IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

SUMMIT CARBON SOLUTIONS, LLC, Plaintiff, v. IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA, Respondent, and SIERRA CLUB IOWA CHAPTER, Intervenor, and OFFICE OF CONSUMER ADVOCATE, Intervenor.	Case No. 05771 CVCV062900 **ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION**

Petitioner, Summit Carbon Solutions, LLC ("Summit"), filed its Petition for Temporary and Permanent Injunctive Relief and Motion for Temporary Injunction on December 14, 2021. The Office of Consumer Advocate ("OCA"), a division of the Iowa Department of Justice filed a Motion to Intervene on December 22, 2021. Sierra Club Iowa Chapter ("Sierra Club") filed a Motion to Intervene on January 17, 2022. Respondent Iowa Utilities Board (the "Board") filed its Answer on January 10, 2022.

This is not a review of the Board's assessments of the confidentiality of the records at issue. It is a new action by Summit seeking to enforce the protections granted by statutory exemptions to the Open Records Act. OCA and the Board do not oppose the Motion for Temporary Injunction. Sierra Club filed a Response to Petition for Temporary and Permanent

Injunctive Relief and Motion for Temporary Injunction on January 17, 2022. Summit filed its Reply in Support of Motion for Temporary Injunction on February 1, 2022.

A hearing was held on February 4, 2022. Bret Dublinske represented Summit. Anna Ryon represented OCA. Jon Tack represented the Board. Wallace Taylor represented Sierra Club. The matter is fully submitted. Having considered the arguments and briefs of the parties, the Court enters this Order.

Background

Summit seeks to build a pipeline crossing Iowa that would transport CO2 emissions from ethanol plants to permanent storage in North Dakota. As part of the process for seeking a permit for the project, Summit had to provide notice of public meetings to land owners potentially impacted by the project. To provide these notices, Summit spent time and money to compile a list of more than 10,000 landowners. Summit submitted the list to the Board at the Board's request, but Summit asked that it remain confidential.

Sierra Club is working with certain landowners to oppose the pipeline. It filed an open records request pursuant to Iowa Code Chapter 22 seeking the mailing lists. Sierra Club asserts that the list will help landowners communicate with one another and band together in their opposition. The Board provided Summit with time to seek an injunction preventing disclosure and has continued to keep the lists confidential pending the outcome of this hearing.

Analysis

Summit asserts that there are multiple bases for granting a temporary injunction in this matter including Iowa Code §§ 22.7(6), 22.7(18), 22.8, and a general balancing test assessing the privacy interests of the landowners against the public interest in disclosing the documents. Each of these arguments is addressed below.

Iowa Code § 22.7(18) – Communications by Persons Outside of Government

Summit seeks to keep the mailing lists confidential pursuant to Iowa Code § 22.7(18) which states:

> 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:
> 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.
> 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.
> c. Information contained in the communication is a public record to the extent that it indicates the date, time, specific location, and immediate facts and circumstances surrounding the occurrence of a crime or other illegal act, except to the extent that its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person. In any action challenging the failure of the lawful custodian to disclose any particular information of the kind enumerated in this paragraph, the burden of proof is on the lawful custodian to demonstrate that the disclosure of that information would jeopardize such an investigation or would pose such a clear and present danger.

It is undisputed that Summit is an "identified person outside of government" and that the Board is a "government body" for purposes of the Open Records Act. Additionally, none of the three exceptions to the exemption is applicable. Summit explicitly sought to keep its submission confidential. The information cannot be disclosed without identifying Summit. The information does not involve a crime or illegal act.

The Court finds that, given Summit's request to treat the information as confidential, and the fact that other similar companies did not voluntarily submit the information, the Board could reasonably believe that such communications would not be voluntarily provided if they would become "available for general public examination." Thus, the primary issue before the Court is assessing whether the communication was "not required by law, rule, procedure, or contract."

The Declaration of Summit's Vice-President of Government and Public Affairs, Jake Ketzner, asserts that Board staff requested the mailing lists, but "filing of the list was not required by law." At the hearing, Sierra Club's counsel argued that it has always been the Board's procedure – albeit an unwritten one – to require submission of mailing lists. The Board's counsel represented that such lists had always been requested, but in the past they were not part of the electronic docket. Thus, the public may not have known the Board had the lists. Summit's counsel represented that he had worked on projects where the Board did not request such lists.

