra Club ends its quote, which comes from a footnote, in such a way as to

conceal that the Iowa Supreme Court said no such thing. It is important, while it is long, to provide the entire passage, including the material immediately after the footnote:

> n. 2
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> 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." Andrea G. Nadel, Annotation, *What Constitutes Personal Matters Exempt from Disclosure by Invasion of Privacy Exemption Under State Freedom of Information Act*, 26 A.L.R.4th 666, 670 (1983). 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. ***However, because we decide this case without applying a balancing test, we will leave that question for another day.***
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> Finally, we most recently considered section 22.7(11) in *Clymer*. There, we restated that when "a statutory exemption does not articulate precisely what records or information the legislature considers private, courts commonly apply [a balancing test] as a means of weighing individual privacy interests against the public's need to know." *Clymer*, 601 N.W.2d at 45. As in *DeLaMater*, we surveyed Iowa cases and cases from other jurisdictions to determine whether the records sought could be categorized as information considered private under the Act. *Id*. at 45–47. After determining the Act did not categorize the records under an exemption, we applied the balancing test. *Id*. at 47–48.
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> In summary, to determine if requested information is exempt under section 22.7(11), we must first determine whether the information fits into the category of "[p]ersonal information in confidential personnel records." We do this by looking at the language of the statute, our prior caselaw, and caselaw from other states. If we conclude the information fits into this category, then our inquiry ends. If it does not, we will then apply the balancing test under our present analytical framework.

*American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Comm. School Dist.*, 818 N.W.2d 231, 234-35 (Iowa 2012)(hereafter *ACLU*)(bold italics added were not quoted in Sierra Club's brief, nor was any material following). The *ACLU* majority questioning whether Iowa has a balancing test is a far cry from Sierra Club's assertion to the Court that there is no such test. Moreover, notably the Court in *ACLU* goes on after the footnote to discuss *Clymer* as good law, and even admits that where existing sources of law do not resolve the issue, "***we will then apply the balancing test under our present analytical framework***." The material that continued beyond Sierra Club's quote undercuts Sierra Club's argument.

The quoted passage above also demonstrates how Sierra Club misinterprets the law when it insists the balancing test only applies to cases under Iowa Code § 22.7(11). Sierra Club has it backwards: as the passage above suggests, the balancing test doesn't apply *at all* if the facts of the case clearly fall within the language of an exception, whether that is § 22.7(11), § 22.7(18) or any other. The balancing test is a backstop to protect important privacy interests where "the Act [does] not categorize the records under an exemption." As indicated in the quote from *ACLU* above, quoting *Clymer*, "when a statutory exemption does not articulate precisely what records or information the legislature considers private, courts commonly apply [a balancing test]'" – nothing in that language limits the test to cases under § 22.7(11); to the contrary, the Court broadly references "***a*** statutory exemption" – meaning any. Sierra Club's arguments regarding the common law balancing test are wrong as a matter of law.

## OTHER TEMPORARY INJUNCTION ISSUES

Finally, there are two other things the Court should note with regarding to Sierra Club's opposition to the Request for Temporary Injunction, which is the only issue being argued before the Court at this time. Even if this case did not arise in the specialized context of the Open

Records Act, two key aspects of a temporary injunction are a balancing of harms between the parties, and the importance of timing and urgency of the issue.

In this case, while Summit Carbon did not object to Sierra Club's intervention, it is nonetheless fair to note the lengthy delays in Sierra Club joining the confidentiality issue. As Sierra Club's brief states at page 1, Summit Carbon filed its motion for confidential treatment for the list on August 13, 2021. On page 2 of the brief, Sierra Club notes it waited to file its motion to release the lists but notably does not say when that was finally filed. It was filed November 19, 2021 – more than three months later. Then, while Summit Carbon filed its request in this Court on December 14, 2021, Sierra Club again waited over a month to resist.[4] If Sierra Club showed no urgency to upset the status quo, the Court should not, either.

Similarly, while thousands of landowners who have had no say in the matter stand to lose their privacy – once public, the information cannot be recaptured – if the injunction is *not* granted, the harm to Sierra Club is minimal. The status quo is that entities like Sierra Club do not and have never in the past had access to such lists. The injunction being denied here would purely be a windfall, with no real relationship to the purpose of opening government acts to sunlight. Further, Sierra Club has obviously found a way to generate its own list – as **Exhibit D** shows, Sierra Club has done a mailer opposing the project. Finally, Sierra Club's argument that people have filed comments with the Board on the issue only shows that Sierra Club's supporters know how to identify themselves and voluntarily make their identity public if they so choose. Additionally, landowners had an opportunity to show up at the 31 county information meetings and were able to speak for and against the project and meet like-minded people; there are also

[4] Sierra Clib's representative was quoted in a news article about Summit Carbon's injunction request on December 18, 2021 (https://www.desmoinesregister.com/story/money/agriculture/2021/12/19/pipeline-company-property-owner-names-could-divulged-under-iowa-order/8929362002/); counsel for the Board also e-mailed counsel for Sierra Club when the Board filed its response on December 20, 2021.

social media pages and websites where they can find each other, and nothing about this list dispute stops them from talking to their neighbors about their position regarding the project. Where landowners have not had a meaningful chance to participate is in the Open Records request, which most of them likely are not aware of.

Summit Carbon believes in working with its potential landowners. It is not Summit Carbon's place to disclose their identifying information against their will and when there is no legal requirement to do so. The statutes and caselaw, the facts, the equities, and the policy all favor enjoining the release of the mailing lists in this case. Sierra Club's arguments to the contrary are easily rebutted and do not require a contrary conclusion. The Court should grant Summit Carbon's request for temporary injunction.

Filed this 1st day of February, 2022

Respectfully submitted,

*/s/ Bret A. Dublinske*

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**CERTIFICATE OF SERVICE**

The undersigned certifies the foregoing document was electronically filed with the Clerk of Court using the Electronic Document Management System (EDMS) on February 1, 2022, which will send a notice of electronic filing to all registered parties.

/s/ *Sarah McCray*