In sum, it appears undisputed that the lists were not required by law, rule, or contract, but there is a factual dispute as to whether they were required by "procedure." Summit bears the burden of proving that § 22.7(18) applies, but the Court recognizes the difficulty of proving a negative—the absence of a procedure. As the matter proceeds, the parties can conduct discovery about the Board's procedures on this issue. A more detailed record may also be developed as to the record custodian's belief as to whether disclosing the lists would deter future voluntary communications.[1]

"A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation." State v. Krogmann, 804 N.W.2d 518, 523 (Iowa 2011) (internal citation and quotations omitted). Given the evidence

[1] The § 22.7(18) exemption was not raised by Summit in its arguments to the Board. Therefore, the record does not contain the Board's viewpoint on this issue.

currently before the Court as well as the purpose of this statutory exemption, the Court finds sufficient evidence to hold that § 22.7(18) exemption applies and that a temporary injunction should be granted. City of Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895, 898 (Iowa 1988) ("We conclude that the purpose of the foregoing legislation is reasonably clear. It is the legislative goal to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure.") If evidence revealed in the future shows the exemption does not, in fact, apply, the records could then be released. The reverse is, of course, not true. If the records were released now and that decision were shown to be in error, the toothpaste could not be put back in the tube.

Although the previously submitted mailing lists fall under the 22.7(18) statutory exception for voluntary communications, nothing prevents the Board from subsequently *requiring* the submission of such mailing lists from Summit which would, presumably, take the newly filed lists out of the scope of this exemption. Indeed, the Board has already ordered other entities to file similar mailing lists from other entities and ordered Summit to file updates to its previously submitted lists. Response Exhibit 5. Accordingly, the Court addresses the other bases for protection asserted by Summit.

Iowa Code § 22.7(6) – Communications Useful to Competitors

Iowa Code § 22.7(6) makes confidential "[r]eports to governmental agencies which, if released, would give advantage to competitors and serve no public purpose." The Court believes that Summit has proven the first prong applies. Nothing limits the term "competitors" to other entities in the same industry. Here, Sierra Club is a competitor of Summit in that Sierra Club is actively opposing the pipeline that Summit seeks to build. Additionally, even if the provision were limited to competing business entities, Summit has persuasively argued that the information

in the mailing lists would provide useful intelligence to Navigator Heartland Greenway, LLC, which is working on a competing project. Summit has not, however, convinced the Court that the mailing lists "serve no public purpose."

The proposed Summit pipeline and the competing projects have received a great deal of public attention. Summit acknowledges that a number of landowners oppose the project. In addition to the public purpose identified by Sierra Club – that the lists will help opponents of the project communicate with one another – the Court finds that knowing which land owners are impacted by the project helps the public evaluate the work of the Board. This exemption requires a showing that the release serves "no public purpose," not just a showing that the requester of the documents seeks them to advance private interests.

Knowing which land is involved in a pipeline project can help the public assess whether the Board properly approved or rejected a project. It can help the public weigh the benefits and detriments of one project compared to another. Additionally, as stated by the Board, knowing the names of the landowners is required to assess whether the Board appropriately screened for conflicts of interest. The public has a right to know if these conflicts were properly addressed.

Iowa Code § 22.8 – Injunction to Restrain Examination

Summit argues that even if the mailing lists did not fall under one of the specific exemptions, the Court should still grant an injunction pursuant to Iowa Code § 22.8. The Court agrees that under certain circumstances it could grant an injunction pursuant to that subchapter. In re Langholz, 887 N.W.2d 770, 776 (Iowa 2016) ("If a public record does not fall under one of the stated exemptions, the district court may still grant an injunction to restrain the examination of the record. Iowa Code § 22.8(1). This injunction is an equitable remedy that is independent of the section 22.7 listed exceptions."). However, to obtain such an injunction, the Court would

have to find "that 'the examination would clearly not be in the public interest' and that 'the examination would substantially and irreparably injure any person or persons.'" Id. Having found that disclosure of the mailing lists may serve a public purpose as described in the previous section, the Court cannot find that "the examination [of the lists] would clearly not be in the public interest." Accordingly, the Court cannot issue an injunction pursuant to Iowa Code § 22.8. See Ripperger v. Iowa Public Information Board, No. 20-0902 p. 23 (Iowa Dec. 17, 2021) (noting that the standard for obtaining an injunction under § 22.8 is a "much steeper climb" than proving confidentiality under § 22.7(18)).

Common Law Balancing Test

Summit also argues that the Court should prevent disclosure based on an application of the five-factor balancing test discussed in DeLaMater v. Marion Civil Service Commission, 554 N.W.2d 875, 879 (Iowa 1996) and Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 45 (Iowa 1999). Sierra Club contends that "there is no common law balancing test for privacy interests" and "Summit has not, and cannot, cite any cases where a balancing test was used that was not in the context of a specific statutory exemption." Response p. 12. The Court agrees with Sierra Club that DeLaMater and Clymer did not create an independent balancing test.

The Clymer Court stated: "The five-factor test is applied when 'a statutory exemption does not articulate precisely what records or information the legislature considers private….'" Id. at 45. In Clymer and DeLaMater, the Court applied a balancing test to determine whether certain information met the standard for exemption under Iowa Code § 22.11. The Court has been unable to identify any case where a balancing test was used independent from one or more of the statutory exemptions.

In support of its argument, Summit cites American Civil Liberties Union Foundation of Iowa, Inc. v. Records Custodian, Atlantic Community School District, 818 N.W.2d 231 (Iowa 2012).

> 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.**

Id. at 235 (emphasis added). This language suggests that a balancing test should be applied even after a determination that information is not protected by an exemption. However, this was not the holding in the case. The majority held that because the information *was* protected by the exemption, no balancing test was needed. Thus, any statement about what happens when information is *not* protected by an exemption is dicta. Additionally, whether the majority actually believed a balancing test should be applied in such instances is called into question by a preceding footnote to which Sierra Club calls the Court's attention.

> 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.* 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. 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.**

Id. at 234 (internal citations and quotations omitted) (bold emphasis added). Questioning whether Iowa has a balancing test *at all* strongly suggests that the ACLU majority was *not* advocating for use of a balancing test unmoored from the statutory exemptions.

ACLU Foundation v. Records Custodian was a 4-3 decision. But the dissent also does not suggest that a balancing test should be used apart from the statutory exemptions. Rather, the dissent states: "The majority opinion takes a step backward from the new age of open government in this state. It is a step in the wrong direction." Id. at 236 (Cady, C.J. dissenting). The belief that the majority was too quick to preclude the release of records based on the language of the exemption is directly opposed to Summit's argument that the Court should apply a balancing test to preclude disclosure *even when no exemption applies*.

Given the conflicts within the ACLU opinion, the Court resolves this question by looking to the basic principle of the Open Records Act as stated in Iowa Code § 22.2: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record." The Legislature later provides specific exemptions to this rule in §§ 22.7 and 22.8. The only reference to a "balancing test" is the Open Records Act is in § 22.10(3)(b)(3) wherein the Legislature grants immunity to public officials who "incorrectly balanced the right of the public to receive public records against the rights and obligations of the government body to maintain confidential records as provided in section 22.7 under any judicially created balancing test, unless the person is unable to articulate any reasonable basis for such balancing." Notably, the Legislature refers to "section 22.7 under any judicially created balancing test" rather than "section 22.7 *or* any judicially created balancing test.

Using a balancing test to determine if information falls within the scope of the Legislature's exceptions (as was done in Clymer and DeLaMater) is fundamentally different from using a balancing test to create a completely new type of exemption. The Court finds that no common law balancing test should be applied in this case.

Notwithstanding the Court's interpretations of Chapter 22, the Court agrees with a number of the privacy concerns raised by Summit and discussed by the Board in its November 23, 2021, opinion. But those are policy considerations to be raised with the Legislature. City of Sioux City v. Greater Sioux City Press Club, 421 N.W.2d 895, 897 (Iowa 1988) ("[I]t is not the responsibility of this court to balance the competing policy interests. The balancing of those interests is the province of the legislature, and we act only to devine [sic] the legislature's intent with regard to those important policy issues."). None of the 74 currently listed exemptions provides for the protection of individual information simply because it contains addresses or because individuals have not consented to the disclosure of their information.

Further, in City of Dubuque v. Tel. Herald, Inc., 297 N.W.2d 523, 525 (Iowa 1980), a newspaper sought the "name, address, employers, education, training and experience" of applicants for the position of city manager. The Iowa Supreme Court ordered disclosure of the records finding that they were not covered as "personal information in confidential personnel records" as then-codified in Iowa Code § 68A.7(11). In response, the Legislature enacted what is now Iowa Code § 22.7(18) protecting incoming communications to government, which would include most employment applications. Clymer, 601 N.W.2d at 45-46. The Legislature could have, but did not amend the statute to protect all names and/or addresses.

It is also worth noting that the names and addresses that appear on the mailing lists created by Summit already appear in other public sources – county assessor's offices. The

release of the mailing lists would make it easier for Sierra Club and others to quickly find an individual's name and address, but Summit's lists are not the only source of that information. Indeed, if the information were truly confidential, Summit would not have been able to discover it to put it in its mailing lists in the first place.

Conclusion

At this stage of the proceedings, the Court finds that mailing lists are not covered by Iowa Code § 22.7(6) and that an injunction is not warranted under Iowa Code § 22.8 or an independent balancing test. However, the Court finds Summit's voluntary communications, including the mailing lists, fall within the scope of Iowa Code § 22.7(18). Documents need only fall into one statutory exemption to be kept confidential. Accordingly, the Court GRANTS the Motion for Temporary Injunction to prevent disclosure of the voluntary communications.

IT IS SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV062900	SUMMIT CARBON SOLUTIONS LLC V IOWA UTILITIES BOARD
Type:	OTHER ORDER

So Ordered

David Nelmark, District Judge
Fifth Judicial District of Iowa

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